

**ARIZONA SUPREME COURT**

STATE OF ARIZONA,

Appellee,

v.

KEVIN HARRY MONINGER,

Appellant.

CR-21-

Court of Appeals  
No. 1 CA-CR 19-0353

Mohave County  
Superior Court  
No. S8015CR201801598

**STATE OF ARIZONA'S  
PETITION FOR REVIEW**

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## **I. Issues Presented for Review.**

1. Whether the majority below erroneously 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," contrary to the plain language of the statute, this Court's precedent, and secondary methods of statutory interpretation.
2. Whether the majority below erroneously held that first-degree luring offenses are probation-eligible, contrary to the plain language of the dangerous-crimes-against-children ("DCAC") statute, [A.R.S. § 13-705](#).

## **II. Material Facts.**

Appellant, Kevin Moninger, a 63-year-old man living in Las Vegas, placed two advertisements online seeking sex. One ad said, "open to age." R.T. 4/30/19, at 121-24. In September 2018, Moninger exchanged text messages with "Sabrina," who had responded to his ads and introduced herself as a 13-year-old girl living in Kingman, Arizona. *Id.* at 127-128, 134. Over the span of a week in early October, Moninger planned a meeting with Sabrina in Kingman and repeatedly requested sex with her, continuously upping the pressure by offering additional enticements. *See State v. Moninger*, No. 1 CA-CR 19-0353, ¶¶ 75-99 (Ariz. App. Jun. 8, 2021) (Morse, J., dissenting) (recounting the pressure campaign) (hereinafter "*Majority*" or "*Dissent*"). Moninger was unaware he was actually texting with an undercover detective. R.T. 4/30/19, at 142-43; Exh. 5, parts A-C.

On October 5th, Moninger drove to Kingman to meet Sabrina for sex and officers arrested him. *Majority*, ¶ 3. Moninger was carrying children’s clothing, a Viagra pill, and a “Sabrina the Teenage Witch” doll. *Id.*

The State charged Moninger with three counts of luring a minor for sexual exploitation (one for a text sent on October 3rd, one for a series of texts sent on October 4th, and one for a series of texts sent on October 5th), along with attempted sexual conduct with a minor (based on Moninger’s arrival in Kingman on October 5th). R.O.A. 2; R.T. 4/30/19, at 34, 40-41 (prosecutor’s delineation of the charges during opening statements); R.T. 4/30/19, at 186-87, 214, 220 (prosecutor’s specification of charges during direct examination of detective); R.T. 5/1/19, at 224-25 (prosecutor’s reiteration of each count’s factual basis in closing arguments). At trial, Moninger testified and raised an entrapment defense. R.T. 5/1/19 at 89-91, 102, 107, 167-68. The jury convicted Moninger as charged. *Majority*, ¶ 6. The trial court sentenced Moninger to consecutive prison terms totaling 31 years, as required by [A.R.S. § 13-705\(H\) & \(M\)](#).

On appeal, Moninger argued his luring convictions were multiplicitous, contending he had engaged in only one continuous “solicitation.” He also argued that his luring convictions were probation-eligible. In a divided opinion, the majority agreed, vacating two of the luring convictions and holding that probation is available for a first-degree luring conviction. *Majority*, ¶¶ 45, 59.

### **III. This Court Should Grant Review of Issue 1 Because the Unit of Prosecution for Luring a Minor Is an Issue of First Impression and the Majority’s Analysis Conflicts with This Court’s Precedent.**

This Court should grant review because: (1) no opinion before *Moninger* addressed the unit of prosecution for [A.R.S. § 13-3554](#), (2) the majority’s analysis conflicts with this Court’s precedent, and (3) important issues of law were incorrectly decided in a published decision. *See* [Ariz. R. Crim. P. 31.21\(d\)\(1\)\(C\)](#); *see, e.g., State v. Jurden*, [239 Ariz. 526, 529, ¶ 11 \(2016\)](#) (granting review to decide the unit of prosecution for Arizona’s resisting-arrest statute).

“[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.” *Jurden*, [239 Ariz. at 529, ¶ 11](#). Arizona’s luring statute states that “[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.” [§ 13-3554](#).

As discussed below, there are four flaws in the majority’s analysis of [§ 13-3554](#). First, the majority failed to construe the term, “solicit,” in the context of the luring statute as a whole. Second, the majority’s reliance on inchoate-offense case law contravenes *Mejak v. Granville*, [212 Ariz. 555, 558, ¶ 18-21 \(2006\)](#), which squarely rejected the argument that luring was “equivalent to a preparatory offense.” Third, the majority incorrectly concluded that a narrower definition of

“solicit”—one that would separately punish repeated requests for the same sexual conduct—would lead to greater punishment than the Legislature intended. Fourth, the majority’s six-factor test for determining when a request (or offer) for sex ends and another begins is illusory, given the majority’s holding that the sole determining factor is whether the perpetrator happens to request additional sexual activity in a separate offer or solicitation. The test also creates perverse incentives to escalate offers or requests for sex, which magnifies harm to the minor victim with no associated penalty to the perpetrator.

**A. The word “solicit” is not ambiguous when read in context of the statute as a whole.**

“Solicit” is not defined in the criminal code. *Majority*, at ¶ 13. The majority found a dictionary that defined “solicit” as both an individual act and a course of conduct, but failed to consider the term in conjunction with the inherently single-act-based term “offering.” *Majority*, ¶¶ 13-14. Instead, in a footnote, the majority stated it would not examine the word “offering” because the State charged Moninger only with soliciting sexual conduct. *Id.* ¶ 10 n.2. Based solely on the two dictionary definitions, the majority found “solicit” to be ambiguous and moved on to secondary methods of statutory interpretation. *Id.* The majority’s refusal to interpret “offer” is a critical flaw in its statutory interpretation analysis.

Courts do not read parts of statutes in isolation. *See State v. Tagge*, 246 Ariz. 486, 488, ¶ 5 (App. 2019) (“We look to the statute as a whole, and construe

together all parts of the statute relating to the same subject.”). The inclusion of the inherently single-act-based term “offer” as a way to commit luring shows the Legislature likewise intended to use the single-act definition of “solicit.” An “offer” is “[t]he act or an instance of presenting something for acceptance; specif[cally] a statement that one is willing to do something for another person or to give that person something.” *OFFER*, BLACK’S LAW DICTIONARY (11th ed. 2019); see also *State v. Padilla*, 169 Ariz. 70, 72 (App. 1991) (“An ‘offer’ is not so much a matter of speech as it is an act of presentation for consideration, for acceptance or rejection.”).<sup>1</sup>

When the two dictionary definitions of “solicit” proffered by the majority are viewed in context of the luring statute as a whole, it is obvious the Legislature intended “solicit” to mean “[t]he act or an instance of requesting or seeking to obtain something.” *SOLICITATION*, BLACK’S LAW DICTIONARY (11th ed. 2019). There is no reason why the Legislature would intend to punish each individual offer of sexual conduct, but group repeated solicitations into one offense. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (“The plainness or ambiguity

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<sup>1</sup> In a footnote, the majority cited *Padilla* for the proposition that “offering” should also be considered a course of conduct. *Majority*, ¶ 22 n.4. But context makes clear that *Padilla*’s reference to a “course of conduct” meant the combination of a single offer and a subsequent sale of drugs, not a series of offers.

of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”). Thus, the inquiry should have stopped at the plain language of the statute.

**B. *Mejak* establishes that luring cannot be equated with the inchoate offense of solicitation.**

The majority’s reliance on inchoate-offense case law is problematic for three reasons. First, it defies this Court’s holding that the crime of luring is complete when a person offers or solicits sexual conduct with a minor. *Mejak*, 212 Ariz. at 558, ¶ 18; see also *State v. Hollenback*, 212 Ariz. 12, 15, ¶¶ 6-7 (App. 2005) (rejecting equivalency between luring and the inchoate offense of soliciting sexual conduct).

Second, the comparison to inchoate offenses fails to address the statute’s purpose of preventing harm arising from the act of soliciting sex itself. Minors suffer a distinct harm each time a defendant solicits sexual conduct. *Yegan*, 223 Ariz. at 217, ¶ 14 (sexual exploitation chapter’s original purpose “was to prohibit any conduct which causes or threatens psychological, emotional or physical harm to children as a result of such sexual exploitation”). As Judge Morse noted, “repeated requests can magnify the harm to the minor.” See *Dissent*, ¶ 68 (collecting authorities).

Notably, the State could have charged Moninger with solicitation of sexual conduct with a minor. However, this crime would be both a lower class of felony and probation-eligible. See §§ 13-3554(C) (luring is a class 3 felony); 13-1002(B)(2) & 13-1405(B) (solicitation for sexual conduct with a minor is a class 4 felony); 13-705(E), (H), and (O) (preparatory offenses are probation eligible). The purpose of preventing sexual conduct with a minor is served by the existence of § 13-1405, as well as the other statutes proscribing sexual activities with a minor. *Majority*, ¶ 16. The primary purpose of the luring statute is to protect children from the harm caused by offers of or solicitations for sexual conduct. *Dissent*, ¶ 68. The definition of “solicit” that refers to a completed act, not a series of acts, better serves that purpose and aligns with *Mejak*’s holding that luring is a completed offense.

**C. The majority’s legislative-intent analysis is flawed.**

The majority speculated that the Legislature must not have intended for “solicit” to “refer to singular acts” given that a defendant who makes repeated requests for sexual conduct during a continuous conversation would be exposed to “harsher penalties” than if he had “accomplished the object of the luring.” *Majority*, ¶ 20. But this compares aggregated sentences of *multiple* luring offenses against a *single* offense of sexual conduct with a minor. See *Dissent*, ¶ 65 n.8 (collecting authorities rejecting the aggregate-sentence comparison). As Judge

Morse noted, “[t]he punishment for completed sexual conduct with a minor is significantly greater than the punishment for one act of luring.” *Id.*

The majority relied on *Ladner v. United States*, 358 U.S. 169 (1958), and *Ex parte Snow*, 120 U.S. 274 (1887). *Majority*, ¶¶ 48, 51. But *Ladner* is inapplicable because the statute there is markedly different from the luring statute. As for *Snow*, the majority misapplied its reasoning by speculating that a narrower definition of solicit “risk[ed] giving the State carte blanche to divide a continuous conversation into as many luring charges as it wishes.” *Majority*, ¶ 51. But unlike the charges in *Snow*, which could have been divided into smaller time periods “ad infinitum,” 120 U.S. at 282, the State is limited in luring cases by the number of solicitations for sexual conduct made by the defendant.

Nor does the majority’s legislative-intent analysis hold up in light of the punishment for the analogous crime of sexual exploitation of a minor. Like the offense of luring, a defendant found in possession of multiple images of child pornography may have never engaged in any sexual conduct with a child. Still, “Arizona severely punishes . . . possession of child pornography” for each image, *State v. Berger*, 212 Ariz. 473, 474, ¶ 2 (2006), and defendants are sentenced to lengthy consecutive sentences in such instances. Thus, the Legislature has shown its intent to severely punish even those DCAC offenses in which a defendant does not engage in any physical conduct or communication with a minor. So even if the

aggregate sentence for multiple acts of luring could be fairly compared against a single act of sexual conduct with a minor, any disparity may simply reflect the Legislature’s view that luring is an especially pernicious offense warranting a commensurate punishment. It is well-settled that the Legislature, not the judiciary, “determines what is a crime and what punishment may be exacted for its breach” *State v. Prentiss*, 163 Ariz. 81, 85 (1989).

Finally, the majority’s analysis discounts the broad charging discretion afforded to prosecutors. See *State v. Holle*, 240 Ariz. 300, 309, ¶ 44 (2016) (hypothetical absurd prosecutions do not “warrant ignoring the plain language of the subject statutes”); *State v. Klokic*, 219 Ariz. 241, 244, ¶ 14 (App. 2008) (“[T]he 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.”). Thus, the majority’s cases do not support its legislative-intent analysis, and it erred by comparing an aggregate luring sentence to a single sentence for sexual conduct with a minor.

**D. The majority’s ostensible six-factor test is unworkable and creates perverse incentives.**

Under the majority’s holding, to prove multiple violations of the luring statute, the State must show “[a] distinct impulse to persuade or induce the minor to engage in a new occasion of sexual conduct.” *Majority*, ¶ 51. This initially

appears to require only a single inquiry—i.e., on separate occasions, did Moninger offer or request different sex acts? But the majority also pronounced a six-factor, non-exhaustive test to determine when one solicitation ends and another begins. *Id.* ¶ 38. Worse still, the majority cited with approval an out-of-state case holding that a new request for criminal activity occurs when—as here—a person escalates a prior request for a particular unlawful course of conduct with a “fresh enticement.” *Majority*, ¶ 34 (citing *State v. Jensen*, 195 P.3d 512, 520, ¶ 35 (Wash. 2008)). The majority then abandoned that approach by making the sole determining factor whether the defendant requested a new, unrelated sexual act on a different occasion. *Majority*, ¶ 51; *contra Dissent*, ¶¶ 75-99 (detailing each fresh enticement Moninger offered Sabrina over the course of the conversation).

Even on its own terms, there are two unworkable factors in the majority’s six-factor test. First, the majority suggests that “the victim’s responses to the defendant’s proposals” are relevant to the inquiry. *Id.* But nothing in § 13-3554 conditions the offense on the victim’s response, and this factor is irreconcilable with *Mejak*’s holding that the offense is *complete* once the solicitation is made. *Mejak* 212 Ariz. at 558, ¶ 18; *see also Dissent*, ¶ 78 (criticizing the majority’s focus on Sabrina’s responses). A victim need not respond at all for the offense to be completed.

Second, the proposed factor requiring that a perpetrator suggest or invite distinct forms of sexual behavior is likewise untethered to the text of the luring statute and creates a perverse incentive. Under the majority’s test, a defendant who sends only one message to a 13-year-old girl asking her to lose her virginity to him is punished no differently than a defendant who sends the same message daily for a year. See *Majority*, ¶ 51 (“The passage of time or another reference to the same sexual encounter alone will rarely form a new unit of prosecution.”). As Judge Morse emphasized, “repeated requests can magnify the harm to the minor.” *Dissent*, ¶ 68 (collecting authorities); 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”).

Finally, the majority suggested, *sua sponte* and in a footnote, that if the unit of prosecution is each request for sex, then the trial evidence here may have created duplicitous charges. *Majority*, ¶ 21 n.3. Not so. As noted above, the State delineated the factual basis of each count for the jury several times throughout trial. And Moninger presented the same defense (entrapment) to all of the charges. Unsurprisingly, Moninger did not raise a duplicity claim in the trial court or on appeal. No fundamental error occurred.

For all of these reasons, this Court should grant review of Issue 1.

**IV. This Court Should Grant Review of Issue 2 Because It Is an Issue of First Impression and the Majority Violated Separation of Powers Principles by Effectively Rewriting a Sentencing Statute.**

This Court should grant review of the second issue because: (1) no opinion before *Moninger* addressed whether luring is a probation-eligible offense; (2) courts have inconsistently applied the sentencing statute, *see* Answering Brief at 27 n.3 (collecting cases); (3) the majority discarded statutory interpretation principles; and (4) the majority violated separation of powers under article III of the Arizona Constitution by effectively rewriting [A.R.S. § 13-705](#) to correct a perceived “mistake” in the way the Legislature drafted the statute. *See* [Ariz. R. Crim. P. 31.21\(d\)\(1\)\(C\)](#).

[Section 13-705\(H\)](#) prohibits probation for *first-degree* DCAC offenses, including luring a minor for sexual exploitation:

*Except as provided in subsection F of this section, a person who is sentenced for a dangerous crime against children in the first degree pursuant to this section is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until the sentence imposed by the court has been served or commuted.*

(Emphases added). Thus, convictions for all first-degree DCAC offenses, except the two listed in [§ 13-705\(F\)](#) (sexual abuse and bestiality), require mandatory prison sentences. “A dangerous crime against children is in the first degree if it is a completed offense.” [§ 13-705\(O\)](#). *Moninger* was convicted of three completed luring offenses.

Rather than apply the plain language of § 13-705(H), the majority instead focused on § 13-705(E), which provides, in relevant part:

Except as otherwise provided in this section, if a person . . . is convicted of a [DCAC] involving luring a minor for sexual exploitation . . . and is sentenced to a term of imprisonment, the term of imprisonment is as follows . . . [setting forth range of 5-15 years].

The majority observed that both subsection E and F contain the same phrase—“if a person . . . is sentenced to a term of imprisonment”—which, if read in isolation, suggests probation is available. *Majority*, ¶ 59. Then, in a footnote, the majority assumed that “either the [L]egislature mistakenly failed to add A.R.S. § 13-705(E) to the exception provided in A.R.S. § 13-705(H) or mistakenly drafted A.R.S. § 13-705(E) in a way that indicated such offenses are probation-eligible.” *Majority*, ¶ 64 n.6.

Courts may not rewrite statutes on the belief the Legislature may have mistakenly omitted words from a statute. *Ariz. Const. art. III* (no branch of government “shall exercise the powers properly belonging to either of the others”); *see also State ex rel. Polk v. Campbell*, 239 Ariz. 405, 408, ¶ 12 (2016) (rejecting defendant’s proposal to add a word to a sentencing provision); *see also City of Phoenix v. Butler*, 110 Ariz. 160, 162 (1973) (“The choice of the appropriate wording rests with the Legislature, and the court may not substitute its judgment for that of the Legislature.”). By assuming the Legislature meant something different from what it wrote, and then effectively rewriting § 13-705(H) to make

first-degree luring probation-eligible, the majority “exercise[d] the powers properly belonging” to the Legislature. [Ariz. Const. art. III](#).

Moreover, subsections E and H can be harmonized. [Section 13-705\(E\)](#) does not distinguish between first- and second-degree offenses, so logic dictates that, under the more-specific [§ 13-705\(H\)](#), *first-degree* luring offenses are not eligible for probation, while *second-degree* offenses are. For the same reason, the sentencing chart cited by the majority is not inherently at odds with the statute. This reading is further bolstered because [§ 13-705\(E\)](#) begins with the phrase, “Except as otherwise provided in this section,” rendering it subject to the more specific provisions of [§ 13-705\(H\)](#). The majority’s one-paragraph analysis is silent on the difference between first- and second-degree luring offenses. [Majority](#), ¶ 59.

Finally, even if secondary interpretive methods were necessary to resolve this issue, the majority erred by considering the “legislative acquiescence” doctrine because that doctrine applies only “when a statute construed by *a court of last resort* is reenacted in substantially the same terms.” [State v. Jones](#), 235 Ariz. 501, 503, ¶ 12 (2014). No decision from *this Court* has construed [§ 13-705](#) as making luring probation eligible. The majority also erred by concluding that the sentencing chart rendered the *statute* ambiguous. The sentencing chart is merely a summary of sentencing statutes and does not reflect every possible exemption or special condition for each offense. *Cf. Wareing v. Falk*, 182 Ariz. 495, 501 (1995)

(holding that courts could not rely exclusively on recommended jury instructions and should “satisfy themselves in each case that the instructions are correct”).

Thus, this Court should grant review to correct the majority’s faulty application of statutory interpretation methods and to preserve separation of powers principles. See *Mecham v. Gordon*, 156 Ariz. 297, 300 (1988) (“Nowhere in the United States is this system of structured liberty [separation of powers] more explicitly and firmly expressed than in Arizona.”).

**V. Conclusion.**

For these reasons, this Court should grant review.

RESPECTFULLY SUBMITTED this 7th day of July, 2021.

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