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COURT OF CRIMINAL APPEALS
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No. PD-1299-18
In the
Texas Court of Criminal Appeals
At Austin

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COURT OF CRIMINAL APPEALS
12/28/2018
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No. 14-17-00005-CR
In the
Court of Appeals for the
Fourteenth District of Texas
At Houston

No. 2112570
In County Criminal Court at Law No. 8
Of Harris County, Texas

LESLEY DIAMOND
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 68.4(d), the State requests oral argument because oral argument would assist this Court in determining whether the Fourteenth Court of Appeals (1) created a conflict in case law, and (2) failed to apply the standard of review correctly in its evaluation of the trial court's ruling on appellant's application for writ of habeas corpus.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 68.4(a), a complete list of the names of all interested parties is provided below.

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Trial & Habeas Judge:

Honorable Jay Karahan

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TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT OF THE CASE

Appellant was charged by information with driving while intoxicated. (CR – 31, CR Supp. 23)[1] The information included an allegation that appellant's blood-alcohol level was at or above 0.15. (CR Supp. 23) On May 1, 2014, appellant was convicted by a jury and sentenced by the trial court to five days in jail and a $2,000 fine. She did not appeal her conviction. (CR – 32) In September 2016, appellant filed an application for writ of habeas corpus alleging that the State failed to disclose favorable, material impeachment evidence regarding the blood analyst, in violation of her right to due process. (CR – 4) After an evidentiary hearing, the habeas court denied appellant's writ application. In a single issue on appeal, appellant argued that the habeas court erred in denying the writ application.

STATEMENT OF THE PROCEDURAL HISTORY

On May 3, 2018, a panel of the Fourteenth Court of Appeals affirmed the trial court's denial of appellant's writ application. *Diamond v. State*, No. 14-17-00005-CR, 2018 WL 2050392 (Tex. App.—Houston [14th Dist.] May 3, 2018), *opinion withdrawn and superseded by Diamond v. State*, No. 14-17-00005-CR, 2018 WL

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[1] "CR" refers to the clerk's record, which was filed in the court of appeals on January 11, 2017. "CR Supp.," "CR Supp. II," and "CR Supp. III" refer to the first, second, and third supplemental clerk's records, which were filed in the court of appeals on February 17, 2017, August 1, 2017, and June 14, 2018, respectively.

4326441 (Tex. App.—Houston [14th Dist.] Sept. 11, 2018) (op. on reh'g). On May 21, 2018, the trial court granted appellant's motion to enter a judgment nunc pro tunc, which changed the degree of appellant's offense from a Class B misdemeanor to a Class A misdemeanor. On May 29, 2018, appellant filed a motion for rehearing and the State responded on June 14, 2018.

On September 11, 2018, the Fourteenth Court's opinion was withdrawn and appellant's motion for rehearing was granted. On the same date, a majority of the panel published an opinion that reversed the trial court's denial of appellant's writ application, granted habeas relief, set aside the nunc pro tunc judgment of conviction, and remanded the case for further proceedings. *Diamond v. State*, No. 14-17-00005-CR, 2018 WL 4326441 (Tex. App.—Houston [14th Dist.] Sept. 11, 2018) (op. on reh'g), *opinion withdrawn and superseded by Diamond v. State*, No. 14-17-00005-CR, —S.W.3d—, 2018 WL 5261185 (Tex. App.—Houston [14th Dist.] Oct. 23, 2018, pet. filed) (substitute op.). A dissenting opinion was also published. *Id*. (Donovan, J., dissenting). On September 11, 2018, the State filed a motion for rehearing and appellant responded on September 26, 2018.

On October 23, 2018, the September 11 opinion was withdrawn and the State's motion for rehearing was denied. On the same date, a majority of the panel published a substitute opinion that again reversed the trial court's denial of appellant's writ application, granted habeas relief, set aside the nunc pro tunc

judgment of conviction, and remanded the case for further proceedings. *Diamond v. State*, No. 14-17-00005-CR, —S.W.3d—, 2018 WL 5261185 (Tex. App.—Houston [14th Dist.] Oct. 23, 2018, pet. filed) (substitute op.). A substitute dissenting opinion was also published. *Id.* (Donovan, J., substitute dissenting op.). A subsequent motion for rehearing was not filed.

QUESTIONS PRESENTED FOR REVIEW

1) Did the court of appeals erroneously address an argument that appellant did not present in her application for writ of habeas corpus?

2) Did the court of appeals fail to apply to the standard of review correctly in conducting its *Brady* analysis?

I. Reasons for granting review

This Court should grant review of the court of appeals' decision because (1) the majority has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision power, (2) disagreement exists among the justices of the court of appeals regarding the proper application of the standard of review, and (3) the court of appeals' decision conflicts with other appellate court decisions. TEX. R. APP. P. 66.3(a), (e), (f), 68.1.

ARGUMENT

I. Relevant Facts

A. Appellant's trial

Before trial, the State filed disclosures of experts, including Houston Forensic Science Center (HFSC) analyst Andrea Gooden and her supervisor, William Arnold. (CR Supp. 26-30) On April 28, 2014, appellant filed a motion for production of evidence favorable to the accused, which was granted by the trial court. (CR Supp. 31-33) The State made no disclosures. (RRV – 102-105, 128)

At trial, Precinct 5 Deputy Justin Bounds testified that he was conducting a traffic stop on a tollway when he saw appellant speeding in the lane closest to him and make several unsafe lane changes. (RRV – 143-49, 159-60) Bounds testified that appellant exhibited several signs of intoxication, she admitted to drinking three beers, and she had one open beer can with two closed beer cans in her vehicle. (RRV – 153-59, 254)

Deputy Francis assisted in Bounds' investigation. (RRV – 158-59) Bounds observed Francis administer the walk-and-turn and one-leg-stand tests to appellant.[2] (RRV – 239) Bounds saw appellant exhibit five clues on the walk-and-turn test, and four clues on the one-leg-stand test. (RRV – 250, 252) Appellant's blood was drawn pursuant to a search warrant. (RRV – 261-264, 395-96) Andrea Gooden analyzed

[2] Deputy Francis was prohibited from testifying as a result of a violation of Texas Rule of Evidence 614 ("the Rule"). (RRV – 185-86; AX 12-2 at 22-23)

the blood and testified that appellant's blood alcohol concentration (BAC) was 0.193 grams per 100 milliliters. (RRV – 454) Appellant was convicted on May 1, 2014, and she did not appeal her conviction. (CR Supp. 24)

B. Appellant's writ hearing

In September 2016, appellant filed an application for writ of habeas corpus alleging that the State suppressed favorable impeachment evidence in violation of her right to due process. (CR – 4-18) Specifically, she claimed that the State suppressed evidence that, prior to trial: (1) Gooden certified a lab report in an unrelated case with the incorrect defendant's name; and (2) Arnold removed her from her case work due to the erroneous report, concerns about Gooden's ability to testify, and concerns about her knowledge base. (CR – 10-16) Appellant argued the information would have resulted in an acquittal or a deadlocked jury. (CR – 16-17)

The trial court conducted a writ hearing in November 2016, during which Gooden, Arnold, the trial prosecutor, and general counsel for the Harris County District Attorney's Office testified. (*See* RRII) Exhibits at the hearing included the information and judgment, portions of the trial transcript, a report from the Texas Forensic Science Commission (TFSC Report), and a City of Houston Officer of Inspector General Report (OIG Report). (AX 1-2, 8, 9)[3]. The trial court denied appellant's writ application on December 5, 2016. (CR – 31, 48; RRIV – 5) In its

[3] "AX" refers to appellant's exhibits included with her writ application.

findings, the trial court summarized facts developed outside trial and at the writ hearing. (CR – 38-43) The relevant timeline was developed is as follows:

On October 5, 2013, a Houston Police Officer submitted a blood sample with the wrong incident number, but the correct name on the vial labels. (CR – 38) The officer was contacted multiple times by another analyst to provide a correct submission form. (CR – 38) On December 9, 2013, pursuant to lab practice for minor discrepancies, Gooden analyzed the blood evidence and set it aside. (CR – 38) On January 10, 2014, Gooden signed the certificate of analysis for the mislabeled blood. (CR – 38) Arnold reviewed and approved the erroneous report, which was released into the report system. (CR – 38)

On April 15, 2014, Gooden discovered that the erroneous report had been released and immediately informed supervisors about the error. (CR – 39) Arnold determined that no one had accessed the erroneous report. (CR – 39) On April 16, 2014, Arnold advised Gooden that she was being removed from case work in order to focus solely on documenting the issues surrounding the unrelated mislabeled blood case. (CR – 39, 42) Gooden testified on April 29-30 and Arnold observed her testimony on April 30. (RRV – 166, 454-57, 466-74)

In May 2014, Gooden spoke with Arnold about returning to case work and was told that her removal was due to her trial testimony. (CR – 39) On June 3, 2014, Gooden contacted the American Society of Crime Lab Directors (ASCLD) regarding

her removal from case work, her concern that the erroneous lab report had not been corrected, and the failure to notify the District Attorney's Office. (CR – 39) The following day, she reported the certification of the erroneous lab report to TFSC. (CR – 39) On June 26, 2014, Arnold provided Gooden with a written evaluation of her courtroom testimony from appellant's trial. (CR – 42) On July 28, 2014, Arnold informed Gooden that she was released to return to case work. (CR – 40)

Arnold issued a memo on August 4, 2014, regarding Gooden's return to case work. (CR – 43) In the memo, he stated that he began to question Gooden's knowledge base in early April, 2014, after he reviewed a PowerPoint presentation she prepared for a pending trial. (CR – 43) The memo stated that Arnold had the opportunity to review Gooden's analytical work after January 1, 2014, and that his technical reviews had not caused him any particular concern. (CR – 43) Arnold stated in the August 4 memo that the erroneous report certification coupled with his previous observations led to Gooden's "suspension from casework."[4] (CR – 43)

In a report issued in January, 2015, TFSC: (1) did not identify any professional conduct by Gooden, (2) found Arnold professionally negligent for failing to issue timely amended reports to the District Attorney's Office once Gooden identified the mistake in the report names in the unrelated case, (3) found Arnold and the HFSC Quality Manager professionally negligent for failing to issue a timely Corrective and

[4] Gooden acknowledged receipt of the memo but did not agree with all the contents. (CR – 43)

Preventative Report, (4) found that Arnold's August 4 memo contradicted representations made to the TFSC that the error in the blood alcohol report certification was independent from other reasons Gooden was removed from case work; (6) found that Arnold's representation that Gooden was removed from case work for concerns regarding testimony independent from the erroneous lab report case do not comport with the timeline of facts. (CR – 40-41) The trial court found that TFSC did not find that Gooden was professionally negligent. (CR – 42)

The habeas court found that appellant did not demonstrate that the undisclosed information was favorable or material. (CR – 44-47) The court also found that, had the State disclosed the information, the evidence would not have been relevant or admissible in appellant's trial. (CR – 45-46)

II. The majority erred by addressing an argument not raised in the habeas court.

Texas Courts of Appeals are not empowered to issue or grant writs of habeas corpus. TEX. CODE CRIM. PROC. art. 11.05; *see Greenville v. State*, 798 S.W.2d 361, 362 (Tex. App.—Beaumont 1990, no pet.). Therefore, in reviewing an order denying habeas relief, an intermediate court of appeals only reviews issues that were properly raised in the habeas petition and addressed by the trial court. *Ex parte Perez*, 536 S.W.3d 877, 881 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *Greenville*, 798 S.W.2d at 362-63 (stating that intermediate appellate court's jurisdiction is regarding writs of habeas corpus is strictly appellate and that to rule

upon issues raised to intermediate appellate court for the first time would place the court in the position of exercising original jurisdiction).

In her writ application, appellant stated that she was charged with Class B misdemeanor driving while intoxicated and that she was convicted and sentenced to five days in jail and a $2,000 fine. (CR – 5) Attached as an exhibit was the misdemeanor information, which includes an enhancement paragraph alleging that appellant's blood-alcohol level was at least 0.15.[5] (CR Supp. 23) She also included as an exhibit the judgment of her conviction which listed her offense as "DWI 1ST OFFENDER BAC .08" and the degree of offense as a Class B misdemeanor. (CR Supp. – 24) In the record portions that were submitted as exhibits, the jury verdict is omitted, but the record indicated that, after the jury found appellant guilty of driving while intoxicated, a special issue on the 0.15 finding was drafted for the jurors to consider. (RRV – 800, 806-807)

Appellant asserted in her application that the "jury likely placed substantial weight on [Gooden's] testimony to resolve whether applicant was intoxicated." (CR – 17) She also stated that "this evidence was the most contested issue, and [Gooden's] testimony was crucial to applicant's conviction." (CR – 17) Appellant also argued that "[t]he suppressed impeachment evidence probably would have resulted in an acquittal or a deadlocked jury." (CR – 17) Appellant did not clarify

[5] The information notes that it had been amended. (CR Supp. 23)

in her writ application that she was convicted of a Class A misdemeanor or that the jury found the 0.15 allegation to be true.

At the writ hearing, appellant argued that, because the remainder of the State's evidence showing intoxication was so weak, "[t]he blood was critical to the prosecution" to show that appellant was intoxicated. (RRIII – 21-22) She also reiterated closing arguments made in the trial court, including the prosecutor's argument that: (1) "[t]he only issue in the case is intoxication," (2) that "[t]he blood result confirmed [appellant] was intoxicated," and (3) "[i]f you believe that blood evidence, [appellant] was far above 0.08." (RRIII – 23-25)

The habeas court, which was also the trial court, took judicial notice of the trial transcript and made a finding that the jury found the 0.15 allegation true. (RRIII – 47; CR – 32) However, the court also found that Deputy Bounds' testimony "regarding appellant's intoxication [ ] was more than sufficient to support a guilty verdict in the primary case." (CR – 46) This finding illustrates the habeas court's understanding of appellant's argument to be that Gooden's testimony was necessary to prove—and therefore the undisclosed evidence was material to—the intoxication element of DWI, not solely the 0.15 finding. (CR – 46)

In its initial opinion in this case, the Fourteenth Court of Appeals affirmed the trial court's denial of the writ application. *See Diamond*, 2018 WL 2050392 at *10. The appellate court found that the undisclosed information would have been material

if appellant had been convicted of a Class A misdemeanor. *Id.* at *8. However, because she was convicted of a Class B misdemeanor, and there was other evidence of her intoxication, the undisclosed evidence was not material. *Id.* at *8-10.

After the original opinion was issued, appellant moved the trial court to issue a judgment nunc pro tunc, changing her conviction to that for a Class A DWI. (CR Supp. III – 4-6) The trial court granted the motion, appellant supplemented the appellate record with the new judgment, and argued in his motion for rehearing that because appellant was convicted of a Class A misdemeanor, the court's original opinion was based on a factual determination that is unsupported by the record. (CR Supp. III – 19-24; Appellant's Mtn. for Reh'g – 6) The appellate court thereafter reversed the habeas court's ruling on, among other things, the grounds that because appellant was convicted of a Class A misdemeanor, the undisclosed evidence was material. *Diamond*, 2018 WL 4326441 at *14 (op. on reh'g).

In its most recent opinion, the Fourteenth Court addressed the State's argument that the appellate court had no authority to address appellant's request for the court to consider the *Brady* issue in light of the nunc pro tunc judgment for a Class A misdemeanor. *Diamond*, 2018 WL 5261185 at *7 (substitute op.). The appellate court disagreed, stating that "that the ground on which appellant seeks habeas relief has remained consistent in the trial court and on appeal: that the State

violated *Brady* by not disclosing evidence concerning Gooden's qualifications and the reliability of her opinions." *Id.* at *8.

The record shows that the appellate court's characterization of appellant's habeas-level argument is incorrect. (CR – 4-17, 46; RRIII – 21-25) By addressing an argument that appellant did not raise in the habeas court—namely that the undisclosed information was material specifically to a 0.15 blood-alcohol-concentration finding, instead of a determination that appellant was intoxicated—the court of appeals erred by addressing an argument that appellant did not present to the habeas court. *See Greenville*, 798 S.W.2d at 362-63.

Further, the Fourteenth Court's decision contradicts other appellate court opinions on the same issue. *See Ex parte Evans*, 410 S.W.3d 481, 485 (Tex. App.—Fort Worth 2013, pet. ref'd) (refusing to consider argument raised in defendant's brief on appeal where defendant did not raise the same argument in the writ application filed in the trial court); *State v. Romero*, 962 S.W.2d 143, 144 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (stating that the court may not consider grounds not raised before the trial court); *Ex parte Torres*, 941 S.W.2d 219, 220 (Tex. App.—Corpus Christi 1996, pet. ref'd) (agreeing that defendant waived alleged error by failing to include theory raised on appeal in his application for writ of habeas corpus).

III. The majority opinion is erroneous because it results from an incorrect application of the standard of review.

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The duty to disclose evidence is applicable even if there has been no request by a defendant, and the duty to disclose encompasses both impeachment and exculpatory evidence. *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006).

Even if this Court finds that the appellate court properly addressed arguments that were presented by appellant in the habeas court, the majority's failure to apply the standard of review correctly led to an erroneous conclusion that the undisclosed evidence was favorable and material.

To prevail upon a post-conviction writ of habeas corpus, the applicant bears the burden of proving, by a preponderance of the evidence, that the facts would entitle him to relief. *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002). To establish a claim under *Brady*, a habeas applicant must demonstrate that: (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to him; and (3) the evidence is material, meaning that there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. *Ex parte Miles*, 359 S.W.3d 647,

665 (Tex. Crim. App. 2012). The applicant must prove the constitutional violation and his entitlement to habeas relief by a preponderance of the evidence. *Richardson*, 70 S.W.3d at 870.

An appellate court reviewing a trial court's ruling on a habeas claim must review the record evidence in the light most favorable to the trial court's ruling and must uphold that ruling absent an abuse of discretion. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). Reviewing courts should afford almost total deference to a trial court's determination of the historical facts that the record supports, especially when the trial court's fact findings are based on an evaluation of credibility and demeanor. *Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003), *overruled on other grounds by Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007). Reviewing courts also afford the same level of deference to a trial court's ruling on application-of-law-to-fact questions if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *Id*. But appellate courts review *de novo* those mixed questions of law and fact that do not depend upon credibility and demeanor. *Id*. Reviewing courts should also grant deference to implicit factual findings that support the trial court's ultimate ruling, but they cannot do so if they are unable to determine from the record what the trial court's implied factual findings are. *Id*.

A. The majority incorrectly found that the undisclosed information was favorable.

Favorable evidence is any evidence that, if disclosed and used effectively, may make a difference between conviction and acquittal and includes both exculpatory and impeachment evidence. *Harm*, 183 S.W.3d at 408. Impeachment evidence is that which disputes or contradicts other evidence. *Id.*

The majority found that the undisclosed evidence was favorable to appellant. *Diamond*, 2018 WL 5261185 at *5-6 (substitute op.). Specifically, the majority found that the evidence could be used: (1) to impeach Gooden's qualifications and the reliability of her opinion, or (2) to move under Rule of Evidence 702 to exclude her testimony based on lack of qualifications or reliability. *Id.* at *4. However, the majority's conclusion is predicated on an incorrect determination that the evidence was relevant and admissible as impeachment evidence. *See id.* at *4.

The majority stated that the "evidence was undisputed in the habeas record that the State did not disclose that . . . Arnold lacked confidence in Gooden's understanding of the basic science." *Id.* The majority went on to state: "In his August 4, 2014 memo, Arnold claimed he had concerns about Gooden's level of knowledge and understanding regarding her 'knowledge base' and her inability to answer 'basic questions.' This is favorable evidence with which to impeach Gooden's qualifications in performing the blood analysis and question the reliability of her opinion that appellant had a BAC of 0.193." *Id.* at *5. However, in this

determination, the majority fails to give proper deference to the habeas court's fact findings as to why Gooden was removed from case work.

In its favorability analysis, the habeas court found:

> Applicant does not demonstrate the favorability of information regarding Gooden's work status when she testified in Applicant's trial. *When Gooden testified in Applicant's trial, she had simply been removed from casework to focus solely on documenting issues surrounding an unrelated mislabeled blood case . . . .*
>
> (CR – 45) (emphasis added)

The court's findings noted that Arnold's August 4 memo stated that he began to question Gooden's knowledge base in early April, 2014, after he reviewed a PowerPoint presentation Gooden prepared for a pending trial. (CR – 43) However, the habeas court expressly found that the memo was composed after Gooden had contacted ASCLD, had self-disclosed to the TFSC, and communicated with the HFSC Human Resources Director about returning to work. (CR – 43) The habeas court made no finding that Gooden was removed from case work due to concerns about her knowledge base. In fact, in its characterization of Arnold's testimony, the habeas court found that "Arnold testified that while he was concerned about Gooden's ability to explain 'why she did what she did,' he did not express concern with her ability to perform blood analysis." (CR – 47; *see* RRII – 112-23, 174, 182) The habeas court also found "suspect and unpersuasive" Arnold's use of the term "suspension" or "under suspension" regarding Gooden's work status. (CR – 45)

The habeas court's findings are supported by the record and account for the trial judge's ability to assess Arnold's credibility and demeanor during the writ hearing.

The majority noted that the habeas court made no findings regarding evidence of Arnold's lack of confidence in Gooden's understanding of the basic concepts underlying the performance of her duties, but the dissent correctly recognized that the habeas court's findings reflected disbelief that Gooden was removed from case work due to concerns about her knowledge base. *Diamond*, 2018 WL 5261185 at *4 (substitute op.); *id.* at *11 (Donovan, J., dissenting).

Had the majority given proper deference to the findings of fact, the only information that would have been subject to a *Brady* analysis was: (1) Gooden's certification of a lab report in an unrelated case with an incorrect defendant's name, and (2) her removal from case work to document that incident. This evidence is not relevant to impeach Gooden's qualifications or the reliability of her analysis in appellant's case.

Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action. TEX. R. EVID. 401(a), (b). Irrelevant evidence is not admissible. TEX. R. EVID. 402. A witness may be cross-examined on any relevant matter, including credibility. TEX. R. EVID. 611(b). However, it is important, when determining whether evidence is relevant, that courts examine the purpose for which the evidence

is being introduced, and "[i]t is critical that there is a direct or logical connection between the actual evidence and the proposition sought to be proved." *Layton v. State*, 280 S.W.3d 235, 240 (Tex. Crim. App. 2009).

In addressing the materiality prong, the dissent recognized that the erroneous lab report and Gooden's removal from case work to document that error is irrelevant. *See Diamond*, 2018 WL 5261185 at *11 (Donovan, J., dissenting) As Justice Donovan stated, "[t]here is no logical connection between the undisclosed evidence—that Gooden certified a report in another case that contained a labeling error by the officer or was removed or suspended from her regular job duties to provide documentation regarding that error—and the testimony describing appellant's intoxicated state or the accuracy of the blood test results." *Id.* Nor does this evidence have a logical connection to Gooden's qualifications as a blood analyst. The dissent recognized that, given the habeas court's unchallenged fact findings regarding the blood evidence in appellant's case, "the undisclosed evidence . . . would not impeach the evidence that appellant's blood was analyzed and had a BAC level of .193." *Id.* at *12.

Because the undisclosed evidence has no logical connection to Gooden's qualifications or the reliability of the blood analysis in appellant's case, it is not relevant or admissible to impeach Gooden's qualifications or the reliability of the

blood test results in this case. The majority's conclusion to the contrary was erroneous. *See id.* at *5-6.

B. The majority incorrectly determined that the undisclosed information was material.

An applicant is required to show that undisclosed, favorable evidence is material to guilt or punishment. *Miles*, 359 S.W.3d at 666. The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense. *Id*. Instead, an applicant must show that, in light of all the evidence, it is reasonably probable that the outcome of the trial would have been different had the prosecutor made a timely disclosure. *Id*.

A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial." *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). When evaluating whether the materiality standard is satisfied, the strength of the exculpatory evidence is balanced against the evidence supporting conviction. *Id*.

Sometimes, what appears to be a relatively inconsequential piece of potentially exculpatory evidence may take on added significance in light of other evidence at trial. *Hampton v. State*, 86 S.W.3d 603, 613 (Tex. Crim. App. 2002). In that case, a reviewing court should explain why a particular *Brady* item is especially material in light of the entire body of evidence. *Id*.

In conducting its materiality analysis, the majority summarized Deputy Bounds' testimony and stated that Gooden's was the only testimony that appellant's BAC was at or above 0.15. *Diamond*, 2018 WL at 5261185 at *6-7 (substitute op.). The majority concluded that, because there was no other trial evidence that appellant had a BAC of at least 0.15, there is a reasonable probability that the jury would have reached a different result on the Class A misdemeanor charge if Gooden's testimony had been excluded or subject to cross-examination regarding the undisclosed evidence. *Id.* at *7.

Just as it did in its favorability analysis, the majority erroneously included in its materiality analysis the alleged information that Gooden was removed from case work due to concerns about her knowledge base and ability to answer blood-alcohol-analysis questions. *See id.* at *6-7. As discussed above, the majority failed to defer to the habeas court's findings as to the reason why Gooden was removed from case work and, therefore, failed to properly limit the scope of undisclosed information at issue in this case. The majority also completely ignored the remaining evidence to which Gooden testified at trial, which should have been included in the materiality analysis. *See Hampton*, 86 S.W.3d at 613.

The dissent correctly included the totality of Gooden's testimony in its materiality analysis. Some of this testimony included that: (1) appellant's name was verified on the blood vials, (2) the instrumentation used to perform the analysis was

validated and permitted to be used through an addendum to the Standard Operating Procedures, (3) Gooden had completed two to three thousand exercised and passes a competency test prior to engaging in blood alcohol analysis case work, and (4) analysis of appellant's blood sample revealed a BAC of 0.193. *Diamond*, 2018 WL 2561185 at *9-10 (Donovan, J., dissenting). (*See* CR – 36-37) Therefore, the fact that Gooden certified an erroneously-named report in a different case and was removed from case work to document the incident, when considered in light of all the evidence adduced at trial, appellant failed to show that there was a reasonable probability that the outcome of her trial would have been different. The majority's conclusion to the contrary was incorrect.

PRAYER FOR RELIEF

It is respectfully requested that this petition be granted and the lower appellate court's decision be reversed.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been sent to the following email addresses via e-filing:

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CERTIFICATE OF COMPLIANCE

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APPENDIX A

Diamond opinion dated May 3, 2018

**opinion withdrawn and superseded by Diamond v. State*, No. 14-17-00005-CR, 2018 WL 4326441 (Tex. App.—Houston [14th Dist.] Sept. 11, 2018) (op. on reh'g)

Affirmed and Opinion filed May 3, 2018.

In The

Fourteenth Court of Appeals

NO. 14-17-00005-CR

LESLEY ESTHER DIAMOND, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 8
Harris County, Texas
Trial Court Cause No. 2112570

O P I N I O N

Appellant Lesley Esther Diamond was convicted of misdemeanor driving while intoxicated. She filed an application for writ of habeas corpus, in which she alleged that the State suppressed favorable evidence in violation of her due process rights. After a hearing, the habeas court denied the application. On appeal, appellant contends in one issue that the habeas court erred in concluding that the undisclosed evidence was not favorable to the defense or material to the jury's guilty verdict under *Brady v.*

Maryland.[1] Concluding that the undisclosed evidence was not material to the jury's verdict, we affirm.

Background

Appellant did not appeal her conviction. But after appellant was convicted, Andrea Gooden, an analyst from the Houston Police Department crime lab who testified in appellant's trial, self-reported that the crime lab had violated quality control and documentation protocols. This report culminated in an investigation and report by the Texas Forensic Science Commission that was provided to appellant after her conviction.

I. Evidence Adduced at Trial

Deputy Bounds was conducting a traffic stop in Harris County, Texas, when he observed appellant driving in excess of the speed limit in the lane closest to Bounds's stopped patrol car and the other stopped vehicle. Appellant made several unsafe lane changes without signaling that caused other drivers to brake suddenly. Bounds got into his vehicle and pursued appellant until she stopped her vehicle.

While conducting the stop, Bounds asked appellant to step out of her vehicle. When she did so, she staggered. Appellant told Bounds she was coming from a golf course at a country club but did not know the name or location of the country club. Appellant told Bounds she had consumed three beers that day. She also had an empty can of beer and two cold, unopened cans of beer in her car.

Bounds testified that appellant appeared intoxicated, smelled of alcohol, had red, glassy eyes and incoherent, slurred speech, and appeared confused. Appellant said she

[1] In that case, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

had taken medication but was unable to tell Bounds what kind of medication it was.

Bounds requested another deputy to assist him. Deputy Francis arrived and administered field sobriety tests. Bounds testified that he observed appellant exhibit five out of eight clues of intoxication on the walk and turn test and four out of four clues on the one leg stand test.[2] Bounds further testified that appellant had poor balance and staggered during the walk and turn test but conceded that Francis made some mistakes in administering the field sobriety tests. Bounds opined that appellant was intoxicated.

Gooden testified that her analysis of appellant's blood sample revealed a blood alcohol concentration (BAC) of 0.193, which is above the legal limit of 0.08.

The prosecutor argued during closing argument that the blood analysis was "really important" because 0.193 is "multiple times" the legal limit and that "[i]t is pretty much undisputed that Deputy Bounds is not good at testifying. In fact, he's probably not a very good officer" and "[e]ven someone as simple or dumb, however you want to call it, as Deputy Bounds, it was clear to him that she was intoxicated."

The jury found that appellant's BAC was above 0.15.

II. Evidence Adduced at Habeas Hearing

Gooden had been removed from casework two weeks prior to trial because of her involvement with an erroneous lab report in another case. In that case, an officer had mislabeled vials containing blood specimens with the wrong suspect's name. Knowing about the error, Gooden analyzed the blood samples but initially set them aside until the officer could correct the mistake. Gooden also prepared a draft lab report

[2] The trial court excluded Francis's testimony as a sanction at trial because Francis and Bounds discussed the case with the prosecutor in each other's presence in violation of the Rule. *See* Tex. R. Evid. 614 (the Rule).

and certified that it was accurate. The report, still containing the wrong suspect's name, erroneously was released into the Laboratory Information Management System (LIMS) in January 2014. Reports submitted on LIMS can be accessed by prosecutors.

On April 15, 2014, Gooden discovered the error and reported it. The next day, her supervisor, William Arnold, sent her an email stating that she would not be allowed to work on any other cases: "[u]ntil further notice[,] you are to focus solely on documenting the issues surround[ing] the [errors] in the case we discussed yesterday. Do not handle any evidence, process any data or generate any reports or documentation that is unrelated to your research on this case." Arnold did not document or disclose this action to the Harris County District Attorney because he did not want to damage Gooden's career or subject her to harsh cross-examination by a defense lawyer.

Gooden issued a memorandum regarding the lab error on April 17 and assumed she would be able to resume her other casework at that time. Instead, she was told she could not return to casework.

Gooden testified for the State against appellant on April 29 and 30, 2014. The erroneous lab report and Gooden's removal from casework were not disclosed to the defense. Arnold observed Gooden's testimony at trial.

On May 12, 2014, Arnold told Gooden that she still could not commence with casework because she needed to improve her courtroom testimony. Arnold subsequently told a human resources director that he preferred retraining Gooden in lieu of "documenting concerns about [Gooden's] performance which would make [Gooden] subject to painful cross examination" and he wanted to avoid damaging Gooden's career.

Gooden filed a self-disclosure with the Commission on June 4, 2014 concerning the erroneous lab report, alleging that the crime lab failed to amend the report, notify

the district attorney's office of the error, or issue a required corrective and preventative action report. After a period of retraining, Gooden was allowed to return to casework in August.

The Commission opened an investigation on August 1 to review Gooden's disclosure. On August 4, Arnold gave Gooden an interoffice memo in which he noted that in early April, Gooden prepared a PowerPoint presentation for use in court testimony and during the proposed presentation, Gooden could not answer "basic questions" about the type of analysis used to analyze blood alcohol content. Arnold questioned whether Gooden could convey the proper information and whether she understood the concepts associated with the analysis.

The City of Houston's Office of Inspector General conducted an investigation on these matters during the same timeframe and issued its report on December 18, 2014. It found, in relevant part, that (1) lack of attention by Arnold and Gooden allowed the erroneous report to be submitted to the district attorney's office; and (2) Gooden testified in three trials while "off casework" and without disclosing the erroneous report.

The Commission issued its report on January 23, 2015. It concluded that Arnold engaged in professional negligence by, among other things, failing to issue timely amended reports to the district attorney's office once the mislabeling mistake was identified by Gooden and failing to document the reasons for Gooden's removal from casework. In doing so, the Commission concluded in relevant part, that Arnold:

1. Deprived the prosecutor of the opportunity to determine whether any action was required to disclose impeachment information to the defense;

2. Possibly deprived the defense of impeachment information to which it was entitled; and

3. Sent the message that it is acceptable not to document issues that arise in the

laboratory for fear of a tough cross-examination.

Discussion

Appellant argues, among other things, that the habeas court erred in concluding that the undisclosed evidence was not material.[3] We agree with the habeas court that the undisclosed evidence was not material.[4]

To demonstrate reversible error under *Brady*, a habeas applicant must show (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to her; and (3) the evidence is material—that is, there is a reasonable probability that, had the favorable evidence been disclosed, the outcome of the trial would have been different.[5] *Ex Parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012). The evidence central to the *Brady* claim must be admissible in court. *Id*.

We ordinarily review a habeas court's ruling on an application for writ of habeas corpus for an abuse of discretion. *Ex Parte Navarro*, 523 S.W.3d 777, 780 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). But when the resolution of the ultimate issue turns on an application of purely legal standards, our review is de novo. *Id*.

We turn to whether the undisclosed evidence was material. The possibility that an item of undisclosed information might have helped the defense or affected the outcome of the trial does not establish materiality. *Miles*, 359 S.W.3d at 666. The

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[3] Appellant is not currently in custody, but the trial court had jurisdiction over her habeas application, and we have jurisdiction over her appeal because she faces "collateral legal consequences" resulting from her misdemeanor conviction. *See Le v. State*, 300 S.W.3d 324, 326 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

[4] Accordingly, we do not address appellant's arguments that the undisclosed evidence was favorable evidence that would have undermined Gooden's qualifications and the reliability of her opinion.

[5] The State concedes that it did not disclose the evidence at issue here.

evidence is material only if there is a reasonable probability that, in light of all the evidence, it is reasonably probable that the outcome of the trial would have been different had the evidence been disclosed to the defense. *Id*. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id*.

Although we defer to the habeas court's credibility determinations, we review the question of materiality de novo. *See Ex Parte Weinstein*, 421 S.W.3d 656, 664 n.17 (Tex. Crim. App. 2014) (noting that in addressing habeas claims involving *Brady*, materiality of evidence is reviewed de novo). We balance the strength of the exculpatory evidence against the evidence supporting conviction and consider the suppressed evidence collectively, not item by item. *Miles*, 359 S.W.3d at 666.

Appellant argues that had she known about the undisclosed evidence, she would have attempted to exclude Gooden's testimony and, if unsuccessful, would have used the evidence to impeach Gooden. Appellant additionally argues she would have called Arnold to testify regarding his misgivings about Gooden's abilities. Thus, even if Gooden's testimony had been admitted at trial, appellant asserts that the jury would have had a factual basis to doubt Gooden's qualifications and the reliability of her blood alcohol analysis.

The habeas court concluded that appellant failed to establish materiality of the evidence because Bounds' testimony regarding appellant's intoxication was "more than sufficient" to support a guilty verdict and there is no reasonable probability that the jury would have reached a different result if appellant had been able to cross-examine Gooden with the undisclosed evidence. The habeas court made the following fact findings in support of its conclusions on materiality:

- Bounds observed appellant speeding in the lane closest to Bounds and the stopped patrol car and other vehicle. Appellant made several unsafe lane changes and caused other drivers brake suddenly.

- Appellant staggered when she got out of the car. She had red, glassy eyes, incoherent, slurred speech, and a very strong odor of alcohol and could not identify the name of the golf course she came from or what medication she had taken.

- Appellant admitted she drank three beers and had one open, and two cold, unopened cans of beer in her car.

- Bounds observed the other officer administer the walk and turn and one leg stand field sobriety tests. Bounds testified that appellant exhibited five out of eight clues of intoxication on the walk and turn test and four out of four clues of intoxication on the one leg stand test.

Balancing the strength of the undisclosed evidence against the evidence supporting appellant's conviction, we conclude that the undisclosed evidence was not material. The State's evidence of intoxication was strong, even without any evidence of appellant's BAC.

We note that the jury found that "an analysis of [appellant's] blood showed an alcohol concentration of .15 or more." That finding is a required element of a Class A misdemeanor. Tex. Penal Code § 49.04(d). The evidence supporting this answer could only have come from Gooden's testimony and related exhibits. Had appellant been convicted of a Class A misdemeanor, Gooden's testimony would have been material. However, appellant was convicted of a Class B misdemeanor, which does not require evidence of an analysis showing a BAC of .15 or more. *See id*. § 49.04(a)-(b); *see also Meza v. State*, 497 S.W.3d 574, 587 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (holding jury's finding of .15 BAC for a Class A misdemeanor DWI was not supported by legally sufficient evidence and acknowledging that jury can convict for a Class B misdemeanor DWI "without finding a particular BAC"). Therefore, Gooden's testimony was cumulative of evidence of appellant's intoxication.

Many of the "usual indicia of intoxication" were present here, including "erratic driving, post-driving behavior such as stumbling, swaying, . . . inability to perform

field sobriety tests . . . , bloodshot eyes, [and] admissions . . . concerning what, when, and how much [the defendant] had been drinking." *Kirsch v. State*, 306 S.W.3d 738, 745 (Tex. Crim. App. 2010); *see also* Tex. Pen. Code § 49.01(2) (defining "intoxicated" as having an alcohol concentration of 0.08 or more ***or*** "not having the normal use of mental or physical faculties by reason of the introduction of alcohol" or other substances or combination thereof); *Cotton v. State*, 686 S.W.2d 140, 142 n.3 (Tex. Crim. App. 1985) (identifying characteristics that may constitute evidence of intoxication). These signs of intoxication raise an inference that appellant was intoxicated at the time of driving even without evidence of her BAC. *See Kirsch*, 306 S.W.3d at 745.

Appellant's admission that she consumed three beers, along with the open container of beer in her car and her inability to answer basic questions about where she came from or what medication she had taken, were also significant indicators of intoxication. *See Thom v. State*, 437 S.W.3d 556, 563 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (holding that trial court did not err in determining probable cause existed to support warrant for defendant's blood sample when the defendant "displayed many classic signs of intoxication and admitted to having consumed six beers" in spite of a breath test that registered his BAC at 0.00). Similarly, a defendant's poor performance on standardized field sobriety tests is further evidence of intoxication. *Zill v. State*, 355 S.W.3d 778, 786 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

Appellant argues, however, that there is a reasonable probability that the jury would not have convicted her if it heard the undisclosed evidence because the blood alcohol evidence was the most important evidence of intoxication adduced at trial and Bounds was not a good witness. Bounds did not preserve the in-car video of the incident, lost his notes from the night of the incident, and admitted that the police report "contains numerous mistakes." He also conceded that the officer who administered the

field sobriety tests did not give appellant proper instructions. The prosecutor made handwritten additions to the police report for Bounds to rely on during his testimony to add observations of clues of intoxication. Bounds was not trained to transport blood evidence and did not have custody of the blood specimen for two extended periods of time during which time the specimen was unattended in his car and the location was not documented. Despite these failures, Bounds still identified many significant factors indicating appellant was intoxicated.

Given the strength of the evidence indicating appellant was intoxicated, we cannot conclude that there is a reasonable probability that the jury would have reached a different result if Gooden's testimony had been excluded. We also conclude that if the habeas court had not excluded Gooden's testimony but allowed appellant to cross-examine Gooden with the undisclosed evidence, there similarly is not a reasonable probability that the jury would have reached a different result.

Conclusion

Because appellant did not establish that the undisclosed evidence is material to her case, the habeas court did not err in denying appellant's writ application. We affirm the judgment of the habeas court.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Jamison, Busby, and Donovan.
Publish — TEX. R. APP. P. 47.2(b).

APPENDIX B

Diamond majority opinion on rehearing dated September 11, 2018

* *opinion withdrawn and superseded by Diamond v. State*, No. 14-17-00005-CR, —S.W.3d—, 2018 WL 5261185 (Tex. App.—Houston [14th Dist.] Oct. 23, 2018, pet. filed) (substitute op.)

Opinion dated May 3, 2018 Withdrawn, Motion for Rehearing Granted, Reversed and Remanded, and Majority and Dissenting Opinions on Rehearing filed September 11, 2018

In The

Fourteenth Court of Appeals

NO. 14-17-00005-CR

LESLEY ESTHER DIAMOND, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 8
Harris County, Texas
Trial Court Cause No. 2112570

M A J O R I T Y O P I N I O N O N R E H E A R I N G

On May 3, 2018, we affirmed the trial court's denial of Lesley Esther Diamond's petition for writ of habeas corpus. Appellant then filed a motion for rehearing pointing out an error in her original briefing, the trial court's underlying judgment, and our opinion. Because appellant is correct, we grant appellant's motion for rehearing, withdraw our opinion dated May 3, 2018, and issue this substitute

opinion on rehearing.[1]

Appellant Lesley Esther Diamond was convicted of misdemeanor driving while intoxicated. She filed an application for writ of habeas corpus, in which she alleged that the State suppressed favorable evidence in violation of her due process rights. After a hearing, the habeas court denied the application. On appeal, appellant contends in one issue that the habeas court erred in concluding that the undisclosed evidence is not favorable to the defense or material to the jury's guilty verdict under *Brady v. Maryland*.[2] Concluding that the undisclosed evidence is material to the jury's verdict and favorable to appellant, we reverse the trial court's order.

Background

Appellant did not appeal her conviction. But after appellant was convicted, Andrea Gooden, an analyst from the Houston Police Department crime lab who testified in appellant's trial, self-reported that the crime lab had violated quality control and documentation protocols. This report culminated in an investigation and report by the Texas Forensic Science Commission that was provided to appellant after her conviction.

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[1] Although the jury found appellant guilty of a Class A misdemeanor, the original judgment stated that appellant was convicted of a Class B misdemeanor. Furthermore, appellant's brief stated that she was charged with a Class B misdemeanor and failed to disclose that she was convicted of a Class A misdemeanor. In a post-submission letter brief, appellant's counsel referred this court to the supplemental reporter's record where "at sentencing, the [trial] court pronounced that [appellant] was convicted of a Class A misdemeanor based on the jury's affirmative finding on the special issue." After our original opinion issued, appellant moved for and the trial court issued a judgment nunc pro tunc correcting the classification of appellant's conviction from a Class B to a Class A misdemeanor.

[2] In that case, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

I. Evidence Adduced at Trial

Deputy Bounds was conducting a traffic stop in Harris County, Texas, when he observed appellant driving in excess of the speed limit in the lane closest to Bounds's stopped patrol car and the other stopped vehicle. Appellant made several unsafe lane changes without signaling that caused other drivers to brake suddenly. Bounds got into his vehicle and pursued appellant until she stopped her vehicle.

While conducting the stop, Bounds asked appellant to step out of her vehicle. When she did so, she staggered. Appellant told Bounds she was coming from a golf course at a country club but did not know the name or location of the country club. Appellant told Bounds she had consumed three beers that day. She also had an empty can of beer and two cold, unopened cans of beer in her car.

Bounds testified that appellant appeared intoxicated, smelled of alcohol, had red, glassy eyes and incoherent, slurred speech, and appeared confused. Appellant said she had taken medication but was unable to tell Bounds what kind of medication it was.

Bounds requested another deputy to assist him. Deputy Francis arrived and administered field sobriety tests. Bounds testified that he observed appellant exhibit five out of eight clues of intoxication on the walk and turn test and four out of four clues on the one leg stand test.[3] Bounds further testified that appellant had poor balance and staggered during the walk and turn test but conceded that Francis made some mistakes in administering the field sobriety tests. Bounds opined that appellant was intoxicated.

[3] The trial court excluded Francis's testimony as a sanction at trial because Francis and Bounds discussed the case with the prosecutor in each other's presence in violation of the Rule. *See* Tex. R. Evid. 614 (the Rule).

Gooden testified that her analysis of appellant's blood sample revealed a blood alcohol concentration (BAC) of 0.193, which is above the legal limit of 0.08.

The prosecutor argued during closing argument that the blood analysis was "really important" because 0.193 is "multiple times" the legal limit and that "[i]t is pretty much undisputed that Deputy Bounds is not good at testifying. In fact, he's probably not a very good officer" and "[e]ven someone as simple or dumb, however you want to call it, as Deputy Bounds, it was clear to him that she was intoxicated."

The jury found that appellant's BAC was above 0.15.

II. Evidence Adduced at Habeas Hearing

Because of her involvement with an erroneous lab report in an unrelated case, Gooden had been removed from casework two weeks prior to appellant's 2014 trial. In the unrelated case, an officer had mislabeled vials containing blood specimens with the wrong suspect's name. Knowing about the error, Gooden analyzed the blood samples but initially set them aside until the officer could correct the mistake. Gooden also prepared a draft lab report and certified that it was accurate. The report, still containing the wrong suspect's name, erroneously was released into the Laboratory Information Management System (LIMS) in January 2014. Reports submitted on LIMS can be accessed by prosecutors.

On April 15, 2014, Gooden discovered the error and reported it. The next day, her supervisor, William Arnold, sent her an email stating that she would not be allowed to work on any other cases: "[u]ntil further notice[,] you are to focus solely on documenting the issues surround[ing] the [errors] in the case we discussed yesterday. Do not handle any evidence, process any data or generate any reports or documentation that is unrelated to your research on this case." Arnold did not document or disclose this action to the Harris County District Attorney's Office

because he did not want to damage Gooden's career or subject her to harsh cross-examination by a defense lawyer.

Gooden issued a memorandum regarding the lab error on April 17 and assumed she would be able to resume her other casework at that time. Instead, she was told she could not return to casework.

Gooden testified for the State against appellant on April 29 and 30, 2014. The erroneous lab report and Gooden's removal from casework were not disclosed to the defense. Arnold observed Gooden's testimony at trial.

On May 12, 2014, Arnold told Gooden that she still could not commence with casework because she needed to improve her courtroom testimony. Arnold subsequently told a human resources director that he preferred retraining Gooden in lieu of "documenting concerns about [Gooden's] performance which would make [Gooden] subject to painful cross examination" and he wanted to avoid damaging Gooden's career.

Gooden filed a self-disclosure with the Commission on June 4, 2014 concerning the erroneous lab report, alleging that the crime lab failed to amend the report, notify the district attorney's office of the error, or issue a required corrective and preventative action report. After a period of retraining, Gooden was allowed to return to casework in August.

The Commission opened an investigation on August 1 to review Gooden's disclosure. On August 4, Arnold gave Gooden an interoffice memo in which he noted that in early April, Gooden prepared a PowerPoint presentation for use in court testimony and during the proposed presentation, Gooden could not answer "basic questions" about the type of analysis used to analyze blood alcohol content. Arnold questioned whether Gooden could convey the proper information and whether she

understood the concepts associated with the analysis.

The City of Houston's Office of Inspector General conducted an investigation on these matters during the same timeframe and issued its report on December 18, 2014. It found, in relevant part, that (1) lack of attention by Arnold and Gooden allowed the erroneous report to be submitted to the district attorney's office; and (2) Gooden testified in three trials while "off casework" and without disclosing the erroneous report.

The Commission issued its report on January 23, 2015. It concluded that Arnold engaged in professional negligence by, among other things, failing to issue timely amended reports to the district attorney's office once the mislabeling mistake was identified by Gooden and failing to document the reasons for Gooden's removal from casework. In doing so, the Commission concluded in relevant part, that Arnold:

1. Deprived the prosecutor of the opportunity to determine whether any action was required to disclose impeachment information to the defense;

2. Possibly deprived the defense of impeachment information to which it was entitled; and

3. Sent the message that it is acceptable not to document issues that arise in the laboratory for fear of a tough cross-examination.

III. Motion for Rehearing

The trial court considered this evidence and denied appellant's habeas application, issuing written findings and conclusions. On original submission, we affirmed the trial court's decision.

After we issued our opinion, appellant sought to correct an error in the underlying judgment of conviction. The jury found that an analysis of appellant's blood showed an alcohol concentration of more than 0.15. Driving with such a concentration is a Class A misdemeanor. *See* Penal Code 49.04(d). The trial court

orally pronounced appellant's conviction of a Class A misdemeanor. The original judgment, however, reflected that appellant was convicted of a Class B misdemeanor with a BAC of 0.08. Appellant filed a motion to enter judgment nunc pro tunc to correct the judgment to reflect her conviction of a Class A misdemeanor. On May 21, 2018, the trial court granted appellant's motion and entered a judgment nunc pro tunc showing that she was convicted of a Class A misdemeanor with a BAC of 0.15 or more.

Discussion

Appellant argues that the habeas court erred in concluding that the undisclosed evidence is neither favorable nor material.[4] We agree with appellant that the undisclosed evidence is favorable to her and is material.[5]

To demonstrate reversible error under *Brady*, a habeas applicant must show (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to her; and (3) the evidence is material—that is, there is a reasonable probability that, had the favorable evidence been disclosed, the outcome of the trial would have been different. *Ex parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012). The evidence central to the *Brady* claim must be admissible in court. *Id*.

We ordinarily review a habeas court's ruling on an application for writ of habeas corpus for an abuse of discretion. *Ex parte Navarro*, 523 S.W.3d 777, 780 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). But when the resolution of the

[4] Appellant is not currently in custody, but the trial court had jurisdiction over her habeas application and we have jurisdiction over her appeal because she faces "collateral legal consequences" resulting from her misdemeanor conviction. *See Le v. State*, 300 S.W.3d 324, 326 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

[5] In our original opinion, we did not address whether the undisclosed evidence is favorable to appellant.

ultimate issue turns on an application of purely legal standards, our review is de novo. *Id*.

I. Favorability

The State concedes that it did not disclose the certification of the erroneous report. Also, the evidence is undisputed in the habeas record that the State did not disclose that Gooden had been suspended or temporarily removed from her casework or that Arnold lacked confidence in Gooden's understanding of the basic science. Therefore, we turn first to whether the undisclosed evidence is favorable.

Favorable evidence is that which, if disclosed and used effectively, "may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985). Favorable evidence includes exculpatory evidence and impeachment evidence. *Id.* Exculpatory evidence is that which may justify, excuse, or clear the defendant from fault, and impeachment evidence is that which disputes, disparages, denies, or contradicts other evidence. *Pena v. State*, 353 S.W.3d 797, 811–12 (Tex. Crim. App. 2011); *Harm v. State*, 183 S.W.3d 403, 408 (Tex. Crim. App. 2006).

The habeas court found that evidence of (1) a single incident in which Gooden certified a report with mislabeled blood in an unrelated case, and (2) Gooden's temporary removal from casework, would not have been relevant or admissible. The habeas court made no findings regarding evidence of Arnold's lack of confidence in Gooden's understanding of the basic concepts underlying the performance of her duties. Before we analyze the favorability of the evidence, we address whether the evidence is admissible.

The habeas court relied on Rule of Evidence 608(b) in finding that the undisclosed evidence is not admissible. "Except for a criminal conviction under Rule

609, a party may not inquire into or offer extrinsic evidence to prove specific instances of the witness's conduct in order to attack or support the witness's character for truthfulness." Tex. R. Evid. 608(b).

Appellant asserts that she would not have offered the undisclosed evidence to attack Gooden's character for truthfulness, and that the evidence does not demonstrate that Gooden has a mendacious character. Instead, according to appellant, the evidence would have been admissible to rebut and undermine Gooden's expert qualifications and the reliability of her opinion after the State presented her as a qualified expert.

We agree with appellant that Rule 608(b) does not render inadmissible at trial evidence of the mistakes in an unrelated case or Gooden's removal from casework. This evidence has no relation to whether Gooden has a propensity for being untruthful.

We also disagree with the habeas court's finding that the undisclosed evidence is not relevant. Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence. Tex. R. Evid. 401. In general, a witness may be cross-examined on any relevant matter, including credibility. Tex. R. Evid. 611(b). The undisclosed evidence is relevant because it can be used for impeachment of Gooden's qualifications and the reliability of her opinion. In addition, regardless of its admissibility, the evidence could have been used in moving under Rule of Evidence 702 to exclude Gooden's expert testimony entirely based on lack of qualifications or reliability. *See* Tex. R. Evid. 104(a); *Kelly v. State*, 824 S.W.2d 568, 572 & n.10 (Tex. Crim. App. 1992).

We now address whether the undisclosed evidence is favorable. Appellant argues that the suppressed evidence is admissible under the Confrontation Clause and Rule 702 because it relates directly to Gooden's qualifications and the reliability

of her opinion. Had she known about Gooden's "suspension," her certification of the erroneous report in the unrelated case, and Arnold's lack of confidence in her understanding of the basic science, appellant claims she would have attempted to exclude Gooden's testimony and, if unsuccessful, would have used the evidence to impeach Gooden. Appellant additionally argues she would have called Arnold to testify regarding his misgivings about Gooden's abilities. Thus, appellant asserts, even if Gooden had been permitted to testify as an expert at trial, the jury would have had a factual basis to doubt Gooden's qualifications and the reliability of her blood alcohol analysis.

We address each type of undisclosed evidence in turn. Appellant repeatedly refers to Gooden's having been "suspended" or being "under suspension." The habeas court found, however, that Gooden was not suspended but was "temporarily removed from casework" to focus on documenting the mislabeled blood sample report. The court noted that Arnold never used the terms "suspended" or "under suspension" until he wrote the August 4, 2014 memo, and further found Arnold's use of those terms "suspect and unpersuasive" given the TFSC's finding of "no professional misconduct" or "negligence" by Gooden; Gooden's continued performance of tasks and receipt of compensation; and Arnold's labeling Gooden's work status as "suspended" only after Gooden self-reported to the TFSC and contacted the human resources director about returning to work.

The State argues that the failure of the habeas court to find that Gooden was "suspended" or "under suspension" eviscerates appellant's theory that she can impeach Gooden's credibility by showing evidence that Gooden was "suspended" or "under suspension" when she testified at appellant's trial. Irrespective of the terms used to describe Gooden's work status ("under suspension" or "off of casework" or otherwise), Gooden's testimony would have been "subject to painful cross

examination" had the evidence of her removal been disclosed, just as Arnold feared. We conclude that the undisclosed evidence of Gooden's work status at the time of appellant's trial is favorable impeachment evidence.

We also conclude that the certification of the mislabeled lab report in another case is favorable impeachment evidence. At appellant's trial, Gooden testified to several issues of State personnel mishandling evidence in this case: the vials containing appellant's blood were missing labels containing the nurse's name, the officer's name, the suspect's name, and the time of the draw; and the labels should have been placed on the blood vials when the vials were transported from the blood draw room to the police evidence locker. Moreover, Bounds testified at trial that the vials containing appellant's blood were in his custody from immediately after the draw until he turned them in at the police department. However, Bounds, who was not trained to transport blood evidence in DWI cases, left the vials unattended twice for at least 30 minutes at a time.

There is no evidence that Gooden personally was responsible for the errors in appellant's case. However, the undisclosed evidence would have provided appellant with "painful cross examination" material questioning the integrity of the crime lab's processes in analyzing blood samples for BAC at that time.

In his August 4, 2014 memo, Arnold claimed he had concerns about Gooden's level of knowledge and understanding regarding her "knowledge base" and her inability to answer "basic questions." This is favorable evidence with which to impeach Gooden's qualifications in performing the blood analysis and question the reliability of her opinion that appellant had a BAC of 0.193.

We conclude that the undisclosed evidence is favorable. That is, if the evidence had been disclosed and used effectively by appellant's counsel for impeachment, it might have made the difference between appellant's conviction and

a possible verdict of acquittal. *See Bagley*, 473 U.S. at 676.

II. Materiality

The possibility that an item of undisclosed information might have helped the defense or affected the outcome of the trial does not establish materiality. *Miles*, 359 S.W.3d at 666. The undisclosed evidence is material only if there is a reasonable probability that, in light of all the evidence, it is reasonably probable that the outcome of the trial would have been different had the evidence been disclosed to the defense. *Id*. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id*.

Although we defer to the habeas court's credibility determinations, we review the question of materiality de novo. *See Ex parte Weinstein*, 421 S.W.3d 656, 664 n.17 (Tex. Crim. App. 2014) (noting that in addressing habeas claims involving *Brady*, materiality of evidence is reviewed de novo). We balance the strength of the exculpatory evidence against the evidence supporting conviction and consider the suppressed evidence collectively, not item by item. *Miles*, 359 S.W.3d at 666.

The habeas court concluded that appellant failed to establish materiality of the evidence because Bounds' testimony regarding appellant's intoxication was "more than sufficient" to support a guilty verdict[6] and there is no reasonable probability that the jury would have reached a different result if appellant had been able to cross-examine Gooden with the undisclosed evidence. The habeas court made the following fact findings in support of its conclusions on materiality:

[6] We note that this is not the correct test for materiality. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been [sufficient evidence] to convict." *Kyles v. Whitley*, 514 U.S. 419, 434–35 (1995). Instead, the question is whether, considering the whole record, the undisclosed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

- Bounds observed appellant speeding in the lane closest to Bounds and the stopped patrol car and other vehicle. Appellant made several unsafe lane changes and caused other drivers to brake suddenly.

- Appellant staggered when she got out of the car. She had red, glassy eyes, incoherent, slurred speech, and a very strong odor of alcohol and could not identify the name of the golf course she came from or what medication she had taken.

- Appellant admitted she drank three beers and had one open, and two cold, unopened cans of beer in her car.

- Bounds observed the other officer administer the walk and turn and one leg stand field sobriety tests. Bounds testified that appellant exhibited five out of eight clues of intoxication on the walk and turn test and four out of four clues of intoxication on the one leg stand test.

Appellant argues that there is a reasonable probability that the jury would not have convicted her if it had heard the undisclosed evidence because the blood alcohol evidence was the most important evidence of intoxication adduced at trial and Bounds was not a good witness. Bounds did not preserve the in-car video of the incident, lost his notes from the night of the incident, and admitted that the police report "contains numerous mistakes." He also conceded that the officer who administered the field sobriety tests did not give appellant proper instructions. The prosecutor made handwritten additions to the police report for Bounds to rely on during his testimony to add observations of clues of intoxication. Bounds was not trained to transport blood evidence and did not have custody of the blood specimen for two periods of at least 30 minutes during which the specimen was unattended in his car and the location was not documented.

We agree with the State that it provided ample evidence of intoxication; however, the jury also found that "an analysis of [appellant's] blood showed an alcohol concentration of 0.15 or more." That finding is a required element of a Class A misdemeanor, of which appellant was convicted. *See* Tex. Penal Code § 49.04(d).

The evidence supporting this answer could only have come from Gooden's testimony and related exhibits. Had appellant been convicted of a Class B misdemeanor, Bounds' testimony of intoxication would have been sufficient, and Gooden's testimony would not have been material. *See id.* § 49.01(2) (defining "intoxicated" as having an alcohol concentration of 0.08 or more ***or*** "not having the normal use of mental or physical faculties by reason of the introduction of alcohol" or other substances or combination thereof). However, because appellant was convicted of a Class A misdemeanor, evidence was required to establish a BAC of 0.15 or more. *See id*. § 49.04(d).

Gooden's testimony that she analyzed a sample of blood identified as appellant's and concluded the BAC was 0.193 was necessary for the jury to make an affirmative finding on the special issue of whether appellant's BAC level was 0.15 or more. *See Castellanos v. State*, 533 S.W.3d 414, 419 (Tex. App.—Corpus Christi 2016, pet. ref'd). The statutory scheme differentiates between a Class A and Class B misdemeanor based upon an analysis of blood, breath, or urine showing an alcohol concentration level of 0.15 or more. *See* Tex. Pen. Code § 49.04b(b), (d). There was no testimony regarding appellant's BAC from any witness other than Gooden.

Given the lack of other evidence indicating appellant had a BAC of 0.15 or more, we conclude that there is a reasonable probability that the jury would have reached a different result on the Class A misdemeanor charge if Gooden's testimony had been excluded. We also conclude that if the habeas court had not excluded Gooden's testimony but allowed appellant to cross-examine Gooden with the undisclosed evidence, there similarly is a reasonable probability that the jury would have reached a different result.

Conclusion

We reverse the order of the trial court denying appellant's application for writ of habeas corpus, grant habeas relief, set aside the nunc pro tunc judgment of conviction signed May 21, 2018, and remand this case for further proceedings consistent with this opinion.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Jamison, Busby, and Donovan (Donovan, J., dissenting).
Publish — TEX. R. APP. P. 47.2(b).

APPENDIX C

Diamond dissenting opinion on rehearing dated September 11, 2018

* *opinion withdrawn and superseded by Diamond v. State*, No. 14-17-00005-CR, —S.W.3d—, 2018 WL 5261185 (Tex. App.—Houston [14th Dist.] Oct. 23, 2018, pet. filed) (substitute dissenting op.)

Opinion dated May 3, 2018, Withdrawn, Motion for Rehearing Granted, Reversed and Remanded, and Majority and Dissenting Opinions on Rehearing filed September 11, 2018.

In The

Fourteenth Court of Appeals

NO. 14-17-00005-CR

LESLEY ESTHER DIAMOND, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law No. 8
Harris County, Texas
Trial Court Cause No. 2112570

D I S S E N T I N G O P I N I O N O N R E H E A R I N G

To demonstrate reversible error under *Brady*,[1] appellant was required to show the State failed to disclose material evidence that was favorable to her. *Ex Parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012). The evidence in question is

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

(1) Gooden's certification of the Hurtado[2] report when it contained a labeling error; and (2) Gooden's removal or suspension from performing her regular job duties before she testified at appellant's trial. The record reflects the trial court found the evidence was not favorable to appellant's defense. The trial court then found that even if the evidence had been disclosed, it would not have been relevant or admissible, citing Rule 608(b). Further, the trial court concluded the evidence was not material. I respectfully dissent from the majority's conclusion that the undisclosed evidence was material.[3]

We review the trial court's denial of habeas corpus relief under an abuse of discretion standard and consider the facts in the light most favorable to the trial court's ruling. *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006). We afford almost complete deference to the trial court's determination of historical facts supported by the record, especially when those factual findings rely upon an evaluation of credibility and demeanor. *Ex parte Tarlton*, 105 S.W.3d 295, 297 (Tex. App.—Houston [14th Dist.] 2003, no pet.). We apply the same deference to review the trial court's application of law to fact questions, if the resolution of those determinations rests upon an evaluation of credibility and demeanor. *Id.* Only if the outcome of those ultimate questions turns upon an application of legal standards do we review the trial court's determination *de novo*. *Id.*

[2] The Hurtado report is the "erroneous lab report in an unrelated case" discussed in Section II of the majority opinion.

[3] I would note that the oral pronouncement controls over the written judgment, *see Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004), and our record included the reporter's record wherein the trial stated that appellant was convicted of a Class A misdemeanor.

The trial court made the following findings of fact:

A. THE TRIAL

17. The State presented the following evidence of Applicant's guilt for the charged offense:

a. On March 23, 2013, Harris County Constable Precinct 5 Deputy Justin Bounds was conducting a traffic stop in an unrelated case on the Westpark Tollway in Harris County, Texas, when he first observed Applicant, who was the sole operator and occupant of her vehicle, driving in excess of the speed limit in the lane closest to the stopped patrol car and the other stopped vehicle.

b. Bounds observed Applicant make several unsafe lane changes without signaling that caused other drivers to slam on their brakes.

c. Bounds illuminated his overhead lights, but Applicant took a long time to stop her vehicle.

d. Bounds asked Applicant to step out of her car; when she did so, Applicant was staggering and could not keep her balance.

e. During this traffic stop Applicant told Bounds that she was coming from a golf course at a country club, but was unable to identify the name or location of the club despite being asked multiple times.

f. Applicant admitted she had been drinking, and told Bounds that she had consumed three Bud Light beers that day.

g. Bounds recovered one open can of beer and two cold, unopened cans of beer from Applicant's vehicle.

h. Bounds testified that Applicant appeared intoxicated; that there was a very strong odor of alcohol coming from Applicant's vehicle and breath; Applicant had red, glassy eyes, incoherent, slurred speech, and appeared confused; and Applicant indicated she was taking medication, but she was unable to identify the medication.

i. Bounds testified that he requested another deputy to assist him with Applicant's traffic stop, and Bounds, who was also certified to administer standardized field sobriety tests,

observed Deputy J. Francis administer the walk-and-turn and one-leg-stand field sobriety tests to the applicant.

j. Bounds testified that he observed Applicant exhibit five clues of intoxication on the walk-and-turn test and four clues of intoxication on the one-leg-stand test, and that he formed the opinion that Applicant had lost the normal use of her mental and physical faculties.

k. Bounds testified that Applicant had poor balance and was staggering during the walk-and-turn test.

l. Bounds testified that Applicant's poor performance on the walk-and-turn test was not due to nervousness, and she stated that she suffered no handicaps or disabilities that would have affected her performance.

m. Applicant was then placed under arrest for driving while intoxicated.

n. Bounds arrested Applicant and requested a sample of her breath or blood for alcohol analysis, and Applicant refused to give a sample.

o. Bounds secured a search warrant to obtain a sample of Applicant's blood.

p. Bounds testified that over the course of 3 or 4 hours he had an opportunity to observe Applicant and concluded that she was "highly intoxicated."

q. Finally, Bounds testified that:

    i. he observed Nurse Curran draw Applicant's blood;

    ii. Applicant's blood vials were labeled with his initials, Applicant's name, and the case number;

    iii. the case number in the primary case was 035791513M; and

    iv. Bounds delivered the blood vials to a secure lockbox at the Houston Police Department.

r. This Court excluded Francis's testimony following a violation of TEX. R. EVID. 614.

s. Regarding her analysis of Applicant's blood, Gooden testified that:

i. she retrieved Applicant's blood samples in the primary case from a cooler;

ii. prior to testing Applicant's blood sample, Gooden verified that the name on the blood vial labels matched the name on the sealed evidence envelope;

iii. Applicant's name was on the blood vial labels;

iv. the instrument used to analyze Applicant's blood sample was validated at the time of the analysis;

v. Gooden followed all the lab's standard operating procedures that were in place at the time of her analysis of Applicant's blood in the primary case;

vi. Gooden used the PerkinElmer instrument in analyzing Applicant's blood sample;

vii. the Standard Operating Procedures specify the use of the Agilent instrument;

viii. the use of the PerkinElmer instrument was authorized in a memo;

ix. the PerkinElmer memo was an addendum to the Standard Operating Procedures; and,

x. the PerkinElmer instrument was validated.

t. Gooden further testified regarding her qualifications, namely that she had completed two to three thousand exercises and passed a competency test prior to engaging in blood alcohol analysis casework.

u. Finally, Gooden testified that alcohol did not affect everyone in the same way, and alcoholics may exhibit no symptoms of intoxication due to tolerance.

v. Gooden then testified that her analysis of Applicant's blood sample revealed a blood alcohol level of .193 grams per 100 milliliters.

w. Gooden testified over a period of two days, April 29 and 30, 2014, and the defense conducted a thorough cross-examination of Gooden.

Appellant's brief does not argue, and the majority opinion does not conclude, that any of the above findings are not supported by the record. Instead, appellant hypothesizes that Bounds' testimony was so "destroyed" by cross-examination that the jury could not have believed any part of his testimony. Discounting Bounds' evidence entirely, making Gooden's testimony "the most important evidence at trial," appellant then theorizes that the undisclosed evidence would have enabled her to impeach Gooden and either exclude her testimony or discredit it, resulting in a mistrial or an acquittal. At its' core, appellant's argument is that if we ignore Bounds' testimony the undisclosed evidence would have formed the basis for a successful attack on the blood evidence that she was intoxicated and her BAC level was over 0.15.

Evidence is material if there is a reasonable probability that, had it been disclosed, the outcome of the trial would have been different. *Ex Parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012). The United States Supreme Court has defined "reasonable probability" to mean the likelihood of a different result is great enough to undermine confidence in the outcome of the trial. *Smith v. Cain*, 565 U.S. 73, 75, 132 S. Ct. 630, 181 L. Ed. 2d 571 (2012) (citing *Kyles v. Whitley,* 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). Thus the "outcome" is not a hypothetical result that a jury could have reached, such as a mistrial, but is the result of the trial in question. In this case, then, the question is whether there is a reasonable probability that, had the evidence been disclosed, the jury would have found appellant "not guilty" or answered "no" on the special issue.

Impeachment evidence "may not be material if the State's other evidence is strong enough to sustain confidence in the verdict." *Cain,* 565 U.S. at 76. According to the unchallenged findings of fact, the jury heard evidence that appellant was driving over the speed limit, made unsafe lane changes without signaling, staggered

when she exited her vehicle, did not know the name or location of the country club she claimed to have left, admitted to having consumed three beers, and had an empty can of beer and two cold, unopened cans of beer in her vehicle. Further, appellant appeared intoxicated, smelled of alcohol, had red, glassy eyes, her speech was incoherent and slurred, and she appeared confused. In addition, appellant failed the field sobriety tests, had poor balance and was staggering during the walk-and-turn test.

Appellant's blood was drawn, the blood vials were labeled with appellant's initials, name, and case number and delivered to a secure lockbox. Gooden retrieved appellant's blood samples and prior to testing verified the name on the blood vials matched the name on the sealed evidence envelope; it was appellant's name. Gooden followed all the lab's standard operating procedures which included, by addendum, use of the PerkinElmer instrument. Gooden had completed two to three thousand exercises and passed a competency test. Appellant's blood revealed a BAC of .193. Furthermore, from the evidence developed external to appellant's trial and adduced at the hearing on her petition, the trial court found, and appellant does not challenge, that there was no evidence of any error in the labeling of appellant's blood or Gooden's analysis of it.

The majority concludes the evidence set forth above is sufficient to sustain confidence in the jury's finding of "guilty" but not its answer of "yes" to the special issue.[4] The majority reaches this conclusion by disregarding the trial court's findings of fact and reweighing the evidence presented.[5] It is not for this court to reweigh the

[4] Because I would find the evidence sufficient to sustain both the "guilty" finding and "yes" answer, I do not address whether the majority's reversal of the conviction is the appropriate remedy.

[5] The majority goes so far as to quote the State's disparaging remarks about Officer Bounds to no discernible purpose.

evidence and invade the jury's role as the sole judge of the credibility of the witnesses and the evidence presented. *See Villani v. State*, 116 S.W.3d 297, 301 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd.).

There is no logical connection between the undisclosed evidence—that Gooden certified a report in another case that contained a labeling error by the officer or was removed or suspended from her regular job duties to provide documentation regarding that error—and the testimony describing appellant's intoxicated state or the accuracy of the blood test results. In her reply brief, appellant attacks the trial court's finding that Gooden's removal or suspension was for the purpose of documenting the Hurtado error. But the trial court expressly found the claim of Gooden's supervisor, William Arnold, that it was for another reason was not credible in light of the surrounding circumstances. In an article 11.072 post-conviction habeas corpus proceeding, the trial judge is the sole finder of fact. *See Ex parte Garcia*, 353 S.W.3d 785, 788 (Tex. Crim. App. 2011). We "afford almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's fact findings are based on an evaluation of credibility and demeanor." *Guzman v. State,* 955 S.W.2d 85, 89 (Tex. Crim. App. 1997); *see also Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003), *overruled on other grounds by Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007). We are obligated to defer to the trial court's assessment of Arnold's credibility because the trial court heard his testimony while we must rely on the cold record. *See Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008).

Moreover, the trial court's findings detail the events surrounding the Hurtado report, the reports of the City of Houston Officer of Inspector General and the Texas Forensic Science Commission, and correspondence between Arnold and Gooden. Those findings, but for the one noted above, are not challenged on appeal. It is the

trial court that is charged with finding the facts and applying the law. *Hester v. State*, 535 S.W.2d 354, 356 (Tex. Crim. App. 1976). "On appeal challenges to the trial court's ruling generally should be directed to whether the trial court abused its discretion in one of its findings of fact or to whether the trial court properly applied the law to those facts found by it." *Id*. We should restrict our review of the facts to any issues raised in challenge to the trial court's findings. *See id*.

"[I]mpeachment evidence is that which disputes, disparages, denies, or contradicts other evidence." *Ex Parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012) (citing *Harm v. State*, 183 S.W.3d 403, 408 (Tex. Crim. App. 2006)). Given the unchallenged findings of fact by the trial court that the blood samples were labeled as appellant's and there was no evidence of any errors in Gooden's analysis of appellant's blood, the undisclosed evidence in this case would not impeach the evidence that appellant's blood was analyzed and had a BAC level of .193. Thus, the likelihood of a different result is not great enough to undermine confidence in the outcome of the trial. I would therefore conclude the alleged *Brady* evidence is not material and affirm the trial court's ruling.

/s/ John Donovan
Justice

Panel consists of Justices Jamison, Busby, and Donovan (Jamison, J. majority).
Publish — Tex. R. App. P. 47.2(b).

APPENDIX D

Diamond substitute majority opinion dated October 23, 2018

Opinion dated September 11, 2018 Withdrawn, Motion for Rehearing Denied, Reversed and Remanded, and Substitute Majority and Substitute Dissenting Opinions filed October 23, 2018.

In The

Fourteenth Court of Appeals

NO. 14-17-00005-CR

LESLEY ESTHER DIAMOND, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 8
Harris County, Texas
Trial Court Cause No. 2112570

S U B S T I T U T E M A J O R I T Y O P I N I O N

After we issued our opinion on rehearing, the State filed a motion for rehearing. We withdraw our majority opinion on rehearing issued on September 11, 2018, issue this substitute majority opinion, and deny the State's motion for rehearing.

Appellant Lesley Esther Diamond was convicted of misdemeanor driving

while intoxicated. She filed an application for writ of habeas corpus, in which she alleged that the State suppressed favorable evidence in violation of her due process rights. After a hearing, the habeas court denied the application. On appeal, appellant contends in one issue that the habeas court erred in concluding that the undisclosed evidence is not favorable to the defense or material to the jury's guilty verdict under *Brady v. Maryland*.[1] Concluding that the undisclosed evidence is material to the jury's verdict and favorable to appellant, we reverse the trial court's order.

Background

Appellant did not appeal her conviction. But after appellant was convicted, Andrea Gooden, an analyst from the Houston Police Department crime lab who testified in appellant's trial, self-reported that the crime lab had violated quality control and documentation protocols. This report culminated in an investigation and report by the Texas Forensic Science Commission that was provided to appellant after her conviction.

I. Evidence Adduced at Trial

Deputy Bounds was conducting a traffic stop in Harris County, Texas, when he observed appellant driving in excess of the speed limit in the lane closest to Bounds's stopped patrol car and the other stopped vehicle. Appellant made several unsafe lane changes without signaling that caused other drivers to brake suddenly. Bounds got into his vehicle and pursued appellant until she stopped her vehicle.

While conducting the stop, Bounds asked appellant to step out of her vehicle. When she did so, she staggered. Appellant told Bounds she was coming from a golf

[1] In that case, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

course at a country club but did not know the name or location of the country club. Appellant told Bounds she had consumed three beers that day. She also had an empty can of beer and two cold, unopened cans of beer in her car.

Bounds testified that appellant appeared intoxicated, smelled of alcohol, had red, glassy eyes and incoherent, slurred speech, and appeared confused. Appellant said she had taken medication but was unable to tell Bounds what kind of medication it was.

Bounds requested another deputy to assist him. Deputy Francis arrived and administered field sobriety tests. Bounds testified that he observed appellant exhibit five out of eight clues of intoxication on the walk and turn test and four out of four clues on the one leg stand test.[2] Bounds further testified that appellant had poor balance and staggered during the walk and turn test but conceded that Francis made some mistakes in administering the field sobriety tests. Bounds opined that appellant was intoxicated.

Gooden testified that her analysis of appellant's blood sample revealed a blood alcohol concentration (BAC) of 0.193, which is above the legal limit of 0.08.

The prosecutor argued during closing argument that the blood analysis was "really important" because 0.193 is "multiple times" the legal limit and that "[i]t is pretty much undisputed that Deputy Bounds is not good at testifying. In fact, he's probably not a very good officer" and "[e]ven someone as simple or dumb, however you want to call it, as Deputy Bounds, it was clear to him that she was intoxicated."

The jury found that appellant's BAC was above 0.15.

[2] The trial court excluded Francis's testimony as a sanction at trial because Francis and Bounds discussed the case with the prosecutor in each other's presence in violation of the Rule. *See* Tex. R. Evid. 614 (the Rule).

II. Evidence Adduced at Habeas Hearing

Because of her involvement with an erroneous lab report in an unrelated case, Gooden had been removed from casework two weeks prior to appellant's 2014 trial. In the unrelated case, an officer had mislabeled vials containing blood specimens with the wrong suspect's name. Knowing about the error, Gooden analyzed the blood samples but initially set them aside until the officer could correct the mistake. Gooden also prepared a draft lab report and certified that it was accurate. The report, still containing the wrong suspect's name, erroneously was released into the Laboratory Information Management System (LIMS) in January 2014. Reports submitted on LIMS can be accessed by prosecutors.

On April 15, 2014, Gooden discovered the error and reported it. The next day, her supervisor, William Arnold, sent her an email stating that she would not be allowed to work on any other cases: "Until further notice[,] you are to focus solely on documenting the issues surround[ing] the [errors] in the case we discussed yesterday. Do not handle any evidence, process any data or generate any reports or documentation that is unrelated to your research on this case." Arnold did not document or disclose this action to the Harris County District Attorney's Office because he did not want to damage Gooden's career or subject her to harsh cross-examination by a defense lawyer.

Gooden issued a memorandum regarding the lab error on April 17 and assumed she would be able to resume her other casework at that time. Instead, she was told she could not return to casework.

Gooden testified for the State against appellant on April 29 and 30, 2014. The erroneous lab report and Gooden's removal from casework were not disclosed to the defense. Arnold observed Gooden's testimony at trial.

On May 12, 2014, Arnold told Gooden that she still could not commence with casework because she needed to improve her courtroom testimony. Arnold subsequently told a human resources director that he preferred retraining Gooden in lieu of "documenting concerns about [Gooden's] performance which would make [Gooden] subject to painful cross examination" and he wanted to avoid damaging Gooden's career.

Gooden filed a self-disclosure with the Commission on June 4, 2014 concerning the erroneous lab report, alleging that the crime lab failed to amend the report, notify the district attorney's office of the error, or issue a required corrective and preventative action report. After a period of retraining, Gooden was allowed to return to casework in August.

The Commission opened an investigation on August 1 to review Gooden's disclosure. On August 4, Arnold gave Gooden an interoffice memo in which he noted that in early April, Gooden prepared a PowerPoint presentation for use in court testimony and during the proposed presentation, Gooden could not answer "basic questions" about the type of analysis used to analyze blood alcohol content. Arnold questioned whether Gooden could convey the proper information and whether she understood the concepts associated with the analysis.

The City of Houston's Office of Inspector General conducted an investigation on these matters during the same timeframe and issued its report on December 18, 2014. It found, in relevant part, that (1) lack of attention by Arnold and Gooden allowed the erroneous report to be submitted to the district attorney's office; and (2) Gooden testified in three trials while "off casework" and without disclosing the erroneous report.

The Commission issued its report on January 23, 2015. It concluded that Arnold engaged in professional negligence by, among other things, failing to issue

timely amended reports to the district attorney's office once the mislabeling mistake was identified by Gooden and failing to document the reasons for Gooden's removal from casework. In doing so, the Commission concluded in relevant part, that Arnold:

1. Deprived the prosecutor of the opportunity to determine whether any action was required to disclose impeachment information to the defense;

2. Possibly deprived the defense of impeachment information to which it was entitled; and

3. Sent the message that it is acceptable not to document issues that arise in the laboratory for fear of a tough cross-examination.

The trial court considered this evidence and denied appellant's habeas application, issuing written findings and conclusions. On original submission, we affirmed the trial court's decision.

III. Appellant's Motion for Rehearing

After we issued our opinion, appellant sought to correct an error in the underlying judgment of conviction.[3] The jury found that an analysis of appellant's blood showed an alcohol concentration of more than 0.15. Driving with such a concentration is a Class A misdemeanor. *See* Penal Code 49.04(d). The trial court orally pronounced appellant's conviction of a Class A misdemeanor. The original judgment, however, reflected that appellant was convicted of a Class B misdemeanor with a BAC of 0.08. Appellant filed a motion to enter judgment nunc pro tunc to correct the judgment to reflect her conviction of a Class A misdemeanor. On May

[3] Appellant's brief stated that she was charged with a Class B misdemeanor and failed to disclose that she was convicted of a Class A misdemeanor. In a post-submission letter brief, appellant's counsel referred this court to the supplemental reporter's record where "at sentencing, the [trial] court pronounced that [appellant] was convicted of a Class A misdemeanor based on the jury's affirmative finding on the special issue." It was after our original opinion had issued that appellant moved for and the trial court issued a judgment nunc pro tunc correcting the classification of appellant's conviction from a Class B to a Class A misdemeanor.

21, 2018, the trial court granted appellant's motion and entered a judgment nunc pro tunc showing that she was convicted of a Class A misdemeanor with a BAC of 0.15 or more.

Discussion

Appellant argues that the habeas court erred in concluding that the undisclosed evidence is neither favorable nor material.[4] We agree with appellant that the undisclosed evidence is favorable to her and is material.[5]

To demonstrate reversible error under *Brady*, a habeas applicant must show (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to her; and (3) the evidence is material—that is, there is a reasonable probability that, had the favorable evidence been disclosed, the outcome of the trial would have been different. *Ex parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012). The evidence central to the *Brady* claim must be admissible in court. *Id*.

We ordinarily review a habeas court's ruling on an application for writ of habeas corpus for an abuse of discretion. *Ex parte Navarro*, 523 S.W.3d 777, 780 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). But when the resolution of the ultimate issue turns on an application of purely legal standards, our review is de novo. *Id*.

[4] Appellant is not currently in custody, but the trial court had jurisdiction over her habeas application and we have jurisdiction over her appeal because she faces "collateral legal consequences" resulting from her misdemeanor conviction. *See Le v. State*, 300 S.W.3d 324, 326 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

[5] In our original opinion, we did not address whether the undisclosed evidence is favorable to appellant.

I. Favorability

The State concedes that it did not disclose the certification of the erroneous report. Also, the evidence is undisputed in the habeas record that the State did not disclose that Gooden had been suspended or temporarily removed from her casework or that Arnold lacked confidence in Gooden's understanding of the basic science. Therefore, we turn first to whether the undisclosed evidence is favorable.

Favorable evidence is that which, if disclosed and used effectively, "may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985). Favorable evidence includes exculpatory evidence and impeachment evidence. *Id.* Exculpatory evidence is that which may justify, excuse, or clear the defendant from fault, and impeachment evidence is that which disputes, disparages, denies, or contradicts other evidence. *Pena v. State*, 353 S.W.3d 797, 811–12 (Tex. Crim. App. 2011); *Harm v. State*, 183 S.W.3d 403, 408 (Tex. Crim. App. 2006).

The habeas court found that evidence of (1) a single incident in which Gooden certified a report with mislabeled blood in an unrelated case; and (2) Gooden's temporary removal from casework, would not have been relevant or admissible. The habeas court made no findings regarding evidence of Arnold's lack of confidence in Gooden's understanding of the basic concepts underlying the performance of her duties. Before we analyze the favorability of the evidence, we address whether the evidence is admissible.

The habeas court relied on Rule of Evidence 608(b) in finding that the undisclosed evidence is not admissible. "Except for a criminal conviction under Rule 609, a party may not inquire into or offer extrinsic evidence to prove specific instances of the witness's conduct in order to attack or support the witness's character for truthfulness." Tex. R. Evid. 608(b).

Appellant asserts that she would not have offered the undisclosed evidence to attack Gooden's character for truthfulness and that the evidence does not demonstrate that Gooden has a mendacious character. Instead, according to appellant, the evidence would have been admissible to rebut and undermine Gooden's expert qualifications and the reliability of her opinion after the State presented her as a qualified expert.

We agree with appellant that Rule 608(b) does not render inadmissible at trial evidence of the mistakes in an unrelated case or Gooden's removal from casework. This evidence has no relation to whether Gooden has a propensity for being untruthful.

We also disagree with the habeas court's finding that the undisclosed evidence is not relevant. Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence. Tex. R. Evid. 401. In general, a witness may be cross-examined on any relevant matter, including credibility. Tex. R. Evid. 611(b). The undisclosed evidence is relevant because it can be used for impeachment of Gooden's qualifications and the reliability of her opinion. In addition, regardless of its admissibility, the evidence could have been used in moving under Rule of Evidence 702 to exclude Gooden's expert testimony entirely based on lack of qualifications or reliability. *See* Tex. R. Evid. 104(a); *Kelly v. State*, 824 S.W.2d 568, 572 & n.10 (Tex. Crim. App. 1992).

We now address whether the undisclosed evidence is favorable. Appellant argues that the suppressed evidence is admissible under the Confrontation Clause and Rule 702 because it relates directly to Gooden's qualifications and the reliability of her opinion. Had she known about Gooden's "suspension," her certification of the erroneous report in the unrelated case, and Arnold's lack of confidence in her understanding of the basic science, appellant claims she would have attempted to

exclude Gooden's testimony and, if unsuccessful, would have used the evidence to impeach Gooden. Appellant additionally argues she would have called Arnold to testify regarding his misgivings about Gooden's abilities. Thus, appellant asserts, even if Gooden had been permitted to testify as an expert at trial, the jury would have had a factual basis to doubt Gooden's qualifications and the reliability of her blood alcohol analysis.

We address each type of undisclosed evidence in turn. Appellant repeatedly refers to Gooden's having been "suspended" or being "under suspension." The habeas court found, however, that Gooden was not suspended but was "temporarily removed from casework" to focus on documenting the mislabeled blood sample report. The court noted that Arnold never used the terms "suspended" or "under suspension" until he wrote the August 4, 2014 memo, and further found Arnold's use of those terms "suspect and unpersuasive" given the TFSC's finding of "no professional misconduct" or "negligence" by Gooden; Gooden's continued performance of tasks and receipt of compensation; and Arnold's labeling Gooden's work status as "suspended" only after Gooden self-reported to the TFSC and contacted the human resources director about returning to work.

The State argues that the failure of the habeas court to find that Gooden was "suspended" or "under suspension" eviscerates appellant's theory that she can impeach Gooden's credibility by showing evidence that Gooden was "suspended" or "under suspension" when she testified at appellant's trial. Irrespective of the terms used to describe Gooden's work status ("under suspension" or "off of casework" or otherwise), Gooden's testimony would have been "subject to painful cross examination" had the evidence of her removal been disclosed, just as Arnold feared. We conclude that the undisclosed evidence of Gooden's work status at the time of appellant's trial is favorable impeachment evidence.

We also conclude that the certification of the mislabeled lab report in another case is favorable impeachment evidence. At appellant's trial, Gooden testified to several issues of State personnel mishandling evidence in this case: the vials containing appellant's blood were missing labels containing the nurse's name, the officer's name, the suspect's name, and the time of the draw; and the labels should have been placed on the blood vials when the vials were transported from the blood draw room to the police evidence locker. Moreover, Bounds testified at trial that the vials containing appellant's blood were in his custody from immediately after the draw until he turned them in at the police department. However, Bounds, who was not trained to transport blood evidence in DWI cases, left the vials unattended twice for at least 30 minutes at a time.

There is no evidence that Gooden personally was responsible for the errors in appellant's case. However, the undisclosed evidence would have provided appellant with "painful cross examination" material questioning the integrity of the crime lab's processes in analyzing blood samples for BAC at that time.

In his August 4, 2014 memo, Arnold claimed he had concerns about Gooden's level of knowledge and understanding regarding her "knowledge base" and her inability to answer "basic questions." This is favorable evidence with which to impeach Gooden's qualifications in performing the blood analysis and question the reliability of her opinion that appellant had a BAC of 0.193.

We conclude that the undisclosed evidence is favorable. That is, if the evidence had been disclosed and used effectively by appellant's counsel for impeachment, it might have made the difference between appellant's conviction and a possible verdict of acquittal. *See Bagley*, 473 U.S. at 676.

II. Materiality

The possibility that an item of undisclosed information might have helped the defense or affected the outcome of the trial does not establish materiality. *Miles*, 359 S.W.3d at 666. The undisclosed evidence is material only if there is a reasonable probability that, in light of all the evidence, it is reasonably probable that the outcome of the trial would have been different had the evidence been disclosed to the defense. *Id*. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id*.

Although we defer to the habeas court's credibility determinations, we review the question of materiality de novo. *See Ex parte Weinstein*, 421 S.W.3d 656, 664 n.17 (Tex. Crim. App. 2014) (noting that in addressing habeas claims involving *Brady*, materiality of evidence is reviewed de novo). We balance the strength of the exculpatory evidence against the evidence supporting conviction and consider the suppressed evidence collectively, not item by item. *Miles*, 359 S.W.3d at 666.

The habeas court concluded that appellant failed to establish materiality of the evidence because Bounds' testimony regarding appellant's intoxication was "more than sufficient" to support a guilty verdict[6] and there is no reasonable probability that the jury would have reached a different result if appellant had been able to cross-examine Gooden with the undisclosed evidence. The habeas court made the following fact findings in support of its conclusions on materiality:

- Bounds observed appellant speeding in the lane closest to Bounds and the stopped patrol car and other vehicle. Appellant made several unsafe

[6] We note that this is not the correct test for materiality. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been [sufficient evidence] to convict." *Kyles v. Whitley*, 514 U.S. 419, 434–35 (1995). Instead, the question is whether, considering the whole record, the undisclosed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

lane changes and caused other drivers to brake suddenly.

- Appellant staggered when she got out of the car. She had red, glassy eyes, incoherent, slurred speech, and a very strong odor of alcohol and could not identify the name of the golf course she came from or what medication she had taken.

- Appellant admitted she drank three beers and had one open, and two cold, unopened cans of beer in her car.

- Bounds observed the other officer administer the walk and turn and one leg stand field sobriety tests. Bounds testified that appellant exhibited five out of eight clues of intoxication on the walk and turn test and four out of four clues of intoxication on the one leg stand test.

Appellant argues that there is a reasonable probability that the jury would not have convicted her if it had heard the undisclosed evidence because the blood alcohol evidence was the most important evidence of intoxication adduced at trial and Bounds was not a good witness. Bounds did not preserve the in-car video of the incident, lost his notes from the night of the incident, and admitted that the police report "contains numerous mistakes." He also conceded that the officer who administered the field sobriety tests did not give appellant proper instructions. The prosecutor made handwritten additions to the police report for Bounds to rely on during his testimony to add observations of clues of intoxication. Bounds was not trained to transport blood evidence and did not have custody of the blood specimen for two periods of at least 30 minutes during which the specimen was unattended in his car and the location was not documented.

We agree with the State that it provided ample evidence of intoxication; however, the jury also found that "an analysis of [appellant's] blood showed an alcohol concentration of 0.15 or more." That finding is a required element of a Class A misdemeanor, of which appellant was convicted. *See* Tex. Penal Code § 49.04(d). The evidence supporting this answer could only have come from Gooden's

testimony and related exhibits. Had appellant been convicted of a Class B misdemeanor, Bounds's testimony of intoxication would have been sufficient, and Gooden's testimony would not have been material. *See id.* § 49.01(2) (defining "intoxicated" as having an alcohol concentration of 0.08 or more ***or*** "not having the normal use of mental or physical faculties by reason of the introduction of alcohol" or other substances or combination thereof). However, because appellant was convicted of a Class A misdemeanor, evidence was required to establish a BAC of 0.15 or more. *See id*. § 49.04(d).

Gooden's testimony that she analyzed a sample of blood identified as appellant's and concluded the BAC was 0.193 was necessary for the jury to make an affirmative finding on the special issue of whether appellant's BAC level was 0.15 or more. *See Castellanos v. State*, 533 S.W.3d 414, 419 (Tex. App.—Corpus Christi 2016, pet. ref'd). The statutory scheme differentiates between a Class A and Class B misdemeanor based upon an analysis of blood, breath, or urine showing an alcohol concentration level of 0.15 or more. *See* Tex. Pen. Code § 49.04b(b), (d). There was no testimony regarding appellant's BAC from any witness other than Gooden.

Given the lack of other evidence indicating appellant had a BAC of 0.15 or more, we conclude that there is a reasonable probability that the jury would have reached a different result on the Class A misdemeanor charge if Gooden's testimony had been excluded. We also conclude that if the habeas court had not excluded Gooden's testimony but allowed appellant to cross-examine Gooden with the undisclosed evidence, there similarly is a reasonable probability that the jury would have reached a different result.

III. The State's Motion for Rehearing

The State filed a motion for rehearing, in which it asserts that we erred by not

addressing, in our September 11, 2018 majority opinion on rehearing, all the arguments it raised in response to appellant's motion for rehearing in accordance with Texas Rule of Appellate Procedure 47.1. Tex. R. App. P. 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issued raised and necessary to final disposition of the appeal.").[7] Although we considered the State's additional arguments and concluded that addressing them in the opinion was not necessary to the disposition of this appeal, we address them here for clarity.

The State urged in its response to appellant's motion for rehearing that appellant was presenting new arguments that she did not present to the trial court. Appellant's habeas petition stated that she "was charged with [a] Class B misdemeanor," and the trial judge made the same recitation in the procedural history of his findings of fact. However, in the same procedural section of his findings of fact, the trial judge also stated, "the jury convicted Applicant and found that her blood alcohol concentration was above 0.15." Because appellant moved for rehearing asking this court to consider the *Brady* issue in light of the nunc pro tunc judgment for a Class A misdemeanor, the State contends that this court—as an intermediate appellate court with no original habeas corpus jurisdiction in criminal cases—does not have the authority to address appellant's request.[8]

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[7] *See also State v. Cortez*, 501 S.W.3d 606, 609 (Tex. Crim. App. 2016) (vacating the judgment of the court of appeals and remanding the case to that court to consider an opinion, which the court of appeals failed to address and which the State claimed resolved the case); *Ikner v. State*, 848 S.W.2d 161, 162 (Tex. Crim. App. 1993) (vacating the judgments of the court of appeals and remanding the causes to the that court because it sustained appellant's points of error without addressing the State's argument that appellant had not preserved error for appellate review).

[8] *See Ex parte Evans*, 410 S.W.3d 481, 485 (Tex. App.—Fort Worth 2013, pet. ref'd) (refusing to consider on appeal from the denial of an application for writ of habeas corpus an argument not raised in the application); *Greenville v. State*, 798 S.W.2d 361, 362–63 (Tex. App.—Beaumont 1990, no pet.) (holding that the court of appeals could not rule on issues on appeal from the denial of an application for writ of habeas corpus that were not raised in the application).

We disagree. A review of appellant's application for writ of habeas corpus, the habeas corpus hearing record, her appellate brief, and her motion for rehearing reflect that the ground on which appellant seeks habeas corpus relief has remained consistent in the trial court and on appeal: that the State violated *Brady* by not disclosing evidence concerning Gooden's qualifications and the reliability of her opinions. As explained above, appellant's conviction of a Class A rather than a Class B misdemeanor shows that the withheld evidence was material. But the nature of appellant's conviction has not changed: even if appellant and the habeas judge later made clerical errors, the trial court orally pronounced that appellant was convicted of a Class A misdemeanor. Indeed, the State notes that "the .15 enhancement was plain on the face of the record, and the appellant's habeas counsel was also her trial counsel." We also note that the habeas court was the trial court. Accordingly, we find no merit in the State's arguments and deny its motion for rehearing.

Conclusion

We reverse the order of the trial court denying appellant's application for writ of habeas corpus, grant habeas relief, set aside the nunc pro tunc judgment of conviction signed May 21, 2018, and remand this case for further proceedings consistent with this opinion.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Jamison, Busby, and Donovan (Donovan, J., dissenting).
Publish — TEX. R. APP. P. 47.2(b).

APPENDIX E

Diamond substitute dissenting opinion dated October 23, 2018

Opinion dated September 11, 2018, Withdrawn, Motion for Rehearing Denied, Reversed and Remanded, and Substitute Majority and Substitute Dissenting Opinions filed October 23, 2018.

In The

Fourteenth Court of Appeals

NO. 14-17-00005-CR

LESLEY ESTHER DIAMOND, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law No. 8
Harris County, Texas
Trial Court Cause No. 2112570

S U B S T I T U T E D I S S E N T I N G O P I N I O N

After I issued a dissenting opinion on rehearing, the Sate filed a motion for rehearing. I withdraw my dissenting opinion on rehearing issued on September 11, 2018, and issue this substitute dissenting opinion. I note that I agree and do not dissent to the substitute majority opinion's denial of the State's motion for rehearing.

To demonstrate reversible error under *Brady*,[1] appellant was required to show the State failed to disclose material evidence that was favorable to her. *Ex Parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012). The evidence in question is (1) Gooden's certification of the Hurtado[2] report when it contained a labeling error; and (2) Gooden's removal or suspension from performing her regular job duties before she testified at appellant's trial. The record reflects the trial court found the evidence was not favorable to appellant's defense. The trial court then found that even if the evidence had been disclosed, it would not have been relevant or admissible, citing Rule 608(b). Further, the trial court concluded the evidence was not material. I respectfully dissent from the majority's conclusion that the undisclosed evidence was material.[3]

We review the trial court's denial of habeas corpus relief under an abuse of discretion standard and consider the facts in the light most favorable to the trial court's ruling. *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006). We afford almost complete deference to the trial court's determination of historical facts supported by the record, especially when those factual findings rely upon an evaluation of credibility and demeanor. *Ex parte Tarlton*, 105 S.W.3d 295, 297 (Tex. App.—Houston [14th Dist.] 2003, no pet.). We apply the same deference to review the trial court's application of law to fact questions, if the resolution of those determinations rests upon an evaluation of credibility and demeanor. *Id.* Only if the outcome of those ultimate questions turns upon an application of legal standards do

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[2] The Hurtado report is the "erroneous lab report in an unrelated case" discussed in Section II of the majority opinion.

[3] I would note that the oral pronouncement controls over the written judgment, *see Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004), and our record included the reporter's record wherein the trial stated that appellant was convicted of a Class A misdemeanor.

we review the trial court's determination *de novo*. *Id.*

The trial court made the following findings of fact:

A. THE TRIAL

17. The State presented the following evidence of Applicant's guilt for the charged offense:

a. On March 23, 2013, Harris County Constable Precinct 5 Deputy Justin Bounds was conducting a traffic stop in an unrelated case on the Westpark Tollway in Harris County, Texas, when he first observed Applicant, who was the sole operator and occupant of her vehicle, driving in excess of the speed limit in the lane closest to the stopped patrol car and the other stopped vehicle.

b. Bounds observed Applicant make several unsafe lane changes without signaling that caused other drivers to slam on their brakes.

c. Bounds illuminated his overhead lights, but Applicant took a long time to stop her vehicle.

d. Bounds asked Applicant to step out of her car; when she did so, Applicant was staggering and could not keep her balance.

e. During this traffic stop Applicant told Bounds that she was coming from a golf course at a country club, but was unable to identify the name or location of the club despite being asked multiple times.

f. Applicant admitted she had been drinking, and told Bounds that she had consumed three Bud Light beers that day.

g. Bounds recovered one open can of beer and two cold, unopened cans of beer from Applicant's vehicle.

h. Bounds testified that Applicant appeared intoxicated; that there was a very strong odor of alcohol coming from Applicant's vehicle and breath; Applicant had red, glassy eyes, incoherent, slurred speech, and appeared confused; and Applicant indicated she was taking medication, but she was unable to identify the medication.

i. Bounds testified that he requested another deputy to assist him

with Applicant's traffic stop, and Bounds, who was also certified to administer standardized field sobriety tests, observed Deputy J. Francis administer the walk-and-turn and one-leg-stand field sobriety tests to the applicant.

j. Bounds testified that he observed Applicant exhibit five clues of intoxication on the walk-and-turn test and four clues of intoxication on the one-leg-stand test, and that he formed the opinion that Applicant had lost the normal use of her mental and physical faculties.

k. Bounds testified that Applicant had poor balance and was staggering during the walk-and-turn test.

l. Bounds testified that Applicant's poor performance on the walk-and-turn test was not due to nervousness, and she stated that she suffered no handicaps or disabilities that would have affected her performance.

m. Applicant was then placed under arrest for driving while intoxicated.

n. Bounds arrested Applicant and requested a sample of her breath or blood for alcohol analysis, and Applicant refused to give a sample.

o. Bounds secured a search warrant to obtain a sample of Applicant's blood.

p. Bounds testified that over the course of 3 or 4 hours he had an opportunity to observe Applicant and concluded that she was "highly intoxicated."

q. Finally, Bounds testified that:

    i. he observed Nurse Curran draw Applicant's blood;

    ii. Applicant's blood vials were labeled with his initials, Applicant's name, and the case number;

    iii. the case number in the primary case was 035791513M; and

    iv. Bounds delivered the blood vials to a secure lockbox at the Houston Police Department.

r. This Court excluded Francis's testimony following a violation of TEX. R. EVID. 614.

s. Regarding her analysis of Applicant's blood, Gooden testified that:

   i. she retrieved Applicant's blood samples in the primary case from a cooler;

   ii. prior to testing Applicant's blood sample, Gooden verified that the name on the blood vial labels matched the name on the sealed evidence envelope;

   iii. Applicant's name was on the blood vial labels;

   iv. the instrument used to analyze Applicant's blood sample was validated at the time of the analysis;

   v. Gooden followed all the lab's standard operating procedures that were in place at the time of her analysis of Applicant's blood in the primary case;

   vi. Gooden used the PerkinElmer instrument in analyzing Applicant's blood sample;

   vii. the Standard Operating Procedures specify the use of the Agilent instrument;

   viii. the use of the PerkinElmer instrument was authorized in a memo;

   ix. the PerkinElmer memo was an addendum to the Standard Operating Procedures; and,

   x. the PerkinElmer instrument was validated.

t. Gooden further testified regarding her qualifications, namely that she had completed two to three thousand exercises and passed a competency test prior to engaging in blood alcohol analysis casework.

u. Finally, Gooden testified that alcohol did not affect everyone in the same way, and alcoholics may exhibit no symptoms of intoxication due to tolerance.

v. Gooden then testified that her analysis of Applicant's blood sample revealed a blood alcohol level of .193 grams per 100 milliliters.

w. Gooden testified over a period of two days, April 29 and 30, 2014, and the defense conducted a thorough cross-examination of Gooden.

Appellant's brief does not argue, and the majority opinion does not conclude, that any of the above findings are not supported by the record. Instead, appellant hypothesizes that Bounds' testimony was so "destroyed" by cross-examination that the jury could not have believed any part of his testimony. Discounting Bounds' evidence entirely, making Gooden's testimony "the most important evidence at trial," appellant then theorizes that the undisclosed evidence would have enabled her to impeach Gooden and either exclude her testimony or discredit it, resulting in a mistrial or an acquittal. At its' core, appellant's argument is that if we ignore Bounds' testimony the undisclosed evidence would have formed the basis for a successful attack on the blood evidence that she was intoxicated and her BAC level was over 0.15.

Evidence is material if there is a reasonable probability that, had it been disclosed, the outcome of the trial would have been different. *Ex Parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012). The United States Supreme Court has defined "reasonable probability" to mean the likelihood of a different result is great enough to undermine confidence in the outcome of the trial. *Smith v. Cain*, 565 U.S. 73, 75, 132 S. Ct. 630, 181 L. Ed. 2d 571 (2012) (citing *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). Thus the "outcome" is not a hypothetical result that a jury could have reached, such as a mistrial, but is the result of the trial in question. In this case, then, the question is whether there is a reasonable probability that, had the evidence been disclosed, the jury would have found appellant "not guilty" or answered "no" on the special issue.

Impeachment evidence "may not be material if the State's other evidence is strong enough to sustain confidence in the verdict." *Cain*, 565 U.S. at 76. According to the unchallenged findings of fact, the jury heard evidence that appellant was driving over the speed limit, made unsafe lane changes without signaling, staggered

when she exited her vehicle, did not know the name or location of the country club she claimed to have left, admitted to having consumed three beers, and had an empty can of beer and two cold, unopened cans of beer in her vehicle. Further, appellant appeared intoxicated, smelled of alcohol, had red, glassy eyes, her speech was incoherent and slurred, and she appeared confused. In addition, appellant failed the field sobriety tests, had poor balance and was staggering during the walk-and-turn test.

Appellant's blood was drawn, the blood vials were labeled with appellant's initials, name, and case number and delivered to a secure lockbox. Gooden retrieved appellant's blood samples and prior to testing verified the name on the blood vials matched the name on the sealed evidence envelope; it was appellant's name. Gooden followed all the lab's standard operating procedures which included, by addendum, use of the PerkinElmer instrument. Gooden had completed two to three thousand exercises and passed a competency test. Appellant's blood revealed a BAC of .193. Furthermore, from the evidence developed external to appellant's trial and adduced at the hearing on her petition, the trial court found, and appellant does not challenge, that there was no evidence of any error in the labeling of appellant's blood or Gooden's analysis of it.

The majority concludes the evidence set forth above is sufficient to sustain confidence in the jury's finding of "guilty" but not its answer of "yes" to the special issue.[4] The majority reaches this conclusion by disregarding the trial court's findings of fact and reweighing the evidence presented.[5] It is not for this court to reweigh the

[4] Because I would find the evidence sufficient to sustain both the "guilty" finding and "yes" answer, I do not address whether the majority's reversal of the conviction is the appropriate remedy.

[5] The majority goes so far as to quote the State's disparaging remarks about Officer Bounds to no discernible purpose.

evidence and invade the jury's role as the sole judge of the credibility of the witnesses and the evidence presented. *See Villani v. State*, 116 S.W.3d 297, 301 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd.).

There is no logical connection between the undisclosed evidence—that Gooden certified a report in another case that contained a labeling error by the officer or was removed or suspended from her regular job duties to provide documentation regarding that error—and the testimony describing appellant's intoxicated state or the accuracy of the blood test results. In her reply brief, appellant attacks the trial court's finding that Gooden's removal or suspension was for the purpose of documenting the Hurtado error. But the trial court expressly found the claim of Gooden's supervisor, William Arnold, that it was for another reason was not credible in light of the surrounding circumstances. In an article 11.072 post-conviction habeas corpus proceeding, the trial judge is the sole finder of fact. *See Ex parte Garcia*, 353 S.W.3d 785, 788 (Tex. Crim. App. 2011). We "afford almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's fact findings are based on an evaluation of credibility and demeanor." *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997); *see also Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003), *overruled on other grounds by Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007). We are obligated to defer to the trial court's assessment of Arnold's credibility because the trial court heard his testimony while we must rely on the cold record. *See Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008).

Moreover, the trial court's findings detail the events surrounding the Hurtado report, the reports of the City of Houston Officer of Inspector General and the Texas Forensic Science Commission, and correspondence between Arnold and Gooden. Those findings, but for the one noted above, are not challenged on appeal. It is the

trial court that is charged with finding the facts and applying the law. *Hester v. State*, 535 S.W.2d 354, 356 (Tex. Crim. App. 1976). "On appeal challenges to the trial court's ruling generally should be directed to whether the trial court abused its discretion in one of its findings of fact or to whether the trial court properly applied the law to those facts found by it." *Id*. We should restrict our review of the facts to any issues raised in challenge to the trial court's findings. *See id*.

"[I]mpeachment evidence is that which disputes, disparages, denies, or contradicts other evidence." *Ex Parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012) (citing *Harm v. State*, 183 S.W.3d 403, 408 (Tex. Crim. App. 2006)). Given the unchallenged findings of fact by the trial court that the blood samples were labeled as appellant's and there was no evidence of any errors in Gooden's analysis of appellant's blood, the undisclosed evidence in this case would not impeach the evidence that appellant's blood was analyzed and had a BAC level of .193. Thus, the likelihood of a different result is not great enough to undermine confidence in the outcome of the trial. I would therefore conclude the alleged *Brady* evidence is not material and affirm the trial court's ruling.

/s/ John Donovan
Justice

Panel consists of Justices Jamison, Busby, and Donovan (Jamison, J. majority).
Publish — Tex. R. App. P. 47.2(b).