ARIZONA SUPREME COURT

STATE OF ARIZONA	)	Supreme Ct. No. CR-21-0239
	)	
Appellee,	)	1 CA-CR 19-0353
	)	
	)	
V.	)	MOHAVE COUNTY
	)	
State v. Kevin Harry Moninger,	)	Superior Court
	)	No. S8015CR201801598
Appellant.	)	
	)	
_____	)	

APPELLANT'S SUPPLEMENTAL BRIEF

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QUESTIONS PRESENTED FOR REVIEW

Is Luring a Minor for Sexual Exploitation pursuant to A.R.S. 13-3554 an offense based on a "course of conduct" rather than on each separate statement or text message in an ongoing conversation soliciting sexual conduct?

Is the offense of Luring a Minor for Sexual Exploitation pursuant to A.R.S. 13-3554 probation eligible?

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INTRODUCTION

Moninger was convicted by jury of Counts 1-3, Luring a Minor for Sexual Exploitation, and Count 4, Attempted Sexual Conduct with a Minor. 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. 13-705 and remanded the matter for re-sentencing on Counts 1 and 4. *State v. Moninger*, 251 Ariz. 487 (App. 2021).

The Majority held that Moninger committed only one violation of A.R.S. 13-3554 when he solicited sexual conduct 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 on Friday. 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 multiplicious 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.

Thereafter, the state filed a petition for review raising the questions for review as stated above, which this court granted on August 25, 2022.

ARGUMENT

I. Luring a Minor for Sexual Exploitation pursuant to A.R.S. 13-3554 is an offense based on a "course of conduct" rather than on each separate statement or text message in an ongoing conversation soliciting sexual conduct.

After extensive analysis, the *Majority* below correctly held that the unit of prosecution is the course of conduct, rather than each statement interpreted as a single act, for an occasion of sexual conduct with the defendant. *Majority*, at ¶38.

A. The statutory language, context and purpose supports the holding that a unit of prosecution for a distinct offense of Luring is based on a "course of conduct" rather than on each separate statement soliciting sexual conduct.

"[T]he statutory definition of the crime determines the scope of conduct for which a discrete charge can be brought," known as the "allowable unit of prosecution." *State v. Jurden*, 239 Ariz. 526, 529, ¶11 (2016). Arizona's "Luring" statute provides the following:

A.R.S. 13-3554. Luring a minor for sexual exploitation

> **A.** A person commits luring a minor for sexual exploitation by offering or soliciting sexual conduct with another person knowing or having reason to know that the other person is a minor.

The *Majority* correctly concluded that the term soliciting as charged in this case is ambiguous, since it could refer to a single act or "repetitive or persistent conduct inherently consisting of multiple actions that may be necessary to achieve a specific result." *Majority*, at ¶¶12, 13.

Where a statute is ambiguous as to a unit of prosecution, a court will analyze its language, context, history, purpose, effects. *Majority* at ¶¶12-14. If still unclear, then the rule of lenity is applied. *State v. Jurden*, at ¶13.

After extensive analysis, the *Majority* correctly held that the unit of prosecution is the course of conduct, rather than each statement interpreted as a single act, for an occasion of sexual conduct with the defendant. *Majority*, at ¶38.

In addition to the analysis of "soliciting" set forth by the *Majority*, the holding is also supported by the additional statutory language of the term "Luring." The term "Luring," is contained in both the title and body of the statute. To "lure" or

"luring" may be defined as "to persuade someone to go somewhere or do something by offering pleasure or gain." *People v. Vara*, 68 N.E.3d 1018, ¶40 (Ill. 2016), Or, similarly, as "tempting a person to do something or to go somewhere, especially be offering some form of reward." Oxford Languages Dictionary (2022). Thus, by its plain language, the statute is prohibiting the adult perpetrator from tempting, persuading or enticing a targeted minor to engage in sexual conduct, with the adult, before the actual sexual event takes place, whether or not the minor agrees, and whether or not there is an actual attempt or actual sexual conduct. Any attempted sexual conduct or actual sexual conduct are separately punished, as the attempt was in this case (Count 4).

In addition, additional context within the other provisions of Chapter 35.1 provide support for the same course of conduct conclusion. The term soliciting or offering may be based on continuous statements or conversations based on a reading of the plain language of the crime of Aggravated Luring a Minor for Sexual Exploitation as set forth in A.R.S. 13-3560. That statute makes "Luring" an aggravated or more serious offense by using a 'visual depiction" for "initiating or engaging in communication" where "by means of the communication, offers or solicits sexual conduct with the minor." *Id.* The statute implies the possible continuous nature of the "offer or solicitation" by its plain language, stating that the "offer or solicitation may occur before, contemporaneously with, after or as an

integrated part of the transmission of the visual depiction." A.R.S. 13-3560(A)(1)(2). Thus, by its language, it acknowledges that an offer or solicitation may be continuous in nature.

The "primary purpose" of the statute is also considered when determining a unit of prosecution. *State v. Jurden*, at ¶12. The *Majority* correctly found that the primary evil or harm of this statute is the targeting of a child by an adult with the enticement of sexual conduct, in order to engage in sexual conduct with the same child. The statute also seeks to deter any actual sexual conduct with the child before it happens.

In Arizona, the stated purpose of the statute generally includes "protecting all children of this state from being sexually exploited" and "prohibiting any conduct which causes or threatens psychological, emotional or physical harm to children as a result of such sexual exploitation." *Majority* at ¶¶15-16. words spoken with an intent to bring about the commission of an act of sexual exploitation are not protected speech, since there is no first amendment protection for one who speaks with the intent to persuade another to commit a crime. *New York v. Ferber*, 458 U.S 747, 756 (1982); *State v. Crisp*, 175 Ariz. 281, ¶9 (App. 1993). Here, while there may be harm caused by each distinct sexual statement within each solicitation and offer, that harm is secondary to the primary purpose of the statute,

which is punishing and deterring an adult from enticing a minor into an occasion of sexual conduct using the enticement of sex.

The *Dissent* points to the primary evil that the statute intends to prevent is the harm in each statement itself, including "grooming" behavior." *Dissent* at ¶¶65-68. The fact that grooming behavior may be harmful does not mean that the statute intended each statement to be the unit of prosecution. Evidence of grooming is typically introduced at a trial to prove sexual intent, or that otherwise innocent acts are sexually motivated. Nevertheless, the *Dissent* argues that the primary purpose of the statute is to prevent the harm of grooming a child by sending illicit text messages, as discussed in *People v. Vara,* 68 N.E. 3d 1018.

In *Vara*, the Illinois statute, which was entitled "Grooming," prohibited a person from using the internet to "solicit, lure or entice" a child to commit any sex offense. The court rejected the defendant's argument that it prohibited a defendant from luring a child to commit a sexual offense with *another person*, rather than with the defendant. The court noted that the purpose of the statute was to stop predators from using the internet to "target children for sexual abuse." *Id.* at ¶38. According to the legislative history, "grooming" "meant 'using the internet to try to seduce or entice a child' in order to commit a sexual offense." *Id.* While the court acknowledged that grooming was understood to mean "a method of building trust with a child…in an effort to gain access to the child," the court did not hold

that the statute prohibited each individual statement of solicitation because of the harm of each repeated statement. Rather, the court interpreted solicit as commonly understood which meant "to urge strongly, or to entice or lure, especially to evil." *Id.* at ¶39. And, that "lure" was defined as "to persuade someone to go somewhere or do something by offering pleasure or gain." *Id.* at ¶40. The evil that the statute intended to prevent was the defendant's enticing, seducing, or luring a child to have sex with the defendant, as is the case with the Arizona statute.

The term offering, and also luring for that matter, are ambiguous in the same way. The state did not charge the defendant with "offering" and thus the Court did not analyze the term. *Majority*, 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 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.

Further, the Majority holding does not conflict with "*Mejak v. Granville*, 212 Ariz. 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. *Mejak* does not answer the question of what constitutes an offer or solicitation, and when is it ongoing as opposed to complete.

The *Dissent* 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. The *Dissent* is correct that in the Luring statute, both the person solicited and the target of the solicitation are the same, distinguishing it from general solicitation cases. *Compare State v. Jensen*, 195 P.3d 512 (2008); *State v. Varnell*, 170 P.3d 24 (2008). But that does not mean that the statute's primary purpose here is to protect a victim from the harm of each sexual statement. It simply means that here, the person solicited and the victim or "target" of the solicitation are the same, nothing more.

The *Dissent* argues 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 Majority* at ¶49; A.R.S. 13-3554 (no actual harm to victim required because no defense "victim" not a minor; A.R.S. 13-705(Q) (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 never showed up to complete the solicited offense.

Additional context lends support. The luring statute is one of many in Chapter 35.1. Chapter 35.1 is entitled" Sexual Exploitation of Children." Each relates to the prevention of sexual exploitation and abuse of children by adults. Besides Luring and Aggravated Luring, the other provisions in Chapter 35 broadly prohibit child pornography and related offenses where adults exploit children, including the masquerading of an adult as a child during sexual conduct or in pornography, admitting minors to sexual establishments, and an adult misrepresenting their age to a minor for the purpose of committing any offense listed in A.R.S. 13-3821(A) (sex registration) with the minor. Unlike Chapter 14, that punishes actual sexual assaults, in this chapter, "Sexual Conduct" is defined in six categories, several

which relate to visual depictions for the "sexual stimulation of the viewer" as in computer crimes. *See* A.R.S. 13-3551(10).[1] *See also Majority* at ¶19 (Luring introduced as part of a computer crimes bill to address the use of computers and the internet in crimes, including sex crimes). Thus, the primary evil is the adult targeting, enticing and using children for sexual conduct.

The Dissent also relies on *State v. Rodriguez,* 251 Ariz. 90 (Div. II App. 2021) for support. However, in *Rodriguez,* the defendant was convicted of multiple counts even though his convictions arose from a single uninterrupted course of conduct of assaults involving the use of the same object and resulting in similar injuries. *Rodriguez*, at ¶¶9-11; A.R.S. 13-3623. The court found no multiplicity, since the unit of prosecution was not the event or occasion of the continuous assault, but each harm inflicted on the victim. *Id.* However, unlike the Luring statute here, the vulnerable abuse statutory language unambiguously

[1] "Sexual conduct" means actual or simulated:
(a) Sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex.
(b) Penetration of the vagina or rectum by any object except when done as part of a recognized medical procedure.
(c) Sexual bestiality.
(d) Masturbation, for the purpose of sexual stimulation of the viewer.
(e) Sadomasochistic abuse for the purpose of sexual stimulation of the viewer.
(f) Defecation or urination for the purpose of sexual stimulation of the viewer.

focused on causing particular harms, including physical injuries, abuse or endangerment.

Here, the primary evil or purpose of statute is also not affected by number of statements or number of sex acts discussed. The primary harm of targeting and enticing a minor to have sexual conduct with an offer or solicitation for the same occasion of sexual conduct is the same regardless of the number of times the same sexual event is discussed, so that permitting separate charges for each statement would not further the statute's primary purpose. *Jurden*, at ¶11; *State v. Powers*, 200 Ariz. 123 (App. 2001). The test is not whether there are multiple statements of conversations, but instead, whether as a course of conduct, each conversation gives rise to a new unit of prosecution. *See e.g. State v. Jensen*, 195 P.3d at 520, ¶33 (rejecting a "per conversation" theory of solicitation); *People v. Jacobs*, 91 P.3d 438, ¶12-13 (Colo. 2004) (finding numerous emails provided for a single count of soliciting a third person to set up a "date" with a fictitious child, where all proved a single transaction). In addition, a course of conduct analysis is appropriate, since conduct may be relevant to prove intent, *Pederson v. City of Richmond*, 254 S.E.2d 95, 99 (1979), and some conversations may be corroborating evidence of a defendant's intent. *Melina v. People*, 161 P.3d 635, 641 (Colo. 2007).

In *State v. Rios*, 252 Ariz. 316, ¶¶15-19 (Div. II App. 2021), the court found that the harassment statute was not ambiguous when it criminalized each text

message communication with each victim to support distinct crimes. However, there, the plain language of the statute clearly provided that each separate contact or communication was a distinct unit of prosecution. That is not the case here, where the terms are ambiguous. *See e.g. State v. Hall*, 230 P.3d 1048, ¶¶14-18 (2010) (Superseded by Statute) (crime of witness tampering a continuous offense based on then plain statutory language). It is then up to the legislature to clarify any contrary intent. Id. Where there is ambiguity, and no clear evidence of statutory intent, the rule of lenity must be applied by the courts. *State v. Jurden*, 239 Ariz. 526, ¶13.

Further, unlike here, the primary purpose of the statute in *Rios* was victim-directed, to protect an individual from any act that harassed. The harm was in the harassment itself, not in the deterrence of future events. Thus, the prosecutor could elect to charge one crime or multiple crimes, as long as each were separately plead and proven, pursuant to the requirements of *State v. Counterman,* 8 Ariz. App. 526 (1969). The court noted that a harassing contact under the statute could be made by either one text message or a series of texts and did not require the prosecutor to elect an arbitrary time period, as was done here. *Id*. at ¶26. The difference, however, was again, that in *Rios*, the statute unambiguously criminalized each contact (as a separate harassment). Here, unlike *Rios*, the primary purpose cannot

be the harm of each statement to a victim, since, as previously discussed, the victim or "target" may not in fact be harmed.

The *Majority* also correctly held that the "effects" of the statute otherwise interpreted would lead to unintended results, based primarily on the context of the statute in the statutory scheme, and the possible effect of punishing the offer or solicitation for sex more harshly that the actual sexual conduct or attempt. *Majority* at ¶20, *citing Jurden*, 239 Ariz. at 531, ¶23. 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." *Majority* at ¶¶46-48. The Court's interpretation is most logical based on the statutory goals of differentiating the different offenses on reasonable grounds between the level of offenses. *See* A.R.S. 13-301.

While the State is allowed to charge distinct counts of Luring, the question remains, what constitutes a completed crime of solicitating sexual conduct to support a distinct crime of the Luring as intended by the legislation. Although the

prosecution has "broad charging discretion," the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution 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." U.S. Constitution, Amendments 5, 14; *Majority* at ¶P51. And, as in *Ex Parte Snow*, 120 U.S. 274 (1887), if otherwise interpreted, 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 that that which would result from a single act of Sexual Conduct with a Minor, and which would be an absurd result. The likelihood, for example, of a defendant sending the same message to the victim every day for a year, asking her to have sex, without other circumstances arising, is a very unlikely scenario, unlike the likelihood of arbitrarily dividing an ongoing electronic conversation into different counts, based for example, on the artificial division of different dates, which was done in this case.

B. The test of whether a "course of conduct" supports one or more distinct offenses is whether the sexual conduct being solicited or offered is for a distinct occasion.

Under the *Moninger test*, 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. To prove multiple courses of conduct, the Majority analyzed *Blockburger v. United States*, 284 U.S. 299, 302, 303 (1932) and other cases, summarizing the above-state test. *Id.* at ¶32, 33.

The court also set forth a more specific test to determine whether the defendant made statements proposing distinct occasions of sexual conduct. *Majority* at ¶38. The test includes a non-exhaustive list including the form of sex solicited, different communication strategies, the victim's responses, the amount of time separating the defendant's proposals, any intervening events between the requests, and any other facts showing a new or distinct motivation or criminal impulse. *Majority* at ¶38.

The test does not mean, however, that a separate charge may be brought based on successive statements soliciting the same sexual act, which in this case was "sexual intercourse" as charged, despite the holdings of cases in sexual assault cases. Those cases deal with the question of the unit of prosecution for multiple sex acts committed on the same occasion. *See e.g. State v. Bruni*, 129 Ariz. 312, 318-320 (App. 1981); *State v. Boldrey*, 176 Ariz. 378, 381 (App. 1993). The courts have held that repeated sexual assaults, even if of the same type, during the sexual assault may be distinct crimes, because each sexual act causes an additional actual harm, and punishing the harm to the victim is the primary purpose of the statute.

Id. *See also Majority* 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). Here, there is no additional harm by repeating a solicitation for the same sex act since there is no actual harm of a sex act, as there is in sexual assault cases. Rather, the harm is complete upon the solicitation. The unit of prosecution is solicitation of one occasion, not the number of times the same sexual conduct is referenced. The harm is in each distinct solicitation for sexual conduct. There is no actual sexual conduct that is punished or many times an actual victim, as in this case.

In addition, unit of prosecution is not based on the different types of sexual conduct solicited. "Sexual conduct" for the purposes of A.R.S. 13-3554 is defined by several specific types of sexual conduct unique to this statute. *See* FN1, *infra.* The element of "sexual conduct" in the Luring statute is unitary, meaning that sexual conduct may be solicited in any of the ways listed in the statute. A jury need not agree on the "manner" in which the offense is committed. *See State v. Encinas*, 132 Ariz. 493, 496-7 (1982) (murder and felony murder); *State v. Dixon*, 127 Ariz. 554, 561 (App. 1980) (Theft); *State v. Forrester*, 134 Ariz. 444 (App. 1982); *State v. Payne*, 233 Ariz. 484, ¶ 83 (2013) (child abuse). Thus, each different type of sexual conduct solicited does not require a separate charge of

solicitation. Finally, even if the element of "sexual conduct" is not unitary, the element of "sexual intercourse" as defined by this statute is unitary, and the same reasoning applies. Each different manner that "sexual intercourse" as defined by the statute is committed does not support a distinct offense.

However, without conceding the point, even if there can be a distinct solicitation based on different types of sexual conduct solicited, this is only one factor to be considered, and here, there was not. All the conversations and actions were about sexual intercourse as defined by A.R.S. 13-3551(10)(a), and the same occasion or event that they planned, meaning the sex that they agreed to have on Friday. There was one target "victim." Thus, there was one offense of solicitation. This is in line with the purpose of the statute to prevent abuse to children, as well as to punish the solicitation alone, less than, but even where, there is no acceptance or attempt or sexual conduct.

As the *Majority* noted, in *State v. Yegan*, 223 Ariz. 213 (Div. I App. 2009), the defense did not challenge the unit of prosecution. But there, as in this case, each chat conversation was a continuing offer or solicitation enticing the targeted child to have sex with the defendant, up until the time that the defendant appeared to meet the target on that occasion and was arrested. If there had been multiple targets, there would have been multiple crimes. If the target had refused, and the defendant had started again, there may have been a new impulse and a new

offense, as in a new offer for a drug sale. *See Blockburger*, 284 U.S. 302. But here, there was one target, one continuing conversation, and one solicitation for the single event or occasion of sexual conduct to take place on Friday. There was one offense.

CONCLUSION

The Court should uphold the *Majority* decision and find that the unit of prosecution for Luring a Minor for Sexual Exploitation is solicitation as a course of conduct and vacate Counts 2 and 3 as multiplicitous in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Further, this Court should find that probation was available for Count 1 and remand the matter for re-sentencing.

Respectfully submitted,

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