

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
October 3, 2003 Session
Heard at Murfreesboro¹

STATE OF TENNESSEE v. DARYL KEITH HOLTON

**Direct Appeal from the Court of Criminal Appeals
Circuit Court for Bedford County
No. 14302 William Charles Lee, Judge**

No. M2000-00766-SC-DDT-DD - Filed January 5, 2004

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

I concur in the conclusion of the majority that Holton's convictions should be affirmed. As to the sentence of death, however, I continue to adhere to my views expressed in a long line of dissents beginning with State v. Chalmers, 28 S.W.3d 913, 920-25 (Tenn. 2000) (Birch, J., concurring and dissenting), and most recently elaborated on in State v. Davidson, ___ S.W.3d ___, ___ (Tenn. Oct. 20, 2003) (Birch, J., dissenting), that the comparative proportionality review protocol currently embraced by the majority is inadequate to shield defendants from the arbitrary and disproportionate imposition of the death penalty. See Tenn. Code Ann. § 39-13-206(c)(1)(D) (1995 Supp.). I have repeatedly expressed my displeasure with the current protocol since the time of its adoption in State v. Bland, 958 S.W.2d 651 (Tenn. 1997). I believe there are three basic problems with the current proportionality analysis: (1) the proportionality test is overbroad,² (2) the pool of

¹This case was heard as part of the October 3, 2003, S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project in Murfreesboro, Rutherford County, Tennessee.

²I have urged adopting a protocol in which each case would be compared to factually similar cases in which *either* a life sentence or capital punishment was imposed to determine whether the case is more consistent with "life" cases or "death" cases. See State v. McKinney, 74 S.W.3d 291, 321 (Tenn. 2002) (Birch, J., concurring and dissenting). The current protocol allows a finding proportionality if the case is similar to existing *death penalty* cases. In other words, a case is disproportionate only if the case under review "is plainly lacking in circumstances consistent with those in similar cases in which the *death penalty* has been imposed." Bland, 958 S.W.2d at 665 (emphasis added).

cases used for comparison is inadequate,³ and (3) review is too subjective.⁴ I have previously discussed, in depth, my perception that these flaws undermine the reliability of the current proportionality protocol. See, e.g., Godsey, 60 S.W.3d at 793-800 (Birch, J., concurring and dissenting). Accordingly, I respectfully dissent from that portion of the majority opinion affirming the imposition of the death penalty in this case.

ADOLPHO A. BIRCH, JR., JUSTICE

³In my view, excluding from comparison that group of cases in which the State did not seek the death penalty, or in which no capital sentencing hearing was held, frustrates any meaningful comparison for proportionality purposes. See Bland, 958 S.W.2d at 679 (Birch, J., dissenting).

⁴As I stated in my concurring/dissenting opinion in State v. Godsey, “[t]he scope of the analysis employed by the majority appears to be rather amorphous and undefined—expanding, contracting, and shifting as the analysis moves from case to case.” 60 S.W.3d 759, 797 (Tenn. 2001) (Birch, J., concurring and dissenting).