

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
July 13, 2004 Session

ANTHONY D. CUTTLE v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Shelby County
No. P-20307 J. C. McLin, Judge**

No. W2003-00684-CCA-R3-PC - Filed September 28, 2004

JOHN EVERETT WILLIAMS, J., separate concurring.

I concur in the majority opinion. I have chosen to write separately to express concern over two issues that appear from the record and that are not addressed by either party. Admittedly, the record is unclear but the majority opinion concludes that the petitioner originally filed a *pro se* petition for post-conviction relief, that counsel was appointed, and that the petition was summarily dismissed in August of 1998. In February of 2001, the petitioner again filed a *pro se* motion to reopen his post-conviction petition, which was granted by the post-conviction court. I found nothing in the record that would support the reopening of the petitioner's original post-conviction relief petition. Next, it appears that the petitioner was appointed counsel and on the second day of the hearing, the petitioner filed a *pro se* amended petition for post-conviction relief and was allowed an additional day in which to present evidence. This procedure appears to be in conflict with the holdings of our supreme court in State v. William Lee Burkhart, 541 S.W.2d 365. The petitioner in the instant case did not have a constitutional right to participate in *propria persona* and, simultaneously, be represented by participating counsel.

JOHN EVERETT WILLIAMS, JUDGE