UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

DAVID E. SCOTT,

Case No. 12-CV-214

Plaintiff,

v.

GERALD P. BOYLE,
BOYLE, BOYLE, & BOYLE, SC and
DARWIN NATIONAL ASSURANCE CORPORATION,

Defendants.

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

STATEMENT OF FACTS

On June 5, 2008, following a criminal trial, *State of Wisconsin v. David E. Scott*, Case No. 2007CF228, Kenosha County, in which plaintiff, David E. Scott ("Scott"), was represented by defendants, Boyle, Boyle & Boyle, SC and Gerald P. Boyle ("Boyle"), Scott was found guilty of three counts of sexual assault of a child under age 13. Scott's bond was revoked and he was taken into custody (¶1).[1] On July 24, 2008, Scott was sentenced to 8 years in prison to be followed by 7 years of supervision. On August 6, 2008 Boyle filed Scott's notice of right to seek post-conviction relief (¶2).

On September 12, 2008, Mark Richards of Richards & Hall, SC, filed a notice of retainer to represent Scott as post-conviction counsel (¶3). On July 27, 2009, Scott filed a motion for post-conviction relief based on defendant Boyle's ineffective assistance of counsel (¶4). The

[1] ¶ refers to the paragraph of the stipulation of findings of fact that is filed herewith.

issues were fully briefed. Kenosha County Assistant District Attorney Tracey Braun filed two briefs in opposition to Scott's motion, arguing that Scott was represented by "not one but two highly respected attorneys", that they were "thoroughly prepared", and provided Scott with more than an adequate defense[2] (¶¶ 5 and 6).

On September 24, 2009, a *Machner* hearing[3] was conducted before the Honorable Wilbur W. Warren, III, Kenosha County Circuit Court Judge, at which Scott presented testimony from Deputy Douglas Wade, and attorneys K. Richard Wells and Gerald P. Boyle with respect to the issue of whether or not Boyle's representation of Scott was constitutionally deficient, unreasonable and ineffective. After examination by Scott's attorney, both Boyle and Wells were examined by District Attorney Tracey Braun, who presented their testimony to support the State's position that Boyle's representation of Scott was reasonable, competent and constitutionally adequate (¶7).

On October 28, 2009, after considering the testimony, briefing and oral argument, Judge Warren found Boyle's representation of Scott was ineffective and fell below an objective standard of reasonableness. The Court's findings included the following:

> And as we all know when it comes to standards like this, the Court should look at the totality of the circumstances and determine, first of all, whether there is a deficient performance so as to render counsel ineffective; and secondly, of course, that that defective performance was prejudicial. Courts from time to time are permitted to skip over the first and go right to the second if it can be said that even if all of the claimed deficiencies were true, it still did not result in prejudice, but I will not do that in this case.
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> It was early on identified in this case that this was what's commonly referred to as a he-said/she-said case which is true in almost all cases. Rarely are there situations where there are multiple witnesses to a sexual assault. It's typically a

[2] Boyle's associate K. Richard Wells participated in Scott's defense.
[3] A *Machner* hearing addresses a defendant's ineffective assistance of counsel claim. *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1970).

situation where the person accused of the assault and the alleged victim of the assault are alone, in private, whether they're an adult and child or two adults. Rarely is it that there are others that can be called upon to testify about what happened and who did what. This case was that typical he-said/she-said case.

It was also early identified, and frankly conceded by Mr. Boyle in his comments, that, I believe in his words, "If they believe the little girl, we're going to lose." So at the crux of the entire case was the credibility of Bonnie, the alleged victim in this case. The defense recognized that early, and the State obviously would have to concede and perhaps even in comments earlier in this hearing conceded that if the jury believed the girl, then the verdicts would be returned guilty. In this case the jury obviously did believe the little girl.

So the question becomes, and this is part of the post-trial postconviction motions here, did counsel for the defense have an obligation to do more to undermine the credibility, to attack the credibility of Bonnie? The issues here were raised at the eve of trial, I think in December of '07, when the State somewhat belatedly sought to introduce Jensen-type evidence through the testimony of Julie McGuire. Julie McGuire for purposes of this record today, although it's certainly set forth in ample discussion on the trial record, was the CAC examiner, the advocacy examiner who interviewed Bonnie. This Court by previous decision has indicated it was not an examination, it was an interview, and therefore it denied any type of independent examination, psychological or otherwise, of Bonnie under the Maday case. I'm never sure how to pronounce that, M-A-D-A-Y. But in any event, the motion to strike that Jensen evidence made on the eve of the December trial was made by the defense recognizing inherently, I suppose, by the motion itself that Jensen evidence is something that could hurt the defense. Discussions with respect to what the delayed reporting was and the piecemeal reporting were things that they may not have any answers for. There was a discussion at the time whereby the defense did not want to have the expert testify. I believe the Court ruled that the Jensen evidence would not come in. And then the fork in the road arrived. Well, will the State simply dismiss and re-issue or will we get an adjournment on this? And although an adjournment, I think, was initially opposed by the defense here, the adjournment was granted by the Court eventually and the trial was reset to June. But part and parcel to this, and this is the important part of the exchange, was that there was actual discussion by defense counsel as to the need to retain an expert, that there was some opportunity, if the trial was to go on and Jensen evidence was presented, that they would need to present their own expert in that regard or words to that effect. And I'm not attempting to quote verbatim, but that was the thrust of what counsel said. Now, this may simply have been hollow words. This may have simply been some strategy on the part of the defense counsel to say, "Well, we don't want their Jensen evidence because now we don't have an opportunity to rebut it because we haven't had time to hire our own expert," not really intending to hire an expert but using the inability to hire an expert as the basis to support the motion to strike the State's Jensen evidence. But the words are what they are, and I can't sit here and

second-guess what strategy or what representations may have been made that were insincere. So I have to assume that counsel at that point was actually considering retaining an expert for Jensen evidence.

There was also talk about some of the vocabulary, the use of words, I think in the defense brief here, that Jensen evidence might have been used to support the defense which has been Mr. Scott's position all along, that Bonnie was put up to this by her mother. So it's clear to me that the defense at least considered the use of an expert witness at trial notwithstanding the postconviction hearing in which I think Mr. Boyle testified, and perhaps Mr. Wells too but definitely Mr. Boyle, that "We never use experts for Jensen evidence." Notwithstanding that, in a he-said/she-said case where Jensen evidence will be admitted, I think it's not necessarily totally a matter of strategy but that there may be some element of deficiency there to not rebut that in a case such as this.

The defense also argues about the investigation and motions that were not made or not undertaken here. There are issues of 904.04 evidence, the theory of the case here being that the girl was put up to it which apparently is more of a theory of the defendant's rather than counsel's, but Mr. Boyle was pretty clear in his testimony that he believed the defendant, and it's clear that the defendant believed that Bonnie was put up to this. So if that was the case, it's hard to find support for the idea that we don't need to investigate issues to put the girl's credibility in issue, that we don't need to investigate further the credibility of the mother here, Jeanice, simply because it was the defendant's belief, a belief which I think was adopted by defense counsel but really not set forth at trial.

The issues that are brought forth here that support the investigation by defense counsel are prior court records concerning false allegations. Now, there are a number of different ways that character evidence can be attacked. And this was not done because apparently an investigation was not done into these prior allegations. Most if not all were listed, and I think it's contained in an exhibit here, that being notes that Mr. Scott had provided to counsel about these prior acts. The State in its responsive brief for this hearing indicates that character for truthfulness is something that is limited in how it can be brought up and that under other-acts evidence and under the credibility statute concerning the number of convictions and the like, the defense was limited with respect to what they could bring in. But in looking at this under 906.08(a) concerning evidence and character for truthfulness and untruthfulness, it's fairly clear under Sub. (2) that cross-examination of any witness as to either their own or another's character for untruthfulness by specific instances of conduct is something that may be gone into on cross-examination. You can cross-examine a witness about specific instances of his or her own conduct or the conduct of a person whose character they testify about. It must be probative of truthfulness or untruthfulness, which is the very issue raised here in these briefs, and it must not be remote in time. No extrinsic evidence is permitted to prove what actually happened in that specific instance. There should not be a trial within a trial. But if there were actual investigations of

incidents and perhaps even admissions of false allegations having been made, and the mother here, Jeanice, if not the first person to whom it was reported because I think probably the brother, Jonathan, was the first person a report was actually made to, but if the first adult to whom the report was made would have been Jeanice and the initiation of the meeting at school was through Jeanice, to be able to cast some doubt as to the credibility of Jeanice is something that may have been permitted to be in the record and not fully excluded.

There's reference to Schiffra/Green because of some witness's - - in this case Jeanice's - - treatment and perhaps Bonnie's untruthfulness about prior situations, which prior instances of untruthful allegations are not exempted under the Rape Shield Law. So all of these other acts, prior instances of false allegations and things, are out there and none were investigated. No investigator was hired. And much like the Court's concern here about the Jensen evidence where no Jensen expert was retained by defense counsel, no investigator was retained by defense counsel. And I can't help but wonder without concluding that when a retainer is received and costs are to be taken from the retainer, that there at least is a suspicion, a probability, which may be even greater than a possibility, that decisions are made about retaining experts when the cost would come from the retainer as opposed to from the client. Obviously it's going to reduce the income to the lawyer if these costs are taken from the retainer. And the attorney could very well be influenced in making decisions about whether or not experts should be retained because of the personal cost to the attorney as opposed to the cost to the client, not that cost isn't a factor in every event; it is. But under those circumstances, it seems like there's at least that suspicion that there may have been judgment exercised here for the wrong reasons. So clearly there was a failure to investigate. The areas that are brought out here by defense counsel are all areas that could have been investigated. Would it necessarily resulted in the admissibility of all of that information? Without knowing what information is out there and available, it would be somewhat speculative to say that. Post-trial counsel has done a good job of putting forth what is out there, but without access to records that are not otherwise accessible, one would never know.

. . .

Then we move on to the issue of Deputy Wade. This is a little more problematic because under the situation here, counsel for Mr. Scott definitely made reference to Deputy Wade in opening statements about statements that would be coming in, about reports that were generated and findings that may have been made in so many words again. I'm not quoting from the transcript but only paraphrasing what I believe it states in substance. So it was out there that the defense was concerned with Deputy Wade and that they wanted the jury to hear Deputy Wade's testimony. Clearly counsel for the defense was surprised at the fact that Deputy Wade, although having been named on the State's list and actually having been present in the courtroom during the early part of these proceedings, was no longer available when the defense wished to call him. There is any number of

different things that could have been done to procure his appearance, none of which were done at trial. And one can only wonder if counsel's strategy was to have Deputy Wade testify, and then Deputy Wade is not available, not to ask for an adjournment, not to ask for additional time to procure his attendance, not to anticipate that the deputy might not be there if released by the State, not to subpoena a witness you're telling the jury that you're going to get to make sure that the witness is going to be there, all of those things are cause for concern. And I think this concern was reflected, at least in part, in the fact that the jury, as one of their questions during deliberations, asked to see Deputy Wade's report. Now, it must have been important to the jury to understand what the contents of that report were if they actually asked for it when the report had never been marked or received as an exhibit and Deputy Wade did not testify. The representation made to them was that Deputy Wade had something to say that was of importance and that it was at least implied to be of an exculpatory nature.

We've all seen Exhibit 1(a) from the postjudgment hearing. We know it contains not only the report of Deputy Wade, which is relatively brief, but that it encompasses as attachments the statements of Mary Gedemer-Jensen and also, I think, Jeanice Myers. Whether or not that would be admissible under hearsay exceptions is hard to say. Certainly the Court, if hearing proper argument, could consider that to be admissible because this, although not immediately after the disclosure was made, was shortly after the disclosure was made. Disclosures were made to Ms. Gedemer-Jensen, and disclosures were made to Jeanice Myers. This all could be considered part of the *res gestae* of disclosure of a young girl to which this Court, as well as other Trial Courts, has been directed to give a considerable amount of latitude in the admissibility of disclosure-type testimony. And simply because disclosure testimony may not in this case be as favorable to the State as in other cases involving disclosure statements, it nonetheless, I think, would qualify as a disclosure statement, so it probably would have been admissible. But the Court in having the benefit of the statement itself and recognizing that Mary Gedemer-Jensen did testify to much of what the defense probably would have wanted Wade to testify to, I can't help but wonder what was going through the jury's mind when they said, "We want to see Wade's report." And he was not only referred to as a witness and not called, but the report that they specifically requested was not available. I think that is tantamount to ineffectiveness also.

There are a number of other things of concern here. Lead counsel, Mr. Boyle, had not even seen the CAC tape before it was played to the jury. Now, I understand Mr. Boyle was hired by Mr. Scott. Richard Wells is a very capable, competent attorney, but he doesn't enjoy the state or regional reputation that Mr. Boyle does. And I'm sure that when it came time to hire an attorney, it was Mr. Boyle who was hired and Mr. Wells was only assisting him. So to have your lead counsel, the big gun as he's been referred to, hired and not even to look at the CAC tape when this is admittedly a he-said/she-said case I think smacks of ineffectiveness. I mean, how can an attorney properly prepare for cross-examination, even having

the transcript of the tape, without seeing the tape itself? The tape obviously was important. It was important to the jury. The jury asked to have the tape re-played to them. They were brought out into the courtroom and the tape was re-played for them, obviously something very, very important. And to have not even seen the tape prior to the actual playing at trial, I can't find a good excuse for that anywhere.

. . .

Finally, the Court has some concern here also, and I think it's an issue that goes to Machner rather than to anything else, in that during her testimony, Julie McGuire was asked by defense counsel, I think Mr. Wells, whether all of the people that she talked to, all of the children, some 1,200 children in her tapes, told the truth. And she said yeah, they all told the truth in so many words. That would certainly imply that if they all told the truth and Bonnie was one of those 1,200 that she was saying Bonnie told the truth which under Hazeltine, [sic] I think, is impermissible. But counsel opens the door so I think if it were something the State had done - - And I realize counsel in his brief makes a distinction that it doesn't make any difference who does it, it's still wrong, but I think that goes more to the claim of ineffectiveness of counsel in the manner in which that was handled rather than the actual admission of that evidence.

With respect to Machner then on the issue of incompetency of counsel, the Court will find that for the numerous reasons that have been cited here, counsel was ineffective, that all of those things that the Court's commented on negatively here as raised by defense counsel were things which should have been done. And cumulatively, I think it did affect the result of the trial. That isn't to say that in a he-said/she-said case juries are not permitted to ignore evidence they don't' accept and give more weight to certain other items of evidence that they do accept. But the important part is that every defendant is entitled to their day in court with the effective assistance of counsel. And because of those misgivings, shortcomings, omissions and oversights of defense counsel here, I think Mr. Scott did not receive a full and fair trial in this matter. I think it was prejudicial and the Court will so find. . . .

(¶8).

The State appealed. The Court of Appeals, District II, affirmed Judge Warren's findings:

¶4 After his conviction, Scott moved for post conviction relief claiming ineffective assistance of defense counsel, Attorneys Gerald Boyle and K. Richard Wells. A *Machner* hearing was conducted by the judge who presided at trial. The trial court granted a new trial based on: 1.) the failure to hire an expert to rebut the ***Jensen***-type evidence presented by McGuire; 2.) failure to investigate Jeanice's prior acts involving disorderly conduct and false sexual assault allegations to challenge Jeanice's credibility; 3.) failure to ensure that the officer

who spoke to Bonnie testified at trial; 4.) eliciting testimony from McGuire on cross-examination which violated ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984); and 5.) failure of Attorney Boyle to watch the videotaped interview before trial. We conclude that together deficiencies one and four provide a sufficient basis to sustain the trial court's order for a new trial. We address only those.

¶5 *To prove ineffective assistance of counsel, a defendant must show that counsel's representation was deficient* and that the deficiency was prejudicial. ***Strickland v. Washington***, 446 U.S. 668, 687 (1984). *Deficient performance is conduct that falls below an objective standard of reasonableness*. ***Id.*** at 687-88; ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis.2d 571, 665 N.W.2d 305. *We view the case from counsel's perspective at the time of trial and there is a "strong presumption that counsel acted reasonably within professional norms*." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To satisfy the prejudice aspect of ***Strickland***, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the preceding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694. The critical focus is not on the outcome of the trial but on the "reliability of the proceedings." ***Thiel***, 264 Wis. 2d 571, ¶2 (citations omitted). *We may aggregate the effects of multiple incidents of deficient performance in determining whether the overall impact of the deficiencies satisfy the standard for a new trial*. ***Id.***, ¶60.

¶6 The determination of deficient performance and prejudice both present mixed questions of fact and law. ***Id.***, ¶21. We will uphold the trial court's findings of fact unless they are clearly erroneous, but *whether trial counsel's performance was deficient or prejudicial is a question of law we review de novo*. ***Id.***

¶7 The State first argues that the defense team was not deficient in failing to present expert testimony to rebut McGuire's ***Jensen***-type evidence because both attorneys testified it was a strategic decision not to obtain an expert[4] . . . . Here the court rejected the explanation for not hiring an expert because on the first scheduled trial date the defense team objected to McGuire giving expert testimony based on the late notification that she was more than an authentication witness. The defense argued that the late notice precluded the preparation of a defense witness that might compete with McGuire's testimony. The trial court found that there are experts who would come to court and say things contrary to McGuire's intended testimony and that the late notice was a detriment to the defense. The court ruled that McGuire would not be allowed to testify and denied the State's request for an adjournment. The State then moved to dismiss without

[4] Attorney Wells testified that presenting a defense expert would not have been helpful to the defense. (¶7, attached transcript, pp. 22-23). Attorney Boyle testified he did not believe that there was a need for an expert and it was counterproductive to the defense to make the case one of expert versus expert. (¶7, attached transcript, pp. 91, 101-102).

prejudice indicating that it was unable to proceed with the exclusion of its expert[5]. Not only did this exchange at the adjourned trial date establish the defense's desire to retain an expert to rebut McGuire's intended expert testimony, but it also highlighted the import of the ***Jensen***-type evidence since State would not proceed without it. The defense also moved to exclude McGuire's expert testimony on relevancy grounds at the start of the jury trial. Again the defense exhibited concern about the expert testimony. The later explanation that the evidence was not significant or that no countervailing expert was necessary rang hollow in light of the previous defense position. The trial court's finding that he failure to hire an expert was not a strategy decision is not clearly erroneous.

. . .

¶9 McGuire's testimony related to the theory of defense. She explained how the interview protocol she utilized was designed to provide the most reliable and untainted information. She explained why children delay in disclosing abuse and make piecemeal disclosures. She explained how fear of the reaction of family members can make a child ambivalent about disclosure. Why a child can remember "who" and "where" but not "what" and "when" of an assault was explained. The defense did not have its own expert to speak to these common behaviors of child victims. Rather on cross-examination of McGuire the defense attempted to elicit an expert's acknowledgement that false reporting occurs. It was untested cross-examination and it backfired on the defense. Questions about false reporting allowed McGuire to explain how the protocol she followed reduces false allegations to between three and ten percent of cases. That led to further questions which ultimately elicited responses that, as discussed later in this opinion, violate ***Haseltine*****.** That the defense was attempting to use McGuire as its expert is further exhibited by questions put to her about alternative hypotheses for the child's accusation, including the possibility that the child had been influenced to make added allegations or false allegations to serve the needs or purposes of somebody else. When the defense questioned whether a child would make false allegations as a "pity-poor-me syndrome," McGuire indicated that was beyond the scope of her expertise. Similarly, McGuire was unable to speak to a "reinforcement process" that the defense suggested can occur during an interview with a child. The defense threw in possible alternative explanations for false allegations that tied into the theory of defense but left them unsupported by expert testimony.

¶10 The State also contends that because Scott did not establish that there was an expert available and what would have been said to rebut McGuire, he has not shown ineffective counsel. . . . The trial court found pretrial that an expert to rebut McGuire could be found. . . . The record establishes that an expert in the field of child psychology could have offered information to compete with McGuire's explanation of victim behavior.

[5] Ultimately the trial was adjourned on the agreement of the parties.

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> ¶12 The State's position that McGuire's testimony that she had not uncovered any false allegations did not violate **Haseltine** is untenable. . . . It was not reasonable for trial counsel to purse cross-examination which tended to and in fact did elicit the offending response. The defense team's failure to present its own expert and proceeding blindly in trying to elicit favorable expert testimony from McGuire was deficient performance in these circumstances.
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> The combined effect of deficient performance regarding the lack of a defense expert and eliciting testimony violating ***Haseltine*** shakes our confidence in the outcome. We affirm Scott's right to a new trial because of ineffective assistance of counsel.

(¶11) (emphasis added).

ARGUMENT

THE DOCTRINE OF ISSUE PRECLUSION BARS BOYLE FROM RE-LITIGATING FACTUAL AND LEGAL ISSUES DETERMINED BY THE KENOSHA COUNTY CIRCUIT COURT, AND AFFIRMED BY THE COURT OF APPEALS, IN REVERSING SCOTT'S CONVICTION.

Under Wisconsin law, issue preclusion is a doctrine designed to limit re-litigation of issues that were contested in a previous action between the same or different parties. *Michelle T. by Sumpter v. Crozier*, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993) (citing *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 75 S. Ct. 865, 99 L.Ed. 1122 (1995). *See also Masko v. City of Madison*, 2003 WI App 124, ¶4, 265 Wis. 2d 442, 665 N.W.2d 391. Issue preclusion involves a two-step analysis. The first step is to determine whether an issue has been actually litigated and determined in a prior proceeding, and whether a litigant against whom issue preclusion is asserted is in privity, or has a sufficient identity of interests, with a party in the prior litigation to comport with due process. *Paige K.B. ex rel. Peterson v. Steven G.B.*, 226 Wis. 2d 210, 224, 594 N.W.2d 370 (1999). *See also, Landess v. Schmidt*, 115 Wis. 2d 185, 197, 340 N.W.2d 213 (Ct. App. 1983); *Harborview Office Center LLC v. Nash*, 2011 WI App 109, ¶7, 336 Wis. 2d 161,

804 N.W.2d 839; *Estate of Rille v. Physicians Ins. Co.*, 2007 WI 36, ¶36, 300 Wis. 2d 1, 728 N.W.2d 693. Obviously, the latter element is involved only when issue preclusion relates to a nonparty to the former action. *Paige*, 226 Wis. 2d at 224; *see also Masko, supra*, 2003 WI App 124, at ¶5.

The second step in issue preclusion analysis is whether application of the doctrine comports with principles of fundamental fairness:

> Courts may consider some or all of the following factors to protect the rights of all parties to a full and fair adjudication of all issues involved in the action: (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of [issue preclusion] to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Paige, supra, 226 Wis. 2d at 220-21; *see also Crozier, supra*, 173 Wis. 2d at 689; *Pesek v. Witscheber*, 132 F.3d 36, 1997 WL 780284, *3 (7th Cir. 1997) (unpub.) (Wisconsin law).

A. Privity.

With respect to the issue of whether a non-party to a prior proceeding is in "privity" with a party to the prior proceeding, the non-party's right to due process is violated if the non-party did not have a sufficient identity of interest with a party to that prior proceeding. *Paige, supra*, 226 Wis. 2d at 223. Due process requires that in order to find privity, the non-party must have had "at least one full and fair opportunity to litigate an issue before being bound by a prior determination of that issue." *Id.*, at 226. It is fundamental that "non-parties cannot be bound by a prior litigation unless their interests are deemed to have been litigated." *Id.* In applying this principle, the Wisconsin Supreme Court has held:

> A litigant has a sufficient identity of interest with a party to a prior proceeding if the litigant's interests in the prior case can be deemed to have been litigated. . . . *One who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own has had an opportunity to litigate his or her interests and is as much bound as he would be if he had been a party to the record*. (citations omitted) (emphasis added).

Id., at 226-27. A sufficient identity of interest exists where the non-party was sufficiently "entwined" in prior litigation "so as to have fully and fairly litigated its interest," and the non-party "had adequate opportunity and incentive to obtain a full and fair adjudication of [the] claim [at issue]." *Id.*, at 223, 228.

Privity existed in this case. Although, technically, Boyle was not a "defendant" in the *Machner* hearing held September 24, 2009, the sole purpose of that hearing was to determine whether Boyle's representation of Scott in the criminal trial was so ineffective and incompetent that it deprived Scott of his constitutional rights, thereby necessitating vacation of Scott's conviction. The Sixth Amendment guarantees a criminal defendant "the right . . . to have the assistance of counsel for his defense." *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984), requires a defendant to "identify the acts or omissions of counsel that are . . . outside the wide range of professionally competent assistance." This view of counsel's performance is "highly differential," must proceed under a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and must consider whether the challenged action (or failure to act) "might be considered sound trial strategy." *Id.*, at 689. Only when a criminal defendant has shown counsel's performance to be "objectively unreasonable" can the court even consider the effect of that performance: a criminal defendant is only entitled to a new trial if he can show that "there is a reasonable probably that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694.

In *State of Wisconsin v. Thiel*, 2003 WI 111, ¶¶18-20, 264 Wis. 2d 571, 665 N.W.2d 305, the Wisconsin Supreme Court, applying *Strickland*, held:

> The right to counsel includes the right to 'effective assistance of counsel. . . . In order to find that counsel rendered ineffective assistance, the defendant must show that trial counsel's representation was deficient. . . .
>
> Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. . . . When evaluating counsel's performance, courts are to be 'highly differential' and must avoid the 'distorting effects of hindsight.' . . . 'Counsel need not be perfect, indeed not even very good, to be constitutionally adequate.'. . .
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> In order to demonstrate that counsel's deficient performance is constitutionally prejudicial, the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'

In the present case, at the *Machner* hearing, and in briefing and argument to both the trial court and the Court of Appeals, the State and Boyle had a sufficient identity of interest in refuting Scott's claim of ineffective assistance of counsel -- the State was vitally interested in defeating that claim to sustain Scott's conviction and keep him in prison (¶¶5-10). Boyle had a vital interest in defending himself and his reputation. Failing to provide competent representation resulting in the client's conviction of a felony and incarceration -- depriving one's client of his/her constitutional rights -- is not only professionally and financially damaging, it is personally embarrassing and ignominious. Indeed, Boyle undoubtedly was aware that a finding of ineffective assistance of counsel likely would result in a legal malpractice claim if his former client was later exonerated in a subsequent trial which, of course, occurred here.

Plaintiff submits that there was a sufficient identity of interest between the State and Boyle with respect to the adequacy of the latter's defense of Scott to warrant a finding of privity. Significantly, Boyle testified at the *Machner* hearing and, along with the State, defended the claim of inadequate representation Scott leveled against Boyle. Boyle, through his own testimony, and through the evidence and arguments submitted by the State, in both the trial court and Court of Appeals, had a full opportunity to litigate the issue of the adequacy of his representation of Scott. A finding that Boyle was in privity with the State fully comports with Due Process.

B. Fundamental Fairness.

With respect to the second step in the issue preclusion determination -- whether application of the doctrine is consistent with fundamental fairness, each of the relevant factors, to the extent applicable, is satisfied here. As previously noted, the professional negligence issue in this litigation is, in substance, the same as the issue of ineffective assistance of counsel resolved in the *Machner* hearing. The trial court's determination that Boyle's representation was objectively below the standard of reasonableness was affirmed by the Court of Appeals. Moreover, as previously indicated, Boyle had an adequate opportunity and incentive to defend himself in the *Machner* hearing. Finally, Scott had an even heavier burden to establish ineffective assistance of counsel in the constitutional sense compared to his burden of establishing ordinary negligence in this action.

Not surprisingly, the vast majority of courts considering issue preclusion in the context of a legal malpractice action hold that the plaintiff is precluded from maintaining such an action where he/she was convicted of a crime and has failed to establish ineffective assistance of counsel in seeking to vacate the conviction. *See e.g. Bedford v. McHale, Cook & Welch*, 648

N.E.2d 1241, 1246 (Ind. Ct. at 1995); *Barrow v. Pritchard*, 235 Mich. App. 478, 597 N.E.2d 853, 855-57 (1999); *Michigan v. Trakhtenberg*, 493 Mich. 38, 826 N.W.2d 136, 141-43. As one commentator has observed:

> In most jurisdictions, the criminal malpractice plaintiff must clear a significant hurdle before bringing a malpractice claim: the court effectively requires him to first bring an ineffective assistance of counsel claim. If this claim is unsuccessful, the attorney-defendant has a collateral estoppel [issue preclusion] defense and therefore the subsequent malpractice claim will most likely be dismissed. . . .
>
> . . . In the criminal malpractice context, the attorney-defendant may assert that the client's unsuccessful attempt at reversing his conviction through an ineffective assistance of counsel claim collaterally estops him from bringing a criminal malpractice suit. Collateral estoppel, therefore, works as an affirmative defense to criminal malpractice claims.
>
> Courts and commentators generally agree that a criminal defense attorney may use collateral estoppel as an affirmative defense to preclude the client from further asserting that the attorney's incompetence caused his conviction. Collateral estoppel bars re-litigation of an issue only when the identical issue has been decided in a prior proceeding. Courts have consistently held that the legal standards for ineffective assistance of counsel and for legal malpractice are similar enough to satisfy the requirement that the second proceeding involve the same issue. The *Strickland* standard requires the plaintiff to show that his attorney's representation was inadequate and that this inadequacy prejudiced his case. This standard is equivalent to the malpractice elements that require the plaintiff to show that his attorney was negligent and that this negligence damaged the plaintiff's chance for success in the case.
>
> The use of collateral estoppel is considered appropriate, therefore, because in determining whether the attorney's representation was constitutionally ineffective, the court is applying the same standard used to determine whether an attorney is liable for malpractice. The requirements that the issue decided in the unsuccessful ineffective assistance of counsel claim was actually litigated and essential to the court's decision are satisfied as well.

Susan Treyz, *Criminal Malpractice: Privilege of the Innocent Plaintiff*, 59 Fordham L. Rev., Issue 4 (1999), pp. 723-726. The mirror image of this principle is equally true -- the finding that Boyle's representation fell below the standard of objective reasonableness necessarily means that Boyle's representation was negligent.

CONCLUSION

Because Boyle was in privity with the State of Wisconsin vis-à-vis the *Machner* determination that Boyle's representation of Scott fell below an objective standard of reasonableness, and because a finding of issue preclusion conforms with principles of fundamental fairness, Boyle is bound by the trial court's determination that Boyle's representation was unreasonable, deficient and constitutionally inadequate, a determination affirmed by the Wisconsin Court of Appeals. Accordingly, Scott respectfully requests that the court determine that, for purposes of this action, the issue of Boyle's negligence in his representation of Scott has been determined as a matter of law.

Dated at Milwaukee, Wisconsin, this 16th day of September, 2013.

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