IN THE SUPREME COURT OF IOWA

_____

SUPREME COURT NO. 07-1416

_____

JOEL GOOSMANN,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

_____

APPEAL FROM THE DISTRICT COURT
OF WOODBURY COUNTY
THE HONORABLE DUANE E. HOFFMEYER, JUDGE

_____

APPELLEE'S BRIEF
AND
CONDITIONAL NOTICE OF ORAL ARGUMENT

_____

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STATEMENT OF THE CASE

Nature of the case. In early 1992 Joel Goosmann fired a single shot into the chest of Chad Mackey of Sioux City, killing him. The State charged Goosmann with first-degree murder, alleging both premeditated murder and felony murder with willful injury as the underlying felony. Trial Information; App. _____, Jury Instr. 19; App. ___. The jurors convicted Goosmann as charged, returning a general verdict that did not show whether they relied on the first alternative, the second, or both. Forms of Verdict; App. ____. Goosmann's conviction became final in early 1995. Procedendo (2/9/95); App. ____.

Goosmann now applies for postconviction relief, relying on this Court's decision in *State v. Heemstra,* 721 N.W.2d 549 (Iowa 2006). That case overruled longstanding precedent and adopted the independent felony rule, holding that a defendant could no longer be convicted of felony murder, with willful injury as the underlying felony, when the evidence showed no act constituting willful injury that was independent of the act that caused the victim's death. *Id*. at 558. This Court determined that the new rule of law announced in *Heemstra* should apply only to Heemstra himself "and those cases not finally resolved on direct appeal in which the issue has been raised in the district court." *Id*. Goosmann asks this Court to overrule the quoted portion of the *Heemstra* decision, arguing that principles of due process compel the Court to apply *Heemstra* to Goosmann's case.

Course of proceedings and disposition in the court below. The State accepts Goosmann's statement of these matters as sufficient.

Facts.

> On April 10, 1992, Chad Mackey was talking with friends in a parking lot when they noticed two people in a car looking in their direction. Mackey and two others approached the car and asked if there was a problem. Joel Goosmann, the driver, said there was not. Words, though apparently not heated, were exchanged, and Goosmann pulled out a revolver and set it on the window ledge of the car. When Mackey and company did not retreat, Goosmann cocked the weapon. Mackey took a step forward. A few seconds later the gun discharged, striking Mackey in the chest. Goosmann drove off quickly stating something about having shot him. Mackey later died at the hospital.
>
> ....
>
> Evidence supported the inference Goosmann loaded the pistol and knew it was loaded. Goosmann said he would shoot anyone who "gives us shit." He was "a little mad" during the conversation in the parking lot. After Goosmann produced the gun, there was a pause between the moment when the victim stepped forward and the moment he fired. Goosmann fired the shot from a distance of only twelve to eighteen inches, supporting the inference he intended to hit Mackey and knew it would do so. The shot struck Mackey near the center of the chest, where any bullet wound could be expected to cause serious injury or death. There was testimony he smirked after firing the shot. Goosmann drove off quickly stating something about having shot him. After returning home, he unloaded and hid the gun in the garage. Goosmann appeared calm at a party he attended later that evening. He did not tell any of his friends the shooting was an accident.

State v. Goosmann, Sup. Ct. No. 93-83, Ct. App. No. 4-332, slip op. at 2, 9-10 (Iowa Ct. App. Nov. 28, 1994).

ROUTING STATEMENT

The State agrees that this Court should retain this appeal. Iowa R. App. P. 6.401(2)(*c, d*). The State notes that there are now pending before this Court

approximately twenty appeals from denial of postconviction relief, in which the appellants raise issues which are identical or similar to the issue raised by Goosmann.

ARGUMENT

WHEN NO CONSTITUTIONAL PRINCIPLE COMPELS RETROACTIVE APPLICATION OF A CHANGE IN SUBSTANTIVE CRIMINAL LAW TO CASES THAT ARE FINAL WHEN THE CHANGE IS MADE, AND THE DEFENDANT'S CASE WAS FINAL LONG BEFORE THIS COURT OVERRULED CONTROLLING PRECEDENT AND ADOPTED THE INDEPENDENT FELONY RULE IN *STATE V. HEEMSTRA*, 721 N.W.2D 549 (IOWA 2006), NO PRINCIPLE OF DUE PROCESS COMPELS THIS COURT TO APPLY THE INDEPENDENT FELONY RULE RETROACTIVELY TO THE DEFENDANT'S CASE.

> If defendants were allowed to collaterally attack prior convictions every time the legislature changed a penal statute or the Supreme Court issued a decision changing prior law, few convictions would ever be final. The courts would be swamped in revolving litigation for the same offense. Each defendant is entitled to a full and complete fair trial. This right does not extend to a new trial every time the law subsequently changes.

Dryer v. State, 2003 WL 22187437 at *3 (Iowa Ct. App. Sept. 23, 2003).

A. Preservation of error.

The State agrees that Goosmann has preserved his due process claim. However, the State will show below that Goosmann's due process argument does not apply to the facts of Goosmann's case, and Goosmann offers no other basis, such as a claim of ineffective assistance of counsel, to support his challenge to this Court's decision to limit applicability of the new rule of *Heemstra*.

Goosmann also raises claims based on principles of equal protection and separation of powers. Brief of Appellant 17, 22-23. Goosmann neither raised these claims in the postconviction court, nor obtained a ruling. *See generally* Application (2/23/07); App. _____, Memorandum (2/23/07); Ruling

(7/17/07); App. _____. "Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal." *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997).

B. Standard of review.

The State agrees that this Court's review of Goosmann's due process claim is *de novo*. This Court's review of statute-of-limitations issues is for correction of errors of law. *Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003).

C. Discussion.

1. Statute of limitations.

The State argued below that the statute of limitations, Iowa Code section 822.3, barred Goosmann's claim. Motion to Dismiss (3/16/07); App. ____. The postconviction court agreed. Ruling (7/17/07) 13; App. ___. Goosmann claims the postconviction court's ruling was erroneous. Brief of Appellant 26-27.

Iowa Code section 822.3 provides that applications for postconviction relief:

> must be filed within three years from the date the conviction or decision is final or, in the event of an appeal, from the date the writ of procedendo is issued. However, this limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period.

The three-year limitation period began to run on February 9, 1995, when procedendo issued following affirmation of Goosmann's conviction by the Iowa Court of Appeals. Procedendo (2/9/95); App. ____. Goosmann did not file his present application for postconviction relief until February 23, 2007, more than nine years after the three-year limitations period ran. Application (2/23/07) 1;

App. ___. Iowa Code section 822.3 bars Goosmann's claim unless he raises "a ground of fact or law that could not have been raised within the applicable time period."

Goosmann claims he raises a ground of law that could not have been raised within the limitations period because *Heemstra* was not decided until August 25, 2006, long after the limitations period expired. *State v. Heemstra,* 721 N.W.2d 549, 549 (Iowa 2006).

However, "the exception [for claims that could not have been raised within the three-year period] applies to situations in which there would be no opportunity to test the validity of the conviction in relation to the ground of fact or law that allegedly could not have been raised within the time period." *Wilkins v. State*, 522 N.W.2d 822, 824 (Iowa 1994) (*per curiam*) (punctuation and quotation marks omitted). "[T]he focus of our inquiry has been whether the applicant was or should have been alerted to the potential claim before the limitation period expired." *Cornell v. State*, 529 N.W.2d 606, 611 (Iowa Ct. App. 1994) (quotation marks omitted). "A party claiming an exception to a normal limitations period must plead and prove the exception." *Id*. at 610. The claim raised by Goosmann – that the independent felony rule bars conviction for felony murder based on willful injury, when the act constituting willful injury also caused the death of the victim – was available and was raised by other litigants, both before and after Goosman's conviction. *State v. Anderson,* 517 N.W.2d 208, 214 (Iowa 1994); *State v. Rhomberg*, 516 N.W.2d 803, 805 (Iowa 1994); *State v.*

Ragland, 420 N.W.2d 791, 792-94 (Iowa 1988); *State v. Mayberry*, 411 N.W.2d 677, 682-83 (Iowa 1987); *State v. Beeman*, 315 N.W.2d 770, 776-77 (Iowa 1982).

It is no argument that the claim could not have been raised successfully during the three-year period. "[F]utility cannot constitute cause [excusing procedural default] if it means simply that a claim was unacceptable to that particular court at that particular time." *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 1611, 140 L. Ed. 2d 828, 840 (1998) (interpreting federal *habeas corpus* statute; quotation marks omitted).

As Goosmann filed his claim after the three-year limitation period ran, and he does not raise a claim that could not have been raised within that period, Iowa Code section 822.3 bars Goosmann's claim.

In addition, Goosmann has already had the benefit of a direct appeal, a prior postconviction action, and a federal *habeas corpus* action. *State v. Goosmann*, Sup. Ct. No. 93-83, Ct. App. No. 4-332 (Iowa Ct. App. Nov. 28, 1994) (hereafter cited as "*State v. Goosmann*"); *Goosmann v. State*, 2000 WL 703215 (Iowa Ct. App. May 31, 2000) (hereafter cited as "*Goosmann v. State*"); Judgment in a Civil Case (N.D. Iowa Dec. 24, 2001); App. _____, Order (N.D. Iowa Apr. 20, 2005); App. ____. Goosmann does not claim ineffective assistance or offer any other explanation for his failure to raise his present claim in prior proceedings.

2. The constitution does not compel.

In *Heemstra* this Court adopted the independent felony rule, construing Iowa Code sections 707.2(2) and 702.11 to preclude a conviction for felony murder, with willful injury as the underlying felony, when the act constituting willful injury is not independent of the act causing the victim's death. *State v. Heemstra,* 721 N.W.2d at 558. The Court said:

> The rule of law announced in this case regarding the use of willful injury as a predicate felony for felony-murder purposes shall be applicable only to the present case and those cases not finally resolved on direct appeal in which the issue has been raised in the district court.

Id.

The new rule of *Heemstra* is not constitutionally based. *Id.* (adoption of independent felony rule is "the responsibility of the court and within the power of the court to apply, based on legal precedent, common sense, and fairness"); *id.* at 567 (Carter, J., dissenting) (citing *Heaton v. Nix*, 924 F.2d 130, 134 (8th Cir. 1991) (argument against merger doctrine lacks constitutional basis)). However, Goosmann claims that principles of due process compel this Court to overrule *Heemstra,* in so far as this Court in that decision limited the applicability of the independent felony rule, and apply *Heemstra* to Goosmann's case, although Goosmann's conviction was final long before *Heemstra* was decided.

Analysis of this claim proceeds in four distinct steps, each of which depends on the answer to the question presented in the previous step. The State will make the following showings: **first step** – the new rule of law announced in *Heemstra* is substantive and not procedural in nature; **second step** – the new

rule announced in *Heemstra* changed the law and did not merely clarify what the law had always been; **third step** – no constitutional principle either requires or forbids retroactive application of changes in substantive law to cases that were final at the time the changes were made; **fourth step** – the equities of the case, and practical considerations noted by many courts, support this Court's decision to limit application of the new substantive rule of *Heemstra* to Heemstra himself and other cases that were not final at the time of the *Heemstra* decision.

The **first step** addresses the question whether the new rule of law adopted in *Heemstra* is substantive or procedural in nature.

> A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. ... In contrast, rules that regulate only the manner of determining the defendant's culpability are procedural.

Schriro v. Summerlin, 542 U.S. 348, 353, 124 S. Ct. 2519, 2523, 159 L. Ed. 2d 442, 449 (2004) (citations omitted).

> [S]ubstantive law is that which declares what acts are crimes and prescribes the punishment therefore; whereas procedural law is that which provides or regulates the steps by which one who violates a criminal statute is tried and punished.

Easterwood v. State, 44 P.3d 1209, 1217 (Kan. 2002) (quotation marks omitted).

If the newly adopted rule is procedural in nature, then a court must determine whether to apply it retroactively to cases on collateral review according to the procedure set forth in *Teague v. Lane*, 489 U.S. 288, 310-11, 109 S. Ct. 1060, 1075-76, 103 L. Ed. 2d 334, 355-57 (1989), *see also Brewer v. State*, 444 N.W.2d 77, 81 (Iowa 1989) (adopting *Teague*). However, "*Teague* by its terms

applies only to procedural rules" and not to situations in which a court determines the meaning of a criminal statute enacted by the legislature. *Bousley v. United States*, 523 U.S. at 620, 118 S. Ct. at 1609-10, 140 L. Ed. 2d at 838; *Johnson v. Florida Dept. of Corrections*, 513 F.3d 1328, 1335 & n. 12 (11th Cir. 2008) (*Teague* applies to new constitutional procedural rules, not to substantive statutory changes).

If the newly adopted rule is substantive, then there is "no issue of retroactivity" governed by *Teague*, and the question is whether a conviction, obtained before the new rule was adopted, comports with the due process requirement that the State must prove all of the elements of the crime beyond a reasonable doubt. *Fiore v. White*, 531 U.S. 225, 228-29, 121 S. Ct. 712, 714, 148 L. Ed. 2d 629, 633 (2001) (*per curiam*).

Here, as in the postconviction court, Goosmann argues that the new rule of *Heemstra* is substantive in nature, and concedes that "*Teague's* analysis of retroactive application is not directly applicable." Brief of Appellant 20-21, 26; *see* Memorandum (2/23/07) 8-10; App. _____. The State agrees that the rule of *Heemstra* is substantive. In *Heemstra* this Court overruled a long line of cases that had refused to adopt the independent felony rule, and held that a defendant could no longer be convicted of felony murder, with willful injury as the underlying felony, when there was no willful injury independent of the act that caused the victim's death. *State v. Heemstra*, 721 N.W.2d at 558. As this "alter[ed] the range of conduct ... that the law punishes," *Schriro v. Summerlin*,

542 U.S. at 353-54, 124 S. Ct. at 2523-24, 159 L. Ed. 2d at 449-50, there is no doubt that it produced a substantive change in the law.

Many of the cases cited and quoted by Goosmann deal with the possible retroactive application, not of substantive changes in the law, but of new procedural rules. *See Teague; Schriro v. Summerlin,* 542 U.S. at 349-51, 124 S. Ct. at 2521-22, 159 L. Ed. 2d at 447-48; *Saffle v. Parks*, 494 U.S. 484, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990); *Griffith v. Kentucky,* 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987); *Mackey v. United States*, 401 U.S. 667, 91 S. Ct. 1160, 28 L. Ed. 2d 404 (1971); *State v. Royer,* 436 N.W.2d 637 (Iowa 1989). None of these cases is on point.

Goosmann cites *Schriro* for the propositions that it "set out the appropriate standard for determining retroactivity of new rules in criminal cases ... without any reliance on the by then discredited rule ... that there were no constitutional considerations involved in retroactivity analysis," and that this Court should "reexamine its own retroactivity analysis and adopt the standard found in *Schriro*." Brief of Appellant 23-24. However, the discussion of retroactivity in *Schriro* pertained to the question whether the new procedural rule announced in *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), should apply retroactively to the defendant's case. *Schriro v. Summerlin*, 542 U.S. at 349-51, 124 S. Ct. at 2521-22, 159 L. Ed. 2d at 447-48.

Goosmann cites *Griffith* for the propositions that newly declared rules must be applied retroactively to all criminal cases, that the nature of judicial

review strips courts of the essentially legislative prerogative to make rules of law retroactive or prospective as they see fit, that selective application of new rules violates the principle of treating similarly situated parties the same, and that equal protection requires that substantive new rules in criminal cases be applied retroactively. Brief of Appellant 22, 26. However, *Griffith* deals with new procedural rules, not new substantive rules. *Griffith v. Kentucky*, 479 U.S. at 316, 107 S. Ct. at 709, 93 L. Ed. 2d at 654. In addition, *Griffith* uses the word "retroactive" to signify application of new constitutionally based procedural rules to the case in which the new rule is announced and to other cases still pending on direct review at the time of the announcement. *Id*. at 322-23, 107 S. Ct. at 712-13, 93 L. Ed. 2d at 658-59. However, the new rule of *Heemstra* is not constitutionally based, *State v. Heemstra*, 721 N.W.2d at 558; *id*. at 567 (Carter, J., dissenting), and *Griffith* has nothing to say about the possible application of new non-constitutional substantive rules to cases, like Goosmann's, which have long been final at the time the new substantive rule is announced.

Goosmann cites Justice Harlan's concurring opinion in *Mackey* for the proposition that new constitutional rules generally should not be applied retroactively on collateral review, but that this principle is subject to an exception for new rules "that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Brief of Appellant 20, *see Mackey v. United States*, 401 U.S. at 692, 91 S. Ct. at 1180, 28 L. Ed. 2d at 420 (Harlan, J.,

concurring). However, as the State has noted, the new rule of *Heemstra* is not constitutionally based, and no one has ever dreamed that the constitution prevents a state from punishing a defendant who shoots his victim in the chest from a distance of twelve to eighteen inches. *See State v. Goosmann,* slip op. at 9. Justice Harlan himself noted that "the Federal Constitution imposes no barrier to a state court's decision to apply a new state common-law rule prospectively only." *Mackey v. United States*, 401 U.S. at 698, 91 S. Ct. at 1183, 28 L. Ed. 2d at 424 (Harlan, J., concurring).

Goosmann cites *Royer* for the proposition that in that case this Court "updated its retroactivity analysis" in reliance on *Griffith,* saying that "the reasoning adopted therein is applicable to this situation." Brief of Appellant 24. However, like *Griffith, Royer* did not deal with the possible retroactive application of new substantive law, but the possible retroactive application of a new procedural rule concerning instruction on lesser included offenses; in addition, the case was on direct appeal and the alleged procedural error had been properly preserved. *State v. Royer,* 436 N.W.2d at 640-41.

None of these procedural cases has any bearing on the question whether principles of due process compel this Court to apply the new substantive rule of *Heemstra* to Goosmann's case.

The **second step** of the analysis addresses the question whether the new rule of *Heemstra* merely clarified what the law has always been, or changed the law.

When the highest court of a jurisdiction addresses a criminal statute for the first time, clarifies its meaning, and holds that it does not reach certain conduct, the decision does not change substantive law, but "merely explain[s] what [the statute] meant ever since the statute was enacted." *Bousley v. United States,* 523 U.S. at 625, 118 S. Ct. at 1612, 140 L. Ed. 2d at 841 (Stevens, J., concurring in part and dissenting in part). "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Id*. at 626, 118 S. Ct. at 1612, 140 L. Ed. 2d at 842 (Stevens, J., concurring in part and dissenting in part). When a first authoritative judicial decision clarifies substantive law and announces what the statute meant at the time of an earlier criminal conviction, then due process requires that the validity of the conviction be examined in light of the later decision, to ensure that the defendant was not convicted on facts that do not constitute the crime. *Fiore v. White,* 531 U.S. at 226-29, 121 S. Ct. at 713-14, 148 L. Ed. 2d at 632-33; *In re Hinton,* 100 P.3d 801, 802-05 & n. 2 (Wash. 2004).

The heart of Goosmann's argument is that the *Heemstra* decision merely clarified substantive law and "that Iowa's Felony Murder statute has always meant what it has now been interpreted to mean." Brief of Appellant 14.

However, *Fiore* deals only with clarifications of law, *i.e.*, situations in which the highest court of the jurisdiction construes a statute for the first time; when an authoritative judicial decision overrules a prior controlling decision and

changes substantive law rather than merely clarifying it, the reasoning of *Fiore* does not apply. *Johnson v. Florida Dept. of Corrections*, 513 F.3d 1328, 1334-35 & n. 12 (11th Cir. 2008) (distinguishing *Fiore*); *Chapman v. LeMaster*, 302 F.3d 1189, 1196-97 & n. 4 (10th Cir. 2002) (same); *Clem v. State*, 81 P.3d 521, 527-29 & n. 47 (Nev. 2003) (*per curiam*) (same). No due process violation results from failure to apply a change in substantive law (as opposed to a clarification) to a long-final criminal conviction. *Johnson v. Florida Dept. of Corrections*, 513 F.3d at 1334-35 & n. 12; *Clem v. State*, 81 P.3d at 529.

Prior to *Heemstra*, this Court repeatedly rejected claims based on the independent felony rule. *State v. Anderson*, 517 N.W.2d at 214; *State v. Rhomberg*, 516 N.W.2d at 805; *State v. Ragland*, 420 N.W.2d at 792-94; *State v. Mayberry*, 411 N.W.2d at 682-83; *State v. Beeman*, 315 N.W.2d at 776-77. *Heemstra* adopted the independent felony rule, recognized that its prior cases were "inconsistent with" its current view, and overruled them. *State v. Heemstra*, 721 N.W.2d at 558. There can be no doubt that this produced a substantive change in the law, and not merely a clarification.

Goosmann overlooks the distinction between a clarification of the law and a change in the law, relying upon cases that deal with clarifications. *See Fiore v. White*, 531 U.S. at 226, 121 S. Ct. at 713, 148 L. Ed. 2d at 632; *Bousley v. United States*, 523 U.S. at 616-18, 118 S. Ct. at 1608, 140 L. Ed. 2d at 835-39; *McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987); *United States v. Gobert*, 139 F.3d 436 (5th Cir. 1998); *United States v. Mandel*, 672 F.

Supp. 864 (D. Md. 1987), *affirmed*, 862 F.2d 1067 (4th Cir. 1988); *In re Hinton*, 100 P.3d at 802-04; *In re Andress*, 56 P.3d 981 (Wash. 2002, as amended on denial of reconsideration 2003). None of these cases is on point.

Goosmann cites *Fiore* for the proposition that the State cannot, consistent with due process, convict a defendant for conduct that the statute, as properly interpreted, does not prohibit. Brief of Appellant 10-11. However, Fiore deals with a clarification of the law, not a change in the law. *Fiore v. White*, 531 U.S. at 226, 121 S. Ct. at 713, 148 L. Ed. 2d at 632 (determining effect of first interpretation by Pennsylvania Supreme Court of Title 35, section 6018.401(a), Pennsylvania Statutes Annotated (operation of hazardous waste facility without permit)). Goosmann recognizes that "[i]n *Fiore* there was no prior state precedent holding that his conduct came within the statute in question[, while i]n the present case there was prior state precedent holding that the Appellant could be convicted under a felony murder theory based on Willful Injury," but says that this "does not mean that the Appellant is not entitled to retrospective application of the rule of *Heemstra*." Brief of Appellant 11. However, the factual difference noted by Goosmann is precisely the distinction between clarifications of law and changes of law, and due process does not compel retroactive application of changes in the law. *Johnson v. Florida Dept. of Corrections*, 513 F.3d at 1334-35 & n. 12; *Clem v. State*, 81 P.3d at 529.

Goosmann claims *Bousley* is "on all fours" with the facts of this case, and cites it for the propositions that new substantive rules generally apply

retroactively, that this includes decisions that narrow the scope of a criminal statute by interpreting its terms, that such rules apply retroactively because without retrospective application there would be a significant risk that the defendant stands convicted of an act that the law does not make criminal, and that a postconviction challenge based on *Heemstra* raises a constitutional claim. Brief of Appellant 12, 15-16, 25. However, *Bousley* deals with clarifications of law rather than changes of law. *Bousley v. United States,* 523 U.S. at 616-21, 118 S. Ct. at 1608-10, 140 L. Ed. 2d at 835-39. The language Goosmann quotes from *Bousley*, which at first sight appears to support Goosmann's claim, actually is not pertinent to it. (Goosmann also cites *Schriro* for the same propositions. Brief of Appellant 25. However, for those propositions the Court in *Schriro* cited and quoted *Bousley*, *see Schriro v. Summerlin,* 542 U.S. at 351-52, 124 S. Ct. at 2522-23, 159 L. Ed. 2d at 448, so the language Goosmann quotes from *Schriro* is no more pertinent than the language he quotes from *Bousley*.)

Goosmann cites and quotes the Fifth Circuit's decision in *Gobert* for the proposition that "if a defendant has been convicted of a criminal act that becomes no longer criminal, such a conviction cannot stand. After all, a refusal to vacate a sentence where a change in the substantive law has placed the conduct for which the defendant was convicted beyond the scope of a criminal statute would result in a complete miscarriage of justice." Brief of Appellant 16-17. However, the language quoted from *Gobert* deals with the necessity of giving retrospective effect to the clarification of law announced in *Bailey v. United States,* 516 U.S.

137, 144-50, 116 S. Ct. 501, 506-09, 133 L. Ed. 2d 472, 480-84 (1995) (construing 18 U.S.C. § 924(c)(1)) (imposing punishment on a person who "during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm") and determining that "use" "denotes active employment" of a firearm); *see United States v. Gobert*, 139 F.3d at 437. Again, language that appears to support Goosmann's claim actually does not pertain to the issue in this appeal.

Goosmann cites and quotes the United States district court's opinion in *Mandel*, saying that its "reasoning in granting retroactive effect of the *McNally* decision is particularly *apropos*," and noting language from the district court to the effect that if the defendant's conduct was not prohibited by the statute, it was not a crime. Brief of Appellant 18. However, *McNally* clarified the statute at issue, and did not change it, *McNally v. United States*, 483 U.S. at 359-61, 107 S. Ct. at 2881-82, 97 L. Ed. 2d at 302-03 (construing 18 U.S.C. § 1341, the federal mail fraud statute, and determining that it is "limited in scope to the protection of property rights"), so the district court's reasons for giving *McNally* retrospective effect have nothing to do with the question whether due process principles compel this Court to give retrospective effect to the change in the law produced by *Heemstra*.

Goosmann argues that *Hinton* presents issues virtually identical to those here, and that it is so similar to this case that this Court should find it persuasive. Brief of Appellant 11-12. However, *Hinton* dealt with the retrospective application of the clarification of statutory language announced in *In re Andress*,

56 P.3d at 983-85, 988 (interpreting section 9A.32.050, Revised Code of Washington (second degree felony murder statute) for the first time, and determining that when the legislature adopted the statute in 1976 it did not intend that an assault could serve as the predicate felony for second degree felony murder); *see In re Hinton,* 100 P.3d at 802-04, so *Hinton* does not bear on the facts of this case.

None of these cases is contrary to the proposition that due process does not require application of changes in substantive law (as opposed to clarifications of law) to long-final convictions. *See Johnson v. Florida Dept. of Corrections,* 513 F.3d at 1334-35 & n. 12; *Clem v. State,* 81 P.3d at 529.

The **third step** of the inquiry addresses the question whether any constitutional principle compels this Court to apply the change of substantive law announced in *Heemstra* to cases that were final when the change was made.

"A change of [substantive] law does not invalidate a conviction obtained under an earlier law." *Kleve v. Hill,* 243 F.3d 1149, 1151 (9th Cir. 2001) (citing *Pulley v. Harris,* 465 U.S. 37, 42, 104 S. Ct. 871, 875, 79 L. Ed. 2d 29, 35 (1984); *Wainwright v. Stone,* 414 U.S. 21, 23-24, 94 S. Ct. 190, 192-93, 38 L. Ed. 2d 179, 182 (1973) (*per curiam*)); *Clem v. State,* 81 P.3d at 527 & n. 44.

When a state court decision, handed down after the defendant's conviction was final, overrules prior controlling precedent and changes the meaning of a substantive criminal statute so that it no longer reaches the defendant's conduct, the state is not "constitutionally compelled to ... make retroactive its new

construction of the ... statute." *Wainwright v. Stone,* 414 U.S. at 23-24, 94 S. Ct. at 193, 38 L. Ed. 2d at 182; *State v. Davis,* 525 N.W.2d 837, 841 (Iowa 1994) (procedural case; "constitution neither prohibits nor requires retroactive application of judicial decisions"); *Houston v. Dutton,* 50 F.3d 381, 385 (6th Cir. 1995) ("No federal issues are implicated and no federal question is presented in determining whether a change in state law is to be applied retroactively").

In *Sunburst Oil,* addressing the question whether any constitutional principle required retroactive application of a change in substantive state law made by the Supreme Court of Montana, Justice Cardozo wrote:

> This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the Constitution of the United States is infringed by the refusal.
>
> We think the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. ....
>
> .... [W]e are not at liberty, for anything contained in the Constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process.

Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 359-61, 364-66, 53 S. Ct. 145, 146-49, 77 L. Ed. 360, 363-64, 366-67 (1932) (cited and quoted in *American Trucking Assns. v. Smith,* 496 U.S. 167, 196, 110 S. Ct. 2323, 2340-41, 110 L. Ed. 2d 148, 171 (1990) (civil case), and *Wainwright v. Stone,* 414 U.S. at 24, 94 S. Ct. at 193, 38 L. Ed. 2d at 182); *State v. Leonard,* 243 N.W.2d 75, 84 (Iowa 1976) (procedural case; constitution neither requires nor prohibits

retrospective application of a decision; "this court has the power to set forth its own standard of retroactivity of a new rule"); *Chapman v. LeMaster*, 302 F.3d at 1198 (federal Constitution neither prohibits nor requires retroactive application of judicial decisions; when a state's highest court has made a substantive change in the criminal law and "has resolved the question of retroactivity, that determination is a matter of state law"); *Clem v. State*, 81 P.3d at 529 & nn. 59-61 (state court not required to make retroactive application of new law overruling or reversing prior decisions to narrow the reach of a substantive criminal statute). "When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions." *American Trucking Assns. v. Smith*, 496 U.S. at 177, 110 S. Ct. at 2330, 110 L. Ed. 2d at 159.

Thus, contrary to Goosmann's claim, no principle of due process requires this Court to apply the new substantive rule of *Heemstra* to Goosmann's case.

Goosmann also bases his claim in part on separation-of-powers principles, citing *State v. Nicholson*, 402 N.W.2d 463, 464-65 (Iowa Ct. App. 1987), for the proposition that "only the legislature has the power to define criminal offenses and to determine the punishments to be imposed." Brief of Appellant 17. The State has noted that Goosmann has not preserved this part of his claim. In any event, the quoted language may be an argument that, in narrowing the scope of Iowa Code sections 707.2(2) and 702.11, this Court overstepped the boundaries of its role. It is not an argument that this Court must apply *Heemstra* to Goosmann's case.

Goosmann also bases his claim in part on the equal protection clauses of the United States and Iowa Constitutions, presumably on the theory that *Heemstra* provided that the new rule announced in that case should apply to Heemstra's own case "and those cases not finally resolved on direct appeal in which the issue has been raised in the district court," but not to cases like Goosmann's, which was final many years before *Heemstra* was decided. *State v. Heemstra,* 721 N.W.2d at 558. Brief of Appellant 23. The State has noted that Goosmann has not preserved this part of his claim. In any event, equal protection principles merely "require equal treatment of similarly situated people. .... Dissimilar treatment of people who are situated differently does not violate equal protection." *In re Detention of Hennings,* 744 N.W.2d 333, 339 (Iowa 2008) (citations omitted). When courts consider whether their decisions are to apply to cases other than the one before the court, they routinely distinguish between defendants whose cases are still pending on direct review and defendants whose cases are final. *See, e.g., Teague v. Lane,* 489 U.S. at 310, 109 S. Ct. at 1075, 103 L. Ed. 2d at 356; *Griffith v. Kentucky,* 479 U.S. at 328, 107 S. Ct. at 716, 93 L. Ed. 2d at 661. The two classes of defendants are not similarly situated. Furthermore, the constitution does not require retrospective application of changes of substantive law. *American Trucking Assns. v. Smith,* 496 U.S. at 177, 110 S. Ct. at 2330, 110 L. Ed. 2d at 159; *Wainwright v. Stone,* 414 U.S. at 23-24, 94 S. Ct. at 193, 38 L. Ed. 2d at 182; *State v. Davis,* 525 N.W.2d at 841; *Chapman v. LeMaster,* 302 F.3d at 1198.

The following cases present factual situations closely analogous to that of Goosmann's case, and support this Court's decision to limit the substantive change of law announced in *Heemstra* to cases that were still pending at the time of the decision.

In *Clem* the defendants received enhanced sentences based on their use of "deadly weapons" – a red-hot table fork and heated electric iron – to burn their victim during the commission of their crimes. *Clem v. State,* 81 P.3d at 523. On direct appeal the Supreme Court of Nevada interpreted the phrase "deadly weapon" for the first time and adopted a functional test, which considered how an instrument was used, to determine whether it was a deadly weapon. *Id*. at 524. Applying that test, the court found that the defendants' use of a red-hot table fork and heated electric iron constituted the use of deadly weapons. *Id*. After the defendants' cases were final, the court overruled its previous decision, rejected the functional test, and adopted a test requiring the instrument to be "inherently dangerous," such that the instrument would or was likely to cause life-threatening injury or death when used in the ordinary manner, to qualify as a deadly weapon. *Id*. In a later appeal involving one of the defendants, the Nevada court decided that the new "inherently dangerous" test would not apply retroactively. *Id*. at 525. The defendants then applied for state *habeas corpus* relief, claiming the new "inherently dangerous" test must be applied retroactively to their cases. *Id*. The defendants relied in part on *Fiore,* but the Nevada Supreme Court held that *Fiore*'s due process considerations did not apply to the

situation because *Fiore* involved a clarification of law, while the case in which the Nevada court overruled its prior decision and adopted the "inherently dangerous" test involved a change, not a clarification, of the law. *Id*. at 526-29. The Nevada court noted that "*Fiore* does not undermine the rule that a change of law does not invalidate a conviction obtained under an earlier law," *id*. at 527, and concluded that it had authority to determine for itself whether a substantive change in the law would be applied retroactively:

> Appellants ignore the reality that, as a state court, we are free to choose the degree of retroactivity or prospectivity which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires.
>
> Therefore, this court is not required to make retroactive its new rules of state law that do not implicate constitutional rights. This is true even where our decisions overrule or reverse prior decisions to narrow the reach of a substantive criminal statute. That is, we may determine that such decisions, though we ultimately overrule them, were law none the less for intermediate transactions.

Id. at 529 (footnotes and quotation marks omitted).

In *Easterwood* the defendant and his cousin committed an armed robbery and kidnaping, in the course of which police officers shot and killed the cousin. *Easterwood v. State*, 44 P.3d at 1211. Prior to the crime Kansas courts had adopted a "proximate cause" theory, under which a defendant could be charged with felony murder if the participants in the crime could reasonably foresee or expect that a life might be taken. *Id*. 1215. Easterwood pled guilty to felony murder under this theory, to avoid the dangers of going to trial on felony murder and many other serious charges. *Id*. at 1211-14. After Easterwood's case was

final, the Kansas Supreme Court changed substantive law and held that a felon could not be convicted of felony murder based on the killing of a co-felon by law enforcement officers or by a victim acting in self-defense. *Id*. at 1214-15. Easterwood then claimed on collateral review that he did not commit felony murder and that the Kansas court's intervening decisions had to be applied retroactively to Easterwood's case. *Id*. at 1215. The Kansas Supreme Court noted that the intervening decisions produced a substantive change in criminal law, and that fact should be considered in determining the retroactive effect of the change. *Id*. at 1216-17. The Kansas court distinguished *Bousley*, relied upon by Easterwood, *id*. at 1215, 1223, and also distinguished *Fiore* on the ground that the Kansas court's intermediate decisions changed the law rather than clarifying it. *Id*. at 1223. The court held that its intermediate decisions should not apply retrospectively to Easterwood's case. *Id*.

In *Chapman* the defendant was convicted of felony murder in New Mexico state court, under instructions that did not require the jurors to find any *mens rea* element in order to convict. *Chapman v. LeMaster*, 302 F.3d at 1191, 1196. The instructions were consistent with controlling decisions of the New Mexico Supreme Court. *Id*. at 1197. However, long after Chapman's conviction became final, the New Mexico court changed the law, overruling its prior decisions and holding that felony murder required proof of a *mens rea* element. *Id*. at 1196-97. Chapman sought federal *habeas corpus* relief, relying on *Fiore*. *Id*. at 1193, 1197 & n. 4. The United States Court of Appeals for the Tenth Circuit distinguished

Fiore, noting that *Fiore* involved a clarification of law while the intervening decision of the New Mexico court had changed the law. *Id*. at 1197 & n. 4. Chapman argued that even if *Fiore* did not govern his case, the court should nevertheless apply the intervening New Mexico decision retroactively. *Id*. at 1198. The United States Court of Appeals rejected this claim, noting that "[w]hen a state's highest criminal court has resolved the question of retroactivity, that determination is a matter of state law," and concluding that the New Mexico court, if presented with Chapman's claim, would reject it. *Id*. at 1198-99.

This Court should follow *Clem, Easterwood, Chapman,* and the other authorities set forth above, and find that no principle of due process compels this Court to apply the substantive change in the law announced in *Heemstra* to Goosmann's case.

The **fourth step** of the inquiry begins from the fact that the constitution leaves this Court free to apply *Heemstra* prospectively or retrospectively as it sees fit, and addresses the question whether this Court should confirm, or overrule, its determination that *Heemstra* should apply only to Heemstra's own case "and those cases not finally resolved on direct appeal in which the issue has been raised in the district court." *State v. Heemstra,* 721 N.W.2d at 558.

The analysis begins with the fact that Goosmann is not actually innocent. When Goosmann shot and killed Chad Mackey in 1992, he was on notice that his conduct constituted felony murder under the statute as then construed, *State v. Ragland,* 420 N.W.2d at 791 (1988 decision); *State v. Mayberry,* 411 N.W.2d at

677 (1987 decision); *State v. Beeman,* 315 N.W.2d at 770 (1982 decision), and may well have constituted premeditated murder, given the fact that he had previously expressed the intention to shoot anyone who "gives us shit." *State v. Goosmann,* slip op. at 9. A jury, correctly instructed pursuant to the state of the law at the time, Jury Instr. 19; App. ____, found beyond a reasonable doubt that the State had proven every element of the crime as it was then defined. Goosmann had the benefit of a direct appeal, a prior postconviction action, and a federal *habeas corpus* action, in which the courts found that the evidence was sufficient to support Goosmann's conviction, rejected Goosmann's claims of procedural error, and found that Goosmann's trial counsel were not ineffective. *State v. Goosmann,* slip op. at 3-10; *Goosmann v. State,* 2000 WL 703215 at *1-*3; Judgment in a Civil Case (N.D. Iowa Dec. 24, 2001); App. _____, Order (N.D. Iowa Apr. 20, 2005); App. ____. No injustice has tainted the proceedings against Goosmann. To give Goosmann relief pursuant to *Heemstra* would be to grant him a windfall that the equities of the case neither require nor justify.

In addition, many courts have noted that practical considerations, such as reasonable and good-faith reliance by prosecutors and courts upon the law as it stood at the time of the original trial, the additional costs and burdens upon the judicial system, the difficulty of locating witnesses and evidence in order to re-try old cases, and the need for finality, all weigh against applying a new rule retroactively to cases that were final at the time the new rule was adopted.

Discussing retroactive application of new constitutionally based procedural rules, the United States Supreme Court has said:

> Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions shows only that conventional notions of finality should not have *as much* place in criminal as in civil litigation, not that they should have *none*. .... If a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competence to determine legality. .... No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.
>
> ....
>
> The costs imposed upon the States by retroactive application of new rules of constitutional law on habeas corpus ... generally far outweigh the benefits of this application. .... In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions ... for it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards.

Teague v. Lane, 489 U.S. at 309-10, 109 S. Ct. at 1074-75, 103 L. Ed. 2d at 355 (citations, quotation marks, and punctuation omitted; emphases by the Court); *see also Danforth v. Minnesota*, ___ U.S. ___, ___, 128 S. Ct. 1029, 1039 & n. 13, 169 L. Ed. 2d 859, ___ (2008) (noting that the United States Supreme Court "denied retroactive effect to the rule announced in *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), prohibiting prosecutorial comment on the defendant's failure to testify," and thereby "protected the State of California from a potentially massive exodus of state prisoners because their

prosecutors and judges had routinely commented on a defendant's failure to testify"); *Dryer v. State*, 2003 WL 22187437 at *3.

In *Chapman*, discussing retroactive application of a change in substantive law made by the New Mexico Supreme Court, the United States Court of Appeals noted that the purpose of the change was to prevent the state from convicting a defendant without proof of his *mens rea*, but that:

> This factor ... must be balanced against the state's reliance on the felony murder rule before *Ortega* [the intervening decision]. Law enforcement officials and prosecutors undoubtedly relied on the pre-*Ortega* felony murder law for over thirty years. ....
>
> Applying *Ortega* retroactively would require retrial of those convicted of felony murder without an *Ortega* instruction, which may not be feasible depending on the availability and age of witnesses and evidence. The state's reliance on the finality of its convictions, the New Mexico Supreme Court's endorsement of the pre-*Ortega* rule, and the burden of retrying those convicted of felony murder prior to *Ortega* outweighs *Ortega*'s retroactive [*sic;* "subsequent"?] imposition of a *mens rea* element in the felony murder statute. Because we conclude that New Mexico would not apply *Ortega* retroactively to Chapman's felony murder conviction, his conviction does not violate federal due process standards.

Chapman v. LeMaster, 302 F.3d at 1199; *see also Policano v. Herbert*, 859 N.E.2d 484, 489, 495-96 (N.Y. 2006) ("factors strongly favor[ing] nonretroactivity" of change of substantive law include fact that "[f]or two decades prosecutors relied on [prior law] when making their charging decisions," and fact that "retroactive application would potentially flood the criminal justice system" with postconviction proceedings filed by defendants "who were properly charged and convicted ... under the law as it existed at the time of their convictions").

Given the fact that the equities do not favor Goosmann, and the practical concerns weighing against application of *Heemstra* to cases on collateral review, this Court should affirm its prior holding: the new rule adopted in *Heemstra* applies only to Heemstra himself and to "those cases not finally resolved on direct appeal in which the issue has been raised in the district court." *State v. Heemstra,* 721 N.W.2d at 558.

CONCLUSION

For all the reasons given above, the State respectfully asks this Court to affirm the ruling of the postconviction court dismissing applicant-appellant Joel Goosmann's application for postconviction relief.

CONDITIONAL NOTICE OF ORAL ARGUMENT

Notice is hereby given that upon submission of this cause, and in the event that appellant is granted oral argument, counsel for appellee hereby desires to be heard in oral argument.

COST CERTIFICATE

We certify that the cost of printing Appellee's Brief and Argument was the sum of $11.70.

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ATTORNEY'S CERTIFICATION
REGARDING UNPUBLISHED OPINION

I, the undersigned, hereby certify that on December 23, 2008 I have conducted a diligent search for, and fully disclosed, any subsequent disposition of unpublished opinions cited in, and attached to, this brief as required by Iowa Rule of Appellate Procedure 6.14(5).

_____
THOMAS S. TAUBER
Assistant Attorney General