

**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.

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 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 16 17 18 19 20 21 22 23 24 25 26 27 28