IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SEDLEY ALLEY,	)	
	)	
Plaintiff-Appellee,	)	
	)	No. 06-5650
vs.	)	
	)	
GEORGE LITTLE,	)	
RICKY BELL, *et al.*,	)	
	)	
Defendants-Appellants.	)	

RESPONSE TO DEFENDANTS' MOTION TO VACATE

It is "only in the rarest of cases" that this Court may overrule a District Court's weighing of the equities in issuing a preliminary injunction. United States v. Edward Rose & Sons, 384 F.3d 258, 261 (6th Cir. 2004). This is not one of those "rarest of cases." Judge Trauger has carefully considered Article III principles, all the operative facts, and governing law to conclude that, in the balance of equities, Defendants should be temporarily enjoined from subjecting Sedley Alley to conscious torture. See R. 27: District Court Memorandum (Exhibit 1). She has not abused her discretion by any stretch of the imagination. Defendants' motion should be denied.

I.
AN INJUNCTION MAY BE OVERTURNED
ONLY IF IT CONSTITUTES AN ABUSE OF DISCRETION

As Defendants recognize, this Court reviews Judge Trauger's order under an

abuse of discretion standard. United States v. Szoka, 260 F.3d 516, 521 (6th Cir. 2001). A district judge abuses her discretion if she applies the wrong legal standard, misapplies the correct standard, or relies on clearly erroneous findings of fact. Id. That simply has not occurred here.

II.
JUDGE TRAUGER DID NOT ABUSE HER DISCRETION IN CONCLUDING THAT SEDLEY ALLEY'S CLAIMS ONLY RECENTLY BECAME JUSTICIABLE

Defendants don't meaningfully challenge Judge Trauger's weighing of the traditional equities governing injunctions. Understandably so. Judge Trauger has stated the proper legal test, and carefully and sensitively weighed Sedley Alley's irreparable harm, harm to Defendants, the public interest, and Sedley Alley's likelihood of relief. See Exhibit 1: District Court Memorandum, pp. 4-6. Sedley Alley's likelihood of success on the merits is fully confirmed by Dr. Lubarsky's affidavit establishing that Sedley Alley would suffer a conscious, torturous death. R. 11: Plaintiff's Position Regarding Status Of Case, Ex. A, Affidavit of David A. Lubarsky, M.D., M.B.A. (Attached as Exhibit 2).[1]

Instead, Defendants claim only that Sedley Alley somehow unduly delayed in

[1] The recent botched lethal injection of Joseph Clark underlines the gravity of Sedley Alley's complaint. Without question, Clark was not adequately anesthetized, and officials acknowledged their mistakes in the administration of the chemicals. See Botched Execution Leads To Ohio Review, New York Times, May 12, 2006.

bringing his lawsuit. He did not. Judge Trauger fully recognized that Defendants' argument was wrong, and indeed it is. Article III makes manifest that Sedley Alley brought his lawsuit as soon as it became ripe and he had standing. Judge Trauger's conclusion is faithful to Article III, while Defendants' argument is not.

A.

UNDER ARTICLE III, SEDLEY ALLEY WAS OBLIGATED TO RAISE HIS CLAIMS ONCE HE FACED IMMINENT HARM FROM A PARTICULARIZED, CONCRETE THREAT

Whether a litigant has unduly delayed bringing an action turns, of course, on when the action became justiciable. One cannot delay bringing an action one has yet to possess. Clear, consistent, Supreme Court law establishes the controlling legal standard. The Article III power extends to requests for injunctive relief only when a party is "immediately in danger" of sustaining some direct injury. City of Los Angeles v. Lyons, 461 U.S. 95, 101-102, 103 S.Ct. 1660 (1983). Or, put differently, to properly invoke Article III, a party *must establish* an actual or imminent threat of a concrete and particularized nature. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130 (1992). The imminent harm at issue in the complaint – torture through a specific lethal injection protocol on May 17, 2006 – only recently became justiciable.

B.

ONLY AFTER THE RECENT OCCURRENCE OF THREE EVENTS HAS SEDLEY ALLEY FACED THE IMMINENT, CONCRETE, PARTICULARIZED HARM HE NOW FACES ON MAY 17, 2006

Sedley Alley's proposed May 17, 2006, execution via lethal injection, as currently envisioned by Defendants, presented an immediate danger – a concrete and particularized imminent threat – only after (1) the Tennessee Supreme Court set May 17, 2006, as the date for Sedley Alley's proposed execution; (2) Tennessee law established lethal injection as the method for Mr. Alley's proposed execution; and (3) after consultation, Defendants informed Mr. Alley that they would not exercise the discretion vested in them to use a lethal injection protocol addressing his stated concerns. Because each of these three events occurred only in the past month and a half, and Sedley Alley acted the day after the first of these occurred, Judge Trauger did not abuse her discretion in concluding that Sedley Alley has not engaged in any "undue delay."

1.

Recognizing That Federal Proceedings In The District Court Could Render Any Execution Date Set A Nullity, The Tennessee Supreme Court Declined To Set A Date Until March 29, 2006

On December 14, 2004, the State requested that the Tennessee Supreme Court set a date for Sedley Alley's execution. That Court noted that even though the United States Supreme Court had denied Sedley Alley's habeas certiorari petition, Mr. Alley

nonetheless had pending federal court litigation, including pending litigation under Fed.R.App.P. 60(b). See Exhibit 3, January 6, 2005, Tennessee Supreme Court Order. Recognizing that the pending litigation "could render ineffectual any date set," the Tennessee Supreme Court denied the State's request. Id.

The import of that order is clear and unmistakable: Sedley Alley would not face any imminent threat of execution *until* his 60(b) proceedings had concluded. Thus, as of January 6, 2005, Sedley Alley was on clear notice that he would only potentially face execution upon final denial of his 60(b) motion. It was only on March 29, 2006 – after the completion of the Rule 60(b) proceedings in the District Court – that the Tennessee Supreme Court ultimately set May 17, 2006, as the proposed date for Mr. Alley's execution.

Until only recently, therefore, the very entity charged with scheduling Sedley Alley's execution recognized that pending federal litigation insulated Mr. Alley from any potential execution, and hence any potential harm. Until March 29, 2006, Sedley Alley faced no imminent, immediate danger of being taken to the execution chamber.

2.

Under Tennessee Law, Lethal Injection Was Not Established
As The Method For Sedley Alley's Proposed Execution Until April 19, 2006

Not only was it clear that Sedley Alley faced no imminent harm until (at least) the District Court finally denied his 60(b) motion, the harm at issue here – attendant

to lethal injection – only became imminent under Tennessee law in April 2006.

Tennessee law provides that the State can execute a condemned individual one of two ways: electrocution or lethal injection. Tenn. Code Ann. § 40-23-114. To establish which method the State will use, Defendant Warden Bell presents the condemned inmate a document asking him to choose one. If the inmate selects one, the State uses the selected method to execute him. If the inmate refuses to make a choice, Tennessee law provides that the method for execution will be lethal injection.

On April 19, 2006, Warden Bell presented Sedley Alley the choice document. If Sedley Alley had selected electrocution, the State would prepare to execute him in Tennessee's electric chair. If Sedley Alley selected lethal injection, the State would prepare to execute him on the gurney. Sedley Alley refused to make a selection.

Only at the moment of that refusal was lethal injection established as the actual method for Sedley Alley's proposed execution. Defendants themselves recognize this reality. See R. 16: Motion To Dismiss, p. 5 ("the consequence of his failure to choose a method ... *results* in his execution being carried out by lethal injection")(emphasis supplied). Thus, it was only on April 19, 2006, that lethal injection was established as the method for the proposed May 17 execution, thereby potentially giving rise to the harm alleged in the complaint.

3.

The Specifics Of The Lethal Injection Protocol Defendants Intend To Use At Sedley Alley's Proposed Execution Were Firmly Set Only In The Past Month

Even so, Tennessee law leaves to the Defendants' discretion how they wish to carry out an execution by lethal injection. Tenn. Code Ann. §40-23-114(c). In fact, Defendants have made clear their ability to craft whatever protocol they wish. See R. 11: Plaintiff's Position Regarding Status Of Case, Ex. C (Bell deposition testimony).

The day after the Tennessee Supreme Court set an execution date, Sedley Alley informed Defendant George Little of his objections to the lethal injection protocol that TDOC used for Robert Coe's April 19, 2000, execution. See R. 19: Response To Motion To Dismiss, Attachment 2, March 30, 2006, Letter From Bottei To Commissioner Little. On April 6, 2006, Defendant Little informed Sedley Alley that he had received Alley's concerns, but he wanted additional time to consult with legal counsel about them. See R. 25: Reply To Response To Motion For Preliminary Injunction, Attachment 1, April 6, 2006, Letter From Commissioner Little To Bottei.

This clearly indicates that, even as of April 6, Defendant Little had not finalized any decision about the protocol to be used. One week later, on April 13, Commissioner Little informed that, despite Alley's objections, Defendants would use on him the same protocol they used to execute Robert Coe six years ago. Little could have addressed Alley's concerns and changed the protocol, just as has occurred in

other states. It was not until April 13, when Commissioner Little expressly stated Defendants would not do so, that it was clear that Sedley Alley would face the prospect of torture he now alleges in his complaint.

C.
SEDLEY ALLEY DID NOT DELAY:
HE ACTED AT THE FIRST APPEARANCE OF AN IMMINENT HARM,
AND THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION
IN SO CONCLUDING

All told, given the Tennessee Supreme Court's January 2005 order, Sedley Alley did not face the imminent harm alleged in his complaint until: The United States District Court finally denied the Rule 60(b) motion on March 22; the Tennessee Supreme Court set an execution date on March 29; Defendant Little set the protocol on April 13; and lethal injection "resulted" from Alley's refusal to choose an execution method on April 19. Sedley Alley has not delayed: He has raised his claims with dispatch after they ripened and he faced imminent harm – exactly as Article III demands.

Having considered these operative facts, Judge Trauger thus properly recognized that Sedley Alley has engaged in no delay at all. She properly takes into account Article III, recognizing that while Sedley Alley's Rule 60(b) proceedings remained pending in the District Court, he had no justiciable claim attendant to any possible future execution which might never have occurred:

> The plaintiff brought his first habeas petition before the federal courts in 1998 and, subsequently, brought a Rule 60(b) petition that was eventually held to be a second habeas attempt . . . . While those actions were pending plaintiff's execution was stayed, and accordingly, it was not yet determined that the plaintiff would actually be executed. *In fact, the plaintiff may well have faced ripeness issues had he challenged the lethal injection protocols before that determination was made.*

See District Court Memorandum (Exhibit 1, p. 6)(emphasis supplied). Absolutely. The District Court correctly acknowledged that Article III limitations precluded Sedley Alley from raising his complaint any sooner than he did.

The District Court also carefully addressed counsel's diligence in bringing the lawsuit once it became certain that Alley would face execution, would face lethal injection, and would face a protocol which would allegedly cause torture:

> The plaintiff cannot be said to have unduly delayed by failing to challenge his method of execution before it was certain that the execution in the challenged manner would occur. The record demonstrates that soon after learning that an execution would in fact occur – seven days after the Western District of Tennessee denied his motion to alter or amend judgment on his Rule 60(b) motion and *just one day after the Tennessee Supreme Court set a new execution date* – the plaintiff wrote Commissioner George Little, expressing his objections to the lethal injection protocol. . . . After failing to receive a response, the plaintiff filed this action on April 11, 2006. Under such circumstances it would be strange jurisprudence to dismiss this action for 'undue delay.'

See District Court Memorandum: Exhibit 1, p. 7 (emphasis supplied). See Beardslee v. Woodford, 395 F.3d 1064, 1069-1070 (9th Cir. 2005)(because Beardslee

aggressively pursued his claims as soon as he viewed them as ripe, District Court abused its discretion by dismissing §1983 lethal injection complaint as dilatory). And, as Judge Trauger recognized, in *In Re Sapp*, the plaintiff there simply did not face the "ripeness issues that Alley would have faced had he brought his Eighth Amendment challenge while his habeas petitions were outstanding." Id., p. 7 n. 3.

Nothing about Judge Trauger's analysis is abusive. She is faithful to Article III's requirements of ripeness and standing. She is faithful to the Tennessee Supreme Court's January 2005 order – which meant that harm was only imminent (at the earliest) upon conclusion of the Rule 60(b) proceedings in District Court. And she properly recognized that once harm was threatened by the setting of the execution date, counsel acted with diligence in immediately approaching Commissioner Little in an effort to avoid the harm which is the subject of this lawsuit. Judge Trauger is absolutely right. Her decision cannot be overturned as abusive.

D.

APPELLANTS' CITED CASES CONCERNING ALLEGED DELAY ARE DISTINGUISHABLE, WRONGLY DECIDED, OR BOTH

In an effort to attack Judge Trauger's careful consideration of the issue, Defendants cite cases which are distinguishable on the facts, wrong on the law, or both. For instance, in Hicks v. Taft, 431 F.3d 916 (6th Cir. 2005), the Ohio inmate's federal habeas proceedings concluded on August 1, 2005. On October 5, 2005, the

Ohio Supreme Court set a November 29, 2005, execution date. Despite Ohio law establishing lethal injection as the means for executing all Ohio death sentences, (See Ohio Rev. Code § 2949.22), Hicks did nothing to challenge his imminent lethal injection until November 23, 2005, close to five months after his habeas proceedings concluded, forty-nine days after an execution date was set, and *just six days before his execution date.*

Here, unlike Hicks, until March 22, 2006, Sedley Alley had habeas proceedings pending which, as the Tennessee Supreme Court itself recognized, could prevent Sedley Alley's execution altogether. The day after the court set a date, Sedley Alley acted: He expressed to Defendants his concerns with the State's previously endorsed lethal injection protocol. And unlike Hicks, lethal injection was not even established as the method for Sedley Alley's proposed execution until *after* the execution date was set. While Hicks may have waited unreasonably long after his claim ripened, Sedley Alley has not: Once his claim ripened, Sedley Alley immediately sought relief.

Unlike Judge Trauger, Harris v. Johnson, 376 F.3d 414 (5th Cir. 2004), fails to acknowledge Article III ripeness and standing. There, the Fifth Circuit faulted Harris for waiting to bring his 1983 action until his execution became "imminent." Harris, 376 F.3d at 417. It determined that Harris should have brought his action during a period when "the execution was not so much an imminent or impending danger as it

was an event reasonably likely to occur in the future . . . ." Id. at 418.

Without question, this reasoning turns Article III jurisdiction on its head: Article III demands an imminent, immediate danger before a federal court has jurisdiction over a request for injunctive relief. See City of Los Angeles v. Lyons, 461 U.S. at 101-102. A situation that envisions a threat as reasonably likely to occur at some unspecified future date does not bestow a court with Article III jurisdiction to enter injunctive relief. See Ohio Forestry Association, Inc. v. Sierra Club, 523 U.S. 726, 736-37, 118 S.Ct. 1665 (1998)(while adoption of a logging plan made logging of a National Forest likely, that adoption did not present an immediate danger of any tree being cut, and request for injunctive relief was therefore premature). *Harris* is wrongly decided.[2]

Finally, in the *Bieghler* case, the condemned inmate waited until *the day before his execution* to file his lethal injection challenge despite the fact that, like Ohio and Texas, Indiana law established lethal injection as the method for executing all death

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[2] And even if Harris provided this Court any guidance (which is does not), the facts here are inapposite. Unlike Tennessee, but as in Ohio, in Texas lethal injection is established as the method for executing all death sentences. As discussed above, however, in Tennessee the method of executing an inmate is not established until after the inmate is given a choice of choosing electrocution or lethal injection. So while lethal injection had been established for years as the method Texas would use to execute Harris, it was not established as the method for Alley's proposed execution until April 19, 2006. Simply put, Harris is wrongly decided and distinguishable.

sentences. See Bieghler v. Donahue, 163 Fed.Appx. 419 (7th Cir.) *vacated*, 126 S.Ct. 1190 (2006). That simply is not the case here.

To reiterate, Sedley Alley raised his claims as soon as they became ripe and justiciable under Article III, Tennessee law, and the Tennessee Supreme Court's January 2005 order *in this case*. Hicks, Harris, and Bieghler waited too long after their claims could have been raised. They let ripe claims spoil. Sedley Alley did not. The District Court did not abuse its discretion in so concluding.[3]

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[3] The reasons refuting any suggestion of undue delay also defeat Defendants alternative argument that should this Court construe Sedley Alley's 1983 action as a habeas petition, the AEDPA requires its dismissal. While the AEDPA requires Circuit Court approval for the filing of a "second or successive" habeas application, 28 U.S.C. § 2244(b)(3)(A), not every petition second in time to a first petition constitutes a "second or successive" petition. Rather, federal courts treat the "second or successive" phrase as a term of art and look to the abuse-of-the-writ doctrine to bring meaning to that phrase. See Stewart v. Martinez-Villareal, 523 U.S. 637, 645, 118 S.Ct. 1618 (1998); James v. Walsh, 308 F.3d 162, 167 (2nd Cir. 2002). An abuse-of-the-writ occurs when a habeas petitioner raises a claim in a second-in-time petition that could have been raised in the first petition. When, however, a second-in-time habeas petition presents a claim that was not available during the prior habeas proceeding, the second-in time-petition is not a "second or successive" petition, and as a result the section 2244(b)(3)(A) gatekeeping mechanism does not apply. See, e.g., James v. Walsh, 308 F.3d at 168 (citing cases); Hill v. Alaska, 297 F.3d 895, 898 (9th Cir. 2002); U.S. v. Orozco-Ramirez, 211 F.3d 862, 869 (5th Cir. 2000); Walker v. Roth, 133 F.3d 454, 455 (7th Cir. 1997). As discussed above, during the initial habeas proceedings Sedley Alley's challenge to his proposed May 17, 2006, execution via a specific lethal injection protocol was not justiciable, and hence, unavailable.

III.
CONCLUSION

Having carefully reviewed the facts and applied all applicable law, the District Court has entered a non-abusive order of temporary duration. Defendants quibble about Judge Trauger's weighing of the equities, but that quibble does not turn this into the rare case which permits appellate intervention. Especially where other District Courts have entered similar orders and even the Attorney General of the United States has agreed to one such order (See R. 27: District Court Memorandum p. 4 n. 2), one cannot reasonably conclude that Judge Trauger – after weighing all the equities – has engaged in abusive conduct. The Defendants' Motion To Vacate should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served upon Joseph Whalen, Office of the Attorney General, 425 5th Avenue North, Nashville, Tennessee 37243 this 12th of May, 2006.

/s/ *Paul R. Bottei*