**IN THE SUPREME COURT OF OHIO**
**2016**

In the Matter of D.S.
(an alleged delinquent minor child

Case No. 2016-0907

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 15AP-487

# MEMORANDUM OF APPELLEE OPPOSING JURISDICTION

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## EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

Neither of D.S.'s two propositions of law warrants this Court's review. D.S.'s first proposition of law raises the fact-specific claim of whether the juvenile court abused its discretion in dismissing the complaint under Juv.R. 9. As a majority of the Tenth District panel below recognized, the juvenile court's "reasoning and the present record is devoid of sufficient information from which to determine whether the case is 'appropriate' to file in juvenile court." App.Op. at ¶ 25. Any decision from this Court on whether the record contained "sufficient information" will have minimal impact on future cases.

Moreover, the fact that the record contained insufficient information distinguishes this case from *In re M.D.*, 38 Ohio St.3d 149 (1988). *In re M.D.* contained an extensive factual record, including (1) facts adduced at trial showing that the juvenile committed no crime at all, (2) evidence that the complaint violated the juvenile court's intake policy, (3) the alleged victim's family requesting dismissal, and (4) a "battery of tests and evaluations" showing M.D. to be a normal pre-teen whose profile "deviate[d] markedly" from that of other sex offenders and that sex "played but a minute role" in the case. *Id*. at 154.

Judge Klatt dissented on the Juv.R. 9 issue, but not on any *legal* grounds. Rather, Judge Klatt disagreed with the majority's factual conclusion that the record supported the juvenile's court's Juv.R. 9 dismissal. App.Op. at ¶ 30 (Klatt, J., dissenting). Echoing Judge Klatt's dissent, D.S. states that the record contained evidence showing (1) the ages of the children involved (ages 12 and 9), (2) the children were three years apart in age (actually, they were two years and five months apart), and (3) the complaint contained no allegation of force. But the majority correctly held that these facts fail to justify dismissal under Juv.R. 9. The first two facts are really the same fact expressed in different ways. Simply stating the ages of the juveniles and how much older one is than the other is not enough to show that the case is "appropriate" for dismissal.

And the third fact is irrelevant because gross sexual imposition under R.C. 2907.05(A)(4) does not require proof of force.

D.S.'s second proposition of law is equally unworthy of review. D.S. maintains that R.C. 2907.05(A)(4) is unconstitutional as applied to juveniles under 13. D.S. relies on *In re D.B.*, 129 Ohio St.3d 104, 2011-Ohio-2671, which held that statutory rape under R.C. 2907.02(A)(1)(b) is unconstitutional as applied to juveniles under 13. But every Ohio appellate court that has addressed this issue has rejected this argument. *In re T.A.*, 2nd Dist. Nos. 2011-CA-28, 2011-CA-35, 2012-Ohio-3174, ¶¶ 26-27; *In re K.A.*, 8th Dist. Nos. 98924, 99144, 2013-Ohio-2997, ¶¶ 11-12, appeal not allowed, 132 Ohio St.3d 1423, 2013-Ohio-5285; *In re K.C.*, 32 N.E.3d 988, 2015-Ohio-1613, ¶¶ 13-14 (1st Dist.). These cases all hold that the "purpose" element in R.C. 2907.05(A)(4) distinguishes that statute from R.C. 2907.02(A)(1)(b). This Court declined to review this issue in *In re K.A.*, and it should so again here.

Judge Luper Schuster concurred on this issue, stating that R.C. 2907.05(A)(4) could be unconstitutionally applied if both juveniles were under 13 and acted with the requisite mens rea. App.Op. at ¶ 33 (Luper Schuster, J., concurring). But, Judge Luper Schuster concluded that the record in this case did not support such a finding. *Id*. at ¶ 34 (Luper Schuster, J., concurring).

In the end, this case presents no questions of such constitutional substance or statewide interest as would warrant further review. Jurisdiction should be declined.

## STATEMENT OF THE CASE AND FACTS

In November 2013, a delinquency complaint was filed against D.S. (born July 15, 2001), alleging three counts of gross sexual imposition under R.C. 2907.05(A)(4), all third-degree felonies if committed by an adult. All three counts alleged that D.S. engaged in sexual contact with another boy, D.M. (born December 16, 2003). The first count alleged that D.S. "did touch and rub [D.M.] about his penis on numerous occasions." The second and third counts, although

phrased in terms of sexual contact, alleged that D.S. engaged in various forms of sexual *conduct* with D.M.—specifically, anal intercourse in count two, and fellatio in count three.

D.S. moved to dismiss the complaint. Relying on *In re D.B.*, D.S. argued that R.C. 2907.05(A)(4) is unconstitutionally vague and violates equal-protection principles. D.S. also argued that the complaint should be dismissed under Juv.R. 9. After a hearing, a magistrate judge overruled D.S.'s motion.

D.S. then filed with the juvenile court an interlocutory objection to the magistrate's decision. The juvenile court held a hearing, and in a written decision and entry sustained the objection. In its decision, the juvenile court stated that, given the age disparity between D.S. and D.M. (a little less than two and a half years), "it is more difficult to distinguish between the parties and not as easy to determine who should be charged given the closeness of their ages." Although "not willing to make the GSI statute unconstitutional in all cases involving children under the age of thirteen," the juvenile court found R.C. 2907.05(A)(4) "to be unconstitutional as applied in this case." The juvenile court also stated that the two counts alleging sexual conduct could have been charged as rape under R.C. 2907.02(A)(1)(b), and "[i]f that had occurred," *In re D.B.* would have required dismissal.

The juvenile court also held that the complaint should be dismissed under Juv.R. 9 because "there are alternative methods available to provide for the treatment needs of both children and to protect the community as a whole without the use of formal Court action." Noting that a dependency action could be filed if the parents do not provide the necessary treatment, the juvenile court stated that it was not "in the best interest of either child, given the facts of this case, to continue with the prosecution of this matter."

The State appealed, and the Tenth District reversed. Judge Sadler wrote the lead opinion, holding that the juvenile court abused its discretion in dismissing the complaint under Juv.R. 9 and that R.C. 2907.05(A)(4) was not unconstitutional as applied to juveniles under 13. Judge Klatt dissented, stating that the record was sufficient to support the trial court's dismissal under Juv.R. 9. App.Op. at ¶¶ 28-31 (Klatt, J., dissenting). Judge Luper Schuster concurred on the Juv.R. 9 issue, but wrote separately on the constitutional issue to state that R.C. 2907.05(A)(4) could be unconstitutionally applied to a fact pattern where both juveniles were under 13 and both acted with the requisite sexual-purpose mens rea. *Id*. at ¶¶ 32-33 (Luper Schuster, J., concurring). Judge Luper Schuster noted, however, that this fact pattern was not present in this case. *Id*. at ¶ 34 (Luper Schuster, J., concurring).

## ARGUMENT

**Response to First Proposition of Law:** A juvenile court abuses its discretion by dismissing a complaint under Juv.R. 9 absent evidence in the record that the complaint is "appropriate" for dismissal.

Juv.R. 9 states:

> (A) In all appropriate cases formal court action should be avoided and other community resources utilized to ameliorate situations brought to the attention of the court.
>
> (B) Information that a child is within the court's jurisdiction may be informally screened prior to the filing of a complaint to determine whether the filing of a complaint is in the best interest of the child and the public.

The juvenile court dismissed the complaint under Juv.R. 9, holding that "there are alternative methods available to provide for the treatment needs of both children and to protect the community as a whole without the use of formal Court action." The juvenile court further noted that a dependency action could be filed if the parents are "not able to provide for the

treatment necessary." The juvenile court declined to find that "it is in the best interest of either child, given the facts of this case, to continue with the prosecution of this matter."

The leading case on Juv.R. 9 is *In re M.D.*. In that case, M.D., then a 12 year old girl, was found delinquent for complicity to rape. At trial, M.D.'s sister testified that M.D. and two five year olds—one boy and one girl—were "playing doctor," and that M.D. directed the girl to perform fellatio on the boy "ostensibly because M.D. had instructed them to take temperature that way." *Id*. at 150.

The appellate court affirmed the adjudication, holding that M.D.'s constitutional objections had been waived. This Court, however, vacated the adjudication. In the syllabus, this Court held that the waiver doctrine is discretionary. *Id*. at syllabus. On the merits, the opinion first notes that M.D. could not be complicit in any rape because "the underlying offense of rape did not occur." *Id*. at 152. Specifically, the opinion observed that fellatio encompasses elements of either stimulation or sexual satisfaction, and that mere "penetration of the oral cavity is not sufficient to complete the offense." *Id*. Because there was no evidence of sexual satisfaction or oral stimulation among the five year old participants, no fellatio occurred, so no rape was committed for which M.D. could be complicit. *Id*.

The opinion continued that the prosecution of M.D. violated the public policy expressed in Chapter 2151 and the Juvenile Rules. After quoting Juv.R. 9, the opinion noted that under the intake policy of the Cuyahoga County Juvenile Court statutory rape charges "are not to be taken" when both the alleged offender and the victim are under 13. *Id*. Plus, "the best interest of the child and the public" were not served by prosecuting M.D. because the five year old boy's family had petitioned the juvenile court to dismiss the charge. *Id*. at 153-154. "Nor was the 'care, protection, and mental and physical development of children' provided for herein." *Id*. at 154.

This was so, because a report from a mental health counselor and a "battery of tests and evaluations" showed M.D. to be a normal pre-teen whose profile "deviate[d] markedly" from that of other sex offenders and sex "played but a minute role" in the case. *Id*.

At least two courts, applying the then-existing superintendence rules, have noted that only the syllabus in *In re M.D.* is binding and that the language in the opinion reflects only the opinion of the author. *In re T.C.*, 4th Dist. No. 09CA10, 2009-Ohio-4325, ¶ 28; *In re Smith* at 505. But even if the opinion does set forth controlling law, the juvenile court abused its discretion by relying on Juv.R. 9 to dismiss the complaint against D.S.

First, unlike in *In re M.D.*, D.S. "advances no argument that the underlying conduct was innocent." *In re T.C.* at ¶ 28. As stated in *In re M.D.*, "[a]djudicating a child as 'delinquent' under circumstances where, as here, the child has neither committed a crime nor violated a lawful order of the juvenile court is obviously contrary to R.C. Chapter 2151." *In re M.D.* at 152. Although the rest of the opinion was based on the "assum[ption]" that a rape had occurred, *id*., the fact that no rape occurred was central to the opinion's analysis. As one court stated, "Notwithstanding the Supreme Court's rhetoric, its legal basis for the *M.D.* decision was that complicity cannot be charged unless an underlying offense is actually committed." *In re Mark B.*, 6th Dist. No. L-99-1066 (Feb. 11, 2000).

Second, the opinion in *In re M.D.* discusses at length the specific facts in that case that made it "appropriate" for dismissal. Here, however, the juvenile court did not rely on any specific facts about D.S. himself or about the circumstances surrounding the incidents. Rather, the juvenile court's dismissal under was based on nothing more than the nature of the charges.

For example, the juvenile court stated that there were alternative treatment methods "available," and that if D.S.'s and D.M.'s parents were unable to provide the necessary treatment

a dependency action could be filed. But alternative treatment methods are "available" in *every* case. What makes a case "appropriate" for a Juv.R. 9(A) dismissal is not the availability of alternative treatment, but hard evidence that "other community resources" will "ameliorate situations brought to the attention of the court" better than formal court action. Juv.R. 9(A).

This is where the initial screening becomes crucial. Under Juv.R. 9(B), the purpose of such a screening is to determine "whether the filing of a complaint is in the best interest of the child and the public." In *In re M.D.*, the complaint violated the Cuyahoga County Juvenile Court's specific intake policy to divert any statutory rape case involving under-13 children. There is no such policy in Franklin County, and there is no indication in the record that the intake screening conducted in this case yielded any information that would suggest that alternative treatment methods would be more effective than formal court action. That is to say, the record reveals no information from the initial intake screening that this is an "appropriate" case for dismissal under Juv.R. 9(A). The juvenile court could only speculate that the alternative treatment methods would "ameliorate [the] situation[]." Juv.R. 9(A).

Furthermore, the opinion in *In re M.D.* relied heavily on the mental health counselor's report and the "battery of tests and evaluations" performed on M.D. *In re M.D.* at 153-154. The juvenile court here, however, did not rely on any such information about D.S. To the contrary, from all that appears in the juvenile court's decision, it would apply the same analysis and dismiss *any* case in which a child under 13 is charged with gross sexual imposition under R.C. 2907.05(A)(4). But the simple fact that a complaint charges an under-13 child under R.C. 2907.05(A)(4) is not enough to establish the case as "appropriate" for dismissal under Juv.R. 9(A). *In re Amos*, 3rd Dist. No. 3-04-07, 2004-Ohio-7037, ¶ 8 (fact that the offender was under 13 years old "does not alone make the conduct of the type governed by *In re M.D.*").

In short, the juvenile court dismissed the complaint against D.S. based on a near non-existent factual record. Indeed, in requesting dismissal under Juv.R. 9, D.S. relied on nothing more than the fact that this case is a sex case involving juveniles. D.S. offered nothing *specific* about this case that would make it "appropriate" for dismissal under Juv.R. 9(A). Despite having ample opportunity to do so, D.S. presented no evidence that he was simply "playing doctor" or that that his conduct could be characterized as "childhood curiosity and exploration." Whereas the opinion in *In re M.D.* relied heavily on the mental health counselor's report and the "battery of tests and evaluations" performed on M.D., the juvenile court here knew virtually nothing about D.S. other than his age.

The following passage—although involving a post-trial dismissal under Juv.R. 29(F)(2)(d)—is particularly relevant here:

> Unfortunately, in contrast with the *Smith* and *M .D.* cases, *supra*, there is virtually nothing in this record to support the conclusions of the trial court as to the "best interest of the child and the community." Instead, the juvenile court in this case appeared to rely on factors which were essentially irrelevant to the charged crime as well as the court's own indication that even though true, these allegations "should not be the basis of a criminal conviction" and that the criminal statute in this case "was not meant to apply to this type of situation."
>
> For example, the court noted that the sexual encounter was consensual and non-violent, factors which may mitigate the possible disposition but are not defenses to the charge and do not directly bear upon the best interest of the child and the community. The court also declared that a finding of guilt would expose the defendant to severe criminal penalties; however, there was no character evidence, psychological reports, or other impact evidence in the record to assist the trial court in determining, or to assist this Court in reviewing, whether a dismissal was, in fact, in the best interest of the child and the community. Moreover, submitting the case entirely on the joint stipulation of counsel deprived the court of the opportunity to observe the testimony of any witness, the alleged victim, or the defendant. As a result, and perhaps most importantly, there are no relevant factual or legal determinations in

> the record to distinguish the Juv. R. 29(F)(2)(d) dismissal of this case from every other juvenile delinquency case involving a twelve year old and a fifteen year old under the same charge.
>
> In the absence of anything in the record to establish why a dismissal was in the best interest of the child and the community, and in the absence of any findings by the trial court directed specifically to the best interest of the child and the community, we cannot conclude that the provisions of Juvenile Rule 29(F)(2)(d) were followed in this case. Under these circumstances we must find that the trial court's dismissal of the charges constituted an abuse of discretion.

*In re Arnett* , 3rd Dist. No. 5-04-20, 2004-Ohio-5766, ¶¶ 17-19.

One last point: Juv.R. 9 is phrased in non-mandatory terms—"should" and "may"—and therefore imposes no substantive requirements on delinquency complaints. Nothing in Juv.R. 9 gives juvenile courts the positive authority to dismiss a delinquency complaint. But even if Juv.R. does confer this authority, the Tenth District majority correctly held that the trial court abused its discretion in dismissing the complaint under Juv.R. 9. Further review is unwarranted.

> **Response to Second Proposition of Law:** R.C. 2907.05(A)(4) is not unconstitutional as applied to juveniles under 13 years old.

Statutes are presumed constitutional, and the burden is on the person challenging the statute to prove otherwise beyond a reasonable doubt. *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶ 17, citing *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, ¶ 4. Moreover, "[i]f a party challenges a statute on the ground that it is unconstitutional as applied to a particular set of facts, 'the burden is upon the party making the attack to present clear and convincing evidence of a presently existing state of facts which makes the Act unconstitutional and void when applied thereto.'" *State v. Small*, 162 Ohio App.3d 325, 2005-Ohio-2291, ¶ 20 (10th Dist.), quoting *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231 (1988), citing *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329 (1944), paragraph six of the syllabus.

This Court in *In re D.B.* held that statutory rape under R.C. 2907.02(A)(1)(b) "is unconstitutional as applied to a child under the age of 13 who engages in sexual conduct with another child under 13." *In re D.B.* at syllabus. This Court stated that R.C. 2907.02(A)(1)(b) is unconstitutionally vague when applied to children under 13 because "when two children under the age of 13 engage in sexual conduct with each other, each child is both an offender and a victim, and the distinction between those two terms breaks down." *In re D.B.* at ¶ 24. This Court noted that D.B. and the other child engaged in sexual conduct "with each other," yet only D.B. was charged. *Id*. at ¶ 26. According to this Court, these facts "demonstrate that R.C. 2907.02(A)(1)(b) authorizes and encourages arbitrary and discriminatory enforcement when applied to offenders under the age of 13." *Id.*

This Court further held that R.C. 2907.02(A)(1)(b) violates equal-protection principles because, according to the Court, when two individuals under 13 engage in sexual conduct, "both parties could be prosecuted as identically situated," and charging one but not the other "violates the Equal Protection Clause's mandate that persons similarly circumstanced shall be treated alike." *Id*. at ¶ 30.

The State respectfully submits that *In re D.B.* is flawed and should be overruled. At the very least, the holding in *In re D.B.* should not be extended to R.C. 2907.05(A)(5) because that statute is markedly different from statutory rape under R.C. 2907.02(A)(1)(b). Unlike R.C. 2907.02(A)(1)(b), which prohibits sexual *conduct*, R.C. 2907.05(A)(1)(b) prohibits sexual *contact*. "Sexual contact" means "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

The differences between sexual conduct and sexual contact are significant. Not only do the two definitions describe different acts, but sexual contact contains a "purpose" element that is absent from sexual conduct. R.C. 2907.05(A)(4) "requires a specific intent behind the touching—the touching must be intended to achieve sexual arousal or gratification." *State v. Dunlap*, 129 Ohio St.3d 461, 2011-Ohio-4111, ¶ 25.

Because R.C. 2907.05(A)(4) contains a "purpose" element, multiple courts have refused to extend *In re D.B.* to R.C. 2907.05(A)(4). The Second District in *In re T.A.* stated:

> * * * Statutory Rape only involves the offender engaging in a proscribed act, regardless of his intent. Gross Sexual Imposition involves both a proscribed act and a purpose—the purpose to cause sexual arousal or gratification. This permits ready differentiation between victim and offender. As the State notes, a two-year-old is not capable of forming the mens rea necessary to commit the offense.
>
> We conclude that, in this case, R.C. 2907.05(A)(4) is neither impermissibly vague nor a violation of Equal Protection. T.A.'s First Assignment of Error is overruled.

*Id*. at ¶¶ 26-27.

The Eighth District reached the same conclusion in *In re K.A*:

> Thus, although both the statutory rape statute and gross sexual imposition statute involve children under the age of 13, they require a different mens rea. Statutory rape is a strict-liability offense because it does not require a mens rea. Statutory rape only requires engaging in a proscribed act. Gross sexual imposition pursuant to R.C. 2907.05(A)(4), however, requires the offender to engage in certain contact with the 'purpose' to cause sexual arousal or gratification. The means rea of 'purpose' to cause sexual arousal or gratification provides a way to differentiate the victim from the offender.
>
> There is no arbitrary and discriminatory enforcement because only K.A. had the purpose of sexually arousing or gratifying either person. Therefore, R.C. 2907.05(A)(4) is not impermissibly vague nor a violation of equal protection. *See in the*

> *Matter of: T.A.*, 2nd Dist. Nos. 2011-CA-28, 2011-CA-35, 2012-Ohio-3174.

*Id*. at ¶¶ 11-12.

The First District in *In re K.C.* recently joined the list of courts finding that *In re D.B.* does not apply to R.C. 2907.05(A)(4):

> The mens rea element distinguishes gross sexual imposition under R.C. 2907.05(A)(4) from statutory rape. It provides a way to differentiate between the victim and the offender. *See In re K.A.*, 8th Dist. Cuyahoga Nos. 98924 and 99144, 2013-Ohio-2997, 2013 WL 3582013, ¶ 11; *In re T.A.*, 2d Dist. Champaign Nos. 2011–CA–28 and 2011-CA-35, 2012-Ohio-3174, 2012 WL 2866605, ¶ 26.
>
> There is no arbitrary and discriminatory enforcement against K.C. because she had the purpose of sexually arousing or gratifying either person, while the victim did not. Therefore, R.C. 2907.05(A)(4) is not impermissibly vague as applied to K.C., and it does not violate her right to equal protection. *See In re K.A.* at ¶ 12; *T.A.* at ¶ 27. We overrule K.C.'s first assignment of error.

*Id*. at ¶¶ 13-14.

These cases recognize that when two under-13 juveniles engage in sexual conduct, both children commit statutory rape under R.C. 2907.02(A)(1)(b). But when sexual contact occurs between two under-13 children, it is not always true that both children commit gross sexual imposition under R.C. 2907.05(A)(4) because one of the children might not have the requisite mens rea. It is not difficult to imagine scenarios where a child commits the actus reus for sexual contact, but lacks the mens rea. For example, a child might be too young to be capable of being motivated by sexual arousal or gratification. *In re T.A.* at ¶ 26. Or, a child may have a physical or mental disability that prevents him or her from possessing the requisite mental state. Or, a child may simply have some non-sexual purpose for engaging in the activity—i.e., the child is "playing doctor."

Thus, when sexual contact occurs between two children under 13, it is not always the case that "each child is both an offender and a victim." *In re D.B.* at ¶ 24. When one child acts with a sexual purpose and the other does not, or when one child engages in acts that constitute sexual contact and the other does not, then the distinction between offender and victim does not "break[] down." *Id*. Nor are the two children "identically situated" in such a scenario. *Id*. at ¶ 30. In *In re D.B.*, the facts alleged in the complaint made both children guilty of statutory rape. *Id*. at ¶ 25. But here, the complaint alleges only that D.S. engaged in sexual contact. The complaint does not allege any sexual contact on the part of D.M. There is no evidence in the record that D.M. engaged in sexual contact (i.e., acted with a sexual purpose) or was otherwise "identically situated" to D.S. Indeed, the only information in the record discloses about D.M. is his age.

That two of the counts against D.S. could have charged him with statutory rape under R.C. 2907.02(A)(1)(b) has no bearing on whether R.C. 2907.05(A)(4) is unconstitutionally applied to this case. It is often the case that the same conduct can be charged under multiple statutes. "The general rule is that prosecutorial discretion as to what offense is charged when two statutes proscribe the same conduct is not unconstitutional unless exercised to discriminate against a particular class of defendants." *State v. Wilson*, 58 Ohio St.2d 52, 55 (1979), n. 2.

Equally without merit is the juvenile court's finding that R.C. 2907.05(A)(4) is unconstitutionally applied to this case because D.S. and M.S. are "quite close in age." At the time of the incidents, D.S. was three months past his twelfth birthday, and D.M. was two months shy of his tenth birthday. At these ages, an age gap of 2 years and five months can be significant. A twelve year old child can be much more physically and emotionally advanced

than a child who has yet to reach his tenth birthday. A twelve year old may be several years into puberty, whereas a nine or ten year old may have yet to begin or only recently begun puberty.

While the age disparities in *In re T.A.*, *In re K.A.*, and *In re K.S.* were all greater than the 29 months separating D.S. and M.S., none of the holdings in those cases turned solely on the ages of the individuals involved. Age is no doubt a factor in determining whether someone acts with a sexual purpose. After all, some children are so young that they are incapable of forming a sexual purpose. *In re T.A.* at ¶ 26. But age is by no means the only factor. Again, there can be any number of reasons why an under-13 child may engage in the actus reus for sexual contact but not have the requisite sexual purpose. As stated in the majority opinion below, "identifying the victim and offender is nonetheless possible through the 'purpose' element of R.C. 2907.05(A)(4)—no matter the age span between the minors involved." App.Op. at ¶ 17.

The Tenth District correctly held that D.S. failed to show that R.C. 2907.05(A)(4) is unconstitutional as applied to a juvenile under 13 years old. This proposition of law warrants no further review.

## CONCLUSION

For the foregoing reasons, jurisdiction should be declined.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand-delivered this day, July 8, 2016, to DAVID L. STRAIT, 373 South High Street-12th Fl., Columbus, Ohio 43215; Counsel for Appellant.

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