

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs January 23, 2002

ROY C. SMITH, JR. v. STATE OF TENNESSEE

**Direct Appeal from the Circuit Court for Lauderdale County
No. 5472**

No. W2001-01457-CCA-R3-CD - FILED SEPTEMBER 10, 2002

James Curwood Witt, Jr., J., concurring in results only.

I concur in the results reached by the majority. Although I agree that the petitioner's sentence may be vulnerable to a proper *habeas corpus* attack, I see no basis for commenting that the petitioner was convicted pursuant to a statute that was not in effect at the time the offenses were committed.

Although the petitioner was indicted and apparently convicted pursuant to Tennessee Code Annotated section 39-13-522, proscribing rape of a child, that statutory provision was merely a recodification of the rape-of-a-child prong of aggravated rape previously contained in section 39-13-502(a)(4). The elements of the offense are the same. Thus, in the form of section 39-13-504(a)(4), rape of a child was a proscribed offense at the time the offenses under review were committed.

James Curwood Witt, Jr., Judge