

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
April 12, 2000 Session

STATE OF TENNESSEE v. DAVID M. KEEN

**Appeal from the Criminal Court for Shelby County
No. 90-06629 John P. Colton, Judge**

No. W1997-00147-SC-DDT-DD - Filed October 5, 2000

ADOLPHO A. BIRCH, JR., J., dissenting.

In State v. Chalmers, I filed a separate Concurring and Dissenting Opinion to state my view that Tennessee's comparative proportionality review procedure is constitutionally inadequate. ___ S.W.3d ___ (Tenn. 2000) (Birch, J., concurring and dissenting). Although a significant portion of that dissent was devoted to a discussion of the role of race in comparative proportionality review, I also raised three general concerns with regard to comparative proportionality review which are relevant here: "the 'test' we employ [for comparative proportionality review] is so broad that nearly any sentence could be found proportionate; our review procedures are too subjective; and the 'pool' of cases which are reviewed for proportionality is too small." Id. (Birch, J., concurring and dissenting). Based on those concerns, I concluded that our current comparative proportionality review protocol "fails to protect defendants from the arbitrary or disproportionate imposition of the death penalty." Id. (Birch, J., concurring and dissenting). I adhere to this view.

As I have expressed on previous occasions in the context of other dissents, "I am unwilling to approve of results reached through the use of a procedure with which I cannot agree." See Coe v. State, 17 S.W.3d 193, 248-49 (Tenn. 2000) (Birch, J., dissenting). Accordingly, because the flaws in our comparative proportionality review protocol have neither been addressed nor corrected, I dissent from the Court's decision to impose the death penalty in this case and would remand the cause for the imposition of a sentence of life imprisonment with or without the possibility of parole.

ADOLPHO A. BIRCH, JR., JUSTICE