

**AARON M. DEMKE**

Legal Advocate Attorney  
State Bar No. 025978

**JILL L. EVANS**

Deputy Legal Advocate Attorney  
State Bar No. 015051  
316 N. Fifth Street  
Kingman, AZ 86402  
Telephone: 928 / 753-0782  
Mobile: 928-814-4557  
Fax No.: 928 / 718-7175  
Jill.evans@mohavecounty.us  
Attorney for Defendant

**IN THE SUPREME COURT  
STATE OF ARIZONA**

THE STATE OF ARIZONA,	)	Supreme Court No. CR-21-0239-PR
	)	
Plaintiff,	)	1 CA-CR 19-0353
	)	
	)	
v.	)	<b>RESPONSE TO STATE’S</b>
	)	<b>PETITION FOR REVIEW</b>
<b>Kevin Harry Moninger,</b>	)	
	)	Mohave County CR 2018-01598
Defendant.	)	
_____	)	

**ISSUES PRESENTED FOR REVIEW**

- 1. Whether the Court of Appeals erred when it held that the unit of prosecution for A.R.S. 13-3554 (luring a minor for sexual exploitation) is a defendant’s “course of conduct” rather than each separate text message in an ongoing conversation soliciting sexual conduct?**
- 2. Whether the Court of Appeals erred when it held that first-degree luring offenses are probation eligible?**

## **FACTS RELEVANT TO PETITION FOR REVIEW**

In an Opinion, Division One of the Court of Appeals vacated Counts 2 and 3 based on a double jeopardy multiplicity constitutional violation, found that the Luring a Minor for Sexual Exploitation offense pursuant to A.R.S. 13-3554 is a probation available pursuant to the Dangerous Crimes Against Children statute, A.R.S. 13-704, and remanded the matter for re-sentencing on Counts 1 and 4. (*State v. Moninger*, 1 CA CR 19-0353 (App. 6/8/2021), attached hereto).

The Majority held that Moninger committed only one violation of A.R.S. 13-3554 when he solicited sex with a minor in an ongoing text conversation that continued for three days leading up to the defendant's arrival at a hotel room to meet the minor.

The state had charged and convicted Moninger for three counts of Luring, by separating the charge into three counts for each day of the ongoing text message conversation. In a 2-1 Opinion, the court held that, although 13-3554 allows for separate convictions for distinct offers or solicitations of Sexual Conduct, in Moninger's case, there was only one, since there was only one "course of conduct." Moninger, ¶¶ 39-45. The Court held that the statute did not intend to punish each statement or act or

text message soliciting sexual conduct as a separate solicitation, but rather, a course of conduct as solicitation, including “persistent conduct inherently consisting of multiple actions that may be necessary to achieve a specific result,” *Id.* at ¶¶ 14, which in *Moninger*’s case, was a “statement or series of statements requesting sexual conduct,” made up of multiple text messages all referring to the same proposed sexual encounter. *Id.* at ¶¶ 12, 14.

The court further held that although there may be additional offenses of “Luring,” they must be shown by distinct conduct. *Id.* at ¶ 38. There must be proof of two or more separate courses of conduct based on the “timing of the defendant’s actions, the presence of intervening events, whether a specific criminal impulse arose during the course of conduct, and the number of victims.” *Id.* at ¶ 33. Whether a defendant has committed multiple violations of “soliciting sexual conduct” from the same victim will depend on whether the defendant made statements proposing distinct occasions of sexual conduct. *Id.* at ¶ 38. Factors to analyze to determine the unit of prosecution may include “the form of sexual behavior suggested, whether the defendant employed different strategies in communicating with the victim; the victim’s responses to the defendant’s proposals; the amount of time separating the defendant’s proposals; any intervening events between the

requests; and any other facts showing a new or otherwise distinct motivation or criminal impulse.” Id.

The court then rejected the state’s argument in *Moninger* that temporal interruptions and topic changes separated the three counts. Id. at ¶ 39. Instead, the communication all concerned the sex that they had agreed to meet and have. The victim accepted the invitation on the first day and never wavered thereafter. Id. at ¶ 41. The court thus vacated the second two counts of “Luring” as multiplicitous in violation of double jeopardy. Id. at ¶ 45.

The court further found that probation was available pursuant to A.R.S. 13-705, and remanded for re-sentencing.

### **I. REASONS REVIEW SHOULD BE DENIED**

Reasons this Court grants review include, “among others, that no Arizona decision controls the point of law in question, that a decision of the Supreme Court should be overruled or qualified, that there are conflicting decisions by the Court of Appeals, or that important issues of law have been incorrectly decided.” Ariz. R. Crim. P. 31.21(d)(1)(C).

The State asks this Court to adopt the Dissenting opinion’s analysis and reverse the Majority’s holding on both issues. On the contrary, this court should deny review, as the holdings are correct.

As discussed below, review should be denied as to Issue #1 because the Court's analysis is correct and does not conflict with this Court's precedent.

Review should be denied as to Issue #2 because the Court's holding is correct and does not violate Separation of Powers.

1. **Review should be denied of Issue #1 because the Court's analysis of the unit of prosecution for Luring a Minor is correct and does not conflict with this Court's precedent.**

The Court below correctly held that the unit of prosecution for Luring a Minor for Sexual Exploitation ("Luring") is a communication or a conversation, whether at one time or ongoing, as one course of conduct, about offering or soliciting sexual conduct with a minor under 15.

**A. The word "Solicit" was properly construed.**

The State first argues that the Court misconstrued the statute by failing to read "soliciting" in conjunction with the "inherently single act-based term "offering." (Response at 5). The state did not charge the defendant with "offering" and thus the Court did not analyze the term. *Opinion*, at ¶22 n.4. However, there is no meaningful or relevant difference in interpreting the meaning of solicitation and offer here. An offer to have sexual intercourse with a victim or fictitious victim is no different from a request for the victim or fictitious victim to have sexual intercourse with the perpetrator. In each

case, an offer or solicitation can be based on “a single act” or an ongoing conversation. Further, the Court recognized the possibility that a single request could qualify as an offense by stating that Luring is a communication or conversation, “*whether at one time or ongoing.*” Thus, for example, there can be one offer or solicitation to meet the victim on one day to perform sexual acts for her, or to solicit sex from her, and the same offer can be in one brief conversation, or in one ongoing three-day conversation. Thus, the addition of “offer” adds nothing to the analysis, and does not provide any further context for the meaning of solicitation. “Offer” is not an “inherently single-act-based term,” in the same way as solicitation is not.<sup>1</sup>

**B. The Court’s reliance on inchoate-offense case law does not contravene this Court’s holding in *Mejak v. Granville*.**

The State argues that the Court’s reliance on inchoate-offense case law is problematic for three reasons. First, according to the State, “it defies this Court’s holding that the crime of luring is complete when a person offers or solicits sexual conduct with a minor,” citing *Mejak v. Granville*, 212 Ariz.

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<sup>1</sup> As the court noted, in *State v. Padilla*, 169 Ariz. 70, 72 (App. 1991), the court held that an offer to sell drugs in violation of A.R.S. 13-3408 was not overbroad because the statute did not criminalize protected speech, but instead, proscribed a course of criminal conduct that may be carried out by speech. Offering to sell drugs is using speech as a “course of conduct” and is analogous to offering or soliciting sex from a minor using speech.

555, 558, ¶18 (2006). On the contrary, *Mejak* simply noted that solicitation was a complete crime if under the then statutory language that the victim was a minor or a police officer posing as a minor, regardless of whether the defendant actually showed up and had sex with a minor. Additionally, *Mejak* does not answer the question of what constitutes an offer or solicitation, and when is it ongoing as opposed to complete? The state also mistakenly relies on *State v. Hollenback*, 212 Ariz. 12, 15, ¶¶ 6-7 (App. 2005), stating that it “reject[] (the) equivalency between luring and the inchoate offense of soliciting sexual conduct.” (*See* Response at 7). On the contrary, *Hollenback* merely noted that the luring statute was more specific and therefore governed over the more general solicitation statute, since it included the element “knowing or having reason to know that the other person is a minor,” and provided for sentencing under A.R.S. § 13–604.01, the dangerous crimes against children statute, when the victim is under the age of fifteen. It does not support the argument that Luring was held to be based on a differently defined element of solicitation.

Second, the State argues that the comparison to inchoate offenses “fails to address the statute’s purpose of preventing harm arising from the act of soliciting sex itself.” But again, this begs the question of when does a

solicitation begin and end? The State and Dissent argue that the focus should be on the harm that a victim suffers at each reference to sexual conduct in an ongoing conversation or course of conduct. But as the majority explained at length, the focus of the statute is on the defendant's intent and actions, rather than the actual impact on a particular victim, since the statute allows for prosecution even where the victim is fictitious. *See Opinion* at ¶49. *See* A.R.S. 13-3554 (no actual harm to victim required because no defense "victim" not a minor; 13-705(P) (no defense "victim" not a minor under fifteen years of age or is otherwise fictitious). And the harm is not based on the injury to a victim. *Id.* at ¶50. The purpose is to punish luring, even if the defendant as in this case never showed up on Friday to complete the solicited offense of having sex with the minor.

The harm in this chapter is consistent with the other crimes in the same chapter, which involve using the internet or other communication devices to harm victims. *See Opinion* at ¶15. The legislature has chosen to punish these crimes more severely. *C.f. State v. Snyder*, 801 N.E. 2d 876 (Ohio 2003) (purpose of statute which prohibits solicitation for sexual activity when the other person is a law enforcement officer posing as a minor and is therefore not actually harmed focuses on prohibiting adults from using

communication to take advantage of minors and does not violate free speech). Thus, the state could have charged solicitation with a lesser penalty. This does not support the State and Dissent's analysis that each statement alone is a completed act of solicitation, different from inchoate solicitation case law.

**C. The Court's legislative-intent analysis is sound. The Court correctly concluded that a narrower definition of solicit would result in absurd results by punishing solicitation more severely than the solicited offense.**

The Court's legislative-intent analysis is sound. The Court correctly concluded that a narrower definition of solicit would result in absurd results by allowing for the punishment of solicitation more severely than the solicited offense. As the Court below noted, this is a unit of prosecution analysis, and as such, it is appropriate to consider whether a proposed unit of prosecution "would inflate the number of potential charges - and consequently - the total possible punishment - defendant would face in a manner inconsistent with the purpose and structure of the legislative scheme." *Opinion* at P 46. Further, contrary to the State's argument, *Ladner v. United States*, 358 U.S. 169 (1958) is analogous. *Id.* And, while the State may charge numerous counts of Luring, this still begs the question of what constitutes a completed crime of soliciting sexual conduct to support a

crime of the Luring as intended by the legislation. Although the prosecution has “broad charging discretion,” the Double Jeopardy Clause protects against multiplicitous convictions based on the court’s finding of what constitutes a unit of prosecution, and here, protects against the arbitrary division of a continuous conversation into “as many luring charges as it wishes.” *Opinion* at P51. And, as in *Ex Parte Snow*, 120 U.S. 274 (1887), if the State and Dissent prevail, there would be nothing stopping the State from charging dozens and dozens of solicitations from the lengthy text message conversation about one ongoing solicitation for the same sexual event to take place at one time in the future, resulting in a far lengthier sentence than that which would result from a single act of sexual conduct with a minor, and which would be an absurd result. The Court’s analysis is sound.

**D. The Court’s six factor test is neither “unworkable” nor does it “create perverse incentives.”**

The Court’s test is not unworkable, nor does it “create perverse results.” First, the State misstates the Court’s test. The Court held that to prove multiple violations of luring, the State must show “[a] distinct impulse to persuade or induce the minor to engage in a new occasion of sexual conduct.” *Opinion* at ¶51. The State interprets this to mean that the Court is requiring “only a single inquiry – i.e., on separate occasions, did Moninger

offer or request different sex acts?” (*See* Response at 10-11). This misstates the Court’s test. Rather, to answer the above-stated questions, the court set out at length a concrete workable non-exhaustive six factor test, similar to numerous other cases which have analyzed a similar question. Whether or not a different sex act is being requested is only one factor to consider and not even conclusive.

The State argues that “even on its own terms, there are two unworkable factors,” to wit: the victim’s responses and whether a perpetrator suggests or invites distinct forms of sexual behavior. As to the first, the victim’s response is relevant to the inquiry of when a solicitation starts and ends. *Mejak* does not answer this question. A victim need not respond at all for the offense to be completed. But the victim’s responses are relevant to the question of whether or not there was a solicitation. There has to be a victim, or at least a fictitious victim involved in the conversation. There is no crime of soliciting a rock.

As to the second, “whether a perpetrator suggests or invites distinct forms of sexual behavior,” the State and Dissent misdirect the focus to the harm to the victim, as analogous to multiple offenses in a sex crime event, rather than on the actions of the defendant, as previously noted. The victim may be

fictitious and not harmed. Even the cases addressing consecutive sentences for multiple sexual acts against one victim require distinct sexual acts or courses of conduct to support separate charges, and do not allow multiple charges for a single ongoing sexual act, which the State and Dissent are promoting here. *See* Opinion at ¶37 (to support separate charges during one sexual event, defendants must be shown to have embarked on distinct acts or courses of conduct, motivated by different impulses, each time they engaged in a new sex act, even when the time between each act was brief).

Finally, the test ensures the avoidance of absurd or perverse results, or that of allowing the state to artificially divide one solicitation into dozens and dozens of charges. The likelihood of a defendant sending the “same message to the victim every day asking her to lose her virginity,” without other circumstances arising, is a very unlikely exaggeration, unlike the likelihood of arbitrarily dividing a conversation into different counts, based for example, on the artificial division based on different dates, which was done in this case.

1. **Review should be denied of Issue #2 because the Court did not discard statutory interpretation principles or violate the separation of powers doctrine.**

The Court correctly held that A.R.S. 13-705(E) permits probation as a

possible sentence for Luring offenses, based on the conditional statutory language of subsection E which states “if” a defendant convicted of luring is sentenced to prison. Further, that the interpretation was supported by the Arizona Supreme Court Criminal Sentencing Chart.

The State argues that the Court did not rely on the “plain language” of the statute, citing A.R.S. 13-705(H), which only excepts (F) and not (E) from mandatory prison sentences. (Response at 14). On the contrary, as the Court explained, the mandatory prison language of 13-705(H) conflicts with the conditional prison language in 13-705(E), and since both apply to luring offenses, the statute is therefore ambiguous. As such, the court was unable to resolve the ambiguity based on the language alone.

A statute must be read in its entirety and in context. The State argues that subsections E and H can be harmonized, in that H must refer to first degree luring offenses, while E must refer to second degree offenses. And that as such, probation would be available for second degree luring offenses only. But there is no offense of second degree or preparatory Luring. Luring is a completed offense and therefore a first-degree offense. There is no crime of solicitation to commit solicitation. There is no crime of attempted luring as stated in *Mejak*. The legislature clarified this by amending the statute in

2007 after *Mejak* to exclude a possible attempt, by making the offense complete even where the victim was any adult posing as a child, not just a police officer posing as a child.

Finally, the Court did not apply the legislative acquiescence doctrine, but instead pointed out that the lack of legislation in light of the sentencing chart, and also in light of numerous intermediary appellate case holdings that probation is available for luring, is just additional evidence of ambiguity. Once ambiguity was established, the court correctly applied the rule of lenity. *See Opinion* at ¶58.

#### **IV. CONCLUSION**

For all of the foregoing reasons, this Court should deny review.

Respectfully submitted,

AARON M. DEMKE, 025978  
Legal Advocate Attorney

Jill L. Evans

By: **JILL L. EVANS**, 015051