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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REPLY BRIEF OF PETITIONER-APPELLANT

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ARGUMENT

I.

THE CENTRAL PREMISES OF ENDICOTT'S RESPONSE ARE INACCURATE

Endicott's argument that Anou Lo's habeas petition was untimely is based in large part on a misinterpretation of what the Wisconsin Supreme Court actually did in *State v. Head,* 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413, and Mr. Lo's own case, *State v. Lo,* 2003 WI 107, 264 Wis.2d 1, 665 N.W.2d 756. This erroneous assumption permeates Endicott's arguments, not only on the timeliness issue, but his arguments on equitable tolling and on the merits as well.

Endicott's error is twofold. First, he asserts throughout his brief that the

decision in *Head* "changed the substantive state law that controlled at the time of Lo's trial and at the time of his conviction became final on November 19, 1998" and "redefined the elements of the offense for which Lo was convicted." Endicott's Brief at 2; *see, e.g.*, *id.* at 6, 8-9, 22, 24, 26. Second, he asserts that the Wisconsin Supreme Court in Lo's case held that *Head* is not retroactive to cases on collateral review. *E.g.*, *id* at 3-4, 7, 9, 19, 27.

Endicott's first assertion, that *Head* "changed the law," is simply wrong. *Head* did not "change" the substantive state law that controlled at the time of Lo's trial; it corrected the prior misinterpretation of the law set forth in *dicta* in *State v. Camacho*, 176 Wis.2d 860, 501 N.W.2d 380 (1993). *Head* interpreted the plain language of Wis. Stat. §§940.01(2)(b) & 940.05(2), their legislative history, and their original purpose. Based on that analysis, the Court concluded that, since their enactment in 1988, they had always required that the state prove the absence of an actual belief that the defendant was in imminent danger and that the amount of force used was necessary to prevent or terminate this interference. *Head*, ¶¶82-103.

This analysis required the Court to first "examine the law of homicide in Wisconsin both before and after the 1988 revision of the homicide statutes . . .." *Head*, ¶53. The Court then compared the statutory language from before the 1988 amendments to that enacted by those amendments, *id.* ¶¶54-70, and concluded that, under the latter,

> to prove first-degree intentional homicide, 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.

Id. ¶70.

The Court then addressed its prior decision in *Camacho*, noted that the 1988 revisions "were not in play before the court" in that case, and concluded that the meaning of those revisions was an open question. *Id.* ¶81 (footnote omitted). The Court held that, "to determine whether a defendant must still meet the same objective threshold to assert imperfect self-defense after the 1988 revision," it had to "re-examine and interpret the statutes in question." *Id.*

Again addressing the statutory language, the Court held that §940.01(2)(b) was "not ambiguous," and "requires only *actual* beliefs even if they are unreasonable." *Id.* ¶87 (emphasis in original); *see id.* ¶¶88-91. The Court then found that the legislative history of the 1988 revisions "offers compelling evidence to support [its] interpretation," *id.* ¶92; *see id.* ¶¶93-100, as did "the articulated public policy behind the statutory revisions" of 1988, *id.* ¶101. Based on this analysis of the plain language, legislative history and original purposes of the 1988 revisions, the Court rejected as inaccurate the *Camacho dicta* requiring a threshold showing that the defendant have a *reasonable* belief that she was preventing or terminating an unlawful

interference with her person in order to raise the issue of unnecessary defensive force (imperfect self-defense). *Id.* ¶103-04.

Head thus did not "change the law;" it merely corrected *Camacho's* erroneous interpretation of it. Although not acknowledged by the Wisconsin Supreme Court until 2002, the language, meaning and intent of §940.01(2)(b) remained the same from its enactment in 1988 through the time of Lo's alleged offense in 1995, and through the time of Lo's challenge to his conviction.

Endicott's second assertion, that the Wisconsin Supreme Court refused to apply *Head* retroactively in *Lo*, overstates that Court's holding. As relevant here, *Head* made two related but separate holdings: (1) the substantive determination of what the relevant statutes had required since their enactment in 1988, *Head*, ¶¶54-104, and (2) the procedural holding that the defendant who adequately raises self-defense under the 1988 amendments is entitled to an instruction accurately setting out the facts that the state must prove beyond a reasonable doubt for conviction, *id.* ¶¶143-47. While the Court in *Lo* refused to apply the requirement of an accurate jury instruction retroactively, it did not hold that the applicable statutes meant something different in 1995 than they did after the *Head* decision.

The Court's focus in *Lo* was on the requirement of accurate jury instructions, not the meaning of §§940.01(2)(b) and 940.05(2). As the Court explained *Head's* potential effect on its holding,

> [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.

Lo, ¶73 (App. 140).

> ¶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 (App. 143-44 (emphasis in original).

The *Lo* Court's focus on the perceived non-retroactivity of the requirement of an accurate jury instruction made sense given the absurdity of any suggestion that the 1988 revisions to §§940.01(2)(b) and 940.05(2) meant one thing before *Head* and something else afterwards. As already discussed, *Head* made clear that its construction of those provisions and imperfect self-defense was based on the plain meaning of the statutory language as enacted in 1988, as well as the legislative history and public purpose of that enactment. Nothing in *Head* suggested that its interpretation was based in anything that had happened since 1988.

Lo's focus solely on *Head's* procedural holding rather than its substantive interpretation also is consistent with the judiciary's limited position under the Wisconsin Constitution and statutes. Because applying *Head's* substantive

interpretation of §§940.01(2)(b) & 940.05(2) only prospectively would subject individuals to criminal punishment not authorized by the Legislature, to adopt Endicott's view of the *Lo* Court's actions is to assume that the Wisconsin Supreme Court ignored the fact that, under Wisconsin law, only the legislature has the authority to create crimes. *E.g.*, *State v. Popanz*, 112 Wis.2d 166, 332 N.W.2d 750, 756 (1983) ("Defining the contours of laws subjecting a violator to criminal penalty is a legislative, not a judicial, function." (citations omitted)); *see* Wis. Stat. §939.10 ("Common-law crimes are abolished."). Such a usurpation of legislative authority should not be assumed. *See also State v. Hall*, 207 Wis.2d 54, 557 N.W.2d 778, 792 (1997):

> Tempted as we may be to rewrite the confidentiality provision, as the court of appeals did and as the legislature very likely will, we would be setting a dangerous precedent to allow such a judicial usurpation of the legislature's role. The checks and balances needed to sustain a democratic government stay our hands from the pen.

The fact that *Lo* focused solely on the procedural requirement of a jury instruction as opposed to the substantive issue of the requirements for imperfect self-defense also is demonstrated by the fact that it applied United States Supreme Court authority for assessing the retroactivity of *procedural* decisions, *Lo*, ¶¶62-63, 70-71, 75-94, in holding that it need not apply retroactively *Head's* procedural requirement of jury instructions requiring proof beyond a reasonable doubt of all facts *Head* had found to be required for conviction under the 1988 revisions to §§940.01(2)(b) and 940.05(2). *E.g.*, *Lo*, ¶84 (App. 144) ("We conclude that the instructional error

recognized in *Head* need not be applied retroactively to Anou Lo."). Indeed, the *Lo* Court expressly distinguished United States Supreme Court precedent holding that *substantive* interpretations of criminal statutes are to be applied retroactively on the grounds that only *Head's* holding on the requirement of a proper jury instruction was at issue in Lo's case. *Lo*, ¶73 (App. 140).

The *Lo* Court's rationale also demonstrates that its non-retroactivity holding addressed only *Head's* procedural/instructional holding and not its substantive holding. Rather than holding that *Head's* substantive interpretation of the applicable statutes only applied prospectively, the *Lo* Court instead accepted that substantive ruling but sought to minimize its impact. According to that Court, "a change in the jury instructions as to how the State disproves the presence of mitigating circumstances" is "different from proving an additional element." *Lo*, ¶73 (App. 140). *See also id*. ¶68 (App. 138) ("*Head* requires the State to prove *actual* belief as opposed to *reasonable* belief, but this modification involves proof of a fairly subtle difference in state of mind" (emphasis in original)).

II.

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

The fact that Lo's habeas petition was timely under 28 U.S.C. §2244(d)(1)(D) is based on a number of legal principles set forth in Lo's opening Brief at 11-23, that Endicott either misstates or simply chooses to ignore.

First, the Supreme Court in *Johnson v. United States*, 544 U.S. 295 (2005), established that a state court decision *can* be a "fact," the existence of which triggers a new, one-year deadline under §2244(d)(1)(D).

Second, *Johnson* and *Daniels v. Uchtman*, 421 F.3d 490, 492 (7th Cir. 2005), together establish that the controlling test for assessing whether a state court decision is such a "fact" is whether that decision is a necessary element of the petitioner's federal claim.

Endicott's reading of *Johnson* as applying only to state court decisions in which the petitioner was involved personally, Endicott's Brief at 10-17, 20, makes no sense in light of *Johnson*'s reasoning. Nothing in the Supreme Court's rationale for finding that state court decisions can be "facts" for purposes of the one-year limitations period relied on Johnson's personal involvement in obtaining the state court decision. That rationale consisted of the facts that the state court decision formed a necessary predicate for Johnson's federal claim, that Congress did not intend to cut off relief before the federal claim had accrued, and that Congress had no need to require an earlier limitations period because the states were free to provide their own limitations periods. *See* 544 U.S. at 304-08. To the contrary, his involvement, and failure to act expeditiously, is what led the Court to hold that, although the state court decision was a "fact" for purposes of the federal proceedings, Johnson had not acted diligently in "discovering" it. *Id.* at 307-11.

Endicott's interpretation of *Johnson* also conflicts with common sense. A fact

relevant to one's federal claim does not become a "non-fact" merely because it does not directly involve the petitioner. The fact that a third party confessed to the crime allegedly committed by a particular petitioner would not become something other than a fact merely because that petitioner was not involved in obtaining the confession. Nor would the fact that a judge was taking bribes in other cases lose its status as a "fact" merely because the petitioner was not involved in those cases. *Cf. Bracy v. Gramley*, 520 U.S. 899 (1997). It does not make sense, therefore, to suggest that one specific type of fact, a state court decision, loses that status unless the petitioner was directly involved in obtaining it.

Contrary to Endicott's position and that of the Ninth Circuit in *Shannon v. Newland,* 410 F.3d 1083 (9th Cir. 2005), *cert. denied*, 125 S.Ct. 1333 (2006), on which it relies, therefore, the critical factor in *Johnson* was not the petitioner's personal involvement in obtaining the state court ruling, but the fact that the state decision formed a necessary predicate to Johnson's substantive federal claim. That, of course, is exactly what this Court already held in *Daniels*, 421 F.3d at 492 (relying upon critical fact that, "[i]n *Johnson,* the state court decision vacating his state convictions supplied a necessary element of the petitioner's claim"). Endicott's reliance upon *Shannon* and its "personal involvement" theory accordingly is misplaced.

Third, as explained in *Johnson*, the artificial distinction between fact and law relied upon by Endicott and the court below is consistent with neither common sense nor Congressional intent. Where, as here, a state court decision forms a necessary

element of the petitioner's federal claim, it makes no sense to cut off federal relief before the necessary elements exist. Congress, moreover, did not intend that relief be denied in such circumstances. As the *Johnson* Court explained:

> it is highly doubtful that in [28 U.S.C.] §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,

544 U.S. at 305.

Fourth, the artificial law/fact distinction relied upon by Endicott and the court below overlooks the difference reflected in *Johnson* between state court proceedings and federal habeas proceedings. In state court, state (and sometimes federal) law is applied to the evidentiary and procedural facts to reach a decision. The substantive question in federal habeas proceedings, however, is whether, under the particular circumstances of the case, the petitioner's custody violates the *federal* constitution or, albeit rarely, some other federal law. Analysis of that question thus involves applying federal law to the facts. Unlike in state court, therefore, the relevant distinction in a federal habeas proceeding is between *federal* law on the one side and the relevant "facts," which would include not only evidentiary and procedural facts but also facts regarding relevant state law, on the other.

It is this distinction between federal law and the applicable facts that is reflected in both the *Johnson* decision and §2244(d)(1). The former does so expressly. *See* 544 U.S. at 305 (state court decision properly viewed as "fact" because

the underlying evidentiary facts were not alone sufficient basis for a federal claim absent the actual state court decision vacating prior conviction). The latter, on the other hand, does so implicitly by providing for alternative triggers for the one-year limitations period based on relevant changes in either federal law, 28 U.S.C. §2244(d)(1)(C), or the facts, 28 U.S.C. §2244(d)(1)(D), but no express alternative for relevant changes regarding state law.

Given *Johnson's* recognition that Congress did not intend to cut off federal habeas relief before the claim had accrued, 544 U.S. at 305, the omission of any alternative trigger for relevant developments in state law makes sense only if such developments already are included within the existing alternatives.[1]

Finally, Endicott's *ad terrorem* assertions that reading §2244(d)(1)(D) consistent with *Johnson*, *Daniels*, and common sense would vitiate the limitations period under the AEDPA, Endicott's Brief at 17-19, lacks arguable merit. Developments in state law provide a new trigger for the one-year limitations period only if those developments provide a necessary element of the petitioner's claim. *Daniels*, *supra*, and the petitioner is diligent in discovering them. Thus, unlike court decisions such as that in *Head* that define what a criminal statute has always required, new statutory definitions of a crime not made retroactive by the legislature would have no effect on a petitioner's claim. Likewise, state law decisions that merely help

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[1] While this case could be viewed as falling within 28 U.S.C. §2244(d)(1)(B), on the grounds that *Camacho's* erroneous *dicta* prevented Lo from filing this habeas claim until that impediment was removed by the *Head* decision, it falls more neatly into the "factual predicate" provision of §2244(d)(1)(D) given the holdings in *Johnson* and *Daniels*.

a petitioner or perhaps bolster a claim that already exists would not result in a new limitations period. As the Court explained in *Johnson*, moreover, Congress never intended to cut off federal relief before the necessary predicate for the claim exists. 554 U.S. at 305-06. Endicott's fear that following *Johnson* and *Daniels* will undermine the goals of finality and comity thus are misplaced as well.

Because the Wisconsin Supreme Court's substantive decision in *Head*, defining what facts the state was required to prove beyond a reasonable doubt in Lo's case is a necessary factual predicate for his federal due process claim, his petition was timely under §2244(d)(1)(D). The district court's decision to the contrary accordingly must be reversed.

III.

LO IS ENTITLED TO EQUITABLE TOLLING

As explained in Lo's opening Brief at 23-26, equitable tolling applies where, as here, the petitioner could not have been expected to have filed his petition earlier. *E.g.*, *Pervaiz v. Gonzales*, 405 F.3d 488, 491 (7th Cir. 2005). Lo had no federal claim until the Wisconsin Supreme Court in *Head* acknowledged what facts the state was required to prove in cases such as his under the homicide law revisions of 1988. It was only in light of that decision that the fatal constitutional defects in the jury instructions in Lo's case became apparent.

Endicott nonetheless asserts that any petitioner who makes a losing argument that his petition was timely under §2244(d)(1)(D) is barred from relying on equitable

tolling. Endicott's Brief at 21. That is not, however, what this Court held in *Owens v. Boyd*, 235 F.3d 356, 360 (7th Cir. 2001), and does not make sense. Rather, while the *Owens* Court held that it could not "add time on a theory that would amount to little more than disagreement with the way Congress wrote [28 U.S.C.] §2244(d)," "[t]olling may be available when some impediment of a variety not covered in [28 U.S.C.] §2244(d)(1) prevents the filing of a federal collateral attack." 235 F.3d at 360 (citation omitted).

If Endicott and the court below are correct that *Head's* identification of the necessary elements that the state was required to prove under the 1988 amendments does not constitute a "factual predicate" of Lo's claim falling within §2244(d)(1)(D), then that decision necessarily constitutes an "impediment of a variety not covered in §2244(d)(1)." Lo had no federal claim until *Head* defined the elements the state was required to prove in his case. He accordingly could not file his federal petition until *Head* established that the instructions in his case failed to require proof beyond a reasonable doubt of all facts necessary for conviction.

Applying equitable tolling under these circumstances, moreover, does not conflict with Congress' intent under §2244(d)(1). As the Supreme Court explained in *Johnson*, "it is highly doubtful" that Congress intended to cut off availability of federal habeas relief, as Endicott seeks to do here, before the federal claim had even accrued. 544 U.S. at 305.

Nor does equitable tolling here "eviscerate[]" the interests in finality served by

§2244(d)(1). Endicott's Brief at 24. Any delay in this case is attributable, not to Lo, but to the state's own actions in failing to correct the error it made in *Camacho* more expeditiously. Because the constitutional error here goes directly to Lo's guilt or innocence, and the Wisconsin Supreme Court itself acknowledged that reversal would be required under *Head*, *Lo*, ¶58 (App. 133-34), he is the victim of the delay, not its beneficiary.[2]

IV.

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

Endicott's argument on the merits of Lo's due process claim is based on the same faulty assumption that underlies much of its timeliness argument. Specifically, it erroneously assumes that the Wisconsin Supreme Court in Lo's case held that neither the substantive nor the procedural holdings in *Head* should apply retroactively. Endicott's Brief at 26-30. As already demonstrated in Section I, *supra*, that Court's retroactivity holding in *Lo* was limited to *Head's* requirement of a jury instruction mandating proof beyond a reasonable doubt of all the facts necessary for conviction under the 1988 revisions. The Wisconsin Supreme Court did not make the absurd

[2] Although disputing application of equitable tolling here, Endicott fails to champion the district court's assumption that equitable tolling applies only when the petitioner's inability to file a timely petition resulted from the wilful or wrongful conduct of another person (R26:4; App. 9). He thus concedes Lo's argument that the district court was wrong on that point. *See* Lo's Brief at 24.

holding, attributed to in by Endicott here, that the relevant statutes meant one thing prior to its decision in *Head* on July 11, 2002 and something different thereafter.

Because Endicott's entire argument on the merits is based on an erroneous premise, its conclusion fails as well. It is one thing for a state court to give its interpretations of state law only prospective effect. Endicott is correct that no Supreme Court decision has yet imposed on the states the common sense requirement that a criminal statute cannot rationally mean one thing on one day and something else the next. Endicott's Brief at 27-30.

That is not what happened here, however. Once the state court has identified the facts necessary for conviction under a particular statute, as the Wisconsin Supreme Court did regarding the 1988 amendments in *Head*, it cannot constitutionally then say, as the state court did in Lo's case, that those required facts simply are not important and that the jury thus need not be instructed on those requirements. Unlike the definition of a crime, which is a matter of state law, the question of whether the jury must be instructed on the requirement of proof beyond a reasonable doubt on all elements of such a crime is an issue of *federal* law. The Wisconsin Supreme Court's holding that such an instruction is *not* required is directly contrary to the United State's Supreme Court's holdings that due process requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime," *In re Winship*, 397 U.S. 358, 364 (1970), and that the instructions' failure to require such proof violates due process as well, *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); *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).

Because Lo accordingly has demonstrated a "decent chance of success" on his constitutional claim, remand is appropriate for resolution of his claim on the merits. *E.g.*, *Modrowski v. Mote*, 322 F.3d 965, 969 (7th Cir. 2003).

CONCLUSION

For these reasons, as well as for those in his opening brief, Mr. Lo respectfully asks that the Court reverse the order dismissing his habeas petition as untimely and remand the matter for consideration of his constitutional claim on the merits.

Dated at Milwaukee, Wisconsin, June 25, 2007.

Respectfully submitted,

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Lo Consol. Reply.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 reply 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 4,038 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

Robert R. Henak

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 2007, I caused 15 hard copies of the Reply Brief 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 and one copy of the brief 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.

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