

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee,

vs.

LESLEY L. NICKEL,

Appellant.

: Supreme Court
: Case No.: 10-2134
:
: Court of Appeals
: Case No.: OT-10-004
:
: Trial Court
: Case No.: 07-CR-157
:
:

Appeal from the Ottawa County Common Pleas and
The Sixth District Court of Appeals, County of Ottawa,
State of Ohio

STATE OF OHIO'S MOTION TO DISMISS

Mark E. Mulligan (0024891)
Assistant Prosecuting Attorney
Ottawa County, Ohio
315 Madison Street, 2nd Floor
Port Clinton, Ohio 43452
(419) 734-6845
Fax (419) 734-3862
prosecutor@co.ottawa.oh.us

Attorney for Appellee

Terrence K. Scott (0082019)
Assistant State Public Defender
250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
Fax (614) 752-5167
terrence.scott@opd.state.oh.us

Attorney for Appellant

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**MOTION TO DISMISS CASE NUMBER 2010-2134 PURSUANT TO
S. CT. PRAC. R. 4.2(C)**

Now comes the State of Ohio, by and through the Ottawa County Prosecuting Attorney, Mark E. Mulligan, who hereby moves this Court to dismiss the above-captioned case on the grounds that no actual conflict exists. S. Ct. Prac. R. 4.2(C) (“If the Supreme Court determines that a conflict does not exist, it will issue and order dismissing the case.”). A memorandum in support is attached hereto.

MEMORANDUM IN SUPPORT

The court of appeals *sua sponte* certified a conflict between *State v. Nickel*, 6th Dist. No. OT-10-004, 2010-Ohio-5510 and *State v. Rodman* (July 27, 1982), 5th Dist. No CA 595. The court of appeals certified the following question for review and final determination:

Are rape as defined by R.C. 2907.02(A)(2) and sexual battery as defined in R.C. 2907.03(A)(5) allied offense of similar import pursuant to R.C. 2941.25.

State v. Nickel, 2010-Ohio-5510, ¶ 34.

There is no conflicting rule of law between *Nickel* and *Rodman*. The court of appeals applied settled precedent announced by this Court in *Cabrales*, *infra*. Precedent established twenty-six years after the *Rodman* decision. Since the court of appeals in *Nickel* erred certifying a conflict, the case should be dismissed pursuant S. Ct. Prac. R. 4.2(C).

Three conditions must be met if a conflict is properly certified before this Court. *Whitelock v. Gilbane Building Company* (1993), 66 Ohio St. 3d 594, 613 N.E.2d 1032. “First the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be ‘upon the same

question.’ Second, the alleged conflict must be on a rule of law – not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law the certifying court contends is in conflict with the judgment of the same question by other district courts of appeals.” *Id.* 66 Ohio St. 3d at 596.

Here, there is no conflicting rule of law between *Nickel* and *Rodman*, only different legal conclusions resulting from the application of a separate set of laws. In *Nickel*, the court of appeals followed the rule of law set forth by this Court in *State v. Cabrales*, 188 Ohio St. 3d 54, 2008-Ohio-1625, 886 N.E. 2d 181, paragraph one of the syllabus:

In determining whether offense are allied offense of similar import under R.C. 2941.25(A), court are required to compare the elements of the offense in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offense in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offense are allied offenses of similar import.

See *Nickel*, 2010-Ohio-5511, at ¶ 16, citing, also, *State v. Williams*, 124 Ohio St. 3d 381, 2010-Ohio-147, ¶ 22, 922 N.E. 2d 937. The rule of law set forth in *Cabrales* clarified the previous rule in *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E. 2d 699, paragraph one of the syllabus, in that *Rance* never required an exact alignment of the statutory elements. *State v. Nickel*, 2010-Ohio-5511, at ¶ 15.

Applying the *Cabrales* abstract comparison rule, the court of appeals conclude, correctly, that “[a]n abstract comparison of the statutory elements reveals that a defendant who commits rape in violation of R.C. 2907.02(A) does not necessarily commit sexual battery under R.C. 2907.03(A)(5). *State v. Nickel*, 2010-Ohio-5511, ¶ 26. It reasoned, “[o]bviously, an offender can compel another to submit to sexual conduct by the use or

threat of force without being the victim's parent, stepparent, guardian, custodian, or other comparable caregiver." *Id.*

The *Cabrales* rule, applied in *Nickel*, was not available to the court of appeals in *Rodman*. The court of appeals in *Rodman* focused on conduct and did not engage in any "abstract comparison" whatsoever. The *Rodman* court concluded, without considering any case law, "[i]t is obvious that the **conduct** in the two counts is, within the meaning of that statute, 'two or more allied offense of similar import' if not the **same identical act.**" (emphasis added.) *State v. Rodman*, 5th Dist. No. CA 595. The *Rodman* court's focus was exclusively on the alleged conduct, not an abstract comparison of the elements.

The *Rodman* court's reasoning was contrary to *Cabrales*. See *State v. Cabrales*, 188 Ohio St. 3d 54, paragraph one of the syllabus ("courts are required to consider the elements of the offense in the abstract without considering the evidence in the case."). The *Rodman* court was not able to apply law established twenty-six years later in *Cabrales*. Had the *Rodman* court considered *Cabrales*, it could not have reached the same conclusion. The court of appeals should have found the reasoning in *Rodman* not-well-taken as contrary to *Cabrales* rather than certifying a conflict.

CONCLUSION

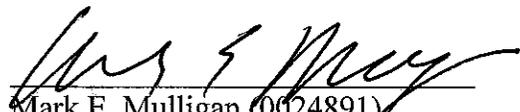
There is no conflicting rule of law between *Nickel* and *Rodman*. *Cabrales*, precedent set by this Court, is binding precedent in Ohio. The *Rodman* court was unable to apply *Cabrales*, therefore, there is no conflicting rule of law with *Cabrales*. Since the *Rodman* court's reasoning is contrary to *Cabrales*, and does not challenge the validity of *Cabrales*, the *Nickel* court erred certifying a conflict with the *Rodman* case. Accordingly, and for the foregoing reasons, the State of Ohio requests that this Court dismiss the above captioned case. Furthermore, this Court's December 29, 2010 decision in *State v. Johnson*, (Slip Opinion No. 2010-Ohio-6314) sufficiently settles allied offense issues such that further consideration by this Court is not warranted.

Respectfully Submitted,


Mark E. Mulligan (0024891)
Ottawa County Prosecuting Attorney

CERTIFICATE OF SERVICE

3 This is to certify that a copy of the foregoing was sent by regular U.S. Mail this day of January, 2011, to Terrence K. Scott, Assistant State Public Defender, Attorney for Appellant, 250 E. Broad Street, Suite 1400, Columbus, Ohio, 43215.


Mark E. Mulligan (0024891)
Ottawa County Prosecuting Attorney