Please rise.

Hear ye, hear ye, hear ye.

The Supreme Court of Florida

is now in session.

All who have cause to plea,

draw near, give attention,

and you shall be heard.

God save these United States,

the great state of Florida

and this honorable court.

Ladies and gentlemen,

the Florida Supreme Court.

Please be seated.

>> Good morning and welcome to

the Florida Supreme Court.

The first case on our docket

today is Reynolds versus the

State.

>> Good morning, Your Honor.

May it please the court.

I am Melodee Smith.

Following the denial of

Mr. Reynolds' motion for a

postconviction release today

five issues were briefly

addressed and I have 20 minutes.
The first ground, ground one in
the habeas petition followed by
postconviction motions claimed,
10 and 12 in .1 and claims 3D
and A1 in .2.
During the trial --
>> Do you just want, in words,
to say which claims those are?
>> Yes, maam.
>> We know you have a lot of
claims.
>> The first claim is in the
state habeas petition and has to
do with the court not getting
the correct instructions as to
burden of proof.
In motion claims 10 and 12,
these are claims that we
requested an evidentiary hearing
at the circuit court level.
>> What were those about?
>> Those claims were about two
lay witnesses who testified and
it's our position they gave

expert testimony.

>> That's one of them.

The detective testifying?

And what's the other one?

>> Detective Parker and --

>> And what is the other point?

>> And the two points in the

motion claims 3B and 1A.

3B is the claim that

addresses -- we did have a

hearing on this but the trial

court, trial counsel's failure

to object when the state

asserted that Mr. Reynolds had

committed or attempted to commit

sexual battery and in the .2

claim, A1 presents mitigation.

Okay, the first that I'm going

to talk about them is the safe

haven.

The petition where it's the

courts domain to instruct the

jury, not the lawyers'.

It's the domain of

responsibility and that begins

with what dear recesses and

proceeding to liberations.

>> This claim that you are

arguing now has to do with the

statement that the state doesn't

have to do anything and you

shouldn't hold that against the

state?

Correct?

>> That's exactly correct.

>> Why don't we talk about the

fact that there are other places

throughout the record where the

correct instruction was given,

that the state has the burden of

proof, that the state has to

prove beyond a reasonable doubt,

all of those things were said

numerous times throughout this

trial.

Isn't that correct?

>> It is correct.

It's also more precisely correct

to say it's mostly the attorneys

who did that instruction and

when the trial court did
instruct them it is our position
that it still left ambiguity.
This was the first thing they
heard when they sat down in
flawed gear and were sworn in,
but the state doesn't have to do
anything and the state will
cross-examine them.
They may present evidence if
they choose to do so.
>> The judge, the state attorney
points us out to the judge and
the defense lawyer was aware of
it and wasn't there a
discussion?
This was again an instruction
but he obviously --
And didn't they both decide
together that it was being
covered?
>> No.
>> I guess I'm thinking of the
appellate..
I was looking at the direct

appeal and the person who
brought this appeal is a very
experienced lawyer and brought a
lot of issues on appeal.
What would have been on appeal
to say if there had been a
mistrial at that point, if there
had been curative instruction
and the defense attorney
essentially agreed what was
brought to his attention, so how
could the appellate lawyer of in
effect not raise that as an
appellate issue?
>> That's the point.
It should've been raised in the
state habeas.
The defense trial counsel agreed
that there was an error and
wanted the judge to correct it,
but the judge refused to.
There was no request for a
curative instruction.
There was no request or a motion
for mistrial.

>> If he didn't want curative instruction what was that?

>> This is what they wanted. They wanted the judge to correct himself and the judge -- the state has argued it was a slip of the tongue.

>> A Freudian slip of the tongue?

>> I'm not sure what in context that would mean.

>> I'm sorry.

>> Did they ask the judge to correct the mistake?

>> That's right and because of that, the issue was raised on the direct appeal. The judge's response in record 627 and 28 was -- I think I drove it home enough to where they understand.

>> Let's then assume that it should have been raised under direct appeal. We looked at many cases where

things were said either
inadvertently or in error about
you don't have to vote for this
and you do have to vote for
this.
Wouldn't there have been a
harmless error analysis of
whether the error --
>> The position was it was a
fundamental error and the reason
was because the trial counsel
did not present a defense.
They were raising reasonable
doubt.
Reasonable doubt goes to burden,
burden of proof and in Allen,
and I'm sure you are all aware
of this, in Allen, it's a court
DCA case.
They have a very good
discussion, a pertinent
discussion on fundamental error
and how it may inform this
court.
It's just our position that this

should have been raised in the
state habeas and its fundamental
error in Sullivan, the United
States Supreme Court case.
For a valid conviction the
essential connection to a
reasonable, beyond a reasonable
doubt fact-finding cannot be
made where the instructional air
consists of a missed description
of a burden of proof which
vitiates all the jury's
findings.
The reviewing court can only
engage in pure speculation, it's
view of what a reasonable jury
may have done and what it does
as the wrong entity judges the
defendant guilty.
>> Does that case involved a
misstatement in Wadeer that was
then followed?
Everyone agrees that the jury
was instructed on the law and
thereafter that there was no

misstatement and it was

corrected.

>> And it was --

>> Wasn't the U.S. Supreme Court

case the same as ours?

>> Yes.

>> Identical?

>> No, no not identical.

>> Wasn't that a case during

Wadeer?

>> Your Honor that's correct but

I would argue the instruction

during Wadeer is just as

important as any instruction to

the end.

>> Even if it is recognized as

such?

>> That's our position.

>> Do you want to go on to your

next one?

Looking at the record, the

correct state and of the

incorrect statement from the

state depends --

[INAUDIBLE]

So in fundamental error remotely similar to any case because of a misstatement of the law and maybe that is why the experienced appellate counsel didn't raise it when there were many other issues.

>> The cases cited by the state and dealt with in penalty phase instructions and other types of instructions.

I think it's important to note that you know, the judge, he was -- that he had made a mistake.

He just decided, I'm not going to correct my error.

>> In any other issue, with very short time, is there one issue that you think is sort of the most important in this case?

>> The most important case and I totally agree with this, but from my perspective is the last issue and that is the lack of

investigation and presentation
mitigation.
>> He waived mitigation.
What is the standard for when we
look at whether there is
ineffective assistance of
counsel and somebody knowingly
waived mitigation and we have
had recent cases on this as to
whether a reasonable
investigation was done from the
beginning.
This defendant posed any real
investigation but then lawyers
persisted, so what is the
standard when somebody waives
mitigation as to how we look at
council?
>> Well, respectfully I disagree
with Your Honor's premise.
He would have been examined if
any doctors would have made an
appointment.
>> Was there a mental health
expert retained in this case?

>> Psychologists went to see him
for a few minutes, came back to
the lawyers and said he is
competent.
This is not an evaluation.
>> Was there evidence either way
with regard to the level of
cooperation of this defendant
with a mental health expert?
>> Well it was conflicted that
the attorneys now say that he
didn't cooperate, however he
signed releases to get
information.
>> Did they get the information?
>> No, they didn't get school
information.
>> The lawyers got no
information or mental health
experts?
I thought they had school
records.
>> I got the school records with
the mitigation.
I'm the one who got the school

records.

>> So I mean that is

postconviction so what was done?

Anything at all with regard to

records prior to your becoming

involved on postconviction?

>> I believe that they had

contacted the prison to get his,

maybe his prison history.

I don't think they actually got

it but the trial counsel did get

his current work record.

He was working at the time that

this incident occurred, so I

don't want to say they didn't do

anything.

What I'm saying is it was

deficient.

>> It becomes important as to

the qualitative nature of

obtaining information.

It becomes important in the

discussion.

>> That's right.

>> What was the standard that if

they would have obtained
whatever it is like school
records, his school records,
that he would have made a
different decision and would not
have waived mitigation?
Is that how we look at this type
of case?
>> Yes, and the idea is, and he
testified this, that if he would
have been informed about the
type of mitigation, he didn't
think there was any mitigation
and he said that on the record.
>> But let me ask you this.
The attorneys actually said that
they worked on this case for
mitigation and they hired a
mitigation expert and they in
fact got school records and they
got prison records.
They got the records from prior
criminal cases that he had had
and all of this so if that is in
the record, and that is what the

defense attorney testifies to,

do you have evidence that this

was not done?

>> Yes, Judge.

And we presented that evidence

by putting forth the records.

They claim that the school

records -- they told the trial

court that the records weren't

available.

We have them in the file.

They were available and

Mr. Reynolds school history

was --

We found out that they socially

promoted him throughout his

entire academic life.

>> The statements --

>> He was the lawyer who was

appointed --

He was appointed to handle the

second phase of the penalty

phase, however he focused on the

DNA.

That was his expertise for the

trial.

>> So if he said he hired a mitigation specialist, the development of evidence with the penalty phase that he and loved worked on Reynolds mitigation together and part of their work was just trying to convince Michael to let us do anything mitigationwise.

He stated that he and Love obtained school records, medical records and prison records from Florida and criminal records from prior cases and family photographs.

They hired a psychologist to interview and evaluate Reynolds and Reynolds had made it perfectly clear he had no interest in presenting mitigation.

Now you think that testimony is untrue and the judge believed it?

The judge was clearly erroneous
in believing it?
>> What you can look at is the
evidentiary hearing and look at
the witnesses who presented the
mitigation.
You can look in that and you can
say no, that might be a true
statement in a colorful world,
but it's totally inflated and
out of context in terms of --
Your Honor I presented it.
>> What did the judge find about
whether that was true or not?
>> The judge didn't say.
Well he says it was good enough.
>> So in other words what I'm
having trouble with on this part
and I realize you are doing your
best to represent your client,
but when someone waives
mitigation, the standard as to
whether the investigation was
inadequate so if they had had an
adequate investigation they

would have done something
different is simply not the same
as when somebody doesn't present
mitigation and wants to.
>> What I tried to show the
trial court during the
evidentiary hearing, first of
all the testimony came in that
Sandra Love, yes she is a
mitigation specialist but she
was put on the guilt phase team
and went to Texas.
She's the one who went to try to
get Justin Pratt and convinced
him to come back and testify.
She did work on the mitigation.
That is what she was hired for,
to do that.
If you want to say spending a
couple of hours with the sister,
that's where they put their
work, then that's fine but we
spent months putting together a
mitigation.
The mitigation that was

presented is clearly a contrast
to the mitigation that could
have been presented and that's
our point and that's the only
point we can make.
>> But the problem is, when
someone waives, that it's not
enough to show you could have
put a better case on.
It would have been more
compelling.
The the question is whether
Mr. Reynolds then, knowing the
mitigation, would have waited.
It's easy after-the-fact for him
to say if he has a 12-0 death
penalty recommendation in two
murders, three murders that he
now does not want the death
penalty.
But we have to look at this
testimony as --
>> You can do that and I got to
know him and he could've said no
then.

I would not have been his lawyer

at that point.

I would have said you get

another lawyer and he knew that.

>> Council you are now down to

three minutes in your rebuttal.

You may continue.

>> May I, with five minutes

additional for rebuttal?

>> No.

>> The state did supplement the

court with the Wyatt case which

I believe helps us because in

that case defense attorneys

actually did some mitigation

investigation and relied on

doctors.

In this case they didn't rely on

anything.

Thank you.

>> May it please the court.

I'm Kenneth Nunnelly and I

represent the state of Florida

in this proceeding.

With respect to the mitigation

investigation and the asserted
lack of mitigation
investigation, I would direct
the court to page 86 through 88
of my colleagues brief in this
case.
This sets out what the testimony
was at the evidentiary hearing
about what the lawyers did.
And rather then than spend the
court's time reading the brief
and reading the list, let me
summarize it in this fashion.
The only thing that really came
in at the evidentiary hearing
that was allegedly new in
quotation marks, in the form of
mitigation was the contested
middle stay testimony that this
defendant has post traumatic
stress disorder.
You juxtapose that against the
states postconviction expert who
said no, this guy is not
post-dramatic stress disordered.

You go back to the time of trial
and read the testimony of the
trial attorneys who hired back
Herkoff who was known to this
court and he testifies pretty
often.
He evaluated this man and came
back and told defense counsel, I
can't believe -- that is an
antisocial personality.
I can't help you.
I'd be a better state witness.
That is, the PTSD is the only
thing new.
Defense counsel had all of this.
>> What about the issue and this
is something that is concerning
to me about the school records.
The defense lawyer said they had
obtained school records, not
that is -- really in this case
would make a difference one way
or another but is there evidence
they actually are not telling
the truth and they didn't do

what they said they did?

>> They testified.

Line 14, page 685 through 86

that Mr. Ineco and the

investigator obtained school

records.

That is their testimony.

They went on and said some of

those records or some records

had been destroyed and we

couldn't get them.

We know that happens.

That is nothing new.

We know records get destroyed.

>> But the issue here really is

whether they got all the school

records.

They are Reynolds' school

records.

The issue is if they had done a

different investigation whether

he would have made a different

decision.

What is the standard when

someone waives mitigation?

>> Like you said whether he would have made a different decision -- and there is nothing to indicate that he would have made a different decision because they had everything. Except for the middle state testimony that this guy is post-traumatic stress disordered.
That is literally the only new part of mitigation.
There is no suggestion the trial counsel's testimony under oath about getting school records is false.
There is no claim of that.
>> I guess were there any records found in the defense attorney's files?
I mean normally that is where we start with this investigation is what was in the defense attorney's files?
Were there school records?

Were there health records or
other things in the district
attorneys file?
>> My recollection is that there
were and in addition to the
school records that they had,
the available school records
come in other words the ones
that hadn't been destroyed, they
had mental records in prison
records from Arizona and
Florida.
Mr. Reynolds' prior criminal
history and his family
photographs obtained from his
sister, Stacia, who testified
after postconviction hearing.
She also gave a deposition.
It was attended by the state and
defense I believe in Fort Myers
and there was also a lengthy
conversation between defense
counsel and this witness who was
Mr. Reynolds' sister.
In addition to that, the sister

and his other sister -- I
believe her name was Sara but
I'm not positive about that --
were present at the penalty
phase, waiting outside, when
Mr. Reynolds decided he wanted
to wave a mitigation
presentation.
The bottom line is defense
counsel had this information and
Mr. Reynolds would not let them
use it.
Defense counsel was very clear
and I believe the trial court
even wound at page 1650 of the
record, and I'm quoting the
trial court, the defendant was
not forthcoming with any details
of his upbringing.
He initially refused to allow
counsel to speak to his sisters
to the point where counsel had
to, quote, go behind the
defendant's back to get much of
the family information.

Virtually all such information
was eventually provided by the
defendants sister, Stacia Adams.
Any information the Council
claimed was despite the Council
and not because of the system.
That finding by the trial court
is not contested.
That is the state of his record
and that is what they
evidentiary hearing showed and
that is the end of this issue as
far as Mr. Reynolds is
concerned.
Defense counsel did everything
they could and an awful lot more
than they were required to do
under this court's process in
getting to, in dealing with, a
defendant who was of staff for
us and difficult to deal with on
a good day.
There is nothing --
They managed to put on some
mitigation despite the

defendant's insistence against
it.
They got the trial court to find
mitigation.
>> I was curious about that.
There is no question that during
the penalty phase, that no
mitigation was put on and the
judge rightly said under
Mohammed, he doesn't give the
jury investigation much weight.
At the center hearing the
defendant then let the judge,
but the attorneys put something
on or was it that he was doing
what the judge was supposed to
do?
>> The judge was doing what he
was supposed to do and he gave
them the benefit of the doubt is
what he did.
>> But where did you get that
mitigation from that he found?
>> I believe they came out of
the investigation is where I

think it came from.

I'm not positive.

>> So the attorneys, did they

put -- at the evidentiary

hearing?

>> Mr. Reynolds wanted to

testify about residual doubt and

he testified and he testified

and he testified at the Spencer

hearing that basically he didn't

do it and he was trying to make

a residual doubt argument and he

testified for probably 30

minutes or so.

The trial judge, don't remember

off the top of my head what they

were, nonstatutory mitigation

that he was a good worker and

all that sort of thing.

That is uncontested in no doubt

properly found.

No doubt they were properly

weighed.

This man killed three people and

got death recommendations for

two of them and under these facts, under the facts of this case, nothing that has been suggested as mitigation calls the result into question.

I would suggest that the court should affirm the denial of relief.

>> I have a question on a point that Ms. Smith didn't raise an argument but it had to do -- though there were several summary denials and I realized that you know, the judge did hold evidentiary hearings on several other claims and the defense lawyers bear, my feeling would be asking a couple of more questions and getting those claims.

That is something I would have hoped happened but most of them probably would come up with the same out come.

The sleeping juror situation.

Maybe they should've had an evidentiary hearing that but you have to prove that you are biased and I don't know they did that.

Also about his not testifying. They stated in opening statements that he would testify, and, but then he ends up not testifying and he says he would have testified if he had been better prepared.

Now how do we evaluate that claim without an evidentiary hearing?

>> Judge, that's --

>> It seems to me that would have been a quintessential one that would have been easy to ask a couple of other questions than it would have been the end of it.

Is it because the colloquy itself, that the judge properly -- and hopefully did

put an end to this -- that he made a waiver of it, and knowing waiver, or how do we evaluate that without an evidentiary hearing?

>> Justice Pariente I'm not going to bail out on a summary denial and I think I would suggest that the record of the colloquy is sufficient to deal with this claim summarily as the trial court did but the fact remains that this issue kind of prep its way into the evidentiary hearing anyway and there is testimony from both defense attorneys that, from the beginning of their involvement in the case, and I think they were in the case about three years or so after the TD went through for reasons and I don't know --

The defense attorneys were very specific as was Mr. Reynolds

that the strategy and the plan
was for Mr. Reynolds to testify.
That had been the plan from long
before trial part but this
wasn't --
The decision that Mr. Reynolds
was going to testify was not one
that was made as trial counsel
was standing up to get his
opening statement.
That decision had been made a
long time ago.
>> They didn't agree with it
that Reynolds wanted it?
>> Yes, Maam.
>> That is why I got confused
because he summarily or --
summarily denied it but you said
you have enough evidence to
support the denial in the merit?
>> It was clear Reynolds was
going to testify for reasons
unknown.
He decided not to but --
>> It but the point is than they

would have had it good faith to
leave at the time they made the
statement to the jury that he
was going to testify?
>> Yes maam -- yes maam and that
was their testimony.
There were other statements made
about one being I believe
Mr. Ineco.
One of them said that I'm not
that worried about it.
I don't worry like some lawyers
to about the criminal record.
I think maybe we could pick up
another way to strike another
juror and get somebody off.
They had a number of other
reasons such that in addition to
their belief that Reynolds was
going to testify, they thought
he was going to do it because
that was apparently what he had
been telling them all along.
>> He also had given the whole
story about how he had been

injured.

What about the injection of the

sexual battery, and again,

that's one that was or was not

given at the evidentiary

hearing?

>> That one got an evidentiary

hearing.

That was developed and defense

counsel testified that he didn't

really see it as objectionable

first of all because the

argument made by the state was a

reasonable inference from the

state of the record.

>> Was he charged?

>> No, he wasn't charged.

>> In this case because -- and

now we have the Hellman case,

In this case there's a lot of

evidence that he was going to

sexually batter her.

>> That is true.

>> That came out without

objection -- came in without

objection.

>> It's part of the defense and

certainly it comes in.

[INAUDIBLE]

As far as this case is

concerned, we had evidence from

which defense -- I'm sorry, the

state would make that argument

and defense counsel didn't want

to ring the bell again.

He came back later on and argued

that this was all theoretical,

there was no evidence in this

court for the attempted sexual

battery.

>> Why wouldn't he have moved in

Limine if he hadn't charged

sexual battery or an attempted

sexual battery?

Why would the lawyer prove in

Limine to prove that argument

from being made?

>> Now the record is not --

Why there was no motion in

Limine files is not developed in

the record.
That's not something that came
up.
There was no claim that defense
counsel was ineffective for not
making the Limine motion.
>> There were a lot of other
points that were raised.
You know when you finally think
of this court trial, and you
think that there may have been
an attempted sexual battery, it
just adds, adds aggravation to
aggravation.
And that is a lot of the issues
that have been raised.
>> In this case, it is a very
aggravated case and I don't
agree that the argument that the
state was improper.
I don't believe that counsel was
ineffective and not objected to
it but even if he was it
wouldn't make any difference.
This man didn't get a death

sentence because of that brief
argument by the state.
He didn't get convicted because
of that brief argument by the
state.
He got convicted because of the
evidence in the case.
>> I just want to make sure the
evidence that she didn't have
her underpants on and she
normally did have them on, that
came in -- that's not a point on
appeal?
>> No, maam.
>> So again, if it was relevant
to how this crime occurred it
seems, and think I agree with
you that maybe they would way it
ends they know they can't make
that argument at the jury would
have known the facts.
>> It's also part of
identification as well.
The pubic hair was also part of
identification.

>> The pubic hair was found --

>> In amongst the fabric items,

the blankets and a pillowcase.

>> I believe it was nuclear DNA

and not mitochondrial DNA that

matched him to the pubic hair.

Mitochondrial is only --

Mitochondrial DNA is

maternal-linked only and can

only say that these two people

that had this match come from --

have the same father is I

believe the way it works.

If I'm wrong they will tell me.

Nuclear DNA is the more

traditional PTR, RSL, RSLP

analysis that was done in this

case which is what is done on

blood and in body fluid.

>> Are you saying it is more

accurate?

>> It is definitive.

Nuclear DNA, traditional DNA is

the one that gives you the match

to one in 24 quadrillion people.

I'm not making that number up.
I'm not saying that's what it
was in this case but it's not
important here.
It's a big number.
It's a couple of planets, but
anyway with that said I would
ask the court to affirm the
convictions.
>> Let me just briefly make
three points.
Number one, if you go to the
evidentiary hearing, page 797,
you will read trial counsel can
say the witness did not have the
Reynolds school records in his
file.
The second is, the reason was
known why Reynolds waived,
decided not to testify -- I'm
sorry -- or didn't testify and
that is because the trial
counsel specifically told him,
he admitted at the evidentiary
hearing that if he testifies, he

would go directly to death row.

>> Wait a second.

I know it's with an expletive

but the statement, I will f'ing

kill you, I will f'ing kill you.

Your testimony will contribute

to convict you.

And it will not help you.

I don't know how that says if

you testify you will get --

>> The testimony makes it a

little more clear then what we

just said.

>> What Justice Pariente said is

a direct quote from the

transcripts.

>> The trial counsel talked

about this for a few minutes,

trying to figure out what he

said.

He couldn't remember initially

that was what he said and then

he went on.

>> So even though it was

summarily denied as a claim, is

that correct that there was
evidence that came in so that we
can evaluate it at the
evidentiary hearing -- if the
evidentiary hearing had been
held?
>> We would request that the
court remand on this issue.
>> If you were able to ask those
questions then how were you
restricted and how will you
seek -- what else you would have
asked?
>> Your Honor, I need to rely on
the brief on that point.
The third point that I would
like to make before I sit down
and know my time is almost up.
>> I will give you an extra
minute.
>> Thank you, Sir.
At the evidentiary hearing and I
think this is very important,
the trial counsel testified and
this is his testimony, that the

evidence presented that
Reynolds' DNA was on a blanket
that was found with the child
and were located near her.
And it was his opinion that even
though he doesn't remember the
attempted sexual battery
accusation, that it was used as
a motive for the murders, that
the state could argue there was
potentially our actual attempted
battery of that child so that is
his testimony at the evidentiary
hearing.
The problem is, Your Honor, the
trial testimony does not say
that.
The testimony says that both the
blankets and the panties that
were found under Robin -- this
is the mom -- state experts
collected it, labeled 61 other
items of having stains or blood
but neither the blanket nor the
panties had it when they first

got it and the state referred to
them as women's panties.
At the trial transcript 947 and
948 in the states opening --
The only thing that the trial
counsel did in this issue is,
during closing arguments, they
actually argued that there was
no evidence of attempted sexual
battery.
If they argued this, then why
didn't they object to it coming
in?
Why didn't they filed a motion
of Limine to keep it out?
That is the question and thank
you Sir.
>> Thank you both.
>> I request that this court
remand further proceedings for
the new trial.
>> We thank you both for your
arguments.