IN THE SUPREME COURT OF THE STATE OF NEVADA

Nathan Ohm, Petitioner, vs. Eighth Judicial District Court, and the Honorable Kathleen Delaney, District Court Judge, Respondents, and City of Henderson, Real Party in Interest.	)	Supreme Court Case No.: Electronically Filed Oct 19 2020 03:20 p.m. Elizabeth A. Brown Clerk of Supreme Court **PETITIONER'S APPENDIX INDEX** **Vol. I** **Bates 001-150**

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HENDERSON MUNICIPAL COURT
HENDERSON, NEVADA

City of Henderson, Plaintiff vs. Nathan Ohm Defendant	Case No.: 19CR002298 Dept. No: 1 **DEFENDANT'S MOTION TO DIVEST MUNICIPAL COURT OF JURISDICTION OR, IN THE ALTERNATIVE, MOTION TO DISMISS** **Hearing Requested**

COMES NOW, Defendant Nathan Ohm, by and through his attorney of record, DAMIAN SHEETS, ESQ. of the firm Mayfield Gruber & Sheets, hereby submits this Defendant's Motion to Divest Municipal Court of Jurisdiction or, in the Alternative, Motion to Dismiss.

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NOTICE OF HEARING

TO: CITY OF HENDERSON, Plaintiff; and

TO: DEPUTY CITY ATTORNEY:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing motion on for hearing on the ____ day of _____, 2019, at the hour of _____, before the above-entitled Court, or as soon thereafter as counsel can be heard.

DATED this ___ day of _____, 2019.

MAYFIELD GRUBER & SHEETS
Respectfully Submitted By:

__/s/ Damian Sheets_____
DAMIAN SHEETS, ESQ.
Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Nathan Ohm is alleged to have committed the offense of Battery Constituting Domestic Violence on or about February 22, 2019. This Motion follows, seeking to divest the Henderson Municipal Court of jurisdiction over the case or, in the alternative, to dismiss the Amended Criminal Complaint.

This Motion is brought on four grounds: first, the Amended Criminal Complaint filed on or about October 24, 2019 constitutes an unlawful *ex post facto* amendment; second, assuming the Amended Complaint is valid, Defendant is nonetheless entitled to a jury trial on this matter based on qualification under 18 U.S.C. § 1921(a)(33)(A), and by the instant Motion makes this request; third, the Henderson Municipal Code creates an equal protection violation under the United States Constitution that cannot pass strict scrutiny; and fourth, the Henderson Municipal Court lacks jurisdiction to prosecute the instant case under either the Nevada Revised Statutes or Municipal Code.

A. The Amended Criminal Complaint Constitutes an Unlawful Ex Post Facto Amendment

Article I, § 9 of the United States Constitution prevents federal and state governments from enacting any *ex post facto* laws to matters which have been "commenced or prosecuted." U.S. CONST. Art. I. § 9.; *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 382 (1798). The *ex post facto* clause has been broadly interpreted by the United States Supreme Court. "[O]ur decisions prescribe that two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events

occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 964 (1981).

In this case, Defendant contends the Amended Criminal Complaint violates the constitutional prohibition against *ex post facto* laws. The only substantive amendment to the complaint was altering the source of the conduct's criminality from the Nevada Revised Statutes to the recently enacted Henderson Municipal Code (hereinafter "Code"). However, Defendant's conduct was alleged to have occurred on December 9, 2018, and the Code under which he is now charged was enacted by Ordinance on or about October 15, 2019. Therefore, there is little question that Defendant is being charged under a law that had not yet been enacted when the conduct allegedly occurred. As a result, the first criteria for an invalid *ex post facto* law – that it apply retrospectively – is satisfied. The remaining issue, then, is only whether the law "disadvantages the offender affected by it."

The City will likely argue here that the Amended Complaint does not constitute an *ex post facto* violation because the Code is substantively identical to the law contained in the Nevada Revised Statutes under which offenders were previously charged. Therefore, the City may argue that the Amended Complaint neither criminalizes an offense that was not previously criminal, nor does it enhance or alter the punishment for the offense; these are perhaps the more common types of *ex post facto* challenge under state law. See, e.g., *Miller v. Warden, Nev. State Prison*, 112 Nev. 930, 933, 921 P.2d 882, 883 (1996).

However, federal law has not construed "disadvantaged" as limited to retroactive criminalization or punishment. Rather, the Courts have taken a much broader approach by

specifically recognizing four distinct types of *ex post facto* law in addition to the catch-all sweep of "fundamental fairness."

> Long ago the Court pointed out that the Clause protects liberty by preventing governments from enacting statutes with "manifestly unjust and oppressive" retroactive effects…
>
> I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive. *Stogner v. California*, 539 U.S. 607, 611, 123 S. Ct. 2446, 2449 (2003) (citing *Calder* v. *Bull,* 3 U.S. 386, 3 Dallas 386, 1 L. Ed. 648 (1798)).

Stogner's recitation of the four common types of *ex post facto* (and "similar") laws have been traced back to historical roots of manifest injustice, particularly when the Ex Post Facto Clause itself was enacted to "restrict governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 964 (1981); *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915). Indeed, the Courts strongly caution against *ex post facto* laws and their consistent ties to passions which may grow from the "feelings of the moment." "Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of

those sudden and strong passions to which men are exposed." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-38 (1810).

Notions of manifest injustice and fundamental fairness have been inextricably intertwined with *ex post facto* analysis since the inception of the United States Constitution. From 1798 to 2018, the Courts have built the foundation of *ex post facto* analysis on these overarching considerations. "All these, and similar laws, are manifestly unjust and oppressive. In my opinion, the true distinction is between *ex post facto* laws, and retrospective laws. Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law: The former, only, are prohibited. Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91 (1798). "In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell v. Texas*, 529 U.S. 513, 516, 120 S. Ct. 1620, 1624 (2000).

> Our holding today is consistent with basic principles of fairness that animate the *Ex Post Facto* Clause. The Framers considered *ex post facto* laws to be "contrary to the first principles of the social compact and to every principle of sound legislation." The Clause ensures that individuals have fair warning of applicable laws and guards against vindictive legislative action. Even where these concerns are not directly implicated, however, the Clause also safeguards "a fundamental fairness interest . . . in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a

> person of his or her liberty or life." *Peugh v. United States*, 569 U.S. 530, 544, 133 S. Ct. 2072, 2084-85 (2013) (citations omitted).

Thus, the Courts have made it apparent that *ex post facto* analysis reaches beyond laws which merely affect criminalization or enhanced punishment. The United States Supreme Court has explicitly recognized at least four different types of *ex post facto* laws – laws affecting criminalization, aggravation of the crime, enhancing the punishment, or changing the evidence or testimony – as well as any "similar laws" that would otherwise trigger principles of "fundamental fairness," "manifest injustice," "vindictiveness," or those laws which, applied retrospectively, are "unjust or oppressive."

In this case, Defense maintains that the Amended Criminal Complaint fits within two of the four enumerated types of *ex post facto* laws, that being laws changing the criminalization of conduct and laws which change the evidence or testimony; the amendment also falls within the more sweeping penumbra of fundamental fairness and manifest injustice.

The sole amendment to the Criminal Complaint is the alteration of the underlying charging authority from Nevada Revised Statute to Henderson Municipal Code 8.02.055. However, the Courts examine not simply the text of the retrospective law, but also the *purpose* of the law, in order to determine if such laws are fundamentally unfair, vindictive in nature, or unjust and oppressive. The Henderson Municipal Ordinance which amended the Code, Ordinance No. 3632 (see **Exhibit 1**, attached), is clear that the singular purpose for enacting the law was to avoid the imposition of jury trials as a newly recognized fundamental right:

> WHEREAS, in Andersen v. Eighth Judicial District Court, 135 Nev. Adv. Op. 42 (2019), the Nevada Supreme Court held… the offense of misdemeanor battery domestic violence under NRS 200.485(1)(a), as a "serious" offense, for the purpose of having the right to a jury trial under the Sixth Amendment; and
> …
> WHEREAS, there will be anticipated legal challenges to the Municipal Court's jurisdiction to entertain and hold jury trials as a result of the recent Nevada Supreme Court decision and there are current practical challenges of holding jury trials in the Henderson Municipal Court, enacting a city ordinance is important to protect the general health, safety and welfare of the citizens of Henderson; and
> …
> Henderson Municipal Code Chapter 8.02 is hereby amended as follows [creating Henderson Municipal Code criminalizing Battery Constituting Domestic Violence].

As a result of the enumerated purpose of the Ordinance, the legal analysis must examine whether the Amendment constitutes an unlawful *ex post facto* law when the sole reason for enacting the law, effective retroactively, is to avoid and deny criminal defendants the opportunity to assert a fundamental right, that being a trial by jury. Federal analysis would conclude this law is unconstitutional.

The concerns noted as the basis for enacting the law are "anticipated legal challenges" to jury trials as well as "practical challenges" of holding jury trials. However, this reasoning offers unrivaled clarity to conclude that the law was enacted entirely as a reaction to the Nevada Supreme Court's recognition of jury trials as a fundamental right in *Andersen*. A law which is so clearly designed and intended to subvert the availability of a fundamental right can go by no other words than "vindictive," "fundamentally unfair," "manifestly unjust" and "oppressive."

Although this is the primary basis on which Defense maintains the Code and Amended Criminal Complaint constitute an unlawful *ex post facto* law, there are also two

alternative theories on which to reach the same conclusion. First, an *ex post facto* law is also specifically recognized when the law changes the testimony or evidence to be received. The distinction between charging the offense under the Nevada Revised Statute versus the newly enacted Code is simply that under Statute, the defendant is entitled to a jury trial, whereas under the Code, the City maintains they are not (although Defense disagrees with the City's position for the basis outlined in § B, *infra*). A law which alters the availability of a trial by jury is one that changes the testimony or evidence received; during a bench trial, the Judge acts as a trier of law and a trier of fact, and will often hear evidence or testimony in relation to his or her role as the trier of law (for example, pre-trial motions, writs, evidentiary hearings, and suppression claims). Such testimony or evidence would not be heard by the jury, whose rule is exclusively that of trier of fact. It would be an uphill climb to take the position that a bench trial versus a jury trial results in no substantive change to the evidence received by the body ultimately responsible for determining guilt or innocence.

As a final alternative basis on which to find the Amended Complaint and Code is an unlawful *ex post facto* law, Defense posits the Code alters the criminalization of the underlying conduct because, prior to the enactment of the Code, the Municipal Court lacked jurisdiction over all cases which require trial by jury (see § D, *infra*). Therefore, the Code altered the law to create an offense which was previously not legally chargeable in the Henderson Municipal Court due to a lack of jurisdiction, discussed in greater detail below; in summation, the amendment would create jurisdiction over a charge where it previously did not exist.

In conclusion, whether analyzed as a substantive change in the evidence received, altering the criminality of the offense, or under the most applicable considerations for "fundamental unfairness" and "manifest injustice," the amendment to a retrospective law which is specifically designed to avoid the implementation of a constitutional and fundamental right is an unlawful *ex post facto* amendment. Therefore, the amended complaint must be dismissed.

B. The Henderson Municipal Code Still Qualifies as a Misdemeanor Crime of Domestic Violence Under 18 U.S.C. § 921(a)(33)(A), and Therefore Still Requires Trial by Jury

On September 12, 2019, the Nevada Supreme Court released *Andersen v. Eighth Judicial District Court*, 135 Nev. Adv. Op. 42 (2019), which held that "[b]ecause our statutes now limit the right to bear arms for a person who has been convicted of misdemeanor battery constituting domestic violence, the Legislature has determined that the offense is a serious one. And given this new classification of the offense, a jury trial is required." *Id.*

The Court based its decision on the revision to Nevada Revised Statute 202.360, which states, in pertinent part:

> 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)

The City has taken the position that a violation under the Municipal Code does not fall within the definition of "misdemeanor crime of domestic violence" as set forth in 18 U.S.C. § 921(a)(33); under this construction, a conviction under the Code would not trigger

the firearm restriction as set forth in NRS 202.360, and pursuant to *Andersen*, would therefore also not require trial by jury. The Defense respectfully disagrees, and maintains that a conviction for domestic violence under the newly enacted Code also falls within the definition as set forth in federal statute.

As a preliminary matter, it is significant to note that the Municipal Code is verbatim to the Nevada Revised Statute criminalizing battery constituting domestic violence, NRS 200.485(1)(a). The Code and Statute are substantively identical. There is no doubt that a conviction for battery domestic violence under NRS 200.485(1)(a) results in firearm restrictions warranting a jury trial, as that was the specific holding announced in *Andersen*. The basis on which the Code would escape this requirement cannot be to any substantive alterations in the law (given the identical language of the Code and Statute), but rather is only due to its source as a Municipal Code rather than State statute. The ultimate question, therefore, is whether a Municipal Code that criminalizes the same conduct as the State statute also meets the definition of a "misdemeanor crime of domestic violence" under 18 U.S.C. § 921(a)(33). If the Code falls within the federal definition, the Code will also trigger the firearm provision of NRS 202.360 and subsequently, pursuant to *Andersen*, will require a jury trial.

The Code falls within the scheme of 18 U.S.C. § 921(a)(33) for two reasons: first, it fits within the plain language of the definition itself; second, case law has recognized the definition to apply when the underlying conduct falls within the articulated definition, without deference to the title of the conviction itself.

Two pertinent definitions apply to the first analysis: the actual criminalization of possessing a firearm by certain individuals, and the definition of a "misdemeanor crime of domestic violence" contained in the criminalization statute. The possession of a firearm by prohibited individuals is made a federal offense pursuant to 18 U.S.C. § 922(d)(9), which states in pertinent part:

> (d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—
> …
> (9) has been **convicted in any court** of a misdemeanor crime of domestic violence (emphasis added).

A "misdemeanor crime of domestic violence" has the meaning ascribed to it in 18 U.S.C. § 921(a)(33)(A):

> Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an **offense that**—
>
> (i) **is a misdemeanor** under Federal, State, or Tribal law; and
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim (emphasis added).

To link the two statutes together, it is a federal crime to possess a firearm (thus warranting a jury trial in State court) if a person has been convicted in any court of an offense that is a misdemeanor under State law. Significantly, Congress used two unique terms in the two statutes, one being a "conviction" and the other being "offense." The two are neither synonymous nor interchangeable, and the distinction is significant.

Under federal interpretation, an "offense" refers to the underlying *conduct* that is criminalized. "We can, and should, define 'offense' in terms of the conduct that constitutes the crime that the offender committed on a particular occasion, including criminal acts that are 'closely related to' or 'inextricably intertwined with' the particular crime set forth in the charging instrument." *Texas v. Cobb*, 532 U.S. 162, 186, 121 S. Ct. 1335, 1350 (2001). "The plain meaning of 'criminal offense' is generally understood to encompass both misdemeanors and felonies. *Black's Law Dictionary* defines 'criminal offense' under 'offense' as 'a violation of the law; a crime, often a minor one.'" *Black's Law Dictionary* (9th ed. 2009). *United States v. Shill*, 740 F.3d 1347, 1351 (9th Cir. 2014).

The Courts distinguish this from a "conviction," which requires an additional finding of guilt under an established burden of proof. "Where a defendant has been convicted of an offense, meaning 'the guilt of the defendant has been established,' including 'by guilty plea,' but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence." *United States v. Mendez-Sosa*, 778 F.3d 1117, 1119 (9th Cir. 2015). "The word 'conviction' is susceptible to two meanings - an ordinary or popular meaning which refers to the finding of guilt by plea or verdict, and a more technical meaning which refers to the final judgment entered on a plea or verdict of guilty. Even with reference to criminal cases, in which a technical meaning might be expected, sometimes '[a] plea of guilty is tantamount to conviction.'" *Transamerica Premier Ins. Co. v. Miller*, 41 F.3d 438, 441 (9th Cir. 1994) (citations omitted).

Under recognized canons of statutory interpretation, the use of two distinct terms is presumed intentional, and additionally is intended to ascribe two different meanings to

those terms. "The fact that Congress chose to use different terms in connection with the different § 33(g) requirements… surely indicates that Congress intended the two terms to have different meanings. Had Congress intended the meaning the Court attributes to it, it would have used the same term in both contexts." *Estate of Cowart v. Nicklos Drilling Co*., 505 U.S. 469, 497, 112 S. Ct. 2589, 2605 (1992). "Indeed, Congress' deliberate choice to use a different term -- and to define that term -- can only mean that it intended to establish a standard different from the one established by our free speech cases." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 242, 110 S. Ct. 2356, 2367-68 (1990).

As the use of the word "conviction" versus "offense" is presumed intentional, the statutory analysis of each term need not go beyond the plain language. "The starting point in statutory interpretation is 'the language [of the statute] itself.' We assume that the legislative purpose is expressed by the ordinary meaning of the words used." *United States v. James*, 478 U.S. 597, 604, 106 S. Ct. 3116, 3120 (1986) (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)).

By its plain language, a Municipal Court conviction for domestic violence under the Municipal Code qualifies as a "conviction in *any* court" per 18 U.S.C. § 922(d)(9) (emphasis added). Therefore, if the conviction is for an "offense that is a misdemeanor under Federal, State or Tribal law," it meets the statutory definition of a "crime of domestic violence" under 18 U.S.C. § 921(a)(33)(A). The distinction between "conviction" and "offense" is pertinent here; the examination is not concerned with the actual finding of guilt, but whether the offense, i.e. the *conduct*, is a misdemeanor under State law.

This interpretation was adopted by the U.S. Supreme Court in *United States v. Hayes*, 555 U.S. 415, 418, 129 S. Ct. 1079, 1082 (2009), wherein the Court concluded that a conviction for simple battery meets the definition of a "misdemeanor crime of domestic violence" so long as the underlying conduct includes the use or threatened use of force, and that force was directed towards a person that qualifies as a domestic relationship under the federal statute. In *Hayes*, the Court ruled that to require a conviction for *domestic* battery specifically would frustrate the purpose of Congress in keeping arms away from those whose conduct would otherwise satisfy the definition in 18 U.S.C. § 921(a)(33)(A).

> [I]n a § 922(g)(9) prosecution, it suffices for the Government to charge and prove a prior conviction that was, in fact, for "an offense . . . committed by" the defendant against a spouse or other domestic victim. We note as an initial matter that § 921(a)(33)(A) uses the word "element" in the singular, which suggests that Congress intended to describe only one required element. Immediately following the word "element," § 921(a)(33)(A)(ii) refers to the use of force (undoubtedly a required element) and thereafter to the relationship between aggressor and victim…
>
> Most sensibly read, then, § 921(a)(33)(A) defines "misdemeanor crime of domestic violence" as a misdemeanor offense that (1) "has, as an element, the use [of force]," and (2) is committed by a person who has a specified domestic relationship with the victim….
>
> Congress' less-than-meticulous drafting, however, hardly shows that the legislators meant to exclude from § 922(g)(9)'s firearm possession prohibition domestic abusers convicted under generic assault or battery provisions… By extending the federal firearm prohibition to persons convicted of "misdemeanor crime[s] of domestic violence," proponents of § 922(g)(9) sought to "close this dangerous loophole." *United States v. Hayes*, 555 U.S. 415, 421, 129 S. Ct. 1079, 1084 (2009) (internal citations omitted).

The dissent in *Hayes* is equally instructive, as the primary basis for dissent was the Court having previously analyzed a "predicate offense" based on the statutory definition of

the conviction, rather than the underlying conduct, in other instances. Specifically, the dissent notes that when interpreting the Armed Career Criminal Act, the Court looked "only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Hayes*, 555 U.S. at 436. The dissent's disagreement serves to highlight the majority's focus on the underlying conduct of the offense, without regard to the title or name of the final conviction.

Hayes also cited with approval the Ninth Circuit case of *United States v. Belless*, which more clearly articulates the Court's position: "The purpose of the statute is to keep firearms out of the hands of people whose past violence in domestic relationships makes them untrustworthy custodians of deadly force. That purpose does not support a limitation of the reach of the firearm statute to past misdemeanors where domestic violence is an element of the crime charged as opposed to a proved aspect of the defendant's conduct in committing the predicate offense." *United States v. Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003).

As noted previously, the newly enacted Henderson Municipal Code is identical to the language in the Nevada Revised Statute, both of which criminalize the same conduct which constitutes domestic violence under the same definition. Therefore, a conviction beyond a reasonable doubt that an individual violated the Municipal Code means the actual conduct underlying the conviction would also be a misdemeanor under State law, since the identical prohibition and language in the Code and Statute means the law applies to identical conduct. Because the Code and Statute contain no substantive distinction, conduct that violates the Code is conduct that would also violates the Statute, and vice-versa.

The federal law defines a "misdemeanor crime of domestic violence" as an *offense* that is a misdemeanor under state law. An offense or conduct that violates the Municipal Code would also be a misdemeanor under state statute because the same underlying conduct is equally punishable by both laws. The only portion of the federal statute that requires a "conviction," on the other hand, specifically notes that the conviction can come from "any court," which by its plain language includes both state and municipal courts. In conclusion, an allegation that conduct amounts to an offense under the Henderson Municipal Code is also a misdemeanor under State statute, and a conviction qualifies as a "conviction in any court" that would make possession of firearms a federal crime. As such, an alleged violation of the Municipal Code also results in the same firearm restrictions under NRS 202.360 because a conviction is a "misdemeanor crime of domestic violence" under 18 U.S.C. § 921(a)(33)(A), and pursuant to *Andersen*, a jury trial is required.

C. The Henderson Municipal Code Creates an Equal Protection Violation that Cannot Pass Strict Scrutiny Analysis

Concurrent jurisdiction exists whenever two authorities can simultaneously exercise lawful jurisdiction over the same matter. Over misdemeanor criminal matters, the Justice Courts and the Municipal Courts exercise concurrent jurisdiction. This is recognized in both Nevada statute and case law. "The municipal court shall have such powers and jurisdiction in the city as are now provided by law for justice courts, wherein any person or persons are charged with the breach or violation of the provisions of any ordinance of such city or of this chapter, of a police or municipal nature." NEVADA REVISED STATUTE 266.550; *see also*, NEVADA REVISED STATUTE 5.050(2). However, it is also recognized that the State cannot

delegate or surrender its sovereignty to municipalities in relation to criminal law or police power:

> It was further held in that case that the city might enact ordinances not inconsistent with the state laws regulating such matters (gambling and prostitution) within its territorial limits. This is a well settled rule. In fact, it is from this source of concurrent jurisdiction between the state and municipalities in matters subject to the police power that the latter derive a delegated authority to deal with minor criminal infractions which are also punishable under state laws. The state, however, cannot surrender its sovereignty in these important duties of government. *Kelley v. Clark Cty*., 61 Nev. 293, 299, 127 P.2d 221, 223-24 (1942)

As it applies to the instant case, both the Henderson Justice Court and the Henderson Municipal Court entertain concurrent jurisdiction over charges of misdemeanor battery domestic violence committed within Henderson city limits. However, only those cases prosecuted in the Henderson Municipal Court can charge the violation under the newly enacted city Ordinance. The City holds the position that charging an individual under the Ordinance does not necessitate a jury trial under the Nevada Supreme Court's holding in *Andersen*. Therefore, although the City and County exercise concurrent jurisdiction over these misdemeanor charges, the City's position means that cases prosecuted under County authority in the Justice Court are entitled to a jury trial, whereas cases for the same charges prosecuted under the City authority in the Municipal Court are not.

Although Defense maintains the position that even charges for misdemeanor battery domestic violence under the Code nonetheless require a trial by jury (see § B, *supra*), assuming the City's position is correct that this is not the case, an equal protection violation ensues. Specifically, given there are two courts capable of exercising simultaneous concurrent jurisdiction, the only substantive difference between charges brought under

County authority versus City authority is the availability of a fundamental right. This jurisdictional distinctions means that of two equally situated individuals, one criminal defendant will be entitled to a jury trial, whereas the other will not.

The Fourteenth Amendment to the United States Constitution provides that no person shall be deprived of life or liberty without the due process of law, nor shall he be denied the equal protection of law. U.S. CONST. AMEND. XIV, § 1. Equal Protection claims generally come in two forms: laws which disadvantage a "suspect class," and laws which impede upon a "fundamental right." "The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.' With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Plyler v. Doe*, 457 U.S. 202, 217 n.15, 102 S. Ct. 2382, 2395 (1982).

In this case, the Nevada Supreme Court held that charges of battery domestic violence which carry subsequent restrictions on firearm ownership, whether under federal or state law, warrant a jury trial as a "serious offense" under the Sixth Amendment to the United States Constitution. "It is well established that the right to a jury trial, as established by the Sixth Amendment of the United States Constitution and Article I, Section 3 of the Nevada Constitution, does not extend to those offenses categorized as 'petty' but attaches only to those crimes that are considered 'serious' offenses… the right affected here

convinces us that the additional penalty is so severe as to categorize the offense as serious." *Andersen*, 135 Nev. Adv. Op. 42 at 6-7. The right to a trial by jury under the United States and State constitution is well-recognized as a fundamental right. "But, as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 57 S. Ct. 809, 811-12 (1937). As set forth in *Maxwell v. Dow*, 176 U.S. 581, 610, 20 S. Ct. 448, 458 (1900):

> The judgment of his peers here alluded to, and commonly called, in the quaint language of former times, a trial per pais, or trial by the country, is the trial by a jury, who are called the peers of the party accused, being of the like condition and equality in the State. When our more immediate ancestors removed to America, they brought this privilege with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our state constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.

In the instant matter, the City's position that charges for battery domestic violence under the Municipal Code do not warrant a jury trial, whereas charges for battery domestic violence under the Nevada Revised Statute do require a jury trial, creates a classification that directly impairs a fundamental right. As such, the Code is "presumptively unconstitutional" unless the government can establish that it passes a strict scrutiny inquiry. "Under the Equal Protection Clause, if a classification 'impinges upon a fundamental right explicitly or implicitly protected by the Constitution, . . . strict judicial scrutiny' is required, regardless of whether the infringement was intentional." *Mobile v. Bolden*, 446 U.S. 55, 113, 100 S. Ct. 1490, 1518 (1980) (citing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973)). "It is well settled that, quite apart from the

guarantee of equal protection, if a law impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional." *Harris v. McRae*, 448 U.S. 297, 312, 100 S. Ct. 2671, 2685 (1980). "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388, 98 S. Ct. 673, 682 (1978). "In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein." *Plyler v. Doe*, 457 U.S. 202, 217 n.15, 102 S. Ct. 2382, 2395 (1982)

As applied, the government cannot establish a substantial government interest because the Ordinance itself makes clear *the very purpose* of enacting the Code was to avoid the imposition of this fundamental right. Neither the "anticipated challenges" to the jurisdiction of the Court, nor the "current practical challenges," are grounds to overcome the presumption of unconstitutionality under strict scrutiny analysis.

Further, that the governmental body at issue here is a municipality, rather than the State itself, does not remove or lessen the applicability of equal protection. "The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State… Although the forms and functions of local government and the relationships among the various units are matters of state concern, it is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment. The actions of local government are the actions of the State. A

city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law." *Avery v. Midland Cty*., 390 U.S. 474, 479-80, 88 S. Ct. 1114, 1117-18 (1968).

In addition to traditional equal protection analysis, the Code is also problematic in that it specifically allows for *arbitrary* denial of a fundamental right. Defense is aware of no specific algorithm that determines whether misdemeanor offenses are charged in Justice versus Municipal Court when both courts have concurrent jurisdiction. Therefore, it appears that prosecutorial discretion governs the jurisdiction in which charges are brought. Given that the same charges brought in one court require trial by jury and charges brought in the other court do not, prosecutorial discretion remains the basis on which criminal defendants are granted or denied this fundamental right. The enactment of the Ordinance, and the City's position that jury trials are not required, thus creates a quandary which has no solution so long as jurisdiction remains concurrent between the two courts.

D. The City Must be Divested of Jurisdiction over Misdemeanor Battery Domestic Violence Cases

The City cannot maintain jurisdiction over misdemeanor battery domestic violence cases for several reasons: first, due to the application of federal law to the Municipal Code (see § B, *supra*); second, there is a due process violation that results from concurrent jurisdiction where one court requires a fundamental right and the other seeks to avoid it (see § C, *supra*); third, jurisdiction must be divested based on Nevada's statutory grant of authority to the municipalities over criminal matters.

Nevada Revised Statute 266.550(1) formally grants authority over criminal charges to municipalities and details the concurrent jurisdiction between the two courts. "The municipal court shall have such powers and jurisdiction in the city as are now provided by law for justice courts, wherein any person or persons are charged with the breach or violation of the provisions of any ordinance of such city or of this chapter, of a police or municipal nature." However, the same statute also contains a very significant caveat: "The trial and proceedings in such cases must be summary and without a jury."

While NRS 266.550 grants municipal courts power and jurisdiction akin to those of justice courts, it also explicitly precludes jury trials in municipal courts. See also, *Blanton v. North Las Vegas Municipal Court*, 103 Nev. 623, 627 (1987) ("NRS 266.550 provides municipal courts with the power and jurisdiction of justices' courts, except that the statute precludes municipal courts from conducting jury trials"). Under any recognized canon of statutory interpretation, the plain language of NRS 266.550 prohibits municipal courts from presiding over jury trial cases.

"It is well established that, when interpreting a statute, the language of a statute should be given its plain meaning." *We the People Nevada v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166 (2008). Thus, when a statute is facially clear, a court should not go beyond its language in determining its meaning. *Nev. State Democratic Party v. Nev. Republican Party*, 256 P.3d 1, 5 (2011) (quoting *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438 (1986)); *Las Vegas Taxpayer Comm. v. City Council*, 125 Nev. 165, 177, 208 P.3d 429 (2009) (explaining that a statute's meaning is plain when it is "facially clear").

Both the municipal and justice courts are courts of limited jurisdiction with concurrent jurisdiction to prosecute misdemeanors allegedly committed within the city limits. "The municipal courts have jurisdiction of all misdemeanors committed in violation of the ordinances of their respective cities…" NRS 5.050(2). The same act or conduct may violate both a city ordinance and a state statute. See, *Hudson v. City of Las Vegas*, 81 Nev. 677, 409 P.2d 245 (1965).

The prohibition on jury trials in municipal courts is further clarified in NRS 175.011. The statute states:

> NRS 175.011 Trial by jury.
> 1. In a district court, cases required to be tried by jury must be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the State. A defendant who pleads not guilty to the charge of a capital offense must be tried by jury.
> 2. In a Justice Court, a case must be tried by jury only if the defendant so demands in writing not less than 30 days before trial. Except as otherwise provided in NRS 4.390 and 4.400, if a case is tried by jury, a reporter must be present who is a certified court reporter and shall report the trial.

The statute contains two explicit provisions, the first requiring a trial by jury in the District Court, and the second provision requiring trial by jury in Justice Court if requested at least 30 days before trial. The statute does not contain any specific provision for the Municipal Court, nor was it drafted in a manner to permit application to another type of judicial authority. The statute that provides the same powers of the Justice Court to the Municipal Court, on the other hand, contain the express prohibition *against* trial by jury. These two statutes are clear, unambiguous, and not in conflict with one another when read in their entirety.

The City may argue that Nevada Revised Statute 5.073 grants this authority. The statute states, in pertinent part: "1. The practice and proceedings in the municipal court must conform, as nearly as practicable, to the practice and proceedings of justice courts in similar cases. An appeal perfected transfers the action to the district court for trial anew, unless the municipal court is designated as a court of record as provided in NRS 5.010. The municipal court must be treated and considered as a justice court whenever the proceedings thereof are called into question." However, using NRS 5.073 as a purported grant of authority over jury trials creates a series of problems and statutory contradictions.

Reading the statute in this manner to permit jury trials creates a facial conflict with NRS 266.550, which explicitly prohibits them. Virtually every guideline of statutory interpretation would reject this proposition.

First and foremost, statutes should not be interpreted in a manner that would create a conflict with another statute. "[T]he canon against reading conflicts into statutes is a traditional tool of statutory construction…" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018). "This court 'avoid[s] statutory interpretation that renders language meaningless or superfluous,' and 'whenever possible . . . will interpret a rule or statute in harmony with other rules or statutes.'" *Williams v. State Dep't of Corr.*, 402 P.3d 1260, 1262 (Nev. 2017) (citing *Watson Rounds v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 79, 358 P.3d 228, 232 (2015)). Using the generally worded "conformity" statute to conflict with an explicit prohibition in another chapter of the Nevada Revised Statute would violate this basic maxim.

Additionally, when there are two conflicting statutory provisions, the more specific will typically control over the more generally worded statute. "Under the general- specific canon, the more specific statute will take precedence, and is construed as an exception to the more general statute, so that, when read together, 'the two provisions are not in conflict, but can exist in harmony.'" *Williams* , 402 P.3d at 1265 (citing *Lader v. Warden*, 121 Nev. 682, 687, 120 P.3d 1164, 1167 (2005); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 183 (2012)); see also, *Piroozi v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 100, 363 P.3d 1168, 1172 (2015) ("Where a general and a special statute, each relating to the same subject, are in conflict and they cannot be read together, the special statute controls"). As applied to this case, the specific statute that Municipal Courts are explicitly prohibited from jury trials "is construed as an exception" to the general statute that the practices and proceedings of the Municipal Court should conform to the Justice Court whenever possible. Therefore, in any conflict between the specific prohibition in NRS 266.550 and the general conformity statute in NRS 5.073, the more specific prohibition will control.

Lastly, utilizing the Code to prosecute battery domestic violence cases without the benefit of a trial by jury also violates other portions of the Henderson Municipal Code. Specifically, Section 2.080(1) provides: "The City Council may make and pass all ordinances, resolutions and orders not repugnant to the Constitution of the United States or the State of Nevada, or to the provisions of Nevada Revised Statutes or of this charter, necessary for the municipal government and the management of the affairs of the City, and for the execution of all the powers vested in the City." In this case, the Ordinance is

"repugnant to the Constitution of the United States" and the Nevada Revised Statute because its purpose is to circumvent the availability of a fundamental constitutional right. The Nevada Supreme Court determined in *Andersen* that charges of misdemeanor battery domestic violence carry penalties sufficient to categorize the offense as "serious" rather than "petty." Therefore, pursuant to Nevada precedent such as *Blanton v. N. Las Vegas Mun. Court*, 103 Nev. 623, 629 (1987) (holding rights in the Nevada Constitution to be "coextensive with that guaranteed by the federal constitution"), classifying the charge as a "serious" one creates a vested constitutional interest in a trial by jury under both Article III of the Nevada Constitution as well as the Sixth Amendment to the United States Constitution.

After formally recognizing the existence of this fundamental right, the Henderson Ordinance was enacted to avoid this right that would otherwise be available under state statute. As such, the substance and purpose of the Code is "repugnant" to the Constitutions of Nevada and the United States. It also directly contradicts the Nevada Revised Statute, where the right to a trial by jury was explicitly recognized.

For all of these reasons, the Municipal Courts lack jurisdiction to preside over a jury trial due to the express statutory prohibition. As a charge of battery domestic violence prosecuted under the Municipal Code still nonetheless warrants a trial by jury based on the federal definition that examines the underlying conduct, the Municipal Court is divested of jurisdiction in the instant matter.

However, the result of divesting jurisdiction need not mandate outright dismissal. A specific statute exists which details the process for transferring the jurisdiction of a case

from the Municipal Court to the Justice Court in this instance. Specifically, NRS 5.0503(1)(b) provides: "A municipal court may, on its own motion, transfer original jurisdiction of a criminal case filed with that court to a justice court or another municipal court if… Such a transfer is necessary to promote access to justice for the defendant and the municipal court has noted its findings concerning that issue in the record."

Although subsection 2 provides that the Court may not transfer jurisdiction "until a plea agreement has been reached or the final disposition of the case," a finding that the Municipal Court lacks jurisdiction over the matter would qualify as a "final disposition" permitting the transfer. Specifically, a "final disposition," also referred to as a "final order" or "final judgment," is defined as "one that disposes of all issues and leaves nothing for future consideration." *Sandstrom v. Second Judicial Dist. Court*, 121 Nev. 657, 659, 119 P.3d 1250, 1252 (2005); *Elsman v. Elsman*, 54 Nev. 28, 30, 3 P.2d 1071, 1072 (1931) (stating that a final judgment in a civil case disposes of all issues and leaves nothing for future consideration). "A judgment or decree is final that disposes of the issues presented in the case, determines the costs, and leaves nothing for the future consideration of the court. When no further action of the court is required in order to determine the rights of the parties in the action, it is final." *Perkins v. Sierra Nev. Silver Mining Co*., 10 Nev. 405, 411 (1876).

///

///

As applied to the instant case, a finding that the Municipal Court lacks jurisdiction over a matter is a "final disposition" that leaves nothing further for the consideration of the Municipal Court. Therefore, a transfer of jurisdiction to the Justice Court pursuant to NRS 5.0503(1)(b) is permissible and requested.

DATED this ____ day of _____, 2019.

Respectfully Submitted,
MAYFIELD, GRUBER & SHEETS

_____
DAMIAN R. SHEETS, ESQ.
Nevada Bar No. 10755

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing MOTION is hereby acknowledged this ____ day of _____, 2019.

_____
CITY ATTORNEY

COPY

FILED

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MUNICIPAL COURT
CITY OF HENDERSON

CLERK

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IN THE MUNICIPAL COURT, CITY OF HENDERSON
IN THE COUNTY OF CLARK, STATE OF NEVADA

THE CITY OF HENDERSON,

Plaintiff,

-vs-

NATHAN OHM,

Defendant.

CASE NO.: 19CR002297, 19CR002298

Department: 1

Hearing Date: 12/16/19

Hearing Time: 10AM

CITY OF HENDERSON'S OPPOSITION TO DEFENDANT'S MOTION TO DIVEST MUNICIPAL COURT OF JURISDICTION OR, IN THE ALTERNATIVE, MOTION TO DIMSISS

COMES NOW, the City of Henderson, by and through its attorney, BRIAN K. REARDON, Esq., Assistant City Attorney, and hereby opposes Defendant's Motion To Divest Municipal Court of Jurisdiction or, In The Alternative, Motion To Dismiss. This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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STATEMENT OF THE CASE

On February 22, 2019, Nathan Ohm ("Defendant") was arrested on two counts of Battery Constituting Domestic Violence, misdemeanor violations of NRS 33.018, 200.481, and 200.485.[1] The Criminal Complaint charged Appellant in case 19CR002297 with one count of Battery Constituting Domestic Violence, alleging that Appellant "did strike Hailey Schmidt about the face and/or did get on top of her" on or about February 22, 2019, in the City of Henderson. And in case 19CR002298 with one count of Battery Constituting Domestic Violence, alleging that Appellant "did strike and/or did punch Marcuse Ohm one or more times" on or about February 22, 2019, in the City of Henderson. Defendant posted bail and was released from custody. On March 25, 2019, the Public Defender entered a plea of not guilty on behalf of Defendant and the court set the trial for June 10, 2019.

On June 10, 2019, Defendant retained the current defense counsel and requested a continuance. The City had no opposition and the court set the trial for August 19, 2019. Defense then requested a continuance of the August trial date. The court set the trial date for November 4, 2019. On September 12, 2019, the Nevada Supreme Court released and opinion in the case of Andersen v. Eighth Judicial District Court et al., 135 Nev. Adv. Op. 42, 448 P.3d 1120 (2019).

Based on the Andersen case, Defendant filed a written demand for a jury trial and on November 4, 2019 this court issued a briefing schedule. Defendant filed his motion three days past the due date of November 11, 2019. On December 2, 2019, the City contacted

[1] Defendant lists only one count of Domestic Battery on his motion; however, the City charged him with two counts as noted in the amended complaint attached as Exhibit C. And Defendant's motion incorrectly states the incident occurred on December 9, 2018 instead of February 22, 2019. See Defendant's Motion at 4.

defense counsel via email to notify counsel that based on their late filing that our response would be three days past our deadline. Defense counsel did not object. The City's response follows.

STATEMENT OF FACTS

In the early morning hours of February this year, Hailey Schmidt ("Schmidt") slept peacefully next to her husband, Nathan Ohm ("Defendant") in their home at 3044 Paseo Hills Way in Henderson, NV, with his father, Marcuse Ohm ("Marcuse") sleeping in a different bedroom. Defendant abruptly woke Schmidt when he struck her in the face near her forehead. Schmidt fled their bedroom and went into Marcuse's room to tell him what just happened. Marcuse left his room to check on his son.

Marcuse went into Defendant's bedroom and saw his son laying in the bed, eyes open, and staring at the ceiling. Marcuse then saw Defendant get off the bed, exit the room, and head towards Marcuse's room. Following Defendant, Marcuse next saw his son get on top of Schmidt, swinging his arms over her. Marcuse pulled his son off Schmidt and held him down on the floor. Schmidt called 911 while Marcuse held Defendant on the floor. Defendant struck Marcuse in the face. Marcuse would later tell Dispatch that his son was freaking out and acting crazy.

Officer Matthew Engel from the Henderson Police Department responded to the house and met Schmidt and Marcuse outside, standing in the driveway. Marcuse told Officer Engel that something was wrong because Defendant was not acting like himself. And that Defendant has used heroin but was unsure if he was using the narcotic that night. After they told Officer Engel what occurred, Officer Engel went into the house and called

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for Defendant to come out of his bedroom. Officer Engel watched a heavily sweaty and unsteady Defendant walk towards officers. Officer Engel explained to Defendant that his family called because they said he was causing a disturbance in the house. Defendant denied that anything occurred. When asked if he used any narcotics, Defendant denied using and said he only takes Methadone. Officer Engel however would later note in his incident report that as he interacted with Defendant, he thought he was on some type of medication or narcotic.

Henderson Fire Department arrived at the house to assess Defendant. After an assessment, they concluded that there were no apparent medical issues with Defendant. Officer Engel asked Defendant if he struck either Schmidt or Marcuse. Defendant denied hitting either and said that he was sleeping. Based on his observations, the consistent version of events from Schmidt and Marcuse, Defendant's demeanor along with heavy perspiration consistent with physical exertion like a struggle, Officer Engel placed Defendant under arrest for two separate counts of Domestic Battery.

Defendant filed a Motion To Divest Municipal Court of Jurisdiction or, In The Alternative, Motion To Dismiss.

1. THERE IS *NO EX POST FACTO* VIOLATION, AND CHARGING THE DEFENDANT UNDER THE HENDERSON MUNICIPAL CODE WAS BOTH LEGAL AND PROPER.

Defendant claims that the City of Henderson's battery domestic violence ordinance, Henderson Municipal Code ("hereinafter HMC") § 8.02.055, violates the federal and state prohibition against *ex post facto* laws, as applied to him. In short, Defendant complains that

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since his attack on his wife and father occurred before the enactment of HMC § 8.02.055[2], the City is not allowed to charge him under the city ordinance. Defendant is mistaken. Since Defendant's conduct was clearly illegal under state law when it occurred on February 22, 2019 (Battery Constituting Domestic Violence – NRS 200.581, 33.018), and the HMC provides for the exact same penalties and elements of the offense, the prohibition against *ex post facto* laws is not offended.

A. The *Ex Post Facto* Clause prohibits laws that are retroactive and disadvantage the defendant by changing the definition of crimes or increases the penalties thereof.

Both the federal and state constitutions prohibit the passage of *ex post facto* laws. U.S. Const. art. I, § 10; Nev. Const. art. 1, § 15. The instinctive assumption is that the prohibition on *ex post facto* laws means that no laws can be passed which apply to past conduct, but that is simply not the case. Actually, this prohibition forbids the passage of laws that impose punishments for acts that were not punishable when they were committed or impose punishments in addition to those prescribed at the time of the offense. Weaver v. Graham, 450 U.S. 24, 28, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). Accordingly, to be *ex post facto*, a law must both operate retrospectively and disadvantage the person affected by it by either changing the definition of criminal conduct or imposing additional punishment for such conduct. Id. For purposes of *ex post facto* analysis, a retrospective law is one that "changes the legal consequences of acts completed before its effective date." Id. at 31, 101 S.Ct. 960. *See also* State v. Eighth Jud. Dist. Ct. (Logan D.), 129 Nev. 492, 510–11, 306 P.3d 369, 382 (2013).

[2] HMC § 8.02.055 was passed unanimously by the Henderson City Council on October 15, 2019 and took effect on October 18, 2019.

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And, "[a]lthough the Latin phrase "*ex post facto*" literally encompasses any law passed "after the fact," it has long been recognized by the U.S. Supreme Court that **the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them**. Calder v. Bull, 3 Dall. 386, 390–392, 1 L.Ed. 648 (1798) (opinion of Chase, J.) (emphasis added). In Beazell v. Ohio, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925), the U.S. Supreme Court was able to confidently summarize the meaning of the Clause as follows:

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, **that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.**

Id., at 169–170, 46 S.Ct., at 68–69 (emphasis added), *see also* Dobbert v. Florida, 432 U.S. 282, 292, 97 S.Ct. 2290, 2297, 53 L.Ed.2d 344 (1977).

In Collins v. Youngblood, 497 U.S. 37, 41, 110 S.Ct. 2715, 2718, 111 L.Ed.2d 30 (1990), the U.S. Supreme Court reaffirmed that the *Ex Post Facto* Clause incorporated a term of art with an established meaning at the time of the Constitution's framing. "In accordance with this original understanding, we have held that the Clause is **aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts**." Id., at 43, 110 S.Ct., at 2719 (*citing* Calder v. Bull, 3 U.S. (Dall.) 386, 391-392, 1 L.Ed. 648 1798) (opinion of Chase, J.); Beazell v. Ohio, 269 U.S. 167, 169-170, 46 S.Ct. 68, 68-69, 70 L.Ed. 216 (1925))." (emphasis added). The Court reiterated, "[a]n ex post facto law is one that **retroactively alters the definition of a crime or increases the applicable punishment**." Id. at 43 (1990) (emphasis added).

Just as the U.S. Supreme Court had years before, the Nevada Supreme Court in 1970 identified *ex post facto* laws as those that increase the punishment to a defendant from the time when the offense was committed. Goldsworthy v. Hannifin, 86 Nev. 252, 486 P.2d 350 (1970) (*citing* Calder, 3 Dall. at 386). Further demonstrating accord with federal jurisprudence, the Nevada Supreme Court used the "two critical element" rule set forth in Weaver, requiring that "a law must both operate retrospectively and disadvantage the person affected by it by either changing the definition of criminal conduct or imposing additional punishment for such conduct." State v. Eighth Jud. Dist. Ct. (Logan D.), 129 Nev. 492, 510, 306 P.3d 369, 382 (2013).

As recently as 2018, the Nevada Supreme Court has consistently held that a law is *ex post facto* when it "retroactively changes the definition of a crime or increases the applicable punishment." Cole v. Bisbee, 422 P.3d. 718, 134 Nev. Adv. Op. 62 (2018). In Cole, the Nevada Supreme Court addressed changes to parole procedures, holding that they may violate the Nevada *Ex Post Facto* Clause "when they create a significant risk of prolonging the inmate's incarceration." Id., 134 Nev. at 511, 422 P.3d at 720 (*citing* Garner v. Jones, 529 U.S. 244, 250-51, 120 S.Ct. 1362, 146 L.Ed.2d 236 (2000)).

B. Battery Constituting Domestic Violence under the Henderson Municipal Code and Nevada Revised Statutes have the same elements and penalties, thus there can be no *ex post facto* violation.

The crimes of battery constituting domestic violence under the HMC and the Nevada Revised Statutes have the same elements and penalties.

1. *Battery Constituting Domestic Violence under Henderson Municipal Code § 8.02.055 is defined as follows.*

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The crime of Battery Constituting Domestic Violence is set forth in HMC § 8.02.055 as follows:

> 8.02.055 – Battery Constituting Domestic Violence
>
> A. Any person who commits an offense of battery as defined in 8.02.050 against or upon the person's spouse or former spouse, any other person to whom the person is related by blood or marriage, any other person with whom the person has had or is having a dating relationship, any other person with whom the person has a child in common, the minor child of any of those persons, the person's minor child or any other person who has been appointed the custodian or legal guardian for the person's minor child is guilty of a battery constituting domestic violence.
>
> B. The provisions of this section do not apply to:
>
> 1. Siblings, except those siblings who are in a custodial or guardianship relationship with each other; or
>
> 2. Cousins, except those cousins who are in a custodial or guardianship relationship with each other.
>
> C. As used in this section, "dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement. The term does not include a casual relationship or an ordinary association between persons in a business or social context.
>
> D. A person convicted of a battery constituting domestic violence:
>
> 1. For the first offense within 7 years, is guilty of a **misdemeanor** and shall be sentenced to:
>
> (a) **Imprisonment** in the city jail or detention facility for not less than **2 days**, but not more than 6 months, and
>
> (b) Perform not less than **48 hours**, but not more than 120 hours, of **community service**, and
>
> (c) a **fine of not less than $200**, but not more than $1,000., and
>
> (d) **Participate in weekly counseling sessions of not less than 1 1/2 hours per week for not less than 6 months**, but not more than 12 months, at his or her expense, in a program for the treatment of persons who commit domestic violence that has been certified pursuant to NRS 439.258.

(emphasis added).

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Battery under HMC § 8.02.050, which was enacted by the Henderson City Council on November 7, 2017, is: "A person who willfully and unlawfully **uses force or violence upon the person of another**." (emphasis added).

Thus, the elements of battery constituting domestic violence under the HMC are: 1) willful and unlawful use of force or violence upon the person of someone, (2) with whom the defendant shares a domestic relationship. The penalties under the HMC are imprisonment for 2 to 180 days, 48 to 120 hours of community service, a fine of $200 to $1,000, and weekly counseling for 6 to 12 months. A review of the NRS sections comprising the description of the law of Battery Constituting Domestic violence reveals the same elements and penalties.

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2. *Battery Constituting Domestic Violence under Nevada Revised Statutes 33.018, 200.481 & 200.485 is defined as follows.*

The crime of battery constituting domestic violence under the Nevada Revised Statutes is made up of several statutory provisions. They are, as follows:

> 1. Domestic violence occurs when a person commits one of the following acts against or upon the person's spouse or former spouse, any other person to whom the person is related by blood or marriage, any other person with whom the person has had or is having a dating relationship, any other person with whom the person has a child in common, the minor child of any of those persons, the person's minor child or any other person who has been appointed the custodian or legal guardian for the person's minor child:
>
> (a) A battery.
>
> . . .
>
> 2. The provisions of this section do not apply to:
>
> (a) Siblings, except those siblings who are in a custodial or guardianship relationship with each other; or
>
> (b) Cousins, except those cousins who are in a custodial or guardianship relationship with each other.
>
> 3. As used in this section, "dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional or

sexual involvement. The term does not include a casual relationship or an ordinary association between persons in a business or social context.

NRS 33.018(in pertinent part). NRS 200.485 then states, in pertinent part:

> 1. Unless a greater penalty is provided pursuant to subsections 2 to 5, inclusive, or NRS 200.481, a person convicted of a battery which constitutes domestic violence pursuant to NRS 33.018:
>
> (a) For the first offense within 7 years, is guilty of a **misdemeanor** and shall be sentenced to:
>
> (1) **Imprisonment** in the city or county jail or detention facility for not less than **2 days**, but not more than 6 months; and
>
> (2) Perform not less than **48 hours**, but not more than 120 hours, of **community service**.
>
> The person shall be further punished by a **fine of not less than $200**, but not more than $1,000.
>
> ...
>
> 6. In addition to any other penalty, if a person is convicted of a battery which constitutes domestic violence pursuant to NRS 33.018, the court shall:
>
> (a) For the first offense within 7 years, require the person to participate in **weekly counseling sessions of not less than 1 1/2 hours per week for not less than 6 months**, but not more than 12 months, at his or her expense, in a program for the treatment of persons who commit domestic violence that has been certified pursuant to NRS 439.258.

(emphasis added).

The elements of battery are set forth in NRS 200.481(1), which states: "[b]attery means any willful and unlawful use of force or violence upon the person of another."

Thus, the elements of battery constituting domestic violence under the NRS are: 1) willful and unlawful use of force or violence upon the person of someone, (2) with whom the defendant shares a domestic relationship. The penalties under the NRS are imprisonment for 2 to 180 days, 48 to 120 hours of community service, a fine of $200 to $1,000, and weekly counseling for 6 to 12 months. These penalties and elements are identical to those in the HMC.

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3. *State law prohibited the same conduct when the defendant committed the offense, and the Henderson Municipal Code does not mandate a harsher punishment than state law*

As can be seen by comparison of the NRS and the HMC, and as is undisputed by the Defendant, the elements and punishments of the crimes of battery constituting domestic violence are identical between the two sources of law. Because Defendant's conduct was criminal under the NRS at the time of the incident, and because the penalties under the HMC are no harsher than the penalties under the NRS, retroactively applying the HMC to Defendant's conduct does not violate *ex post facto* prohibitions.

Once more, in Collins v. Youngblood, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990), the United States Supreme Court was presented with the question "whether the application of a Texas statute, which was passed after respondent's crime and which allowed the reformation of an improper jury verdict in respondent's case, violate[d] the *Ex Post Facto* Clause of Art. I, § 10." Id. at 39, 110 S.Ct. at 2717. In summarizing the meaning of the *ex post facto* clause, the Court stated:

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute [(1)] which punishes as a crime an act previously committed, which was innocent when done[, (2)] which makes more burdensome the punishment for a crime, after its commission, or [(3)] which deprives one charged with [a] crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*." Id. at 42, 110 S.Ct. at 2719 (quoting Beazell v. Ohio, 269 U.S. 167, 169–70, 46 S.Ct. 68, 70 L.Ed. 216 (1925)). "The Beazell formulation is faithful to our best knowledge of the original understanding of the ***Ex Post Facto* Clause: Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts."**

Id. (emphasis added).

HMC § 8.02.055 passes this constitutional test. Simply, the definition of battery constituting domestic violence as well as the punishment are the same under both the

Nevada Revised Statutes and the HMC. Clearly, a defendant charged with HMC § 8.02.055 is not disadvantaged because the defendant could have been (and in the instant case already was) charged for the same violent conduct: battery constituting domestic violence under NRS 200.485.

The crime of battery constituting domestic violence was already prohibited by state law on February 22, 2019 (date of offense), thus Defendant's violent behavior was not innocent when the crime was committed. Further, the HMC's penalties are the exact same as those in the NRS (fine, jail sentence, counseling, and community service). As demonstrated above, HMC § 8.02.055 is virtually identical to NRS 33.018, 200.481 & 200.485, further showing that the Defendant was on notice that the act of battery constituting domestic violence was prohibited at the time of the offense, which ensures compliance with the purpose of *ex post facto* prohibitions.

3. <u>The perceived loss of a jury trial is not a new penalty or punishment, and does not trigger a broader "manifest injustice" *ex post facto* analysis.</u>

Defendant further complains, without citation to any authority, that while the penalty and elements of battery domestic violence may be the same under both provisions (HMC & NRS), the loss of the right to a jury trial is punitive or manifestly unjust. Defendant mistakenly reasons that the Defendant's loss of a right to jury trial somehow creates an *ex post facto* violation.

This exact issue has already been considered and rejected by the U.S. Supreme Court. In <u>Collins v. Youngblood</u>, 497 U.S. 37, 110 S.Ct. 2715 (1990), a newly enacted law permitted the appellate court to remedy an incorrect verdict, when under previous law the defendant would have a right to a new trial by a jury. The Court held that "the right to a jury

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trial provided by the Sixth Amendment is obviously a 'substantial' one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* Clause." Id. at 51. Thus, the new law did not violate the *ex post facto* clause, even though it removed the defendant's right to a **new** jury trial. Collins overturned Thompson v. Utah, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1898), where the Court held that a change in Utah law reducing the size of juries in criminal cases from 12 persons to 8 deprived Thompson of "a substantial right involved in his liberty" and violated the *Ex Post Facto* Clause. Id., at 352, 18 S.Ct., at 623.

Other jurisdictions have also come to the same conclusion: the potential loss of a right to a jury trial does not create an *ex post facto* concern. In State of Hawaii v. Nakata, 76 Haw. 360, 878 P.2d 699 (Hi. 1994), the state legislature amended the DUI statute by reducing the penalties for a 1st offense DUI with the intent of eliminating the right to a jury trial. Id. at 701. The statute was to apply retroactively to all active 1st offense DUI cases. Id. Using Collins as guidance, the Hawaii Supreme Court held that the retroactively applying the new law did not violate the *ex post facto* clause because the new law "affects only the procedural determination of whether appellants will be tried by a judge or jury; their right to a fair and impartial trial has not been compromised or divested in any way. We fail to see any substantial prejudice which would result to appellants from the retrospective application of a non-jury trial." Id. at 715.

Also, in U.S. v. Joyner, 201 F.3d. 61 (2d Cir. 2000), the 2nd Circuit Court of Appeals considered whether retroactively applying a law that removed the right for a jury to decide whether a defendant convicted of arson resulting in death should be sentenced to the death

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penalty violated the *ex post facto* clause. After discussing Collins, the 2nd Circuit held that ""a change in law that reduces or eliminates the jury's role in determining the crime or punishment of a defendant does not violate the *Ex Post Facto* Clause because it does not change the substantive definition of the crime, increase the punishment, or eliminate any defense with respect to the offense of arson. Indeed, if removing the right to a new trial by jury does not violate the *Ex Post Facto* Clause, then, *a fortiori,* removing the right to sentencing by jury passes constitutional muster."" Id. at 80.

Clearly, whether a domestic abuser has the right to a jury trial or not under the applicable law, has no bearing on the actual definition of domestic violence, available defenses, or potential punishments. The elements of the crimes, defenses, and penalties are the exact same for both the NRS and HMC versions of battery constituting domestic violence. The perceived loss of the right to a jury trial is simply not a factor in an *ex post facto* analysis.

2. THE FEDERAL DEFINITION DOES NOT INCLUDE CONVICTIONS UNDER MUNICIPAL LAW, ACCORDINGLY NRS 202.360 DOES NOT APPLY TO SUCH CONVICTIONS, AND THEREFORE CHARGES UNDER THE HMC DO NOT REQUIRE A JURY TRIAL.

Defendant erroneously argues that a conviction under HMC § 8.02.055 qualifies as a predicate offense under the federal definition of "misdemeanor crime of domestic violence," contained in NRS 202.360, triggering a prohibition on possession of firearms. Based upon that incorrect assumption, Defendant insists that being charged under HMC § 8.02.055 requires trial by jury. However, municipal law convictions do not meet the federal definition of "misdemeanor crime of domestic violence," do not trigger the loss of firearm rights under Nevada state law, and do not require trial by jury.

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Although the Sixth Amendment of the U.S. Constitution guarantees an individual the right to a jury trial, the right "does not extend to every criminal proceeding." Blanton v. N. Las Vegas Mun. Court, 103 Nev. 623, 629, 748 P.2d 494, 497 (1987), *aff'd sub nom.* Blanton v. N. Las Vegas, 489 U.S. 538 (1989). The right to a jury trial attaches only to "serious" offenses. Id. Defendants in cases involving "petty" offenses are not entitled to trial by jury. *See*, Lewis v. United States, 518 U.S. 322, 116 S. Ct. 2163 (1996); Blanton v. City of North Las Vegas, 489 U.S. 538, 541, 109 S. Ct. 1289, 1292 (1989); *citing*, Duncan v. Louisiana, 391 U.S. 145 (1968), District of Columbia v. Clawans, 300 U.S. 617 (1937), Callan v. Wilson, 127 U.S. 540 (1888); *see also*, Pettipas v. State of Nevada, 106 Nev. 377, 794 P.2d 705 (1990), and most recently Amezcua v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 130 Nev. 45, 46–47, 319 P.3d 602, 603 (2014).

In Amezcua, the Nevada Supreme Court considered whether the statutory framework criminalizing battery constituting domestic violence warranted a trial by jury. Amezcua v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 130 Nev. 45, 319 P.3d 602 (2014). After careful analysis, the Court determined that the legislature had not elevated the offense above "petty" to "serious," and therefore the right to a trial by jury did not attach. Id., 130 Nev. at 50, 319 P.3d at 605. The Court also considered the potential loss of firearm rights under federal law after a misdemeanor conviction of domestic battery under Nevada law, but concluded that was a collateral consequence that did not impact the Nevada legislature's determination of whether domestic battery was a serious offense, and those consequences were therefore irrelevant to determining whether a defendant would be entitled to a trial by jury for such an offense. Id.

It was the potential loss of firearm rights, this time under state law, that became the

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central issue only a few years later. After the Amezcua decision, the Nevada legislature in 2015 passed an amendment to NRS 202.360, the statute which prohibits the possession or control of firearms by some individuals. Specifically, the relevant portion of NRS 202.360 states:

> 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) [...]

Based upon this legislative change, the Nevada Supreme Court in Andersen found that the Nevada legislature had amended the penalties associated with a misdemeanor domestic battery conviction when it prohibited the possession of firearms under state law by those convicted of domestic battery. Andersen v. Eighth Judicial District Court et al., 135 Nev. Adv. Op. 42, 448 P.3d 1120 (2019). That change, the Andersen Court said, was the basis for the distinction between Amezcua and Andersen: once the Nevada legislature added the additional penalty of the loss of gun rights under NRS 202.360 upon conviction, the right to a trial by jury attached. Id.

The crux of the issue of whether a domestic battery charge entitles a defendant to a jury trial, then, is the potential loss of gun rights pursuant to NRS 202.360. Effective June 2, 2015, NRS 202.360 was amended. Pursuant to that amendment, it became unlawful for a person to have in his or her possession, or to own, or to have in his or her custody or control any firearm if he or she had been convicted in Nevada or any other state of a misdemeanor crime of domestic violence, *as it is defined in 18 U.S.C. § 921(a)(33).* NRS 202.360. In effect, the change criminalized possession or control of a firearm by a person convicted in

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Nevada or any other state of a misdemeanor crime of domestic violence only as defined in 18 U.S.C. § 921(a)(33). Andersen v. Eighth Judicial District Court et al., 135 Nev. Adv. Op. 42, 448 P.3d 1120 (2019). The Andersen Court explained that the legislature's amendment to NRS 202.360, by limiting the constitutional right to possession of a firearm as a result of conviction of a crime of domestic violence as defined in 18 U.S.C. § 921(a)(33), entitled those affected to trial by jury. Id., 135 Nev. Adv. Op. 42, 448 P.3d at 1124. It follows, then, that if a criminal conviction would *not* trigger prohibition of firearms possession or ownership under NRS 202.360 —i.e., the amendment would not be applicable— the defendant would *not* be entitled to a trial by jury just as before under Amezcua.

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A. Convictions under municipal law do not meet the definition under 18 U.S.C. § 921(a)(33).

Because NRS 202.360 relies upon the definition of misdemeanor domestic violence as it is defined by 18 U.S.C. § 921(a)(33) (hereinafter "the federal definition"), it is important to examine and know the restricted language in that section of the Code:

> (33)
> (A) Except as provided in subparagraph (C),[2] the term "misdemeanor crime of domestic violence" means an offense that—
> (i) is a misdemeanor under **Federal, State, or Tribal [3] law**; and
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.
> (B)
> (i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless—
> (I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel

in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

(emphasis added).

Specifically, the federal definition includes a jurisdictional source of law element that must be fulfilled to trigger the application of NRS 202.360 to a defendant. Defendant highlights several other phrases in the federal definition in their motion, but glosses over this important source of law requirement. Pursuant to the federal definition under 18 U.S.C. § 921(a)(33)(A)(i) (and thus under NRS 202.360), in order to be considered a predicate conviction of misdemeanor crime of domestic violence, the offense must be "a misdemeanor under Federal, State, or Tribal law." The federal definition does not include convictions under municipal code.

1. *The plain language of the federal definition excludes municipal convictions.*

Defendant incorrectly contends that the offense of domestic violence as charged under Henderson's municipal ordinance still requires a jury trial, contending it is covered by the plain language of the federal definition. However, Defendant's analysis of that section of the statute overlooks the very language that plainly defines what category of offenses are

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considered "misdemeanor crimes of domestic violence." Specifically, 18 U.S.C. § 921(a)(33)(A) provides that "the term 'misdemeanor crime of domestic violence' means an offense that... is a misdemeanor under **Federal, State, or Tribal law**." (emphasis added). Thus, pursuant to plain language of the statute, domestic violence offenses codified under federal, state, or tribal law are included in the federal definition. Because municipal ordinances do not fit into any of those categories, they are not covered by 18 U.S.C. § 921(a)(33)(A).

The starting point for determining legislative intent is the statute's plain meaning; when a statute "is clear on its face, a court cannot go beyond the statute in determining legislative intent." Id.; *see also* State v. Catanio, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). The Nevada Supreme Court has consistently ruled that for purposes of statutory construction and determination of legislative intent, the clear and plain language of a statute is controlling. State v. Lucero, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011); We the People Nevada v. Secretary of State, 124 Nev. 874, 881, 192 P.3d 1166, 1170–71 (2008) (explaining that if a statute's language is clear and the meaning plain, this court will enforce the statute as written).

Here, the definition is clear and lends itself to only one reasonable interpretation: Congress delineated three sources of law from which predicate convictions qualify: Federal, State, and Tribal. There is nothing ambiguous about those terms, and none of them is "municipal." A predicate offense must be a misdemeanor conviction under "Federal, State, or Tribal law" to fit within the federal definition. Accordingly, convictions under municipal law or code do not qualify. Nonetheless, Defendant spends over two pages of their brief explaining what they contend is the "plain meaning" of the federal definition, never once

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addressing the jurisdictional source requirement. See Defendant's Motion at 11-14. Yet the plain meaning is clear on its face and does not require such lengthy explanations, does not require linking multiple statutes or referring to other terms of art defined by case law, and does not require reference to additional canons of statutory interpretation.

When plain meaning is ambiguous, Nevada case law may analyze and follow the canon of statutory interpretation "expressio unius est exclusio alterius," the expression of one thing is the exclusion of another. State v. Javier C., 128 Nev. 536, 541, 289 P.3d 1194, 1197 (2012) (citations omitted). Assuming *arguendo* that this Court found that the federal definition was ambiguous, this canon weighs in favor of the City's position. If Congress wished municipal code convictions to qualify, it would have been clearly enunciated in the federal statute. "When interpreting a statute, legislative intent "is the controlling factor." Robert E. v. Justice Court, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983). Since the definition specifically includes "Federal, State, and Tribal laws," but excludes municipal jurisdictions, convictions under local and municipal codes, ordinances, and laws do not qualify.

In fact, Congress *did* delineate local sources of law in other sections of 18 U.S.C. § 922, (*see, e.g.*, 18 U.S.C. § 922(a)(2)(A)), but it chose to exclude local and municipal convictions from the definition of a "misdemeanor crime of domestic violence." It is not as though Congress intended for local sources of law to qualify in all situations in all portions of §921 and §922. When Congress intended for local sources of law, like municipal code convictions, to be considered, it included "local laws" in its express language. This is particularly telling considering that Congress added Tribal law to the previous pair of State and Federal law sources with its amendment of §921 in 2006. See generally Violence

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Against Women Act, Pub. L. No. 109-162, § 908, 119 Stat. 2960 (2006). At the same time, Congress also amended dozens of other portions of §921 to distinguish "local law" from state and federal law but did not add local law to §921(a)(33)(A)(i), the federal definition at issue here. Id. *Expressio inius est exclusion alterius* justifies an "inference that items not mentioned were excluded by deliberate choice, not inadvertence." Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003). When Congress said "Federal, State, and Tribal," they meant just that, what is *included* in the plain language they wrote in the statute. Accordingly, it is clear that the legislative intent was to exclude local and municipal law convictions from the federal definition.

2. *The federal courts that have addressed the issue agree that the federal definition does not include convictions under municipal law.*

This specific issue has been addressed by federal courts in interpreting 18 U.S.C. § 921(a)(33)(A)(i)'s application to convictions under municipal law, and those courts have applied a similar analysis. Although this is a relatively recent issue to be brought to courts' attention, and two of the three cases are unpublished, they can nonetheless provide helpful insight into the issue at hand, statutory interpretation, and the federal perspective on interpretation of a federal statute. They have all come to the same conclusion: convictions under municipal law do not qualify under the federal definition.

In U.S. v. Pauler, the defendant was convicted of violating 18 U.S.C. § 922(g)(9) for possessing a firearm after a prior conviction of domestic violence under Wichita, Kansas municipal code. United States v. Pauler, 857 F.3d 1073, 1075 (10th Cir. 2017). The Tenth Circuit considered whether a misdemeanor violation of a municipal ordinance qualified as a misdemeanor under "State law" under 18 U.S.C. § 921(a)(33). There, the government

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argued that "State" in 18 U.S.C. § 921(a)(33)(A)(i) should be read to mean "state and local;" as a division of the state, a violation of municipal ordinance would constitute a violation of state law. The Court rejected their argument, finding that the Gun Control Act repeatedly distinguished between State and local jurisdictions, and the government had cited to no examples in the Act where the term State was "even arguably meant to encompass both state and local governments or laws." Pauler, 857 F.3d at 1075. The Court applied several canons of statutory interpretation, finding that each weighed in favor of the defendant's interpretation that convictions under municipal law do not qualify as predicate offenses under the federal definition. The Court further opined:

> However, as the Supreme Court has recently reiterated, "supply[ing] omissions transcends the judicial function," *Nichols v. United States*, —— U.S. ——, 136 S.Ct. 1113, 1118, 194 L.Ed.2d 324 (2016), and "[d]rawing meaning from silence is particularly inappropriate ... [when] Congress has shown that it knows how to [address an issue] in express terms," *Kimbrough v. United States*, 552 U.S. 85, 103, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007). The government is certainly free to petition Congress to address the perceived deficiency in the scope of this statute's coverage, but it would be inappropriate for this court to depart from all of the well-established rules of statutory interpretation to construe § 921(a)(33) atextually, including more individuals within the scope of a criminal statute than are covered by the plain language of the statute, based simply on policy concerns. "[W]hat matters is the law the Legislature *did* enact. We cannot rewrite that to reflect our perception of legislative purpose." *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 559 U.S. 393, 403, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010).

Pauler, 857 F.3d at 1077.

Ultimately, the Tenth Circuit held that a "a misdemeanor under Federal, State, or Tribal law" does not include a conviction under municipal ordinance. Id. at 1078. Accordingly, the defendant's municipal conviction did not qualify as a predicate offense, and he could not be convicted under 18 U.S.C. § 922(g)(9). Id.

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In United States v. Enick (attached as Exhibit A), the defendant was similarly charged with a violation of 18 U.S.C. § 922(g)(9). United States v. Enick, No. 2:17-CR-00013-BLW, 2017 WL 2531943, at *1 (D. Idaho June 9, 2017) (unpublished). The government alleged that his qualifying prior conviction was for misdemeanor assault under Spokane Municipal Code. The defendant filed a motion to dismiss, arguing that the prior conviction was not a qualifying predicate offense. The United States District Court for the District of Idaho found that a violation of municipal ordinance does not qualify under the definition of a "misdemeanor crime of domestic violence." The Court's analysis through several canons of construction, including plain language, legislative intent, (including examination of legislative history), and *expressio unius est exclusio alterius* revealed that Congress purposefully excluded local law from that definition, and found that a "misdemeanor crime of domestic violence" *only* includes "an offense that—(i) is a misdemeanor under Federal, State or Tribal law[.]" 18 U.S.C. § 921(a)(33)(A). Enick, 2017 WL 2531943, at *1. A violation of municipal code does not qualify under the federal definition. Id.

The U.S. District Court for the District of Nevada has also considered this issue. United States v. Wagner, No. 317CR00046MMDWGC, 2017 WL 4467544, at *1 (D. Nev. Oct. 5, 2017) (unpublished) (attached as Exhibit B). Wagner was charged with possession of ammunition under 18 U.S.C. § 922 (g)(1) and § 924(a)(2), and filed a motion to dismiss, arguing his predicate conviction under Reno Municipal Code did not qualify to make him a prohibited person under the definition contained in 18 U.S.C. § 922(g)(9)(A). Again, the government argued that the term "State" law should be interpreted to include violations of local laws. The Court determined that the plain language of the statute was unambiguous

and supported Wagner's argument: State law means State law and does not include municipal or local offenses. The Court also considered the government's public policy argument that the legislature enacted the Gun Control Act with the intent to keep guns out of the hands of domestic abusers, but it found that because the language of the statute was unambiguous, no other statutory interpretation was necessary. Nonetheless, the Court completed an exercise in addressing the legislative history, reaching the same conclusion as the courts in Enick and Pauler – observations of the legislative history led the Court to the conclusion that Congress intended to exclude local law from the qualifying predicate offenses. The Court concluded that the misdemeanor conviction under the Reno Municipal Code did not qualify as a predicate offense because it does not fall within the definition under 18 U.S.C. § 921(a)(33)(A)(i) and granted the motion to dismiss the Superseding Indictment. Wagner, 2017 WL 4467544, at *3. Wagner is a particularly telling analysis because a U.S. District Court interpreted the federal definition in light of a Nevada municipal ordinance and concluded that a conviction under a municipal law in Nevada does not qualify under the federal definition.

All three courts analyzed the federal definition under 18 U.S.C. § 921(a)(33)(A)(i), all three used multiple canons of statutory interpretation, and all three came to the same conclusion. As far as the City is aware, no other courts have addressed this specific issue, so all federal courts that have addressed the issue have come to the same conclusion: the federal definition does not include convictions under municipal ordinances.

3. Hayes does not apply, and Defendant's interpretation of the federal definition has been rejected by federal courts.

Even though the plain language and case law reveal that misdemeanor ordinances are not included in the federal definition, Defendant nonetheless contends that Henderson's

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municipal ordinance is included because the conduct amounting to a domestic violence conviction under the HMC may also constitute domestic violence under state law. Defendant relies upon U.S. v. Hayes to support that proposition. U.S. v. Hayes, 555 U.S. 415, 129 S. Ct. 1079 (2009). However, Hayes is not applicable here because the Hayes court never considered whether a domestic violence offense charged under a local law is included in the federal definition of a "misdemeanor crime of domestic violence." Hayes actually addresses a completely different issue: whether an offense charged under *state law,* where a domestic relationship exists but is not an element of the charged predicate offense, is included in the federal definition of a "misdemeanor crime of domestic violence." The Hayes Court presumably focused on the relationship underlying the offense because the statute at issue there, a West Virginia state law, was unquestionably included in the plain language of the federal definition as a conviction under State law. However, focusing on the underlying conduct is specious in the instant case, because the language of the federal definition plainly excludes municipal ordinances.[3] When the plain language is clear, it is unnecessary to go beyond it.

More specifically, Hayes does not apply here because in Hayes, the court used statutory interpretation to determine whether the federal definition included the relationship described as a required element of the convicted offense. The holding in Hayes is relatively narrow; the Court held "that the domestic relationship, although it must be established beyond a reasonable doubt in a § 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense." United States v. Hayes, 555 U.S. 415, 418, 129

[3] Defendant also cites to United States v. Belles, 338 F.3d 1063, 1067 (9th Cir. 2003) to further bolster the argument that the court should focus on the underlying conduct instead of the plain language of the statute. That case is also inapposite, as it involves a conviction for an offense under Tennessee state law, not a municipal ordinance.

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S. Ct. 1079, 1082 (2009). Although Defendant insists that Hayes suggested *conduct* could be proved outside the convicting statute, the Court actually determined that the *relationship* could be. Id. While the issue here is determining whether a conviction qualifies under 18 U.S.C. § 921(a)(33)(A)(i), Hayes dealt with parsing the intricacies of § 921(a)(33)(A)(ii).

This is an important distinction because the Hayes court based its decision in part on the statutory interpretation of one specific word in § 921(a)(33)(A)(ii), "element." Hayes, 555 U.S. at 421–22, 129 S. Ct. at 1084–85. The Court determined that because Congress utilized the word "element" rather than "elements" to define the offense, it intended only the first part of that clause to be a required element included in the statute of conviction, not the relationship. Notably, the language at issue here, the source of law requirement, is language included *before* the word "element," indicating that it *is* a required part of the statute of conviction. Essentially, all of § 921(a)(33)(A)(ii) would have been required to be included in the convicting statute without the phrasing of the section including the distinguishing word "element" and other grammatical and structural cues indicating that only the first part of the section (the conduct) must be included as part of the convicting statute, but the second portion (the relationship) could be proved otherwise. *See generally*, Hayes, 555 U.S. 415, 129 S. Ct. 1079. In section § 921(a)(33)(A)(i), though, there is no such language and no other grammatical and structural cues. Accordingly, § 921(a)(33)(A)(i) (the jurisdictional source) is a required component of the convicting statute just like the conduct element of § 921(a)(33)(A)(ii) is.

The word "offense," which Defendant erroneously refers to repeatedly in their brief as a synonym for conduct, is applied by the Hayes court not as used by Defendant. Instead, "offense" is used by the Hayes court relating to the "use or attempted use" of force

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requirement that must be part of the conviction, not to describe the relationship portion of the clause that need not be a predicate element of the convicting statute. Specifically, the Court noted:

> Treating the relationship between aggressor and victim as an element of the predicate offense is also awkward as a matter of syntax. It requires the reader to regard "the use or attempted use of physical force, or the threatened use of a deadly weapon" as an expression modified by the relative clause "committed by." In ordinary usage, however, we would not say that a person "commit[s]" a "use." It is more natural to say that a person "commit [s]" an "offense." See, e.g., United States v. Belless, 338 F.3d 1063, 1066 (C.A.9 2003) ("One can 'commit' a crime or an offense, but one does not 'commit' 'force' or 'use.' ").

Hayes, 555 U.S. at 422–23, 129 S. Ct. at 1085; *see also* United States v. Belless, 338 F.3d 1063, 1066 (9th Cir. 2003).

In that scenario, it's possible to replace "offense" with "force or violence" (the element that must be included in the convicting statute), but not with "committed by." Essentially, the Court found that the *convicted predicate offense* must have as an *element* the force requirement *committed by* a person with the appropriate relationship to the victim. Similarly, the *convicted predicate offense* must be a misdemeanor under Federal, State, or Tribal law.

Moreover, the Court opined, **"[a]s structured, §921(a)(33)(A) defines 'misdemeanor crime of domestic violence' by addressing in clause (i) the meaning of 'misdemeanor' and, in turn, in clause (ii), 'crime of domestic violence.'"** Hayes, 555 U.S. at 423, 129 S. Ct. at 1085. It is clear the Hayes court felt it was unquestionable that clause (i), (the jurisdictional source requirement) is a defining requirement of the predicate conviction. Clause (ii) is also a defining requirement, but is broken into a required element of the conviction (the use or attempted use of physical force, or the threatened use of a

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deadly weapon) and who the offense was committed by (the relationship, which must be proved beyond a reasonable doubt but need not be an *element* of the convicting law). To be sure, it would be nonsensical to read § 922(a)(33)(A) to include the element of "the use or attempted use of physical force, or the threatened use of a deadly weapon" from clause (ii) as a defining requirement of the predicate offense convicting law, but *not* to include clause (i) in the same way.

Because the plain language of the federal definition is unambiguous, it is also unnecessary for the court to examine the legislative intent behind the statute to determine whether Congress intended to include local laws, as Defendant apparently suggests. As the Wagner court noted, "the Court 'need not examine legislative history as an aide to interpretation unless the 'legislative history clearly indicates that Congress meant something other than what was said.'" U.S. v. Wagner, 2017 WL 4467544 at *3 (D. Nev. Oct. 5, 2017) *citing* U.S. v. Williams, 659 F.3d 1223, 1225 (9th Cir. 2011). Similarly, the court in Enick found that a review of the legislative intent of the statute was unnecessary because the plain language of the statute was unambiguous. U.S. v. Enick, 2017 WL 2531943 at *2. Nonetheless, the Enick court examined the legislative history and determined that it "strongly suggests that Congress purposefully excluded local law from the list of predicate offenses." Id. The legislative history also did not persuade the court in Wagner that Congress intended to include local laws. Wagner, 2017 WL 4467544 at *3. Thus, when federal courts have examined the legislative intent behind the federal firearms prohibition and the federal definition, they have concluded that Congress deliberately intended to exclude local laws from the definition of a "misdemeanor crime of violence conviction."

In Pauler, the Tenth Circuit Court of Appeals also rejected the claim that local laws

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should be included in the federal definition on public policy grounds, namely that "the dangers of firearms in the hands of domestic violence offenders are the same regardless of the jurisdictional source of the individual's prior domestic violence conviction." Pauler, 857 F.3d 1073 at 1077. There, the Court found that "it would be inappropriate for this court to depart from the well-established rules of statutory interpretation to construe §921(a)(33) atextually, including more individuals within the scope of a criminal statute than are covered by the plain language of the statute, based simply on public policy concerns." Id. Thus, any argument that Henderson's municipal ordinance is included in the federal definition because of the public policy goals of the firearm prohibition also lacks merit. The court in Wagner considered and rejected the same policy argument:

> Despite the statute's plain meaning, the government argues that constructing state law to include local laws (i.e., municipal ordinances) is consistent with Congress's intent in enacting § 922(g)(9) to "keep[ ] guns out of the hands of domestic abusers." (ECF No. 37 at 4 (quoting United States v. Hayes, 555 U.S. 415, 426 (2009)). However, because the Court finds that the statute is unambiguous, "that meaning is controlling." United States v. Williams, 659 F.3d 1223, 1225 (9th Cir. 2011). [...] But even if the Court were to consider the legislative history, the Court is not persuaded that, as the government argues, Congress meant for state law to include local laws.

Wagner 2017 WL 4467544 at *3.

Finally, the Defendant's claim that a domestic violence conviction under the HMC is included in the federal definition because it is covered by the "conviction in any court" portion of the statute is also unavailing. The courts in Enick, Pauler, and Wagner all rejected similar arguments. In Pauler, the court stated that "the issue here is not the type of court involved, but the type of offense, and §921(a)(33) provides that the only domestic violence convictions that qualify are convictions under "Federal, State, or Tribal law." Pauler, at 1077. The Wagner court also rejected the government's argument that the

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location of the conviction was determinative, recognizing that "the court of conviction is of no import." Wagner, 2017 WL 4467544 at *2. As the Wagner court noted, "[j]ust because the Reno Municipal Court could have convicted Wagner of a misdemeanor in violation of state law does not render all convictions by the same court convictions under state law." Id. In Pauler, the court recognized that "[t]he issue here is not the type of court involved, but the type of offense, and §921(a)(33) provides that the only domestic violence convictions that qualify are convictions under "Federal, State, or Tribal law." Pauler at 1077. The "any court" language means the defendant may be adjudicated in any court, not that any source of law may apply. In essence, a defendant could be convicted in a *municipal court* of a *State law* violation, and that conviction would nonetheless fit the federal definition. But a municipal law conviction in any court would not.

As written, § 922(g)(9) applies to any individual with a prior conviction for a misdemeanor crime of domestic violence adjudicated in any domestic court, but the source of law underlying the conviction must have been "Federal, State, or Tribal." 18 U.S.C. § 921(a)(33)(A)(i). In Small v. United States, 544 U.S. 385, 387 (2005), the Supreme Court held that the phrase "any court" in 18 U.S.C. § 922(g)(1) encompasses only domestic, not foreign, convictions. In doing so, the Court recognized that a legislature's use of the phrases "any person" and "any court" "may or may not mean to include each and every person or court." *Id.* at 388. Moreover, Congress using expansive language such as "any courts" only serves to further distinguish its decision to limit the definition of "misdemeanor crime of domestic violence" to convictions under "Federal, State, or Tribal law" "is significant because Congress knew how to define the boundaries of [the crime] broadly when it so desired." Bloate v. United States, 559 U.S. 196, 206-207 (2010). If

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Congress intended a broader reach for the jurisdictional source requirement, it could have easily defined a "misdemeanor crime of domestic violence" as "any misdemeanor," just as it referred to "any person" or "any court" in § 922(g)(9). However, Congress chose to include only State, Federal, and Tribal laws, excluding local laws despite including them in other sections of § 922, and despite using the expansive term "any" in related sections as well. Therefore, the court where the conviction was adjudicated is not dispositive, but instead the source of law under which the defendant was convicted.

Finally, Defendant's argument that a conviction under the HMC qualifies as a predicate conviction because its language is similar to the domestic battery statute under the NRS is similarly unpersuasive. Again, the United States Supreme Court has explained: "As structured, § 921(a)(33)(A) defines 'misdemeanor crime of domestic violence' by addressing in clause (i) the meaning of 'misdemeanor' and, in turn, in clause (ii), 'crime of domestic violence.'" Hayes, 555 U.S. at 423, 129 S. Ct. at 1085. 18 U.S.C. § 922(g)(9) prohibits the possession or use of firearms by "any person [...] who has been convicted in any court of a misdemeanor crime of domestic violence." Defendant attempts to divide "conviction" and "offense" into separate concepts, but that is an unfair reading of the statutory text in context. The plain language and a common sense reading of the statute clearly indicates that the conviction must be for a misdemeanor under Federal, State, or Tribal law, just as the conviction must include a crime of domestic violence (which includes as an element the force or violence requirement, and also the relationship as a requirement that must be proven).

Defendant's interpretation complicates the statute far beyond the plain meaning and reads into the statute significant additional language. The omitted-case cannon states that

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"nothing is to be added to what the text states or reasonably implies." United States v. McEligot, No. 14-CV-05383-JST, 2015 WL 1535695, at *4 (N.D. Cal. Apr. 6, 2015); *citing to* Shea v. Kerry, 961 F. Supp. 2d 17,29 (D.D.C. 2013). "It is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done." Southern Nevada Homebuilders Ass'n v. Clark County, 121 Nev. 446, 117 P.3d 171 (2005) (*citing* Falcke, 116 Nev. at 589, P. 3d at 665 (*quoting* McKay v. Board of Cty. Comm'r, 103 Nev. 490, 492, 746 P.2d 124, 125 (1987))).

The omitted-case canon is consistent with the City's position that the jurisdictional source of law is a requirement of the conviction. Defendant attempts to add to the text and unreasonably imply that the federal definition applies to convictions for "offenses that could have also been violations of" State, Federal, or Tribal law. This would create an "absurd result," because municipal codes will naturally have similarities to state laws. Clinton v. City of New York, 524 U.S. 417, 429, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998); *see also* United States v. Middleton, 231 F.3d 1207, 1210 (9th Cir. 2000). Additionally, Defendant's proposal would require reading into the federal definition the additional requirement of a review of every case for a "functional equivalent" under which the conduct could have been charged under State, Federal, or Tribal law. The federal definition certainly does not include that language. Under the omitted-case canon, it is impermissible to read this additional language and requirement into the text of the federal definition.

The negative-implication canon "properly applies only when in the natural association of ideas in the mind of the reader, that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference." United States v. Bainbridge, 746 F.3d 943, 948 (9th Cir. 2014). "Every positive

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direction contains an implication against anything contrary to it which would frustrate or disappoint the purpose of that provision." William W. Galloway, duly elected and acting Treasurer of Clark County, a political subdivision of the State of Nevada, v. Robert I. Truesdell, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) (*quoting* People ex rel. Wood v. Draper, 15 N.Y. 532, 544 (1857)).

The negative-implication canon also supports the City's argument because the federal definition can be read to create an affirmative understanding of the jurisdictional sources that qualify for predicate offense convictions. The three sources of law are the *only* three the statute offers. The sources of law are clearly listed, and Congress chose not to include language regarding a "conduct underlying the conviction" test. The federal firearms prohibition does not include language such as, "it shall be unlawful for any person who has been convicted in any court of *any offense that could have been charged as* a misdemeanor crime of domestic violence; the term 'misdemeanor crime of domestic violence' means an offense *that could have been charged as* a misdemeanor under Federal, State, or Tribal law[...]." Neither does it include language such as, "it shall be unlawful for any person who has been convicted in any court of *any conduct that could be* a misdemeanor crime of domestic violence; the term 'misdemeanor crime of domestic violence' means *any conduct that could violate* a misdemeanor Federal, State, or Tribal law[...]." The omission of such language indicates that Congress intended the firearm prohibition to apply only to those who had been convicted under Federal, State, or Tribal law, and not to require courts to consider whether conduct that was charged under another source, like the HMC, *could have been* charged under or *could have violated* a qualifying jurisdictional source.

The plain meaning of the federal definition is clear and unambiguous. Defendant's

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attempts to muddy the waters are unpersuasive. Municipal code convictions fall squarely outside the federal definition.

4. Congress has overtly acknowledged that the federal definition does not include municipal code convictions.

Moreover, Congress has this year acknowledged that the definition does not apply to municipal law convictions. The U.S. House of Representatives proposed the Violence Against Women Reauthorization Act of 2019 (VAWA), which includes an amendment to 18 U.S.C. § 921(a)(33)(A)(i): "by inserting after 'Federal, State,' the following: 'municipal,'[.]" Violence Against Women Reauthorization Act of 2019, H.R. 1585, 116th Cong. § 801 (2019-2020) (available at https://www.congress.gov/bill/116th-congress/house-bill/1585/text). The amendment would similarly add that a misdemeanor crime of stalking is defined as an offense that is a misdemeanor crime of stalking under "Federal, State, Tribal, or municipal law." Id. VAWA was introduced on March 7, 2019, has passed in the House, and has been waiting on the Senate Legislative Calendar since April 10, 2019. Id. The proposed amendment indicates that Congress is not only aware of the exclusion, but also agrees that the current definition does not include convictions under municipal law. The proposed amendment indicates that although Congress may be interested in changing the definition to include municipal convictions in the future, as the law currently stands, municipal convictions are excluded.

B. Because municipal convictions are excluded from the federal definition, they are also excluded from NRS 202.360.

Because misdemeanor municipal convictions are excluded under the federal definition pursuant to 18 U.S.C. § 921(a)(33)(A)(i), they are necessarily also excluded as predicate convictions under NRS 202.360. Again, NRS 202.360 states, in relevant part:

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> 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); [...]

It follows that if a conviction does not qualify under the definition contained in 18 U.S.C. § 921(a)(33), then it cannot qualify under NRS 202.360. Because a conviction under municipal code does not qualify under the federal definition, it also does not qualify under NRS 202.360. Accordingly, a conviction under HMC § 8.02.055, which Defendant is charged with in the Amended Complaint, does not trigger the possible loss of gun rights under NRS 202.360.

C. Municipal ordinance violations do not entitle a defendant to a jury trial.

Because NRS 202.360 is not triggered by a conviction under HMC § 8.02.055, and the increased penalty associated with the legislature's passage of NRS 202.360 was the basis of the Court's decision in Andersen, Amezcua applies and the Defendant is not entitled to a jury trial.

Until recently, under Nevada Supreme Court precedent, individuals charged with misdemeanor battery constituting domestic violence were under no circumstances entitled to a jury trial. The Court had considered the specific issue and ruled that individuals like Defendant were not entitled to trial by jury because they were charged with a petty offense. Amezcua v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 130 Nev. 45, 46–47, 319 P.3d 602, 603 (2014). Recently, as discussed *supra*, the Court reconsidered the issue after a legislative change. Andersen v. Eighth Judicial Dist. Court in & for Cty. of Clark, 135 Nev. Adv. Op. 42 (2019). However, it is important to consider the rationale of the court as well as prior decisions before considering and understanding how the new case law

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should be applied, and whether a municipal code violation entitles a defendant to a jury trial.

In Amezcua, the Court provided the following rendition of the history of precedent and analysis regarding whether a defendant was entitled to a jury trial:

> "[T]o determine whether the ... right to a jury trial attaches to a particular offense, the court must examine 'objective indications of the seriousness with which society regards the offense.' " United States v. Nachtigal, 507 U.S. 1, 3, 113 S.Ct. 1072, 122 L.Ed.2d 374 (1993) (quoting Blanton v. N. Las Vegas, 489 U.S. 538, 541, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989)). The best objective indicator of the seriousness with which society regards an offense is the **maximum penalty** that the legislature has set for it. Id. Although a "penalty" may include things other than imprisonment, the focus for purposes of the right to a jury trial has been " 'on the **maximum authorized period of incarceration**.' " Id. (quoting Blanton, 489 U.S. at 542, 109 S.Ct. 1289). Taking this approach, the **Supreme Court has held that an offense for which the period of incarceration is six months or less is presumptively a "petty" offense and a jury trial is not constitutionally required**. Id. We have reached the same conclusion. Blanton, 103 Nev. at 633–34, 748 P.2d at 500–01. **The presumption may be overcome "only by showing that the additional penalties, viewed together with the maximum prison term, are so severe that the legislature clearly determined that the offense is a 'serious' one."** Nachtigal, 507 U.S. at 3–4, 113 S.Ct. 1072 (quoting Blanton, 489 U.S. at 543, 109 S.Ct. 1289).

Amezcua, 130 Nev. at 48–49, 319 P.3d at 604 (emphasis added).

Because first offense domestic battery is a misdemeanor with a maximum term of imprisonment of six months, it is a presumptively petty offense and it is the burden of the defense to prove that the right to a jury trial attaches. NRS 200.485(1)(a)(1); HMC § 8.02.055; Amezcua, 130 Nev. at 49, 319 P.3d at 604. In order to do so, the defense must prove that any additional penalties, when considered in combination with the maximum term of imprisonment, "are so severe that they clearly reflect a legislative determination that first-offense domestic battery is a "serious" offense." Id. (*citing* Blanton, 489 U.S. at 543,

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109 S.Ct. 1289).

In Amezcua, the Appellant alleged that his domestic battery charge rose to a "serious" offense and was worthy of a jury trial because (1) a conviction created a rebuttable presumption that he was unfit for sole or joint custody of his children (2) he could lose the right to possess a firearm under federal law and (3) a conviction would render a noncitizen deportable under federal immigration law. The Court determined that the rebuttable presumptions created by statute regarding child custody reflected the legislative intent about the best interest of a child rather than the seriousness of the offense of domestic battery, and thus the defense failed to rebut the presumption that the offense was petty. Id., 130 Nev. at 50, 319 P.3d at 605. The Court also found that the potential loss of firearm rights under federal law and the possibility of deportation were collateral consequences that did not impact the Nevada legislature's determination of whether domestic battery was a serious offense, and were therefore irrelevant. Id. The Court held that first-offense domestic battery was a "petty" offense, and that the right to a jury trial did not attach. Id.

It was the potential loss of firearm rights that became the central issue only a few short years later in Andersen. As discussed *supra*, the Nevada Supreme Court found that the Nevada legislature had amended the penalties associated with a misdemeanor domestic battery conviction when it prohibited the possession of firearms by those convicted of domestic battery with its amendment to NRS 202.360. Andersen v. Eighth Judicial Dist. Court in & for Cty. of Clark, 135 Nev. Adv. Op. 42 (2019). That change, the Andersen Court said, was the basis for the distinction between Amezcua and Andersen: once the Nevada legislature added additional penalties upon conviction, the right to a trial by jury attached. Id.

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Because the firearms prohibition "penalty" the Andersen Court determined was the impetus for the right to jury trial attaching in misdemeanor domestic battery cases does not apply in all misdemeanor domestic battery cases, it follows that the right to trial by jury does not attach in all misdemeanor domestic battery cases. When the firearms prohibition of NRS 202.360 does not apply, neither does the right to a trial by jury.

A municipal conviction does not fall under the federal definition, and therefore does not invoke the penalty associated with NRS 202.360, so the basis for the Court's decision in Andersen disappears, and we are left with the court's decision in Amezcua. Without the application of NRS 202.360, the increased penalty does not apply, and the offense is again "petty." Accordingly, a defendant charged under municipal code, more specifically here HMC § 8.02.055, is not entitled to a jury trial.

D. The Henderson City Council intended HMC § 8.02.055 to be a petty offense, and therefore no right to a jury trial attaches.

The City anticipates that the defense will likely argue that Andersen nonetheless controls, despite the fact that NRS 202.360 would not be invoked by a conviction under HMC § 8.02.055. However, applying the same analysis used in Amezcua and Andersen leads to the same conclusion: the legislative intent in passing HMC § 8.02.055 was absolutely to return Battery Constituting Domestic Violence to the same petty offense it was before the state legislature's amendment of NRS 202.360; thus returning it to the same status as applied when Amezcua was decided.

The right to a trial by jury afforded to defendants by the Sixth Amendment of the United States Constitution and Article 1, Section 3 of the Nevada Constitution does not extend to "petty" offenses, but it attaches only to "serious" offenses. Andersen v. Eighth

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Judicial Dist. Court in & for Cty. Of Clark, 135 Nev. Adv. Op. 42, 448 P.3d 1120, 1122–23 (2019) (*citing* Blanton v. City of N. Las Vegas, 489 U.S. 538, 541, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989); Duncan v. Louisiana, 391 U.S. 145, 159, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); *see also* Blanton v. N. Las Vegas Mun. Court, 103 Nev. 623, 628-29, 748 P.2d 494, 497 (1987) ("[T]he right to a trial by jury under the Nevada Constitution is coextensive with that guaranteed by the federal constitution."), *aff'd sub nom.* Blanton, 489 U.S. 538, 109 S.Ct. 1289). In determining whether an offense is "petty" or "serious," the Court considers indicators of society's perception of the seriousness of the offense, the most telling of which is the maximum penalty, established by the legislature. United States v. Nachtigal, 507 U.S. 1, 3, 113 S.Ct. 1072, 122 L.Ed.2d 374 (1993). In addressing this issue, United States Supreme Court has determined that an offense with a maximum period of incarceration of six months or less is presumptively petty; to overcome this presumption, and to demonstrate that an offense is "serious" and warrants a jury trial, a defendant must "demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they **clearly reflect a legislative determination that the offense in question is a serious one**." Blanton, 489 U.S. at 543, 109 S.Ct. 1289 (emphasis added).

Here, the penalties associated with conviction of violation of HMC § 8.02.055 are *the same* as the penalties associated with a conviction of battery constituting domestic violence analyzed in Amezcua, where the court held the offense was petty and did not warrant a jury trial. The federal definition does not apply, so the increased penalty included in NRS 202.360 which made the difference in Andersen is nonexistent. Moreover, the legislative intent could not be any clearer in this instance: the Henderson City Council

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passed HMC § 8.02.055 specifically with the intent to return the municipal offense of domestic battery to its state before the legislative amendment of NRS 202.360; the City Council wanted to make the offense "petty" and continue to hold bench trials, at least temporarily. Here, the City Council has indicated that the offense of misdemeanor domestic battery is *petty*, so it follows that one facing the charge is *not* entitled to the right to a jury trial. *Contrast with* Andersen v. Eighth Judicial Dist. Court in & for Cty. of Clark, 135 Nev. Adv. Op. 42, 448 P.3d 1120, 1124 (2019) ("Given that the Legislature has indicated that the offense of misdemeanor domestic battery is serious, it follows that one facing the charge is entitled to the right to a jury trial.")

For all the reasons above, convictions under the Henderson Municipal Code do not evoke the right to a trial by jury.

3. HENDERSON MUNICIPAL CODE § 8.02.055 DOES NOT VIOLATE THE CONSTITUTIONAL REQUIREMENTS OF EQUAL PROTECTION.

Defendant mistakenly claims that since domestic abusers charged with battery constituting domestic violence by the City of Henderson in Henderson Municipal Court are being charged under a different legal authority than domestic abusers charged by the state of Nevada in the Henderson Justice Court, that HMC § 8.02.055 creates an equal protection violation. This mistaken claim fails because equal protection is not at issue; prosecutorial discretion is wide-ranging as relates to charging authority. Equal protection is also not impacted because no actual classification is created, and no fundamental right is impacted. Finally, even if HMC § 8.02.055 created a classification that impacted a fundamental right,

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the code section is a narrowly-tailored law created and used for the compelling state interests of public safety, reduction of domestic violence, and victim protection.

A. Equal Protection Framework

The federal constitution prohibits the passage and application of laws which "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. Similarly, the Nevada constitution requires that all laws be "general and of uniform operation throughout the State." Nev. Const. Art. 4, Section 21. "The standard for testing the validity of legislation under the equal protection clause of the state constitution is the same as the federal standard." In re Candelaria, 126 Nev. 408, 416, 245 P.3d 518, 523 (2010), *quoting* Barrett v. Baird, 111 Nev. 1496, 1509, 908 P.2d 689, 698 (1995), *overruled on other grounds by* Lioce v. Cohen, 124 Nev. 1, 174 P.3d 970 (2008). "A statute that treats similarly situated people differently implicates equal protection." Rico v. Rodriguez, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005). However, "mere classification . . . does not of itself deprive a group of equal protection." Carrington v. Rash, 380 U.S. 89, 92, 85 S. Ct. 775, 778, 13 L. Ed. 2d 675 (1965). "When a suspect class or fundamental right is not involved, different classifications are permissible, so long as they are reasonable." In re Candelaria, 126 Nev. 408, 416–17, 245 P.3d 518, 523 (2010), *citing* Flamingo Paradise Gaming v. Att'y General, 125 Nev. 39, ——, 217 P.3d 546, 558–59 (2009). When a statute treats similarly situated people differently, and involves certain fundamental rights, the limitation of the fundamental right must be narrowly tailored and justified by a compelling state interest. Roe v. Wade, 410 U.S. 113, 155–56, 93 S. Ct. 705, 728, 35 L. Ed. 2d 147 (1973), *holding modified by* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

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B. <u>There is no Equal Protection violation, since the City Attorney has Wide-Ranging Prosecutorial Discretion, and the Charge was Supported by Probable Cause.</u>

Defendant complains *ad nauseam* that there must be an equal protection violation since defendants charged with battery domestic violence under the HMC have no constitutional right to a jury trial, and other completely unrelated defendants may have that right in a totally separate jurisdiction. The entire premise of Defendant's equal protection claim is grossly flawed.

Prosecutors have wide-ranging discretion in what cases to file, and under what authority to file them. In Salaiscooper v. Eighth Judicial District Court ex rel. County of Clark, 117 Nev. 892, 903, 34 P.3d 509, 516 (2001), the Nevada Supreme Court clearly stated, "[i]ndeed, a district attorney is vested with immense discretion in deciding whether to prosecute a particular defendant that 'necessarily involves a degree of selectivity.'" *quoting* State v. Barman, 183 Wis.2d 180, 515 N.W.2d 493, 497 (Wis.Ct.App.1994). Further, **"so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file...generally rests entirely in his discretion."** Id. fn 5., *quoting* U.S. v. Armstrong, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (emphasis added), Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). Under an appropriate equal protection analysis that challenges a charging decision in a case, the court solely looks to whether there was probable cause to support the charged offense and whether the decision to prosecute was based upon a protected class (race, gender, religion etc.). Provided there was probable cause to support the charge, and there is no claim of

discrimination regarding a protected class, the prosecutor's discretion must be respected. The entire inquiry ends there.

In exercising this discretion, the prosecutor is clothed with the presumption that they acted in good faith and properly discharged their duty to enforce the laws. Salaiscooper, 117 Nev. at 903, 34 P.3d 517. Although prosecutorial discretion is broad, the equal protection clause constrains the prosecutor from basing a decision to prosecute upon an unjustifiable classification, such as race, religion, or gender. Id.

The requisite analysis for a claim of unconstitutional selective prosecution is two-part. First, the defendant has the burden to prove a prima facie case of discriminatory prosecution. "To establish a prima facie case, the defendant must show that a public officer enforced a law or policy in a manner that had a discriminatory effect, and that such enforcement was motivated by a discriminatory purpose." Salaiscooper, 117 Nev. at 903, 34 P.3d 517. A discriminatory effect is proven when a defendant shows that other persons similarly situated "are generally not prosecuted for the same conduct." Id. A discriminatory purpose or "evil eye" is established when a defendant shows that a prosecutor chose a particular course of action, at least in part, because of its adverse effects upon a particular protected group. Id. Second, if a discriminatory purpose is established by prima facie evidence, then the burden shifts to the prosecution to establish that there was a reasonable basis to justify the unequal classification. Id. Overall though, the decision to prosecute may not be "'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" Bordenkircher v. Hayes, 434 U.S., at 364, 98 S.Ct., at 668, *quoting* Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 505, 7 L.Ed.2d 446 (1962).

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Here, all the Defendant has shown is that he is charged with battery domestic violence under the HMC, as opposed to the Nevada Revised Statutes. Based on that fact, he makes the leap of logic to assert an equal protection violation for the rights afforded to an unconnected hypothetical defendant charged under a wholly separate legislative act. Defendant's argument is as confusing as it is unrelated to equal protection principles.

Equal protection is only implicated when *a particular law* treats similarly situated people differently. In re Candelaria, 126 Nev. 408, 417, 245 P.3d 518, 523 (2010). The threshold question in an Equal Protection analysis is whether a statute treats similarly situated people disparately. Rico v. Rodriguez, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005); Vickers v. Dzurenda, 134 Nev. Adv. Op. 91, 433 P.3d 306, 308 (Nev. App. 2018). Equal Protection is not impacted when two different jurisdictions make separate prosecutorial decisions and charge cases under an entirely distinct body of law.

Defendant has not shown, or even alleged, that the enforcement of the HMC (in the instant case or others) is either based on a lack of probable cause or intentionally discriminatory against a protected class. Whether or not a completely unrelated defendant is, or is not, entitled to a jury trial in a separate jurisdiction has no bearing on the constitutionality of the decision to charge this Defendant under the Henderson Municipal Code. Simply, HMC § 8.02.055 was duly enacted by the Henderson City Council and the City Attorney has the distinct ability to choose to prosecute this Defendant with battery domestic violence under this provision, as opposed to the Nevada Revised Statutes.

Clearly, Defendant does not contend that HMC § 8.02.055 treats those that it affects (domestic abusers in the Henderson Municipal Court) differently. In other words, this is no credible assertion that the ordinance is being applied in an uneven or unconstitutional

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manner. Defendant does not argue that similarly situated defendants charged under HMC § 8.02.055 are treated in a constitutionally different way from one another.

Defendant more broadly alleges, that since a domestic violence defendant charged under the state law by the Clark County District Attorney's Office could lose their gun rights, and a domestic violence defendant charged under the city ordinance by the City Attorney would not be subject to losing their gun rights, the equal protection clause must be offended. To be clear, different prosecutorial decisions by different prosecutorial agencies occur all the time, even between defendants living and/or committing crimes in the same physical location. For example, federal and state courts have overlapping jurisdiction for many crimes. It does not create an equal protection violation for defendants to be charged under different authorities in different courts, which may afford different rights simply because they were charged under federal law versus state law (or city ordinance). This alone does not create an equal protection violation or even trigger an equal protection analysis.

The specific issue has been considered by the Nevada Supreme Court previously. In Hudson v. City of Las Vegas, the Court explained the petitioner's position, which is on all fours with Defendant's claim here, as follows:

> The basis of his argument is that since the municipal ordinance under which he is charged is identical in language with that of the state statute, which allows a jury trial had he been prosecuted by the state, he is constitutionally entitled to a jury trial. Since the municipal court of Las Vegas does not hear jury trials, it is, he contends, without jurisdiction.

Hudson v. City of Las Vegas, 81 Nev. 677, 679, 409 P.2d 245, 246 (1965). The Court held that it is constitutionally permissible to try a defendant under a municipal code that does not require a jury trial even when there is a state statute that mirrors the same language but

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provides for a jury trial. Hudson, 81 Nev. at 680–81, 409 P.2d at 247. The Supreme Court of Nebraska similarly held "[a] person tried for the violation of a city ordinance is not entitled to a jury trial, although the ordinance is but a reiteration of the provisions of a statute covering the same offense, and although the person charged would be entitled to a jury trial if prosecuted under the statute. State ex rel. Connolly v. Parks, 199 Minn. 622, 273 N.W. 233; State v. Ketterer, 248 Minn. 173, 79 N.W.2d 136." State v. Amick, 173 Neb. 770, 773, 114 N.W.2d 893, 895 (1962), *abrogated on other grounds by* Waller v. Fla., 397 U.S. 387, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970). The prevailing rule is that it is legally permissible to have a trial under municipal ordinance without a jury, "even if the ordinance is but a reiteration of a statute covering the same offense under which an accused would be entitled to a jury trial." § 27:40.Jury trials—Criminal prosecutions, 9A McQuillin Mun. Corp. § 27:40 (3d ed.) (Jul. 2019).

Moreover, "[i]t is not reasonable to say that the constitutional guarantee of equal protection of the laws requires that identical judicial procedures be provided in all of the various courts in all subdivisions of the state. We think, as a general rule, that the constitution is complied with in that respect if all persons being prosecuted in a certain court are accorded the same rights and protection." State ex rel. Cole v. Nigro, 471 S.W.2d 933, 937 (Mo. 1971) (finding that prosecution under municipal code with no jury trial for same offense as state statute that would have given a jury trial did not violate equal protection). So long as defendants charged with the violation of the same law, statute, or ordinance are treated similarly, there is no equal protection violation.

The Henderson City Attorney had the clear discretion to charge this Defendant with battery domestic violence under the HMC, as probable cause existed for the charge. Since

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this is an appropriate use of prosecutorial discretion, the Defendant's constitutional challenge must fail.

C. There is no Equal Protection violation because HMC § 8.02.055 does not create a classification.

If the court chooses to look beyond prosecutorial discretion and conduct an equal protection analysis, the court must first determine whether a classification is created. Amongst defendants charged with battery domestic violence by the Henderson City Attorney's office in Henderson Municipal Court, there is no classification alleged by Defendant. Thus, the analysis should end there.

However, Defendant alleges that since justice courts and municipal courts have overlapping jurisdiction over misdemeanor crimes in Nevada, and since different prosecutors are making different decisions in those different courts, that equal protection is implicated. Defendant seems to allege that the charging statute and/or jurisdiction create a classification, but the City is aware of no legal authority to support such a claim. Defendant's argument relies on the **incorrect** assumption that misdemeanor arrests for battery domestic violence charges in Henderson are distributed by act of prosecutor decision between the Henderson Justice Court and the Henderson Municipal Court, despite Defendant's admission that Defendant is unaware of how the cases are distributed between the two courts.[4]

Virtually all misdemeanor battery domestic violence cases that occur within the City of Henderson are heard in the Henderson Municipal Court and prosecuted by the Henderson City Attorney's Office. To date, in 2019, there have been 829 new cases of battery

[4] Defendant admits that Defendant "is aware of no specific algorithm that determines whether misdemeanor offenses are charged in Justice versus Municipal Court when both courts have concurrent jurisdiction." Defendant's Motion at 22: 7-10. Defendant's Motion then mistakenly alleges that charges are distributed between the Justice and Municipal Courts by some act of prosecutorial discretion. *Id.* At 22:10-15.

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domestic violence filed in the Henderson Municipal Court. By contrast, only 19 charges of misdemeanor battery domestic violence have been filed in the Henderson Justice Court in 2019.[5] Most, if not all, of the misdemeanor battery domestic violence cases filed in the Henderson Justice Court are for defendants that are alleged to have committed an accompanying felony. Those cases must go to the Henderson Justice Court to be initially arraigned and potentially bound over to District Court to handle the felony.

Misdemeanor charges of all kinds, including battery domestic violence, that have an accompanying felony charge must be filed in the same court by rule. *See* NRS 173.115.[6] In short, HMC § 8.02.055 does not treat offenders differently; the overwhelming majority of misdemeanor battery domestic violence defendants in Henderson are being adjudicated in the Henderson Municipal Court, as opposed to Henderson Justice Court. Once again, Defendant's claim that domestic abusers are treated differently under the city ordinance as opposed to the state law for domestic violence distorts the purpose of this important constitutional protection.

Equal Protection examines whether a singular law treats individuals differently based on immutable characteristics, not where a case is tried or under which statute or code. It does not render judgment on how a separate legislative body (Nevada State Legislature) or

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[5] The number of misdemeanor battery domestic violence cases filed in the Henderson Municipal Court and Henderson Justice Court were obtained directly from those respective courts.

[6] **NRS 173.115 Joinder of offenses: Misdemeanor joined in error must be stricken.**

2. Except as otherwise provided in subsection 3, a misdemeanor which was committed within the boundaries of a city and which would otherwise be within the jurisdiction of the municipal court must be charged in the same criminal complaint as a felony or gross misdemeanor or both if the misdemeanor is based on the same act or transaction as the felony or gross misdemeanor. A charge of a misdemeanor which meets the requirements of this subsection and which is erroneously included in a criminal complaint that is filed in the municipal court shall be deemed to be void ab initio and must be stricken.

3. The provisions of subsection 2 do not apply:

(a) To a misdemeanor based solely upon an alleged violation of a municipal ordinance.

executive body (Clark County District Attorney's Office) treat an unrelated defendant or set of facts.

D. Domestic abusers are not a protected class under the Equal Protection Clause, and the ordinance does not affect a fundamental right.

As discussed above, HMC § 8.02.055 does not create a classification at all, and thus the equal protection inquiry should end. However, if the court finds there is a classification, the equal-protection analysis involves a two-part inquiry. The court must first establish what level of scrutiny the legislation receives, and then examine the legislation under the appropriate level of scrutiny. Gaines v. State, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000). "Strict scrutiny is applied in cases involving fundamental rights, such as . . . cases involving a suspect class." Id. If fundamental rights are not infringed or a suspect class is not involved, the statute "will survive an equal protection attack so long as the classification withstands 'minimum scrutiny,' *i.e.,* is rationally related to a legitimate governmental purpose." Arata v. Faubion, 123 Nev. 19, 23, 161 P.3d 244, 248 (2007).

1. Domestic abusers are not a protected class.

First, Defendant does not (and cannot credibly) claim that Defendant is the member of a protected class. The class of individuals affected by HMC § 8.02.055 is domestic violence abusers, which is not a protected class under either the U.S. or Nevada Constitution. Similarly, in Peck v. Zipf, 133 Nev. 890, 898, 407 P.3d 775, 782 (2017), the Nevada Supreme Court held that inmates were not a suspect class under the Equal Protection Clause. *See* Glauner v. Miller, 184 F.3d 1053, 1054 (9th Cir. 1999) (noting that inmates are not a suspect class). Clearly, there can be no strict scrutiny analysis based on a protected class, as Defendant does not allege any discrimination based on such a class.

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2. *There is no "Fundamental Right" to a jury trial for all misdemeanor battery domestic violence cases in Nevada.*

Defendant's Motion fails to set forth any sort of analysis of or authority for how to determine what a "fundamental right" is; it merely asks the court to assume that the right to a jury trial is a "fundamental right." Defendant asserts without any legal authority that the right to a jury trial is a "fundamental right" and therefore any law that impacts an individual's right to a jury trial must withstand strict scrutiny. This argument ignores two important facts: (1) not all constitutional rights are "fundamental rights" for the purposes of equal protection, and (2) that the right to a jury trial is charge-specific, not universal.

a. Not all Constitutional rights are "fundamental rights."

While the "determination of which interests are fundamental should be rooted in the text of the Constitution" (San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 102–03, 93 S. Ct. 1278, 1332, 36 L. Ed. 2d 16 (1973), not all constitutionally guaranteed rights are "fundamental rights" that require strict scrutiny. This is a confusing, but important distinction. In San Antonio Independent School Dist., the U.S. Supreme Court said, regarding determining which rights are fundamental rights:

> The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.

San Antonio Indep. Sch. Dist., at 102–03, 1332. There must be some analysis of how a constitutional right interacts with non-constitutional interests before there is a determination of what rights are fundamental.

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For example, the individual right to bear arms is a right rooted in the U.S. Constitution through the Second Amendment. Many U.S. Citizens consider it to be a sacred right. However, at least three federal circuits have determined that the Second Amendment right to bear arms is not a "fundamental right" for the purposes of an equal protection analysis. United States v. Booker, 644 F.3d 12, 25 (1st Cir.2011)(First Circuit case applying intermediate scrutiny on case involving right to bear arms); District of Columbia v. Heller, 554 U.S. 570, 595, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) and United States v. Staten, 666 F.3d 154, 167 (4th Cir.2011) (Fourth Circuit cases applying intermediate scrutiny on case involving right to bear arms); United States v. Skoien 614 F.3d 638, 641 (Seventh Circuit case applying intermediate scrutiny on case involving right to bear arms). These cases examined laws regulating the right to bear arms by individuals having been convicted of domestic violence. In each case, the right to bear arms, in this circumstance, was not a fundamental right; intermediate scrutiny was sufficient.

While a right to a jury for certain serious offenses has been determined to be a fundamental right (Duncan v. State of La., 381 U.S. 145, 149, 88 S.Ct. 1444, 1447-1448 (1968)), there is no constitutional or fundamental right to a jury for petty offenses. As not all constitutional rights are fundamental rights, more analysis is necessary.

b. Since the right to a jury trial for battery constituting domestic violence in Nevada can be changed by indirect act of the Nevada legislature, it is not a fundamental right.

Fundamental rights are the kind of rights that individuals have no matter what the legislature decides. "Fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." Obergefell v. Hodges, 135 S. Ct. 2584, 2606, 192 L. Ed. 2d 609 (2015). If the application of a constitutional right can be legislated into or out of, it is

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not a fundamental right requiring strict scrutiny. Thus, the right to a jury trial for misdemeanor battery domestic violence is not a fundamental right requiring strict scrutiny.

In Nevada, the constitutional right to a jury trial only attaches to serious offenses. Blanton v. N. Las Vegas Mun. Court, 103 Nev. 623, 629, 748 P.2d 494, 497 (1987), *aff'd sub nom.* Blanton v. N. Las Vegas, 489 U.S. 538 (1989). Defendants in cases involving "petty" offenses are not entitled to trial by jury. *See* Lewis v. United States, 518 U.S. 322, 116 S. Ct. 2163 (1996); Blanton v. City of North Las Vegas, 489 U.S. 538, 541, 109 S. Ct. 1289, 1292 (1989); citing, Duncan v. Louisiana, 391 U.S. 145 (1968), District of Columbia v. Clawans, 300 U.S. 617 (1937), Callan v. Wilson, 127 U.S. 540 (1888); *see also*, Pettipas v. State of Nevada, 106 Nev. 377, 794 P.2d 705 (1990), and Amezcua v. Eighth Judicial District Court of the State of Nevada et al., 319 P.3d 602, 604 (2014), *cert. denied sub nom.* Amezcua v. Eighth Judicial Dist. Court of Nevada, Clark Cnty., 135 S. Ct. 59, 190 L. Ed. 2d 57 (2014).

While the recently-decided Andersen case determined that misdemeanor battery constituting domestic violence charged under the NRS is a "serious offense" due to the application of NRS 202.360 (prohibiting the possession of guns for those convicted of battery domestic violence under the NRS in cases where the parties' relationship meets the federal definition for domestic violence)(Anderson v. Eighth Judicial District Court, 135 Nev. Adv. Op. 42, pp 5-6 (2019)), the Nevada Supreme Court had previously determined that battery domestic violence misdemeanors (before the gun limitations were enacted) were "petty offenses" that did not require jury trials. Amezcua v. Eighth Judicial District Court of the State of Nevada et al., 319 P.3d 602, 604 (2014), *cert. denied sub nom.* Amezcua v. Eighth Judicial Dist. Court of Nevada, Clark Cnty., 135 S. Ct. 59, 190 L. Ed. 2d 57 (2014).

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Put more simply, before the domestic violence gun prohibition, there was no right to a jury trial; after the enactment of the domestic violence gun prohibition, there is a right to a jury trial for cases charged under the NRS. In enacting the domestic violence gun prohibition, the Nevada legislature had no express intent to grant domestic abusers a new constitutional right. Yet they did so. Thus, the right to a jury trial for a misdemeanor battery domestic violence charge swings on the actions of elected legislators (whether intentionally or not). As established by the U.S. Supreme Court in Obergefell, fundamental rights are the kind of rights that individuals have no matter what the legislature decides. Obergefell v. Hodges, 135 S. Ct. 2584, 2606, 192 L. Ed. 2d 609 (2015). If the application of a right can be legislated into or out of, it is **not** a fundamental right requiring strict scrutiny. Thus, the right to a jury trial for misdemeanor battery domestic violence in Nevada is not a fundamental right.

Since Defendant has not claimed to be part of a protected class, and as no fundamental right is impacted, equal protection is not impacted.

E. Henderson Municipal Code §8.02.055 is Narrowly-Tailored for the Compelling State Interests of Reduction of Domestic Violence, Public Safety, Ability to Prosecute Domestic Violence, and Victim Protection.

Even if the court finds that HMC §8.02.055 creates a classification, and that Defendant is part of a protected class or that the right to a jury trial for misdemeanor battery domestic violence is a fundamental right, the ordinance still does not violate equal protection as it is narrowly tailored to serve a compelling state interest.

1. If the Court determines that Henderson Municipal Code §8.02.055 creates a classification that impacts a fundamental right, strict scrutiny applies.

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Under a strict scrutiny analysis, the government has the burden of proving that classifications "are narrowly tailored measures that further compelling governmental interests." Johnson v. California, 543 U.S. 499, 505, 125 S. Ct. 1141, 1146, 160 L. Ed. 2d 949 (2005). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813, 120 S. Ct. 1878, 1886, 146 L. Ed. 2d 865 (2000).

In the wake of the Andersen decision in September 2019, defendants facing charges of misdemeanor battery constituting domestic violence began challenging the City's authority and ability to prosecute crimes of domestic violence. Andersen requires municipal courts to provide jury trials to defendants facing battery domestic violence charges under the NRS, despite the municipal court's authority to conduct jury trials being unclear, and no infrastructure in place in municipal courts to conduct such trials. The practical effects of the Andersen decision essentially brought the City's ability to prosecute domestic abusers to a halt. The City currently has over 1,000 open battery domestic violence cases, with new cases being filed every day. Dismissing over 1,000 cases and handing the cases over to the Clark County District Attorney's office to re-file in Henderson Justice Court, without a grant of funding to handle such a huge surge in caseload, is not a practical or realistic option.

Domestic violence is, undisputedly, a very serious problem in Nevada. Prosecuting domestic violence is essential to public safety, to reducing acts of domestic violence, and to protecting victims of domestic violence. As domestic violence is a major cause of death in Nevada at an alarmingly high rate, the ability to prosecute domestic violence is a compelling government interest of the City of Henderson. "Reducing domestic violence is

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a compelling government interest." United States v. Knight, 574 F. Supp. 2d 224, 226 (D. Me. 2008), *citing* United States v. Lippman, 369 F.3d 1039, 1043 (8th Cir.2004), *cert. denied,* 543 U.S. 1080, 125 S.Ct. 942, 160 L.Ed.2d 824 (2005). *See also* People v. Jungers, 127 Cal.App.4th 698, 704 (2005) (elimination of domestic violence is a compelling state interest).

After Andersen, the City needed a way to continue prosecuting domestic abusers during the current and ongoing temporary time during which prosecutions for battery domestic violence under the NRS by the City are unclear. The uncertainty of authority is necessarily temporary, as either: (1) the legislature will clarify the authority in the next legislative session, or (2) the Nevada Supreme Court will clarify it as cases are currently frequently being challenged. HMC § 8.02.055 is only intended to be used until this unclear status of the law is fixed. HMC § 8.02.055 mirrors the prohibited criminal conduct and penalties under NRS 200.485 (in conjunction with NRS 33.018) exactly. Defendants charged under the HMC and under the NRS are subject to the same conduct being criminalized, with the exact same penalties; the only difference is the lack of invocation of the gun prohibition when charging under the HMC. Thus, HMC § 8.02.055 is narrowly tailored to have as limited effect as possible, while allowing the City to continue keeping domestic violence victims safe by prosecuting domestic violence.

Further, the only defendants being charged for misdemeanor battery constituting domestic violence in Henderson Justice Court are defendants who face felony crimes arising out of the same incident as their domestic violence charge. Thus, the only defendants entitled to jury trials for misdemeanor battery domestic violence in Henderson, are defendants who are already entitled to a jury trial for their more serious charges. It does not

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appear that any defendants who have a sole charge of battery domestic violence in Henderson are being charged in the Henderson Justice Court. Application of HMC § 8.02.055 is narrowly-tailored for the compelling government interest of reducing domestic violence.

2. If the Court determines that Henderson Municipal Code § 8.02.055 creates a classification that does not impact a protected class, minimum scrutiny applies.

If fundamental rights are not infringed and a suspect class is not involved, the statute "will survive an equal protection attack so long as the classification withstands 'minimum scrutiny,' *i.e.*, is rationally related to a legitimate governmental purpose." Arata v. Faubion, 123 Nev. 19, 23, 161 P.3d 244, 248 (2007). As described immediately above, HMC § 8.02.055 can survive strict scrutiny, so it certainly meets the basic requirements of minimum scrutiny. There has been no equal protection violation by charging battery domestic violence defendants under the HMC.

For all the above reasons, Defendant's claims of an equal protection violation fail.

4. THIS COURT CANNOT BE "DIVESTED" OF JURISDICTION OVER THIS CASE, AND DEFENDANT IS NOT ENTITLED TO A JURY TRIAL.

The Defendant argues that this Court lacks the legal authority to conduct a jury trial and demands this Court "divest" itself jurisdiction over this case. In an attempt to bolster that argument, Defendant recycles the rationale from Sections "B" and "C" of their Motion. As discussed in detail above in Section II of this Opposition, Defendant's interpretation of the federal definition of misdemeanor domestic violence is demonstrably incorrect and contradicts federal case law. Likewise, Defendant's contention that concurrent jurisdiction between courts creates a due process violation is

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inapposite, as discussed in detail above in Section III of this Opposition. Moreover, divestment (i.e. what the Defendant really means is "transfer") is not available under the NRS. Further, this Court has the authority to conduct jury trials in battery constituting domestic violence cases, however, because the City is proceeding under the Municipal Code, the Defendant is not entitled to a jury trial. Finally, the Defendant is unable to show there is any lack of access to justice for a charge of domestic battery under HMC § 8.02.055.

A. NRS 5.0503 does not apply for "divesting" this court of jurisdiction or transferring the instant case to Justice Court.

Since the Defendant seeks to persuade this Court to dismiss the instant case and move it (or transfer it) to the Justice Court, the City will use the more common word "transfer." Furthermore, there is nothing in the NRS that refers to "divesting" or a Court's divestment of a case. To persuade this Court for transfer, the Defendant cites to NRS 5.0503. Nothing in that statute allows for this case to be transferred. NRS 5.0503 states:

> **Transfer of original jurisdiction of criminal case to justice court or another municipal court.**
>
> 1. A municipal court may, on its own motion, transfer original jurisdiction of a criminal case filed with that court to a justice court or another municipal court if:
>
> (a) The case involves criminal conduct that occurred outside the limits of the city where the court is located and the defendant has appeared before a magistrate pursuant to NRS 171.178;
>
> (b) Such a transfer is necessary to promote access to justice for the defendant and the municipal court has noted its findings concerning that issue in the record; or
>
> (c) The defendant agrees to participate in a program of treatment, including, without limitation, a program of treatment made available

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pursuant to NRS 176A.250, 176A.280, 453.580 or 458.300, or to access other services located elsewhere in this State.

2. A municipal court **may not** issue an order for the **transfer** of a case pursuant to paragraph (b) or (c) of subsection 1 **until a plea agreement has been reached or the final disposition of the case**, whichever occurs first.

3. An order issued by a municipal court which transfers a case pursuant to this section becomes effective after a notice of acceptance is returned by the justice court or municipal court to which the case was transferred. If a justice court or municipal court refuses to accept the transfer of a case pursuant to subsection 1, the case must be returned to the municipal court which sought the transfer.

(emphasis added).

The cited statute allows for a case to be transferred if it falls into one of three categories. Notably, transfer of a case is never required, it is always at the discretion of the municipal court, only after the statutory prerequisites are met. First, under Section 1(a), a case may be transferred if it occurred outside the City of Henderson—essentially when this Court has no jurisdiction to hear the case. In the instant case, the incident occurred inside the city limits of the City of Henderson. Therefore, Section 1(a) does not permit this Court to transfer this case.

Second, under Section 1(c), a case may be transferred if the Defendant agrees to a program of treatment for mental illness or intellectual disabilities (NRS 176A.250), a veteran's treatment program (NRS 176A.280), or a program for treatment of alcohol or controlled substance addictions (NRS 453.580), (with some exceptions which prevent participation, such as a crime against a child or domestic violence under NRS 33.018).

Last, under Section 1(b) (the Section the Defendant seeks to hang their hat on) a case may be transferred if ". . . such a transfer is necessary to promote access to justice

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for the defendant and the municipal court has noted its findings concerning that issue in the record."

However, and most importantly, a case **cannot be transferred** even if a defendant is entering a specialty court under Section 1(c), or it is necessary to promote access to justice under 1(b) **unless** "a plea agreement has been reached or [there has been] a final disposition of the case" as required by Section 2. The City and the Defendant certainly have not reached a plea agreement in this case, and the case has not been finally disposed of, so Defendant's case cannot be transferred.

B. <u>The Defendant is not deprived of access to justice since there is no right to jury trial when charged under HMC §8.02.055.</u>

The Defendant claims that he has no access to justice with his case in the Municipal Court because the City would not provide him a jury trial. But, as noted throughout this Opposition, the Defendant does not have the right to a jury trial in this case under HMC § 8.02.055. As this Court knows, NRS 202.360 ties removal of gun rights to 18 U.S.C. § 921(a)(33), which as discussed *supra*, requires a conviction under Federal, State or Tribal law. Municipal law is not mentioned in the federal code. The HMC does not alter gun rights for a municipal charge of domestic battery, so the case can proceed in the Municipal Court. The Defendant receives all the access to justice he is entitled to under the law.

The Defendant requests a transfer that he is not entitled to under the law. There is no issue as to access to justice for the Defendant since the law does not provide him with a jury trial. There has been no plea agreement in the case, and no final disposition of the case either. Defendant may argue that by transferring this case to Justice Court,

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there is a final disposition. But there must be a final disposition *before* a case may qualify for transfer. Moreover, transferring the case to Justice Court would require a predicate showing that the Defendant is entitled to a jury trial under HMC § 8.02.055. Yet, the law clearly shows that no right to a jury trial exists under the HMC crime of battery constituting domestic violence. The Nevada Supreme Court has recognized that trial of an ordinance violation in municipal court without a jury is not a violation of due process when a violation of state law for the same offense provides a defendant with a jury trial. Hudson v. City of Las Vegas, 81 Nev. 677, 409 P.2d 245 (1965).

Defendant is unable to show that there is a lack of access to justice when the law does not entitle the defendant to a jury trial and his treatment is that of any other misdemeanor defendant in the Municipal Court.

C. The Henderson Municipal Court has original jurisdiction of the case.

Defendant advocates for this Court to transfer the case to Justice Court because it has concurrent jurisdiction over NRS-based crimes of battery constituting domestic violence. Doing so would be a misapplication of the statutory scheme as discussed above *supra* and would set bad precedent. This is true because, among other things, the Henderson Municipal Court has original jurisdiction of a case charged under HMC § 8.02.055.

The Henderson Municipal Court "has the jurisdiction to hear, try and determine all cases, whether civil or criminal, for the breach or violation of any city ordinance or any provision of" Chapter 266 of a police or municipal nature, and shall hear, try and determine cases in accordance with the provisions of those ordinances or of Chapter

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266. NRS 266.555. The City of Henderson has original jurisdiction of this case, and it should remain with the Henderson Municipal Court. City of Las Vegas. v. Eighth Judicial Dist. Court of State ex rel. County of Clark, 122 Nev. 1041, 1047, 146 P.3d 240, 244 (2006). Since statutes and case law direct that the City has original jurisdiction to hear the instant case, the City requests this Court deny the Defendant's motion.

D. Henderson Municipal Court May Conduct Jury Trials.

The Defendant is incorrect when he argues that the Henderson Municipal Court is prevented from conducting jury trials for battery domestic violence cases. The Henderson Municipal Court is not forestalled from conducting those jury trials when it is required by state or federal constitutional law. The Nevada Supreme Court held that the prohibition against jury trials in municipal courts (pursuant to NRS 266.550) does not apply to municipal courts in a city incorporated under a special charter. Donahue v. City of Sparks, 111 Nev. 1281, 903 P2d 225 (1995). The City of Sparks, Nevada is incorporated under a special charter. Sparks City Charter, Chapter 470, Statutes of Nevada 1975, Article I, Section 1.010. Like the City of Sparks, the City of Henderson is a city incorporated under a special charter, which was passed by the Legislature in 1971. Henderson City Charter, Chapter 266, Statutes of Nevada 1971, Article I, Section 1.010.

In 1995, the Nevada Supreme Court held in Donahue that a city incorporated "under a special charter" is not subject to a statutory prohibition against jury trials in municipal courts. Donahue at 1282-1283, 226. However, in Donahue, the court ultimately concluded that "absent an express grant of authority, a municipal court lacks discretion to order a jury

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trial where one is not required by state or federal constitutional law." Id., at 1283, 227. Therefore, in the alternative, if state or federal constitutional law requires a jury trial, the Municipal Court may conduct said trial.

The constitutional necessity for Henderson's Municipal Courts to conduct jury trials became manifest in the Nevada Supreme Court's Andersen decision on September 12, 2019. Andersen v. Eighth Judicial District Ct., 448 P.3d 1120, 135 Nev. Adv. Op. 42 (2019). The Nevada Supreme Court concluded in Andersen that the additional penalty affecting the appellant's gun rights as charged under the NRS now required a jury trial since his constitutional Second Amendment right to bear arms was impacted. Thus, Andersen's case was transformed from a "petty" to a "serious" offense warranting a trial by jury. "Given that the Legislature has indicated that the offense of misdemeanor domestic battery is serious, it follows that one facing the charge is entitled to the right to a jury trial." Id., at 1124.

The Nevada Supreme Court's decision in Andersen revealed that the Henderson Municipal Court has discretion to order a jury trial when a defendant is charged with a case that impacts Second Amendment gun rights because a jury trial is "required by state and federal constitutional law." However, since the City is proceeding under the Municipal Code and not the NRS in this case, the Defendant is not entitled to a jury trial.

E. HMC § 8.02.055 does not invoke the right to a jury trial.

Through section "D" of Defendant's Motion, he primarily argues that the Henderson Municipal Court lacks the legal authority to conduct jury trials, preventing this court from hearing this case. Defendant's argument relies on the erroneous assumption that the

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Andersen decision entitles every defendant charged with battery constituting domestic violence, in every court in Nevada, to a jury trial. However, the issue of whether the Henderson Municipal Court has the legal authority to conduct jury trials became moot when the City filed its Amended Complaint (which charges Defendant with battery constituting domestic violence under the HMC) (see Amended Complaint attached as Exhibit C) because, as explained at length in Section II above, defendants charged under the HMC are not entitled to a jury trial.

F. The enactment of Henderson Municipal Code § 8.02.055 does not violate the Henderson City Charter because there is no repugnancy.

Defendant argues that the prosecution of battery domestic violence cases[7] without a jury trial violates the Henderson City Charter[8] because HMC § 8.02.055 (HMC) is repugnant to the United States Constitution, the Nevada Constitution and the Nevada Revised Statute. Defendant alleges that repugnancy exists because the purpose of the code is to circumvent Defendant's "fundamental constitutional right" to a jury trial. However, there is no such fundamental right in the instant matter and thus no repugnancy exists.

1. No fundamental right to a jury trial exists for a criminal matter that is a "petty offense."

There is no fundamental constitutional right to a jury trial for *all* criminal matters. As discussed above, the right to a jury trial, as established by the Sixth Amendment of the United States Constitution and Article 1, Section 3 of the Nevada Constitution, does not extend to those offenses categorized as "petty" but attaches only to those crimes that are considered "serious" offenses. Andersen v. Eighth Judicial District Court et al., 135 Nev.

[7] Under HMC § 8.02.055.

[8] Specifically, Henderson City Charter 2.080(1), which states in relevant part: "The City Council may make and pass all ordinances...not repugnant to the Constitution of the United States or the State of Nevada, or to the provisions of the Nevada Revised Statutes...necessary for the municipal government..."

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Adv. Op. 42, 448 P.3d 1120, 1122-23 (2019), *citing* Blanton v. City of N. Las Vegas, 489 U.S. 538, 541(1989); Duncan v. Louisiana, 391 U.S. 145, 159 (1968); and, Blanton v. N. Las Vegas Mun. Court, 103 Nev. 623, 628-29, 748 P.2d 494, 497 (1987)("[T]he right to a trial by jury under the Nevada Constitution is coextensive with that guaranteed by the federal constitution.")

Prior to the decision in Andersen, the Nevada Supreme Court held that the crime of misdemeanor battery domestic violence was a "petty" offense that did *not* entitle the defendant to a jury trial. Amezcua v. Eighth Judicial Dist. Court of State ex rel. County of Clark, 130 Nev. 45, 319 P.3d 602 (2014). As explained more fully above, HMC § 8.02.055 is a petty offense that does not entitle the defendant to a jury trial because it does not invoke the firearm prohibition under NRS 202.360. *See* Andersen v. Eighth Judicial District Court et al., 135 Nev. Adv. Op. 42, 448 P.3d 1120 (2019).

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2. HMC § 8.02.055 is not repugnant to and does not conflict with state law.

Assuming Defendant means to argue that enacting a municipal code that has a different penalty or outcome from the same crime charged under the NRS is somehow problematic, that argument also fails. Defendant apparently contends that HMC § 8.02.055 is repugnant to the NRS and U.S. Constitution because it was enacted with a lesser penalty that does not invoke the loss of firearm rights under NRS 202.360, thus not triggering the right to a trial by jury. Defendant's argument fails on several levels. HMC § 8.02.055 does not conflict with state law domestic battery provisions or NRS 202.360(1)(a)1.

The Henderson City Council properly acted within the authority granted by the State Legislature in its City Charter when it enacted HMC § 8.02.55. In Henderson's City

Charter, the State Legislature granted the City of Henderson the ability to enact and enforce ordinances prohibiting behavior that is also a violation of state law, provided the penalties do not exceed those in state law. Specifically, Section 2.080(3) of the Henderson City Charter provides: "The City Council may enforce ordinances by providing penalties not to exceed those established by the Legislature for misdemeanors." The inclusion of Section 2.080(3) is a deliberate choice by the legislature: it indicates that the legislature *intended* for the Henderson City Council to provide for penalties that are different from those established by the state legislature for misdemeanors, as long as the municipal ordinance did not include a harsher penalty than state law. Although the legislature expected and granted the authority to the Henderson City Council to prohibit the same conduct as state law, the legislature also expected and granted authority to the Council to impose different penalties than state law. This unambiguous language indicates that differing penalties between state and municipal laws that prohibit the same conduct do not conflict and are legally permissible.

The Legislature also delegated to the City the authority to exercise police powers by way of local ordinances. Henderson, Nevada, Municipal Code § 2.140; *see also* NRS 268.018 (granting charter cities the authority to establish by ordinance a misdemeanor offense that is also a misdemeanor under state law). Thus, the City clearly has the authority to enact an ordinance prohibiting conduct that also constitutes an offense under state law, as long as the penalties prescribed are not more severe.

A common sense reading of Section 2.080(3) of the Charter leads to the conclusion that the Legislature did not view a City ordinance prohibiting conduct already prohibited by state law as directly conflicting with state law, or else it would not have granted the City

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authority to enforce such ordinances. Rather, the conflict occurs when the penalty *exceeds* that set forth in state law. Here, the penalties in HMC § 8.02.55 do not exceed those in the NRS. Rather, they are identical, save one provision: a defendant convicted of domestic violence under HMC § 8.02.55 does not lose his or her Second Amendment right to bear arms. Because HMC § 8.02.55 does not implicate a defendant's Second Amendment right, its penalties are *less severe* than those in the NRS. Accordingly, HMC 8.02.55 is not in conflict with or repugnant to state law.

Further, the Nevada Supreme Court long ago established that "a municipality may pass ordinances prohibiting acts already prohibited by state statute." Sheriff, Washoe County v. Wu, 708 P.2d 305, 101 Nev. 687 (1985) *citing* Hudson v. City of Las Vegas, 81 Nev. 677, 409 P.2d 245 (1965); Ex Parte Sloan, 47 Nev. 109, 217 P. 233 (1923) *abrogated by* Waller v. Fla., 397 U.S. 387, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970)[9]. In Wu, the defendant challenged the jurisdiction of a Justice Court to preside over a traffic violation that occurred within the jurisdiction of a City Municipal Court. In reversing a grant of habeas corpus, the Wu court clarified that concurrent jurisdiction exists between a justice court and municipal court for offenses occurring within the municipality when the conduct violates both a municipal ordinance and a state statute for petty offenses. Sheriff, Washoe Cty. v. Wu, 101 Nev. 687, 690, 708 P.2d 305, 306 (1985).

In support of its reasoning, the Wu court cited both Hudson and Sloan to announce "[i]t is well settled that a municipality may pass ordinances prohibiting acts already prohibited by state statute." Sheriff, Washoe Cty. v. Wu, 101 Nev. 687, 688, 708 P.2d 305,

[9] The United States Supreme Court, in Waller v. Fla., 397 U.S. 387, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970), held that prosecution for the same act under both a municipal ordinance and state law constituted double jeopardy. Therefore, the Waller holding abrogated any part of Sloan that permitted two prosecutions for the same conduct under both a municipal ordinance and state law.

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305 (1985). Decided well after the abrogation of Sloan, the Nevada Supreme Court once again used its previous reasoning to support its position that municipalities can exercise their police powers to pass ordinances identical to state statutes:

> There is a conflict of authority upon this question. The decided weight of authority, however, is to the effect that **the same act may constitute an offense both against the state and a municipal corporation**. "Indeed," says Judge Cooley, in his work on Constitutional Limitations (7th ed.) p. 279, "an act may be a penal offense under the laws of the state, and further penalties, under proper legislative authority, be imposed for its commission by municipal by-laws, and the enforcement of the one would not preclude the enforcement of the other." (emphasis added).

47 Nev. at 115, 217 P. at 235; *see also* Ex Parte Siebenhauer, 14 Nev. 365 (1879). Sheriff, Washoe Cty. v. Wu, 101 Nev. 687, 688–89, 708 P.2d 305, 306 (1985).

Applying the above principles of construction, the Court ultimately held in Wu that concurrent jurisdiction does not conflict with the Constitution if jurisdiction is proper. Sheriff, Washoe Cty. v. Wu, 101 Nev. 687, 690, 708 P.2d 305, 306 (1985).

Moreover, the court should reconcile statutes which may appear to be in conflict and attempt to read the provisions in harmony. Beals v. Hale, 45 U.S. 37, 51, 11 L. Ed. 865 (1846); Szydel v. Markman, 121 Nev. 453, 457, 117 P.3d 200, 202–03 (2005). The court must seek to find whether there is any way to reconcile the provisions. Importantly, in Nevada, the reviewing court presumes that a statute is constitutional, and a party who challenges the constitutionality of the statute must clearly show its invalidity. Martinez v. Maruszczak, 123 Nev. 433, 448-49, 168 P.3d 720, 730 (2007). Here, Defendant has failed to do so.

In Defendant's brief, they allege that HMC § 8.02.055 is repugnant to U.S. and state

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law, but they do not expound much further except to say that the conflict lies in the difference in jury trial. However, the City has shown above through ample analysis of statutory authority and case law that a jury trial is not a fundamental right in trials for petty crimes, and a difference in penalty does not cause a fatal conflict unless the municipal code prescribes a penalty that exceeds the state law penalty, which is not the case here.

Moreover, HMC § 8.02.055 plainly does not conflict with state domestic battery provisions or NRS 202.360. To the contrary, HMC § 8.02.055 defines the misdemeanor domestic battery the same way as state law, and it works *within* the definition contained in NRS 202.360 as amended by the Nevada State Legislature in 2015. That there are different outcomes for convictions under NRS domestic violence statutes and HMC § 8.02.055 does not mean the two irreconcilably conflict. In fact, the difference in outcomes is precisely *because* of how the legislature chose to define misdemeanor crime of domestic violence in its amendment to NRS 202.360. It is that definition which exempts convictions under municipal law, like HMC § 8.02.055, from qualifying as predicate offenses to prohibit firearm possession. 18 U.S.C. § 921(a)(33)(i) (the term "misdemeanor crime of domestic violence" means an offense that "(i) is a misdemeanor under Federal, State, or Tribal [3] law [...]"); United States v. Pauler, 857 F.3d 1073, 1078 (10th Cir. 2017) (holding that a "a misdemeanor under Federal, State, or Tribal law" does not include a conviction under municipal ordinance). The definition contained within 18 U.S.C. § 921(a)(33), and incorporated within NRS 202.360, distinguishes convictions under state law from those under municipal law, which is what causes the alleged conflict to which Defendant refers. Accordingly, there is no actual conflict between NRS 202.360, the NRS domestic battery statutes, and HMC § 8.02.055; only a distinction in outcomes for convictions under state

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and local law because *NRS 202.360 creates that distinction itself* within the amendment added by the state legislature. **That a conviction under HMC does not trigger the right to a jury trial is not because HMC § 8.02.055 conflicts with NRS provisions, but because such convictions are excluded as predicate offenses by the text of NRS 202.360 itself.**

Finally, Defendant's claim that demoting an offense from serious to petty to avoid the requirement of a jury trial is somehow repugnant to state and Constitutional law is erroneous. There is no right to a jury trial under the United States Constitution for domestic battery with the penalties associated with HMC § 8.02.055. *See* Amezcua v. Eighth Judicial Dist. Court of State ex rel. County of Clark, 130 Nev. 45, 46-47, 319 P.3d 602, 603 (2014). Courts have upheld the validity and constitutionality of a statute that reduces the penalty of an offense to eliminate the right to a jury trial. For example, in State v. Nakata, 878 P.2d 699, 76 Haw. 360 (1994), the Hawaii state legislature amended the DUI statute by reducing the penalties for a 1st offense DUI with the intent of eliminating the right to a jury trial. Id. at 701. There, the Hawaii Supreme Court held that reduction in penalties in order to eliminate the right to a jury trial was constitutional because the new law "affects only the procedural determination of whether appellants will be tried by a judge or jury; their right to a fair and impartial trial has not been compromised or divested in any way." Id. at 715. Similarly here, a defendant charged with domestic violence under HMC § 8.02.55 still has a right to a fair and impartial trial. Thus, not only is HMC § 8.02.55 not in conflict with the NRS, it also passes constitutional muster.

Since there is no repugnancy, prosecuting battery domestic violence cases under the HMC does not violate the Henderson City Charter, and Henderson Municipal Court does

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not lack jurisdiction.

CONCLUSION

Based upon the foregoing, Defendant's attacks on HMC § 8.02.055's validity and application are unavailing. Defendant's prosecution under HMC § 8.02.055 passes constitutional muster, does not require a trial by jury, and is appropriately heard in Henderson Municipal Court. Accordingly, the City respectfully requests Defendant's requests be denied.

Dated this 5th day of December, 2019.

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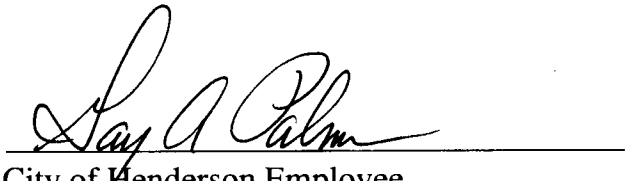
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of December 2019, I sent a true and correct copy of the foregoing CITY OF HENDERSON'S OPPOSITION TO DEFENDANT'S MOTION TO DIVEST MUNICIPAL COURT OF JURISDICTION, AND ALTERNATIVE MOTION TO DISMISS via email and addressed as follows:

Damian R. Sheets, Esq
dsheets@defendingnevada.com



City of Henderson Employee

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EXHIBIT A

2017 WL 2531943
Only the Westlaw citation is currently available.
United States District Court, D. Idaho.

UNITED STATES of America, Plaintiff,
v.
Samuel Jay ENICK, Defendant.

Case No. 2:17-cr-00013-BLW
|
Signed 06/09/2017

Attorneys and Law Firms

Nancy D. Cook, US Attorney's Office, Coeur D'Alene, ID, for Plaintiff.

North Federal Defender, Federal Defenders of Eastern Washington & Idaho Spokane Office, Spokane, WA, for Defendant.

MEMORANDUM DECISION AND ORDER

B. Lynn Winmill, Chief Judge

INTRODUCTION

*1 Before the Court is Defendant's Motion to Dismiss. (Dkt. 18). The matter is fully briefed and the Court finds that the decisional process would not be aided by oral argument. For the reasons set forth below, the Court will grant the Motion to Dismiss.

BACKGROUND

Samuel Jay Enick has been charged with one count of unlawful possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(9) and one count of criminal forfeiture under 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c) (Dkt. 1). The indictment alleges that Enick unlawfully possessed firearms and ammunition despite having been previously convicted of a violent misdemeanor involving domestic violence which disqualified him from such ownership. His prior conviction was a misdemeanor assault charge under Spokane Municipal Code ("SMC") Section 10.11.010 (Dkt. 18). The Government asserts that the assault misdemeanor is the type of crime which operates as a predicate offense under 18 U.S.C. § 922(g)(9). Enick contends that it does not.

ANALYSIS

Section 922(g)(9) provides that it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence ... [to] possess in or affecting commerce, any firearm or ammunition[.]" 18 U.S.C. § 922(g)(9) (2012). A "misdemeanor crime of domestic violence" is defined as,

> an offense that—(i) is a misdemeanor under Federal, State or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 921(a)(33)(A) (2012). Therefore, to qualify as a predicate offense a "misdemeanor crime of domestic violence" must have, "as an element, the use or attempted use of physical force, or threatened use of a deadly weapon." *U.S. v. Hayes*, 555 U.S. 415, 421 (2009). In addition, the Supreme Court has held that § 922(g)(9)'s "physical force" requirement is satisfied "by the degree of force that supports a common-law battery conviction." *U.S. v. Castleman*, 134 S. Ct. 1405, 1413 (2014).

The question here is whether Enick's prior conviction under SMC § 10.11.010 qualifies as a predicate offense under § 922(g)(9). Enick argues that, because SMC § 10.11.010 is a local law and not a "Federal, State, or Tribal law," SMC § 10.11.010 cannot be a predicate offense under § 922(g)(9). (Dkts. 18, 26). Enick also contends that neither the categorical approach nor the modified categorical approach qualify his prior conviction as a predicate offense because SMC § 10.11.010 is overbroad and indivisible. (Dkts. 18, 26).

1. Municipal Ordinance Conviction as Predicate Offense

The Court finds that a municipal ordinance does not fit within the definition of a "misdemeanor crime of domestic violence." Rather, it appears that Congress purposefully excluded local law from that definition. Specifically, a "misdemeanor crime of domestic violence" only includes "an offense that—(i) is a misdemeanor under Federal, State or Tribal law[.]" 18 U.S.C. § 921(a)(33)(A).

A. *Concurrent Jurisdiction*

***2** Although the Government originally argued to the contrary, the parties now agree that the defendant can be convicted in *any* court for § 922(g)(9) to apply. The Court concurs. Thus, § 922(g)(9) may apply where a defendant is convicted in Spokane Municipal Court as Enick was here. However, that conviction in municipal court must be a misdemeanor under "Federal, State, or Tribal law." Under the plain language of § 921 and § 922(g)(9), a conviction under a municipal ordinance cannot serve as a predicate offense for the purposes of § 922(g)(9).

B. *Congressional Intent*

In statutory construction, "our starting point is the plain language of the statute." *U.S. v. Williams*, 659 F.3d 1223, 1225 (9th Cir. 2011) (citing Children's Hosp. & Health Ctr. v. Belshe, 188 F.3d 1090, 1096 (9th Cir. 1999)). If the "plain meaning of the statute is unambiguous, that meaning is controlling," and courts do not look to the legislative history to determine if Congress meant something else. *Williams*, 659 F.3d at 1096.

The Court finds that the statute's language is unambiguous, clearly providing that only a violation of "Federal, State, or Tribal law" can constitute a predicate offense for a prosecution under 18 U.S.C. § 922(g)(9). But, even if the Court were to find the statute ambiguous and could consider Congressional intent, the legislative history strongly suggests that Congress purposefully excluded local law from the list of predicate offenses. Prior to amending § 921 in 2006, the relevant language mentioned only federal and state law. 18 U.S.C. § 921(a)(33)(A)(i) (amended 2006). The 2006 amendment added tribal law to the list of available substantive law. *See generally* Violence Against Women Act, Pub. L. No. 109-162, § 908, 119 Stat. 2960 (2006). The same amendment also distinguished "local law" in dozens of other portions of § 921, but not § 921(a)(33)(A)(i). *Id.* The statutory interpretation canon, *expressio unius est exclusio alterius*, "the expression of one thing is the exclusion of another," justifies an "inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Therefore, the Court concludes that it was Congress's intent to exclude local laws from the "misdemeanor crime of domestic violence" definition.

2. Categorical Approach

A. *Overbroad*

Even if the Court were to find that convictions under a municipal code fit within the definition of § 921(a)(33)(A)(i), the predicate offense would not be a categorical match. To determine whether Enick's prior conviction qualifies as "misdemeanor crime of domestic violence," the Court applies the "categorical approach" set forth in *Taylor v. U.S.*, 495 U.S. 575, 599 (1990). To evaluate the predicate offense under the categorical approach, the Court must compare the elements of the statute forming the basis of the defendant's conviction with the elements of the "generic" crime. *Descamps v. U.S.*, 133 S.Ct. 2276, 2283 (2013). Thus, if the elements of the SMC § 10.11.010 are the same or narrower than the elements in § 921(a)(33)(A)(ii) then Enick's prior conviction would serve as a predicate offense for the § 922(g)(9) charge. However, if SMC § 10.11.010 is broader than the elements in § 921(a)(33)(A)(ii), then the conviction does not categorically qualify as a predicate offense.

SMC § 10.11.010 clearly prohibits more conduct than the federal definition of a "misdemeanor crime of domestic violence. The ordinance states, "[n]o person may willfully use or threaten to use by purposeful words or acts unlawful physical force against the person of another." SPOKANE, WASH., CODE § 10.11.010. It thus criminalizes the mere threat of use of physical force. In contrast, the federal statute only criminalizes one type of threat: threat with a deadly weapon. 18 U.S.C. § 921(a)(33)(A)(ii). And both parties appear to agree that Enick's prior conviction does not qualify as a predicate offense under the categorical approach because it is overbroad. (Dkt. 18 at 11, 26 at 15) (Dkt. 22 at 5). The Court agrees.

B. *Indivisible*

***3** Even if the underlying offense is overbroad, it may still be considered as a predicate offense under the modified categorical approach. This approach is appropriate where the prior conviction is for violating a "divisible" statute.

Decamps, 133 S. Ct. at 1413. A divisible statute is a statute that "sets out one or more elements of the offense in the alternative." *Id.* A statute is considered divisible if "it contains multiple alternative elements, as opposed to multiple alternative means." *Rendon v. Holder*, 764 F.3d 1077, 1084-85 (2014). However, a disjunctive (that is, with an "or") statute is not immediately considered a divisible statute. *Id.* at 1086. Rather, a disjunctive statute is divisible "[o]nly when state law requires that in order to convict the defendant the jury must unanimously agree that he committed a particular substantive offense contained within the disjunctively worded statute...." *Id.*

Here, SMC § 10.11.010 is a disjunctive statute because it contains "or", suggesting that the ordinance can be broken into three sub-offenses: (1) using physical force, (2) attempting to use physical force, or (3) threatening to use physical force. However, the statute is only divisible if jury unanimity is required as to which part of the offense the defendant committed. *Rendon*, 764 F.3d at 1086. Fortunately, the Washington appellate courts have provided a clear answer, holding that jury unanimity is not required for a conviction under SMC § 10.11.010. *City of Spokane v. White*, 102 Wn. App. 955, 965 (2000). Because SMC § 10.11.010 does not require juror unanimity, it is indivisible and the conviction cannot qualify under the modified categorical approach.

Because SMC § 10.11.010 is a local law and not a "State, Federal, or Tribal law" and because SMC § 10.11.010 is overbroad and indivisible, it does not qualify as a predicate offense for the § 922(g)(9) charge. The Court will therefore grant the Motion to Dismiss.

ORDER

IT IS ORDERED:

1. Defendant's Motion to dismiss (Dkt. 18) is **GRANTED**.
2. Defendant's Motion to Suppress (Dkt. 19) is **DEEMED MOOT.**
3. The June 19, 2017 hearing is **VACATED**.

All Citations

Not Reported in Fed. Supp., 2017 WL 2531943

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EXHIBIT B

2017 WL 4467544
Only the Westlaw citation is currently available.
United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff,
v.
Andre WAGNER, Defendant.

Case No. 3:17-cr-00046-MMD-WGC
|
Signed 10/05/2017

Attorneys and Law Firms

Megan Rachow, AUSA, U. S. Attorney's Office, Reno, NV, for Plaintiff.

ORDER

MIRANDA M. DU, UNITED STATES DISTRICT JUDGE

I. SUMMARY

***1** Defendant Andre Wagner was indicted on one count of possession of ammunition by a prohibited person in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (ECF No. 17 at 2.) Wagner moves to dismiss the Superseding Indictment, contending that his prior misdemeanor conviction under Reno Municipal Code does not qualify as a predicate offense to make him a "prohibited person" under the relevant statute. The Court has reviewed Wagner's motion to dismiss, the government's response and Wagner's reply. (ECF Nos. 35, 37, 38.) The Court agrees with Wagner and grants his motion.

II. BACKGROUND

Count Two of the Superseding Indictment charges Wagner with possession of ammunition by a prohibited person. (ECF No. 17 at 2.) The Superseding Indictment alleges that Wagner knowingly possessed ammunition after "having been convicted of a misdemeanor crime of domestic violence in the Reno Municipal Court, Reno, Nevada, on or about September 22, 2016[.]" (*Id.*) The criminal complaint filed in Reno Municipal Court charged Wagner with domestic battery in violation of NRS §§ 200.481 and 33.018. (ECF No. 35-1.) On September 22, 2016, Wagner pled nolo contendre to the lesser offense of simple battery in violation of Reno Municipal Code § 8.08.020A. (ECF No. 35-2 at 4.)

III. DISCUSSION

Wagner raises three arguments in seeking dismissal. The first two arguments relate to the predicate offense. Wagner insists that he was not convicted of the predicate offense of "misdemeanor crime of domestic violence" as required under 18 U.S.C. § 922(g)(9) ("section 922(g)(9)" or "§ 922(g)(9)") because he was convicted of a misdemeanor under municipal law, not state law, and because the Indictment fails to plead the required elements of the predicated offense of domestic battery. (ECF No. 35 at 5–10.) His third argument challenges the constitutionality of the statute as applied. (*Id.* at 10–13.) Because the Court agrees with Wagner that conviction of a simple misdemeanor under municipal law does not meet the requirement for the predicate offense under 18 U.S.C. § 921(a)(33)(A) ("section 921(a)(33)(A)" or "§ 921(a)(33)(A)"), the Court declines to address the latter two arguments.

Section 922(g)(9) provides, in pertinent part, that it is "unlawful for any person ... who has been convicted in any court of a misdemeanor crime of domestic violence [ ] to ... possess ... ammunition." 18 U.S.C. § 922(g)(9). Section 921(a)(33)(A) in turn defines the term "misdemeanor crime of domestic violence" to mean an offense that—

> **(i)** is a misdemeanor under Federal, State, or Tribal law; and
>
> **(ii)** has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 921(a)(33)(A). Wagner argues that the plain meaning of "State law" found at section 921(a)(33)(A)(i) means state law while the government argues that the term includes local laws.

***2** "The starting point for [the court's] interpretation of a statute is always its language." *United States v. Olander*, 572 F.3d 764, 768 (9th Cir. 2009) (quoting *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 953 (9th Cir. 2007)). The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). "The plainness or ambiguity 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." *Id.* at 341.

The plain and unambiguous language of section 921(a)(33)(A) supports Wagner's argument that a misdemeanor conviction under municipal law does not constitute a predicate offense for violation of section 922(g)(9). Section 921(a)(33)(A)(i) covers a misdemeanor under three specific categories of substantive laws: "Federal, State and Tribal law." The statute clearly and plainly does not cover a misdemeanor conviction under municipal or local law. In this respect, the Court agrees with two other courts that have similarly construed § 921(a)(33)(A)(i) to exclude municipal ordinances. *See United States v. Enick*, Case No. 2:17-cr-00013-BLW, 2017 WL 2531943, at *2 (D. Idaho June 9, 2017) (finding that 18 U.S.C. § 921(a)(33)(A) is unambiguous in "providing that only a violation of 'Federal, State, or Tribal law' can constitute a predicate offense for a prosecution under 18 U.S.C. § 922(g)(9)" and that the statute does not include a conviction for misdemeanor assault charge under Spokane Municipal Code); *United States v. Pauler*, 857 F.3d 1073, 1078 (10th Cir. 2017) (interpreting 933(a)(33) to "not include a violation of a municipal ordinance" and rejecting the government's argument that "State" should be read to mean "state and local").

The government argues that a misdemeanor conviction in a municipal court is the equivalent of a misdemeanor conviction under state law. As support, the government relies on NRS § 1.010's inclusion of municipal courts as a "court of justice" for the State and NRS § 268.018's grant of authority to an incorporated city to treat a misdemeanor under state law as a misdemeanor under city ordinance. (ECF No. 37 at 2–3.) However, the government's focus on the court of conviction is misplaced because the court of conviction is of no import. Section 922(g)(9) covers a conviction "in any court of a misdemeanor crime of domestic violence." There is no dispute that the Reno Municipal Court has jurisdiction over the matter. In fact, the complaint filed in Reno Municipal Court charged Wagner with a misdemeanor under NRS § 200.481 and NRS § 33.018 as adopted by § 1.04.015 of the Reno Municipal Code. Just because the Reno Municipal Court could have convicted Wagner of a misdemeanor in violation of state law does not render all convictions by the same court convictions under state law. Nor does the municipal court's status as a "court of justice" for the state make a municipal court conviction under municipal law a conviction under state law. The Court agrees with Wagner that "[t]he relevant question ... is what body of law a court's order construes, not what type of court is construing it." (ECF No. 38 at 2.)

As to the government's argument that the city may treat a misdemeanor under state law as a misdemeanor under city ordinance, such grant of authority does not turn a misdemeanor under the municipal code into a misdemeanor under state law. While NRS § 268.018 gives a municipality the authority to treat a misdemeanor under state law as a misdemeanor under city ordinance, the government cites to no Nevada statute that incorporates municipal ordinances as state law. As Wagner aptly points out, the Reno Municipal Code enumerates its own set of laws that criminalizes some conduct that are not covered under the Nevada Revised Statutes. (ECF No. 38 at 3.)

***3** Despite the statute's plain meaning, the government argues that constructing state law to include local laws (i.e., municipal ordinances) is consistent with Congress's intent in enacting § 922(g)(9) to "keep[ ] guns out of the hands of domestic abusers." (ECF No. 37 at 4 (quoting *United States v. Hayes*, 555 U.S. 415, 426 (2009)). However, because the Court finds that the statute is unambiguous, "that meaning is controlling." *United States v. Williams*, 659 F.3d 1223, 1225 (9th Cir. 2011). Indeed, the Court "need not examine legislative history as an aide to interpretation unless 'the legislative history clearly indicates that Congress meant something other than what it said.' " *Id.* (quoting *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir.2001) (en banc)). But even if the Court were to consider the legislative history, the Court is not persuaded that, as the government argues, Congress meant for state law to include local laws.

In considering the legislative history, the Court does not have to start with a clean slate. The court in *Enick* engaged in that exercise and found that "the legislative history strongly suggests that Congress purposely excluded local law from the list of predicate offenses." *Enick*, 2017 WL 2531943, at *2. The court reached this conclusion based on the following observations: Congress amended § 921 in 2006 to include tribal law to the list of substantive law the violation of which constituted the predicate offense for § 922(g)(9) and "[t]he same amendment also distinguished 'local law' in dozens of other portions of § 921, but not § 921(a)(33)(A)(i)." *Id.* The Court agrees with the *Enick* court's reasoning. The government cites to Black's Law Dictionary's definition of "state law" at the time the two statutory provisions

—§§ 922(9)(g) and 921(a)(33)—were enacted in 1996—as including "ordinances of a city or town." (ECF No. 37 at 3 (quoting *State Law*, BLACK'S LAW DICTIONARY (6th ed. 1990).) However, this argument ignores the 2006 amendment. Moreover, this argument, as the Tenth Circuit Court of Appeals observed in *Pauler*, "completely ignores the fact that §§ 921 and 922 clearly and consistently differentiate between states and municipalities and between state laws and municipal ordinances." *Pauler*, 857 F.3d at 1075.

"The Supreme Court has stated that 'a legislature says in a statute what it means and means in a statute what it says there.'" *Benko v. Quality Loan Serv. Corp.*, 789 F.3d 1111, 1118 (9th Cir. 2015) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). Here, Congress meant state law when it says "State [ ] law", not "state and local laws" as the government argues.

Wagner's misdemeanor conviction under the Reno Municipal Code does not fall within section 921(a)(33)(A)(i) and therefore does not qualify as a predicate offense to make him a "prohibited person" under section 922(g)(9). The Court therefore agrees with Wagner that Count Two in the Superseding Indictment against him must be dismissed.

IV. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of Wagner's motion.

It is therefore ordered that Defendant Andre Wagner's Motion to Dismiss (ECF No. 35) is granted.

All Citations

Not Reported in Fed. Supp., 2017 WL 4467544

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EXHIBIT 3

EXHIBIT C

MUNICIPAL COURT OF THE CITY OF HENDERSON

IN THE COUNTY OF CLARK, STATE OF NEVADA

CITY OF HENDERSON, NEVADA,

Plaintiff,

vs.

NATHAN NOAH OHM,

Defendant.

AMENDED
CRIMINAL COMPLAINT

CASE NO. MARS
COUNT 1 - 19CR002297 (PCN 1)
COUNT 2 - 19CR002298 (PCN 2)

Nicholas G. Vaskov, Esq., City Attorney

The defendant has committed the crimes of:
BATTERY CONSTITUTING DOMESTIC VIOLENCE (Misdemeanor - Henderson Municipal Code 8.02.055) within the City of Henderson, in the County of Clark, State of Nevada, in the manner following, that the said defendant, on or about February 22, 2019:

COUNT 1 - BATTERY CONSTITUTING DOMESTIC VIOLENCE
did willfully and unlawfully use force or violence against or upon the person's spouse, former spouse, any other person to whom the person is related by blood or marriage, any person with whom the person has had or is having a dating relationship, any person with whom the person has a child in common, the minor child of any of those persons or his minor child or any other person who has been appointed the custodian or legal guardian for the person's minor child, to-wit: Did strike Hailey Schmidt about the face and/or did get on top of her, all of which occurred in the area of 3044 Paseo Hills Way.

COUNT 2 - BATTERY CONSTITUTING DOMESTIC VIOLENCE
did willfully and unlawfully use force or violence against or upon the person's spouse, former spouse, any other person to whom the person is related by blood or marriage, any person with whom the person has had or is having a dating relationship, any person with whom the person has a child in common, the minor child of any of those persons or his minor child or any other person who has been appointed the custodian or legal guardian for the person's minor child, to-wit: Did strike and/or did punch Marcuse Ohm one or more times, all of which occurred in the area of 3044 Paseo Hills Way.

All of which is contrary to the form, force and effect of statutes in such cases made and provided and against the peace and dignity of the City of Henderson, State of Nevada. Said Complainant makes this declaration on information and belief subject to the penalty of perjury.

Brian K. Reardon, Esq.
Assistant City Attorney

Dated: October 21, 2019
CAO File #: 021466
PCN#: NVHP5127178C

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HENDERSON MUNICIPAL COURT
HENDERSON, NEVADA

City of Henderson, Plaintiff vs. Nathan Ohm Defendant	Case No.: 19CR002297; 19CR002298 Dept. No: 1 **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DIVEST MUNICIPAL COURT OF JURISDICTION OR, IN THE ALTERNATIVE, MOTION TO DISMISS**

COMES NOW, Defendant Nathan Ohm, by and through his attorney of record, DAMIAN SHEETS, ESQ. of the firm Mayfield Gruber & Sheets, hereby submits this Defendant's Reply in Support of Motion to Divest Municipal Court of Jurisdiction or, in the Alternative, Motion to Dismiss.

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MEMORANDUM OF POINTS AND AUTHORITIES

To avoid redundancy and expedite identification of the contested issues, pursuant to Defendant's Motion and the City's Opposition, the following points are agreed upon by the parties:

- Defendant is charged with Battery Constituting Domestic Violence in the instant case;[1]
- Defendant's alleged conduct occurred prior to the City of Henderson's enactment of the Henderson Municipal Code § 8.02.055, the law under which he is now charged;
- The Nevada Revised Statute prohibiting Battery Domestic Violence and the Henderson Municipal Code prohibiting Battery Domestic Violence are substantively identical;
- In order for an offense to trigger the firearm restrictions in NRS 202.360, it must qualify as a predicate offense under existing state law or the federal definition as set forth in 18 U.S.C. § 921(a)(33)(A);
- If the charged offense in this case does in fact meet the federal definition under 18 U.S.C. § 921(a)(33)(A), pursuant to *Andersen*, 135 Nev. Adv. Op. 42, 448 P.3d 1120 (2019), a trial by jury is required;
- The legislative intent and express purpose of passing Henderson Municipal Code § 8.02.055 was to avoid the jury trial requirement by attempting to return Battery Domestic Violence to a "petty" offense, despite recognition that "[t]he constitutional necessity for Henderson's Municipal Courts to conduct jury trials became manifest in the Nevada Supreme Court's Andersen decision on September 12, 2019" (City's Opposition, 38; 62).

[1] As Defendant's challenge is jurisdictional in nature, Defendant objects to the City's recitation of the allegations in this matter and requests this Court decline to consider them.

1. *Ex Post Facto Laws are Not Strictly Limited Exclusively to Those Which Change the Definition of Criminal Conduct or Increase Punishment*

In his Motion, Defendant alleged that Henderson Municipal Code § 8.02.055 (hereinafter the "Code") constituted an unlawful *ex post facto* law based on the four distinct types of *ex post facto* proscriptions identified in *Stogner v. California*, 539 U.S. 607, 611, 123 S. Ct. 2446, 2449 (2003). These include:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive. *Id*. (citing *Calder* v. *Bull,* 3 U.S. 386, 3 Dallas 386, 1 L. Ed. 648 (1798)).

Additionally, Defendant specifically identified these four types of *ex post facto* violations based on the City's anticipated argument that the Code neither alters the criminalized conduct nor the penalties associated with that conduct (see Defendant's Motion, 4, "The City will likely argue here that the Amended Complaint does not constitute an *ex post facto* violation because… the Amended Complaint neither criminalizes an offense that was not previously criminal, nor does it enhance or alter the punishment for the offense").

As anticipated, this was the precise argument offered by the City in its Opposition. "Accordingly, to be *ex post facto*, a law must both operate retrospectively and disadvantage the person affected by it by either changing the definition of criminal conduct or imposing

additional punishment for such conduct" (City's Opposition, 5). However, as argued in Defendant's Motion, a law may still be an invalid *ex post facto* prohibition through several alternative means. Despite the City's arguments to the contrary, a law is not unconstitutional *only* when it changes the definition of criminal conduct or imposes additional punishment.

The vast majority of the City's arguments in opposition revolve exclusively on the issue of changing the criminality of certain conduct or imposing additional punishments. However, since Defendant did not argue this type of *ex post facto* violation to begin with, the City's extensive opposition on this point is informative, but distinctly a red herring. Both parties agree that the Code, as applied in this case, satisfies the requirement of retroactivity. Therefore, the only question is whether the Code "disadvantages the offender affected by them."

Notably, the City did not, and reasonably cannot, oppose that the sole purpose of enacting the Code was to avoid the jury trial requirement. While the City spends considerable time dedicated to the two types of *ex post facto* violation that were not alleged, the substantive opposition on the primary *ex post facto* proscription Defendant did assert – that based on fundamental fairness and manifest injustice – is entirely sparse. Specifically, Defense noted the very purpose of prohibiting *ex post facto* laws, dating back to the early 19th centry, is to "shield themselves and their property from the effects of those sudden and strong passions to which men are exposed." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-38 (1810). Indeed, *ex post facto* has been very broadly construed, noting not only the four types of proscriptions identified in *Stogner v. California*, but also "these and similar

laws." "Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91 (1798). "The Clause ensures that individuals have fair warning of applicable laws and guards against vindictive legislative action. Even where these concerns are not directly implicated, however, the Clause also safeguards 'a fundamental fairness interest'… in having the government abide by the rules of law it establishes" *Peugh v. United States*, 569 U.S. 530, 544, 133 S. Ct. 2072, 2084-85 (2013).

In response to this argument, the City cites to only one controlling authority, *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715 (1990). However, the City's reliance on this case is misplaced, as *Youngblood* provides substantial support for Defendant's position in this context. In *Youngblood*, the petitioner was convicted of trial by jury in the State of Texas for aggravated sexual abuse; the jury further decided his punishment of life imprisonment plus a $10,000 fine. *Id.* at 3. At the time of the conviction, Texas law did not permit a jury to impose a fine in addition to a term of imprisonment. *Id.* As a result, once the petitioner's conviction was affirmed through direct appeal, he sought to declare the judgment invalid due to the fine imposed by the jury, and requested a second trial by jury. *Id.* Prior to his challenge being heard, however, Texas passed a law that permitted the appellate court to "reform an improper verdict that had assessed a punishment not authorized by law." *Id.* The Texas appellate court invoked the new law, removed the fine from the judgment, and thereafter denied the petitioner's request for a new trial. *Id.* The petitioner challenged the new law as an impermissible *ex post facto* violation, and the Supreme Court granted certiorari.

The City relies on *Youngblood*, in conjunction with *State of Hawaii v. Nakata*, 76 Haw. 360, 878 P.2d 699 (Hi. 1994), to conclude that laws which "affect only the procedural determination of whether appellants will be tried by a judge or jury" are categorically outside the scope of the *ex post facto* clause. However, the Supreme Court actually reaches the opposite conclusion in *Youngblood*:

> Respondent correctly notes, however, that we have said that a procedural change may constitute an ex post facto violation if it "affect[s] matters of substance," by depriving a defendant of "substantial protections with which the existing law surrounds the person accused of crime," or arbitrarily infringing upon "substantial personal rights." *Collins v. Youngblood*, 497 U.S. 37, 45, 110 S. Ct. 2715, 2720 (1990) (citing *Beazell v. Ohio*, 269 U.S. 167, 70 L. Ed. 216, 46 S. Ct. 68 (1925); *Duncan v. Missouri*, 152 U.S. 377, 382-383, 38 L. Ed. 485, 14 S. Ct. 570 (1894); *Malloy v. South Carolina*, 237 U.S. 180, 183, 59 L. Ed. 905, 35 S. Ct. 507 (1915)).

The Supreme Court further affirmed its holdings in *Duncan* and *Malloy* regarding "procedural" changes in the context of an *ex post facto* challenge.

> This Court's decision in *Duncan* v. *Missouri, supra*, subsequently adopted that phraseology:
>
> An *ex post facto* law is one which … in short, in relation to the offence or its consequences, alters the situation of a party to his disadvantage; but the prescribing of different modes or procedure and the abolition of courts and creation of new ones, *leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime*, are not considered within the constitutional inhibition.
>
> Later, in *Malloy* v. *South Carolina, supra*, we stated that even with regard to procedural changes, the *Ex Post Facto* Clause was "intended to secure substantial personal rights against arbitrary and oppressive legislative action." We repeated that recognition in *Beazell* itself, while also emphasizing that the provision was "not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance."

> We think the best way to make sense out of this discussion in the cases is to say that by simply labeling a law "procedural," a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause. See *Gibson* v. *Mississippi*, 162 U.S. 565, 590, 40 L. Ed. 1075, 16 S. Ct. 904 (1896). Subtle *ex post facto* violations are no more permissible than overt ones. *Collins v. Youngblood*, 497 U.S. 37, 45-46, 110 S. Ct. 2715, 2721 (1990) (emphasis in original).

Under this framework, the Supreme Court overturned its prior decision in *Thompson v. Utah*, a point on which the City heavily relies. In *Thompson*, the accused challenged the reduction from a 12-person jury required under the Sixth Amendment to a 6-person jury under Utah law. The Supreme Court initially found the reduction to be impermissible "since Utah was a Territory when Thompson's crime was committed, and therefore obligated to provide a 12-person jury by the Sixth Amendment, the *Ex Post Facto* Clause prevented the State from taking away that substantial right from him when it became a State and was no longer bound by the Sixth Amendment as then interpreted." *Collins v. Youngblood*, 497 U.S. 37, 51, 110 S. Ct. 2715, 2724 (1990). The *Youngblood* Court reversed this holding, finding only that the specific requirement of a *twelve person jury* under the Sixth Amendment as opposed to a *six person jury* under State law did not fit within the *Ex Post Facto* Clause. *Id.* at 12.

Thus, the City's quotation from *Youngblood* is taken largely out of context; *Youngblood* held that even "procedural changes" can, and often do, implicate the *Ex Post Facto* Clause, but changing from the Sixth Amendment's specific requirement of a 12-person jury to a state law requirement of a 6-person jury is a valid change. Significantly, the challenged law in *Thompson* was solely regarding the formation of the jury, not the complete availability of the right to a jury trial itself, which is the issue contested here.

Because the accused was still granted a trial by jury, the Supreme Court reasonably asserted that the accused's rights in going from a 12-person jury to a 6-person jury were not violated in a manner to constitute an *ex post facto* violation.

Along that same line of reasoning, the Defense can find no case, nor did the City cite the one, where the complete retroactive removal of a constitutionally required right is a legitimate procedural alteration of the law. The City cites to two cases, *State of Hawaii v. Nakata* and *U.S. v. Joyner*, 201 F.3d 61 (2nd Cir. 2000). *Nakata* removed the right of a trial by jury for misdemeanor DUI offenses; however, these jury trials are the result of a statutory grant of authority rather than constitutional mandate (as DUI charges remain "petty" offenses under the Sixth Amendment); thus, because the jury trial is a matter of statutory privilege rather than constitutional right, rescinding this statutory authority does not implicate constitutional concerns. Similarly, *Joyner* deals exclusively with the right of a jury in sentencing, not the ultimate determination of guilt or innocence. This, too, is likewise not a constitutional requirement under the Sixth Amendment, and therefore the law can be legitimately subject to modification without constitutional implications.

In this case, on the other hand, the Nevada Supreme Court has ruled that charges of Battery Domestic Violence are serious offenses that require a jury trial under the Sixth Amendment. A law that is specifically designed to circumvent this fundamental right does trigger an *ex post facto* violation pursuant to the Supreme Court's holding in *Youngblood*.

Additionally, in his Motion, Defendant further reasoned the Henderson Municipal Code was an invalid *ex post facto* law because it changes the evidence or testimony to be

received. Defense would note the City provided no opposition to this alternative *ex post facto* theory.

2. *The City Ignores the Plain Language of the Federal Definition in 18 U.S.C. § 921(a)(33)(A) by Repeatedly Replacing the Term "Offense" with "Conviction"*

Defense reasserts the parties agree that whether a jury trial is required depends on if a conviction satisfies the federal definition of a "crime of domestic violence" under 18 U.S.C. § 921(a)(33)(A). If it does in fact meet the definition, a jury trial is required pursuant to *Andersen*. While the City argues that Defense ignores the plain language of the federal definition, Defense posits it is actually the City who does so by repeatedly replacing the word "offense" with the word "conviction" throughout the City's analysis. "Offense" and "conviction" are deliberate terms of art that are neither synonymous nor interchangeable. The former relates to the underlying conduct that is being charged, and the latter requires a formal adjudication of guilt.

18 U.S.C. § 922(d)(9), which criminalizes possession of a firearm, states in pertinent part:

> (d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—
> …
> (9) has been **convicted in any court** of a misdemeanor crime of domestic violence (emphasis added).

A "misdemeanor crime of domestic violence" has the meaning ascribed to it in 18 U.S.C. § 921(a)(33)(A):

> Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an **offense that**—

> (i) is a misdemeanor under Federal, State, or Tribal law; and
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim (emphasis added).

While the City focuses exclusively on the language "Federal, State or Tribal law," in doing so the City ignores the preamble term of "offense," and in many points throughout its analysis, simply replaces it at whim with the word "conviction" in order to reach the desired conclusion:

- "A predicate offense must be a misdemeanor conviction under 'Federal, State or Tribal Law' to fit within the federal definition" (City's Opposition, 19).
- "It is clear the Hayes court felt it was unquestionable that clause (i) (the jurisdictional source requirement) is a defining requirement of the predicate conviction" (City's Opposition, 27).
- "The source of law underlying the conviction must have been 'Federal, State or Tribal'" (City's Opposition, 30)
- "Congress using expansive language such as 'any courts' only serves to further distinguish its decision to limit the definition of 'misdemeanor crime of domestic violence' to convictions under 'Federal, State or Tribal law'" (City's Opposition, 30)
- "The plain language and a common sense reading of the statute clearly indicates that the conviction must be for a misdemeanor under Federal, State or Tribal law" (City's Opposition, 31)
- "The federal definition can be read to create an affirmative understanding of the jurisdictional sources that qualify for predicate offense convictions" (City's Opposition, 33)

- "The omission of such language indicates that Congress intended the firearm prohibition to apply only to those who had been convicted of Federal, State or Tribal law" (City's Opposition, 33)

Despite the City's repeated use of the word "conviction," it cannot escape the plain language of the law that specifically uses the term "offense." The distinction is significant, as the City's mistaken reliance on a "conviction of Federal, State or Tribal law" is the underpinning of its entire federal analysis.

The City maintains that "[a] predicate offense must be a misdemeanor conviction under 'Federal, State or Tribal law' to fit within the federal definition" (City's Opposition, 19). The City's transposition of conviction and offense reveals the fundamental flaw in its reasoning; to fit within the federal definition, there must be a "conviction" in any court of an "offense" that is a misdemeanor under Federal, State or Tribal law. Contrary the City's assertions, the law does not require a "conviction under Federal, State or Tribal law." Similarly, the law does not require an offense "that is a misdemeanor conviction under Federal, State or Tribal law."

Notwithstanding this attempt to create an atextual "common sense" reading of the statute, the plain language *must* prevail, and the plain language is clear. The only requirement for a "conviction" is that it can occur in "any court," which by its plain language includes municipal courts. Next, the "offense" must be a misdemeanor under Federal, State or Tribal law. Again, it does not state a misdemeanor *conviction* under Federal, State or Tribal law; rather the offense, i.e. the *conduct*, must be a misdemeanor under Federal, State or Tribal law. As the City concedes the same conduct both violates the

Code and NRS given laws' respective identical content, a violation of the Code is also a misdemeanor under State law. Under the plain language of the statute, "Federal, State or Tribal law" must be the basis of the offensive conduct, not the source of the ultimate conviction.

Although the City contends that "Federal, State or Tribal law" must be the source of law for the conviction, the City provided no controlling authority to support its claim. Rather, the City relies on one case from the Tenth Circuit and two District-level cases, all of which the City acknowledges rely on and analyze an entirely unrelated argument. Specifically, the *Pauler* Circuit addressed whether the definition of "State law" should be expanded to include municipal law. "There, the government argued that 'State' in 18 U.S.C. § 921(a)(33)(A)(i) should be read to mean 'state and local'" (City's Opposition, 21-22). The same arguments were made in the two unpublished, District cases provided. "Again, the government argued that the term 'State' law should be interpreted to include violations of local laws" (City's Opposition, 23). However, since Defendant does not make that argument in this case, as the Defense does not seek to expand the definition of the word "State," the cases cited (and the conclusions based on that specific argument) are inapposite to this analysis. While the City claims that focusing on the underlying conduct is "specious" and "unfair," it is simply what the plain language of the law requires.

The United States Supreme Court reaffirmed this reasoning in *Hayes*. Although the City attempts to muddle and minimize the holding in *Hayes*, the City's logic is entirely circular; particularly, the City claims that using "offense" as synonymous with "conduct" is erroneous, but then acknowledges that *Hayes* uses "offense" to as relating to the "use or

attempted use" of force requirement – the required *conduct* that must exist to qualify under 18 U.S.C. § 921(a)(33)(A).

Further, the City's argument is directly belied by the Supreme Court's reasoning in *Hayes*. The Court recognized that "offense" is a preamble to both subsections (i) and (ii), and thus applies equally to both: it must be an offense that is a misdemeanor under Federal, State or Tribal law; ***and***, it must be an offense that has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, etc. The City's position would assign a different meaning of the word "offense" to the two subsections. Under the City's argument, the word "offense" as used in subsection (i) actually means a conviction, whereas the word offense as used in subsection (ii), per *Hayes*, relates to conduct. This argument must fail.

The rationale of *Hayes* in defining "offense" cannot simply be applied only to one subsection when other subsections of the same statute are governed by the same preamble term. Given the framework of the statute itself as well as basic grammar and syntax structural rules, the preamble "offense" carries the same definition throughout the subsections over which the preamble applies. Simply put, "offense" must carry the same definition in subsection (i) and subsection (ii) of 18 U.S.C. § 921(a)(33)(A).

To that end, the concise language from *Hayes* is dispositive: "a person 'commits' an 'offense.'" For additional clarification, the Court immediately follows this with a quotation from the controlling Ninth Circuit case *United States v. Belless*, 338 F.3d 1063, 1066, reaffirming that "One can 'commit' a crime or an offense." *Hayes* makes it clear that "offense" means the conduct committed by the individual. If "offense" specifically relates to

"conduct" in subsection (ii) of the federal definition per *Hayes*, the same definition must apply in subsection (i), to which the same preamble term "offense" also applies. For this reason, the City's repeated argument that "offense" in subsection (i) relates to the conviction, but in subsection (ii) relates to conduct, is without merit. One commits an offense, but one does not commit a conviction.

As applied to subsection (i), the federal definition requires that the "offense," or the underlying conduct committed, must be a misdemeanor under Federal, State or Tribal law. Since the Code and the NRS punish the same conduct, an "offense" or act committed that violates the Code is also an "offense" or act committed that violates State law. As such, it fits within the federal definition as set forth in 18 U.S.C. § 921(a)(33)(A), and a jury trial is required.

The City similarly tries to avoid the plain language of the statute by implying that legislative intent desired a different interpretation. However, the law is clear that when the plain language of the law is unambiguous, perceived legislative intent cannot be used to alter the plain meaning and indeed, the courts may not search for additional meaning. "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." *J.D. Constr., Inc. v. IBEX Int'l Grp., Ltd. Liab. Co*., 126 Nev. 366, 375, 240 P.3d 1033, 1039-40 (2010); *Madera v. SIIS*, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998).

The City attempts, without additional authority, to provide alternative legislative theories as to why the plain language of the law says "offense," but Congress actually

intended (according to the City) for the law to mean "conviction." As the City writes in its Opposition, "[i]f Congress intended a broader reach for the jurisdictional source requirement, it could have easily defined a 'misdemeanor crime of domestic violence' as 'any misdemeanor,' just as it referred to 'any person' or 'any court'" (City's Opposition, 31). Respectfully, the City's argument as to perceived legislative intent need not and should not be considered. Alternatively, the City's version of Congressional intent can equally be read in the inverse: if Congress intended a narrower reach for the so-called "jurisdictional source requirement," it could have easily defined a "misdemeanor crime of domestic violence" as a "conviction under Federal, State or Tribal law." Alas, both parties must rely on the language which Congress selected – that the conduct must constitute an offense under Federal, State or Tribal law. Therefore, as the City writes, "the entire inquiry ends there" because "when the plain language is clear, it is unnecessary to go beyond it" (City's Opposition, 25; 43). It is not the purview of the courts to comment on the propriety or wisdom of federal laws, but merely to apply it as written when the language is clear, as it is in this case.

Lastly, the City's position is belied by the actual practice of the Ninth Circuit and federal prosecutors in Nevada. Although the City takes the position that a person convicted in a municipal court, under a municipal ordinance, does not qualify for the firearm restriction of 18 U.S.C. § 921(a)(33)(A), this Court need only look to the case of Isaiah Perkins to see this is not the position taken by federal prosecutors or the District of Nevada (see **Exhibit 1**, attached hereto). In that case, "The defendant, Isaiah Perkins, is charged with two counts of Prohibited Person in Possession of a Firearm, in violation of 18 U.S.C. §§

922(g)(9) and 924(e)(2)." *United States v. Perkins*, No. 2:12-cr-00354-LDG (CWH), 2012 U.S. Dist. LEXIS 173258, at 1 (D. Nev. Dec. 6, 2012). The charges stem from a conviction of battery domestic violence in the North Las Vegas ***Municipal*** Court.

> On October 15, 2010, the defendant was charged with battery domestic violence in a criminal complaint filed in the North Las Vegas Municipal Court. The criminal complaint alleged the victim was B.G., a person alleged to have a specified domestic relationship with the defendant. On March 3, 2011, the defendant was found guilty, pursuant to his plea of nolo contendere, of simple battery. The government proffers that it has obtained a certified copy of the birth certificate of a child common to the defendant and B.G., the victim identified in the criminal complaint against the defendant, which evidence would establish a domestic relationship between the defendant and the victim for purposes of establishing the battery was a misdemeanor crime of domestic violence. The case was closed on February 15, 2012.
>
> The federal grand jury returned the present indictment on September 25, 2012. The first count charges that on or about January 29, 2012, the defendant possessed a Springfield .40 caliber handgun. The second count charges that on or about July 11, 2012, the defendant possessed a Ruger .40 caliber handgun… The defendant is charged with prohibited possession of a firearm by any person "who has been convicted *in any court* of a misdemeanor crime of domestic violence." 18 U.S.C. 922(g)(9). *United States v. Perkins*, No. 2:12-cr-00354-LDG (CWH), 2012 U.S. Dist. LEXIS 173258, at *1-2 (D. Nev. Dec. 6, 2012) (italics in original).

In fact, the very basis for the *Perkins* decision was that the defendant was unaware that a *municipal* court conviction resulted in the firearm prohibition under federal law. As a result, the North Las Vegas Municipal Court permitted Perkins to withdraw his plea to Battery Domestic Violence and enter a plea instead to Disturbing the Peace, precisely because of Perkins' mistaken knowledge as to the application of the firearm restrictions under 18 U.S.C. § 921(a)(33)(A). The District of Nevada, confirming that federal

prosecutors did charge Perkins as a result of his municipal conviction, found the charges to be valid notwithstanding the subsequent modification (that occurred after he had been federally charged) and despite Perkins' lack of knowledge as to his illegal conduct. "Accordingly, as the defendant's modification of his conviction for a misdemeanor crime of battery occurred after the dates on which he is alleged to have possessed a firearm, such evidence is not relevant and the court will grant the government's motion to exclude any such evidence. Similarly, the defendant's lack of knowledge that he was prohibited from possessing a firearm is irrelevant and thus inadmissible." *Id.*

The *Perkins* case is highly illustrative to the instant matter, as it shows the position of federal prosecutors and the District of Nevada that municipal convictions do result in firearm restrictions pursuant to the definition in 18 U.S.C. § 921(a)(33)(A). Since the controlling authority in the District of Nevada has ruled that an individual may be federally charged for firearm possession as a result of a municipal conviction, post-*Andersen* the municipalities are required to provide a trial by jury.

3. The Code Violates Equal Protection Principles by Treating Similarly Situated Individuals Differently when the Same Conduct is Committed in the Same Jurisdiction

A. Equal Protection Analysis Applies to the Arbitrary Treatment of Similarly Situated Individuals in Denying a Fundamental Right

The City argues multiple times that equal protection is not implicated because no suspect class is created; however, like much of the *ex post facto* argument, the bulk of the City's opposition relies on an argument that was never made. Defense never claimed that the law created a classification based on race, religion or some other impermissible

demographic, but rather that it directly impacted a fundamental right of a trial by jury under the Sixth Amendment. Therefore, the complete portion of the City's equal protection analysis as applied to a suspect class confuses the issues and is irrelevant to Defendant's Motion.

Specifically, Defense maintains that in a physical location where the City and County exercise concurrent jurisdiction, such as the City of Henderson, similarly situated people who engage in the *exact same conduct* that occurred in the *exact same place* at the *exact same time* are treated differently because the availability of a fundamental jury trial under the Sixth Amendment hinges solely on whether those individuals are charged under the Code or the NRS – a decision which, as the City concedes, is solely a matter of discretion with no governing uniform or objective standards. "A statute that treats similarly situated people differently implicates equal protection." *Rico v. Rodriguez*, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005).

The City attempts to shield itself from equal protection requirements under the broad stroke of prosecutorial discretion, claiming that so long as probable cause exists that a crime was committed, there can be no equal protection violation. While it is true that case law gives discretion over whether to prosecute and what charges to bring, Defense is aware of no law (nor did the City provide one) that holds prosecutorial discretion permits the arbitrary assignment of whether an individual can invoke a fundamental constitutional right under the Sixth Amendment. Prosecutorial discretion does not permit the prosecuting body to select at whim what defendants, charged for the same conduct, can invoke a constitutional right.

As originally suspected by the Defense and confirmed by the City, there exists no algorithm or objective standards to determine whether an individual subject to both City and County jurisdiction is charged under the auspices one authority versus the other. While the Defense can appreciate that most (but not all) offenses are charged in City rather than County, it is not the actual number of cases that are filed, but the lack of uniform guidance that permits arbitrary enforcement. Our constitutional jurisprudence requires, as the City recognizes, that selective enforcement of an otherwise valid law may not be based on race, religion, or some other "arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 506 (1962); *United States v. Batchelder*, 442 U.S. 114, 125 n.9, 99 S. Ct. 2198, 2205 (1979) ("The Equal Protection Clause prohibits selective enforcement 'based upon an unjustifiable standard such as race, religion, or other arbitrary classification'").

As applied to this case, there is no standard at all to determine whether a person who commits the same conduct is charged under Nevada Revised Statutes – and thus is entitled to a trial by jury as a fundamental right under the Sixth Amendment – or whether that same person is charged under the Henderson Municipal Code, which the City asserts precludes the jury trial right. The United States Supreme Court selected a definition of "arbitrary" in *United States v. Carmack*, 329 U.S. 230, 243 n.14, 67 S. Ct. 252, 258 (1946): "Arbitrary" is defined by Funk & Wagnalls New Standard Dictionary of the English Language (1944), as "1. . . .; without adequate determining principle; . . ." and by Webster's New International Dictionary, 2d Ed. (1945), as "2. Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned; . . . ." *Id.* (ellipses in original).

In this instance, some criminal charges for the same conduct are brought in one jurisdiction and some in the other, but there is no governing standard or "adequate determining principle" to govern when similarly situated people in the same jurisdiction are, or are not, constitutionally entitled to a trial by jury. As such, Defense continues to assert that the arbitrary enforcement directly impacts a fundamental right by permitting a jury trial under the Sixth Amendment when charged under the NRS, but denying this right under the Code (even if both are otherwise valid laws). This distinction, made without guidance or reason, violates established Equal Protection principles under the state and federal constitution.

Although the City states correctly that more than one charging authority may exist at any given time, thus creating concurrent jurisdiction, the decision to charge under one authority as opposed to the other must not impact the availability of a fundamental constitutional right.[2] In this case, that selection is arbitrary and without any guiding standards, and the availability of what the Nevada Supreme Court has declared is a fundamental constitutional right under the Sixth Amendment depends on which jurisdiction that charges are brought.

The City lastly relies on *Hudson v. City of Las Vegas*, 81 Nev. 677, 409 P.2d 245 (1965) to conclude that "this specific issue has been considered" previously and is "on all

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[2] Although the City provides the example of overlapping State and Federal authority to charge for a criminal offense, Defense believes this example is misplaced given that State and Federal jurisdiction does not create jeopardy implications to charge under *both* jurisdictions, whereas the same conduct cannot be charged under City and County authority without jeopardy attaching. See, *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184 (1970). The distinction is significant, as the State/Federal dichotomy permits two separate prosecutions that each require the availability of all fundamental constitutional rights. Under the scheme that currently exists in the City/County jurisdiction, however, there can only be one prosecution, and thus the availability of certain rights – in this instance, trial by jury – hinges on which of the jurisdictions is aritrarily selected.

fours with Defendant's claim here." Defense would express some concern over the misleading manner in which the *Hudson* case is used in this instance, as a brief reading of the case reveals the challenge and ruling was entirely different from the contentions which Defense raises here. Specifically in *Hudson*, the defendant charged sought a ruling that he was entitled to a trial by jury for a charge of contributing to the delinquency of a minor based on the plain language of Article II, Sec. 2 of the U.S. Constitution, effectively asking the Nevada Supreme Court to overturn the doctrine that "petty offenses" are not entitled to a trial by jury. While the City claims the Nevada Supreme Court ruled he is not entitled to a jury trial in the municipality whereas *he would be* under the State authority, the Court ultimately concluded that he is *not* entitled to a jury trial under State law, and therefore not entitled to a jury trial under the municipal statute. In fact, the City mistakenly cites the argument proffered by the appellant in *Hudson* as if it were the Court's conclusion, when the Court actually determined the opposite.

> The complaint charged petitioner with "a misdemeanor, to wit: Contributing to the delinquency of a minor,…" Petitioner asks this court to restrain the municipal court permanently from acting in this matter. The basis of his argument is that since the municipal ordinance under which he is charged is identical in language with that of the state statute, which allows a jury trial had he been prosecuted by the state, he is constitutionally entitled to a jury trial. Since the municipal court of Las Vegas does not hear jury trials, it is, he contends, without jurisdiction.
>
> Although the United States Constitution specifically provides for trial by jury [Art. III, Sec. 2. "The trial of all crimes, except in cases of impeachment, shall be by jury…"] such right to a jury trial does not include the trial of numerous offenses, commonly described as "petty," which were summarily tried without a jury by justices of the peace in England and by police magistrates or corresponding judicial officers in the colonies.
> …

> Article I, Section 3 of the Constitution of Nevada provides that "the right of trial by jury shall be secured to all and remain inviolate forever." This court has held that this refers to the right of trial by jury as it existed at the time of the adoption of the Nevada Constitution, and does not confer any right thereto where it did not exist at that time. In *State v. Ruhe*, 24 Nev. 251, 52 P. 274 (1898), this court, after discussing summary procedure before police judges, held that the constitutional provision for a jury trial has not been considered as extending such right but simply as confirming and securing it as it was understood at common law.
>
> … Petitioner makes a valiant attempt to distinguish our statutory "misdemeanors" from what the cases refer to as "petty offenses" under the common law, summarily tried without a jury… The majority rule appears to equate "petty offense" with "misdemeanor." Therefore, petitioner's contention in this regard is without merit. *Id.*

Therefore, far from being "on all fours" with the claim made here, Defense is not arguing that the plain language of the Constitution requiring a jury trial for "all" criminal offenses (including petty offenses) warrants a jury trial under both state and municipal law. Indeed, the Nevada Supreme Court in *Andersen* resolved that question as it applies to charges of Battery Domestic Violence, concluding that such charges under State law are "serious" and requiring a jury trial under both the Federal and State constitutions.

To that end, *Hudson* is instructive in support of Defendant's position. The Court explicitly ruled that a municipal jury trial was not required because it was not required under State law – since *Andersen* concluded that a jury trial *is* required under State law, *Hudson* would then lend support to the conclusion that a jury trial is equally required under municipal law as well.

B. A Trial by Jury Under the Sixth Amendment is a "Fundamental Right"

In its opposition, the City writes that "Defendant asserts without any legal authority that the right to a jury trial is a 'fundamental right' …" (City's Opposition, 50). Defense would point the City to page 20 of Defendant's Motion, where the United States Supreme Court cases of *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 57 S. Ct. 809, 811-12 (1937) and *Maxwell v. Dow*, 176 U.S. 581, 610, 20 S. Ct. 448, 458 (1900) provide this very assertion.

To resolve any further uncertainty, Defense can equally rely on *Hodges v. Easton*, 106 U.S. 408, 412, 1 S. Ct. 307, 311 (1882) ("It has been often said by this court that the trial by jury is a fundamental guarantee of the rights and liberties of the people"); *Slocum v. N.Y. Life Ins. Co*., 228 U.S. 364, 378, 33 S. Ct. 523, 529 (1913) ("The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy… As soon as the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress, and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people"); *Patton v. United States*, 281 U.S. 276, 312, 50 S. Ct. 253, 263 (1930) ("In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions…"); or *Dimick v. Schiedt*, 293 U.S. 474, 485-86, 55 S. Ct. 296, 300-01 (1935) ("The right of trial by jury is of ancient origin, characterized by Blackstone as 'the glory of the English law' and

'the most transcendent privilege which any subject can enjoy' … Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care").

In conjunction with its unsound and unsupported assertion that a jury trial is not a fundamental right, the City makes two additional arguments: that the Code reduces the offense to a "petty" one, and therefore does not require a trial by jury; and that because the right to a jury trial can be granted or taken away with "legislative action," it cannot be truly fundamental in nature. Both arguments must fail.

The notion that Battery Domestic Violence is a "petty" offense was directly refuted by the Nevada Supreme Court in *Andersen* ("Because our statutes now limit the right to bear arms for a person who has been convicted of misdemeanor battery constituting domestic violence, the Legislature has determined that the offense is a serious one"). Indeed, it is this very case that seeks to properly apply *Andersen* rather than permit a municipality from escaping this unambiguous mandate under the guise of "ordinance" versus "law." Although the City recognizes that "[t]he constitutional necessity for Henderson's Municipal Courts to conduct jury trials became manifest in the Nevada Supreme Court's Andersen decision on September 12, 2019," the City's attempts to circumvent the ruling through enactment of the Code would facially appear to defy all recognized precedents of the higher Court's supremacy.

Furthermore, the City's argument that a trial by jury can be removed through an act of legislation is similarly circular and without merit. The state legislature retains governing

discretion over *all* criminal statutes in the NRS. Should it desire, the legislature can turn the felony crime of "burglary" (or any other felony) into a petty misdemeanor. Under the City's argument, no felonies would then require a jury trial because that right can be removed through "legislative action" reducing the offense to a misdemeanor. Since the legislature retains control over treatment of all criminal offenses, including whether such offenses are defined as a felony, gross misdemeanor or misdemeanor, the legislature's corresponding ability to alter that treatment has no bearing on whether a corresponding right is "fundamental" under the constitution.

C. The Express Purpose of the Code Does Not Pass Strict Scrutiny Analysis

The City asserts that the Code passes strict scrutiny analysis based on the general principles which apply to all criminal laws: reduction of criminal offenses, public safety, ability to prosecute, and victim protection (City's Opposition, 53). However, these broad public policy considerations are not narrowly tailored to the Code's purpose, as they apply to every criminal proscription, and the City cannot ignore or supplement the *express* purpose of the Code. The Code itself clarifies that its sole basis is to avoid the jury trial right which the Nevada Supreme Court declared to be fundamental under the Sixth Amendment. As the full preamble to the Code was included in Defense's initial Motion, it need not be reiterated here.

In order to pass strict scrutiny analysis, the law in question must be "precisely tailored to serve a compelling governmental interest." *Fisher v. Univ. of Tex*., 570 U.S. 297, 308, 133 S. Ct. 2411, 2417 (2013). In this case, even assuming the City's general policy

considerations apply, removing a trial by jury is not narrowly tailored to reducing criminal offenses, public safety, or victim protection. To the contrary, the City's policy has come under fire from independent interest groups because if the City's position regarding the federal definition were correct – that violation of the municipal ordinance does not result in firearm restrictions under 18 U.S.C. § 921(a)(33)(A) – it is unclear how permitting convicted domestic abusers to keep guns is narrowly tailored to serve "public safety" and "victim protection."

4. The Code is Repugnant to the State and Federal Constitution, and the Court May Divest Itself of Jurisdiction Pursuant to Statute

The majority of the remaining points raised in the City's opposition are contingent upon resolution of the above-contested matters; for example, the City argues that the Code is not repugnant to the Henderson City Charter because a jury trial is not a "fundamental right" (City's Opposition, 63). Therefore, a finding that a jury trial under the Sixth Amendment is a fundamental right will equally resolve the remainder of the City's opposition on this issue. Similarly, the City's argument that it may lawfully pass ordinances that are identical to state statutes will likewise be resolved upon concluding whether arbitrary enforcement of that law violates other constitutional principles, such as equal protection (City's Opposition, 67). The City's remaining position that "Henderson Municipal Court has discretion to order a jury trial when a defendant is charged with a case that impacts Second Amendment gun rights" will be resolved upon determining whether the charge qualifies as a "serious" offense (City's Opposition, 62). If so, the grant of a trial by a

jury is a fundamental constitutional right, which by its nature is as non-discretionary as the right to counsel or the right against self-incrimination.

Lastly, the City argues that NRS 5.053, regarding transfer of jurisdiction, does not apply because "there must be a final disposition *before* a case may qualify for transfer" (City's Opposition, 60) (emphasis in original). Respectfully, a finding by this Court that it lacks jurisdiction to preside over the case is a final disposition, and thereafter the matter may be transferred pursuant to statute.

CONCLUSION

For these reasons and those stated above, the Defendant in this matter respectfully requests this Court transfer the jurisdiction to the Justice Court pursuant to NRS 5.0503(1)(b).

DATED this 9 day of December, 2019.

Respectfully Submitted,
MAYFIELD, GRUBER & SHEETS

/s/ Damian Sheets
DAMIAN R. SHEETS, ESQ.
Nevada Bar No. 10755

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing MOTION is hereby acknowledged this _____ day of _____, 2019.

_____
CITY ATTORNEY

EXHIBIT 1

United States v. Perkins

United States District Court for the District of Nevada

December 6, 2012, Decided; December 6, 2012, Filed

Case No. 2:12-cr-00354-LDG (CWH)

Reporter
2012 U.S. Dist. LEXIS 173258 *; 2012 WL 6089664

UNITED STATES OF AMERICA, Plaintiff, v. ISAIAH ALJAVAR-MARTELL PERKINS, Defendant.

Subsequent History: Appeal dismissed by *United States v. Perkins, 2014 U.S. App. LEXIS 18711 (9th Cir. Nev., Sept. 30, 2014)*

Counsel: **[*1]** For Isaiah Aljavar-Martell Perkins, Defendant: Scott M Holper, LEAD ATTORNEY, Naimi and Dilbeck, Chtd., Las Vegas, Ne.

For USA, Plaintiff: Cristina D Silva, LEAD ATTORNEY, Phillip N Smith, Jr, U.S. Attorneys Office, Las Vegas, NV.

Judges: Lloyd D. George, United States District Judge.

Opinion by: Lloyd D. George

Opinion

ORDER

The defendant, Isaiah Perkins, is charged with two counts of Prohibited Person in Possession of a Firearm, in violation of *18 U.S.C. §§ 922(g)(9)* and *924(e)(2)*. Trial is scheduled for December 12, 2012. The government moves in limine (#14) to exclude evidence of the defendant's misdemeanor crime of domestic violence being modified and to exclude evidence of the defendant's ignorance of the law. The defendant opposes the motion (#21). Having considered the record and the arguments of the parties, the Court will grant the motion.

Factual Background

On October 15, 2010, the defendant was charged with battery domestic violence in a criminal complaint filed in the North Las Vegas Municipal Court. The criminal complaint alleged the victim was B.G., a person alleged to have a specified domestic relationship with the defendant. On March 3, 2011, the defendant was found guilty, pursuant to his plea of nolo **[*2]** contendere, of simple battery. The government proffers that it has obtained a certified copy of the birth certificate of a child common to the defendant and B.G., the victim identified in the criminal complaint against the defendant, which evidence would establish a domestic relationship between the defendant and the victim for purposes of establishing the battery was a misdemeanor crime of domestic violence. The case was closed on February 15, 2012.

The federal grand jury returned the present indictment on September 25, 2012. The first count charges that on or about January 29, 2012, the defendant possessed a Springfield .40 caliber handgun. The second count charges that on or about July 11, 2012, the defendant possessed a Ruger .40 caliber handgun.

On October 10, 2012, the defendant moved in the North Las Vegas Municipal Court to withdraw his plea to misdemeanor battery. The North Las Vegas Municipal Court granted the motion on November 20, 2012, and adjudicated the defendant guilty of disturbing the peace.

Analysis

The government seeks to exclude, as irrelevant, evidence that the defendant requested and was granted

a modification of his conviction for battery to disturbing the peace, **[*3]** and evidence that the defendant did not know he was prohibited from possessing a firearm. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." *Fed. R. Evid. 401*. Pursuant to *Rule 402*, "[i]rrelevant evidence is not admissible."

The modification of defendant's battery conviction after the dates on which he is alleged to have possessed firearms is irrelevant, and thus inadmissible and properly subject to exclusion. As pertinent to the present motion, the material issue is the defendant's status at the time he possessed the firearms. "The Supreme Court has held that a prior conviction that is subject to collateral attack on the ground of constitutional invalidity may nevertheless serve as the predicate . . . conviction for a charge of being a [prohibited person] in possession of a firearm" *United States v. Padilla, 387 F.3d 1087, 1090 (9th Cir. 2004)* (*citing Lewis v. United States, 445 U.S. 55, 65, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980)*). The Supreme Court stated, in *Lewis*, that "[t]he statutory language is sweeping, and its plain meaning is that the fact of a felony conviction imposes **[*4]** a firearm disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action, such as a qualifying pardon or a consent from the Secretary of the Treasury." *445 U.S. at 60-61*. [1] As summarized by the Ninth Circuit, "'a convicted felon [must] challenge the validity of a prior conviction, or otherwise his [firearm] disability, *before* obtaining a firearm.' Thus, the only relevant circumstance for present purposes is [the defendant's] status as a convicted felon at the time he possessed a firearm. The state court's later order, *nunc pro tunc* or not, has no effect on that status." *Padilla, 387 F.3d at 1091* (quoting *Lewis, 445 U.S. at 67*) (emphasis original in *Padilla*). Likewise, the reduction of a state felony conviction to a misdemeanor upon completion of probation was not grounds to vacate a felon in possession conviction because "*on the date [the defendant] was apprehended with a firearm*, [he] was a felon." This line of authority establishes that the fact of consequence is whether, on the dates on which the defendant possessed a weapon, he had been convicted of a misdemeanor crime of domestic violence. The North Las Vegas Municipal Court's **[*5]** November 20, 2012, order granting the defendant's motion to withdraw his prior plea, and adjudicating him guilty of disturbing the peace, has no effect on that status.

In opposing the government's motion, the defendant asserts that the evidence of the modification of his plea to battery was withdrawn in November 2012 (after he was indicted in the present matter) is relevant, but cites no authority for his position, and he does not distinguish the decisions of the Supreme Court and the Ninth Circuit that are contrary to his position.

Accordingly, as the defendant's modification of his conviction for a misdemeanor crime of battery occurred after the dates on which he is alleged to have possessed a firearm, such evidence is not relevant **[*6]** and the court will grant the government's motion to exclude any such evidence.

Similarly, the defendant's lack of knowledge that he was prohibited from possessing a firearm is irrelevant and thus inadmissible. "The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." *Cheek v. United States, 498 U.S. 192, 199, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991)*. As relevant to the present matter, the Ninth Circuit has explained:

> The mental-state requirement for *18 U.S.C. § 922(g)(9)* is "knowingly." See *18 U.S.C. § 924(a)(2)*. This court already has held that the requirement of knowledge in *18 U.S.C. § 924(a)* refers only to knowledge of possession: To obtain a conviction, the government must prove that a defendant "[knew] that he possessed the firearm."

United States v. Hancock, 231 F.3d 557, 561 (9th Cir. 2000) (quoting *United States v. Miller, 105 F.3d 552, 555 (9th Cir.1997)*. Consistent with this explanation, the Ninth Circuit has rejected the argument that due process requires that actual knowledge of *18 U.S.C. §922(g)(9)* is an element of the statute. *Id., at 562-63*. The appellate court has further rejected the argument that a defendant's **[*7]** due process rights are violated when convicted of violating *§922(g)(9)* despite a lack of knowledge that the possession of firearms was illegal. *Id., at 563-64*.

The defendant summarily asserts that his lack of

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[1] The relevant statutory language interpreted by the Supreme Court in *Lewis*, prohibited possession of a firearm by any person who "*has been convicted* by a court of the United States or of a State . . . of a felony." *445 U.S. 60* (italics added, ellipses original). The defendant is charged with prohibited possession of a firearm by any person "who *has been convicted* in any court of a misdemeanor crime of domestic violence." *18 U.S.C. 922(g)(9)* (italics added).

knowledge that federal law prohibited his possession of a firearm is relevant, and briefly states that prohibiting him for asserting such a defense would violate due process. The defendant does not, however, offer any authority contrary to that set forth above. Accordingly, the Court will grant the government's motion and exclude evidence of the defendant's ignorance of the law.

THEREFORE, for good cause shown,

THE COURT **ORDERS** that the United States' Motion in Limine to Exclude Evidence of the Defendant's Conviction for a Misdemeanor Crime of Domestic Violence Being Modified and Evidence of the Defendant's Ignorance of the Law (#14) is GRANTED.

DATED this 6 day of December, 2012.

/s/ Lloyd D. George

Lloyd D. George

United States District Judge

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CITY OF HENDERSON MUNICIPAL COURT

CLARK COUNTY, NEVADA

CITY OF HENDERSON	)	
PLAINTIFF	)	
vs.	)	Case No: 19CR002297
NATHAN OHM	)	19CR002298
DEFENDANT	)	
_____	)	

MOTION HEARING

DECEMBER 16, 2019

PRESENT:

COURT: Hon. Mark J. Stevens

FOR THE PLAINTIFF:

REARDON: - Brian Reardon - Deputy City Attorney

FOR THE DEFENDANTS:

BERNSTEIN: - Kelsey Bernstein, Esq.

DEFENDANT:

OHM: - Nathan Noah Ohm

TRANSCRIBED BY: Humberto Rodriguez

CLERK: Page six, City vs. Nathan Ohm 19CR2297, 298.

COURT: Okay, so, we are here today for oral arguments and decision on a motion to devest jurisdiction or dismiss. I do have a copy of that as well as the opposition and the subsequent reply. The city's opposition talks about the statement of facts specific to this case. The activity of the alleged accounting of what took place and I know there was a note in the reply not to consider this and I haven't considered it because I don't think that's necessary for the purposes of this motion. Counselors, do you have any comments on that?

BERNSTEIN: On the consideration of that facts, no, your Honor.

REARDON: No, your Honor.

COURT: I don't see how that impacts the whole jury trial issue in the motion that's in front of the Court. Okay, considering this is your motion, go ahead.

BERNSTEIN: Thank you, your Honor. As kind of a procedural matter I do have very strong objection. The city filed a SUR-reply. They titled it an opposition but that forth document it says in the content that it is a SUR-reply to our reply. I do

very strongly object to that being filed. The SUR-reply ----

COURT: One second.

BERNSTEIN: Okay.

COURT: I don't ---

BERNSTEIN: It was filed Thursday.

COURT: I don't have a copy of that.

BERNSTEIN: Okay.

COURT: I haven't reviewed that at all.

BERNSTEIN: If I can just at least make my objection known for the record that it was filed and sent to us at 9:15PM on Thursday for argument on Monday.

CLERK: It might be in transition since it was just filed.

COURT: I don't, I haven't reviewed that. City?

REARDON: Your Honor, the city can address that verbally in the oral motions or oral arguments to the Court. We filed it Thursday afternoon based on some of the issues that were raised in the response to our opposition and we're prepared to move forward and address that orally here as well.

COURT: So, you're prepared to go forward without the written SUR rebuttal or SUR-reply?

REARDON: Your Honor, I can address that orally and if there is additional information that the court would like to receive then certainly, we could make sure that the court has this and set the final date at a later time.

COURT: Counselor?

BERNSTEIN: Thank you, your Honor. So, I understand that the position that we are putting your Honor in is not enviable by any stretch. We are asking your Honor to make a decision that is going to be unpopular with a lot of people and I do understand that is not what the City of Henderson wants. I do understand this is not what the city attorney's office really wants to hear, but I do believe that the position that we laid forth in our motion is what the law requires. So, out motion broke it down into four pretty concrete sections. We have the expo facto argument. We have the misdemeanor crime of domestic violence under 18 U.S.C. 921(a)33(a). I'll just refer to the federal definition to avoid that kind of long stream there and then there is the equal protection argument. All of which seaway into the request that this court divest itself of jurisdiction based on repugnancy to the municipal code and the unconstitutionality of the newly enacted Henderson

Municipal Code as it related to battery domestic violence. So, just kind of going back to address each of those sections individually. Starting with the expo facto. Expo facto has two elements. Number one retroactivity. I'm not going to say that it's a stipulation, but I do believe that there is an agreement that, that is satisfied. This conduct occurred in 2018. The ---- Allegedly occurred and this municipal code was passed just recently. There retroactively applying it to conduct that predated the code. So, the retroactivity element is satisfied. The only other question then in terms of valid expo facto law is whether it disadvantages the offender affected by them and that's the end of the quote your Honor. Disadvantages the offender affected by them, period. Now, the city's argument you'll notice in reply. I did bring up that we anticipated the city's argument pretty much to a T. I said in my opening motion that I anticipate the city will argue that it's not expo facto based on the fact that it does not necessarily change the criminality of the conduct and it doesn't increase the punishment and that's exactly what the city in turn sent. I would say a good ninety percent of their brief dedicated to this expo facto section specifically addressing those two

topics. Now, the problem with that your Honor is that we identified at least four different types of expo facto laws and these are one, two, three, four and that's from the Stogner case which these cites Calder v. Bull which is where those type of expo facto laws and similar laws originally came from. So, I do understand that changing the criminality or increasing the punishment is two of those four, but that is not the only basis on which law can be declared invalid under the expo facto clause of the U.S. Constitution and so, to kind of go into the similar law aspects. It's the four discrete types of expo facto and similar laws which are manifestly unjust, oppressive and basically invalid. So, to determine if falls under the scope we have to look to the purpose of the expo facto prohibition to begin with. Now, we know back in 1810 very, very old case. One of the initial cases that talked about this prescription which is in a very first article of the constitution. It's article one says that we are to prevent arbitrary or vindictive legislation. That's what this is designed to do. The expo facto law is designed to prevent arbitrary or vindictive legislation that grow from the feeling of the moment and I though quote from that nineteenth-century case

was particularly apt here. To prevent arbitrary legislation that grows from the feelings of the moment and then from that we have a number of case laws that recognize a very discreet existing fundamental fairness interest. That's from the Peugh and the Carmel v. Texas case both of which are U.S. Supreme Court cases that explicitly recognize the fundamental interest that sort of over arches or encompasses the entire expo facto prescription and so, you compare the purpose of preventing expo facto laws with the purpose of the municipal code that was passed. Now, the preamble to the municipal code sets it very, very clearly that the purpose of enacting the code was to avoid the jury trial mandate in Henderson or I'm sorry in Andersen. The Nevada Supreme Court case that I think we are all pretty aware of at this point. So, I won't go into that in too much detail. It basically says if the firearms restriction is triggered it is required under the sixth amendment. So, the purpose of the municipal code is to avoid this fundamental right the Nevada Supreme Court explicitly recognized. So, compare that you know, the purpose of expo facto laws is to avoid arbitrary legislation that grows form the feelings of the moment and then we have a law passing immediately

after that says we're doing this for the sole purpose of circumventing this newly recognized fundamental right. This falls squarely within the design of the expo facto clause. This is exactly the type of legislation that, that clause was enacted to prevent. Additionally, your Honor, there is some legitimate concern and I'm not pointing any fingers by any means but there is a genuine concern that it was done in bad faith. Now, again that's not an allegation that I make towards the city attorney's office or any one specific person but let's take a case that we are all fairly familiar with which is you know, Bustos a Bustos continuance. Whenever you are making a continuance you have to attest that the continuance is in good faith and not for the purposes of delay. There is a plethora of case law that says, "When you do something for the purpose of delay. That is done in bad faith" and I think the city, I don't want to say admitted it but definitely very strongly implicated that, that was the purpose of this law when in their opposition they said, "We recognize the constitutional mandate of Andersen, but we pass this law to essentially fill in the gap until the unclear status of the law is fixed" and I don't have the exact quote, but I believe that's very similar to