ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. KEVIN HARRY MONINGER, Appellant.	CR–21–0239–PR Court of Appeals No. 1 CA–CR 19–0353 Mohave County Superior Court No. S8015CR201801598

STATE OF ARIZONA'S RESPONSE TO BRIEF OF AMICUS CURIAE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

Mark Brnovich
Attorney General
(Firm State Bar No. 14000)

Linley Wilson
Deputy Solicitor General /
Section Chief of Criminal Appeals

Casey D. Ball
Assistant Attorney General
Criminal Appeals Section
2005 N. Central Ave.
Phoenix, Arizona 85004
Telephone: (602) 542–4686
CADocket@azag.gov
(State Bar Number 034987)
Attorneys for Appellee

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. Amicus's Proposed Agreement-Based Unit of Prosecution Is Unsupported by the Luring Statute's Text, and a Single-Act-Based Unit of Prosecution Does Not Lead to Absurd Results........ 1

A. The Luring Statute Does Not Punish an "Agreement" to Engage in Sexual Activity; It Punishes the Offer or Solicitation in the First Instance. 1

B. A Single-Act-Based Unit of Prosecution Does Not Lead to Absurd Results. 6

II. The Court Should Not Entertain Amicus's Argument that All Offenses Punishing Communications Should Be Continuous Offenses, and this Argument Fails Anyway. 14

III. Amicus, Like the Majority Below, Tries to Inject Conflict Between Two Subsections of A.R.S. § 13–705 (2018), Even Though the Two Subsections Can Be Easily Harmonized. 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases **Page(s)**

Ex parte Snow, 120 U.S. 274 (1887) 9, 10
Mejak v. Granville, 212 Ariz. 555 (2006).................... 3, 5
Robers v. United States, 572 U.S. 639 (2014) 19
Stambaugh v. Killian, 242 Ariz. 508 (2017).................... 5
State v. Allen, 253 Ariz. 306 (2022).................... 2
State v. Berger, 212 Ariz. 473 (2006).................... 8
State v. Bon, 236 Ariz. 249 (App. 2014).................... 20
State v. Bowsher, 225 Ariz. 586 (2010).................... 19
State v. Brock, 248 Ariz. 583 (App. 2020) 14
State v. Estrada, 201 Ariz. 247 (2001) 12
State v. Gagnon, 236 Ariz. 334 (App. 2014) 19
State v. Grainge, 186 Ariz. 55 (App. 1996).................... 13
State v. Hollenback, 212 Ariz. 12 (App. 2005).................... 3
State v. Hoskins, 199 Ariz. 127 (2000) 7
State v. Jurden, 239 Ariz. 526 (2016).................... 1
State v. Klokic, 219 Ariz. 241 (App. 2008).................... 7
State v. McPherson, 228 Ariz. 557 (App. 2012).................... 8
State v. Monaco, 207 Ariz. 75 (App. 2004) 11
State v. Moninger, 251 Ariz. 487 (App. 2021) .... passim
State v. Rios, 252 Ariz. 316 (App. 2021) 6, 10
State v. Trujillo, 248 Ariz. 473 (2020).................... 16
United States v. Wiltberger, 18 U.S. 76 (1820) 16
Vangilder v. Ariz. Dept. Rev., 252 Ariz. 481 (2022) 14

Statutes

A.R.S. § 11–532(A)(2), (4).................... 7
A.R.S. § 13–705 (2018) 17, 18, 19
A.R.S. § 13–1003(A) 2
A.R.S. § 13–2409.................... 15
A.R.S. § 13–2602(A)(1).................... 15
A.R.S. § 13–2810.................... 16
A.R.S. § 13–2904.................... 16
A.R.S. § 13–3005.................... 16
A.R.S. § 13–3553(A)(2).................... 8
A.R.S. § 13–3554.................... 2, 3
A.R.S. § 13–3560(A)(2).................... 4, 5

ARGUMENT

I. Amicus's Proposed Agreement-Based Unit of Prosecution Is Unsupported by the Luring Statute's Text, and a Single-Act-Based Unit of Prosecution Does Not Lead to Absurd Results.

Amicus argues that this Court should decide that Arizona's Luring statute may be prosecuted based on a theory of an "agreement-based" unit of prosecution. Amicus Br. at 7.[1] Amicus also argues a single-act-based unit of prosecution would lead to absurd results. *Id.* at 14. Neither argument has merit. Amicus's proposed agreement-based unit of prosecution is unsupported by the plain language of the Luring statute. And Amicus's proposed construction of the statute, not the single-act unit of prosecution, creates absurd results.

A. The Luring Statute Does Not Punish an "Agreement" to Engage in Sexual Activity; It Punishes the Offer or Solicitation in the First Instance.

Amicus' proposal for an agreement-based unit of prosecution fails as a matter of law because that construction is not supported by the statutory text. As this Court has explained, "the statutory definition of the crime determines the scope of conduct for which a discrete charge can be brought." *State v. Jurden*, 239 Ariz. 526, 529, ¶ 11 (2016). Nothing in the plain text of the Luring statute suggests the Legislature intended to punish an agreement between a criminal and

---

[1] All citations to pleadings are to the pdf page number.

his victim; indeed, the statute does not require anything of the victim. *See* A.R.S. § 13–3554 ("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.").

In contrast, if this Court were construing Arizona's conspiracy statute, which Amicus cites as a "classic example" of a continuous offense, Amicus Br. at 9–10, then Amicus's argument would have more force because the focus of the conspiracy statute is an agreement to commit a crime. *See* A.R.S. § 13–1003(A) ("A person commits conspiracy if, with the intent to promote or aid the commission of an offense, such person *agrees* with one or more persons that at least one of them or another person will engage in conduct constituting the offense . . .") (emphasis added); *see also State v. Allen*, 253 Ariz. 306, 311, ¶ 72 (2022) ("Any action sufficient to corroborate the existence of an agreement to commit the unlawful act and to show that it is being put into effect supports a conspiracy conviction."). Here, however, the plain text of the Luring statute unambiguously punishes each offer of, or solicitation for, sexual conduct with a minor, not an agreement. *See* A.R.S. § 13–3554; State's Supp. Br. at 6–12.

Amicus nonetheless suggests that the Luring statute punishes the "agreement" to have sex, not the solicitation. Amicus Br. at 9.[2] Using the benign example of selling a house, Amicus posits that an offer or solicitation is ongoing until the parties come to final terms. *Id.* The text-message exchange here, of course, is not akin to negotiating a legal contract. To prove Moninger committed Luring, the State had to prove only that he (1) offered or solicited sexual conduct with another person, and (2) knew or had reason to know that the other person is a minor. A.R.S. § 13–3554. The statute does not require *any* response from the targeted minor, let alone that she negotiate the terms of her future victimization. This Court has already explained in *Mejak v. Granville* that the crime of Luring is "complete when a person offers or solicits sexual conduct with a minor or a peace officer posing as a minor." 212 Ariz. 555, 559, ¶ 18 (2006); *see also State v. Hollenback*, 212 Ariz. 12, 14, ¶ 5 (App. 2005) ("[T]he criminal act occurs whether or not it leads to sexual exploitation."). Even the Majority below conceded that "a

---

[2] The Majority below made a similar mistake by suggesting that a child victim's response to the offer or solicitation is relevant to the solicitation's scope. *Moninger*, 251 Ariz. at 498, ¶¶ 38, 41 ("The record shows that on October 3, Sabrina accepted Moninger's proposal to have intercourse and never wavered from that acceptance in her communication on October 4 or 5.").

single statement explicitly requesting sexual conduct may constitute a solicitation." *See State v. Moninger*, 251 Ariz. 487, 494, ¶ 22 (App. 2021).

Amicus concedes that "at some point in the communications, the elements of the offense are satisfied," but argues that once the elements are satisfied, "there is not a 'reset' where the participants start working on a new offense." Amicus Br. at 9. Logically, however, an offense cannot simultaneously be "complete" and "continuous." Trying to avoid this contradiction, both the Majority below and Amicus propose an unwarranted exception to the statute's single-act unit of prosecution, essentially creating two classes of Luring offenses. *See id.* at 11–12; *Moninger*, 251 Ariz. at 498, ¶ 38 ("[W]e hold that 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."). Under this proposed carve-out exception, a defendant who solicits oral sex twice in two separate communications (even on two separate days, months apart) could be charged with only one count of Luring, but a defendant who first solicits oral sex, and then solicits sexual intercourse, could be charged with two counts of Luring. This result finds no support in the statute's text and makes little sense.

Nor does Amicus's agreement-based unit of prosecution find support in the companion statute to the Luring statute—A.R.S. § 13–3560 (Aggravated Luring).

See Stambaugh v. Killian, 242 Ariz. 508, 509, ¶ 7 (2017) ("In construing a specific provision, we look to the statute as a whole and we may also consider statutes that are *in pari materia*—of the same subject or general purpose—for guidance and to give effect to all of the provisions involved."). Amicus concedes that the Luring and Aggravated Luring statutes likely carry the same unit of prosecution, but then criticizes the State for "reading too much into" the Aggravated Luring statute's use of the singular when describing "*the* offer or solicitation." Amicus Br. at 11; A.R.S. § 13–3560(A)(2) (emphasis added). But along with the use of the singular "the" to describe offer and solicitation, the statute also explicitly provides that "[t]he offer or solicitation may occur . . . as an integrated part of the transmission of *the visual depiction*," in the singular. A.R.S. § 13–3560(A)(2) (emphasis added). Thus, a defendant could satisfy the elements of Aggravated Luring by a single act of transmitting a photograph of his penis to a minor with text scrawled over the image soliciting sexual conduct. Because the Aggravated Luring statute unambiguously establishes the unit of prosecution as a single act, this further confirms that the Legislature intended to punish each separate offer of or solicitation for sexual conduct with a minor, as contemplated by this Court in *Mejak*, 212 Ariz. at 559, ¶ 18.

For these reasons, Amicus fails to show any support for its proposition that the Luring statute punishes an overarching "agreement" between the defendant and

his victim. Nor has Amicus shown that the Luring statute's unit of prosecution is ambiguous and thus subject to secondary methods of statutory interpretation.

B. A Single-Act-Based Unit of Prosecution Does Not Lead to Absurd Results.

Amicus further contends a unit of prosecution that punishes each solicitation for sexual conduct, even those that are repetitive, would lead to absurd results. Amicus. Br. at 14. In particular, Amicus worries that (1) prosecutors have too much discretion to determine how many charges to bring, and (2) police might be incentivized to draw out a conversation with a suspect to increase the number of charges. Neither contention merits serious consideration.

1. ***Charging discretion***

Amicus alleges the "court of appeals has often disregarded the requirement to effect the intent of the legislature that wrote the statute in favor of deference to the executive branch and prosecutorial discretion," *see* Amicus Br., at 14, but this contention fails. Amicus cites *State v. Rios*, 252 Ariz. 316, 322, ¶ 24 (App. 2021), as purported proof of this deference, but even a cursory reading of *Rios* reveals the court of appeals applied the correct analysis. The court of appeals found the harassment statutes unambiguously punished each discrete act of harassment, even when done in a single course of conduct, *see id.* at 322, ¶¶ 25–26. Given the plain language of the statute, the court reasoned that the State had discretion to either bundle the whole course of conduct as a single charge or charge the multiple acts

of harassment individually. *Id.* at ¶ 24. Because the statutory text allowed separate charges for each message, the court reasoned that the only limitation to charging each act separately was that each act "must be individually proved." *Id.* (citing *State v. Hoskins*, 199 Ariz. 127, 145, ¶ 73 (2000)).

It is well-established that the prosecution, not the court or the defendant, determines whether to file criminal charges and which charges to file. A.R.S. § 11–532(A)(2), (4); *State v. Klokic*, 219 Ariz. 241, 244, ¶ 14 (App. 2008) ("[I]n drafting an indictment, the State may choose to charge as one count separate criminal acts that occurred during the course of a single criminal undertaking even if those acts might otherwise provide a basis for charging multiple criminal violations."). That a prosecutor might choose to indict on fewer counts than the number of offenses committed does not render a single-act unit of prosecution absurd. Rather, it might simply reflect that the prosecutor is balancing various considerations, including judicial and prosecutorial economy, the availability of aggravating or mitigating circumstances in a particular case, or a prosecutor's belief in a reasonable likelihood of obtaining a conviction.

Both Amicus and the Majority below cite the sheer number of messages Moninger sent and worry that an act-based unit of prosecution would subject Moninger to unduly harsh punishment. *See* Amicus Br. at 17; *Moninger*, 251 Ariz. at 493, ¶ 21 (speculating that "the State could charge Moninger with scores of

counts of luring committed over several days, each based on a statement suggesting or anticipating sexual conduct on the coming Friday."). But just because a crime is easy to commit repeatedly does not render the resulting punishment for those multiple violations unduly harsh. *See, e.g. State v. Berger*, 212 Ariz. 473, 479, ¶ 27 (2006) (analyzing the punishment for each count of possession of child sexual exploitation images separately rather than in the aggregate). For example, a defendant can download hundreds of images depicting child sexual exploitation with a single click, and yet face stiff penalties for each individual image. *See State v. McPherson*, 228 Ariz. 557, 560–61, ¶¶ 6–8 (App. 2012) (holding that separate images "obtained in the same electronic download" are punished separately under A.R.S. § 13–3553(A)(2), and that "[e]ven identical images . . . result in separate prosecution and punishment").

Indeed, the Legislature's stated purpose in creating the Luring statute was to "modernize[] Arizona's criminal code regarding the use of computer technology and the Internet in [various crimes including] sex crimes." *See Moninger*, 251 Ariz. at 493, ¶ 19 (citing H.B. 2428 Bill Summary, 44th Legis., 2d Reg. Sess.). Thus, Amicus's complaint that it is simply too easy to repeatedly violate the Luring statute through electronic means amounts to second-guessing the Legislature's policy choice to combat sex crimes committed through technological means by punishing each solicitation or offer. The Court should not mitigate the

unit of prosecution to a course of conduct because doing so would frustrate the Legislature's stated intent.

Putting aside the statute's text, the facts here do not present any reason to lessen the criminal liability a defendant faces for repetitive solicitations for sex. Moninger solicited sex from Sabrina of his own volition, even knowing and explicitly admitting that he could face severe penalties for his actions. *See, e.g.*, R.O.A. 63, Exh. 5, Part B, at pages 70–71, Texts 902–09 (Moninger telling Sabrina, "Cops set up stings for older guys picking up younger girls, I have to be safe . . . I look at everything u say trying to be sure . . . If I come down to see u and its a set up I'll go to prison[.] I can't do that[.] Age between us doesn't bother me but cops will freak label me pedofile child whatever that I'm not[.]"). Moninger, fully aware of the criminal penalties he faced, tried to determine whether Sabrina was real by requesting a spontaneous selfie from her. *See id.* at pages 66–70 (first asking her what color shirt she was wearing, then demanding an immediate selfie after she answered, "black"). He later accepted Sabrina's explanation that her camera was broken and instead initiated two short phone calls (the first call got cut off, and he quickly called back) with the undercover detective to determine whether she was real. R.T. 4/30/19, at 204–207.

Amicus also cites *Ex parte Snow*, 120 U.S. 274 (1887) as an example of a prosecutor bringing an arbitrary number of charges for a single offense. Amicus.

Br. at 14–15. But in *Snow*, the prosecutor's basis for dividing "unlawful cohabitation" charges was the mere passage of time rather than some independent act by the defendant. *Snow*, 120 U.S. at 282. The Supreme Court reasoned that if the passage of time was the *only* basis for dividing counts, a prosecutor could continue dividing the counts "ad infinitum." *Id.* But in Luring cases, each offer of or request for sex, even if repetitive, represents an intentional, distinct act by the defendant. A prosecutor cannot divide a single solicitation "ad infinitum," so the upper limit of potential charged offenses is entirely within the control of the person soliciting sexual activity with a minor.

Finally, Amicus proposes a series of "what-ifs?" involving stuttering defendants, technical glitches, and prematurely sent messages. Amicus Br. at 15–16. These hypotheticals do not help answer what the correct unit of prosecution is; they merely represent some factors a prosecutor would likely consider when determining how many charges to bring, or arguments a defendant could make to challenge the sufficiency of the State's evidence when charged with multiple counts. *See Rios*, 252 Ariz. at 322, ¶ 24 (explaining that while a prosecutor might charge individual acts separately, the charges are necessarily limited by the fact that each act "must be individually proved").

2. *Police investigations*

Amicus also suggests a single-act unit of prosecution "will invariably lead to undercover police officers dragging out a conversation with a target solely for the purpose of inflating the prison exposure." Amicus. Br. at 17. This argument, at its core, is a "sentencing manipulation" or "sentencing entrapment" argument, which the Arizona Court of Appeals has expressly rejected in the context of controlled drug buys. *See* *State v. Monaco*, 207 Ariz. 75, 79, ¶¶ 10–11, 22 (App. 2004). In drug cases, the typical sentencing entrapment argument goes as follows: a defendant argues that the State unfairly increased his sentence or eliminated eligibility for probation by arranging a series of drug transactions rather than arrest them after the first transaction.

As in *Monaco*, the argument has no merit here because every message in the conversation between Moninger and Sabrina represented a separate opportunity for Moninger to withdraw from the conversation, a point Amicus recognizes elsewhere in its brief. *See* Amicus Br. at 12 ("Particularly in cases involving undercover officers, the communication goes on longer than necessary to charge the offense; this is because the officer wants to ensure that the suspect has a fair opportunity to withdraw so that the suspect will have greater difficulty proving a claim of entrapment."). Amicus's speculation about police officers' motives while conducting undercover investigations does not render the State's interpretation of

the Luring statute absurd. *See State v. Estrada*, 201 Ariz. 247, 251, ¶ 17 (2001) (result absurd "if it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion").

Nor does this record suggest the police unnecessarily or improperly extended the conversation. When Sabrina answered Moninger's ad and told him she was 13 years old, Moninger could have stopped responding; instead, he immediately escalated. *See* R.O.A. 61, at page 16 (email chain in which Sabrina tells Moninger she is 13 and "just looking 4 some one 2 hang out n do stuff with," and Moninger immediately responds that he is "looking for more of a relationship or girlfriend" and asks her "does this still interest you?"). And the police gave Moninger plenty of opportunities to disengage both before and after he started soliciting sexual conduct. *See, e.g.*, *id.* at 11 (in a separate email thread, Moninger saying it is a "shame" that Sabrina told him her age because "now I have to wonder if ur cops," to which Sabrina replied, "I don't want 2 get in truble or any one else in truble im not a cop so if u dont want 2 talk any more then dont talk 2 me"); R.O.A. 63, Exh. 5, Part B, pages 72–73, texts 911–917 (after Moninger worried aloud that Sabrina was just a sting operation, Sabrina telling Moninger, "Just stop u dont love me u used me").

If anything, Moninger, like many child sexual predators, sought to prolong his conversations with Sabrina by keeping them a secret. *Cf. State v. Grainge*, 186 Ariz. 55, 58 (App. 1996) (discussing how the grooming process fosters continued acquiescence to a defendant's sexual crimes). Early on in his conversation with Sabrina, Moninger instructed her to delete the messages so her mother would not see them. R.O.A. 62, Part A, at page 26, text 128. He returned to the topic of secrecy often, repeating his warnings to Sabrina that she must keep the conversation a secret. *See, e.g.*, R.O.A. 63, Part B, at page 41, text 749 (Moninger asking, "What if mom comes home for lunch?" while planning the meet-up); page 59, text 843 (telling Sabrina, "I want to say or say again . . . what we do behind a closed door is strictly between u and I[.] I will never tell anyone. It is nobody's business"); page 59, text 844 (asking if they would "have to worry about neighbors at all?"); page 61, text 852 ("if mom still at home when I call just hang up on me I'll understand"); page 77, text 941 ("if there are [cops] just say nothing I walk away . . .").

Thus, the Majority's and Amicus's proposed course-of-conduct unit of prosecution, which gives a free pass to repetitive solicitations for the same sexual-conduct act or episode, would only embolden a criminal to engage in a persistent campaign of harm-inducing sexual solicitation requests, knowing that he could be charged with only a single count of Luring. This is the epitome of an absurd and

perverse result. *Cf. State v. Brock*, 248 Ariz. 583, 595, ¶ 36 (App. 2020) (seeking to avoid "perverse results" in which a defendant "could commit as many acts of molestation as he chose and still receive concurrent sentences for those offenses as long as he molested the same victim").

II. The Court Should Not Entertain Amicus's Argument that All Offenses Punishing Communications Should Be Continuous Offenses, and this Argument Fails Anyway.

Amicus urges this Court to establish a "rule" that for "crimes such as luring, harassment, stalking," and a number of others listed in a footnote, "the unit of prosecution is the course of conduct directed at a single victim." Amicus. Br. at 13 n.1. As an initial matter, only the Luring statute is at issue in this case, and Amicus are not "permitted to create, extend, or enlarge the issues" on review. *See Vangilder v. Ariz. Dept. Rev.*, 252 Ariz. 481, 493, ¶ 46 (2022). In any event, because the unit-of-prosecution analysis for any offense turns on the plain language of the statute, this Court must decline Amicus's invitation to impose a one-size-fits-all unit of prosecution for what Amicus deems "communication-based" offenses.

Amicus inappropriately tries to convert every offense involving communications into what Amicus characterizes as a continuous offense. Amicus Br. at 9, 13 n.1 (listing offenses). But rather than examine the language of the statutes for the offenses it identifies, Amicus instead points to the inchoate offense

of conspiracy as a "classic example" of a continuous offense. *Id.* at 9–10. In doing so, Amicus commits the same misstep the Majority did by layering the inchoate offense of solicitation onto the completed offense of Luring. *See Moninger*, 251 Ariz. at 494, 501, ¶¶ 23, 52 (applying case law addressing the inchoate offense of solicitation to the completed offense of Luring). As discussed above, *supra* Section I, although a conspiracy offense turns on the "agreement" between two or more co-conspirators, it does not hold true that every offense involving communication is per se a continuous offense.

A review of the statutes proscribing other so-called communication-based offenses cited by Amicus shows that many of the statutes actually contain, as an element of the offense, intent to achieve some result from the communication. For example, A.R.S. § 13–2409, obstructing criminal investigations, requires the State to prove the defendant "knowingly attempts . . . to obstruct, delay or prevent the communication of information or testimony" by means of "bribery, misrepresentation, intimidation or force or threats of force." Similarly, a person commits bribery under A.R.S. § 13–2602(A)(1) if, "with corrupt intent," the person "offers, confers or agrees to confer any benefit upon a public servant . . . with the intent to influence the public servant's or party officer's vote." The Luring statute includes no such similar element of intent to achieve a particular result.

Other statutes listed by Amicus present multiple alternative means of committing the offenses, only some of which involve communications, thereby reflecting that those offenses are not inherently or strictly accomplished through communications. *See* A.R.S. § 13–2810 (interfering with judicial proceedings); A.R.S. § 13–2904 (disorderly conduct); A.R.S. § 13–3005 (interception of wire, electronic, and oral communications). Given the unique characteristics of each statute cited by Amicus, and the countless ways one might conceivably commit each offense, a one-size-fits-all approach to the unit of prosecution is both undesirable and unworkable.

Moreover, even if the Legislature proscribes two or more criminal offenses that involve similar types of conduct, whether communicative or continuing in nature, the Legislature still might decide in its discretion to define different units of prosecution based on considerations unique to each offense or even for no discernible reason. *State v. Trujillo*, 248 Ariz. 473, 478, ¶ 25 (2020) ("[W]e recognize that under the constitutional principle of separation of powers, the legislature, not the judiciary, has the authority to prescribe punishments for crimes."); *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment."). For this reason, the *sole* consideration in determining the Legislature's intent for the unit of prosecution (barring an absurd result) is the plain language of the statute at issue

because that language provides the clearest and most direct evidence of the Legislature's intent.

For these reasons, this Court should reject Amicus's invitation to impose a one-size-fits-all unit of prosecution for offenses involving communication.

III. Amicus, Like the Majority Below, Tries to Inject Conflict Between Two Subsections of A.R.S. § 13–705 (2018), Even Though the Two Subsections Can Be Easily Harmonized.

Amicus contends that subsections E and H of the dangerous crimes against children ("DCAC") statute, A.R.S. § 13–705 (2018), are irreconcilable because one allows probation for Luring offenses, while the other prohibits probation for Luring offenses.[3] *See* Amicus Br. at e.p 21 ("[T]he DCAC statute is internally contradictory as pertaining to luring"). Amicus then suggests that subsection E is the more specific statute, and should therefore control the issue. *Id.* (arguing subsection E is the "more recent, specific statute"). And, as a last resort, Amicus suggests the rule of lenity favors Moninger's interpretation of the DCAC provisions at issue. *Id.* at 22. Amicus is wrong on all points, and its analysis

---

[3] Amicus cites the current versions of the DCAC statute, but this leads to unnecessary confusion. Because this Court's decision will be restricted to the former version of the statute, it makes more sense to cite the versions in effect at the time of Moninger's offenses. As to Amicus's question about whether the 2018 version was in effect at the time of Moninger's offenses, Amicus Br. at 19, the answer is yes. The 2018 version went into effect on August 3, 2018, well before Moninger solicited sex from Sabrina in October 2018.

glosses over crucial phrases in the provisions that undermine its preferred outcome of probation eligibility.

First, Amicus, like the Majority below, does not address the fact that subsection E does not distinguish between first- and second-degree offenses. *Id.* at 21. Instead, both Amicus and the Majority stop at the word "luring" in subsection E and implicitly conclude it means "first-degree Luring." *See id.*; *Moninger*, 251 Ariz. at 502, ¶ 59 n.6 (concluding the Legislature "mistakenly drafted A.R.S. § 13–705(E) [2018] in a way that indicated such offenses are probation-eligible"). Only by that reasoning could one conclude that subsections E and H are contradictory. *See* Amicus Br. at 21. But because subsection E does not distinguish between first- and second-degree offenses, the two subsections can be harmonized in a way that permits probation for *only* second-degree Luring offenses.

In addition to the arguments already put forward supporting harmonization, *see* P.F.R. at 15; State's Supp. Brief at 21–22, one more exists. Neither subsection E nor F—which the Majority noted are structured similarly—distinguish between first- and second-degree offenses. Yet subsection H only excludes subsection F from its requirement that prison be imposed for first-degree DCAC offenses. When it drafted subsection E, the Legislature had an opportunity to exclude it from subsection H like it had done with subsection F, but it chose not to. This confirms the Legislature intended that first-degree Luring offenses be subject to subsection

H's requirements. Thus, the two subsections can be harmonized, a point that neither Amicus, Moninger, nor the Majority below appear willing to even consider. But this Court is obligated to harmonize the DCAC statute's provisions. *State v. Bowsher*, 225 Ariz. 586, 589, ¶ 14 (2010) ("When construing two statutes, this Court will read them in such a way as to harmonize and give effect to all of the provisions involved.").

Even if this Court decided the subsections were irreconcilable, subsection H is the controlling statute. Amicus contends subsection E is the more specific statute and should therefore control. *See* Amicus Br. at 21. But Amicus glosses over the first clause of subsection E—"Except as otherwise provided in this section." That clause subjects subsection E's sentencing provisions to any conflicting provisions in § 13–705 (2018). Additionally, contrary to Amicus's contention, subsection H is the more specific statute because it qualifies subsection E. *See State v. Gagnon*, 236 Ariz. 334, 335, ¶ 7 (App. 2014) ("In effect, the specific statute creates 'an exception or qualification' to the general statute.").

Finally, this Court should reject Amicus's and the Majority's suggestion that the rule of lenity be applied. *See Moninger*, 251 Ariz. at 502, ¶ 59 n.6. The rule of lenity is a rule of last resort and need not be applied here because no "grievous ambiguity" exists. *See Robers v. United States*, 572 U.S. 639, 646 (2014) ("[T]he rule of lenity applies only if, after using the usual tools of statutory construction,

we are left with a grievous ambiguity or uncertainty in the statute.") (internal quotation marks omitted); *State v. Bon*, 236 Ariz. 249, 253, ¶ 13 (App. 2014) ("The rule of lenity . . . is a construction principle of last resort.").

CONCLUSION

For these reasons, the State respectfully requests that this Court vacate paragraphs 1–53 and 58–60 of the court of appeals' opinion and reinstate Moninger's convictions and sentences.

Respectfully submitted,

Mark Brnovich
Attorney General

Linley Wilson
Deputy Solicitor General /
Section Chief of Criminal Appeals

/s/____________________
Casey D. Ball
Assistant Attorney General

Attorneys for Appellee

Doc. No. SHMQOMO00EX4EQ