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. II** **Bates 151-350**

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what the city wrote in their opposition. So, essentially we have an admission that this law was passed to delay the implementation of what we recognize this --- as this fundamental constitutional right to be and so, I do think that, that's a genuine concern that we have with why this law was passed. Again, to tie that into the expo facto this was to avoid vindictive and arbitrary legislation and I do think that this code qualifies as exactly that. Additionally, your Honor, we did provide an alternative basis to find that it is an invalid expo facto law. That it changes the testimony to be received. Now, obviously that is a pretty significant distinction because as it is right now with bench trials the judge wears many hats. Trier of law, trier of fact. When we split that into two sperate bodies we have the judge and then the jury that ultimately determine guilt or innocence. That does fundamentally change the evidence to be received by the jury because previously the judge would decide all the evidence --- sorry, all of the evidentiary issues, suppression issues, motions to dismiss all that sort of pre-trial litigation and so, the judge would then have all this additional information that the jury would then not have and it doesn't' say it

necessarily lessens or increases the testimony should be received, it says it changes it and I do think that this law by denying a jury trial where it would otherwise be required does change the testimony to be received and on that point I don't believe that the city actually provided much if any opposition in their written motion. What their opposition did focus on when it comes to the expo facto argument is the Youngblood case. Now, I do understand that the Youngblood case at least superficially would seem to support the city's position but when you read it, it's really not quite so black and white. The city uses the Youngblood case to say that procedural changes can never really trigger an expo facto challenge, but the case actually says the opposite. The case reaffirms several old Nevada or U.S. Supreme Court cases. I think it's the Malloy case that specifically did recognize that procedural changes can trigger expo facto violations if they target or if they impact substantial right or a personal right of the defendant and they overturned a prior case which was Utah v. Thompson and that I believe is where the quote came from in the city's opposition. However, the Thompson case the challenge that was being made there was going from a twelve-person jury

to a six-person jury. So, it's not the difference between a yes, jury and no, jury. It's the question of how the jury is actually formed. So, the U.S. Supreme Court overturned the Thompson case basically said, "We're overturning that. We previously found not to be invalid. Now, we're basically going to define that as a procedural change overturn that because we are only going from twelve to six" because it has to do with the formation of the jury not the availability of the jury and along those same lines your Honor, the city cites to two other cases. One of them is the Hawaii v. Nakata case. Now that case deal with a jury trial for a petty offense of misdemeanor D.U.I. and I believe the U.S. Supreme Court said that as long as it's, you know penalty is less than this amount, the fine is less than this amount. You look at the penalty of the offense, D.U.I still remains a petty offense. Now, that doesn't mean that states can't then statutorily grant the right to a jury trial over and above what is guaranteed by the constitution because the constitution is just a baseline. Just simply because it's not required under the sixth amendment when being defined as a serious offense doesn't mean that the states can't then have a statute or pass some legislative act to then grant

the right to a jury trial when it would not otherwise be required and that's exactly what happened in the Hawaii case. We had a statutory right of jury trial based on a petty offense of a misdemeanor D.U.I and so, by rescinding or withdrawing that statutory grant of authority, there were no constitutional implications because it was not required under the constitution to begin with. We have the exact same analysis in U.S. v. Joiner. That case dealt with the jury trial deciding sentencing, which again not required under the constitution. It was purely an act of legislative grace. So, when the legislature prescribes that a jury trial may be had even though it's not required by the constitution, withdrawing that right does not create the constitutional implications. So, that's why the Hawaii vs. Nakata case and the U.S. v. Joiner case are not really relevant to this situation because neither of those involve the constitutional right to a jury trial. Whereas the Nevada Supreme Court in Andersen said that it is required as a fundamental right under the sixth amendment and the way that we get there, the way that it is a fundamental right and kind of seawaying then into the next section is the definition of a misdemeanor crime of domestic

violence as pertains to the federal code. Now, in this there is kind of a long train of analyses here but I think between the city's opposition and my motion I think we can kind of narrow the question or narrow the issue to make it a little bit easier on everybody. If the municipal code that we're talking about here 8.055 the domestic violence. If the municipal code qualifies as a misdemeanor crime of domestic violence as it is defined under federal law then it then requires a jury trial because if it qualifies under the deferral definition it triggers NRS 206, firearm restrictions, triggers Andersen's, triggers jury trials. So, kind of eliminating all of that we can go from beginning to end. If it qualifies under the federal definition a jury trial is required. That's really the question that we are dealing with when it comes to whether or not it qualifies as misdemeanor crime of domestic violence and so, in this regard your Honor, there is really no getting around the plain language of the statute. Both the city and myself cited rather extensively to the law that says plain language must prevail. The only distinction is the city is ignoring the plain language or replacing the plain language to suite their desired analysis. I think I laid it out pretty

clearly your Honor, that we are dealing with two separate terms here. The word offense and the word conviction. There cannot be a legitimate dispute that those words mean two different things. I cited to number of cases that all say offense means conduct. That's the definition of what offense means versus conviction and for that we have the Hayes case that specifically says offense relates to conduct. We have Texas v. Cobb which is the U.S. Supreme Court case and we have U.S. v. Shell which is the 9th Circuit case that's also controlling and it quotes Black's Law Dictionary. All of those cases say that offense specifically relates to conduct. Now, an offense and a conviction are not the same thing. The statute uses two very distinct terms to mean two distinct things. So, the city cites to three cases. One was a 10th Circuit case and the two that were attached as exhibits were both district level cases. Obviously, it's pretty facially clear. I'm sure your Honor noted that those are not controlling being outside the jurisdiction or too low of an authority to be binding on this Court but not withstanding that all of those cases analyze the same argument that we are not making and so, bases on that the conclusion reached based on that argument I don't think is controlling

or should apply on this case. In all three of those cases the 10th Circuit case and the two district level cases the opponent or the challenger basically tried to say that the word “state” should be read to include state and municipal. They tried to expand the definition of the plain language of state and they got shut down. No, state, means state. It’s a very reasonable assertion that you can’t read something into a word that’s not there. State just means state and that’s all it is. They didn’t make the argument that we’re making here. They argued based on the definition of federal, state or tribal law. We’re not arguing that. Federal is federal, state is state, tribal is tribal. What we are focusing on is the word offense. It is a preamble term that applies to both elements to be a misdemeanor crime of domestic violence. Now, let's go back to the offense conviction dichotomy there. We have the word conviction in another portion of the same statute conviction in any court. Now the city and again, this is from their SUR reply, but I don’t think they are much apposing this. A Municipal Court does include or is encompassed in any court. I know they kind of imply in their opposition that it's a foreign versus domestic component or something like that but I think

we have the Isiah Perkins case that was a federal charge based on it North Las Vegas to Municipal Court conviction. So, I think that is pretty indicative any Municipal Court is encompassed in the term any court. So, I think that's been satisfied but then we have does it constitute an offense that is a misdemeanor under state law. That’s what we're dealing with here. So, the question then becomes even narrower because we qualify as a or it would qualify as a conviction in court the only remaining question is, does conduct that violates the municipal code which mirrors identically a state statute constitute an offense that is a misdemeanor under state law? Now, I quoted a in my reply brief at least seven or eight different places where the city’s opposition substantively misstated the plain language of the statute. They just kept saying conviction under federal, state or tribal law. It requires a conviction under federal, state or tribal law. There must be a predicate conviction under federal, state or tribal law. That’s not what the statute says. The statute’s plain language said there must be an offense that is a misdemeanor under those sources of law and so, in this case we can go straight into the Hayes v. United States case which I do believe is fairly dispositive

of this issue. Now, the Hayes case specifically deals with the domestic element. So, there is really the offense language has two predicate elements. An offense which is a misdemeanor under federal, state or tribal law and an offense that has with it the attempted use, use or attempted use of force against a domestic relation, etc, etc. So, the Hayes case primarily deals with the second element the use of force and the domestic relation because the actual challenge in that case was a simple battery conviction rather than a domestic battery conviction that would still charge and still triggered the firearm statute, but the Hayes case even though dealt specifically with that second element did clearly define offense in relation to the underlying conduct and it did so both the majority and the decent opinion and in fact, that was the basis for the decent. The decent says, you know we had this prior instance where we didn't consider offense and conduct to be synonymous, but I guess now here we are that's why we're dissenting. So, I think that alone makes it clear that the Hayes Court did define offense I relation to the underlying conduct. So, when you look at the structure of the statute, we have that preamble language and offense that and then the two

elements. So, the language or the preamble language of offense would apply equally to the two elements and it has to mean the same thing for both instances. Like for example, you know one cannot “a, b and c”. It’s read as one cannot “a”, one cannot “b” and one cannot “c”. We essentially have the same structure here. An offense that’s “a” and “b”. It is an offense that is a misdemeanor under federal, state or tribal law and it is an offense that requires the use or attempted use of force and if that was unclear the Hayes case also cited to a 9th Circuit case that had a very, very concise way of putting it. One does not commit a use; one commits an offense. Again, going back to the underlying conduct the same rational can apply here. The state is trying to confuse or mix offense with conviction, but one commits an offense. One does not commit a conviction. That’s why the city’s argument makes no sense. The word offense has to have the same meaning as it’s carried throughout the same statute. It can’t mean something different in number two than it does in number one. That just wouldn’t make sense and so, when the Hayes case is saying offense for first of the underlying conduct as it relates to element two by necessity it must relate, it must carry the same definition throughout

the same sub-section of that statute. Meaning offense, meaning conduct that is a misdemeanor under federal, state and tribal law and this also comports your Honor, with the very strong public policy argument that is articulated in Hayes and to get to this they quote from the 9th Circuit case Bellis v. United States and I do have a quote here that I think is fairly important to these proceedings. “The purpose of the statute, the firearm prohibition. 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.” and that’s the basis that they use to say, “It’s not the name of the conviction that matters. It’s not all these technical, logistical reasons. It’s designed to target people whose past violence in domestic relationships makes them untrustworthy custodians of deadly force.” That exact same reasoning, that exact same purpose of the statute applies to this case where we have a prescription for the exact same thing, that would then trigger exact same policy argument that the U.S. Supreme Court explicitly adopted in the Hayes case and so based on that your Honor we are left with the question of whether or not conduct that violates the

municipal code and the city agrees the code in the NRS are substantively identical. Same penalties, same elements, same criminal conduct, everything about them is the same. The Only thing that's really different according to the city's position is that one result in a fundamental jury trial the other does not. So, they're talking about the underlying conduct. If the offense must be a misdemeanor under state law. The offensive combat that violates one is also offensive conduct that violates the other because the statutes are identical. An offense that constitutes a violation of the Henderson Municipal code is also conduct that is a misdemeanor under state law because of state law and the code are identical. So, it’s not talking about the conviction because we know the conviction can come from any court, it's talking about the conduct. Conduct that that violates one, is the same conduct that violates the other and so, for that reason it is a defenses position that even a conviction under the Henderson Municipal Code would still trigger the firearms restrictions and would fit within the federal definition of section 921. So, to move on from that point your Honor, I think I've kind of gone through that pretty thoroughly we move on to the equal

protection issue. Now, there's two types equal protection. Number one, suspect class, race, religion, sexual orientation. We're not talking about that obviously. This is not talking about a suspect class of any type. However, the equal protection clause can still be implicated when a fundamental right is impacted, especially one that is impacted in such an arbitrary way. Now the city's opposition On this point says that a jury trial is not a fundamental right because it's contingent on legislative action because the Nevada Legislature passed NRS 206 but your Honor, that argument frankly doesn't make a whole lot of sense because the legislature has control over every criminal offense. The legislature defines the classification, treatment, penalty for every criminal offense that exists under state law and so, I gave it my reply the example of burglary. You know the Nevada Legislature can at any point, for whatever reason they see fit, can reduce the offense of burglary from a felony to a petty misdemeanor and I actually chose burglary for a specific reason because there is legislation that has been proposed And I think it's past I’m not sure yet it does something very similar. It breaks up burglary into different levels of offenses based on the

underlying conduct. So, if the legislature can then by whatever act they deem necessary, reduce a charge from a felony to a misdemeanor, just because they feel it's not worthy of felony treatment, they can then remove the right to a jury trial. Under the city's position because the jury trial is contingent on an act of legislative grace, no felony would require a jury trial because it can be removed from felony treatment define active legislative authority. That argument doesn’t make any sense. I think it’s fairly indisputable at this point that felonies do require jury trials under the sixth amendment. The sheer fact that the legislature has a hand in classifying it as a serious offense does not remove it from the fundamental nature required under the constitution and so, for that I go back to the Andersen case. The Andersen case was very, very specific that this is now a serious offense. They’re not saying that we’re doing this because the legislature passed this law. They’re saying that because of the penalties associated with the offense it is now a serious offense and requires a jury trial under the sixth amendment. It is not bay an act of legislative grace. It is the same as we would see any felony. It is based on the penalty of the offense.

So, the fact that, that comes through the act of legislative grace does not remove it from the constitutional mandate of a fundamental jury trial and again, here the city cited again the Hawaii v. Nakata and U.S. v. Joiner cases both of which are cases where the grant of a jury trial was not based on constitutional implications. It was not required under the constitution because it was for a petty offense and it was during sentencing. So, it's not required under the sixth amendment. That's was makes this fundamentally distinct here and so, when we are talking whether or not jury trial is a fundamental right, I don't think there can really be any question that it is. I cited to probably eight or nine different U.S. Supreme Court cases. We got the Etna case, Maxwell v. Dow, Hodges v. Easton, Patton v. U.S. just for an example that all went very much into detail on how the right to a jury trial is probably one of the most fundamental rights that we do recognize. It is the basis of our entire judicial system and must be preserved at all cost. So, to have the city come in and say, "Well it's not really a fundamental right." is kind of surprising to see that because I think it pretty clearly is and so, to tie that into the equal protection argument we have the

Nevada Revised Statute versus the code. Again, the only real distinction between them is the effect in that it impacts a fundamental right. One allows for a jury trial. The other again, under the city's position, the other does not but what's even more surprising about it is that this distinction by definition arbitrary. There is no algorithm. There is no uniform standard. There is no guiding principles and it's subject to change at any time. So, the city's opposition on page forty-seven actually says in bold and underline that incorrectly assumed that cases are disbursed based on an act of prosecutorial discretion. So, they actually very conspicuously said that I was wrong in that assumption but that didn't provide any additional information. I said in my motion, look I don't know how these cases are distributed. I'm assuming that it's by prosecutorial discretion because based on my knowledge and my experience I haven't seen any actual principals, I haven't seen any rules or anything like that, that would say, "Okay, certain cases go here, other cases go here or are charged under this authority versus that authority. So, I said I assume it's an act of prosecutorial discretion". They say I'm wrong in that assumption but then provide nothing. They don't

provide any principals. They don't provide any guidance. They basically say I'm wrong but then don't tell me why I'm wrong. Other than to say, "Well you know most cases are sent here." that's not the answer to the analysis. To say that most but not all cases are sent to the Henderson Municipal Court or versus the Henderson Justice Court or quite frankly your Honor, even if it was one hundred percent of cases. Even if they were to say every single case is currently being prosecuted under municipal authority when it occurs in municipal jurisdiction. That's not the point. The statistics and what actually occurs is not the focus of an equal protection analysis in this case. It's the arbitrariness of who's making the decision and on what basis. Currently all cases may go to the Henderson Municipal Court although it's about, I would, if I had to do a percentage I would say about ninety percent of them go to the municipal court but that's subject to change at any time because there is no guiding standard and there is guiding principle and then we have the U.S. v. Bichilder (sp) case that specifically defines what it means to be arbitrary and they use this exact same definition without guiding principles or objective or uniform standards and so, in this sense we did point

out that it does treat similarly situated people differently because we can have to individuals that commit the exact same conduct, at the exact same time, at the exact same place, for the exact same reason, basically exact same everything. Two twins do the exact same thing and for whatever reason they deem appropriate one can be charged in the justice court in which case they are entitled to a jury trial. The other can be charged in the municipal court in which case the city says that they are not. So, we have two people that can literally be in the exact same situation, treated differently and the treated differently directly impacts a fundamental right that is guaranteed by the U.S. Constitution and so, under these circumstances it is presumptively unconstitutional. Whenever you have and this is from the Harris v. Mcrae and the Mobile v. Bolden both of which are U.S. Supreme Court cases. Those cases very explicitly say that when you have a law that impacts a fundamental right in an arbitrary way it is presumptively unconstitutional unless it can pass strict scrutiny analysis. In going back to law school strict scrutiny means that it’s narrowly tailored to a substantial government interest. So, we start from the bases that it’s unconstitutional under equal

protection principles unless it can pass this extremely high burden strict scrutiny analysis and so, on that the city provides essentially, I think, yeah, it's four different government interest I guess we can call them. Number one, reduction of criminal offenses. Number two, public safety. Number three, ability to prosecute. Number four, victim protection. Those are the basis that the city is saying this passes constitutional scrutiny. The problem with that your Honor is that none of those are narrowly tailored to the Henderson Municipal Code because the code on its face is very clear that the purpose of it is to avoid the jury trial. It's not reduced criminal offenses; it does not increase public safety. I mean granted I guess it does go into some degree towards their ability to prosecute but I don't think you can make the argument that, that code is narrowly tailored to that purpose and it most certainly doesn't go towards victim protection. Now, all of those are just general policy arguments that you can find in any criminal prosecution. Those do not specifically relate to the jury trial issue nor do they specifically relate to the Henderson Municipal Code. Those are just general, we have criminal laws for these reason but what's kind of funny about that

your Honor is that and I mean I understand the city has come under fire for this very reasoning in a sense that they're saying that the conviction for battery domestic violence does not carry firearm restrictions and there for those who are convicted can still carry guns. It's not clear on the defense side how allowing domestic abusers to continue to carry firearms is narrowly tailored to public safety and victim protection. I don't think that even passes a rational basis test because those are counter intuitive policy arguments. You can't say that allowing someone who has been convicted of a violent offense to keep a firearm is even rationally related to victim protection or public safety and so, the city's opposition on page sixty-three again, narrows the question because if a jury trial is a fundamental right then we know that --- I'm sorry. Then we know that there are equal protection principles triggered. Again, I think I made it fairly clear in the briefing that this is a fundamental right that's at stake and based on how it's treating exactly similarly situated people differently and the only bases that it's doing this is on the availability of a jury trial that's the only distinction between them, I do believe that it triggers an equal protection violation under the

fourteenth amendment to the U.S. Constitution and so, I know it's kind of been long winded but we do have three separate basis in which your Honor can conclude that the Henderson Municipal Code does not pass constitutional muster. We have a expo facto violation and that violates article one section ten of the U.S. Constitution. We have the right to a jury trial under the sixth amendment based on the federal definition in section 921(a)33(a) and then we have that it's unconstitutional on equal protection grounds under the fourteenth amendment because we have a distinction that directly impacts a fundamental right in a completely arbitrary manner. Arbitrary as in it can change at any time. There is no uniformity. There is no guiding principles. It's basically just whatever we feel like and so following kind of all of those seaway into the request that this Court divest itself of jurisdiction. Now, the Donahue case that brough up some legitimate issues that I would like to further research. So, I don't really have much to say on that. I'll submit on that point. There is a little bit more that I want to look into but for now I just kind of have to leave that where it is but I don't think that, that's necessarily the only basis that we would ask this Court to devest itself a jurisdiction

because we also have the repugnancy to the Henderson Municipal Code. We have the section of the code that I quoted in my opening brief that basically said, “Any portion of this code that conflicts with the constitution, whether state or federal, you know is basically invalid, unconstitutional, whatever you want to call it.” and I do have three separate basis that I just articulated to reach that conclusion and really only one of them has to apply. It can be expo facto or it can carry firearms restrictions or it can be an equal protection violation. All of those or any of those would create a repugnancy with the Federal Constitution and the Nevada State Constitution to the point where that code cannot be used as a basis to prosecute and so, from that your Honor we’ll kind of seaway into the very last section and this is what was brough up in the city SUR-reply Isaiah Perkins case and I’ll kind of let them go into more detail on it, but basically the substance of the SUR-reply was an attempt to distinguish the Isaiah Perkins case because we don’t know what authority he was charged under. We don’t know if it was the NRS and they go -- - They actually did some research on the North Las Vegas City Code to say that there was not a code for battery domestic violence that existed at the time.

Mr. Perkins original criminal complaint in the North Las Vegas Municipal Court was I want to see in 2010, 2010 or 2011 that's I don't think we're going to be able to get another copy to know for sure. However, there is another municipal code that's still in effect that essentially incorporates the NRS and says, that anything that is a criminal offense or criminal misdemeanor under the NRS, is also a criminal offense or a criminal misdemeanor under the municipal code and that essentially is what gives the municipal court authority to prosecute what would otherwise be strictly state offenses, but that raises a very interesting question because he was convicted in North Las Vegas Municipal Court, then subsequently charged in federal court with possessing a firearm. So, is there really a substantive difference between Isaiah Perkins and Mr. Ohm’s case because for Isaiah Perkins we have him being charged in theory under a code that incorporated the NRS. Versus here, he is being charged under a code that copied the NRS and so, if one of those resulted in federal prosecution charges for carrying a firearm, there's really no basis to say that this would result in the same thing because it qualifies under the federal definition. So, that was the basis as to why we included it in

our reply. The actual federal question as the case addressed wasn't ineffective assistance of counsel claim. We're not worried about that, that's not relevant to these proceedings. The simple fact of the matter is said he was convicted of battery domestic violence in municipal court, that was then subsequently charged when he possessed a firearm in federal court and so, if that carried the same firearm restrictions there is no basis to conclude these would not as well and so, that takes us all the way through the argument on that sense. I'll just reserve from ---- are we going to do reply or is this kind of --- ?

COURT: I'll let you reply.

BERNSTEIN: Okay, I guess I'll submit with that.

COURT: If you could address, I think in your motion or your reply you talk about the reason that municipal court would have to divest is because of the inability statutorily to conduct jury trials.

BERNSTEIN: That's that Donahue case that I said I'm not, you know what I'll submit on that because, that kind of surprised me. What's very interesting when I looked into that case is it basically says that statutory prescription applies to

certain city's but not others and Henderson was included in the not others category and so, I'll just leave that where it is. I'll kind of let that argument go for now. I mean it's in the record, but I don't have much to say on that point but if you still find that the Henderson Municipal Code is unconstitutional or repugnant with the constitution that leaves only a couple of options. That means we can start conducting jury trial in Henderson Municipal Court or at least until the funding and structure and all that is put in place then your Honor still has the option to promote access to justice of devesting itself of jurisdiction and transferring it to the Henderson Justice Court for prosecution. So, different argument same result.

COURT: Okay, thank you and city?

REARDON: Your Honor, when it comes to public policy the court rule is very specific. Simply put elected officials create public policy and it's the court's role to interpret that public policy to ensure it doesn't run afoul the constitution. Here in this motion the defendant ask this court to step in the shoes of Congress and interject language into a statute that currently doesn't exist. The rules statutory interpretation forbid discord from granting

the motion on that basis. Your honor, there are four other reasons why this court should deny the defendants motion. So, dealing with issue that was raised in defendant's motion under section B which they opened their argument with is the federal definition of a misdemeanor crime domestic violence. That's what this whole theme of the arguments that they put in their motion centers around. What the city has found and briefed in their motion submitted to this court were three federal cases that ruled in our favor. First, the 10th Circuit Court of Appeals in a federal panel considered this exact same issue and that's the Pauler case and in the Pauler case that they found that any conviction that is sourced from the municipal code does not qualify for the federal definition of a misdemeanor crime of domestic violence because it's not sourced from either a federal law, a state law or a tribal law and it was the state in that case that was pursing this to have this municipal code be considered as a predicate offense for the federal definition for misdemeanor domestic violence but the federal court in the published opinion ruled for the defendant and said that this municipal court conviction cannot qualify under the federal statute as it sits today. Then we

have the Enk Case and the Wagner Case these were two other federal courts followed along with Pauler and the reasoning there just matched up exactly to what the city's argument is and that's, that a municipal code conviction does not qualify as a predicate offense under the federal definition as it sits today. That's as simple as we need to get your Honor. We don't need to go into looking at offense versus the conviction. Doing this word play of verbal gymnastics with the statute at issue. The federal courts have already addressed this and they found under the way that the rules of statutory interpretation require them to rule they can not interject language into that statute where it does not exist and what's specific for or really interesting for this case your Honor is that Federal Court in the District of Nevada, that's the Wagner case ruled just like Pauler and just like Enk. There is a federal statute or excuse me a federal case looked at this Reno Municipal Code and said it will not qualify under the federal definition because it is not a federal, state or tribal law. Now, there is an NRS on point that qualified and matched what the same type of conviction that the Wagner case addressed and that was a simple battery and that is

what this defendant is asking this Court to do. It is to say, “Well we have this NRS and since we treat misdemeanors in the City of Henderson just like misdemeanors under state law you should take these together and should, it would qualify as a predicate offense federally”. The Wagner Court looked at that your Honor and said, “No, that’s not the way that the statute is written”. Going back to Pauler that case says clearly and consistently congress addressed federal laws, state laws and tribal laws differently and handled them differently throughout the statute. When they wanted to refer to local municipality, they used the word local or they used the word municipality. Except they bypassed that in the federal definition and they also bypassed that in the prohibited section 922(d)(9), if you are found to be convicted of misdemeanor crime and domestic violence. Section 922 tells you all the things you cannot do and that’s where bypassed that and said, we’re not going to touch it. We’re not going to insert local, either into 922 or section 921, the definition of a misdemeanor crime and domestic violence and so, there is a lot of argument about the public policy in keeping the guns out of domestic abusers when they’re convicted and the city certainly wants to see that

happen as well, but we'll point back to the Pauler case your Honor. There is a quote there that says, "What matter is the law the legislature did enact" and that's italicized. We cannot rewrite that to reflect our perception of legislative purpose. So, what the courts have said is they have taken a step back and said, "We can't get into the shoes of congress and decide what they really wanted to do when they left these words out." They're just going to look at the plain language of the statute and decide what that requires them to do today and so, both parties are agreeing that you can't go beyond the plain language of the statute here. So, this court is actually forbidden as outlaid in these three federal cases from granting the defendant's motion on this part because a municipal code conviction does not qualify as a predicate offense in the federal definition. Now, defense cites to Hayes and Bellis and says that these cases are dispositive because it looks at the offense and the underlying conduct and that would give rise to a federal prohibition if you're convicted and the fed's come in and eventually prove that relationship. We don't even get to that your Honor because we don't dispute the fact that if you are convicted under a state code for a simple

battery and the federal government proves that relationship, that they can convict you under the federal statute, but we don't get to that because the Hayes case and the Bellis case just dealt with what is required for a predicate offense and that was use of force. Those cases look at the elements of the crime and they say, "You know what, if you're convicted of a simple battery with the use of force or any other crime under federal, state or tribal law and we can prove the domestic relationship. That's all it required." There is only one element that's required and that's the use force. So, those cases the Hayes and Bellis case dealt with what is the qualifying predicate offense and what elements needed to be included in that. These Pauler, Wagner and Enk cases take a step back and say, "We don't even get to that. We look at the fact that there is a source of law requirement written into the federal statute before you even get to the predicate offense." That source of law requirement requires that the conviction must be either a federal conviction, a state conviction or a tribal conviction and so, that's why this Court needs to deny that part of the motion because we don't even get to the fact that we're looking at offense versus conduct and deciding,

"Well, will this work in this instance? Will this not work in this instance?" We take a step back and we say, "Well, first, we need to decide if this qualifies under the source of law requirement of the statute." Three federal courts, one a published opinion from a panel in the 10th Circuit said that it does not. Moving on, they next cite to the expo facto requirement. They raise three different reason on why that our Henderson Municipal Code violates expo facto and first, I think that both parties agree we did not increase the penalties or change the elements there. So, that satisfies expo facto. As argued today and submitted in the brief, they then say that there is a sweeping prohibition against expo facto that's manifest and just to their client. Well city disputed that your Honor. First, let's walk through the issues that they raise here. They said the code is fundamentally unfair un-manifesting and just because it voids a fundamental right to a jury. I'll address that next. We hold that it does not. They say, second the code changes the testament of your evidence received. So, basically what they are saying your Honor is that, if these cases were stayed to a bench trial that the testimony and evidence is changed because it's going to be heard by judge instead of a

jury. Well that's simply not what happens during these pre-trial motions your Honor and certainly not the case law she had cited in her argument Carmel vs. Texas. So, in these pre-trial motion's hearings your Honor. Judges are acting as questions of law. They're not doing trier of fact at this point. They're addressing questions of admissibility and what could be admitted into evidence at trial. So, you're not sitting there and weighing whether this type of evidence is more probative for the conviction, it meets the elements at this point. You're just making determinations on admissibility of law. That doesn't affect the evidence that's actually gonna be admitted and considered at trial and the Supreme Court case, Carmel vs. Texas case which she had pointed out in her argument, that is not applicable to this because that was a statute that removed the corroboration requirements along with the witnesses testimony during trial and so, when she says that expo facto prohibits the changing of evidence or testimony at trial. That's what the Supreme Court is talking about. You can't change a law that once said, "Okay, if we are going to convict somebody it requires that, that person show up and testify and that there is also some corroboration of that evidence." That law

in Carmel vs. Texas removed that corroboration requirement and that's where the Supreme Court stepped in and said, "You can't do that. You're now lowering your burden and making it easier to prosecute people that were once before this law existed." So, that's not applicable to this case and I'll note that the Supreme Court said this evidence or testimony helped shape the scope of the expo facto and the clause prohibiting this, but it's not doctored unto it itself. So, there has to be an order for the expo facto requirement to be met for this part of it. Where you change testimony or evidence. There has to be some type of procedural substance rule of evidence that's actually changed and that's not what happened here your Honor. So, these pre-trial motions are just going to be heard before a case goes to trial. So, we are not changing the type of evidence that's required to convict somebody. We're not making it easier for the state to prosecute somebody under this code and actually in the Carmel vs. Texas. The Supreme Court even said that as long as the evidence is admitted, it doesn't necessarily mean that benefits the state, it can go either way and so, that's what they're looking at. If the evidence is admitted it can go and benefit the state

or can benefit the defendant and if it does that then it passes expo facto. You just can't change these requirements to meet the required elements of that case. There is some argument that they alter their criminalization the underlying conduct I think that's not sensical. That ties back to the fact that we didn't criminalize conduct that was once innocent. We just mirrored the statute that was existing. So, this alleged fact an instance that occurred prior to our Henderson municipal code was still legal at the time when it was committed. So, there is no violation of expo facto clause requirement here your Honor and so, their second point ties into fundamental right to a jury trial and that's where both these parties will say the dispute kind of centers there too. There is not a fundamental right to a jury trial. This goes into the next part of their requirement or excuse me issue that they raised in section three or section three of their motions and that's equal protection. So, there is three issues under the umbrella of equal protection that they raised. The biggest one being the fundamental right to a jury trial. During argument for defense counsel said they had cited to a number of Case laws here that at first glance it appears like there is substantial support in the

Supreme Court that there is a fundamental right to a jury trial and the city is violating that, but I decided to unpack that a little bit your honor, because I was curious about that. I was thinking how many cases do we have here? We have five cases that they added into their motion and two additional ones that they originally cited, and I didn't think that we missed all that precedence here. What I found was something that we need to make a record of and point out to the court. First, they cite Etna Case and the Maxwell vs. Dow case, two Supreme Court cases. One of them doesn’t apply because it’s a seventh amendment case and that’s a theme throughout their case law that they support here. It’s that they are citing to case law for the right to a jury trial in a civil suit. That’s not applicable here. We’re talking about the sixth amendment. That’s first in the Etna case. The Maxwell vs. Dow case that’s a 1900 that ruled an eight-member jury trial instead of a twelve is contrary to the sixth amendment. That’s one of the two cases that cited in the briefs that was actually abrogated by Williams v. Florida. Another case that they cite in that stream of cases that say gives them a substantial right, a fundamental right to a jury trial. Then they quote, I’ll quote “To resolve any

further uncertainty defense relies on a string of cases from (INAUDIBLE) to that Etna case" and that's the Hodges vs. Easton, the Slocan case, the Patton, the Williams v. Florida and the Demic – Dominic --- Demic. So, of those five cases another one of those cases were abrogated. Three of those cases are seventh amendment cases and the last case is a sixth amendment case that abrogated the previous two that we cited. Interestingly enough they don't put any cites in there string of parentheticals that says that, "Hey, those cases that we are saying have a fundamental right to a jury trial. This actual last case abrogated these last two." So, There is actually no legal basis to support their argument that there is a fundamental right to a jury trial and then your honor, if you are prohibited from finding this municipal code qualifies under the federal definition , then we're back to where we were before Andersen and that's Amezcua cause this a petty offense and I don't think either party would disagree that Amezcua says that you have--- you do not have A right to a jury trial if it's a petty offense. We may disagree a little bit on whether some of that is still good case law. It's the city's position that it is Andersen didn't specifically overrule that. If they did, we

would have noted in the briefs, but they didn't overrule Amezcua. So, we're still there, since a conviction in Municipal Court and the under a municipal code doesn't qualify to prohibit you from owning a firearm the Nevada Supreme Court is clear that that is a petty offense. We're back to Amezcua and there is no right to a jury trial. Thus, there is no equal protection violation. However, I'd like to address the other issues that they raised for equal protection. I spent a lot of time saying that similarly situated people are being treated differently here in the City of Henderson. I take exception to that. The Cooper vs. Eighth Judicial District outlines the test for selected prosecution here in the State of Nevada. That's a two-part test that we cited in our case or excuse me in our motion and your Honor this Henderson Municipal Code passed that test. First, there is two requirements and I'll note that to be clear the defendant has the burden when they're logging this argument there has been a violation of equal protection. They have not met their burden. The Supreme Court said it's an owner's burden at that and the Salas Cooper case there is a two-part test. First, they have to prove that there is discriminatory effect and next they have to prove

there has been a discriminatory purpose in our prosecution. So, going to the effect. What that is required is that they have to show that similar situated people are generally not prosecuted for the same conduct. Their argument is contrary to that. They're saying that, hey two people are prosecuted one goes to justice court, one goes to Henderson. What the test requires your honor, is that you have to show that the people similar situated, some of them are not prosecuted and some of them are. That's discriminate effect under Nevada Supreme Court precedence. The second part of that is discriminatory purpose or what the Court says is an evil eye. Basically, your Honor they have to show that chose a particular course of action in part because of an adverse effect upon a particular group. There is no evidence in their motion, or no arguments being made that we're targeting a specific group. Now, we're not talking just about the protected classes. I think that's undisputed that this, that issue was not raised here but what they are saying is that hey, there is an equal protection violation because we're raising our constitutional right to a jury trial. Well when you do that the Nevada Supreme Court says that, "Hey, you have to show that people are being

penalized for raising that constitutional right". This test requires them to show, the defendant, to show that we are going after people for raising that constitutional right. That's the second part of the test and they certainly cannot meet that your Honor. We are prosecuting these cases evenly. There is no evidence saying that we are prosecuting some people that are similar situated then other and not going after others. So, they have not met their burden and proven in meeting this two-part test in the Salas Cooper case that we cited in our motions. Second, so they say that it's an arbitrary decision on whether or not we are choosing to prosecute people. We would dispute that. I think by statute there is a joiner requirement. So, if there is a felony that accompanies a domestic violence that case is joined to justice court felony cases and that's why those domestic violence misdemeanor cases are going to justice court. All the other domestic violence cases stay here with us in the City of Henderson. So, I would argue that it's not arbitrary. In fact, there is a statute that requires that these cases go to justice court. If there is somebody that is prosecuted or arrested in unincorporated Clark County that case would go to justice court, it wouldn't come

to us. So, these are rules that are in statute and go to jurisdiction on why these cases go to justice court. So, there is not an arbitrary determination. So, you Honor that argument fails as well. So, the last part of this that they say, “Hey, strict scrutiny applies because this is equal protection argument.” First, we'd argue that based on no legal basement basis for a fundamental right to a jury trial that it's irrational basis review. The cases cited is supported there. It's not applicable most of those cases are seventh amendment cases. Two of the three cases that they cited or abrogated by the Supreme Court. So, there is not really a fundamental right to a jury trial because Amezcua still stands because the municipal code violation or conviction doesn’t qualify under the federal definition. So, you don’t have a right to a jury trial. So, we’re left with rational basis. They cite these number of cases that says that, you know we can’t meet strict scrutiny even if it did apply. Well your Honor, we would oppose that as well. The part of this, their motion circles back around to the claim that criminal defendants are arbitrarily being treated this test for unconstitutional selective prosecution I just addressed. We addressed fully in our brief. They

can’t meet that two part test your Honor. They can’t show that we have some type of discriminatory purpose here. They next argue that this law wasn’t narrowly tailored, and we don’t have a compelling interest if we were to go under strict scrutiny, we would argue against that. I would think that the compelling government is here to protect its citizens that are affected by domestic violence. What they are arguing your honor is to have these cases go to justice court and go to an overburdened court system that can’t handle these cases. So that they are dismissed, or they get better deals. So, we are trying to protect the interest of our citizens and prosecute these cases until there can be some changes in the law and so that ties into how this is narrowly tailored. They attack us for creating this municipal code and saying that it's not narrowly tailored, we're just making general statements on how we can protect the law or excuse me protect our citizens and then they next are here to argue we did that in bad faith. Your Honor, I'd submit to this court that protecting victims’ rights is not their faith. That's us meeting our duties to protect the citizens of this city and following what the number one priority of our council is and that's public safety. If we were just to

ignore what our abilities are to do to protect our citizens here that would be bad faith, that would be us not doing our jobs. So, I take offense to the fact that they are now arguing in court this law was made in bad faith. Your Honor, this was narrowly tailored. We considered sending these cases to justice court. Our office took a step back, looked at it and looked at their ability to handle these cases. Whether or not are victims here in the City of Henderson would be represented in there. When they're mixed in there with everybody else here in the local County your Honor. So, we considered that. Our council was briefed on that as well. Your Honor, we also considered the legislative action necessary to correct this ruling from Andersen and to move forward with jury trials here. To clear up the law for everybody. Well, your Honor, we are without power to make the legislative body meet. Unfortunately, they're not going to meet until 2021. That's when the city can use their lobbying efforts to try to get new rules in place or clarify the law for everybody. So, we did consider that your Honor. Also, this ordinance is limited in duration. As I just noted that legislative body meets in 2021. So, there is a finite amount of time until the next session. Until then

these cases would be prosecuted here under a local ordnance And I'll submit to this court one of the most compelling things or one of the most important things that the Supreme Court looks at when they look how these laws whether they were narrowly tailored is the time that goes along with him. Your Honor, we're just asking we have enough time that we can prosecute these cases here locally until the law --- the session meets in 2021. Your Honor, we also consider the criminal elements here. We narrowly tailored this well to meet the existing law. The NRS that's on point for battery, we mirrored that exactly. So, we've done everything in our power to make sure that this law is as close as possible as we can to meeting the NRS. To keep these cases here in the Henderson Municipal Court and protect the citizens here in Henderson. So, we would submit to this court that strict scrutiny first doesn't apply because they don't have a fundamental right to jury trial. There is not a violation of equal protection. Next then we are left with rational basis and we believe that everything we've done certainly meets rational basis.

COURT: Okay, and counselor.

REARDON: Your Honor, I was --- I'm sorry, just a momentary pause there. Maybe for effect but

kind on to move on to the next issue here.

COURT: Obviously didn't work for effects. So, lets go on.

REARDON: So, your Honor, the last issue is the issue of divesture and transfer. They're coming to this Court and ask for this Court to take all these cases and send them over to justice court and as defense has just noted. That actually the Donahue case was quite surprising to them, gives us the authority to keep those cases here and do jury trials. The Supreme Court has come out and said that, "Hey, when there is an issue of constitutionality that requires a jury trial special city's that are incorporated under a special charter have that right." and so, where that issue is or where they touched on it that "I wasn't to sure what that meant". Well some cities are incorporated by petitioning the legislature under a statute. Some cities are incorporated by acts of the legislature and that's what a special charter is and that's what the City of Henderson qualifies under and that's what the Supreme Court was mentioning in Donahue. So, we do have the right to conduct jury trials you Honor under the Supreme Court precedence. Next, they make an argument that our Henderson Municipal Code is

repugnant to the state constitution and what they're saying there is basically there is no legal basis that I took from their motions on how the statute was repugnant. First you Honor, we've been delegated the police powers from the legislature to enact these local ordinances because we have such connection here to our citizens, that we're given that policing power and what they said in our charter when the legislature approved it was that we have this power to enact these local ordinances as long as our penalties don't exceed what's in state law and that's certainly the case here your Honor. We're not exceeding the penalties. They even stipulated to the fact that we're not exceeding the penalties here. Therefore, this is --- our law is not repugnant to the state constitution. Your Honor, I'd also like to touch on Perkins. Now, that was in our SUR reply and since defense had brought it up, I want to go into that a little bit deeper as well. The arguments here today were don't know what was charged under that case. It's a little unclear. Some research could be done. I would submit that actually know what was charged under that case your Honor and we could get the docket to the court. We filed it with our SUR reply, but Mr. Sheets who is on this motion here at

some point was attorney of record on that case and so he represented the defendant there or was involved in it some case, but we looked into it your Honor, we pulled the docket and found that person was charged, Mr. Perkins was charged under NRS. So, we find it a little misleading that in their motion they're saying that, "Hey, this Perkins case. This is what the federal prosecutors and what the federal district courts are following her this 2010 case supports our position. This is what everybody in the state federally is doing." Your Honor, well that's just not the case. As we cited Pauler, Wagner and Enk were all decided well after Perkins was. This was 2017 I believe Wagner was and Pauler. So, we find that to be very misleading if they are saying, "Hey, because he was convicted in municipal court", they say court in the motion, not ordinance but because he was convicted in a municipal court he can then be prosecuted federally and that's not what the case law is your Honor. That's what they are trying to plant this hook and lead this Court away towards that to say that, "Hey this predicate offense that was in North Las Vegas qualifies for a federal prohibition." So, it's trying to get the Court to look at it and say, "Hey, since this happened over in North Las

Vegas this is the same thing that would happen here in Henderson.", but that's not the law and that's not what the federal court did in the Wagner case. It decided well after Perkins. So, it's misleading to say that this is what the federal prosecutors and this is what the federal courts are doing. When there is no legal basis to support that. The city however spent much time and effort in their brief to show that there is federal precedence out there with the 10th Circuit case that's published and the other two unpublished cases that walked this court through the arguments and line up to exactly what we have in our motions that says, if you're convicted in a municipal court on a municipal code then it doesn't qualify as a source of law and that's why this Court should deny the defendant's motion in full and we should proceed to trial.

BERNSTEIN: Are you done now?

COURT: Okay, go ahead counselor.

REARDON: I sat down, so.

BERNSTEIN: Thank you, your Honor. So, I will just take my reply in the same order that the city raised their arguments. It's a slightly different order than what we had initially. So, we start with the federal definition. They open their

response by saying that It's this court responsibility to interpret the public policy. I would respectfully but whole heartedly disagree. It’s this court's position to interpret the law as it's written. If there is an ambiguity in the law or the plain language of the law then we can look towards public policy but in this case I don't think we need to go that far because the plain language of the statute is clear and in the alternative even if there is an ambiguity as to whether offense means conduct or conviction, although I don't think there is, we have that public policy that is expressly endorsed by the Supreme Court came the Hayes case quoted from the Bellis case that said the purpose of the law is to keep guns out of the hands of domestic abusers but public policy realistically shouldn't even come into this because the plain language of the statute says offense. They do everything they can to try to reword the statute or draw things from other sources to say, “No, it requires a conviction under federal, state or tribal law” and that's where these other three cases come in. Now, if you read the city's opposition They actually take specific notes that the argument that was raised in all of those three cases was a request to have the words state under federal, state or

tribal law, to have the definition of the word state expanded to include state and local and that I can see a perfectly legitimate reason as to why that's a losing argument. It violates the plain language doctrine for all the reasons that they stated. The word local appears elsewhere. So, the courts can't interpret the word state to include state and local. That is a perfectly legitimate end result but it's not what we're arguing here and so, not only are those cases not controlling in any meaningful sense but they rely on an entirely different argument and not one of those three cases did the parties argue that it's the underlying conduct based on the language of offense that dictates whether it's a misdemeanor under federal, state or tribal law and especially in those three cases. We don't know the code, municipal code at issue and the state statute actually mirrored each other. If they weren't identical as they are in this case. For example, if there wasn't a different element under one, then the other, then maybe there would be slightly more to that argument but in this case because the Henderson Municipal Code and the state law are substantively identical and verbatim identical it's the defense's position that a violation of one violates the other

and those three federal cases don't do anything to dispute that because they never considered that argument. That was never a position that was made and that was never an argument that was made. So, not only are they not controlling from outside jurisdiction, but they rely on it completely different fundamental basis to reach that conclusion and again your honor, the state keeps reiterating state, federal or tribal conviction. That's not what the plain language says. It says offense that is a misdemeanor under for all intents and purposes state law. So, is a violation of the code that is identical to the state law constitute --- when you violate one is it also a misdemeanor under state law? The answer is yes, because there's two statutes for the code and the statue are identical a misdemeanor under one would also be a misdemeanor under the other. So, violation of the Henderson Municipal Code is a misdemeanor under state law because the offensive conduct would violate both provisions because they are identical and so, I'll leave it based on that again, it's just a very plain language argument. We do have the public policy on our side because it specifically says the purpose is to avoid these technicalities essentially that are very similar to

those that were raised in the Hayes case. So, then moving on to the expo facto. City kept their opposition fairly short. So, I will here too. The first is that they dispute the existence of a fundamental fairness interests and so, to that your Honor I did site to two U.S. Supreme Court cases one of them is PEUGH it’s spelled P-E-U-H-G vs. United States and the other is the Carmel case. We're not saying that the analysis for the specific issues are identical to this case, but those cases explicitly recognized the existence of a fundamental fairness interest and even if they don't necessarily qualify under the four types of articulated types of expo facto law. They’re still This overarching compelling consideration that needs to be taken into effect and so in a sense one could say it created the fifth category in more or less, it's the catchall and I believe that when you consider the purpose of expo facto laws that created that category and the purpose of the code that we have here which is too specifically designed to avoid a jury trial, that it does qualify. Again, just briefly the city noted that there was no alteration in the criminalization. Part of altering the criminalization of conduct is changing the defenses that are available. I’ll just

say very briefly. One of our arguments is, you know lack of jurisdiction as a defense. So, prior to the code we're going to argue that there was jurisdiction after the code. I think we can kind of connect those dots, but I'll just leave that where it is. I think the fundamental fairness interest is definitely the primary basis that we're alleging the expo facto and I do believe that when you look at those long list of cases that we cited that all recognize manifestly unjust, oppressive, improper, vindictive, arbitrary legislation feelings of the moment. This fits to a T. The exact thing that they were trying to avoid back when they put that clause in article one of the constitution. So, moving on from there we have the equal protection. So, again, I'm very surprised to be sitting here arguing whether or not a jury trial under whatever amendment 6th amendment, 7th amendment, 14th amendment, 20th amendment, is a fundamental right and if the city genuinely disputes that at all I ask for is two minutes and use of Mr. (INAUDIBLE) iPad because I can probably pull a list of ten cases that all say the right to a jury trial is a fundamental right. It's not, you know, when you look at the excerpts that were taken for those cases. They didn't say the jury trial under the 7th

amendment is a fundamental right. A jury trial in a civil case is a fundamental right. It all just is the most fundamental right that exist in our system of justice. So, I just reiterate I'm still fairly dumbfounded that we're arguing as to whether or not a jury trial for a serious offense under the 6th amendment qualifies as a fundamental right. I think that is pretty and ambiguous based in the law that it does and if you're on it would require supplemental briefing, I will happily get you a number of cases to that effect. Additionally, your Honor, the city goes --- essentially tries to misconstrue our claim of equal protection as one of selective prosecution. If we were making in equal protection argument on the basis of them discriminating against a suspect class, you know, race, religion, those things I mentioned earlier Then selective prosecution maybe the appropriate analysis here but one element of selective prosecution is that there is discrimination again successful class. That's not what we're arguing. This is not that they're choosing to prosecute some people but not others, you know even the example that I gave where it's two people who commit the same conduct one is going to justice court, one is going to municipal they’re still both

being prosecuted. So, this is not an instance of selective prosecution and truthfully, I don't believe that, that analysis has any place in our argument. This is not a selective prosecution claim, but when a law is created that directly impacts a fundamental right that does trigger an equal protection analysis and to have it be in such an arbitrary manner again, requires strict scrutiny. So, the city's argument on this point was essentially what I indicated earlier. That it's not the practice, it's not the statistics it's the lack of guidance, lack of standards. I said before, even if one hundred percent of cases that are eligible are prosecuted in one jurisdiction. Which they are saying as of right now, although I have no verification and I have no way to establish this. I'm just kind of taking the city at their word for it. That you know, the law requires all felonies or misdemeanors joint with felonies to go to justice court. That's correct because only the justice court can prosecute felony cases but just to say at the rest of me go to Henderson Municipal Court which is just kind how we've been doing it. Again, that doesn't cure the arbitrariness of the decision because that's subject to change at any time based on whoever decides to make that decision and in this

case you know, they said it themselves we consider letting these go to Henderson Justice Court. Well, okay, the fact that there is even that option that it can go to Henderson Justice Court vs. prosecuted here creates the distinction and there is no --- I go back to the term algorithm because I believe that, that applies here, you know an algorithm being a set of principles or a way to get from you know, desired or from beginning to desired result. That doesn't exist here. There is nothing that says these cases must be prosecuted here versus those cases must be prosecuted there or under these principles this is what happens. It's basically just custom in practice I guess or it's whoever feels that, that decision is worth making but just the fact that these can go to the Henderson Justice Court, yet they stay here but they could go over there, even though they don't in practice, there is always that possibility nobody really knows which way it's going to go. That just highlights the arbitrariness of this decision and the lack of guidance and so, I'm a little surprised to hear the city say that you know, “We didn't want them to transfer them to the justice court because we feel that they are overburdened and more likely to get better deals.” I can certainly appreciate the deals

out of Henderson Municipal Court are generally, one could argue not as favorable as they can be in justice court but that really shouldn't factor into the analysis at all. You know the result and how the cases are negotiated has nothing to do with the availability of a fundamental right and where these cases are prosecuted to begin with. You know it's not a question of funding or being an overburdened system. If they we're going to consider transferring these to the justice court anyway the justice court is equipped to handle these prosecutions. I understand there is concern as to whether or not they will be mixed in and lost but that's not a basis to deny a fundamental right. Especially on such an arbitrary basis and additionally, your Honor, they say that the law is only temporary. Again, that just goes to the delay tactic and to sit here and say, “Now, we recognize that there is this constitutional mandate. Which they say in their opposition, but we have this law that’s designed to avoid that, but this law is only valid for two years.” So, we’re only going to violate this for two years and then we’ll go back to the way it should be. That doesn’t make any sense your Honor and I don’t think that, that is a legitimate basis to overcome the strict scrutiny

analysis when the law, the code on its face says we are doing this to avoid the jury trial mandate in Andersen and when it comes to devesting the jurisdiction in Donahue case. Your Honor, if you want to rule that this, the municipal court has the authority to do jury trials and its constitutionally mandated let's do it. You know, let's do jury trials here. This was not an attempt to get all of these battery domestic violence cases dismissed or transferred. I just, the point of doing this was to make sure that their rights are preserved, and they have now a fundamental right to a jury trial under the 6th amendment. So, if that right is going to be vested in this Court, that's fine. Let's do it that way. If the city wants to keep those cases here and have jury trials here. I am all for it and then that just kind of leads to the last part which is the Perkins case. Now, the city indicated that they were charged under the NRS. I did not see that in the docket. I saw that they were charged with battery constituting domestic violence and Mr. Sheets was on that case which is quite frankly the only reason that we knew that a case like that existed but given that the case is nine years old as indicated before there is not going to be any paperwork or anything like

that, that still exist from that case. That was before the digital age. Very old, you know we're almost talking a ten-year-old case. So, I don't think we are going to be able to know for sure what they were charged under, but if my memory serves me prior to Andersen and all of this kind of confusion that it creates. The North Las Vegas Municipal Court was charging duo under the municipal code that incorporated the NRS and under the NRS as the incorporated reference law. So, to say that it's charged strictly under the NRS I think is --- Unless we actually have some verification of that. I don't think it would necessarily apply here, but just in closing your Honor. I think what I find probably the most difficult is that the city is claiming that they have prosecutorial discretion but the amount of discretion that they're claiming they have it's , quite frankly , it's kind of astounding your Honor, because they're saying that they can choose what cases to prosecute, they can choose the legal authority under which to prosecute, they can choose jurisdiction under which to prosecute, they can choose a source of law under which they prosecute, they can choose when people are entitled to their rights and they can choose when they're not. So, it's

basically the city coming in and saying, “You know, sorry defendants who have been accused of a crime, but you have no say, you have to play by our rules. This is our court, this is our game and we're going to tell you what the rules are based on whatever we feel should be for your particular case, based on whatever reasons we see fit and you can't do anything about it.” That's essentially the position that the city is taking here. Is that they can choose to prosecute under the justice or the municipal court. they can choose that, okay, you’re entitled to a jury trial here but not here. You're entitled to this right here but not here. You know we can charge you under this authority, under that authority and basically dictate what rights you get based on our decision we make on a whim with no guiding standards whatsoever. It is the very definition of arbitrary and so, your Honor, I don’t see how there is a court that would find that level of absolute unfettered and arbitrary discretion to be constitutional and I cited to three different basis as to why the Henderson Municipal Code does not pass a constitutional analysis and I just go back to saying your Honor, I began this by saying, I know this is not a popular decision. I know that we've kind of placed you in a

somewhat difficult position but I think that and the city can feel free to disagree with me but I do think that this is an issue that no matter what happens both sides are prepared to kind of take all the way to see what happens. So, it doesn't really, you know whether or not we win or lose I do think we're going to get some additional guidance on this. So, hopefully, you know we just, we will continue to have the utmost respect for this court no matter what happens and I do really appreciate taking the time to go through all this and I definitely appreciate the unprecedented density of the city's opposition that I've never seen before. Seventy-one pages, props to you on that but based on what we wrote your Honor, I do believe that the law requires a finding that, that code is unconstitutional and if that means transferring the cases to the justice court, if that means having a jury trial here. Regardless of the procedure I think that outcome is required. So, based on that your Honor, I'd ask that our motion be granted.

COURT: Thank you both for your arguments and for your motions. I do have one thing I want to address with regard to Perkins. Since there seems to be some confusion with regard to whether it was be

adopting the municipal code, adopting the NRS or was it a separate municipal code that he was charged under. (INAUDIBLE) First off, see whether they actually even have a separate municipal code.

BERNSTEIN: Are you asking me or city?

COURT: Both actually, since this wasn't really addressed in this new issue that seems to be ---

BERNSTEIN: We offered initially --- We offered the Perkins case initially just to kind of show that it is possible for a municipal court conviction to be picked up in the federal jurisdiction, for them to charge it. So, we got kind of convoluted of this more narrower issue under what he was charged under and to my belief they would be both and NRS and a code. So, the city can feel free to agree or disagree with me or we can do additional research on it, but the purpose of offering the Isiah Perkins case was just to show that municipalities are not categorically excluded based on, you know the source of the conviction.

COURT: I just think it's important since this has been brought up to know whether it was an adoption of the NRS or whether it was a separate ---

BERNSTEIN: Got a copy of the complaint.

REARDON: Your Honor, I can shed some light and show counsel here too. It's attached in our SUR reply that we filed, and it will be coming in a little bit late.

COURT: Since I have not reviewed that.

REARDON: Yes, and I'll make a record too your Honor. So, in the docket that we received form North Las Vegas it says the charge is NRS 200.485 (1)(a). So, it's a battery domestic violence under the state statute, under NRS. There is no mention of municipal code or any other North Las Vegas Code that the person ultimately plead to or was charged with. They were charged under state law. So, we actually argue that, that helps us in our argument that we cited with the source of law requirement that's in the federal statute.

BERNSTEIN: Well, I mean we never disputed that he was, that there was at least a reference to the NRS, they have to, but that doesn't mean that there wasn't also a municipal code attached. That's why I mean we need a copy of the complaint.

REARDON: Well your Honor, it shows the docket shows the charge. I would argue if there was another charge under a North Las Vegas code that,

that would be listed in the docket as well. We had reached out to North Las Vegas to get this docket.

COURT: I guess my question is. Is there even a separate municipal code domestic battery.

BERNSTEIN: There was not at the time. There was not a separate, like now there is the Henderson Municipal Code that specifically prescribed battery domestic violence. There was not something similar in North Las Vegas at the time because what they had was the municipal code that essentially incorporated the criminal offenses of the NRS.

COURT: Okay.

BERNSTEIN: Which is why I'm not surprised that the NRS is cited because it would have to be as the referencing charge.

COURT: Okay, I guess both sides are in agreement that there wasn't a municipal code specifically for, a municipal code specifically for domestic battery at the time. It was the incorporating ---

BERNSTEIN: Correct.

COURT: Municipal Code incorporating the Nevada Revised Statute. Is that ---

REARDON: That's the city's understanding your Honor. To clarify too, there is no charge for a

municipal code on the docket either.

COURT: And counsel is that your understanding?

BERNSTEIN: Yeah, I mean, the city just showed me that the code is not listed on there, but I do believe that they were duo charged under both, but I would expect the NRS to be on there as the actual source of the law. So, I think we're in agreement on that.

COURT: Okay, okay, thanks. It's just the only question I had with regarding to this. Well since there has been some additional issues and arguments brought up in the arguments itself today. I'm going to review everything and take it under advisement and come back after the first of the year since the holidays and we're closed, with my decision. When do we have the trial date set for this one?

REARDON: Your Honor, I believe we vacated a trial date and set the briefing schedule for this.

COURT: Okay, so, let's put it right after the first of the year for my decision.

CLERK: Do you want to do that Monday the sixth or the following Monday the thirteenth?

REARDON: Your Honor, if I may add I'll be

out of the office on the sixth and I'd like to be here in case there is any additional questions. If the defense doesn't have any opposition to the thirteenth.

COURT: Counselor, what's your thoughts?

BERNSTEIN: Obviously, sooner, rather than later would be the position of the defense but if counsel is out, I understand. So, ---

COURT: Are you out the full week?

REARDON: Yes, your Honor.

COURT: So, are you okay with the thirteenth then?

BERNSTEIN: Is there any way we can go before the beginning of the year or is that not feasible?

CLERK: We're vacated.

COURT: We're vacated.

BERNSTEIN: Everyone is on vacation I see. Well, I'll be here. So, the thirteenth will work.

COURT: Okay.

CLERK: Ten o'clock.

COURT: Yeah, ten o'clock.

BERNSTEIN: Can I wave Mr. Ohm's presence at the decision.

COURT: Certainly, you don't have any opposition there?

REARDON: No opposition, your Honor.

COURT: Okay.

BERNSTEIN: Alright, thank you.

COURT: Counselors again, thanks for your arguments and your motions and oppositions and replies.

CLERK: Concludes criminal trials.

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CERTIFICATE OF TRANSCRIBER

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, HUMBERTO RODRIGUEZ, declare as follows:

That I transcribed the AUDIO FILE presented.

I further declare that I am not a relative or employee of any party involved in said action, nor a person financially interested in the action.

Dated at Las Vegas, Nevada this 27th day of January, 2020.

/s/Humberto Rodriguez
HUMBERTO RODRIGUEZ

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CITY OF HENDERSON MUNICIPAL COURT

CLARK COUNTY, NEVADA

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

MOTIONS HEARING

JANUARY 13, 2020

PRESENT:

COURT: Hon. Mark J. Stevens

FOR THE PLAINTIFF:

REARDON: - Brian Reardon - Deputy City Attorney

FOR THE DEFENDANTS:

SHEETS: - Damian R. Sheets, Esq.

TRANSCRIBED BY: Humberto Rodriguez

CLERK: City vs. Nathan Ohm 19CR2297-298.

SHEETS: Good morning your Honor, Damian Sheets on behalf of the defendant.

REARDON: Good morning your Honor, Brian Reardon on behalf of the city and thank you for trailing this matter. Your Honor, if we could the city would like to be briefly heard on exhibit. I've shown defense counsel a copy of what we would like to have admitted as part of the record in case (INAUDIBLE) part of the record. There was some discussion at the last argument but the component for a Mr. Perkins. The defense had put in their motion that there was some precedence out of North Las Vegas for a defendant that was charged over there in North Las Vegas on a domestic violence. The city at the time did not have a copy of the complaint. We had a copy of the docket. We now have a certified copy of the complaint and the docket. We'd like to move the court to admit this as part of the exhibit and I also have a copy for your Honor as well.

COURT: Counselor.

SHEETS: Yes, at this point for the same reason that we were objecting to the city's SUR-reply is procedural defective. I think we would object to this. One, I don't think it provides any relevant

input. A copy of a charging document that the defendant was not convicted of provides no relevance. It does say stated NRS and it does state a city code on the top right hand of that particular complaint but it's a complaint for domestic violence and at no point was he actually convicted of a domestic violence. As the minutes establish, he was convicted of a simple battery and then was convicted of a, at the time it would have been put on the record as disturbing the peace in City of North Las Vegas. The minutes don't cite whether or not the final conviction was on a city code or whether it was a Nevada Revised Statue. They don't reflect that on either of those particular convictions. So, I don't see how they would provide relevant input anyway. I had talked to the city just briefly a second ago about whether there would be transcripts. I can't remember if at that time they a court of record were yet. I remember they were not a court of record until at least a year or two after Judge Ramsey was elected out there. So, there might not even be transcripts to support whatever minutes exist and don't include those statutes. So, I'm not sure it provides that, nonetheless it was not part of our position anyway. Our position with regard to Perkins was that the

court decided that the predict underlying offense conduct is what governed the firearm restriction and that's why the district court granted the governments motion in limine to preclude Mr. Holper in Mr. Perkins defense from presenting the actual name of the charge that was underlying the situation and with regard to that reduction to a disturbing the peace because they deemed it a status crime and the status exists under the underlying predicate conduct the defendant is convicted of and would that underlying predicate conduct meet the federal definition of a domestic battery.

COURT: Okay and counselor we are not really opening it all for argument again today.

SHEETS: Right, so, ---

COURT: The argument was previously --- I'm not going to consider that today, just coming in today, but I am prepared for ruling on the motions.

REARDON: Your Honor, just to clarify. The city wasn't trying to admit this as an exhibit to go to the ruling today. We anticipate that this would be whichever way the ruling is that this would probably make its way up through the courts and so, we just wanted a complete record for any other court that was going to review this and that's why we requested

that.

COURT: Fine, it’s just that I of course have not reviewed that nor been provided until now. So, with regard to the motion we have here today. Let’s start off with, you know since I understand the course, the Nevada Supreme Court case clear That there is a mandate I can do jury trials under the NRS for domestic battery and that complied with the definition on the U.S. Code. That's based on legislative changes in 2015 and there were, let me see there was a mandate charged under NRS and it fits the definition of domestic battery under the uniform USC. So, first we're going to talk about the authority to conduct jury trials without any changes to the NRS 266 and HMC 4.015. So, under NRS 266.550 it states, the municipal court shall have such powers and jurisdiction in the city as are now provided by law for justice courts, wherein any person of this chapter city or of chapter, of a police or municipal nature. The trial and proceedings in such cases must be summary and without a jury. Follow that up with NRS 266.005. Where it states essentially that based on a special charter these provisions don’t apply. So, that would indicate that Henderson because it is a special charter it would be except from 266.005.

However, so, it would put us back to where you could do jury trials in municipal court in Henderson because it is a special charter and therefor 266.550 would not apply. However, you have Henderson Municipal Code 4.015 and it says, there is a municipal court for the City of Henderson consist of at least one department, each department must be presided over by a municipal court judge that has such power and jurisdiction as prescribed in and is in all respects which are not inconsistent with this chapter governed by the provisions of chapter 5 and 266 of the NRS, which relates to municipal courts. That brings us back to 266 being incorporated into the HMC. So, the plain reading of HMC seems to incorporate 266 which would include 266.550 which prohibits conducting a jury trial in municipal court. So, although I think certainly if it was --- If the municipal code didn’t say it’s governed by 266 of the NRS then the prohibition wouldn’t be in affect Because it is a special charter but I think by doing that by the HMC saying it’s governed by 266 and how the power and authority is provided and 266.550 says unless we summary them without a jury in conclusion based on the current legislation NRS 266.550 and HMC 4.015 incorporating 266 the Henderson Municipal Court

at the current date doesn’t have current authority to conduct a jury trial without a state legislative change or a municipal court code amendment that would allow to maybe make exceptions for domestic battery or wouldn’t reference that the power and authority is governed by 266. So, with that in mind the sixth amendment right to jury trial (INAUDIBLE) and Nevada Supreme Court case held that the sixth amendment guarantees an individual the right to a jury trial, but it doesn’t extend to every criminal proceeding. The right to a jury trial attaches only on serious offenses and the defendant in cases involving petty offenses are not entitled to a jury trial. Amezcua in another Nevada Supreme Court case dating back to 2014 considered the statutory frame work for criminalizing domestic battery and if that frame work warranted a jury trial the court determined that the legislature had not elevated the offense of domestic battery from a petty offense to a serious offense and therefore the right of a trial by jury did not attach. The court specifically considered potential loss of second amendment rights and loss of firearm rights under the federal law after a misdemeanor conviction in domestic battery under send that along but concluded that it was a collateral consequence

and did not impact that legislative determination of whether the domestic battery was a serious offense and the consequences were therefor irrelevant in that it determined, undetermined whether they would be entitled to a jury trial. After that case legislature passed that amendment to domestic battery laws as well as NRS 202.306 and the statute prohibited a firearm by some individuals. 202.306 says, shall not own or have in possession, or under his custody or control a firearm if the person has been convicted in this state or any other state of a misdemeanor crime of domestic violence as defined by 18 U.S.C. section 921(a)(33). The Nevada Legislature also included the increase in the minimum jail time for domestic battery second offense. The firearms provision is a class “B” felony if it falls under the definition 18 U.S.C. section 922(a)(33). After that legislation was passed in the Supreme Court in Andersen in 2019 readdressed domestic battery after the legislative change. Based upon the legislative change the Supreme Court in Andersen found that the Nevada Legislature had amended the penalties associated with misdemeanor domestic battery conviction when it prohibited the possession of firearms under the state law by those that are convicted. That change the Andersen court

said was a basis for the distinction between Amezcua, the previous case in 2014 and Andersen. Once the Nevada Legislature added that addtional penalty of loss of gun rights under NRS 202.360, upon conviction a right to a jury trial attached. The Andersen Court explained that the legislative amendment to NRS by limiting a constitutional right of possession of a firearm as a result of conviction as defined by 18 U.S.C. 921(a)(33). After the Andersen ruling Henderson Municipal Court or Henderson Municipal Code added 08.02.055. It was passed by the Henderson City Council making domestic battery a municipal code misdemeanor. The HMC 08.02.055 has the same elements and penalties as NRS for domestic battery prior to the legislative change in 2015. So, it did not increase the domestic battery second offense minimum jail time and is an apparent attempt to avoid NRS 202.360 because of the definition of misdemeanor under 18 U.S.C. section 921 (a)(33). The case is important in this in that Sheriff of Washoe County vs. Wu, it’s a 1985 case. Where essentially it established that municipal court may pass ordinances providing acts already prohibited by state statute. The act may be penal offense under the laws of the state and further penalties under legislative

authority be imposed for the commission of a municipal bylaw and the enforcement of one would not preclude the enforcement of the other. Essentially allowing for in these other cases, allowing for a municipal code violation that's the same as an NRS. So, the first issue brought up in this motion is expo facto. First off, it's clear that the offense in this case, the charge in this case. I shouldn't say the charge. The offense date in this case predated the municipal code enactment. The 8.02.055, so, it's clear that, that predated it. So, with that in mind with regard to expo facto issue dealing with whether it's retrospective and whether it, and keyword, and if it disadvantages a person. So, clearly HMC occurred after the offense in this case but is there a disadvantage of the person? So, punishment for an act not punishable at the time or changing a definition of the criminal conduct is certainly a disadvantage, An act that took place before the enactment of this code wasn't already punishable it's clear the expo facto in this case domestic battery was punishable under the NRS and was illegal under the NRS before the municipal code came about. As far as additional penalties under the municipal code, it's actually less punishment on a domestic battery

second offense, at least with regards to the minimums where it went from ten days to twenty days in the new NRS but the code, municipal code maintained the pre 2015 penalties of ten days minimum and there is an argument of fundamental fairness and manifest injustice and something the defense argued that ordinary or the ordinance averts the fundamental right to a jury trial. Of course, you know, a bench trial isn't fundamentally unfair or unjust in it of itself and in this case the right to a jury trial only attaches if it's a serious offense and domestic battery law prior to the 2015 legislative changes was found to be petty offense by the Supreme Court in Amezcua. Therefor, and the argument is that because it was a petty offense before the firearm provision in the state statute regarding firearms came into place it doesn't meet that standard for the firearms provision in the state's statute and that it is an additional or it isn't subordinating fundamental right to a jury trial because it doesn't attach on petty offense. The other argument or one of the other arguments was dealing with whether there is a change in in the testimony or evidence that would d be presented that would cause an expo facto issue. It certainly true that a jury would not hear motions,

writs, etc. That is of course the judge that would hear those. So, in that regard there is a change. However, it doesn't change what's legally admissible or what's admitted in the case. It doesn't change that. It's just simply in bench trial the judge is the trier of law and fact and the judge must not consider anything that's not admissible. So, it doesn't change what's coming in as being admissible. So, in conclusion with hearing all that and also based in part in Collins vs. Youngblood it says that removing it isn't an expo facto violation if they remove a right to a jury trial in that case and there is certainly some distinctions in that case but in conclusion I don't find that there is a violation of expo facto. Second issue is whether the ordinance falls under the federal definition of domestic violence. Now, that's important of course because if it doesn't fall under that definition the logic behind that is it doesn't fall under the NRS 202.360. Taking away a person's constitutional rights in the state statue for possession of firearms. So, under that 202.360 it says, "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: Has been convicted in this State or any other state of a

misdemeanor crime of domestic violence as defined in 18 U.S.C. section 921(a)(33).” 18 U.S.C.921(a)(33) states that the term “misdemeanor crime of domestic violence” means an offense that is a misdemeanor under federal, state, or tribal. law; and then it goes on to say, and has these different elements and relationships. So, the city has argued that it’s not a federal, state or tribal. It’s in fact, local and or municipal and doesn’t fall under that definition 18 U.S.C.. So, the federal definition of a misdemeanor crime of domestic violence in plain reading it excludes municipalities and it only applies to federal, state and tribal. Therefor, 202.360 doesn’t trigger a conviction under any domestic violence Henderson Ordinance and since we revert back to the Amezcua ruling and so, in conclusion plain reading the 18 U.S.C. 921(a)(33) does not include local and municipal offenses in 202.306 would not apply to Henderson Municipal Code for domestic battery and so, I don’t find that it falls within that definition. Third issue is whether it violates equal protection the municipal code. So, equal protection violations argument of the defense is (INAUDIBLE) to justice court they’re entitled to a jury trial. The defense in municipal court they would

not base on this argument, this equal protection and under the definition of, the federal definition. So, does it disadvantage a suspect class and the law impede, does it impede a fundamental right? With regard to the suspect class, does it treat similarly situated differently, disparately. Certainly, domestic violence defendants aren’t a suspect class as a gender or a race or religion those suspect class and it’s important in that suspect class would require strict scrutiny and it have to be narrowly tailored to serve any compelling government interest. So, if it follows that the Henderson Municipal Code isn’t requiring, doesn’t require a jury trial then it’s not a fundamental right for a petty offense. It certainly it is for a serious offense. So, in this case there is no indication that individuals are being treated differently that are charged with this ordinance (INAUDIBLE) charged with this ordinance and also the prosecutor sometimes ahs discretion as a charging authority and isn’t required that they have do it whether ordinance or NRS. They have the ability to make that decision and as indicated there is no classification as a protected class anybody that is charged with domestic battery and find that because it’s not a serious offense under the municipal code

it's a petty offense and so, it isn't a fundamental right but I think even if it was a fundamental right in that it was a serious offense there is still the strict scrutiny and think based on the decision on the fact that it's a petty offense there is no protected class and so, in justice court or municipal court can have concurrent jurisdiction over a domestic violence charges. There Hudson vs. City of Las Vegas a 1965 case involving contributing to the delinquency of a minor and the argument was that there was at the time NRS that made it a gross misdemeanor or a felony which would require a jury trial, but Las Vegas also had it as a municipal code. The argument was that it couldn't do that under the municipal code because it's the same act and one is without a jury, the other one was with a jury and in that decision they said there was no statutory guarantee of a trial by jury when a municipal ordinance, when there is a municipal ordinance and a state and they coincide and the prosecution can decide whether to charge it in justice court requiring a jury or allowing for a jury or municipal code, a municipal court with municipal code and not having a jury. So, in conclusion I find that they are allowed to charge it either court. In conclusion I

don't find an equal protection violation. Now, the last issue is whether the city can retain jurisdiction over the misdemeanor domestic battery cases if it's charged under the municipal code and I'm not going to rehash all the statements I made previously or my decisions on these other issues but with all of those prior statements and decisions or holdings I do find that they are allowed to maintain jurisdiction for domestic battery cases if it's under the Henderson Municipal Ordinance and allowing them to do bench trials based on that and therefore I, the Court does or the Court is denying the motion to divest or to dismiss under the HMC with regard to domestic batteries. So, counselors you want to set this for trial? Counselors want to approach for a second.

SHEETS: Well if we could you Honor, I just had a--- because I was going to be asking a stay because of jurisdictional issues are always ripe and proceedings are to be stayed pending any kind of writs or appeals on a jurisdictional argument. I was going to ask if your Honor would be inclined. There were a couple of things I just wanted to make sure I understood your ruling right since this isn't a written ruling. If it's okay with regards, I had four

little questions. The first one was with regards to your initial analysis regarding expo facto are you concluding that Mr. Ohm had a vested right to a jury trial when originally charged under the state statute for Armstrong and then but that it's okay for the city now to ---

COURT: What is Armstrong?

SHEETS: Arm--- The case that made ---

COURT: Andersen?

SHEETS: Andersen, I'm sorry. Big cluster in my brain right now. Yeah, Andersen. Are you concluding that when Andersen came out that a defendant charged under the NRS had a vest right to a jury trial but that it's okay that, that vested right is removed for the reasons that you laid out under the initial expo facto analysis you did? I'm just trying to figure out because you were kind of silent as to whether or not Mr. Ohm had a right to a jury trial before the amendment of the statute or the addition of the municipal code and are you concluding that he had that right to a jury trial when he was originally charged in department under the Nevada Revised Statute.

COURT: Under the NRS of course he has a right to a jury trial as long as it fit that

description of the domestic battery under the federal provision that I stated previously the ---

SHEETS: And then, that's actually my follow up---

COURT: 18 U.S.C section 921(a)(33).

SHEETS: That actually was my next question. Just to see if you would clarify for me your Honor. In your analysis of 921(a)(33)(a), the definition that says it is a violation of federal, state or tribal law and then it goes on to list offense conduct. Is your Honor concluding that the word "is" requires a conviction under an actual statue in the state or can it meet the definition of a crime in the state?

COURT: I'm going to have a plain reading of that. It says, "is a misdemeanor under federal, state or tribal. This is municipal or local and doesn't fall under that.

SHEETS: So, I think it's fair to say that you're concluding that it requires a conviction under the federal, state or tribal does that sound right?

COURT: No, I'm saying that it doesn't fit the definition of 18 U.S.C section 921 (a)(33) misdemeanor under federal, state or tribal. There is no indication that it includes municipal or local

law.

SHEETS: Okay and the reason that I was just trying to clarify is just because the position that the underlying conviction for a municipal code would be a violation of state law. So, that's why I was trying to figure out if your Honor is concluding that it has to be charged or convicted under the federal, state or tribal and if that's where the definition is within your purview. That's the only, I'm just trying to clarify it for the court.

COURT: Plain reading of the statute 18 U.S.C., misdemeanor under federal, state or tribal. This is municipal and certainly if they wanted municipal or local, they would have put that in there and that's not included in there.

SHEETS: And the only other question I had is your Honor or the Court making a determination as to our rational basis argument if it's not subject to strict scrutiny regarding the enactment of the municipal ordinance.

COURT: As indicated under the analysis with regard to equal protection that first off, because it's a petty charge it's not a fundamental right. Under petty charges it is a fundamental right. Under serious offense to have a jury trial in that

there is no suspect class included. As there is no indication that they are treating Hispanics different than whites or gender or any other impermissible suspect class there is no indication in that and I also don't know or don't believe that it isn't a narrowly tailored but I don't even get to that cause I don't find that it's a suspect class or a petty offense fundamental right for a jury trial.

SHEETS: I guess that's where our argument then --- So, your Honor is not applying strict scrutiny and I understand that. So, I guess our other argument in our brief was whether or not the enactment of the ordinance was rationally related to a legitimate governmental interest and I don't know if I heard your Honor make that analysis and that's what I was wondering.

COURT: True enough and that wasn't covered and yes, I certainly think that they are, there is a rational relationship. They have, the city has of course the need to protect the public, reduced domestic batteries, victim protection and this certainly a compelling interest and certainly a rational basis and quite frankly likely has strict scrutiny standards that still be narrowly tailored to serve that compelling interest.

SHEETS: Excellent, thank you, your Honor. That's just what I wanted to clarify so that we have a cleaner record up top and we're not guessing as to what your Honor wanted.

COURT: And city.

REARDON: Your Honor, since you've already made your ruling, we just request the Court again if we could submit this certified court disposition from North Las Vegas about the Perkins case that the defense had cited in their motion. Just for the fact of making a clean record as it moves up as well.

SHEETS: My concern is I see this today. I mean then I'd ask for the ability to admit the actual pleadings from the Perkins case. If we are going to go with a completely clear record, I would sure like to show the governments motion on the issue which I think directly falls in line with our point and what's good of the city is good for the gander. Government wanted moved in that case to preclude the introduction to the name of the charge because their position was the underlying the 921(a)(33)(a). If the offense that you're convicted of, no matter what, no matter what the name of the charge is. If the offense you're convicted of the underlying conduct is defined as the criminal conduct listed in there and could be

a violation of state law, then it meets the definition. That's what the ruling was. I mean if we are going to start getting into certified records after the fact then I think it opens the door for me to just start pouring all kinds of new documents in. They weren't part of your Honor's decision and I don't think it would be a proper record for the upper court to consider.

COURT: Go ahead counselor.

REARDON: If I could be heard on that. I mean certainly there has been at least I think four weeks since we had this argument, and this was brought to the Court's attention. We haven't received any documents from the defense and certainly would like to review more documents that, you know they have for their position. We were just providing this for the Court to complete the record out for the oral arguments that were made because there was some discussion at oral arguments about the actual complaint that was filed in Perkins and so, we were just adding that for the record, for purposes of the record your Honor.

COURT: And I understand but certainly I'm sure that this is heading to higher court on appeal and so, you can certainly in your motions and

oppositions or your writs, can attach whatever the documents the higher courts would like to see, but it's not something I'm considering today. It wasn't provided in advance and so, you can attach whatever you want to any opposition or writs that may be going to a higher court. So, with regard to this underlying case this is all about defense do you want to stay these pending writs? Is that what's anticipated or we set this for trial.

REARDON: State is requesting since the motion is denied that they set it for trial. That will be the city's position.

SHEETS: And our position is because it's a jurisdictional argument and I can affirm to your Honor we are filling a writ. That would compel that the process be stayed the minute we file the writ anyway. I don't see the need in wasting the resources to subpoena witnesses and to prepare a trial calendar when we know that's what's going to happen, and I was going to ask your clerk if we can prepare the transcripts. Obviously, I can't file the writs without the transcripts because your decision is very, very thorough and I'm going to need that.

COURT: The clerk wouldn't do it. You have to order it at the window the transcripts.

SHEETS: I wouldn't be in a position to even file a writ in assuming it take thirty to forty-five days. Then we get that and then we have to produce the writ. So, ---

COURT: Well we'll try to ask it to be expedited because I'm feeling some other cases maybe delayed now until some of this is dealt with. I understand too that there is not on, let's say on these specific issues of Supreme Court case that's pending. That's my understanding with regard to some of these ---

SHEETS: It's a separate issue. I think the issue in that is solely whether or not there is jurisdiction at least for municipal courts to have a jury trial.

COURT: Yeah.

SHEETS: I think that's the only way that it related to this.

COURT: Yeah.

REARDON: Your Honor, the city does have a case in the Nevada Supreme Court the briefing has already been closed out on that case.

COURT: Okay. Well, let's go ahead and I'm going to continue this thirty days to see if there is a writ filed. So, we will set for status check for

thirty days to see where we go from here. Counselor is that ---

SHEETS: Yes, your Honor and we will order the transcripts right away.

COURT: Okay and let them know we going to need to try and expedite transcripts or I think it's appropriate to expedite the transcripts. Counselors can you approach on unrelated.

SHEETS: Yes, your Honor.

CLERK: Off the record.

(11:08:15 - OFF THE RECORD)

(11:10:47 – ON THE RECORD)

CLERK: Back on the record. Judge you want a thirty-day date, is that correct?

COURT: Yes, a thirty-day date.

CLERK: Okay. Thirty-day date would be February 24th, 10AM and no trial to be determined at this point, right?

COURT: Correct.

CLERK: Okay, thank you. Okay, Judge, Ms. Jones is ready on her case, page one.

(11:11:18 – HEARING CONCLUDED)

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CERTIFICATE OF TRANSCRIBER

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, HUMBERTO RODRIGUEZ, declare as follows: That I transcribed the AUDIO FILE presented. I further declare that I am not a relative or employee of any party involved in said action, nor a person financially interested in the action.

Dated at Las Vegas, Nevada this 28th day of January, 2020.

/s/Humberto Rodriguez
HUMBERTO RODRIGUEZ

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F

ORDINANCE NO. 3632
(Amendment to Henderson Municipal Code Chapter 8.02)

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF HENDERSON, NEVADA, TO AMEND HENDERSON MUNICIPAL CODE CHAPTER 8.02 – VIOLATION OF STATE LAW, OF TITLE 8 - PUBLIC PEACE AND SAFETY

WHEREAS, in Andersen vs. Eighth Judicial District Court, 135 Nev. Adv. Op. 42 (2019) the Nevada Supreme Court held that since a new statutory provision in NRS 202.360(1) affected another constitutional right, the legislature intended to treat 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, 18 U.S.C. § 921(a)(33)(A), as referenced in NRS 202.360(1), in turn defines the term "misdemeanor crime of domestic violence" as an offense that is a misdemeanor only under Federal, State, or Tribal law; and

WHEREAS, there will be anticipated legal challenges to the Municipal's Court 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

WHEREAS, battery constituting domestic violence is a widespread offense and the City of Henderson has a significant interest in protecting its citizens from this offense; and

NOW, THEREFORE, the City Council of the City of Henderson, Nevada, does ordain:

SECTION 1. Henderson Municipal Code Chapter 8.02 is hereby amended as follows:

8.02 – [VIOLATION OF STATE LAW] *CRIMES AGAINST PUBLIC PEACE*

SECTION 2. Henderson Municipal Code Section 8.02.055 is hereby added to Chapter 8.02 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.*

2. *For the second 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 10 days, but not more than 6 months, and*

(b) *Perform not less than 100 hours, but not more than 200 hours, of community service, and*

(c) *Pay a fine of not less than $500, but not more than $1,000, and*

(d) *Participate in weekly counseling sessions of not less than 1 1/2 hours per week for 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.*

E. *A person arrested for a battery constituting domestic violence pursuant to this section must not be admitted to bail sooner than 12 hours after arrest.*

SECTION 3. If any section, subsection, sentence, clause, phrase, provision or portion of this Ordinance, or the application thereof to any person or circumstances, is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or provisions of this Ordinance or their applicability to distinguishable situations or circumstances.

Editor's Note: Pursuant to City Charter Section 2.090(3), language to be omitted is red and enclosed in [brackets], and language proposed to be added is in *blue italics and underlined*.

SECTION 4. All ordinances, or parts of ordinances, sections, subsections, phrases, sentences, clauses or paragraphs contained in the Municipal Code of the City of Henderson, Nevada, in conflict herewith are repealed and replaced as appropriate.

SECTION 5. A copy of this Ordinance shall be filed with the office of the City Clerk, and notice of such filing shall be published once by title in the Las Vegas Review-Journal, a newspaper having general circulation in the City of Henderson, at least ten (10) days prior to the adoption of said Ordinance, and following approval shall be published by title (or in full if the Council by majority vote so orders) together with the names of the Councilmen voting for or against passage for at least one (1) publication before the Ordinance shall become effective. This Ordinance is scheduled for publication on October 18, 2019, in the Las Vegas Review-Journal.

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Editor's Note: Pursuant to City Charter Section 2.090(3), language to be omitted is red and enclosed in [brackets], and language proposed to be added is in *blue italics and underlined*.

PASSED, ADOPTED, AND APPROVED THIS 15TH DAY OF OCTOBER, 2019.

Debra March, Mayor

ATTEST:

Sabrina Mercadante, MMC, City Clerk

The above and foregoing Ordinance was first proposed and read in title to the City Council on October 1, 2019, which was a Regular Meeting, and referred to a Committee of the following Councilmen:

"COUNCIL AS A WHOLE"

Thereafter on October 15, 2019, said Committee reported favorably on the Ordinance and forwarded it to the Regular Meeting with a do-pass recommendation. At the Regular Meeting of the Henderson City Council held October 15, 2019, the Ordinance was read in title and adopted by the following roll call vote:

Those voting aye:

Debra March, Mayor
Councilmembers:
Michelle Romero
John F. Marz
Dan H. Stewart

Those voting nay: None
Those abstaining: None
Those absent: Dan K. Shaw

Debra March, Mayor

ATTEST:

Sabrina Mercadante, MMC, City Clerk

Editor's Note: Pursuant to City Charter Section 2.090(3), language to be omitted is red and enclosed in [brackets], and language proposed to be added is in *blue italics and underlined*.

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

End of Document

2009 Nev. AB 164

Enacted, May 6, 2009

Reporter
2009 Nev. ALS 42; 2009 Nev. Stat. 42; 2009 Nev. Ch. 42; 2009 Nev. AB 164

NEVADA ADVANCE LEGISLATIVE SERVICE > NEVADA 75TH REGULAR SESSION > CHAPTER 42 > ASSEMBLY BILL 164

Notice

Added: Text highlighted in green
Deleted: ~~Red text with a strikethrough~~

Synopsis

AN ACT relating to crimes; providing certain penalties for a battery that is committed by strangulation; increasing the penalty for a battery which constitutes domestic violence if the battery is committed by strangulation; increasing the penalty for a battery under other circumstances if the battery is committed by strangulation; and providing other matters properly relating thereto. Legislative Counsel's Digest: Section 3 of this bill revises provisions governing the crime of battery to provide the same penalties for a battery which is committed by strangulation as are imposed for a battery which results in substantial bodily harm. (*NRS 200.481*) Section 3 also defines the term "strangulation" similarly to the manner in which the term is defined in a similar Minnesota law. (Minn. Stat. Section 609.2247(1)(c)) Sections 4 and 5 of this bill revise provisions governing the crime of battery which constitutes domestic violence to impose a category C felony with a maximum fine of $ 15,000 upon any person who is convicted of a battery which constitutes domestic violence if the battery is committed by strangulation. (*NRS 200.485*) Sections 1, 2, 6 and 7 of this bill amend certain provisions regarding additional penalties, battery with the intent to commit sexual assault, the reporting of certain crimes committed against a child and bail so that those provisions will apply in the same manner to a battery which resulted in substantial bodily harm and a battery which was committed by strangulation. (*NRS 193.166*, *200.400*, *202.876*, *178.484*)

Text

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. *NRS 193.166* is hereby amended to read as follows:

193.166

term of not less than 2 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than $ 10,000.

(f) If the battery is committed by a probationer, a prisoner who is in lawful custody or confinement or a parolee, without the use of a deadly weapon, whether or not substantial bodily harm results ~~,~~ AND WHETHER OR NOT THE BATTERY IS COMMITTED BY STRANGULATION, for a category B felony by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years.

(g) If the battery is committed by a probationer, a prisoner who is in lawful custody or confinement or a parolee, with the use of a deadly weapon, and:

(1) No substantial bodily harm to the victim results, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years.

(2) Substantial bodily harm to the victim results ~~,~~ OR THE BATTERY IS COMMITTED BY STRANGULATION, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years.

Sec. 4. *NRS 200.485* is hereby amended to read as follows:

200.485

1. Unless a greater penalty is provided pursuant to SUBSECTION 2 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. A term of imprisonment imposed pursuant to this paragraph may be served intermittently at the discretion of the judge or justice of the peace, except that each period of confinement must be not less than 4 consecutive hours and must occur at a time when the person is not required to be at his place of employment or on a weekend.

(b) For the second 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 10 days, but not more than 6 months; and

(2) Perform not less than 100 hours, but not more than 200 hours, of community service. The person shall be further punished by a fine of not less than $ 500, but not more than $ 1,000.

(c) For the third and any subsequent offense within 7 years, is guilty of a category C felony and shall be punished as provided in *NRS 193.130*.

2. UNLESS A GREATER PENALTY IS PROVIDED PURSUANT TO *NRS 200.481*, A PERSON CONVICTED OF A BATTERY WHICH CONSTITUTES DOMESTIC VIOLENCE PURSUANT TO *NRS 33.018*, IF THE BATTERY IS COMMITTED BY STRANGULATION AS DESCRIBED IN *NRS 200.481*, IS GUILTY OF A CATEGORY C FELONY AND SHALL BE PUNISHED AS PROVIDED IN *NRS 193.130* AND BY A FINE OF NOT MORE THAN $ 15,000.

3. 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) Except as otherwise provided in this subsection, for the first offense within 7 years, require him 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 expense, in a program for the treatment of persons who commit domestic violence that has been certified pursuant to NRS 228.470.

(b) Except as otherwise provided in this subsection, for the second offense within 7 years, require him to participate in weekly counseling sessions of not less than 1 1/2 hours per week for 12 months, at his expense, in a program for the treatment of persons who commit domestic violence that has been certified pursuant to NRS 228.470. If the person resides more than 70 miles from the nearest location at which counseling services are available, the court may allow the person to participate in counseling sessions in a program for the treatment of persons who commit domestic violence that has been certified pursuant to NRS 228.470 every other week for the number of months required pursuant to paragraph (a) or (b) so long as the number of hours of counseling is not less than 6 hours per month. If the person resides in this State but the nearest location at which counseling services are available is in another state, the court may allow the person to participate in counseling in the other state in a program for the treatment of persons who commit domestic violence that has been certified pursuant to NRS 228.470.

3. 4. An offense that occurred within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section when evidenced by a conviction, without regard to the sequence of the offenses and convictions. The facts concerning a prior offense must be alleged in the complaint, indictment or information, must not be read to the jury or proved at trial but must be proved at the time of sentencing and, if the principal offense is alleged to be a felony, must also be shown at the preliminary examination or presented to the grand jury.

4. 5. In addition to any other fine or penalty, the court shall order such a person to pay an administrative assessment of $ 35. Any money so collected must be paid by the clerk of the court to the State Controller on or before the fifth day of each month for the preceding month for credit to the Account for Programs Related to Domestic Violence established pursuant to NRS 228.460.

5. 6. In addition to any other penalty, the court may require such a person to participate, at his expense, in a program of treatment for the abuse of alcohol or drugs that has been certified by the Health Division of the Department of Health and Human Services.

6. 7. If it appears from information presented to the court that a child under the age of 18 years may need counseling as a result of the commission of a battery which constitutes domestic violence pursuant to NRS 33.018, the court may refer the child to an agency which provides child welfare services. If the court refers a child to an agency which provides child welfare services, the court shall require the person convicted of a battery which constitutes domestic violence pursuant to NRS 33.018 to reimburse the agency for the costs of any services provided, to the extent of his ability to pay.

7. 8. If a person is charged with committing a battery which constitutes domestic violence pursuant to NRS 33.018, a prosecuting attorney shall not dismiss such a charge in exchange for a plea of guilty, guilty but mentally ill or nolo contendere to a lesser charge or for any other reason unless he knows, or it is obvious, that the charge is not supported by probable cause or cannot be proved at the time of trial. A court shall not grant probation to and, except as otherwise provided in *NRS 4.373* and *5.055*, a court shall not suspend the sentence of such a person.

8. 9. As used in this section:

(a) "Agency which provides child welfare services" has the meaning ascribed to it in NRS 432B.030.

(b) "Battery" has the meaning ascribed to it in paragraph (a) of subsection 1 of NRS 200.481.

(c) "Offense" includes a battery which constitutes domestic violence pursuant to NRS 33.018 or a violation of the law of any other jurisdiction that prohibits the same or similar conduct.

Sec. 5. *NRS 200.485* is hereby amended to read as follows:

200.485

1. Unless a greater penalty is provided pursuant to SUBSECTION 2 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. A term of imprisonment imposed pursuant to this paragraph may be served intermittently at the discretion of the judge or justice of the peace, except that each period of confinement must be not less than 4 consecutive hours and must occur at a time when the person is not required to be at his place of employment or on a weekend.

(b) For the second 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 10 days, but not more than 6 months; and

(2) Perform not less than 100 hours, but not more than 200 hours, of community service. The person shall be further punished by a fine of not less than $ 500, but not more than $ 1,000.

(c) For the third and any subsequent offense within 7 years, is guilty of a category C felony and shall be punished as provided in *NRS 193.130*.

2. UNLESS A GREATER PENALTY IS PROVIDED PURSUANT TO *NRS 200.481*, A PERSON CONVICTED OF A BATTERY WHICH CONSTITUTES DOMESTIC VIOLENCE PURSUANT TO *NRS 33.018*, IF THE BATTERY IS COMMITTED BY STRANGULATION AS DESCRIBED IN *NRS 200.481*, IS GUILTY OF A CATEGORY C FELONY AND SHALL BE PUNISHED AS PROVIDED IN *NRS 193.130* AND BY A FINE OF NOT MORE THAN $ 15,000.

3. 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 him 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 expense, in a program for the treatment of persons who commit domestic violence that has been certified pursuant to *NRS 228.470*.

(b) For the second offense within 7 years, require him to participate in weekly counseling sessions of not less than 1 1/2 hours per week for 12 months, at his expense, in a program for the treatment of persons who commit domestic violence that has been certified pursuant to *NRS 228.470*. If the person resides in this State but the nearest location at which counseling services are available is in another state, the court may allow the person to participate in counseling in the other state in a program for the treatment of persons who commit domestic violence that has been certified pursuant to *NRS 228.470*.

3. 4. An offense that occurred within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section when evidenced by a conviction, without regard to the sequence of the offenses and convictions. The facts concerning a prior offense must be alleged in the complaint, indictment or information, must not be read to the jury or proved at trial but must be proved at the time of sentencing and, if the principal offense is alleged to be a felony, must also be shown at the preliminary examination or presented to the grand jury.

4. 5. In addition to any other fine or penalty, the court shall order such a person to pay an administrative assessment of $ 35. Any money so collected must be paid by the clerk of the court to the State Controller on or before the fifth day of each month for the preceding month for credit to the Account for Programs Related to Domestic Violence established pursuant to *NRS 228.460*.

5. 6. In addition to any other penalty, the court may require such a person to participate, at his expense, in a program of treatment for the abuse of alcohol or drugs that has been certified by the Health Division of the Department of Health and Human Services.

6. 7. If it appears from information presented to the court that a child under the age of 18 years may need counseling as a result of the commission of a battery which constitutes domestic violence pursuant to *NRS 33.018*, the court may refer the child to an agency which provides child welfare services. If the court refers a child to an agency which provides child welfare services, the court shall require the person convicted of a battery which constitutes domestic violence pursuant to *NRS 33.018* to reimburse the agency for the costs of any services provided, to the extent of his ability to pay.

7. 8. If a person is charged with committing a battery which constitutes domestic violence pursuant to *NRS 33.018*, a prosecuting attorney shall not dismiss such a charge in exchange for a plea of guilty, guilty but mentally ill or nolo contendere to a lesser charge or for any other reason unless he knows, or it is obvious, that the charge is not supported by probable cause or cannot be proved at the time of trial. A court shall not grant probation to and, except as otherwise provided in *NRS 4.373* and *5.055*, a court shall not suspend the sentence of such a person.

8. 9. As used in this section:

(a) "Agency which provides child welfare services" has the meaning ascribed to it in *NRS 432B.030*.

(b) "Battery" has the meaning ascribed to it in paragraph (a) of subsection 1 of *NRS 200.481*.

(c) "Offense" includes a battery which constitutes domestic violence pursuant to *NRS 33.018* or a violation of the law of any other jurisdiction that prohibits the same or similar conduct.

Sec. 6. *NRS 202.876* is hereby amended to read as follows:

202.876

"Violent or sexual offense" means any act that, if prosecuted in this State, would constitute any of the following offenses:

1. Murder or voluntary manslaughter pursuant to *NRS 200.010 to 200.260*, inclusive.

2. Mayhem pursuant to *NRS 200.280*.

3. Kidnapping pursuant to *NRS 200.310 to 200.340*, inclusive.

4. Sexual assault pursuant to *NRS 200.366*.

5. Robbery pursuant to *NRS 200.380*.

6. Administering poison or another noxious or destructive substance or liquid with intent to cause death pursuant to *NRS 200.390*.

7. Battery with intent to commit a crime pursuant to *NRS 200.400*.

8. Administering a drug or controlled substance to another person with the intent to enable or assist the commission of a felony or crime of violence pursuant to *NRS 200.405* or *200.408*.

9. False imprisonment pursuant to *NRS 200.460* ~~,~~ if the false imprisonment involves the use or threatened use of force or violence against the victim or the use or threatened use of a firearm or a deadly weapon.

10. Assault with a deadly weapon pursuant to *NRS 200.471*.

11. Battery which is committed with the use of a deadly weapon or which results in substantial bodily harm ~~pursuant to~~ AS DESCRIBED IN *NRS 200.481* OR BATTERY WHICH IS COMMITTED BY STRANGULATION AS DESCRIBED IN *NRS 200.481* ~~.~~ OR 200.485.

12. An offense involving pornography and a minor pursuant to *NRS 200.710* or *200.720*.

2017 Nev. SB 25

Enacted, June 5, 2017

Reporter
2017 Nev. ALS 382; 2017 Nev. Stat. 382; 2017 Nev. Ch. 382; 2017 Nev. SB 25

NEVADA ADVANCE LEGISLATIVE SERVICE > NEVADA 79TH 2017 SESSION > CHAPTER 382 > SENATE BILL 25

Notice

Added: Text highlighted in green
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Digest

Legislative Counsel's Digest:

Existing law requires the Attorney General to appoint a Committee on Domestic Violence and requires the Committee to adopt regulations to certify programs for the treatment of persons who commit domestic violence. (*NRS 228.470*) Existing law also creates the Nevada Council for the Prevention of Domestic Violence, and charges the Council with, among other duties, increasing awareness of certain issues relating to domestic violence. (*NRS 228.480*, *228.490*) Section 29 of this bill abolishes the Nevada Council for the Prevention of Domestic Violence, and sections 1, 5 and 6 of this bill transfer the duties of the Council and any subcommittees of the Council to the Committee on Domestic Violence. Sections 5 and 22.5 of this bill transfer the requirement to adopt regulations relating to programs for treatment of persons who commit domestic violence from the Committee on Domestic Violence to the Division of Public and Behavioral Health of the Department of Health and Human Services. Sections 1-4, 9, 10 and 13 of this bill make conforming changes.

Section 5 also revises the composition of the Committee on Domestic Violence to authorize the Attorney General to appoint additional members to the Committee. Further, section 5 establishes 2-year terms for each member appointed to the Committee on Domestic Violence and provides that a member may be reappointed for additional terms.

Existing law authorizes the Attorney General to organize or sponsor multidisciplinary teams to review the death of a victim of a crime that constitutes domestic violence under certain circumstances. Section 7 of this bill transfers the duties of these multidisciplinary teams to the Committee on Domestic Violence. Sections 8, 11, 12 and 19-23 of this bill make conforming changes to reflect the transfer of these duties to the Committee.

Existing law authorizes the Attorney General to issue a fictitious address to a victim, or the parent or guardian of a victim, of domestic violence, human trafficking, sexual assault or stalking who applies for the issuance of a fictitious address. (*NRS 217.462-217.471*) Sections 14-18 of this bill transfer the authority over this application process to the Division of Child and Family Services of the Department of Health and Human Services.

Synopsis

AN ACT relating to the Office of the Attorney General; transferring authority over the application for a fictitious address from the Attorney General to the Division of Child and Family Services of the Department of Health and Human Services; revising the duties of the Committee on Domestic Violence; revising provisions relating to the appointment of members to the Committee on Domestic Violence; transferring the requirement to adopt regulations relating to programs for the treatment of persons who commit domestic violence from the Committee to the Division of Public and Behavioral Health of the Department of Health and Human Services; abolishing the Nevada Council for the Prevention of Domestic Violence and transferring certain duties of the Council to the Committee on Domestic Violence; and providing other matters properly relating thereto.

Text

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS *228.205* is hereby amended to read as follows:

228.205

1. There is hereby created in the Office of the Attorney General the Victim Information Notification Everyday System, which consists of a toll-free telephone number and an Internet website through which victims of crime and members of the public may register to receive automated information and notification concerning changes in the custody status of an offender.

2. The ~~Attorney General shall:~~

~~(a) Appoint a subcommittee of the Nevada Council for the Prevention of~~Committee on Domestic Violence ~~created by~~appointed pursuant to NRS ~~228.480~~228.470 ~~to~~shall serve as the Governance Committee for the System.~~; and~~

~~(b) Consider nominations by the Council when appointing members of the Governance Committee.~~

3. The Governance Committee may adopt policies, protocols and regulations for the operation and oversight of the System.

4. The Attorney General may apply for and accept gifts, grants and donations for use in carrying out the provisions of this section.

5. To the extent of available funding, each sheriff and chief of police, the Department of Corrections, the Department of Public Safety and the State Board of Parole Commissioners shall cooperate with the Attorney General to establish and maintain the System.

6. The failure of the System to notify a victim of a crime of a change in the custody status of an offender does not establish a basis for any cause of action by the victim or any other party against the State, its political subdivisions, or the agencies, boards, commissions, departments, officers or employees of the State or its political subdivisions.

7. As used in this section:

(a) "Custody status" means the transfer of the custody of an offender or the release or escape from custody of an offender.

(b) "Offender" means a person convicted of a crime and sentenced to imprisonment in a county jail or in the state prison.

(v) The State Board of Osteopathic Medicine.

(w) The Board of Massage Therapists and its Executive Director.

(x) The Board of Examiners for Social Workers.

(y) ~~A multidisciplinary team to review~~The Committee on Domestic Violence appointed pursuant to *NRS 228.470* when, pursuant to *NRS 228.495*, the Committee is reviewing the death of the victim of a crime that constitutes domestic violence ~~organized or sponsored by the Attorney General~~ pursuant to NRS ~~228.495.~~33.018.

8. Agencies of criminal justice in this State which receive information from sources outside this State concerning transactions involving criminal justice which occur outside Nevada shall treat the information as confidentially as is required by the provisions of this chapter.

Sec. 13. NRS *200.485* is hereby amended to read as follows:

200.485

1. Unless a greater penalty is provided pursuant to subsection 2 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. A term of imprisonment imposed pursuant to this paragraph may be served intermittently at the discretion of the judge or justice of the peace, except that each period of confinement must be not less than 4 consecutive hours and must occur at a time when the person is not required to be at his or her place of employment or on a weekend.

(b) For the second 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 10 days, but not more than 6 months; and

(2) Perform not less than 100 hours, but not more than 200 hours, of community service.

The person shall be further punished by a fine of not less than $500, but not more than $1,000.

(c) For the third and any subsequent offense within 7 years, is guilty of a category C felony and shall be punished as provided in *NRS 193.130*.

2. Unless a greater penalty is provided pursuant to *NRS 200.481*, a person convicted of a battery which constitutes domestic violence pursuant to *NRS 33.018*, if the battery is committed by strangulation as described in *NRS 200.481*, is guilty of a category C felony and shall be punished as provided in *NRS 193.130* and by a fine of not more than $15,000.

3. 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 228.470.~~section 22.5 of this act.

(b) For the second offense within 7 years, require the person to participate in weekly counseling sessions of not less than 1 1/2 hours per week for 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 228.470.~~section 22.5 of this act.

If the person resides in this State but the nearest location at which counseling services are available is in another state, the court may allow the person to participate in counseling in the other state in a program for the treatment of persons who commit domestic violence that has been certified pursuant to ~~NRS 228.470.~~section 22.5 of this act.

4. An offense that occurred within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section when evidenced by a conviction, without regard to the sequence of the offenses and convictions. The facts concerning a prior offense must be alleged in the complaint, indictment or information, must not be read to the jury or proved at trial but must be proved at the time of sentencing and, if the principal offense is alleged to be a felony, must also be shown at the preliminary examination or presented to the grand jury.

5. In addition to any other fine or penalty, the court shall order such a person to pay an administrative assessment of $35. Any money so collected must be paid by the clerk of the court to the State Controller on or before the fifth day of each month for the preceding month for credit to the Account for Programs Related to Domestic Violence established pursuant to *NRS 228.460*.

6. In addition to any other penalty, the court may require such a person to participate, at his or her expense, in a program of treatment for the abuse of alcohol or drugs that has been certified by the Division of Public and Behavioral Health of the Department of Health and Human Services.

7. If it appears from information presented to the court that a child under the age of 18 years may need counseling as a result of the commission of a battery which constitutes domestic violence pursuant to *NRS 33.018*, the court may refer the child to an agency which provides child welfare services. If the court refers a child to an agency which provides child welfare services, the court shall require the person convicted of a battery which constitutes domestic violence pursuant to *NRS 33.018* to reimburse the agency for the costs of any services provided, to the extent of the convicted person's ability to pay.

8. If a person is charged with committing a battery which constitutes domestic violence pursuant to *NRS 33.018*, a prosecuting attorney shall not dismiss such a charge in exchange for a plea of guilty, guilty but mentally ill or nolo contendere to a lesser charge or for any other reason unless the prosecuting attorney knows, or it is obvious, that the charge is not supported by probable cause or cannot be proved at the time of trial. A court shall not grant probation to and, except as otherwise provided in *NRS 4.373* and *5.055*, a court shall not suspend the sentence of such a person.

9. As used in this section:

(a) "Agency which provides child welfare services" has the meaning ascribed to it in *NRS 432B.030*.

(b) "Battery" has the meaning ascribed to it in paragraph (a) of subsection 1 of *NRS 200.481*.

(c) "Offense" includes a battery which constitutes domestic violence pursuant to *NRS 33.018* or a violation of the law of any other jurisdiction that prohibits the same or similar conduct.

Sec. 14. NRS *217.462* is hereby amended to read as follows:

217.462

1. An adult person, a parent or guardian acting on behalf of a child, or a guardian acting on behalf of an incompetent person may apply to the ~~Attorney General~~Division to have a fictitious address designated by the ~~Attorney General~~Division serve as the address of the adult, child or incompetent person.

2. An application for the issuance of a fictitious address must include:

(a) Specific evidence showing that the adult, child or incompetent person has been a victim of domestic violence, human trafficking, sexual assault or stalking before the filing of the application;

2019 Nev. AB 60

Enacted, June 3, 2019

Reporter
2019 Nev. ALS 308; 2019 Nev. Stat. 308; 2019 Nev. Ch. 308; 2019 Nev. AB 60

NEVADA ADVANCE LEGISLATIVE SERVICE > NEVADA 80TH REGULAR SESSION > CHAPTER 308 > ASSEMBLY BILL 60

Notice

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Digest

Legislative Counsel's Digest:

Existing law sets forth certain unlawful acts that constitute domestic violence when committed against certain persons. (*NRS 33.018*) Section 1 of this bill revises the unlawful acts that constitute domestic violence to include coercion, burglary, home invasion and pandering. Section 1 also provides that such acts if committed by siblings against each other, unless those siblings are in a custodial or guardianship relationship, or such acts if committed by cousins against each other, unless those cousins are in a custodial or guardianship relationship, do not constitute domestic violence. Section 1.5 of this bill makes a conforming change.

Existing law requires a peace officer, under certain circumstances, to arrest a person when the officer has probable cause to believe that the person has committed a battery upon: (1) a spouse; (2) a former spouse; (3) a person to whom he or she is related by blood or marriage; (4) a person with whom he or she is or was actually residing; (5) a person to whom he or she is in a dating relationship; (6) a person with whom he or she has a child; (7) the minor child of any such person; or (8) his or her minor child. (*NRS 171.137*) Section 1.5 additionally requires a peace officer to make such an arrest if the person committed such a battery upon the custodian or guardian of the person's minor child. Section 1.5 also removes the requirement that the officer make such an arrest for a battery committed upon a person with whom he or she is or was actually residing.

Section 1.1 of this bill authorizes a peace officer, under certain circumstances, to arrest a person when the officer has probable cause to believe that the person has committed a battery within the preceding 24 hours upon: (1) a person with whom he or she is actually residing; (2) a sibling, if the person is not the custodian or guardian of the sibling; or (3) a cousin, if the person is not the custodian or guardian of the cousin. Sections 1.1 and 1.5 also provide that liability cannot be imposed against a peace officer or his or her employer for a determination made in good faith not to arrest a person suspected of committing such a battery or a battery which constitutes domestic violence, as applicable. Section 1.3 makes a conforming change.

Existing law authorizes a court to order the videotaping of a deposition under certain circumstances. (*NRS 174.227*) Existing law also authorizes, under certain circumstances, the use of such a videotaped deposition instead of the

deponent's testimony at trial. (*NRS 174.228*) Section 2 of this bill authorizes the court to order the videotaping of a deposition of a victim of facilitating sex trafficking. Section 3 of this bill makes a conforming change to allow such a videotaped deposition to be used instead of the deponent's testimony at trial. When a person is convicted of a battery which constitutes domestic violence, existing law requires the court to order the person to pay an administrative assessment of $35 to be deposited in the Account for Programs Related to Domestic Violence. (*NRS 200.485*) Section 3.5 of this bill requires the court to order a $35 fee to be paid and deposited into the Account for Programs Related to Domestic Violence if a person is convicted of certain unlawful acts which constitute domestic violence. Section 3.5 requires the court to enter a finding of fact that a person has committed an act which constitutes domestic violence in such a person's judgment of conviction. Section 3.5 also requires the court to order such a person to attend such counseling sessions relating to the treatment of persons who commit domestic violence under certain circumstances. Section 40 of this bill requires such fees to be deposited with the State Controller for credit to the Account.

Under existing law, a person convicted of a battery which constitutes domestic violence, for the first offense, is guilty of a misdemeanor and shall be punished by: (1) imprisonment in a city or county jail or detention center for not less than 2 days, but not more than 6 months; (2) community service; and (3) a fine of not less than $200 and not more than $1,000. Existing law authorizes a court to impose the term of imprisonment intermittently, except that each period of confinement cannot last less than 4 consecutive hours and cannot be served when the person is required to be at his or her place of employment. (*NRS 200.485*) Section 15 of this bill requires the court to impose intermittent confinement of not less than 12 consecutive hours for the first offense of such an act.

Additionally, under existing law, a person convicted for his or her second offense of a battery which constitutes domestic violence is guilty of a misdemeanor and is required to be imprisoned in a city or county jail or detention facility for not less than 10 days and not more than 6 months and pay a fine of not less than $500 or more than $1,000. (*NRS 200.485*) Section 15 increases the minimum term of imprisonment to 20 days.

Under existing law, a person convicted for his or her third or any subsequent offense of a battery which constitutes domestic violence is guilty of a category C felony. (*NRS 200.485*) Section 15 increases the penalty for such an act to a category B felony.

Existing law provides that any person who has previously been convicted of a battery which constitutes domestic violence that is punishable as a felony or a conviction for a similar felony of another state and who commits a battery that constitutes domestic violence is guilty of a category B felony. (*NRS 200.485*) Section 15 instead provides that a person who has previously been convicted of any felony that constitutes domestic violence or a similar offense in another state and who commits a battery which constitutes domestic violence is guilty of a category B felony.

Section 15 also provides a penalty for a battery which constitutes domestic violence where the act was committed against a victim who was pregnant at the time of such a battery. Under section 15, a person who commits such a battery: (1) for the first offense is guilty of a gross misdemeanor; and (2) for the second or any subsequent offense is guilty of a category B felony and authorizes the court to impose a minimum fine of not less than $1,000 and not more than $5,000.

Section 15 also provides that if a person is convicted of a battery which constitutes domestic violence, where such a battery causes substantial bodily harm to the victim, the person: (1) is guilty of a category B felony; and (2) the court is authorized to impose a fine of $1,000 to $15,000.

Existing law provides that a person is guilty of: (1) a category D felony if the person commits an assault upon an officer; and (2) a category B felony if the person commits an assault upon an officer with the use of a deadly weapon or the present ability to use a deadly weapon. (*NRS 200.471*) Existing law also provides that a person is guilty of: (1) a category B felony if the person commits a battery upon an officer which causes substantial bodily harm or is committed by strangulation; and (2) a gross misdemeanor if the person commits a battery upon an officer and the person knew or should have known that the victim was an officer. (*NRS 200.481*) Sections 14 and 14.5 of

this bill revise the definition of “officer” for such purposes to include a prosecuting attorney of an agency or political subdivision of the United States or of this State.

Existing law provides that a person who, without lawful authority, willfully or maliciously engages in conduct that would cause a reasonable person to feel terrorized, frightened, intimidated, harassed or fearful for the immediate safety of a family or household member, and the conduct actually causes the victim to feel such emotions, is guilty of the crime of stalking. Existing law makes such a crime punishable as a misdemeanor for the first offense, and as a gross misdemeanor for any subsequent offense. (*NRS 200.575*) Section 17 of this bill revises the definition of stalking to: (1) provide that the course of conduct must be directed at the victim; and (2) clarify that the conduct would cause the victim to be fearful for his or her immediate safety. Section 17 also increases the penalty for a third or any subsequent offense of stalking to a category C felony and authorizes a court to impose a fine of not more than $5,000. Section 17 also provides that if the crime of stalking is committed against a victim who is under the age of 16 and the person is 5 or more years older than the victim: (1) for the first offense, the person is guilty of a gross misdemeanor; (2) for the second offense, the person is guilty of a category C felony and may be further punished by a fine of not more than $5,000; and (3) for a third or any subsequent offense, the person is guilty of a category B felony and may be further punished by a fine of not more than $5,000.

Existing law authorizes a court to impose an additional fine of $500,000 on certain persons who are convicted of sex trafficking or living from earnings of a prostitute. (*NRS 201.352*) Section 21 of this bill similarly authorizes a court to impose an additional fine of $500,000 on a person convicted of facilitating sex trafficking.

Existing law provides for the compensation of certain victims of crime. (*NRS 217.010-217.270*) Section 38 and 39 of this bill expand the definition of “victim” to include victims of the crime of facilitating sex trafficking so that such persons may be compensated under certain circumstances.

Existing law requires the Attorney General to appoint a Committee on Domestic Violence whose duties include, among other things: (1) increasing awareness of domestic violence within the State; and (2) reviewing certain programs related to the treatment of persons who commit domestic violence and making recommendations concerning those programs to the Division of Public and Behavioral Health of the Department of Health and Human Services.

Existing law also requires a quorum of six members of the Committee for voting purposes. (*NRS 228.470*) Section 41 of this bill: (1) authorizes the Attorney General to appoint a subcommittee to carry out the Committee’s duty to review and make recommendations concerning such treatment programs; (2) requires a quorum of six members for all purposes; and (3) authorizes the Committee to adopt regulations necessary to carry out its duties.

Under existing law, the duties of the Office of Advocate for Missing or Exploited Children of the Office of the Attorney General include investigating and prosecuting any alleged crime involving the exploitation of children. (*NRS 432.157*) Section 42 of this bill expands the Office’s duties to include investigating and prosecuting the crime of facilitating sex trafficking involving children.

Synopsis

AN ACT relating to criminal justice; revising the definition of domestic violence; increasing certain penalties relating to a battery which constitutes domestic violence; revising provisions relating to the procedure for arresting a person suspected of committing a battery which constitutes domestic violence; enacting provisions relating to the procedure for arresting a person suspected of committing a battery against certain persons; imposing a fee on certain unlawful acts that constitute domestic violence; requiring such fees to be deposited into the Account for Programs Related to Domestic Violence; revising the definition of stalking; increasing certain penalties related to stalking; revising provisions relating to the crime of facilitating sex trafficking; revising provisions relating to the crime of assault; revising provisions relating to the crime of battery; revising provisions relating to the Committee on

Domestic Violence; revising provisions relating to the Office of Advocate for Missing or Exploited Children; providing penalties; and providing other matters properly relating thereto.

Text

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS *33.018* is hereby amended to read as follows:

33.018

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.

(b) An assault.

(c) ~~Compelling the other person by force or threat of force to perform an act from which the other person has the right to refrain or to refrain from an act which the other person has the right to perform.~~Coercion pursuant to *NRS 207.190*.

(d) A sexual assault.

(e) A knowing, purposeful or reckless course of conduct intended to harass the other person. Such conduct may include, but is not limited to:

(1) Stalking.

(2) Arson.

(3) Trespassing.

(4) Larceny.

(5) Destruction of private property.

(6) Carrying a concealed weapon without a permit.

(7) Injuring or killing an animal.

(8) Burglary.

(9) An invasion of the home.

(f) A false imprisonment.

(g) ~~Unlawful entry of the other person's residence, or forcible entry against the other person's will if there is a reasonably foreseeable risk of harm to the other person from the entry.~~Pandering.

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.

in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years.

(g) If the battery is committed by a probationer, a prisoner who is in lawful custody or confinement or a parolee, with the use of a deadly weapon, and:

(1) No substantial bodily harm to the victim results, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years.

(2) Substantial bodily harm to the victim results or the battery is committed by strangulation, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years.

Sec. 15. NRS *200.485* is hereby amended to read as follows:

200.485

1. Unless a greater penalty is provided pursuant to ~~subsection~~subsections 2 ~~or 3~~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. A term of imprisonment imposed pursuant to this paragraph may be served intermittently at the discretion of the judge or justice of the peace, except that each period of confinement must be not less than ~~4~~12 consecutive hours and must occur at a time when the person is not required to be at his or her place of employment or on a weekend.

(b) For the second 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 ~~10~~20 days, but not more than 6 months; and

(2) Perform not less than 100 hours, but not more than 200 hours, of community service.

The person shall be further punished by a fine of not less than $500, but not more than $1,000. A term of imprisonment imposed pursuant to this paragraph may be served intermittently at the discretion of the judge or justice of the peace, except that each period of confinement must not be less than 12 consecutive hours and must occur at a time when the person is not required to be at his or her place of employment or on a weekend.

(c) For the third offense within 7 years, is guilty of a category

~~C~~B felony and shall be punished ~~as provided in NRS 193.130.~~by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not less than $1,000, but not more than $5,000.

2. Unless a greater penalty is provided pursuant to subsection 3 or *NRS 200.481*, a person convicted of a battery which constitutes domestic violence pursuant to *NRS 33.018*, if the battery is committed by strangulation as described in *NRS 200.481*, is guilty of a category C felony and shall be punished as provided in *NRS 193.130*~~. and by a fine of not more than $15,000.~~

3. Unless a greater penalty is provided pursuant to *NRS 200.481*, a person who has been previously convicted of:

(a) ~~A battery which~~A felony that constitutes domestic violence pursuant to *NRS 33.018*; ~~that is punishable as a felony pursuant to paragraph (c) of subsection 1 or subsection 2;~~or

(b) A violation of the law of any other jurisdiction that prohibits the same or similar conduct set forth in paragraph (a),

and who commits a battery which constitutes domestic violence pursuant to *NRS 33.018* is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years, and shall be further punished by a fine of not less than $2,000, but not more than $5,000.

4. Unless a greater penalty is provided pursuant to *NRS 200.481*, a person convicted of a battery which constitutes domestic violence pursuant to *NRS 33.018*, if the battery is committed against a victim who was pregnant at the time of the battery and the person knew or should have known that the victim was pregnant:

(a) For the first offense, is guilty of a gross misdemeanor.

(b) For the second or any subsequent offense, is guilty of a category B felony and shall be punished by imprisonment in the state prison of a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not less than $1,000, but not more than $5,000.

5. Unless a greater penalty is provided pursuant to *NRS 200.481*, a person convicted of a battery which constitutes domestic violence pursuant to *NRS 33.018*, if the battery causes substantial bodily harm, is guilty of a category B felony and shall be punished by imprisonment in the state prison of a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not less than $1,000, but not more than $5,000.

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*.

(b) For the second offense within 7 years, require the person to participate in weekly counseling sessions of not less than 1 1/2 hours per week for 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*.

If the person resides in this State but the nearest location at which counseling services are available is in another state, the court may allow the person to participate in counseling in the other state in a program for the treatment of persons who commit domestic violence that has been certified pursuant to *NRS 439.258*.

5.7. Except as otherwise provided in this subsection, an offense that occurred within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section:

(a) When evidenced by a conviction; or

(b) If the offense is conditionally dismissed pursuant to *NRS 176A.290* or dismissed in connection with successful completion of a diversionary program or specialty court program,

without regard to the sequence of the offenses and convictions.

An offense which is listed in paragraph (a) or (b) of subsection 3 that occurred on any date preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section when evidenced by a conviction, without regard to the sequence of

the offenses and convictions. The facts concerning a prior offense must be alleged in the complaint, indictment or information, must not be read to the jury or proved at trial but must be proved at the time of sentencing and, if the principal offense is alleged to be a felony, must also be shown at the preliminary examination or presented to the grand jury.

~~6. In addition to any other fine or penalty, the court shall order such a person to pay an administrative assessment of $35. Any money so collected must be paid by the clerk of the court to the State Controller on or before the fifth day of each month for the preceding month for credit to the Account for Programs Related to Domestic Violence established pursuant to NRS 228.460.~~

7.8. In addition to any other penalty, the court may require such a person to participate, at his or her expense, in a program of treatment for the abuse of alcohol or drugs that has been certified by the Division of Public and Behavioral Health of the Department of Health and Human Services.

8.9. If it appears from information presented to the court that a child under the age of 18 years may need counseling as a result of the commission of a battery which constitutes domestic violence pursuant to *NRS 33.018*, the court may refer the child to an agency which provides child welfare services. If the court refers a child to an agency which provides child welfare services, the court shall require the person convicted of a battery which constitutes domestic violence pursuant to *NRS 33.018* to reimburse the agency for the costs of any services provided, to the extent of the convicted person's ability to pay.

9.10. If a person is charged with committing a battery which constitutes domestic violence pursuant to *NRS 33.018*, a prosecuting attorney shall not dismiss such a charge in exchange for a plea of guilty, guilty but mentally ill or nolo contendere to a lesser charge or for any other reason unless the prosecuting attorney knows, or it is obvious, that the charge is not supported by probable cause or cannot be proved at the time of trial. Except as otherwise provided in this subsection, a court shall not grant probation to or suspend the sentence of such a person. A court may grant probation to or suspend the sentence of such a person:

(a) As set forth in *NRS 4.373* and *5.055*; or

(b) To assign the person to a program for the treatment of veterans and members of the military pursuant to *NRS 176A.290* if the charge is for a first offense punishable as a misdemeanor.

10.11. In every judgment of conviction or admonishment of rights issued pursuant to this section, the court shall:

(a) Inform the person convicted that he or she is prohibited from owning, possessing or having under his or her custody or control any firearm pursuant to *NRS 202.360*; and

(b) Order the person convicted to permanently surrender, sell or transfer any firearm that he or she owns or that is in his or her possession or under his or her custody or control in the manner set forth in *NRS 202.361*.

11.12. A person who violates any provision included in a judgment of conviction or admonishment of rights issued pursuant to this section concerning the surrender, sale, transfer, ownership, possession, custody or control of a firearm is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than $5,000. The court must include in the judgment of conviction or admonishment of rights a statement that a violation of such a provision in the judgment or admonishment is a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than $5,000.

12.13. As used in this section:

(a) "Agency which provides child welfare services" has the meaning ascribed to it in *NRS 432B.030*.

(b) "Battery" has the meaning ascribed to it in paragraph (a) of subsection 1 of *NRS 200.481*.

(c) "Offense" includes a battery which constitutes domestic violence pursuant to *NRS 33.018* or a violation of the law of any other jurisdiction that prohibits the same or similar conduct.

Sec. 16. NRS *200.571* is hereby amended to read as follows:

200.571

1. A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(1) To cause bodily injury in the future to the person threatened or to any other person;

(2) To cause physical damage to the property of another person;

(3) To subject the person threatened or any other person to physical confinement or restraint; or

(4) To do any act which is intended to substantially harm the person threatened or any other person with respect to his or her physical or mental health or safety; and

(b) The person by words or conduct places the person receiving the threat in reasonable fear that the threat will be carried out.

2. Except where the provisions of subsection 2, ~~or~~ 3 or 4 of *NRS 200.575* are applicable, a person who is guilty of harassment:

(a) For the first offense, is guilty of a misdemeanor.

(b) For the second or any subsequent offense, is guilty of a gross misdemeanor.

3. The penalties provided in this section do not preclude the victim from seeking any other legal remedy available.

Sec. 17. NRS *200.575* is hereby amended to read as follows:

200.575

1. A person who, without lawful authority, willfully or maliciously engages in a course of conduct directed towards a victim that would cause a reasonable person under similar circumstances to feel terrorized, frightened, intimidated, harassed or fearful for his or her immediate safety or the immediate safety of a family or household member, and that actually causes the victim to feel terrorized, frightened, intimidated, harassed or fearful for his or her immediate safety or the immediate safety of a family or household member, commits the crime of stalking. Except where the provisions of subsection 2, ~~or~~ 3 or 4 are applicable, a person who commits the crime of stalking:

(a) For the first offense, is guilty of a misdemeanor.

(b) For ~~any subsequent~~the second offense, is guilty of a gross misdemeanor.

(c) For the third or any subsequent offense, is guilty of a category C felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 5 years, and may be further punished by a fine of not more than $5,000.

2. Except as otherwise provided in subsection 3 or 4 and unless a more severe penalty is prescribed by law, a person who commits the crime of stalking where the victim is under the age of 16 and the person is 5 or more years older than the victim:

(a) For the first offense, is guilty of a gross misdemeanor.

(b) For the second offense, is guilty of a category C felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 5 years, and may be further punished by a fine of not more than $5,000.

PET
MAYFIELD GRUBER & SHEETS
Damian Sheets, Esq.
Nevada Bar No. 10755
Kelsey Bernstein, Esq.
Nevada Bar No. 13825
726 S. Casino Center Blvd.
Las Vegas, Nevada 89101
Telephone: (702) 598-1299
Facsimile: (702) 598-1266
dsheets@defendingnevada.com
Attorney for Petitioner
Nathan Ohm

CASE NO: A-20-810452-W
Department 25

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

Nathan Ohm, Petitioner, vs. Henderson Municipal Court, and the Honorable Mark Stevens, Henderson Municipal Judge, Respondent, and City of Henderson, Real Party in Interest.	Case No.: Dept. No: Municipal Court Case No.: 19CR002297; 19CR002298 **PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI** Hearing Requested

COMES NOW, Petitioner Nathan Ohm, by and through his attorney of record, DAMIAN SHEETS, ESQ. of the firm Mayfield Gruber & Sheets, hereby submits this Petition for Writ of Mandamus or, In the Alternative, Petition for Writ of Certiorari.

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NOTICE OF HEARING

TO: Henderson Municipal Court, Respondent;

TO: The Honorable Mark Stevens, Henderson Municipal Judge, Respondent;

TO: City of Henderson, Real Party in Interest;

TO: Henderson City Attorney's Office, Real Party in Interest;

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 _____, 2020, at the hour of _____, before the above-entitled Court, or as soon thereafter as counsel can be heard.

DATED this 13 day of February, 2020.

MAYFIELD GRUBER & SHEETS
Respectfully Submitted By:

DAMIAN SHEETS, ESQ.
Attorney for Defendant

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TABLE OF AUTHORITIES

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LIST OF EXHIBITS

(Filed as Appendix under Separate Cover)

1. Petitioner's Motion to Divest Jurisdiction from the Henderson Municipal Court, filed November 14, 2019;

2. Respondent's Opposition to Motion to Divest Jurisdiction, filed December 5, 2019;

3. Petitioner's Reply in Support of Motion to Divest Jurisdiction, filed December 11, 2019;

4. Transcripts, Oral Argument on Petitioner's Motion to Divest Jurisdiction, heard December 16, 2019;

5. Transcripts, Decision on Petitioner's Motion to Divest Jurisdiction, heard January 13, 2020;

6. Henderson Municipal Ordinance No. 3632, amending Henderson Municipal Code 8.02.055, available at https://library.municode.com/nv/henderson/ordinances/code_of_ordinances?nodeId=984795;

7. *United States v. Perkins*, Case No. 2:12-cr-00354-LDG, 2012 U.S. Dist. LEXIS 173258; 2012 WL 6089664 (United States District Court for the District of Nevada, December 6, 2012);

8. Nevada Revised Statute 200.485 re: Battery Constituting Domestic Violence (2009 Version, showing relevant amendments);

9. Nevada Revised Statute 200.485 re: Battery Constituting Domestic Violence (2017 Version, showing relevant amendments);

10. Nevada Revised Statute 200.485 re: Battery Constituting Domestic Violence (2019 Version, showing relevant amendments).

MEMORANDUM OF POINTS AND AUTHORITIES

I. Statement of the Facts

This Petition challenges Respondent City of Henderson's jurisdictional authority to charge and adjudicate Petitioner's charges of battery domestic violence, without the constitutional benefit of a jury trial as required by the Nevada Supreme Court in *Andersen v. Eighth Judicial District Court*, 135 Nev. Adv. Op. 42 (2019).

On or about February 22, 2019, Petitioner Nathan Ohm was arrested and charged with two counts of Battery Domestic Violence in the Henderson Municipal Court. He was originally charged under NRS 200.485, Nevada's Battery Domestic Violence statute. On September 12, 2019, while Petitioner's case was still pending, the Nevada Supreme Court issued *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.*

Subsequent to *Andersen*, on or about October 15, 2019, Respondent passed Ordinance No. 3632, which amended the Henderson Municipal Code 8.02.055 (hereinafter "Code") specifically to create a municipal code-based violation for the offense of Battery Domestic Violence. The Code and the NRS are substantively identical.

After enacting the Code, Respondent amended the criminal complaint against Petitioner on or about October 24, 2019. The sole amendment consisted of altering the

source of the charge from the previously listed NRS, where a jury trial would be required under *Andersen*, to the newly enacted Code, where Respondent argues a jury trial is not required. This amendment, in addition to the ruling in *Andersen*, prompted Petitioner to file a Motion to Divest Jurisdiction from the Henderson Municipal Court on November 14, 2019. Respondent filed an Opposition on December 5, 2019, and Petitioner filed his Reply on December 11, 2019 (see **Exhibits 1**, **2**, and **3**, respectively). Respondent subsequently filed a Sur-Reply without leave of the Court approximately one judicial day before the scheduled argument, but at the hearing the Municipal Court indicated that it had not received the Sur-Reply and thus would not consider it. Excluding the Sur-Reply, briefing on the matter totaled approximately 139 pages.

Oral argument was heard on December 16, 2019, with a formal decision to be given January 13, 2020. On that date, the Municipal Court orally denied the Motion, but no written order was provided to or requested from the parties. Transcripts of the argument on the Motion, as well as the Court's decision, are attached hereto (see **Exhibits 4** and **5**, respectively).

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II. Issues Presented

1. Does the Amended Criminal Complaint filed on or about October 24, 2019 constitute an unlawful *ex post facto* amendment?
2. Assuming the Amended Complaint is valid, is Petitioner nonetheless entitled to a jury trial on this matter based on qualification under 18 U.S.C. § 1921(a)(33)(A)?
3. Did the Henderson Municipal Code create an equal protection violation under the Nevada and United States Constitution that is subject to strict scrutiny?
4. Does the Henderson Municipal Court lack jurisdiction to prosecute the instant case under either the Nevada Revised Statutes or Henderson Municipal Code?

III. Relief Sought

Petitioner prays that this Court issue a writ of Mandamus, or in the alternative, writ of Certiorari, directing the Henderson Municipal Court to divest itself of jurisdiction, or alternatively provide Petitioner, and those similarly situated, a trial by jury.

IV. Standard for Writ of Mandamus

This Court may issue a Writ of Mandamus to enforce the performance of an act which the law enjoins as a duty, especially resulting from an office, or to compel the admission of a party to the use and enjoyment of a right to which he is entitled and from which he is unlawfully precluded by such inferior tribunal. NEV. REV. STAT. 34.160. A writ of mandamus will issue when the petitioner has no plain, speedy and adequate remedy at law. *Scrimer v. Eighth Judicial District Court*, 998 P.2d 1190, 1193 (2000).

Mandamus will not lie to control discretionary action unless it is manifestly abused or is exercised arbitrarily or capriciously. *Office of the Washoe County DA v. Second Judicial District Court*, 5 P.3d 562, 566 (2000). Thus a writ of mandamus will issue to control a court's arbitrary or capricious exercise of its discretion. *Id. (*citing *Marshall v. District Court,* 108 Nev. 459, 466, 836 P.2d 47, 52 (1992)); *City of Sparks v. Second Judicial District Court,* 112 Nev. 952, 954, 920 P.2d 1014, 1015-16 (1996*); Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981). It is within the discretion of the appellate court to determine if such writ will be considered. *Id.*; see also *State ex rel. Dep't Transp. v. Thompson*, 99 Nev. 358, 662 P.2d 1338 (1983).

V. Standard for Interlocutory Writ of Certiorari

As no trial has yet taken place in Petitioner's matter, this appeal would otherwise be designated as interlocutory; while the Nevada Supreme Court has ruled that District Courts, as appellate courts of limited jurisdiction, do not have a specific statutory authority to consider direct interlocutory appeals, certain pre-trial matters which nevertheless originate in Justice or Municipal Court may be considered in the District Court by way of a Petition for Writ of Certiorari. Even if not specifically deemed a Writ Petition, the District Court is empowered to treat an interlocutory appeal as the proper Writ. This issue was addressed by the Nevada Supreme Court in *Salaiscooper v. Eighth Judicial Dist. Court*, 117 Nev. 892 n.2, 34 P.3d 509, 514 (2001):

///

> NRS 177.015(1)(a) permits an appeal to the district court only from a final judgment of the justice court. Here, petitioner appealed to the district court from an interlocutory order of the justice court, and there is no statutory provision or court rule permitting such an appeal. Thus, the district court lacked jurisdiction to consider the "appeal." **Petitioner should have sought, and certainly would have obtained, the district court's review of the order by way of a petition for a writ of certiorari.** This court could have then properly reviewed the district court's ruling in an appeal authorized by statute. See NRS 34.120 (authorizing an appeal to this court from an order of the district court resolving a petition for a writ of certiorari). *Id.* (citing *In re Temporary Custody of Five Minors*, 105 Nev. 441, 777 P.2d 901 (1989)) (emphasis added).

Based on the Court's ruling in *Salaiscooper*, the instant brief is designated a Petition for Writ of Certiorari, and therefore, the District Court has proper jurisdiction to consider the substantive matters contained herein.

This Court has the authority to issue a Writ of Certiorari, and the writ "shall be granted in all cases when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy." NRS 34.020. "The inquiry upon the writ could not be extended any further than is necessary to determine whether the inferior tribunal has exceeded its jurisdiction or has regularly pursued its authority." *Phillips v. Welch*, 12 Nev. 158 (1877); NRS 34.090.

In the instant matter, as the District Court would otherwise lack jurisdiction to hear a direct interlocutory appeal, there is no other plain, speedy and adequate remedy at law to challenge the jurisdictional issues raised herein. Give no other plain, speedy or adequate remedy at law exists to challenge the jurisdiction of the inferior court, the foregoing writ is procedurally proper to be considered by the District Court.

ARGUMENT

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

For ease of reference, each of the following arguments will be broken down into two subsections: Petitioner's argument, and the opposition and ruling from the Henderson Municipal Court which addresses each argument.

1. Petitioner's Argument

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, Petitioner contends the Amended Criminal Complaint violates the state and federal 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. However, Petitioner's conduct was alleged to have occurred on February 22, 2019, 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 Petitioner is being charged under a law that had not yet been enacted when the conduct allegedly occurred. As a result, the first criterion 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."

Respondent would 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 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), but they are not the only types.

Federal law has not construed "disadvantaged" as limited only to retroactive criminalization or punishment. Rather, the Courts have taken a much broader approach by specifically recognizing at least four distinct types of *ex post facto* law in addition to a fifth catch-all category recognizing a specific interest 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 modern day, the Courts have built the foundation of *ex post facto* analysis on these hallmark policies. "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, Petitioner 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 as a separately recognized category of *ex post facto* laws.

The sole amendment to the Criminal Complaint in Petitioner's case is the alteration of the underlying charging authority from Nevada Revised Statute to Henderson Municipal Code 8.02.055. However, when undertaking an *ex post facto* analysis, the courts examine not simply the bare 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, 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] (see **Exhibit 6**, publicly available but attached hereto for ease of reference).

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 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 Petitioner 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, Respondent maintains they are not (although Petitioner disagrees with Respondent'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 challenges). 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, and further impacts the defenses available to criminal defendants, such a lack of jurisdiction.

In conclusion, whether analyzed as a substantive change in the evidence received, altering the criminality of the offense, or under the most dispositive category of "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.

2. Respondent's Opposition and the Municipal Court's Ruling

On this specific point, after oral argument on Petitioner's Motion to Divest, the Henderson Municipal Court likewise concluded that retroactivity is satisfied (Transcripts, January 13, 10: 9). However, when questioning whether the change in law disadvantaged the offender affected by it, the Municipal Court only conducted a limited analysis. The Municipal Court first held that the Code did not change the criminality of conduct from the NRS, because the two are substantively identical ("it's clear the ex post[sic] facto in this case domestic battery was punishable under the NRS and was illegal under the NRS before the municipal code came about") (Transcripts, January 13, 10: 21).[1] The Municipal Court also found the Code did not increase the penalties for the offense (Transcripts, January 13, 10: 23). With regards to the fundamental fairness argument, the Municipal Court simply held that "a bench trial isn't fundamentally unfair or unjust in and of itself," and there was no fundamental right to a jury trial (Transcripts, January 13, 11: 8). Lastly, the Municipal Court concluded that the new law *did* in fact change the evidence to be received, but held this was still not a violation because the Code did not change what was legally admissible (Transcripts, January 13, 12: 2).

[1] Presumably because the transcripts were ordered to be prepared in an expedited manner, the transcripts frequently contain grammatical, spelling, and punctuation errors, as well as mistyped words (ascertainable from the surrounding context). Rather than indicate [sic] every time such an error has occurred, Petitioner would note that such errors occur throughout the transcripts, and Petitioner has engaged in *de minimis* edits to correct these errors solely for ease of understanding while at all times striving to stay true to the original transcripts. At no point does Petitioner substantively edit any portion of the transcripts beyond simple grammar/syntax corrections and single word substitutions when the context is clear.

The flaw in the Municipal Court's reasoning is simply that it fails to address Petitioner's main argument, that the *purpose* of the Code was explicitly designed to subvert the right to a jury trial. The argument is not whether a bench or jury trial is just or unjust, but rather that the focus of an *ex post facto* analysis looks to the underlying motivation of *why* the law was passed. This is the primary contention that Petitioner offered, and on this point, the Municipal Court's ruling is conspicuously silent.

Significantly, with regards to the ex post facto analysis, the Henderson Municipal Court also found that prior to amending the criminal complaint in Petitioner's case, *his right to a trial by jury had vested*.

> SHEETS: … Are you concluding that when Andersen came out that a defendant charged under the NRS had a vested right to a jury trial but that it's okay that, that vested right is removed for the reasons that you laid out under the initial ex post facto analysis you did? I'm just trying to figure out because you were kind of silent as to whether or not Mr. Ohm had a right to a jury trial before the amendment of the statute or the addition of the municipal code and are you concluding that he had that right to a jury trial when he was originally charged in department under the Nevada Revised Statute?
> COURT: Under the NRS of course he has a right to a jury trial as long as it fit within that description of the domestic battery under the federal provision that I stated previously the –
> SHEETS: And then, that's actually my follow up – … (Transcripts, January 13, 17: 11).

This is a very significant fact for purposes of ex post facto analysis. Returning to *Calder v. Bull*, "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) (emphasis added). Recognition that Petitioner had a vested right

to a jury trial prior to being charged under the Code strongly supports the unconstitutionality of amending Petitioner's complaint; prior to enactment of the Code, Petitioner had a vested right to a jury trial. Subsequent to the enactment of the Code, Petitioner no longer has a right to a jury trial (under the Henderson Municipal Court's ruling). Thus, charging Petitioner under the Code has directly taken away and impaired a vested right, thereby facially triggering the *ex post facto* prohibition.

Lastly, the Municipal Court ruled that the Code did in fact change the testimony or evidence to be received, but yet still failed to recognize an *ex post facto* violation. The Municipal Court noted that "It is certainly true that a jury would not hear motions, writs, etc. That is of course the judge that would hear those. So, in that regard, there is a change" (Transcripts, January 13, 11: 25). Nonetheless, the Municipal Court held that because it doesn't alter the "admissibility" or "what's admitted" in a case, it does not run afoul of the *Ex Post Facto* clause. However, nothing in the *Stogner* case would require a change in admissibility, only "different" testimony or evidence. "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." The Municipal Court recognized that precluding the right to a trial by jury does in fact result in different testimony to be received, and thus provides an alternative basis on which to find the Code unconstitutional when applied retroactively.

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

1. Petitioner's Argument

Respondent has maintained that charging individuals under the Henderson Municipal Code obviates the need for a jury trial. Shortly before the Code was enacted, 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 Nevada Supreme Court based its conclusion in *Andersen* 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)…

Respondent 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. Petitioner 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 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, with the exception that the most recently 2019 amendment to the NRS battery domestic violence statute increased the penalties for a second offense from a minimum of 10 days in custody to 20.

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 purportedly 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.

Petitioner posits 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." 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, Federal or Tribal law which involves the use or attempted use of force against a qualifying domestic relation. 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" that involves the use of force against a qualifying domestic relation, 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 or Federal law.

This interpretation was formally analyzed and 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 fall under 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 it contains the very argument used by Respondent in this case; 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 "particular facts" and underlying conduct of the offense, without regard to the title, source 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).

Petitioner maintains the Code qualifies as a federal "misdemeanor crime of domestic violence" under both the State law and Federal law interpretations. 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 that 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 state statute, and vice-versa.

Even assuming, for purposes of argument, that the Code and NRS were not identical (although this makes the analysis significantly clearer), the answer of whether the Code qualifies as a misdemeanor crime of domestic violence is much simpler than Respondent would make it: the Code qualifies as a "misdemeanor crime of domestic violence" because it falls squarely within the test set forth in *Hayes*. To reiterate briefly:

> 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…. *Hayes*, 555 U.S. at 421.

This Court need only fill in the blank: the Henderson Municipal Code is a misdemeanor offense that (1) has, as an element the use of force and (2) is committed by a person against a qualifying domestic relation. The conduct that is proscribed by the Code is a misdemeanor under State law because it is identical to the NRS. Therefore, the Code qualifies as a misdemeanor crime of domestic violence. The inquiry should end there, and need not be made any more complicated.

For further support, the Federal District of Nevada case *United States v. Perkins* (see **Exhibit 7**, publicly available but attached hereto for ease of reference) is instructive. In *Perkins*, the named defendant was convicted in North Las Vegas Municipal Court of simple battery. Perkins was subsequently arrested and charged in federal court with being a prohibited person in possession of a firearm. After being federally charged, Perkins withdrew his plea to the simple battery in North Las Vegas Municipal Court, and the final conviction was reduced to disturbing the peace.

Perkins filed a Motion to dismiss his federal case, raising two issues: first, that Perkins was unaware that a simple battery conviction carried a firearm restriction under federal law; and second, that he is not a prohibited person because the charge was amended from simple battery (which qualifies as a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A)) to disturbing the peace (which does not). The Federal District of Nevada first ruled that Perkins' lack of knowledge regarding the federal firearms restriction arising from a simple battery conviction was immaterial and irrelevant to the charges, also explicitly confirming that a simple battery conviction can trigger the firearms restriction, even when the conviction comes from a municipal court. On the second contention, the Court held that a federal charge of being a prohibited person in possession of a firearm is a "status offense." "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 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." *Id.*

The Federal Court's recognition that the federal charge is a "status offense" is significant. The Federal District Court granted the Government's Motion in Limine to preclude Defense Counsel from presenting the actual name of the conviction that was underlying the federal firearms charges with regard to that reduction to disturbing the peace precisely because the firearms charge is a status crime, i.e. governed by the status of whether the underlying predicate conduct meets the federal definition of a misdemeanor crime of domestic violence at the time the firearm is possessed.

In denying Perkins' request to dismiss the case, the Federal Court held that the case could proceed because Perkins had been convicted of a "misdemeanor crime of domestic violence" at the time he possessed the weapon. The Court did not distinguish between the source of the law or the type of court from which the underlying conviction originated, so long as the conduct qualifies as a misdemeanor crime of domestic violence per 18 U.S.C. § 921(a)(33)(A).

In conclusion, an allegation of conduct that contains the use of force against a federally qualifying domestic relation will bring the charge within the purview 18 U.S.C. § 921(a)(33)(A). An offense of domestic violence under the Henderson Municipal Code, which would also be a misdemeanor under State statute given the identical prohibitions as well as its application under the *Hayes* definition, is 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.

2. Respondent's Opposition and the Municipal Court's Ruling

In written briefing and oral argument on the matter, Respondent attempted to circumvent the plain language of the § 921(a)(33)(A) by constantly replacing the phrase "an offense that is a misdemeanor" with "a conviction that is a misdemeanor":

- "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)

- "That source of law requirement requires that the conviction must either be a federal conviction, a state conviction or a tribal conviction and so, that's why this Court needs to deny that part of the motion…" (Transcripts, December 16, 38: 19).

Despite Respondent's repeated use of the word "conviction," the plain language of the law specifically uses the term "offense." The distinction is significant, as Respondent's mistaken reliance on a "conviction of Federal, State or Tribal law" is the underpinning of its entire opposition.

Respondent argued 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); this 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 to Respondent'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." It simply requires an "offense that is a misdemeanor under Federal, State or Tribal law."

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 Respondent conceded, and as the Henderson Municipal Court also recognized, the same conduct both violates the Code and NRS given

laws' respective identical content. Therefore, *conduct that amounts to a violation of the Code is an offense that 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.

Returning again to the language in *Hayes*, "§ 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…" *Hayes*, 555 U.S. at 421. *Hayes* make it clear that the federal definition of a "crime of domestic violence" requires a conviction in any court of an offense that contains specific elements, namely the use of force and that such force is directed against a qualifying domestic relation. The Henderson Municipal Code applies on all counts.

Although Respondent argued 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, Respondent relied on one case from the Tenth Circuit and two District-level cases, but Respondent also acknowledged that all three of these cases examined an argument that is entirely different than what Petitioner raises here. Specifically, the Tenth Circuit case 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 Petitioner does not seek to expand the facial definition of the word

"State," the cases cited (and the conclusions based on that specific argument) are inapposite to this analysis.

Respondent further argued 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). Interestingly, Respondent acknowledged this both in written briefing and in oral argument on the Motion as well. "[T]he Hayes case and the Belless case just dealt with what is required for a predicate offense and that was use of force. Those cases look at the elements of the crime… So, those cases the Hayes and Belless case dealt with what is the qualifying predicate offense and what elements needed to be included in that" (Transcripts, December 16, 38: 4). Further, Respondent's position 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… Respondent's position would assign a different meaning of the word "offense" to the two subsections. Under Respondent'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, is 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.

When Petitioner attempted to clarify the Henderson Municipal Court's oral ruling to determine if it was adopting the City's position on this point, the Municipal Court concluded that it was ruling in favor of the City, but refused to affirmatively adopt or refute that

position, ultimately failing to provide clarification one way or the other, effectively sidestepping the offense/conviction dichotomy issue:

> SHEETS: That actually was my next question. Just to see if you would clarify for me Your Honor. In your analysis of 921(a)(33)(A), the definition that says it is a violation of federal, state or tribal law and then it goes on to list offense conduct. Is Your Honor concluding that the word "is" requires a conviction under an actual statute in the state or can it meet the definition of a crime in the state?
>
> COURT: I'm going to have a plain reading of that. It says, "is a misdemeanor under federal, state or tribal." This is municipal or local and doesn't fall under that.
>
> SHEETS: So, I think it's fair to say that you're concluding that it requires a conviction under the federal, state or tribal law, does that sound right?
>
> COURT: No, I'm saying that it doesn't fit the definition of 18 U.S.C. section 921 (a)(33) misdemeanor under federal, state or tribal. There is no indication that it includes municipal or local law.
>
> SHEETS: Okay. And the reason that I was just trying to clarify is just because the position that the underlying conviction for a municipal code would be a violation of state law. So, that's why I was trying to figure out if Your Honor is concluding that it has to be charged or convicted under the federal, state or tribal and if that's where the definition is within your purview. That's the only. I'm just trying to clarify it for the court.
>
> COURT: Plain reading of the statute 18 U.S.C. misdemeanor under federal, state or tribal. This is municipal and certainly if they wanted municipal or local they would have put that in there and that's not included in there.
>
> SHEETS: And the only other question I had… (Transcripts, January 13, 18: 6).

For these reasons and those raised above, the Henderson Municipal Code qualifies as a "misdemeanor crime of domestic violence" under the federal definition in 18 U.S.C. §

921(a)(33)(A), further clarified in *Hayes*. As such, a conviction for battery domestic violence under the Code triggers the firearms restrictions in NRS 202.360, and per the Nevada Supreme Court's ruling in *Andersen* that said firearm restrictions elevate the charge to a serious offense, a trial by jury is required.

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

1. Petitioner's Argument

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*, NRS 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 Code. Respondent holds the position that charging an individual under the Code 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, Respondent'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 Petitioner maintains the position that even charges for misdemeanor battery domestic violence under the Code nonetheless require a trial by jury (see § B, *supra*), assuming Respondent'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, Respondent'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. Additionally, the Henderson Municipal Court also concluded that prior to charging Petitioner under the Code, Petitioner had a vested right to a jury trial under the NRS.

> SHEETS: … I'm just trying to figure out because you were kind of silent as to whether or not Mr. Ohm had a right to a jury trial before the amendment of the statute or the addition of the municipal code and are you concluding that he had that right to a jury trial when he was originally charged in department under the Nevada Revised Statute?
> COURT: Under the NRS of course he has a right to a jury trial as long as it fit within that description of the domestic battery under the federal provision that I stated previously…
> (Transcripts, January 13, 17: 16).

As such, because the Code directly removed a vested fundamental right, 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 City of Henderson cannot establish a substantial government interest because the Ordinance itself makes apparent that 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. Petitioner 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 Respondent'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.

2. Respondent's Opposition and the Municipal Court's Ruling

The Henderson Municipal Court's ruling on this point was somewhat quizzical; ultimately, the Municipal Court ruled that strict scrutiny did not apply because the jury trial

is not a fundamental right. Specifically, the Municipal Court ruled that Battery Domestic Violence does not require a jury trial as a fundamental right because it is still a "petty offense" per *Amezcua*. *Amezcua v. Eighth Judicial District Court*, 130 Nev. 45, 46, 319 P.3d 602 (2014). However, the Municipal Court's ruling is flawed in that it relies on a premise which is factually incorrect.

> After that case [*Amezcua*], the legislature passed that amendment to domestic battery laws as well as NRS 202.360 and the statute prohibited a firearm by some individuals. 202.360 says, shall not own or have in possession, or under his custody or control a firearm if the person has been convicted in this state or any other state of a misdemeanor crime of domestic violence as defined by 18 U.S.C. section 921 (a)(33). The Nevada Legislature also included the increase in the minimum jail term for domestic battery second offense…
>
> After that legislation was passed in the Supreme Court in Andersen in 2019 readdressed domestic battery after the legislative change. Based upon the legislative change the Supreme Court in Andersen found that the Nevada Legislature had amended the penalties associated with misdemeanor domestic battery convictions when it prohibited the possession of firearms under the state law by those that are convicted. That change the Andersen court said was a basis for the distinction between Amezcua, the previous case in 2014 and Andersen. Once the Nevada Legislature added that additional penalty of loss of gun rights under NRS 202.360, upon conviction a right to a jury trial attached…
>
> After the Andersen ruling Henderson Municipal Court or Henderson Municipal Code added 08.02.055. It was passed by the Henderson City Council making domestic battery a municipal code misdemeanor. The HMC has the same elements and penalties as NRS for domestic battery prior to the legislative change in 2015. So, it did not increase the domestic battery second offense minimum jail time and is an apparent attempt to avoid NRS 202.360 because of the definition of misdemeanor under 18 U.S.C. section 921(a)(33)…
>
> [D]omestic battery law prior to the 2015 legislative changes was found to be a petty offense by the Supreme Court in Amezcua. Therefore, and the argument is that because it was a petty offense before the firearm provision and the state statute regarding firearms came into place it

> doesn't meet that standard for the firearms provision in the state's statute and that it is an additional or it isn't subordinating fundamental right to a jury trial because it doesn't attach on a petty offense (Transcript, January 13, 8: 5-11: 21).

If Petitioner is understanding the Municipal Court correctly, it held that battery domestic violence under the Code does not require a jury trial as a fundamental right because *Amezcua* still considers the charge to be a petty offense. The Municipal Court concluded that the Code copied the domestic violence statute that existed "prior to the legislative change in 2015," and therefore contains the version of the NRS that existed prior to the firearms provision that was originally governed by *Amezcua*. As further support that the Code uses the statute that existed *prior* to the firearms legislation, the Municipal Court further noted that the Code did not contain the increase in penalties from ten days in custody to twenty for a domestic violence second offense.

Upon closer inspection, with no disrespect intended to the Municipal Court, reasoning used is factually flawed. There was no amendment to the battery domestic violence statute in 2015, and in fact NRS 200.485 remained exactly the same from 2009 to 2017. Because the firearms legislation was amended in 2015, there is simply no such thing as a domestic violence statute that existed "prior to the legislative change in 2015." The increase in penalty from ten days in custody to twenty occurred in 2019. Thus, the Code copied the battery domestic violence statute that existed from 2009-2017, even though the firearms amendment was passed in 2015. Therefore, the Code cannot be controlled by *Amezcua* because the statute on which it is based existed both before and after the firearms

amendment was passed (the 2009, 2017 and 2019 amendments to Nevada's battery domestic violence statute are attached hereto as **Exhibits 8**, **9** and **10**, respectively).

The Municipal Court concluded that *Amezcua* controls because "the HMC has the same elements and penalties as NRS for domestic battery prior to the legislative change in 2015. So, it did not increase the domestic battery second offense minimum jail time and is an apparent attempt to avoid NRS 202.360." This reasoning is unsound. The Code has the same elements and penalties that existed for domestic battery both before *and after* the firearms legislation passed in 2015 (because Nevada's battery domestic violence statute was not amended from 2009 to 2017). That the Code uses the ten day penalty instead of twenty days for a second offense means the Code did not adopt the 2019 amendment, but that amendment has no relevance to the firearms provision that was passed in 2015.

The factual error of the Municipal Court's argument undermines its entire reasoning. *Amezcua* cannot control the Code because the statute on which the Code is based existed in its same form *after* the firearms legislation passed in 2015 that made it a serious offense.

Additionally, Respondent's opposition the equal protection claim is equally unsound. Specifically, Respondent relied on three premises: that Petitioner did not meet the test for discriminatory prosecution; that a jury trial under the Sixth Amendment is not a fundamental right; and that prosecutorial discretion permits the City to decide whether an individual is charged under City or County jurisdiction, essentially permitting Respondent to determine when the accused is entitled to a trial by a jury.

Regarding the first premise, a large percentage of Respondent's written and oral opposition was based on a selective or discriminatory prosecution analysis (see, City's Opposition, 43; Transcripts, December 16, 45: 13). "They're saying that, hey two people are prosecuted one goes to justice court, one goes to Henderson [Municipal]. What the test requires Your Honor, is that you have to show that the people similarly situated, some of them are not being prosecuted and some of them are" (Transcripts, December 16, 46: 6). However, Petitioner affirmed that he was *not* making a selective prosecution claim, and therefore the entire discriminatory prosecution analysis is more or less irrelevant. "This is not that they're choosing to prosecute some people but not others, you know even the example that I gave where it's two people who commit the same conduct one is going to justice court, one is going to municipal they're still both being prosecuted. So, this is not an instance of selective prosecution and truthfully, I don't believe that, that analysis has any place in our argument. This is not a selective prosecution claim" (Transcripts, December 16, 61: 21).

As to the second point, Respondent argued during oral argument that a jury trial under the Sixth Amendment is not a fundamental right:

> During argument for defense counsel said they had cited to a number of case laws here that at first glance it appears like there is substantial support in the Supreme Court that there is a fundamental right to a jury trial and the city is violating that, but I decided to unpack that a little bit Your Honor, because I was curious about that… So, of those five cases another one of those cases were abrogated. Three of those cases are seventh amendment cases and the last case is a sixth amendment case that abrogated the previous two that we cited. Interestingly enough they don't put any cites in their string of parentheticals that says that, "Hey, those cases that we are saying have a fundamental right to a jury trial. This actual last case abrogated these last two." So, there is actually

> no legal basis to support their argument that there is a fundamental right to a jury trial… (Transcripts, December 16, 42: 22; 44: 5).

Respondent's position that a jury trial under the Sixth Amendment is not a fundamental right is bewildering. A right to a trial by jury is constantly recognized as *the* most fundamental right protected by our constitution. Nonetheless, it should be apparent that a jury trial under the Sixth Amendment is in fact a fundamental right. "Moreover, in view of our heritage and the history of the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right… Trial by jury in a court of law and in accordance with traditional modes of procedure after an indictment by grand jury has served and remains one of our most vital barriers to governmental arbitrariness. These elemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or convenience." *Reid v. Covert*, 354 U.S. 1, 9, 77 S. Ct. 1222, 1226-27 (1957). "The right to jury trial guaranteed by the Sixth and Fourteenth Amendments 'is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants.'" *Brown v. Louisiana*, 447 U.S. 323, 330, 100 S. Ct. 2214, 2221 (1980) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968)).

Regarding Respondent's third point, Respondent argued that prosecutorial discretion permits them to decide, for whatever reasons it deems fit, to decide if individuals are prosecuted under County versus City authority, even after recognizing that the outcome of this decision determines whether the accused is afforded a jury trial or not for the same

conduct. The Henderson Municipal Court agreed that Respondent maintains this discretion: "So, in this case there is no indication that individuals are being treated differently that are charged with this ordinance[sic] and also the prosecutor sometimes has discretion as a charging authority and isn't required that they have do it whether ordinance or NRS. They have the ability to make that decision and as indicated there is no classification as a protected class anybody that is charged with domestic battery…" (Transcripts, January 13, 14: 15).

The Court explicitly conditioned its reasoning based on *Hudson v. City of Las Vegas*, 81 Nev. 677, 409 P.2d 245 (1965). Upon reading the *Hudson* case, however, the Municipal Court again bases its reasoning on a factually incorrect premise. The Municipal Court reasoned that charging under the Code versus the NRS was legitimate, even after concluding the NRS creates the right to a jury trial whereas the Code does not, for the following reason:

> [B]ased on the decision on the fact that it's a petty offense there is no protected class and so, in justice court or municipal court can have concurrent jurisdiction over a domestic violence charges. The Hudson v. City of Las Vegas a 1965 case involving contributing to the delinquency of a minor and the argument was that there was at the time NRS that made it a gross misdemeanor or a felony which would require a jury trial, but Las Vegas also had it as a municipal code. The argument was that it couldn't do that under the municipal code because it's the same act and one is without a jury, the other one was with a jury and in that decision they said there was no statutory guarantee of a trial by jury when a municipal ordinance, when there a municipal ordinance and a state and they coincide and the prosecution can decide whether to charge it in justice court requiring a jury trial or allowing for a jury or municipal code, a municipal court with municipal code and not having a jury. So, in conclusion I find that they are allowed to charge it in either court. In conclusion I don't find an equal protection violation. Transcripts, January 13, 15: 4.

The Municipal Court recognized that charging defendants with battery domestic violence under County authority permitted them a trial by jury as a serious offense, but charging defendants under City authority does not permit them a trial because it remains a petty offense. Ultimately, the Municipal Court held that despite this distinction, prosecutors have discretion to choose which authority to bring charges. To support this reasoning, the Municipal Court relies on several factual predicates from *Hudson* to reach its conclusion: first, the charge of contributing to the delinquency of a minor "was at the time NRS that made it a gross misdemeanor or a felony which would require a jury trial, but Las Vegas also had it as a municipal code" as a misdemeanor; second, that "it's the same act and one is without a jury, the other one was with a jury;" and third, that "when there a municipal ordinance and a state statute and they coincide and the prosecution can decide whether to charge it in justice court requiring a jury trial or a… municipal code and not having a jury." All of these three factual predicates from the *Hudson* case form the basis for the Municipal Court's conclusion that "I find that they are allowed to charge it in either court." However, upon a cursory reading of the case, *all three* of these factual premises are false.

In *Hudson*, the charge of contributing to the delinquency of a minor was not a gross misdemeanor or felony under state law, but rather a misdemeanor under *both* state statute and municipal code. Indeed, the Nevada Supreme Court specifically recognized that Hudson was charged under a local ordinance that "incorporates by reference certain acts which had been declared misdemeanors by the state and makes them misdemeanors under local law." *Hudson v. Las Vegas*, 81 Nev. 677, 678, 409 P.2d 245, 246 (1965) (underline added).

This distinction is significant because it goes to the second premise of the Municipal Court's reasoning, that "it's the same act and one is without a jury, the other one was with a jury." This is precisely what the Nevada Supreme Court held is *not* the case. Hudson premised his argument on the legal theory that misdemeanors were entitled to jury trials in state court, which is why charging him under the municipal code (where he would not be afforded a jury trial) was unlawful. The Nevada Supreme Court held there was no violation because it was not entitled to a jury trial under *either* state or municipal law. "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, 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..." *Id.* at 679. The Supreme Court then further analyzed why the crime of contributing to the delinquency of a minor would not be entitled to a jury trial under *Ruhe* and its progeny, which 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. The offense charged in this complaint was unknown at common law." *Id.*

Lastly, the Municipal Court claimed that *Hudson* ruled "when there a municipal ordinance and a state statute and they coincide and the prosecution can decide whether to charge it in justice court requiring a jury trial or a… municipal code and not having a jury."

However, the *Hudson* case has no mention of prosecutorial discretion whatsoever. In fact, it never considered the issue of the prosecutor's discretion to charge under specific authorities at all. The challenge in *Hudson* was simple: Hudson alleged he would be entitled to a jury trial under state law, therefore he should be entitled to a jury trial under the municipal code for the same charge. The Nevada Supreme Court ruled that Hudson was *not* entitled to a jury trial under state law, because contributing to the delinquency of a minor is a petty offense, and therefore there is no violation for charging him under the municipal code that also precludes a jury trial.

In the instant case, the Municipal Court relied on *Hudson* to conclude that it was acceptable to charge Petitioner under the municipal law, where he would not be entitled to a jury trial, whereas if Petitioner were charged under state law, he would be entitled to a jury trial. In actuality, *Hudson* reached a completely different conclusion: Hudson was not entitled to a jury trial under *either* state or municipal law, and therefore prosecutors had discretion to charge him in either jurisdiction. It did not address the question of prosecutorial discretion when the defendant *is* entitled to a jury trial under one authority and not the other, as the right to a jury trial for *any* misdemeanor offense was not recognized in Nevada until *Andersen* over fifty years later.

As a result, the factual premises relied on the Henderson Municipal Court are factually inaccurate and do not provide any legal support to the Municipal Court's ultimate conclusion that such an unfettered level of discretion is permissible when this discretion permits prosecutors to decide when a defendant is, or is not, entitled to exercise a fundamental right.

In conclusion, the Code creates an equal protection violation because under the Nevada Revised Statute, Petitioner had a vested right to a trial by jury for his charges of battery domestic violence. This right still exists if Petitioner is charged under County authority. However, Petitioner is denied this right, deemed fundamental per *Andersen* because the charge is a "serious" offense under the Sixth Amendment, when he is charged under City authority. Because the City and County exercise concurrent jurisdiction over conduct committed within city limits, whether Petitioner can invoke this fundamental right depends purely on what authority he is charged under; there is no uniform principles or standards to determine whether individuals are charged under City or County authority, and the Henderson Municipal Court concluded that prosecutorial discretion permits prosecuting agencies to determine where he is ultimately charged. As a result, Respondent has the ability to arbitrarily determine when criminal defendants are able to exercise a vested fundamental right.

Under this framework, two similarly situated individuals who commit the same conduct, at the same time, in the same place, can be charged differently. For the one who is charged under County authority, he can exercise his right to a jury trial under the Sixth Amendment. For the other who is charged under City authority, he cannot exercise this right. When the only distinction between two similarly situated individuals is the availability of a fundamental right, which may be granted or taken away by an act of arbitrary prosecutorial discretion, an Equal Protection violation results.

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

1. Petitioner's Argument

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 an unconstitutional Equal Protection 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 that permit trials which are only summary and without a jury.

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 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.

Respondent 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.

2. Respondent's Opposition and the Municipal Court's Ruling

In its written opposition to Petitioner's Motion to Divest Jurisdiction, Respondent argued that the prohibition of NRS 266.550 did not apply to Henderson because the municipality was incorporated by special charter.

> 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 P.2d 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 (City's Opposition, 61).

However, the jury trial prohibition in NRS 266 also contains a caveat that it will apply to cities incorporated under a special charter if the special charter explicitly recognizes the applicability of the NRS. See, NRS 266.005 ("*Except as otherwise provided in a city's charter*, the provisions of this chapter shall not be applicable to incorporated cities in the State of Nevada organized and existing under the provisions of any special legislative act or special charter…") (emphasis added).

In this case, the Henderson Municipal Court expressly concluded that the Henderson City Charter did in fact incorporate NRS 266, and therefore incorporated the jury trial prohibition in NRS 266.550:

> Where it states essentially that based on a special charter these provisions don't apply. So, that would indicate that Henderson because it is a special charter it would be exempt from 200.550. However, so, it would put us back to where you could do jury trials in municipal court in Henderson because it is a special charter and therefore 266.550 would not apply. However, you have Henderson Municipal Code 4.015 and it says, there is a municipal court for the City of Henderson consist of at least one department, each department must be presided over by a municipal court judge that has such power and jurisdiction as prescribed in and is in all respects which are not inconsistent with this chapter governed by the provisions of chapter 5 and 266 of the NRS, which relates to municipal courts. That brings us back to 266 being incorporated into the HMC. So, the plain reading of HMC seems to incorporate 266 which would include 266.550 which prohibits conducting a jury trial in municipal court. So, although I think if it was – if the municipal code didn't say it's governed by 266 of the NRS then the prohibition wouldn't come into effect. Because it is a special charter but I think by doing that by the HMC saying it's governed by 266 and how the power and authority is provided and 266.550 says unless we summary them without a jury in conclusion based on the current legislation NRS 266.550 and HMC 4.015 incorporating 266 the Henderson Municipal Court at the current date doesn't have current authority to conduct a jury trial without a state legislative change… (Transcripts, January 13, 5: 22).

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 Supreme Court, where the right to a trial by jury for these charges 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 well as the Code's repugnancy to the Nevada and Federal Constitutions. 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 must be divested of jurisdiction.

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