

PET

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Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF NEVADA

STATE OF NEVADA

CHRISTOPHER ANDERSEN,
Petitioner,

vs.

THE HONORABLE ROB BARE,
EIGHTH JUDICIAL DISTRICT
COURT JUDGE,
Respondent,

CITY OF LAS VEGAS,
Real Party in Interest.

NEV. SUPREME CT. CASE
NO. _____

NEV. CT. OF APP. CASE
NO. _____

DIST. CASE NO. C-16-
319933-A

DIST. CT. DEPT. 32

MUNICIPAL CT. CASE
NO. C11135328A/B

MUNICIPAL CT. DEPT. 1

SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS
OR ALTERNATIVELY PETITION FOR WRIT OF MANDAMUS

COMES NOW Defendant, CHRISTOPHER ANDERSEN, by and
through his attorney of record, MICHAEL D. PARIENTE, and petitions this
Honorable Court to grant his petition for a writ of habeas corpus or

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2 alternatively writ of mandamus to order the Honorable Rob Bare, District
3 Court Judge, Department 32 to order the Honorable Cynthia Leung,
4 Municipal Court Judge No. 1 to reverse his conviction and grant him the
5 right to trial by jury.
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7 DATED this 28th day of February, 2018.

8 Respectfully submitted,
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10 */s/ Michael D. Pariente*
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ROUTING STATEMENT

Mr. Christopher Andersen agrees with the presumption that his appeal should first be heard before the Nevada Court of Appeals.

MEMORANDUM OF POINTS AND AUTHORITIES

Mr. Andersen files this petition alleging that the Honorable Cynthia Leung violated her ministerial duty by not granting Mr. Andersen a jury trial. He also alleges the Honorable Rob Bare erred in not granting his Appeal which was denied by written order on July 20, 2017.

Mr. Andersen moves to vacate his conviction for Misdemeanor Battery Constituting Domestic Violence (NRS 200.485). Mr. Andersen requests this Honorable Court grant his petition to set aside the judgment of conviction entered on December 6, 2016 because the Las Vegas Municipal Court denied him his request for a jury trial. On December 6, 2016, Mr. Andersen entered a conditional guilty plea reserving the right to appeal this issue of the denial of his right to a jury trial. He argues the loss of fundamental rights due to a conviction for domestic violence is a “serious offense” entitling a defendant the right to a jury trial. He distinguishes his case from *Amezcuca v. Eighth Judicial District Court*, 319 P.3d 602 (Nev. 2014) due to the fact that NRS 202.360 has been amended subsequent to

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2 *Amezcu*a, to make him a felon punishable up to 6 years in Nevada prison if
3 he is caught possessing a firearm and has a conviction for domestic
4 violence.¹ In 2015, the Nevada Legislature amended NRS 202.360 to
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6
7 1 NRS 202.360 Ownership or possession of firearm by certain persons
8 prohibited; penalties.

9 1. A person shall not own or have in his or her possession or under his
10 or her custody or control any firearm if the person:

11 (a) Has been convicted in this State or any other state of a misdemeanor
12 crime of domestic violence as defined in 18 U.S.C. § 921(a) (33);

13 (b) Has been convicted of a felony in this State or any other state, or in
14 any political subdivision thereof, or of a felony in violation of the laws of
15 the United States of America, unless the person has received a pardon and
16 the pardon does not restrict his or her right to bear arms;

17 (c) Is a fugitive from justice;

18 (d) Is an unlawful user of, or addicted to, any controlled substance; or

19 (e) Is otherwise prohibited by federal law from having a firearm in his
20 or her possession or under his or her custody or control.

21 A person who violates the provisions of this subsection is guilty of a
22 category B felony and shall be punished by imprisonment in the state prison
23 for a minimum term of not less than 1 year and a maximum term of not
24 more than 6 years, and may be further punished by a fine of not more than
25 \$5,000.

26 2. A person shall not own or have in his or her possession or under his
27 or her custody or control any firearm if the person:

28 (a) Has been adjudicated as mentally ill or has been committed to any
mental health facility by a court of this State, any other state or the United
States;

(b) Has entered a plea of guilty but mentally ill in a court of this State,
any other state or the United States;

(c) Has been found guilty but mentally ill in a court of this State, any
other state or the United States;

(d) Has been acquitted by reason of insanity in a court of this State, any
other state or the United States; or

(e) Is illegally or unlawfully in the United States.

deprive Nevadans of their Second Amendment Right to Bear Firearms if convicted in Nevada of domestic violence. In October 1, 2017, Senate Bill 124 was enacted which required persons convicted of Battery Constituting Domestic Violence in violation of NRS 200.485 to *permanently* surrender, sell or transfer any firearms they own, possess or for which they have custody. A person who fails to comply with this new law faces prosecution for a Category B Felony which carries a potential fine of \$5,000 and incarceration in Nevada State Prison of 1 to 6 years.²

The lower courts erred in denying Mr. Andersen a jury trial consistent with his procedural due process rights:

[O]nce it is determined that the Due Process Clause applies, ‘the question remains what process is due.’ [Citation.]” (*Loudermill*, supra, 470 U.S. at p. 541.) “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481 [33 L. Ed. 2d 484, 92 S. Ct. 2593].) “[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the

A person who violates the provisions of this subsection is guilty of a category D felony and shall be punished as provided in NRS 193.130.

3. As used in this section:

(a) “Controlled substance” has the meaning ascribed to it in 21 U.S.C. § 802(6).

(b) “Firearm” includes any firearm that is loaded or unloaded and operable or inoperable.

² This change in the law went in to effect after Mr. Anderson’s appeal was filed.

procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” (*Mathews v. Eldridge* (1976) 424 U.S. 319, 335 [47 L. Ed. 2d 18, 96 S. Ct. 893].) *Cook v. City of Buena Park*, 126 Cal. App. 4th 1, 6 (Cal. App. 4th Dist. 2005).

Applying the first prong of the *Mathews* test to Mr. Andersen’s case, the private interest that will be affected is his Second Amendment right to bear arms. The second prong is the risk of an erroneous deprivation of his Second Amendment right caused by a conviction for domestic violence. Third, the additional protection of a six-person jury trial to hold the City to its burden of proving its case beyond a reasonable doubt would help eliminate the risk that Mr. Andersen does not face an erroneous deprivation of his Second Amendment right because the City must prove its case beyond a reasonable doubt to six people sitting in a jury, instead of one Municipal Court Judge. Finally, the City’s interest in fiscal and administrative burdens would be proportionately no greater than those incurred by the overwhelming majority of states that provide jury trials for misdemeanors.

The loss of the right to possess a firearm makes a conviction for battery constituting domestic violence a serious offense. The Court held that the right to possess a firearm for self-defense is a fundamental right and

cannot be abridged by the State. Specifically, the Court in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) held that the Second Amendment is a fundamental right that is fully applicable to the States through the Fourteenth Amendment. *McDonald* further holds:

Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is "the central component" of the Second Amendment right. 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d, at 662; see also *id.*, at ___, 128 S. Ct. 2783, 171 L. Ed. 2d, at 679 (stating that the "inherent right of self-defense has been central to the Second Amendment right"). Explaining that "the need for defense of self, family, and property is most acute" in the home, *ibid.*, we found that this right applies to handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," *id.*, at ___, 128 S. Ct. 2783, 171 L. Ed. 2d, at 679 (some internal quotation marks omitted); see also *id.*, at ___, 128 S. Ct. 2783, 171 L. Ed. 2d, at 679 (noting that handguns are "overwhelmingly chosen by American society for [the] lawful purpose" of self-defense); *id.*, at ___, 128 S. Ct. 2783, 171 L. Ed. 2d, at 680 ("[T]he American people have considered the handgun to be the quintessential self-defense weapon"). Thus, we concluded, citizens must be permitted "to use [handguns] for the core lawful purpose of self-defense." *Id.*, at ___, 128 S. Ct. 2783, 171 L. Ed. 2d, at 680. *McDonald v. Chicago*, 130 S. Ct. 3020 (U.S. 2010).

Other courts have recognized the right to a jury trial in cases where a defendant faces a lifetime prohibition of possession of a firearm as a consequence of a misdemeanor assault conviction not punishable by more than six months:

In the present case the question is whether the lifetime prohibition of

possession of a firearm in addition to 6 months imprisonment makes the offense serious under *Blanton* and therefore entitles Defendant to a jury trial. Citing *USA v. Chavez*, 204 F.3d 1305 (11th Cir. 2000), the Government argues that the lifetime prohibition on firearm possession does not make the penalty serious. The undersigned is unpersuaded by the court's reasoning in *Chavez* and concludes that the penalty is serious. In *Chavez*, the court focused on the fact that in 18 U.S.C. § 921 (a)(33)(B)(i)(II) Congress recognized that some domestic violence offenses do not carry the right to a jury trial even though a conviction results in the prohibition of firearm possession. However, the issue is not whether Congress recognized a right to a jury trial for domestic violence offenses. The issue is whether the *penalty* Congress attached to the offense was serious enough to entitle the Defendant to a jury trial under the 6th Amendment. Having examined that issue, the Court finds that a lifetime prohibition on the possession of a firearm is a serious penalty which entitles a Defendant to a jury trial under the 6th Amendment. Possession of a firearm for military purposes, self protection and sport has been an important aspect of American life throughout our history. Today, the issue of Governmental restriction of firearm possession is hotly debated. Substantial segments of American society hold strong opinions on the issue. Many advocate strict government restrictions on the ability to possess firearms while many others take the opposite view and consider firearms possession to be an integral part of their lives. In this context, the issue is very serious. Moreover, the categories of persons prohibited from possessing firearms under 18 U.S.C. § 922(g) and the penalties imposed under 18 U.S.C. § 924 for violating the prohibition (10 years) *demonstrate that Congress views the prohibition as serious. The Court finds that a lifetime prohibition on the possession of a firearm is a serious penalty and, when combined with 6 months imprisonment, entitles a Defendant to the common-sense judgment of a jury.* Defendant's Motion for a Jury Trial is GRANTED. *United States v. Smith*, 151 F. Supp. 2d 1316, 1317-1318 (N.D. Okla. 2001). (italics added)

The *Smith* case, *supra*, is right on point. The fact that the Nevada Legislature has barred persons from owning or possessing firearms, even for

self-defense for the rest of their lives, and subjects them to felony prosecution punishable up to 6 years if such persons are convicted of domestic violence, demonstrates that the Legislature “views the prohibition as serious.” The Legislature chose to amend NRS 202.360 in 2015 to treat persons convicted of domestic violence the same as felons, mentally ill persons, and drug addicts by lumping them in with the category of people who cannot own or possess a firearm even for self-defense demonstrates a clear intent of the Legislature that it believes Domestic Violence is a serious crime. Thus, this Court should find the Legislature’s lifetime ban *and* felony prosecution for possessing a firearm and for failure to permanently surrender firearms, when combined with 6 months imprisonment “entitles a Defendant to the common-sense judgment of a jury.”

In this case, Mr. Andersen has provided notice under NRS 175.011 demanding his right to trial by jury. If Mr. Andersen’s appeal is denied and he is convicted of Battery Constituting Domestic Violence in violation of NRS 200.481, NRS 200.485, and NRS 33.018, he faces the loss of his right to possess a firearm even for self-defense, up to 6 years in prison if he is caught owning or possessing a firearm under NRS 202.360(2), despite the fact that the Court in *McDonald v. City of Chicago, supra*, held that the

Second Amendment right to bear arms is a fundamental right incorporated through the Fourteenth Amendment to the States.

The fact that a defendant stands to lose his Second Amendment right and face felony prosecution under NRS 202.360(2) upon conviction of misdemeanor battery constituting domestic violence makes this criminal offense anything but “petty”. Because a defendant’s Second Amendment right is at stake in a criminal complaint of Battery Constituting Domestic Violence and because he or she faces subsequent felony prosecution under NRS 202.360(2) if caught owning or possessing a firearm even for self-defense, Mr. Andersen should have been afforded a jury trial per his demand.

CONCLUSION

This Honorable Court should grant Mr. Andersen’s petition and remand this case to the Las Vegas Municipal Court Department No. 1 for a jury trial.

Respectfully submitted,

THE PARIENTE LAW FIRM, P.C.

/s/ Michael D. Pariente

MICHAEL D. PARIENTE, ESQ.
Attorney for Petitioner

VERIFICATION

STATE OF NEVADA)

)ss:

COUNTY OF CLARK)

CHRISTOPHER ANDERSEN, being first duly sworn, deposes and states as follows:

That I am the Petitioner in the above-entitled action; that I have read the foregoing Petition for Writ of Mandamus or Alternatively Petition for Writ of Habeas Corpus and know the contents thereof, that the same is true of my own knowledge, except for those matters therein contained stated on information and belief, and as to those matters, I believe them to be true.

DATED this 28th day of February, 2018.


CHRISTOPHER ANDERSEN

SUBSCRIBED and SWORN to before me
this 28th day of February, 2018.



NOTARY PUBLIC in and for said
Clark County and State of Nevada



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DECLARATION OF COUNSEL

STATE OF NEVADA)
)
COUNTY OF CLARK)

I, MICHAEL D. PARIENTE, ESQ., being first duly sworn according to
law, upon oath, deposes and says:

1. Your declarant is an Attorney at Law duly licensed to practice in all
courts in the State of Nevada;
 2. Your declarant is the Attorney of record for the Defendant herein;
- FURTHER YOUR DECLARANT SAYETH NAUGHT.

/s/ Michael D. Pariente

MICHAEL D. PARIENTE, ESQ.

CERTIFICATE OF COMPLIANCE

I, Michael D. Pariente, Esquire, hereby certify that this petition for review by the Supreme Court pursuant to rule 40B complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: It has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 and Times New Roman font. I further certify that this motion for rehearing complies with the page or type volume limitations of NRAP 40 or 40B because it is: monospaced, has 14 or fewer characters per inch and contains 2,874 words or 344 lines of text; or does not exceed 10 pages.

DATED this 28th day of February, 2018.

/s/ Michael D. Pariente

Michael D. Pariente, Esquire

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of THE PARIENTE LAW FIRM, P.C., and that on the date shown below, I caused service to be completed by:

- ☐ personally delivering
- ☒ delivery via Las Vegas Messenger Service
- ☐ sending via Federal Express or other overnight delivery service
- ☒ depositing for mailing in the U.S. mail with sufficient postage affixed thereto
- ☐ delivery via facsimile machine to fax no. [fax number]

a true and correct copy of the attached document addressed to:

City of Las Vegas Attorney Brad Jerbic
Las Vegas City Attorney
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

Attorney General Adam Paul Laxalt
Office of the Attorney General
555 E. Washington, Suite 3900
Las Vegas, NV 89101

DATED this 28th day of February, 2018.



Chris Barden - Paralegal