

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE
May 2, 2002 Session

HAROLD WAYNE NICHOLS v. STATE OF TENNESSEE

**Appeal by Permission from the Court of Criminal Appeals
Criminal Court for Hamilton County
Nos. 205863, 213883-213896 D. Kelly Thomas, Jr., Judge, By Designation**

No. E1998-00562-SC-R11-PD - Filed October 7, 2002

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

I fully concur in the conclusion of the majority that Nichols's convictions should be affirmed. To the extent, however, that the petitioner's allegations of ineffective assistance of counsel may be interpreted to include the failure to object to the method of proportionality review, I continue to adhere to the views expressed in a long line of dissents beginning with State v. Chalmers, 28 S.W.3d 913, 923-25 (Tenn. 2000) (Birch, J., concurring and dissenting), and elaborated upon in State v. Godsey, 60 S.W.3d 759, 793-800 (Tenn. 2001) (Birch, J., concurring and dissenting). Those dissents suggest, essentially, 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) (1997). Accordingly, while I concur in the affirmance of Nichols's convictions, I cannot, for the reasons above stated, concur in the imposition of the death penalty in this case.

ADOLPHO A. BIRCH, JR., JUSTICE

