

1                   IN THE COURT OF APPEALS THE STATE OF NEVADA

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3                   Electronically Filed  
4                   Apr 27 2022 03:59 p.m.  
5                   Elizabeth A. Brown  
6                   Clerk of Supreme Court

7                   MICHAEL ALLEN MACK,

CASE NO.: 83165-COA

8                   Appellant,

9                   vs.

10                  THE STATE OF NEVADA,

11                  Respondent,

12                  **ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT IN AND**  
13                  **FOR THE COUNTY OF NYE, THE HONORABLE KIMBERLY WANKER,**  
14                  **PRESIDING**

15                  **PETITION FOR REHEARING**

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                  reconsider its Order of Affirmance from an Order of the District Court denying a  
19                  Post-Conviction Petition for a Writ of Habeas Corpus. This Motion is made and  
20                  based upon SCR 40, the following Points and Authorities, all papers, pleadings and  
21                  documents on file herein, as well as any oral arguments that may be entertained at  
22                  the hearing of this Motion.  
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1 **POINTS AND AUTHORITIES**

2 NRAP 40(a) allows rehearings where this Court has misapprehended a  
3 material fact in a case. NRAP 40(a) states:

4 a. Procedure and Limitations.

5 (1) Time. Unless the time is shortened or enlarged by order, a petition for  
6 rehearing may be filed within 18 days after the filing of the court's decision under  
7 Rule 36. The 3 day period set forth in Rule 26© does not apply to the time limits  
8 set by this Rule.  
9

10 (2) Contents. The petition shall state briefly and with particularity the points  
11 of law or fact that the Petitioner believes the court has overlooked or  
12 misapprehended and shall contain such argument in support of the petition as the  
13 petitioner desires to present. Oral argument in support of the petition will not be  
14 permitted. Any claim that the court has overlooked or misapprehended a material  
15 fact shall be supported by a reference to the page of the transcript, appendix or  
16 record where the matter is to be found; any claim that the court has overlooked,  
17 misapprehended a material question of law or has overlooked, misapplied or failed  
18 to consider controlling authority shall be supported by a reference to the page of  
19 the brief where petitioner has raised the issue.  
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22 Here, the Court has misapprehended one (1) matter in the record.  
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1 The Court has misapprehended a material fact when it concluded that Trial  
2 Counsel did not have a conflict of interest during his representation that he never  
3 disclosed to his client.

4 The Court states, “Finally, Mack claimed counsel had a conflict of interest  
5 that counsel never disclosed to him. Mack claimed counsel owed his continued  
6 employment to serving the interests of the District Attorney’s Office because  
7 counsel was hired by the District Attorney’s Office, the District Attorney  
8 represented counsel before the Board of County Commissioners, and the District  
9 Attorney controls the public defender contracts and was counsel’s supervisor. A  
10 conflict of interest exists if “counsel actively represented conflicting interests” and  
11 the “conflict of interest adversely affected {the defendant’s} lawyer’s  
12 performance.” Strickland, 466 U.S. at 692. “In general, a conflict exists when an  
13 attorney is placed in a situation conducive to divided loyalties.” Clark v. State, 108  
14 Nev. 324, 326 831 P.2d 1374, 1376 (1992)”

17 “Mack failed to demonstrate the alleged facts underlying this claim by a  
18 preponderance of the evidence. Accordingly, Mack failed to demonstrate counsel’s  
19 performance fell below an objective standard of reasonableness or a reasonable  
20 probability he would not have pleaded guilty and would have insisted on going to  
21 trial if not for counsel’s alleged errors. Therefore, we conclude the district court  
22 did not err by denying this claim.”  
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Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra 446 U.S., at 346, 90 S.Ct., at 1717. From the counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See Powell v. Alabama, 287 U.S., 68-69, 53 S. Ct., 63-64. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In Cuyler v. Sullivan, 446 U.S., at 345-350, 100 S. Ct., at 1716-1719, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see e.g. Fed Rule Crim. Proc. 44©, it is reasonable for the

1 criminal justice system to maintain a fairly rigid rule of presumed prejudice for  
2 conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that  
3 exists for the Sixth Amendment claims mentioned above. Prejudice is presumed  
4 only if the defendant demonstrates that counsel “actively represented conflicting  
5 interests” and that “a conflict of interest adversely affected his lawyer’s  
6 performance.” Cuyler v. Sullivan, supra, 446 U.S., at 350, 348, 100 S. Ct. at 1719,  
7 1718. Strickland v. Washington, 466 U.S. 669, 104 S. Ct. 2052, 80 L. Ed. 2d 674  
8 (1984)  
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10 At the Evidentiary hearing, Trial Counsel was asked the following, “So prior  
11 to your contract as an individual contractor, your prior firm Gibson & Kuehn had  
12 the public defender contract, didn’t it? Trial Counsel responded, “Yes.”  
13

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

5  
6 He was then asked, “And was your understanding that if you fought him you  
7 wouldn’t get a contract?” Trial Counsel responded. “My understanding if I fought  
8 him, that is a possibility I wouldn’t have gotten the contract. Because I was led to  
9 believe he had great influence over the commissioners.” He was then asked, “Who  
10 drafted the contracts?” Trial Counsel responded, “Kunzi.” He was then asked,  
11 “And who sent the contracts out?” Trial Counsel responded, “Who sent it out?” He  
12 was then asked, “Yeah. Did you receive the contracts from Mr. Kunzi?” Trial  
13 Counsel responded, “I got a copy of it, yes.” He was then asked, “Okay. And did  
14 Mr. Kunzi represent you at the commissioners meeting when they heard the pitch  
15 for the contracts?” Trial Counsel responded, “That’s my recollection.”

16  
17 The Court asked the following, “I’ve got a question on that. You said  
18 represent. Did Mr. – was Mr. Kunzi retained as your counsel? That’s the  
19 allegation.” Trial Counsel responded, “never.” The Court continues, “that’s the  
20 question. Maybe you need to clarify Mr. Neely. Because you’re saying that he –  
21 that Mr. Kunzi represented. And in the legal context, legal representation is he  
22 would act as counsel for Mr. Kuehn and Mr. Gibson. Is that what you’re asking?  
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1 Appellant's Counsel replied, "Let me put it – let me rephrase it." Trial  
2 Counsel was then asked, "So when you went to the commissioners' meeting, Mr.  
3 Kunzi was there, he put forward the idea of the Humboldt plan?" Trial Counsel  
4 responded, "He – yes, he was the one who was there representing the county  
5 commission – or the – he was the DA who represents the commissions. Now, I  
6 don't remember if he got up and spoke in front of them in detail, but I believe most  
7 of the bargaining was done behind closed doors." He was then asked, "Okay. And  
8 was it – was it Mr. Kunzi who was really a driving force behind the Humboldt  
9 plan?" Trial Counsel responded, "Yes". He was then asked, "And was it your  
10 understanding that it would be Pam Webster was going to be the supervisor of the  
11 public defenders?" Trial Counsel responded, "No."

14 He was then asked, "Did you – was it your understanding that the plan that  
15 he put forth would probably save the county half a million dollars?" Trial Counsel  
16 responded. "Something like that, yeah." He was then asked, "That would be  
17 because they would not be using any of the other conflict lawyers?" Trial Counsel  
18 responded, "That's my understanding." He was then asked, "Yeah. And would you  
19 – was it your understanding the desire was to eliminate the expense of paying  
20 separate lawyers?" Trial Counsel responded, "Yes."

22 He was then asked, "And did you ultimately lose your job as a contract  
23 public defender?" Trial Counsel responded, "Yes. Well, it wasn't renewed. I didn't  
24



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

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

7 He was then asked, “Mr. Gibson, who do you think was the – was the  
8 ultimate on the contract attorneys at that – when you were working there? Who had  
9 hiring and firing – did Mr. Kunzi have the ability to get you fired if he wanted?”  
10 Trial Counsel responded, “Do I know or do I suspect?” He was then asked, “Do  
11 you suspect?” Trial Counsel responded, “I suspect that Mr. Kunzi had control over  
12 the situation, and that Pam Webster pretty much did whatever he wanted her to do.  
13 And I – and Kunzi had a history of when he decided that someone needed to leave,  
14 he slowly built up a file in order to get rid of them, as evidenced by some of the  
15 attorneys. But what he did with – with me was, he started that deal wit the no  
16 insurance and then with the then with the with the maintaining files. Neither one  
17 of those had anything to do with me, buyt I know they were using that as their...”

20 Trial Counsel had negotiated the terms of his contract to perform public  
21 defender services in Nye County with the Nye County District Attorney. In fact,  
22 Trial Counsel negotiated the termination of his previous contract that his firm,  
23 Gibson and Kuehn, had in effect as the Nye County Public Defender with the Nye  
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1 County District Attorney. The Nye County District Attorney represented Trial  
2 Counsel at two (2) separate hearings before the Nye County Board of  
3 Commissioners as an advocate and as Trial Counsel in his bid to be awarded a  
4 contract as Public Defender after termination of his firm's contract as the Nye  
5 County Public Defender. After being awarded a contract to perform public  
6 defender services, the Nye County District Attorney assumed control of the public  
7 defender contracts and was Trial Counsel's supervisor. Trial Counsel never  
8 disclosed this relationship to Appellant during his representation. Petitioner had a  
9 right to counsel that was independent of the District Attorney who was prosecuting  
10 him.  
11

12  
13 In Cuyler v. Sullivan, 446 U.S., at 345-350, 100 S. Ct. at 1716-1719, the  
14 Court held that prejudice is presumed when counsel is burdened by an actual  
15 conflict of interest which is present in this case. In those circumstances, counsel  
16 breaches the duty of loyalty, perhaps the most basic of counsel's duties. Trial  
17 Counsel has breached his duty of loyalty by negotiating his contract to perform  
18 public defender services with the Nye County District Attorney and by working  
19 under the supervision of the Nye County District Attorney after that contract was  
20 obtained. Prejudice is presumed only if the Appellant demonstrates that counsel  
21 "actively represented conflicting interests" which is present since Trial Counsel  
22 owed his continued employment to serving the interests of the Nye County District  
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1 Attorney. This actual conflict of interest adversely affected his lawyer's  
2 performance since the Appellant received representation from Trial Counsel that  
3 the Nye County District Attorney felt he was entitled to, not what he deserved.  
4 The Sixth Amendment recognizes the right to the assistance of counsel because it  
5 envisions counsel's playing a role that is critical to the ability of the adversarial  
6 system to produce just results. Strickland v. Washington, 466 U.S 668, 104 S. Ct.  
7 2052, 80 L.Ed. 674 (1984) There was not an adversarial system present in Nye  
8 County at that time and as a result there were no just results.  
9

## 10 CONCLUSION

11 In conclusion, the Court has misapprehended one material fact in the instant  
12 matter. The material fact that the Court misapprehended was when it concluded  
13 that Trial Counsel did not have a conflict of interest during his representation that  
14 he never disclosed to his client.  
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1 **CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 40 and 40A**


2 1. I hereby certify that this petition for rehearing/reconsideration or answer  
3 complies with the formatting requirements of NRAP 32(a)(4), the typeface  
4 requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6)  
5 because:  
6

7 [x] It has been prepared in a proportionally spaced typeface using Microsoft  
8 Word 2016 in Times New Roman 14.

9 2. I further certify that this brief complies with the page or type-volume  
10 limitations of NRAP 40 or 40A because it is either:

11 [x] Proportionately spaced, has a typeface of 14 points or more, and contains  
12 3,108 words;  
13

14 **DATED** this 27 day of April, 2022.

15  
16   
17 DAVID H. NEELY III  
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21 Attorney for Appellant  
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attorney, and that on the 27 day of April, 2022, I served the above and foregoing **PETITION FOR REHEARING** by depositing a copy in the United States mails, postage prepaid, addressed to the following persons or parties at their last known addresses as indicated below:

Aaron Ford, Esq.  
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