

# The Supreme Court of Ohio

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State of Ohio,	)	
	)	
Plaintiff/Appellee,	)	
	)	
v.	)	On appeal from the Sixth District Court
	)	of Appeals Case No. WD-16-053
Michael C. Horn,	)	
	)	
Defendant/Appellant.	)	

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## APPELLANT'S APPLICATION FOR RECONSIDERATION OF JURISDICTION

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This court declined jurisdiction with Justices French and Donnelly dissenting.

The state's memorandum opposing jurisdiction misstated the law. Because this may have swayed this court's decision, we ask for reconsideration.

Here is Horn's proposition of law, which primarily concerns the mental-condition element of R.C. 2907.02(A)(1)(c):

When the state's theory of the "mental-condition" element in a rape prosecution under R.C. 2907.02(A)(1)(c) is that the alleged victim has a general inability to cope, it must offer expert opinion or objective evidence, such as an I.Q. report. Only after this threshold showing of a potential "mental condition" is made may the factfinder infer that it "substantially impairs" the alleged victim's ability to resist or consent. The alleged mental condition may not itself be inferred.

The state in its memorandum opposing jurisdiction offered a non-responsive "counter-proposition" that would eliminate the mental-condition element by omission.

It then on page 3 insisted that "the fulcrum of why Horn argues that this case is of public or great general interest stretches from the argument that this Court has never defined 'substantial impairment,' as it relates to sufficiency of the evidence claims."

But Horn's proposition does *not* hinge upon the "definition" of substantial "impairment"—a noun that does not appear in the statute. In truth, Horn raises an issue of first impression respecting the primacy of the mental-condition element. The state's

focus on a so-called “substantial impairment” in lieu of addressing the mental-condition element punctuates the lack of significant precedent on that element.

“This court has *not* extensively discussed R.C. 2907.02(A)(1)(c).” *State v. Horn*, --- N.E.3d---, 2020-Ohio-960, (“*Horn I*”), ¶8. The mental-condition element is now fully ripe for review after the appellate court’s decision on remand from *Horn I*. And the law-of-the-case doctrine is irrelevant because it forbids inferior courts from disregarding decisions of superior courts. That doctrine is merely a rule of practice—not of substantive law—and does not bind this superior court of last resort.

### CONCLUSION

If competent, sufficient evidence of a “mental” condition is offered, jurors may infer that it substantially “impaired”—a past tense verb as used in the statute—the other person’s ability to consent or resist to sexual conduct.

But Horn’s proposition asks a distinctly important question: what type evidence is required to prove a “mental condition”?

This element, for example, is what separates rape from sexual battery under R.C. 2907.03(A)(2) and should be considered by this court on the merits.

Respectfully submitted,

/s/ Andy Mayle

## CERTIFICATE OF SERVICE

I emailed a copy of this memorandum in support of jurisdiction to *dharold@co.wood.oh.us* on October 16, 2020.

/s/ Andy Mayle