

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 09-1572
Plaintiff-Appellant,	:	On Appeal from the Seneca
v.	:	County Court of Appeals
KIEL HENRY,	:	Third Appellate District
Defendant-Appellee.	:	Court of Appeals
	:	Case No. 13-08-10

BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE KIEL HENRY

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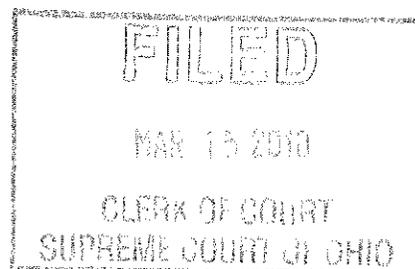
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## STATEMENT OF THE CASE AND FACTS

Amicus adopts by reference the statement of the case and facts set forth by Appellee Kiel Henry.

### STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in the case sub judice insofar as the State is requesting this Court to overrule twenty years of stare decisis. The State is attempting to lessen its burden of proof in gross-sexual-imposition cases by asserting that it should not be required to demonstrate that a defendant compelled an alleged victim to submit by force, or the threat of force, to the alleged sexual contact. But the Third District Court of Appeals correctly applied the analysis that this Court developed in *State v. Eskridge* (1988), 38 Ohio St.3d 56 and *State v. Schaim*, 65 Ohio St.3d 51, 1992-Ohio-31. And the court of appeals properly determined that Mr. Henry's conviction for

gross sexual imposition was not supported by sufficient, credible evidence. *State v. Henry*, 3<sup>rd</sup> Dist. No. 13-08-10, 2009-Ohio-3535, at ¶¶26-31.

Accordingly, the OPD has an enduring interest in protecting the integrity of the justice system and ensuring equal treatment under the law. To this end, the OPD supports the fair, just, and correct interpretation and application of Ohio's felony statutes.

## **RESPONSE TO THE STATE'S PROPOSITIONS OF LAW**

### **I. Introduction.**

While the precise wording of the State's propositions of law differs, the issue presented by each is the same: May a court of appeals reverse a conviction for gross sexual imposition when the State failed to prove, as required by R.C. 2907.05, that the defendant compelled the victim to submit by force or threat of force? This Court has already affirmatively answered that question twice. See *State v. Eskridge*, 38 Ohio St.3d at paragraphs one and two of the syllabus, respectively ("The force and violence necessary to commit the crime of rape depends upon the age, size and strength of the parties and their relation to each other..."; "A reviewing court will not reverse a conviction where there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt."); *State v. Schaim*, 65 Ohio St.3d at paragraph one of the syllabus ("A defendant purposely compels another to submit to sexual conduct by force or threat of force if the defendant uses physical force against that person, or creates the belief that physical force will be used if the victim does not submit. A threat of force can be inferred from the circumstances surrounding sexual conduct, but a pattern of incest will not substitute for the element of force where the state introduces no evidence that an adult victim believed that the defendant might use physical force against her.").

While this case deals with an allegation of sexual contact, and not sexual conduct, the definition of “force” is the same in either context, and this Court’s analysis of “force” should be the same here as it was in *Eskridge* and *Schaim*. Indeed, the court of appeals cited this Court’s decisions in *Eskridge* and *Schaim*, and applied this Court’s rulings appropriately. (See Arguments II and III, pp. 3-10, *infra*). Accordingly, this Court should dismiss this case as being improvidently accepted.

**II. The applicable law as stated by this Court.**

**A. *State v. Eskridge* (1988), 38 Ohio St.3d 56:**

In *State v. Eskridge*, this Court considered the issue of whether the State presented sufficient evidence at Mr. Eskridge’s trial to prove that he forced or threatened force during the commission of a rape. This Court first reviewed the rape statute, R.C. 2907.02, which provided in pertinent part:

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

\* \* \*

(3) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this section is guilty of rape, an aggravated felony of the first degree. If the offender under division (A)(3) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(3) of this section shall be imprisoned for life.

The Ohio Revised Code defined force as “any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.” R.C. 2901.01(A).

The victim, who was Eskridge’s four-year-old daughter, testified that the defendant “took off [her] panties and kissed [her] on [her] lips, and [her] neck...,” and that the defendant “put his thing in [her].” *Eskridge* at 57. This Court concluded that “while the record could have been

more explicit on the amount of force involved, in light of all the circumstances, i.e., the child's testimony, the child's tender age, and the relationship of parental authority that defendant had with his four-year-old daughter, [this Court found] substantial evidence from which the trial court could have found beyond a reasonable doubt that Eskridge committed the act with force." *Eskridge* at 58. This Court continued, explaining that "[f]orce need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established." *Id.* Accordingly, even in cases involving child victims, this Court established that the defendant must have taken some sort of action that would have amounted to the statutorily required force.

**B. *State v. Schaim*, 65 Ohio St.3d 51, 1992-Ohio-31:**

In *State v. Schaim*, this Court further developed its analysis from the *Eskridge* case, and explained what is required for the State to meet the requirements of R.C. 2907.02 in those cases that do not have a child victim making the allegations. In *Schaim*, the State was urging this Court to adopt the position that a defendant's alleged pattern of sexual abuse toward his adult daughter was sufficient to uphold a conviction for forcible rape even though the victim admitted that the defendant did not use physical force or the threat of physical force. *Schaim* at 54. This Court explained that "[a] defendant purposely compels another to submit to sexual conduct by force or threat of force if the defendant uses physical force against that person, or creates the belief that physical force will be used if the victim does not submit. A threat of force can be inferred from the circumstances surrounding sexual conduct, but a pattern of incest will not substitute for the element of force where the state introduces no evidence that an adult victim believed that the defendant might use physical force against her." *Schaim* at paragraph one of the syllabus.

This Court then discussed its holding in *Eskridge* and how to apply that holding in subsequent cases. Indeed, this Court explained that a minimal amount of force may be shown in those cases in which the allegations of rape are coming from a young child, and the aggressor is that young child's parent. *Schaim* at 55. Such a rationale was developed on the basis that "[e]very detail of a child's life is controlled by a parent, and a four-year-old child knows that disobedience will be punished, whether by corporal punishment or an alternative form of discipline. Because of the child's dependence on his or her parents, a child of tender years has no real power to resist his or her parent's command, and every command contains an implicit threat of punishment for failure to obey." *Id.* However, because *Schaim* did not involve a child victim, this Court explained that the State was required to demonstrate that the defendant had used physical force against the victim, or that the defendant had threatened to use physical force, in order to compel the alleged victim into submission.

Reviewing the evidence for sufficiency, this Court dismissed the defendant's forcible rape convictions, concluding that:

[T]he court of appeals was correct in finding that the State did not offer sufficient evidence on the element of force. Rhonda [the victim] testified that "he [the defendant] didn't force me" and there was no evidence offered that the defendant threatened her during the incidents in question. *The prosecution did not introduce evidence that the defendant had used physical force or threatened Rhonda with physical force in the past, such that she would infer the threat of physical force based on past occurrences.* In the absence of this testimony, the state did not offer sufficient evidence to convince an average mind that the defendant committed the crime with which he had been charged beyond a reasonable doubt. We affirm the court of appeals' decision to dismiss the forcible rape convictions.

*Id.* at 55-56. Emphasis added.

**III. Application of the principles that have been established by this Court in *State v. Eskridge*, 38 Ohio St.3d 56 and *State v. Schaim*, 1992-Ohio-31, to the case sub judice.**

If this Court reverses the court of appeals' decision in the case sub judice, it would be reversing its previous decisions in *State v. Eskridge* and *State v. Schaim*. The State is asking that this Court hold that a defendant may be convicted of gross sexual imposition when the State cannot prove that the alleged victim did not feel compelled to submit to the sexual contact by means of a defendant's use of force or threatened use of force. (See State's Merit Brief, pp. 5-22). But Ohio's Revised Code, along with this Court's precedent, has already explained that force, and the alleged victim's submission to the sexual contact due to such use of force, are necessary elements of the offense. Furthermore, this Court has already explained what evidence the State must put forth in order to prove that a defendant purposefully compelled an alleged victim to submit to sexual contact by force or the threat of force.

Mr. Henry was convicted of gross sexual imposition. Ohio Revised Code Section 2907.05 governs gross sexual imposition and provides, in pertinent part:

No person shall have sexual contact with another, not the spouse of the offender[,],...when any of the following applies: (1) The offender purposely compels the other person...to submit by force or threat of force.

The Ohio Revised Code defines "force" as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1). That definition is the same for rape cases and gross-sexual-imposition cases. And as explained by this Court in *Eskridge* and *Schaim*, in order to prove that Mr. Henry compelled the alleged victim to submit by force or threat of force, the State was required to submit evidence that Mr. Henry: (1) used physical force against the alleged victim; (2) created the belief that physical force would be used if the victim did not submit; or (3) threatened that force would be used. See *State v. Henry*,

2009-Ohio-3535, at ¶26. Hence, the alleged victim must have submitted—i.e., the alleged victim’s will must have been overcome—due to the defendant’s use, or threatened use, of force.

The court of appeals determined that the State failed to meet its burden. In reviewing whether sufficient evidence existed to support Mr. Henry’s conviction, the court of appeals reviewed this Court’s decisions in *Eskridge* and *Schaim*:

The Supreme Court of Ohio has addressed the issue of “force or threat of force” several times in the context of the rape statute, R.C. 2907.02. The Court stated that, under R.C. 2907.02, the amount of force necessary to commit the offense “depends upon the age, size and strength of the parties and their relation to each other.” *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, paragraph one of the syllabus. Additionally, in *Eskridge*, the Court stated that force is present where the “victim’s will [is] overcome by fear or duress...[.]” 38 Ohio St.3d at 59; see, also, *State v. Byrd*, 8<sup>th</sup> Dist. No. 82145, 2003-Ohio-3958, ¶26. The Supreme Court of Ohio has further clarified that “[a] defendant purposely compels another to submit to sexual conduct by force or threat of force if the defendant uses physical force against that person, or creates the belief that physical force will be used if the victim does not submit. A threat of force can be inferred from the circumstances surrounding sexual conduct...[.]” *State v. Schaim*, 65 Ohio St.3d 51, 1992-Ohio-31, 600 N.E.2d 661, paragraph one of the syllabus.

*State v. Henry*, 2009-Ohio-3535, at ¶26.

The court of appeals then noted numerous other appellate districts that dealt with similar fact patterns—i.e., victims who were sleeping, unconscious, or taken by surprise when the touching occurred. One such case was *State v. Byrd*, 8<sup>th</sup> Dist. No. 82145, 2003-Ohio-3958. In *Byrd*, the Eighth District Court of Appeals found that force or threat of force was absent when a fifteen-year-old victim awoke in her bed to find an adult defendant touching her genitals over her clothing. *Byrd* at ¶1-10. The main reasons for the court of appeals’ conclusion were because: (1) Mr. Byrd did not apply any force in relation to the victim’s body or clothing; (2) Mr. Byrd did not hold a position of authority over her; (3) as the victim became aware of the touching, she

immediately got up and left the area; and, (4) the contact did not occur due to fear or duress. *Byrd* at ¶25-26. The *Byrd* court also noted that “perpetrators who engage in sexual conduct with another who is asleep or otherwise unable to appraise or control the nature of his or her conduct are typically prosecuted for sexual battery in violation of R.C. 2907.03(A)(2) or (3), an offense which does not list force as an essential element. *Byrd* at ¶23. Emphasis added.

The court of appeals also discussed its previous decision in *State v. Euton*, 3<sup>rd</sup> Dist. No. 2-06-35, 2007-Ohio-6704. In *Euton*, the court held that a defendant’s act of slipping his hand under a blanket to touch a victim was insufficient evidence that the victim was compelled to submit by force or threat of force. *Henry* at ¶29, citing *State v. Euton*. The *Euton* court came to that conclusion because the defendant made no comments or threats to the victim; because the defendant did not apply any force in relation to the victim’s body or clothing; because, as soon as the victim overcame the surprise of the touching, the victim jumped up and left the room; and, because there was no evidence that the defendant attempted to restrain the victim from getting up or leaving the room. *Id.*

After reviewing this Court’s and other appellate districts’ caselaw, the *Henry* court reviewed the facts of the case sub judice:

Henry made no comments or threats to K.C.; there was no evidence that Henry applied force in relation to K.C.’s body or clothing; as soon as K.C. became aware of what was happening, she pushed Henry out of her bed, jumped out of bed, and left the room; and, there was no evidence that Henry attempted to restrain K.C. from getting up or leaving the room. Further, although evidence was presented that Henry was much larger in size than K.C., and that she was positioned between him and the wall, K.C. did not testify that she was restrained because of Henry’s size or her position on the bed. In fact, to the contrary, K.C. testified that she was able to push Henry out of her bed on her first attempt “as soon as [she] wanted to” and leave the room immediately. Additionally, K.C. testified that she was repeatedly able to remove his hand from her shorts. Thus, the evidence elicited at trial

demonstrates that K.C.'s will was not overcome by fear or duress. Accordingly, we cannot find that Henry's actions constituted the "violence, compulsion, or constraint" contemplated by R.C. 2901.01(A)(1) in comprising force or threat of force *sufficient to overcome the will of the victim*.

*Henry* at ¶31. Emphasis original.

And just as the *Byrd* court explained that the State could have prosecuted the defendant for sexual battery, so did the *Henry* court:

Additionally, although the dissent claims that our majority rule allows a perpetrator to impose any sexual activity upon a sleeping victim without fear of being charged with any sexual offense requiring force or threat of force, *we note that such a perpetrator may properly be charged with any number of offenses not requiring force, such as sexual battery in violation of R.C. 2907.03(A)(3) or sexual imposition in violation of R.C. 2907.06(A)(3)*. See, e.g., *State v. Lindsay*, 3d Dist. No. 8-06-24, 2007-Ohio-4490; *State v. Antoline*, 9th Dist. No. 02CA008100, 2003-Ohio-1130; *State v. Wright*, 9th Dist. No. 03CA0057-M, 2004-Ohio-603; *Byrd*, 2003-Ohio-3958, at ¶23.... Notably absent from the dissent is any discussion of Henry overcoming the will of the victim.

*Henry* at ¶33. Emphasis added.

Accordingly, the State could have proceeded with a case against Mr. Henry for sexual battery or sexual imposition, but failed to so do. And the State is now attempting to lessen its burden of proof for gross-sexual-imposition cases by requesting that this Court reverse twenty years worth of precedent. But the *Eskridge* and *Schaim* opinions do not meet the reversal requirements that this Court has established. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, at paragraph one of the syllabus. Both *Eskridge* and *Schaim* are "workable," as evidenced by the caselaw that has been established by courts' reliance upon those opinions. *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, at paragraph one of the syllabus. And

abandoning such precedent at this time would cause courts to redevelop what is required for the State to prove that a defendant forced an alleged victim to submit to his or her will. *Id.*

In the case sub judice, Mr. Henry did not compel the alleged victim to submit by force or the threat of force. The State did not, and could not, prove otherwise. Because the court of appeals' opinion is supported by *stare decisis*, this Court should dismiss this case as being improvidently accepted.

### CONCLUSION

The Third District Court of Appeals properly analyzed the sufficiency-of-the-evidence claim under *State v. Eskridge*, 38 Ohio St.3d 56 and *State v. Schaim*, 1992-Ohio-31. Thus, this Court should dismiss this case as being improvidently accepted.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



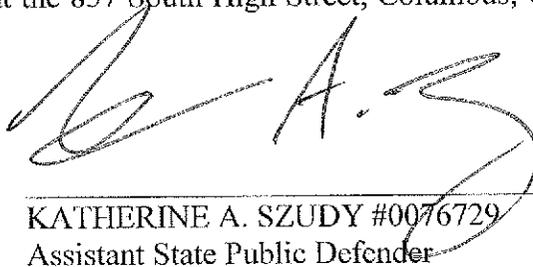
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE KIEL HENRY** was forwarded by regular U.S. Mail, postage prepaid to James A. Davey, Assistant Seneca County Prosecutor, addressed to his office at 71 South Washington Street, Suite 1204, County Svcs. Bldg., Tiffin, Ohio 44883; David H. Hoffman, Assistant Clermont County Prosecutor, addressed to his office at 123 North Third Street, Batavia, Ohio 45103; Benjamin C. Mizer, Solicitor General, addressed to his office at 30 East Broad Street, 17<sup>th</sup> Floor, Columbus, Ohio 43215; and Javier Armengau, addressed to his office at the 857 South High Street, Columbus, Ohio 43206, on this 15<sup>th</sup> day of March, 2010.



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