STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 01-0843

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANOU LO,

Defendant-Appellant-Petitioner

Appeal From The Order Entered In The Circuit Court For LaCrosse County, The Honorable Ramona A. Gonzalez, Circuit Judge, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. *ESCALONA-NARANJO* SHOULD BE OVERRULED 2

II. LO IS ENTITLED TO REVERSAL AND A NEW TRIAL 4

III. THE STATE'S NOVEL LIMITATIONS ON INEFFECTIVENESS CLAIMS ARE INAPPROPRIATE 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Boyer v. United States, 55 F.3d 296 (7th Cir. 1995) 6

Colby v. Columbia County, 202 Wis.2d 342,
550 N.W.2d 124 (1996) 7

Engle v. Isaac, 456 U.S. 107 (1982) 6

Fay v. Noia, 372 U.S. 391 (1963) 3-4, 9

Gilmore v. Taylor, 508 U.S. 333 (1993) 7

Gray v. Greer, 800 F.2d 644 (7th Cir. 1986) 10

Hayes v. State, 46 Wis.2d 93, 175 N.W.2d 625 (1970) 3

Henslee v. Union Planters Bank, 335 U.S. 595 (1949) 2

Oliver v. United States, 90 F.3d 177 (6th Cir.1996) 7

Reed v. Ross, 468 U.S. 1 (1984) 6

Sanders v. United States, 373 U.S. 1 (1963) 3-4, 9

Smith v. Robbins, 528 U.S. 259 (2000) 10

State ex rel. Gen. Motors Corp. v. Oak Creek,
49 Wis.2d 299, 182 N.W.2d 481 (1971) 4-5

State v. Camacho, 176 Wis.2d 860, 501 N.W.2d 380 (1993) . . . 5-6

State v. Douangmala, 2002 WI 62, 253 Wis.2d 173,
646 N.W.2d 1 2

State v. Escalona-Naranjo, 185 Wis.2d 168,
517 N.W.2d 157 (1994) . . . . *passim*

State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413 . 4-8

State v. Howard, 199 Wis.2d 454,
544 N.W.2d 626 (Ct. App. 1996) 8

State v. Howard, 211 Wis.2d 269, 564 N.W.2d 753 (1997) 5-7

State v. Huebner, 2000 WI 59, 235 Wis.2d 486,
611 N.W.2d 727 5-6

State v. Polashek, 2002 WI 74, 253 Wis.2d 527,
646 N.W.2d 330 . . . . 4, 5

State v. Thiel, 2001 WI App. 52, 241 Wis.2d 439,
625 N.W.2d 321 7

Teague v. Lane, 489 U.S. 288 (1989) 7

United States v. Dashney, 52 F.3d 298 (10th Cir.1995) 7

United States v. McClelland, 941 F.2d 999 (9th Cir.1991) 7

Rules and Statutes

Wis. Stat. §939.48(1) 8

Wis. Stat. §939.48(2)(a) 8-9

Wis. Stat. §939.48(2)(b) 9

Wis. Stat. §940.01 5

Wis. Stat. §940.01(2)(b) 8

Wis. Stat. §974.06 . . . . *passim*

Wis. Stat. §974.06(4) . . . . *passim*

Other Authorities

11A U.L.A. 268 (Master Ed. 1995) 3

11A U.L.A. 375 (Master Ed. 1995) 3

Uniform Post-Conviction Procedure Act (1966) 2-3

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ARGUMENT

Contrary to what one might think reading the state's brief, this appeal is limited to two straight-forward issues: should this Court overrule *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994), and, regardless of the decision on that issue, is Lo entitled to a new trial on attempted first degree intentional homicide because the jury was not required to find a fact necessary to conviction on that charge. The issues presented do not require this Court to define "sufficient reason," modify the established procedures for claiming ineffectiveness of post-conviction or appellate counsel, or enact the state's wish-list of new procedural hurdles for those unconstitutionally denied their liberty. A future case may present the issues raised by the state; this one does not. *See* State's Response to Petition for Review at 2-3:

> This case is not an appropriate vehicle for examining broader issues regarding the adequacy of a motion for postconviction relief alleging ineffective assistance of

postconviction and appellate counsel and the method the circuit and appellate courts should use in reviewing such claims.

I.

ESCALONA-NARANJO SHOULD BE OVERRULED

> "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Bank*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

Stare decisis does not prevent this Court from correcting the mistake it made in *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994). State's Brief at 5-6. As this Court recently explained in *overruling* the prior construction of a statute,

> The principle of stare decisis does not, however, require us to adhere to interpretations of statutes that are objectively wrong. That the legislature has not taken action with respect to a statute that a court has construed is entitled to some weight in determining legislative intent, but it is not conclusive.

State v. Douangmala, 2002 WI 62, ¶42, 253 Wis.2d 173, 646 N.W.2d 1.

There exist compelling reasons for overruling *Escalona-Naranjo*. The state, however, chooses to ignore the legislative history and clearly expressed purposes of the Uniform Post-Conviction Procedure Act of 1966, and thus Wis. Stat. §974.06(4). The purpose of §974.06(4) was to *expand* rather than contract the availability of state collateral review and to encourage resolution of such challenges on their merits in an attempt both to expedite the release of those unconstitutionally imprisoned and to reduce the number of federal habeas cases. *See* Lo's Brief at 12-23.

Rather than address the true purpose and history of the statute, the state seeks to take but one of many purposes of the provision and

elevate it to the *sole* purpose. While it is true that "provid[ing] defendants with the opportunity to litigate claims that they could not have litigated on direct appeal," State's Brief at 7, was *one* purpose of Wis. Stat. §974.06, it certainly was not the *only* purpose. The history and purposes of the Uniform Act demonstrate an attempt to provide the same permissiveness for state collateral relief then required for federal habeas review, so that petitioners with valid claims could obtain relief in state court. Lo's Brief at 12-19; *see, e.g.*, 11A U.L.A. 375 (Master Ed. 1995) (App. 59).

The state's desired reconstruction of §974.06(4) is wholly irrational in light of the statute's purposes and history. Even *Escalona-Naranjo* did not go so far as to suggest that §974.06 is limited to constitutional claims the defendant "could not have raised on direct appeal." Indeed, while the 1955 version of the Uniform Act limited a second or subsequent petition *under that act* to grounds "which could not reasonably have been raised in the original or amended petition," 11A U.L.A. 268, the 1966 version of that Act incorporated into §974.06 rejected that language as too limiting and replaced it with the much broader, "sufficient reason" language. 11A U.L.A. 375.

The state's assertion that the Legislature and the authors of the Uniform Act had "no legitimate reason" for what they did is wrong. State's Brief at 9. As explained in Lo's Brief at 12-19, §974.06(4) was drafted and enacted when its authors and the courts understood that the unconstitutional imprisonment of a person "is abhorrent to our sense of justice," 11A U.L.A. at 270. Despite the currently popular view of finality as an end in itself, therefore, there is every legitimate reason to believe, as this Court did at the time, that "[i]t is more important to be able to settle a matter right with a little uncertainty than to settle it wrong irrevocably." *Hayes v. State*, 46 Wis.2d 93, 175 N.W.2d 625, 631 (1970). Even the United States Supreme Court agreed. *E.g.*, *Sanders v. United States*, 373 U.S. 1 (1963); *Fay v. Noia*, 372 U.S. 391 (1963).

Given these truths, there was every reason why the authors of the Uniform Act and the Legislature in enacting §974.06 would believe

it important, if not critical to a sense of fairness, that an unlawfully detained individual not be denied relief merely because his or her lawyer failed to raise a particular meritorious issue on direct appeal. That, after all, was the underlying principle of then-controlling authority such as *Fay* and *Saunders*: a detained person should not be denied relief on the basis of "procedural default" unless his or her own actions could be deemed a personal and knowing waiver of the particular claim.

Unlike constitutions, the meaning of a statute does not change with the prevailing philosophical winds. It means what the Legislature originally intended it to mean. While the philosophical/political pendulum has swung away from the concern for those unlawfully detained expressed in the Uniform Act and §974.06 to elevation of finality as an end in itself, the original intent of the Legislature still controls. *Escalona-Naranjo* accordingly was wrong and should be overruled.

II.

LO IS ENTITLED TO REVERSAL AND A NEW TRIAL

The jury instructions in this case failed to require proof beyond a reasonable doubt of all facts necessary for a conviction for attempted first degree intentional homicide, thus denying Lo due process. Lo's Brief at 23-34; *see State v. Head*, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. The state does not contest that fact, arguing instead that Lo should be denied relief on various technical grounds. State's Brief at 23-34.

Lo's failure previously to raise this specific claim below does not prevent this Court from granting the relief he is due. *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)); *State ex rel. Gen. Motors Corp. v. Oak Creek*, 49 Wis.2d 299, 182

N.W.2d 481, 491 (1971) (question whether to address claim raised for first time in this Court "is one of administration not of power" (citations omitted)).

The state does not dispute, and thus concedes, that the instructions here failed to comply with the legal requirements set forth in *Head*. Rather, it merely raises technical challenges, such as non-retroactivity, which this Court likely will have to decide eventually in any event. These matters are fully briefed and are issues of law. Judicial economy thus is served by this Court deciding the claim rather than forcing Lo to seek relief through a new §974.06 petition. *E.g.*, *Polashek, supra*.

This Court decision in *State v. Howard*, 211 Wis.2d 269, 564 N.W.2d 753, 762-63 (1997), also dictates that relief is appropriate here. Because Lo and his counsel did not and could not know that this Court in *Head* would overrule its prior interpretation of Wis. Stat. §940.01 in *State v. Camacho*, 176 Wis.2d 860, 501 N.W.2d 380 (1993), he did not waive that claim and has established "sufficient reason" under §974.06(4) even if this Court upholds *Escalona-Naranjo*. 564 N.W.2d at 762-63.

The state does not appear to challenge application of *Howard's* "sufficient reason" holding, nor could it rationally given that Lo's claim was unavailable until this Court recently overruled *Camacho* in *Head*. *See* State's Brief at 9 ("sufficient reason" exists where, e.g., "the claim was unavailable at the time of the direct appeal because the relevant legal principle did not exist . . .").

The state's argument that *Howard's* waiver holding has been overruled *sub silento* is just wrong. *State v. Huebner*, 2000 WI 59, 235 Wis.2d 486, 611 N.W.2d 727, is readily distinguishable. That case neither questioned *Howard* nor even cited it. The constitutional challenge to the 6-person jury statute would have been readily available at the time of Huebner's trial as this Court had already granted review on that very claim.

Huebner also dealt with a "purely procedural defect" which "did not undermine the fundamental integrity of Huebner's trial." *Id.* ¶30-

31. The error here, on the other hand, concerns the central question of Lo's guilt or innocence on the charge of attempted first degree intentional homicide. If he subjectively believed his acts were necessary to protect himself, he is not guilty of that charge. *Head*, *supra*. The jury, however, was never told that.

Unlike in *Huebner*, moreover, this Court in *Camacho* previously had ruled contrary to Lo's position on the very issue in dispute here. None of the objectives of the waiver rule identified in *Huebner* would have been served by a trial objection here given that the trial court was bound by *Camacho's* holding that the state may meet its burden of disproving "unnecessary defensive force" by showing the defendant's belief in the need for self-defense to be objectively unreasonable. *See Reed v. Ross*, 468 U.S. 1, 15 (1984) ("Counsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference to a State's procedural bar").

The federal authorities cited by the state are distinguishable for the same reasons. It is one thing to expect a party to foresee eventual judicial acceptance of a previously unresolved legal argument, *see, e.g.*, *Engle v. Isaac*, 456 U.S. 107 (1982); it is quite another to require that party to foresee reversal of controlling legal authority. *Reed*, 468 U.S. at 14, 17 (claim not waived when counsel failed to raise "a constitutional issue reasonably unknown to him," as when a controlling Supreme Court decision subsequently is overruled); *Boyer v. United States*, 55 F.3d 296, 299 (7th Cir. 1995) ("There is a qualitative difference between on one hand a theory for which the basis and authority have long been in existence but which has only recently been seized upon, and on the other hand a theory which has been argued thoroughly and rejected in the past but which now has been accepted for the first time. The latter situation clearly provides cause for a procedural default; the former, however, does not.").

Despite the state's attempt to reargue *Howard*, State's Brief at 25-31, the issue of retroactivity also is controlled by this Court's conclusion there that "the doctrine of non-retroactivity found in

[*Teague v. Lane*, 489 U.S. 288 (1989)] does not apply to substantive interpretations." 564 N.W.2d at 761; *see, e.g.*, *United States v. McClelland*, 941 F.2d 999, 1001 (9th Cir.1991) (*Teague* does not apply to the "retroactive application of a substantive non-constitutional decision concerning the reach of a federal statute"); *Oliver v. United States*, 90 F.3d 177, 179 (6th Cir.1996); *United States v. Dashney*, 52 F.3d 298, 299 (10th Cir.1995). *Compare Gilmore v. Taylor*, 508 U.S. 333, 344-45 (1993) (new procedural rule which did not "decriminalize" any conduct not retroactive). None of the cases cited by the state suggests otherwise.

Because this is a criminal case, moreover, and the error concerns the facts which the state must prove to a jury for conviction, the civil standard of cases such as *State v. Thiel*, 2001 WI App. 52, 241 Wis.2d 439, 625 N.W.2d 321 and *Colby v. Columbia County*, 202 Wis.2d 342, 550 N.W.2d 124 (1996), likewise do not apply here. Even if they did, however, they would mandate retroactive application of *Head*.

As recognized in *Colby*, decisions generally are retroactive, although "injustice or hardship" may justify otherwise. 550 N.W.2d at 133-34. Denying retroactivity of a decision "is appropriate only if there is a compelling judicial reason to limit its application to future litigants." *Thiel*, ¶11 (citation omitted).

No such injustice, hardship, or compelling reason remotely supports the state's position. Indeed, those factors dictate retroactive application of *Head*. *Head* defined what conduct may be criminalized as first degree intentional homicide. "This is a substantive change in the law mandating retroactivity because 'a statute cannot "mean one thing prior to the Supreme Court's interpretation and something entirely different afterwards."'" *Dashney*, 52 F.3d at 299 (citations omitted). "In this context, principles of judicial finality . . . are irrelevant." *Id.* A state has no legitimate interest in holding someone absent a finding he or she in fact committed the crime alleged. Where, as here, a new interpretation of a substantive criminal statute means that the defendant's actions may not have constituted the crime of conviction, "it would be a miscarriage of justice to deny him the

retroactive application of [that interpretation]." *State v. Howard*, 199 Wis.2d 454, 544 N.W.2d 626, 630 (Ct. App. 1996), *aff'd*, 211 Wis.2d 269, 564 N.W.2d 753 (1997).

Mr. Lo stands convicted of attempted first degree intentional homicide. The state's assertion that the absence of any jury finding beyond a reasonable doubt on a fact necessary for conviction for that offense is harmless, State's Brief at 32-34, is plainly wrong.

While the state argued provocation below, the central dispute at trial was whether Lo reasonably believed his actions were necessary to protect himself. Provocation was merely a side-line introduced by the prosecutor to overcome the fact his victim was a gang member who had reached for the gun in his waistband just prior to the shooting.

For several reasons, "provocation" is merely a red herring. First, Wis. Stat. §939.48(2)(a), by its terms, only limits the "privilege of self-defense" provided under Wis. Stat. §939.48(1).[1] "Unnecessary defensive force" under Wis. Stat. §940.01(2)(b) is not a "privilege" but a defense which mitigates the offense level. *Head*, ¶107; *see id.* ¶¶83-102. Section 939.48(2)(a) thus has no application here.

Even if it did, however, a jury easily could have found that Lo did not provoke Vang's actions within the meaning of §939.48(2)(a). Nothing about the argument regarding the TMC's threats to get Lo and his brothers can be viewed as adequate to provoke Vang to reach for a gun. A jury more reasonably could conclude that Vang's actions were incited by the opportunity to act on his gang's threats to get Lo than by anything Lo did that day, especially since Lo remained 40-50 feet away and had already turned to leave when Vang reached for the gun.

Given Lo's testimony, corroborated by that of Mr. Stibick, a reasonable jury easily could have found that Lo's actions did not provoke Vang's attack and that Lo had, in any event, regained any lost privilege by signaling his good faith withdrawal from the argument by

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[1] Wis. Stat. §939.48(2)(a) provides that "[a] person who engages in unlawful conduct of a type likely to provoke others to attack him or her and thereby does provoke an attack is not entitled to claim the privilege of self-defense against such attack . . .."

turning to leave *before* Vang initiated his attack by reaching for his gun, *see* Wis. Stat. §939.48(2)(b).

Lo also notes that neither the circuit court nor apparently the state below shared the state's current view of the evidence. Without objection from the state, that court deemed the evidence sufficient to support instructions on both self-defense and "unnecessary defensive force." If §939.48(2)(a) applied as clearly as the state asserts now, such instructions would not have been appropriate.

Because a properly-instructed jury easily could have acquitted Lo of attempted first degree intentional homicide, the error was not harmless.

III.

THE STATE'S NOVEL LIMITATIONS ON INEFFECTIVENESS CLAIMS ARE INAPPROPRIATE

Although not directly at issue in this case, the state's proposed restrictions on the right to effective assistance of counsel, State's Brief at 10-23, find no support in law or logic. As the Court of Appeals held here, ineffectiveness can be either an independent constitutional claim or "sufficient reason" under §974.06(4) (App. 7-10). The state's attempt to bifurcate post-conviction/appellate ineffectiveness claims by requiring first a habeas petition on ineffectiveness, followed by separate proceedings on the merits of the omitted claims is wasteful, irrational and contrary to the purpose of §974.06 to *replace* habeas in all but the most unusual circumstances. *Escalona-Naranjo*, 517 N.W.2d at 160.

Indeed, given the purpose of §974.06(4) to implement the permissive *Fay/Saunders* standard and encourage decision on the merits of a defendant's claims, an attorney's failure previously to raise a claim should constitute "sufficient reason," even in the absence of constitutional ineffectiveness, unless the defendant was personally involved in the decision not to raise the claim.

Contrary to the state's spin on the applicable standard for assessing appellate ineffectiveness, State's Brief at 15-21, a defendant

need only show deficient performance and resulting prejudice. *Smith v. Robbins*, 528 U.S. 259 (2000). As to the former, *Smith* expressly cited as appropriate the Seventh Circuit's standard from *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) (finding deficient performance "when ignored issues are clearly stronger than those presented"). 528 U.S. at 288. As for resulting prejudice, the defendant need only show "a reasonable probability" of success but for counsel's errors, *id.* at 285-86, not that he "would have been entitled to reversal," State's Brief at 19.

CONCLUSION

For these reasons, Mr. Lo respectfully asks that the Court (1) overrule *Escalona-Naranjo* and (2) reverse the decisions below and remand with directions to grant him a new trial on the charge of attempted first degree intentional homicide.

Dated at Milwaukee, Wisconsin, December 13, 2002.

Respectfully submitted,

ANOU LO, Defendant-Appellant-Petitioner

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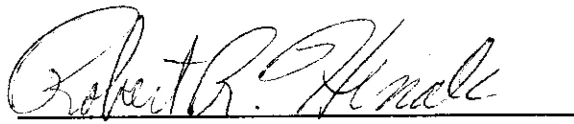

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,993 words.

Robert R. Henak

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