[This opinion has been published in *Ohio Official Reports* at 82 Ohio St.3d 1207.]

THE STATE OF OHIO, APPELLANT, *v.* NELSON, APPELLEE.

[Cite as *State v. Nelson*, 1998-Ohio-415.]

Appeal dismissed as improvidently allowed.

(No. 96-2160—Submitted April 2, 1998—Decided May 20, 1998.)

APPEAL from the Court of Appeals for Tuscarawas County, No. 95AP070051.

David C. Hipp, Tuscarawas County Assistant Prosecuting Attorney, for appellant.

Tarin Stuart Hale, for appellee Seth Nelson.

{¶ 1} The cause is dismissed, *sua sponte*, as having been improvidently allowed.

MOYER, C.J., DOUGLAS, RESNICK and F.E. SWEENEY, JJ., concur.

PFEIFER, COOK and LUNDBERG STRATTON, JJ., dissent.

COOK, J., dissenting.

{¶ 2} I respectfully dissent. The issue underlying this case is whether R.C. 2903.11(A)(2) felonious assault may be considered a lesser included offense of attempted murder. A review of appellate court opinions demonstrates that the appellate jurisdictions have reached conflicting conclusions on this issue. See, *e.g.*, *State v. Hall* (May 17, 1996), Sandusky App. No. 5-95-032, unreported, 1996 WL 256610; *State v. Hammers* (Feb. 28, 1996), Medina App. No. 2469-M, unreported, 1996 WL 84616; *State v. Konoff* (Nov. 1, 1991), Ottawa App. No. 90-OT-036, unreported, 1991 WL 224991; *State v. Mabry* (Nov. 1, 1984), Cuyahoga App. No. 47821, unreported, 1984 WL 3553. Moreover, if one is to accept the majority's interpretation of the appellate judges' separate opinions in *State v. Williams* (1998),

81 Ohio St.3d 1262, 693 N.E.2d 282, there is also a schism within the Fifth Appellate District on the issue. Compare *State v. Nelson* (Aug. 6, 1996), Tuscarawas App. No. 95AP070051, unreported, 1996 WL 488879, with *State v. Williams* (Sept. 23, 1996), Stark App. No. 95-CA-0258, unreported, 1996 WL 570956.

{¶ 3} I believe that we should settle this issue by adopting Judge Hoffman's well-reasoned majority opinion in *Nelson*, which concludes that R.C. 2903.11(A)(2) felonious assault is not a lesser included offense of attempted murder. By dismissing this case as having been improvidently allowed, the majority allows the judgment in *Nelson* to stand. For the benefit of the bar, I would go further by adopting the opinion as setting forth the proper standard of law in Ohio.

PFEIFER and LUNDBERG STRATTON, JJ., concur in the foregoing dissenting opinion.