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 REPLY BRIEF

THOMAS J. MILLER
Attorney General of Iowa

JEFFREY S. THOMPSON
Solicitor General

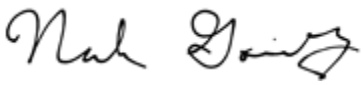
NOAH GOERLITZ
DAVID M. RANSCHT
Assistant Attorneys General
Hoover State Office Building, 2nd Floor
1305 E. Walnut St.
Des Moines, Iowa 50319
Ph: (515) 281-6668
(515) 281-7175
Email: noah.goerlitz@ag.iowa.gov
david.ranscht@ag.iowa.gov

CERTIFICATE OF SERVICE

On the 7th day of April, 2020, the State served Appellant's Reply Brief on the following counsel by EDMS electronic filing:

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

CERTIFICATE OF SERVICE 2

TABLE OF AUTHORITIES 4

STATEMENT OF ISSUE PRESENTED FOR REVIEW 8

ARGUMENT 9

I. An errors-at-law standard best fits the dispute in this case, but the Court must reverse even under an abuse-of-discretion standard 9

II. The Court should address whether the ineffectiveness finding was essential to the PCR judgment 13

III. The "issue" is not identical under a granular approach 18

CONCLUSION 26

CERTIFICATE OF COMPLIANCE 28

TABLE OF AUTHORITIES

PAGE(S)

CASES

33 CARPENTERS CONSTR., INC. V. STATE FARM LIFE & CAS. CO.,
939 N.W.2D 69 (IOWA 2020) 14
BANDSTRA V. COVENANT REFORMED CHURCH,
913 N.W.2D 19 (IOWA 2018)..... 9, 10
BARROW V. PRITCHARD,
597 N.W.2D 853 (MICH. CT. APP. 1999)..... 23
BELFORD V. MCHALE COOK & WELCH,
648 N.E.2D 1241 (IND. CT. APP. 1995)..... 23
CASEY V. KOOS,
323 N.W.2D 193 (IOWA 1982)..... 11, 12
CITY OF CORALVILLE V. IOWA UTILS. BD.,
750 N.W.2D 523 (IOWA 2008)..... 21
COMES V. MICROSOFT CORP.,
709 N.W.2D 114 (IOWA 2006) 10, 16
CORNWELL V. KIRWAN,
606 S.E.2D 1 (GA. CT. APP. 2004) 24
DES MOINES AREA REG'L TRANSIT AUTH. V. YOUNG,
867 N.W.2D 839 (IOWA 2015) 25
DOE V. MCKESSON,
947 F.3D 8746 (5TH CIR. 2020) (HO, J., CONCURRING IN DENIAL OF REHEARING EN BAN 17
EMP'RS MUT. CAS. CO. V. VAN HAAFTEN,
815 N.W.2D 17 (IOWA 2012)..... 9, 12
ESTATE OF LEONARD V. SWIFT,
656 N.W.2D 132 (IOWA 2003) 19
FELD V. BORKOWSKI,
790 N.W.2D 72 (IOWA 2010)..... 13, 15, 17, 18
FISCHER V. CITY OF SIOUX CITY,
654 N.W.2D 544 (IOWA 2002)..... 11, 19
FREDERICK V. SHORMAN,
259 IOWA 1050, 147 N.W.2D 478 (1966) 15
GARCIA V. RAY,
556 S.W.2D 870 (TEX. CIV. APP. 1977) 24

GARDNER V. HARTFORD INS. ACCIDENT & INDEM. CO.,
659 N.W.2D 198 (IOWA 2003) 18, 19
GIBSON V. TRANT,
58 S.W.3D 103 (TENN. 2001) 24
GRANT V. IOWA DEP'T OF HUMAN SERVS.,
722 N.W.2D 169 (IOWA 2006) 9, 11
HALL V. BARRETT,
412 N.W.2D 648 (IOWA CT. APP. 1987) 11
HASKENHOFF V. HOMELAND ENERGY SOLUTIONS, LLC,
897 N.W.2D 553 (IOWA 2017) 17
HEINZ V. HEINZ,
653 N.W.2D 334 (IOWA 2002) 17
HUMBOLDT TRUST & SAV. BANK V. ENTLER,
349 N.W.2D 778 (IOWA CT. APP. 1984) 12
HUNTER V. CITY OF DES MOINES,
300 N.W.2D 121 (IOWA 1981) 18
JBS SWIFT & CO. V. OCHOA,
888 N.W.2D 887 (IOWA 2016) 15
JOHNSON V. RABAN,
702 S.W.2D 134 (MO. CT. APP. 1985) 24
JORGE CONSTR. CO. V. WEIGEL EXCAVATING & GRADING CO.,
343 N.W.2D 439 (IOWA 1984) 21
KING V. STATE,
818 N.W.2D 1 (IOWA 2012) 16
KRAHN V. KINNEY,
538 N.E.2D 1058 (OHIO 1989) 21, 24
KRAKLIO V. SIMMONS,
909 N.W.2D 427 (IOWA 2018) 17
KRAMER V. DIRKSEN,
695 N.E.2D 1288 (ILL. APP. CT. 1998) 23
LEMARTEC ENG'G & CONSTR. V. ADVANCE CONVEYING TECHS., LLC,
___ N.W.2D ___, 2020 WL 1316410 (IOWA 2020) 20
LUNDY V. O'CONNOR,
246 IOWA 1231, 71 N.W.2D 589 (1955) 25
MCCORD V. BAILEY,
636 F.2D 606 (D.C. CIR. 1980) 22
MCELROY V. STATE,
637 N.W.2D 488 (IOWA 2001) 17

MCILRAVY V. N. RIVER INS. CO.,
653 N.W.2D 323 (IOWA 2002)..... 18
PIERCE V. STALEY,
587 N.W.2D 484 (IOWA 1998) 15
RANTZ V. KAUFMAN,
109 P.3D 132 (COLO. 2005)..... 22, 23
RHOADES V. STATE,
848 N.W.2D 22 (IOWA 2014)..... 26
RUSH V. REYNOLDS,
2020 WL 825953 (IOWA CT. APP. FEB. 19, 2020)..... 11
SANDERS V. MALIK,
711 A.2D 32 (DEL. 1998)..... 23
SCHNEBERGER V. U.S. FID. & GUAR. CO.,
213 N.W.2D 913 (IOWA 1973) 10
SHAW V. STATE,
816 P.2D 1358 (ALASKA 1991) 22
SMITH V. PUB. DEFENDER SERV.,
686 A.2D 210 (D.C. 1996) 23
STATE V. ARY,
877 N.W.2D 686 (IOWA 2016) 12
STATE V. CLARK,
814 N.W.2D 551 (IOWA 2012) 26
STENDER V. BLESSUM,
897 N.W.2D 491 (IOWA 2017)..... 11, 13
THOMPSON V. STEPHENSON,
332 N.W.2D 341 (IOWA 1983)..... 10
TYSON FOODS, INC. V. HEDLUND,
740 N.W.2D 192 (IOWA 2007) 10
UNITED SUPPLIERS, INC. V. HANSON,
876 N.W.2D 765 (IOWA 2016) 14
UNIVERSAL COOPS. V. TASCO, INC.,
300 N.W.2D 139 (IOWA 1981)..... 21
VAVOLIZZA V. KRIEGER,
308 N.E.2D 439 (N.Y. 1974) 24
WESTEGARD V. DAVIS CTY. CMTY. SCH. DIST.,
580 N.W.2D 726 (IOWA 1998) 19
WILLEY V. BUGDEN,
318 P.3D 757 (UTAH CT. APP. 2013) 24
WINGER V. CM HOLDINGS, L.L.C.,
881 N.W.2D 433 (IOWA 2016) 9, 10, 18, 19

YOUNAN V. CARUSO,
59 CAL. RPTR. 2D 103 (CT. APP. 1996) 22
ZEIDWIG V. WARD,
548 SO. 2D 209 (FLA. 1989) 23

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. What is the standard of review for a district court ruling granting partial summary judgment by applying offensive issue preclusion?

II. Should the Court reach the essential-to-the-judgment element of offensive issue preclusion?

III. Are the issues identical under a granular approach?

ARGUMENT

Appellee Donald Clark does not identify any authority holding that PCR cases asserting ineffective assistance and criminal malpractice cases asserting negligence address the same issue for *offensive* issue preclusion purposes. Instead, every case Clark cites addresses only *defensive* issue preclusion. (Clark Br. at 45–47.) Further, Clark ignores this Court's cases that compare issues narrowly for preclusion purposes. Clark also ignores the important differences between offensive and defensive issue preclusion.

The Court should reverse and remand for a trial unaffected by offensive issue preclusion.

I. An errors-at-law standard best fits the dispute in this case, but the Court must reverse even under an abuse-of-discretion standard.

"Whether the elements of issue preclusion are satisfied is a question of law." *Grant v. Iowa Dep't of Human Servs.*, 722 N.W.2d 169, 173 (Iowa 2006); *accord Bandstra v. Covenant Reformed Church*, 913 N.W.2d 19, 36 (Iowa 2018); *Winger v. CM Holdings, L.L.C.*, 881 N.W.2d 433, 445 (Iowa 2016). If the relevant determination is a question of law, the standard of review is to correct legal error. *See Emp'rs Mut. Cas. Co. v. Van Haaften*, 815 N.W.2d 17, 22 (Iowa 2012).

The Court has frequently discussed district courts' issue preclusion rulings in terms of legal error. *See, e.g.*, *Bandstra*, 913 N.W.2d at 51 ("[T]he district court did not err in determining that [offensive] issue preclusion is inappropriate in this instance."); *Winger*, 881 N.W.2d at 453 ("We conclude the doctrine of offensive issue preclusion should not apply . . . . Accordingly, we hold the district court erred . . . ."); *Tyson Foods, Inc. v. Hedlund*, 740 N.W.2d 192, 195 (Iowa 2007) (reviewing a district court ruling that "relied on the doctrine of res judicata"—a doctrine of which offensive issue preclusion is a subset—"for corrections of errors at law"); *Comes v. Microsoft Corp.*, 709 N.W.2d 114, 117 (Iowa 2006) (reviewing an interlocutory ruling for correction of errors at law when the question was "whether the district court correctly applied" the elements of offensive issue preclusion); *Thompson v. Stephenson*, 332 N.W.2d 341, 344 (Iowa 1983) ("We conclude the district court erred in applying the doctrine of [offensive] issue preclusion."); *Schneberger v. U.S. Fid. & Guar. Co.*, 213 N.W.2d 913, 918 (Iowa 1973) ("The theory of issue preclusion cannot be called upon in the second suit now before us . . . , and to that extent we conclude trial court erred in its ruling."). The court of appeals also did so when addressing defensive issue preclusion in a criminal

malpractice case. *See Hall v. Barrett*, 412 N.W.2d 648, 652 (Iowa Ct. App. 1987).

In some instances, the Court has instead discussed offensive issue preclusion in discretionary terms. *See, e.g.*, *Stender v. Blessum*, 897 N.W.2d 491, 514 (Iowa 2017); *Fischer v. City of Sioux City*, 654 N.W.2d 544, 550 (Iowa 2002); *Casey v. Koos*, 323 N.W.2d 193, 197 (Iowa 1982). Notwithstanding those decisions, however, an errors-at-law standard more accurately fits the dispute in this, and potentially in many, offensive issue preclusion cases: "[w]hether the elements of issue preclusion are satisfied," which "is a question of law." *Grant*, 722 N.W.2d at 173. It also fits Clark's characterization of this case as reviewing only the district court's *legal* conclusions (Clark Br. at 22). Indeed, any discretionary component in an issue preclusion ruling is potentially subsumed into the errors-at-law standard of review for summary judgment when summary judgment is how the district court rules on issue preclusion. *Cf. Rush v. Reynolds*, No. 19–1109, 2020 WL 825953, at *7 (Iowa Ct. App. Feb. 19, 2020) (applying the general errors-at-law standard of review to a ruling on a motion to dismiss while rejecting the appellee's suggestion that a discretionary component of the ruling demanded an abuse-of-discretion standard);

see also Emp'rs Mut. Cas. Co., 815 N.W.2d at 22 ("Issue preclusion . . . is appropriately adjudicated by summary judgment.").

Further, *Casey*—the only case upon which Clark relies—was unusual because the trial court had not yet ruled (at all) on the question of offensive issue preclusion, instead electing to await a ruling in a pending appeal that might resolve it. *See Casey*, 323 N.W.2d at 197. The Court concluded the district court's decision *not to rule at all* was not an abuse of discretion and expressed "no opinion concerning offensive issue preclusion except to say that on remand" it could be raised again. *Id.* To the extent *Casey* mandates or implies a blanket abuse-of-discretion standard for summary judgment rulings applying (rather than reserving decision on) offensive issue preclusion, the Court should either distinguish it or overrule it.

However, it is not truly necessary even to articulate which standard of review applies, because the Court should "reach the same result in this case under either standard." *Humboldt Trust & Sav. Bank v. Entler*, 349 N.W.2d 778, 780 (Iowa Ct. App. 1984); *accord State v. Ary*, 877 N.W.2d 686, 699 (Iowa 2016) ("Because we . . . would reach the same conclusion applying either standard of review, we need not decide which standard applies."). "A district court . . . abuses its

discretion if it bases its conclusions on an erroneous application of the law." *Stender*, 897 N.W.2d at 501. In other words, it is an abuse of discretion to commit legal error.

An errors-at-law standard is most consistent with this Court's offensive issue preclusion cases, with Clark's characterization of this case, and with the procedural posture of summary judgment that preceded this appeal. Ultimately, however, the standard of review is not truly "of extreme importance" (Clark Br. at 23) because the State prevails under either standard.

II. The Court should address whether the ineffectiveness finding was essential to the PCR judgment.

The question of whether to reach an issue when there is a dispute about whether it is properly raised "involves a number of considerations." *Feld v. Borkowski*, 790 N.W.2d 72, 82 (Iowa 2010) (Appel, J., concurring in part and dissenting in part). While it is "sometimes discussed in a conclusory fashion as involving 'issue preservation' or 'waiver,' the field is, in fact, considerably more nuanced." *Id.* In this case, the Court should reach the question whether the ineffectiveness finding was essential to the PCR judgment, both because the district court implicitly rejected any such argument, and because reaching it in this appeal would promote judicial economy.

The district court "granted summary judgment without expressly deciding" whether the ineffectiveness finding was essential to the PCR judgment. *33 Carpenters Constr., Inc. v. State Farm Life & Cas. Co.*, 939 N.W.2d 69, ___ (Iowa 2020). Usually when an issue is "not decided in the district court ruling, the issue is not preserved for review." *Id.* Nonetheless, as the Court explained in *33 Carpenters*, it is appropriate to reach an issue on appeal when "the district court must have *implicitly* rejected the argument" by granting summary judgment. *Id.*; *see also United Suppliers, Inc. v. Hanson*, 876 N.W.2d 765, 783-84 (Iowa 2016) (reaching a legal question that may not have been preserved but that the district court "necessarily determined" in granting summary judgment).

This case is similar. The dispute below was whether Clark satisfied the elements of issue preclusion. In ruling that the PCR decision had preclusive effect, the district court necessarily found Clark established all six elements of offensive issue preclusion. In turn, if all six elements of offensive issue preclusion were established, the district court implicitly rejected any argument that one element—the "necessary and essential" element—was not met. This is consistent with the United States Supreme Court's distinction "between a claim

and an argument," under which "a party is not limited to *arguments* presented below" so long as the purportedly new arguments support a properly presented claim. *Feld*, 790 N.W.2d at 83 (Appel, J., concurring in part and dissenting in part) (emphasis added).

Here, the underlying claim is that Clark has not satisfied the elements of offensive issue preclusion. The element addressing whether a finding is "essential to the judgment" is merely an additional argument in support of that claim. *See, e.g.*, *JBS Swift & Co. v. Ochoa*, 888 N.W.2d 887, 893 (Iowa 2016) (finding a litigant preserved error because although it did not cite a specific subsection of a statute in the district court, it did so on appeal as "additional ammunition" for the overall argument made below); *Pierce v. Staley*, 587 N.W.2d 484, 486-87 (Iowa 1998) (finding a litigant's overall argument that she owed no tort law duty preserved error on all elements of the relevant legal test); *Frederick v. Shorman*, 259 Iowa 1050, 1056–57, 147 N.W.2d 478, 482 (1966) (reaching an issue closely related to the defendant's contentions, even though that specific articulation of the issue "was apparently not asserted" below).

Additionally, the interlocutory nature of this appeal justifies reaching the issue. *See Feld*, 790 N.W.2d at 81 (Wiggins, J., concurring

specially) ("The procedural posture of this case makes it even more important for us to address the issue . . . ."). "[O]ur rules of judicial restraint," one of which is the doctrine of error preservation, "are full of nuance and exceptions and ultimately rest on the particular circumstances of each case." *King v. State*, 818 N.W.2d 1, 37 (Iowa 2012) (Cady, C.J., concurring specially). Judicial economy is also an important consideration. *See id.* And here, deciding whether the ineffectiveness finding was essential to the PCR judgment would further judicial economy rather than leaving open a lingering issue.

Comes demonstrates that the question whether a finding was necessary and essential to a prior judgment is an important consideration—so important that it is reviewable at the interlocutory appeal stage, just like the other issue preclusion elements in this case. *Comes*, 709 N.W.2d at 117 ("We granted Microsoft's application for leave to appeal the district court's ruling. The overarching issue . . . is whether the district court correctly applied the requirement that facts subject to [offensive issue preclusion] be 'necessary and essential' to the judgment in the prior litigation."). The issue is important because addressing it clarifies the scope of the trial that will eventually occur. If the Court does not decide it now, it will remain an open question on

remand, potentially creating additional delay and "extra expense for the parties and the court" as the issue is litigated. *Feld*, 790 N.W.2d at 82 (Wiggins, J., concurring specially). That is, if the Court does not address the essential-to-the-judgment prong, the State will raise it on remand,[1] and this element could be back before this Court in any subsequent appeal. Yet, because the essential-to-the-judgment prong is a purely legal question resolved solely by examining the district court's PCR ruling, further factual development is unnecessary.

Such an approach is consistent with the way this Court sometimes addresses issues on appeal that are likely to arise on remand, even when it is not strictly necessary to address them given the Court's holding. *See, e.g.*, *Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 599 (Iowa 2017); *Heinz v. Heinz*, 653 N.W.2d 334, 341 (Iowa 2002); *McElroy v. State*, 637 N.W.2d 488, 500 (Iowa 2001) ("[W]e will briefly consider the remaining issues

[1] Even if the Court does not address the essential-to-the-judgment prong, it should acknowledge that the alternative ground prohibiting offensive issue preclusion because the ineffectiveness finding was not necessary and essential to the PCR judgment "may be addressed by the district court on remand." *Kraklio v. Simmons*, 909 N.W.2d 427, 441 (Iowa 2018); *see also Doe v. McKesson*, 947 F.3d 874, 875-76 (5th Cir. 2020) (Ho, J., concurring in denial of rehearing en banc) (asserting that an issue the defendant did not raise below could be dispositive on remand).

presented on appeal because they may occur again . . . ."). Although these decisions generally involve a completed trial that becomes subject to a *second* trial after appeal, they are nonetheless rooted in the pursuit of judicial economy. The same reasoning applies here. *See Feld*, 790 N.W.2d at 84 (Appel, J., concurring in part and dissenting in part) (noting the Court has "been willing to relax ordinary rules of issue preservation based on notions of judicial economy and efficiency."). When a trial must be scheduled (or rescheduled) after the Court remands a case, why "leave the question unanswered when the district court will be confronted with it on remand?" *Id.* at 82 (Wiggins, J., concurring specially). Why create "a potential appeal on this issue . . . when [the Court] can answer the question now?" *Id.* Judicial economy is "an additional benefit" of issue preclusion, and deciding all elements of issue preclusion in this appeal would further that efficiency goal. *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 330 (Iowa 2002).

III. The "Issue" is Not Identical Under a Granular Approach.

Offensive issue preclusion "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 v. City of Des Moines*, 300

N.W.2d 121, 124 (Iowa 1981) (adopting a "more restrictive" standard for offensive issue preclusion than "where the doctrine is invoked in a defensive manner"). Offensive issue preclusion also "lacks some of the policy support underlying the defensive use of the doctrine." *Fischer*, 654 N.W.2d at 547. Put simply, the rules are different—and importantly, are more restrictive—for offensive issue preclusion. Even in defensive issue preclusion cases, the Court carefully analyzes whether the same "issue" is truly at stake. Therefore, the same cautious analysis—indeed, even *more* cautious analysis—should occur when a litigant invokes issue preclusion offensively.

For issue preclusion to apply, the issue at stake in both cases must be *precisely* the same. *See Westegard v. Davis Cty. Cmty. Sch. Dist.*, 580 N.W.2d 726, 728 (Iowa 1998). Mere "[s]imilarity of issues is not sufficient." *Estate of Leonard v. Swift*, 656 N.W.2d 132, 147 (Iowa 2003). This precise approach developed even in less restrictive defensive issue preclusion cases. Therefore, the Court should also apply a precise approach in the offensive-use context, because offensive issue preclusion "is more restrictively and cautiously applied." *Winger*, 881 N.W.2d at 451 (quoting *Gardner*, 659 N.W.2d at 203).

In the recent *Lemartec* case, the Court confirmed that issue preclusion analysis "centers on a determination of the proper level of generality to be applied in determining the scope of an 'issue' for preclusion purposes." *Lemartec Eng'g & Constr. v. Advance Conveying Techs., LLC*, ___ N.W.2d ___, ___, 2020 WL 1316410, at *10 (Iowa 2020). The Court acknowledged competing arguments about whether the approach to comparing issues for preclusion purposes "is a categorical one . . . or a more granular one," and selected the granular approach. *Id.* The Court further acknowledged that the pleadings in both cases were similar, but nonetheless concluded a categorical approach focusing on similarities between pleadings was too broad—even for defensive issue preclusion purposes. *See id.* Instead, key factual differences prevented the issues from being the same. *See id.*

The same logic applies here—and because *Lemartec* is a defensive-use case, the logic and the precise approach applies even more strongly. The question whether Robertson breached a duty under ineffectiveness standards is different from the question whether he breached a duty under tort standards. The issue here is not just broadly about "breach" but must also include the standards by which to

measure and ascertain breach. *See Universal Coops. v. Tasco, Inc.*, 300 N.W.2d 139, 142-43 (Iowa 1981) (concluding issue preclusion should not apply when an issue was not just about proper service, but about the standards by which to measure service). Further, even if the PCR case and this criminal malpractice case address similar *conduct* by Robertson, they do not address the same *issue*. The issue in Clark's PCR proceedings was whether he was would receive at most a new criminal trial—not the additional relief (in the form of money damages) that he now seeks. *See Jorge Constr. Co. v. Weigel Excavating & Grading Co.*, 343 N.W.2d 439, 444 (Iowa 1984) (denying issue preclusion because although two cases involved the same conduct, the available relief was different).

A proper application of the granular approach makes clear that the issue in this case is not identical or precisely the same as in the PCR proceeding. *See City of Coralville v. Iowa Utils. Bd.*, 750 N.W.2d 523, 528 (Iowa 2008) (declining to apply issue preclusion because the issues were "clearly not identical," and noting a district court's determination "must be read in its proper context" for preclusion purposes); *see also Krahn v. Kinney*, 538 N.E.2d 1058, 1062 n.8 (Ohio 1989) (noting the elements of ineffective assistance and malpractice

are similar, but observing they are "not identical"). Therefore, offensive issue preclusion does not apply here.

Additionally, Clark does not identify a single case applying offensive issue preclusion to a criminal malpractice claim, and the State is unaware of any. Every case Clark cites—even the ones acknowledging that issue preclusion *can* apply in criminal malpractice cases—considers only defensive issue preclusion. *See, e.g.*, *McCord v. Bailey*, 636 F.2d 606, 611 (D.C. Cir. 1980) ("McCord seeks to relitigate issues concerning the quality of his criminal trial counsel that he raised in the course of the criminal proceedings. Having twice raised these issues and lost, McCord cannot raise the claims anew in a civil case."); *Shaw v. State (Shaw I)*, 816 P.2d 1358, 1361 (Alaska 1991) ("If the defendant was denied post-conviction relief, the legal principle of collateral estoppel would serve to eliminate any frivolous malpractice claim."); *Younan v. Caruso*, 59 Cal. Rptr. 2d 103, 105 (Ct. App. 1996) (noting the trial court granted the attorney's motion seeking "dismissal of Younan's complaint on the ground that the earlier denial of Younan's habeas corpus petition—based on a claim of ineffective assistance of counsel—collaterally estopped Younan"); *Rantz v. Kaufman*, 109 P.3d 132, 139 (Colo. 2005) ("Here, Kaufman and Levinson are asserting that

key factual issues alleged by Rantz were already resolved against him in the order denying his . . . motion for ineffective assistance of counsel."); *Sanders v. Malik*, 711 A.2d 32, 34 (Del. 1998) ("[Plaintiff's] present allegations, in all material respects, encompass the allegations of ineffective assistance of counsel that were raised and rejected . . . in his postconviction proceedings."); *Smith v. Pub. Defender Serv.*, 686 A.2d 210, 211-12 (D.C. 1996); *Zeidwig v. Ward*, 548 So. 2d 209, 214 (Fla. 1989) ("We conclude that, where a defendant in a criminal case has had a full and fair opportunity to present his claim in a prior criminal proceeding, and a judicial determination is made that he has received the effective assistance of counsel, then the defendant/attorney in a subsequent civil malpractice action brought by the criminal defendant may defensively assert collateral estoppel."); *Kramer v. Dirksen*, 695 N.E.2d 1288, 1291 (Ill. App. Ct. 1998); *Belford v. McHale Cook & Welch*, 648 N.E.2d 1241, 1246 (Ind. Ct. App. 1995) ("The issue of ineffective assistance of counsel was decided unfavorably to [the malpractice plaintiff] and affirmed in a decision by the Seventh Circuit Court of Appeals."); *Barrow v. Pritchard*, 597 N.W.2d 853, 855 (Mich. Ct. App. 1999) ("[W]e believe the standards are sufficiently similar in substance to support the application of the defense of

collateral estoppel."); *Johnson v. Raban*, 702 S.W.2d 134, 138 (Mo. Ct. App. 1985) ("[T]he adequacy of defendant's representation was determined by the direct infusion of that point into plaintiff's [PCR] motion. The denial of that motion met all the criteria for the effective invocation of defensive collateral estoppel."); *Vavolizza v. Krieger*, 308 N.E.2d 439, 442 (N.Y. 1974); *Krahn*, 538 N.E.2d at 1062 ("The malpractice suit was conclusively adjudicated, appellants maintain, when the trial court denied Krahn's motion to vacate judgment in the criminal proceeding."); *Gibson v. Trant*, 58 S.W.3d 103, 117 (Tenn. 2001) ("[A]ll of Gibson's allegations can be reduced to the charge that he suffered damage because his lawyers induced him to plead guilty involuntarily. As we have explained, the federal courts have considered and rejected this charge. Gibson is not entitled to relitigate these claims in the guise of a malpractice suit."); *Garcia v. Ray*, 556 S.W.2d 870, 872 (Tex. Civ. App. 1977); *see also Cornwell v. Kirwan*, 606 S.E.2d 1, 5 (Ga. Ct. App. 2004) (discussing defensive issue preclusion "though [the attorney] did not argue collateral estoppel" below); *Willey v. Bugden*, 318 P.3d 757, 762, 764-65 (Utah Ct. App. 2013) (declining to decide the issue squarely, but suggesting the court would conclude the issues of ineffective assistance and malpractice are the same when

considering whether an "unsuccessful ineffective assistance claim precluded any malpractice claims").

But "sameness" is not a two-way street for both offensive and defensive issue preclusion purposes. Offensive and defensive issue preclusion are simply not interchangeable. *Cf. Des Moines Area Reg'l Transit Auth. v. Young*, 867 N.W.2d 839, 848 (Iowa 2015) (Hecht, J., dissenting) ("Every square is a rectangle, but not every rectangle is a square."); *Lundy v. O'Connor*, 246 Iowa 1231, 1236, 71 N.W.2d 589, 592 (1955) ("The old saying that although all horse thieves are members of the human race, not all humans are horse thieves, illustrates the point."). Despite what Clark asserts, the "overwhelming majority of jurisdictions" (Clark Br. at 46) do not agree with his position, because they have not considered it. Rather, the overwhelming majority of jurisdictions have only considered the opposite side of the coin from the question this case presents.

Indeed, these defensive-use cases from other jurisdictions support the State here. Despite superficial similarity in the "preponderance" standard, the constitutional focus on the PCR applicant's liberty interest at the PCR stage makes it comparatively easier to demonstrate ineffective assistance than to demonstrate

malpractice.[2] Because the burden is comparatively lower, defensive issue preclusion makes sense. A person who did not satisfy a lower burden also could not satisfy a higher one. But *offensive* issue preclusion is not an automatic corollary, because satisfying the lower burden does not establish the higher one.

CONCLUSION

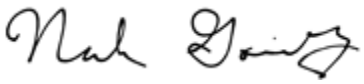
Defendant respectfully requests the Court reverse the district court and remand for further proceedings.

---

[2] Clark notes that the direct appeal from his criminal conviction featured a dissent on the issue of ineffective assistance. (Clark Br. at 14.). That dissent does not aid Clark here, because it cast no material aspersions on Robertson's own acts. Rather, the dissent contended that *the district court's* refusal to grant a continuance, despite Robertson requesting one, meant that Clark received ineffective assistance because Robertson was deprived of time to prepare a full-throated defense utilizing newly-disclosed evidence. *State v. Clark*, 814 N.W.2d 551, 568 (Iowa 2012) (Appel, J., dissenting) ("In my view, however, the failure to grant a short continuance, under all the facts and circumstances of this case, was an abuse of discretion and a violation of the right to effective assistance of counsel."). Nothing Robertson did caused the dissenting justices to assert Clark received ineffective assistance; instead, in their view, the *district court's* actions rendered Robertson ineffective by denying him additional time to explore "a highly significant four-page, single-spaced email" that "was produced only on the eve of trial." *Id.* The nature of the dissent in Clark's direct appeal, and its assertion that the district court itself can cause a lawyer to be deemed ineffective, illustrates that in some respects, the Court views "ineffective assistance as a substitute for a plain error rule." *Rhoades v. State*, 848 N.W.2d 22, 33 (Iowa 2014) (Mansfield, J., concurring specially).

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



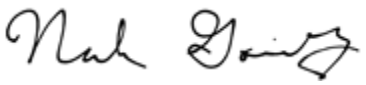
NOAH GOERLITZ
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-6668
noah.goerlitz@ag.iowa.gov

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 4,284 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