IN THE SUPREME COURT OF THE STATE OF NEVADA

A. J., A 16-YEAR-OLD FOSTER CHILD,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE WILLIAM O. VOY, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 70119

FILED

DEC 19 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING EN BANC RECONSIDERATION

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.

Cherry, C.J.

Gibbons, J.

Hardesty, J.

Parraguirre, J.

Stiglich, J.

cc: Hon. William O. Voy, District Judge, Family Court Division
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney/Juvenile Division
Eighth District Court Clerk

PICKERING, J., with whom DOUGLAS, J., agrees, dissenting:

I would grant en banc reconsideration under NRAP 40A(a)(1). The panel opinion conflicts with long-established law governing statutory construction. As such, "reconsideration by the full court is necessary to . . . maintain uniformity of decisions of the Supreme Court." *Id.*

The statute involved in this proceeding reads as follows:

> If the district attorney files a petition with the juvenile court alleging that a child who is less than 18 years of age has engaged in prostitution or the solicitation of prostitution, the juvenile court . . . shall . . . [p]lace the child under the supervision of the juvenile court pursuant to a supervision and consent decree, without a formal adjudication of delinquency . . . .

NRS 62C.240(1)(a)(1). By its plain terms, this statute only applies "[i]f the district attorney files a petition with the juvenile court alleging that a child who is less than 18 years of age has engaged in prostitution or the solicitation of prostitution." *Id.* The district attorney did not file a petition with the district court alleging that A.J. had engaged in prostitution or solicitation. Rather, the district attorney filed a petition charging A.J. with obstructing an officer. NRS 62C.240 thus has nothing to do with the proceedings below.

I.

"It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). This fundamental principle of interpretation "is based on the constitutional separation of powers—[the Legislature] makes the law and the judiciary

interprets it. In doing so we generally assume that the best evidence of [the Legislature's] intent is what it says in the texts of the statutes." *Pope v. Motel 6*, 121 Nev. 307, 314, 114 P.3d 277, 282 (2005) (quoting *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3rd Cir. 2002)).

For as long as Nevada has had statutes, Nevada courts have adhered to this principle of interpretation and given statutes their plain meaning. *See, e.g., Brown v. Davis*, 1 Nev. 409, 413 (1865) ("The rule is cardinal and universal that if the law is plain and unambiguous, there is no room for construction or interpretation."); *State v. Jepsen*, 46 Nev. 193, 196, 209 P. 501, 502 (1922) ("Where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself."); *Rural Tel. Co. v. Pub. Utils. Comm'n*, 133 Nev., Adv. Op. 53, 398 P.3d 909, 911 (2017) ("'[W]hen the language of a statute is plain and unambiguous,' the courts are not permitted to look beyond the statute itself when determining its meaning.") (alteration in original) (quoting *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 225, 19 P.3d 245, 247 (2001)). Indeed, "[t]here is no safer nor better settled canon of interpretation than that when the language [of a statute] is clear and unambiguous it must be held to mean what it plainly expresses." 2A Norman J. Singer & Shambie Singer, *Sutherland Statutory Construction* § 46:1, at 155-56 (7th ed. 2014) (quoting *Swarts v. Siegel*, 117 F. 13, 18-19 (8th Cir. 1902)).

Despite this longstanding principle, the panel's decision takes NRS 62C.240's legislative history, and not its plain text, as the starting point for its statutory interpretation. The panel did not, before reaching beyond a literal interpretation of the statute's plain meaning, determine

that the text of the statute was ambiguous. *See, e.g., Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 641-42, 81 P.3d 532, 534-35 (2003) (considering legislative "intent" only after determining the statute had two reasonable interpretations and thus was ambiguous). Nor did it hold that giving effect to the plain meaning of the text would lead to an absurd result. *See, e.g., Newell v. State*, 131 Nev., Adv. Op. 97, 364 P.3d 602, 603-04 (2015) (when a statute's plain meaning leads to an absurd result, this court may look to other sources to interpret the statute).

Instead, the decision disregards NRS 62C.240's text entirely, ignoring the language enacted by the Legislature for a new construction supposedly supported by legislative history. In doing so, the panel did not apply any of the conventional limitations to the plain meaning rule, but instead created a new exception: If the statute is "protective," then the court may disregard the plain meaning of the text and use legislative history to make its own determination of what it thinks the Legislature should have written. Such a rule ignores the reality that nearly every statute is "protective" in nature, giving courts "an open invitation to engage in 'purposive' rather than textual interpretation, and generally to engage in judicial improvisation." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 364-66 (2012). This method of statutory interpretation conflicts with centuries of precedent, is unworkable moving forward, and oversteps our bounds as the judiciary.

II.

The panel's decision also invades the longstanding adherence to the separation of powers between the legislature's role in creating the law, the judiciary's role in interpreting the law, and the executive's role in enforcing the law. In our system of government, "[p]rosecutors have wide discretion in the performance of their duties." *Lopez v. State*, 105 Nev. 68,

77, 769 P.2d 1276, 1282 (1989). "The matter of the prosecution of any criminal case is within the entire control of the district attorney . . . ." *Cairns v. Sheriff*, 89 Nev. 113, 115, 508 P.2d 1015, 1017 (1973). Absent unconstitutional discrimination or some other limiting principle, prosecutors have broad discretion to charge conduct as they see fit. *See id.* The Legislature structured the language of NRS 62C.240 to respect this discretion, providing for the statute's protections only if the district attorney files a petition against the juvenile that alleges a prostitution-related offense.

The district attorney's office did not file such a petition. It filed a petition alleging obstruction of an officer. Petitioning the juvenile court to adjudicate A.J. delinquent based on obstruction of an officer was within the prosecutor's discretion. Contrary to the panel's conclusion that obstructing an officer is "fictitious conduct" or a "fictitious charge," the declaration of arrest states that the responding officer "advised that both females were being uncooperative and refused to provide their names" and that "upon making contact with [A.J.] she stated that she does not like vice and refused to give [the officer] her name and [date of birth]." The panel's decision disregards the prosecutor's use of discretion to allege obstructing an officer in the petition, because in the panel's judgment it would have been better for A.J.'s interests if the prosecutor alleged a prostitution-related offense under NRS 62C.240 instead. It is not the judiciary's role, in the face of longstanding adherence to prosecutorial discretion, to remove the ability of a prosecutor to charge conduct within the statutory scheme.

The impact of the panel's decision as precedent moving forward—the uprooting of our principles of statutory interpretation and the removal of prosecutorial discretion—require the full consideration of this

court to maintain uniformity in our law. For these reasons, I dissent from the court's denial of the petition for en banc reconsideration.

Pickering, J.
Pickering

I concur:

Douglas, J.
Douglas