

**IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT  
IN AND FOR BAY COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

vs.

Case No. 08-4160H

DENNIS "PEEWEE" CREAMER,

Defendant.

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**STATE OF FLORIDA'S MEMORANDUM IN SUPPORT  
OF THE IMPOSITION OF THE DEATH PENALTY**

The State of Florida, by and through the undersigned Assistant State Attorney, files this memorandum regarding the applicability of the death penalty in this case. The Defendant has waived a jury recommendation regarding the penalty. The State asks the Court to impose the death penalty on Dennis "Peewee" Creamer for the murder of Haleigh Marie Cain. In support, the State would offer the following:

**AGGRAVATING CIRCUMSTANCES**

The State submits that the following aggravating circumstances have been proven beyond a reasonable doubt:

- 1. The capital felony was committed while the defendant was engaged in the commission of aggravated child abuse.**
  - a. The jury found the Defendant guilty of First Degree Murder and Aggravated Child Abuse. The murder was committed while the Defendant was engaged in the commission of Aggravated Child Abuse. This circumstance has been proven beyond a reasonable doubt.
  - b. This factor merges with the aggravating factor that **the victim of the capital felony was a person less than twelve (12) years of age**, and the victim's age increases the weight of this factor.
    - i. The Florida Supreme Court has held that it constitutes improper doubling to count these two aggravating factors separately, as both are based upon the victim's status as a child. *Lukehart v. State*, 776 So.2d 906, 925 (Fla. 2001). However, the Court also said that the fact

that a victim was under 12 is properly considered in weighing the aggravating factor that the murder occurred while the defendant was engaged in the commission of aggravated child abuse. The fact that the victim was a helpless infant increases the weight of this aggravator. *Id.*

ii. Jessica Krsul, Haleigh's mother, testified that Haleigh was approximately 2 years and 1 week old when she was killed. The fact that the victim was under 12 years old has been proven beyond a reasonable doubt.

c. This factor, enhanced by Haleigh's young age, should be given great weight.

## **2. The capital felony was especially heinous, atrocious, or cruel (HAC).**

a. This aggravating circumstance has been described as one of the "most weighty" in Florida's sentencing calculus. *Sireci v. Moore*, 825 So.2d 882, 887 (Fla. 2002); *see also Guardado v. State*, 965 So.2d 108, 119 (Fla. 2007) (HAC and CCP aggravators are "two of the most serious aggravators set out in the statutory sentencing scheme"). The death penalty has been approved when this was the only aggravating factor. *See Butler v. State*, 842 So.2d 817 (Fla. 2003).

b. The Florida Supreme Court has defined heinous as extremely wicked or shockingly evil; atrocious as outrageously wicked and vile; and cruel as designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. It is intended for conscienceless or pitiless crimes which are unnecessarily torturous to the victim. *Hernandez v. State*, 4 So.3d 642, 668-69 (Fla. 2009). Unlike the CCP aggravator, which focuses on the state of mind, intent and motivation of the defendant, the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death. *Id.* The focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator. The victim's mental state may be evaluated in accordance with common-sense inferences from the circumstances. *Id.*

c. The fear and emotional strain preceding a death may be considered as contributing to the heinous nature of the crime. *Adams v. State*, 412 So.2d 850 (Fla.1982). In *Adams*, an 8-year-old girl was bound by her wrists with tape prior to being strangled, and the trial court noted that that showed that she had time to anticipate her murder. In affirming the application of the HAC aggravator, the Supreme Court noted that a frightened eight-year-old girl being strangled by an adult man "should certainly be described as heinous, atrocious and cruel." *Adams*, *supra*, at 857.

- d. The Florida Supreme Court has consistently upheld the HAC aggravator in beating deaths. *Douglas v. State*, 878 So.2d 1246, 1261 (Fla. 2004); *see also Guardado v. State*, 965 So.2d 108, 115-116 (Fla. 2007) (collecting cases, stating, “This Court has found competent, substantial evidence to support the HAC aggravator in a number of cases involving brutal beatings. *See Dennis v. State*, 817 So.2d 741, 766 (Fla. 2002) (HAC affirmed where both victims suffered skull fractures and were conscious for at least part of the attack as they had defensive wounds to their hands and forearms); *Bogle v. State*, 655 So.2d 1103, 1109 (Fla. 1995) (HAC affirmed where victim was struck seven times on the head, victim was alive during infliction of most of the wounds, and the last blows caused death); *Wilson v. State*, 493 So.2d 1019, 1023 (Fla. 1986) (HAC affirmed where victim was brutally beaten while attempting to fend off the blows before being fatally shot).”)
- e. Dr. Michael Hunter, the medical examiner, testified that Haleigh had multiple impact injuries to her face. She sustained approximately 11 injuries to her head alone. Four to five impacts to her torso caused extensive abdominal damage, including causing the menestery of the intestine to bruise and bleed, and it actually tore; causing a relatively large laceration to the liver; and transecting her pancreas in half. He testified that her lethal abdominal injuries were consistent with a forceful punch or kick to the stomach, with the force of an impact similar to that seen in motor vehicle accidents. Dr. Hunter testified that it was “very possible” that Haleigh could have survived the attack if she had received medical treatment. He testified that the abdominal injuries, particularly the lacerations of the liver, menestery, and pancreas, would have been “very painful” injuries. He testified that Haleigh’s injuries were not immediately lethal, and that it would take a considerable amount of time to bleed from the injuries. He stated that it could be “an hour to hours” that Haleigh was alive following the injuries.
- f. As one of the most weighty factors in Florida’s sentencing scheme, this factor should be given great weight.

**3. The victim was particularly vulnerable because the defendant stood in a position of familial or custodial authority over the victim.**

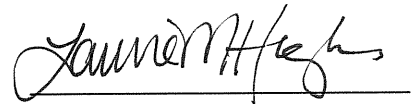
- a. The only case the State has been able to find applying this aggravator to a child victim is *Hernandez-Alberto v. State*, 889 So.2d 712 (Fla. 2004), where the Defendant was convicted of murdering his adult stepdaughter and his 11-year-old stepdaughter. As to the 11-year-old, the court applied the vulnerable victim aggravator. The Supreme Court did not specifically discuss that aggravator in its opinion, but found the death penalty to be proportionate. Notably, the trial court had also applied the victim less than 12 aggravator as a separate aggravating factor.

- b. Fla. Stat. § 921.141 does not define “familial or custodial authority.” However, in defining familial authority for purposes of the child sexual battery statute, the Florida Supreme Court has stated, “There is no single definition or description of what constitutes a ‘familial relationship’ in the context of child sexual battery.... The determination of whether a familial relationship exists must be done on a case-by-case basis. Consanguinity and affinity are strong indicia of a familial relationship but are not necessary. Also, the defendant and victim need not reside in the same home. The relationship must be one in which there is a recognizable bond of trust with the defendant, similar to the bond that develops between a child and her grandfather, uncle, or guardian. Where an individual legitimately exercises parental-type authority over a child or maintains custody of a child on a regular basis, a familial relationship may exist for purposes of the admissibility of collateral crimes evidence...” *State v. Rawls*, 649 So.2d 1350, 1353 (Fla. 1994), *superseded by statute on other grounds as recognized in McLean v. State*, 934 So.2d 1248 (Fla. 2006); *See also Oliver v. State*, 977 So.2d 673, 676-677 (Fla.App. 5 Dist.,2008) (“This evidence was sufficient for the jury to conclude that Oliver was in a position of familial or custodial authority. The girls looked up to Oliver as a father figure. They trusted and confided in him. Their own father was deceased and they were not close to their step-father. Thus, there was a recognizable bond of trust between Oliver and the girls similar to that of father and child. In addition, the twins’ mother trusted Oliver enough to let them stay overnight at his home and go on vacation with him. Oliver was one of the girls’ soccer coaches. All of the incidents occurred at Oliver’s home at times when Oliver was alone with the girls or others were asleep. Thus, Oliver was in a position of custodial authority over the girls because they frequently stayed overnight with him and were alone with him at his house when the incidents occurred.”).
- c. In this case, testimony at trial established that the Defendant, Haleigh, and Haleigh’s mother lived together as a family unit. Haleigh’s mother testified that the Defendant was the only father figure that Haleigh ever knew. The Defendant himself considered Haleigh to be his daughter, and referred to her as such in his statement to police. As noted above, Dr. Hunter testified that it was very possible that Haleigh could have survived if she had received medical treatment for her injuries. Although he was entrusted with her care, the Defendant not only caused Haleigh’s injuries, but also left her to die alone instead of taking her to the hospital.
- d. This factor was given great weight in *Hernandez-Alberto*, and should likewise be given great weight in this case. 889 So.2d at 725.

**MITIGATING CIRCUMSTANCES**

The State reserves argument on any mitigating circumstances until such time as it receives notice from the Defendant regarding which mitigators he intends to rely upon.

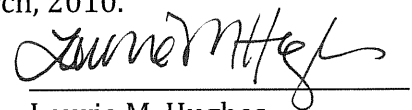
RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of March, 2010.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished via hand delivery to Kimberly D. Jewell Dowgul, Assistant Public Defender, 115 East 4<sup>th</sup> St., P.O. Box 580, Panama City, FL 32402, on this 11<sup>th</sup> day of March, 2010.



Laurie M. Hughes

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT  
OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY

STATE OF FLORIDA,

Plaintiff,

CASE NO.: 08-4160-H

vs.

DENNIS PEEWEE CREAMER,

Defendant.

\_\_\_\_\_ /

**DEFENDANT'S MEMORANDUM IN SUPPORT OF**  
**IMPOSITION OF A LIFE SENTENCE**  
**ARGUMENT ON AGGRAVATING CIRCUMSTANCES**

The Defendant, in the above listed case, waived his right to a trial by jury in the penalty-phase of proceedings in this matter under Section 921.141(1), Florida Statutes on February 17, 2010. By waiving a penalty phase jury, the Defendant agreed to have the aggravating and mitigating circumstances heard solely before the court. It is therefore up to the Court to render a decision as to an appropriate sentence in this case without a jury recommendation. The Defendant submits that for the below stated reasons as to aggravating circumstances, the appropriate sentence in this case is Life Without the Possibility of Parole.

The State filed a Notice of Aggravating Circumstances on the 20<sup>th</sup> day of January, 2010, listing four statutory aggravating circumstances. The State intended to establish 1) the capital felony was committed while the defendant was engaged in the commission of aggravated child abuse, 2) the capital felony was especially heinous, atrocious or cruel, 3) the victim of the capital felony was a person less than 12 years of age, and 4) the victim was particularly vulnerable because the defendant stood in a position of familial or custodial authority over the

victim. For the following reasons, the Defendant submits that the aggravating circumstances sought to be used by the State do not genuinely limit the class of persons who are death eligible and should be given little or no weight.

The Defendant submits the Court should not be swayed by the fact that the homicide occurred during the commission of aggravated child abuse. As more fully explicated in the Defendant's pre-trial motion attacking felony murder by child abuse, any homicide of a child is ipso facto aggravated child abuse. Simply stated, one cannot commit a homicide against a child without also committing aggravated child abuse against that child. Accordingly, the Court should assign little, if any, weight to an aggravating factor that is present 100% of the time. It is fundamental that an aggravating factor must genuinely limit the class of persons who are death-eligible. Zant v. Stevens, 462 U.S. 862 (1983). Alternatively, the Court can view application of this aggravating factor as improper "doubling." First, the felony-murder doctrine dispenses with proof of premeditation and transforms second-degree murder into a capital offense. Second, the same fact, i.e. that the State has proven commission of aggravated child abuse, provides the necessary aggravation to support a death penalty. Under a "doubling" analysis, no weight should be given to this aggravating factor.

This same argument applies to the second aggravating factor: the murder was "especially heinous, atrocious, or cruel." Since all murders can be characterized as heinous, atrocious, or cruel (even second-degree murders), this aggravating factor does not limit the class of persons who are death-eligible. The adjective, "especially," does nothing to describe the types of homicidal acts which are encompassed by this aggravating factor. Indeed, the Defendant filed a pre-trial motion asking the court to declare this aggravating factor to be

unconstitutional under the holding of Maynard v. Cartwright, 486 U.S. 356 (1988).

The Florida Supreme Court has been no more adept than jurors in constraining the application of this aggravating factor. In some cases, the Court emphasized that the victim's perception of the homicidal events gives meaning to the phrase, "especially heinous, atrocious or cruel." See, Hitchcock v. State, 578 So.2d 685 (Fla. 1990). In another case, decided the same year as Hitchcock, the Court rejected a finding of HAC where it was not proven that the defendant intended that the victim's death be extraordinarily painful. Porter v. State, 564 So.2d 1060 (Fla. 1990). In Brown v. State, 721 So.2d 274 (Fla. 1998) the Court reiterated that "the factor of heinous, atrocious, or cruel is proper only in torturous murders-those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another". Citing Shere v. State, 579 So.2d 86, 95 (Fla. 1991); Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Perhaps the best way to define HAC is to limit its application to crimes which are "both conscienceless or pitiless and unnecessarily torturous to the victim." Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992).

In this case, there is expert testimony that the fatal injury was most likely a single blow to the abdomen of the victim. Although disturbing, the other injuries to the face and head did not contribute to the cause of death. The medical examiner testified that he believed the abdominal injury to be from a single blow while the victim was against a solid surface. It was clear from his testimony that there would be no way to see the internal damage that was caused as there were no external signs visible on the victim. The medical examiner could not determine the amount of time it would have taken the victim to die from the injury or at what point the

victim would have become unconscious. Therefore, the level of suffering is speculative and has not been proven beyond a reasonable doubt.

The facts of this case set it apart from other cases in which especially heinous, atrocious or cruel has been found in beating deaths. *See* Whitton v. State, 649 So.2d 861 (Fla. 1994)(HAC upheld where medical examiner testified beating lasted approximately 30 minutes and blood throughout the room was evidence of a violent combat. There were massive wounds on the neck and side of the victim's face and defensive wounds on victim's hand and arm. The Court found the defendant acted with utter indifference to the suffering of his victim.); Colina v. State, 634 So.2d 1077 (Fla. 1994)(HAC found where both victims beaten to death with a tire iron and evidence showed one victim was beaten a second time after being taken 100 yards from original attack and continued to moan.); Bruno v. State, 574 So.2d 76 (Fla. 1991)(HAC applicable where Defendant savagely beat the victim in the head and shoulders with a crowbar in excess of 10 times. The victim had self-defense wounds on his hands and Defendant continued the savage beating until the victim was no longer capable of resisting.... The Defendant's use of the crowbar was clearly especially atrocious or cruel.) In each of these cases, the death of the victim was intended from the actions of the defendant. Here, there was no testimony that any type of weapon was used, that the Defendant continued to beat the victim until he knew she had died, or that the victim's death was intended or contemplated as a result of the Defendant's actions. To the contrary, the State entered into evidence statements of the Defendant in which he told law enforcement he laid her down in her bed and thought the next morning everything would be fine.

Defendant submits that the proper focus of this aggravating factor should be on

the Defendant's subjective intent. Simply stated, did the Defendant intentionally choose a modality of death which was torturous to the victim? Clearly, he did not. The Defendant did not strike and/or kick the victim and delight in her suffering. The State argued during trial that this was an act performed out of frustration while trying to get the victim to go to bed and/or stop crying. There was no evidence produced by the State to support the contention that the Defendant intended to kill the victim, much less intentionally chose a modality of death which was torturous to the victim. Prior to jury selection, the State removed from the indictment the language alleging the Defendant tortured the victim. The State put on no evidence that the Defendant tortured the victim. Furthermore, there was no evidence presented at trial to support the State's second contention which was that the Defendant maliciously punished the victim. The Court granted Defendant's Motion for Judgment of Acquittal as to the allegation of malicious punishment, thereby leaving the State to prove Aggravated Child Abuse by knowingly or willfully committing child abuse upon the victim, and in doing so causing great bodily harm, permanent disability or permanent disfigurement. Given the facts of this case, it cannot be concluded beyond a reasonable doubt that the victim's death was especially heinous, atrocious, or cruel.

The State's third aggravating circumstance is that the victim was under the age of twelve. The court can also view application of this aggravating factor as improper "doubling" with the aggravating factor the murder was committed during the course of an aggravated child abuse. In Hutchinson v. State, 882 So.2d 943 (Fla. 2004) the trial court merged the factors supporting the aggravated child abuse aggravator with the victim was a person under the age of twelve aggravator. The State appealed the merger and the Court found that the trial court

properly merged the two aggravators. Id. At 957. The Court further cited its previous decision in Lukehart v. State, 776 So. 2d 906, 925 (Fla. 2000) wherein it held the trial court improperly doubled the aggravated child abuse aggravator and “victim under twelve” aggravator because both aggravators relied upon the victim’s status as a child. The facts in Lukehart are similar in nature to the facts presented at trial in the present case. In Lukehart, the defendant was placed in charge of a 5 month old child and during the course of her care had repeatedly forced her by her head and neck to the floor, after which the child stopped moving. The medical examiner testified to bruises on her head and arm which occurred close to the time of death. Additionally, there was testimony the child had received five blows to her head, two of which created fractures. Id. At 911.

In the case at bar, evidence was presented as to a single course of action resulting in injuries to the victim. The medical examiner testified that all injuries appeared to have occurred at the same time. Furthermore, the same set of facts and circumstances were argued in support of Ct. 1 First Degree Felony Murder during the course of Aggravated Child Abuse and Ct. 2 Aggravated Child Abuse. In each count, the State argued the victim’s age as an element of the offenses and therefore the court should afford this aggravator little or no weight as it does not in any way limit the application of the death penalty in this case.

For its fourth aggravating factor, the State relies upon Section 921.141(5)(m), Florida Statutes, (2009), which requires the State to prove beyond a reasonable doubt that “the victim of the capital felony was particularly vulnerable due to advanced age, or because the defendant stood in a position of familial or custodial authority over the victim.” The Florida Supreme Court has provided very little guidance with respect to the applicability of this

aggravating factor to the murder of a child by a family member. It is clear, however, that the State must establish that the two-year-old victim in this case was “particularly vulnerable.” It is important to note that the Supreme Court has addressed the meaning of the phrase, “particularly vulnerable,” within the context of a victim’s advanced age.

In Francis v. State, 808 So.2d 110 (Fla. 2002), the court rejected the state’s argument that the manner of death and nature of the wounds bore a relationship to the victims’ vulnerability prior to their deaths. As the court observed: “if that were the case, every murder victim would be vulnerable.” Id. at 139. The court also held that the state could not establish the existence of this aggravating factor merely by proving the age of the victims, even though both victims were sixty-six-years-old. Instead, the court opted for a fact-specific finding of a causal relationship between the victims’ advanced age and their vulnerability.

Applying the same analysis to this case, it is clear that the State has not proven that the victim in this case was “particularly vulnerable.” According to the evidence and testimony, the victim was a well-developed two-year-old, capable of communicating, expressing needs, playing with older children, and seeking affection. At the time of the homicide, she was present in her own home together with her mother, as well as two older children who were situated just outside her bedroom. In short, the Defendant did not exploit a situation in which the victim was “particularly vulnerable.” She was no more vulnerable than any young child would be under similar circumstances.

The aggravating factor also requires a causal connection between the victim’s vulnerability and the Defendant’s “position of familial or custodial authority over the victim.” This is a concept borrowed from the sexual battery statute, which punishes more severely a

sexual act that is committed by a person in an authoritative relationship with the victim. See § 794.041, Florida Statutes (2009). Again, the statute and applicable case law target the situation in which an adult exploits a relationship with a child in order to obtain sexual gratification.

Within this context, there is an obvious causal connection between the victimization of the child and the perpetrator's position of authority. The State has not proven such a connection in this case.

Under the State's theory, the Defendant became enraged because the victim was interfering with his efforts to engage in sexual relationships with Jessica Krsul. The resulting homicide had nothing to do with discipline, punishment, or exploiting the family or custodial authority which the Defendant may have held over the victim. It did not occur because the victim was more readily accessible to the Defendant's crime. Instead, the homicide occurred because the Defendant was angry, not because he stood as a "father figure" within the household.

Even if the Court finds beyond a reasonable doubt that the State has established both prongs of this aggravating factor, the Court should assign little, or no weight, to it. Under a "doubling" analysis, the court is merely substituting the age of the victim for her vulnerability. The Court has already considered the age of the victim in determining whether the homicide occurred during the commission of child abuse, and whether the victim was under 12 pursuant to §921.141(5)(1), Florida Statutes. The homicidal death of virtually any child under 12 will occur through an act of child abuse, committed by an adult who is in a position of authority over the child. The triple-weighting of the aggravating factors identified by the State does nothing to limit the death-eligibility of a Defendant convicted of first-degree murder of a child. Accordingly, the Court should not place great weight upon an observation of the obvious.

In conclusion, this case presents a situation where the State has sought imposition of the death penalty based on aggravating factors that rely upon the age of the victim. It would constitute improper “doubling” or “tripling” for the court to find separate aggravators which are based upon this single factor. Furthermore, the State has failed to establish by evidence beyond a reasonable doubt that the homicide was especially heinous, atrocious or cruel. Therefore, it is clear that based upon the factual issues in this case, the State has not provided aggravating circumstances such that would warrant the ultimate penalty of death. It is for the above reasons the defendant submits this is not one of the “most aggravated and least mitigated” cases for which the death penalty is reserved.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Larry Basford, Assistant State Attorney, P. O. Box 1040, Panama City, FL 32402 by Hand Delivery this \_\_\_\_\_ day of March, 2010.

Respectfully submitted,

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