25-7136

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL M. MOFFETT,

PETITIONER,

V.

CASE NO:

Criminal Case:

Appeal Case no. 2023AP2104

MICHAEL MIEINER,

RESPONDENT.

ON WRIT OF CERTIORARI TO PETITION FOR WRIT OF CERTIORARI WISCONSIN COURT OF APPEALS

PETITIONER FOR CERTITORARI
MICHAEL M. MOFFETT
FOX LAKE CORRECTIONAL INST.
W10237 LAKE EMILY RD.
PO BOX 200
FOX LAKE, WI 53933-0200
PROSE,

QUESTIONS PRESENTED FOR REVIEW

1. The question of concern shall be reasonably resolved is whether the trial court lose jurisdiction when a notice of appeal is filed, and shall the time to file a notice of appeal be toll, while a motion for reconsideration is pending in the circuit court?
2. Whether a new trial shall be granted in the interest of justice, where defendant actually innocence is raised?
3. Whether this court should establish what constitute sufficient reason why an issues was inadequately raised?

LIST OF PARTIES IN COURT BELOW

Michael M. Moffett who is currently incarcerated at Fox Lake Correctional Institution. ***State v. Moffett,*** 2023AP2104, Sheboygan County Circuit Court., presiding Judge Natasha L. Torry, Branch.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES:

STATUTES AND RULES

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Michael M. Moffett (Moffett) respectfully prays that a writ of certiorari is issues to review the judgment below.

OPINION BELOW

- For cases from **federal Court:**

The opinion of the United States court of appeals appears at Appendix **A** to the petition and is reported at, **Michael M. Moffett, v. Michael Meisner,** No. 23-2178, decided June 13th, 2024, is unpublished.

The opinion of the United State district court appears at Appendix **B** to the petition and is reported at case no. 22-CV-705-SCD, decided May, 17th, 2023, is unpublished.

- For cases from **state court**:

The opinion of the highest state court to review the merits appears at Appendix **C** to the petition and is reported at **State v. Michael M. Moffett,** 2023AP2104, decided June 25, 2025, is unpublished.

The opinion of the Wisconsin State Court of Appeal appears at Appendix **D** to the petition and is reported at **State v. Michael M. Moffett,** 2023AP2104, decided February 5th, 2025, is unpublished. (Reconsideration, denied March 5th, 2025. Appears at Appendix **E**). **State v. Michael M. Moffett,** 2023Ap2104, notification order to show, court has jurisdiction of petitioner's appeals, December 11th, 2023, appear at Appendix **F** to the petition.

The opinion of the Wisconsin, Sheboygan County circuit court appears at Appendix **G** to the petition and is reported at **State v. Michael M. Moffett,** 2023Ap2104.(Doc. #310), decided July 18th, 2023.(Reconsideration denied October 19th, 2023), appear at Appendix **H** to the petition.

JURISDICTION

- For cases from **federal courts:**

The date on which the United State Court of Appeals decided my case was June 11th, 2024. The premise of the petition was seeking a second or successive petition, based on newly discovered evidence, proves actual innocence. Prior to, the 2024 petition, Moffett, in 2022 sought permission in the USCA for permission to filed second and successive petition in the district court, based on newly discovered evidence. **Moffett v. Radtke,** No. 22-1634. No petition for rehearing was timely filed in my case. Instead, Moffett returned back to the state court, in order to properly exhaust his remedies on the newly discovered evidence claims.

The jurisdiction of this Court is invoked under 28 U.S.C §1254(1).

- For cases from **State court:**

The date on which the highest state court decided my case was June 25th, 2025. A copy of that decision appears at Appendix **C**. No rehearing was timely filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION AND STATUTES INVOKED

The Sixth Amendment of the United States Constitution provides: In all criminal prosecution the accused shall enjoy the right to speedy trial by an impartial jury of the States and district shall have been committed which district shall have been previously ascertained by the law and to confronted with the witnesses against him to have the compulsory process for obtaining witness in his favor and to have the assistance of counsel for his defense.

In all criminal prosecutions, the accused shall...have the Assistance of Counsel for his defense and as well as right to first appeal Fourteenth Amendment United States Constitution...No State... shall...deprive any person of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

Petitioner, Michael M. Moffett was charged and convicted by jury trial of first degree intentional homicide in the shooting death of Luis Deleon. Moffett's defense at trial was self-defense that he reasonably believed he had to terminate Deleon who was armed with a gun. In Moffett's defense at pre-trial, it was ruled he be allowed to present McMorris evidence, to show Deleon had a history of violence against others, therefore Moffett reasonable believed, Deleon would make well on his threats when he seen Moffett. For whatever reason, defense counsel moved the court, for the jury to not be allowed to hear the most essential piece of K. Brown's testimony about Deleon shooting Keith Brown. Prior to trial, there were serious allegations that someone took Deleon's gun from the scene before police arrived. Importantly, there were several witnesses, outside of Moffett who witnessed Deleon with a gun in his hand, when he exited the car to confront Moffett. Again, prior to trial defense counsel was aware detectives failed to investigate, by following up on information they received that Deleon was armed with a gun. At preliminary stage defense counsel discovered, that the evidence of injury conflicted with, eye-witness account, who testified and gave statements, that Moffett and Deleon were facing each other when, Moffett opened fire upon Deleon. However, defense counsel failed to obtain a forensic expert witness to re-examine the evidence of injury. Knowing there was a strong possibility somebody, took Deleon's gun from the scene, defense counsel made on efforts to investigate, a substantial line of the defense. Then at trial when the State's chief witness, Kerry Bohannon testified, defense counsel made no efforts to elicit such critical piece of information, of whether Bohannon took the gun from the scene before police arrived. Overall, Moffett's defense was he had to use deadly force again Deleon, because Deleon was armed with a gun, and this claim that he shot Deleon in the back seven times, is false and the State mislead the jury to believe such evidence was true. The most

two critical points to support Moffett's defense, whether Deleon was armed with a gun, and was the use of force reasonable, defense counsel failed to hold the state's case to its burden of proof. Outside of that, when it was time for the defense to present its case, defense counsel only called officer Yang and Lor, as rebuttal witnesses, Shane, who testified he seen a gun stick out the window and a shot fired, was Deleon's hand, and Christlyee Nohelty, who counsel assisted and coached to testify falsely to the jury, to claim Deleon pulled a gun out on her over a ten dollar drug debt. The state's case was, Deleon was unarmed with no gun when Moffett fired upon him, therefore Moffett couldn't have had believed he was in imminent danger of great bodily harm or death, and even if there was some reasonable believe, the amount of force was unreasonable, to had shot Deleon seven time, six shots in the back torso and once in the buttocks. To support its theory, on the manner in which the evidence of injury occurred to Deleon's torso, it called forensic pathologist, Dr. Mark Witeck, who testified at the preliminary hearing stage, and then at trial, there were critical insistences and discrepancy in his findings, enough for defense counsel to have investigated the state's findings in the autopsy report, however counsel again failed to do so. At trial, Kerry Bohannon, Deleon's friend and driver of the car Deleon was a passenger of, testified for the State as its chief witness. He told detectives, Deleon saw Moffett walking down 14th and Huron Ave, so he ordered Bohannon to pull the car over, so he could "talk" to Moffett. Initially, Bohannon told Officer Lor, when Deleon exited the front passenger door, immediately Moffett, walked up and shot Deleon in the head, and he fell to the ground. Bohannon then claimed when he stopped at the corner, he seen Moffett firing from a 9mm or 380 caliber-type handgun, he sped off and proceeded to Bonnie's house. Once he arrived at Bonnie's house, he got Deleon's brother Daniel, and brought him back to the scene. Afterwards, Daniel ordered him to go pick up Shanda, from the hotel and bring her back to the scene. As the record can reflect, when he dropped off

Shanda, he attempted to leave the area again. According to Officer Lor reports, he alerted, over the radio, that he seen a car fleeing from the scene at a high rate of speed, so he got in pursuit and pulled Bohannon over conducting a high risk traffic stop. During the traffic stop, Officer Lor placed Bohannon in the back of the squad car. In Lor's report Bohannon's initial description of the incident, which was recorded on the squad #8 car camera. Bohannon said, Deleon was standing outside the car and Moffett walked up and shot him in the head. Then Deleon fell to the ground and Moffett fired several more shots from a 9mm or 380 caliber handgun. At some point upon being placed in the squad car, Bohannon was search by Officer Yang, and a "crack pipe" was recovered in narrative report pages: 57-58. Shortly afterwards, Bohannon was escorted, by Detective Clark to the police station, where he was further interviewed. In Detective Clark's narrative report, he decided, Bohannon and he move to a more *secret* room, so they can *speak privately*. Detective Clark claims, while he was moving Bohannon to a much *secret* room, the initial portion of Bohannon's statement got recorded over somehow. So, he told Bohannon to read his written statement into the digital recorder. See: Kerry Bohannon hand written a statement, dated 3/3/2009. After speaking with detective Clark the facts in Bohannon statement became much more aggravating, from when he first gave his statement in back of the police car. He now claimed, Deleon exited the car and started backing up away from Moffett with his hands up, the duration of the incident lasted 1 and half minute. He heard approximately three to four shots, Deleon fell backwards, he sped off, and stopped at the corner, then saw Moffett standing over Deleon, gun out his pocket, with the barrel 1 and half foot away from Deleon's body, and he denied the fact Deleon was armed with a gun, according to narrative report pages,74-77. At the preliminary hearing, Bohannon provided a different description yet again, he claimed Deleon got out and started walking backwards away from Moffett, he heard one shot, Deleon fell, and he sped off and stopped

at the corner. At the corner, he saw Moffett fire several more shots, but didn't see a gun, only gunfire coming from Moffett's pocket. Meanwhile there were some consistency in Bohannon statement, which can be supported by the evidence. He testified Deleon was not lying face down, rather on his side, but was unsure if it was his left or right side. (R-261:3-7). However, prior to trial, defense counsel was aware the State's own evidence conflicted with each other, where eye witnesses, witnessed Deleon was facing Moffett, at least when the first few shots were fired, therefore how can the evidence of injury claim all shots entered from right back side and existed the left front torso. He testified, at trial Deleon exited the car to confront Moffett, and began to raise his hands while backing up away from Moffett. Suddenly, he heard one shot, he sped away, stopped at the corner, seen Moffett and the other people bent over pumping shell into Deleon at Transcript: Vol. 3 page 90. He went on to testify, that *he didn't know if everybody was shooting*, all he seen was fleshes from the gun, but couldn't see the actual gun itself. Unfortunately defense counsel made no efforts to disclose Bohannon's inconsistent statement to the jury. The State, knew Bohannon gave several inconsistent statements, as he was now saying he "*seen Moffett and the other people bent over Deleon",* and didn't see no gun in Moffett's hand. Mr. DeCecco, went on to asked Bohannon does he remember telling Detective Clark something different, about it being just Moffett standing over Deleon, he responded "yes" it *true.* The State, then asked Bohannon, did he ever known Deleon to carry a firearm? He said, "Not to his Knowledge", claimed he never know Deleon to carry a gun, and never in his presence did he hear Deleon talk about being angry or wanting to get even, and or do something to Moffett. Bohannon said no, in Transcript: vol. 3 page: 93-94. In conclusion again, as the State was continuing to paint this narrative that Moffett shot Deleon in the back, asked Bohannon again, what position was Deleon's body lying on his left or right side, at which he relied he don't remember which side but know he was "*on his side*,

not face down in Transcript Vol. 3 page 95. On cross, trial counsel asked Bohannon was Deleon armed with a gun He said *"n*o". On cross-examination, defense counsel asked Detective Clark, considering the fact, he had received information, that Deleon was armed with a gun, where two witnesses outside of Moffett, one witness seen Deleon reach in his waistline for a gun and another seen Deleon's gun discharge, therefore why didn't Detective Clark, follow up such evidence, and Detective Clark's response was he didn't believe it was relevant to investigate whether Deleon was armed with a gun. In defense counsel, opening statement, he told the jury how there were strong inferences, Bohannon may had took Deleon's gun from the scene upon it falling into the car. However, counsel made no effort to elicit this evidence from Bohannon on the stand before the jury, of whether or not he removed Deleon's gun from the scene? Plus, counsel was well aware before trial that Detective Clark fail to make mention of it in his narrative report, where Teiana said she seen Deleon reach in his waistline for a gun in Transcript, Vol. 4 pages 178.

A. The defense trial counsel presented to the jury.

In counsel's opening statement, Attorney Wells never mention not one time Moffett's defense was self-defense and or Moffett acted in self-defense. Meanwhile, he told the jury, they were going to hear evidence from Shane Hall, who saw a gun come out a window of the car, and seen a shot and a flesh, from the gun, in Transcript Vol. 3 page 32-42. Counsel went on to say how the evidence will show Teiana told detectives she seen Deleon reach for a gun in his witness. And he was calling Chirstylee Nohetly, she was going to testify how Deleon pulled a gun on her days before the incident, because she owned him ten dollar for a drug debt. For whatever reason counsel considered it relevant, he brought up an incident, which actually happened between Nohelty and a guy nicknamed T.Y. The T.Y. and Nohelty incident was reported and prosecuted. Even more so District Attorney DeCecco was fully aware of the incident between them two and was skeptical

how both descriptions were verbatim, to the point he commented before cross-examined, suggested in the presence of the jury, that Mr. Wells witnesses, may had basically reached out with the intent to commit perjury on behalf of the defense. Here it was the State's case was, Moffett couldn't had reasonable believed he had to cause Deleon's death, because Deleon was armed with a gun, therefore the use of force, *i.e.* seven shots were was unreasonable. Knowing, there was a substantial amount evidence, to support the fact Moffett acted lawfully out of self-defense, when he caused Deleon's death, still defense counsel made absolutely no efforts to obtain a forensic expert, considering the fact there was a serious conflict with the State's own evidence of injury and how the wounds actually occurred. Nor did counsel, investigate or call any *McMorris* witnesses, considering the fact, it was determined at a pre-trial hearing he can do so. For whatever reason defense counsel, moved the court to excuse the jury from hearing critical McMorris evidence? Rather than elicit in the presence of the jury, from Bohannon whether he took his friends gun from the scene, counsel in his closing argument told the jury there was a possibility Bohannon had removed Deleon's gun from the scene upon it failing through the shattered back passenger side window, in Transcript vol. 4 pg. 185. Defense counsel has an obligation to hold the prosecution case to its burden of proof beyond a reasonable doubt. Again, negating the State's case require counsel, if there was evidence that can proof the defense, that Deleon was armed with a gun, and the use of force was necessary, then counsel must done so. As the record can reflect, defense counsel did everything to undermine Moffett's defense to no basically no defense at all. How is it at all reasonably sound for defense counsel, who appeared to suggest to the jury Deleon was armed with a gun, therefore find Moffett not guilty of either first or second degree intentional homicide defense, when counsel in closing argument told the jury, quote, "*I don't have to prove there was a gun. Mr. DeCecco doesn't have to prove there was a gun, either. But if a gun is*

important to you, then he does have to prove it", in Transcript. Vol. 4 pages 182. First of all why would the State, want to prove Deleon had a gun, would been counter-productive to for the State, and why wouldn't defense counsel, in favor of his client prove, Deleon was armed with a gun considering the fact, he had information and evidence Deleon was in fact armed with a gun? The jury, was instructed on first degree intentional homicide, lesser included second-degree intentional homicide, and self-defense, 1014-WIS-JI CRIMINAL-§ 940. 01(2) (b); §940.05. The jury found Moffett guilty of first-degree intentional homicide. After the trial, on March 3rd 2010 a member of the jury spoken with the news reporter Eric Likte and reported they weren't convince Deleon had a gun, (*therefore a gun was important to them),* and they believed six shots to Deleon's back torso were unreasonable, (*there was evidence that overwhelmingly conflicted with the State evidence of injury that had defense counsel presented would show the jury Deleon was not shot six times in the back).* At sentencing, the state addressed the court and continued to perpetuate the false narrative, claimed Moffett shot Deleon in the back seven times in Transcript at page 7. The Prosecutor even made mention, there were public comments from the jury on why they rejected Moffett's self-defense claim. But his stance was that all seven shots entered the back of Deleon and he was unarmed, The State acknowledged, *"there being inferences that someone could have taken it (the gun) away before the police got there" in* Transcript at page 8. And how some witnesses said Deleon was unarmed and how one witness believe she seen a gun in Deleon's hand. The state recommended life without extended supervision. Then defense counsel addressed the Court, criticized, how the state, "*interpretation that the jury verdict implied that Michael had intended to kill that whole weekend ignores the fact the jury was instructed something to the contrary...* " in sentencing transcript at page 13. Counsel went on to address how the State was claiming evidence show Deleon was lying face-down, was false, but now suggest something the

evidence didn't support, and how it was contrary to what the State expert witness Dr. Witeck said at trial, in sentencing transcript at page 14. Before defense counsel made a recommendation, he made mention of how the State called Brown to testified that there was there years long plan, Moffett had on try plotting to kill Deleon, and how it *didn't fit any of the facts,* in other words outside the scope of probative value, in sentencing transcript at page 15-16. The same evidence counsel appear at sentencing to criticize, was the same evidence he elicited at trial, knowing it was prejudicial, and also knowing there was a conflict with the evidence of injury detailed in the autopsy report, but never obtained an expert to reexamine the evidence of injury. Timely, Moffett appealed his sentence and conviction. At direct appeal in 2010, Moffett was appointed Attorney Jeffrey W. Jensen, to represent him on first appeal as of right. **State v. Moffett,** No. 2011Ap1290, decided February 15th, 2011 (R: 177). Petition for review in state Supreme Court, decided June 12, 2012. (R: 179). After first appeal concluded Moffett requested post-conviction counsel Jeffery W. Jensen to turn over, trial transcripts, trial counsel case file, and a copy of criminal discovery. During, direct appeal Moffett was under the believe Attorney Jensen, had in his possession all the necessary material to bring a meaningful first appeal, that is including the criminal discovery. Meanwhile in a letter complied by Attorney Jensen he noted, that he never even had the criminal discovery. For post-conviction counsel to have had the discovery was essential, because how was he going to know the fact of the case, in order to determined, whether trial counsel failed to do something. All the issues Moffett informed counsel of is preserved in letter between Attorney Jensen and himself. Moffett informed counsel about several issues that were clearly stronger then the issues counsel raised in the appellate brief, involving trial counsel being ineffective, when he failed to investigate whether Deleon was armed with a gun and the evidence of injury, *McMorris* evidence, false information about security measures, and subornation of perjury. When Moffett

discovered post-conviction counsel never possessed any criminal discovery, he motion the circuit court with a constructed, *O'Brien* motion pursuant to Wis. Stat. 974.06. Where he argued, he was entitled to effective assistance of post-conviction counsel in bringing his first appeal **State v. Moffett,** 2012Ap2564, decided June 5th, 2013. The court determined, post-conviction wasn't ineffective for not have the discovery. Moffett was under the believe, he needed the discovery in order to support his issue with sufficient material facts, so when the court denied his O'Brien motion, he decided he would just present the trial counsel subornation of perjury, evidence of injury issues, of the significance of the leather coat, and excessive security measures. As a result of Moffett not having all the necessary materials, the court denied him relief without an evidentiary hearing despite how serious the allegations were. In support of Moffett's claims he referred to the transcripts were they showed, very compelling facts of an unfair trial. **State v. Moffett,** 2013Ap2187, decided September 14th, 2014, Petition for Review denied, December 18th, 2014. Afterward, Moffett sought review in the district court, it was deem time barred, Moffett was order to show cause, and where he explained he file a motion for post-conviction discovery, pursuant to Wis. Stat. 974.06,which is a properly filed application that shall had toll the clock, but the district court deemed otherwise. **Moffett v. Foster,** case no. 15-cv-599. Following, the District Court decision Moffett filed a motion for Rule 60, in 2018. Then in 2019, Moffett filed successive motion for post-conviction relief, pursuant to Wis. Stat. 974.06, re-litigating issues raised from his 2013 motion, as they were inadequately raised. Also, Moffett requested the court of appeals to use it discretionary reversal power, pursuant to Wis. Stat. 752.35, both were denied. Meanwhile, as the 2019 motion was pending in the courts Moffett discovered newly discovered evidence, in the form of affidavits. Upon receiving the new evidence, Moffett moved the court of appeal, requesting a stay so he could bring the new evidence before the circuit court, but it was denied. **State v. Moffett,**

No.2019AP1953. So, after the court of appeal denied relief, Moffett filed a motion for post-conviction raising the new evidence and ground to re-litigate the previously raised issues from his 2013 motion. **State v. Moffett,** 2023Ap2104. The circuit court determined Moffett was procedurally barred from presenting the new evidence and re-litigating the old issues, pursuant to *Escalona-Naranjo and Witkowski,* denied on July 8th, 2023. Moffett filed a motion for reconsideration, argued, the circuit court mislabeled the law, by ignoring clearly established law. It was denied on October 19th, 2023. Following, Moffett filed a notice of appeal on November 6th, 2023. The court of appeal on December 11th, 2023 notified Moffett that it lacked jurisdiction to review the underlined motion, as the notice of appeal was untimely. But for the motion for reconsideration both parties address the later motion in their brief, as to whether the court has jurisdiction over it. On February 5th, 2025 the court of appeal affirmed the circuit court decision, insisted Moffett was procedurally barred. **State v. Moffett,** No.2023Ap2104.

B. Newly discovered evidence.

After Moffett's trial the State's chief witness, Kerry Bohannon recantation statement, dated March 16, 2022, has come forward admitting he took Deleon's gun from the area before, when it fell into the car, through the back passenger side window, was the reason why the gun was never recovered and he never disclosed it to detectives. He also provides additional newly discovered evidence which wasn't known to Moffett until now, of him being coerced by Detective Clark, fabricate details of what actually transpired between Moffett and Deleon. It was testified to by officer Tellen, when she arrived on scene, Deleon was lying on his back, on the curb. Mr. Bohannon also noted that he received *consideration* in exchange for his testimony. Overall Mr. Bohannon continues with details of how he come about taken Deleon' gun from the area. Once he arrived at Bonnie's house, before he went inside to get Daniel, he hid the gun behind the garage.

After he completed his interview with detectives they provided him a ride back to Bonnie's house. He retrieved Deleon's gun from behind the garage and kept it, until his sister came to take him back to Milwaukee. He returned to Milwaukee, and sold it to supply his drug addiction. Mr. Bohannon also provide additional critical evidence, that had defense counsel done his due diligence, he would had discovered evidence bolster evidence that was available, but never presented. Where, he confirms they drove to Milwaukee to get, Daniel and another male, to assist Deleon in carrying out an attack against Moffett. He explained Daniel, was armed with a black gun, either 9mm or 380 caliber handgun, and the other male too was armed with a gun. All four of them, then drove back to Sheboygan. Arrived in Sheboygan, dropping Daniel and the other male off at Bonnie's house, Deleon got a call from Daniel telling, him Moffett was at Bonnie. That when he and Deleon left the hotel. Here it is in 2011, Shanda Moffett, Deleon's gun friend, provided an affidavit after Moffett trial, explaining Deleon got a call from Daniel, and he and Bohannon left from the hotel with guns looking for Moffett.

Second, dated January 24th, 2022, Moffett received an affidavit from Ms. Nohelty, where in the newly discovered affidavit she has come forward with information, on how she was lead into testifying for the defense. She state, she crossed path with Mr. Wells and how it concluded with him asking her to testify, for him in Moffett's defense. That she was too testify, Deleon pulled a gun out on her over a ten dollar drug debt. Ms. Nohelty, in her affidavit confesses that it was all false, Deleon never pulled a gun out on her, that she made it all up, by taking an incident that happened between her and T. Y. and switching it to as if Deleon committed the same acts against her. It can be shown how in Attorney Wells opening statement, him leading to the anticipation responses of Nohelty false testimony. The prosecution, before he commenced with his cross-examination, he made a statement in the presence of the jury, stating he didn't want his statement

to be taken the wrong why, but somebody reached out to Mr. Wells in order to false evidence, in. Tran. Vol. 4 pages 36-47. However, today Ms. Nohelty affidavit she, admits Deleon never pulled a gun out on her over a ten dollar drug debt, that she only was willing to lie to help Mr. Wells because he asked her to do so. Christy lee Nohelty (Broehm) dated: 1/24/2022. In 2013, Moffett filed a grievance with the Office of Lawyer Regulation, against Attorney Robert J. Wells. Despite the overwhelming evidence, that he coached and assisted two witnesses to testify falsely, he claimed in his response to the allegation, he didn't have no witness gave false evidence. In his response, he suggested that was his only way to prove Deleon had a gun.

C. Sufficient reason to overcome the procedural bar, under ***Ecalona-Naranjo.***

Moffett *pro se* filed another motion for post-conviction relief in the state circuit court supported by newly discovered evidence (Doc. #310), filed July 18th, 2023. He argued, pursuant to *State v. McCullum,* 208 Wis.2d 473, 561N. W.2d 707, *citing Love, 284 wis.2d 111, 700 N.W. 2d 62.* Newly discovered evidence can overcome the procedural bar. A judgment is to be set side based on newly discovered evidence the defendant must provide sufficient evidence to establish that defendant's conviction is a manifest injustice, meeting the four criteria. In addition, a claim of newly discovered evidence based on recantation, requires corroboration of the recantation, with newly discovered evidence. In Moffett's case the court determined he was procedurally barred, pursuant to *Escalona-Naranjo*. Because he did not offer a reason why the witnesses could not have come forward with their recantation during the filing of the earlier post-convictions motion. The State in their brief at page 12, acknowledge, in quote, "*First Moffett is correct that newly discovered evidence may be sufficient to overcome the Ecalona-Naranjo's and Wis. Stat. 974.04(6)'s procedural bar*". In other word, acknowledge circuit court made an error misapplied the law.

Second, in Moffett's motion he argued the issues he raised in his 2013 motion were inadequately raised, because he didn't have the necessary evidence at the time, and as a result the court denied the 2013 issues. ***See: State v. Michael M. Moffett,*** 2013AP2187. Again, the court reiterated, Moffett must present a sufficient reason why evidence was not submitted in previous post conviction motions before the court will consider arguments presented. The Court insisted, Moffett offered no sufficient reason as to why the late recantation of testimony by witnesses whose statements have no *indicia* of reliability and claims unsupported by independent evidence of record were not set forth in his numerous earlier filings. (Doc. #310 at page 3 Circuit court decision dated: 7/18/2023. When Moffett first raised the claim, that trial counsel suborned perjury, he didn't have all the necessary materials, *i.e.* affidavits from either witness. So when Moffett obtained the evidence he reasonably decided to re-raise the 2013 issues *adequately* in his 2023 motion. In his 2023 motion, he properly relied on the law governed under Wis. Stat. 974.06(4) that he can re-litigate an issues if he provided a sufficient reason why the issue was inadequately raised. So, the question is what constitute an issue *inadequately raised?* The court in Moffett case, cited ***Witkowski,*** 163 Wis.2d 985, 990, 473 N. W. 2d 512(Ct. App. 1991), ruled Moffett was completely barred from re-litigating issues, no matter how artfully the defendant may rephrase the issues. **State v. Michael Moffett,** 2023AP2104. (2/5/2025). Clearly the circuit court misapplied the law. Moffett moved motion for reconsideration. He argued there was a manifest error when the circuit court wrongfully applied the law, when determine whether he met the standard for newly discovered evidence. And second the circuit court fail to properly apply Wis. Stat. 974.06(4) where if a defendant provide a sufficient reason, why an issue was inadequately raised, the procedural bar can be over-come, to re-litigate a previously raised issue. The court denied Moffett motion for reconsideration, on October 19th, 2023, insisted he raised no new information that has not already

been considered and addressed by the court. After, the circuit court denied relief on the motion for reconsideration, Moffett filed a notice of appeal on November 6th, 2023. The court of appeals, on December 11th, 2023, notified Moffett, that it lack jurisdiction over the July 18th, 2023 order, which is the underlying matter. The court of appeals stated the July, 18th, 2023, order was final order from which an appeal as of right could be taken, pursuant to Wis. Stat. §808.03(1), because the underlying matter is civil in nature, see: §974.06(6), and the ninety-day appeal period in Wis. Stat. §808.04(1)applied. The court of appeal went on to say, although Moffett moved for reconsideration, the motion did not affect the time for appealing because it was not filed after a trial to the court or other evidentiary hearing". *Citing* ***Continental Cas. Co. v. Milwaukee Metro. Sewerage Dist.*** 175 Wis.2d 527, 533-35, 499 N.W.2d 282(Ct. App. 1993). The court of appeal, determined the October 19th, 2023 order on the motion for reconsideration, was timely filed.

Third, Moffett argued the court misapplied law, when determining pursuant to Wis. Stat. §974.06(4), a defendant can re-litigate a previously raised issue if he can provide a sufficient reason, why the issue was inadequately raised, citing: ***State v. Stark,*** 349 Wis.2d 275 at ¶101 Counsel performance may also be considered deficient when the claim is not adequately raised, such as when there is a failure to conduct research sufficient to support the claim and another is a failure to present necessary evidence. And third Moffett argued, the court of appeals should use its discretionary powers, to reverse his conviction and remand the case back to the trial court, as the real controversy was not fully and fairly tried, as the evidence proves that if any reasonable jury hearing the old and new evidence, can render a different result at a new trial. In conclusion, the court of appeal denied Moffett relief, on February 5th, 2025.see: ***State v. Michael M. Moffett,*** 2023AP2104. Shortly after, Moffett timely filed motion for reconsideration back in the court of appeals, it was denied on March 5th, 2025. The court insisted the motion for reconsideration didn't

persuade them. Following, Moffett sought petition for review in the state Supreme Court, argued it should adopt the federal guideline, where a matter is tolled, while a proceeding is pending in the court, citing ***Morway v. Morway,*** 2025WI3 (2025 W.S.C.), Rebecca Frank Dallet, J concurring, ¶¶42-43, argued, *the Wisconsin Supreme Court should consider adopting the approach taken by the federal court of treating each discrete post-judgment (conviction) matter as free-standing litigation that is final when as order dispose of all issues raised in the motion that initially sparked the post-judgment proceedings and no other related issue is pending.* Then Moffett, went on to argue, the court should establish what constitute a sufficient reason why an issues was *inadequately raised, citing:* ***State v. Stark,*** 349 Wis.2d 274, and ¶¶ 101-102. The State Supreme Court denied Moffett, on June 25th 2025.

REASON FOR GRANTING THE WRIT

A state court of last resort has decided an important federal question in way that conflict with the decision of another federal court of last resort or of a United State Court of Appeal?

I. The question of concern shall be reasonably resolved, whether the court loses jurisdiction when a notice of appeal is filed, and should the time to file a notice of appeal be toll, while a motion for reconsideration is pending in the circuit court?

According, to *Morway v, Morway,* 2025WI113 (2025 W.S.C.), at ¶ ¶ 42-43, Justice Dallet, states in her dissenting opinion, "Clearly rules governing finality are essential for the court parties. That is because the entry of final order or judgment under Wis. stat. §808.03(1). Start the clock for filing an appeal, 808.04(1) once that clock runs out, the court of appeals lack jurisdiction over the appeal. Wis. Stat. Rule 809.10(1) (e) without clear rules governing finality parties may thus unintentionally lose their right to appeal. …" "Unfortunately our analysis of finality under Rule

808.03(1) is not clear as it should be". Justice Dallet suggests in her opinion, which Wisconsin Supreme Court should consider adopting the approach taken by the federal court of treating each discrete post-judgment matter as free-standing litigation that is final when an order dispose of all issues raised in the motion that initially sparked the post-judgment processing on other related issue pending. Moffett agrees with Justice Dallet, dissenting opinion, as it makes reasonable sense to toll the time to filed a notice of appeals, when a motion for reconsideration is filed in the state circuit court, as a result it unintentional places Moffett in a position where he has lost his right to appeal. The Wisconsin Appellate Process, a petition for review, Wis. Stat. 809.67 must be filed with the Supreme Court Clerk within 30 days of, the Court of Appeals decisions or if a motion for reconsideration, Wis. Stat. 809.24has been filed in the court of appeals, within 30 days of the court of appeals decision on the motion. So, why can't the same apply for the appellate process starting in the circuit court? To where the time to file a notice of appeals is toll until a decision is made on the motion for reconsideration. **S & S Sales Corp. Marvin Lumber & Ceder Co.** 457 F. Supp. 2d 903. Generally, speaking once a notice of appeals if filed a district court is divested of jurisdiction over those aspects of the case involved in the appeal. **Grube v. Lau Industries Inc,** 257 F. 3d 723. Once a notice of appeal is filed with the district court it is divested of jurisdiction over the case, and the appellate court assumes jurisdiction. The whole point of establishing a clear guideline for the appellate process in the low court, where the petition must address his issue at first shall have clarification on finality, to avoid overlapping and potential inconsistent decisions whipsawing litigants between two courts. **Ameritech Corp. v. International Broth. Of Elec. workers, local 21,** 543 F.3d 414(7th Cir. 2008). In Wisconsin, the appellate practices how it stands has the potential to overlap and result in inconsistent decisions in the courts. The court expected Moffett to have filed two notices of appeals, one on the underlined motion decision and another

on the motion for reconsideration. **State v. Moffett,** 2023Ap2104. We all can, imagine what could potentially happen, considering the fact once a notice of appeal is filed the circuit court is divested of jurisdiction. At the end of the day, what the court should want to avoid is overlapping decisions. In other districts there are exceptions to, that when timely filed motion is filed in the circuit court, the time to file a notice of appeal is toll. See: ***Bowen v. El Dupont de Nemours and Co. Inc.*** 879 A. 2d 920 (2005 S.C. of Delaware). "In a civil action a timely a filed motion for re- argument suspect the finality of the judgment and tolls the time for taking an appeal filing what otherwise has been a final judgment". So, a pending motion should render the underlined motions not final until a decision is made. Therefore, Moffett asks this court seriously consider Wisconsin state court to adopt the federal guideline of tolling the clock while a timely file motion is pending, before a notice of appeal is filed, again to prevent damage of a petitioner loss of appeal, and overlapping of decisions.

II. Whether a new trial should be granted in the interest of justice, where actual Innocence is raised?

In Moffett's 2023 motion, he presented newly discovered evidence in the form of a state witness recanting their statement, citing ***State v. McCullum***, 208 Wis.2d 473, 561 N. W.2d 707, also be Love, 284 Wis.2d 111, ¶44. See: ***State v. Moffett,*** 2023AP2104. The circuit court abused its discretion when it disregarded clearly established law. The circuit court in Moffett's case held he was procedurally barred from presenting his newly discovered evidence, when he discovered them. The criticized, the new evidence by weight of why didn't Moffett present these witnesses in his early motion. Please let me frank, if newly discovered evidence didn't exist at the time how it could possibly been presented in Moffett's earlier motion? However, the law governing post-conviction relief, holds newly discovered evidence may be sufficient to overcome the *Escalona-*

Naranjo's and Wis. Stat. 974.06(4)'s procedural bar. In ***State v. McAlister,*** 2018 WI 34, ¶¶25, 28, 380 Wis. 2d 684, 911 N. W. 2d 77. To set aside a judgment based on newly discovered evidence, the defendant must present sufficient evidence that demonstrate that the defendant's conviction is manifestly unjust. *Id.* ¶ 31. To obtain a hearing on a newly discovered evidence claim, establish the four criteria. Then if the defendant satisfies these criteria, the circuit court must determine whether a reasonable probability exists that the factfinder would reach a different result at trial. A reasonable probability of a different outcome exist if there is a reasonable probability that a jury, looking at both the (old evidence) and the (new evidence), would have a reasonable doubt as to the defendant's guilt. ***State v. Plude,*** 2008 WI 58, ¶33, 310 Wis.2d 28, 750 N. W.2d42. The circuit court never found out whether, Moffett met the first four criteria by clear and convincing evidence. Also the real crux of the dispute in this case is whether the evidence, that Deleon was armed with a gun but his friend Bohannon took it from the area, never disclosing it to detectives, establish a reasonable probability that a different result would be reached in a new trial? ***State v. Edmunds,*** 308 Wis.2d 375, ¶17, *citing McCallum at 468.* In Moffett's case the evidence is critically material to an issue in Moffett's case, because it proves Deleon was in fact armed with a gun, when he confronted Moffett. At trial, elements were Moffett reasonably believing he was terminating an unlawful interference and reasonably believing the force used was necessary to prevent imminent death or great bodily harm. ***State v. Head,*** 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413. Now what shall be taken into consideration, is the circumstances surrounding the event which led Moffett to such beliefs. The State's evidence presented to the factfinders, it relied on its agents who claimed they found *no gun* or evidence of Deleon being armed with a gun. As the record can reflect, again the State's case was Deleon was unarmed. However, Moffett's defense, he testified Deleon was armed with a gun, therefore he reasonably believed he had no choice but to use deadly

force, to terminate an unlawful interference posed by an armed Deleon. The strongest line of defense to bolster self-defense is proof Deleon was in fact armed with a gun. Considering the fact there were eye-witnesses (Shane and Teiana) outside of Moffett who informed detectives they seen Deleon with a gun and it discharged. The real issue is what happened to Deleon's gun? As the record can reflect, Detective Clark was aware of evidence that Deleon was armed with a gun and it had discharged, but did absolutely nothing, no follow up or other method to see if he can recover the gun or evidence a gun discharged in Deleon's hand. Attorney Wells made no efforts to investigate. All counsel did was just mentioned it in his closing argument, of the fact Bohannon may had took Deleon's gun from the area. Thirteen years after Moffett's trial, Bohannon has come forward, with evidence that was never disclosed at trial. Mr. Bohannon admits that he did in fact tamper with evidence, by taking Deleon's gun from the area and never disclosing what he did to detectives. Affidavit from Kerry Bohannon, dated March 16th, 2022.

In Moffett briefs he did provide corroborated additional newly discovered evidence. ***McAlister,*** 380 Wis.2d 684, ¶33. As for *a feasible motive,* why Bohannon's initial false statement. First, Bohannon had something to hide, the fact he took Deleon gun from the area and never disclosed it to detective. In *McAlister*, the daughter recanted, her statement and her feasible motive for lying, was that she didn't want her parents to separate, and was mad she got punished. Second, Bohannon receiving consideration for his testimony, further prompt him to continue fabricate evidence or simply fail to come forward with the complete truth. Third, an even greater *feasible motive*, Bohannon reveals, he was led by detectives to change details of what happened, because they weren't satisfied with his initial statement. As for the circumstantial guarantees of the trustworthiness of the recantation? Moffett cannot explain why Bohannon didn't come forward earlier. However, Mr. Bohannon himself explained why he refused to come forward at trial. The

fact that Mr. Bohannon tampered with the scene, could have subject him to prosecution. It shall be noted Moffett did in fact post-conviction counsel, of the importance of locating and interviewing Bohannon, as well as him may tampered with Deleon' gun. The fact that Moffett is in prison effects his ability to have located Bohannon, in his earlier motions. In 2011, after Moffett's trial, Shanda was contacted by private investigator Cindy Papka. She reveal newly discovered evidence, that which could have cooperated, evidence that Deleon was armed with a gun, i.e. black revolver style hand gun, when he left the hotel looking for Moffett, and somebody must had took it from the area. Her reason why she wasn't forthcoming was, she feared Deleon's family would retaliate against her, and blame for his death. Here in Moffett's case the circuit court applied an erroneous legal standard. The correct legal standard when applying the reasonable probability of a different outcome, is whether there is a reasonable probability that a jury looking at both the accusations and the recantation, would have a reasonable doubt as to the defendant's guilt. The answers in Moffett's case is yes, the jury looking at the old and new evidence, could reasonable believe Moffett acted lawfully in self-defense. Clearly the jury will have been presented with actual evidence that Deleon was armed with a gun, heard from Deleon's friends and girlfriend is much more believable. A reasonable probability that a different result would be reached at a new trial based on its findings that the witness's recantation was less credible, just because. However it's not the court role to weigh the evidence, as a result the court abused its discretion. Moffett has lost the opportunity to protect and defend his liberty, due to the appellate practices in the circuit court, which has made it so easy for the baby to be thrown out with the bath water. This court should seriously consider, for the Wisconsin Court of Appeals to adopt, the federal guideline, toll the clock while a motion is pending.

III. Whether the court should establish what constitutes a sufficient reason why an issue is adequately raised?

This court should establish what constitute a sufficient reason why an issue was inadequately raised in petitioner Wis. Stat. §974.06(4). The statutory law governed under s. 974.06, is that a defendant may re-litigate an issue, if he can provide a sufficient reason why an issue was *inadequately raised"?* In Moffett 2023 motion which is the underline matter, he re-litigated some issue, he raised from his 2013, motion. See: ***State v. Moffett,*** 2013AP2187. The circuit court in Moffett's 2023 motion insisted he was barred pursuant to *Witkowski,* from re-raising issues, citing *Witkowski,* a defendant cannot re-litigate an issues no matter how artfully he may rephrase the issue. See: ***State v. Michael Moffett,*** 2023AP2104. There has been a wholesale disregard of statutory law. In Moffett underlined 2023 motion, the issues he re-litigated, were one, his trial lawyer was ineffective when he suborned perjury, by coaching and assisting a defense witness, to testify falsely for the defense. When Moffett first raised this issue in 2013, he presented the only evidence he had available those out the trial transcript, that showed the anticipated responses from Chistylee Nohelty (Broehm) in Transcript Vol. 4 pages 36-47. The circuit court decided Moffett's claims was conclusory at best, clearly ignored the facts in the record. Because, Moffett didn't have admission from Attorney Wells, of him suborned perjury or admission Chirstlee Nohelty, of her being assisted by Mr. Wells. The court deemed their testimony aided the defense, despite the allegations of perjury. Then Moffett's second issues, was about the evidence of injury, in Transcript Vol. 3 page 14-15. How the injuries occurred to Deleon's torso is very important to the unnecessary use of force element, in Moffett's defense. Prior to trial defense counsel was well aware that the state findings in the evidence of injury conflict with itself, based on testimony by both Bohannon and Dr. Witeck. In the State's case it presented, two autopsy photos of Deleon's

person, which conveyed this false narrative to the jury to imply Deleon was shot in the back on his right side and exited the left front side. However, when Moffett first raised this issue in 2013, he didn't have any criminal discovery. During his direct appeal post-conviction counsel informed Moffett, that he never retrieved the discovery material from trial counsel to assist him during first appeal of right. It was mentioned at trial, that Deleon's injury to his torso could be shored exit wounds. If Deleon was wearing a heavy leather coat. As the record can reflect counsel, it was mentioned of Deleon's leather coat, but it was never explored by either defense counsel, or the state in Transcript Vol. 3 page: 49. Dr. Witeck testified, he couldn't had come to such conclusion as to whether Deleon's injuries shored exist or not, because he didn't have all the factors i.e. the leather. Therefore, as a result the only conclusion he came to was based on his lack of information or evidence. In fact, post-conviction counsel never possessed any discovery material involving Moffett's case. In 2022, Moffett family purchased a copy of the discovery from the Sheboygan County District Attorney's office, and the district attorney office mailed it to Moffett. After reviewing the discovery, Moffett discovered it contained several additional photos of Deleon's injuries. As the record can reflect the State presented exhibits #42 and #43. Which gave the jury this idea Deleon was shot six times in the back torso. However, with a further view of all the autopsy photos, Moffett discovered there were several photos of Deleon's torso, that revealed there were no exit or entry wounds to Deleon's left front torso as The State claimed to the jury that there were exit wounds on Deleon left front torso. In Moffett's brief and appendix while the photos did exist but never disclosed to the jury by defense counsel, was a clear case of failure to hold the prosecution's case to meaningful adversarial testing. These items reveal the true nature of the evidence of injury, which Moffett presented in brief and appendix items: #IMG227, IMG2278, IMG2276, and IMG2280, are autopsy photos of Deleon's evidence of injury. Secondly, Moffett

discovered photos of, Deleon black leather coat and its existence. As the record can reflect, in the circuit court 2013 decision they misconstrued, the facts by insisting Moffett was confused as to whether Deleon leather coat existed and referred to the hoodie jacket as being the item Moffett was referring to. Once Moffett discovered these evidences existed, when he obtained a copy of his discovery in 2022 he decided to re-litigate the 2013 issues, argued they were inadequately raised previously due to the fact he didn't have all the necessary materials to present sufficient material facts. The jury was led to believe, Moffett shot Deleon in the back six times, and once in the buttocks. Please not deny seven shots to a person back can reasonably be deemed aggravating. So, to show the jury that Deleon was not shot even times in the back, reasonably mitigate the use of force. Whether those injuries to the front or back are very critical to Moffett's defense? It's important, trial counsel shall have reviewed and read all the State's evidence. Counsel has an obligation to read the discovery, had he adequately reviewed the discovery he will had found the photos, of Deleon's torso that without a doubt negate The State case, that again Deleon was not shot in the right back side and exited the front left side. Also, counsel will have recovered Deleon's black leather coat, as it was in The State's storage with Deleon's car, which wasn't released to Shanda until after Moffett's trial. To take Moffett's 2013 motion into serious consideration, determining whether those issues raised were inadequately raised, can be supported by the court decision. ***State v. Moffett,*** 2013Ap2187. The court denied Moffett relief, insisted he hadn't provided sufficient material evidence to show that he counsel was ineffective, when counsel didn't hold the state to it burden of proof, use of force (less aggravating to negate the state case that Deleon wasn't shot in the back. Also, insisted while they may been some errors, with perjury still both witnesses testimony aided the defense. Again, had Moffett possessed any of the material facts, to support his claims in 2013, there's a strong possibility of success of appeal. In support of this

argument Moffett refers to ***State v. Sparks,*** 349 Wis. 2d 274, 324, ¶ ¶ 101-102, dissenting opinion by, Ann Walsh Bradley, "*Even if counsel properly identify an issue that is strongest issue available, his performance may also be considered deficient when the claims is not adequately raised. Such as when (1) there is failure to conduct research sufficient to support the claim, (2) a failure to present necessary evidence, or (3) failure to adequately argue the claim*". According to Wis. Stat. 974.06(4), a defendant can re-litigate a previously raised issue, if he can provide a *sufficient reason* why it was *inadequately raised* in the original motion? It should be established, what constitute a sufficient reason why, an issue is inadequately raised?

CONCLUSION

The petition for writ of certiorari should be granted. Permission for writ, it is necessary in a case where it is clear there has been a miscarriage of justice. The appellate court practice in Wisconsin has been continues problem, where there is no complete clarity in finality. Moffett discovered newly discovered evidence and presented them properly in the circuit court. Meanwhile it was the circuit court who, misapplied the law, and so Moffett moved them to reconsider their decision. Considering the fact that once a notice of appeal is filed in the Court of Appeal, then the circuit court is divested of jurisdiction shall be taken serious, and allow toll while a motion for reconsideration is pending. Second, Moffett is asking this court to refer the case back to the trial court for an evidentiary hearing on the newly discovered evidence, and the inadequately raised issues. A new trial is warranted in the interest of justice, and shall not be further denied much longer, by reversing the lower court decisions, with directions to do so.