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 SUPPLEMENTAL BRIEF

THOMAS J. MILLER
Attorney General of Iowa

JEFFREY S. THOMPSON
Solicitor General

NOAH GOERLITZ
DAVID M. RANSCHT
Assistant Attorneys General
Hoover State Office Bldg., 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

In accordance with the Court's May 4, 2020 order authorizing supplemental briefs, Appellant State of Iowa submits the following responsive supplemental brief.

I. *Lemartec* reaffirmed that Iowa courts must take a granular approach to determine the "same issue" prong of issue preclusion.

The State cited *Lemartec Engineering & Construction v. Advance Conveying Technologies, LLC*, 940 N.W.2d 775 (Iowa 2020), for the proposition that the Court should do a close, granular analysis to determine whether the "issue" decided in the PCR case is identical to the "issue" of breach in this malpractice case. (State Reply Br. at 18.) Clark's supplemental brief addresses *Lemartec* but contends the real focus is on whether the party against whom preclusion is sought had a full and fair opportunity to litigate the issue. (Clark Supp. Br. at 5). This merely reiterates the parties' existing dispute; the State has already briefed its position that Robertson—the party Clark alleges was negligent and therefore the party against whom preclusion is sought, notwithstanding the vicarious liability provision in Iowa Code section 669.2(3)(*a*)—did not have a full and fair opportunity to litigate the breach element of malpractice because Robertson was not a party to the PCR action. (State Br. at 20-26.)

Under *Lemartec's* measured approach, the issues between cases here are different. The legal standards for ineffective assistance of counsel and breach in malpractice differ, in part because of the different consequences and purposes of the two actions. *See* State Br. at 31-38. Even where the two actions arise from a common occurrence, the Court must closely scrutinize whether the issue actually litigated in the prior action is the same issue for which preclusion is sought. *See Lemartec*, 940 N.W.2d at 787. *Lemartec* ultimately selected a "more granular" approach for comparing issues. *Id.* The same logic applies here: just because the two cases arise from a common occurrence, the issues litigated are not necessarily identical for preclusion purposes. *See* State Rep. Br. at 19. Furthermore, *Lemartec* concerned defensive issue preclusion, *id.* at 778, and "[offensive issue preclusion] is more restrictively and cautiously applied than defensive issue preclusion." *Winger v. CM Holdings, L.L.C.*, 881 N.W.2d 433, 451 (Iowa 2016). *Lemartec*'s rejection of a categorical approach for defensive issue preclusion therefore compels an even closer analysis of the "issue" here.

II. No court that has confronted the issue has applied offensive issue preclusion against any criminal defense attorney, yet Clark's proposed rule would categorically apply it against public defenders.

The State does not argue that Clark must "find a case 'factually' on all fours" for offensive issue preclusion to apply. (Clark Supp. Br. at 12). The

State merely shows: (1) every case cited by Clark concerns *defensive* issue preclusion applied *against* the malpractice plaintiff; and (2) all courts deciding cases attempting to invoke offensive issue preclusion against the criminal defense attorney in the PCR and criminal malpractice context have declined to apply it. *See* State Rep. Br. at 22-25. The State does not suggest Clark must find an identical case—merely that Clark's argument lacks legal support.

Clark's proposed rule is also problematic because it would treat public defenders differently than both privately retained attorneys and court-appointed defense attorneys. Clark claims not to seek a categorical rule that all post-conviction rulings are preclusive against criminal defense attorneys. (Clark Supp. Br. at 13). Yet, he proposes a rule that would only operate, and would operate categorically, when the criminal defense attorney is a State-employee public defender. (Clark Supp. Br. at 13-14). By contrast, Clark's proposed preclusion rule would *not* operate against private attorneys representing indigent defendants under a court appointment and a contract with the State Public Defender—even though those attorneys serve identical functions to a public defender, and even though the costs they incur are reimbursed from the indigent defense fund, which consists of "money appropriated by the general assembly." Iowa Code § 815.11.

Moreover, Clark incorrectly asserts that the law *already* treats public defenders differently. (Clark Supp. Br. at 13.) First, he cites chapter 815, which applies to private attorneys, not public defenders. *See* Iowa Code § 815.10(2)-(3) (authorizing district courts to appoint a private attorney "who has a contract with the state public defender," or if one is not available, "a noncontract attorney"). Second, the language in chapter 815 also appears in chapter 13B—the chapter actually addressing public defenders. *Compare id.* § 815.10(6), *with id.* § 13B.9(2). Third, the case upon which Clark relies announced a common law rule regarding actual innocence that applies equally to public defenders, privately retained defense counsel, and court-appointed counsel. *See Barker v. Capotosto*, 875 N.W.2d 157, 168 (Iowa 2016). The law doesn't treat public defenders and private criminal defense attorneys differently; it expressly treats them the same.

Clark also attempts to distinguish two cases which held offensive issue preclusion inapplicable in this context by noting that both of those cases involved private defense attorneys. (Clark Supp. Br. at 14.) *See Stewart v. Elliott*, 239 P.3d 1236 (Alaska 2010); *Stevens v. Horton*, 984 P.2d 868 (Or. Ct. App. 1999). This again implies that public defenders should be treated categorically differently from private attorneys for the operation of offensive issue preclusion. This categorical rule would run against the policies

underlying the Iowa Tort Claims Act and would place public defenders at a disadvantage in malpractice actions relative to private criminal defense attorneys (whether retained or appointed). *See* State Br. at 47-49.

CONCLUSION

Even where the underlying facts in the proceedings are the same, the issue actually litigated in the first proceeding must be the same issue to be litigated in the second for preclusion to apply. *Lemartec* rejected a categorical approach to comparing the issues, and instead applied a narrow comparison. In this case, a narrow comparison reveals that the breach element of malpractice was not actually litigated in the PCR proceeding. Furthermore, Clark's proposed rule would operate categorically against public defenders. This rule runs counter to the policy underlying the Iowa Tort Claims act and disadvantages public defenders compared to their private counterparts. The Iowa Tort Claims Act puts the State "in the *same* shoes as a private party," *Madden v. City of Iowa City*, 848 N.W.2d 40, 54 (Iowa 2014) (emphasis added)—not in shoes that have more holes just because the State happens to be wearing them.

The Court should reverse and remand.

CERTIFICATE OF COMPLIANCE

This Supplemental Brief complies with the limitations of the Court's May 4, 2020, Order, which includes proportionally spaced typeface and containing 1,053 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ *David M. Ranscht*

PROOF OF SERVICE

I, David M. Ranscht, hereby certify that on the 12th day of June, 2020, I, or a person acting on my behalf, did serve the State's Supplemental Brief on all parties to this appeal by EDMS.

/s/ *David M. Ranscht*

CERTIFICATE OF FILING

I, David M. Ranscht, hereby certify that on the 12th day of June, 2020, I, or a person acting on my behalf, filed the State's Supplemental Brief with the Clerk of the Iowa Supreme Court by EDMS.

/s/ *David M. Ranscht*