NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

DANIEL G. DURAIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D18-1654

Opinion filed March 6, 2019.

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Lee County; John E. Duryea, Jr., Judge.

Daniel G. Durain, pro se.

PER CURIAM.

Affirmed.

LaROSE, C.J., and SILBERMAN and ATKINSON, JJ., Concur.

Appendix
A

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA CIVIL DIVISION

DANIEL DURIAN,

Petitioner,

vs. **Case No. 18-CA-1104**

STATE OF FLORIDA,

Respondent.

_____/

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

THIS CAUSE comes before the Court on Petitioner's "Petition for Writ of Habeas Corpus," filed March 19, 2018. Petitioner is an inmate with the Florida Department of Corrections who was convicted of first degree murder in 1997. The conviction was affirmed by the Second District Court of Appeal in 1999.

In his petition, Petitioner argues that he is being detained illegally due to alleged trial court error. Specifically, he argues that because the trial judge found that he did not commit murder for pecuniary gain during his sentencing hearing, then the charge of first-degree murder had not been proven beyond a reasonable doubt at trial.

First, an alleged error of this type is an issue for direct appeal. It is well-settled that a petition for writ of habeas corpus cannot be used to obtain relief which has, or which should have been, sought on direct appeal of the judgment and sentence. *See Grim v. State*, 971 So.2d 85, 103 (Fla. 2007) (habeas claim regarding constitutionality of standard jury instructions was procedurally barred because it was an issue for direct appeal); *Teffeteller v. Dugger*, 734 So.2d 1009 (Fla. 1999); *Chandler v. Dugger*, 634 So.2d 1066 (Fla. 1994); *Hargrave v. Wainwright*, 388 So. 2d 1021 (Fla. 1980) (it is well settled that habeas corpus may not be used as a vehicle to raise for the first time

Appendix B

issues that the petitioner could have raised during the formal trial and on appeal); *Heilmann v. State*, 832 So. 2d 834 (Fla. 5th DCA 2002) (petitioner raised issues which were or could have been raised in the direct appeal of his conviction, and therefore they could not be raised in a habeas corpus petition); *Scott v. State*, 820 So. 2d 321 (Fla. 5th DCA 2001) (habeas corpus is not a vehicle for additional appeals of issues that were raised or should have been raised on direct appeal); *Gaiter v. State*, 737 So.2d 565 (Fla. 3rd DCA 1999). Complaints seeking habeas corpus relief raising appellate issues should be dismissed, even in cases where no appeal was actually filed. *Powell v. Fla. Dept. of Corrections*, 741 So.2d 1201 (Fla. 1st DCA 1999).

Second, while the Court appreciates Petitioner's frank acknowledgement that his claim is not reviewable in a petition for habeas corpus except on the basis of fundamental error, it is clear that no error was committed on the premise he sets forth in this petition. Motive is not an element of first-degree murder and does not have to be proven at trial. Moreover, motive is not the equivalent of premeditation. The sentencing judge's decision to override the jury's recommendation of death does not negate the jury's factual findings at trial regarding Petitioner's guilt. The argument set forth in the petition is simply meritless and does not constitute fundamental error, or any error at all.

Finally, the Court takes judicial notice of the record in Lee County criminal case number 96-CF-2222 and notes that Petitioner has filed five unsuccessful postconviction motions under Fla. R. Crim. P. 3.850 since his case became final. He raised the same claim as this petition in at least two of those postconviction motions. The claim was denied by the postconviction court and the Second District Court of Appeal has affirmed the postconviction court's denials.

The Court further observes that Petitioner has been warned of the imminency of sanctions by the postconviction court due to his successive meritless filings. The Court shall dismiss his petition for writ of habeas instead of transferring it to the criminal case, which would likely result

in the imposition of sanctions against Petitioner. Instead, Petitioner is advised that this is his final warning not to file successive claims and that the next successive filing will result in sanctions.

It is, therefore

ORDERED AND ADJUDGED that the petition for writ of habeas corpus is DISMISSED.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 27 day of March, 2018.

John E. Duryea, Jr.
Circuit Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished to **Daniel Durian**, DC#Y02358, Liberty Correctional Institution, 11064 NW Dempsey Barron Rd., Bristol, FL 32321; **Office of the State Attorney**, P.O. Box 399, Ft. Myers, Florida 33902-0399; and **Court Administration (XXIV)**, 1700 Monroe Street, Fort Myers, Florida 33901, this 27 day of March, 2018.

By: Cindy Hammond
Judicial Assistant

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

April 01, 2019

CASE NO.: 2D18-1654
L.T. No.: 18-CA-001104

DANIEL G. DURAIN	v.	STATE OF FLORIDA
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Linsey Sims - Bohnenstiehl, A.A.G. Daniel G. Durain Linda Doggett, Clerk

mep

Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel
Clerk

Appendix C

[ ] Probation Violator
[ ] Community Control Violator
[ ] Retrial
[ ] Resentence
[ ] Amended

In the Circuit Court, 20TH Judicial Circuit,
in and for LEE County, Florida

Division FELONY
Case Number 96002222CF

State of Florida
v.
DURAIN, DANIEL G

4360191

JUDGMENT

The defendant, DURAIN, DANIEL G being personally before this court represented by PUBLIC DEFENDER, , the attorney of record, and the state represented by CHAPPELL, SHERI JEAN POLSTER , and having

[X] been tried and found guilty by jury~~/by court~~ of the following crime(s)

[ ] entered a plea of guilty to the following crime(s)

[ ] entered a plea of nolo contendere to the following crime(s)

Count	Crime	Offense Statute	Degree	Case Number	OBTS Number
001	FIRST DEGREE ~~MURDER~~ Premeditated Murder	78204	C	96002222CF	9127583

0731 2281

[X] and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

[ ] and pursuant to section 943.325, Florida Statutes, having been convicted of attempts or offenses relating to sexual battery (ch 794) or lewd and lascivious conduct (ch 800) the defendant shall be required to submit blood specimens.

[ ] and good cause being shown; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

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D.C.

Appendix
D

518

efendant DURAIN, DANIEL G Case Number 96002222CF OBTS Number 9127583

SENTENCE (As to Count 001)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, PUBLIC DEFENDER, nd having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters n mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being hown (Check one if applicable)

[X] and the Court having on 09/05/1997 deferred imposition of sentence until this date.

[ ] and the Court having previously entered a judgment in this case on _____ now resentences the defendant.

[ ] and the Court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control.

OR2941 PG1749

t Is The Sentence Of The Court that:

[ ] The defendant pay a fine of $ 0.00, pursuant to section 775.083, Florida Statutes, plus $ 0.00 as the 5% surcharge required by section 960.25, Florida Statutes.

[X] The defendant is hereby committed to the custody of the Department of Corrections.

[ ] The defendant is hereby committed to the custody of the Sheriff of LEE County, Florida.

[ ] The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

0731 2282

o Be Imprisoned (Check one; unmarked sections are inapplicable):

[X] For a term of natural life.

[ ] For a term of _____.

[ ] Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

[ ] To await imposition of the death penalty.

f 'split' sentence, complete the appropriate paragraph.

[ ] Followed by a period of _____ on probation/community control under the supervision of the _____ according to the terms and conditions of supervision set forth in a separate order entered herein.

[ ] However, after serving a period of _____ imprisonment in the _____, the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

n the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before he defendant begins service of the supervision terms.

onsecutive/Concurrent As To Other Counts

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[ ] It is further ordered that the sentence imposed for this count shall run (check one) [ ] Consecutive to [ ] Concurrent with the sentence set forth in count _____ of this case.

Defendant DURAIN, DANIEL G Case Number 96002222CF OBTS Number 9127583

SPECIAL PROVISIONS (As to Count 001)

By appropriate notation, the following provisions apply to the sentence imposed:

Mandatory/Minimum Provisions:

Firearm — [ ] It is further ordered that the 3-year minimum imprisonment provision of section 775.087(2), Florida Statute, is hereby imposed for the sentence specified in this count.

Drug Trafficking — [ ] It is further ordered that the _____ mandatory minimum imprisonment provision of section 893.135(1), Florida Statute, is hereby imposed for the sentence specified in this count.

Controlled Substance Within 1,000 Feet of School — [ ] It is further ordered that the 3-year minimum imprisonment provisions of section 893.13(1)(c)1, Florida Statute, is hereby imposed for the sentence specified in this count.

Habitual Felony Offender — [ ] The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statute. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Habitual Violent Felony Offender — [ ] The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statute. A minimum term of _____ must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court.

Law Enforcement Protection Act — [ ] It is further ordered that the defendant shall serve a minimum of 0 years before release in accordance with section 775.0823, Florida Statute.

Capital Offense — [X] It is further ordered that the defendant shall serve ~~no less than 25 years~~ in accordance with the provisions of section 775.082(1), Florida Statute. (WITHOUT THE POSSIBILITY OF PAROLE)

Short-Barreled Rifle, Shotgun, Machine Gun — [ ] It is further ordered that the 5-year minimum provisions of section 790.221(2), Florida Statute, are hereby imposed for the sentence specified in this count.

Continuing Criminal Enterprise — [ ] It is further ordered that the 25-year minimum sentence provisions of section 893.20, Florida Statute, are hereby imposed for the sentence specified in this count.

Taking a Law Enforcement Officer's Firearm — [ ] It is further ordered that the 3-year mandatory minimum imprisonment provision of section 775.0875(1), Florida Statute, is hereby imposed for the sentence specified in this count.

Other Provisions:

Retention of Jurisdiction — [ ] The Court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statute (1983).

Jail Credit — [ ] It is further ordered that the defendant shall be allowed a total of _____ as credit for time incarcerated before imposition of this sentence.

Prison Credit — [ ] It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

Resentencing Upon Revocation of Supervision — [ ] Defendant is allowed credit for _____ county jail credit served between date of arrest as a violator and date of resentencing. The Department of Corrections shall apply original jail credit awarded and shall compute and apply credit for time served and unforfeited gain-time awarded during prior service of case number/count number _____.

OR2941 PG1750

0731 2283

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efendant DURAIN, DANIEL G. Case Number 96002222CF

ther Provisions, continued:

Consecutive/Concurrent as to Other Convictions

[ ] It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run (check one) [ ] Consecutive to [ ] Concurrent with the following:

(check one) [ ] any active sentence being served.

[ ] specific sentences:

_____

_____

_____

In the event the above sentence is to the Department of Corrections, the Sheriff of LEE County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

The defendant in open court was advised of the right to appeal from this sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendant's right to the assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

In imposing the above sentence, the court further recommends/orders/states:

_____

_____

_____

DONE AND ORDERED in open court at LEE County, Florida, this 25th day of MARCH , 1998.

[ ] Nunc Pro Tunc _____.

_____

JUDGE, E DIVISION JUDGE ISAAC ANDERSON

OR2941 PG1176

731-2284

CHARLIE GREEN, CLERK
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521

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA
CRIMINAL ACTION

STATE OF FLORIDA,
Plaintiff,

vs.

DANIEL G. DURAIN,
Defendant.

CASE NO. 96-2222 CF IA

FILED LEE CO. FLORIDA
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BY

SENTENCING ORDER

The Defendant was tried before this Court from September 2, 1997 through September 5, 1997. The jury found the Defendant guilty as charged in the Indictment of First Degree Premeditated Murder. The same jury reconvened on November 3, 1997 and evidence in support of aggravating factors and mitigating factors was heard. The jury returned a 7-5 recommendation that the Defendant be sentenced to death.

On December 4, 1997, the Court requested sentencing memoranda from counsel for the State and the Defendant. The memoranda were received and a Spencer hearing was held on January 5, 1998. A presentence investigation report was also received by the Court on February 19, 1998. The Court set final sentencing for today, March 25, 1998.

Having heard the evidence presented in both the guilt phase and penalty phase and having had the benefit of the legal memoranda and argument of counsel in support of their respective positions, the Court finds as follows:

0730 2142

(A) AGGRAVATING FACTORS:

1. The capital felony was especially heinous, atrocious, or cruel.

On July 24, 1996 the body of Glenn Harkins was found by the Lee County Sheriff's Department under the Defendant's bed. Mr. Harkins had been brutally beaten about the head with a baseball bat. He had been beaten with such force that his skull had been fractured, his teeth had been knocked out, his nose, lips and brain were crushed.

Appendix E

Direct evidence of how the crime occurred was furnished by the Defendant himself in the form of a taped confession. The Defendant gave several conflicting confessions. Originally, the Defendant told detectives that he didn't know what happened to the victim, Glenn Harkins. However, the Defendant later admitted to killing him.

<u>The facts are as follows:</u>

At the time of the crime the Defendant was unemployed and penniless. He lived in a home owned by Robert Tracy and occupied by Tracy and Harkins.

According to the Defendant, on July 23, 1996, he and Harkins went fishing from approximately 7:00 p.m. to 11:30 p.m.. While fishing, the two men drank some beer.

After the two men arrived home from fishing, a fight erupted between Harkins and the Defendant because the Defendant wanted to continue drinking and Harkins had determined that the Defendant had drank enough for the night.

At approximately 2:30 a.m. Tracy suggested that the Defendant "go to bed" in order to prevent any further disorder between the two men. The Defendant then went into his bedroom.

In his confession, the Defendant stated that at approximately 4:00 a.m., he left his bedroom and retrieved a baseball bat from the laundry room and entered Glen Harkins' bedroom where he repeatedly hit him in the head with the bat. After the beating, the Defendant tied a plastic bag over Harkins' head. He then moved Harkins' body into his bedroom and pushed him under his bed. In his taped confession, the Defendant states:

> That's when I take him into the room and put him under the bed. Of course, there was bags over his head, because I didn't want blood going all over the floor.

Sometime during the day of July 24, 1996, Robert Tracy went into the victim's bedroom and discovered that the

bed sheets had been changed. On the floor of the victim's bedroom he discovered a tooth and bone fragments. These findings startled Tracy and he asked the Defendant to help him search the victim's room to see if the victim could be located. The Defendant's search for the victim yielded no results and, afterwards, the Defendant returned to a chair in front of the television.

The Defendant stated in his confession that he was watching television and waiting for Tracy to leave for work so he could dispose of Harkins' body. Eventually, Tracy left the home to request the assistance of the Lee County Sheriff's Department.

The Sheriff's Department arrived at the Tracy home and found Harkins' body under the Defendant's bed. The body was removed from the home and taken to the medical examiner's office.

At trial, Sam Johnson, an investigator with the medical examiner's office and an expert in blood stain analysis, testified that blood spatter was found on the ceiling, walls and carpet in the victim's bedroom. Based on the blood spatter evidence, the investigator concluded that the bloodshed occurred on the bed and the blood spatter was consistent with blunt force injury caused by a baseball bat. The expert testified that it took a considerable amount of force to make the kinds of castoff stains that he observed in the victim's room.

An autopsy was performed by the medical examiner, Dr. Manfred Borges. He testified that Harkins sustained between 6 to 12 blunt force injuries during the attack. Harkins' skull was fractured, his nose was crushed and his lips and brain were "pulpified." The medical examiner testified that Harkins died as a result of massive blunt trauma and possible asphyxia.

The medical examiner also testified that Harkins had wounds to his arms and hands consistent with his attempting to defend himself. Accordingly, the medical examiner concluded that Harkins was conscious during part of the attack.

In determining whether the State proved this aggravating factor of heinousness beyond a reasonable doubt, the Court notes that this was not an instantaneous or painless killing. This was a brutal crime whereby the

victim sustained a massive beating to his head which pulverized his brain. This method of killing, a beating death, is one to which the factor of heinousness is applicable. See, James v. State, 695 So.2d 1229 (Fla. 1997).

There was evidence presented at trial that the victim was alive for a period of time during the infliction of the injuries and that he attempted to defend himself. As such, "the circumstances of this killing indicate a conscienceless and pitiless regard for his life and it was unnecessarily torturous to him." Geralds v. State, 674 So.2d 96, 102 (Fla. 1996).

Based on the medical evidence and testimony presented in this case, the Court finds that this aggravating factor was proven beyond a reasonable doubt and affords this factor great weight.

In addition to the foregoing, several cases are factually analogous and support the Court's finding of the heinous, atrocious or cruel aggravating circumstance. See, e.g. Whitton v. State, 649 So.2d 861 (Fla. 1994); Chandler v. State, 534 So.2d 701 (Fla. 1988); Lamb v. State, 532 So.2d 1051 (Fla. 1988); Bruno v. State, 574 So.2d 76 (Fla.1991)and Colina v. State, 634 So.2d 1077 (Fla. 1994).

2. The capital felony was committed for pecuniary gain.

At trial the State presented evidence that on the day of the killing the Defendant had no money. However, Harkins had received a paycheck, cashed it and used some of the money to buy beer for himself and the Defendant.

There is evidence in the record that the Defendant was unemployed and that it was common for Tracy or Harkins to buy him cigarettes, food and beer. Additionally, there was evidence presented at trial that prior to the murder, the Defendant called his mother asking for money. His mother refused to send him any money. After the murder, $187 was found in the Defendant's wallet.

Although a jury might conclude that this evidence demonstrates the Defendant took the victim's money, it does not show that the primary motivating factor for committing the murder was the money. The money could have been taken as an afterthought. Hill v. State, 549 So.2d 179 (Fla. 1989), Wuornos v. State, 644 So. 2d 1012 (Fla. 1994)and Bruno v. State, 574 So.2d 76 (Fla. 1991).

As such, the evidence is insufficient to prove beyond a reasonable doubt that pecuniary gain was the primary motivation for the murder and the Court so finds.

None of the other aggravating factors enumerated under Florida Statute § 921.141(5) are applicable to this case and no others were considered by this Court.

(B) MITIGATING FACTORS:

Statutory Mitigating Factors:

1. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. Florida Statute § 921.141 (6)(b).

In order to prove this mitigating circumstance, the Defendant sought and obtained the assistance of Dr. Bruce Crowell, who testified that the Defendant told him that he was intoxicated on the night of the offense. This is hearsay evidence.

Dr. Crowell testified that it was his opinion, based on interviews with the Defendant, that the Defendant suffers from alcohol dependence, dysthymia, a mild form of depression, and general depression. He also testified that the Defendant has an average IQ.

The evidence presented as to the Defendant's mental state at the time of the offense is primarily hearsay evidence that does not rise to the level sufficient to establish it as a statutory mitigator. See, James v. State, 695 So.2d 1229 (Fla. 1997). Additionally, when the Defendant was asked in his confession if he had a mental problem he responded, "No."

The Court has considered this evidence and rejects the Defendant's mental or emotional disturbance as a statutory mental mitigator. As such, the Court gives this mitigator no weight.[1]

1 In James v. State, 695 So. 1229 (Fla. 1997)the Defendant suffered from alcohol dependence, severe dysthymia, chronic depressive disorder and had consumed ten "hits" of acid (LSD) and more than 24 cans of beer prior to committing murder. The trial court held that this did not rise to the level of an extreme mental or emotional disturbance. The Supreme Court affirmed and held "so long as the trial count considers all the evidence, the trial court's subsequent determination of a lack of mitigation will stand absent a palpable abuse of discretion."

2. The capacity of the Defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired. Florida Statute § 921.141(6)(f).

During the guilt phase defense counsel alleged that Harkins asked the Defendant, just prior to the killing, to perform fellatio on him. In his confession, the Defendant alleged that because he had been drinking on the night of the crime he was unable to act rationally when Harkins made that request.

At trial there was no evidence presented that Harkins had made that request to the Defendant other than the Defendant's own statement to this effect as contained in his confession.

Furthermore, there was no evidence presented that the Defendant was substantially impaired at the time of the killing. In fact, the Defendant had stopped drinking five hours before the killing.

Additionally, in the Defendant's confession to the police he described his meticulous clean up efforts after the murder which consisted of washing off the bat, washing down the walls, taking a shower to remove the blood which had gotten on him, wiping down the shower, removing the sheets from Harkins bed and replacing them with clean sheets, and concealing Harkins' body under his bed and the bloodstained towels and sheets in his closet.

> THE DEFENDANT: Put the bat up. Then I see blood on the walls. I'm trying to think. I got to get this cleaned so Bob doesn't see it...got some towel, tried to wipe him up...thinking, what am I gonna do with Glenn. I dragged him into my room.
> DETECTIVE JONES: You dragged him or you carried?
> THE DEFENDANT: No. I couldn't carry him. He's dead weight.

0730 2147

After the Defendant had cleaned up Harkins room, he went to sleep.

> DETECTIVE JONES: Did you go to sleep in the same bed--
> THE DEFENDANT: On top of him, right.
> DETECTIVE JONES:--He was under?
> THE DEFENDANT: Right, you know.

These actions during the course of the crime show planning and premeditation which are inconsistent with the Defendant's claim that his capacity to conform his conduct to the requirements of law was substantially impaired. Accordingly, there is no satisfactory evidence from which the Court can find the existence of this fact. This mitigating factor does not exist.

Non-Statutory Mitigating Factors:

1. The Defendant's remorse. At the Spencer hearing defense counsel presented a letter to the Court which indicated that the Defendant was sorry for killing Harkins. The Court gives this non-statutory circumstance very little weight.

2. The Defendant's past employment. At the Penalty Phase two former supervisors of the Defendant testified that he was a hard worker during the time that they supervised him. The Court gives this factor little weight.

3. The Defendant's support for his children. During the Penalty Phase the deposition of Diane Durain, the Defendant's ex-wife, was read into the record. In short, her testimony consisted of the fact that the Defendant drank too much, that when he wasn't drinking he worked hard and provided for her and their children.

The Defendant asks the Court to give this non-statutory mitigator moderate weight. In essence, he seeks "credit" for doing that which responsible people do without question. The Court notes that, at the time the Defendant killed Glenn Harkins, he was unemployed and living in Florida. He was not in Ohio (the State in which his children reside), he was not employed and was not paying child support. He was also not receiving any help for his drinking problem. As such, the Court gives this factor no weight.

0730 2148

4. The Defendant's family background. At the Penalty Phase the Defendant's mother, Shirley Durain and the Defendant's brother, Robert Durain, testified that the Defendant had a drinking problem since his teenage years, that he had once attempted suicide, and that he had difficulty holding down a job due to his drinking.

The Defendant's brother testified that when the Defendant was young he would get high by putting Pam cooking spray into a plastic bag and breathing it into his lungs. He further testified that the Defendant quit school.

The Defendant contends that this is evidence that he had a "troubled childhood." There was no evidence presented that the Defendant was abandoned by either parent, neglected by either parent or that he was molested or abused by a family member. There was no evidence presented that the Defendant came from an impoverished background and that he was deprived of the basic necessities as a child. As a result, the Court gives this factor little weight.

5. The Defendant's drinking problem. There was evidence presented at the Penalty Phase that the Defendant has a drinking problem. The Defendant's former employers and supervisors testified that the Defendant drank too much. The Defendant's mother and ex-wife both testified that the Defendant drank too much. Dr. Crowell testified that the Defendant suffered from general depression and alcohol dependency. He further testified that the Defendant drank in an attempt to relieve his depressed feelings. Based on this evidence, the Court believes that the Defendant is alcohol dependent and therefore gives this factor moderate weight.

6. The Defendant as a good prisoner. At the Spencer hearing evidence was presented that the Defendant has not been a "problem" while he has been in custody and that he has attended church on occasion while in custody. The defense contends that this is evidence that the Defendant has been "a good prisoner" and can be rehabilitated.

The Court notes however that this merely shows that the Defendant can conform his conduct to the norm applicable to inmates who are subject to close confinement. Accordingly, the Court gives this factor only slight weight.

0730 2149

The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that a human life is at stake and in the balance. This Court has also carefully weighed and examined the jury recommendation by a vote of 7 to 5 of death for the Defendant. The Court recognizes and appreciates that the jury serves as the conscience of the community and it is loathe to disturb any such recommendation. However, the Court is also bound by the decisions of the United States Supreme Court and the Florida Supreme Court. After careful review of the recent decisions from those Courts, this Court cannot in good conscience find that the sole statutory aggravating circumstance proven by the State in this case outweighs the non-statutory mitigating circumstances demonstrated by the Defendant.

The Court recognizes that this is an especially cruel killing. This fact notwithstanding, the Supreme Court has repeatedly held that the death penalty is reserved for only "the most aggravated and unmitigated of most serious crimes." Deangelo v. State, 616 So.2d 440, 443(Fla. 1993), citing State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973). As with Deangelo and Dixon, the Court finds that this is not such a case.

The Court finally recognizes that its sentence will not and indeed cannot even begin to assuage the deep sense of loss experienced by victim's father, Glenn Harkins, Sr., whose son was brutally murdered at the hands of Defendant. Let it not go unsaid, however, that the Defendant, once committed to the Department of Corrections, will spend the rest of his natural life in prison.

Accordingly, it is

ORDERED AND ADJUDGED for the murder of Glenn Harkins, Daniel Durain is hereby sentenced to life imprisonment without the possibility of parole.

The Defendant is hereby committed to the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

The Defendant has 30 days to appeal. An appeal must be taken by filing a Notice of Appeal with the Clerk of Court for Lee County within the time frame prescribed above.

0730 2150

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 25th day of March, 1998.

Isaac Anderson, Jr.
Circuit Judge

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to Ken Garber, Esq., Assistant Public Defender, Office of the Public Defender, Lee County Justice Center, 1700 Monroe Street, 6th Floor, Fort Myers, Florida 33901; Sheri Polster Chappell, Esq., Assistant State Attorney, Office of the State Attorney, P.O. Box 399, Fort Myers, Florida 33902; Court Administration, Ft. Myers, FL; this 26TH day of March, 1998.

2 cert. copies sent with sentence & judgment per court

CHARLIE GREEN
Clerk of Court

By: P. Wilson
Deputy Clerk

0730 2151

517

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, LEE COUNTY, FALL TERM, IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED NINETY-SIX

CASE NO. 96-2222CF

INDICTMENT FOR

STATE OF FLORIDA

vs.

Daniel G. Durain
(White Male, D.O.B. 8/23/63)

I. FIRST DEGREE PREMEDITATED MURDER F.S. 782.04

In the name of and by the Authority of the State of Florida:

The Grand Jurors of the State of Florida, impaneled and sworn to inquire and true presentment make in and for the County of Lee upon their oath do present that **Daniel G. Durain**, of the County of Lee and State of Florida, on or about the twenty-fourth day of July in the year of our Lord one thousand nine hundred and ninety-six, in the County and State aforesaid:

COUNT I: did unlawfully from a premeditated design to effect the death of a human being, kill and murder **Glenn J. Harkins**, a human being, by beating him to death with a deadly weapon, to wit: a baseball bat or similar object or by suffocating him to death.

0626 2926

Appendix F

96-2222CF

I, Assistant State Attorney Sheri Polster Chappell, as authorized and required by law, have advised the Grand Jury returning the indictment.

Sheri Polster Chappell
Assistant State Attorney

A TRUE BILL

Mike Bennett,
Foreman of the Grand Jury

Presented in open Court by the Grand Jury and filed

August 13, 1996

CHARLIE GREEN
Clerk of the Circuit Court

SPC/jes

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