IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 08-0225

ALBERT WINFREY, III,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE DISTRICT COURT OF POLK COUNTY
THE HONORABLE GLENN E. PILLE, DISTRICT COURT JUDGE

APPELLEE'S BRIEF
and Conditional Request for Oral Argument

THOMAS J. MILLER
Attorney General of Iowa

THOMAS W. ANDREWS
Assistant Attorney General
Iowa Department of Justice
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-6526 (515) 281-4902(fax)
E-mail: *tandrews@ag.state.ia.us*

JOHN SARCONE
Polk County Attorney

JAMES WARD
Assistant Polk County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE PROOF COPY

PROOF OF SERVICE

On December 29, 2008, I did cause to be served

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of this Brief by

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on the other parties in this appeal by delivery to:

Gary Dickey, Jr.
Dickey & Campbell Law Firm, P.C.
601 East Locust Street, Suite 102
Des Moines, Iowa 50309

THOMAS W. ANDREWS
Assistant Attorney General

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State v. Heemstra, 721 N.W.2d 549 (Iowa 2006)

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28 U.S.C. § 2255

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Bryan A. Garner, *The Winning Brief* ch. 75 (2d ed. 2004)

Mario Pittoni, *Brief Writing and Argumentation* 39 (1967)

Bill Stott, *Write to the Point* 113 (1991)

28 U.S.C. § 2254(a)

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)

Commonwealth v. Fiore, 445 Pa.Super. 401, 665 A.2d 1185 (1995)

Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)

Solem v. Stumes, 465 U.S. 638, 104 S. Ct. 1338, 79 L. Ed. 2d 579 (1984)

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United States v. United States Coin & Currency, 401 U.S. 715, 91 S. Ct. 1041, 28 L. Ed. 2d 434 (1971)

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28 U.S.C. § 2244(b)(2)

United States v. Morgan, 230 F.3d 1067 (8th Cir. 2000)

Danforth v. Minnesota, 552 U.S. __, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008)

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Butler v. McKellar, 494 U.S. 407 (1990)

Saffle v. Parks, 494 U.S. 484 (1990)

Graham v. Collins, 506 U.S. 461 (1993)

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O'Dell v. Netherland, 521 U.S. 151 (1997)

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Sawyer v. Smith, 497 U.S. 227 (1990)

Caldwell v. Mississippi, 472 U.S. 320 (1985)

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Penry v. Lynaugh, 492 U.S. 302 (1989)

United States v. Sanchez-Cervantes, 282, F.3d 664 (9th Cir. 2002)

Tyler v. Cain, 533 U.S. 656 (2001)

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Mills v. United States, 2002 WL 424635 (N.D. Ill. Mar. 19, 2002)

Leavitt v. Arave, 383 F.3d 809 (9th Cir. 2004)

Gideon v. Wainwright, 372 U.S. 335 (1963)

Beard v. Banks, 542 U.S. 406(2004)

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

STATEMENT OF THE CASE

Nature of the Case. This is an appeal from a second postconviction action that was summarily dismissed as time-barred.

Factual Background. Both the entire original trial file (FECR 141104) and the entire prior postconviction action (PCCE 44710) were judicially noticed in this second postconviction case, which arises out of the second degree murder conviction of Albert F. Winfrey, III. *See State v. Winfrey*, 2001 WL 725439 (Iowa Ct. App. June 29, 2001).

On August 20, 1999, Winfrey walked into a neighborhood auto garage in northeast Des Moines during a card game and shot Castine

"Mo" Moore in the stomach with a .38 magnum, killing him. A month earlier, Mo – an occasional mechanic at that garage – had alerted the owner of the garage to a steering column problem with a truck Winfrey was trying to sell to the garage, resulting in the owner paying Winfrey a lower sale price. *State v. Winfrey*, 2001 WL 725439 (Iowa Ct. App. June 29, 2001); PCR Ruling at 2; TT 277-80, 285, 372-73.

On the Friday evening of the murder, Winfrey had been gambling for several hours in the back of the garage with a variety of friends and relatives when Mo criticized side-betting by Winfrey. An argument ensued and Winfrey told Mo, "I do whatever I want on my money." Winfrey got up and "backed away from the table" as he put his money in his pocket, exited the garage, and drove away. *Id.;* TT 97, 101, 138, 145, 172-73, 200, 222, 242-44, 262, 340, 348, 351-52, 362-65.

Fifteen to twenty minutes later, just after 7:00 p.m., Winfrey re-appeared outside the garage, telling one of the men who had just seen him leave: "Everything's going to be all right now." Winfrey had a revolver tucked in the waistband of his pants. One of the men outside the garage, sensing that "something would happen," told Winfrey "not

to go in there, start that shit." *Id.;* TT 101, 173-74226-28, 245-47, 252, 264-67, 271, 287-88, 352, 354, 365, 408.

Winfrey entered through the overhead door of the garage, which positioned Winfrey behind Mo's back. Winfrey only stepped "about three steps inside" the overhead door and "didn't get that close" to Mo, standing about eighteen feet behind him. Winfrey was seen holding a handgun in his hand at his side as he walked into the garage. Winfrey stood still and in an irritated and argumentative voice stated: "Now speak on my money."[1] *Id.;* TT 101, 105, 158, 174, 189, 192, 226-28, 245-47, 252, 264-67, 271, 287-88, 352, 354, 366, 394-96.

Mo was sitting at a card table playing blackjack but, unlike others, did not turn to look at Winfrey standing about eighteen feet behind him. Others "started leaving the table" as Winfrey kept repeating his statement in an upset-sounding voice. Mo turned

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[1]"Now speak on my money" in this context was interpreted by one of the card players to refer to "if you're dealing with another person and a third party sticks their nose in, then that's interfering in your business." TT 105. In this second PCR action Winfrey complained that the testimony implied that what he was saying to Mo was, "yeah, you were meddling before. Now meddle again." 2nd PCR Tr. at 19 (Oct. 31, 2007). However, Winfrey offered no other explanation for what his statement, uttered in an irritated and argumentative voice as he pointed a gun at Mo, was intended to convey. *Id.*

"around to see what was going on. Then Mo took his gambling money and put it in his pocket," stood up silently from his chair, turned to face Winfrey, and "took a step" away from the table, and then Mo "just stood there."[2] *Id.*; TT 156, 189-90, 193, 200, 209, 232, 234-35, 267-68, 270-74, 366; State's Ex. 14 (photo).

One of the card players heard somebody say, "He's got a gun." Others in the room in loud, excited voices said things in the nature of, "Don't do this," or "It isn't worth it," or "This shit don't have to be this way." The garage owner was unaware of anyone having ever brought a gun to a card game in his garage before that day. *Id.;* TT 108, 110, 158, 163-64, 196, 226-28, 245-47, 252, 264-67, 271, 287-88, 352, 354, 366, 394-96.

Winfrey continued to stand still, now pointing his raised .38 magnum blue-steel revolver at the silent Mo and repeated his statement in the same tone: "Now speak on my money." Winfrey

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[2]Testimony from Winfrey's relatives and friends in attendance varied as to whether Mo took 1, 2, 2½, or 3 steps, and the extent to which Mo would have had to step from his position at the card table next to a stove to move in any direction, including to leave the garage, as well as whether Mo put his money in his pocket before or after standing. *Id.*

then shot the unarmed Mo in the abdomen.[3] Mo "just stood there" silently looking at Winfrey, then took two or three steps to the side, began shaking, and collapsed to his knees. *Id.;* TT 107, 110, 112, 143, 158, 176, 192, 197-98, 232, 234-35, 267-68, 270-74, 36, 387, 406; State's Ex. 14 (photo).

Winfrey then shook his head and silently walked back out the overhead door of the garage still carrying his gun, got in his car, drove away, and tossed his gun in the river. *See generally State v. Shanahan*, 712 N.W.2d 121, 137 (Iowa 2006) ("Evidence showing a defendant's actions following commission of the alleged crime inconsistent with a claim of self-defense is probative of the defendant's lack of justification.") (citing *State v. Thornton*, 498 N.W.2d 670, 673-74 (Iowa 1993) (explaining a jury heard evidence the defendant "left the scene immediately after the shooting without stopping to call the police or an ambulance, or to explain to his friends present what had happened" and based on this and other

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[3]Winfrey now claims (Brief at 3) that Mo was armed: albeit, with a *pocket knife*, an item apparently inventoried from his pockets. Leaving aside the old adage not to bring a knife to a gunfight (and the fact that Mo stood motionless and speechless some 18 feet from Winfrey as the fatal shot was fired into him), the state of this record is that "[i]t is undisputed that Moore was not armed." *State v. Winfrey*, 2001 WL 725439 (Iowa Ct. App. June 29, 2001).

evidence it "could rationally believe these were not the actions of someone who honestly believed he acted in self-defense").

Mo died shortly thereafter on the operating table. *Id.*

Procedural background.

Winfrey has filed a direct appeal, a prior postconviction action, a postconviction appeal, a federal habeas action, a federal habeas appeal, and this second postconviction action, the dismissal of which he now appeals.

ROUTING STATEMENT

This case involves the application of existing legal principles warranting transfer to the Iowa Court of Appeals. Iowa R. App. P. 6.401(3)(b).

To the extent that this case raises a *Heemstra* retroactivity issue, that issue is also currently before this Court in *Scott v. State*, No. 06-2084, and *Goosman v. State*, No. 07-1416, as well as pending in at least 20 other PCR appeals.

ARGUMENT AND DISCUSSION

The State responds to Winfrey's two divisions in this single division.

Winfrey has also filed a pro se brief challenging the timing of the State's merits brief in the proceedings below. Winfrey is apparently under the misapprehension that the State's merits brief was a resistance to his motion to amend his postconviction application. It was not. And the district court did not disallow his amended petition. Thus the timing provisions of Iowa Rule of Civil Procedure 1.431(4), relating to motion practice, are inapplicable to the State's merits brief. *See generally* Brief in Resistance to Applicant's Second Postconviction Relief. The State's merits brief was not a resistance to his motion to amend, but to his request for relief on the amended application.

I. Winfrey's *Heemstra* arguments are without merit.

> *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.*
>
> --*Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932).

A. ***Preservation of Error.*** The parties agree that error is preserved. *See* Amended PCR Petition; App. __.

B. ***Standard of Review***. The parties agree that review is at law for errors for postconviction matters and jury instructions, except to the extent a constitutional issue is presented, in which case review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

C. ***Merits***. Winfrey seeks to overturn his second degree murder conviction by reliance on the recently announced decision in *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006).

By way of background, in 2006 the Iowa Supreme Court decided *Heemstra* and expressly overruled nearly a quarter-century of consistently applied Iowa precedent as to whether willful injury could serve as the predicate felony for felony murder. *Compare State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006) ("We now hold that, if the act causing willful injury is the same act that causes the victim's death, the former is merged into the murder and therefore cannot serve as the predicate felony for felony-murder purposes") *with State v. Beeman*, 315 N.W.2d 770, 772, 776-77 (Iowa 1982) (the felony of

willful injury may serve as the predicate felony for felony murder under Iowa practice, declining to adopt an independent felony rule). *See also Morris v. State*, 2007 WL 1827394 (Iowa Ct. App. June 27, 2007) (The felony murder rule announced in *Beeman* "was affirmed in numerous subsequent decisions by the supreme court," citing *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, 793 (Iowa 1988); *State v. Phams*, 342 N.W.2d 792, 795 (Iowa 1983)); *see also State v. Mayberry*, 411 N.W.2d 677, 682-83 (Iowa 1987).

The decision in *Heemstra* was not based on a federal constitutional right. Rather, *Heemstra* was an explication of Iowa law by the state's high court in the time-honored tradition of the common law:

> We now hold that, if the act causing willful injury is the same act that causes the victim's death, the former is merged into the murder and therefore cannot serve as the predicate felony for felony-murder purposes. In reaching this conclusion, we agree that we should not attribute to the legislature an intent to "create[ ] an ever-expanding felony murder rule" by characterizing every willful injury as a forcible felony for felony-murder purposes.

Heemstra, 721 N.W.2d at 558.

The Iowa Supreme Court's decision in *Heemstra* was subsequently amended by the Court to add a single sentence giving express guidance as to the applicability of *Heemstra*: "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.* *Cf.* Iowa Code § 822.2 (a postconviction relief action is "not a substitute for . . . direct review of the sentence or conviction."); *Morris v. State*, 2007 WL 1827394 (Iowa Ct. App. June 27, 2007) ("Our case law is clear that postconviction proceedings are collateral, rather than direct appeals," citing *Jones v. State*, 479 N.W.2d 265, 269 (Iowa 1991) ("[P]ostconviction relief proceedings are not 'criminal proceedings' involving 'charges' and a 'defense.' They are collateral actions initiated by an incarcerated individual challenging a prior conviction.").

Applicant's conviction for second degree murder has long since been "finally resolved on direct appeal." *Id.* There was thus nothing left to litigate in a second postconviction action. *Id.* Contrary to the

arguments of Winfrey, and as discussed below in greater detail, the Iowa Supreme Court was not constitutionally compelled to make *Heemstra* retroactive. *See, e.g., Wainwright v. Stone*, 414 U.S. 21, 23-24, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973) (holding Florida not constitutionally compelled to make a new construction of criminal statute retroactive). "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) (holding a claim based on evolution of state law is a matter of state law properly addressed to the state courts)); *Clem v. State*, 81 P.3d at 527 & n. 44.

1. This action is time-barred.

The State resisted Winfrey's claim below by invoking the postconviction statute of limitation. *See* Brief in Resistance at 13 (Jan. 4, 2008); App. ___. Iowa Code section 822.3 states, in pertinent part:

> applications 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 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...

Iowa Code § 822.3. "[T]he legislative intent [of adopting a postconviction statute of limitations] . . . was to limit postconviction litigation in order to conserve judicial resources, promote substantive goals of the criminal law, foster rehabilitation, and restore a sense of repose in our system of justice." *State v. Edman*, 444 N.W.2d 103, 106 (Iowa Ct. App. 1989).

The facts underlying Winfrey's claim were known at the time of trial. Those facts are not newly discovered. Moreover, there has been no change in the law which would affect the validity of Winfrey's conviction for second degree murder. The Iowa Supreme Court has provided that the state law rule adopted in *Heemstra* does not apply to cases that became final before *Heemstra* was decided, *State v. Heemstra*, 721 N.W.2d at 558, and it was within the Court's power so to provide. *American Trucking Assns, Inc. v. Smith,* 496 U.S. at 177, 110 S. Ct. at 2330, 110 L. Ed. 2d at 159. As discussed elsewhere in this brief, the rule announced in *Heemstra* is also inapplicable to Winfrey.

Winfrey's claim based on the independent felony rule is not a claim that could not have been raised within the three-year period of Iowa Code section 822.3. Such claims challenging Iowa's felony

murder rule were available to be raised. *See State v. Beeman*, 315 N.W.2d 770, 776-77 (Iowa 1982); *State v. Phams*, 342 N.W.2d 792, 795 (Iowa 1983); *State v. Mayberry*, 411 N.W.2d 677, 682-83 (Iowa 1987); *State v. Ragland*, 420 N.W.2d 791, 793 (Iowa 1988); *State v. Rhomberg*, 516 N.W.2d 803, 804-805 (Iowa 1994); *State v. Anderson*, 517 N.W.2d 208, 214 (Iowa 1994).

When Winfrey filed his second postconviction action it had been more than three years since procedendo issued from his direct appeal. The district court thus lacked "authority to hear the case because the statute of limitations had expired." *Schrier v. State*, 573 N.W.2d 242, 244 (Iowa 1997), citing *Wilkins v. State*, 522 N.W.2d 822 (Iowa 1994) and *Fuhrmann v. State*, 433 N.W.2d 720, 721 (Iowa 1988) ("the application on its face is barred by the statute of limitations"); *see also Dible v. State*, 557 N.W.2d 881, 886 (Iowa 1996) ("Any other decision would result in an endless procession of postconviction actions, and the legislature's hope to avoid stale claims and to achieve a sense of repose in the criminal justice system would not be realized."); *Davis v. State*, 443 N.W.2d 707 (Iowa 1989) (statute of limitations bar may be raised whenever application is

untimely on its face); *cf. Cornell v. State*, 529 N.W.2d 606 (Iowa App. 1994) ("party claiming an exception to a normal limitations period must plead and prove the exception"), citing *Franzen v. Deere & Co.*, 334 N.W.2d 730, 732 (Iowa 1983).

2. This action is piecemeal.

The State resisted Winfrey's claim below by invoking the piecemeal provisions of the postconviction statute. *See* Brief in Resistance at 14-15 (Jan. 4, 2008); App. ___. Iowa Code section 822.8 prohibits waived and procedurally defaulted issues from being presented in piecemeal litigation, stating:

> All grounds for relief available to an applicant under this chapter must be raised in the applicant's original, supplemental or amended application. Any ground finally adjudicated or not raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, on in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Iowa Code § 822.8.

This is Winfrey's second postconviction action. He did not need the decision in *Heemstra* to challenge the felony murder rule anew; but he did not do so at trial, on direct appeal, or in his prior postconviction cation. Even issues of constitutional magnitude will not be addressed in postconviction proceedings if they were not first properly raised on direct appeal. *Wenman v. State*, 327 N.W.2d 216 (Iowa 1982). "A postconviction proceeding is not an avenue for litigating issues that were not properly preserved for . . . review on direct appeal." *Washington v. Scurr*, 304 N.W.2d 231, 235 (Iowa 1981); *see also Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991); *State v. Knox*, 464 N.W.2d 445, 450 (Iowa 1990); *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989); *State v. White*, 337 N.W.2d 517, 519 (Iowa 1983); *State v. Epps*, 322 N.W.2d 288, 292 (Iowa 1982); *State v. Steltzer*, 288 N.W.2d 557, 560 (Iowa 1980); *Knox v. State*, 532 N.W.2d 149, 157 (Iowa App. 1995); *Whitsel v. State*, 439 N.W.2d 871, 873 (Iowa App. 1989); *Frank v. State*, 376 N.W.2d 637, 639 (Iowa App. 1985).

"Under section 822.8, this failure to raise grounds which could have been raised on direct appeal precludes asserting the grounds in a

postconviction relief petition." *Bugley v. State of Iowa*, 596 N.W.2d 893, 897 (Iowa 1999).

3. Winfrey has abandoned his ineffectiveness claims.

In his postconviction briefing to the district court, Winfrey argued that "his trial counsel and his appellate counsel were ineffective for failing to raise this '*Heemstra*' issue earlier," which the State resisted. *See* Brief in Resistance at 13-14 (Jan. 4, 2008); App. ___. The postconviction court rejected that claim. PCR II Ruling at 9-10; App. ___.

Winfrey apparently abandons his gateway ineffectiveness claims in this appeal, making it unclear how he seeks to arrive at the underlying merits of his *Heemstra* arguments. *See Goodell v. Humboldt County*, 575 N.W.2d 486, 493 n. 8 (Iowa 1998) (claim not raised until a reply brief cannot be considered on appeal)**;** *Sun Valley Iowa Lake Ass'n. v. Anderson*, 551 N.W.2d 621, 642 (Iowa 1996) (same); *Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992) (same); *State v. Willet*, 305 N.W.2d 454, 458 (Iowa 1981) (same); *Ames v. Board of Supervisors*, 234 Iowa 617, 623, 12 N.W.2d 567, 570-71

(1944) (same); *Polk County v. Davis*, 525 N.W.2d 434, 435 (Iowa Ct. App. 1994).

4. *Heemstra* does not apply to Winfrey's case.

Before delving further into Winfrey's *Heemstra*-based arguments, the State pauses to note that Winfrey makes the following assertion (Brief at 11): "Winfrey's second-degree murder conviction was based on the theory of willful injury as the underlying felony." Winfrey likewise claims (Brief at 11-12) that he was "tried and convicted of second-degree murder under a theory of implied malice" and that "[t]he State was allowed to bootstrap a willful injury offense into a conviction of second-degree murder. . . ."

These assertions are incorrect. Winfrey was convicted of second degree murder. Under Iowa law there is no specific intent element to second degree murder, and thus no felony murder exception to the showing of specific intent in the context of second degree murder conviction. Accordingly, Winfrey's conviction for second degree murder was *not* based on any underlying felony.

Thus, even if the holding in *Heemstra* was available to apply to Winfrey's case -- and, as discussed above and below, it is not -- the holding in *Heemstra* still would not apply to Winfrey's case, for he was not convicted of felony murder. Thus, this is not a situation where there is any risk that Winfrey convicted of "an act that the law does not make criminal," *Bousley v. United States*, 523 U.S. 614, 620-621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (quoting *Davis v. United States*, 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974)).

Heemstra by its own terms has no applicability to Winfrey's second degree murder conviction.

5. The Constitution does not require the courts of Iowa to make the *Heemstra* decision retroactive.

Winfrey asserts that the decision of the Iowa Supreme Court to not apply the *Heemstra* decision retroactively is unconstitutional. Much of the authority presented by Winfrey as to retroactivity simply is not on point as Iowa's independent felony rule is not constitutionally based. *See, e.g., State v. Rhomberg*, 516 N.W.2d 803, 804-805 (Iowa 1994) (the decision to adopt or reject the felony murder rule is a matter of statutory construction); *State v. Beeman*,

315 N.W.2d 770, 776-77 (Iowa 1982) (same); *see also Heemstra*, 721 N.W.2d at 558 (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).

Winfrey concedes (Brief at 9) that, unless *Heemstra* does apply retroactively, this appeal fails in its entirety. Thus, this appeal fails. *See Wainwright v. Stone*, 414 U.S. 21, 23-24, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973) (holding a state is not constitutionally compelled to make a new construction of a criminal statute retroactive); *State v. Davis*, 525 N.W.2d 837, 841 (Iowa 1994) (procedural case; "constitution neither prohibits nor requires retroactive application of judicial decisions").

For the sake of clarity the State underscores that the Iowa Supreme Court announced a new statutory interpretation in *Heemstra*, rather than a new retroactive rule of constitutional law. *Cf. United States v. Peterman*, 249 F.3d 458, 462 (6th Cir. 2001)

(Congress can preclude prisoners who seek collateral relief from using new statutory interpretations by the United States Supreme Court as a basis for their claims). The change was substantive, not procedural. *See, e.g., Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S. Ct. 2519, 2523, 159 L. Ed. 2d 442, 449 (2004) ("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.").

The arguments forwarded by Winfrey fail to account for the fact that the holding in *Heemstra* did not remove the fact that when Winfrey committed the acts with which he was charged, he was "on clear notice that [his] conduct was criminal under the statute as then construed." *Wainwright v. Stone*, 414 U.S. 21, 23-24, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973).

The Iowa Supreme Court -- like most states -- has commonly limited the retroactive effect of new judicial pronouncements to the current case and cases pending on direct review at the time decision is rendered. *See, e.g., State v. Royer*, 436 N.W.2d 637, 640 (Iowa 1989) (applying lesser included offense analysis from *State v. Jeffries*, 430

N.W.2d 728 (Iowa 1988) because issue was preserved); *State v. Monroe*, 236 N.W.2d 24, 39 (Iowa 1975) (adjusting jury trial requirements); *State v. Martin*, 217 N.W.2d 536, 542 (Iowa 1974) (limiting impeachment with felony convictions); *Schultz v. Gosselink*, 260 Iowa 115, 148 N.W.2d 434 (Iowa 1967) (finding contributory negligence statute to be retroactive and prospective as to burden of proof, but prospective only as to the quantum of proof).

When questions of state law are at issue, state appellate courts have the authority to determine the retroactivity of their own decisions. *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 177, 110 S. Ct. 2323, 2330, 110 L. Ed. 2d 148 (1990), citing *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S. Ct. 145, 148, 77 L. Ed. 360 (1932) ("We think the federal constitution has no voice upon the subject")[4]; *see also State v.*

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[4]In *Sunburst Oil,* 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

Monroe, 236 N.W.2d 24, 37-38 (Iowa 1975) ("it is now well settled that the constitution neither prohibits nor requires retroactive application"), citing *Linkletter v. Walker*, 381 U.S. 618, 622-629, 85 S.Ct. 1731, 1734-1737, 14 L.Ed.2d 601, 604-608 (1965).

The public policy decision by Iowa's high court to limit the retroactive application of certain of its pronouncements is reasonable and well within its purview. Retroactive application of new pronouncements to collateral proceedings would impose significant costs upon the State, law enforcement, and the sound administration of justice, disrupting long-settled expectations, as well as the finality and dignity of the trial process conducted with reasonable and good-faith reliance by prosecutors and courts upon the law as it stood at the time of the original trial, and continually force the State to marshal resources to keep offenders in prison whose trials and appeals

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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).

conformed to then-existing standards, mandating retrial in stale cases where witnesses and evidence may no longer be available. *Cf. Teague v. Lane*, 489 U.S. 288, 308-10, 109 S. Ct. 1060, 1075, 103 L. Ed. 2d 334 (1989) (adopting restrictive view of retroactivity of federal criminal procedural decisions for cases on federal collateral review); *Bousley v. United States*, 523 U.S. at 620, 118 S. Ct. at 1609-10, 140 L. Ed. 2d at 838 ("*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."); *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).

In deciding how best to apply a new rule of criminal law, the Iowa Supreme Court may appropriately consider, *inter alia*, the purpose of newly announced standards, whether the prior rule somehow affected the integrity of the fact-finding process, the strong reliance which may have been placed upon prior decisions on the subject, and the negative effect on the administration of justice of a

retroactive application. *State v. Monroe*, 236 N.W.2d 24, 38 (Iowa 1975).

It is not unconstitutional to not apply the new felony murder construction retroactively. Winfrey was on notice as to how the felony murder rule was interpreted and how it would be applied to him at the time he shot Mo. *See, e.g., La Rue v. McCarthy*, 833 F.2d 140, 142-43 (9th Cir.1987) (finding no due process violation where the California Supreme Court changed the felony-murder rule after petitioner's conviction became final and did not apply change retroactively); *Northrop v. Alexander*, 642 F.Supp. 324, 329 (N.D.Cal.1986) (finding no equal protection violation where the California Supreme Court changed the felony-murder rule after petitioner's conviction became final and did not apply change retroactively). "The retroactivity of a state change of law is a state question and 'the federal Constitution has no voice upon the subject.' " *Id.* at 327 (quoting *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932)); *see also Wainwright v. Stone*, 414 U.S. 21, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973) (per curiam) (United States Supreme Court

declined to order that a state constitutional ruling be applied retroactively after the state refused to do so). *Cf. Bouie v. City of Columbia*, 378 U.S. 347, 362, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) (prohibiting state from applying its new construction of a statute retroactively to affirm convictions).

Winfrey relies on the case of *Bousley v. United States,* 523 U.S. 614, 620-621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). But *Bousley* did not involve a state court decision regarding the interpretation of a state statute dealing with state criminal law in a collateral proceeding. Instead, the United States Supreme Court in *Bousley* was acting in its *supervisory* capacity to require that its decisions as to *federal* criminal law be applied by the lower federal courts retroactively in federal habeas actions brought by federal prisoners pursuant to 28 U.S.C. section 2255. Thus, the holding in *Bousley* is akin to this Courts holding in *State v. Graves*, 668 N.W.2d 860, 873 (Iowa 2003), which newly announced a bright line rule that prosecutors may not ask a criminal defendant if other witnesses were lying-type questions.

Justice Alito, when he as still a judge on the Third Circuit, addressed – and rejected – the argument being forwarded by

Winfrey. *See Fiore v. White*, 149 F.3d 221, 224-25 (3d Cir. 1998) (Alito, J.) (rejecting habeas claim based on state law precedent not in force "at the time of [petitioner's] conviction"), *overruled on other grounds*, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001) (per curiam).

Because the analysis conducted by Judge Alito provides one-stop shopping for the issue now before *this* Court, the undersigned takes the unusual step of offering this Court a four-page quotation. The quotation is dense. The State apologizes for that. But in this instance, in the opinion of the undersigned, the source material would not benefit from editing. *Contra* Bryan A. Garner, *The Winning Brief* ch. 75 (2d ed. 2004) ("Avoid voluminous quotations . . . Even the friendliest, most patient reader will eventually begin to skip the quoted passages. The busy judicial reader may well toss your brief aside. . . ."); Mario Pittoni, *Brief Writing and Argumentation* 39 (1967) ("Quotation is usually the lazy lawyer's outlet, and it interferes with readability and effective argumentation."); Bill Stott, *Write to the Point* 113 (1991) ("Novice writers . . . quote too much . . . [because] they are insecure and crave any support they can get. Rather than

stand up, say something, and dare the lightning, they prefer lying low and letting someone else say it, or something like it. . . .").

Without further ado, the State offers the detailed analysis of then-Judge Alito:

> To be eligible for a federal writ of habeas corpus, a state prisoner must show that "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Fiore contends that he meets this requirement because, under the Supreme Court of Pennsylvania's decision in *Scarpone*, his conduct does not constitute the crime with which he was charged. *See In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Fiore's argument would have force had *Scarpone* been the law in Pennsylvania at the time of his conviction. However, *Scarpone* was decided after Fiore's conviction became final, and the Pennsylvania courts refused to apply the decision to Fiore's case based on state retroactivity principles. *See Commonwealth v. Fiore*, 445 Pa.Super. 401, 665 A.2d 1185, 1193 (1995). Since "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions," *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), Fiore is entitled to relief only if federal law requires retroactive application of *Scarpone*.
>
> The district court held, and Fiore maintains on appeal, that the Due Process and Equal Protection Clauses of the Fourteenth Amendment require retroactive application of *Scarpone*. This conclusion, however, is at odds with the Supreme Court's longstanding position that

"the federal constitution has no voice upon the subject" of retroactivity. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 77 L.Ed. 360 (1932). *See Solem v. Stumes*, 465 U.S. 638, 642, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984); *United States v. Johnson*, 457 U.S. 537, 542, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982). While the Court has concluded that some federal criminal decisions should apply retroactively, *see Davis v. United States*, 417 U.S. 333, 346-47, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974); *United States v. United States Coin & Currency*, 401 U.S. 715, 724, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971), it has made clear that state courts are under no constitutional obligation to apply their own criminal decisions retroactively. *Wainwright v. Stone*, 414 U.S. 21, 23-24, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973). Thus, just as the Supreme Court has fashioned retroactivity rules for the federal courts based on principles of judicial integrity, fairness, and finality, *see Teague v. Lane*, 489 U.S. 288, 304-310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), the state courts are free to adopt their own retroactivity rules after independent consideration of these and other relevant principles. As the Supreme Court explained in *Sunburst Oil:*

> 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.... The alternative is the same whether the subject of the new decision is common law or statute. The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts.... [W]e are not at liberty, *for anything contained in the constitution of the United States,* to thrust upon those courts a different conception of the binding force of precedent or of the meaning of judicial process.

287 U.S. at 364-66, 53 S.Ct. 145 (emphasis added) (citations omitted).

Consistent with the Supreme Court's admonition that federal courts not require retroactive application of state judicial decisions, this court has refused to require application of new state decisions in habeas proceedings. In *Martin v. Warden, Huntingdon State Correctional Institution*, 653 F.2d 799 (3d Cir. 1981), the petitioner claimed that the trial court's jury instructions misstated the requirements of the Pennsylvania felony-murder rule. *Id.* at 810. Although the Supreme Court of Pennsylvania rejected Martin's argument on direct appeal, it subsequently interpreted the felony-murder rule in a manner that cast doubt on the charge given in Martin's case. *Id.* at 810-11. We rejected Martin's argument for retroactive application of the new decision, stating:

> Even were [the new decision] to be given retroactive effect ... it would not be the responsibility of a federal court to apply this newly formed state decisional law to a state conviction obtained almost a decade ago. Martin's remedy on such a claim is not in this court. Therefore, under the *then-existing* Pennsylvania law of felony murder, the judge adequately charged the jury....

Id. at 811 (emphasis added). *Accord Houston v. Dutton*, 50 F.3d 381, 385 (6th Cir.1995) (denying habeas relief to a state prisoner because "[n]o federal issues are implicated and no federal question is presented in determining whether a change in state law is to be applied retroactively"). In light of this court's decision in *Martin*, as well as the Supreme Court's rulings in *Sunburst Oil* and *Wainwright*, we must reject Fiore's argument that the constitution requires retroactive application of the *Scarpone* decision.

Our conclusion is not altered by Fiore's reliance on *Davis v. United States,* 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974). In *Davis,* the Supreme Court reviewed a § 2255 petition filed by a federal prisoner who had been convicted under the Selective Service Act for failing to comply with an induction order. On Davis' direct appeal, the Ninth Circuit had concluded that his induction order was valid and that he could be prosecuted for failing to comply with the order. In a subsequent case, however, the same court found that an induction order issued under "virtually identical" circumstances was "illegal and created no duty on [the defendant's] part to report for induction." *Id.* at 339-40, 94 S.Ct. 2298. Davis filed a § 2255 petition based on the new Ninth Circuit decision, and the Supreme Court held that Davis raised a cognizable claim. The Court explained:

> If [Davis'] contention is well taken, then [his] conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief under § 2255.

Id. at 346-47, 94 S.Ct. 2298 (internal quotations and alterations omitted).

Based on *Davis,* Fiore contends that he is entitled to retroactive application of the *Scarpone* decision. However, Fiore's argument fails to account for the fact that *Davis* concerned the interpretation of a federal, not state, statute. Section 2255 allows federal prisoners to assert habeas claims if their confinement is "in violation of the Constitution *or laws* of the United States." 28 U.S.C. § 2255 (emphasis added). Since Davis claimed that his conviction resulted from an improper construction of a federal statute, the Supreme Court allowed him to seek

relief without alleging a violation of the Constitution. *See Davis* 417 U.S. at 342-346, 94 S.Ct. 2298 (relying solely on the "or laws" language of § 2255). Fiore, by contrast, must allege a violation of the Constitution since there is no federal statute at issue in his case. Given that the *Davis* Court never mentioned a constitutional basis for its decision, and given that the Supreme Court explicitly has held that the Constitution does not require retroactive application of state criminal decisions, *Wainwright,* 414 U.S. at 23-24, 94 S.Ct. 190, we reject Fiore's contention that he has a due process right under *Davis* to have the *Scarpone* decision applied retroactively.FN4

> FN4. In holding that the *Davis* retroactivity rule is not required by the Due Process Clause, we join two other circuits. *See Young v. United States,* 124 F.3d 794, 799 (7th Cir. 1997); *Brennan v. United States,* 867 F.2d 111, 121 (2d Cir. 1989). We note that the Supreme Court recently reaffirmed *Davis* in *Bousley v. United States,* 523 U.S. 614, ----, 118 S.Ct. 1604, 1610, 140 L.Ed.2d 828 (1998). *Bousley* involved a federal prisoner who filed a motion under 28 U.S.C. § 2255 seeking retroactive application of the Supreme Court's interpretation of 18 U.S.C. § 924(c)(1) in *Bailey v. United States,* 516 U.S. 137, 144, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). The *Bousley* Court held that *Bailey* 's interpretation of § 924(c)(1) was fully retroactive, explaining that "under our federal system it is only Congress, and not the courts, which can make conduct criminal." *Bousley,* 523 U.S. at ----, 118 S.Ct. at 1610. *See also id.* at 1612 (Stevens, J., concurring) (*Bailey* "did not change the law. It merely explained what § 924(c) had meant ever since the statute had been enacted."). Because the *Bousley* decision rested on the Supreme Court's understanding of the balance of power in the federal system, it differs critically from the current case, which involves a state court's

> refusal to give retroactive effect to a judicial interpretation of a state statute.
>
> * * * * *
>
> When a decision providing a new interpretation of a state criminal statute is not made fully retroactive, some defendants convicted prior to the new interpretation will almost always continue to suffer the consequences of a conviction based on conduct that would not constitute a crime under the new interpretation, and that is the fate that has befallen Fiore. His situation is particularly striking because the new interpretation was handed down by the state courts in his co-defendant's appeal, which happened to follow a different procedural track. However, any relaxation of the Pennsylvania rules regarding retroactivity due to the particular circumstances present in this case must come from the Pennsylvania courts or the governor. Although we might be inclined to grant relief if it were within our power, the limitations of our authority under the habeas corpus statute prevent us from doing so.

Fiore v. White, 149 F.3d at 224-25. The Supreme Court granted certiorari and ruled that *Fiore* presented "no issue of retroactivity" in light of the answer from the Supreme Court of Pennsylvania to a certified question advising that *Scarpone* did not announce a new rule of law, but instead clarified the statutory language.[5] *Fiore*, 531

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[5]Given the statutory clarification, an element of the crime was lacking in *Fiore*. *Id.* Thus, *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 -- as in *Heemstra* -- 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. *See, e.g., Johnson v. Florida Dept. of Corrections,*

U.S. at 228, 121 S.Ct. at 712 (If the newly adopted rule is substantive, then there is "no issue of retroactivity" governed by *Teague*).

The Supreme Court of Nevada rejected a similar claim to that now being made by Winfrey. In the case of *Clem v. State*, 119 Nev. 615, 81 P.3d 521 (2004), the Nevada court held in a detailed ruling that *Fiore* does not undermine the rule that a change in a rule of law "does not invalidate a conviction obtained under an earlier law." *Id.*, 119 Nev. at 622-30, 81 P.3d at 526-32.

The Nevada court also noted that *Bousley* "addresses only the retroactivity of United States Supreme Court decisions interpreting the meaning of federal criminal statutes" and does not bind state courts in their choice of retroactivity policies. *Id.*, 119 Nev. at 629-30, 81 P.3d at 531-32.

The Supreme Court of Kansas came to the same conclusion in *Easterwood v. State,* 273 Kan. 361, 44 P.3d 1209 (Kan. 2002), and held that neither *Bousley* nor *Fiore* required retroactive application of

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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). Winfrey consistently overlooks the distinction between a clarification of the law and a change in the law, relying upon cases that deal with clarifications.

a new rule of law announced by the Kansas courts, and declined to do so "as a matter of public policy under all the facts of this case." *Id*. at 273 Kan. at 383, 44 P.3d 1223.

Winfrey's argument places more weight on *Bousley* than it will bear, in the sense that *Bousley* does not purport to offer an exhaustive analysis of the Supreme Court's thinking when it comes to the question of retroactivity. A case such as *Griffith v. Kentucky*, 479 U.S. 314, 320-26, 107 S.Ct. 708, 711-15, 93 L.Ed.2d 649 (1987), is instructive for its extended discussion of the cyclic, ever-changing contours of retroactivity that the Court has applied to its own decisions as to rules of criminal procedure. *Cf. Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) ("the Constitution neither prohibits nor requires retrospective effect" of new constitutional rules).

Federal habeas rules acknowledge that the United States Supreme Court has the discretion to decide whether a given rule is to be deemed retroactive or not. For instance, 28 U.S.C. section 2254(e)(2)(A)(i) provides that an evidentiary hearing typically may not be conducted unless the claim relies on "a new rule of

constitutional law, made retroactive to cases on collateral review by the Supreme Court. . . ." And section 2244(b)(2) discusses allowing claims only if they are premised on a "new, retroactive, previously unavailable rule of constitutional law. . . ." It would be curious strange, and certainly poor public policy, if any change in the law automatically caused jailhouse doors to clang open.

Winfrey's arguments also fail to appreciate precisely what it was that the Court allowed in *Bousley*. The Court there allowed the petitioner to attack his *guilty plea* in collateral proceedings, but *only* if he could show either cause and prejudice or actual innocence. 523 U.S. at 622. Of course, Winfrey was convicted of murder in a *jury trial*, not by his own guilty plea. "[I]n *Bousley* and other cases, courts have permitted petitioner collaterally to attack guilty pleas on the basis of intervening decisions modifying the substantive criminal law defining the offense, despite procedural default, if the petitioner makes a showing of actual innocence – *that the petitioner did not commit the offense as modified*." *United States v. Morgan*, 230 F.3d 1067 (8th Cir. 2000). This is a showing that Winfrey cannot make.

There is no reasonable argument to be made that all of the elements of second degree murder were not amply shown at trial.

Under whatever modification Winfrey might argue the application of *Heemstra* might make, the evidence of Winfrey's guilt was overwhelming and *Heemstra* would not do anything to modify the charge of second degree murder or the overwhelming evidence arrayed against him.

Again, this discussion is all largely academic, for by its own terms, *Heemstra* is inapplicable to Winfrey's conviction for second degree murder. Winfrey's suggestion that the Iowa Supreme Court acted unconstitutionally in deciding to not allow retroactive application of *Heemstra* is without merit.

6. Winfrey's substantive argument as to *Heemstra* is without merit.

Winfrey seeks to make use of the decision in *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006), in arguing that the jury could have used willful injury to infer malice in convicting him of second degree murder. Winfrey is wrong.

By way of background, the elements of the second degree murder charge were presented to the jury in Jury Instruction number 38 as follows:

> The State must prove all of the following elements of Murder in The First Degree:
>
> 1. On or about the 20th day of August, 1999, the defendant shot Castine Moore.
>
> 2. Castine Moore died as a result of being shot.
>
> 3. The defendant acted with malice aforethought.
>
> 4. The defendant was not justified.
>
> If the State has proved all of the elements, the defendant is guilty of Murder in The Second Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Murder in The Second Degree and you will then consider the charge of Voluntary Manslaughter explained in Instruction No. 40.

Inst. No. 38; App. ____.

Winfrey argues that the jury instructions for first degree murder could have improperly lowered the showing necessary for his second degree murder conviction. First degree murder has an additional element to it -- specific intent, or in lieu or that, the felony murder rule -- which was presented to the jury as follows:

> [5[6]]. a. The defendant acted willfully, deliberately, premeditatedly and with a specific intent to kill Castine Moore;
>
> or
>
> b. The defendant was participating in the forcible felony of Willful Injury.

Inst. No. 30; App. ____.

The jury was also instructed on, *inter alia*, the meaning of "willful," "deliberate, " "premeditate," "malice," "malice aforethought," and the fact that malice aforethought may be inferred by a defendant's use of a dangerous weapon, and that when that use was by a person who had an opportunity to deliberate, then malice, premeditation, and specific intent to kill may all be inferred. Jury Inst. Nos. 31-36; App. ___.

In addition, the jury was instructed on the felony murder alternative to specific intent as follows: "Malice may be inferred from the commission of Willful Injury which results in death." Jury Inst. No. 35; App. ___.

Winfrey argues (Brief at 7-8) that the jury may have used this Willful Injury alternative to specific intent for first degree murder to convict him of second degree murder.

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[6]This element was actually numbered "4" in Instruction 30. *Id.*

That argument immediately breaks down, for it is axiomatic that if the jury had found that Winfrey committed the underlying felony of Willful Injury, then, by definition, the jury would have convicted him of first degree murder. *See* Inst. No. 30; App. ___. The jury would not have even proceeded on to the second degree murder analysis. *Id.*; *see also* Jury Inst. No. 39 ("Murder in The Second Degree does not require a specific intent to kill another person."); App. ____. As the postconviction court concluded, Winfrey:

> was not convicted by jury verdict of the offense of first-degree felony murder as reinterpreted in *Heemstra*, but was rather convicted of the lesser included offense of second-degree murder, and offense to which the felony murder rule has no application....
>
> * * * * *
>
> To the extent [Winfrey] wishes to argue that the jury was somehow misled, as [a] result of the felony murder instruction, to believe that they could also infer malice aforethought for purposes of a second-degree murder conviction based upon [Winfrey's] commission of a felonious assault, the Court finds no basis in the record for concluding that such was the case. Mere allegations that the jury improperly applied the jury instructions read to them in reaching a verdict will not suffice to demonstrate the type of prejudice necessary to reverse [Winfrey's] conviction . . . Our courts have consistently recognized a conclusive presumption that the jury will follow the instructions of the court. . . .

PCR II Ruling at 9; App. ____ (citations omitted).

There was no underlying felony element to Winfrey's conviction for second degree murder.

7. Winfrey's *Heemstra* argument based on *Teague v. Lane* is without merit.

Winfrey offers an argument (Brf. at 9-11) that appears to presuppose that the *Heemstra* decision represents a change in criminal *procedure*. Preliminarily, *Heemstra* does not represent a ruling relating to Iowa criminal procedure. *Heemstra,* 721 N.W.2d at 558 ("rule of law"). *See, e.g., State v. Rhomberg*, 516 N.W.2d 803, 804-805 (Iowa 1994) (the decision to adopt or reject the felony murder rule is a matter of statutory construction); *State v. Beeman*, 315 N.W.2d 770, 776-77 (Iowa 1982) (same).

In adopting the rule in the *Heemstra* case itself, the Iowa Supreme Court used language suggesting that the independent felony rule is akin to a rule of common law, which the states are free to adopt or reject, describing it as "a legal principle that is the responsibility of the court and within the power of the court to apply, based on legal precedent, common sense, and fairness." *State v. Heemstra,* 721 N.W.2d at 558. The Court was explicit that what it was dealing with

was a "rule of law" and that 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." 721 N.W.2d at 558.

The rule in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion), which Winfrey relies upon, announced that decisions articulating federal criminal procedure are generally not applied retroactively.[7] Winfrey appears to counter that *Heemstra* should be viewed as an exception to *Teague*, representing a "watershed" rule of criminal procedure subject to retroactive application.

The United States Supreme Court has been singularly restrictive in what announced rules of criminal procedure have been deemed to rise to the extraordinarily high level of a watershed rule implicating the bedrock procedural elements essential to the fundamental fairness of proceedings. *Sawyer v. Smith*, 497 U.S. 227, 242 (1990);

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[7]State courts are free to retroactively apply federal rules of criminal procedure if they so choose. *Danforth v. Minnesota*, 552 U.S. __, __, 128 S.Ct. 1029, 1040, 169 L.Ed.2d 859 (2008).

Butler v. McKellar, 494 U.S. 407, 416 (1990); *Saffle v. Parks*, 494 U.S. 484, 495 (1990). "[W]hatever the precise scope of this exception, it is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." *Graham v. Collins*, 506 U.S. 461, 478 (1993). "As the plurality cautioned in *Teague*, '[b]ecause we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge.'" *Id.* at 477 (quoting *Teague*, 489 U.S. at 313); *see generally Beard v. Banks*, 542 U.S. 406 (2004) (*Mills* rule [invalidating capital sentencing schemes requiring juries to disregard mitigating factors not found unanimously] applies narrowly and works no fundamental shift in the Court's understanding of the bedrock procedural elements essential to fundamental fairness.); *O'Dell v. Netherland*, 521 U.S. 151 (1997) (rejecting argument that rule announced in *Simmons v. South Carolina*, 512 U.S. 154 (1994) [capital defendant must be allowed to inform the sentencer that he would be ineligible for parole if the prosecution argues future dangerousness] was "on par" with *Gideon*);

Sawyer v. Smith, 497 U.S. 227 (1990) (while rule announced in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) [Eighth Amendment bars imposition of the death penalty by a jury that had been led to believe that responsibility for the ultimate decision rested elsewhere] was intended to enhance the accuracy of capital sentencing, it did so incrementally and, thus, was not an absolute prerequisite to fundamental fairness); *Graham v. Collins*, 506 U.S. 461 (1993) (rule announced in *Penry v. Lynaugh*, 492 U.S. 302 (1989) does not fall within the second *Teague* exception).

Indeed, the *Teague* exception appears "narrower than the category of structural-error rules." *United States v. Sanchez-Cervantes*, 282, F.3d 664, 670 (9th Cir. 2002); *cf. Tyler v. Cain*, 533 U.S. 656, 666 & n.7 (2001). Thus, the fact that a claim is subject to harmless or plain error review – as opposed to constituting structural error – indicates that it is not a bedrock or watershed rule requiring retroactive application on collateral review. *See also United States v. Sanders*, 247 F.3d 139, 150 (4th Cir. 2001) (the fact the claim is subject to harmless and plain error review indicates it is not a watershed change in criminal procedure, and emphasizing "that

finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively under *Teague*."); *Mills v. United States*, 2002 WL 424635, *7 (N.D. Ill. Mar. 19, 2002) ("the errors in Neder and Lanier do not rise to the level of structural error, it is difficult to see how *Apprendi* could be considered a bedrock or watershed rule requiring retroactive application on collateral review.") And the Ninth Circuit has found even structural errors that did not satisfy the "watershed" *Teague* exception. *Leavitt v. Arave*, 383 F.3d 809, 825-26 (9th Cir. 2004) (even though a violation of *Cage v. Louisiana* [reasonable doubt instructions] constitutes structural error, it is not a watershed rule since *Cage* does not alter the court's understanding of bedrock procedures).

To underscore the rarity of "watershed" rules, the Supreme Court has repeatedly invoked the sweeping rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that indigent defendants have the right to court-appointed counsel in all criminal prosecutions), as a quintessential watershed rule, and has repeatedly remarked that it seems unlikely that many such components of basic

due process have yet to emerge. Indeed, since 1989, beginning with the rule at issue in *Teague*, the Court has measured numerous new rules, or proposed new rules, of criminal procedure against the criteria for the second exception and, in every case, has refused to apply the rule at issue retroactively on habeas review. *Beard v. Banks*, 542 U.S. 406, 417 (2004) ("it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception.").

As the Iowa Court of Appeals has aptly observed:

> 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).

Heemstra did not announce a rule of procedure, and if it had, it would not have been a watershed rule.

CONCLUSION

For all the reasons set out above, the State asks that this appeal be rejected.

CONDITIONAL REQUEST FOR ORAL ARGUMENT

"[O]ral argument would not be of assistance" nor advance the issues in this appeal. Iowa R. App. P. 6.21(3); *see also* Rule 21.24(2) (oral argument is not granted as a matter or right). Should Winfrey be granted oral argument, the State requests a like amount of time.

COST CERTIFICATE

The cost of printing this brief was $_____.

THOMAS J. MILLER
Attorney General of Iowa

THOMAS W. ANDREWS
Assistant Attorney General
Iowa Department of Justice

ATTORNEY'S CERTIFICATION REGARDING UNPUBLISHED OPINION

I, the undersigned, hereby certify that on December 29, 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).

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THOMAS W. ANDREWS
Assistant Attorney General