IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1641

ROBERT EUGENE HENDRIX,

Petitioner,

v.

JAMES V. CROSBY, Secretary,
Florida Department of Corrections

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Petitioner, ROBERT HENDRIX, was the defendant at trial and will be referred to as the "Petitioner" or "Hendrix." Respondent, James V. Crosby, will be referred to as the "Respondent." References to the appellate records will be consistent with those in the Answer Brief filed simultaneously with this Response, i.e. “R” for the record on this appeal and “TT” for the original record on direct appeal from the plea and sentencing.

STATEMENT OF THE CASE

Petitioner was charged with two counts of premeditated murder, two counts of conspiracy to commit murder, and armed burglary after Elmer Scott and his wife were found dead on August 27, 1990. A jury convicted Petitioner as charged and unanimously recommended death for each murder. The trial judge imposed the death penalty for each, finding five aggravating circumstances[1] and several nonstatutory mitigating circumstances[2] that applied to each murder. Petitioner was sentenced to thirty-year terms on each of the conspiracy convictions and life on the armed burglary conviction.

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[1]FN1. The judge found in the case of each murder that the crime:

> (1) had been committed in a cold, calculated, and premeditated manner;
> (2) was committed to avoid lawful arrest;
> (3) was committed in the course of an armed burglary;
> (4) was committed in an especially heinous, atrocious, or cruel manner; and
> (5) that the defendant had been convicted of a prior capital felony.

[2]The judge found the following as nonstatutory mitigating circumstances:

> The Defendant's family history, juvenile history, and close relationship with his mother and sisters, as well as the sentence of his co-defendant herein, Alma Denise Turbyville, to seventy-five (75) years in the Department of Corrections as a result of her plea negotiated with the State in return for her cooperation herein, give rise to non-statutory mitigating circumstances, which have been given weight by this court.

Hendrix raised nine (9) claims on direct appeal:

> 1. The trial court erred in denying Hendrix's motion to disqualify the judge;
>
> 2. The trial court erred in denying his motion to strike the jury panel on the grounds that the selection process resulted in under-representation of African-Americans;
>
> 3. The trial court erred in denying his motions for mistrial on the basis of various comments made by the prosecutor during opening and closing;
>
> 4. The trial court erred in denying his motion for mistrial based on the prejudicial effect of the emotional outburst by the victim's father;
>
> 5. The trial court erred in allowing admission of inflammatory and irrelevant photos of the victim;
>
> 6. The trial court erred in denying his motion for judgment of acquittal on the conspiracy counts;
>
> 7. The trial court erred in refusing to give limiting instructions on the aggravating circumstances of heinous, atrocious or cruel, and cold, calculated, and premeditated;
>
> 8. Florida's death penalty statute is unconstitutional because the Florida Supreme Court's interpretation and application of the aggravating factor of cold, calculated, and premeditated as set forth in Florida Statutes has resulted in an arbitrary and capricious application of the death penalty; and
>
> 9. The aggravating factor of heinous, atrocious, or cruel is unconstitutionally vague.

The State raised one issue on cross-appeal: The trial court erred in refusing to allow the State to present as an aggravating factor the fact that Hendrix had a prior conviction for a violent felony as a juvenile. *Hendrix v. State,* 637 So.

2d 916, 918 (Fla. 1994). This Court affirmed the first-degree murder convictions and death penalties, the armed burglary conviction and life sentence and one conspiracy conviction and thirty-year sentence. The Court reversed the second conspiracy conviction and vacated the corresponding thirty-year sentence. *Hendrix*, 637 So. 2d at 921.

Petitioner filed a Petition for Writ of Certiorari in the United States Supreme Court. Relief was denied on November 14, 1994. *Hendrix v. Florida*, 513 U.S. 1004 (1994).

Petitioner filed a Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend on February 29, 1996 (R1-62). The gist of the motion was that CCRC was underfunded and unable to file an appropriate pleading. After a series of motions, Petitioner's Amended Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend ("Amended Motion to Vacate") was filed August 24, 1998 (R 503-669). The motion raised twenty-five (25) claims as follows:

CLAIM I

MR. HENDRIX IS BEING DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION BY THE LACK OF FUNDING TO FULLY INVESTIGATE AND PREPARE HIS POST CONVICTION PLEADINGS IN VIOLATION OF ARTICLE 1, SECTION 9 AND HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, THE SPIRIT AND INTENT

OF 28 U.S.C. 2254 AS AMENDED BY THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 AND SPALDING V. DUGGER.

CLAIM II

COUNSEL FOR MR. HENDRIX HAS NOT RECEIVED AND/OR REVIEWED ALL OF THE RECORDS FROM STATE AGENCIES AND OTHER SOURCES THAT COULD HAVE SOME EFFECT UPON MR. HENDRIX'S CASE. AS A RESULT, COUNSEL IS UNABLE TO PROPERLY (1) INVESTIGATE THIS CASE; AND (2) PREPARE THIS MOTION AND OTHERWISE LITIGATE MR. HENDRIX'S CLAIMS. THIS CLAIM ARISES PURSUANT TO CHAPTER 119 OF THE FLORIDA STATUTES AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM III

RULE 3.851 OF THE RULES OF CRIMINAL PROCEDURE, WHICH REQUIRES MR. HENDRIX TO FILE HIS POSTCONVICTION MOTION WITHIN ONE YEAR AFTER HIS CONVICTIONS AND SENTENCES BECOME FINAL, VIOLATES MR. HENDRIX RIGHTS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. THIS RULE ALSO DENIES MR. HENDRIX THE EFFECTIVE ASSISTANCE OF COUNSEL AND ACCESS TO THE COURTS OF THE STATE OF FLORIDA AND THE UNITED STATES, AS WELL AS, HIS RIGHT TO PETITION FOR A WRIT OF HABEAS CORPUS.

CLAIM IV

THE OUTCOME OF MR. HENDRIX'S GUILT/INNOCENCE AND SENTENCING PHASES WAS MATERIALLY UNRELIABLE DUE TO THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT MATERIAL, PREJUDICIAL ACTS OR OMISSIONS OF TRIAL COUNSEL, IMPROPER RULINGS OF THE TRIAL COURT, IMPROPER STATE CONDUCT, AND/OR ALL OF THE FOREGOING, IN VIOLATION OF MR. HENDRIX'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM V

MR. HENDRIX'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES

CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, WERE VIOLATED WHEN THE TRIAL COURT FAILED TO EXCUSE JURORS FOR CAUSE FOLLOWING A DEFENSE CHALLENGE.

CLAIM VI

IT WAS UNCONSTITUTIONAL FOR THE TRIAL COURT TO FIND AS AN AGGRAVATING CIRCUMSTANCE THAT MR. HENDRIX HAD PREVIOUSLY BEEN CONVICTED OF ANOTHER FELONY INVOLVING THE USE OF OR THREAT OF VIOLENCE TO A PERSON.

CLAIM VII

THE JURY INSTRUCTIONS AND PROSECUTOR'S ARGUMENT UNCONSTITUTIONALLY SHIFTED THE BURDEN TO MR. HENDRIX TO PROVE THAT DEATH WAS AN INAPPROPRIATE SENTENCE.

CLAIM VIII

IT WAS UNCONSTITUTIONAL FOR THE TRIAL COURT TO ADMIT INTO EVIDENCE AND FOR THE JURY TO HEAR AND CONSIDER NON-STATUTORY AGGRAVATING EVIDENCE.

CLAIM IX

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY. IT ALSO VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT.

CLAIM X

MR. HENDRIX'S SENTENCE RESTS UPON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XI

MR. HENDRIX DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL.

CLAIM XII

MR. HENDRIX DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL.

CLAIM XIII

MR. HENDRIX DID NOT RECEIVE MENTAL HEALTH ASSISTANCE AS CONTEMPLATED BY AKE V. OKLAHOMA, 470 U.S. 68 (1985), IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XIV

MR. HENDRIX DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER OF ANY RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XV

THE TRIAL COURT AND PROSECUTOR UNCONSTITUTIONALLY MISLEAD THE JURY AS TO ITS SENSE OF RESPONSIBILITY TOWARDS THE SENTENCING OF MR. HENDRIX.

CLAIM XVI

THE TRIAL COURT ERRED WHEN IT DID NOT DEFINE THE WORDS, "REASONABLE DOUBT" DURING THE PENALTY PHASE. THE ERROR VIOLATED MR. HENDRIX'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM XVII

MR. HENDRIX'S COUNSEL IS PROHIBITED FROM INTERVIEWING JURORS TO DETERMINE WHETHER JUROR MISCONDUCT CREATES CAUSE FOR RELIEF. MR. HENDRIX'S RIGHTS UNDER THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED.

CLAIM XVIII

THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING

FACTOR AND INSTRUCTION ARE UNCONSTITUTIONALLY VAGUE. MR. HENDRIX'S JURY WAS IMPROPERLY INSTRUCTED ON THIS AGGRAVATING CIRCUMSTANCE.

CLAIM XIX

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON THE STANDARD BY WHICH THEY MUST JUDGE EXPERT TESTIMONY. THE JURY MADE DECISIONS OF LAW THAT WERE WITHIN THE PROVINCE OF THE COURT IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XX

MR. HENDRIX WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THIS COURT DID NOT FIND THE EXISTENCE OF MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XXI

MR. HENDRIX WAS DENIED A PROPER DIRECT APPEAL FROM HIS JUDGMENT OF CONVICTION AND A PROPER APPEAL FROM HIS SENTENCE OF DEATH IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ART. 5, SEC. 3(b)(1) OF THE FLORIDA CONSTITUTION AND FLORIDA STATUTES ANNOTATED, SEC. 921.141(4), DUE TO OMISSIONS IN THE RECORD.

CLAIM XXII

FLORIDA'S CURRENT USE OF JUDICIAL ELECTROCUTION AS ITS METHOD OF EXECUTION IS UNCONSTITUTIONAL BECAUSE IT DOES NOT RESULT IN INSTANT DEATH AND INFLICTS SEVERE MUTILATION ON THE BODY OF THE CONDEMNED PRISONER. FLORIDA'S CURRENT USE OF JUDICIAL ELECTROCUTION AS ITS SOLE METHOD OF EXECUTION IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EVOLVING STANDARDS OF DECENCY THAT MARK THE PROGRESS OF A MATURING SOCIETY.

CLAIM XXIII

THE STATE OF FLORIDA FAILS TO AFFORD MR. HENDRIX A

CLEMENCY REVIEW PROCESS WHICH COMPORTS WITH DUE PROCESS. THE PROCESS OF CLEMENCY REVIEW IN FLORIDA VIOLATES MR. HENDRIX FOURTEENTH AND EIGHTH AMENDMENT RIGHTS.

CLAIM XXIV

MR. HENDRIX WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS, HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, WHEN HE WAS IMPROPERLY SHACKLED DURING THE GUILT AND PENALTY PHASES OF HIS TRIAL.

CLAIM XXV

MR. HENDRIX'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Respondent responded (R 671-709). Judge Lockett denied relief on Claims III, VI, VII, VIII, IX, X XVI, XVII, XVIII, XIX and XXI (R 989-990). On February 4, 2000, after an oral request to amend the Amended Motion to Vacate, Judge Lockett granted the motion (R 1013). On March 10, 2000, Petitioner filed a "Written Argument Regarding 3.850 Motion" which was actually a motion for rehearing on the November 23, 1999, order. In the "Written Argument," Petitioner asked the trial judge to defer ruling on the claims which had been denied until after the evidentiary hearing (R 1014-1015). Judge Lockett entered an order December 8, 2001, allowing an evidentiary hearing on Claims IV

(paragraphs 2, 3 & 4) and XII (paragraphs 2A, 2C, 2E, 2F, 2G, 2I and 3). The judge recognized that Claims III, VI, VII, VIII, IX, X XVI, XVII, XVIII, XIX, and XXI had previously been denied. Additionally, Claims I, V and XXII were denied. The court deferred ruling on Claims IV(paragraphs 6-9), XI, XII (paragraphs 2B, 2D, 2H, 2J, 2K, and 2L), XIII, XIV, XV, XX, XXIII, and XXV as requested by Petitioner (R 1043). That order was then amended to add Claim XXIV to the claims which required an evidentiary hearing (R 1047-1048). Petitioner moved to interview jurors: Judge Lockett denied the motion (R 1066-1069, 1086). Petitioner also requested a new *Huff* hearing and an order allowing the deposition of Judge Lockett and the co-defendant's attorneys. The basis of this motion was that Judge Lockett had resigned and Judge Law had been assigned to the case (R 1115-1132). On June 11, 2002, Petitioner moved to disqualify Judge Law (R 1160-1169). The order was granted (R 1170) and Judge Hill was assigned to the case (R 1172). Judge Hill allowed Petitioner to depose Judge Lockett only on the issue of whether Petitioner's shackles were visible (R 1183). Judge Hill also expanded the scope of the evidentiary hearing to add Claims XI, XII (paragraphs 2B, 2D, 4 and 4A), XIII and XIV. Claim II was denied as moot. On May 16, 2003, Petitioner filed a Supplemental Motion to Vacate Judgments of Conviction and

Sentences based on *Ring v. Arizona*, 536 U.S. 584 (2002) (R 1435-1452). The Respondent responded to the supplemental motion (R 1489-1509).

Judge Hill held the evidentiary hearing December 2, 2002, March 25, 2003, and May 29-30, 2003, on Claims IV (paragraphs 2-4), XI, XII (paragraphs 2B, 2D, 4 and 4A), XIII, XIV and XXIV[3]. By order dated December 11, 2003, Judge Hill denied relief as follows:

> **Claim I** was legally insufficient;
>
> **Claim II** was moot;
>
> **Claim III** had no merit;
>
> **Claim IV** (paragraphs 2-4) were afforded an evidentiary hearing and failed for lack of proof;
>
> **Claim IV** (paragraphs 5 and 9) were moot; **Claim IV** (paragraphs 6-8) were procedurally barred;
>
> **Claim V** was procedurally barred, the ineffective assistance portion had no merit;
>
> **Claims VI/X[4], VII, VIII, IX, XIII, XVI, XVII, XVIII, XIX, XX**, were procedurally barred and had no merit;
>
> **Claims XI, XII and XIV** were afforded an evidentiary hearing and denied for lack of proof;
>
> **Claims XV, XXII, XXIII, and XXV** had no merit;

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[3]Additionally, the court had deferred ruling on several claims until after the evidentiary hearing.

[4]The court held these two claims encompassed the same issue.

Claim XXI was procedurally barred;

Claim XXIV was afforded an evidentiary hearing and denied for lack of proof.

(R 1644-1667). The order was accompanied by exhibits 1-13 which included transcript excerpts, an order on pre-trial motions and the sentencing order (R 1668-1880). The denial of the Motion to Vacate is currently before this Court in Case No. SC04-54.

STATEMENT OF THE FACTS

This Court summarized the relevant facts in *Hendrix v. State*, 637 So. 2d 916, 918 (Fla. 1994):

> The defendant, Robert Hendrix, broke into a house with his cousin, Elmer Scott. Scott was caught and entered into a plea agreement with the State wherein he would plead no contest to a reduced charge of simple burglary, adjudication would be withheld, and he would serve two years' community control. As a condition of the plea, Scott agreed to testify truthfully against Hendrix. Based on Scott's deposition, Hendrix was arrested and charged with armed burglary of the dwelling. The State offered a plea agreement to Hendrix wherein he would receive four years' imprisonment and five years' probation. The court date was set for August 28, 1990.
>
> Hendrix did not want to accept a plea and told several friends prior to his court date that he was going to kill Scott to keep him from testifying. Hendrix discussed with his live-in girlfriend, Denise Turbyville, various plans to kill Scott. Hendrix also tried to secure from a number of people a "throw-away" pistol that could not be traced to him. On August 27, 1990, the day before his court date, he came home with a handgun, attempted to construct a silencer for it, and test-fired it.
>
> At some time after 11 p.m. that night, he told Denise to get ready, that they were going to Scott's. He had a mask, gloves, and hat. She drove to the vicinity of Scott's mobile home, dropped him off, drove to the county line, and pulled over to wait. Denise heard a number of shots and then several minutes later Hendrix got in the car, saying "Don't look, just go." When they arrived home, they did not turn on the lights. Hendrix took a shower and burned his clothes out back. He gave Denise an account of the murders: He shot Elmer Scott in the head, and when Elmer's wife, Michelle, tried to fight him, he slashed her throat with a knife. He then hit Elmer over the head with the gun butt and slashed his throat "for insurance." As he

shot Elmer, he swore-- "I'll see you in hell!"

Hendrix was arrested and tried for the crimes. The medical examiner testified that each victim had been shot, bludgeoned, and stabbed. Several witnesses, including Denise, testified that Hendrix admitted committing the murders to silence Scott. He was convicted of two counts of premeditated first-degree murder, two counts of conspiracy to commit murder, and one count of armed burglary.

EVIDENTIARY HEARING FACTS

The following testimony was presented at the evidentiary hearing December 2, 2002, March 25, 2003, and May 29-30, 2003, regarding Hendrix wearing shackles:

Judge Lockett, the trial judge, testified that Petitioner was shackled during trial in the same procedure used in every trial (R 2832). When a defendant was brought in, the courtroom would be cleared except court personnel. The handcuffs were removed after the leg irons were attached to the shackle holders at the table. A defendant was never handcuffed in the presence of the jury. The jury could not see the leg irons (R 2833). There was a partition between the defense table and the jury. As a precaution, a partition was also placed on the prosecutor's table (R 2836). Petitioner was treated no differently from any other defendant (R 2834). The jurors could not see Petitioner as he entered or left the courtroom (R 2837). Judge Lockett vaguely remembered that Petitioner had weapons at the jail and there was talk about an escape (R 2835).

Lt. Newcombe was the bailiff during Petitioner's trial. He was the Deputy Bureau Commander and worked his entire career in Court Services. (R 2841). Judge Lockett made it clear that no juror should see a defendant in shackles. When a defendant was brought into the courtroom, his legs would be shackled and his

hands cuffed (R 2842). Jurors would never see a defendant in shackles – they would not be in the courtroom but in the separate, secured jury room (R 2843). The jury entered the jury room through a separate entrance (R 2854). Once the defendant was seated, the handcuffs would be removed and the feet shackled to an anchor by the floor (R 2843). There were facades in front of both counsel tables to prevent the jury from seeing under the tables (R 2844). The prosecution's table was closer to the jury box than the defense table (R 2853). Newcombe was aware Petitioner was an escape risk and had a weapon at the jail (R 2845). Lt. Bass found a homemade shank in Petitioner's cell on June 27, 1991, two and one-half months before the trial (2846). Petitioner and another inmate also attempted to make a shank in order to obtain an officer's keys in order to escape (R 2847).

Michael Graves and Michelle Morley were the attorneys for Denise Turbyville. Graves sat in the courtroom during Petitioner's trial (R 2858). Petitioner was shackled during the trial. The custom in Lake County at the time was to place a facade in front of counsel table to hide the shackles. Graves did not recall ever hearing Petitioner's shackles rattle (R 2849). Generally, you could hear the chains if a defendant made an abrupt movement (2859). Graves did not have any conversation with Judge Lockett about the shackling (R 2862). When both he

and Ms. Morley were appointed to Turbyville, Graves assumed it was a death penalty case even though the State had not announced it was seeking the death penalty (R 2864). Morley knew the shackling policy in the courthouse (R 2958). You could hear the chains when a defendant was brought in, but she never heard them after that (R 2949). She did not attend Petitioner's trial (R 2959).

Denise Turbyville testified at Petitioner's trial and never observed shackles (R 2869).

ARGUMENT

ISSUE I

APPELLATE COUNSEL'S ASSISTANCE WAS EFFECTIVE; APPELLATE COUNSEL IS NOT REQUIRED TO RAISE AN ISSUE WHICH WAS NOT RAISED IN THE LOWER COURT AND HAS NO MERIT.

Hendrix argues appellate counsel was ineffective for failing to raise as an issue that the use of shackles denied him a fair trial. Hendrix recognizes this issue was not raised on direct appeal. He raised the issue as ineffective assistance of trial counsel in his Rule 3.850 Motion to Vacate Judgements and Sentences, and this argument is Issue II on appeal from denial of that motion.

Appellate counsel may not be deemed ineffective for not challenging an unpreserved issue on direct appeal. *See Owen v. Crosby*, 854 So.2d 182, 191 (Fla. 2003) (affirming that "counsel cannot be considered ineffective for failing to raise issues that were unpreserved and do not constitute fundamental error)); *Downs v. Moore*, 801 So. 2d 906, 910 (Fla. 2001) (same); *Johnson v. Singletary*, 695 So. 2d 263, 266 (Fla. 1996) (same).

Furthermore, the claim is without merit. Every witness who testified at the evidentiary hearing stated that the procedure ensured that jurors did not see shackles. Hendrix has failed to demonstrate that any juror had any exposure, visually or audibly

to the shackles. The judge took precautions to ensure no violation of due process.

As general rule, a defendant in a criminal trial has the right to appear before the jury free from physical restraints, such as shackles or leg and waist restraints. *See Illinois v. Allen*, 397 U.S. 337, 344 (1970). Retraining a defendant with shackles in view of the jury may adversely impact on an accused's presumption of innocence. *See Diaz v. State*, 513 So.2d 1045, 1047 (Fla. 1987); *Elledge v.State*, 408 So.2d 1021, 1022 (Fla. 1981). However, a criminal defendant's right to be free of physical restraints is not absolute: "[U]nder some circumstances, shackling 'is necessary for the safe, reasonable and orderly progress of trial.' " *United States v. Mayes*, 158 F.3d 1215, 1225 (11th Cir.1998) (quoting *United States v. Theriault*, 531 F.2d 281, 284 (5th Cir.1976)). "Courtroom security is a competing interest that may, at times, 'outweigh[ ] a defendant's right to stand before the jury untainted by physical reminders of his status as an accused.' " *Mayes*, 158 F.3d at 1225 (quoting *Allen v. Montgomery*, 728 F.2d 1409, 1413 (11th Cir. 1984)). Shackling is a permissible tool to be exercised in the sound discretion of the trial judge when circumstances involving the security and safety of the proceeding warrant it. *See Bryant v. State*, 785 So.2d 422, *428

(Fla. 2001), *Derrick v. State*, 581 So.2d 31, 35 (Fla. 1991); *Correll v. Dugger*, 558 So.2d 422 (Fla. 1990); *Stewart v. State*, 549 So.2d 171 (Fla. 1989).

As Lt. Newcombe testified, Hendrix was an escape risk, had been found with a homemade shank two and one-half months before trial. The collateral trial judge made the following findings of fact in the Motion to Vacate proceedings:

> At the evidentiary hearing Judge Lockett, the Judge who presided over the trial, and Art Newcombe, the bailiff, in charge of security during the Defendant's trial, as well as the testimony of various attorneys and even a witness who was present at the trial all testified that the jury would not have been able to see Mr. Hendrix's shackles. Further, Mr. Newcombe testified that he was aware, prior to trial from the deputies at the Lake County Jail, that a shank made from an air conditioning louver was found in the Defendant's cell approximately two and a half months before the trial. He also said that about a month after finding the shank, Mr. Hendrix asked on of the cleanup men at the jail to get him a louvered slat from an air conditioning unit. The Defendant had also been implicated in an escape plot with another prisoner; just three weeks before trial.
>
> The Court finds that the shackling of Mr. Hendrix was necessary in this case, and that no prejudice has been demonstrated by the Defendant because of his shackling. The Defendant was seated behind counsel table where his feet would be shackled to the table by an anchor near the floor. The table has a floor length facade on the front and both sides.
>
> Florida courts have found a sufficient showing of. necessity to support the use of physical restraints on a defendant where there is a history or threat of escape, or a demonstrated propensity for violence. See, Jackson v. State, 698 So.2d 1299,1303 (Fla. 4"

> DCA 1997). If restraint devices were necessary, measures could have been taken to reduce the prejudicial impact. See Dufour v. State, 495 So.2d 154,162 (FIa.1986) (approving the use of shackles, after a finding of necessity, where a table was used to reduce the visibility of the shackles); Diaz v. State. 513 So.2d 1045, 1047 (Fla.1987) (approving shackling of defendant where trial court suggested that jury's view of shackles be obstructed by defendant "keeping his pants leg pulled down" or by placing a box or briefcase in front of his feet, and defendant refused to hide shackles).
>
> *Miller v. State*, 852 So. 2d 904, 905-906 (Fla. 4th DCA 2003).

(R 1665-1666).

Hendrix has not satisfied the standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984). Hendrix must demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688-89, 694 (1984).

In *Valle v. Moore,* 837 So. 2d 905 (Fla. 2002), this Court noted:

> The standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), standard for claims of trial counsel ineffectiveness. *See Jones v. Moore*, 794 So. 2d 579, 586 (Fla. 2001). However, appellate counsel cannot be considered ineffective under this standard for failing to raise ... claims without merit because appellate counsel

> cannot be deemed ineffective for failing to raise nonmeritorious claims on appeal. *See* [*Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000)]. In fact, appellate counsel is not necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue. *See Jones v. Barnes*, 463 U.S. 745, 751-53, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (appellate counsel not required to argue all nonfrivolous issues, even at request of client); *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990) (noting that "it is well established that counsel need not raise every nonfrivolous issue revealed by the record").

Valle, 837 So. 2d at 907-08. As recognized in *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000), "[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. *See Knight v. State*,394 So. 2d 997 (Fla. 1981). 'In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error.' *Id.* at 1001." In this case, the issue is procedurally barred, the trial judge did not abuse his discretion, and counsel cannot be ineffective for failing to raise an issue which has no merit.

CONCLUSION

Based upon the foregoing, the Respondent respectfully requests that this Court deny habeas corpus relief.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been furnished by U.S. Mail to Harry Brody, Brody & Hazen, 1804 Miccousukkee Commons Dr., Suite 200, P.O. Box 16515, Tallahassee, Florida 32317, this _____ day of September, 2004.

_____

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____
Barbara C. Davis