

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No.	<b>10-2134</b>
	:		
Plaintiff-Appellee,	:	On Appeal from the Ottawa	
	:	County Court of Appeals,	
v.	:	Sixth Appellate District	
	:		
LESLIE L. NICKEL,	:	C.A. Case No. OT-10-004	
	:		
Defendant-Appellant.	:		

**APPELLANT'S MEMORANDUM IN OPPOSITION TO  
STATE'S MOTION TO DISMISS**

OFFICE OF THE OHIO PUBLIC DEFENDER

MARK E. MULLIGAN #0024891  
Ottawa County Prosecuting Attorney  
(COUNSEL OF RECORD)

TERRENCE K. SCOTT #0082019  
Assistant State Public Defender  
(COUNSEL OF RECORD)

Ottawa County Courthouse  
315 Madison Street, 2<sup>nd</sup> Floor  
Port Clinton, Ohio 43452  
(419) 734-6845  
(419) 734-6875 - Fax

250 E. Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 - Fax  
E-mail: [terrence.scott@opd.state.oh.us](mailto:terrence.scott@opd.state.oh.us)

COUNSEL FOR THE STATE OF OHIO

COUNSEL FOR LESLEY L. NICKEL

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 SUPREME COURT OF OHIO

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**APPELLANT'S MEMORANDUM IN OPPOSITION TO  
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Appellant Leslie L. Nickel hereby submits his memorandum in opposition to the State's January 4, 2011 motion to dismiss. Appellant requests the Court to deny the motion to dismiss or, in the alternative, to deny the motion to dismiss and remand this case to the court of appeals for application of this Court's decision in *State v. Johnson*, \_\_ Ohio St.3d \_\_, 2010-Ohio-5510, \_\_ N.E.2d \_\_, as set forth in Appellant's motion to remand, filed concurrently herewith.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

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TERRENCE K. SCOTT (0082019)  
Assistant State Public Defender  
250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
Phone (614) 466-5394  
Fax (614) 752-5167  
Terrence.Scott@OPD.Ohio.gov

COUNSEL FOR APPELLANT  
LESLIE L. NICKEL

**MEMORANDUM IN OPPOSITION TO STATE'S MOTION TO DISMISS  
CASE NUMBER 2010-2134 UNDER S. CT. PRAC. R. 4.2(C).**

On January 4, 2011, the State moved to dismiss Case No. 2010-2134. Appellant Lesley L. Nickel now submits his memorandum opposing the motion to dismiss. This Court should deny the State's motion to dismiss and determine that a conflict does exist under S. Ct. Prac. R. 4.2(D) ("If the Supreme Court determines that a conflict exists, it will issue an order finding a conflict, identifying those issues raised in the case that will be considered by the Supreme Court on appeal, and ordering those issues to be briefed"). In the alternative, Mr. Nickel requests that the Court deny the State's motion to dismiss and remand this case to the court of appeals for application of this Court's decision in *State v. Johnson*, \_\_\_ Ohio St.3d \_\_\_, 2010-Ohio-6314, \_\_\_ N.E.2d \_\_\_.

**MEMORANDUM IN SUPPORT**

The court of appeals *sua sponte* certified a conflict between *State v. Nickel*, Sixth Dist. No. OT-10-004, 2010-Ohio-5510, and *State v. Rodman* (July 27, 1983), Fifth Dist. No CA 595, certifying a conflict on the following question:

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

This Court in *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 1993-Ohio-223, established the three conditions that must be met in order to properly certify a conflict under Ohio Const. art. I, §3(B)(4):

...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 which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

*Whitelock* at 596.

The State concedes the first and third conditions set forth in *Whitelock*. Motion to Dismiss, 3, 4. However, the State argues that the second prong in *Whitelock*, which requires a conflicting rule of law and not merely conflicting facts between *Nickel* and *Rodman*, is not satisfied.

The State's analysis of the second prong of *Whitelock* is not accurate. The State bases its argument on the second part of the test in *Whitelock*. Motion to Dismiss, 3. It argues there is no conflict about the legal rule the *Nickel* and *Rodman* courts applied. But that is not an accurate analysis under the second prong of *Whitelock*. That prong merely requires that the conflict not be based on facts, but upon a legal rule. Here, the conflict is not a factual one, so this prong is satisfied. The State is misinterpreting - - and asking this Court to misinterpret - - the second prong. In *Nickel*, the court of appeals held that rape and sexual battery are not allied offenses, but *Rodman* held that rape and sexual battery are allied offenses. This conflict is based on a legal rule, but not facts; therefore, the second prong is satisfied. The *Nickel* court's certification of a conflict satisfied all three of the requirements of *Whitelock*.

The plain language of Section 3(B)(4) of Article IV of the Ohio Constitution supports this conclusion. Section 3(B)(4) states that, "[w]henver the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." Ohio Const. art. I, §3(B)(4). Here, there is no doubt that the judgments of *Rodman* and *Nickel* are in conflict.

## CONCLUSION

The court of appeals properly applied *Whitelock* when it certified the conflict in *Nickel*. Accordingly, this Court should deny the State's motion to dismiss and determine a conflict does exist under S. Ct. Prac. R. 4.2(D). Further, this Court should issue an order for briefing of the allied offenses issues. In the alternative, this Court should deny the State's motion to dismiss and remand this case to the court of appeals for application of this Court's decision in *State v. Johnson* as requested in Nickel's motion to remand, filed concurrently with the instant memorandum in opposition.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

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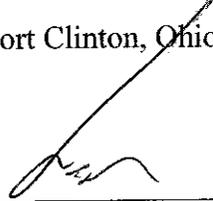
TERRENCE K. SCOTT (0082019)  
Assistant State Public Defender  
(COUNSEL OF RECORD)

250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 – Fax  
terrence.scott@opd.ohio.gov

COUNSEL FOR APPELLANT  
LESLIE L. NICKEL

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **APPELLANT'S MEMORANDUM IN OPPOSITION TO STATE'S MOTION TO DISMISS** was forwarded by regular U.S. Mail this 13th day of January, 2011, to the office of Mark E. Mulligan, Ottawa County Prosecutor, Ottawa County Courthouse, 2<sup>nd</sup> Floor, 315 Madison St., Port Clinton, Ohio 43452.



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TERRENCE K. SCOTT (0082019)  
Assistant State Public Defender

COUNSEL FOR APPELLANT  
LESLIE L. NICKEL

#334902