

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

[NAME],

Case No. X-X-XX-XXX

Petitioner,

vs.

District Judge [NAME]

Magistrate Judge [NAME]

[NAME], Warden,

Respondent.

ORDER STAYING EXECUTION OF SENTENCE OF DEATH

This case is before the Court on Petitioner's Motion for Stay of Execution of Death Sentence (Doc. #XX). A motion for stay of execution is a nondispositive motion which may be decided by a Magistrate Judge. See 28 U.S.C. §636(b).

This is the Petitioner's first federal habeas corpus petition related to his conviction and sentence of death in the [NAME] County Common Pleas Court. On its face the Petition raises one or more issues on which, if successful, Petitioner would be entitled to relief. In particular, pursuant to this Court's Order of [DATE], Petitioner has filed a successive petition under Ohio Revised Code §2953.21 to raise his claim that he is exempt from execution under the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed. 335 (2002). The claim that Petitioner is mentally retarded is at least colorable, based on evidence already of record in this Court.

Furthermore, the state court petition appears to have been filed in accordance with the procedure adopted by the Ohio Supreme Court in *State v. Lott*, 97 Ohio St. 3d 303, 2002-Ohio-6625 (2002). Petitioner's requested a stay of the habeas corpus proceedings in accordance with the Sixth Circuit's decision in *Palmer v. Carlton*, 276 F.3rd 377 (6th Cir. 2002), for dealing with mixed habeas petition in the wake of the AEDPA's adoption of a statute of limitations. By granting the stay of proceedings, this Court did not lose jurisdiction of the habeas corpus case.

It is impossible to consider the issues raised in the habeas corpus petition properly prior to the Petitioner's presently scheduled execution date of [DATE], particularly in light of the fact that this Court has stayed its consideration of the case pending exhaustion of the pending state court proceedings. A stay of execution is therefore necessary to protect this Court's habeas corpus jurisdiction and its power to grant relief if merited.

Accordingly, it is hereby ORDERED that the execution of Petitioner [NAME], presently scheduled for [DATE], be, and it hereby is, STAYED pending further order of this Court. The Clerk shall serve a copy of this Order on Respondent forthwith. [DATE].

[NAME]
United States Magistrate Judge