

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Nicholas Ed Buskirk v. Patrick Covello

No. 5:24-cv-01444-CV-JC, United States District Court for the Central District of California (April 16, 2025)

SUMMARY

The United States District Court for the Central District of California accepts the magistrate judge’s Report and Recommendation and grants petitioner’s motion for a stay under Kelly v. Small. Claims Eight, Nine, and Ten are dismissed without prejudice, the fully exhausted petition and action are stayed pending exhaustion of those claims, and the court imposes periodic reporting and other procedural requirements.

CASE DETAILS

COURT	United States District Court for the Central District of California
WRITING FOR THE COURT	Cynthia Valenzuela
JURISDICTION	United States District Court for the Central District of California
DECIDED	April 16, 2025
DOCKET	5:24-cv-01444-CV-JC
DISPOSITION	other
PROCEDURAL POSTURE	The district court reviewed and accepted a magistrate judge's Report and Recommendation concerning a state prisoner's petition for a writ of habeas corpus under 28 U.S.C. § 2254 and his motion to stay the federal proceedings pending exhaustion of state remedies.
STANDARD OF REVIEW	The district court reviewed the magistrate judge's Report and Recommendation pursuant to 28 U.S.C. § 636.
PRECEDENTIAL VALUE	Unpublished district court order; nonprecedential
PARTIES	Nicholas Ed Buskirk v. Patrick Covello, Warden

TOPICS

- federal habeas corpus
- post-conviction relief
- civil procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the court should stay the federal habeas action under *Kelly v. Small* while Buskirk exhausts Claims Eight, Nine, and Ten in state court.
2. Whether Claims Eight, Nine, and Ten should be dismissed without prejudice during the stay.
3. What conditions and reporting obligations should govern the stay.

HOLDINGS

1. The court granted a stay under the procedure recognized in *Kelly v. Small*, subject to specified conditions and limitations, so that Buskirk could exhaust Claims Eight, Nine, and Ten in state court.
2. Claims Eight, Nine, and Ten were dismissed without prejudice, and the resulting fully exhausted petition and action were stayed while Buskirk exhausted those claims.
3. Buskirk was required to file status reports every sixty days, notify the court of relevant state-court decisions within the specified thirty-day periods, and comply with the one-year limitations period under 28 U.S.C. § 2244(d)(1).

FACTUAL BACKGROUND

Buskirk is a person in state custody who filed a federal habeas petition under 28 U.S.C. § 2254. Claims Eight, Nine, and Ten had not yet been exhausted in state court. He sought a stay while pursuing state habeas relief on those claims.

PROCEDURAL HISTORY

Buskirk filed a verified § 2254 petition and moved for a stay pending exhaustion of state court remedies. The magistrate judge issued a Report and Recommendation on February 14, 2025. The district court approved and accepted the recommendation, granted a *Kelly* stay subject to conditions, dismissed Claims Eight, Nine, and Ten without prejudice, and administratively closed the case during the stay.

DISPOSITION

other

CASES CITED

- *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003)

OPINION

Nicholas Ed Buskirk v. Patrick Covello

PER CURIAM.

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UNITED STATES DISTRICT COURT

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CENTRAL DISTRICT OF CALIFORNIA

10 11 NICHOLAS ED BUSKIRK,) Case No. 5:24-cv-01444-CV-JC) 12) Petitioner,)

13) ORDER ACCEPTING FINDINGS,

v.) CONCLUSIONS, AND

14) RECOMMENDATIONS OF

PATRICK COVELLO, Warden,) UNITED STATES MAGISTRATE

15) JUDGE

)

16) [DOCKET NO. 3]

Respondent.) 17 _____ 18 Pursuant to 28 U.S.C. § 636, the
Court has reviewed the Verified Petition for 19 Writ of Habeas Corpus by a Person in State
Custody Under 28 U.S.C. § 2254 and 20 the supporting memorandum (“Petition”), the parties’
submissions in connection 21 with petitioner’s Motion for a Stay Pending Exhaustion of State
Court Remedies 22 (“Stay Motion”), and all of the records herein, including the 23 February 14,
2025 Report and Recommendation of United States Magistrate Judge 24 (“Report and
Recommendation”). The Court approves and accepts the Report and 25 Recommendation. 26 ///
27 /// 28 1 IT IS HEREBY ORDERED: 2 1. The Stay Motion is granted to the extent it seeks a
stay pursuant to 3 Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003) subject to the below-specified 4
conditions/limitations. 5 2. Claims Eight, Nine, and Ten of the Petition are dismissed without 6
prejudice. 7 3. The resulting fully exhausted Petition and this action are stayed 8 for petitioner to
exhaust only Claims Eight, Nine, and Ten. 9 4. Petitioner shall file periodic reports detailing the
status of the 10 state court proceedings beginning sixty (60) days from the date of this Order and
11 every sixty (60) days thereafter. If petitioner has no new information regarding the 12 status of
petitioner’s efforts to exhaust his state remedies in a given period because 13 a matter remains
pending in state court, petitioner must nonetheless file a status 14 report advising the Court of such
fact. 15 5. Petitioner shall, within thirty (30) days of any state decision 16 granting petitioner
habeas relief or, if none, within thirty (30) days of the 17 California Supreme Court’s decision
relative to a state habeas petition containing 18 Claims Eight, Nine, and Ten, file a notice of such
decision and attach as an exhibit 19 thereto, a copy of such decision. 20 6. Petitioner is cautioned
that: 21 a) the failure to meet any of the time requirements set out 22 above may result in an order
vacating the stay, nunc pro tunc, may preclude 23 consideration of petitioner’s unexhausted
claims, and may result in dismissal 24 of this action for lack of prosecution or failure to obey this
Order; and 25 b) the granting of the stay pursuant to Kelly, in no way 26 relieves petitioner of the
obligation to comply with the one-year statute of 27 limitations under 28 U.S.C. section 2244(d)
(1) and nothing in this Order 28 should be construed to suggest that the Court has made any
determination as to whether it would ultimately permit petitioner to amend the Petition to re-

2 || add Claims Eight, Nine, and Ten once they have been exhausted. 3 7. Noting in this Order precludes respondent from raising procedural or 4 || other objections/defenses to the Petition, any amended federal petition or any 5 | claims contained therein. 6 8. The Clerk shall administratively close this case during the 7 || pendency of the stay and remove this case from the Court's active case load. 8 9. The Clerk shall serve copies of this Order on counsel for 9 || petitioner and respondent. 10 IT IS SO ORDERED.

11 | DATED: 4/16/25

12 13 Cath a Valenzuela

14 HONORABLE CYNTHIA VALENZUELA

5 UNITED STATES DISTRICT JUDGE

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