

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3 Electronically Filed
4 Jul 05 2022 06:35 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

5 MICHAEL ALLEN MACK,

CASE NO.: 83165

6 Appellant,

7
8 vs.

9 THE STATE OF NEVADA,

10 Respondent,

11 ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT IN AND
12 FOR THE COUNTY OF NYE, THE HONORABLE KIMBERLY WANKER,

13 PRESIDING

14 PETITION FOR REVIEW

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16 Appellant, MICHAEL ALLEN MACK, by and through his attorney of
17 record, DAVID H. NEELY III, ESQ., hereby petitions this Honorable Court to
18 Review the COURT OF APPEALS ORDER DENYING REHEARING from
19 an appeal of an order of the district court that denies a Post-Conviction Petition for
20 Writ of Habeas Corpus.

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1 This Motion is made and based upon SCR 40B, the following Points and
2 Authorities, all papers, pleadings and documents on file herein, as well as any oral
3 arguments that may be entertained at the hearing of this Motion.

4 **POINTS AND AUTHORITIES**

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6 NRAP 40B(a) allows review of a decision of the Court of Appeals on petition
7 for review. NRAP 40B(a) states:

8 (a) Decisions of Court of Appeals Reviewable by Petition for Review. A
9 decision of the Court of Appeals is a final decision that is not reviewable by the
10 Supreme Court except on petition for review. A party aggrieved by a decision of the
11 Court of Appeals may file a petition for review with the clerk of the Supreme Court.
12 The petition must state the question(s) presented for review and the reason(s) review
13 is warranted. Supreme Court review is not a matter of right but of judicial discretion.
14 The following, while neither controlling nor fully measuring the Supreme Court's
15 discretion, are factors that will be considered in the exercise of that discretion:
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17 (1) Whether the question presented is one of first impression of general
18 statewide significance;

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20 (2) Whether the decision of the Court of Appeals conflicts with a prior
21 decision of the Court of Appeals, the Supreme Court, or the United States Supreme
22 Court;

1 (3) Whether the case involves fundamental issues of statewide public
2 importance.

3 Here, the Court has misapprehended one (1) matter in the record.

4 The Court has misapprehended a material fact when it concluded that Trial
5 Counsel did not have a conflict of interest during his representation that he never
6 disclosed to his client.
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8 The Court states, “Finally, Mack claimed counsel had a conflict of interest
9 that counsel never disclosed to him. Mack claimed counsel owed his continued
10 employment to serving the interests of the District Attorney’s Office because
11 counsel was hired by the District Attorney’s Office, the District Attorney
12 represented counsel before the Board of County Commissioners, and the District
13 Attorney controls the public defender contracts and was counsel’s supervisor. A
14 conflict of interest exists if “counsel actively represented conflicting interests” and
15 the “conflict of interest adversely affected {the defendant’s} lawyer’s
16 performance.” Strickland, 466 U.S. at 692. “In general, a conflict exists when an
17 attorney is placed in a situation conducive to divided loyalties.” Clark v. State, 108
18 Nev. 324, 326 831 P.2d 1374, 1376 (1992)”
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21 “Mack failed to demonstrate the alleged facts underlying this claim by a
22 preponderance of the evidence. Accordingly, Mack failed to demonstrate counsel’s
23 performance fell below an objective standard of reasonableness or a reasonable
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1 probability he would not have pleaded guilty and would have insisted on going to
2 trial if not for counsel's alleged errors. Therefore, we conclude the district court
3 did not err by denying this claim."

4 Representation of a criminal defendant entails certain basic duties. Counsel's
5 function is to assist the defendant, and hence counsel owes the client a duty of
6 loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra 446 U.S.,
7 at 346, 90 S.Ct., at 1717. From the counsel's function as assistant to the defendant
8 derive the overarching duty to advocate the defendant's cause and the more
9 particular duties to consult with the defendant on important decisions and to keep
10 the defendant informed of important developments in the course of the
11 prosecution. Counsel also has a duty to bring to bear such skill and knowledge as
12 will render the trial a reliable adversarial testing process. See Powell v. Alabama,
13 287 U.S., 68-69, 53 S. Ct., 63-64. Strickland v. Washington, 466 U.S. 668, 104 S.
14 Ct. 2052, 80 L. Ed. 2d 674 (1984).

17 One type of actual ineffectiveness claim warrants a similar, though more
18 limited, presumption of prejudice. In Cuyler v. Sullivan, 446 U.S., at 345-350, 100
19 S. Ct., at 1716-1719, the Court held that prejudice is presumed when counsel is
20 burdened by an actual conflict of interest. In those circumstances, counsel breaches
21 the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is
22 difficult to measure the precise effect on the defense of representation corrupted by
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1 conflicting interests. Given the obligation of counsel to avoid conflicts of interest
2 and the ability of trial courts to make early inquiry in certain situations likely to
3 give rise to conflicts, see e.g. Fed Rule Crim. Proc. 44©, it is reasonable for the
4 criminal justice system to maintain a fairly rigid rule of presumed prejudice for
5 conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that
6 exists for the Sixth Amendment claims mentioned above. Prejudice is presumed
7 only if the defendant demonstrates that counsel “actively represented conflicting
8 interests” and that “a conflict of interest adversely affected his lawyer’s
9 performance.” Cuyler v. Sullivan, supra, 446 U.S., at 350, 348, 100 S. Ct. at 1719,
10 1718. Strickland v. Washington, 466 U.S. 669, 104 S. Ct. 2052, 80 L. Ed. 2d 674
11 (1984)
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14 At the Evidentiary hearing, Trial Counsel was asked the following, “So prior
15 to your contract as an individual contractor, your prior firm Gibson & Kuehn had
16 the public defender contract, didn’t it? Trial Counsel responded, “Yes.”

17 He was then asked, “And your prior firm, Gibson & Kuehn began to break
18 apart due to Mr. Kuehn’s legal and ethical issues?” Trial Counsel responded,
19 “Yes.” He was then asked, “And it was a result of the Fellini case, which is a case
20 everybody heard about, the cow getting hit and he got in a lot of trouble with the
21 State Bar.” Trial Counsel responded, “Yeah, I think he was disbarred, actually.”
22 He was then asked, “He actually became disbarred. And had it become apparent
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1 that your – Mr. Kuehn could lose his license at one point?” Trial Counsel
2 responded, “Repeat?” He was then asked, “Did it become apparent to you when
3 you were still his partner that he could lose his license?” Trial Counsel responded,
4 “It – that was an issue. I felt that based on the circumstances, that he – he could
5 lose his license, at the very minimum being suspended. And Mr. Ernest disagreed
6 with me. He said Harry would just get a slap on the wrist based on his research.
7 And Harry ran with that.” He was then asked, “And did you consider dissolving
8 your law firm?” Trial Counsel responded, “Did I what?” He was then asked,
9 “Consider dissolving Gibson & Kuehn?” Trial Counsel responded, “It’s no longer
10 in existence.” He was then asked, “So it actually did dissolve?” Trial Counsel
11 responded, “No, we actually haven’t closed it up yet, because there’s still – I
12 haven’t there’s tax issues and other things that were – it’s in the process. But -.” He
13 was then asked, “That’s not relevant. We’re not going to get into that.” Trial
14 Counsel, “It’s a slow – it’s a slow death.” He was then asked, “I understand. Now,
15 did you approach the then DA, Brian Kunzi, about taking over the public defender
16 contract you had?” Trial Counsel responded, “I think, if I recall, Mr. Ernest and
17 Mr. Kuehn explained to me that they had been in conversations with Mr. Kunzi
18 about this – then new Humboldt plan that they wanted to get into. And we were
19 told – well yes.” He was then asked, “Okay, what was your understanding of the
20 offer Mr. Kunzi made to you? I know you just referred it as a Humboldt?” Trial
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1 Counsel responded, "Take it or leave it, if we – if we agreed to go along with – and
2 opt out of our contract early and take – and submit to the Humboldt plan, that we
3 would be given by the county that he – wasn't guaranteed, but he would be urging
4 the county commissioners to approve this plan. And that we would be the first
5 three contracts that would be approved. If we – if I – anyone of us did not agree
6 with it, then there would be no promises." He was then asked, "Was it a take it or
7 leave it kind of deal?" Trial Counsel responded, "Absolutely. That's how I took it."

9 He was then asked, "And was your understanding that if you fought him you
10 wouldn't get a contract?" Trial Counsel responded. "My understanding if I fought
11 him, that is a possibility I wouldn't have gotten the contract. Because I was led to
12 believe he had great influence over the commissioners." He was then asked, "Who
13 drafted the contracts?" Trial Counsel responded, "Kunzi." He was then asked,
14 "And who sent the contracts out?" Trial Counsel responded, "Who sent it out?" He
15 was then asked, "Yeah. Did you receive the contracts from Mr. Kunzi?" Trial
16 Counsel responded, "I got a copy of it, yes." He was then asked, "Okay. And did
17 Mr. Kunzi represent you at the commissioners meeting when they heard the pitch
18 for the contracts?" Trial Counsel responded, "That's my recollection."

21 The Court asked the following, "I've got a question on that. You said
22 represent. Did Mr. – was Mr. Kunzi retained as your counsel? That's the
23 allegation." Trial Counsel responded, "never." The Court continues, "that's the
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1 question. Maybe you need to clarify Mr. Neely. Because you're saying that he –
2 that Mr. Kunzi represented. And in the legal context, legal representation is he
3 would act as counsel for Mr. Kuehn and Mr. Gibson. Is that what you're asking?
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5 Appellant's Counsel replied, "Let me put it – let me rephrase it." Trial
6 Counsel was then asked, "So when you went to the commissioners' meeting, Mr.
7 Kunzi was there, he put forward the idea of the Humboldt plan?" Trial Counsel
8 responded, "He – yes, he was the one who was there representing the county
9 commission – or the – he was the DA who represents the commissions. Now, I
10 don't remember if he got up and spoke in front of them in detail, but I believe most
11 of the bargaining was done behind closed doors." He was then asked, "Okay. And
12 was it – was it Mr. Kunzi who was really a driving force behind the Humboldt
13 plan?" Trial Counsel responded, "Yes". He was then asked, "And was it your
14 understanding that it would be Pam Webster was going to be the supervisor of the
15 public defenders?" Trial Counsel responded, "No."
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17 He was then asked, "Did you – was it your understanding that the plan that
18 he put forth would probably save the county half a million dollars?" Trial Counsel
19 responded. "Something like that, yeah." He was then asked, "That would be
20 because they would not be using any of the other conflict lawyers?" Trial Counsel
21 responded, "That's my understanding." He was then asked, "Yeah. And would you
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1 – was it your understanding the desire was to eliminate the expense of paying
2 separate lawyers?” Trial Counsel responded, “Yes.’

3 He was then asked, “And did you ultimately lose your job as a contract
4 public defender?” Trial Counsel responded, “Yes. Well, it wasn’t renewed. I didn’t
5 lose it, it – yeah, they didn’t renew it.” He was then asked, “Was it over
6 insurance?” Trial Counsel responded, “No, but if you want to ask a follow up
7 question.” He was then asked, “What was it over?” Trial Counsel responded, “I
8 was accused of not having insurance. And I – and I showed my proof of insurance.
9 And they said, oh, this is just a – I believe a rider or a proof that I had insurance.
10 But they wanted – then Pam asked for the policy, which I didn’t have handy and I
11 had to order it and get it. And then I went over to her office, dropped it on her desk
12 and said, There it is , knock yourself out. Politely.”

13 He was then asked, “Did you feel set up in the way your contract -.” Trial
14 Counsel responded, “Oh. Yes. Yes.” Trial Counsel responded, “well, my
15 understanding – my belief is – set when you say ”set up.” Please be more specific.
16 What do you mean by that? He was then asked, “Do you feel like, you know, that
17 fix was in that you would lose your contract after one year?” Trial Counsel
18 responded, “There were – there was another issue that came up before – I mean
19 right after the insurance. And that was the retention of files. Which belonged to the
20 former firm of Gensler, Ernest and Harry Kuehn chartered – whatever Harry was
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1 going under at that time. Those are all old files, that they were not public defender
2 files that we were maintaining. Those were old other independent files. And I got a
3 frantic call from Pam Webster demanding I go pick them up in Tonopah. And I got
4 a call from the State Bar and Brian Kunzi. And I had to – said the same thing to all
5 three of those entities. “Not my files, not my problem. Talk to Ernest or Kuehn or
6 Gensler.” And so that was all – that was another rift we had. Because they, for
7 some reason, presumed it was going to be my problem. And then – but then Ernest
8 actually went and picked all those files up in Tonopah later. They were being
9 stored up there by Bob Bruschetta in one of his buildings.”

11 He was then asked, “Mr. Gibson, who do you think was the – was the
12 ultimate on the contract attorneys at that – when you were working there? Who had
13 hiring and firing – did Mr. Kunzi have the ability to get you fired if he wanted?”
14 Trial Counsel responded, “Do I know or do I suspect?” He was then asked, “Do
15 you suspect?” Trial Counsel responded, “I suspect that Mr. Kunzi had control over
16 the situation, and that Pam Webster pretty much did whatever he wanted her to do.
17 And I – and Kunzi had a history of when he decided that someone needed to leave,
18 he slowly built up a file in order to get rid of them, as evidenced by some of the
19 attorneys. But what he did with – with me was, he started that deal with the no
20 insurance and then with the then with the with the maintaining files. Neither one
21 of those had anything to do with me, but I know they were using that as their...”
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1 Trial Counsel had negotiated the terms of his contract to perform public
2 defender services in Nye County with the Nye County District Attorney. In fact,
3 Trial Counsel negotiated the termination of his previous contract that his firm,
4 Gibson and Kuehn, had in effect as the Nye County Public Defender with the Nye
5 County District Attorney. The Nye County District Attorney represented Trial
6 Counsel at two (2) separate hearings before the Nye County Board of
7 Commissioners as an advocate and as Trial Counsel in his bid to be awarded a
8 contract as Public Defender after termination of his firm's contract as the Nye
9 County Public Defender. After being awarded a contract to perform public
10 defender services, the Nye County District Attorney assumed control of the public
11 defender contracts and was Trial Counsel's supervisor. Trial Counsel never
12 disclosed this relationship to Appellant during his representation. Petitioner had a
13 right to counsel that was independent of the District Attorney who was prosecuting
14 him.
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17 In Cuyler v. Sullivan, 446 U.S., at 345-350, 100 S. Ct. at 1716-1719, the
18 Court held that prejudice is presumed when counsel is burdened by an actual
19 conflict of interest which is present in this case. In those circumstances, counsel
20 breaches the duty of loyalty, perhaps the most basic of counsel's duties. Trial
21 Counsel has breached his duty of loyalty by negotiating his contract to perform
22 public defender services with the Nye County District Attorney and by working
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1 under the supervision of the Nye County District Attorney after that contract was
2 obtained. Prejudice is presumed only if the Appellant demonstrates that counsel
3 “actively represented conflicting interests” which is present since Trial Counsel
4 owed his continued employment to serving the interests of the Nye County District
5 Attorney. This actual conflict of interest adversely affected his lawyer’s
6 performance since the Appellant received representation from Trial Counsel that
7 the Nye County District Attorney felt he was entitled to, not what he deserved.
8 The Sixth Amendment recognizes the right to the assistance of counsel because it
9 envisions counsel’s playing a role that is critical to the ability of the adversarial
10 system to produce just results. Strickland v. Washington, 466 U.S 668, 104 S. Ct.
11 2052, 80 L.Ed. 674 (1984) There was not an adversarial system present in Nye
12 County at that time and as a result there were no just results.

15 CONCLUSION

16 In conclusion, the Court has misapprehended one material fact in the instant
17 matter. The material fact that the Court misapprehended was when it concluded
18 that Trial Counsel did not have a conflict of interest during his representation that
19 he never disclosed to his client.
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21 Review is warranted because this was a miscarriage of justice which is a
22 fundamental issue of state wide importance when the Court of Appeals
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1 misapprehends one (1) material fact that resulted in the Appellant having lost his
2 liberty as a result.

3 **CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 40 and 40A**

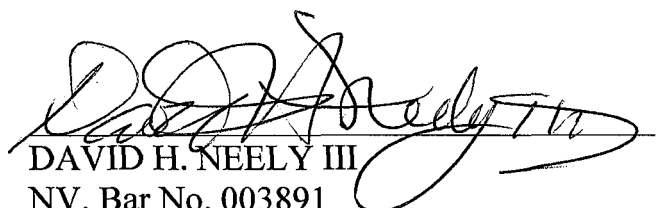
4
5 1. I hereby certify that this petition for review complies with the formatting
6 requirements of Rule 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the
7 type style requirements of NRAP 32(a)(6) because:

8 [a] It has been prepared in a proportionally spaced typeface using Microsoft Word
9 in Times Roman 14.

10 2. I further certify that this brief complies with the page limitations of Rule
11 40B(d) because it:

12
13 [x] Proportionately spaced, has a typeface of 14 points or more, and contains
14 3,122 words;

15 **DATED** this 5th day of July, 2022.

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17 
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