IN THE SUPREME COURT OF IOWA
Supreme Court No. 19–1558

DONALD CLARK,

Appellee,

vs.

STATE OF IOWA,

Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY
HONORABLE LARS ANDERSON, JUDGE

APPELLANT'S FINAL BRIEF

THOMAS J. MILLER
Attorney General of Iowa

JEFFREY S. THOMPSON
Solicitor General

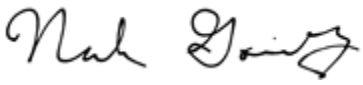
NOAH GOERLITZ
DAVID M. RANSCHT
Assistant Attorneys General
Hoover State Office Building, 2nd Floor
1305 E. Walnut St.
Des Moines, Iowa 50319
Ph: (515) 281-6668
(515) 281-7175
Email: noah.goerlitz@ag.iowa.gov
david.ranscht@ag.iowa.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he, or a person acting on his behalf, electronically filed Appellant's Final Brief on the 7th day of April, 2020, and further certifies that he, or a person acting on his behalf, served Appellant's Final Brief on all other parties to this appeal via EDMS.

Frank Nidey
Nidey, Erdahl, Fisher, Pilkington & Meier, PLC
fnidey@eiowalaw.com

Thomas P. Frerichs
Frerichs Law Office, P.C.
tfrerichs@frerichslaw.com



NOAH GOERLITZ
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-6668
noah.goerlitz@ag.iowa.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

Other Authorities

STATEMENT OF ISSUE PRESENTED FOR REVIEW

I. Is a postconviction finding that a public defender rendered ineffective assistance of counsel offensively preclusive in a subsequent legal malpractice action against the public defender?

ROUTING STATEMENT

The State recommends retention because this case presents a substantial issue of first impression and presents fundamental and urgent issues of broad public importance requiring ultimate determination by the Supreme Court. Iowa R. App. P. 6.1101(2)(*c*)—(*d*). The question of first impression is whether a postconviction finding that a public defender rendered ineffective assistance is offensively preclusive in a subsequent legal malpractice action against the public defender.[1] Iowa courts have previously addressed only *defensive* issue preclusion in criminal malpractice cases. *See Hall v. Barrett*, 412 N.W.2d 648, 650 (Iowa Ct. App. 1987).

STATEMENT OF THE CASE

On October 13, 2017, Plaintiff Donald Clark sued the State of Iowa seeking money damages for a legal malpractice claim against former Assistant State Public Defender John Robertson. *See* Petition (App. 71-75). The case proceeded through the discovery phase.

On May 8, 2019, Clark moved for partial summary judgment, asserting that a grant of post-conviction relief (PCR) for ineffective

[1] A legal malpractice claim against a former criminal defense attorney is known as a "criminal malpractice" claim. *Barker v. Capotosto*, 875 N.W.2d 157, 161 n.2 (Iowa 2016).

assistance of counsel establishes Robertson's breach of duty in the malpractice action as a matter of law. *See* Motion for Partial Summary Judgment (App. 79-81). On May 23, 2019, the Defendant resisted. *See* Resistance to Motion for Partial Summary Judgment (App. 82).

On June 7, 2019, the district court denied Clark's motion for partial summary judgment, finding that the legal standard for ineffective assistance of counsel differs from the legal standard for the breach element of a legal malpractice claim. *See* June 7, 2019 Order (App. 102-107). On June 13, 2019, Clark moved to reconsider, amend, and enlarge the district court's ruling on partial summary judgment. *See* June 13, 2019 Motion (App. 108-113). On June 24, 2019, Defendant resisted the motion to reconsider. *See* Resistance to motion to amend (App. 114-117).

On August 29, 2019, the district court reversed course from its previous ruling, granted the motion to reconsider, amend, and enlarge, and granted Clark's motion for partial summary judgment, concluding that an ineffective-assistance finding stemming from a public defender's representation satisfies the breach element of a criminal malpractice case against the public defender as a matter of law. *See* August 29, 2019 Order (App. 118-129). The district court reached this

conclusion in part by deciding that the "State of Iowa" in the PCR context is the same party as the "State of Iowa" in a subsequent legal malpractice proceeding, and therefore "the State" had a full and fair opportunity to litigate. *See id.* (App. 118-129). The district court further concluded that it would apply issue preclusion despite other policy reasons articulated by the State. The State timely filed this interlocutory appeal. Application for Interlocutory Appeal (App. 130-144).

STATEMENT OF FACTS

On February 10, 2010, a jury found Clark guilty of sexual abuse in the second degree for molesting a fifth-grade student in the 2003-2004 school year while Clark was a guidance counselor at an elementary school. Jury Verdict (App. 1). The Iowa Court of Appeals affirmed Clark's conviction, *State v. Clark*, 808 N.W.2d 754 (Table), No. 10–0511, 2011 WL 5515221, at *4 (Iowa Ct. App. Nov. 9, 2011), and so did the Iowa Supreme Court on further review. *State v. Clark*, 814 N.W.2d 551, 567 (Iowa 2012). On appeal, Clark claimed Robertson did not provide effective assistance of counsel, but the Court left those claims "to be determined in a possible postconviction relief proceeding." *Id.*

About three months after the Court issued its opinion in his direct appeal, Clark applied for PCR, arguing that Robertson failed to provide effective assistance of counsel, which violated Clark's Sixth Amendment right. *See* Application for Postconviction Relief (App. 2-7). As an alternative ground, Clark also contended that newly discovered evidence warranted a new trial. Application for Postconviction Relief at 4 (App. 2-7). Robertson died suddenly and unexpectedly in 2013, while the PCR action was pending, without giving a deposition, and before the PCR trial took place. Death Certificate (App. 11). The PCR case was tried to the court on March 27, 2014. *See* Iowa Code § 822.7 (requiring PCR applications to be heard by the court). At Clark's request, the court reopened the record on April 1, 2015. April 2015 Order (App. 12-13). On March 21, 2016—more than three years after Clark applied for PCR, and after several delays or continuances Clark himself sought or initiated—the court granted Clark's application for PCR and ordered a new trial. PCR Ruling (App. 39-67).

The PCR court found Clark did not receive effective assistance of counsel because Robertson: (1) did not visit or photograph the scene of the crime; (2) waived Clark's presence at a deposition without Clark's

permission; and (3) did not investigate and offer character evidence while allowing evidence of Clark's prior bad acts to be presented to the jury. PCR Ruling pp. 20-24 (App. 58-62). The PCR court also found that newly discovered evidence warranted a new trial. PCR Ruling at 27 (App. 65). The PCR ruling was not appealed. On July 7, 2016, the Johnson County Attorney dismissed the criminal charges against Clark. Dismissal (App. 68).

On October 13, 2017, Clark filed a Petition, starting this tort action. *See* Petition (App. 71-75). Clark now seeks money damages for alleged legal malpractice stemming from Robertson's representation during Clark's criminal proceedings in 2009 and 2010. Clark claims he is entitled to relief based only on grounds for which the PCR court found Robertson was ineffective. Clark moved for partial summary judgment, arguing that the PCR court's finding of ineffective assistance establishes Robertson's breach in this legal malpractice action as a matter of law. Clark Motion for Partial Summary Judgment (App. 79-81). The Court granted the State's interlocutory appeal from the district court's ruling granting Clark's motion to reconsider and granting Clark's motion for partial summary judgment on preclusion grounds.

ARGUMENT

I. The PCR Ruling is not Offensively Preclusive on the Issue of Breach in this Legal Malpractice Action.

Preservation of Error

The State preserved error by resisting Clark's motion for summary judgment. *See* Resistance to MSJ (App. 82). The State also resisted Clark's motion to reconsider, enlarge, or amend. (App. 114-117). And the district court ruled on Clark's motions, rejecting the State's assertions. *See Young v. Iowa City Cmty. Sch. Dist.*, 934 N.W.2d 595, 602 (Iowa 2019) (concluding error was preserved when a party raised the issue in briefs and the district court expressly ruled on the contention).

Standard of Review

Iowa appellate courts "review grants of summary judgment for correction of errors at law." *Barker v. Capotosto*, 875 N.W.2d 157, 161 (Iowa 2016).

Merits

To prevail on a legal malpractice claim "arising from either civil or criminal representation," a plaintiff must prove: "(1) the existence of an attorney–client relationship between the defendant and plaintiff giving rise to a duty; (2) the attorney, by either an act or a failure to act,

breached that duty; (3) this breach proximately caused injury to the plaintiff; and (4) the plaintiff sustained actual injury, loss, or damage." *Kraklio v. Simmons*, 909 N.W.2d 427, 434 (Iowa 2018) (quoting *Huber v. Watson*, 568 N.W.2d 787, 790 (Iowa 1997)); *see also* Iowa Civil Jury Instruction No. 1500.1. For criminal malpractice claims alleging the lawyer's breach of duty caused a conviction, there is one additional prerequisite: the malpractice plaintiff must first achieve relief from the conviction, usually through PCR. *Trobaugh v. Sondag*, 668 N.W.2d 577, 583 (Iowa 2003). But although "post-conviction relief is a necessary prerequisite for a claim of legal malpractice in criminal cases," it does not take "the place of establishing the elements of negligence" through issue preclusion. *Stewart v. Elliott*, 239 P.3d 1236, 1240 (Alaska 2010).

Issue preclusion "is a form of res judicata." *Emp'rs Mut. Cas. Co. v. Van Haaften*, 815 N.W.2d 17, 22 (Iowa 2012). It "prevents parties to a prior action in which judgment has been entered from relitigating in a subsequent action issues raised and resolved in the previous action." *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981). One of its purposes is to promote "judicial economy by reducing unnecessary litigation." *Winger v. CM Holdings, L.L.C.*, 881 N.W.2d

433, 450 (Iowa 2016); *see also McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 330 (Iowa 2002) (characterizing judicial economy as "an additional benefit" of issue preclusion).

Litigants may use issue preclusion either offensively or defensively. *Goolsby v. Derby*, 189 N.W.2d 909, 913 (Iowa 1971). Here, Clark seeks to use offensive issue preclusion. Iowa courts recognize offensive issue preclusion but warn that "it is more restrictively and cautiously applied than defensive issue preclusion." *Winger*, 881 N.W.2d at 451 (quoting *Gardner v. Hartford Ins. Accident & Indem. Co.*, 659 N.W.2d 198, 203 (Iowa 2003); *see also Hunter*, 300 N.W.2d at 124 (adopting a "more restrictive" standard for offensive issue preclusion than "where the doctrine is invoked in a defensive manner").

When a litigant seeks to invoke issue preclusion, they must establish four elements: "(1) the issue in the present case must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment." *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 104 (Iowa 2011)

(quoting *Fischer v. City of Sioux City*, 654 N.W.2d 544, 546-47 (Iowa 2002)).

The Court has sometimes discussed an additional mutuality or privity requirement:

> In addition to these four [issue preclusion] requirements, "either (1) the parties in both actions must be the same (mutuality of parties), or (2) there must be privity between the party against whom issue preclusion is invoked and the party against whom the issue was decided in the first litigation."

Dettman v. Kruckenberg, 613 N.W.2d 238, 244 (Iowa 2000) (quoting *Brown v. Kassouf*, 558 N.W.2d 161, 163 (Iowa 1997)). However, the "traditional" mutuality requirement, *see Goolsby*, 189 N.W.2d at 913, is no longer a hard-and-fast rule. *See Hunter*, 300 N.W.2d at 126 ("[W]e decide today that the absence of mutuality will no longer *invariably* bar the offensive application of issue preclusion.") (emphasis added); *Goolsby*, 189 N.W.2d at 917 (concluding a trial court correctly applied defensive issue preclusion despite no mutuality of parties).

Instead, when "invoked offensively to establish an element of a claim," issue preclusion analysis involves two additional factors. *Emp'rs Mut. Cas. Co.*, 815 N.W.2d at 22; *accord Winger*, 881 N.W.2d

at 451 ("two extra considerations"). The court must also consider: (1) whether "the party sought to be precluded was afforded a full and fair opportunity to litigate the issue" in the earlier action; and (2) whether any other circumstances justify granting the party resisting issue preclusion an opportunity to relitigate the issue. *Hunter*, 300 N.W.2d at 126. These additional requirements for offensive issue preclusion derive from the Restatement (Second) of Judgments § 29. *See Hunter*, 300 N.W.2d at 125 ("[W]e adopt as ours the position taken by [the] Restatement (Second) of Judgments . . . with respect to the use of issue preclusion in this [offensive-use] context."); *see also Soults Farms*, 797 N.W.2d at 104 (noting the Restatement section adopted in *Hunter*, which was at that time numbered section 88, is now section 29). In short, a litigant may not rely on offensive issue preclusion if any of the six elements is not met.

Clark's post-conviction relief is not preclusive in this action because several of the elements are not met. First, because Robertson was not a party to the PCR action, the party sought to be precluded—Robertson—lacked a full and fair opportunity to litigate in the PCR proceeding. Second, the issue in the PCR action is not identical to the issue in this legal malpractice case. Third, the grounds on which Clark

seeks preclusion were not essential to the judgment in the PCR case. Finally, several other considerations make offensive issue preclusion inappropriate under the circumstances presented here.

A. The party sought to be precluded—Robertson—lacked a full and fair opportunity to litigate in the PCR action because he was not a party to it.

While "the absence of mutuality will [not] *invariably* bar the offensive application of issue preclusion," *Hunter*, 300 N.W.2d at 126 (emphasis added), here the absence of mutuality is dispositive. When, as here, the party sought to be precluded is not the same as the party against whom the issue was decided in the first action, the party sought to be precluded cannot have a full and fair opportunity to litigate the issue as a matter of law because it lacked *any* opportunity to litigate. In other words, complete mutuality is not a strict requirement, but if the party sought to be precluded was not a party to the prior action, its absence in the prior proceeding is appropriately considered as part of the "full and fair" inquiry. *Hall* illustrates that principle by applying the reverse: a PCR ruling can be used defensively in a subsequent malpractice action because the malpractice plaintiff "*was* a party to the former action and therefore had the requisite opportunity to litigate the issue." *Hall*, 412 N.W.2d at 651 (emphasis added).

Here, however, "the State" in the PCR case is not the same party as the defendant in this legal malpractice case alleging negligence by Robertson. There is no privity between "the State" in the PCR case and the malpractice defendant Robertson, even though the Iowa Tort Claims Act substitutes "the State" as the nominal defendant in this case. The mere fact that "the State" is in the caption of both actions does not make "the State" the same party. Therefore, issue preclusion is inappropriate because Robertson, whose individual actions Clark assails, did not have a full and fair opportunity to litigate his conduct in the PCR action. *See Stevens v. Horton*, 984 P.2d 868, 873 (Or. Ct. App. 1999).

1. Despite both being captioned "Clark v. State," Clark's PCR and malpractice claims involve different parties-in-interest in different capacities.

Clark's claim in this case alleges legal malpractice by Robertson. (Petition ¶¶ 11, 13–15, 17–19; App. 73-74). Clark's only allegations are that Robertson negligently represented Clark during the criminal proceedings in 2009 and 2010. Therefore, the only reason the State of Iowa is the nominal defendant in this case is because of the operation of the Iowa Tort Claims Act. *See* Iowa Code § 669.5(2) (stating that claims made against State employees under the Iowa Tort Claims act

are "deemed to be an action against the State" and that the State of Iowa "shall be substituted as the defendant in place of the employee"); *see also State v. McKinley*, 860 N.W.2d 874, 886 (Iowa 2015) (Waterman, J., concurring specially) ("[P]ublic defenders are salaried state employees and experienced trial lawyers . . . ."). Clark appropriately named the State as a defendant from the beginning of his lawsuit pursuant to section 669.5(2).

Merely naming the State of Iowa in Robertson's place does not make the parties the same. Robertson, not the State, is the "party" who Clark alleges committed malpractice. Therefore, Robertson must have had a full and fair opportunity to litigate in the PCR action. *See Hunter*, 300 N.W.2d at 126. Furthermore, the roles played by Robertson and the Johnson County Attorney differ so greatly that even though "the State" is listed in the caption of both this case and the PCR proceeding, "the State" as represented by the Johnson County Attorney in the PCR proceeding is not the same as "the State" in this tort action defending John Robertson as a public defender.

The comments to the Restatement (Third) of the Law Governing Lawyers, section 53, address this exact situation while acknowledging the significant difference between offensive and defensive issue

preclusion.[2] Comment *d* to section 53 explains that an *unsuccessful* PCR applicant who becomes a legal malpractice plaintiff cannot "relitigat[e] an issue decided in a postconviction proceeding after a full and fair opportunity to litigate." Restatement (Third) of the Law Governing Lawyers § 53, cmt. *d*. That formulation is consistent with the court of appeals decision applying defensive issue preclusion in *Hall*. 412 N.W.2d at 650. Important for this case, however, comment *d* goes on to explain that *offensive* issue preclusion is not an automatic corollary for successful PCR applicants because the lawyer is not bound by a PCR court's ineffective assistance finding. That is, the unsuccessful PCR applicant faces defensive issue preclusion in a subsequent malpractice case "even though the lawyer sued *was not a party* to that [PCR] proceeding and is hence *not bound by any decision favorable to the defendant*." Restatement (Third) of the Law Governing Lawyers § 53, cmt. *d* (emphasis added). Instead, "[a]

[2] The Court has relied on section 53 of the Restatement (Third) of the Law Governing Lawyers in the past—and even specifically on comment *d*. *See Kraklio*, 909 N.W.2d at 439 ("We follow the Restatement (Third) of the Law Governing Lawyers, section 53 . . . ."); *Barker*, 875 N.W.2d at 165–66 (finding "the approach taken by the Restatement" section 53, comment *d*, "to be persuasive," and noting previous reliance on the Restatement "when defining the scope of the duty of care attorneys owe their clients").

judgment in a postconviction proceeding is binding in the malpractice action to the extent provided by the law of judgments." *Id.*

The law of judgments, as set forth in the Restatement (Second) of Judgments,[3] provides that "[a] party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity." Restatement (Second) of Judgments § 36(2). Indeed, "[i]n some circumstances, a prior determination that is binding on one [government] agency and its officials may not be binding on another agency and its officials." *Id.* cmt. *f*. Especially relevant here,

> If the second action involves an agency or official whose functions and responsibilities are so distinct from those of the agency or official in the first action that applying preclusion would interfere with the proper allocation of authority between them, the earlier judgment should not be given preclusive effect in the second action.

Id.

---

[3] Like the Restatement (Third) of Law Governing Lawyers, the Court has frequently relied on, discussed, adopted, or applied the principles set forth in the Restatement (Second) of Judgments. *See, e.g.*, *Stender v. Blessum*, 897 N.W.2d 491, 513 (Iowa 2017); *Winger*, 881 N.W.2d at 451; *Emp'rs Mut. Cas. Co.*, 815 N.W.2d at 27; *Soults Farms*, 797 N.W.2d at 105.

Consider the difference in the agencies involved here. In the PCR case, the Johnson County Attorney, acting pursuant to Iowa Code § 331.756, was fulfilling its role of enforcing the State criminal law by protecting its conviction. If it failed, the Johnson County Attorney would lose the conviction it had obtained, but it could retry Clark. In the malpractice case, the agency is the State Public Defender. The State Public Defender had the exact opposite interest in the underlying criminal action. *See Polk County v. Dodson*, 454 U.S. 312, 322 n.13 (1981) ("[A] public defender is not acting on behalf of the State; he is the State's adversary."). The State Public Defender has more than a mere "distinct" function compared to the Johnson County Attorney; it has the exact opposite function. The State Public Defender, through its employee Robertson, defended Clark against "the State's" accusations, brought by the Johnson County Attorney. The State Public Defender, through its employee Robertson, was not a party to the PCR action, because the PCR action determined only whether Clark's unsuccessful defense against the State in the criminal case was constitutionally sound.

Robertson was not a party to the PCR action and therefore did not have a full and fair opportunity to litigate his conduct in that

proceeding. Under the Restatement (Second) of Judgments and the Restatement (Third) of the Law Governing Lawyers, the judgment in Clark's PCR action is not preclusive against Robertson in this malpractice action. The Court should reverse the district court's contrary ruling.

2. Clark's PCR counsel communicated directly with Robertson, which was not ethically permissible if Robertson was a party to the PCR action.

Clark's PCR counsel also appeared to agree that Robertson was not a party to the PCR proceeding. Clark's counsel in his PCR proceeding communicated several times with Robertson after the Supreme Court upheld Clark's conviction. *See* PCR Counsel Billing Records (App. 145-153); Email from PCR Counsel to Robertson (App. 153). A lawyer may not ethically "communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter . . . ." Iowa R. Prof'l Conduct 32:4.2. Under Clark's theory of this case and the district court's ruling, Robertson was a party to the PCR case and was represented by the Johnson County Attorney's Office. If that were true, Clark's PCR counsel's communications with Robertson were unethical. And, as discussed below, this type of frank communication with criminal defense counsel

should be encouraged—but affirming the district court would likely chill such communication to future PCR applicants' detriment. Even if the Court were to decide that all the other preclusion elements are met, in this case it would be particularly unjust to allow Clark's PCR counsel to benefit from what would be a breach of the ethical rules. For this additional reason, the Court should reverse the district court's contrary ruling.

3. Other jurisdictions addressing criminal malpractice claims have concluded a PCR ruling is not offensively preclusive against a criminal defense attorney.

This Court is not the first to address whether the judgment in a PCR proceeding is preclusive against a criminal defense attorney in a subsequent legal malpractice case stemming from the criminal defense attorney's representation. Three other jurisdictions—Oregon, Alaska, and Minnesota—have decided the issue, with each concluding that PCR findings of ineffective assistance do not preclusively bind the criminal defense attorney in a subsequent legal malpractice case.[4]

---

[4] One other jurisdiction acknowledged the issue without deciding it. *Glaze v. Larsen*, 83 P.3d 26, 31 n.3 (Ariz. 2004) ("We are not confronted today with the issue of whether the determination in a [PCR] proceeding that ineffective assistance of counsel has been provided has a preclusive effect in a subsequent civil case alleging malpractice.").

An Oregon legal malpractice plaintiff obtained a new trial through PCR in part because the criminal defense lawyer did not interview certain potential witnesses. *Stevens*, 984 P.2d at 870. "On remand, the prosecutor dismissed the case" rather than pursuing a retrial. *Id.* The plaintiff asserted the PCR court's "determination that [the lawyer] had failed to exercise reasonable professional skill and judgment" had preclusive effect on the breach element of a legal malpractice claim. *Id.* at 871. The Oregon Court of Appeals rejected that argument and held that issue preclusion did not apply. *Id.* at 872. The Oregon court reasoned that in the PCR "proceeding, the state represented its own interest, which was to preserve [its] conviction"—not to represent the individual attorney's personal interest. *Id.* at 873. The court further explained that the defense attorney's "mere *participation* in the post-conviction proceeding" as an important witness "cannot be equated to the state's *representation* of [the defense attorney's] interests. *Id.*

The Oregon court provided two reasons for its conclusion. First, even though he was a central witness, the criminal defense attorney "lacked any ability to direct or control the state's defense of [the defense attorney]'s conduct" in the PCR proceeding. *Id.* Second,

> [T]he state's interests in the post-conviction proceeding differed dramatically from [the criminal defense attorney's] interests in the malpractice proceeding, [so] the state cannot be said to have "represented" [the criminal defense attorney's] "interests." In a post-conviction proceeding, the state stands to lose a conviction (that it can generally prosecute again in a new trial). In a malpractice proceeding, on the other hand, a lawyer's personal interests are at stake, including his or her professional and financial future.

Id.

Like Oregon, the Alaska Supreme Court decided a "post-conviction relief decision does not bind [the criminal defense attorney] in [a subsequent] professional negligence claim." *Stewart*, 239 P.3d at 1240. The court reasoned that the criminal defense attorney's "limited participation in post-conviction relief certainly did not allow him sufficient control to establish privity," meaning he did not have a full and fair opportunity to litigate. *Id.* at 1241. The court concluded the criminal defense attorney "could not decide which general strategies to pursue in the [PCR] litigation, what evidence to present, how to cross-examine adverse witnesses, or whether to settle the claim." *Id.* at 1242. Therefore, the court reasoned "it would not be fair for him to be bound by the [PCR] decision." *Id.*

Lastly, the Minnesota Supreme Court concluded a "federal court's determination that [a criminal defense attorney] provided ineffective assistance of counsel is not conclusive as to [a] legal malpractice claim" and does not preclude the attorney "from litigating any of the elements of [the] legal malpractice claim." *Noske v. Friedberg*, 670 N.W.2d 740, 746 (Minn. 2003). The court carefully differentiated between the interests in the two proceedings: money damages versus "the integrity of our adversary system of justice." *Id.* (quoting *White v. State*, 248 N.W.2d 281, 285 (Minn. 1976)).

The mere fact that the criminal defense lawyer in this case happened to be an Assistant State Public Defender does not change the rationale underlying these decisions. Here, the Johnson County Attorney's interests in the PCR proceeding differed dramatically from Robertson's interests in the present malpractice proceeding—the Johnson County Attorney was trying to preserve its conviction, while here Robertson's professional reputation and the public fisc are at stake. And, Robertson—despite himself being paid by the State of Iowa—was not empowered to control the way the Johnson County Attorney litigated the PCR case. Robertson was not the Johnson County Attorney's client in the PCR action because the Johnson County

Attorney was representing the entire public by enforcing the State criminal law. Further, as discussed above, Clark's PCR counsel felt free to communicate with Robertson without the Johnson County Attorney's presence. And particularly acute in this case, because Robertson died before the PCR trial, not only was he unable to control the PCR case, he was not even a witness in the PCR case. *Cf. Stewart*, 239 P.3d at 1241 ("Elliott submitted an affidavit for the earlier [PCR] proceedings, but he was not a party there . . . ."); *Stevens*, 984 P.2d at 873 (concluding an attorney's status as a central PCR witness does not make him or her a party to the PCR proceeding such that the PCR judgment becomes preclusive in a later malpractice action). This Court should adopt the reasoning of Oregon, Alaska, and Minnesota, apply it to state public defenders, and reverse the district court's ruling.

B. The issue in the PCR case differs from the issue in this case.

"Claims of ineffective assistance of counsel are derived from the Sixth Amendment to the United States Constitution." *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005). To prevail on an ineffective assistance claim, the claimant must prove "counsel failed to perform an essential duty and . . . prejudice resulted." *State v. Clay*, 824 N.W.2d 488, 495 (Iowa 2012) (quoting *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa

2008)). To prove counsel failed to perform an essential duty, the convicted must prove "counsel 'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *State v. Brown*, 930 N.W.2d 840, 855 (Iowa 2019) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

In contrast, legal malpractice is a creature of tort law. In a legal malpractice case, an attorney's conduct is measured by "the degree of skill, care and learning ordinarily possessed and exercised by other attorneys in similar circumstances." Iowa Civil Jury Instruction 1500.3 (App. 154) (citing *Devine v. Wilson*, 373 N.W.2d 155, 157 (Iowa Ct. App. 1985) and *Martinson Manufacturing Co. v. Seery*, 354 N.W.2d 772, 775 (Iowa 1984)); *accord Kurtenbach v. TeKippe*, 260 N.W.2d 53, 56 (Iowa 1977).

These standards are different because different interests are at stake: for ineffective assistance, the Sixth Amendment right to counsel; for legal malpractice, money damages caused by negligence. *See Krahn v. Kinney*, 538 N.E.2d 1058, 1062 (Ohio 1989) (concluding an application "to vacate a criminal judgment based on ineffective assistance of counsel is not the same as a cause of action for legal malpractice," and cautioning that proof of one "does not necessarily

establish the other"); *see also Mylar v. Wilkinson*, 435 So. 2d 1237, 1239 (Ala. 1983) (cautioning that the validity of a claim of ineffective assistance "is not necessarily conclusive on [a] claim for civil damages"); *White*, 248 N.W.2d at 285 (cautioning that the court's decision to grant procedural relief should not be taken "to suggest that a finding of ineffective representation would entail the success of a malpractice action"). These are vastly different standards with vastly different consequences. *See Mylar*, 435 So. 2d at 1239 ("The test in the criminal case is one of fundamental due process, and the remedy for the failure to provide that is to afford the defendant a new trial. The civil damages action, however, is tested against traditional tort concepts . . . ." (footnote omitted)). Importantly, in the analogous wrongful-imprisonment context,[5] this Court has recognized a similar principle, holding that appellate "reversal of [the plaintiff]'s convictions" does not automatically satisfy the elements of a statutory claim under Iowa Code chapter 663A. *State v. Dohlman*, 725 N.W.2d 428, 432–33 (Iowa 2006).

[5] There are two options for persons seeking compensation from the State for their imprisonment: a statutory claim under Iowa Code chapter 663A, and a legal malpractice claim like the one Clark brings here. *See Cox v. State*, 686 N.W.2d 209, 215 (Iowa 2004).

Because the right implicated in ineffective assistance claims is the criminal defendant's constitutional right to counsel, the inquiry is appropriately focused on the criminal defendant, and courts do not consider circumstances facing the lawyer. *See Clay*, 824 N.W.2d at 503 (Appel, J., concurring specially) (recognizing that "a criminal defense lawyer has a challenging assignment" and that "no court can demand perfection," but insisting that courts nonetheless "must require what the Iowa Constitution as well as the United States Constitution demands"). The Minnesota Supreme Court has explained the difference:

> Review of the issue of ineffectiveness is not to pass judgment on the abilities of a defense lawyer. Rather, the overall concern is whether our adversary system of justice has functioned properly. The narrow issue is not whether defense counsel was effective in the assistance rendered but rather whether *defendant received* the effective assistance required to assure him a fair trial and the integrity of our adversary system of justice.

White, 248 N.W.2d at 285 (emphasis added).

In the legal malpractice context, however, the jury must measure the attorney's performance compared to other attorneys in similar circumstances. Relevant here, a public defender's workload is not a consideration in the ineffective-assistance context, but is relevant and important in the legal malpractice context. *See Jacobi v. Holbert*, 553

S.W.3d 246, 259 (Ky. 2018) ("The public defender does everything he or she can with the resources given him or her; it would be an unfair burden to hold them responsible for shortages not of their own making."); Dwain E. Fagerlund, Note, *Legal Malpractice: The Locality Rule and Other Limitations of the Standard of Care: Should Rural and Metropolitan Lawyers Be Held to the Same Standard of Care?*, 64 N.D. L. Rev. 661, 688 (1988) ("The 'similar circumstances' element . . . recognizes that circumstances such as available resources and specialization may be relevant to determining the requisite standard of care."). Put another way, constitutional protections for criminal defendants "are not intended to confer any direct benefit outside the context of the criminal justice system." *Wiley v. Cty. of San Diego*, 966 P.2d 983, 988–89 (Cal. 1998).

Iowa's decision not to recognize a plain-error rule for reviewing criminal convictions also causes Iowa courts to "take an expansive view of ineffective assistance of counsel." *Rhoades v. State*, 848 N.W.2d 22, 33 (Iowa 2014) (Mansfield, J., concurring specially). As Justice Mansfield recognized, Iowa essentially uses "ineffective assistance as a substitute for a plain error rule." *Id.* This expansive view of ineffective assistance specifically causes Iowa courts to "recognize a rather broad

concept of what constitutes a failure to perform an essential duty for ineffective-assistance-of-counsel purposes." *Clay*, 824 N.W.2d at 504 (Mansfield, J., concurring specially). Broad ineffective assistance analysis is appropriate in that context because the Court is concerned with criminal defendants' constitutional liberty interests. *See White*, 248 N.W.2d at 285 ("[T]he overall concern is . . . whether our adversary of criminal justice has functioned properly."). However, the Court's expansive view of failure to perform an essential duty has the practical effect of making it easier for the ineffective-assistance applicant to obtain a finding of a failure to perform an essential duty than for the legal-malpractice plaintiff to prove the defense lawyer breached the duty of care. *See Rhoades*, 848 N.W.2d at 34 (Mansfield, J., concurring specially) ("I think it is especially important that we not appear to be criticizing counsel [in an ineffective assistance case] when we are talking about a legal construct of this court."); *see also Purdy v. Zeldes*, 337 F.3d 253, 260 (2d Cir. 2003) (concluding a PCR court applied a standard "lower than the preponderance of the evidence standard applicable in a civil malpractice action"); *Knoblauch v. Kenyon*, 415 N.W.2d 286, 289 (Mich. Ct. App. 1987) (concluding the "approach used to establish ineffective assistance of counsel is *less* stringent for

the person claiming substandard representation than the measure used in a claim of legal malpractice").

An Alaska case illustrates that the standards for ineffectiveness and malpractice are different because a lawyer can be ineffective but not negligent. In *Stewart*, an Alaska attorney "failed to distinguish between Alaska Standard Time and Daylight Saving Time," which meant that a law under which the attorney's client was prosecuted and convicted had not actually gone into effect at the time of the client's arrest. *See Stewart*, 239 P.3d at 1237–38, 1240. For that reason, after the client filed a PCR petition, the court vacated the conviction. *Id.* at 1238. However, after a bench trial, the court denied the client's subsequent malpractice claim because the attorney's failure to realize the distinction between standard time and daylight time was subtle and understandable. *Id.* at 1239. In other words, the attorney had failed to perform an essential duty under ineffectiveness standards, thereby depriving the criminal defendant of his right to effective assistance, but did not breach his duty under negligence standards. On appeal, the Alaska Supreme Court affirmed, finding the evidence insufficient to establish that the defense attorney breached a *tort law* duty to the client. *Id.* at 1242–43. *Stewart* demonstrates that the issue in a PCR

proceeding is not identical for offensive issue preclusion purposes to the issue in a malpractice action, even though both types of cases use similar terminology. Likewise, because the issues decided in Clark's PCR case are not identical for offensive issue preclusion purposes to the issues in this malpractice case, preclusion is inappropriate, and the Court should reverse the district court's contrary ruling.

C. The ineffectiveness finding was not essential to the PCR judgment.

The issues of ineffective assistance the PCR court decided, which Clark seeks to afford preclusive effect here, were not essential to the PCR court's judgment. "If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded." Restatement (Second) Judgments § 27 cmt. *h*; *see also In re Pardee*, 872 N.W.2d 384, 391 (Iowa 2015) (citing the Restatement (Second) of Judgments for the proposition "that where the judgment is 'not dependent' upon the determination, the determination does not have preclusive effect"); *West v. Wessels*, 534 N.W.2d 396, 399 (Iowa 1995) (declining to apply issue preclusion because matters litigated in the previous action were not essential to the resulting judgment). And when "a judgment . . . is based on determinations of two issues, either

of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." Restatement (Second) of Judgments § 27 cmt. *i*.

Here, Clark seeks preclusion based on the following conclusions of the PCR court:

> (1) Robertson failed to properly investigate and prepare for trial by not examining and photographing the area alleged to be the crime scene and in failing to object to the entry of the State's photos of the crime scene.
>
> (2) Robertson failed to timely inform Clark about the scheduled discovery depositions, or to obtain and document Clark's consent to waiver of his presence at the discovery depositions.
>
> (3) Robertson failed to investigate, discover and introduce character evidence in favor of Clark at the time of the criminal trial.

Motion for Partial Summary Judgment ¶ 3 (App. 79-80). However, the PCR court also granted a new trial on an alternate and independent ground. In the PCR proceeding, Clark urged the PCR court to grant relief "based on the fact [the victim] provided testimony regarding the alleged incidents of abuse in the criminal trial, but provided, after the criminal trial, different testimony in civil litigation based on this incident." Application for Postconviction Relief at 4 (App. 5-6); PCR Ruling p. 26 (App. 64). The PCR court agreed with Clark, concluding

that "the newly discovered evidence relied on by Mr. Clark is a basis upon which Mr. Clark's Application for Postconviction Relief must be granted." PCR Ruling p. 27 (App. 65).

The PCR court's determination regarding the newly-discovered evidence was an independent reason for granting Clark a new trial. That is, even if the PCR court did not grant relief based on Robertson's purported ineffective assistance, Clark nonetheless would have received a new trial because of the PCR court finding that newly-discovered evidence warranted a new trial. *See* PCR Ruling p. 27 ("The Court already has found that postconviction relief is warranted based on . . . the newly discovered evidence."). Accordingly, the PCR court's findings that Robertson rendered ineffective assistance were not essential to the judgment and are not a basis on which to afford the PCR ruling preclusive effect—*even if* the Court otherwise concludes the issue is the same. For this additional reason, the Court should reverse the district court's decision.

D. Other considerations make offensive issue preclusion inappropriate.

Even if the Court determines the issues are identical, Robertson had a full and fair opportunity to litigate in the PCR action, and the PCR court's findings were essential to the judgment, issue preclusion

is still not appropriate under the circumstances presented here. Applying offensive issue preclusion in this case does not serve the underlying purposes of issue preclusion and, in addition, generates troubling policy implications. Offensive issue preclusion is not appropriate in this case because: (1) it deprives the State of its right to have a jury decide the breach issue; (2) it has negative collateral consequences; (3) it would have a chilling effect to the detriment of future PCR applicants; and (4) it does not support the policy underlying preclusion.

1. Availability of jury trial

The Supreme Court has recognized "it might be unfair to apply" offensive issue preclusion "where the second action affords the defendant procedural opportunities unavailable in the first action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330–31, 99 S. Ct. 645, 651 (1979). That consideration exists in this case. Because the fact finder in a postconviction proceeding is the court, not a jury, *see* Iowa Code § 822.7, applying offensive issue preclusion here would unfairly deprive the State of its Constitutional right to a jury trial.[6]

[6] Denying the State its right to a jury trial is an independent reason not to apply issue preclusion. That is, even if the elements of

Article I, Section 9 of the Iowa Constitution provides in part that "The right of trial by jury shall remain inviolate . . . ." Similarly, the United States Constitution provides in relevant part that "the right of trial by jury shall be preserved . . . ." U.S. Const. Amend. VII. The Seventh Amendment of the United States Constitution has not been applied to the states through the Fourteenth Amendment. *See McDonald v. City of Chicago*, 561 U.S. 742, 765 n.13 (2010) (stating the Seventh Amendment's right to a jury trial in civil cases is one of "the only rights [in the Bill of Rights] not fully incorporated"); *Weltzin v. Nail*, 618 N.W.2d 293, 298 (Iowa 2000) ("[T]he Seventh Amendment has never been made applicable to the states."). Nonetheless, in interpreting Article I Section 9 of the Iowa Constitution, this Court sometimes looks to federal cases interpreting the Seventh Amendment. *See, e.g.*, *Rieff v. Evans*, 672 N.W.2d 728, 732 (Iowa 2003) (stating that the Iowa Supreme Court has "considered . . . federal cases interpreting the Seventh Amendment" when interpreting the Iowa Constitution); *Weltzin*, 618 N.W.2d at 298

---

issue preclusion are met and the deprivation of the State's right to a jury trial is not a sufficient "other reason" to deny issue preclusion, the deprivation itself is an independent, constitutional basis on which to reverse the district court.

("While not identical, both federal and state provisions appear to provide the same general preference for jury trials."); *Iowa Nat. Mut. Ins. Co. v. Mitchell*, 305 N.W.2d 724, 726 (Iowa 1981) ("Because there is a nexus between interpretations of Iowa's jury provision and the federal provision, we first examine interpretations of the seventh amendment, even though its provisions have no application to state court proceedings."). Despite the Iowa courts looking to the federal Constitution for guidance, Iowa remains free to interpret the Iowa Constitution in a manner contrary to federal law. *See Weltzin*, 618 N.W.2d at 300 (declining to apply Seventh Amendment jurisprudence to Article I, Section 9 of the Iowa Constitution).

The district court relied on *Parklane Hosiery* to find that offensive issue preclusion stemming from a prior equitable determination does not violate the constitutional right to a jury trial. While true as a general matter that a prior equitable determination does not necessarily prevent the application of offensive issue preclusion, *Parklane Hosiery* is distinct from this case.

In *Parklane Hosiery*, the plaintiff brought a shareholder class action against Parklane Hosiery alleging it "issued a materially false and misleading proxy statement in connection with a merger."

Parklane Hosiery, 439 U.S. at 324. While the class action was pending, but before it went to trial, the SEC sued "the same defendants [(Parklane Hosiery)] . . . alleging that the proxy statement that had been issued by Parklane was materially false and misleading in essentially the same respects as those that had been alleged" in the shareholder class action. *Id.* "[T]he District Court found that the proxy statement was materially false and misleading in the respects alleged." *Id.* at 325. The plaintiff shareholder then moved for partial summary judgment in the class action, relying on the district court's decision in the SEC action. The parties did not dispute that the defendants in both actions were the same and the plaintiffs in the actions were different. The Supreme Court framed the question as "whether a litigant who was not a party to a prior judgment may nevertheless use that judgment 'offensively' to prevent a defendant from relitigating issues resolved in the earlier proceeding." *Id.* at 326. The *Parklane* court held that under the circumstances of the case, offensive collateral estoppel was appropriate.

Here, in contrast, Clark is not "a litigant who was not a party to the prior judgment." *Id.* Instead, *Robertson* was not a party to the prior judgment and Clark is seeking to estop Robertson from having the jury

decide the breach element. Not only is the party sought to be precluded in this case different, but the issue on which preclusion is sought is also different. *See* Section I.B, *supra*.

Moreover, "offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does." *Parklane Hosiery*, 439 U.S. at 329. In fact, the *Parklane* court warned that "offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation." *Id.* at 330. However, rather than disallow all use of offensive issue preclusion altogether, the Court granted "trial courts broad discretion to determine when it should be applied." *Id.* at 331. The Court directed lower courts to consider, among other things, whether "the defendant in the first action was forced to defend in an inconvenient forum" because "[t]he problem of unfairness is particularly acute in cases of offensive estoppel . . . because the defendant against whom estoppel is asserted typically will not have chosen the forum in the first action." *Id.* at 331 n. 15. *See also* Restatement (Second) Judgment § 29, cmt. *d* (stating that "[i]t may also be relevant that the party against whom preclusion is invoked had no choice, or restricted choice, as to the forum in which the issue was litigated"). Also relevant to the Court allowing offensive issue

preclusion in the *Parklane* case was "the foreseeability of subsequent private lawsuits that typically follow a successful government judgment." *Parklane Hosiery*, 439 U.S. at 332. Indeed, the Court pointed out that the party sought to be precluded had actual knowledge of the subsequent lawsuit, because such action had "commenced before the filing of the SEC action." *Id.* at 332 n. 18. Robertson had no such actual notice in the PCR case.

The difference in the availability of a jury between the PCR case and this case is reason alone not to apply preclusion. The Iowa Code requires that a PCR "application shall be heard in, and before any judge of the court in which the conviction or sentence took place." Iowa Code § 822.7. And PCR is a prerequisite to bringing a legal malpractice case against a criminal defense attorney. *See Trobaugh*, 668 N.W.2d at 583. Thus, even if the Johnson County Attorney and Robertson are deemed to be the same party, Robertson had no ability to choose or affect the forum for the PCR action by demanding a jury. The inability of Robertson to get the issue of breach in front of a jury is particularly relevant here. Robertson was dead at the time of the PCR trial, and therefore was unable to testify to any of the facts underlying his representation of Clark. Thus, whether Clark was credible in his

testimony was a decision ultimately made by the PCR judge. However, determining the credibility and weight of testimony is a traditional jury function. *See Becker v. D & E Distributing Co.*, 247 N.W.2d 727, 730 (Iowa 1976) ("The weight and credibility of testimony are matters for the jury."); *Ward v. Loomis Bros., Inc.*, 532 N.W.2d 807, 812 (Iowa Ct. App. 1995) ("A jury, as a trier of fact, can accept or reject all or part of the testimony of any witness."). Applying preclusive effect to the PCR court's ruling would be additionally troublesome here because of the purported change in the victim's testimony—evidence a jury cannot hear in the malpractice case.[7] Indeed, not only did the PCR court hear evidence and consider the victim's purported changed testimony, it found this "newly discovered evidence relied on by Mr. Clark is a basis upon which Mr. Clark's Application for Postconviction Relief must be granted." PCR Ruling p. 27 (App. 65); *see also* Part I.C, *supra*.

2. Collateral consequences for criminal defense attorneys

The district court's ruling creates significant collateral consequences and implications for future criminal malpractice cases.

[7] Clark does not assert that Robertson breached his duty because of the victim's purported changed testimony. Indeed, Robertson could not have breached his duty on this ground because the purported change in testimony came after Robertson's representation ended.

Cf. Iowa Ins. Inst. v. Core Grp., 867 N.W.2d 58, 75–76 (Iowa 2015) (noting with respect to interpreting statutes that the Court "sometimes consider[s] fact patterns other than the one before the court" to identify possible "untoward consequences," and that seeing "where those alternatives logically lead" is "part of the judicial function"). There are two possible ways to interpret the scope of the district court's decision to afford the PCR ruling offensive preclusive effect, and both are unfair to criminal defense attorneys—either a subgroup of them, or all of them.

If it applies only to a subgroup, then if a PCR finding is preclusive against a public defender because his or her employer is "the State," then, paradoxically, offensive issue preclusion is *only* available in criminal malpractice claims against public defenders—not against any other criminal defense attorney. A plaintiff bringing a criminal malpractice claim against a non-public-defender attorney would never have the benefit of chapter 669's automatic substitution making the defendant "the State." Accordingly, a finding that only public defenders are subject to offensive issue preclusion in these circumstances is contrary to the policies underlying the Iowa Tort Claims Act.

Under the Iowa Tort Claims Act, the State is liable for torts "to the same extent as a private individual under like circumstances." Iowa Code § 669.4(2). But affording the PCR ruling preclusive effect in this case would make Robertson and the State liable to a *greater* extent than a private individual under like circumstances. A PCR ruling finding ineffective assistance of counsel would preclude the State and its public defender employees, but only those categories. By contrast, a private attorney or contract attorney[8] would not face offensive issue preclusion because *their* employer is not the State. That contravenes the purpose and intent of the Iowa Tort Claims Act. The Act instructs courts to treat the State the same as private litigants—not to treat the State less favorably.

Worse yet, the other possible interpretation of the district court's ruling is that *every* criminal defense attorney—public defender,

[8] A defendant in a criminal case can receive representation from a privately retained attorney, a State-employee public defender, or a contract attorney who is authorized to accept court appointments when the public defender cannot represent a particular defendant. *See* Iowa Code §§ 13B.4(1)(*a*), 13B.4(3), 13B.5, 13B.8, 13B.9(4)(*a*). Although they accept court appointments to represent indigent defendants and therefore serve similar functions to a State-employee public defender, each contract attorney is "an independent contractor and shall not be an agent or employee of the state of Iowa." Iowa Admin. Code r. 493—11.2(6).

contract attorney, or private attorney—has their interests represented by the county attorney in a PCR proceeding if, when opposing the PCR application, the county attorney contends the defense lawyer rendered effective assistance. If the defense lawyer's interests were deemed to be represented by the county attorney, the defense lawyer could face offensive issue preclusion in a subsequent malpractice case despite participating in the PCR proceedings only as a witness, because privity is not required for offensive issue preclusion. *See Hunter*, 300 N.W.2d at 126. Many private-practice criminal defense attorneys would likely blanch at the notion that their *adversary* during the criminal proceedings adequately represents their *personal* interests on PCR. And exposing private criminal defense lawyers to this greater liability would likely increase the cost to criminal defendants, because criminal defense attorneys will have to mitigate the increased exposure through higher-cost malpractice insurance.

Both interpretations of the district court's preclusion ruling are plausible. Both are concerning. Both are strong reasons not to apply offensive issue preclusion in this case.

3. Chilling effect

Permitting offensive use of issue preclusion in these circumstances would also chill defense attorneys' willingness to cooperate in future PCR proceedings. As Justice Zager discussed when deciding whether a plaintiff in a legal malpractice case must establish actual innocence: "[m]ost significantly, such a ruling could have a chilling effect on the willingness of the already strapped defense bar to represent indigent accused. Further, it would put attorneys in the position of having an incentive not to participate in post-conviction efforts to overturn wrongful convictions." *Barker*, 875 N.W.2d at 171 (Zager, J., dissenting) (quoting *Dombrowski v. Bulson*, 971 N.E.2d 338, 340-41 (N.Y. 2012)). If a PCR ruling can be held against the criminal defense attorney, that attorney has much less incentive to participate in PCR proceedings. In fact, it creates a tension where the attorney's personal interests are in direct conflict with a former client's interests. And, as mentioned above, Clark's PCR counsel in fact communicated freely and openly with Robertson. Allowing offensive use of issue preclusion in these circumstances would discourage future attorneys in Robertson's position from so openly cooperating with a criminally-convicted person's PCR counsel. *See Hicks v. Nunnery*, 643

N.W.2d 809, 831 n.17 (Wis. Ct. App. 2002) ("According to some, criminal defense attorneys will too often readily admit to deficiencies in their representation during postconviction proceedings, perhaps out of regret over a less than desirable outcome or a sense of continuing loyalty to their former clients."); *Bailey v. Tucker*, 621 A.2d 108, 114 (Pa. 1993) (stating the threat of malpractice could result in "a diminution of defense counsels' willingness to exercise independent legal judgment, to be replaced by a defensive mindset geared more toward avoiding malpractice, and less toward obtaining acquittals," and could create "a powerful disincentive to [criminal defense attorneys] to continue in that field").

Because applying preclusion here would have a chilling effect on future criminal representation in Iowa, this Court should find that issue preclusion is not applicable.

4. Applying offensive issue preclusion here would not serve the fundamental policy underlying issue preclusion.

Issue preclusion "serves several purposes: protecting parties from the vexation of relitigating identical issues, furthering judicial economy by reducing unnecessary litigation, and avoiding the problem of two authoritative but conflicting rulings on the same question."

Winger, 881 N.W.2d at 450. Applying preclusion in this case serves none of those purposes.

First, applying preclusion here would not protect parties from the burden of relitigating identical issues. As discussed above, the issues are not identical in the first instance. And presenting the breach element is not vexatious; both parties have already designated expert witnesses and both parties have deposed the opposing party's expert. All that remains is to present the experts' opinions to the jury. In a trial that already requires Clark to prove causation through a case-within-a-case, this minimal additional element is not vexatious.

Second, because the issue in the PCR proceeding differs for offensive issue preclusion purposes from the issue here, there is no concern of two authoritative but conflicting rulings on the same question. In fact, the Alaska Supreme Court reached that precise result: the criminal defendant achieved post-conviction relief based on ineffective assistance. *Stewart*, 239 P.3d at 1237. The criminal defendant then sued his attorney for legal malpractice and, after a bench trial, the district court concluded that the criminal defense attorney did not breach his duty. *Id.* at 1238. The Alaska Supreme Court did not express any concern that its ruling created two

authoritative, conflicting rulings on the same question. This Court should do the same.

Finally, preclusion here would not materially further judicial economy—and may perhaps unnecessarily waste judicial resources. If offensive issue preclusion applies, Clark must still prove causation and damages. Those elements of Clark's malpractice claim are likely to comprise the bulk of the trial; the only part of the trial that would be avoided by applying issue preclusion would be the presentation of expert testimony. The Court has previously declined to apply issue preclusion when "[t]here would be little, if any, saving of judicial resources" by doing so. *Thompson v. Stephenson*, 332 N.W.2d 341, 344 (Iowa 1983). It should do so again.

Causation alone will require Clark to present a case-within-a-case. *See Quad City Bank & Trust v. Elderkin & Pirnie, P.L.C.*, 870 N.W.2d 249, 253 (Iowa Ct. App. 2015) ("A legal malpractice action is often called a 'case within a case' because the plaintiff must prove he would have been successful in the underlying lawsuit absent the lawyer's negligence."). A legal malpractice case stemming from criminal representation could be especially confounding to a jury, because Clark will have to prove by a preponderance of the evidence

that but for Robertson's alleged breach, he would not have been convicted beyond a reasonable doubt. Under such circumstances the legal malpractice case should be bifurcated between the legal malpractice claim and the underlying claim. *See Haberer v. Rice*, 511 N.W.2d 279, 285 (S.D. 1994) (stating that "[t]he trial-within-a-trial procedure often makes it desirable to bifurcate" because "[t]he standard of care as an issue is distinct and separate from the issue of what should have happened in the underlying proceeding" and that therefore "[s]eparate trials can provide a cogent and clear evidentiary process, minimizing the risk of confusing the jury"). If the trial court bifurcates the trial and the jury finds Robertson did not breach his duty, there would be no need to present the trial-within-a-trial; such a finding could drastically reduce the length of trial for the court, for the parties, and for the jury. Because applying preclusion in this case would not further the policies underlying issue preclusion, the Court should find that preclusion does not apply.

CONCLUSION

Offensive issue preclusion is "more restrictively and cautiously applied than defensive issue preclusion." *Buckingham v. Fed. Land Bank Ass'n*, 398 N.W.2d 873, 876 (Iowa 1987). Here, approaching

offensive issue preclusion with appropriate restraint and caution demonstrates that it does not apply in this case. Robertson is the party sought to be precluded, but he was not a party to the PCR action and therefore lacked a full and fair opportunity to litigate. In addition, the issue in this malpractice case is not identical to the issue in the PCR case when offensive issue preclusion is at stake—and moreover, it was not essential to the PCR judgment. Finally, there are several compelling "other considerations" that make offensive issue preclusion inappropriate under the circumstances presented here.

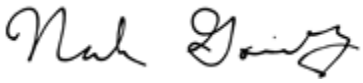
The Court should reverse and remand for a trial at which Robertson and the State are "not estopped from litigating any of the elements of [the] legal malpractice claim." *Noske*, 670 N.W.2d at 746.

REQUEST FOR ORAL ARGUMENT

The State requests oral argument.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



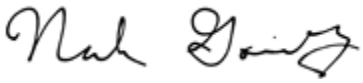
NOAH GOERLITZ
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-6668
noah.goerlitz@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **9,791** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: April 7, 2020



NOAH GOERLITZ
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-6668
noah.goerlitz@ag.iowa.gov