No. 19-·

IN THE
SUPREME COURT OF THE UNITED STATES

NICOLE M. MOORE

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
FLORIDA'S SECOND DISTRICT COURT OF APPEAL

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

JASON M. MILLER

NAJMY THOMPSON P.L.
1401 8th Avenue West
Bradenton, Florida 34205
(941) 748-2216 p
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jmiller@najmythompson.com

Counsel for Petitioner
Counsel of Record

January 3, 2019

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

NICOLE M. MOORE, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D17-317

Opinion filed October 5, 2018.

Appeal from the Circuit Court for Manatee County; Susan B. Maulucci, Judge.

Howard L. Dimmig, II, Public Defender, and Gary R. Gossett, Jr., Special Assistant Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Cerese Crawford Taylor, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed.

NORTHCUTT, SLEET, and ATKINSON, JJ., Concur.

IN THE CIRCUIT COURT IN AND FOR MANATEE COUNTY, FLORIDA
IN THE YEAR OF OUR LORD TWO THOUSAND SIXTEEN

STATE OF FLORIDA

vs. CASE NO. **2014CF002214AX**

NICOLE M MOORE
_____/

AMENDED
INFORMATION FOR:
1) DRIVING WHILE UNDER THE INFLUENCE - MANSLAUGHTER
316.193(3)(c)(3)(a) (2 F)

2) LEAVING SCENE OF CRASH WITH DEATH
316.027(1)(b) (1 F)

3) DRIVING WITH NO VALID DRIVER'S LICENSE AND CAUSING SERIOUS BODILY INJURY OR DEATH 322.34(6)(a) (3 F)

In the Name and by Authority of the State of Florida:

ED BRODSKY, State Attorney of the Twelfth Judicial Circuit of the State of Florida, by and through his undersigned Assistant State Attorney, prosecuting for the State of Florida in the Circuit Court in and for the County of Manatee, Florida, under oath information makes that

NICOLE M MOORE, ADDRESS: [redacted]
SARASOTA, FL 34243
RACE: W SEX: F DOB: [redacted] SSN: [redacted]
HGT: 501 WGT: 150 COLOR EYES/HAIR: GREEN/BLONDE

COUNT 1: late of the County and State aforesaid, on or about February 26, 2013, in the County and State aforesaid did unlawfully drive, or be in actual physical control of a vehicle while under the influence of alcoholic beverages, any chemical substance set forth in Section 877.111 or any substance controlled under Chapter 893 to the extent that her normal faculties were

impaired, or while having a blood or breath alcohol level of 0.08 percent or higher, and did by reason of such operation cause the death of a human being, to-wit: [redacted] having previously been convicted of Driving Under the Influence **within ten years** on June 25, 2007 in Gwinnett County, Georgia and on June 29, 2007 in Cobb County, Georgia, contrary to Section 316.193(3)(c)(3)(a)**and 316.193 (2)(b)(1)**, Florida Statutes, in such case made, and provided and against the peace and dignity of the State of Florida.

COUNT 2: late of the County and State aforesaid, on or about February 26, 2013, in the County and State aforesaid did while the driver of a vehicle involved in an crash resulting in the death of any person, to-wit: [redacted] did willfully fail to stop such vehicle at the scene of such crash or as close thereto as possible, **and willfully failed to remain at**, the scene of the crash, until she had fulfilled the requirements of Section 316.062, Florida Statutes, contrary to Section 316.027(1)(b), Florida Statutes, in such case made, and provided and against the peace and dignity of the State of Florida.

COUNT 3: late of the County and State aforesaid, on or about February 26, 2013, in the County and State aforesaid did operate a motor vehicle without having a valid driver's license and by his or her careless or negligent operation of said motor vehicle did cause serious bodily injury or death to another human being, to-wit: [redacted] contrary to Section 322.34(6)(a), Florida Statutes, in such case made, and provided and against the peace and dignity of the State of Florida.

STATE OF FLORIDA
COUNTY OF MANATEE

Personally appeared before me, ED BRODSKY, the undersigned State Attorney of the Twelfth Judicial Circuit of the State of Florida, in and for Manatee County, or his duly designated Assistant State Attorney, who being duly sworn, says the allegations in the foregoing information are based upon facts that have been sworn to as true, and which, if true, would constitute the offense there in charged, and that this information is filed in good faith in instituting this prosecution and that testimony was received under oath from a

material witness or witnesses.

ED BRODSKY, STATE ATTORNEY
TWELFTH JUDICIAL CIRCUIT

BY: Joanna Piscitello

JOANNA PISCITELLO
Florida Bar #: 0091592
Assistant State Attorney
P. O. Box 1000
Bradenton, FL 34206

The foregoing instrument was acknowledged before me this 4 day of **February, 2016** by JOANNA PISCITELLO who is personally known to me to be an Assistant State Attorney for the Twelfth Judicial Circuit and who did take an oath.

Kimberly Lenoci
(signature)

KIMBERLY LENOCI
Commission # EE 197863
Expires May 13, 2016
Bonded Thru Troy Fain Insurance

(printed name or stamp)
NOTARY PUBLIC, STATE OF FLORIDA

Agency No.: FHP2013F015010
Arrested: **06/23/2014**
SAO No.: 14CF005289AM
OBTS No.: **4131006993**
Booking No.: **2014006961**
Ret. Date: **02/08/2016 TRIAL PERIOD**
Habitual: NO
PRR: NO
10/20/LIFE: NO
CC: CPL BRUNNER, #1595

IN THE SUPERIOR COURT OF GWINNETT COUNTY, STATE OF GEORGIA

STATE OF GEORGIA CRIMINAL ACTION # **06-B-3138-4**

VERSUS JUNE TERM

NICOLE MARIE MOORE

Race: White
Gender: Female
DOB: [redacted]
S.S.: [redacted]
O.T.N.: 132266492

GEORGIA, GWINNETT COUNTY
THIS IS TO CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF [signature] AS THE SAME APPEARS OF RECORD IN GWINNETT COUNTY SUPERIOR COURT GIVEN UNDER MY OFFICIAL SIGNATURE AND SEAL OF THE COURT THIS 26th DAY OF May 2007
[signature]
DEPUTY CLERK SUPERIOR COURT, GWINNETT COUNTY, GEORGIA

FINAL DISPOSITION
NEGOTIATED PLEA
FELONY SENTENCE

FILED IN OFFICE
CLERK SUPERIOR COURT
GWINNETT COUNTY, GA
07 JUN 26 PM 12: 32
TOM LAWLER, CLERK

Count:	Charge:	Disposition of counts:
1	V.G.C.S.A: POSSESSION OF COCAINE (O.C.G.A. 16-13-30[a])	Felony. Guilty as charged.
2	DRIVING UNDER THE INFLUENCE OF ALCOHOL (O.C.G.A. 40-6-391)	Misdemeanor. Guilty as charged.

CONDITIONAL DISCHARGE: This sentence is imposed under the provisions of O.C.G.A. 16-13-2. The defendant has not previously been convicted of a any offense under the Controlled Substances Chapter of O.C.G.A. , and the defendant consenting hereto, this sentence is imposed under the provisions of (OCGA 16-13-2). No judgment of guilt is imposed in this sentence at this time and further proceedings are deferred. Upon violation of any condition of probation, the Court may enter an adjudication of guilt and proceed to sentence defendant to the maximum sentence provided by law. Upon fulfillment of the terms and conditions of probation, or upon release of the defendant by the Court prior to the termination of the period hereof, the defendant shall stand discharged of the above offense(s) charged and shall be completely exonerated of guilt. Let a copy of this Order be forwarded to the Probation System of Georgia and the Identification Division of the Federal Bureau of Investigation.

AGGREGATE SENTENCE: 2 YEARS SERVE 24 HOURS. The sentence for each count is itemized below.

CT 1: 2 YEAR(S) PROBATION TERM: It is further ordered that the defendant is hereby sentenced to a period of confinement for 2 year(s) following the period of confinement set out above. However, this period may be served on probation provided the defendant meets all terms and conditions of probation.

CT 2: 24 HOUR(S) PRISON TERM: DEFENDANT TO REPORT TO GWINNETT CO. DETENTION CENTER ON FRIDAY, JUNE 29, 2007 BY 6:00 PM. It is ordered that the defendant is hereby sentenced to confinement for a period of 24 hour(s) in the State penal system or other institution as the Court or the Commissioner of the Georgia Department of Corrections may direct, to be computed as provided by law. **11 MONTH(S) and 364 DAYS PROBATION TERM:** It is further ordered that the defendant is hereby sentenced to a period of confinement for 11 month(s) and 364 days following the period of confinement set out above. However, this period may be served on probation provided the defendant meets all terms and conditions of probation. **COUNT(S) 2 SHALL RUN CONCURRENT WITH THE SENTENCE IN CT 1.**

GENERAL PROBATION TERMS: It is ordered, and the defendant is hereby advised, that the defendant shall be subject to arrest for violation of any condition of probation herein imposed. If probation is revoked, the Court may order incarceration for the entire sentence or any portion thereof in the manner provided by law after deducting therefrom the time the defendant has served on probation. Probation revocation shall be compliant with OCGA 42-8-34.1 The defendant must comply with the following general conditions of probation: 1) Do not violate the criminal laws of any governmental unit. 2) Avoid injurious and vicious habits, especially alcoholic intoxication and narcotics and other dangerous drugs unless prescribed lawfully. 3) Avoid persons or places of disreputable or harmful character. 4) Report to the probation supervisor as directed and permit said supervisor to visit you at home or elsewhere. 5) Work faithfully at suitable employment insofar as may be possible. 6) Do not change your place of abode, move outside the jurisdiction of the Court, or leave Georgia without permission of the probation supervisor. 7) Support your legal dependents to the best of your ability. 8) Submit to evaluations and testing relating to rehabilitation and participate in and successfully complete rehabilitative programming as directed by the probation department. WARNING: The above noted conditions of probation are hereby incorporated into this sentence and may result in a violation of probation which could revoke to balance of your sentence pursuant to O.C.G.A. 42-8-34.1

SPECIAL PROBATION TERMS: The defendant is advised that a violation of any special condition of probation may subject the defendant to a revocation of probation and be required to serve up to the balance of the sentence in confinement. The following special conditions of probation are imposed:

$850 FINE: **($250.00 on Count 1 and $600.00 on Count 2)**The defendant must pay a fine in the amount of $850 as directed by the probation department; plus $50 or 10% of the fine, whichever is less, pursuant to OCGA 15-21-73 (Peace Officers Annuity); plus 10% of the fine pursuant to OCGA 15-21-93 (jail staffing); plus 5% of the fine pursuant to OCGA 15-21-131 (victims assistance); plus $50 if a felony sentence pursuant to OCGA 42-8-34(d)(1) (crime lab); plus 50% of the fine if a drug offense pursuant to OCGA 15-21-100 (drug abuse treatment); plus $25 if a DUI or misdemeanor marijuana offense pursuant to OCGA 42-8-34(d)(2) (crime lab); plus 10% of the fine if a DUI offense pursuant to OCGA 15-21-149 (brain, spinal injury); plus $25 or 10% of the fine, whichever is less, if a DUI offense pursuant to OCGA 15-21-112 (DUI victims); plus the lesser of $50 or 10% of the fine, plus 10% of the fine if the offense occurred after June 15, 2004, pursuant to OCGA 15-21-73 (indigent defense).

$32 SUPERVISION FEE: The defendant must pay a probation supervision fee of $32 per month.

MENTAL HEALTH/DRUG/ALCOHOL TREATMENT: The defendant must submit to mental health and/or drug/alcohol evaluation and/or treatment as directed by the Probation Department. The defendant must request and authorize unlimited disclosure of treatment information to the Probation Department and that periodic reports be made by Georgia Mental Health Services at any time upon request by the Probation Department.

HABEAS CORPUS NOTICE: Should the defendant seek to challenge this legal proceeding, a Petition for Habeas Corpus must be filed within four years from today's date.

SO ORDERED this 25 day of June, 2007.
Court reporter: GiGi Grubb
Retained counsel: Mr. Richard Otonicar

Honorable Michael C. Clark
Judge, Gwinnett Superior Court

Page 1 ASSIGNED TO JUDGE CLARK ACCUSATION 06B-3138-4

Prosecutor:
Daniel J. Porter

State of Georgia, Gwinnett Superior Court

State of Georgia
versus
Nicole Marie Moore

IMAGING
CD NO. 06GW102

Offense(s):
Count 1: V.G.C.S.A: POSSESSION OF COCAINE (O.C.G.A. 16-13-30[a])
Count 2: DRIVING UNDER THE influence OF ALCOHOL (O.C.G.A. 40-6-391)

We the jury find the defendant

Foreperson

This _____ day of _____, 200___.

The defendant herein waives a copy of indictment, list of witnesses, formal arraignment and pleads ___/___ guilty.

This 25 day of June, 2007.

Nicole Moore
Defendant

Attorney for the Defendant

Assistant District Attorney

FILED IN OFFICE
CLERK SUPERIOR COURT
GWINNETT COUNTY, GA
07 JUN 26 PM 12:32
TOM LAWLER, CLERK

Count 1

On behalf of the people of the State of Georgia, the undersigned, as prosecuting attorney for the county and State aforesaid, does hereby charge and accuse **Nicole Marie Moore** with the offense of **VIOLATION OF THE GEORGIA CONTROLLED SUBSTANCES ACT: POSSESSION OF COCAINE (O.C.G.A. 16-13-30[a])** in that the said accused, in the State of Georgia and County of Gwinnett, on the 22nd day of February, 2006, did then and there unlawfully possess cocaine, a Schedule II Controlled Substance, in violation of the Georgia Controlled Substances Act, contrary to the laws of said State, the peace, good order and dignity thereof.

GEORGIA, GWINNETT COUNTY
THIS IS TO CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE ACCUSATION AS THE SAME APPEARS OF RECORD IN GWINNETT COUNTY SUPERIOR COURT
GIVEN UNDER MY OFFICIAL SIGNATURE AND SEAL OF THE COURT THIS 26 DAY OF May 2014

DEPUTY CLERK SUPERIOR COURT, GWINNETT COUNTY, GEORGIA

Count 2

The undersigned, as prosecuting attorney does further charge and accuse **Nicole Marie Moore** with the offense of **DRIVING UNDER THE INFLUENCE OF ALCOHOL (O.C.G.A. 40-6-391)** for the said accused, in the State of Georgia and County of Gwinnett, on the 22nd day of February, 2006, did then and there unlawfully drive a moving vehicle while under the influence of alcohol to the extent that it was less safe for the said accused to drive, contrary to the laws of said State, the peace, good order and dignity thereof.

Assistant District Attorney, for:
Daniel J. Porter, District Attorney

(drafted: GRM proofed: PW)
(J:\MergerFiles\5054E.rtf)

FILED IN OFFICE
CLERK SUPERIOR COURT
GWINNETT COUNTY, GA
06 MAY 31 AM 11:16
TOM LAWLER, CLERK

remember that. Still, you're right, if you ask her the question and she says, I don't remember what my -- I don't remember what my answer was, he can show it to her and say, does this refresh your recollection, and if she says, no, that's it.

THE COURT: Right. And I agree with that. I agree with that. You can show it to her, and if she says no, you have to stop.

MR. PHILLIPS: And it's just argument later.

THE COURT: And then it's argument.

MR. PHILLIPS: Okay. Fair enough. I don't have a problem with that.

THE COURT: And I am familiar with this case, Mr. Snelling.

MR. SNELLING: Thank you, Judge.

MR. PHILLIPS: Your Honor, the State would also like to put on the record in the presence of the defendant that she does have a prior felony conviction. We have the certified conviction. And if she testifies, we do intend to ask, as we can, if she's been convicted of a felony and how many times.

MR. SNELLING: I have conferred with her with regard to that and she knows that they are going to ask that question.

THE COURT: And she knows how many times already so there's no --

MR. PHILLIPS: It will be one time.

THE COURT: One time. Okay.

THE DEFENDANT: It was 12 years ago.

MR. SNELLING: They are permitted by a Florida rule to ask any witness whether they have ever been convicted of a felony and you have to answer the question.

THE DEFENDANT: Yes, sir.

MR. SNELLING: There is a rule that says they can do it and we can do it.

THE COURT: All right. So is there anything else before we bring in our panel?

MR. SNELLING: No, ma'am. We're ready.

THE COURT: All right. And what we'll do is, so everybody understands what we're going to do, you're going to call her next, right?

MR. SNELLING: Yes. I'm going to put her right after. I've got two witnesses. I have Nicole Moore and Wayne Duer and we're done.

THE COURT: All right, fine. So what we'll do is we'll take Ms. Moore, we'll take a short break in between her direct and cross, maybe 10 minutes to give the jury a little bit of a break, we'll finish her and we'll go to lunch and then we'll come back and do your expert.

MR. SNELLING: After lunch?

THE COURT: Yes.

(THERE WAS A RECESS.)

THE COURT: All right. Is there anything that we need to address before we bring the jury in?

MR. PHILLIPS: No, Judge. The issue we brought up before lunch we're not going to attempt to cross-examine on that, just the prior felony as usual.

THE COURT: Okay. All right then. Is there anything else?

MR. SNELLING: No, ma'am, we're ready.

THE COURT: Let's bring the jury in.

THE BAILIFF: They are on their way out.

(THE FOLLOWING PROCEEDINGS ENSUED IN THE PRESENCE OF THE JURY.)

THE COURT: All right. Everyone, please be seated. Mr. Phillips.

CROSS-EXAMINATION

BY MR. PHILLIPS:

Q. Good afternoon, Ms. Moore.

A. Good afternoon, Mr. Phillips.

Q. Still doing all right?

A. Yes, sir.

Q. Have you ever been convicted of a felony?

A. Yes.

Q. How many times?

A. Once about 12 years ago.

Q. How about 2007?
A. No, sir, I had a child in 2007.
Q. Okay. So February 25, 2013 you were working at Lee Roy Selmon's?
A. Correct.
Q. On University?
A. Yes.
Q. Is that a yes?
A. Yes.
Q. Sorry, she can't take down --
A. Yes, sir.
Q. All right. And you said you had been working there for how long?
A. Couple years.
Q. And I believe you told defense attorney that you would drive to work typically?
A. Not typically. I said I arrived to work typically --
Q. Sometimes you would drive to work?
A. Under emergency situations.
Q. And you didn't have a valid driver's license even back then, did you?
A. Not on February 25, no, sir.
Q. No, even before that in those two years you were working at Lee Roy Selmon's?

Corporal Brunner thought about this case and he tells you what Corporal Brunner thought about this case. I ask you to just rely on actually what Corporal Brunner told you he thought about this case. He told you he didn't believe that Erica was being honest from the beginning and he sent it anyway. He told you it didn't change anything.

You heard testimony from Nicole Moore throughout this trial, and I'm not really at this point going to get into a whole lot of her testimony through closing, but you're ultimately the fact finder. You get to decide. What about Nicole Moore's testimony is credible, what was not, if any, that's completely up to you. The defendant became a witness in this case, so you get to consider her testimony just like you would any other witness. And some of the things you can take into consideration when evaluating her testimony, and the Judge will read this when she reads the jury instructions, 1, whether -- or the fact that she's previously been convicted of a felony. You can consider that when you're weighing her credibility and the credibility of her testimony to you today, or yesterday. 2, whether her testimony makes sense with the rest of the evidence that you heard in this case. And that's pretty much kind of where I'll focus as we go on.

But the third one, whether the witnesses were straightforward in answering the attorneys' questions. And I will kind of talk about that right now. Nicole Moore, when

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA

STATE OF FLORIDA

VS

CASE NO. 2014CF002214AX

NICOLE M MOORE

_____/

NOTICE OF POTENTIALLY INCORRECT TRIAL TESTIMONY

THE STATE OF FLORIDA, represented by Ed Brodsky, State Attorney for the Twelfth Judicial Circuit of the State of Florida files this NOTICE OF POTENTIALLY INCORRECT TRIAL TESTIMONY and in support thereof states the following:

1. Following a jury trial that took place on the dates of February 8, 2016 through February 12, 2016, the defendant was convicted of Driving Under the Influence Manslaughter, Leaving the Scene of a Crash with Death, and Driving with No Valid Driver's License and Causing Serious Bodily Injury or Death.

FILED FOR RECORD
2017 FEB -1 PM 4:30
CLERK OF THE CIRCUIT COURT
MANATEE CO. FLORIDA

2. The defendant testified on her own behalf at trial.

3. The State was in possession of a certified conviction from Gwinnett County Georgia that appeared to indicate that the defendant had been convicted of a felony in Gwinnett County Georgia in 2007 (See State's Exhibit 2).

4. The State, in good faith, inquired as to whether the defendant had been convicted of a felony, and the defendant testified that she had been convicted of a felony (See State's Exhibit 1, pp. 9-10, 86).

5. Subsequent investigation into the prior conviction has led the undersigned attorney to believe that, due to a previously unknown provision of Georgia law, the defendant was likely not adjudicated guilty of the felony charge in Gwinnett County Georgia.

I HEREBY CERTIFY that a true copy of the foregoing NOTICE OF POTENTIALLY INCORRECT TRIAL TESTIMONY has been furnished by EMAIL to JEFF QUISENBERRY this 31 day of January, 2017.

ED BRODSKY, STATE ATTORNEY
TWELFTH JUDICIAL CIRCUIT

By: _____

Justin Phillips
FL Bar #:0105472
ASSISTANT STATE ATTORNEY
P. O. Box 1000
Bradenton, FL 34206
(941) 747-3077 EXT. 6758

STATE OF FLORIDA

-VS-

NICOLE M. MOORE
Defendant

IN THE TWELFTH JUDICIAL CIRCUIT COURT, IN AND FOR MANATEE COUNTY

CASE NUMBER **2014 CF 2214**

DC NUMBER **S40701**

ORDER OF PROBATION

This cause coming before the Court to be heard, and you, the defendant, being now present before the court, and you having

☒ been found guilty by jury verdict of

Count I **DRIVING WHILE UNDER THE INFLUENCE - MANSLAUGHTER**
Count II **LEAVING SCENE OF CRASH WITH DEATH**

FILED FOR RECORD
2017 JAN 18 PM 4:15
CLERK OF CIRCUIT COURT
MANATEE CO FLORIDA

SECTION 1: JUDGMENT OF GUILT

☒ The court hereby adjudges you to be guilty of the above offense(s).

SECTION 3: INCARCERATION DURING PORTION OF SUPERVISION SENTENCE

It is hereby ordered and adjudged that you be:

AS TO COUNT I

☒ committed to the Department of Corrections
for a term of THIRTEEN (13) YEARS prison with ALL credit for TIME SERVED jail time, CONCURRENT WITH COUNT II, WITH FOUR (4) YEAR MINIMUM MANDATORY PURSUANT TO F.S. 316.193(3), followed by PROBATION for a period of FIFTEEN (15) YEARS, CONCURRENT WITH COUNT II, under the supervision of the Department of Corrections, subject to Florida law.

AS TO COUNT II

☒ committed to the Department of Corrections
for a term of THIRTEEN (13) YEARS prison with ALL credit for TIME SERVED jail time, CONCURRENT WITH COUNT I, WITH TWO (2) YEAR MINIMUM MANDATORY PURSUANT TO F.S. 316.027(1)(B), followed by PROBATION for a period of FIFTEEN (15) YEARS, CONCURRENT WITH COUNT I, under the supervision of the Department of Corrections, subject to Florida law.

IT IS FURTHER ORDERED that you shall comply with the following standard conditions of supervision as provided by Florida law:

(1) You will report to the probation officer as directed.

(2) You will pay the State of Florida the amount of $0.00 - WAIVED per month, as well as 4% surcharge, toward the cost of your supervision in accordance with s. 948.09, F.S., unless otherwise exempted in compliance with Florida Statutes.

(3) You will remain in a specified place. You will not change your residence or employment or leave the county of your residence without first procuring the consent of your officer.

(4) You will not possess, carry or own any firearm. You will not possess, carry, or own any weapon without first procuring the consent of your officer.

(5) You will live without violating any law. A conviction in a court of law is not necessary for such a violation of law to constitute a violation of your probation, community control, or any other form of court ordered supervision.

(6) You will not associate with any person engaged in any criminal activity.

(7) You will not use intoxicants to excess or possess any drugs or narcotics unless prescribed by a physician. Nor will you visit places where intoxicants, drugs or other dangerous substances are unlawfully sold, dispensed or used.

(8) You will work diligently at a lawful occupation, advise your employer of your probation status, and support any dependents to the best of your ability, as directed by your officer.

(9) You will promptly and truthfully answer all inquiries directed to you by the court or the officer, and allow your officer to visit in your home, at your employment site or elsewhere, and you will comply with all instructions your officer may give you.

(10) You will pay restitution, court costs, and/or fees in accordance with special conditions imposed or in accordance with the attached orders.

(11) You will submit to random testing as directed by your officer or the professional staff of the treatment center where you are receiving treatment to determine the presence or use of alcohol or controlled substances.

(12) You will submit a DNA sample, as directed by your officer, for DNA analysis as prescribed in ss. 943.325 and 948.014, F.S.

(13) You will submit to the taking of a digitized photograph by the department. This photograph may be displayed on the department's website while you are on supervision, unless exempt from disclosure due to requirements of s. 119.07, F.S.

(14) You will report in person within 72 hours of your release from incarceration to the probation office in Sarasota County, Florida, unless otherwise instructed by the court or department. (This condition applies only if section 3 on the previous page is checked.) Otherwise, you must report immediately to the probation office located at 399 6th Avenue, West, Bradenton, Florida 34208.

SPECIAL CONDITIONS

☒ 1. YOU WILL MAKE RESTITUTION TO THE FOLLOWING VICTIM(S), AS DIRECTED BY THE COURT, UNTIL THE OBLIGATION IS PAID IN FULL:

NAME: _____
TOTAL AMOUNT: $_____
ADDITIONAL INSTRUCTIONS ORDERED, INCLUDING SPECIFIC MONTHLY AMOUNT, BEGIN DATE, DUE DATE, OR JOINT & SEVERAL: COURT RESERVES JURISDICTION AS TO AMOUNT OF RESTITUTION.

☒ 2. PERMANENT LIFETIME DRIVER'S LICENSE SUSPENSION.

☒ 3. FOR FIRST TWO (2) YEARS OF PROBATION – ELECTRONIC MONITOR AT OWN EXPENSE.

☒ 4. NO ALCOHOL.

☒ 5. NO ILLEGAL SUBSTANCE OR DRUGS NOT PRESCRIBED.

☒ 6. VOLUNTEER EIGHT (8) HOURS EACH MONTH AS A MENTOR INVOLVING DRUGS OR ALCOHOL.

☒ 7. ATTEND AA MEETINGS THREE (3) TIMES PER WEEK.

☒ 8. COST OF SUPERVISION IS WAIVED.

☒ 9. CAN DO PUBLIC SERVICE WORK HOURS IN LIEU OF COURT COSTS AT $10.00 PER HOUR RATE.

(15) **Effective for offenders whose crime was committed on or after September 1, 2005**, there is hereby imposed, in addition to any other provision in this section, mandatory electronic monitoring as a condition of supervision for those who:

- Are placed on supervision for a violation of chapter 794, s. 800.04(4), (5), or (6), s. 827.071, or s. 847.0145 and the unlawful sexual activity involved a victim 15 years of age or younger and the offender is 18 years of age or older; or
- Are designated as a sexual predator pursuant to s. 775.21; or
- Has previously been convicted o f a violation of chapter 794, s. 800.04(4), (5), or (6), s. 827.071, or s. 847.0145 and the unlawful sexual activity involved a victim 15 years of age or younger and the offender is 18 years of age or older.

You are hereby placed on notice that should you violate your probation or community control, and the conditions set forth in s. 948.063(1) or (2) are satisfied, whether your probation or community control is revoked or not revoked, you shall be placed on electronic monitoring in accordance with F.S. 948.063.

(16) **Effective for offenders who are subject to supervision for a crime that was committed on or after May 26, 2010**, and who has been convicted at any time of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses listed in s. 943.0435(1)(a)1.a.(I), or a similar offense in another jurisdiction, against a victim who was under the age of 18 at the time of the offense; the following conditions are imposed in addition to all other conditions:

(a) A prohibition on visiting schools, child care facilities, parks, and playgrounds, without prior approval from the offender's supervising officer. The court may also designate additional locations to protect a victim. The prohibition ordered under this paragraph does not prohibit the offender from visiting a school, child care facility, park, or playground for the sole purpose of attending a religious service as defined in s. 775.0861 or picking up or dropping off the offender's children or grandchildren at a child care facility or school.

(b) A prohibition on distributing candy or other items to children on Halloween; wearing a Santa Claus costume, or other costume to appeal to children, on or preceding Christmas; wearing an Easter Bunny costume, or other costume to appeal to children, on or preceding Easter; entertaining at children's parties; or wearing a clown costume; without prior approval from the court.

(17) **Effective for offenders whose crime was committed on or after October 1, 2014,** and who is placed on probation or community control for a violation of chapter 794, s. 800.04, s. 827.071, s. 847.0135(5), or s. 847.0145, in addition to all other conditions imposed, is prohibited from viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material unless otherwise indicated in the treatment plan provided by a qualified practitioner in the sexual offender treatment program. Visual or auditory material includes, but is not limited to, telephone, electronic media, computer programs, and computer services.

YOU ARE HEREBY PLACED ON NOTICE that the court may at any time rescind or modify any of the conditions of your probation, or may extend the period of probation as authorized by law, or may discharge you from further supervision. If you violate any of the conditions of your probation, you may be arrested and the court may revoke your probation, adjudicate you guilty if adjudication of guilt was withheld, and impose any sentence that it might have imposed before placing you on probation or require you to serve the balance of the sentence.

IT IS FURTHER ORDERED that when you have been instructed as to the conditions of probation, you shall be released from custody if you are in custody, and if you are at liberty on bond, the sureties thereon shall stand discharged from liability. (This paragraph applies only if section 1 or section 2 is checked.)

IT IS FURTHER ORDERED that you pay:

FINES

☒ **$10,000.00** **Total of fines assessed** in sentence, pursuant to s. 775.083 (1)(a) through (g) or Chapter 316, F.S.
☒ **$ 500.00** **Statutorily mandated 5% surcharge/cost if fine** assessed (on first line) pursuant to s. 938.04, F.S.

MANDATORY COSTS IN ALL CASES

☒ **$ 556.00** **Additional court cost for felony DUI offense**, pursuant to s. 938.05(1)(a), F.S.
☒ **$ 100.00** **Prosecution Costs**, pursuant to s. 938.27, F.S. (Minimum of $100 Felony/$50 Misdemeanor)
☒ **$ 200.00** **Investigative Costs**, pursuant to s. 938.27, F.S. (if applicable and requested) **FLORIDA HIGHWAY PATROL**
☒ **$ 25.00** **Court Processing Fee** pursuant to Florida Statute 28.24(26)(c) effective 8/11/09

MANDATORY COURT COSTS FOR COURT-APPOINTED COUNSEL CASES

☒ **$ 50.00** **Public Defender Indigency Fee**, if not previously collected, pursuant to ss. 27.52 and s. 938.29, F.S.

MANDATORY COSTS IN SPECIFIC TYPES OF CASES

☒ **$ 3.00** **State Agency Law Enforcement Radio System Trust Fund**, pursuant to s. 318.18(17), F.S. for any violations of offenses listed in s. 318.17 including ss. 316.1935, 316.027, 316.061, 877.111, chapter 893, ss. 316.193, 316.192, 316.067, 316.072(3), 316.545(1), or any other offense in chapter 316 which is classified as a criminal violation.
☒ **$ 30.00** **State Court Facilities Fund**
☒ **$ 30.00** **State Court Facilities Fund**

COURT COSTS, FEES, AND FINES, AS IMPOSED AT SENTENCING, IN THE TOTAL AMOUNT OF: $11,494.00.

Payments processed through the Department of Corrections will be assessed a 4% surcharge pursuant to s. 945.31, F.S.

Pursuant to s. 948.09, F.S., you will be assessed an amount of $2.00 per month for each month of supervision for the Training Trust Fund Surcharge.

☒ Impound Fee in the amount of $50.00 Waived.

IN ADDITION TO MONIES LISTED ABOVE, ALL MANDATORY ASSESSMENTS APPLY. REFER TO WWW.MANATEECLERK.COM FOR TOTAL AMOUNT DUE.

SPECIFIC INSTRUCTIONS FOR PAYMENT:
PAY AS A CONDITION OF PROBATION.

IT IS FURTHER ORDERED that the clerk of this court file this order in the clerk's office and provide certified copies of same to the officer for use in compliance with the requirements of law.

DONE AND ORDERED, on JANUARY 5, 2017.

SUSAN B. MAULUCI, Circuit Judge

I acknowledge receipt of a copy of this order and that the conditions have been explained to me and I agree to abide by them.

Date: _____

_____
Defendant

Instructed by: _____
Supervising Officer

/pjg

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR MANATEE COUNTY
FELONY DIVISION

STATE OF FLORIDA,
Plaintiff,

CASE NO.: 2014-CF-002214 AX

vs.

DIVISION: III

NICOLE M. MOORE,
Defendant.
_____/

NOTICE OF APPEAL

COMES NOW, the Defendant, NICOLE M. MOORE, by and through his undersigned attorney and hereby takes and enters this Appeal to the Second District Court of Appeals to review the Trial, Pretrial and Post Trial, Sentencing Hearing and Sentence rendered by the Circuit Court of Manatee County entered in this action on the 5th day of January, 2017.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; Office of the State Attorney, 1112 Manatee Avenue West, Bradenton Florida 34206; Office of the Public Defender, 1051 Manatee Avenue West, Bradenton Florida 34205; on this 24th day of January, 2017.

Respectfully submitted,

/s/: Jeff R. Quisenberry
Frank G. Fernandez, Esquire
Florida Bar Number: 0076740
Jeff R. Quisenberry, Esquire
Florida Bar Number: 0805262
Post Office Box 22644
Tampa, Florida 33622
(813) 489-3222
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Attorney for Defendant.

Original Filed 4-2-18

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

NICOLE M. MOORE

Appellant/ Defendant

v.

Appellate Case No.: 2D17- 317
Lower Court Case No.: 2014-CF-2214AX

STATE OF FLORIDA,

Appellee/ Plaintiff

_____/

APPELLANT'S INITIAL BRIEF

ON APPEAL FROM A FINAL JUDGMENT OF THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT, IN AND FOR, MANATEE COUNTY, FLORIDA

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TABLE OF CITATIONS

INTRODUCTION

This is an appeal from a final judgment and sentence of guilt entered in the Circuit Court of the Twelfth Judicial Circuit in and for Manatee County, Florida. The Honorable Susan B. Maulucci, Circuit Judge, presiding. Citations to the contents of the documents in the record shall be cited as (R-), including the appropriate page number at the bottom of each page. The pages from the transcript that are cited shall be indicated as (T-) including the appropriate page number found at the right corner of each transcript page.

The Appellant shall be referred to as the Defendant, Appellant, Nicole Moore, or Ms. Moore. Appellee shall be referred to as the State of Florida, State, or Appellee.

STATEMENT OF THE CASE

The Defendant Nicole M. Moore was investigated by the Florida Highway Patrol on or about February 26, 2013. (R-234). The State filed its information charging the Defendant with DUI- Manslaughter, Leaving the Scene of a Crash with Death, and Driving with No Valid Driver's License while Causing Serious Bodily Injury or Death on June 19, 2014. (R-1-3). After the Defendant's arrest the lower Court Magistrate determined that there was probable cause to find that the Defendant committed the crimes charged at a hearing conducted on June 24, 2014. (R-12).

The Defendant entered a plea of not guilty on July 30, 2014. (R-17). Ms. Moore filed a motion to severe the charges for trial on December 22, 2015. (T-41). Further, she filed a motion in limine on December 23, 2015. (R-49). On February 2, 2016 the lower Court conducted a hearing on the Defendant's motions in limine and to sever. (R-454). The trial Court denied these motions on February 2, 2016. (lower case abstract).

The jury trial below was conducted from February 8, 2016 to February 12, 2016. (T-1-916). The Jury found the Defendant guilty of all three crimes charged. (R-194-195, 247). Ms. Moore filed motions for new trial and to arrest judgment on February 22, 2016. (R- 201-206). The State filed written responses to these motions. (R-218-233). A hearing was conducted on the defense motions on March 24, 2016. (R-247, 631-716). The motions were both denied in a written order filed on July 14, 2016. (R- 247-249).

On January 5, 2017 the Circuit Court adjudicated the Defendant guilty of Count I- DUI Manslaughter, Count II- Leaving the Scene of a Crash with Death and Count III- Driving with No Valid Driver's License. (R-287-296, 301-304). The Defendant was sentenced to 13 years Florida State Prison and to 15 years' probation on Count I. (R-287-296, 301-304). On Count II the same sentence was imposed concurrent to the sentence on Count I. (R-287-296, 301,483-612). Time served was given for the Count III conviction for the reduced charge of no valid driver's license.

See, Kelly v. State, 987 So.2d 1237 (Fla. 2DCA 2008). The Defendant filed a timely notice of appeal on January 25, 2017. (R-305). This timely appeal followed.

Pending appeal, the Defendant was released on supersedeas bond after a hearing was conducted on February 15, 2017. (R-437, 613). On March 19, 2018 the Appellant filed a Criminal Rule 3.800(b) 2 motion for relief below. This motion sought correction of the sentence imposed. The Circuit Court denied this motion in a written order filed on March 27, 2018.

STATEMENT OF THE FACTS

The subject collision occurred on February 26, 2013 at about 2:00 a.m. on State Road 610, also known as University Parkway. (R-234). The crash occurred in the westbound lanes of this roadway at about 1:50 a.m. (R-234-235, 324-325). The Florida Highway Patrol investigating Officer, Cpl. Brunner, testified that he arrived at the scene of the crash at about 2:50 a.m. (T-261). He found the vehicle that the Defendant was operating about 1800 feet from the scene. (T-270-279). Cpl. Brunner testified that the Decedent's scooter was imbedded in the Defendant's vehicle in an upright position. (T-270-279).

Further, the Corporal testified that he interviewed the Defendant at about 6:20 a.m. the same day. He stated that after receiving her Miranda warnings, the Defendant waived her rights and agreed to be interviewed. (T-295). He noticed a

slight odor of alcohol on her body. (T-295). Also, he stated that she spoke with a "little mumble". (T-296). No field sobriety tests were given to the Defendant. (T-322-324). Ms. Moore allegedly admitted to having been driving her vehicle at the time of the collision. Further, the Corporal testified that the Defendant stated that she did not have a Florida driver's license. (T-296).

Prior to the interview, at about 3:00 a.m., Ms. Moore's blood was drawn by EMT's with her consent. (T-326, 356-360). The FDLE forensics witness testified at trial that the Defendant's blood sample showed that, when drawn, her blood alcohol content was from .110 to .112. (T-465-466).

The Defendant testified on her own behalf at trial. She stated that the speed limit on the road she was traveling (University) was 50 mph and that she was traveling that speed. (T-614). She had begun slowing down. (T-614). Ms. Moore was almost to her point to turn. (T-615). This area is the darkest portion of University. (T-617). The Defendant was in the right lane nearing her right turn. She was operating her car behind Ms. Erica Guerrero's car. (T-618). Ms. Moore testified that all of a sudden Ms. Guerrero swerved, or jerked, her car from the right lane (in front of Moore) to the middle lane. (T-619). As soon as this happened, Ms. Moore saw an unlit vehicle in front of her. (T-619). The Defendant stated that she had no time to react. (T-620). She then hit a scooter. (T-621). Ms. Moore then stated that she drove her vehicle to a point that she could get off the main road for her safety. (T-622-623).

On cross examination Nicole Moore testified that she thought the scooter could have been parked in the roadway. (T-686-698). She stated that she just saw a dark motorcycle, not a person. (T-686-698). Ms. Moore testified that she did not know that another person was involved in the crash. (T-686-698).

On March 24, 2017 the Circuit Court conducted an evidentiary hearing on the Defendant's motions for new trial and for arrest of judgment. (R-631-716). At that hearing Mr. Thomas E. Robinson testified on behalf of the Defense. (R-642). He stated that he was a professional land surveyor in Florida for 50 years. (R-642-649). He stated that he performed a site survey of the crash site and surrounding area. (R-642-649). While performing this survey he located a Sarasota County line marker near the crash site. Further, he obtained and reviewed the jurisdiction drawing or map used by the local Manatee and Sarasota Counties Sheriffs Offices. (R-642-649). He testified that based upon his survey and the results thereof that he determined that the crash site and the entire westbound lane of University Parkway where the facts of the case occurred was, in fact, located inside Sarasota County, Florida. (R-642-649).

Corporal Brunner, FHP was called as a witness by the State. He testified that the computer system in his car indicated that the relevant part of the right westbound lane of University Parkway was in Manatee County. (R-660-662). Further, he said

that his computer system indicated that the left westbound lane of the same stretch of University was in Sarasota County. (R-660-662).

The Circuit Court denied the Defendant's motions for new trial and to arrest judgment. That Court summarized it's finding of the operative facts of the case in it's order dated July 14, 2016. (R-247-252). There the trial Court stated,

"...Facts...

On or about February 26, 2014, the defendant and some friends went to Linksters Tap Room located on Cooper Creek Boulevard in Manatee County. Defendant admitted to drinking alcohol at Linksters and at least one of the defendant's friends testified they saw her at the bar drinking. The defendant testified at trial that she did not think she was impaired when she decided to drive home from Linksters so, after spending some time in the bar, Defendant left Linksters, got into her car and headed for home; her friends, one whom the defendant followed that night, planned to join her there. On route to her apartment, the defendant who was driving behind her friend, struck and killed the victim, [redacted] as Ms. [redacted] was driving her small motorized scooter in the most northern lane of University Parkway. The defendant continued to drive away from the accident and toward her apartment, the Timberlake Apartments in Palm-Aire, located at the intersection of University Parkway and Whitfield Avenue. The defendant parked her car near her apartment complex and walked back to the scene of the accident; where she was later arrested.

The defense demanded discovery on July 30, 2014. The State provided discovery on August 18, 2014; successively thereafter supplemental discovery was provided to the defendant. The case was investigated, and depositions were taken. From the information received the defendant knew the location of the crash and was given information concerning the death of Ms. [redacted]

The trial in this cause commenced on February 8, 2016. At the close of the State's case, the Defendant moved for a judgment of acquittal arguing that the State did not prove the crimes charged and venue. Corporal Brunner testified as to venue, no other witnesses were called on that issue, and the court denied the defendant's motion for judgment of acquittal. During the trial, the defense venue argument was a general one and it was simply argued that the State failed to prove venue. The motion for judgment of acquittal was denied; the jury was charged and began deliberations. On February 12, 2016, the defendant was found guilty as charged on all three counts..." (R-248-249).

Almost a year after the trial below on February 1, 2017 the Prosecutor filed a notice with the Clerk below titled "Notice of Potentially Incorrect Trial Testimony". (R-311). This notice provided that the Prosecutor had introduced evidence at trial that the Defendant had been previously convicted of a felony in the State of Georgia. The Prosecutor continued to state that he had presented this evidence to the trial Jury through the Defendant's own testimony. (R-311-433). The notice stated that after

the trial the State determined that this evidence was likely false under provisions of Georgia law. (R-312). The Circuit Court took no action on the State's notice.

SUMMARY OF THE ARGUMENT

Issue I

The Circuit Court Committed Reversible Error in Allowing Improper Opinion Testimony to be Admitted into Evidence at Trial

At the trial conducted below, it became a facet of the State's case to attempt to prove the Defendant's guilt on all charges by proving the impairment of her normal faculties by alcohol consumption. In its zeal to prove its case, the State offered the improper opinion testimony of Cpl. Brunner, FHP and Ms. Lisa Montgomery, FDLE on the issue of impairment. This testimony lacked a proper foundation and was inadmissible under Daubert, and Martinez, infra. Further, it was prejudicial to the Defense. Reversible error occurred as a result of this opinion testimony.

Issue II

The Circuit Court Erred in Failing to Grant the Defendant's Motions for Judgment of Acquittal

The alleged criminal acts were not proved beyond a reasonable doubt to have been committed by the Defendant. Further, in the case at bar there was insufficient proof to lawfully convict the Defendant of the crimes alleged. Venue was not sufficiently proved to sustain a conviction here. The Defendant's motions for judgment of acquittal were therefore denied in error by the Circuit Court.

Issue III

The Circuit Court Erred in Failing to Grant the Defendant's Motions for New Trial and Arrest of Judgment

As to the information filed, the crime was alleged to have occurred in Manatee County. (R-1-3). The Defendant challenged this fact by arguing that the operative facts of the crash actually occurred in Sarasota County. (R-196-206). The Circuit Court denied the Defendant's post-trial motions in a written order. (R-247). The Defendant's motions should have been granted based upon the law asserted above, and the facts established at the hearing conducted thereon.

Venue must be accurately pled in an information. See, Fla. R. Civ. Pro. Rules 3.140 and 3.610; Fla. Const. Art. I, §16. Venue must also be proved at trial. See, Tucker and McClellion, infra. Here, neither requirement of law was accomplished by the State.

Issue IV

Fundamental Error Resulted Below Where the Prosecutor Presented Mistakenly False Evidence of the Defendant Receiving a Prior Felony Conviction

On February 1, 2017, almost a full year after the trial below, the Prosecutor filed a notice with the Court below titled "Notice of Potentially Incorrect Trial Testimony". (R-311). This notice provided that the Prosecutor had mistakenly introduced evidence at trial that the Defendant had been previously convicted of a felony in the State of Georgia. The Prosecutor continued to state that he had

presented this evidence to the trial Jury through the Defendant's own testimony. (R-311-433). The presentation of such prejudicial and false information at trial and at sentencing by the Prosecutor on a key issue constituted fundamental error. This evidence vitiated the fairness of the entire trial and the sentencing proceeding. See, Harrington, Hannum, and Johnson, infra.

ARGUMENT

Issue I

The Circuit Court Committed Reversible Error in Allowing Improper Opinion Testimony to be Admitted into Evidence at Trial

At the trial conducted below, it became a facet of the State's case to attempt to prove the Defendant's guilt by proving the impairment of her normal faculties by alcohol consumption and the causation of the deadly collision thereby. (T-164-168). In its zeal to prove its case, the State offered the inadmissible opinion testimony of Cpl. Brunner, FHP and Ms. Lisa Montgomery, FDLE on the issue of impairment and the effects of alcohol on Ms. Moore. This opinion testimony was therefore offered by the State to prove directly causation and guilt. This opinion testimony was offered on the ultimate issue of guilt and also lacked a proper foundation under Daubert and Martinez v. State, 761 So.2d 1074, 1079 (Fla. 2000). statute. It and was therefore inadmissible. See, Conner v. State, 2D05-4123 (Fla. 2DCA 2007). The improper opinion testimony was very prejudicial to the Defense below.

Generally, the standard for review in regard to evidentiary rulings of the trial court is the abuse of discretion standard. See, K.V. v. State, 832 So.2d 264 (Fla. 4DCA 2002). However, in reviewing trial court rulings involving questions of law, the de novo standard of review applies. See, K.V., supra. For instance, the question of whether a particular statement constitutes hearsay is a question of law. See, K.V., supra. The evidentiary rulings challenged here raise issues of law, therefore, the de novo standard of review applies here. If this Honorable Court should deem that the abuse of discretion standard applies, then such discretion is limited by the rules of evidence. See, Conner, supra.

In Conner this Honorable Court held that,

"... Conner was charged in a two-count information with DUI manslaughter in violation of section 316.193(3), Florida Statutes (2003), and vehicular homicide in violation of section 782.071(1)(a), Florida Statutes (2003), as a result of an accident involving his car and a bicycle. At trial, it was disputed as to exactly where the contact between the car and the bicycle occurred. The State argued that the impact occurred in the bicycle lane; the defense argued that the bicycle swerved out of the bicycle lane and into the traffic lane. The first issue—the improperly admitted opinion on the disputed issue of causation arose when state witness Deputy Hyder answered, "Yes, ma'am" when asked the following question on direct: "And is it your opinion that [Conner's] impairment contributed to the crash and to the death of [the victim] in this case?" The court overruled defense's objection that the question called for a legal conclusion. This was error for two interrelated reasons.

First, in the context of this DUI manslaughter and vehicular homicide trial, as phrased, this question necessarily called for an opinion that Conner was guilty of negligently or recklessly operating his motor vehicle, and not just that he was impaired and contributed to the accident and death of the victim. Asking for an opinion that a defendant is guilty of each element of a crime charged equates to an opinion of guilty of the crime itself...Second, an examination of the above statutes also reveals that the unqualified compound question posed to Deputy Hyder not only

called for an improper opinion but also indiscriminately mixed the elements of the two crimes charged..."

Here, Corporal Brunner was asked by the Prosecutor if he knew of anything other than the field sobriety tests (that were not conducted) that showed that the, "the defendant was impaired that night?". (T-345, lines 9-10). The Trooper answered partially, stating no reaction time and the defendant pushing the other vehicle a distance "is usually a sign of impairment. –the movement". (T-345, lines 11-15). The Defense Counsel objected. The State offered its justification for the question stating that, "he's the witness who can testify as to his observation.". (T- 345, lines 11-21). The Court overruled the objection. (T-345). The witness continued with his opinion answers on this line of questioning. (T-345-346).

This testimony was offered without a proper Daubert foundation for the opinions contained therein. These opinions were admitted in error. The Corporal's prior testimony was that he arrived at the vicinity of the crash about an hour after the fatality. (T-257). So, he made no observations of the Defendant's actions prior to, or during the collision, as the State perhaps was suggesting. This opinion testimony was most prejudicial to the Defense on the issue of her impairment. It was also mere speculation without a proper evidentiary foundation for its admission into evidence. Such testimony did not meet the requirements of the Daubert test. See, Daubert v. Merrell Dow Pharms., Inc, 509 U.S. 579 (1993); Andrews v. State, 181 So.3d 526 (Fla. 5DCA 2015). In Giamio v. Fla. Autosport, Inc.,154 So.3d 385 (Fla. 1DCA

2014) the Court explained this test as being, "...If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;
(2) The testimony is the product of reliable principles and methods; and
(3) The witness has applied the principles and methods reliably to the facts of the case..."

Further, in this vein of proof, the State offered the improper opinion testimony of Ms. Lisa Montgomery, a forensics technician with the Florida Department of Law Enforcement. (T-407, 419, 453, 501). Ms. Montgomery possessed a bachelor's degree in chemistry. (T-468). She also has a blood alcohol toxicology certification since February, 2012. (T-469).

At trial the following occurred during Ms. Montgomery's testimony,

"...Q: What's the legal limit for blood alcohol in Florida?

A: 0.08 grams per 100 milliliters of blood."

Q: Are defendants – defendants' blood measured by the same blood ratio as that?
A: Yes.

Q: Are those result above that .08 limit?

A: Yes. It's 1.5 times higher.

Q: **1.5 times higher? Okay. Based on your training and experience, what types of effects would you expect to see in a person with this high amount of alcohol –**

MR. SNELLING: **Your Honor, I don't believe she's been qualified to testify to that.**

THE COURT: **Sustained**

MR. PHILLIPS: Okay.

BY MR. PHILLIPS:

Q: **What effect does ethanol have on the human body?**

A: Alcohol or ethanol is a central nervous system depressant, which means it's going to slow down the functions of the body. It affects the brain by decreasing inhibitions, decreasing alertness and reducing coordination. The decreased inhibitions is going to impair a person's ability to make sound judgment, and it could increase risk taking behavior. The decreased alertness, which stems from the drowsiness effects of the drug is going to impair reaction time and cause someone to react more slowly. The decreased or reduced coordination is going to impair a person's ability to walk, stand, balance, and do many of the everyday duties that you – people do.

At this particular blood alcohol concentration, I would expect somebody to have impairment of divided attention task, or in other words, the ability to multitask. As one knows, multitasking is very critical when operating a motor vehicle, one needs to be able to steer at the very least, steer, maintain a lane of traffic, brake, watch out for pedestrians all at the same time…"

T-466, line 4 to T-467, line 13.

The State failed to establish a proper foundation for this opinion testimony by Ms. Montgomery. The Defense objected. (T-466). The Court stated that the objection was sustained. (T-466). Yet, inexplicably the challenged opinion testimony

continued until completed. Cleary, Ms. Montgomery was not a medical Doctor or a driving expert. She was not a competent witness to render the opinion testimony on the effects of alcohol on the human body and the requirements of driving a vehicle. See, Daubert, Conner, and Andrews, supra. Nor was there even any testimony that the physical characteristics of the Defendant were taken into consideration by the witness in forming her opinions if she had been a physician. Further, she was not a reconstruction expert. This testimony should not have been allowed by the trial Court under Daubert, Conner and Andrews, supra.

This improper opinion testimony was offered on the disputed and dispositive issue of causation. It was extremely prejudicial to the Defendant on this point. Florida law on evidence prohibits opinion testimony as to the guilt or innocence of the accused, as here. See, Martinez, supra.

The improper opinion testimony entered into evidence here was not harmless. It prejudiced the Defendant's case on the key point of causation and guilt or innocence. That is was impairment the cause of the crash and the death. This error constituted reversible error. See, Martinez, Conner and State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Further, it rose to the level of fundamental error vitiating the entire trial and depriving the Defendant of a Constitutional fair trial and Due Process of Law. See, Harrington v. Richter, 562 U.S. 86 (2011); Johnson v. State, 833 So. 2d 252 (Fla. 4DCA 2002). A new trial should be granted to correct this error.

Issue II

The Circuit Court Erred in Failing to Grant the Defendant's Motions for Judgment of Acquittal

The alleged criminal acts were not proved beyond a reasonable doubt to have been committed by the Defendant. Further, in the case at bar there was insufficient proof to lawfully convict the Defendant of the crimes alleged. The State's evidence did not prove all the elements of the crimes charged. Further, venue was not sufficiently proved to sustain a conviction here. The Defendant's motions for judgment of acquittal were therefore denied in error by the Circuit Court.

This Honorable Court reviews de novo the trial court's denial of a motion for judgment of acquittal. See, Delgado v. State, 71 So.3d 54, 65 (Fla. 2011). At trial, after the close of the State's evidence, the Defendant's Counsel made a lengthy and detailed motion for judgment of acquittal. (T-520-533). There the Defendant challenged the sufficiency of the State's evidence to prove each element of the crimes charged, as well as, venue. (T-520-533). This motion was denied by the Circuit Court. Again, after the close of all the evidence in the case, the Defendant renewed her motion for judgment of acquittal on the same grounds. (T-802). The lower Court denied this renewed motion as well. (T-802). The Appellant's post trial motion for new trial renewed the arguments made in her prior motions for judgment of acquittal. (R- 201-206). Likewise, this motion was denied by the Circuit Court. (R-247-249).

In her initial motion for judgment of acquittal the Defendant raised the issue that venue of the alleged criminal acts had not been sufficiently proven by the State. (T-520). Further, that with regard to the no valid drivers license charge, the State did not prove that the Defendant operated her vehicle in a careless or negligent manner causing the collision. (T-522-526). Defense Counsel continued to move the lower Court stating that on the DUI manslaughter charge there was no proof that the Appellant caused, or contributed to causing, the subject collision. (T-527). Additionally, that the State's evidence did not prove that the Defendants normal faculties were impaired, or that she possessed illegal blood alcohol at the time of the collision. (T-522-534).

On cross examination at trial Cpl. Brunner admitted that he determined that a contributing cause of the collision was the fact that the roadway conditions were very dark and that no streetlights, ambient, or business location lights were present to illuminate the collision area. (T-304-305). Below, the State failed to sufficiently prove a prima facia case that the Defendant was negligent, or that if so, her negligence or carelessness was a legal cause of the subject collision. Failure to present such proof requires an acquittal on the charge of DUI manslaughter. See, State v. Altamura, 676 So.2d 29 (Fla. 2DCA 1996).

The U.S. Supreme Court's ruling in the landmark case of In Re Winship, 397 U.S. 358 (1970) requires proof beyond a reasonable doubt of each

element of the crime charged for a conviction to be upheld under the U.S. Constitutions Due Process Clause. Sufficient proof was not entered into evidence at the trial below to prove the required elements of the crimes charged here. Our Florida Supreme Court enumerated this important rule of law in the case of Baugh v. State, 961 So.2d 198 (Fla. 2007) as well.

At trial, the State argued that Cpl. Brunner's testimony proved venue. (T-520-534). However, the Corporal's trial testimony was that he responded to a "scene" that was secured by Deputies. (T-257). Further, that the scenes location was in Manatee County. (T-257). Cpl. Brunner did not state that the exact location where the crime was committed was in Manatee County. (T-257). He stated that the secured scene was east of the I-75 and Whitfield Road intersection. (T-257). This is a very vague and ambiguous location description given the fact that such a "scene" could have been in either Manatee or Sarasota Counties. (T-642-649).

Post-trial on March 24, 2017 the Circuit Court conducted an evidentiary hearing on the Defendant's motions for new trial and for arrest of judgment. (R-631-716). At that hearing Mr. Thomas E. Robinson testified on behalf of the Defense. (R-642). He stated that he was a professional land surveyor in Florida for 50 years. (R-642-649). He stated that he performed a site survey of the crash site and surrounding area. (R-642-649). While performing this survey he located a Sarasota County line marker near the crash site. Further, he obtained and reviewed the jurisdiction

drawing or map used by the local Manatee and Sarasota Counties Sheriffs Offices. (R-642-649). He testified that based upon his survey and the results thereof that he determined that the crash site and the entire westbound lane of University Parkway where the facts of the case occurred was, in fact, located inside Sarasota County, Florida. (R-642-649).

Corporal Brunner, FHP was called as a witness by the State at the post-trial hearing as well. He testified on March 24, 2017 that the computer system in his car indicated that the relevant part of the right westbound lane of University Parkway was in Manatee County. (R-660-662). Further, he said that his computer system indicated that the left westbound lane of the same stretch of University was in Sarasota County. (R-660-662).

Here, the actual venue of the location of the alleged crimes were not legally proven. Cpl. Brunner was the investigating Florida Highway Patrol Officer. (T-322). He testified at trial that the subject scene was remarkable for the fact that the Decedent's body was there covered by a blanket. (T-258). Further, that a black scuff mark was also present. (T-259). He testified that no vehicles associated with the collision were found at this scene. (T-258). The location of the Decedent's body, or scene, was the "final resting place of the victim". (T-261).

Absent from Brunner's trial testimony was objective proof of the precise location and venue of exactly where the crimes occurred. This is vague and

ambiguous given the fact that the road involved weaves in and out of both Sarasota and Manatee County in the vicinity of the "scene". (R-642-662). To be sure, the Trooper testified that, in his opinion after performing a reconstruction, that the crash occurred 240 feet from the point that the Decedent's body was found. (T-264-265). No eyewitness or opinion testimony was offered that the location of the crash (and perhaps the alleged crimes) occurred in Manatee County. This is especially important given the Trooper's bare opinion admitted below that the "decedent had rode the car for a little bit..." after the impact. (T-265, lines 10-11, 267).

The Corporal also testified that the Defendant's vehicle was found about 1800 feet from the initial scene that he was at. (T-278-279). No testimony was offered about what county that this vehicle was located in when it was discovered. This fact was critical to determining venue given the close proximity of the Manatee-Sarasota county line. (T-642-649).

Section 910.03 Fla. Stat. applies to venue in criminal cases. See, State v. Kotecki, 82 So.3d 1150 (Fla. 2DCA 2012). That statute provides that,

" 910.03 Place of trial generally.—
(1) Except as provided in s. 910.035 or in subsection (2), criminal prosecutions shall be tried in the county where the offense was committed;.."

In the case of Collins v. State, 197 So.2d 574 (Fla.2DCA 1967) this Honorable Court pronounced the right of a defendant to be tried in the county where the crime was committed and held that,

"... A firmly-embedded principle of criminal jurisprudence is that a person accused of crime must, as a general rule, be tried in the community where the alleged crime took place; the community unit usually being the county. In Florida it is embedded in both the organic law and the statutes. §11, Bill of Rights, Florida Constitution, F.S.A., ordains that '(i)n all criminal prosecutions, the accused shall have the right to a * * * trial, by an impartial jury, in the county where the crime was committed * * *.' §910.03, Florida Statutes, F.S.A., provides that '(i)n all criminal prosecutions the trial shall be in the county where the offense was committed unless otherwise provided by law.' As stated by the 1st District Court in Rhoden v. State, Fla.App.1965, 179 So.2d 606: §11, Declaration of Rights, does not afford any change of venue, nor does the constitution elsewhere provide for such change and therefore a statute authorizing a deviation from the constitutional guarantee should be strictly construed and the constitutional right set forth in § 11, Declaration of Rights, jealously guarded. Nothing should be left to presumption.' See, O'Berry v. State, 1904, 47 Fla. 75, 36 So. 440...".

The current Florida Constitution provides in relevant part of Article I that,

"SECTION 16. Rights of accused and of victims. —

(a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and **public trial by impartial jury in the county where the crime was committed."** (emphasis added).

In the legally similar case of McClellion v. State, 858 So.2d 379 (Fla. 4DCA 2003) the Court held that,

"...The problem in this case, however, is one of proof. As our supreme court observed in dicta in Tucker v. State, 459 So.2d 306, 308 (Fla.1984):
Had Tucker been able to show that the crime of which he was convicted was not committed in Dade County, or that the prosecution had not presented sufficient proof that the crime occurred in the county where the trial was held, the conviction clearly could not stand..." at pg. 381. The Tucker case cited by the McClellion Court discussed venue rights protected under our Florida Constitution. Further, that Court cited to the case of Woodward v. Petteway, 168 So. 806 (Fla.1935).

Here, the fundamental Constitutional and legal rights of Ms. Moore to be tried in the county where the alleged crimes were committed and that sufficient proof of venue be presented were clearly violated by the State and the trial Court below. Proper venue was not afforded, or sufficiently proved at trial. See, Tucker, Woodward, and McClellion, supra. This Honorable Court held in its dicta in the case of State v. Katz, 417 So. 2d 716 (Fla. 2DCA 1982) that venue must be proved in a criminal case. In Katz this Court relied on the authority of Mounier v. State, 178 So. 2d 714 (Fla. 1965) for this pronouncement of the law on the issue of venue. See also, Collins v. State, 197 So.2d 574 (Fla. 2DCA 1967).

The facts and evidence presented in the case at bar here are on all fours with the authority cited above. In this case, Justice requires that an acquittal be granted by this Honorable Court to the Defendant/ Appellant to fulfill the requirements of our Florida and United States Constitutions Due Process Clauses. See, In re: Winship, Baugh, supra; Ticknor v. State, 595 So.2d 109 (Fla. 2DCA 1992). Additionally, the Court's error here rose to the level of fundamental error. See, Johnson v.State, 833 So. 2d 252 (Fla. 4DCA 2002).

In all Justice, this Honorable Court should reverse the Defendant's conviction entered below and acquit the Defendant of all charges that she was convicted on.

Issue III

The Circuit Court Erred in Failing to Grant the Defendant's Motions for New Trial and Arrest of Judgment

The Defendant/ Appellant filed her post-trial motions for new trial and arrest of judgment below on February 22, 2016. (R- 196-206). The State filed a written response to these motions. (R-218-233). A hearing was conducted on the defense motions on March 24, 2016. (R-247, T-631-716).

The Defendant argued in her motions that the State's sole trial testimony on venue was from Cpl. Brunner. This testimony was discussed above in the Appellant's first issue on appeal. Further, as to the information filed, the crime was alleged to have occurred in Manatee County. (R-1-3). Additionally, that the operative facts of the crash actually occurred in Sarasota County. (R-196-206, 642-649). The Circuit Court denied the Defendant's post-trial motions in a written order. (R-247). The Defendant's motions should have been granted based upon the law asserted above and the facts established at the hearing conducted by the trial Court.

An issue of law raised in a motion for new trial or for arrest of judgment is reviewed with the de novo standard of review. See, Ferebee v. State, 967 So.2d 1071 (Fla. 2DCA 2007); Carswell v. State, 947 So.2d 692 (Fla. 4DCA 2007). A motion for new trial challenges the weight of the evidence. See, Ferebee, supra. Motions for arrest of judgment in a criminal case challenge "defects apparent on the face of the indictment or information". See, Pittman v. State, 370 So.2d 1207 (Fla. 1DCA 1979).

Venue must be accurately pled in an information. See, Fla. R. Crim. Pro. Rules 3.140 and 3.610; Fla. Const. Art. I, §16.Venue must also be proved at trial. See, Tucker and McClellion, supra. Here, neither requirement of law was accomplished by the State. All requirements of law must be proved for a conviction to result. See, In Re: Winship, supra. This failure was in violation of the Defendant's Constitutional protections regarding Venue and Due Process of Law. See, Fla. Const. Art. I, §16. An acquittal should be granted to correct this Constitutional violation.

The Defendant's motions challenged the State's failure to adequately charge, plead, and prove venue below. (R-196-206). Under the defective information tried, incorrectly alleging the wrong venue of Manatee County, Ms. Moore could not have been convicted. Judgment therefore must be arrested. See, Fla. Const. Art. I, §16; Tucker and McClellion, supra; Fla. R. Crim. Pro. 3.610. Additionally, the Court's error here rose to the level of fundamental error. See, Johnson v.State, 833 So. 2d 252 (Fla. 4DCA 2002).

Issue IV

Fundamental Error Resulted Below Where the Prosecutor Presented Mistakenly False Evidence of the Defendant Receiving a Prior Felony Conviction

On February 1, 2017, almost a full year after the trial below, the Prosecutor filed a notice with the Court below titled "Notice of Potentially Incorrect Trial Testimony". (R-311). This notice provided that the Prosecutor had mistakenly

introduced evidence at trial that the Defendant had been previously convicted of a felony in the State of Georgia. The Prosecutor continued to state that he had presented this evidence to the trial Jury through the Defendant's own testimony. (R-311-433). The notice stated that after the trial was completed the State determined that this evidence was likely false due to provisions of Georgia law. (R-312). Inexplicably, this notice was not presented to the Circuit Court by the State at Sentencing, which was conducted on January 5, 2017. (R-287, 301).

Although this issue was not heard or addressed by the Court below before this appeal, prosecutorial misconduct must be raised on direct appeal. See, Henry v. State, 933 So.2d 28 (Fla. 2DCA 2006). Further, prosecutorial misconduct need not be intentional for relief to be granted to the Defendant. See, Rodriguez v. State, 622 So.2d 1084 (Fla. 4DCA 1993). Such misconduct can be committed by negligence. See, State v. Iglesias, 374 So.2d 1060 (Fla. 3DCA 1979). The judicial remedy for prosecutorial misconduct in many cases is the entry of an acquittal. See, State v. Montgomery, 467 So.2d 387 (Fla. 3DCA 1985).

The presentation of such prejudicial and false information at trial and at sentencing by the Prosecutor constituted fundamental error. See, Hannum v. State, 13 So.3d 132 (Fla. 2DCA 2009). This evidence vitiated the fairness of the entire trial and sentencing proceeding. See, Harrington and Johnson, supra. Further, such prejudicial false evidence submitted and argued to the Jury, and the Court at

sentencing, deprived the Defendant of her Florida and Federal Due Process rights, as well as, her right to have a fair trial under the Fourteenth Amendment to the United States Constitution and under the Florida Constitution. See, Dye v. Hofbauer, 546 U.S. 1 (2005). See also, Donnelly v. DeChristoforo, 416 U.S. 637 (1974); Berger v. United States, 295 U.S. 78 (1935); United States v. Valentine, 820 F.2d 565 (CA2 1987); United States v. Burse, 531 F.2d 1151 (CA2 1976). Further, this error was not harmless.

When notified of this error through the filing of the State's notice, the Circuit Court failed to remedy, or correct, the error presented by granting the Defendant an acquittal, or a new trial. On March 19, 2018 the Defendant filed a Criminal Rule 3.800 (b) 2 motion for relief with the Court below. This motion sought to correct the Defendant's sentence. The motion was filed pending appeal. After review, the Circuit Court denied this motion with a written order filed below on March 27, 2018. Although in its order the Circuit Court even stated, "...The Court notes the unique situation here, in which the State disclosed the error after sentencing...".

The Circuit Court could not lawfully convict or sentence the Defendant in the criminal case without protecting and affording the Defendant her guaranteed Due Process Rights and a fair trial. The Prosecutorial mistake deprived the Defendant of these Constitutional protections. Yet here, no remedy has been afforded by the Courts.

The Circuit Court's failure to remedy this egregious error constituted fundamental error in its own right, and further deprived the Defendant of her Constitutional rights. See, Dye, supra. This Honorable Court should correct the lower Court's error on this issue by reversing the Defendant's conviction and remanding this case below for a new trial to be conducted and for a new sentencing proceeding, if required. See, Hannum, supra.

CONCLUSION

This Honorable Court should in all Justice reverse the Appellant's conviction and sentence below and enter an acquittal herein based upon the facts and authority argued above. In the alternative, a new trial should be granted to the Appellant.

CERTIFICATE OF FONT COMPLIANCE

I FURTHER CERTIFY that this petition has been prepared in Times New Roman 14-point font pursuant to Fla. R. App. P. 9.210(a)(2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Florida E-Filing Portal to: ATTORNEY GENERAL, at CrimappTPA@myfloridalegal.com; this 2nd day of April, 2018.

Respectfully submitted,

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17-0317

NICOLE M. MOORE
vs
STATE OF FLORIDA

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SECOND DISTRICT COURT OF APPEAL CASE NO. 2D17-317

NICOLE M. MOORE,

APPELLANT/DEFENDANT,

V.

STATE OF FLORIDA,

APPELLEE/PLAINTIFF,

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1. Appellant's Initial Brief.

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SECOND DISTRICT COURT OF APPEAL CASE NO. 2D17-317

NICOLE M. MOORE,

APPELLANT/DEFENDANT,

V.

STATE OF FLORIDA,

APPELLEE/PLAINTIFF,

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1. Appellant's Initial Brief.

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DCA Case No: 17-0317
Case Name : NICOLE M. MOORE v STATE OF FLORIDA
LT Case No : 2014-CF-2214