IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 2/7/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

MICHAEL DOUGLAS MCMILLAN, Petitioner, v. THE HONORABLE STEVEN F. CONN, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MOHAVE, Respondent Judge, JEREMY HUSS, Deputy Mohave County Attorney, Real Party in Interest.	)	1 CA-SA 13-0017 DEPARTMENT B Mohave County Superior Court No. CR-2011-01232 **DECISION ORDER**

In this special action, Petitioner asks us to review whether he is being unconstitutionally subjected to double jeopardy. Given that Petitioner would have no adequate remedy by way of an appeal, we accept jurisdiction but deny relief. *See State v. Moody*, 208 Ariz. 424, 438, ¶ 22, 94 P.3d 1119, 1133 (2004) ("[A] petition for special action is the appropriate vehicle for a defendant to obtain judicial appellate review of an interlocutory double jeopardy claim."). Further, in the exercise of our discretion and on our own motion, we waive any

response to the petition by the Real Party in Interest. Ariz. R. P. Spec. Act. 1(a) and 7(d).

Charging a criminal defendant twice for the same offense is constitutionally prohibited. U.S. Const. amend. V; Ariz. Const. art. II, § 10. Most of Petitioner's arguments rely on the disfavored "charging documents" test rather than the accepted "elements" test set forth in *Blockburger v. United States*, 284 U.S. 299, 300 (1932). However, the "charging documents" test has been explicitly overruled by the United States Supreme Court. *See State v. Cook*, 185 Ariz. 358, 359, 916 P.2d 1074, 1075 (App. 1995) (citing *United States v. Dixon*, 509 U.S. 688 (1993); *State v. Ortega*, 220 Ariz. 320, 324, ¶ 13, 206 P.3d 769, 773 (App. 2009).

When the proper test is used, it is clear that there is no danger of double jeopardy. Under the elements test, when the same act constitutes a violation of two distinct statutory provisions, "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 300 (1932).

Here, the elements of each alleged offense are as follows:

- Loitering. A person commits loitering if such person [1] intentionally: [2] is present in a public place [3] in an offensive manner or in a manner likely to disturb the public peace [4]

solicits another person to engage in any sexual offense." A.R.S. §13-2905(A)(1).

- Luring. "A person commits luring a minor for sexual exploitation by [1] offering or soliciting sexual conduct [2] with another person [3] knowing or having reason to know that the other person is a minor." A.R.S. §13-3554.

- Solicitation. "A person, other than a peace officer acting in his official capacity within the scope of his authority and in the line of duty, commits solicitation if, [1] with the intent to promote or facilitate the commission of a felony or misdemeanor, [2] such person commands, encourages, requests, or solicits another person [3] to engage in specific conduct which would constitute the felony or misdemeanor or which would establish the other's complicity in its commission." A.R.S. § 13-1002(A).

Applying the elements test, the offense in the first prosecution has at least one element that neither of the offenses in the second prosecution require. Similarly, each offense in the second prosecution requires at least one element not required in the offense in the first prosecution. Loitering requires that the conduct occur in a public place, which is not required for either luring or solicitation. Luring requires that the person approached be a minor, which is not a required element of loitering. Solicitation requires that the conduct solicited would constitute a felony or misdemeanor, which is not a required element of loitering.

Thus, under the elements test, the offenses do not constitute double jeopardy, as the trial court properly found.

We therefore deny relief.

/S/_____
ANDREW W. GOULD, Judge