

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
November 15, 2000 Session

STATE OF TENNESSEE v. JAMES P. STOUT

**Automatic Appeal from the Court of Criminal Appeals
Criminal Court for Shelby County
Nos. 96-08227, 96-08228, 96-08229 Joseph B. Dailey, Judge**

No. M1998-00079-SC-DDT-DD - Filed May 24, 2001

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

Although I agree with the majority's decision to uphold the conviction in this case, I write separately to emphasize my continued dissatisfaction with Tennessee's comparative proportionality review protocol. Beginning with my dissent in State v. Chalmers, I have repeatedly called for reform of the protocol. 28 S.W.3d 913, 923-25 (Tenn. 2000) (Birch, J., concurring and dissenting); see also, e.g., State v. Carruthers, 35 S.W.3d 516, 581 (Tenn. 2000) (Birch, J., concurring and dissenting); State v. Keen, 31 S.W.3d 196, 234 (Tenn. 2000) (Birch, J., concurring and dissenting). Our current protocol, in my view, has three shortcomings: "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." Chalmers, 28 S.W.3d at 923 (Birch, J., concurring and dissenting). Unless these shortcomings are remedied, this Court cannot provide genuine assurance that disproportionate sentences of death will be set aside.

"I am unwilling to approve of results reached through the use of a procedure with which I cannot agree,"¹ and to date, the flaws I perceive in our comparative proportionality review protocol have not been cured. Therefore, I dissent, respectfully, from the Court's decision to impose the death penalty in this case.

ADOLPHO A. BIRCH, JR., JUSTICE

¹See Coe v. State, 17 S.W.3d 193, 248-49 (Tenn. 2000) (Birch, J., dissenting).