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PET
ADAM L. GILL, ESQ.
Nevada State Bar No. 11575
MICHAEL AISEN, ESQ.
Nevada State Bar No. 11036
723 South Third Street
Las Vegas, NV 89101
P: (702) 750-1590
F: (702) 548-6884
Attorneys for Petitioner

IN THE SUPREME COURT OF NEVADA
STATE OF NEVADA

ROMAN HILDT, Petitioner, vs. THE HONORABLE RICHARD F. SCOTTI, EIGHTH JUDICIAL DISTRICT COURT JUDGE Respondent, CITY OF HENDERSON, Real Party in Interest.	Nev. Supreme Ct. Case No: Nev. Ct. of App. Case No: District Court Case No: C-19-339750A Dept. No: II Henderson Municipal No: 17CR012574 Dept. No. III

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) OR ALTERNATIVELY PETITION FOR WRIT OF MANDAMUS

COMES NOW Petitioner, ROMAN HILDT, by and through his attorney of record, ADAM L. GILL, ESQ., AND MICHAEL N. AISEN, ESQ., and petitions this Honorable Court to grant his petition for writ of habeas corpus or alternatively writ of mandamus to order the Honorable Richard F. Scotti, District Court Judge,

19-38411

Department 2 to order the Honorable Rodney T. Burr, Henderson Municipal Court Judge Department 3 to reverse his conviction and grant him the right to trial by jury.

DATED this 13th day of September 2019

/s/ Michael N. Aisen

ADAM L. GILL, ESQ.
Nevada State Bar No. 11575
MICHAEL N. AISEN, ESQ.
Nevada State Bar No. 11036
723 South Third Street
Las Vegas, NV 89101
P: (702) 750-1590

ROUTING STATEMENT

Mr. Roman Hildt ("Mr. Hildt") agrees with the presumption that his petition should first be heard before the Nevada Court of Appeals.

MEMORANDUM OF POINTS AND AUTHORITIES

Mr. Hildt files this petition alleging that the Honorable Rodney T. Burr violated his ministerial duty by not granting Mr. Hildt a jury trial. He also alleges the Honorable Richard F. Scotti erred in not granting his Appeal which was denied by written order on August 21, 2019.

Mr. Hildt moves to vacate his conviction of Misdemeanor Battery Constituting Domestic Violence (NRS 200.485). Mr. Hildt requests this Honorable Court grant his petition to set aside the judgment of conviction entered on April 22, 2019 because the Henderson Municipal Court denied him his request for jury trial.

Mr. Hildt 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 *Amezcua v. Eight Judicial District Court*, 319 P.3d 602 (Nev. 2014) due to the fact that NRS 202.360 has been amended subsequent to *Amezcua*, to make him a felon punishable up to 6 years in Nevada prison if he is caught possessing a firearm and has a conviction for domestic violence.[1] In 2015,

[1] 1 NRS 202.360 Ownership or possession of firearm by certain persons prohibited; penalties.
1. A person shall not own or have in his or her possession or under his or her custody or control any firearm if the person:
(a) Has been convicted in this State or any other state of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a) (33);
(b) Has been convicted of a felony in this State or any other state, or in any political subdivision thereof, or of a felony in violation of the laws of the United States of America, unless the person has received a pardon and the pardon does not restrict his or her right to bear arms;
(c) Is a fugitive from justice;
(d) Is an unlawful user of, or addicted to, any controlled substance; or
(e) Is otherwise prohibited by federal law from having a firearm in his or her possession or under his or her custody or control.
A person who violates the provisions of this subsection is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than $5,000.
2. A person shall not own or have in his or her possession or under his or her custody or control any firearm if the person:
(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;

the Nevada Legislature amended NRS 202.360 to deprive Nevada residents 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. Hildt 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

(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.
2 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.

> 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 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 *Matthews* test to Mr. Hildt'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 jury trial to hold the City to its burden of proving its case beyond a reasonable doubt would help eliminate the risk that Mr. Hildt 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. This 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. Hildt has provided notice under NRS 175.011 demanding his right to trial by jury. Mr. Hildt's conviction on the charge of Battery Constituting Domestic Violence in violation of NRS 200.481, NRS 200.485, and NRS 33.018, immediately resulted in the loss of his right to possess a firearm even for self-defense., He now faces 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 immediately and automatically loses their Second Amendment right and faces 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 they face subsequent felony prosecution under NRS 202.360(2) if caught owning or possessing a firearm even for self-defense, Mr. Hildt should have

been afforded a jury trial per his demand.

CONCLUSION

Therefore, this Honorable Court should grant Mr. Hildt's petition and remand this case to the Henderson Municipal Court Department 3 for a jury trial

DATED this 13th day of September 2019.

/s/ Michael N. Aisen

ADAM L. GILL, ESQ.
Nevada State Bar No. 11575
MICHAEL N. AISEN, ESQ.
Nevada State Bar No. 11036
723 South Third Street
Las Vegas, NV 89101

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Supreme Court of the State of Nevada by using the EFlex Electronic Filing system. I certify that the following parties or their counsel of record received by electronic means and by placing a copy in an envelope in the U.S. Mail, postage fully prepaid, addressed to:

Elaine F. Mather, ESQ. Assistant City Attorney
243 S. Water Street, MSC 711
Henderson, Nevada 89015
Email: elaine.mather@cityofhenderson.com

Office of the Attorney General
Aaron Ford, Attorney General
100 N. Carson Street
Carson City, Nevada 89701

DATED this 13th day September, 2019.

By: *Andréa Simmons*
An employee working for Aisen, Gill & Associates

DECLARATION OF COUNSEL

STATE OF NEVADA)

) ss:

COUNTY OF CLARK)

MICHAEL N. AISEN, ESQ., being first duly sworn under oath, subject to the penalty for perjury pursuant to Nevada law, and in conformity with N.R.S. 53.045, hereby deposes and says:

1. I, MICHAEL N. AISEN, ESQ., am the attorney of record for the Defendant, ROMAN HILDT in the above-entitled matter.
2. I am an attorney duly licensed to practice before all Courts in the State of Nevada;
3. I make this Affidavit based upon facts within my own knowledge, save and except as to those matters alleged upon information and belief, and at to those matters, I believe them to be true.
4. I make this Petition for Writ Habeas Corpus (Post-Conviction) or Alternatively for Writ of Mandamus.
5. I am more than eighteen (18) years of age and I am competent to testify as to the matters stated herein

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6. I have personal knowledge pertaining to the facts stated herein, or I have been informed of these facts and believe them to be true.

FURTHER AFFIANT SAYETH NAUGHT.

__/s/ Michael N. Aisen

MICHAEL N. AISEN, ESQ.

Signed in conformity with N.R.S. 53.045 this
_13th__day of September, 2019 in Las Vegas, Nevada.

CERTIFICATE OF COMPLIANCE

I, Michael N. Aisen, Esq., 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 2018 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 2,425 words or 212 lines of text; or does not exceed 10 pages.

DATED this 13th day of September 2019.

/s/ Michael N. Aisen
MICHAEL N. AISEN, ESQ.
Nevada State Bar No. 11036
723 South Third Street
Las Vegas, NV 89101