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2 UNITED STATES DISTRICT COURT
3 DISTRICT OF NEVADA

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5 DAVID MICHAEL PELLEGRINI,

6 Petitioner,

7 v.

8 TIM GARRETT, *et al.*,

9 Respondents.

Case No. 2:01-cv-01382-HDM-BNW

ORDER

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12 This habeas corpus action has been stayed since May 31, 2005, pending
13 completion of proceedings in state court. On March 1, 2021, the petitioner, David
14 Michael Pellegrini, filed a status report notifying this Court, for the first time, that his
15 state court proceedings were completed over three years earlier, on January 11, 2018.
16 See Status Report filed March 1, 2021 (ECF No. 131). The Court will order the stay of
17 this action lifted and will order Pellegrini to show cause why the action should not be
18 dismissed for failure to prosecute and/or for failure to comply with the Court's orders.

19 Pellegrini was convicted in 1987 in Nevada's Eighth Judicial District Court of
20 burglary, attempted robbery with use of a deadly weapon, and first-degree murder with
21 use of a deadly weapon; he was sentenced to death for the murder. Pellegrini appealed
22 and the Nevada Supreme Court affirmed in 1988. *See Pellegrini v. State*, 104 Nev. 625,
23 764 P.2d 484 (1988). Pellegrini then unsuccessfully litigated two post-conviction habeas
24 actions in state court; the Nevada Supreme Court affirmed the denial of relief in the
25 second of those actions on November 15, 2001. *See Pellegrini v. State*, 117 Nev. 860,
26 34 P.3d 519 (2001).

1 Pellegrini initiated this action on November 21, 2001. See Petition for Writ of
2 Habeas Corpus (ECF No. 1). The Court appointed attorney Patricia Erickson as counsel
3 for Pellegrini on April 12, 2002. See Order entered April 12, 2002 (ECF No. 7).

4 On May 31, 2005, this action was stayed to allow Pellegrini to pursue certain
5 claims in state court. See Order entered May 31, 2005 (ECF No. 94). In the order
6 staying this action, the Court ordered:

7 ... [O]n or before September 1, 2005, Petitioner shall file and serve
8 a status report, describing the status of his state-court proceedings.
9 Petitioner shall thereafter file and serve a status report every 6 months (on
10 or before the first day of March 2006, September 2006, March 2007, etc.).
11 Respondents may file and serve a response to any such status report
12 within twenty days after its service. Petitioner may reply within fifteen days
13 of service of such a response.

14 *Id.* at 7. The Court also ordered:

15 At the conclusion of Petitioner's state court proceedings, Petitioner shall,
16 within twenty (20) days, make a motion to lift the stay in this action.

17 *Id.* at 6.

18 Erickson filed status reports on Pellegrini's behalf as ordered—albeit almost
19 always late—until 2017; her last status report, before she stopped filing them, was filed
20 on September 9, 2017 (ECF No. 126). Erickson did not file the status report that was
21 due March 1, 2018 (notably, that was the first status report due after the conclusion of
22 the state-court proceedings). Erickson did not file any further status report for Pellegrini
23 until the Court, on February 8, 2021, ordered Pellegrini to resume filing status reports as
24 required by the May 31, 2005, order. See Order entered February 8, 2021 (ECF No.
25 129). Furthermore, Erickson did not file, on Pellegrini's behalf, a motion to lift the stay of
26 this action within 20 days after the completion of the state court proceedings, as was
27 required by the May 31, 2005, order.

28 The status reports that Pellegrini filed through 2017 indicate that, following the
stay of this action, Pellegrini initiated a further habeas action in state court; the state
district court granted relief on that petition in 2007, vacated Pellegrini's death sentence,
and granted him a new penalty hearing; at the new penalty hearing, Pellegrini was

1 sentenced, for the murder, to life in prison without the possibility of parole; an amended
2 judgment of conviction was entered on December 20, 2010; Pellegrini appealed from
3 the amended judgment of conviction, and the Nevada Supreme Court affirmed on
4 October 8, 2012; Pellegrini filed a habeas petition in state court on October 3, 2013,
5 challenging the amended judgment of conviction, that petition was denied, and
6 Pellegrini appealed from the denial of that petition. See Status Reports filed from 2005
7 to 2017 (ECF Nos. 96, 99, 102, 104, 107, 108, 109, 110, 111, 112, 113, 115, 116, 117,
8 118, 119, 121, 122, 123, 124, 125, 126). Pellegrini's March 1, 2021, status report (ECF
9 No. 131) states:

10 The Nevada Supreme Court, in docket number 71479, issued
11 an Order Affirming the judgment of the district court in denying
12 Mr. Pellegrini's state habeas challenge to his second penalty hearing.
 On January 11, 2018, a remittitur was issued in the appeal.

13 Status Report filed March 1, 2021 (ECF No. 131).

14 The Court will order Pellegrini to show cause why this action should not be
15 dismissed for failure to prosecute (see Fed. R. Civ. P. 41(B)(i)) and/or for failure to
16 comply with the Court's orders (see Order entered May 31, 2005 (ECF No. 94)). The
17 Court will set a schedule for Respondents to respond to Pellegrini's response to the
18 order to show cause, and for Pellegrini to reply.

19 On March 1, 2021, in addition to the status report, Erickson filed a motion to
20 withdraw from her representation of Pellegrini in this action, and for appointment of new
21 counsel for Pellegrini. See Motion to Withdraw as Counsel and Request Appointment of
22 New Counsel (ECF No. 130). Erickson's rationale for seeking to withdraw, in its entirety,
23 is as follows: "This request is based on the fact that undersigned counsel no longer
24 litigates federal habeas corpus cases and has not done so since 2011." *Id.* at 1. The
25 Court will deny Erickson's motion.

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1 **IT IS THEREFORE ORDERED** that the stay of this action is lifted. The Clerk of
2 the Court is directed to administratively reopen this case.

3 **IT IS FURTHER ORDERED** that Petitioner will have 30 days from the date of this
4 order to show cause why this action should not be dismissed for failure to prosecute
5 and/or for failure to comply with the Court's orders. After Petitioner responds to this
6 order to show cause, Respondents will have 30 days to file a response, and Petitioner
7 will then have 15 days to file a reply.

8 **IT IS FURTHER ORDERED** that Patricia Erickson's Motion to Withdraw as
9 Counsel and Request Appointment of New Counsel (ECF No. 130) is **DENIED**.

10 **IT IS FURTHER ORDERED** that, pursuant to Federal Rule of Civil Procedure
11 25(d), Tim Garrett is substituted for E.K. McDaniel as the respondent warden. The Clerk
12 of the Court is directed to update the docket to reflect this change.

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14 DATED THIS 7th day of April, 2021.

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18 HOWARD D. McKIBBEN,
19 UNITED STATES DISTRICT JUDGE
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