UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal No. 06-3948
(Case No. 04-C-133 (E.D. Wis.))

ANOU LO,

Petitioner-Appellant,

v.

JEFFREY P. ENDICOTT, Warden,
Redgranite Correctional Institution,

Respondent-Appellee.

Appeal From A Final Judgment Dismissing Petition For Writ Of Habeas Corpus and the Order Entered In The United States District Court For The Eastern District of Wisconsin, Honorable Rudolph T. Randa, Presiding

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BRIEF AND APPENDIX OF PETITIONER-APPELLANT

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned, *pro bono* counsel for the appellant, Anou Lo, furnishes the following list in compliance with Circuit Rule 26.1 (7th Cir.):

(1) The party represented is Anou Lo

(2) Law firms which have represented the party in this matter:

Henak Law Office, S.C.

Attorneys and law firms which have represented the party in related, state-court matters:

Timothy Gaskell, Attorney at Law

Daniel P. Ryan, Attorney at Law

(3)(i) N/A

(3)(ii) N/A

Dated: _____ _____

Robert R. Henak

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BRIEF OF PETITIONER-APPELLANT

JURISDICTIONAL STATEMENT

Anou Lo appeals from the final judgement entered by the district court on October 7, 2005, dismissing Lo's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. The district court had jurisdiction over this federal habeas action under 28 U.S.C. §§2241 & 2254. The Court of Appeals has jurisdiction to hear this appeal under 28 U.S.C. §§1291 & 2253.

On October, 20, 2005, Lo filed a timely motion for relief from the judgment pursuant to Fed. R. Civ. P. 59(e) and 60(b). By Order entered August 24, 2006, the District Court denied relief from the judgment.

Lo filed his notice of appeal on September 20, 2006. By Orders dated October 27, 2006, and November 28, 2006, the District Court granted his motion for a

certificate of appealability on the issues raised in this brief.

There are no prior or related federal appellate proceedings in this case.

This is a collateral attack on Lo's criminal conviction in Wisconsin state court. Lo's current place of confinement is the Redgranite Correctional Institution, 1006 County Road EE, Redgranite, WI 54970. The warden at that institution is Jeffrey Endicott.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

As set forth in the District Court's Orders granting Lo a Certificate of Appealability, the issue presented on this appeal is as follows:

> 1. Whether release of the Wisconsin Supreme Court's decision in *State v. Head*, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413, on July 11, 2002, defining the elements of the offense for which Lo was convicted and thereby supplying a necessary element of his due process claim, acted to trigger a new one-year limitations period for federal habeas relief under 28 U.S.C. §2244(d)(1)(D);
>
> 2. Whether, if Lo's petition was not filed within the time limits of 28 U.S.C. §2244(d), equitable tolling applies to render the petition timely; and
>
> 3. Whether the state trial court's failure to require a jury finding beyond a reasonable doubt on every fact or element necessary for a finding of guilt on the charge of attempted first degree intentional homicide denied Lo his rights to due process.

(R32; R35; App. 101-02).

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Statement of Facts and Procedural History Leading to State Supreme Court Decision

The Wisconsin Supreme Court described the relevant facts and prior state procedural history as follows:

> ¶6 Some of the facts of this are in dispute. In the summer of 1995, members of TMC, a street gang in La Crosse, were involved in various shootings directe at friends and acquaintances of Anou Lo. As a result, one of the Lo's acquaintances gave him a handgun for protection.
>
> ¶7 On July 6, 1995, Lo met friends with the intention of accompanying them to Trane Park. While the group was in transit, Lo learned that several TMC members had gathered at Hood Park, and he asked his group to go there. At Hood Park, Koua Vang, a member of TMC, and Hue Lee, a friend of Vang, were playing marbles with some young children. Hue Lee observed the car in which Lo was a passenger circle twice around the park. Then Lo entered the park with one of his friends, while the driver of the car and other passengers stayed behind.
>
> ¶8 In the park, Lo yelled at Vang from a distance of 40 to 50 feet. An argument developed. Lo confronted Vang about rumors that the TMCs were out to get Lo's stepbrother. Vang claims that, during the argument, Lo asked him if he wanted to die. Vang became excited and Hue Lee tried to calm him down. In time, Lo and Vang decided to back off and go their separate ways.
>
> ¶9 Lo claims that as he was attempting to leave the park, he saw Vang tried to grab something underneath his shirt, from the front waistband of his pants. Thinking Vang as trying to get a gun, Lo drew his own gun and fired it in Vang's direction four times. Lo and his friend then ran away.
>
> ¶10 Vang was shot in the back of his right arm. At he time of the shooting, he was in fact carrying a gun in the front of his pants, but he denied reaching for it, explaining that he was simply putting marbles in his pocket.

> ¶11 Lo was 16 years old at the time of the shooting. He was waived into criminal court and tried as an adult. On January 12, 1996, a jury found Lo guilty of attempted first-degree intentional homicide while armed and first-degree reckless endangerment while armed. The circuit court sentenced Lo on February 26, 1996, to consecutive terms of 20 years incarceration on the attempted homicide conviction and 9 years on the reckless endangerment conviction.
>
> ¶12 After his conviction, Lo acquired new counsel and filed postconviction motions pursuant to Wis. Stat. § 974.02 and Wis. Stat. § (Rule) 809.30. In one of these motions, he challenged the effectiveness of his trial counsel. After an evidentiary hearing, Lo's motions were denied. Lo appealed two claims of ineffective assistance of counsel. The court of appeals affirmed the conviction and the denial of postconviction relief. State v. Lo, No. 97-00230-CR, unpublished slip op. (Wis. Ct. App. June 25, 1998). Lo then made an unsuccessful pro se attempt at federal habeas relief.
>
> ¶13 On March 6, 2000, Lo, again pro se, requested an order from the circuit court asking for information he needed to file a § 974.06 motion. In a Memorandum Decision and Order dated May 16, 2000, the circuit court denied the request on grounds that Lo could get the information from his prior attorneys. On January 17, 2001, Lo made a pro se § 974.06 motion, which was denied by the circuit court because the claims were barred pursuant to Escalona in that he issues could and should have been raised on direct appeal. The court of appeals affirmed the circuit court decision. . . ..

State v. Anou Lo, 2003 WI 107, ¶¶6-13, 264 Wis.2d 1, 665 N.W.2d 756 (footnote omitted) (R1:Attach.; App. 110-12).[1]

Wisconsin Supreme Court Decision, *State v. Anou Lo*, 2003 WI 107, 264 Wis.2d 1, 665 N.W.2d 756 (July 11, 2003) (R:1 (Attach.); App. 108-168)

The central issue on which the Wisconsin Supreme Court granted review in

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[1] Throughout this brief, several abbreviations are used pursuant to Fed. R. App. P. 28(e). Documents in the record are identified by the District Court docket sheet number as "R___"; the following ":___" reference denotes the exhibit ("Exh.") or page number of the document.

When the document is reproduced in the attached or separate appendix, the applicable appendix page number is also identified as "App. ___."

Lo's case concerned matters of state post-conviction procedure. Specifically, in light of judicial complaints and inefficiencies caused by its decision in *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994) (absent showing of "sufficient reason," criminal defendant cannot raise on collateral review under Wis. Stat. §974.06 issues which could have been raised on direct appeal), the Court was open to reconsideration of that decision. The secondary issue concerned whether Lo's conviction was constitutionally valid. *State v. Anou Lo*, 2003 WI 107, ¶2, 264 Wis.2d 1, 665 N.W.2d 756 (App. 108-09); *id.*, ¶90 (Abrahamson, Ch.J., dissenting) (App. 147).

On July 11, 2002, after the Court granted review but prior to briefing in Lo's case, the Wisconsin Supreme Court entered its decision in *State v. Head*, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. In *Head*, the Court construed the statutes defining the facts which the state must prove beyond a reasonable doubt to support a conviction for first degree intentional homicide under Wis. Stat. §940.01 when a defense of "imperfect self defense" is raised. While an earlier case had asserted, in *dicta* and without analysis, that the state need only prove under the current statute that any belief on the part of the defendant in the need for self-defense was unreasonable, *State v. Camacho*, 176 Wis.2d 860, 501 N.W.2d 380, 388-89 (1993),[2] *Head* rejected

[2] At issue in *Camacho* was the proper application of the law in existence prior to the major revision of Wisconsin's homicide laws in 1987. Although not at issue in that case, the *Camacho* Court nonetheless expressed its view that those revisions did not in fact change the elements which the state must prove beyond a reasonable doubt to sustain a charge of first degree intentional homicide in the fact of an imperfect self-defense claim. 501 N.W.2d at 388-89. *See Head*, 648 N.W.2d at 432-33.

that assertion. Instead, the *Head* Court viewed the statutory language and the purpose behind the statute as enacted in 1987 and concluded that, to meet its burden of proof on a charge of first degree intentional homicide, the state must prove, not only that the defendant's beliefs were objectively unreasonable, but that the defendant did not actually believe his actions were necessary for self-defense. *Head*, 648 N.W.2d at 433-37.

> ¶ 103 Based on the plain language of Wis. Stat. § 940.05(2), supported by the legislative history and articulated public policy behind the statute, we conclude that when imperfect self-defense is placed in issue by the trial evidence, the state has the burden to prove that the person had no actual belief that she was in imminent danger of death or great bodily harm, or no actual belief that the amount of force she used was necessary to prevent or terminate this interference. If the jury concludes that the person had an actual but unreasonable belief that she was in imminent danger of death or great bodily harm, the person is not guilty of first-degree intentional homicide but should be found guilty of second-degree intentional homicide.

648 N.W.2d at 437. The Court further held that existing pattern jury instructions promulgated in light of *Camacho's* misreading of the statute, permitted conviction without proof beyond a reasonable doubt that the defendant in fact held no actual belief in the necessity for his actions in self-defense, and thus were erroneous. 648 N.W.2d at 444-45.

Given *Head's* construction of the elements which the state must prove under the homicide law revisions of 1987 to establish first degree intentional homicide in the face of an imperfect self-defense claim, Lo raised this issue in the Wisconsin Supreme Court. That Court recognized that Lo's instructions suffered from the same

basic defect as did those addressed in *Head* and that this error likely would require reversal of Lo's attempted homicide conviction. *Lo*, ¶58 (App. 133-34).

In a 4-3 decision, it nonetheless affirmed Lo's conviction on the grounds that the statute's requirement that the state disprove the defendant's *actual* belief as opposed to merely *reasonable* belief "involves proof of a fairly subtle difference in state of mind," *Lo*, ¶68 (App. 138), and that *Head's* requirement of a jury instruction on the elements the state must prove should not be applied retroactively:

> [T]he only change resulting from *Head*, as it affects this case, is a change in the jury instructions as to how the State disproves the presence of mitigating circumstances. We see this as different from proving an additional element.

Id., ¶78 (App. 142).

> ¶82 Errors in jury instructions often give rise to new rules. But corrections in jury instructions seldom lead to retroactivity *in collateral proceedings*. [citations omitted].
>
> ¶83 In Lo's case the jury was not precluded from considering imperfect self-defense. It was given two options on self-defense. . . . .
>
> ¶84 The court's instruction was correct at the time it was given and it would be only slightly different today. We conclude that the instructional error recognized in *Head* need not be applied retroactively to Anou Lo. Such a result would disregard the State's reliance on prior law and have a deleterious effect on the administration of justice. . . ..

Id., ¶¶82-84 (emphasis in original) (App. 143-45).

Because it chose not to apply retroactively *Head's* requirement that the jury be instructed on the facts which the state must prove to establish first degree intentional homicide, the Court affirmed Lo's conviction. *Id.*, ¶85 (App. 145).

Federal District Court Proceedings

Lo filed his federal habeas petition pursuant to 28 U.S.C. §2254 and a supporting brief on February 5, 2004 (R1; R2). The district court, Hon. Rudolph T. Randa presiding, entered an Order on October 6, 2004 directing Respondent Endicott to file an answer (R6; App. 104-07). Instead, Endicott filed a motion to dismiss the petition as untimely under 28 U.S.C. §2244(d) (R11), and the district court stayed the requirement of an answer pending decision on that motion (R16).

Lo opposed the motion to dismiss, arguing that the Wisconsin Supreme Court's release of the decision in *Head*, on July 11, 2002, reversing the previously controlling decision in *Camacho*, was a necessary factual predicate for Lo's due process claim, thus triggering a new one-year limitations period under 28 U.S.C. §2244(d)(1)(D) for filing his habeas petition asserting that claim. He also argued that he was entitled to equitable tolling given that he had no basis for his constitutional claim until the *Head* Court overruled its interpretation of the self-defense statutes in *Camacho* (R14). The court nonetheless entered an Order on October 6, 2005, dismissing the petition as untimely, and entered Judgment dismissing the petition the following day (R19; R20; App. 1-5).

Lo filed a timely motion for relief from the judgment on October, 20, 2005, pursuant to Fed. R. Civ. P. 59(e) and 60(b) (R21). The parties briefed that motion (R23; R25), and the District Court denied it by Order entered August 24, 2006 (R26; App. 6-10).

Lo filed his notice of appeal on September 20, 2006 (R27). By Order dated October 27, 2006, the district court granted him a certificate of appealability and granted him leave to appeal *in forma pauperis*. (R32; App. 101). By Order dated November 28, 2006, that court clarified that the certificate of appealability covered each of the issues raised on this appeal (R35; App. 102-03). By Order dated March 1, 2007, this Court denied Lo's motion for appointment of counsel. Undersigned counsel accordingly represents Lo *pro bono*.

SUMMARY OF ARGUMENT

Anou Lo appeals from dismissal of his federal habeas petition under 28 U.S.C. §2254. That petition claimed violation of Lo's due process right to a jury finding beyond a reasonable doubt on all facts necessary for a finding of guilt. Specifically, the jury was not required to find that Lo had no actual belief that his actions were necessary in self-defense, as required under the homicide statute as enacted in 1987 but not acknowledged by the Wisconsin courts until the Supreme Court overruled *State v. Camacho*, 176 Wis.2d 860, 501 N.W.2d 380 (1993) (imperfect self-defense requires reasonable belief actions necessary, not just actual belief), in *State v. Head*, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413, on July 11, 2002. The merits of that claim have not been decided, however, as the district court denied Lo's petition as untimely.

Because Lo filed his petition within one year of non-tolled time after the date on which the factual predicate necessary for his due process claim could have been

known by the exercise of due diligence, that petition was timely. 28 U.S.C. §2244(d)(1)(D). That factual predicate was the release of the Wisconsin Supreme Court's decision in *Head*, reversing *Camacho* and defining the facts that the state must prove beyond a reasonable doubt for a conviction of completed or attempted first degree intentional homicide in cases, like Lo's, involving claims of self-defense.

The district court's cramped reading of §2244(d)(1)(D) as excluding its application to state court decisions forming a necessary predicate to a federal constitutional claim conflicts both with the Supreme Court's contrary holding in *Johnson v. United States*, 544 U.S. 295 (2005), and this Court's interpretation of *Johnson* in *Daniels v. Uchtman*, 421 F.3d 490 (7th Cir. 2005).

Lo's petition also was timely on grounds of equitable tolling. Until *Head* reversed *Camacho* and corrected the definition of what the state was required to prove under the homicide statute as enacted in 1987, Lo had no federal claim. The facts here thus fall squarely within the category of cases in which the Eleventh Circuit has recognized that it "would obviously be unfair" not to apply equitable tolling. *Johnson v. United States*, 340 F.3d 1219, 1227-28 (11th Cir. 2003), *aff'd on other grounds*, 544 U.S. 295 (2005).

Having erroneously dismissed Lo's petition as untimely, the court below did not address the substance of his federal constitutional claim. Indeed, it stayed Endicott's answer to the petition pending decision on the dismissal motion (R16). Accordingly, the record is not yet adequate for decision on Lo's substantive claim.

Although remand accordingly is necessary, Lo presents the substance of his constitutional claim as required by this Court's prior decisions to demonstrate that he has a "decent chance of success" on that claim. *E.g.*, *Modrowski v. Mote*, 322 F.3d 965, 969 (7th Cir. 2003); *Beyer v. Litscher*, 306 F.3d 504, 507 (7th Cir.2002) ("Future petitioners and their lawyers should undertake to show that a substantial constitutional issue exists, however, lest the court of appeals conclude that the procedural error is harmless and a remand pointless").

Because the jury instructions failed to require a jury verdict beyond a reasonable doubt on all facts necessary for conviction, Lo was denied his right to due process. *E.g.*, *Carella v. California*, 491 U.S. 263, 265-66 (1989).

ARGUMENT

I.

LO'S HABEAS PETITION WAS TIMELY UNDER 28 U.S.C. §2244(d)(1)(D)

Lo's petition was timely filed within the one-year limitations period of 28 U.S.C. §2244(d)(1). This Court reviews *de novo* a decision to dismiss a habeas corpus appeal for being untimely. *Moore v. Knight*, 368 F.3d 936, 938 (7th Cir. 2004).

Of course, that would not be so if the applicable trigger for the one-year limitations period were the date on which his judgment of conviction became final. Lo's direct appeal "became final" on November 19, 1998, upon expiration of the 90-day period for filing a petition for certiorari to the United States Supreme Court from

the Wisconsin Supreme Court's August 21, 1998, denial of Lo's petition for review on direct appeal. 28 U.S.C. §2244(d)(1)(A); *e.g.*, *Anderson v. Litscher*, 281 F.3d 672 (7th Cir. 2002) (for purposes of § 2244(d)(1), the one-year limitations period does not begin to run until the Supreme Court has denied review or the time for seeking Supreme Court review has expired). Under that standard, Lo's habeas petition would have been due one year later, or by November 19, 1999.

However, the date the conviction became "final" is not controlling. The statutory limitations period "run[s] from the latest of" four different dates, only one of which is the date of finality. 28 U.S.C. §2244(d)(1)(A)-(D).

The applicable provision here is 28 U.S.C. §2244(d)(1)(D), which provides that the limitations period runs from:

> the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

The applicable "trigger" under this provision is the release of the decision in *State v. Head*, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413, on July 11, 2002.

Given the *dicta* in *Camacho*, Lo and his counsel could not reasonably have known the basis for his claim that the instructions in his case were fatally defective until the Wisconsin Supreme Court in *Head* definitively construed the elements of the offense for which Lo was convicted. The Wisconsin Supreme Court recognized as much in a related context. *State v. Howard*, 211 Wis.2d 264, 564 N.W.2d 753, 762 (1997) (deeming it ""impractical to expect a defendant to present a legal argument

until a higher authority adopts it").[3] *Cf. Reed v. Ross*, 468 U.S. 1, 16-17 (1984) (when constitutional claim so novel that its basis is not reasonably available to counsel, as when Supreme Court subsequently overrules prior authority, defendant has cause for delay in raising it).

Although triggered by *Head* on July 11, 2002, the one-year limitations period was tolled on that date because Lo's §974.06 appeal was then pending in the Wisconsin Supreme Court. *See* 28 U.S.C. §2244(d)(2).[4] The limitations period accordingly did not start to run until July 11, 2003, the date on which the Wisconsin Supreme Court decided Lo's §974.06 appeal. Lo's petition, filed less than seven months later and raising only the due process issue arising out of the *Head* decision, accordingly is timely.

The district court's reliance upon the Ninth Circuit's decision in *Shannon v. Newland*, 410 F.3d 1083 (9th Cir. 2005), *cert. denied*, 125 S.Ct. 1333 (2006), as grounds to dismiss Lo's petition is misplaced (R19:3; R26:3-4; App. 4, 8-9). The *Shannon* Court's rationale is contrary both to the Supreme Court's analysis in *Johnson v. United States*, 544 U.S. 295 (2005), and to this Court's interpretation of *Johnson* in *Daniels v. Uchtman*, 421 F.3d 490 (7th Cir. 2005).

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[3] The Wisconsin Supreme Court overruled a different portion of *Howard* on other grounds in *State v. Gordon*, 2003 WI 69, 262 Wis.2d 380, 663 N.W.2d 765.

[4] Pursuant to 28 U.S.C. §2244(d)(2),

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

In *Johnson*, the Supreme Court rejected the fact/law distinction previously relied upon by some courts for purposes of applying the limitations period on federal habeas imposed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104, 110 Stat. 1214 ("AEDPA"). Johnson's federal sentence had been enhanced based on prior state convictions which were subsequently vacated in state court. Because the one-year-from-finality default deadline for filing for relief under 28 U.S.C. §2255 had expired before the state court had acted, Johnson argued that the petition was timely under §2255, ¶6(4) on the grounds that the state decision vacating his prior convictions was the relevant "fact[] supporting the claim" and that the state decision could not have been discovered prior to the date it was issued.

The Eleventh Circuit, however, deemed it self-evident that state court action in actually vacating a state conviction was merely a "legal proposition[]" or "result[]" to be distinguished from the "facts" referred to in §2255. *Johnson v. United States*, 340 F.3d 1219, 1223 (11th Cir. 2003). It therefore affirmed dismissal of Johnson's petition as untimely.

Although upholding dismissal on other grounds, the Supreme Court rejected the lower court's analysis. The government in *Johnson* declined to endorse the fact/law distinction relied upon by the Eleventh Circuit, *see* 544 U.S. at 305, and the Supreme Court rejected the principle that a state court decision may not be treated as a matter of fact within the meaning of the statute:

> We commonly speak of the "fact of a prior conviction," *e.g., Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435

> (2000), and an order vacating a predicate conviction is spoken of as a fact just as sensibly as the order entering it. In either case, a claim of such a fact is subject to proof or disproof like any other factual issue.

544 U.S. at 306-07.

The *Johnson* Court emphasized, moreover, that *failing* to consider the state court decision as an issue of fact for purposes of setting the limitations period for filing a habeas claim would be contrary both to common sense and legislative intent. The government in *Johnson* argued that the relevant "facts" for purposes of §2255, ¶6(4) consisted of the evidentiary facts on which the motion to vacate the state convictions could be based. The Court disagreed, however, noting that the relevant "claim" was not the state claim, but the federal claim on which the petitioner's §2255 motion was based, and that claim did not exist before the state decision vacating Johnson's state convictions. 544 U.S. at 305.

Because the time for seeking relief under §2255 could expire under the government's interpretation before release of the state court decision forming the necessary predicate for such a motion, the Supreme Court rejected that interpretation:

> The text of § 2255, ¶ 6(4), clearly links the running of the limitation period to the discovery of the "facts supporting the claim or claims presented," but on the Government's view, the statute of limitations may begin to run (and may even expire) before the § 2255 claim and its necessary predicate even exist.

544 U.S. at 305. The Court found it

> highly doubtful that in § 2255 challenges to enhanced sentences Congress would have meant to start the period running under paragraph four on the discoverability date of facts that may have no significance under federal law for years to come and that cannot by themselves be

the basis of a § 2255 claim.

Id. (citation omitted). *See also Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 125 S.Ct. 2444, 2450-51 (2005); *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.,* 522 U.S. 192, 195 (1997) (statutes of limitations ordinarily do not begin to run until a plaintiff's complete cause of action has accrued).

Although Johnson was a federal prisoner, so his claims were governed by 28 U.S.C. §2255, and the applicable limitations period was controlled by §2255, ¶6(4), the counterpart for state prisoners under 28 U.S.C. §2244(d)(1)(D) is "virtually identical" and the provisions have been construed interchangeably. *Daniels*, 421 F.3d at 492 n.2 (citation omitted).

With all due respect to the Ninth Circuit and the court below, the rationale underlying *Shannon* and the dismissal here does not make sense in light of *Johnson*. The *Shannon* Court distinguished *Johnson* on the grounds that, in *Johnson*, the state court decision which provided the predicate for Johnson's claim was issued in a case directly involving Johnson, while Shannon had not participated in the state court decision which gave rise to his federal claim. 410 F.3d at 1088-89. The district court here relied upon the same attempted distinction (R19:3 n.4; R26:3-4; App. 4, 8-9).

Given the Court's rationale in *Johnson*, however, that distinction makes no rational difference. Indeed, the Supreme Court viewed the fact that Johnson was involved in bringing about the state court decision at issue there, not as a *reason* for

its conclusion that the state court decision was a "factual predicate" under §2255, ¶6(4), but as a potential *impediment* to that conclusion. 544 U.S. at 307.

Johnson relied, not on the distinction proposed by *Shannon*, but on the common sense notion that the existence and meaning of a state court decision vacating a conviction are as much "facts" as any other fact. While the actual procedures for proving them sometimes differ, the fact that a prior conviction was vacated "is subject to proof or disproof like any other factual issue." 544 U.S. at 307.

The elements of a state offense which the state must prove for conviction, while sometimes labeled issues of law, likewise are "facts" in any common sense meaning of the term. Although non-tangible, like ideas, they nonetheless constitute "something that exists or occurs" or "a piece of information." The Merriam-Webster Dictionary (1997) at 271 (defining "fact"). Like the state order at issue in *Johnson*, legal facts like the decision in *Head* and the identification of the elements which the state must prove are "subject to proof or disproof like any other factual issue," 544 U.S. at 307, albeit pursuant to different procedures than are used to establish evidentiary facts. The elements necessary for a particular offense, whether established in a state court decision or otherwise, thus constitute "facts" regardless whether the petitioner whose claim relies on that decision as a predicate personally participated in the litigation of that case.

The *Shannon* Court (and the district court's decision here) also overlooks the Supreme Court's holding that Congress would not have intended to cut off a

petitioner's right to raise a constitutional challenge before the basis for such a challenge could exist. 544 U.S. at 305. By refusing categorically to consider the state court's binding determination of the elements necessary for conviction of a particular state offense as a "factual predicate" under §2244(d)(2)(D), both the *Shannon* Court and the court below do exactly that.

Lo, for instance, could not have raised his due process claim until the Wisconsin Supreme Court in *Head* overruled its prior misinterpretation of the imperfect self-defense statutes in *Camacho*, *supra*. As applied by the district court, the *Shannon* Court's interpretation of §2244(d)(2)(D) bars him from *ever* raising that claim in federal court. Here, as in *Johnson*, however, it is "highly doubtful" that "Congress would have meant to start the period running under [§2244(d)(1)(D)] on the discoverability date of facts that may have no significance under federal law for years to come and that cannot by themselves be the basis of a [§2254] claim." 544 U.S. at 305.

As the Court noted in *Johnson*, any concerns for comity and finality of the state conviction in these circumstances is addressed by adherence to the statutory "due diligence" requirements, 544 U.S. at 308, and the state's own limitations periods, if any, and not by arbitrarily excising state court decisions from the application of §2255, ¶6(4) (or the corresponding provisions of §2244(d)(2)(D)):

> Nor is there any reason to think Congress meant the limitations period to run earlier for the sake of preserving finality of state convictions; States are capable of providing their own limitation periods . . ..

544 U.S. at 306. Wisconsin, of course, has no such limitations period on seeking collateral review under Wis. Stat. §974.06.

The district court's attempt to distinguish away *Johnson* is based on semantics rather than any solid legal foundation. *Johnson* establishes that the fact/law distinction relied upon by Endicott and the court below in dismissing Lo's petition is not valid. As Judge Barkett noted while dissenting from denial of rehearing en banc from the court of appeals' decision ultimately reversed in *Johnson*, "[a]lthough distinctions are often made between the facts and legal consequences of a case, no metaphysical barrier prevents a legal consequence from sometimes operating as a fact." *Johnson v. United States*, 353 F.3d 1328, 1329 (11th Cir. 2003) (Barkett, J., dissenting).

Finally, the *Shannon* Court's interpretation of §2244(d)(2)(D) and its focus on whether the petitioner at bar had participated in the state court litigation raised as the applicable "factual predicate" for his federal claims is directly contrary to this Court's analysis of *Johnson* in *Daniels*, a decision the district court overlooked in dismissing Lo's petition.

Mr. Daniels relied upon *Johnson* to argue that the state court's final decision on the collateral attack to his conviction was the "factual predicate" for his federal claim, triggering a new one-year limitations period under §2244(d)(1)(D). The fact that the state court decision relied upon by Daniels was directly related to Daniels' case and, given the exhaustion requirement for federal habeas, had a direct effect on

his ability to raise his claim in federal court presumably would have been adequate given the distinction relied upon in *Shannon* and the district court here. This Court, however, held otherwise.

The relevant distinction, according to the *Daniels* Court, is that, "[i]n *Johnson,* the state court decision vacating his state convictions supplied a necessary element of the petitioner's claim," while Daniels' state court decision was merely "a procedural hurdle to clear before proceeding with his federal habeas petition" 421 F.3d at 492. To trigger a new limitations period merely because the petitioner cleared a procedural hurdle "would significantly undermine the one-year statute of limitations and render the provisions tolling the limitation during the pendency of the state claim meaning-less." *Id.*

Of course, the decision in *Head* "supplied a necessary element of the petitioner's claim" in this case. *Daniels*, 421 F.3d at 492. The facts necessary to Lo's claim here consist of (1) identification of the facts or elements necessary for a finding of guilt on the charge of attempted first degree intentional homicide and (2) the specific instructions given at trial. Lacking either one of these factual predicates, Lo would have been unable to prove his due process claim that the instructions failed to require a jury verdict beyond a reasonable doubt on every fact or element necessary for a finding of guilt.

For the reasons stated in *Johnson*, moreover, recognizing *Head* as the "factual predicate" triggering a new one-year limitations period under §2244(d)(1)(D) would

not undermine Congress' intent. 544 U.S. at 305-06. Congress simply did not intend to cut off habeas relief where, as here, the petitioner could not have pursued federal review before a state court decision which "supplied a necessary element of the petitioner's claim." *Daniels*, 421 F.3d at 429; *see Johnson*, 544 U.S. at 305-06.

Endicott nonetheless suggested below that Lo's petition was untimely because it was filed more than one year after July 11, 2002, the date on which *Head* was decided (R11:5-6). That suggestion ignored 28 U.S.C. §2244(d)(2), which provides as follows:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Because Lo's appeal from denial of his motion under Wis. Stat. §974.06 challenging the same judgment at issue in this petition was then pending in the Wisconsin Supreme Court, §2244(d)(2) mandates that all time from July 11, 2002 through the date the Supreme Court decided Lo's appeal on July 11, 2003 is excluded.

While Endicott objected below that Lo initiated his §974.06 motion and subsequent appeal before July 11, 2002 (R11:5), nothing in the language or purpose of §2244(d)(2) suggests that it applies only when the state proceedings are initiated after the event triggering the limitations period under §2244(d)(1). Rather, by its terms, that provision tolls the limitations period for any time during which a state motion "is pending." For purposes of habeas review, an application for collateral review is "pending" until it has "achieved final resolution through the State's

post-conviction procedures." *Carey v. Saffold*, 536 U.S. 214, 219-20 (2002).

Endicott did not dispute either that Lo's §974.06 motion and subsequent appeal had been properly filed or that the appeal remained "pending" on July 11, 2002, and indeed through July 11, 2003. Nor can counsel for Lo imagine any possible rational basis for tolling the time while a post-trigger motion is pending but not tolling the time while a pre-trigger motion is pending. The apparent purpose of §2244(d)(2) is to ensure that habeas petitioners are not penalized by the state court delay necessary to exhaust their federal claims before proceeding to federal court, and the same rationale applies to a pending state motion, regardless of when it was filed.

Equally irrelevant was Endicott's reference below to the fact that Lo did not raise the *Head* issue in state court until his first brief filed after *Head* was decided (R11:5-6). Although unclear, Endicott appeared to suggest that the two-month period from the *Head* decision until Lo filed his brief should be counted toward the limitations period. That is incorrect. "Any properly filed [state] collateral challenge to the judgment tolls the time to seek federal collateral review," even if the claims raised in the state collateral proceedings are not the same as those ultimately presented in the federal petition. *Carter v. Litscher*, 275 F.3d 663, 665-66 (7th Cir. 2001); *see Tillema v. Long*, 253 F.3d 494, 502 n. 10 (9th Cir. 2001).

Similarly incorrect would be any suggestion that Lo waived the *Head* issue in stated court and that the proceedings in that court accordingly would not act to toll the time for filing his federal habeas petition. First, Lo did not waive that claim. Because

Lo and his counsel did not and could not know that the Wisconsin Supreme Court in *Head* would overrule its prior interpretation of Wis. Stat. §940.01 in *Camacho*, he did not waive that claim as a matter of state law. *See State v. Howard*, 211 Wis.2d 269, 564 N.W.2d 753, 762-63 (1997).[5]

Even if he had, waiver is not jurisdictional and the Wisconsin Supreme Court did not rely on waiver here. *See State v. Polashek*, 2002 WI 74, ¶25, 253 Wis.2d 527, 646 N.W.2d 330 (waiver rule not jurisdictional; proper to address claims when fully briefed and of sufficient public interest to merit a decision" (citations omitted)).

Finally, allegations of procedural default do not render a state motion ineffective at tolling the time for a federal habeas petition under §2244(d)(2). *See Artuz v. Bennet*, 531 U.S. 4 (2000) (state post-conviction motion is "properly filed" so as to toll limitations period under §2244(d)(2), even though claims were procedurally barred).

II.

LO IS ENTITLED TO EQUITABLE TOLLING

Although Lo's petition was timely under §2244(d)(1)(D), he would be entitled to equitable tolling even if it were not. While this doctrine is used sparingly and only in extraordinary circumstances, this is exactly such a case in which application of the doctrine is appropriate.

"Equitable tolling is proper when extraordinary circumstances outside of the

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[5] The Wisconsin Supreme Court overruled a different portion of *Howard* on other grounds in *State v. Gordon*, 2003 WI 69, 262 Wis.2d 380, 663 N.W.2d 765.

petitioner's control prevent timely filing of the habeas petition." *Gildon v. Bowen,* 384 F.3d 883, 887 (7th Cir. 2004); *see Taliani v. Chrans,* 189 F.3d 597, 598 (7th Cir. 1999); *Neverson v. Farquharson,* 366 F.3d 32, 41 (1st Cir. 2004) (collecting cases).

"Equitable tolling excuses an untimely filing when, despite exercising reasonable diligence, a petitioner could not have learned the information he needed in order to file on time." *Jones v. Hulick,* 449 F.3d 784, 789 (7th Cir. 2006) (citing *Taliani*, *supra*); *see Lloyd v. VanNatta,* 296 F.3d 630, 633 (7th Cir. 2002) (citation omitted), *cert. denied*, 537 U.S. 1121 (2003); *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000). Put another way, "the test for equitable tolling, both generally and in the immigration context, is not the length of the delay in filing the complaint or other pleading; *it is whether the claimant could reasonably have been expected to have filed earlier*." *Pervaiz v. Gonzales*, 405 F.3d 488, 491 (7th Cir. 2005) (emphasis added).

This Court has reviewed claims of equitable tolling under §2254 *de novo*. *Modrowski v. Mote*, 322 F.3d 965, 967 (7th Cir.2003).

Contrary to the district court's underlying assumption, therefore, there is no requirement that the petitioner's inability to file the petition was due to willful or wrongful conduct of another (R26:4; App. 9). Equitable tolling is, by its nature, an *equitable* doctrine, not a punitive one. Its purpose is to ensure fairness to the petitioner, not punish the state.

Nor is there any requirement that the missing "information . . . needed in order to file on time" be purely factual. After all, although not specifically labeled as such,

the one universally accepted application of the equitable tolling doctrine under the AEDPA consists of the decisions granting state prisoners a one year "grace period" from enactment of the AEDPA in which to pursue federal habeas relief even when §2244(d)(1) would have provided for an earlier deadline. *See, e.g.*, *Lindh v. Murphy*, 96 F.3d 856, 865-66 (7th Cir. 1996) ("reliance interests" lead to this result), *rev'd on other grounds*, 521 U.S. 320 (1997).

Lo easily meets the standard for equitable tolling. This is not a situation in which the petitioner claims ignorance of existing law or a failure to understand it. *Compare Owens*, 235 F.3d at 360. Lo had no basis for his federal constitutional claim until the Wisconsin Supreme Court rejected its statements in *Camacho* and held that, to meet its burden of proof on a charge of first degree intentional homicide, the state must prove not only that the defendant's beliefs were objectively unreasonable, but that the defendant did not actually believe his actions were necessary for self-defense. *Head*, 648 N.W.2d at 433-37. Lo could not have discovered the information necessary for his federal claim prior to July 11, 2002, because it did not exist until then.

Equitable tolling thus applies here for exactly the same reasons the courts uniformly granted a one-year grace period after enactment of the AEDPA. The First Circuit explained those decisions on the grounds that reasoning that "it is impermissible to bar the filing of a § 2255 motion (or a habeas petition under 28 U.S.C. § 2254, governed by the similar limitations provisions AEDPA added to 28 U.S.C. §

2244(d)(1)) before the claimant has had a reasonable opportunity to bring it," *Rogers v. United States*, 180 F.3d 349, 353-54 (1st Cir. 1999).

Although misconstruing the scope of §2244(d)(1)(D), the Eleventh Circuit in *Johnson* likewise recognized that equitable tolling is appropriate in a case such as this. 340 F.3d at 1227-28. The Court there acknowledged that, even though a court decision cannot, in its view, constitute a "factual predicate" for a claim within the meaning of §2244(d)(1)(D), delay by the state courts in making decisions necessary to a federal challenge can justify equitable tolling. The Court held that it "would obviously be unfair" to hold otherwise. 340 F.3d at 1227-28.[6]

Because Lo could not reasonably have filed his federal habeas petition before the *Head* decision (and thereafter until after he had exhausted his state remedies) he is entitled to equitable tolling. The district court's decision to the contrary accordingly should be reversed.

III.

BECAUSE THE ERRONEOUS INSTRUCTION ON IMPERFECT SELF-DEFENSE DENIED LO DUE PROCESS, HE IS ENTITLED TO RELIEF ON THE MERITS

Although instructing the jury on perfect and imperfect self-defense/unnecessary defensive force as defenses to the charge of attempted first

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[6] Although finding equitable tolling to be appropriate in a case such as Lo's, the *Johnson* Court declined to apply that doctrine in the case before it because Johnson had delayed filing a challenge to his state conviction until more than a year after his AEDPA deadline had passed. 340 F.3d at 1228. Unlike the situation here, therefore, the delay accordingly was attributable to the petitioner, and not merely to the state courts.

degree intentional homicide, the state trial court's instructions failed to require a jury finding beyond a reasonable doubt that Lo did not actually believe that he was in imminent danger of death or great bodily harm, as required by the Wisconsin statutes. *State v. Head*, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Rather, consistent with *dicta* in *State v. Camacho*, 176 Wis.2d 860, 501 N.W.2d 380 (1993), the trial court required only that the state prove any such belief to have been unreasonable. *Lo*, ¶¶58, 69 (App. 133-34, 138-39).

Because the jury instructions accordingly failed to require a jury verdict beyond a reasonable doubt on every fact or element necessary for a finding of guilt on the charge of attempted first degree intentional homicide, Lo was denied his rights to due process. *E.g.*, *Carella v. California*, 491 U.S. 263, 265-66 (1989).

Generally, on appeal from the district court's denial of habeas relief, this Court reviews findings of fact for clear error and legal conclusions *de novo*. *E.g.*, *Dunlap v. Hepp*, 436 F.3d 739, 741 (7th Cir. 2006). However, because the district court dismissed Lo's petition without reaching the merits of his claim, the issue for this Court is whether a "substantial constitutional issue exists," such that the district court's procedural error is not harmless. *E.g.*, *Beyer v. Litscher*, 306 F.3d 504, 507 (7th Cir.2002); *see Modrowski v. Mote*, 322 F.3d 965, 969 (7th Cir. 2003) (petitioner must show he has a "decent chance of success" on his constitutional claim).

A. Background

The defense in this matter was self-defense, based, among other things, upon evidence that the complainant (1) was a member of a gang which had threatened to "get" Lo and his brothers, (2) had been involved in other shootings within five weeks of this encounter, and (3) made a quick move to his waistband (where he in fact did have a gun) immediately prior to Lo's drawing his weapon and firing in the complainant's direction. *See Lo*, ¶69 n.13 (App. 138). Without objection, the circuit court determined that the defense was adequately raised to require instructions on both perfect and imperfect self-defense as defenses to the charge of attempted first degree intentional homicide. *Id.*, ¶¶59, 69 (App. 134, 138-39).

Consistent with Wis. J.I.–Crim. 1014 and *dicta* in *State v. Camacho*, 176 Wis.2d 860, 501 N.W.2d 380 (1993), the circuit court's instructions defined imperfect self-defense as requiring that Lo "reasonably believed" that he was preventing or terminating an unlawful interference with his person:

> If the defendant intended to kill Koua Vang; his acts demonstrated unequivocally, under all the circumstances, that he intended to kill and would have killed Koua Vang, except for the intervention of another person or some other extraneous factor; *and he did not reasonably believe that he was preventing or terminating an unlawful interference with his person* or did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself, the defendant is guilty of attempted first degree intentional homicide.

Lo, ¶69 (emphasis added by *Lo* Court) (App. 138-39).

B. The Imperfect Self-Defense Instruction Misstated the Law, Depriving Lo of a Jury Verdict Beyond a Reasonable Doubt on an Essential Element of the Offense of Attempted First Degree Intentional Homicide.

The state trial court's instruction on imperfect self-defense did not accurately state the law. As a result, it failed to require a jury determination beyond a reasonable doubt on an essential element of the state's proof on the charge of attempted first degree intentional homicide.

In relevant part, Wisconsin law defines first degree intentional homicide as follows:

> (1) OFFENSES. (a) Except as provided in sub. (2) whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony.
>
> * * *
>
> (2) MITIGATING CIRCUMSTANCES. The following are affirmative defenses to prosecution under this section which mitigate the offense to 2nd-degree intentional homicide under s. 940.05:
>
> * * *
>
> (b) Unnecessary defensive force. Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable.

Wis. Stat. § 940.01. The burden of disproving unnecessary defensive force beyond a reasonable doubt is on the state. Wis. Stat. §940.01(3).

Second-degree intentional homicide is defined as follows:

> (1) Whoever causes the death of another human being with

intent to kill that person or another is guilty of a Class B felony if:

> (a) In prosecutions under s. 940.01, the state fails to prove beyond a reasonable doubt that the mitigating circumstances specified in s. 940.01(2) did not exist as required by s. 940.01(3);
>
> * * *
>
> (3) The mitigating circumstances specified in s. 940.01(2) are not defenses to prosecution for this offense.

Wis. Stat. § 940.05.

As the Wisconsin Supreme Court explained in *State v. Head*, 2002 WI 99, ¶70, 255 Wis.2d 194, 648 N.W.2d 413, to prove first-degree intentional homicide under the statutes in effect at the time of Lo's actions,

> the state must prove that the defendant caused the death of another with intent to kill. Wis. Stat. § 940.01(1). If perfect self- defense is placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that one of the defendant's beliefs was not reasonable. Wis. Stat. § 939.48(1). If unnecessary defensive force is [sic] been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the defendant did not actually believe she was preventing or terminating an unlawful interference with her person *or* did not actually believe that the force she used was necessary to prevent imminent death or great bodily harm-- even if those beliefs were unreasonable--to sustain a conviction for first- degree intentional homicide.

At the time of Lo's trial, it was generally assumed that a defendant's actual, subjectively held belief in the need to act in self-defense was insufficient to mitigate an attempted or completed intentional homicide to second degree. The Wisconsin Supreme Court had stated as much in *Camacho*, 501 N.W.2d at 388, albeit in *dicta*, and the pattern instructions reflected that assumption, *see* Wis. J.I.–Crim. 1014

(1994).

In *Head*, however, that Court rejected *Camacho's* assertion that a defendant must satisfy some objective threshold to raise an unnecessary defensive force/imperfect self-defense claim. Instead, relying on the relevant statutes' language and original purpose when enacted in 1987, the Court construed the statutes as requiring that the state disprove beyond a reasonable doubt a defendant's claim that he *actually* believed in the need to act in self-defense:

> Based on the plain language of Wis. Stat. § 940.05(2), supported by the legislative history and articulated public policy behind the statute, we conclude that when imperfect self-defense is placed in issue by the trial evidence, the state has the burden to prove that the person had no actual belief that she was in imminent danger of death or great bodily harm, or no actual belief that the amount of force she used was necessary to prevent or terminate this interference. If the jury concludes that the person had an actual but unreasonable belief that she was in imminent danger of death or great bodily harm, the person is not guilty of first-degree intentional homicide but should be found guilty of second-degree intentional homicide.

Head, 2002 WI 99, ¶103. When the issue of unnecessary defensive force has been placed in issue by the trial evidence, "the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt under sub. (1)." Wis. Stat. § 940.01(3); *see Head*, 2002 WI 99, ¶107.

The defenses of perfect and imperfect self-defense were placed in issue in this case, the circuit court instructed the jury on those offenses, *Lo*, ¶¶59, 69 (App. 134, 138-39), and the Wisconsin Supreme Court did not question its decision to do so. The state, however, was not required to prove beyond a reasonable doubt that Lo had no

actual belief that he was preventing or terminating an unlawful interference with his person. Instead, the jury was instructed that the state need only show that any such belief was objectively unreasonable. *Id*., ¶¶58, 69 (App. 133-34, 138-39).

Given the trial court's instructions, the conviction for attempted first degree intentional homicide may have been based on a jury finding that, although Lo *actually* believed that he was preventing or terminating an unlawful interference with his person, such a belief was unreasonable. Although those instructions were consistent with Wis. J.I.–Crim. 1014 (1994) and the *Camacho dicta*, they did not accurately state the law. *Head*, 2002 WI 99, ¶¶143-47 ("Wis JI--Criminal 1014 is inconsistent with our interpretation of Wis. Stat. §§940.01 and 940.05, and our determination that no threshold determination of a *reasonable* belief in an unlawful interference is required to mitigate first-degree intentional homicide based on the use of unnecessary defensive force" (emphasis in original)).

C. The Failure to Instruct the Jury on a Necessary Element of the Offense Denied Lo Due Process of the Laws

The failure to instruct the jury on a necessary element of the state's proof is not merely an error of state law. In 1970, the Supreme Court declared that the 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." *In re Winship*, 397 U.S. 358, 364 (1970). The Sixth Amendment, as enforced against the states through the Fourteenth, generally mandates that the jury,

rather than the judge, make that determination. *E.g.*, *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993); *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (Constitutional due process and jury trial guarantees require that any fact (other than prior conviction) which increases the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt).

The Supreme Court accordingly has long recognized that instructions which relieve the state of its burden of proving all facts or elements necessary for conviction beyond a reasonable doubt violate due process. *E.g.*, *California v. Roy*, 519 U.S. 2 (1996) (per curiam) (instruction which omitted necessary element violated due process); *Carella v. California*, 491 U.S. 263, 265-66 (1989) (jury instructions relieving state of burden of proving every element of charged offense beyond reasonable doubt violate due process); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

The circuit court's failure to require a jury finding beyond a reasonable doubt on the question of whether Lo *actually* believed the he was preventing or terminating an unlawful interference with his person accordingly violated his rights to due process and to a jury.

D. The Due Process Violation Was Not Harmless

The state cannot rationally suggest that the due process violation here was "harmless." Assessment of Lo's defense properly was for the jury, and even the Wisconsin Supreme Court conceded that application of *Head's* instructional requirement likely would require reversal and a new trial on the facts of this case. *Lo*,

¶58 (App. 133-34). On this point, that Court was correct.

Self-defense was the central issue in dispute at the trial. Evidence was presented that Lo only drew his gun and shot toward Vang after Vang suddenly turned on him, lifted his shirt, and grabbed toward his waistband in a manner in which Lo believed was an attempt to draw a gun. This testimony was corroborated by the facts that Vang did have a gun in his waistband, that Vang was a member of a gang which had threatened to "get" Lo and his brothers, that Vang's gang was involved in two other shootings within weeks of this incident, and that Vang grew quite agitated during the discussion with Lo, to the extent that Vang's friend, Hue Lee, had to try to calm him down. *Lo*, ¶¶6-10, 69 n.13 (App. 110-11, 138); *see id*. ¶127 (Abrahamson, Ch.J., dissenting) (App. 166).

Harmless error analysis does not permit this Court to interpose itself as some sort of "super-jury." *Neder v. United States*, 527 U.S. 1, 19 (1999). Where, as here, the defendant contested the issue and the evidence viewed most favorably to the defendant supports his theory, it is for the jury to determine whether to believe it. *Head*, 2002 WI 99, ¶113; *see Neder*, 527 U.S. at 19 ("where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding [the court] should not find the error harmless"). *Compare id.* at 17 (jury instruction that improperly omits an essential element from the charge constitutes harmless error if "a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict

would have been the same absent the error").

While the jury apparently determined that Lo's belief in the need to act as he did to prevent or terminate an unlawful interference with his person was unreasonable, there is nothing rationally to suggest that it necessarily would have found that Lo did not in fact harbor that belief. The distinction between a "reasonable belief" and an "actual belief" may be "a fairly subtle difference in state of mind," as suggested by majority in the Wisconsin Supreme Court. *Lo,* ¶68 (App. 138). The Dissent in that Court, however, is correct that this difference is nonetheless very real. "Whether a person is to be measured on an objective or subjective standard is a major issue running throughout many different areas of law, and a court's decision to impose criminal or civil liability based on one or the other standard is often outcome determinative." *Lo*, ¶122 (Abrahamson, Ch.J., dissenting) (footnote omitted) (App. 163).

Given the ample corroboration for Lo's testimony that he actually believed he needed to act in self-defense, a rational jury easily could have credited that testimony while still finding his beliefs regarding the need to act unreasonable. Indeed, even without that corroboration, there was nothing about Lo's testimony which would render it incredible as a matter of law.

The trial evidence, in short, adequately placed self-defense in issue. *See Head*, 2002 WI 99, ¶¶105-125. The circuit court found as much in choosing to instruct on perfect and imperfect self-defense, and the Wisconsin Supreme Court did not suggest

otherwise. The circuit court's failure to instruct the jury on a necessary element of the state's proof accordingly was not harmless. *See Head*, 2002 WI 99, ¶¶130-142 (where evidence was sufficient to place imperfect self-defense in issue, failure to instruct on that defense not harmless); *State v. Warren*, 608 N.W.2d 617, 623 (Neb. App. 2000) (improper self-defense instruction not harmless under *Neder* where defendant contested issue of self-defense and evidence supported instruction on the defense). By failing to require a jury finding beyond a reasonable doubt on a disputed fact necessary to a finding of guilt, the jury instructions "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citation omitted). *See also O'Neal v. McAninch*, 513 U.S. 432, 437 (1995) (habeas relief required where "grave doubt" exists as to harmlessness of error); *Roy*, *supra* (same).

E. The AEDPA Does Not Bar Relief

As amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104, 110 Stat. 1214 ("AEDPA"), 28 U.S.C. §2254(d) provides that a habeas application "shall not be granted" with respect to a claim the state courts adjudicated on the merits

> unless the adjudication of the claim--
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court; or
> >
> > (2) resulted in a decision that was based on an unreasonable

> determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d).

A state court's decision is "contrary to . . . clearly established Federal law as established by the United States Supreme Court" if it is "substantially different from relevant [Supreme Court] precedent." *Washington v. Smith*, 219 F.3d 620, 627 (7th Cir. 2000) (quoting *Williams v. Taylor*, 529 U.S. 362, 405 (2000)):

> Under the "contrary to" clause of §2254(d)(1), [a court] could grant a writ of habeas corpus . . . where the state court applied a rule that contradicts the governing law as expounded in Supreme Court cases or where the state court confronts facts materially indistinguishable from a Supreme Court case and nevertheless arrives at a different result.

Id. The "unreasonable application" clause is broader, however, and "allows a federal habeas court to grant habeas relief whenever the state court 'unreasonably applied [a clearly established] principle to the facts of the prisoner's case.'" *Id.* (quoting *Williams*, 529 U.S. at 413).

The reasonableness standard is not a toothless one:

> The statutory "unreasonableness" standard allows the state court's conclusion to stand if it is one of several equally plausible outcomes. On the other hand, Congress would not have used the word "unreasonable" if it really meant that federal courts were to defer in all cases to the state court's decision. Some decisions will be at such tension with governing U.S. Supreme Court precedents, or so inadequately supported by the record, or so arbitrary, that a writ must issue.

Hall v. Washington, 106 F.3d 742, 748-49 (7th Cir.), *cert. denied,* 522 U.S. 907 (1997). "Unreasonableness is judged by an objective standard." *Morgan v. Krenke*,

232 F.3d 562, 565 (7th Cir. 2000), *cert. denied*, 532 U.S. 951 (2001).

Relief is appropriate, despite the AEDPA's restrictions, because the Wisconsin Supreme Court's refusal to apply retroactively *Head's* requirement of a jury instruction on the facts which the state must prove beyond a reasonable doubt for conviction on the charge of attempted first degree intentional homicide directly contravened controlling United States Supreme Court authority. As explained *supra*, the United States Supreme Court had recognized the due process requirement of an instruction on each fact or element which must be proved to establish guilt long before Lo's trial in 1996. *E.g.*, *Carella v. California*, 491 U.S. 263, 265-66 (1989). The Wisconsin Supreme Court simply chose not to follow that controlling authority. This is exactly the type of situation contemplated by the "contrary to" clause of §2254(d)(1). *See Williams v. Taylor*, 529 U.S. at 405.

The Wisconsin Supreme Court's decision likewise is directly contrary to controlling United States Supreme Court authority in its assumption that the statutory requirement that the state prove the absence of any *actual* belief that he was preventing or terminating an unlawful interference, rather than merely the absence of any *reasonable* belief, to prove completed or attempted first degree intentional homicide has no constitutional significance:

> The State always had the burden of proof on the elements of unnecessary defensive force. It always had to prove these elements beyond a reasonable doubt. The elements of the crime remain the same. Hence, the only change resulting from *Head*, as it affects this case, is a change in the jury instructions as to how the State disproves the presence of mitigating circumstances. We see this as different from proving an

additional element.

Lo, ¶73 (App. 140).

Of course, the Wisconsin court's conclusion is directly contrary to the Supreme Court's holding that due process requires "proof beyond a reasonable doubt of every *fact* necessary to constitute the crime." *Winship*, 397 U.S. at 364 (emphasis added). Wisconsin law, as enacted prior to the incident leading to Lo's conviction, requires that the state prove beyond a reasonable doubt that a defendant such a Lo did not *actually* believe his actions were necessary to prevent or terminate an unlawful interference with his person. *Head*, *supra*; Wis. Stat. §940.01(1), (2)(b) & (3). If self-defense is adequately presented by the evidence and the state fails to meet that burden, the defendant is not guilty of either completed or attempted first degree intentional homicide. A court cannot, by mere semantics, transform such a fact necessary for conviction into something of no consequence. *Cf. Mullaney*, *supra*.[7]

Given the United States Supreme Court's pre-1996 holdings that due process is violated by jury instructions which either fail to require a jury finding beyond a reasonable doubt on every fact necessary for conviction, or erroneously define a fact which must be proven, the Wisconsin Supreme Court's refusal to require such an instruction in this case also is patently unreasonable. 28 U.S.C. §2254(d)(1). Both

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[7] Contrary to Endicott's suggestion below (R23:3), the Wisconsin Supreme Court did not hold in *Lo* that Wis. Stat. §§940.01 & 940.05 meant one thing on July 10, 2002 and another thing on July 11, 2002 when it decided *Head*. Rather, it merely (though erroneously) held in Lo's case that the *separate* requirement of an instruction on the required statutory elements of disproving imperfect self-defense (and thus necessary for proving attempted first degree intentional homicide) as found in *Head* need not be applied retroactively. *Lo*, ¶73 (App. 140).

the plain language of the Wisconsin homicide statute as enacted in 1987 and its original purpose and intent mandate proof beyond a reasonable doubt that the defendant had no actual belief that his actions were necessary in self-defense. Absent such proof, the defendant is not guilty of either completed or attempted first degree intentional homicide. The Wisconsin Supreme Court so held in *Head*. Nothing in the United States Supreme Court's authorities dealing with due process and jury instructions reasonably suggests that it is somehow constitutionally permissible simply to omit one or more essential elements from the jury instructions.

CONCLUSION

For these reasons, Anou Lo respectfully asks that the Court reverse the judgment below and remand with directions that the district court order an answer and decide Lo's constitutional claim on its merits.

Dated at Milwaukee, Wisconsin, April __, 2007.

Respectfully submitted,

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Lo Consol. Brief2.wpd

RULE 32(a)(7) CERTIFICATION

I hereby certify that this brief complies with the type volume limitations contained in Fed. R. App. P. 32(a)(7) for a principal brief produced with a proportionally-spaced font. The length of the includable portions of this brief, *see* Fed. R. App. P. 32(a)(7)(B)(iii), is 10,741 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

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Robert R. Henak

TABLE OF CONTENTS TO APPELLANTS' APPENDIX

Items bound with brief:

Items bound in separate appendix:

CIRCUIT RULE 30(c) STATEMENT

The items required by Circuit Rule 30(a) have been bound with appellant's brief. Those items required by Circuit Rule 30(b) are contained in the separate appendix.

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Robert R. Henak

CIRCUIT RULE 31 STATEMENT

With the exception of those contained in the digital copy, the materials contained in Mr. Lo's required short appendix and the separate appendix are not available in non-scanned PDF format that he has the technical capability to include in the digital copy of his appendices.

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Robert R. Henak

United States District Court

EASTERN DISTRICT OF WISCONSIN

JUDGMENT IN A CIVIL CASE

ANOU LO,

Petitioner,

V. CASE NUMBER: **04-C-133**

JEFFREY ENDICOTT, Warden,
Red Granite Correctional Institution,

Respondent.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came on for consideration and a decision has been rendered.

IT IS ORDERED AND ADJUDGED **that Anou Lo's petition pursuant to Title 28, United States Code, Section 2254, is DENIED as untimely. Respondent's motion to dismiss is GRANTED. This action is hereby DISMISSED.**

October 7, 2005
Date

SOFRON B. NEDILSKY
Clerk

s/ Linda M. Zik
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ANOU LO,

Petitioner,

-v- **Case No. 04-C-0133**

JEFFREY ENDICOTT, Warden,
Red Granite Correctional Institution,

Respondent.

DECISION AND ORDER

On February 5, 2004, the petitioner, Anou Lo, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. After initially reviewing the petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases, the Court ordered Jeffrey Endicott to file an answer to Lo's petition. In response, Endicott filed a motion to dismiss the petition as untimely, and a motion to stay the Court's order to answer pending the resolution of the motion to dismiss. The Court granted Endicott's motion to stay because it was unopposed.[1]

In support of his motion to dismiss, Endicott argues that Lo's habeas petition was untimely filed pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). AEDPA establishes a one-year statute of limitations for filing habeas

[1] Typically, a motion to dismiss is not an appropriate pleading in response to a petition for a writ of habeas corpus. *See Chavez v. Morgan*, 932 F. Supp. 1152, 1152-53 (E.D. Wis. 1996); *see also* Rule 5(b) of the Rules Governing Section 2254 Cases ("The answer must . . . state whether any claim in the petition is barred by . . . a statute of limitations."). However, because Endicott's motion to stay was unopposed, the Court decided in these circumstances to allow him to file a motion to dismiss in lieu of an answer.

corpus petitions. 28 U.S.C. § 2244(d)(1). The one year statute of limitations generally runs from the date of the final judgment on direct review or "the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Lo's judgment of conviction in Wisconsin became final on November 19, 1998.[2] Lo filed his habeas petition on February 5, 2004, over five years after his judgment of conviction became final. Thus, it appears that his petition is untimely filed.

Lo argues, though, that a subsequent Wisconsin Supreme Court decision triggered a new one-year statute of limitations under 28 U.S.C. § 2244(d)(1)(D). Section 2244(d)(1)(D) allows the statute of limitations to run from "the date on which the factual predicate of the claim . . . could have been discovered through the exercise of due diligence." Lo claims that the Wisconsin's Supreme Court decision in *State v. Head*, 255 Wis.2d 194 (2002) is that "factual predicate" which triggered a new one-year statute of limitations. In *Head*, the Wisconsin Supreme Court clarified the elements of the offense for which Lo was convicted.[3]

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[2] On November 19, 1998, the 90-day period for filing a petition for certiorari to the United States Supreme Court from the Wisconsin Supreme Court's denial of Lo's petition for review expired. *See Anderson v. Litscher*, 281 F.3d 672, 674-75 (7th Cir. 2002) (holding that for purposes of § 2244(d)(1)(A), the one-year limitations period does not begin to run until the United States Supreme Court has denied review or the time for seeking review from the United States Supreme Court has expired.)

[3] Lo was convicted of first degree intentional homicide on January 12, 1996. During trial, Lo admitted that he shot another person, but claimed that he did so in self-defense. At the time of his conviction, the law of Wisconsin allowed the state to defeat the defense of "imperfect self-defense" by only proving that any belief on the part of the defendant that he needed to defend himself was unreasonable. At Lo's trial, the Wisconsin circuit court instructed the jury according to this understanding of Wisconsin law.

However, subsequently, the Wisconsin Supreme Court rejected that understanding of Wisconsin law. The court in *Head* concluded that, in order to meet its burden of proof on a charge of first degree intentional homicide, the state must prove, not only that the defendant's beliefs were objectively unreasonable, but also that the defendant did not actually believe his actions were necessary for self-defense. *Head*, 648 N.W.2d at 433-37.

Lo's argument is not persuasive. The Wisconsin Supreme Court's decision in *Head* is not a "factual predicate" as understood in § 2244(d)(1)(D), but rather is a clarification of state law. *See Shannon v. Newland*, 410 F.3d 1083, 1088 (9th Cir. 2005). If a state court clarifies or changes state law in a case in which the federal habeas petitioner was not a party, and that subsequent legal determination is deemed a "factual predicate," then "factual" would be meaningless. *Id.* The Wisconsin Supreme Court made a legal determination in *Head*, not a factual determination, and thus, a new one-year statute of limitations was not triggered pursuant to § 2244(d)(1)(D).[4]

Because Lo filed his federal habeas petition over one year after his judgment became final, the Court must deny his petition for a writ of habeas corpus as untimely filed.

Lo argued before the Wisconsin Supreme Court that *Head* should be retroactively applied to his conviction. The Supreme Court rejected Lo's argument, held that *Head* is not retroactively applicable, and affirmed Lo's conviction. *See State v. Lo*, 264 Wis.2d 1 (2003).

[4] The Court recognizes that a state court decision can, in some circumstances, qualify as a "factual predicate." For instance, the Supreme Court recently held, in *Johnson v. United States*, 125 S.Ct. 1571 (2005), that a state court order vacating a petitioner's state court conviction was a "fact" for purposes of triggering a new statute of limitations. *Id.* at 1577.

In *Johnson*, the previous state court convictions were used to enhance the petitioner's federal sentence, and as such, the subsequent, state-court vacatur of those convictions removed the basis of the petitioner's enhanced federal sentence. Here, though, unlike the state-court's vacatur in *Johnson*, the Wisconsin Supreme Court's decision in *Head* was not directly related to Lo's case and had no direct effect on Lo's legal status. *See Shannon*, 410 F.3d at 1089. The court's decision in *Head* is not a fact in Lo's litigation history, but rather establishes an abstract proposition of law that arguably could be helpful to Lo's claim. As such, the Supreme Court's holding in *Johnson* is inapposite, as its circumstances are distinguishable from those here.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT

Lo's Petition for a Writ of Habeas Corpus (Docket #1) is **DENIED.**

Endicott's Motion to Dismiss (Docket # 11) is **GRANTED.**

Dated at Milwaukee, Wisconsin, this 6th day of October, 2005.

SO ORDERED,

s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
Chief Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ANOU LO,

Petitioner,

Case No. 04-C-133

-vs-

JEFFREY ENDICOTT, Warden,
Redgranite Correctional Institution,

Respondent.

DECISION AND ORDER

On February 5, 2004, the petitioner Anou Lo ("Lo") filed a habeas corpus petition pursuant to 28 U.S.C. § 2254. After initially reviewing the petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases, the Court ordered the respondent Jeffrey Endicott ("Endicott") to file an answer. Instead, Endicott filed a motion to dismiss the petition as untimely and a motion to stay the Court's order to answer pending the resolution of the motion to dismiss. The Court granted Endicott's motion to stay. On October 6, 2005, the Court granted Endicott's motion to dismiss. Subsequently, Lo filed a timely motion for reconsideration pursuant to Rule 59(e) and 60(b) of the Federal Rules of Civil Procedure, which is now before the Court. For the reasons that follow, Lo's motion is denied.

BACKGROUND

In its October 6, 2005 Order, the Court found that Lo's petition exceeded the one-year statute of limitations for filing habeas corpus petitions established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") under 28 U.S.C. § 2244(d)(1). The one-year statue of limitations generally runs from the date the judgment becomes final. 28 U.S.C. § 2244(d)(1)(A). Lo concedes that his judgment of conviction became final on November 19, 1998, and that his habeas petition would have been due one year later by November 19, 1999. (Lo's Pet. 8.); *see Anderson v. Litscher*, 281 F.3d 672, 674 (7th Cir. 2002) (for purpose of § 2241(d)(1), the one-year limitations period does not begin until the Supreme Court has denied review or the time seeking Supreme Court review has expired). Thus, Lo's petition was deemed untimely, because his petition was filed over four years after the general statue of limitations had expired.

To evade the limitations period, Lo argued that a Wisconsin Supreme Court case, *State v. Head*, 648 N.W.2d 413 (Wis. 2002), was a "factual predicate" that would trigger a new one-year statute of limitation under 28 U.S.C. § 2244(d)(1)(D). This Court relied on an analogous Ninth Circuit case, *Shannon v. Newland*, 410 F.3d 1083 (9th Cir. 2005), and held that *Head* was not a factual predicate. The Court reasoned: "[t]he Wisconsin Supreme Court made a legal determination in *Head*, not a factual determination, and thus, a new one-year statue of limitations was not triggered pursuant to § 2244(d)(1)(D)." (Ct. Order 3.)(footnote omitted).

ANALYSIS

Rule 60(b) allows the Court to relieve a party from an order to dismiss because of mistake, newly discovered evidence, fraud, the judgment being void, the judgment being no longer equitable, or any other reason justifying relief. The Court has broad discretionary power to decide if a motion for reconsideration should be granted. *Wojton v. Marks*, 344 F.2d 222, 225 (7th Cir. 1965).

I. The Court's rationale was not contrary to controlling precedent.

Lo implies that the Court's reliance on *Shannon* was mistaken, and that *Shannon* along with the Court's prior Order are contrary to the controlling precedent of *Johnson v. United States*, 544 U.S. 295 (2005). In *Johnson*, the state court vacatur of one of the petitioner's prior convictions removed the basis for the federal penalty enhancer that the petitioner received. *Johnson*, 544 U.S. at 302-03. The vacatur changed the petitioner's legal status. *Id.* The Supreme Court reasoned that a prior conviction is a "fact" because a prior conviction is "subject to proof or disproof like any other factual issue." *Id.* at 307; *see Apprendi v. New Jersey*, 530 U.S. 466, 490. By contrast, the Wisconsin Supreme Court decision in *Head* had no direct effect on Lo's legal status, because *Head* only clarified Wisconsin's understanding of the defense of "imperfect self-defense." *Head*, 648 N.W.2d at 433-37. The clarification of Wisconsin law in *Head* is not a "fact" in Lo's litigation history. Therefore, the present case is distinguishable from *Johnson*.

Lo's circumstances are analogous to the petitioner's circumstances in *Shannon*, which is a well-reasoned application of the principle set forth in *Johnson*. In *Shannon*, the petitioner relied on *People v. Laske*, 999 P.2d 666 (Cal. 2000), which clarified California law in a way that was arguably relevant to the petitioner's habeas claim. *Shannon*, 410 F.3d at 1086.

The Ninth Circuit rejected the petitioner's argument that *Laske* created a "factual predicate" that would toll AEDPA's one-year limitations period. *Id.* at 1089. Lo relies on *Head*, but as noted above, *Head* is a clarification of state law and not a "factual predicate" under 28 U.S.C. §2244(d)(1)(D). The legal proposition set forth in *Head* is not a factual element to be proved or disproved at Lo's sentencing. *See Shannon*, 410 F.3d at 1088. A "state-court decision establishing an abstract proposition of law arguably helpful to the petitioner's claim does not constitute the factual predicate for that claim." *Id*. at 1089 (quotations omitted). The Court's reliance on *Shannon* is not misplaced.

II. Lo is not entitled to equitable relief.

The Supreme Court has never directly addressed whether equitable tolling is applicable to AEDPA's statute of limitations. *Pace v. DiGeglielmo*, 544 U.S. 408, 418 n.8 (2005). Assuming equitable tolling is applicable, a petitioner must establish both (1) that he has been diligently pursuing his rights; and (2) that he was estopped from successfully pursuing those rights by some "extraordinary circumstance." *Id*. at 418. Generally, such "extraordinary circumstances" involve wrongful conduct against the petitioner.[1] Equitable tolling is rarely applied. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990).

Lo has not alleged that any court, attorney, or other party have caused delay by any willful or wrongful conduct. Lo alleges that he was prevented from pursuing his rights because the basis for his petition, the Wisconsin Supreme Court's clarification of the

[1] Courts have ruled such "extraordinary circumstances" existed if the petitioner was diligently pursuing his rights and the delay was caused by or attributed to: (1) direct judicial actions or omissions; (2) government interference; (3) actions or omissions of the prisoner's counsel; (4) prisoner's mental incompetence; or (5) prisoner's lack of notice of filing deadlines. *See* 1 Randy Hertz and James S. Liebman, Federal Habeas Corpus Practice and Procedure 276-90 (Lexis Nexis 2005)(footnotes omitted).

"imperfect defense" in *Head*, was not decided until after the expiration of the AEDPA's statute of limitations. (Reply in Supp. of Mot. for Recons. 5.)

However, the Wisconsin Supreme Court decision in *Head* is not an "extraordinary circumstance" that would warrant equitable tolling. The Wisconsin Supreme Court refused to retroactively apply its clarification of an "imperfect defense" to Lo, *see State v. Lo*, 665 N.W.2d 756, 770-75 (Wis. 2003),[2] and "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Warren v. Kyler*, 422 F.3d 132, 136 (3rd Cir. 2005) (quoting *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)). Accordingly, this Court is not persuaded that *Head* is an "extraordinary circumstance" triggering the scarcely-used concept of equitable tolling.[3]

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Lo's Motion for Reconsideration or Relief from Judgment [Docket # 21] is **DENIED.**

Dated at Milwaukee, Wisconsin, this 24th day of August, 2006.

SO ORDERED,

s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
Chief Judge

[2] Also, the United States Constitution does not require states to give retroactive effect to state court decisions. *See Wainwright v. Stone*, 414 U.S. 21, 23-24 (1973); *Stewart v. Lane*, 60 F.3d 296, 304 (7th Cir. 1994).

[3] Furthermore, as noted above, the Wisconsin Supreme Court in *Head* created only an abstract proposition of law that is arguably helpful to Lo. (Ct. Order 3 n.4.) Therefore, a state court decision that may (or may not) provide a remedy for Lo should not be considered an "extraordinary circumstance."

CERTIFICATE OF SERVICE

I hereby certify that on the 2d day of April, 2007, I caused 15 hard copies of the Brief and Appendix of Petitioner-Appellant Anou Lo and 10 hard copies of the Separate Appendix of Petitioner-Appellant Anou Lo to be mailed, properly addressed and postage prepaid, to the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Chicago, Illinois 60604. I further certify that on the same date, I caused two hard copies of the brief, one hard copy of the separate appendix, one copy of the brief on digital media, and one copy of the available portions of the separate appendix on digital media to be mailed, properly addressed and postage prepaid, to counsel for the Respondent, AAG Sally L. Wellman, P.O. Box 7857, Madison, WI 53707-7857.

Robert R. Henak
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