

>> All rise.

Hear ye, hear ye, hear ye, the  
Supreme Court of Florida is now  
in session.

All that have cause to plea,  
draw near, give attention and  
you shall be heard.

God save the United States, the  
great state of Florida and this  
honorable court.

Ladies and gentlemen, the  
Supreme Court of Florida.

Please be seated.

>> Good morning and welcome to  
the Florida Supreme Court.

The first case on our docket  
this morning is Ellerbee versus  
the state of Florida.

>> May it please the court.

My name is Jeffrey Anderson and  
I represent the appellant.

The first issue I would like to  
address is the first issue in my  
briefs and this is where defense

council argued to the jury that  
his client is not guilty of  
felony murder.

>> Please speak up a little bit.

>> Excuse me.

>> He argued that his client  
Mr. Ellerbee was not guilty of  
felony murder because the  
shooting was accidental and it  
was done to distract Mr. Thomas  
Dellarco, the victim in this  
case, so that Mr. Ellerbee could  
escape from his residence.

>> We have an excusable homicide  
instruction.

Is that what he was shooting  
for?

>> Well, that was one of the  
purposes but he still was --  
none of the excusable homicide  
has accident in part of it that  
it also has other clauses that  
have to be for example it has to  
be an accident during unlawful  
activity so he would still have

to show that Mr. Ellerbee wasn't doing some unlawful activity for that to work out.

That is the problem with a felony murder.

He is being accused of doing the shooting in the course of a felony so he really has to deal with that.

>> But isn't it -- the overarching problem here is that the defense counsel really does not have much to work with.

Given the things that have been admitted to by the defendant and the other evidence, this was an extraordinarily difficult case to defend and he is grasping at straws because only straws are there.

Would that be an accurate observation?

>> I don't think that is correct because first of all he does the worst thing possible.

He grasps at a straw by  
informing the jury on something  
that is not the law.

Which only a few minutes later  
they would be instructed that  
during the course of the  
burglary includes flight from  
the burglary.

>> Do we know why he did it?

>> Well he is trying zealously  
to get his client acquitted.

>> My problem with this point  
and you are an experienced  
defense lawyer so you know it  
too is that, unless there is  
clearly ineffective assistance  
of counsel on the face of it, we  
really would prefer to deal with  
this in postconviction where  
then the lawyer can explain why,  
whether it was a strategy and  
then you can evaluate it.

It is very hard for me.

This isn't a situation where has  
Justice Canady was alluding to,

he did nothing and I don't know  
if it was a failed strategy.

But I think you are better off  
given this case that it be  
something we deny without  
prejudice as opposed to rule on.

>> I think this is one of those  
rare, rare cases where we do  
have -- there is no other  
possible strategy because what  
happens in a lot of cases,  
someone will use a strategy that  
may seem ridiculous but they are  
doing it for penalty phase  
purposes.

This strategy was abandoned for  
the penalty phase.

There is no use of it at all.

And in fact, some people say  
concede guilt because you will  
be more credible for the penalty  
phase.

This is not one of them.

>> It seems to me what this  
attorney did was the case, as it

was described by -- where there truly was no real defense in this case was really going for jury nullification, wasn't he? He was asking the jury, look, whatever he did when he came into this house, it was really over when this murder took place.

>> No, he told the jury, follow the instructions and I will explain the instructions.

I'm not asking for sympathy or anything like that.

He distanced himself from any nullification and he told him here is what you are going to be instructed.

Except he was wrong.

He forgot that during the course of the burglary includes the flight from it.

He just didn't know it.

>> If we accept that it is not just a flawed defense but a

matter of law --

[INAUDIBLE]

Where's the defense here?

>> He had other options, viable options.

>> Like what?

>> He has to negate the burglary for felony murder, that is clear.

He could have done it by a necessity defense.

>> Wait a minute now.

You talk about grasping at straws.

Now, if saying that because he needed some money that he was under necessity that justified in going in there and burglarizing that, I mean.

>> His statement includes that he was desperate, that he was basically starving, that he had a small infant to take care of then he went in there for food and some loose money.

>> He also said he deserved to  
live better than he did.

Right before leaving the home  
that is what he told his lady  
friend.

I deserve to live better than  
this.

>> Or he wanted some food to  
eat.

>> Didn't he wait another hour  
for the man to come back home?

Was his other necessity that he  
needed a place to live but he  
decided to take the house and  
kill him?

>> No, I don't think that is  
what happened here.

I don't think the evidence  
really supports that this was a  
lay in wait murder.

>> I would say that it doesn't  
seem to me that under this  
record that the prejudice  
undermining confidence in the  
out come that more can be shown.

I just think for your clients sake it is better to leave the postconviction unless the defense lawyer explains what strategies he is considering and you know whether this is a failed strategy and why he did it.

>> That may be where this court ends up going.

Just let me mention one other thing about alternatives.

He could have always argued, and especially in this case, that there is reasonable doubt as to whether initially this was a burglary or just a trespass.

>> What about the reasonable doubt?

He went into a home that was not his, and so what is the doubt?

>> The state utilizes, Volume 19, page 1785 and it is his statement to the police why he went up to the house.

He went up to the house because  
he needed food and he was hoping  
for some loose money.

He didn't say he actually went  
in the house at that time.

It is just kind of explaining  
why he approached Mr. Dellarco  
to begin with.

And then later on at 18:03 the  
police, maybe it is inartful  
questioning, they asked him what  
did you find in the house?

He talked about things he found.

The things that are missing  
their are what he took from the  
house.

It could be reasonably argued  
there is some doubt because of  
the vagueness of his statements  
and the inartfulness of the  
questions and stuff, that he was  
looking for things and he went  
in and looked around and then  
Mr. Dellarco came back.

>> In any event was it a general

verdict?

>> It was a general verdict

form.

>> Unless you knock off CPC

there is more than enough

evidence in the way this murder

occurred.

>> We don't know if the jury

found premeditation.

>> When you are talking about

whether he is providing some

defense or adversarially --

>> But you haven't argued that

the notes that were introducing

evidence were erroneously

admitted into text?

>> They weren't admitted during

the guilt phase.

>> In the penalty phase only.

You are saying the jury wouldn't

have heard that?

>> Yeah, they warned ended

during the guilt phase.

I am 100% sure of that.

The jury didn't have that.

>> But the jury did have the fact that he was in the house.

The man was not there but he waited for him to come back.

>> He waited in the house and then the man came home.

Is that the scenario that went on?

>> He was in the house for 45 minutes and the man came home.

>> He goes beyond that.

He was in the woods and he watched the victim in this case get in the car and drive into town.

He had spoken to the victim earlier that day in the victim gave him a cigarette in the victim mentioned to him how he was going to go into town which was a long drive, so we watched them leave and after he left he was walked into the house, shot the dog and stayed in the house for quite some time.

>> 45 minutes.

>> And then watched him arrive,  
watched him park the car or the  
truck and watched them walk into  
the house.

Even after he saw the elderly  
gentleman come back.

>> Let me just, because I will  
cover a lot of facts with my  
second .

We are getting very factual here  
and the sufficiency of the CCP  
aggravator.

It is okay if you have no  
further questions.

Our claim is the evidence is  
insufficient for CCP and  
basically that the trial court's  
order on this is very  
speculative.

In fact, the order even  
recognizes that there are  
rational inferences which I  
submit are inconsistent and  
non-CCP.

For instance the trial court's order lays out the sequence of events that the victim came back and then he started to make a phonecall or made phonecalls and that it is a rational inference that the defendant thought he was calling the police and you know the way it is laid out, it is almost like the reaction to the phonecall.

>> Again, now were getting into facts.

He comes into the house.

He says something in the house, and then after he is finished doing whatever he was going to do, he stays.

He knows the victim, as judge Labarga said, has driven away but will be back.

What is a logical inference as to why he continued to stay in the house with a loaded gun waiting for the victim to come

back and having shot his dog?

>> Well, the logical inference is that he waited for Dellarco to leave and then went in the house.

If there was a burglary, it is based -- and the motive for it is first to look for food and you know, to cook food and to eat the food and then he went through --

>> Did he cook anything?

>> There was something mentioned in his statement somewhere that he had to cook something, to not believe.

>> There is more in a statement than just what he said to the police.

It is also what he said to Amber Reed, his lady friend and he told Amber Reed who testified that after being kicked out of the trailer where they were living out on the prairie, that

Reed was aggravated.

She mentioned that he was aggravated and said he deserved to live better than this and then walked off armed with three guns.

A bunch of ammo and four to six throwing knives.

He returned a couple of hours later with the Explorer belonging to this elderly gentleman that he killed and he was happy.

And then he told her -- his friends told Amber Reed it took him a long time to return because quote he had to wait for the man to get home.

Why is he waiting for the man to get home if all he wanted to do was robbed or burglarized the place?

>> The part about waiting for the man to get home, Amber Reed testified in that context -- in

the context of the lie the  
appellant was telling her.

Even Amber Reed realized it was  
a lie.

It was an excuse for coming in  
late.

This whole sequence because it  
was about our wing a truck also,  
so that part was a lie.

>> We are talking about  
competence substantial evidence  
with CCP.

Whether you believe her or not,  
whatever, that is not a fact.

>> The testimony as he made no  
statements beforehand about hey  
we got an opportunity to have a  
place to live.

I'm going to do something about  
that.

He had no even tenor of that.

I mean, he had frustration over  
his current condition but  
after-the-fact, he did stay to  
her, we have an opportunity --

we have a place to live now but  
that is after-the-fact.

>> Can we go back?

After he finishes doing whatever  
he is doing, he weighs -- he  
lays in wait for a period of  
time.

Now, if this reason for laying  
in wait was to rob him when he  
got back, he wouldn't have had  
him sit down at the table and  
start doing things.

He comes up to him and he shoots  
him and in the back of the head  
with a gun.

If there is ever going to be  
someone that says this is not  
CCP it might be me.

This comes close to a classic  
CCP case and it is worse because  
of everything he said, what a  
plan to do before he came to the  
house and what Justice Labarga  
is telling you, so I'm not  
sure -- where we were going was

the judge got it wrong in his interpretation of the facts and the judge should have interpreted the facts in a way that would have shown this was a spontaneous act when he panicked because he thought the guy with -- the victim was going to call the police.

>> I am saying that is one instance where the judge says that that is a rational inference and it seems to be in reaction to this phonecall.

But let me go to your hypothesis that this was a lay in wait.

>> He waited and shot him if the top of ahead.

Is that where the shooting took place?

>> Well, we don't know.

This is one part where the defendants claim this was an accidental shooting could be true because they have bullet

enters the top of the head while Dellarco is sitting at the kitchen table and he shot at the top of the head.

Which the medical examiner dealt with that and said, you know, could happen.

We have to know the position of the head.

One of the things that it could have been that the record doesn't rule out, could have been a ricochet shot because what is found inside of the victim's head is a fragment, not the whole projectile but a fragment.

There is no exit wound and the state never explains where the bullet fragmented.

It could have been off of a ceiling beam.

We don't know because they did the autopsy for five days after they did the forensic work.

For some reason they delayed the autopsy so they didn't go back into extra forensic work.

>> I guess the thing is you are speculating about something that is far less logical, given the totality of the circumstances, then a planned lay in wait murder, kills the dog, plans -- knows he is coming to this house.

He picks his stick them, pick somebody that is living alone and waits for him to come back and then shoots him.

>> Well, I know the state's theory is that all along this was a decision with the house.

There are several illogical things with CCP in this scenario you drew up.

First of all you are in a rural area and no one is around.

This is already planned.

Don't let him drive away and

possibly come back with someone.

If this was a lay in wait you  
would expect the killing to be  
in the beginning.

Second of all, when he returns,  
you don't let them use the phone  
if you don't want them to call  
the police or other people.

That is not consistent with a  
lay in wait.

>> Why isn't that consistent if  
the victim had no idea the  
defendant is even there?

There is nothing inconsistent  
with letting them use the phone.

>> Except for the defendant  
statement was that there was  
some indication he knew someone  
had broken into the house.

>> Someone has broken in.

>> That is what the victim is  
muttering when he is making a  
phonecall.

>> He saw that his dog was  
killed.

>> Right, that is the  
assumption, yeah.

>> Was the dog in the front of  
the house?

>> Yeah he was in the front.  
He would notice when he went in.  
I don't think it had been moved  
at that time.

>> This record would indicate  
that not only was the individual  
going to take this house for  
himself and these other two  
folks, but the plan or the idea  
was to, because the state land  
was made individual has no  
relatives and very him in the  
backyard and nobody will ever  
know.

Is there anything in the record  
about this?

>> There are maybe  
after-the-fact.

>> Wait a minute, so are you  
saying -- you are saying that  
any evidence that relates to the

state of mind and what is happening at the time cannot be based upon statements made after the shooting?

>> No I'm not.

I am not saying it is controlling either.

>> I understand but is there evidence of that?

>> I think he made some reference when he talked to Amber Reed afterwards.

He may have mentioned something about moving the body.

>> And burying the body and nobody will ever know.

Is there evidence about this?

>> I think he told Reed that.

>> So I mean you agree that can be used or it can be considered as part of the evidence in this case, correct?

>> Part of the evidence.

>> I understand but if that is evidence that is here then how

can the judge in his analysis

into eating speculation?

>> Because he is speculating as

to a lay in wait killing.

He is speculating that no

burglary takes more than 45

minutes.

The defendant went through every

room in the house and there is

evidence of that, through all

the doors, all the cabinets and

look for things.

He also looked for food and

prepared food.

>> What about again, going back

to what I mentioned earlier is

Amber Reed.

It took me so long because it

took a long time for these

people to return.

>> Because there was the

borrowing of the truck, Amber

Reed even said that was a lie.

That was an excuse.

It was a lie.

It is not worthy of using a lie  
to build up CCP.

>> That would have to be the  
judge -- does it?

>> I don't think he views  
something that the witness as  
saying he is lying to me about  
this and this was part of a lie.

>> But I guess the thing I'm  
having trouble with is that the  
scenario of what we have been  
talking about, that is that he  
picked the vulnerable victim, he  
targeted him, he came with a gun  
and I don't know the question as  
to why he let him go first.

That would be speculation, and  
then the logical thing is that  
he laid in wait for him.

Now this 21-year-old, everything  
is not a contract killer.

Is everything about the murder  
have to be completely  
consistent?

No.

We have unfortunately a lot of terribly misguided and worse, defendants on death row that just -- at this one is closer to logic than a lot of others.

He was doing it so he could have the house to live in and he planned to kill this man.

>> It is equally consistent with him waiting for Dellarco to leave to go in the house and burglarize the house and then Dellarco returning when he is doing that.

>> Why did he need such heavy armaments if he was simply going to walk in the house?

>> He carried around a lot of stuff constantly.

I mean that is just what he did.

He didn't do any special procurement for this particular thing.

>> So we have an automatic rifle and we have handguns and we have

knives.

When you take to the scene  
weapons, that is something that  
can be considered in connection  
with an analysis for CCP.

>> There has to be a nexus  
between it.

He didn't need all that stuff.

>> How did he carry anything  
away with all the guns he is  
caring?

Talk about speculation.

>> It is not so much that and I  
don't even know he if he went in  
the house with all that stuff.

I doubt he did.

Most of that stuff was in the  
woods.

>> I have yet to hear any  
plausible explanation for why he  
didn't get out of there when the  
victim returned home.

This whole idea that he was  
going to shoot to cause a  
distraction, I mean that is

ludicrous.

>> I know it has been said, the judge said he could have just snuck out.

I don't think they are positioning the defendant in the master bedroom.

Dellarco is sitting in the kitchen at the table with a few of that.

>> But the notion that he is going to shoot is going to be a distraction.

That is just going to bring attention to himself.

It is just ludicrous.

>> He can't sneak by him because he has to go right now.

>> So he shoots him.

>> Or he shoots to be a distraction.

>> Even if he decides to shoot him --

>> What I don't understand is how that could plausibly be a

distraction as opposed to something that is going to draw attention to him.

>> His statement was a distraction because of --

>> But forget about that.

Say he shot them on purpose.

At that point that is a reaction to him coming back during a burglary, it is not CCP, it is a reaction.

>> But we have other evidence.

You are now down to about four minutes and 40 seconds.

You can proceed but you are into your rebuttal.

>> The key is this a really lay in wait?

It is not.

He is interrupted during a burglary.

It is equally consistent with that, if not more.

That is why I think CCP is insufficient in this case.

I covered most of the details that are in my brief, especially my reply brief and it shows a lot of this is acting on all of these inferences.

Thank you and I will reserve the rest of my time.

>> Thank you.

>> Good morning.

May it please the court.

Lisa Marie Lerner with the Attorney General's office with the state of Florida.

If Your Honor would permit me I will go straight into the CCP.

As this court knows the court has to determine whether the judge in his sentencing order applied the correct law.

This judge did.

He discussed the law CCP decided in numerous cases and then he took the facts from the record.

This court reviewed the record itself to see if there is

competent substantial evidence  
to support the trial court's  
findings of CCP.

>> Your opposition seems to take  
the position that order doesn't  
correctly even recite the facts  
that were presented.

And there are errors according  
to your opposition in that order  
and therefore it is an improper  
order and ought to be  
overturned.

You very directly respond to  
your opposition's position with  
regard to this because it does  
appear it seems in the order  
that there are different  
statements that are, if not  
conflicting directly, certainly  
very close to being in conflict.

>> First of all I don't believe  
this court is bound just via  
trial court's order and factual  
finding.

This court can go back under

progeny to look at the evidence  
in the trial record itself to  
see if there is evidence in the  
record to support the finding of  
CCP.

In regards to the trial court's  
mistaking the order, it did make  
a mistake in its initial  
paragraph I believe under CCP,  
where it said that Ellerbee  
waited for Mr. Dellarco to come  
home and once Dellarco when in  
the house, Ellerbee went and  
however I think that was just in  
a statement because on the  
record on appeal on page 582,  
again under CCP, the trial court  
is later expounding when it was  
discussing that Ellerbee could  
have easily escaped.

It said that Ellerbee went  
inside the house while  
Mr. Dellarco was gone and then  
he waited for him.

So clearly the trial court did

know that Ellerbee broke into  
the house while Mr. Dellarco was  
gone and then he waited for him  
inside her go the first-aid  
meant that was incorrect I  
believe was just a misstatement.

The trial court clearly knew  
that the burglary occurred.

Ellerbee stayed in the house and  
waited for Mr. Dellarco to  
return.

And on finding of CCP or any  
other aggregator, this court has  
to look at the totality of the  
evidence, not individual facts  
taken out of context.

And in this situation you have  
Ellerbee targeting an elderly  
man.

Mr. Dellarco had severe gout and  
arthritis.

The testimony was he walked with  
two canes.

He could barely move.

He shook all the time.

He couldn't see well and he was nearly deaf.

Ellerbee knew this because he had watched the house in earlier that day had actually gone and gotten Mr. Dellarco out of the house on a ruse about finding his lost dog and talk to Mr. Dellarco face-to-face.

He saw the victim's condition, how weak he was.

Mr. Dellarco was using two canes, had difficulty getting into the truck so Ellerbee specifically targeted this victim.

Ellerbee then goes into the bushes.

When he had walked up to the house, he already had his rifle, his revolver and his knives.

He left the rifle at least in the bushes when he went to talk to Mr. Dellarco.

He did not take the rifle up to

Dellarco saying he was hunting  
for his dog.

He hid it in the bushes.

Dellarco leaves and Ellerbee  
goes back to the bushes, gets  
his gun, including the rifle, to  
take in the house to burglarize.

There is no reason he had to  
move that rifle from the bushes  
to inside the house unless he  
was planning to use the rifle.

Also, Ellerbee specifically  
targeted the eldest dog, Ricky,  
who is protective of Dellarco.

He told the police that he took  
the revolver for the dogs.

He shot Ricky.

By shooting Ricky, he took away  
Mr. Dellarco's protection and  
the protection for the house.

Again, showing intent to harm  
Dellarco.

He took the other dogs and put  
them in the back porch.

He could have put Ricky back

their too but he didn't because  
he saw that Ricky was  
specifically protect if of  
Mr. Dellarco, so shooting the  
dog is often part of the CCP.  
He went in the house and he  
stayed there.

According to Ellerbee's  
statement himself he was in  
there a good hour or more.  
That is what he told the police.

He a time to go through the  
house, to eat and watch TV.

>> How big is the house?

>> I don't have the size.

>> So it is not a house that  
would take a long time to  
burglarize?

>> No.

This is a two bedroom house on  
the prairie with a living room,  
dining room combination and a  
kitchen.

>> This Prairie area, in that  
particular neck of the woods in

Florida is a pretty big area and  
Okeechobee.

I am just wondering, how was it  
and maybe I missed it in the  
record, how was it that the  
victim in this case was found so  
quickly?

How was it that the Sheriff's  
office responded out there in  
the middle of nowhere so  
quickly?

I think part of the contention  
if I read correctly, was that he  
could shoot this elderly person,  
bury him up there and nobody  
would miss him for a long time.

>> That is correct.

A couple of things.

Mr. Dellarco had decided he was  
going to move into either with  
his family or into assisted  
living because he could no  
longer live by himself.

There is testimony about that.

He had arranged to have this

house clean to salad and the  
house cleaner came that  
afternoon and saw Ellerbee at  
the house.

Because Mr. Dellarco was  
planning to move, he was in  
contact with his family.

His family kept calling him  
because they were expecting him  
to make plans to move.

He didn't answer his phone so  
the family asked the Sheriff to  
do a welfare check.

The sheriff went out there twice  
that week and a sheriff saw the  
dogs either locked up sometimes  
in the yard, sometimes lock up,  
and also Mr. Dellarco's friend  
went out there a couple of times  
to check on him.

He saw the dogs and, the dogs  
out, the garage door open, the  
garage door closed so clearly  
there was someone there and it  
was that friend on Friday who

wins up to the house and went in  
and found Mr. Dellarco.

He was there about a week but  
the reason he was found is  
because Dellarco was planning on  
moving and had been talking to  
his family and his family  
couldn't reach him.

>> Mr. Anderson makes the  
argument that, if he wanted to  
kill Mr. Dellarco, he wouldn't  
have let him go into town and  
come back.

What is your answer to that?

>> Mr. Ellerbee wanted the house  
himself and he had to kill  
Mr. Dellarco.

When he first encountered  
Dellarco and he was talking to  
him, his guns were in the  
bushes.

He left in Dellarco immediately  
got in the truck and drove away.

>> But Dellarco didn't go back  
into the house?

>> No, the victim immediately got into his truck according to Ellerbee.

Ellerbee then went in the house and interestingly enough and I am reaching within my brief, Ellerbee told the police that when Dellarco came back, Ricky was lying in the front yard dead and was upset.

He went in the house, did not see his other dogs and so Mr. Dellarco after he went in the house with Ellerbee still in side then went outside.

He went all the way around the house to the back to the pool enclosure to get the dogs out.

The dogs were acting strange.

The dogs wouldn't go out.

He had to start swatting them to get them out.

>> So you are saying this was not a situation where he comes home and immediately sees the dog

is dead?

>> He did see the dog is dead that Mr. Dellarco went in the house, couldn't find the other dogs and Ellerbee is in the house.

Again, and then I am not trying to -- just to try to understand this.

When he comes into the house, if is the intent of Ellerbee was to kill him, why did he let him go back out of the house?

>> Because he was still moving around at that time.

Dellarco was still standing up moving, be it with two canes.

Ellerbee at that point has a chance to lead either by the front door or the back door because Dellarco is in the back of the house but Ellerbee decides to wait.

He waits until Mr. Dellarco comes in the house and is

stationary.

Ellerbee waited until

Mr. Dellarco sat down and put

his canes away, making him

particularly easy to shoot.

Which again goes to CCP.

If he were frightened because

this man were coming home come

he could have hit him over the

head or escape while Dellarco is

out but now he waited until his

target with stationary and shot

presumably and it would be

easier to do rather than

shooting someone who is standing

up.

>> Do you know the nature of the

phonecall that he was making?

Was he calling the police?

>> What we know is from Ellerbe

himself.

It does not appear --

>> The phone records?

>> It did not appear Dellarco

call the police because Ellerbee

said he got a recording and hung up when he got the recording as if it were like an answering machine or some other sort of automated voice.

And that is the only evidence we have.

Mr. Dellarco did not make any other phonecalls.

He was sitting at the table and this -- he is but the phone down and it was at that point when his head was bent down over the table that Ellerbee took the opportunity to shoot him.

And, Amber Reed did say that he targeted this man because he was an elderly man, by himself, living by himself and the statement about him waiting for the man to return, even though Ellerbee was lying about getting a truck repaired or something, the statement that he waited for the man to return was accurate

and that is what he did until  
Amber Reed.

On the first issue, just to  
respond, this attorney -- there  
is not -- it is not clear from  
the face of the record itself  
why this attorney chose the  
strategy.

I do believe it was sort of a  
Hail Mary pass.

He was challenging the  
premeditation and he was  
challenging the CCP, so he did  
use -- it appears that he might  
have used this with an eye to  
the penalty phase.

>> Is Mr. Anderson correct in  
that he didn't resurrect the  
accidental defense in the  
penalty phase?

>> He didn't resurrect it but he  
argued there was no  
premeditation.

>> It doesn't make a lot of  
sense that the idea was you are

going to throw it out as an  
accident, it wouldn't use that  
than in the penalty phase where  
you know, to try to avoid CCP or  
the death penalty.

>> The focus of the defense  
attorneys penalty phase argument  
was on the mental health  
nonstatutory mitigators, and  
that is primarily what he  
argued.

Whether or not he had a strategy  
for this is not something we  
have before us and that is one  
of the reasons why it is more  
appropriate to handle this, if  
at all, in postconviction and  
again, as some of the justices  
said earlier, with this record,  
the attorneys had to find  
something to get the jury to try  
and prevent him from being  
convicted of first-degree  
murder.

>> Mr. Anderson's argument says,

he could have defended this  
based on whether or not there  
was burglary -- to do what?

To commit a felony?

What was the purpose?

>> Theft.

And I understand Mr. Anderson is  
in a similar position as a trial  
attorney.

He doesn't have a lot to work  
with here, but Ellerbee said he  
went to the house to steal money  
and to get money and food.

That was his intention.

He didn't go to the house just  
to peek in the windows and look.

He went in the house to steal  
items of value, and to steal  
food.

Ellerbee also testified and  
Amber Reed testified that he had  
been burglarizing other houses  
in the area, stealing guns and  
other items.

Ellerbee also told that to the

police, so this is consistent both with his other actions on the Prairie as well as his prior convictions, which interestingly were from stealing guns.

>> Did he steal a gun in his house?

>> Yes, he stole a shotgun as well as the ATM cards, the credit cards and any other items he may have found useful there.

And in terms of a defense he doesn't even need --

Mr. Anderson doesn't even meet the requirement for a necessity defense.

It has to be to avoid eminent harm and there is no other means to do it but the means he chose.

And Mr. Ellerbee himself created a necessity by bringing them all out to the Prairie.

He had other means besides breaking into homes.

He could have driven back to

town.

Amber Reed and her baby were signing up for financial aid from the state, and she was living with Hutchison who was providing her with room and food and shelter.

So he had other means to avoid the problem of being out on the prairie with no food or water or electricity by just driving back into town.

So necessity doesn't work either, nor does trespass.

If the court has no further questions on any of the issues, I would ask the court to affirm both the guilt and penalty phases.

Thank you.

>> I would first like to -- this all goes to the second issue of CCP.

One of the things that I forgot to mention was Dellarco when he

was seated down, you he wasn't far from a front door where he kept his rifle.

There is a possibility if he sneaks out of the house, there is possible repercussions from that.

I just wanted to mention that. It is not like other cases where there is no, you know, the victim can't do anything about it.

There were a bunch of representations about --

>> Wait a minute.

You are saying if he had gotten out of the house the victim would have been close to a weapon?

So when does he take the weapon?

>> Well he takes it after the killing.

There is no evidence that he had it at the time of the shooting.

>> They speculate, he could

have.

>> His statement as vague as to what occurred in that is what we are basing --.

That is what we are basing the CCP on.

A lot of the description of these things were targets and have descriptions that frankly as to his condition on that date, there is no evidence as to him using canes on that date.

It is all speculation and the fact that the claim, the appellant specifically targeted Mr. Ellerbee for his house.

>> Our claim is that these are assumptions.

If you look at the record for things like that, in the statements in what Mr. Dellarco was like on that day, there is no evidence that the appellant saw Dellarco using two canes to get in the truck and then did

this or that.

That is a description that is not part of the defendant statement that it is being used now to argue that he is targeted.

The statement to Amber Reed about the truck and about waiting is about the defendant borrowed the man's truck because he told Dellarco that he needed the truck to buy some parts for his truck, which was broken down, and he had to wait to return the man's truck.

That clearly is not true.

He didn't have a truck that was broken down.

Amber Reed knew that was a lie.

That is why in the context Amber

Reed knew this was a lie.

And unless there are any

questions --

>> We thank you both for your arguments.