

**United States Court of Appeals**  
**FOR THE EIGHTH CIRCUIT**

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No. 10-2306

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Michael Andrew Miller,	*
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Petitioner - Appellant,	*
	* Appeal from the United States
v.	* District Court for the
	* Southern District of Iowa.
John Fayram, Warden,	*
	* [UNPUBLISHED]
Respondent - Appellee.	*

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Submitted: March 16, 2011  
Filed: May 5, 2011

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Before LOKEN and COLLOTON, Circuit Judges, and NELSON,\* District Judge.

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PER CURIAM.

In 1989, an Iowa jury convicted Michael Andrew Miller of first degree murder after being instructed it could base that verdict on either premeditated or felony murder. The conviction was affirmed on direct appeal, and two petitions for state post-conviction relief were denied. In 2007, Miller filed a third petition for post-conviction relief based upon the Supreme Court of Iowa's decision changing the Iowa law of felony murder. State v. Heemstra, 721 N.W.2d 549, 558 (Iowa 2006). In November 2009, the Supreme Court of Iowa affirmed the denial of this petition based

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\*The Honorable Susan Richard Nelson, United States District Judge for the District of Minnesota, sitting by designation.

upon its prior decision that Heemstra was a change in the law and may not be used to collaterally attack a prior conviction. Goosman v. State, 764 N.W.2d 539, 545 (Iowa 2009).

Miller then filed this petition for federal habeas corpus relief under 28 U.S.C. § 2254, arguing that the Supreme Court of Iowa's refusal to apply Heemstra retroactively violated his federal constitutional right to due process of law. The district court<sup>1</sup> dismissed the petition as time-barred under 28 U.S.C. § 2244(d), further observing that it was unlikely Miller would have obtained relief on the merits. Miller timely appealed that ruling. While the appeal was pending, we affirmed the denial of habeas relief to another Iowa inmate who sought retroactive application of the Heemstra decision, concluding "that the Constitution does not require a state's highest court to make retroactive its new construction of a criminal statute." Graves v. Ault, 614 F.3d 501, 512 (8th Cir.) (quotation omitted), cert. denied, 131 S. Ct. 508 (2010). Our decision in Graves is controlling and requires affirming the district court's dismissal of Miller's petition, whether or not it is time-barred.

Accordingly, the judgment of the district court is affirmed.

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<sup>1</sup>The Honorable Robert W. Pratt, Chief Judge of the United States District Court for the Southern District of Iowa.