

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

STATE OF TENNESSEE v. VINCENT SIMS

**Automatic Appeal from the Court of Criminal Appeals
Criminal Court for Shelby County
Nos. 96-09279, 96-09280 Joseph B. Dailey, Judge**

No. W1998-00634-SC-DDT-DD - Filed April 17, 2001

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

I concur in the majority's decision to uphold Sims's conviction, but I dissent from the decision to impose the death penalty in this case because I continue to believe, as I have stated in the past, that the comparative proportionality review protocol currently applied in capital cases is inadequate.

In State v. Chalmers, I discussed three shortcomings of Tennessee's comparative proportionality review protocol which, in my view, render the protocol deficient: "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." 28 S.W.3d 913, 923 (Tenn. 2000) (Birch, J., concurring and dissenting). Because of these shortcomings, I have concluded that the test embraced by the majority fails to provide convincing assurance that "no aberrant death sentence [will be] affirmed." Cf. State v. Bland, 958 S.W.2d 651, 665 (Tenn. 1997). In the cases which have followed Chalmers, however, the majority has continued to apply the protocol despite my objections. See, e.g., State v. Carruthers, ___ S.W.3d ___ (Tenn. 2000) (Birch, J., concurring and dissenting); State v. Keen, 31 S.W.3d 196 (Tenn. 2000) (Birch, J., concurring and dissenting). Consequently, because "I am unwilling to approve of results reached through the use of a procedure with which I cannot agree,"¹ I cannot support a death sentence upheld under the comparative proportionality review protocol which has been embraced by the majority. Accordingly, I respectfully dissent 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).