IN THE SUPREME COURT OF TEN

AT JACKSON

STATE OF TENNESSEE,	)	For Publicatio
Appellee,	)	
	)	Filed: June 3,
vs.	)	
	)	Shelby Crimina
	)	
RICHARD ODOM,	)	No. 02-S-01-95
a/k/a OTIS SMITH,	)	
	)	Hon. Joseph B.
Appellant.	)	Judge

FOR THE APPELLANT

ON APPEAL
A.C. WHARTON
Shelby County Public Defender

W. MARK WARD
Assistant Public Defender
Memphis, TN

BROCK MEHLER
Capital Case Resource Center
Nashville, TN

AT TRIAL
EDWARD THOMPSON
CAROLYN WATKINS
Assistant Public Defenders
Memphis, TN

FOR THE APPELLEE

CHARLES W. BURSON
Attorney General and Reporter

REBECCA GUNDT
Assistant Attorney General
Nashville, TN

JOHN W. PIEROTTI
District Attorney General
DON D. STROTHER
PHILLIP GERALD HAR
Assistant District
Memphis, TN

OPINION

CONVICTION AFFIRMED; SENTENCE
VACATED; REMANDED FOR RESENTENCING

Birch, J

In this capital case, the defen
convicted by a Shelby County jury o
in the perpetration of an attempted
found three aggravating circumstances on
(1) the defendant had been previousl
violent felonies; (2) was the murder clearly hein
or cruel; and (3) the murder was com
escape from lawful custody or from a p
Tenn. Code Ann. § 39-13-204 (i)(2), (5
the aggravating circumstances outw
circumstances beyond a reasonable doubt that did deserve
to death by electrocution. We addr

(1) Whether the standard of revi
for trial court rulings
supervision issues is
"preponderance of the evidence"
standard or, an "any material
evidence" standard;

(2) Whether this Court shou
a rule of law requiring
electronic recording of custodi
interrogations;

(3) Whether the trial court's
failure to admit portions of
testimony of John Hutson, Ph.D.,
clinical psychologist, at th
sentencing phase of the trial, w
reversible error;

(4) Whether the change in Tenn. C
Ann. § 39-13-204(e) adding
language "No distinction shall
made between mitigating circum
asset forth in subsection (

[1] Tenn. Code Ann. § 39-13-202 (a)(2

those otherwise raised by t
evidence which are specifical
requested by either the stat
defendants be instructed to the
is evidence of the legislat
intent that trial courts specif
charge the jury on nonstatut
mitigating factors; and

(5) Whether the definition of
"serious physical abuse" in t
"heinous, atrocious, and cruel
aggravator" in Tenn. Code Ann. §
13-204(i)(5) is unconstitutio
vague.

We have determined from our independe
us that Odom received a fair trial in
the jury's verdict of "guilty" of f
aggravated rape is sufficient to support the
Accordingly, the convictions are affirmed
that reversible error was committed
following (1) the intermediate court ret
"heinous, atrocious, or cruel" aggrava
supported by the evidence; (2) the jury'
was committed by the defendant while
custody in a place of lawful conf
defendant escaped from lawful custody o
confinement; (3) the trial court's failure to
to present mitigating evidence in th
sentencing; and (4) the trial court's fai
the jury as to nonstatutory mitigati

evidence and specifically requested by Ann. § 39-13-204(i)(8)(Supp. 1995).

Considering the entire record we find the errors found therein invo probably than not affected the sent in prejudice to all persons. Tenn. R. App Accordingly, the sentence of death is va remanded for a new sentencing heari

FACTS

The defendant does not challenge the sufficiency of convicting evidence. Nevertheless, a brief evidence, adduced at the guilt phase, perspective. Other evidence will be discu specific issues.

The record indicates that at approxi May 10, 1991, Ms. Minnie Ethel Jesiden sister, Ms. Mary Louise Long, to ke her podiatrist, Stanley Zellner, D.P. few groceries while she was out. Jo p.m.; this delay prompted Long to c Johnson had not kept her appointmen call from Long, Zellner agreed to retu

Johnson's car in the parking garage. H
parking garage observed her body inside.
the Union Avenue police precinct an

Investigating officers found Johnson t
floor board of her car with her back ed
dress was up over, and her back garment was
ankles. One of several latent fingerpr
rear seat belt fastener" of Johnson's
belonging to the defendant, Richard

The medical examiner testified
multiple blunt wounds to the body, including p
the heart, lung, and liver. These
and, ultimately, death. The medical exami
wounds on her hands. Examination revealed a
vagina wall and the presence of semen
medical examiner's, opinion death was neither
immediate to the wounds but had occ

Three days after the incident Ronnie Sewell
of the Homicide Unit, Memphis Police
defendant. As a result of a search
confiscated a large, open, knife from the de
When they arrived at the office, McWilli
defendant attached charges against Miranda and

him. The defendant executed a "Waiv
"Otis Smith." A short time later he a
himself falsely, as executed a waiver by signi
Odom" and gave McWilliams a complet

In his statement, the defendant said t
intention to accost Johnson and "sna
see her in the garage beside her car
grabbed her; both fell into the front
her over to the rear seat. Johnson wi
knife. Johnson addressed him as "son."
enraged the defendant; he responded th
son." He penetrated her vaginally; he felt t
still alive because she spoke to hi
defendant claimed not to have remem
wounds. Thereafter, the defendant
rifled through Johnson's purse. He
except the car keys, which he later
abandoned building where he had clo

The defendant presented no evi
trial. Based on the evidence above,
defendant of first degree murder committed in
rape.

STANDARD OF REVIEW OF SUPPRES

Pretrial, the defendant moved he had given police his lawyers. He cla been threatened and coerced into a coerced requests for an attorney were refused. McWilliams testified that the defendant coerced and that he never requested a lawyer. The trial weighed the credibility of the witnesses and acc testimony of McWilliams. The trial knew and understood his constitutional rights and h waived those rights before giving his Criminal Appeals in reviewing this

> The determination by a trial that confession was given kn and voluntarily is binding o appellate courts unless the defen can show that the eviden preponderate against the trial court's ruling. State v. O'Guinn 709 S.W.2d 561, 566 (Tenn. 1 There is no proof in the record which preponderate against the findings the trial court.

In our consideration of this issue, we note that courts of this state have been consistent standard under which a trial court's conclusion of law on suppression issues a as did the Court of Criminal Appeals "preponderant evidence standard." See, e.g., State Stephenson, 878 S.W.2d 530, 544 (Tenn. 1

determination at a suppression hear
appeal. [T]he presumption may only be rec
on appeal if the evidence in the rec
trial court's findings. State v., 603 S.W.2d
(Tenn. 1980) ("The Court of Criminal Appea
bound to accept that determination [b
confession was fraudulently voluntarily given] in
the record on pages against the Satterfield, in A
859 S.W.2d 359, 362 (Tenn. Crim. Ap
by the trial judge after a no fevtaid on tt
suppress are afforded the weight of
will not set aside the trial court's
contained in the record preponderat

Frequently, however, courts have use
evidence standard to review a trial
suppression. See, e.g., State v., 877 S.W.2
732 (Tenn. 1994) ("With regard to th
involuntary, a trial court's determination
will not be overturned if there is evide
it." State v., 864 S.W.2d 465, 473 (T
offact by a trial court on issues
custody at a bar binding upon appellate
any evidence to support State v., 762 S.W.2d
(Tenn. 1988) ("cert. denied, 489 U.S. 1072 (1989) (
material evidence to support the findin

determoinnsia tbiinding upon the apSptealtleat
John,so6n61 S.W.2d 854, 860 (Tenn. 198
determination of the voluntariness
of cpliaanowith the requirMiramdanteciosfiotn
conclusiveappeal if there be any mat
thedeterminaSttiaotvne.."P)r;i,tc6h2S1.tW.2d 127, 1
1981)("Thial judge's rsutlaiteng twhast ftrhee
voluntagriivleyn has the weight of a jur
there is any material evidence to s

Onoccasion,hacvoeurctosmbtiwoedsttanSedarc
e.g., State v. ,Ha7r0b4isSo.nW.2d 3114,968)3(1"8[T(]
presumpotfiocnorre[cotfnetshse trial courtnlsy
beovercome on appeal if the evidenc
againtshte tcoiurlt's fi.n.di.ng[S.]uch a rul
onthiCsourt if there is any material
Statve. Kil,le7b6r0ewS.W.2d 228, 233 (Tenn
trial judge's findings "at the conc
are afforded the weight of a jury v
setasidejudgemen.t u.n.l.ess the evidence
againhsits findings. Whiesrema.te.ri.alt.heev.ri
tosupporttrial judge.'s.fintdhiinsg Court
affirm his judgment.").

Questioofnscredioblfiltihtey witnwesiegh,
value of the evidence, and resoluti

are matters entrusted to the trial judge fact. th
party revailing in the trial court i
legitimate view of the evidence add
as well as all reasonable and legit
drawn from that evidence. So long as
evidence supports the trial court's
be upheld. In other words, a trial c
suppression ruling will be upheld unless
otherwise. We also note that a trial c
with Tenn. R. App. P. 13(d), that in civ
findings of fact by a trial court a
preponderance of the evidence is otherwise. "pe
standard be applied in reviewing suppression
"preponderance of the evidence" sta

The Court of Criminal Appeals pro
in upholding the trial court's denial o
That court found, as we evident, that does n
against the trial court's ruling with a
voluntarily waived his Fifth Amendment r
confession was properly admitted at

TAPE RECORDING OF CUSTODIAL I

The defendant has fully briefe
"stationing interrogation rescorded." he Pr

assert that they should be. Because this issue, we decline address Even so, we believ is one more properly directed to th

SENTENCING HEARING

As we have stated, reversible the sentencing phase. The legislatur when reviewing capital cases, die to determ support the jury's finding of sta circumstance(s). Tenn. Code Ann. § 39-13 Addition Tenn., R.P.Crim. 52(b) authorizes a notice at, any time, error which has aff of an accused though not raised in the assigned error on appeal, in the di court where necessary to do substan

A. AGGRAVATING CIRCUMSTAN

The State introduced the defendant's conviction in Rankin County, Missis Additionally, the State proved a 19 robbery. Together, these two convictio basis for the jury's finding that the convicted one or more violent felonie 204(i)(2)(Supp. 1995).

In proving the second aggravat murder was heinous, atrocious, or c 204(i)(5) State there lied chiefly upon th the guilt aspe. As additional evidence photographs the victim's body taken a from the car. For the reasons appear evidence was insufficient upon the finding of this circumstance.[2]

In this case, we are presented with to address the constitutionality of cruel statutory aggravating circumstance in 1989. Code Ann. § 39-13-204(i)(5) provide

> The murder was especially he atrocious, cruel in that it involved torture or serious abuse beyond that necessary produce death.

The issue, as the defendant has (1) the sufficiency of the evidence aggravating circumstance; (2) the constitution aggravating circumstance as defined overlap, we will consider them toge

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[2] For a detailed discussion and stat "especially heinous" aggravating circumstance, see Roe The "Especially Heinous" Aggravating Circumstance The Standard, 1984 Nat. Cn. d Lr. d Rev. 941 (

In the Court of Criminal Appeals, it ha
that the evidence was in the *Jurek* case.[3] Un
standard to support the jury's finding
circumstance. Concluding evidence was,
sufficient, intermediate considered, but
adopting, the definition of physica
Supreme Court *State v.*.[4] The Utah decision
physical "[that physical abuse] equali
quantitative different and more culpable
accomplish the murder." 780 P.2d a
then reiterated the definition of "tort
severe physical mental pupon the victim
remain lsive and contact ous.," Wi6l9l0i aSm.sW.2
529 (Tenn. 1985). At that point, appa
combined the two definitions that product f
language in *Williams*. In proving such tortu
show by acts occurring at or shortly
The intermediate then concluded that th
the finding of the heinous, atrocio
circumstance.

In this Court, the defendant c
court's definition of "serious phys
insufficient. Heavy vigorously urg *Teust* use ftion at

[3] 443 U.S. 307 (1979).

[4] 780 P.2d 1203 (*Utah*, *denied*, 1989), 1018 (19

as Tennessee's definition of "serious
the aggravating circumstance under[5]

The State, however, insists to rout sh
physical abuse beyond that necessary
applicable federal and state constituti
written and requires no further def
equal vigor, urges Tustlanguage to the

The State has a constitutional
and apply its adult law in a manner
arbitrary and capricious of its fluid ttimoante p
Godfrey Ge, or 4g4i6a U.S. 420, 427 (1980)
circumstance must genuine reolwy the of clearss ons el
the death pe Znaanlttyv,." Stephens 4 6 2 U.S. 8.7 78 6(21,983
"provide meaningful basis for disting
which the death penalty is imposed
is not Furman v., G4e0o8rgUia S. 238, 313 (
concurring).

As a constitutionally necessary
Eighth Amendment, the Supreme Court ha

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[5] The defendant suggests, but does not
required to make two additional det
aggravating circumstance: (1) that the
intent to inflict such "serious physic
abuse was inflicted before death. W
definition of "serious physical abu

narrow the sentencers' consideration to
smaller more culpable class of homic
pre-*Furman* class of death-eligible. *See* Pulley v. Harris, 465 U.S. 37 (1984). A proper narr
though some defendants who fall clearly within
death-eligible defendants manage to
who receive it will be among the worst
are particularly serious, or the death of the
peculiarly appropriate. *See* Gregg v. Georgia, 428 U.S. 15

The United States Supreme Court has
the statutory language of the aggrava
Maynard v. Cartwright, opined that "
or cruel aggravator would be const
construed to require torture or ser
356, 364-65 (1988). The Court acknowl
of torture or serious physical abus
construction would be constitutional. Id. at 36
see also Walton v., 497 U.S. 639, 652-55

Other courts reviewing statutory a
similar to those of Tennessee have uphe
reliance on such aggravators. *See* Hatton v., 518 F.3d 1468-(6190th Cir. 1995) (construction of
murder involve "torture of the victim o
constitutionally permissible; Bible v. 1 Del. 3d 15

(8th Cir. 1994) ("'some kind of torture [a sufficient limiting Bge]r tcoolnostttriu, cvt8i8oD F.2d 1503, 1526-27 (1 cert. denied, r.4 9179 8U9.)S,. (1990) (Florida's limiting construct be a "conscienceless or piistnileces scar tortuous the victim" Swtaast e a pvp.r, oBv5re6d2t) c;An 1060, 1066 (Conn. 1989) (for the mur had to invoteh intentional infliction tortuae above and beyondilyhac tompaceysin underlyingCon"n, er v,. 6S3t2ate So.2d 1239 *cert. denied*, ___ U.S. ___, 115 S. Ct. 3 limiting instruction that urredqeu itroed bet "conscienocrelpeistsiless crime which is u the victim" was Satapreowed, G;7 5f6 in W.2d (Mo 1988) *cert. denied*, 490 U.S. 1113 (the mu "seriphysical abuse" antdhe"emvuirddeenrcevit [was] . . . beaten or evidence that upon a victim" is Sufficiente, 422 S.E.2d (SC 1992) *cert. denied*, ___ U.S. ___, 113 S. ("physitcoalture occaurs on whien subject t physical abuse' and 'aggravated bat

We declined to adopt the definition of abuse set out by the Utah Supreme Court that definitiotnprofavilde guidance to a beyond that which our statut Tehuatlarhe asdtyatp

issuie Tut tple provided that a knowing and first-degurreder punishable by death committed an especially heinous, atr exceptiodneaplrlayved amnayn noefr, which must by be physical torture, serious physical of the victim before death." Utah Co 1988). As the Utah Court noted, th be interpreted so broadly as to des in instantaneous death and, therefo the class of offenders subject to the 1216. By contrast, Tenn. Code Ann. § construcotfio "nserious physical abuse" necessary to produce death."

As dsicussed above, Tenn. Code A narroawnsd defines the meaning of "hei that the act must involve "torture or that necessary to pr"oTourcehuase" abtehe." defi infliction of severe physical or me heor she remainsn sacliiovuSest.aatned vc.o, Wi6l9lo S.W.2 517, 529 (Tenn. 1985). Because words "serious physical abuse," ite m legislaitnutreended the words "seriouasn someth diinsgtinct from "torture." The matter of degree. The abuse must be ph andit must be "beyond that" or more

produce death." "Abuse" is defined as a
which makes "improper use of a thin
manner contrary to the natural or Black
Law Dictionary (6th ed. 1990). We fin
statute constitutionally sufficient to
subject to the death penalty.

The issue remains whether the evidence in t
sufficient to uphold a finding of the
circumstance. We well understand that a
"heinous, atrocious, and cruel" to some
purpose demeaning to minimize the ordeal this
experienced. In our view, however,
not ordinarily constitute "serious phy
within the meaning of the statute. Wer
murder committed in the perpetration of
a death-eligible offense. Such a result,
sufficiently narrow the class of perpet
distinguish the "worst of the worse
must be reserved." See State Middle, 8 Oak S.W. 2d 3
1992). In a similar vein and with the same d
appearing, we must reject the conclusion
evidence in this case constituted "tor
abuse beyond that necessary to prod

As we consider the circumstances diminish what surely must have been experienced the victim. Most assuredly, the reprehensible purest sense of the ... are. However, the aggravating circumstance reserved for application only to those c contracts, be articulately determined the worse."

As previously stated, the defen evidence does not support the jury's fi "especially heinous, atrocious, or cruel considered this contention and conc have discussed the evidence in the r jury's finding of "heinous, atrocious, cau

For the aggravating circumstance Ann. c 39-13-204(i)(5), we have noted that the defend March 28, 1991, is a sentence of life where he wa life sentence for murder. This is a gal imposition of the death penalty in murder. The committed by the defendant while the def or in a place of lawful confinement as a from lawful custody or from a place

In our view, the record before justification for the jury's finding of circumstances. Based on our prior applic requisites simply have *See, e.g.*, Stt abteee nv .m, eHta 896 S.W.2d 1094, (Tenn. 1995) (murder comm prisoner "trusty," was in constructive cu Statve. Sutton, 761 S.W.2d 7 (Tenn., *cert. denied*, 497 U.S. 1031) (1990) (murder committed while defend lawful confinement); Wmoernktmva.; n S, ta 8t6S8. W.2d 705, 71 Crim.App. 1993) (murder during commitment of defendant' lawful custody of police officer fo is simple--"during" as used in our tute ts continuo afn.c"e The end of the escape ma status as an "escapee." Although Odom by no stretch can we say that the defendant's escape from lawful confinemen escape from lawful custody or from a p When he committed the murder, Odom's fact *a fait accompli*.

B. DR. HUTSON'S TESTIMON

In mitigation, John Hutson, Ph psychologist since 1975, testified at for He th that he had interviewed the occasions meeting Hgust, son gt lhe at net the defiernsdtant tw'eslve

been chaotic. He opined that the de
toward parental infiguemesta lwaarndd mothers i
He found it significant that the vict
as "son."

Hutson related that the beco fmreong draensts
less hostile, defensive, sullen, and a
evaluation process. Concerning the defen
testifiehead the defendant "has never
significpcsaync thiatricsudchoarsdewo, ulbmepali
his ability to appreciate the wrongf
impair his ability to conform his beha
the law." Hutson opined further th
diagnosed as a personality disorder

During the evaluation process,
from the defendant. Asdatnte defendant's ocaosukns He
about some of the details of attehisbeghics
hearsgaryounds. During a jury-out off
counsel attempted to show the relev
the evaluation. The trial court sust
the testimony.

The defendant hiantshiests trital court
refusing to admit is tosn Hutestimony concerning

personal history. We agree with the Co
its conclusion that the trial court did, indeed

Tenn. Code Ann. § 39-13-204(a)(1) (2003) l
extent the admissibility of evidence in
proceeding; it provides:

> In the sentencing proceed
> evidence may be presented as to
> matter that the court deems
> to the punishment and may in
> but not limited to, at the nature
> circumstances of the crime; the
> defendant's character, backgroun
> history, and physical condit
> evidence tending to establish
> rebut the aggravating circumst
> enumerated in subsection (i); and
> evidence tending to establish
> rebut any mitigating factors.
> such evidence which the court
> to have probative value on t
> of punishment may be rece
> *regardless of its admissibility under*
> *the rules of evidence;* provided,
> that the defendant is accorded
> opportunity to rebut any hearsa
> statements not admitted. Howeve
> this subsection shall not
> consrute to authorize th
> introduction of any evidence
> in violation of the constitu
> the United States or the const
> of Tennessee.

Tenn. Code Ann. § 39-13-204(a)(1) (2003) (Supp. 2 (Supp. 1
statute expressly exempts evidence add
proceedings from the usual evidentiary r
concerning a capital defendant's pe
would clearly be admissible under the

courtr'usling in this regard was in statuteu'nsistakable lamnuoatfiend. Whei s harmless under the standards of Ten

C. NONSTATUTORY MITIGATING C

Even though the defendant's otexp permittoedtestify in detail, generally certain aspects of the defendant's s conditioAn.summary of that testimony opinion. With this pertinent, but spars the defendant submitted several writt nonstatutory mitigating circumstanc accept any of the requested instruc begiven to, that injury that the instruc would adequately cover the requested contends that this refusal constitu

With the enactment of Tenn. Co triaclourts are now required atnoyiitnisgtart circumstanaies raised by the evidence at sentencing hearing, or both to plat order su perspectiowe, however, a brief overview of

previously may prove helpful. Befo

1989 Tenn. Code Ann. § 39-2-203(e)(1982) gover

of mitigating circumstances in capi

provided:

> (e) After closing arguments
> sentencing hearing, the trial ju
> shall include in his instructio
> the jury to weigh and conside
> mitigating circumstances and any
> the statutory aggravating ci
> stances set forth in subsection
> of this section which may be
> by the evidence at either th
> or sentencing hearing, or
> These instructions and the m
> arriving at a sentence shall be
> in the oral charge and in wr
> the jury for its deliberatio

Subsection (j) of the statute complemented su

specifying the mitigating circumsta

> (j) In arriving at the puni
> the jury shall consider,
> heretofore indicated, any mi
> circumstances which shall include
> but not be limited to the fo
> (1) The defendant has no sign
> history of prior criminal ac
> (2) The murder was committed
> the defendant was under the in
> of extreme mental or emoti
> disturbance;
> (3) The victim was a partic
> the defendant's conduct or c
> to the act;
> (4) The murder was committed
> circumstances which the defendant
> reasonably believed to provide
> moral justification for his
> (5) The defendant was an ac
> in the murder committed by a

> person and the endangerment' participation was relatively
> (6) The defendant acted u extreme duress or under the substantial domination of another person;
> (7) The youth or advanced age of the defendant at the time of the cri and
> (8) The capacity of defendant to appreciate the wrongfulness of h conduct or to conform his co the requirements of the law substantially impaired as a result mental disease or defect o intoxication which was insufficie to establish a defense to th but which substantially affe judgment.

The case Hoffman v. Statutory was tried the fo provision as above, Hvaertgmuawnte d. considered of nonstatutory mitigating circumsta incorporation on the instructions to th there was no statutory requirement tha factors be expressly instructed:

> [T]he only mandatory instruct with respect to mitigatin circumstances that those statutory circumstances which a raised by the evidence shall expressly charged, and the j be told that they shall weig consider any other facts or circumstances that are raise evidence that they find to b mitigating circumstances, in mak the determination of hwhic circumstances, aggravating o mitigating, outweigh the oth

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[6] 703 S.W. 216 (Tenn. *cert. denied*, 1985), 478 U.S. (1986).

703 S.W.2d at 1118; State v., 875 S.W.2d 253 1994); State v., 857 S.W.2d 1, 15 (Tenn. 1 Wright, 756 S.W.2d 674 (Tenn. 1988); State v., 1987 S. 241, 249 (Tenn. 1986).[7]

In 1989 the General Assembly Sentencing Reform Act of 1989 gotvherni in sutcrtoi in capital sentencing heari apparent response Haertmoan Tenn. Code 39-13-203 (e 1989). Presently, section as revisoemd aprrio revisions are italicized):

> After closing arguments in sentencing hearing, the trial ju shall include the instructions for the jury to weigh and consider *the* statutory aggravat circumstances forth in subsecti (i) which may be raised by evidence at either the guilt sentencing hearing, or both. T trial judge *also* shall include in the instructions for the jury to weig and consider any mitigati circumstances raised by the at either the guilt or sent hearing *which shall include, but not be limited to, those circumstances set forth in subsection*

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[7] *But see* State v., 877 S.W.2d 722, 739-43 (E where a crime committed under the old law. The Court seemed to recognize t statute required that a specific no circumstance be presented for consideration at instruction. The defendant in that case, ho presenwtiedh an opportunity to do so, c that any such mitigating circumstan

> *(j). No distinction shall be made between mitigating circumstances as set forth in subsection (j) and those otherwise raised by the evidence which are specifically requested by either the state or the defense to be instructed to the jury.* These instructions in the manner of arriving a sentence shall be in the oral charge and in wr the jury for its[8] deliberatio

Proper resolution of this issue require the statute: in doing so, our paramo ascertain the legislative intent Sanders to Bob, 727 S.W.2d 945, 952 (Tenn. 1987 Inc., 738 S.W.2d 622, 623 (Tenn. 1985 gathered from the natural, ordinary of the language used in Bob, 727 S.W. 952; Weaver v., 590 S.W.2d 693, 695 (Te

In construing a statute the Cou every word, phrase, clause, and sen legislature. United Canners, 696 S.W.2 527 (Tenn. 1985); Caryville v. 660 S.W. 510, 512 (Tenn. App 1983). "Every w presumed to have meaning and purpose fac if doing so does not violate the Legislature." Murrish v. Henderson, 424 S.W.2d 193, 19 Furthermore, statute should be construed, that

[8] Tenn. Code Ann. § 39-13-204(e)(1)

its component parts are consistent and rea
phrases should be harmonized, where po
legislative Id. intent. To construe the statu
specific instructions on nonstatutory mi
ignore the language referring to requested heixnt
to last sentence of subsection (e)(
basic rules of statutory constructi

Furthermore, when, the legislature m
change in a statute that has been t
construction as this Hart, 7103 Se. W. 2d at 1
the cases subsequent to it, the legislature
fully aware of the judicial construct
alter the Haw. by v. McDaniel, 5 Se. W. 2d 774, 77
When the legislature amends a statute,
to change the law or to clarify a legislative
referring instruction on nonstatutory
and the fact that the meaning of the
out in judicial decisions, it is rea
legislature meant to modify this Court's
issue.[9] To these principles we must a

[9] The Commission Comment to the 1980 Russian
§ 39-13-204 do not, however, include
statutory mitigating circumstances as th
note in the statute. On the other
the Penal Code Revision Subcommitte
as requiring that upon special requ
on all mitigating factors raised by

Under prior laws, the mitigating factor

construction that criminal statutes must favor of the defendant, Kendrant, 563 S.W.2d 184 1978).

In considering the above, we are apc conclusion that the legislature intended to the jury on statutory mitigating circu evidence specifically requested by eith defendant. The trial court failed to h mandate; this failure constitutes r

In addition to his arguments the instructions are statutorily requir the instruction constitutionally required. We will with this contest Stanton v. Hu, 89 S.W.2d 161, (Tenn. 1994), we held that "neither nor the Tennessee Constitution requ submit non-statutory mitigating cir

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of as "statutory" or "non-statutory" and the latter had relatively no sense judge was not required to instruct t statutory factors. This suspect is clarified by T.C.A. § 39-13-203 [sic] that the judge instruct the jury to all mitigat raised by the proof. Obviously, a requires to those factors which nature.

11 Ray Tennessee: Practical Practice, § 32.45 (Supp. 1995).

Two items remain: (1) to suffer from a determining whether a circumstance of law; and (2) to provide, to the e guidance to the trial court regardi mitigating circumstances. Obviously, wh "mitigating" is a matter of law depends i evidence presented. Further, the classif determined case by case rather than by r formula. Thus, our discussion must

The trial court should keep Lockett v. Ohio that "the Eighth and Fourteenth sentencer, all bruaters the kind of capital precluded from considering as a mit defendant's character or record and any o offense that the defendant proffers than death." 438 U.S. 586, 604 (A19 *fortiori*, any evidence relevant to the culpability should be admitted as a the penalty stage of a capital case.[10] Conviction as ribael admitted as relevant on whether it is mitigating

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[10] Conversely, evidence that does not bear on character, prior record or the circ relevant and may be excluded by *See* Delo v Lashley, 507 U.S. 272 (1993); U.S. at Examples of evidence found to be rele circumstances are: Penry v. Lynaugh, 492 U.S. 302, 328 (1989); physical disability; a bad life; a bad history; Eddy, 455 U.S. at 115; and idiot

circumstances exist, the jury has the free mitigating weight to those effects of the actual schoolfrac record and those circumstances of the offense as the trial court is not free to, in effec excluding such evidence from Eddings Oklahoma, 455 U.S. 104, 110, 114-15 (19 trial court, there, cited the threshold ques evidence proffered in mitigation is

Evidence of a defendant's background and considered relevant because defendants wh background or who have emotional and/or m culpable than defendants who have Boyde Calif., 494 U.S. 370, 382 (1990); a Likewise, circumstances particular often emphasize different offenders in Eddings, 455 U.S. at 112. In essence, for the sake of ... relevant because "in capital cases the humanity underlying the Eighth Amendmen consider after the character and the individu and the circumstances of the particular constitution is indispensable part of the p penalty fed th Woodson v. North Carolina 428 (1976) (emphasis added).

Once the trial court has determ
criteria that a circumstance is a mitig
whether the circumstance is hereby between "vria
Embedded Tennessee Law is the rule that "th
right to have every issue of fact and tenrcae
material to his defense submitted to
instructions by the jSutdagtee.T"vom, ps5o1n9 S.W.2d
(Tenn 1975). The trial court should e
determining whether the circumstance has been r
evidence. Once the trial court deci
is "mitigating" in nature and "arids etdhabty
evidence," becomes a "mitigating circ
law, and the trial court must inclu
jury instructions are critical in en
sentencing determination that is de
this reliability, the jury must be give
those circumstances offered by the ea
justification for a sentence less t
party desiring such an instruction m
instruction in writing to the trial

We come to that of the statute wh
"No distinction shall be made between mitiga
set forth in subsection (j) and tho
evidence which are specifically or bequeitnots

the jury.[11] In our view, the legislature intended a mandate to the trial court to place statutory mitigation on equal footing b the statutory mitigation circumstances are submi writing as the statute requires, the circumstances raised by the evidence and pr having mitigating value must, upon def request, also be submitted to the jury i we think the trial court is proper in but that a request was made, in a lot just the ide part(ies) making the request. Only and the spirit of the statute will to attain that degree of integrity

We deem Tenn. Code Ann. § 39-13-204(e)(1) to significant. It requires, in our view, t drafts of that when we are considering the mitigating circumstances are indistinguis mitigating circumstances.

The language of the requested i a fourth of constitutional or lawful Fisher, VI, section 9, of the Tennessee Con that "[t]he Judges shall not charge of fact, but may state the testimony

[11] Tenn. Code Ann. § 39-13-204(e)(1

purpose of this provision is to provi
impartial trial judge and to preser
of-fact. These purposes are accomplished by
court from influencing jury's deliberation on
evidence in the manner of English c
of the evidence, or instructing the
conclusions to be drawn from Tyrus v. Kansas
Ft. S. & M. C., R. 86 S.W. 1074, 1017 v. Hon. g
23 Tenn. (4 Hum.) 154, Sa1s5s5er (1v8.43A) v; erit, t
839 S.W.2d 422, 430-31 (Tenn. App. 71D
S.W.2d 535, 542 (Tenn. App. 1986).

In this case, the defendant subm
specifically instructions on nonstatutory[1,2] The

[1,2] Defendant's special instruction reque
circumstance is any circumstance which offs the
crime even though it is not a legal
Defendant's special instruction r
the defendant's family background, and, in
child abuse or any other circumstance
whether or not a mitigating circumstanc
proof."
Defendant's special instruction r
as a mitigating circumstance mental
Richard Odom, even though he should not be
requirement meant the defendant's mental
emotional disturbance."
Defendant's special instruction r
as a mitigating circumstance that he was
Odom, was abused both mentally and
Defendant's special instruction request 5:
whether there are mitigating circumstances, you
the defendant, Richard Odom, confess
remorse for his acts and asked for
Defendant's special instruction "Every time
has been proof by the defendant, Ri
circumstances which are not the same, mitig

language some of these requested ins
trial court made findings of fact, the idea of e
mental problems, that he had confes
and sought help. We observe that
instruction is circumstance of the constitut
of his case in the penalty phase; ho
instruction implies to the jury that
or believe the certain facts have been e
under our state constitution. Crain
Brown, 823 S.W.2d 187, 1949 (Tenn. App.
Allen, 692 S.W.2d 651, 654 (Tenn. Crim

SUMMARY

1. The standard for appellate re
ruling on suppress suies on "is the preponderance of
standard.

2. This Court leaves to the Gen
whether to require the electronic record
interrogations.

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circumstance so less you or the deformation t
listed in the statute."

3. The "heinous, atrocirouts, ing circumstance constituto wieovnearl,; the facnt ost support the jury's finding of this

4. The evidence does not suppor thedefendant committed the murder d custody.

5. The trial court's refusal Hutson's testimony constituted reve

6. The "no distinction" lan§g3u9a-g 13-204(e) means exactly what it say

Accdoirnglty, he conviction upon the degreemurder (felony) is affirmed. electrocutiovacated. The cause is sentenbeing to be conducted in a m opinion.

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ADOLPHO A. BIRCH, JR

CONCUR:
Reid, White, JJ.

CONCURRING/DISSENTING SEPARATELY:
Anderson, C.J.; Drowota, J.