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Courts

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in their drawer and not make a decision," Gooch said. "Then again, I could be dead wrong."

Not making a decision, in effect, would be the same thing as saying "we're going to let them kill you," he said. Otey's attorneys could do nothing to stop it, Gooch said, and they could take no further action on that appeal.

Gooch said the appeal effectively was the lawsuit that the 8th Circuit suggested Otey file in 1991. Otey's lawyers had filed a similar complaint in 1991 but had taken different paths.

The civil rights appeal alleged that Otey's constitutional rights to due process and equal protection under the law were violated at a clemency hearing before the Board of Pardons. The appeal argued that Attorney General Don Stenberg violated Otey's rights by voting against clemency as one of the three members of the pardons board. He also argued against clemency from the attorney general's position.

"Nothing is impossible in the courts. Just highly unlikely."

ESKRIDGE

UNL law professor

"A grave question that the 8th Circuit will look at is if we're dealing with some miscarriage of justice," Eskridge said.

The fact that the court already has ruled 2-1 against Otey sets a precedent that will unlikely be changed, he said.

If Otey is not granted a stay, court officials said, he has three options:

- request a rehearing with the same court.
- request an En Banc hearing of the whole court.
- appeal to the Supreme Court.

Eskridge said an En Banc hearing was rare. But because of the time required to assemble the court, he said, a stay could be issued pending an En Banc hearing. The court also could deny the request, he said, or just not meet in time.

If Otey appeals to the Supreme Court, Gooch said the case would be heard by Clarence Thomas, who would sit in for retired Justice Harry Blackmun.

"If one reads his (Thomas') opinions and writings, he is as much in favor of the death penalty and expediting it as anyone on the court," Gooch said.

"He is the least likely member of the court to stop an execution," he said. "Regardless of merit."

Gooch said Otey's attorneys also could petition all three courts at the same time.

Eskridge said with Otey's judicial options looking grim, the one thing left for which to hope was the executive side.

"The real option that he (Otey) has," Eskridge said, "is he needs one more vote on the Board of Pardons."

Eskridge said there was little chance that would happen.

Stenberg certainly won't change his mind, Eskridge said, and Gov. Ben Nelson has made many public statements saying he would not stop the execution.

Otey's first execution date was set for Sept. 25, 1978. It has been 16 years filled with appeals, and that is beyond the average time span of 13 to 14 years it takes a death sentence to be carried out, Eskridge said.

"If you want to fight a death penalty case, you're able to fight it for a decade or more," Eskridge said.

The fact that appeals can be pending, however, should reduce that time frame, he said.

"(Otey) is probably pushing the edge."

Eskridge said he expected an execution, but he said an end to the case was not certain yet.

"Nothing is impossible in the courts," he said. "Just highly unlikely."

Gooch said there were a number of options available to Otey beyond the appeal pending in the 8th Circuit, but the public defender would not comment on those options.

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