

**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.

**DECISION AND ORDER GRANTING MOTION TO
HOLD CASE IN ABEYANCE**

This capital habeas corpus case is before the Court on Petitioner's Motion to Hold Proceedings in Abeyance pending exhaustion of state court remedies for newly-advanced grounds for relief (Doc. No. XX).

Upon review of the motion papers and cited authority, the Court finds the Motion is well taken. Respondent urges this Court to find that the state courts are unlikely to entertain these claims but are rather likely to find that they are procedurally defaulted. However, Ohio Revised Code § 2953.23 permits the state courts to consider, on a successive petition under Ohio Revised Code § 2953.21, newly-discovered evidence which could not previously have been discovered in the exercise of due diligence.¹ It is appropriate to allow the state courts in the first instance to make this determination.

¹ The statutory phrase is “unavoidably prevented from discovery...”

While this approach has the virtue of following this Court's precedent in *Rideau v. Russell*, Case No. C-3-00-427, it would be needlessly cumbersome to follow the exact procedure set forth in *Rideau*, to wit, requiring Petitioner to now file a petition with only exhausted claims in it, then re-file another petition after exhaustion. While the *Rideau* procedure has the merit of strict compliance with *Rose v. Lundy*, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982), neither party has suggested that such a procedure is mandatory and it would have no utility here.

The Motion to Hold Proceedings in Abeyance is GRANTED.

The Court notes that on October 22, 2001, it ordered Petitioner to file a copy of his successive 2953.21 petition (which he has done) and to keep the Court “currently advised of that status of that matter.” Other than the petition itself, the Court has received no further advice on the status of the successive post-conviction process.

As provided by the Court's granting of Petitioner's Motion to Extend Date for Filing of Traverse (Doc. No. XX), Respondent's amended return of writ shall be filed not later than thirty days following completion of state court proceedings on Petitioner's successive 2953.21 petition and Petitioner's traverse shall be filed not later than thirty days after the amended return of writ.

[DATE].

[NAME]
United States Magistrate Judge