

**IN THE COURT OF APPEALS OF IOWA**

No. 9-1037 / 08-1717  
Filed February 24, 2010

**ARCHIE ROBERT BEAR,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Poweshiek County, James Q. Blomgren, Judge.

Archie Robert Bear appeals the denial of his second application for postconviction relief. **AFFIRMED.**

Archie Robert Bear, Anamosa, appellant pro se.

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, and Michael W. Mahaffey, County Attorney, for appellee.

Considered by Eisenhauer, P.J., Potterfield, J., and Huitink, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**POTTERFIELD, J.**

Archie Robert Bear was charged with first-degree murder as a result of an altercation in which Bear inflicted a lethal knife wound on another. Bear relied on a defense of justification at trial. A jury returned a verdict finding Bear guilty of the lesser-included offense of second-degree murder. His conviction was affirmed on direct appeal in 2001, and the denial of his first application for postconviction relief was affirmed by this court in 2007. *Bear v. State*, No. 06-1048 (Iowa Ct. App. June 13, 2007); *State v. Bear*, No. 00-558 (Iowa Ct. App. Mar. 28, 2001).

Bear now appeals the denial of his second application for postconviction relief, arguing malice can no longer be inferred<sup>1</sup> from the commission of a forcible felony after the court's decision in *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006). The State argues, and we agree, that this claim is time-barred. See Iowa Code § 822.3 (2007).

Bear also argues that to the extent error was not preserved on his claim regarding the jury instruction, his counsel was ineffective. A claim of ineffective assistance of counsel does not constitute a claim that "could not have been raised within the applicable time period" of section 822.3. *Whitsel v. State*, 525 N.W.2d 860, 864 (Iowa 1994). Therefore, Bear's claim of ineffective assistance of counsel is also barred by section 822.3 and fails.

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<sup>1</sup> Bear specifically challenges Jury Instruction No.13, which provided in pertinent part, "You may, but are not required to, infer 'malice' from the commission of willful injury which results in death."

To the extent that Bear's appeal hinges on the retroactivity of *Heemstra*,<sup>2</sup> we further find *Heemstra* does not apply retroactively to his case. The *Heemstra* court stated that the rule of law announced in *Heemstra* would not apply retroactively, and the supreme court later found that its refusal to apply *Heemstra* retroactively did not violate federal due process. See *Goosman v. State*, 764 N.W.2d 539, 545 (Iowa 2009). We find no reason to apply a different analysis in considering Bear's constitutional due process claim. See *State v. James*, 393 N.W.2d 465, 466 (Iowa 1986) (stating "we interpret provisions in our constitution which are similar to those in the federal constitution as being identical in scope, import and purpose," after noting the due process guarantees of the state constitution are identical to those of the federal constitution). Accordingly, we affirm the district court's denial of Bear's application for postconviction relief on the grounds that *Heemstra* does not apply retroactively to Bear.

**AFFIRMED.**

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<sup>2</sup> In *Heemstra*, the supreme court found, "[I]f 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." *Heemstra*, 721 N.W.2d at 558. However, the *Heemstra* court went on to explain that it would 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.*