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**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. WR-31,536-07

EX PARTE ROBERT ALAN FRATTA, Applicant

**ON AMENDED APPLICATION FOR POST-CONVICTION WRIT OF HABEAS
CORPUS AND AMENDED MOTION TO STAY THE EXECUTION IN CAUSE
NO. 1195044 IN THE 230TH JUDICIAL DISTRICT COURT
HARRIS COUNTY**

Per curiam.

ORDER

This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5 and a motion to stay Applicant's execution.¹

In June 2009, a jury convicted Applicant of the offense of capital murder for the death of his estranged wife. *See* TEX. PENAL CODE ANN. § 19.03(a). The jury answered

¹ Unless otherwise indicated all references to Articles in this order refer to the Code of Criminal Procedure.

the special issues submitted under Article 37.071 and the trial court, accordingly, set Applicant's punishment at death.

This Court affirmed Applicant's conviction and sentence on direct appeal, denied habeas relief on his initial Article 11.071 writ application, and dismissed his first and second subsequent Article 11.071 applications as abuses of the writ. *Fratta v. State*, No. AP-76,188 (Tex. Crim. App. Oct. 5, 2011) (not designated for publication); *Ex parte Fratta*, No. WR-31,536-04 (Tex. Crim. App. Feb. 12, 2014) (not designated for publication); *Ex parte Fratta*, No. WR-31,536-05 (Tex. Crim. App. June 30, 2021) (not designated for publication); *Ex parte Fratta*, No. WR-31,536-06 (Tex. Crim. App. May 25, 2022) (not designated for publication).

Applicant filed in the convicting court on December 27, 2022, this, his third subsequent (amended) Article 11.071 application for a writ of habeas corpus, in which he raises nine claims. In the first claim, Applicant asserts that his jury charge was constitutionally inadequate for failing to include an accomplice-witness instruction for Mary Gipp. In his second and third claims, Applicant asserts that his trial counsel were ineffective for failing to counter false gun testimony introduced by the State, and that the State withheld favorable, material evidence. In his fourth claim, Applicant complains that a juror's exposure to a report about Applicant's prior conviction for the same crime and to the fact that confessions had been excluded violated his rights to an impartial jury and fair trial. In his fifth and sixth claims, Applicant asserts that the law of parties was

unconstitutionally applied in his case and defects in his guilt phase jury charge misled and confused jurors, incorrectly stated the law, and expanded the bases for conviction.

Applicant complains in his seventh and eighth claims that there was insufficient evidence to convict him and that he was denied the right to self-representation in his direct appeal.

Finally, in his ninth claim, Applicant asserts that the State used false evidence to support a finding of future dangerousness.

We have reviewed the application and find that Applicant has failed to show that he satisfies the requirements of Article 11.071 § 5. Accordingly, we dismiss the amended application as an abuse of the writ without reviewing the merits of the claim raised. Art. 11.071 § 5(c). We also decline Applicant's invitation to reconsider his -05 writ. We deny Applicant's amended motion to stay his execution.

IT IS SO ORDERED THIS THE 4th DAY OF JANUARY, 2023.

Do Not Publish

EX PARTE ROBERT ALAN FRATTA

CAUSE NO. 712409-A

230TH DISTRICT COURT

HARRIS COUNTY, TEXAS

RESPONDENT'S AMENDED ANSWER

**ROE WILSON
ASSISTANT DISTRICT ATTORNEY
201 FANNIN
HOUSTON, TEXAS 77002-1901
TBC No. 14500600
(713) 755-6657
(713) 755-5809 FAX**

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murdered. Not only does the applicant fail to show any **Brady** violation, but the applicant also fails to "report" what such alleged information could be.

Based on the foregoing, the applicant fails to show that the State withheld evidence material to either the applicant's guilt or punishment. Assuming *arguendo* any failure to disclose, the applicant cannot show the materiality of any undisclosed information, i.e., that such information creates a reasonable doubt of guilt that did not otherwise exist so that the results of the proceeding would have been different. The applicant's third ground for relief is without merit and should be denied.

Reply to Applicant's Fourth Ground for Relief

The applicant alleges that the State failed to disclose that Laura Hoelscher was hypnotized, and that, "on information and belief," maintains that the alleged hypnosis did not comply with the requirements to ensure that a hypnotized witness' testimony is trustworthy, in violation of the applicant's rights pursuant to **U.S. CONST.**, amend. XIV.

Prior to trial in the applicant's case, Bill Valerio, Harris County Sheriff's Office arranged for Laura and Daren Hoelscher to be hypnotized a few weeks after the offense. **See State's Exhibit G, June 30, 1999 affidavit of Bill Valerio.** Valerio's primary purpose was to attempt to obtain the license number of the car in which the shooter left the scene. **Id.** However, this did not prove successful and afterwards the hypnotist informed Valerio, who was not present at the hypnosis, that no new information was obtained. **Id.** To the best of Valerio's recollection, he documented this information using his laptop computer; however, the encryption program has been lost. **Id.**

The lead detective Ronnie Roberts, Harris County Sheriff's Office, was not aware of the hypnosis which was not documented in a supplement to the offense report. **See State's Exhibit H, June 14, 1999 affidavit of Ronnie Roberts.**

Further, the trial prosecutors were unaware that either Laura or Daren Hoelscher had been hypnotized; the trial prosecutors did not request that hypnosis be done; and, they were never informed by either the Hoelschers or anyone else of any hypnosis. **See State's Exhibit I, June 8, 1999 affidavit of Casey O'Brien; State's Exhibit J, June 7, 1998 affidavit of Kelly Siegler.** Notwithstanding that the information was not conveyed, the applicant's due process rights were not violated.

The Court of Criminal Appeals, in **Spence v. State**, 795 S.W.2d 743, 757 (Tex. Crim. App. 1990), rejected the defendant's claim attacking the admissibility of testimony from a witness who had been hypnotized. After discussing the areas of which courts should be aware regarding hypnosis of witnesses, as set forth in **Zani v. State**, 758 S.W.2d 233 (Tex. Crim. App. 1988), the Court, in **Spence**, held that

[t]he only recognized violation of due process of law in this area occurs when a witness makes an in court identification after undergoing hypnosis in order to restore his memory. The testimony is only excluded if the totality of the circumstances surrounding the pretrial identification demonstrates a violation of due process of law.

Spence, 795 S.W.2d at 757. The Court of Criminal Appeals then noted that Spence's case did not involve "testimony by a State's witness as to the identification of the perpetrator of the 'Lake Waco' murders." **Id.**

In the instant case, neither Laura nor Daren Hoelscher ever made an identification of the man they saw through the window at the time of the offense. Both testified as to only a general description of the shooter. Certainly, neither of the Hoelschers ever contended that the applicant was the person whom they saw. Laura testified that, after she heard a second shot, she thought that she saw pants and movement next to the complainant's body (R. XX - 200-2). Laura further testified that, while she was telephoning 911, she saw a person standing by a tree close to the complainant's garage on the side of the complainant's house (R. XX - 204-8). The man was either a black man or he was a white man with black stuff on

his face, not very tall, very round head, and dressed in black (R. XX - 211). At one point Laura Hoelscher saw the man walk to the curb, look to his left, and then return to the tree (R. XX - 213).

Daren Hoelscher testified that he saw a man, dressed in black or dark colors, step from behind a bush on the side of the complainant's garage (R. XX - 240-4). While the man was at the curb, Daren Hoelscher could see that the man was about 5'9" and weighed about one hundred forty-five pounds (R. XX - 247). In a couple of minutes, a small silver car stopped and the man got in the car which drove away (R. XX - 214-5). Daren Hoelscher saw that the car had a burned out headlight and a Texas license plate (R. XX - 248-50).

Not only was no identification made by the Hoelschers in the instant case, but also Laura Hoelscher was uncertain whether the man was white or black. Further, as previously noted, the hypnosis did not elicit any new information from the Hoelschers. The Hoelschers' testimony was consistent with their statements made shortly after the offense. The offense report contains the following information, obtained on the evening of the offense, concerning what the Hoelschers observed:

I then interviewed three witnesses [Laura Hoelscher, Daren Hoelscher, Elizabeth Campbell] at the scene who stated that they heard two shots and saw the suspect waiting outside the garage. A light silver small car arrived east bound on Timber Trails and picked up the shooter, leaving east bound on Timber Trails.

Upon my arrival on the scene I was met by Pct. 4 Deputy Gary Bailey, who advised me that he was the reporting deputy. Bailey told me that a W/F had been shot in the garage of the home and that three people who live across the street had witnessed a portion of the shooting. Bailey told me that they were sitting in the livingroom of their house and had seen the incident through the bay window. Bailey told me that the witnesses siad (sic) they heard a gunshot, then a woman scream and then another gunshot, all in rapid order. Bailey also told me that they saw the complainant fall to teh (sic) floor of the garage and they also saw a male figure hiding behind the evergreen

shrub near the northeast corner of the house. The witness also observed a car come from Forest Firn (sic) onto Timbers Trail and stop in front of the driveway and the man from the bushes entered the car and the car left east bound on Timbers Trail. Bailey further told me that the witnesses described the car as a small, foreign (sic) with a burnt out headlight.

Detective M. Reynolds and I then went to 5411 Timbers Trail to interview the three witnesses identified to us by Deputy Bailey. The witnesses were:
HOELSCHER, LAURA ELLEN W/F 102868
HOELSCHER, DAREN ANTHONY W/M 112668
CAMPBELL, ELIZABETH A. W/F 031561 ALL RESIDE AT
5411 TIMBERS TRAIL HUMBLE, TX. 77346 852-8180

These witnesses showed us where they were when the incident occurred. Laura told us that she was sitting on the couch in the livingroom facing the bay window, which had the blinds open at the time. She said she heard a pop like a firecracker and looked up to see what kid was playing with them. She heard a woman scream and a second shot fired in quick order. She told us that the light was on in the garage and she saw the complainant fall to the floor of the garage. Laura said (sic) that she saw a pair of red pants, but did not see the person that did the shooting. She said she went to the phone and called 9-1-1 and that she could see Farah laying on the floor of the garage and she saw a man standing near the bush at the northeast corner of the garage and he was sort of jumping around, like he was anxious about something. She said she saw a car drive up and stop and then drive away and she no longer saw the man that had been by the bush.

At the time that Laura Hoelscher told us of what she had seen, she took us to the locations she was at at the time of the incident. Daren reopened the blinds of the bay window and I observed that the witnesses had a perfect view of the garage and the north side of the complainant's property.

At the request of Detective Pratt, I interviewed the witness residents at 5411 Timber Trail: [Daren Hoelscher, Laura Hoelscher, Elizabeth Campbell].

The witnesses related to me that they had been sitting in the living room talking with the blinds up and the drapes open when they noticed the interior garage light of the complainants (sic) come on. They stated that the

light comes on when the garage door is opened by remote control and that they realized that the complainant had arrived home. The witnesses stated that they did not see the complainant actually drive up but only assumed that it was her pulling into the garage. The witness stated that they continued talking and heard a "pop" which sounded like a firecracker followed by a females (sic) scream and then another "pop". Witness LAURA HOELSCHER stated that after hearing the first "pop" she looked up and out the window to see if kids were lighting fireworks and as she heard the second "pop" she observed the complainant fall to the ground beside the white vehicle and someone wearing red pants run from inside the garage exiting through the garage's walkway door. LAURA HOELSCHER stated that she told the other two (2) witness that the complainant had been shot and to turn off the lights and call 9-1-1. DAREN HOELSCHER turned off interior lights and looked out the window and ELIZABETH CAMPBELL ushered the children upstairs to a bathroom. LAURA HOELSCHER stated that while she was on the telephone with the 9-1-1 operator she looked out the window towards the complainants (sic) garage and saw someone behind a tree/bush next to the east side of the garage. She stated that the person she saw standing behind the bush was fidgeting and looking around the bush to the east and west as if looking for someone, ELIZABETH CAMPBELL stated that she also saw the individual by the bush when she came back downstairs. DAREN HOELSCHER stated that as he watched out the window he saw a small silver colored vehicle which he described as a late 80's model approach and the individual beside the garage get into the passengers (sic) side. He stated that the vehicle approached northbound on Forest Fern which curves to the east as Timber Trail, where the individual entered the vehicle, then south where Timber Trail curves south as Spoonwood. DAREN HOELSCHER stated that the vehicle appeared to be of foreign make and that one headlight was not working, he stated that as the vehicle sped away he went outside his residence but was unable to read the license plate. All three (3) of the witnesses stated that the individual that they saw run from next to the garage and get into the silver car was dressed in dark clothing and no features were distinguishable, they described the individual as being 507-508 in height and weighing approx. 150-160 lbs.

WITNESSES TO THE EVENT: [Daren Anthony Hoelscher..., Laura Ellen Hoelscher...Elizabeth Campbell...] I was informed of the witnesses by Detective Reynolds and told that they agree to proceed

from their residence to the Homicide office and give voluntary statements.

OFFICE INVESTIGATION:

Upon arriving at the homicide office, I met with Daren Hoelscher and a sworn statement was given by him. Hoelscher stated that he arrived at this residence which is directly across the street from the scene of the event at approximately 8:00 p.m. He stated that he was alone in the residence for a short period of time when his wife and Elizabeth Campbell arrived. Hoelscher said that they were all three in the living room which has a large bay window that is directly across from the garage. At approximately 8:15 p.m. he states he heard a shot and a woman scream. Hoelscher then said he heard another shot and they all looked out the window. He said he saw the open garage and then ran to his front door. He opened the front door and looked outside. He said he heard his wife say Farah had been shot and then closed the door and returned to the living room. He stated that he went back to the bay window and saw a person who was dressed in black and could possibly have been a black male. The suspect was approximately 5'7" tall and weighed between 140 to 150 pounds. Hoelscher stated he saw the suspect standing to the left of the garage and he saw a silver car stop and pick up the suspect. He further stated that the car appeared to be a late 80's model compact possibly a nissan or a toyota. After the car left the scene Hoelscher stated he crossed the street and found the complainant laying on the garage floor in a pool of blood. For a detailed account see the statement given by this witness.

I next met with Laura Ellen Hoelscher and reviewed the case with her for any details she might have. She stated that she observed the suspect to be dressed in black and she believed that he was a black male or had painted his face black. She further stated that the car that picked up the suspect was either white or silver in color and was a small car. For a more detailed account of this witness statement see the statement that was given by her and is attached to this report.

State's Exhibit K, cited portions of offense report. Further the Hoelschers' November 10, 1994 written statements are consistent with the testimony of the Hoelschers at the applicant's trial. **See State's Exhibit L, November 10, 1994 written statement of Laura Hoelscher; State's Exhibit M, November 10, 1994**

written statement of Daren Hoelscher. Therefore, the procedures used during the hypnosis, which was conducted after the Hoelscher's statements, are not relevant; the hypnosis produced no new information and produced no identification.

Based on the foregoing, the applicant's fourth ground for relief is without merit and should be denied.

Reply to Applicant's Fifth Ground for Relief

The applicant alleges that he is actually innocent of the instant offense. The applicant relies upon the following as "newly discovered" evidence:

- the alleged unreliability of May Gipp's initial statement to the police;
- the alleged hypnosis of Laura Hoelscher;
- alleged statements by William Planter that he knows who is responsible for the complainant's murder;
- Planter's conviction of solicitation of capital murder;
- jail inmate Christopher Mylett's statement;
- co-defendant Prystash's statement, made to applicant's counsel Mike Charlton, during the applicant's trial, allegedly denying that the applicant "had a role in the death of his wife." **Applicant's writ at 45.**

In **State ex rel. Holmes v. Court of Appeals**, 885 S.W.2d 389 (Tex. Crim. App. 1994), the Court of Criminal Appeals recognized the cognizability of the issue of factual actual innocence in habeas proceedings for the unique circumstance where a death row inmate alleges that he is factually innocent of the offense of capital murder, i.e., he did not commit the offense in any manner, and can meet a threshold showing and a strict burden of proof. The Court of Criminal Appeals' decision, in **Holmes**, was prompted, in part, by a death row inmate's claim of factual innocence based on newly discovered evidence and the lack of avenue of habeas relief for such claim at that time. **See Graham v. State**, 853 S.W.2d 565 (Tex. Crim. App. 1993). The Court of Criminal Appeals did not and has not interpreted factual actual

Page 1 of 2

No. 712409-A

State of Texas
County of Harris

§

June 30, 1999

WJ Before me, the undersigned authority, on this day personally appeared Harris County Sheriff's Office Homicide Detective Bill Valerio, who after being by me duly sworn, upon his oath did depose and state *WJ*

WJ "My name is Bill Valerio and I am a detective assigned to the homicide division of the Harris County Sheriff's Office. In 1994, as a detective in the homicide division, I was assigned to the investigation of the capital murder of Farah Fratta for which Robert Fratta was eventually charged and convicted. *WJ*

WJ During the investigation of the offense and prior to Robert Fratta's trial, I arranged for witnesses Laura and Daren Hoelscher to be hypnotized in an attempt to see if more information could be obtained about the car that they saw at the scene of the offense, in particular the license number of the car. I was not present during the hypnosis, but I was informed afterwards that no new information was produced as a result of the hypnosis. I do not recall the exact date of the hypnosis but I do know that it was conducted after the Hoelschers gave written statements and before the Hoelschers testified during Fratta's trial. The Hoelschers never gave "new" information after their hypnosis. *WJ*

WJ Although to the best of my recollection, I documented the Hoelschers' hypnosis on my laptop computer, I have not located or been made aware of a supplement to the offense report concerning this and I am unable to obtain any documentation from my computer. The Robert Fratta investigation was an extremely large, multi-faceted investigation which involved several detectives. Any non-conveyance of information *WJ*

STATE'S
EXHIBIT
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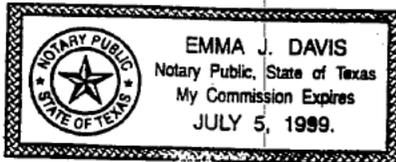
W concerning the Hoelschers' hypnosis was inadvertent. Again, no new information was produced by hypnosis. *W*

The above affidavit is true and correct to the best of my knowledge and recollection.

Signed this 6th day of June, 1999.

Detective Bill Valerio
Harris County Sheriff's Office

SUBSCRIBED AND SWORN TO before me the undersigned authority on this the 30th day of June, 1999.



NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My commission expires:

7-5-99

State of Texas
County of Harris

§

June 14, 1999

Before me, the undersigned authority, on this day personally appeared Harris County Sheriff's Office Homicide Detective Ronnie Roberts, who after being by me duly sworn, upon his oath did depose and state:

"My name is Ronnie Roberts. I have been employed as a peace officer with the Harris County Sheriff's Office for seventeen years. My badge number is 581. In 1994, I was assigned to the Homicide Division and, as such, was the lead detective in the investigation of the capital murder of Farah Fratta for which Robert Fratta was eventually charged and convicted.

During the investigation of the offense and during Robert Fratta's trial, I was not aware that the witnesses Laura and Daren Hoelscher had been hypnotized. After being asked by Roe Wilson, Assistant District Attorney, in May, 1999, whether it was possible that the Hoelschers had been hypnotized, I began inquiries among the other detectives who worked on the Fratta investigation. Eventually, I learned that Detective Bill Valerio had arranged for the hypnosis of the Hoelschers during the investigation and that their hypnosis did not produce any new information.

The above affidavit is true and correct to the best of my knowledge and recollection.

Signed this 14TH day of June, 1999.

Ronnie Roberts

Ronnie Roberts
Harris County Sheriff's Office

SUBSCRIBED AND SWORN TO before me the undersigned authority on this the 14TH day of June, 1999.

Barbara Simpson

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My commission expires:



000329

No. 712409-A

State of Texas
County of Harris

§ June 8, 1999

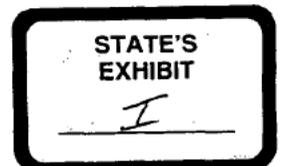
Before me, the undersigned authority, on this day personally appeared Assistant District Attorney Casey O'Brien, who after being by me duly sworn, upon his oath did depose and state:

"My name is Casey O'Brien. I have been licensed to practice law in the State of Texas since May 15, 1981. My Texas Bar No. is 15165900. I am employed as an Assistant District Attorney in the Harris County District Attorney's Office. In my capacity as a division chief, I was the trial prosecutor in the 1995 capital murder trial of the State of Texas v. Robert Alan Fratta, cause no. 712409. The other trial prosecutor was Kelly Siegler.

Laura and Daren Hoelscher testified as State's witnesses during Robert Fratta's trial. Both the Hoelschers had seen the shooter through the window of their home which faced the complainant's house. However, neither Laura nor Daren Hoelscher were able to make an identification of the man they saw.

I did not know that the Hoelschers had been hypnotized until I was informed of that on June 4, 1999. I did not request that hypnosis be done and I was not informed that hypnosis had been done by anyone in the Harris County Sheriff's Department or by the Hoelschers.

I am aware that the Hoelschers' testimony at Robert Fratta's capital murder trial was



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Page 2 of 2

consistent with their written statements and oral statements made on the evening of the offense and on the day after the offense."

The above affidavit is true and correct to the best of my knowledge and recollection.

Signed this 8TH day of January, 1999.



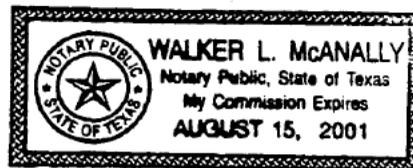
Casey O'Brien
Assistant District Attorney
Harris County District Attorney's Office

SUBSCRIBED AND SWORN TO before me the undersigned authority on this the 8TH day of January, 1999.



NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My commission expires:



No. 712409-A

State of Texas
County of Harris

§

June 7, 1999

Before me, the undersigned authority, on this day personally appeared Assistant District Attorney Kelly Siegler, who after being by me duly sworn, upon her oath did depose and state:

"My name is Kelly Siegler. I have been licensed to practice law in the State of Texas since November, 1987. My Texas Bar No. is 10533450. I have been employed as an Assistant District Attorney in the Harris County District Attorney's Office since November, 1987, and am still employed as a Harris County Assistant District Attorney. In my capacity as chief of the 230TH District Court, I was the trial prosecutor in the 1995 capital murder trial of the State of Texas v. Robert Alan Fratta, cause no. 712409. The other trial prosecutor was Casey O'Brien.

Laura and Daren Hoelscher testified as State's witnesses during Robert Fratta's trial. Both the Hoelschers had seen the shooter through the window of their home which faced the complainant's house. However, neither Laura nor Daren Hoelscher were able to make an identification of the man they saw.

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I am aware that the Hoelschers' testimony at Robert Fratta's capital murder trial was

K/S



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consistent with their written statements and oral statements made on the evening of the offense and on the day after the offense."

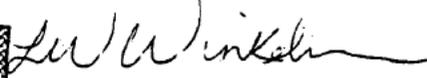
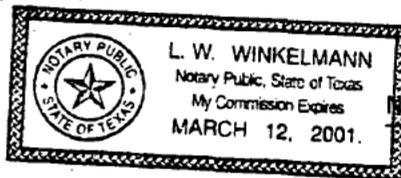
The above affidavit is true and correct to the best of my knowledge and recollection.

Signed this 7TH day of January, 1999.



Kelly Siegler
Assistant District Attorney
Harris County District Attorney's Office

SUBSCRIBED AND SWORN TO before me the undersigned authority on this the 7TH day of January, 1999.



NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My commission expires: