

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

Gregory Harms v. Edward Silva

Harms · No. 2:25-cv-1048 CSK P · Decided April 15, 2025

SUMMARY

The United States District Court for the Eastern District of California directs Gregory Harms to file, within twenty-one days, the motion to stay referenced in his § 2254 habeas petition. The court notes that a stay under Kelly v. Small requires amendment of the petition to delete unexhausted claims and observes that the record did not contain the referenced motion.

CASE DETAILS

COURT	United States District Court for the Eastern District of California
WRITING FOR THE COURT	Chi Soo Kim
JURISDICTION	United States District Court for the Eastern District of California
DECIDED	April 15, 2025
DOCKET	2:25-cv-1048 CSK P
DISPOSITION	other
PROCEDURAL POSTURE	Petitioner, a state prisoner proceeding through counsel, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 and represented that he had filed a motion to stay under Kelly v. Small. The court found that the record did not contain the referenced motion and ordered petitioner to file it.
PRECEDENTIAL VALUE	Unknown; procedural order from a federal district court.
PARTIES	Gregory Harms v. Edward Silva

TOPICS

- federal habeas corpus
- post-conviction relief
- pleadings

PRACTICE AREAS

- Federal habeas corpus
- Post-conviction relief

QUESTIONS PRESENTED

1. Whether petitioner should be ordered to file the Kelly v. Small motion to stay referenced in his habeas petition when the motion was absent from the record.

HOLDINGS

1. Because the record did not contain the Kelly motion referenced by petitioner, the court ordered petitioner to file that motion within twenty-one days of the order.

KEY QUOTATIONS

“Accordingly, IT IS HEREBY ORDERED that within twenty-one days of the date of this order, petitioner shall file the motion to stay referred to in the petition.” (at 1)

FACTUAL BACKGROUND

Gregory Harms is a state prisoner who filed a federal habeas petition under 28 U.S.C. § 2254 through counsel. He stated that he had filed a motion to stay under Kelly v. Small to exhaust unexhausted claims, but the record did not contain that motion. The court also noted that a Kelly stay requires amendment of the petition to delete unexhausted claims.

PROCEDURAL HISTORY

Harms filed a § 2254 habeas petition and paid the filing fee. He stated that he filed a Kelly motion to stay to exhaust unexhausted claims, but the court could not locate the motion. The court ordered him to file the motion within twenty-one days.

DISPOSITION

other

CASES CITED

- Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003)
- Rhines v. Weber, 544 U.S. 269 (2005)

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF
10 CALIFORNIA 11 GREGORY HARMS, No. 2:25-cv-1048 CSK P 12 Petitioner, 13 v. ORDER
14 EDWARD SILVA, 15 Respondent. 16 17 Petitioner, a state prisoner proceeding through
18 counsel, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner
paid the filing fee.

19 Petitioner states that he filed, with the petition, a motion to stay pursuant to Kelly v. 20 Small,
315 F.3d 1063 (9th Cir. 2003) to exhaust unexhausted claims.¹ (ECF No. 1-2 at 12.) 21 However,

the record does not contain a motion to stay pursuant to Kelly. This Court also 22 observes that a stay pursuant to Kelly includes amending the petition to delete any unexhausted 23 claims.

Kelly, 315 F.3d at 1070. 24 Accordingly, IT IS HEREBY ORDERED that within twenty-one days of the date of this 25 order, petitioner shall file the motion to stay referred to in the petition. 26 ///
27 1 Petitioner does not state that he will seek a motion to stay pursuant to Rhines v. Weber, 544 U.S. 28 269 (2005). 1 | Dated: April 14, 2025 ~ CHI S00 KIM 3 | Harm1048.100fee/2 UNITED STATES MAGISTRATE JUDGE 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28