IN THE IOWA DISTRICT COURT
IN AND FOR PUMPKIN COUNTY

BRUCE WAYNE,	)	
	)	
Applicant,	)	
	)	
vs.	)	PCR No. **PCCV 07-2112**
	)	
STATE OF IOWA,	)	
	)	
Respondent.	)	

BRIEF IN SUPPORT OF
RESPONDENT'S MOTION FOR SUMMARY DISMISSAL

This postconviction action involves a claim relating to the revision of the felony murder rule announced in *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006).

Factual Background.

On May 2, 1998, Applicant, Bruce Wayne, kidnaped four-year-old Lindsey Tarantino, locked her in a secret room hand-excavated beneath his business, and proceeded to orally, anally, and vaginally rape the child for weeks on end until the girl's death. *State v. Wayne*, 2001 WL 21122001 (Iowa Ct. App. May 2, 2001).

Procedural Background.

A jury convicted Wayne of first degree murder on December 21, 1998. *Id.* Wayne appealed, the Iowa Court of Appeals affirmed his conviction in an unpublished decision, and procedendo issued May 15, 2001. *Id.*

Wayne filed a *pro se* application for postconviction relief on October 16, 2001, a telephonic hearing was held, and the district court denied relief in 2002. PCR Ruling (April 13, 2002).

Wayne has now filed, *pro se*, a second postconviction action, which the State seeks to summarily dismiss by this motion. Application (Sep. 11, 2007).

Iowa Code section 822.6.

Postconviction practice specifically authorizes motions for summary dismissal. Iowa Code § 822.6; *see also State v. Summage*, 579 N.W.2d 821, 822 (Iowa 1998) (postconviction summary dismissal procedure is analogous to summary judgment procedure set forth in the rules of civil procedure); *Hines v. State*, 288 N.W.2d 344, 346 (Iowa 1980) (summary judgment rules appear to apply to postconviction relief actions); *State v. Mulqueen*, 188 N.W.2d 360, 368 (Iowa 1971) (same); Iowa Code §§ 822.2, 822.3, 822.7, 822.8; Iowa R. Civ. P. 1.981.

Iowa Code section 822.6 provides:

> When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to postconviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for dismissal. The applicant shall be given an opportunity to reply to the proposed dismissal.

Thus, Iowa Code section 822.6 provides a means for summary disposition as "a method to bypass a hearing on the merits of the postconviction petition." *Rheuport v. State*, 238 N.W.2d 770, 776 (Iowa 1976). Section 822.6 allows either party to file a motion to dismiss; the court may itself announce its intention to summarily dispose of the case, affording the parties notice of its inclination and an opportunity to respond. *Poulin v. State*, 525 N.W.2d 815, 816 (Iowa 1994); *Hines v. State*, 288 N.W.2d 344, 346 (Iowa 1980); *State v. Dryer*, 342 N.W.2d 881, 883 (Iowa App. 1983.

This action is time-barred.

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. . . 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).

It has been more than three years since procedendo issued from Petitioner's direct appeal. This district court thus lacks "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); Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts (upon assignment to a judge, any habeas petition from a State prisoner that on its face plainly appears unentitled to relief should be summarily dismissed by the court).

Applicant's ineffectiveness claims are without merit.

Although one of Applicant's claims relates to his prior postconviction counsel, ineffective assistance of postconviction counsel cannot constitute a "ground of fact" within the meaning of the exception to the three-year statute of limitations of Iowa Code section 822.3. *Dible v. State*, 557 N.W.2d 881, 883 (Iowa 1996); *Smith v. State*, 542 N.W.2d 853, 854 (Iowa App. 1995) (Petitioner "cannot circumvent the three-year time-bar by claiming the ineffective assistance of postconviction counsel"), citing *Whitsel v. State*, 525 N.W.2d 860, 864-65 (Iowa 1994).

To establish ineffectiveness, Applicant would need to show that counsel breached a duty and that prejudice resulted. The burden rests with Petitioner to overcome the strong presumption that counsel's performance was competent. To establish prejudice, Petitioner must show that there is a reasonable probability that, but for counsel's claimed unprofessional errors, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668, 687-91, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 692-93 (1984). To prove that his appellate counsel failed to perform an essential duty, Applicant must show that counsel's performance "fell outside the normal range of competency." *State v. Henderson*, 537 N.W.2d 763, 765 (Iowa 1995).

The Iowa Supreme Court had -- over the course of many years -- been emphatic that it would not reconsider the felony murder rule. *See, e.g., State v. Anderson*, 517 N.W.2d 208, 214 (Iowa 1994) ("We have steadfastly declined these invitations to disavow the principles established."); *State v. Rhomberg*, 516 N.W.2d 803, 805 (Iowa 1994) ("A proposed change in the law, if desired, is in the province of the legislature").

Thus, none of Applicant's prior counsel breached a duty by not attacking the felony murder rule. *Morris v. State*, 2007 WL 1827394 (Iowa Ct. App. June 27, 2007) (unpublished) ("[O]ur case law was clear at the time this case was raised on direct appeal -- the act constituting willful injury and also causing the victim's death could serve as a predicate felony for felony murder"); *see also State v. Dixon*, 2004 WL 2951968, *4 (Iowa Ct. App. 2004) (unpublished) (Dixon offers nothing to demonstrate any recent trends in our state's appellate opinions that would have signaled to her counsel that he needed to raise this issue... Counsel could not have been expected to believe our supreme court would change its position on this issue, considering the firm stance it repeatedly has taken in previous cases... trial counsel had no duty to raise this issue ... and thus was not ineffective for not doing so.").

None of Applicant's attorneys had any "reason to assume the supreme court would expressly disavow the principles established in *Beeman." Morris v. State*, 2007 WL 1827394 (Iowa Ct. App. June 27, 2007), citing *Snethen v. State*, 308 N.W.2d 11, 16 (Iowa 1981) ("[I]t is not necessary to know what the law will become in the future to provide effective assistance of counsel."); *see also State v. Liddell*, 672 N.W.2d 805, 814 (Iowa 2003) ("Counsel need not be a crystal gazer"). "We would not expect a reasonably competent attorney to raise such a well-settled issue on appeal. Therefore, we certainly do not find an

attorney breached an essential duty by choosing not to do so." *Morris v. State*, 2007 WL 1827394 (Iowa Ct. App. June 27, 2007).

This action is piecemeal and therefore procedurally barred.

Iowa Code section 822.8 prohibits 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.

Applicant raised a challenge to felony-murder in his pre-trial filings and during the discussion of jury instructions, but did not renew his claims in his direct appeal. 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).

Applicant presents no basis for a second postconviction action.

Applicant seeks to overturn his 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).[1] *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

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[1]It must also be stated that, even if the holding in *Heemstra* was available to apply to Applicant's case -- and it is not -- the holding would not apply to the facts of this case. According to the coroner's testimony, multiple distinct injuries inflicted upon the child were a proximate cause of her death, such that willful injury could be used as the underlying felony for felony murder even after *Heemstra*. *See generally Heemstra*, 721 N.W.2d at 557 (holding that additional acts of willful injury may serve as a predicate for felony-murder purposes).

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 murder has long since been "finally resolved on direct appeal." *Id.* There is thus nothing left to litigate in yet another *pro se* postconviction action. *Id.*

Applicant's additional claims regarding *Heemstra* are without merit.

Applicant's second postconviction action also appears to raise a *pro se* claim that the decision of the Iowa Supreme Court to not apply the *Heemstra* decision retroactively is a violation of the federal Constitution. *But see State v. Anderson*, 517 N.W.2d 208, 214 (Iowa 1994) *("*The issue presented is entirely one of statutory interpretation.*").* Applicant offers no authority for his assertion. *Cf. Luke v. State*, 465 N.W.2d 898, 903 (Iowa Ct. App. 1990) (Failure to cite authority in support of an issue in an appellate brief may be deemed waiver of it); Iowa R. App. P. 6.14(10)(c) (same).

Applicant claims that the Iowa Supreme Court acted unconstitutionally in deciding to not allow retroactive application of *Heemstra*. His claim is without merit. 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"); *see also State v. 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 Iowa Supreme Court 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).

This decision by Iowa's high court to limit the retroactive application of certain of its pronouncements is reasonable. Retroactive application of new rules to collateral proceedings would impose significant costs upon the State, continually forcing it to marshal resources to keep offenders in prison whose trials and appeals conformed to then-existing standards. *See generally 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 for cases on federal collateral review). In deciding how to apply a rule, courts may appropriately consider the purpose of newly announced standards, whether the prior rule somehow affected the integrity of the fact-finding process, the reliance which may have been placed upon prior decisions on the subject, and the effect on the administration of justice of a retroactive application. *State v. Monroe*, 236 N.W.2d 24, 38 (Iowa 1975).

Applicant's pro se Petition advises that if he does not obtain satisfaction in this postconviction action he will seek relief in the federal courts via a habeas corpus petition. Such a filing would likewise be without merit, for "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, 479-80, 116 L.Ed.2d 385 (1991). Federal habeas courts simply do not sit as some sort of "Super State Supreme Courts" to review issues of state law. *Johnson v. Rosemeyer*, 117 F.3d 104, 110 (3rd Cir. 1997).

Conclusion

Respondent urges that all claims and issues raised in the *pro se* Petition — and that the case itself, the Petition, and the action represented by the Petition — be summarily dismissed with prejudice for the reasons discussed above.

Respectfully submitted,

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