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

DONALD L. CLARK,

Appellee,

vs.

STATE OF IOWA,

Appellant.

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

APPELLEE'S FINAL BRIEF
AND REQUEST FOR ORAL ARGUMENT

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

I. Did the trial court err in granting Plaintiff's motion for partial summary judgment by applying offensive issue preclusion in a legal malpractice action against a public defender who was previously found ineffective in a postconviction relief action?

ROUTING STATEMENT

This case should be routed to the Court of Appeals, pursuant to Iowa Rule of Appellate Procedure 6.1101(3)(a). The sole question involves applying existing legal principles. The present appeal concerns the district court's decision to apply offensive issue preclusion to foreclose the State from relitigating the issue of breach of duty in a legal negligence case after a public defender had already been found ineffective *as a matter of law* in prior post-conviction case. Applying offensive issue preclusion to a particular set of facts is clearly not a question of first impression.

STATEMENT OF THE CASE

On January 14, 2017, Plaintiff Donald Clark (hereinafter "Clark") filed a claim for money damages with the State Appeal Board pursuant to Iowa Code § 669.3. The complaint alleged that former Assistant State Public Defender John Robertson ("Robertson")[1], a state employee, committed legal negligence while representing Clark during Clark's criminal trial. *See* State Appeal Board Claim (App. p. 69). No action was taken by the Attorney General on his claim and, on August 4, 2017, Clark withdrew his claim. (App. p. 70). On October 17, 2017, Clark sued the State of Iowa, as Robertson's

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[1] John Robertson died in 2013.

employer, seeking money damages for legal negligence. *See* Petition, App. pp. 71-75) and Iowa Code § 669.5(2).

On May 8, 2019, Clark moved for partial summary judgment, asserting Robertson's breach of his duty of care was fully raised and litigated in Clark's favor in the PCR matter on the exact same issues for which he had filed suit. (Motion for Partial Summary Judgment, App. pp. 79-81). Clark contended that the doctrine of offensive issue preclusion should bar the State from contesting whether or not Robertson had breached his duty of care in the pending legal negligence case. On May 23, 2019, the State of Iowa filed its resistance. (Resistance to Motion for Partial Summary Judgment, App. pp. 82). On June 4, 2019, Clark filed a reply. (Reply to State of Iowa's Resistance to Motion for Partial Summary Judgment, App pp. 83-96).

On June 7, 2019, the District Court denied Clark's motion for partial summary judgment, finding that that the *legal standard for ineffective assistance of counsel and the breach element in a legal malpractice case were different*[2] and, therefore, offensive issue preclusion was inappropriate. (June

[2] The district court held at that time that the standard of care in a legal negligence case was a ***higher*** standard than the standard of care in an ineffective assistance of counsel case.

7, 2019, Order, App. pp. 102-107). Trial remained scheduled for July 12, 2019.[3]

On June 13, 2019, Clark moved to reconsider, amend, and enlarge the district court ruling on partial summary judgment arguing the standard of care for ineffective assistance of counsel was equivalent to the standard of care in a legal malpractice case. (June 13, 2019 Motion, App. pp. 108-113). On June 24, 2019, the State resisted the motion to reconsider. (Resistance to Motion to Amend, App. pp. 114-117). On its own motion, the District Court moved trial to October 29, 2019.

On August 29, 2019, the District Court ***granted*** Clark's Motion to Reconsider and reversed its prior ruling and granted Clark partial summary judgment, finding as a matter of law that the standard of care for ineffective assistance of counsel and legal malpractice were identical for purposes of offensive issue preclusion. (August 29, 2019 Order, App. pp. 118-129). The District Court also found that the State of Iowa, as named in the postconviction proceeding, and the State of Iowa, as named in the legal negligence proceeding, were functionally equivalent in both proceedings. (Id.) Finally, the District Court rejected the State's policy considerations for not applying issue preclusion because (1) the State had control over both proceedings

[3] The original trial date was scheduled 21 months after the Petition was filed.

involving state employees; (2) the state employed public defender does not have the same risks as a private attorney in negligence cases; and (3) there could be different procedures applied to state-employed public defenders than applied to private criminal defense attorneys so as not to affect the defense bar as a whole. (Id.)

On September 19, 2019, the State filed an application for interlocutory appeal and request for stay. (Application for Interlocutory Appeal filed September 19, 2019). The application and stay were initially rejected by the Iowa Supreme Court. (Supreme Court Order, dated October 11, 2019). On October 23, 2019, a panel of the Iowa Supreme Court overruled the earlier denial of interlocutory review and granted the State's appeal. The grant of interlocutory appeal came just six days before the scheduled trial date.

STATEMENT OF THE FACTS

Plaintiff Donald Clark (hereinafter "Clark"), was convicted in March 2010 of the crime of Second-Degree Sexual Abuse, in violation of Iowa Code § 709.3 in Johnson County Case No. FECR087965. (App. p. 1). The sentence for Clark's conviction was a mandatory 25-year prison term requiring actual incarceration for 70% of that time before Clark could even be considered for parole. Clark's defense attorney was John Robertson from the Johnson County Public Defenders' Office. (Clark Sentencing Order, p. 1-2).

Clark appealed his conviction to the Iowa Court of Appeals. The Iowa Court of Appeals affirmed the trial court's opinion without a formal published opinion. *See State v. Clark*, No. 10-0511, 2011 WL 5515221 (Iowa Ct. App. 2011). Clark was granted further review by the Iowa Supreme Court. The Iowa Supreme Court affirmed the judgment of the Court of Appeals with two justices vigorously dissenting on the issue of whether or not Clark had established a claim of ineffective assistance of counsel on direct appeal. *See State v. Clark*, 814 N.W.2d 551 (Iowa 2012).[4]

On September 12, 2012, Clark filed an Application for Post-Conviction Relief pursuant to Iowa Code chapter 822 alleging, *inter alia*, that Robertson failed to perform the essential duties of a criminal defense attorney. (Application for Post-Conviction Relief, App. pp. 2-7). On October 19, 2012, the State of Iowa, the very same party in *this* legal negligence case, filed an Answer in the post-conviction case denying that Attorney Robertson breached any essential duties while defending Clark's criminal case. (Answer to Application for Post-Conviction Relief, App. at pp. 8-10). The *same parties to this lawsuit* then conducted pre-trial discovery in the prior post-conviction

[4] The Iowa Code has since been amended to preclude claims of ineffective assistance of counsel on direct appeal.

matter[5]. An evidentiary hearing was held on September 17, 2014. The issues of whether or not Robertson's breached his essential duties as Clark's criminal defense lawyer were fully and fairly litigated in post-conviction relief. (Order dated May 26, 2016, App. pp. 39-67).

The State of Iowa specifically argued in its post-conviction brief that Robertson ***did not fail to perform any essential duties in representing Clark***. (Brief in Resistance to Post-Conviction Relief, App. at pp. 14-38). Under these circumstances, there can be no question that both the State of Iowa and Clark had a full and fair opportunity to contest whether Robertson's representation of Clark constituted a breach of Robertson's duty to provide Clark with a reasonable defense.

On May 26, 2016, the Court entered its Ruling on Application for Post-Conviction Relief granting Mr. Clark's application and ordered a new trial, specifically finding that, on numerous occasions, Robertson "***failed to perform an essential duty(s) owed to his client.***" (See below for specifics.)

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[5] The State contradicts itself throughout its brief. Initially, it asserted that Roberson was ***not*** a party to the post-conviction proceeding. Then it argued that the trial court held that Robertson ***was*** a party to the proceeding claiming it was unethical for Clark's former attorney, Clemens Erdahl (now deceased) to have spoken to Robertson before the proceedings because Robertson was a "***represented party***" at the time. *See* State's Br. pp. 27-28. Neither the District Court nor Clark have ***ever*** claimed that Robertson was a ***party*** to the post-conviction proceeding. The State's claimed argument in this regard is one of numerous "red herring" or *ignoratio elenchi* arguments pursued by the State.

The Post-Conviction Decision

The district court made extensive and specific findings of fact and conclusions of law in which it found numerous specific instances where Robertson failed to perform his essential duties as Clark's criminal defense attorney. The Court stated in relevant part:

a. "The Court concludes that, in failing to visit the scene of the alleged crime and to take photographs of the crime scene, and in failing to object to the entry of the State's photos of the crime scene, Attorney Robertson fell ***well*** below an objective standard of reasonableness; thus, Attorney ***Robertson failed to perform an essential duty owed to his client***." (Order dated, May 26, 2016, App. at pp. 39-67). (emphasis added).

b. "Given the clear and serious importance of the configuration of the room and its visibility to others in the school, the fact that Attorney Robertson did not visit and photograph the area or, alternatively, designate an investigator to do so, is ***outside the wide range of professionally competent assistance***." (Id.). (emphasis added.)

c. "The Court can deduce nothing in this failure by attorney Robertson that could go to trial strategy or judgment; rather, the Court concludes failure to view the area to be a failure to make a reasonable and necessary investigation of the facts relevant to plausible options. In a case without physical evidence of abuse by Mr. Clark, the lack of the visit to and independent photography of the area allegedly involved is a product of inattention to the responsibilities of an attorney guaranteed to Mr. Clark under the Sixth Amendment to the United States Constitution, ***stated simply, it was unreasonable and inattentive for counsel not to drive across town and view the alleged crime scene.*** (Id.). (Internal Citations Omitted) (emphasis added).

d. Additionally, the Court concludes Mr. Clark has shown prejudice as a result of Attorney Robertson's failure to investigate and photograph the crime scene. The Court concludes ***there is a reasonable probability that the result of the case would have been different had the jury been offered a differing view of the classroom, such that the probability of said change undermines confidence in the outcome reached by the jury.***" (Id.). (emphasis added).

e. Given the clear importance to the issues on the criminal case of the configuration of the area of the alleged crime, including the location of and visibility of Mr. Clark's office, the presence of Mr. Clark at depositions which included testimony about such matters would have been crucial. No evidence is offered that Mr. Clark did waive his presence at such depositions, nor any reasons why he would. The failure to have Mr. Clark attend depositions or to discuss the testimony gleaned from the depositions precluded Mr. Clark from having an opportunity to provide Attorney Robertson with what may have been other relevant evidence that could refute the deponents' testimony. (Id.).

f. The Court can discern no trial strategy that could be supported by failing to have Mr. Clark attend depositions. As with crime scene investigation issues, there is a reasonable probability that the result of the trial would have been different if Mr. Clark had attended or had been informed of the information obtained at the depositions, particularly as it pertained to the perspectives of the classroom in the library arear of the school. (Id.).

g. The Court also is troubled by the apparent statements of Attorney Robertson that he had obtained waiver of Mr. Clark's presence at the depositions. The preponderance of the evidence in this matter suggests that Mr. Clark in fact had not waived his presence at such depositions. The Court concludes that, in addition to the prejudice to Mr. Clark which resulted from his failure to be able to provide input at the time of such depositions, ***Attorney Robertson failed to meet his responsibilities as an attorney of Mr. Clark to obtain and***

***document waiver of Mr. Clark's presence at the deposition*s.** (Id.). (emphasis added).

h. The Court concludes that Mr. Clark has met his burden of establishing grounds for relief for ineffective assistance of counsel based upon failure to communicate and consult with Mr. Clark in connection with discovery depositions and/or in waiving Mr. Clark's presence at such depositions, without his permission to do so. ***The Court finds that such failures of counsel resulted in failures to perform essential duties, resulting in prejudice.*** (Id.). (emphasis added).

i. While the Court concludes, above, that Mr. Clark has not met his burden of establishing that Attorney Robertson failed to perform an essential duty in failing to prevent introduction of prior bad acts testimony*, **the Court concludes that Mr. Clark has met his burden of showing that Attorney Robertson failed to perform an essential duty in failing to investigate, discover and introduce character evidence in favor of Mr. Clark at the time of the criminal trial.*** Allowing the State to introduce the evidence of prior bad acts may have been strategic. The Court sees no strategic basis, however, with such evidence having been received, to support an argument Mr. Clark could in any way be benefited by not having character evidence and testimony offered on his behalf. (Id.). (emphasis added).

j. In effect, by receipt of the prior bad acts evidence and by not having the benefit of the character evidence, Mr. Clark received the "worst of both worlds," in that prior bad acts were introduced without the benefit of character evidence which might have been designed to meet such evidence. ***Attorney Robertson's representation as it pertains to this issue fell below an objective standard of reasonableness*.** (Id.). (emphasis added).

k. It appears no character evidence may have been presented because Mr. Robertson had not spoken to any such potential character witnesses. The court cannot fathom a trial strategy or other reason that would have led Attorney Robertson to

decline to perform an investigation into the issue of character witnesses, particularly given the "he said, he said" nature of the evidence at the time of trial. ***When that evidence was introduced at the time of trial, however, the door to the character evidence was opened and the Court can see no reason why such character evidence would not properly and reasonably have been investigated and introduced.*** (Id.). (emphasis added).

l. The court also concludes there is a reasonable probability that the result of the trial would have been different if the character witness issue had been investigated. As reflected in the testimony of Ms. Thrams, had such evidence been investigated, discovered and offered, the jury also could have had another perspective of the classroom setting, ***and could have had another view of the likelihood of Mr. Clark committing the crime of which he was accused. The lack of investigation into and presentation of such evidence undermined confidence in the outcome of the trial***. (Id.). (emphasis added).

m. The Court concludes that Mr. Clark has met his burden of establishing grounds for relief for ineffective assistance of counsel based upon failure of counsel to investigate and offer character evidence in the face of the "bad acts" evidence offered by the State. ***The Court finds that such failure to investigate and present such evidence represented failure to perform an essential duty, resulting in prejudice.*** (Id.). (emphasis added).

The district court's decision in the post-conviction matter was rendered despite the fact that the State of Iowa specifically argued that Robertson was ***not*** ineffective in relation to the photographic evidence and that it ***did not believe there was much for Attorney Robertson to investigate***. (Brief in Resistance to Post-Conviction, App. pp. 14-38). On the issues of failure to

present character evidence the State specifically argued that there "would not be much benefit to such evidence being offered, and it would be speculative to find that the evidence would have had a positive impact on the jury." (Id.). Further the State of Iowa argued that ***Clark did not show "that Attorney Robertson failed to perform an essential duty,*** and ***the failures alleged by Mr. Clark were not errors in the first place***." (Id.). (Emphasis Added).

Significantly, the State of Iowa did not appeal the post-conviction legal conclusion that Clark received ineffective assistance of counsel nor the multiple findings of fact which specifically found that Robertson *failed to perform essential duties* during his representation of Clark. Shortly after the Court granted Clark a new trial, the State dismissed all charges against Clark specifically stating that it lacked evidence to convict. (State's Motion to Dismiss, App. at pp. 68, Clark Order to Dismiss p. 1).

ARGUMENT

I. The Ineffective Assistance of Counsel Ruling Against a State Public Defender is Preclusive on the Issue of Breach in a Legal Negligence Action.

<u>Preservation of Error</u>

Clark agrees that the State preserved error in its Brief sections I(A), (B), and (D) by resisting Clark's motion for summary judgment and resisting Clark's motion to reconsider, enlarge or amend. *See* Resistance to MSJ and

Resistance to motion to reconsider, enlarge or amend. However, the State *did not preserve error* on Brief section I(C). The State raises *for the first time on appeal*, Brief Section I(C) which alleges, “the ineffectiveness finding was not essential to the PCR judgment.” The district court did not address this argument in either the order denying summary judgment or the order granting Clark’s motion to reconsider, enlarge or amend because the State did not make the argument in the district court. As a result, Issue I(C) was not preserved for appeal and should be ignored. *See Young v. Iowa City Cmty. Sch. Dist*., 934 N.W.2d 595, 602 (Iowa 2019) (“Our preservation rule requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal.”) quoting, *Metz v. Amoco Oil Co*., 581 N.W.2d 597, 600 (Iowa 1998).

Standard of Review

The State of Iowa claims that this appeal should be reviewed for correction of errors at law. In doing so they rely on the broad application of “error at law” applied to the review of summary judgment decisions. In general, the “error at law” standard is applied in summary judgment so as to provide a *de novo* type of review in order to determine whether any genuine issues of material facts exist. *Skadburg v. Gately*, 911 N.W.2d 786, 791 (Iowa 2018). Under such a review, “[t]he moving party has the burden of showing

the absence of a genuine issue of material fact." *Id.* citing *Hlubek v. Pelecky*, 701 N.W.2d 93, 95 (Iowa 2005). The Court then reviews the facts contained in the record in the light most favorable to the nonmoving party and draws every legitimate inference in favor of the non-moving party. *Id.* (internal citations omitted). In this appeal the State does not claim there are any genuine issues of material fact to be decided by this Court. Therefore, the sole issue to be decided is whether Clark was entitled, *as a matter of law*, to partial summary judgment based upon the *legal* conclusions of the District Court.

During a review under the "error at law" standard, little or no deference is given to the trial court by the reviewing court relating to its determination, interpretation, or application of the law. "We are not bound by trial court's determinations of law, however, nor precluded from examining whether trial court applied erroneous rules of law that materially affected its decision." *Kurtenbach v. TeKippe*, 260 N.W.2d 53, 55 (Iowa 1977).

Clark contends that the proper standard of review in cases involving the offensive application of issue preclusion is an "*abuse of discretion"* standard. *Casey v. Koos*, 323 N.W.2d 193, 197 (1982) ("The application of the doctrine of offensive issue preclusion, a term used in *Hunter* interchangeably with collateral estoppel, is a matter left largely to the ***trial court's discretion***…. ***On appeal we reverse only for abuse of discretion.***") (internal citations omitted).

Reversal for abuse of discretion is limited to situations where the Court finds "discretion was exercised on grounds …clearly untenable or, to an extent clearly unreasonable." *Simon Seeding & Sod, Inc. v. Dubuque Human Rights Commission*, 895 N.W.2d 446, 456 (Iowa 2017) (internal citations omitted). When granted discretion, the trial court's right to exercise that discretion is clearly protected. "This court is not to substitute its collective judgment for that of the district court. Instead, under an abuse of discretion standard, this court must affirm the district court's discretionary ruling absent a firm and definite conviction the ruling is beyond the pale of reasonable justification under the circumstances presented—a decision so flawed and prejudicial to the administration of justice that this court must provide relief." *In Re Grand Jury of Dallas County John Doe*, --- N.W.2d --- (Decided February 14, 2020) (J.J. McDonald in dissent citing *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000)).

The standard of review is of extreme importance in this case because of the differing levels of deference given the trial court's application of the law. Given the wholesale lack of a factual dispute in this matter, the correct standard of review should be for abuse of discretion ***not*** for an error of law.

<u>General Legal Standards – Legal Negligence/Malpractice</u>

“To establish a prima facie claim for legal negligence, a plaintiff must produce substantial evidence demonstrating (1) an attorney-client relationship existed giving rise to a duty; (2) the attorney violated or breached the duty, either by an overt act or a failure to act; (3) the breach of duty proximately caused injury to the client; and (4) the client did sustain an actual injury loss or damage.” *Trobaugh v. Sondag*, 668 N.W.2d 577, 580 (Iowa 2003); *see also* Iowa Civil Jury Instruction No. 1500.1.

In criminal cases, the Iowa Supreme Court also recognized a “relief from conviction” rule for all criminal defense attorneys. The rule requires that, prior to filing a criminal legal negligence claim, the plaintiff first obtain relief from the underlying conviction. *Trobaugh v. Sondag*, 668 N.W.2d 577 (Iowa 2003).

For legal negligence in criminal cases against *court appointed counsel*, the Iowa legislature provided an additional legislative requirement; the plaintiff in a legal negligence claim against a public defender or a court appointed attorney plaintiff must obtain postconviction relief specifically as a result of ineffective assistance of counsel. Iowa Code § 815.10(6). “Thus, the legislature has established limited immunity for court appointed counsel unless a post-conviction court first determines that the client’s ‘conviction

resulted from ineffective assistance of counsel." *Barker v. Capotosto*, 875 N.W.2d 157, 168 (Iowa 2016).

General Standards - Offensive Issue Preclusion

Issue preclusion, sometimes referred to as collateral estoppel, is a form of res judicata. *Winnebago Indus., v. Haverly*, 727 N.W.2d 567, 571 (Iowa 2006). "Traditionally, three conditions were required before the doctrine of issue preclusion could be applied in Iowa: (1) the identity of issues raised in the successive pleadings; (2) determination of these issues by a valid final judgment to which such determination is necessary; and (3) identity of the parties or privity[6], often referred to as 'mutuality of estoppel.'" *Goolsby v. Derby*, 189 N.W.2d 909, 913 (Iowa 1971).

In *Hunter v. City of Des Moines*, 300 N.W.2d 121 (1981), the Iowa Supreme Court held that offensive issue preclusion may be invoked, even if mutuality of the parties does not exist, as long as four-factors are met: (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 action; and (4) the determination made

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[6] A "privy" in this context was defined as "one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties as by inheritance, succession, or purchase." *Goolsby v. Derby*, 189 N.W.2d 909, 914 (Iowa 1971).

of the issue in the prior action must have been necessary and essential to the resulting judgment. *Hunter,* 300 N.W.2d at 123; see also *United Fire & Cas. Co. v. Shelly Funeral Home*, 642 N.W.2d 648, 655 (Iowa 2002).

If a litigant asserts offensive issue preclusion, and mutuality of the parties is not present, two additional factors must also considered: "(1) whether the opposing party in the earlier action was afforded a full and fair opportunity to litigate the issues; and (2) whether any other circumstances are present that would justify granting the party resisting issue preclusion an occasion to relitigate the issues." *Hunter* at 126.

A. Robertson's ineffective assistance of counsel was fully and fairly litigated in the PCR action by the State of Iowa.

The "other circumstances" which may determine if the opposing party was truly afforded a full and fair opportunity to litigate the issues are outlined in the Restatement (Second) of Judgments § 29[7] and are set forth as follows:

> (1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the action involved;
>
> (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and that might likely result in the issue being differently determined;

[7] Restatement (Second) of Judgments §29 was previously found in Restatement (Second) of Judgments §88.

(3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have affected joinder in the first action and himself and his present adversary;

(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

(5) The prior determination may have been affected by the relationships among the parties to the first action that are not present in the subsequent action, or was based on a compromise verdict or finding;

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(7) Other circumstances make it appropriate that the party be permitted to relitigate the issue.

Restatement (Second) of Judgments § 29.

Under the Restatement approach, the following questions must be answered before issue preclusion is permitted: (1) whether the party [being precluded] was afforded a full and fair opportunity to litigate the issue[s] and whether any other circumstances are present which would justify granting the [party being precluded] occasion to relitigate those issues. *Id.* at 126 (*quoting* Restatement (Second) of Judgments § 88 (Tent. Draft No. 2, 1975). The relevant inquiry is whether the State of Iowa in this legal negligence case was afforded, directly or through privity, a full and fair opportunity to litigate whether or not Robertson breached his duties as a criminal defense attorney during the post-conviction proceedings. The obvious answer to this inquiry is a wholehearted yes.

In its brief, the State never directly addresses this issue. Instead it attempts to misdirect the Court by trying to confuse the identities of the parties in both proceedings. The simple fact remains that the Johnson County Attorney, clearly represented the State and the State's interest while trying to preserve the State's conviction at post-conviction. The Iowa Attorney General's interest in protecting the State from liability, are one in the same with the State's prior interest in trying to preserve Clark's wrongful conviction. The best proof that the State of Iowa was protecting the very same interests in both cases lies in the fact that the State of Iowa made nearly *the same arguments in both cases*.

Despite the unsupported claim that the State of Iowa (post-conviction) was not protecting the interests of the State of Iowa (legal negligence), a review of the arguments made in both cases shows the fallacy this claim. The arguments made in both cases, by the very same party, are mostly indistinguishable. Compare this argument made by the State of Iowa in the post-conviction:

> "The only evidence we have at this point of Robertson's alleged failure to investigate is the self-serving testimony of Applicant. We simply do not know what Robertson looked into prior to trial. Given the evidence that was presented, however, it does not appear as though there would have been much for Robertson to investigate anyway. The State's photographs accurately represented the shape of the office which, by any description, made it very difficult to see the whole thing from the hallway. It is entirely possible Robertson

> thought there was little value to arguing over how busy the corridor next to the closed office door really was. It is entirely possible he saw no value in pointing out that when Applicant was in the room the furniture would have been situated in such a way that there was lots of open floor space --space on which the assaults could have occurred." (Respondent's Post-Trial Brief by then-Assistant Johnson County Attorney, Andrew B. Chappell on behalf of the State of Iowa, filed March 4, 2016, App. pp. 14-38).

As opposed to this argument made by the State in the legal negligence case:

> "Assuming John Robertson did not visit the scene of the crime, the mere decision not to visit the scene of the crime was not negligent. The photographs taken by D.J. Steva accurately portrayed the crime scene on the date such photographs were taken. A criminal defense attorney does not necessarily have a duty to visit a crime scene. The discovery available to Robertson was sufficient to inform him about relevant aspects of the scene." (Plaintiff's Supplemental Appendix in Support of Summary Judgment, App. pp. 91-101).

Compare this argument made by the State in the post-conviction case:

> "Further, **the record is devoid of evidence of any real prejudice** from this issue. Applicant's argument appears to be that the photographs presented, and unrebutted, created a sort of false narrative about the office that was alleged to be the scene of Applicant's abuse. This is simply not the case. All of the photographs provided to this Court confirm that those admitted by the State in the criminal trial accurately represented the shape of the room, the size of the window in the door, and one's inability to see into the room with the lights off and to see the entire room even with the lights on. These are the reasons the photographs, and accompanying testimony, were offered and there was nothing misleading about that evidence. Thus, there was no false narrative to have been corrected and no prejudice caused by either the admission of the State's photographs or Robertson's failure to admit others. In the end, the evidence shows Robertson was not ineffective in relation to the photographic evidence presented at trial." (Respondent's Post-Trial Brief by then-Assistant Johnson County Attorney, Andrew B. Chappell on behalf of the State of Iowa, filed March 4, 2016, App. pp. 14-38). (Emphasis Added).

With the Argument made by the State of Iowa in this legal negligence case as follows:

> "Mr. Robertson's performance did not cause Plaintiff to be convicted. Had Mr. Robertson represented Plaintiff in the manner that Plaintiff complains, ***it is highly unlikely the result of the trial would have been different***." (Plaintiff's Supplemental Appendix in Support of Summary Judgment, App. pp. 97-101). (Emphasis Added).

Compare this argument made by the State of Iowa in the post-conviction case with:

> "As for the communication issues Applicant describes, Robertson sent Applicant notice of the depositions but it simply did not arrive in time. Applicant did not testify that he had been making efforts to find out when the depositions would be held, but he had been unable to get in touch with Robertson. Given how close the depositions were held in relation to trial it does not seem likely that they could have been rescheduled. Since Applicant was not in custody it would have been reasonable for Robertson to assume, he had chosen not to come." (Respondent's Post-Trial Brief by then-Assistant Johnson County Attorney, Andrew B. Chappell on behalf of the State of Iowa, filed March 4, 2016, App. pp. 14-38).

With the Argument made during this legal negligence case:

> "Assuming Plaintiff did not explicitly waive his attendance at depositions in the criminal case, the decision to conduct depositions without the presence of Plaintiff was not negligent. There are strategic, non-negligent reasons to conduct depositions in the absence of a criminal defendant." (Plaintiff's Supplemental Appendix in Support of Summary Judgment, App. pp. 97-101).

As the District Court recognized, if these very same arguments failed to convince the district court in the post-conviction relief action that Robertson breached his duty, what justifies now allowing the State of Iowa to

get a second bite at the apple on the very same issues with the very same arguments that failed in the postconviction? The State of Iowa had the same opportunity to litigate the issue of Robertson's ineffectiveness when the exact same arguments were made by the State in both the post-conviction case and legal negligence case. Instead of raising specific factual issues or identifying any specific prejudice the State of Iowa supposedly suffered by some unknown failures during the State's defense in the post-conviction case, the State made the very same (losing) arguments in this case. As shown from the State's own arguments—either by the Johnson County Attorney in postconviction—or the Iowa Attorney General in this legal malpractice action, the State of Iowa was given a full and fair opportunity to litigate all of Robertson's conduct in the PCR action.

1. **The *State of Iowa* in the PCR action was not a different party in interest than the *State of Iowa* in this legal negligence case.**

The State argues that issue preclusion should not apply under the authority of the Restatement (Second) of Judgments § 36(2) comment (f) and the Restatement (Third) of the Law Governing Lawyers. Both arguments miss the mark. First, the State incorrectly identifies the State Public Defender as the "agency" in negligence action and the Johnson County Attorney's Office as the "agency" in post-conviction. Clearly, a fair reading of the Restatement requires that the proper inquiry should be a comparison between

the Johnson County Attorney's Office in the post-conviction action and the Iowa Attorney General in the subsequent negligence action. *See* Restatement (Second) Judgments § 36(2) comment (f). Clark asserts that there is no reasonable support to conclude that enforcing the criminal law by protecting its conviction is so distinct from defending a malpractice brought against the State so as to prevent issue preclusion[8]. *See* Iowa Code § 13.2 (the scope of the Attorney General's responsibilities includes both supervising county attorneys in criminal cases and defending state employees in civil claims).

In short, both agencies' responsibilities are not so distinct from one another so as to interfere with the proper allocation of authority between them. It is clear, the Iowa Attorney General has supervisory authority over the Johnson County Attorney's Office in criminal cases, including post-conviction relief. Clearly the Iowa Attorney General had the authority to control the litigation in both cases.

Second, the Restatement (Third) of the Law Governing Lawyers, section 53 states that a judgment in a postconviction proceeding is binding in the malpractice action *to the extent provided by the law of judgments*. (Emphasis Added). The Restatement (Third) does not expressly address what do when the criminal defense attorney is a public defender, other than to say

[8] In fact, the State has never tried to respond to this claim.

"some jurisdictions hold public defenders immune from malpractice suits." *Id.* Iowa has given public defenders only limited immunity lasting until the criminal defendant obtains postconviction relief. *Barker v. Capotosto*, 875 N.W.2d 157, 168 (Iowa 2016).

The sound approach, consistent with Iowa law, is to apply the Restatement (Second) of Judgments § 88 (now 29), which clearly contemplates that when mutuality is lacking, the relevant inquiry goes back to whether the precluded party had a full and fair opportunity to litigate. Clearly the State had such an opportunity and fully exercised that authority.

2. Whether Clark's PCR counsel communicated directly with Robertson during the PCR proceeding is wholly immaterial to whether offensive issue preclusion should apply.

Clark does not contend, and the district court did not find, that the Robertson was a ***party*** to the PCR proceeding or that the Johnson County Attorney's Office represented him. Instead, Clark argued that the State of Iowa was effectively the same party in each action and that the Johnson County Attorney represented the State's interests by arguing Robertson was not ineffective in the PCR proceeding. The State of Iowa, now represented by the Iowa Attorney General is trying to make the very same claims in this case that Robertson didn't breach his duty to Clark but their arguments were

validly precluded on partial summary judgment. The Court should reject any argument that Robertson was ever a "party" in either of these cases.

3. Other jurisdictions addressing criminal legal negligence claims have not addressed whether a PCR ruling is offensively preclusive against a state employed *public defender*.

In neither it's Brief in Resistance to Summary Judgment nor in its Resistance to Reconsideration of summary judgment upon reconsideration, did the State ever make the blanket claim that offensive issue preclusion and legal negligence cases are wholly incompatible. Instead, the State argued that: (1) the parties were not the same in both actions; and (2) a breach of duty in in post-conviction did not necessarily correspond to a breach of duty in the legal negligence case. These were the only two issues specifically raised during summary judgment.

Now, for the first time, the State cites to cases from other jurisdictions which purport to support a broad new claim that a finding of ineffective assistance of counsel ***never*** has a preclusive effect in legal negligence cases when applied offensively. To the extent this particular issue has never been raised in prior proceedings, it should be ignored. *See Young v. Iowa City Cmty. Sch. Dist.*, 934 N.W.2d 595, 602 (Iowa 2019) ("Our preservation rule requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal.") ("It is not a sensible exercise of

appellate review to analyze facts of an issue without the benefit of a full record or lower court determination.") *Meier v. Senecaut*, 641 N.W.2d 532 537 (Iowa 2002). (internal citations omitted).

The State now relies on three out-of-state decisions from Alaska, Oregon, and Minnesota where courts have held that a post-conviction decision is not offensively preclusive in a subsequent negligence action against a *private defense attorney* for the broad proposition that offensive issue preclusion and in a legal negligence case is always prohibited. Each of the cited cases are clearly distinguishable.

Alaska and Oregon each found that for offensive issue preclusion to apply after post-conviction relief, the party sought to be precluded was required to have been a party or in privity with the party to the prior post-conviction proceeding. *See Stevens*, 984 P.2d 872; and *Stewart*, 123 P.3d 140. For the reasons already shown, Iowa no longer requires that the same *party* be involved in both proceedings or even be in privity for offensive issue preclusion to apply. *Hunter,* 300 N.W.2d at 123.

In *Noske v. Friedberg*, 670 N.W.2d 740, 746 (Minn. 2003), the plaintiff obtained post-conviction relief based upon the ineffective assistance of his attorney, Friedberg. Noske then commenced a legal malpractice action against ***Friedberg and his law firm*** based on Friedberg's alleged ineffective

assistance at trial. *Noske* at 742. In *Noske*, the Minnesota Supreme Court was basically faced with one simple issue and the issue had nothing to do with issue preclusion:

> "The issue we must decide is whether a legal malpractice action against a criminal defense attorney based on a claim of ineffective assistance of counsel at the plaintiff's underlying criminal trial *accrues* at the time of the plaintiff's conviction or when postconviction relief is subsequently granted."

In three brief paragraphs at the end of the *Noske* decision (arguably *dicta*), the Minnesota Supreme Court took up offensive issue preclusion in a very truncated manner stating:

> "We have previously held that a finding of ineffective assistance of counsel does not *necessarily* "entail the success of a malpractice action against the defense attorney." *White v. State,* 309 Minn. 476, 481, 248 N.W.2d 281, 285 (Minn. 1976). (emphasis added). In *White,* we noted:
>
> > "Review of the issue of ineffectiveness is not to pass judgment on the abilities of a defense lawyer. Rather, the overall concern is limited to whether our adversary system of criminal 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." *Id.*

The Minnesota Supreme Court did not make the blanket statement of law attributed to it in the State's brief. ("The court carefully differentiated between the interests in the two proceeding; money damages versus our adversary system of justice.") *See* State's Br. p. 31. In short, the Minnesota

Supreme Court gave very short shrift to the offense use of issue preclusion against a ***private*** attorney and did not address the issue in the context of a state employed public defender. If this finding was not dicta, Minnesota is in the very clear minority of States that consider the standard of care in post-conviction to be different that the standard of care in legal negligence.

Notwithstanding the law in Iowa on offensive issue preclusion is quite different than in Oregon and Alaska, the fact that Robertson is a public defender and not private defense counsel completely changes the rationale underlying the decisions cited by the State. The reason is that each of the three cited cases presumes that defense counsel would have control and a stake in the legal malpractice case. No such control or stake exists in this case.

Unlike private defense counsel, Robertson has no ability to control litigation strategy in either the PCR proceeding or the legal malpractice case. Second, unlike private counsel, Robertson has no personal financial liability at stake in this legal malpractice action. *See* Iowa Code §§ 669.5 and 669.11 ("the suit commenced upon a claim shall be deemed to be an action against the state" and "any award to a claimant under this chapter, and any judgment in favor of any claimant under this chapter shall be paid promptly out of appropriations which have been made for such purpose . . ."). Third, unlike private counsel, if there was going to be any specific adverse consequences to

Robertson's reputation personally, such consequences would have flowed solely from the specific finding by a judicial body that he violated Clark's 6th Amendment right to effective assistance of counsel, not from finding of malpractice. Robertson had no way to rebut the adverse reputational interest that occurred in the PCR proceeding. He couldn't appeal the PCR, only the State could. He couldn't represent himself in malpractice, only the State could.

The District Court appropriately acknowledged that, because of the significant financial and reputational interests at stake in a negligence action, offensive issue preclusion may not be appropriate in cases involving *private counsel*. The Alaska, Oregon, and Minnesota cases cited as support for a broad assertion that offensive issue preclusion is incompatible in a legal malpractice context are woefully inadequate and simply don't stand for the proposition asserted.

4. There is sufficient privity between the *State of Iowa* in the PCR action and the *State of Iowa* in this legal negligence case.

Unlike Oregon and Alaska, Iowa clearly recognizes that strict mutuality is no longer a barrier to the application of offensive issue preclusion. In Iowa if there is sufficient privity between State of Iowa in post-conviction with the State of Iowa in this legal negligence case, mutuality exists. "Privity signifies that relationship between two or more persons such that a judgment

involving one of them may be justly conclusive upon the other, although the other was not a party to the lawsuit." **Black's Law Dictionary 6th Ed.** (citing *Gill v. Duffus Services*, *Inc. v. A.M. Nural Islam*, 675 F.2d 404, 405 (D.C. Cir. 1982).

When a criminal defense attorney is also a State employee, and ineffective assistance of counsel is the essential issue in the PCR proceeding, the State has two clear and unmistakable interests in the outcome of the PCR litigation. The State had a compelling interest in not only protecting its conviction in a child sexual abuse case, but also protecting against subsequent civil liability based upon a breach of duty by its employee.

Once Robertson, as a State employee, is alleged to be ineffective, the State of Iowa, as his employer, is put on notice that the court's subsequent determination in the post-conviction matter may be used in a later legal malpractice case. Clearly, the State had an interest, by virtue of *respondeat superior* liability to protect its civil liability exposure in the PCR proceeding just as it had an interest in protecting the conviction on behalf of any alleged victim. This was specifically acknowledged by the State of Iowa in its post-trial brief. (State of Iowa's Post-Trial Brief, App. pp. 14-38). In the PCR proceeding, the Johnson County Attorney specifically argued:

"Even if a claim for legal malpractice could be maintained against

> him [Robertson] based upon providing ineffective assistance of counsel to Clark, Robertson would not be subject to any actual liability."

(State of Iowa's Post-Trial Brief, App. pp. 14-38).

The specific acknowledgement in post-conviction that Robertson would never be subject to any actual liability is an admission by omission that any liability later imposed belonged to the *State and the State only.*

Privity does, and should exist when a State employee is alleged to have failed to perform an essential duty when that failure to perform is an essential part of a PCR judgment.

B. The issue in the PCR action is identical to the issue of whether Robertson breached his duty of care issue of in this case.

The State's argues the ***breach*** element of legal negligence is so varied from the ***breach*** element in ineffective assistance of counsel that issue preclusion is necessarily inapplicable. For the reasons that follow, the District Court did not abuse its discretion when it determined the issues are identical for the purposes of applying issue preclusion to this case.

Iowa adopted the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) standard for determining ineffective assistance of counsel. Ineffective assistance claims "require a showing by a preponderance of the evidence both that counsel failed an essential duty and that the failure resulted in prejudice." *State v. Schlitter*, 881 N.W.2d 380, 388

(Iowa 2016). "An attorney fails to perform an essential duty when he or she "***performs below the standard demanded of a reasonably competent attorney***." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001) (Emphasis Added).

The standard for duty and breach in a legal malpractice case determines whether ***the attorney employed the degree of skill, care and learning ordinarily possessed and exercised by other attorneys in similar circumstances***. *See Devine v. Wilson*, 373 N.W.2d 155, 157 (Iowa App. 1985) and *Martinson Manufacturing Co. v. Seery*, 351 N.W.2d 722, 775 (Iowa 1984) (Emphasis Added). The inquiry undertaken under both circumstances is virtually indistinguishable as both standards focus on what ordinary members of the legal profession would have done at the time the action (or inaction) was done.

The State cited two cases in an attempt to support its claim that the standard of care is different in post-conviction cases than legal negligence cases. The State cited *Krahn v. Kinney*, 538 N.E.2d 1058 (Ohio 1989) in support of such an assertion. In *Krahn*, the only issue on appeal was whether a criminal defendant was required to obtain a reversal of his or conviction in order to state a cause of action for legal malpractice, *the case does not even address whether or not the required duty of an attorney in a PCR case is*

identical to the duty in a legal negligence case. (*Id.*). In *dicta*, after finding a reversal of a conviction was not required, the court acknowledged that in "most cases, the failure to secure a reversal of the underlying criminal conviction may bear upon and even destroy the plaintiff's ability to establish the element of proximate cause." *Id. Krahn* at 1062. The *Krahn* court's only holding is that the failure to first obtain a finding of ineffective assistance of counsel *did not preclude the filing of a legal negligence case altogether*. *Id.* The *Krahn* court went on to underscore that "***whether a conviction resulted from a defense attorney's incompetence is an issue which can be raised and litigated and determined in a prior criminal action where a claim of 'ineffective assistance of counsel' has been made. Thus, collateral estoppel can preclude further litigation on the issue***." *Id.* (Emphasis Added).

Likewise, in *Mylar v. Wilkinson*, 435 So. 2d 1237 (Ala. 1983) the issue before the Alabama Supreme Court was whether, on the pleadings, the defendant "could show that the result would have been different in the underlying action had his lawyer not been guilty of malpractice." *Id.* at 1239. The issue in contention in *Mylar* was *proximate cause* not *breach of duty*. In discussing that relief in a criminal prosecution was *not necessarily conclusive* on his claim for civil damages, the court held the prior ineffective assistance finding was not preclusive only on the issue of *proximate cause*. ***The Court***

did not even discuss the preclusive nature of a breach in both ineffective and negligence cases. Instead the Mylar court held that "[o]ne who claims damages for negligence must allege and prove that the actionable wrong proximately caused the damage for which recompense is sought. *" Id.* (*citing Herston v. Whitesell*, 374 So. 2d 267 (Ala. 1979) (Emphasis Added). Clark does not argue, and never has, that a finding a finding of ineffective assistance of counsel precludes the State from contesting the issue of proximate cause in this legal negligence action, rather he argues it is preclusive on the issue of *breach* only.

The State's argument that somehow a public defender's workload is a relevant factor in the analysis in either an ineffective assistance standard or breach in a legal malpractice action is equally spurious. In *State v. Clay*, 824 N.W.2d 488, 495 (Iowa 2012), the Iowa Supreme Court recognized the American Bar Association standards reflect the prevailing norms of the legal profession. "Regarding an essential duty, the ABA Standards for Criminal Justice require:

> (e) Defense counsel, in common with *all members of the bar*, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, cannons, or other standards of professional conduct." (emphasis added)

Id. at 495.

All attorneys, whether a public defender or member of the private bar, are clearly held to the *same* standards. A public defender's workload or resources are not relevant in the legal malpractice context or in determining ineffective assistance of counsel. The State cited to *Jacobi v. Holbert*, 553 S.W. 3d 246 (Ky. 2018) to support their assertion workload and resources are in fact, relevant in a claim of malpractice. *Jacobi* is inapposite to the facts of this case as it discusses the various public policy reasons that support the granting of *immunity* to public defenders. The Iowa legislature has clearly determined public defenders are not completely immune from suit. Instead, Iowa requires that a criminal defendant obtain postconviction relief on the issue of ineffective assistance of counsel prior to filing suit against a public defender. *See* Iowa Code § 815.10(6).

Finally, the State argues that because this Court has recently taken an expansive view of what constitutes ineffective assistance of counsel, asserting that it is somehow now easier to obtain post-conviction than a finding of breach in a legal negligence claim.

This argument blatantly ignores the strong presumption recognized by the Iowa Supreme Court that trial counsel's conduct was reasonable in ineffective assistance of counsel claims, under prevailing professional norms, considering all circumstances. *Ennenga v. State*, 812 N.W. 2d 696, 710 (Iowa

2012). "Establishing the first prong is not easy because 'there is a strong presumption trial counsel's conduct fell within the wide range of reasonable professional assistance.'" *Id.* (Mansfield, J., dissenting) (*quoting State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003)). No similar presumption of competence exists in the context of a legal negligence claim. In this way, the standard for ineffective assistance of counsel is arguably more onerous than that of breach in a legal negligence claim. Clearly this fact weighs in favor of finding the issues identical because Clark overcame and exceeded the standard in obtaining post-conviction relief.

The Colorado Supreme Court has taken the view that the duty and breach elements in a legal malpractice and the standard for ineffective assistance of counsel are *identical*. In *Rantz v. Kaufman*, 109 P.3d 132, 139 (Colo. 2005) the Colorado Supreme Court held the following:

> "Colorado adopted the *Strickland v. Washington*, standards for determining ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, the criminal defendant must show that (1) counsel's performance was constitutionally deficient; and (2) the deficient performance prejudiced the case. The standard for constitutionally deficient performance asks whether the attorney's performance is within the range of competence demanded of attorneys in criminal cases under prevailing professional norms. The standard for breach in a legal malpractice suit in a malpractice action employed "that degree of knowledge, skill and judgment ordinarily possessed by members of the legal profession in carrying out services for his client.

> Under these standards, the inquiry undertaken in both cases is identical and focuses on what ordinary members of the legal profession would have done at the time the action was taken." (internal citations omitted).
>
> *Rantz* at 139.

Other jurisdictions have taken the same view as Colorado. *See, e.g.*, *Sanders v. Malik*, 711 A.2d 32, 34 (Del. 1998) (holding the standards for proving ineffective assistance of counsel in a criminal proceeding are equivalent to the standards for proving legal malpractice in a civil proceeding); *Barrow v. Pritchard*, 597 N.W.2d 853, 857 (Mich. App. 1999) (standards for establishing ineffective assistance of counsel and legal malpractice are sufficiently similar in substance to support the application of the defense of collateral estoppel); *Youman v. Carouso*, 51 Cal. App. 4th 401, 59 Cal. Rptr 2d 103, 107 (1996)("The habeas standard for gauging the effectiveness of trial counsel is the same as in a legal malpractice case."); *Belford v. McHale, Cook & Welch*, 648 N.E.2d 1241, 1246 (Ind. Ct. App. 1995) ("The first step in the *Strickland* standard and the breach element of legal malpractice are identical, i.e., counsel must act reasonably.").

The overwhelming majority of jurisdictions agree with the district court that the issue of ineffective assistance of counsel in a PCR proceeding is identical to the breach element in a legal malpractice action. Issue preclusion

is appropriate on the issue of breach and the trial court did not abuse its discretion in making this determination.

C. The ineffective assistance of counsel finding was essential to the PCR judgment.

The State raises, again for the first time on appeal, that the finding of ineffective assistance of counsel was not essential to the grant of post-conviction relief. The District Court never addressed this argument in either the order denying summary judgment or the order granting Clark's motion to reconsider, enlarge or amend because it was never litigated by the State. As a result, it was not preserved and should be ignored. *See Young v. Iowa City Cmty. Sch. Dist.*, 934 N.W.2d 595, 602 (Iowa 2019) ("Our preservation rule requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal.")(*quoting*, *Metz v. Amoco Oil Co*., 581 N.W.2d 597, 600 (Iowa 1998)).

Assuming arguendo, the Court decides to render an opinion on this issue, it is without merit and should be rejected. The State relies on the Restatement (Second) Judgments § 27 comment (h) in arguing the PCR decision granting a new trial was not solely dependent on the court's finding that Robertson was ineffective and so it should not be given preclusive effect the subsequent legal malpractice case. However, a careful review of comment

(h), (i), and (j) of the Restatement (Second) Judgments § 27 does not support this view.

First, the Restatement (Second) Judgments § 27 comment (h) describes an issue determined *but not dependent on* the judgment should not be given preclusive effect. "Such determinations have the characteristics of dicta, and may not ordinarily be subject of an appeal by the party against whom they were made." *Id.* The ineffectiveness finding by the District Court is certainly not dicta in the PCR proceeding. The State could have appealed the issue of Robertson's breach of duty, but chose not to do so.

Second, while comment (i) suggests that a judgment of a court based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive to either issue standing alone. The comment also points out that issue preclusion may still be appropriate if certain policy concerns are not present. For instance, the comment is concerned with the possibility that an alternative determination "may not have been as carefully and rigorously considered as it would have if it had been necessary to the result, and in that sense, it has some of the characteristics of dicta." *Id.* The losing party, although entitled to appeal from both determinations, might be dissuaded from doing so because of the likelihood that at least one of the issues would be upheld and

the other not even reached. *Id.* None of these concerns are present in this case. The PCR decision on the issue of Robertson's breach of duty was carefully considered, fully litigated, and never appealed. The losing party, the State, had every incentive to appeal both issues in order to preserve its conviction.

On the other hand, the comment also describes a situation where a losing party might appeal solely for the purpose of avoiding the application of the rule of issue preclusion which may increase the burdens of litigation on the courts and the parties. *Id.* It would be a rare case in which a court would even reach the merits of an ineffective claim in a PCR case if the case could be solely decided based on newly discovered evidence. In other words, the State would not likely be in a situation often where it had to appeal an ineffective finding even if newly discovered evidence would so obviously allow the opposing party to prevail on appeal. Even if the State was placed in such a predicament periodically, it has a legitimate interest, by virtue of *respondeat superior* liability to appeal an ineffective claim adverse to a public defender.

The better approach, as described by comment (j), is to determine whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment. "If so, the determination is

conclusive between the parties in a subsequent action, unless there is a basis for an exception under Restatement (Second) Judgments § 28. Clearly, in this case, the issue of Robertson's breach of duty was recognized by both parties as vitally important and was essential to the district court in the PCR proceeding. *See Home Owners Fed. Sav. & Loan Ass'n v. Northwestern Fire & Marine Ins. Co*., 238 N.E.2d 55, 59 (Mass. 1968) (holding that a finding "not strictly essential" may be relied upon if the issue underlying it was "treated as essential to the prior case by the court and the party to be bound.")

D. The district court appropriately determined other considerations should not prevent offensive issue preclusion.

The state raises four "other" arguments suggesting that offensive issue preclusion is not appropriate. For the reasons that follow, this Court should reject those arguments just as the District Court did.

1. Applying offensive issue preclusion does not violate the State's right to a jury trial.

Applying offensive issue preclusion solely to the issue of breach in a negligence case through summary judgment does not violate the State's right to a jury trial and is consistent with federal Seventh Amendment jurisprudence which holds the same. While the State is correct that Iowa remains free to interpret the Iowa Constitution in a manner contrary to federal law, the Iowa Supreme Court should decline to do so in this case. It is well-

settled federal law that procedural devices, such as summary judgment withstand constitutional challenges, including the right to a jury trial. See *Katchen v. Landy*, 382 U.S. 323, 339-40 (1966) (holding that bankruptcy summary judgment proceedings did not violate plaintiff's right to a jury trial); *Galloway v. United States*, 319 U.S. 372, 393 (1943) (deciding that directed verdict did not encroach upon the right to jury trial); *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 659-61 (1935) (determining judgment notwithstanding verdict did not violate party's right to a jury trial); *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 321-22 (1902) (ascertaining that summary judgment did not detract from party's right to a jury trial). A broad finding, as suggested by the State that summary judgment violates the Constitutional right to a jury trial would throw the whole Court system into flux. Summary judgment would constitutionally be a prohibited procedure.

In *Parklane Hosiery Company v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) the United States Supreme Court considered whether collateral estoppel unconstitutionally infringed on the right to trial by jury. The *Parklane* decision specifically held that the plaintiff's use of collateral estoppel did not violate the defendant's right to a jury trial. *Id.* The Supreme Court reasoned that an equitable determination constitutionally could collaterally *estop the re-litigation of factual issues in a subsequent legal*

claim. *Id.* (emphasis added.) Finally, *Parklane* reasoned that the Seventh Amendment preserves only the *substance* of the right to a jury trial, not the jury trial itself. *Id.*

The State's attempt to distinguish *Parklane* from the facts of this case, ignores the simple fact that applying offensive issue preclusion here does not take away the State's right to a jury trial. Rather, partial summary judgment has only taken away the breach element of the negligence claim. The jury will still decide the issues of causation and damages.

The State argues that a jury wasn't available in the PCR case and this is reason enough not to apply issue preclusion. This argument is inconsistent with the well-established rule in Iowa that issue preclusion may be used through a summary judgment motion to satisfy elements of a cause of action in a civil jury trial. For instance, Iowa courts have held that a validly entered and accepted guilty plea precludes a criminal defendant from relitigating essential elements of the criminal offense in a later civil case arising out of the same transaction or incident. *See e.g. Dettman v. Kruckenberg*, 613 N.W.2d 238, 244-45 (Iowa 2000) (*citing Teggatz v. Kingleb*, 610 N.W.2d 527, 529 (Iowa 2000)); *Ideal Mut. Ins. Co. v. Winker*, 319 N.W.2d 289, 296 (Iowa 1982).

Finally, the State's concern that the PCR court heard the victim's changed testimony and the jury in this legal negligence case will not is without merit. The judge in the PCR fully and carefully considered the issue of whether Robertson was ineffective on wholly separate grounds from the issue of newly discovered evidence and the victim's purported changed testimony. (Order dated May 26, 2016, App. pp. 39-67).

2. The collateral consequences that only apply to public defenders are consistent with the spirit and scope of the Iowa Tort Claims Act.

The District Court acknowledged in its ruling that offensive issue preclusion may not be appropriate in cases involving *private counsel*. On the other hand, because of *respondeat superior* liability, allowing offensive issue preclusion is wholly consistent with the spirit and scope of the Iowa Tort Claim Act. Contrary to the State's assertion that the District Court's opinion makes the State more liable than a private individual under like circumstances, it is axiomatic in Iowa that *every* employer is liable for the negligent acts of their employees while acting within the scope of his or her employment.

The State's unsupported concern that every criminal defense attorney, public defender, contract attorney, or private attorney would be subject to offensive issue preclusion after a post-conviction finding of ineffective assistance of counsel ignores reality. The District Court specifically found

that the financial and reputational interests at stake in legal negligence, make issue preclusion *inappropriate* for private counsel. (Order dated August 29, 2019, App. pp. 118-129).

The District Court's narrow ruling that issue preclusion applies in this case against a public defender, who is an employee of the State, is wholly consistent with the Iowa Tort Claims Act and should be upheld.

3. There is no "chilling effect" for public defenders to not cooperate in PCR proceedings because public defenders face no personal liability in legal negligence cases.

The State's argument that the District Court's ruling, which only applies to public defenders, would chill their willingness to cooperate in future PCR proceedings is simply not true. Even without the District Court's ruling, a public defender in Iowa is immune from suit, unless a court specifically determines he or she is ineffective and the ineffectiveness is the proximate cause of the damage. *See* Iowa Code § 815.10(6). Even then, they never have a personal or financial stake in legal negligence cases. Indeed, a credible argument could be made that a public defender has no different incentive now to cooperate in PCR proceedings, yet we know in practice they routinely cooperate. Public defenders, unlike contract attorneys or private counsel, are more likely to cooperate because they face no personal financial liability when sued for legal negligence. *See* Iowa Code § 669.5 and 669.11.

Nothing in the District Court's ruling will change the level of cooperation public defenders deem appropriate in PCR proceedings consistent with their conscience and ethical rules. Applying issue preclusion here would have no effect on future criminal representation for public defenders in Iowa.

4. Applying offensive issue preclusion here serves all of the fundamental policies underlying issue preclusion.

The purpose of issue preclusion "serves to protect 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. This ruling serves all of those principles.

"Any manner which the State could prove that defense counsel had done his [or her] job the appropriate professional level of competence should have been set forth an argued at the post-conviction trial." "[T]he State has not articulated a single way in which it was prejudiced in the post-conviction proceeding." (Order dated August 29, 2019, App. pp. 118-129). The State's own expert in this case, made the exact same argument as the Johnson County Attorney in the PCR case in claiming that Robertson did not breach his duty to Clark. (Plaintiff's Supplemental Appendix in Support of Summary Judgment, App. pp. 97-101).

The District Court concluded, as should this Court, that the State is relying on the exact same facts and arguments in each case. Under these circumstances, it makes no sense force Clark to relitigate the issue of breach and it serves no purpose other than to give the State another bite at the apple.

Second, if the Court overturns the district court's ruling, then the Court will be doing exactly what issue preclusion was designed to avoid: fostering two conflicting rulings on the same question. Even more troubling, however, is that overturning the district court's ruling will create two conflicting rulings on the very same question, *using the very same arguments and the very same facts*.

Finally, the State's other concerns about the length of the trial or how Clark will try the issues of causation or damages are irrelevant to this analysis. Clark, not the State of Iowa, has the burden of proof. The manner in which Clark decides to present his case and whether the district court bifurcates the trial are not issues before this Court. It seems obvious that by not having to prove breach, the trial would be shorter. Nonetheless, the District Court properly found that whether the trial is considerably shortened by preclusion is not a sufficient basis to not permit it.

CONCLUSION

Wrongful convictions and subsequent exonerations always leave in their wake pain, loss, and a lingering question of how do we make these wrongs, if not right, better. The hurdles facing wrongfully convicted are thick walls built upon long-standing beliefs that we, as a society, don't get things wrong. The State in this case suggests that even though Clark's state public defender, by law, provided a woefully inadequate defense, the State should get a "do over" in civil litigation. They ask you to make Clark live the same facts over and over again even those facts established, *as a matter of law*, that the State is breached essential duties owed to Clark during his criminal trial. The State tells Clark to simply keep fighting the same issues after years of incarceration as it places hurdle after hurdle to barricade Clark's path to justice. In the process, they needlessly re-open wounds from the past and salt them for good measure. The true purpose of this appeal is that the State seeks once again, to proclaim an exoneree, "Guilty!" and undeserving of even a taste of justice.

Baron de Montesquieu, one of the founders of the principles of a "separation of powers" form of government once stated:

> "There is no crueler tyranny than that which is perpetuated under the shield of law and in the name of justice."

The State of Iowa knows that it provided Clark with defense counsel who was seriously deficient and clearly negligent. They had their opportunity to keep fighting that issue but chose not to do so. Permitting re-litigation of these failure makes the PCR proclamation of ineffective counsel toothless, and in the grander scheme, meaningless in the fight for real justice.

The Court should find the District Court did not abuse its discretion and uphold the ruling on summary judgment.

REQUEST FOR ORAL ARGUMENT

Clark requests oral argument.

Respectfully Submitted,

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