

IN THE SUPREME COURT OF THE STATE OF NEVADA

Nathan Ohm,	)	Supreme Court Case No.:
Petitioner,)	
	)	Electronically Filed
vs.	)	Oct 19 2020 03:20 p.m.
	)	Elizabeth A. Brown
	)	Clerk of Supreme Court
Eighth Judicial District Court, and the)	
Honorable Kathleen Delaney, District	)	PETITIONER’S APPENDIX INDEX
Court Judge,)	
Respondents,)	Vol. II
)	Bates 151-350
and)	
)	
City of Henderson,)	
Real Party in Interest.)	
)	

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

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

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

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

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

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

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

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

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

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

1 the same sub-section of that statute. Meaning
2 offense, meaning conduct that is a misdemeanor under
3 federal, state and tribal law and this also comports
4 your Honor, with the very strong public policy
5 argument that is articulated in Hayes and to get to
6 this they quote from the 9th Circuit case Bellis v.
7 United States and I do have a quote here that I think
8 is fairly important to these proceedings. "The
9 purpose of the statute, the firearm prohibition. The
10 purpose of the statute is to keep firearms out of the
11 hands of people whose past violence in domestic
12 relationships makes them untrustworthy custodians of
13 deadly force." and that's the basis that they use to
14 say, "It's not the name of the conviction that
15 matters. It's not all these technical, logistical
16 reasons. It's designed to target people whose past
17 violence in domestic relationships makes them
18 untrustworthy custodians of deadly force." That
19 exact same reasoning, that exact same purpose of the
20 statute applies to this case where we have a
21 prescription for the exact same thing, that would
22 then trigger exact same policy argument that the U.S.
23 Supreme Court explicitly adopted in the Hayes case
24 and so based on that your Honor we are left with the
25 question of whether or not conduct that violates the

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

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

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

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

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

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

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

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

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

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

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

1 Mr. Perkins original criminal complaint in the North
2 Las Vegas Municipal Court was I want to see in 2010,
3 2010 or 2011 that's I don't think we're going to be
4 able to get another copy to know for sure. However,
5 there is another municipal code that's still in
6 effect that essentially incorporates the NRS and
7 says, that anything that is a criminal offense or
8 criminal misdemeanor under the NRS, is also a
9 criminal offense or a criminal misdemeanor under the
10 municipal code and that essentially is what gives the
11 municipal court authority to prosecute what would
12 otherwise be strictly state offenses, but that raises
13 a very interesting question because he was convicted
14 in North Las Vegas Municipal Court, then subsequently
15 charged in federal court with possessing a firearm.
16 So, is there really a substantive difference between
17 Isaiah Perkins and Mr. Ohm's case because for Isaiah
18 Perkins we have him being charged in theory under a
19 code that incorporated the NRS. Versus here, he is
20 being charged under a code that copied the NRS and
21 so, if one of those resulted in federal prosecution
22 charges for carrying a firearm, there's really no
23 basis to say that this would result in the same thing
24 because it qualifies under the federal definition.
25 So, that was the basis as to why we included it in

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

14 COURT: I'll let you reply.

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

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

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

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

16 COURT: Okay, thank you and city?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 COURT: Okay, and counselor.

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

1 kind on to move on to the next issue here.

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

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

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

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

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

18 BERNSTEIN: Are you done now?

19 COURT: Okay, go ahead counselor.

20 REARDON: I sat down, so.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 BERNSTEIN: Are you asking me or city?

6 COURT: Both actually, since this wasn't
7 really addressed in this new issue that seems to be -
8 --

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

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

25 BERNSTEIN: Got a copy of the complaint.

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

5 COURT: Since I have not reviewed that.

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

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

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

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

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

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

12 COURT: Okay.

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

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

21 BERNSTEIN: Correct.

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

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

1 municipal code on the docket either.

2 COURT: And counsel is that your
3 understanding?

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

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

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

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

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

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

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

5 COURT: Counselor, what's your thoughts?

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

9 COURT: Are you out the full week?

10 REARDON: Yes, your Honor.

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

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

16 CLERK: We're vacated.

17 COURT: We're vacated.

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

21 COURT: Okay.

22 CLERK: Ten o'clock.

23 COURT: Yeah, ten o'clock.

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

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

3 REARDON: No opposition, your Honor.

4 COURT: Okay.

5 BERNSTEIN: Alright, thank you.

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

9 CLERK: Concludes criminal trials.

10 ***

11 ///

1 CERTIFICATE OF TRANSCRIBER

2 STATE OF NEVADA)

3) ss.

4 COUNTY OF CLARK)

5
6 I, HUMBERTO RODRIGUEZ, declare as follows:

7 That I transcribed the AUDIO FILE presented.

8 I further declare that I am not a relative
9 or employee of any party involved in said action, nor
10 a person financially interested in the action.
1112 Dated at Las Vegas, Nevada this 27th day of
13 January, 2020.14 

15 /s/Humberto Rodriguez

16 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

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

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

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

21 COURT: Counselor.

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

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

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

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

15 SHEETS: Right, so, ---

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

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

1 that.

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

1 However, so, it would put us back to where you could
2 do jury trials in municipal court in Henderson
3 because it is a special charter and therefor 266.550
4 would not apply. However, you have Henderson
5 Municipal Code 4.015 and it says, there is a
6 municipal court for the City of Henderson consist of
7 at least one department, each department must be
8 presided over by a municipal court judge that has
9 such power and jurisdiction as prescribed in and is
10 in all respects which are not inconsistent with this
11 chapter governed by the provisions of chapter 5 and
12 266 of the NRS, which relates to municipal courts.
13 That brings us back to 266 being incorporated into
14 the HMC. So, the plain reading of HMC seems to
15 incorporate 266 which would include 266.550 which
16 prohibits conducting a jury trial in municipal court.
17 So, although I think certainly if it was --- If the
18 municipal code didn't say it's governed by 266 of the
19 NRS then the prohibition wouldn't be in affect
20 Because it is a special charter but I think by doing
21 that by the HMC saying it's governed by 266 and how
22 the power and authority is provided and 266.550 says
23 unless we summary them without a jury in conclusion
24 based on the current legislation NRS 266.550 and HMC
25 4.015 incorporating 266 the Henderson Municipal Court

1 at the current date doesn't have current authority to
2 conduct a jury trial without a state legislative
3 change or a municipal court code amendment that would
4 allow to maybe make exceptions for domestic battery
5 or wouldn't reference that the power and authority is
6 governed by 266. So, with that in mind the sixth
7 amendment right to jury trial (INAUDIBLE) and Nevada
8 Supreme Court case held that the sixth amendment
9 guarantees an individual the right to a jury trial,
10 but it doesn't extend to every criminal proceeding.
11 The right to a jury trial attaches only on serious
12 offenses and the defendant in cases involving petty
13 offenses are not entitled to a jury trial. Amezcua
14 in another Nevada Supreme Court case dating back to
15 2014 considered the statutory frame work for
16 criminalizing domestic battery and if that frame work
17 warranted a jury trial the court determined that the
18 legislature had not elevated the offense of domestic
19 battery from a petty offense to a serious offense and
20 therefore the right of a trial by jury did not
21 attach. The court specifically considered potential
22 loss of second amendment rights and loss of firearm
23 rights under the federal law after a misdemeanor
24 conviction in domestic battery under send that along
25 but concluded that it was a collateral consequence

1 and did not impact that legislative determination of
2 whether the domestic battery was a serious offense
3 and the consequences were therefor irrelevant in that
4 it determined, undetermined whether they would be
5 entitled to a jury trial. After that case legislature
6 passed that amendment to domestic battery laws as
7 well as NRS 202.306 and the statute prohibited a
8 firearm by some individuals. 202.306 says, shall not
9 own or have in possession, or under his custody or
10 control a firearm if the person has been convicted in
11 this state or any other state of a misdemeanor crime
12 of domestic violence as defined by 18 U.S.C. section
13 921(a)(33). The Nevada Legislature also included the
14 increase in the minimum jail time for domestic
15 battery second offense. The firearms provision is a
16 class "B" felony if it falls under the definition 18
17 U.S.C. section 922(a)(33). After that legislation was
18 passed in the Supreme Court in Andersen in 2019
19 readdressed domestic battery after the legislative
20 change. Based upon the legislative change the Supreme
21 Court in Andersen found that the Nevada Legislature
22 had amended the penalties associated with misdemeanor
23 domestic battery conviction when it prohibited the
24 possession of firearms under the state law by those
25 that are convicted. That change the Andersen court

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

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

1 second offense, at least with regards to the minimums
2 where it went from ten days to twenty days in the new
3 NRS but the code, municipal code maintained the pre
4 2015 penalties of ten days minimum and there is an
5 argument of fundamental fairness and manifest
6 injustice and something the defense argued that
7 ordinary or the ordinance averts the fundamental
8 right to a jury trial. Of course, you know, a bench
9 trial isn't fundamentally unfair or unjust in it of
10 itself and in this case the right to a jury trial
11 only attaches if it's a serious offense and domestic
12 battery law prior to the 2015 legislative changes was
13 found to be petty offense by the Supreme Court in
14 Amezcu. Therefor, and the argument is that because
15 it was a petty offense before the firearm provision
16 in the state statute regarding firearms came into
17 place it doesn't meet that standard for the firearms
18 provision in the state's statute and that it is an
19 additional or it isn't subordinating fundamental
20 right to a jury trial because it doesn't attach on
21 petty offense. The other argument or one of the other
22 arguments was dealing with whether there is a change
23 in in the testimony or evidence that would d be
24 presented that would cause an expo facto issue. It
25 certainly true that a jury would not hear motions,

1 writs, etc. That is of course the judge that would
2 hear those. So, in that regard there is a change.
3 However, it doesn't change what's legally admissible
4 or what's admitted in the case. It doesn't change
5 that. It's just simply in bench trial the judge is
6 the trier of law and fact and the judge must not
7 consider anything that's not admissible. So, it
8 doesn't change what's coming in as being admissible.
9 So, in conclusion with hearing all that and also
10 based in part in Collins vs. Youngblood it says that
11 removing it isn't an expo facto violation if they
12 remove a right to a jury trial in that case and there
13 is certainly some distinctions in that case but in
14 conclusion I don't find that there is a violation of
15 expo facto. Second issue is whether the ordinance
16 falls under the federal definition of domestic
17 violence. Now, that's important of course because if
18 it doesn't fall under that definition the logic
19 behind that is it doesn't fall under the NRS 202.360.
20 Taking away a person's constitutional rights in the
21 state statute for possession of firearms. So, under
22 that 202.360 it says, "A person shall not own or have
23 in his or her possession or under his or her custody
24 or control any firearm if the person: Has been
25 convicted in this State or any other state of a

1 misdemeanor crime of domestic violence as defined in
2 18 U.S.C. section 921(a)(33)." 18 U.S.C.921(a)(33)
3 states that the term "misdemeanor crime of domestic
4 violence" means an offense that is a misdemeanor
5 under federal, state, or tribal.
6 law; and then it goes
7 on to say, and has these different elements and
8 relationships. So, the city has argued that it's not
9 a federal, state or tribal. It's in fact, local and
10 or municipal and doesn't fall under that definition
11 18 U.S.C.. So, the federal definition of a
12 misdemeanor crime of domestic violence in plain
13 reading it excludes municipalities and it only
14 applies to federal, state and tribal. Therefor,
15 202.360 doesn't trigger a conviction under any
16 domestic violence Henderson Ordinance and since we
17 revert back to the Amezcua ruling and so, in
18 conclusion plain reading the 18 U.S.C. 921(a)(33)
19 does not include local and municipal offenses in
20 202.306 would not apply to Henderson Municipal Code
21 for domestic battery and so, I don't find that it
22 falls within that definition. Third issue is whether
23 it violates equal protection the municipal code. So,
24 equal protection violations argument of the defense
25 is (INAUDIBLE) to justice court they're entitled to a
jury trial. The defense in municipal court they would

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

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

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

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

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

7 COURT: What is Armstrong?

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

9 COURT: Andersen?

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

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

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

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

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

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

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

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

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

1 law.

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

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

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

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

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

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

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

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

5 COURT: And city.

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

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

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

9 COURT: Go ahead counselor.

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

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

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

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

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

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

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

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

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

16 COURT: Yeah.

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

19 COURT: Yeah.

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

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

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

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

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

9 SHEETS: Yes, your Honor.

10 CLERK: Off the record.

11 (11:08:15 - OFF THE RECORD)

12 (11:10:47 - ON THE RECORD)

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

15 COURT: Yes, a thirty-day date.

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

19 COURT: Correct.

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

22 (11:11:18 - HEARING CONCLUDED)

23 ***

24 ///

1 CERTIFICATE OF TRANSCRIBER

2 STATE OF NEVADA)

3) ss.

4 COUNTY OF CLARK)

5
6 I, HUMBERTO RODRIGUEZ, declare as follows:

7 That I transcribed the AUDIO FILE presented.

8 I further declare that I am not a relative or
9 employee of any party involved in said action, nor a
10 person financially interested in the action.11
12 Dated at Las Vegas, Nevada this 28th day of
13 January, 2020.14 

15 /s/Humberto Rodriguez

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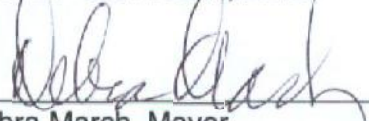
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Editor's Note: Pursuant to City Charter Section 2.090(3), language to be omitted is red and enclosed in [brackets], and language proposed to be added is in blue italics and underlined.

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:

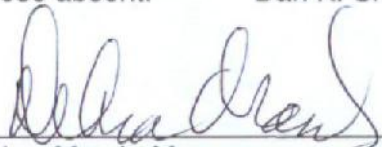
"COUNCIL AS A WHOLE"

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

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

~~CB~~ 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:

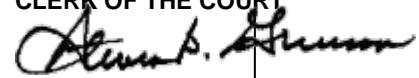
200.571

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.



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

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

**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

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

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.

///

TO: Henderson Municipal Court, Respondent;

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

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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).

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 **I. Statement of the Facts**

4
5 This Petition challenges Respondent City of Henderson's jurisdictional authority to
6 charge and adjudicate Petitioner's charges of battery domestic violence, without the
7 constitutional benefit of a jury trial as required by the Nevada Supreme Court in *Andersen v.*
8 *Eighth Judicial District Court*, 135 Nev. Adv. Op. 42 (2019).

9
10 On or about February 22, 2019, Petitioner Nathan Ohm was arrested and charged
11 with two counts of Battery Domestic Violence in the Henderson Municipal Court. He was
12 originally charged under NRS 200.485, Nevada's Battery Domestic Violence statute. On
13 September 12, 2019, while Petitioner's case was still pending, the Nevada Supreme Court
14 issued *Andersen v. Eighth Judicial District Court*, 135 Nev. Adv. Op. 42 (2019), which held
15 that "[b]ecause our statutes now limit the right to bear arms for a person who has been
16 convicted of misdemeanor battery constituting domestic violence, the Legislature has
17 determined that the offense is a serious one. And given this new classification of the
18 offense, a jury trial is required." *Id.*

19
20 Subsequent to *Andersen*, on or about October 15, 2019, Respondent passed
21 Ordinance No. 3632, which amended the Henderson Municipal Code 8.02.055 (hereinafter
22 "Code") specifically to create a municipal code-based violation for the offense of Battery
23 Domestic Violence. The Code and the NRS are substantively identical.

24
25 After enacting the Code, Respondent amended the criminal complaint against
26 Petitioner on or about October 24, 2019. The sole amendment consisted of altering the
27

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

12
13 Oral argument was heard on December 16, 2019, with a formal decision to be given
14 January 13, 2020. On that date, the Municipal Court orally denied the Motion, but no
15 written order was provided to or requested from the parties. Transcripts of the argument
16 on the Motion, as well as the Court's decision, are attached hereto (see **Exhibits 4 and 5**,
17 respectively).
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1 **II. Issues Presented**

- 2
- 3 1. Does the Amended Criminal Complaint filed on or about October 24, 2019 constitute
- 4 an unlawful *ex post facto* amendment?
- 5 2. Assuming the Amended Complaint is valid, is Petitioner nonetheless entitled to a
- 6 jury trial on this matter based on qualification under 18 U.S.C. § 1921(a)(33)(A)?
- 7
- 8 3. Did the Henderson Municipal Code create an equal protection violation under the
- 9 Nevada and United States Constitution that is subject to strict scrutiny?
- 10 4. Does the Henderson Municipal Court lack jurisdiction to prosecute the instant case
- 11 under either the Nevada Revised Statutes or Henderson Municipal Code?
- 12

13 **III. Relief Sought**

14

15 Petitioner prays that this Court issue a writ of Mandamus, or in the alternative, writ

16 of Certiorari, directing the Henderson Municipal Court to divest itself of jurisdiction, or

17 alternatively provide Petitioner, and those similarly situated, a trial by jury.

18

19 **IV. Standard for Writ of Mandamus**

20

21 This Court may issue a Writ of Mandamus to enforce the performance of an act

22 which the law enjoins as a duty, especially resulting from an office, or to compel the

23 admission of a party to the use and enjoyment of a right to which he is entitled and from

24 which he is unlawfully precluded by such inferior tribunal. NEV. REV. STAT. 34.160. A writ of

25 mandamus will issue when the petitioner has no plain, speedy and adequate remedy at law.

26

27 *Scrimmer v. Eighth Judicial District Court*, 998 P.2d 1190, 1193 (2000).

28

1 Mandamus will not lie to control discretionary action unless it is manifestly abused
2 or is exercised arbitrarily or capriciously. *Office of the Washoe County DA v. Second Judicial*
3 *District Court*, 5 P.3d 562, 566 (2000). Thus a writ of mandamus will issue to control a
4 court's arbitrary or capricious exercise of its discretion. *Id.* (citing *Marshall v. District Court*,
5 108 Nev. 459, 466, 836 P.2d 47, 52 (1992)); *City of Sparks v. Second Judicial District Court*,
6 112 Nev. 952, 954, 920 P.2d 1014, 1015-16 (1996); *Round Hill Gen. Imp. Dist. v. Newman*, 97
7 Nev. 601, 637 P.2d 534 (1981). It is within the discretion of the appellate court to
8 determine if such writ will be considered. *Id.*; see also *State ex rel. Dep't Transp. v.*
9 *Thompson*, 99 Nev. 358, 662 P.2d 1338 (1983).
10
11

12 **V. Standard for Interlocutory Writ of Certiorari**

13

14 As no trial has yet taken place in Petitioner's matter, this appeal would otherwise be
15 designated as interlocutory; while the Nevada Supreme Court has ruled that District Courts,
16 as appellate courts of limited jurisdiction, do not have a specific statutory authority to
17 consider direct interlocutory appeals, certain pre-trial matters which nevertheless
18 originate in Justice or Municipal Court may be considered in the District Court by way of a
19 Petition for Writ of Certiorari. Even if not specifically deemed a Writ Petition, the District
20 Court is empowered to treat an interlocutory appeal as the proper Writ. This issue was
21 addressed by the Nevada Supreme Court in *Salaiscooper v. Eighth Judicial Dist. Court*, 117
22 Nev. 892 n.2, 34 P.3d 509, 514 (2001):
23
24

25 ///
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1 NRS 177.015(1)(a) permits an appeal to the district court only from
2 a final judgment of the justice court. Here, petitioner appealed to the
3 district court from an interlocutory order of the justice court, and there
4 is no statutory provision or court rule permitting such an appeal. Thus,
5 the district court lacked jurisdiction to consider the "appeal."
6 **Petitioner should have sought, and certainly would have obtained,**
7 **the district court's review of the order by way of a petition for a**
8 **writ of certiorari.** This court could have then properly reviewed the
9 district court's ruling in an appeal authorized by statute. See NRS
10 34.120 (authorizing an appeal to this court from an order of the district
11 court resolving a petition for a writ of certiorari). *Id.* (citing *In re*
12 *Temporary Custody of Five Minors*, 105 Nev. 441, 777 P.2d 901 (1989))
13 (emphasis added).

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

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

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

1 **ARGUMENT**

2

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

4

5 For ease of reference, each of the following arguments will be broken down into two

6 subsections: Petitioner's argument, and the opposition and ruling from the Henderson

7 Municipal Court which addresses each argument.

8

9 **1. Petitioner's Argument**

10

11 Article I, § 9 of the United States Constitution prevents federal and state

12 governments from enacting any *ex post facto* laws to matters which have been "commenced

13 or prosecuted." U.S. CONST. Art. I. § 9.; *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 382

14 (1798). The *ex post facto* clause has been broadly interpreted by the United States Supreme

15 Court. "[O]ur decisions prescribe that two critical elements must be present for a criminal

16 or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events

17 occurring before its enactment, and it must disadvantage the offender affected by it."

18 *Weaver v. Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 964 (1981).

19

20 In this case, Petitioner contends the Amended Criminal Complaint violates the state

21 and federal constitutional prohibition against *ex post facto* laws. The only substantive

22 amendment to the complaint was altering the source of the conduct's criminality from the

23 Nevada Revised Statutes to the recently enacted Henderson Municipal Code. However,

24 Petitioner's conduct was alleged to have occurred on February 22, 2019, and the Code

25 under which he is now charged was enacted by Ordinance on or about October 15, 2019.

26

27

1 Therefore, there is little question that Petitioner is being charged under a law that had not
2 yet been enacted when the conduct allegedly occurred. As a result, the first criterion for an
3 invalid *ex post facto* law – that it apply retrospectively – is satisfied. The remaining issue,
4 then, is only whether the law “disadvantages the offender affected by it.”

5
6 Respondent would likely argue here that the Amended Complaint does not
7 constitute an *ex post facto* violation because the Code is substantively identical to the law
8 contained in the Nevada Revised Statutes under which offenders were previously charged.
9 Therefore, the Amended Complaint neither criminalizes an offense that was not previously
10 criminal, nor does it enhance or alter the punishment for the offense; these are perhaps the
11 more common types of *ex post facto* challenge under state law, see, e.g., *Miller v. Warden,*
12 *Nev. State Prison*, 112 Nev. 930, 933, 921 P.2d 882, 883 (1996), but they are not the only
13 types.
14

15
16 Federal law has not construed “disadvantaged” as limited only to retroactive
17 criminalization or punishment. Rather, the Courts have taken a much broader approach by
18 specifically recognizing at least four distinct types of *ex post facto* law in addition to a fifth
19 catch-all category recognizing a specific interest of “fundamental fairness.”

20
21 Long ago the Court pointed out that the Clause protects liberty by
22 preventing governments from enacting statutes with “manifestly unjust
and oppressive” retroactive effects...

23
24 I will state what laws I consider *ex post facto* laws, within the words
25 and the intent of the prohibition. 1st. Every law that makes an action
26 done before the passing of the law, and which was innocent when done,
27 criminal; and punishes such action. 2d. Every law that aggravates a
28 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,

1 testimony, than the law required at the time of the commission of the
2 offence, in order to convict the offender. All these, and similar laws, are
3 manifestly unjust and oppressive. *Stogner v. California*, 539 U.S. 607,
4 611, 123 S. Ct. 2446, 2449 (2003) (citing *Calder v. Bull*, 3 U.S. 386, 3
5 Dallas 386, 1 L. Ed. 648 (1798)).

6 *Stogner's* recitation of the four common types of *ex post facto* (and "similar") laws
7 have been traced back to historical roots of manifest injustice, particularly when the Ex
8 Post Facto Clause itself was enacted to "restrict governmental power by restraining
9 arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 28, 101 S.
10 Ct. 960, 964 (1981); *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915). Indeed, the Courts
11 strongly caution against *ex post facto* laws and their consistent ties to passions which may
12 grow from the "feelings of the moment." "Whatever respect might have been felt for the
13 state sovereignties, it is not to be disguised that the framers of the constitution viewed,
14 with some apprehension, the violent acts which might grow out of the feelings of the
15 moment; and that the people of the United States, in adopting that instrument, have
16 manifested a determination to shield themselves and their property from the effects of
17 those sudden and strong passions to which men are exposed." *Fletcher v. Peck*, 10 U.S. (6
18 Cranch) 87, 137-38 (1810).

19
20 Notions of manifest injustice and fundamental fairness have been inextricably
21 intertwined with *ex post facto* analysis since the inception of the United States Constitution.
22 From 1798 to modern day, the Courts have built the foundation of *ex post facto* analysis on
23 these hallmark policies. "All these, and similar laws, are manifestly unjust and oppressive.
24 In my opinion, the true distinction is between *ex post facto* laws, and retrospective laws.
25 Every *ex post facto* law must necessarily be retrospective; but every retrospective law is
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1 not an *ex post facto* law: The former, only, are prohibited. Every law that takes away, or
2 impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust,
3 and may be oppressive." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91 (1798). "In each instance,
4 the government refuses, after the fact, to play by its own rules, altering them in a way that
5 is advantageous only to the State, to facilitate an easier conviction. There is plainly a
6 fundamental fairness interest in having the government abide by the rules of law it
7 establishes to govern the circumstances under which it can deprive a person of his or her
8 liberty or life." *Carmell v. Texas*, 529 U.S. 513, 516, 120 S. Ct. 1620, 1624 (2000).

11 Our holding today is consistent with basic principles of fairness that
12 animate the *Ex Post Facto* Clause. The Framers considered *ex post facto*
13 laws to be "contrary to the first principles of the social compact and to
14 every principle of sound legislation." The Clause ensures that
15 individuals have fair warning of applicable laws and guards against
16 vindictive legislative action. Even where these concerns are not directly
17 implicated, however, the Clause also safeguards "a fundamental
18 fairness interest . . . in having the government abide by the rules of law
19 it establishes to govern the circumstances under which it can deprive a
20 person of his or her liberty or life." *Peugh v. United States*, 569 U.S. 530,
21 544, 133 S. Ct. 2072, 2084-85 (2013) (citations omitted).

18 Thus, the Courts have made it apparent that *ex post facto* analysis reaches beyond
19 laws which merely affect criminalization or enhanced punishment. The United States
20 Supreme Court has explicitly recognized at least four different types of *ex post facto* laws –
21 laws affecting criminalization, aggravation of the crime, enhancing the punishment, or
22 changing the evidence or testimony – as well as any "similar laws" that would otherwise
23 trigger principles of "fundamental fairness," "manifest injustice," "vindictiveness," or those
24 laws which, applied retrospectively, are "unjust or oppressive."
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1 In this case, Petitioner maintains that the Amended Criminal Complaint fits within
2 two of the four enumerated types of *ex post facto* laws, that being laws changing the
3 criminalization of conduct and laws which change the evidence or testimony; the
4 amendment also falls within the more sweeping penumbra of fundamental fairness and
5 manifest injustice as a separately recognized category of *ex post facto* laws.

7 The sole amendment to the Criminal Complaint in Petitioner's case is the alteration
8 of the underlying charging authority from Nevada Revised Statute to Henderson Municipal
9 Code 8.02.055. However, when undertaking an *ex post facto* analysis, the courts examine
10 not simply the bare text of the retrospective law, but also the *purpose* of the law, in order to
11 determine if such laws are fundamentally unfair, vindictive in nature, or unjust and
12 oppressive. The Henderson Municipal Ordinance which amended the Code, Ordinance No.
13 3632, is clear that the singular purpose for enacting the law was to avoid the imposition of
14 jury trials as a newly recognized fundamental right:
15
16

17 WHEREAS, in *Andersen v. Eighth Judicial District Court*, 135 Nev. Adv.
18 Op. 42 (2019), the Nevada Supreme Court held... the offense of
19 misdemeanor battery domestic violence under NRS 200.485(1)(a), as a
20 "serious" offense, for the purpose of having the right to a jury trial
under the Sixth Amendment; and

21 ...

22 WHEREAS, there will be anticipated legal challenges to the Municipal
23 Court's jurisdiction to entertain and hold jury trials as a result of the
24 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

25 ...

26 Henderson Municipal Code Chapter 8.02 is hereby amended as follows
27 [creating Henderson Municipal Code criminalizing Battery Constituting
Domestic Violence] (see **Exhibit 6**, publicly available but attached
hereto for ease of reference).

1
2 As a result of the enumerated purpose of the Ordinance, the legal analysis must
3 examine whether the Amendment constitutes an unlawful *ex post facto* law when the sole
4 reason for enacting the law, effective retroactively, is to avoid and deny criminal
5 defendants the opportunity to assert a fundamental right, that being a trial by jury. Federal
6 analysis would conclude this law is unconstitutional.
7

8 The concerns noted as the basis for enacting the law are “anticipated legal
9 challenges” to jury trials as well as “practical challenges” of holding jury trials. However,
10 this reasoning offers unrivaled clarity that the law was enacted entirely as a reaction to the
11 Nevada Supreme Court’s recognition of jury trials as a fundamental right in *Andersen*. A law
12 which is so clearly designed and intended to subvert the availability of a fundamental right
13 can go by no other words than “vindictive,” “fundamentally unfair,” “manifestly unjust” and
14 “oppressive.”
15

16 Although this is the primary basis on which Petitioner maintains the Code and
17 Amended Criminal Complaint constitute an unlawful *ex post facto* law, there are also two
18 alternative theories on which to reach the same conclusion. First, an *ex post facto* law is
19 also specifically recognized when the law changes the testimony or evidence to be received.
20 The distinction between charging the offense under the Nevada Revised Statute versus the
21 newly enacted Code is simply that under Statute, the defendant is entitled to a jury trial,
22 whereas under the Code, Respondent maintains they are not (although Petitioner disagrees
23 with Respondent’s position for the basis outlined in § B, *infra*). A law which alters the
24 availability of a trial by jury is one that changes the testimony or evidence received; during
25 a bench trial, the Judge acts as a trier of law and a trier of fact, and will often hear evidence
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1 or testimony in relation to his or her role as the trier of law (for example, pre-trial motions,
2 writs, evidentiary hearings, and suppression challenges). Such testimony or evidence
3 would not be heard by the jury, whose rule is exclusively that of trier of fact. It would be an
4 uphill climb to take the position that a bench trial versus a jury trial results in no
5 substantive change to the evidence received by the body ultimately responsible for
6 determining guilt or innocence.
7

8 As a final alternative basis on which to find the Amended Complaint and Code is an
9 unlawful *ex post facto* law, Defense posits the Code alters the criminalization of the
10 underlying conduct because, prior to the enactment of the Code, the Municipal Court lacked
11 jurisdiction over all cases which require trial by jury (see § D, *infra*). Therefore, the Code
12 altered the law to create an offense which was previously not legally chargeable in the
13 Henderson Municipal Court due to a lack of jurisdiction, discussed in greater detail below;
14 in summation, the amendment would create jurisdiction over a charge where it previously
15 did not exist, and further impacts the defenses available to criminal defendants, such a lack
16 of jurisdiction.
17
18

19 In conclusion, whether analyzed as a substantive change in the evidence received,
20 altering the criminality of the offense, or under the most dispositive category of
21 “fundamental unfairness” and “manifest injustice,” the amendment to a retrospective law
22 which is specifically designed to avoid the implementation of a constitutional and
23 fundamental right is an unlawful *ex post facto* amendment. Therefore, the amended
24 complaint must be dismissed.
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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.

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

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

12 SHEETS: ... Are you concluding that when Andersen came out that a
13 defendant charged under the NRS had a vested right to a jury trial but
14 that it's okay that, that vested right is removed for the reasons that you
15 laid out under the initial *ex post facto* analysis you did? I'm just trying
16 to figure out because you were kind of silent as to whether or not Mr.
17 Ohm had a right to a jury trial before the amendment of the statute or
18 the addition of the municipal code and are you concluding that he had
19 that right to a jury trial when he was originally charged in department
20 under the Nevada Revised Statute?

18 COURT: Under the NRS of course he has a right to a jury trial as long as
19 it fit within that description of the domestic battery under the federal
20 provision that I stated previously the –

19 SHEETS: And then, that's actually my follow up – ... (Transcripts,
20 January 13, 17: 11).

21 This is a very significant fact for purposes of *ex post facto* analysis. Returning to
22 *Calder v. Bull*, "Every *ex post facto* law must necessarily be retrospective; but every
23 retrospective law is not an *ex post facto* law: The former, only, are prohibited. **Every law**
24 **that takes away, or impairs, rights vested, agreeably to existing laws, is**
25 **retrospective, and is generally unjust**, and may be oppressive." *Calder v. Bull*, 3 U.S. (3
26 Dall.) 386, 390-91 (1798) (emphasis added). Recognition that Petitioner had a vested right
27
28

1 to a jury trial prior to being charged under the Code strongly supports the
2 unconstitutionality of amending Petitioner's complaint; prior to enactment of the Code,
3 Petitioner had a vested right to a jury trial. Subsequent to the enactment of the Code,
4 Petitioner no longer has a right to a jury trial (under the Henderson Municipal Court's
5 ruling). Thus, charging Petitioner under the Code has directly taken away and impaired a
6 vested right, thereby facially triggering the *ex post facto* prohibition.
7

8 Lastly, the Municipal Court ruled that the Code did in fact change the testimony or
9 evidence to be received, but yet still failed to recognize an *ex post facto* violation. The
10 Municipal Court noted that "It is certainly true that a jury would not hear motions, writs,
11 etc. That is of course the judge that would hear those. So, in that regard, there is a change"
12 (Transcripts, January 13, 11: 25). Nonetheless, the Municipal Court held that because it
13 doesn't alter the "admissibility" or "what's admitted" in a case, it does not run afoul of the
14 *Ex Post Facto* clause. However, nothing in the *Stogner* case would require a change in
15 admissibility, only "different" testimony or evidence. "Every law that alters the legal rules
16 of evidence, and receives less, or different, testimony, than the law required at the time of
17 the commission of the offence, in order to convict the offender." The Municipal Court
18 recognized that precluding the right to a trial by jury does in fact result in different
19 testimony to be received, and thus provides an alternative basis on which to find the Code
20 unconstitutional when applied retroactively.
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1 B. *A Conviction Under the Henderson Municipal Code Still Qualifies as a Misdemeanor*
2 *Crime of Domestic Violence Under 18 U.S.C. § 921(a)(33)(A), and Therefore Requires*
3 *Trial by Jury*

4 1. Petitioner's Argument

5
6 Respondent has maintained that charging individuals under the Henderson
7 Municipal Code obviates the need for a jury trial. Shortly before the Code was enacted, on
8 September 12, 2019, the Nevada Supreme Court released *Andersen v. Eighth Judicial District*
9 *Court*, 135 Nev. Adv. Op. 42 (2019), which held that “[b]ecause our statutes now limit the
10 right to bear arms for a person who has been convicted of misdemeanor battery
11 constituting domestic violence, the Legislature has determined that the offense is a serious
12 one. And given this new classification of the offense, a jury trial is required.” *Id.*

13
14 The Nevada Supreme Court based its conclusion in *Andersen* on the revision to
15 Nevada Revised Statute 202.360, which states, in pertinent part:

16
17 NRS 202.360 Ownership or possession of firearm by certain persons
18 prohibited; penalties.

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

21 (a) Has been convicted in this State or any other state of a
22 misdemeanor crime of domestic violence as defined in 18 U.S.C. §
23 921(a)(33)...

24 Respondent has taken the position that a violation under the Municipal Code does
25 not fall within the definition of “misdemeanor crime of domestic violence” as set forth in 18
26 U.S.C. § 921(a)(33); under this construction, a conviction under the Code would not trigger
27 the firearm restriction as set forth in NRS 202.360, and pursuant to *Andersen*, would
28 therefore also not require trial by jury. Petitioner respectfully disagrees, and maintains that

1 a conviction for domestic violence under the newly enacted Code also falls within the
2 definition as set forth in federal statute.

3 As a preliminary matter, it is significant to note that the Code is verbatim to the
4 Nevada Revised Statute criminalizing battery constituting domestic violence, NRS
5 200.485(1)(a). The Code and Statute are substantively identical, with the exception that the
6 most recently 2019 amendment to the NRS battery domestic violence statute increased the
7 penalties for a second offense from a minimum of 10 days in custody to 20.
8

9 There is no doubt that a conviction for battery domestic violence under NRS
10 200.485(1)(a) results in firearm restrictions warranting a jury trial, as that was the specific
11 holding announced in *Andersen*. The basis on which the Code would purportedly escape
12 this requirement cannot be to any substantive alterations in the law (given the identical
13 language of the Code and Statute), but rather is only due to its source as a Municipal Code
14 rather than State statute. The ultimate question, therefore, is whether a Municipal Code
15 that criminalizes the same conduct as the State statute also meets the definition of a
16 “misdemeanor crime of domestic violence” under 18 U.S.C. § 921(a)(33). If the Code falls
17 within the federal definition, the Code will also trigger the firearm provision of NRS
18 202.360 and subsequently, pursuant to *Andersen*, will require a jury trial.
19
20

21 Petitioner posits the Code falls within the scheme of 18 U.S.C. § 921(a)(33) for two
22 reasons: first, it fits within the plain language of the definition itself; second, case law has
23 recognized the definition to apply when the underlying conduct falls within the articulated
24 definition, without deference to the title of the conviction itself.
25
26
27
28

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

6 (d) It shall be unlawful for any person to sell or otherwise dispose of
7 any firearm or ammunition to any person knowing or having
8 reasonable cause to believe that such person—

9 ...
(9) has been **convicted in any court** of a misdemeanor crime of
domestic violence (emphasis added).

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

12 Except as provided in subparagraph (C), the term “misdemeanor crime
13 of domestic violence” means an **offense that—**

14 (i) **is a misdemeanor** under Federal, State, or Tribal law; and
15 (ii) has, as an element, the use or attempted use of physical force, or the
16 threatened use of a deadly weapon, committed by a current or former
17 spouse, parent, or guardian of the victim, by a person with whom the
18 victim shares a child in common, by a person who is cohabiting with or
19 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).

20 To link the two statutes together, it is a federal crime to possess a firearm (thus
21 warranting a jury trial in State court) if a person has been convicted in “any court” of “an
22 offense that is a misdemeanor” under State, Federal or Tribal law which involves the use or
23 attempted use of force against a qualifying domestic relation. Significantly, Congress used
24 two unique terms in the two statutes, one being a “conviction” and the other being
25 “offense.” The two are neither synonymous nor interchangeable, and the distinction is
26 significant.
27

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

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

25 Under recognized canons of statutory interpretation, the use of two distinct terms is
26 presumed intentional, and additionally is intended to ascribe two different meanings to
27

1 those terms. “The fact that Congress chose to use different terms in connection with the
2 different § 33(g) requirements... surely indicates that Congress intended the two terms to
3 have different meanings. Had Congress intended the meaning the Court attributes to it, it
4 would have used the same term in both contexts.” *Estate of Cowart v. Nicklos Drilling Co.*,
5 505 U.S. 469, 497, 112 S. Ct. 2589, 2605 (1992). “Indeed, Congress’ deliberate choice to use
6 a different term -- and to define that term -- can only mean that it intended to establish a
7 standard different from the one established by our free speech cases.” *Bd. of Educ. v.*
8 *Mergens*, 496 U.S. 226, 242, 110 S. Ct. 2356, 2367-68 (1990).

11 As the use of the word “conviction” versus “offense” is presumed intentional, the
12 statutory analysis of each term need not go beyond the plain language. “The starting point
13 in statutory interpretation is ‘the language [of the statute] itself.’ We assume that the
14 legislative purpose is expressed by the ordinary meaning of the words used.” *United States*
15 *v. James*, 478 U.S. 597, 604, 106 S. Ct. 3116, 3120 (1986) (citing *Blue Chip Stamps v. Manor*
16 *Drug Stores*, 421 U.S. 723, 756 (1975); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68
17 (1982)).

19 By its plain language, a Municipal Court conviction for domestic violence under the
20 Municipal Code qualifies as a “conviction in *any* court” per 18 U.S.C. § 922(d)(9) (emphasis
21 added). Therefore, if the conviction is for an “offense that is a misdemeanor under Federal,
22 State or Tribal law” that involves the use of force against a qualifying domestic relation, it
23 meets the statutory definition of a “crime of domestic violence” under 18 U.S.C. §
24 921(a)(33)(A). The distinction between “conviction” and “offense” is pertinent here; the
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1 examination is not concerned with the actual finding of guilt, but whether the "offense," i.e.
2 the *conduct*, is a misdemeanor under State or Federal law.

3 This interpretation was formally analyzed and adopted by the U.S. Supreme Court in
4 *United States v. Hayes*, 555 U.S. 415, 418, 129 S. Ct. 1079, 1082 (2009), wherein the Court
5 concluded that a conviction for simple battery meets the definition of a "misdemeanor
6 crime of domestic violence" so long as the underlying conduct includes the use or
7 threatened use of force, and that force was directed towards a person that qualifies as a
8 domestic relationship under the federal statute. In *Hayes*, the Court ruled that to require a
9 conviction for *domestic* battery specifically would frustrate the purpose of Congress in
10 keeping arms away from those whose conduct would otherwise fall under the definition in
11 18 U.S.C. § 921(a)(33)(A).

14 [I]n a § 922(g)(9) prosecution, it suffices for the Government to charge
15 and prove a prior conviction that was, in fact, for "an offense . . .
16 committed by" the defendant against a spouse or other domestic victim.
17 We note as an initial matter that § 921(a)(33)(A) uses the word
18 "element" in the singular, which suggests that Congress intended to
19 describe only one required element. Immediately following the word
20 "element," § 921(a)(33)(A)(ii) refers to the use of force (undoubtedly a
21 required element) and thereafter to the relationship between aggressor
22 and victim...

23 Most sensibly read, then, § 921(a)(33)(A) defines "misdemeanor crime
24 of domestic violence" as a misdemeanor offense that (1) "has, as an
25 element, the use [of force]," and (2) is committed by a person who has a
26 specified domestic relationship with the victim....

27 Congress' less-than-meticulous drafting, however, hardly shows that
28 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."

1 *United States v. Hayes*, 555 U.S. 415, 421, 129 S. Ct. 1079, 1084 (2009)
2 (internal citations omitted).

3 The dissent in *Hayes* is equally instructive, as it contains the very argument used by
4 Respondent in this case; the primary basis for dissent was the Court having previously
5 analyzed a “predicate offense” based on the statutory definition of the conviction, rather
6 than the underlying conduct, in other instances. Specifically, the dissent notes that when
7 interpreting the Armed Career Criminal Act, the Court looked “only to the statutory
8 definitions of the prior offenses, and not to the particular facts underlying those
9 convictions.” *Hayes*, 555 U.S. at 436. The dissent’s disagreement serves to highlight the
10 majority’s focus on the “particular facts” and underlying conduct of the offense, without
11 regard to the title, source or name of the final conviction.
12

13 *Hayes* also cited with approval the Ninth Circuit case of *United States v. Belless*,
14 which more clearly articulates the Court’s position: “The purpose of the statute is to keep
15 firearms out of the hands of people whose past violence in domestic relationships makes
16 them untrustworthy custodians of deadly force. That purpose does not support a limitation
17 of the reach of the firearm statute to past misdemeanors where domestic violence is an
18 element of the crime charged as opposed to a proved aspect of the defendant's conduct in
19 committing the predicate offense.” *United States v. Belless*, 338 F.3d 1063, 1067 (9th Cir.
20 2003).
21

22 Petitioner maintains the Code qualifies as a federal “misdemeanor crime of domestic
23 violence” under both the State law and Federal law interpretations. As noted previously,
24 the newly enacted Henderson Municipal Code is identical to the language in the Nevada
25 Revised Statute, both of which criminalize the same conduct that constitutes domestic
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1 violence under the same definition. Therefore, a conviction beyond a reasonable doubt that
2 an individual violated the Municipal Code means the actual conduct underlying the
3 conviction would also be a misdemeanor under State law, since the identical prohibition
4 and language in the Code and Statute means the law applies to identical conduct. Because
5 the Code and Statute contain no substantive distinction, conduct that violates the Code is
6 conduct that would also violates state statute, and vice-versa.

7
8 Even assuming, for purposes of argument, that the Code and NRS were not identical
9 (although this makes the analysis significantly clearer), the answer of whether the Code
10 qualifies as a misdemeanor crime of domestic violence is much simpler than Respondent
11 would make it: the Code qualifies as a "misdemeanor crime of domestic violence" because it
12 falls squarely within the test set forth in *Hayes*. To reiterate briefly:

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15 Most sensibly read, then, § 921(a)(33)(A) defines "misdemeanor crime
16 of domestic violence" as a misdemeanor offense that (1) "has, as an
17 element, the use [of force]," and (2) is committed by a person who has a
18 specified domestic relationship with the victim.... *Hayes*, 555 U.S. at
19 421.

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

1 For further support, the Federal District of Nevada case *United States v. Perkins* (see
2 **Exhibit 7**, publicly available but attached hereto for ease of reference) is instructive. In
3 *Perkins*, the named defendant was convicted in North Las Vegas Municipal Court of simple
4 battery. Perkins was subsequently arrested and charged in federal court with being a
5 prohibited person in possession of a firearm. After being federally charged, Perkins
6 withdrew his plea to the simple battery in North Las Vegas Municipal Court, and the final
7 conviction was reduced to disturbing the peace.
8

9 Perkins filed a Motion to dismiss his federal case, raising two issues: first, that
10 Perkins was unaware that a simple battery conviction carried a firearm restriction under
11 federal law; and second, that he is not a prohibited person because the charge was
12 amended from simple battery (which qualifies as a misdemeanor crime of domestic
13 violence under 18 U.S.C. § 921(a)(33)(A)) to disturbing the peace (which does not). The
14 Federal District of Nevada first ruled that Perkins' lack of knowledge regarding the federal
15 firearms restriction arising from a simple battery conviction was immaterial and irrelevant
16 to the charges, also explicitly confirming that a simple battery conviction can trigger the
17 firearms restriction, even when the conviction comes from a municipal court. On the
18 second contention, the Court held that a federal charge of being a prohibited person in
19 possession of a firearm is a "status offense." "This line of authority establishes that the fact
20 of consequence is whether, on the dates on which the defendant possessed a weapon, he
21 had been convicted of a misdemeanor crime of domestic violence. The North Las Vegas
22 Municipal Court's November 20, 2012 order granting the defendant's motion to withdraw
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1 his prior plea, and adjudicating him guilty of disturbing the peace, has no effect on that
2 status.” *Id.*

3 The Federal Court’s recognition that the federal charge is a “status offense” is
4 significant. The Federal District Court granted the Government’s Motion in Limine to
5 preclude Defense Counsel from presenting the actual name of the conviction that was
6 underlying the federal firearms charges with regard to that reduction to disturbing the
7 peace precisely because the firearms charge is a status crime, i.e. governed by the status of
8 whether the underlying predicate conduct meets the federal definition of a misdemeanor
9 crime of domestic violence at the time the firearm is possessed.
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12 In denying Perkins’ request to dismiss the case, the Federal Court held that the case
13 could proceed because Perkins had been convicted of a “misdemeanor crime of domestic
14 violence” at the time he possessed the weapon. The Court did not distinguish between the
15 source of the law or the type of court from which the underlying conviction originated, so
16 long as the conduct qualifies as a misdemeanor crime of domestic violence per 18 U.S.C. §
17 921(a)(33)(A).
18

19 In conclusion, an allegation of conduct that contains the use of force against a
20 federally qualifying domestic relation will bring the charge within the purview 18 U.S.C. §
21 921(a)(33)(A). An offense of domestic violence under the Henderson Municipal Code,
22 which would also be a misdemeanor under State statute given the identical prohibitions as
23 well as its application under the *Hayes* definition, is a “conviction in any court” that would
24 make possession of firearms a federal crime. As such, an alleged violation of the Municipal
25 Code also results in the same firearm restrictions under NRS 202.360 because a conviction
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1 is a “misdemeanor crime of domestic violence” under 18 U.S.C. § 921(a)(33)(A), and
2 pursuant to *Andersen*, a jury trial is required.
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4 2. Respondent’s Opposition and the Municipal Court’s Ruling

5

6 In written briefing and oral argument on the matter, Respondent attempted to
7 circumvent the plain language of the § 921(a)(33)(A) by constantly replacing the phrase
8 “an offense that is a misdemeanor” with “a conviction that is a misdemeanor”:
9

- 10 • “A predicate offense must be a misdemeanor conviction under ‘Federal, State or
11 Tribal Law’ to fit within the federal definition” (City’s Opposition, 19).
- 12 • “It is clear the Hayes court felt it was unquestionable that clause (i) (the
13 jurisdictional source requirement) is a defining requirement of the predicate
14 conviction” (City’s Opposition, 27).
- 15 • “The source of law underlying the conviction must have been ‘Federal, State or
16 Tribal’” (City’s Opposition, 30)
- 17 • “Congress using expansive language such as ‘any courts’ only serves to further
18 distinguish its decision to limit the definition of ‘misdemeanor crime of domestic
19 violence’ to convictions under ‘Federal, State or Tribal law’” (City’s Opposition, 30)
- 20 • “The plain language and a common sense reading of the statute clearly indicates that
21 the conviction must be for a misdemeanor under Federal, State or Tribal law” (City’s
22 Opposition, 31)
- 23 • “The federal definition can be read to create an affirmative understanding of the
24 jurisdictional sources that qualify for predicate offense convictions” (City’s
25 Opposition, 33)
- 26 • “The omission of such language indicates that Congress intended the firearm
27 prohibition to apply only to those who had been convicted of Federal, State or Tribal
28 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

1 laws' respective identical content. Therefore, *conduct that amounts to a violation of the*
2 *Code is an offense that is also a misdemeanor under State law.* Under the plain language of
3 the statute, "Federal, State or Tribal law" must be the basis of the offensive conduct, not the
4 source of the ultimate conviction.

5
6 Returning again to the language in *Hayes*, "§ 921(a)(33)(A) defines 'misdemeanor
7 crime of domestic violence' as a misdemeanor offense that (1) 'has, as an element, the use
8 [of force],' and (2) is committed by a person who has a specified domestic relationship with
9 the victim..." *Hayes*, 555 U.S. at 421. *Hayes* make it clear that the federal definition of a
10 "crime of domestic violence" requires a conviction in any court of an offense that contains
11 specific elements, namely the use of force and that such force is directed against a
12 qualifying domestic relation. The Henderson Municipal Code applies on all counts.

13
14 Although Respondent argued that "Federal, State or Tribal law" must be the source
15 of law for the conviction, the City provided no controlling authority to support its claim.
16 Rather, Respondent relied on one case from the Tenth Circuit and two District-level cases,
17 but Respondent also acknowledged that all three of these cases examined an argument that
18 is entirely different than what Petitioner raises here. Specifically, the Tenth Circuit case
19 addressed whether the definition of "State law" should be expanded to include municipal
20 law. "There, the government argued that 'State' in 18 U.S.C. § 921(a)(33)(A)(i) should be
21 read to mean 'state and local'" (City's Opposition, 21-22). The same arguments were made
22 in the two unpublished, District cases provided. "Again, the government argued that the
23 term 'State' law should be interpreted to include violations of local laws" (City's Opposition,
24 23). However, since Petitioner does not seek to expand the facial definition of the word
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1 “State,” the cases cited (and the conclusions based on that specific argument) are
2 inapposite to this analysis.

3 Respondent further argued that using “offense” as synonymous with “conduct” is
4 erroneous, but then acknowledges that *Hayes* uses “offense” to as relating to the “use or
5 attempted use” of force requirement – the required *conduct* that must exist to qualify under
6 18 U.S.C. § 921(a)(33)(A). Interestingly, Respondent acknowledged this both in written
7 briefing and in oral argument on the Motion as well. “[T]he Hayes case and the Belless case
8 just dealt with what is required for a predicate offense and that was use of force. Those
9 cases look at the elements of the crime... So, those cases the Hayes and Belless case dealt
10 with what is the qualifying predicate offense and what elements needed to be included in
11 that” (Transcripts, December 16, 38: 4). Further, Respondent’s position is directly belied by
12 the Supreme Court’s reasoning in *Hayes*.

13 The Court recognized that “offense” is a preamble to both subsections (i) and (ii),
14 and thus applies equally to both: it must be an offense that is a misdemeanor under
15 Federal, State or Tribal law; ***and***, it must be an offense that has, as an element, the use or
16 attempted use of physical force, or the threatened use of a deadly weapon... Respondent’s
17 position would assign a different meaning of the word “offense” to the two subsections.
18 Under Respondent’s argument, the word “offense” as used in subsection (i) actually means
19 a conviction, whereas the word offense as used in subsection (ii), per *Hayes*, relates to
20 conduct. This argument must fail.

21 The rationale of *Hayes* in defining “offense” cannot simply be applied only to one
22 subsection when other subsections of the same statute are governed by the same preamble
23

1 term. Given the framework of the statute itself as well as basic grammar and syntax
2 structural rules, the preamble “offense” carries the same definition throughout the
3 subsections over which the preamble applies. Simply put, “offense” must carry the same
4 definition in subsection (i) and subsection (ii) of 18 U.S.C. § 921(a)(33)(A).
5

6 To that end, the concise language from *Hayes* is dispositive: “a person ‘commits’ an
7 ‘offense.’” For additional clarification, the Court immediately follows this with a quotation
8 from the controlling Ninth Circuit case *United States v. Belless*, 338 F.3d 1063, 1066,
9 reaffirming that “One can ‘commit’ a crime or an offense.” *Hayes* makes it clear that
10 “offense” means the conduct committed by the individual. If “offense” specifically relates to
11 “conduct” in subsection (ii) of the federal definition per *Hayes*, the same definition must
12 apply in subsection (i), to which the same preamble term “offense” also applies. For this
13 reason, the City’s repeated argument that “offense” in subsection (i) relates to the
14 conviction, but in subsection (ii) relates to conduct, is without merit. One commits an
15 offense, but one does not commit a conviction.
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18 As applied to subsection (i), the federal definition requires that the “offense,” or the
19 underlying conduct committed, is a misdemeanor under Federal, State or Tribal law. Since
20 the Code and the NRS punish the same conduct, an “offense” or act committed that violates
21 the Code is also an “offense” or act committed that violates State law. As such, it fits within
22 the federal definition as set forth in 18 U.S.C. § 921(a)(33)(A), and a jury trial is required.
23

24 When Petitioner attempted to clarify the Henderson Municipal Court’s oral ruling to
25 determine if it was adopting the City’s position on this point, the Municipal Court concluded
26 that it was ruling in favor of the City, but refused to affirmatively adopt or refute that
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1 position, ultimately failing to provide clarification one way or the other, effectively
2 sidestepping the offense/conviction dichotomy issue:
3

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

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

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

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

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

26 COURT: Plain reading of the statute 18 U.S.C. misdemeanor under
27 federal, state or tribal. This is municipal and certainly if they wanted
28 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. §

1 921(a)(33)(A), further clarified in *Hayes*. As such, a conviction for battery domestic
2 violence under the Code triggers the firearms restrictions in NRS 202.360, and per the
3 Nevada Supreme Court's ruling in *Andersen* that said firearm restrictions elevate the charge
4 to a serious offense, a trial by jury is required.

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

9 1. Petitioner's Argument

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

21
22 It was further held in that case that the city might enact ordinances not
23 inconsistent with the state laws regulating such matters (gambling and
24 prostitution) within its territorial limits. This is a well settled rule. In
25 fact, it is from this source of concurrent jurisdiction between the state
26 and municipalities in matters subject to the police power that the latter
27 derive a delegated authority to deal with minor criminal infractions
28 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)

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

13 Although Petitioner maintains the position that even charges for misdemeanor
14 battery domestic violence under the Code nonetheless require a trial by jury (see § B,
15 *supra*), assuming Respondent's position is correct that this is not the case, an equal
16 protection violation ensues. Specifically, given there are two courts capable of exercising
17 simultaneous concurrent jurisdiction, the only substantive difference between charges
18 brought under County authority versus City authority is the availability of a fundamental
19 right. This jurisdictional distinctions means that of two equally situated individuals, one
20 criminal defendant will be entitled to a jury trial, whereas the other will not.

23 The Fourteenth Amendment to the United States Constitution provides that no
24 person shall be deprived of life or liberty without the due process of law, nor shall he be
25 denied the equal protection of law. U.S. CONST. AMEND. XIV, § 1. Equal Protection claims
26 generally come in two forms: laws which disadvantage a "suspect class," and laws which
27

1 impede upon a “fundamental right.” “The Equal Protection Clause was intended as a
2 restriction on state legislative action inconsistent with elemental constitutional premises.
3 Thus we have treated as presumptively invidious those classifications that disadvantage a
4 ‘suspect class,’ or that impinge upon the exercise of a ‘fundamental right.’ With respect to
5 such classifications, it is appropriate to enforce the mandate of equal protection by
6 requiring the State to demonstrate that its classification has been precisely tailored to
7 serve a compelling governmental interest.” *Plyler v. Doe*, 457 U.S. 202, 217 n.15, 102 S. Ct.
8 2382, 2395 (1982).

9
10
11 In this case, the Nevada Supreme Court held that charges of battery domestic
12 violence which carry subsequent restrictions on firearm ownership, whether under federal
13 or state law, warrant a jury trial as a “serious offense” under the Sixth Amendment to the
14 United States Constitution. “It is well established that the right to a jury trial, as established
15 by the Sixth Amendment of the United States Constitution and Article I, Section 3 of the
16 Nevada Constitution, does not extend to those offenses categorized as ‘petty’ but attaches
17 only to those crimes that are considered ‘serious’ offenses... the right affected here
18 convinces us that the additional penalty is so severe as to categorize the offense as serious.”
19 *Andersen*, 135 Nev. Adv. Op. 42 at 6-7. The right to a trial by jury under the United States
20 and State constitution is well-recognized as a fundamental right. “But, as the right of jury
21 trial is fundamental, courts indulge every reasonable presumption against waiver.” *Aetna*
22 *Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 57 S. Ct. 809, 811-12 (1937). As set forth in *Maxwell v.*
23 *Dow*, 176 U.S. 581, 610, 20 S. Ct. 448, 458 (1900):
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1 The judgment of his peers here alluded to, and commonly called, in the
2 quaint language of former times, a trial per pais, or trial by the country,
3 is the trial by a jury, who are called the peers of the party accused,
4 being of the like condition and equality in the State. When our more
5 immediate ancestors removed to America, they brought this privilege
6 with them, as their birthright and inheritance, as a part of that
7 admirable common law which had fenced round and interposed
8 barriers on every side against the approaches of arbitrary power. It is
9 now incorporated into all our state constitutions as a fundamental
10 right, and the Constitution of the United States would have been justly
11 obnoxious to the most conclusive objection if it had not recognized and
12 confirmed it in the most solemn terms.

13 In the instant matter, Respondent's position that charges for battery domestic
14 violence under the Municipal Code do not warrant a jury trial, whereas charges for battery
15 domestic violence under the Nevada Revised Statute do require a jury trial, creates a
16 classification that directly impairs a fundamental right. Additionally, the Henderson
17 Municipal Court also concluded that prior to charging Petitioner under the Code, Petitioner
18 had a vested right to a jury trial under the NRS.

19 SHEETS: ... I'm just trying to figure out because you were kind of silent
20 as to whether or not Mr. Ohm had a right to a jury trial before the
21 amendment of the statute or the addition of the municipal code and are
22 you concluding that he had that right to a jury trial when he was
23 originally charged in department under the Nevada Revised Statute?

24 COURT: Under the NRS of course he has a right to a jury trial as long as
25 it fit within that description of the domestic battery under the federal
26 provision that I stated previously...
27 (Transcripts, January 13, 17: 16).

28 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

1 scrutiny' is required, regardless of whether the infringement was intentional." *Mobile v.*
2 *Bolden*, 446 U.S. 55, 113, 100 S. Ct. 1490, 1518 (1980) (citing *San Antonio Independent*
3 *School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973)). "It is well settled that, quite apart from the
4 guarantee of equal protection, if a law impinges upon a fundamental right explicitly or
5 implicitly secured by the Constitution [it] is presumptively unconstitutional." *Harris v.*
6 *McRae*, 448 U.S. 297, 312, 100 S. Ct. 2671, 2685 (1980). "When a statutory classification
7 significantly interferes with the exercise of a fundamental right, it cannot be upheld unless
8 it is supported by sufficiently important state interests and is closely tailored to effectuate
9 only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388, 98 S. Ct. 673, 682 (1978). "In
10 determining whether a class-based denial of a particular right is deserving of strict scrutiny
11 under the Equal Protection Clause, we look to the Constitution to see if the right infringed
12 has its source, explicitly or implicitly, therein." *Plyler v. Doe*, 457 U.S. 202, 217 n.15, 102 S.
13 Ct. 2382, 2395 (1982)

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

22
23 Further, that the governmental body at issue here is a municipality, rather than the
24 State itself, does not remove or lessen the applicability of equal protection. "The Equal
25 Protection Clause reaches the exercise of state power however manifested, whether
26 exercised directly or through subdivisions of the State... Although the forms and functions
27

1 of local government and the relationships among the various units are matters of state
2 concern, it is now beyond question that a State's political subdivisions must comply with
3 the Fourteenth Amendment. The actions of local government are the actions of the State. A
4 city, town, or county may no more deny the equal protection of the laws than it may
5 abridge freedom of speech, establish an official religion, arrest without probable cause, or
6 deny due process of law." *Avery v. Midland Cty.*, 390 U.S. 474, 479-80, 88 S. Ct. 1114, 1117-
7 18 (1968).
8

9 In addition to traditional equal protection analysis, the Code is also problematic in
10 that it specifically allows for *arbitrary* denial of a fundamental right. Petitioner is aware of
11 no specific algorithm that determines whether misdemeanor offenses are charged in
12 Justice versus Municipal Court when both courts have concurrent jurisdiction. Therefore, it
13 appears that prosecutorial discretion governs the jurisdiction in which charges are
14 brought. Given that the same charges brought in one court require trial by jury and charges
15 brought in the other court do not, prosecutorial discretion remains the basis on which
16 criminal defendants are granted or denied this fundamental right. The enactment of the
17 Ordinance, and Respondent's position that jury trials are not required, thus creates a
18 quandary which has no solution so long as jurisdiction remains concurrent between the
19 two courts.
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22

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

24

25 The Henderson Municipal Court's ruling on this point was somewhat quizzical;
26 ultimately, the Municipal Court ruled that strict scrutiny did not apply because the jury trial
27
28

1 is not a fundamental right. Specifically, the Municipal Court ruled that Battery Domestic
2 Violence does not require a jury trial as a fundamental right because it is still a “petty
3 offense” per *Amezcuca*. *Amezcuca v. Eighth Judicial District Court*, 130 Nev. 45, 46, 319 P.3d
4 602 (2014). However, the Municipal Court’s ruling is flawed in that it relies on a premise
5 which is factually incorrect.
6

7
8 After that case [*Amezcuca*], the legislature passed that amendment to
9 domestic battery laws as well as NRS 202.360 and the statute
10 prohibited a firearm by some individuals. 202.360 says, shall not own
11 or have in possession, or under his custody or control a firearm if the
12 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...

13 After that legislation was passed in the Supreme Court in Andersen in
14 2019 readdressed domestic battery after the legislative change. Based
15 upon the legislative change the Supreme Court in Andersen found that
16 the Nevada Legislature had amended the penalties associated with
17 misdemeanor domestic battery convictions when it prohibited the
18 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 *Amezcuca*, 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...

19
20 After the Andersen ruling Henderson Municipal Court or Henderson
21 Municipal Code added 08.02.055. It was passed by the Henderson City
22 Council making domestic battery a municipal code misdemeanor. The
23 HMC has the same elements and penalties as NRS for domestic battery
24 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)...

25 [D]omestic battery law prior to the 2015 legislative changes was found
26 to be a petty offense by the Supreme Court in *Amezcuca*. Therefore, and
27 the argument is that because it was a petty offense before the firearm
provision and the state statute regarding firearms came into place it
28

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

4
5 If Petitioner is understanding the Municipal Court correctly, it held that battery
6 domestic violence under the Code does not require a jury trial as a fundamental right
7 because *Amezcu*a still considers the charge to be a petty offense. The Municipal Court
8 concluded that the Code copied the domestic violence statute that existed "prior to the
9 legislative change in 2015," and therefore contains the version of the NRS that existed prior
10 to the firearms provision that was originally governed by *Amezcu*a. As further support that
11 the Code uses the statute that existed *prior* to the firearms legislation, the Municipal Court
12 further noted that the Code did not contain the increase in penalties from ten days in
13 custody to twenty for a domestic violence second offense.
14

15
16 Upon closer inspection, with no disrespect intended to the Municipal Court,
17 reasoning used is factually flawed. There was no amendment to the battery domestic
18 violence statute in 2015, and in fact NRS 200.485 remained exactly the same from 2009 to
19 2017. Because the firearms legislation was amended in 2015, there is simply no such thing
20 as a domestic violence statute that existed "prior to the legislative change in 2015." The
21 increase in penalty from ten days in custody to twenty occurred in 2019. Thus, the Code
22 copied the battery domestic violence statute that existed from 2009-2017, even though the
23 firearms amendment was passed in 2015. Therefore, the Code cannot be controlled by
24 *Amezcu*a because the statute on which it is based existed both before and after the firearms
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1 amendment was passed (the 2009, 2017 and 2019 amendments to Nevada's battery
2 domestic violence statute are attached hereto as **Exhibits 8, 9 and 10**, respectively).

3 The Municipal Court concluded that *Amezcu*a controls because "the HMC has the
4 same elements and penalties as NRS for domestic battery prior to the legislative change in
5 2015. So, it did not increase the domestic battery second offense minimum jail time and is
6 an apparent attempt to avoid NRS 202.360." This reasoning is unsound. The Code has the
7 same elements and penalties that existed for domestic battery both before *and after* the
8 firearms legislation passed in 2015 (because Nevada's battery domestic violence statute
9 was not amended from 2009 to 2017). That the Code uses the ten day penalty instead of
10 twenty days for a second offense means the Code did not adopt the 2019 amendment, but
11 that amendment has no relevance to the firearms provision that was passed in 2015.

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

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

1 Regarding the first premise, a large percentage of Respondent's written and oral
2 opposition was based on a selective or discriminatory prosecution analysis (see, City's
3 Opposition, 43; Transcripts, December 16, 45: 13). "They're saying that, hey two people are
4 prosecuted one goes to justice court, one goes to Henderson [Municipal]. What the test
5 requires Your Honor, is that you have to show that the people similarly situated, some of
6 them are not being prosecuted and some of them are" (Transcripts, December 16, 46: 6).
7 However, Petitioner affirmed that he was *not* making a selective prosecution claim, and
8 therefore the entire discriminatory prosecution analysis is more or less irrelevant. "This is
9 not that they're choosing to prosecute some people but not others, you know even the
10 example that I gave where it's two people who commit the same conduct one is going to
11 justice court, one is going to municipal they're still both being prosecuted. So, this is not an
12 instance of selective prosecution and truthfully, I don't believe that, that analysis has any
13 place in our argument. This is not a selective prosecution claim" (Transcripts, December
14 16, 61: 21).

15 As to the second point, Respondent argued during oral argument that a jury trial
16 under the Sixth Amendment is not a fundamental right:
17

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

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

3 Respondent's position that a jury trial under the Sixth Amendment is not a
4 fundamental right is bewildering. A right to a trial by jury is constantly recognized as *the*
5 most fundamental right protected by our constitution. Nonetheless, it should be apparent
6 that a jury trial under the Sixth Amendment is in fact a fundamental right. "Moreover, in
7 view of our heritage and the history of the adoption of the Constitution and the Bill of
8 Rights, it seems peculiarly anomalous to say that trial before a civilian judge and by an
9 independent jury picked from the common citizenry is not a fundamental right... Trial by
10 jury in a court of law and in accordance with traditional modes of procedure after an
11 indictment by grand jury has served and remains one of our most vital barriers to
12 governmental arbitrariness. These elemental procedural safeguards were embedded in our
13 Constitution to secure their inviolateness and sanctity against the passing demands of
14 expediency or convenience." *Reid v. Covert*, 354 U.S. 1, 9, 77 S. Ct. 1222, 1226-27 (1957).
15 "The right to jury trial guaranteed by the Sixth and Fourteenth Amendments 'is a
16 fundamental right, essential for preventing miscarriages of justice and for assuring that fair
17 trials are provided for all defendants.'" *Brown v. Louisiana*, 447 U.S. 323, 330, 100 S. Ct.
18 2214, 2221 (1980) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968)).
19

20 Regarding Respondent's third point, Respondent argued that prosecutorial
21 discretion permits them to decide, for whatever reasons it deems fit, to decide if individuals
22 are prosecuted under County versus City authority, even after recognizing that the outcome
23 of this decision determines whether the accused is afforded a jury trial or not for the same
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1 conduct. The Henderson Municipal Court agreed that Respondent maintains this discretion:
2 “So, in this case there is no indication that individuals are being treated differently that are
3 charged with this ordinance[sic] and also the prosecutor sometimes has discretion as a
4 charging authority and isn’t required that they have do it whether ordinance or NRS. They
5 have the ability to make that decision and as indicated there is no classification as a
6 protected class anybody that is charged with domestic battery...” (Transcripts, January 13,
7 14: 15).

8
9 The Court explicitly conditioned its reasoning based on *Hudson v. City of Las Vegas*,
10 81 Nev. 677, 409 P.2d 245 (1965). Upon reading the *Hudson* case, however, the Municipal
11 Court again bases its reasoning on a factually incorrect premise. The Municipal Court
12 reasoned that charging under the Code versus the NRS was legitimate, even after
13 concluding the NRS creates the right to a jury trial whereas the Code does not, for the
14 following reason:
15
16

17 [B]ased on the decision on the fact that it’s a petty offense there is no
18 protected class and so, in justice court or municipal court can have
19 concurrent jurisdiction over a domestic violence charges. The *Hudson*
20 v. *City of Las Vegas* a 1965 case involving contributing to the
21 delinquency of a minor and the argument was that there was at the
22 time NRS that made it a gross misdemeanor or a felony which would
23 require a jury trial, but Las Vegas also had it as a municipal code. The
24 argument was that it couldn’t do that under the municipal code because
25 it’s the same act and one is without a jury, the other one was with a jury
26 and in that decision they said there was no statutory guarantee of a
27 trial by jury when a municipal ordinance, when there a municipal
28 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.

1
2 The Municipal Court recognized that charging defendants with battery domestic
3 violence under County authority permitted them a trial by jury as a serious offense, but
4 charging defendants under City authority does not permit them a trial because it remains a
5 petty offense. Ultimately, the Municipal Court held that despite this distinction, prosecutors
6 have discretion to choose which authority to bring charges. To support this reasoning, the
7 Municipal Court relies on several factual predicates from *Hudson* to reach its conclusion:
8 first, the charge of contributing to the delinquency of a minor “was at the time NRS that
9 made it a gross misdemeanor or a felony which would require a jury trial, but Las Vegas
10 also had it as a municipal code” as a misdemeanor; second, that “it’s the same act and one is
11 without a jury, the other one was with a jury;” and third, that “when there a municipal
12 ordinance and a state statute and they coincide and the prosecution can decide whether to
13 charge it in justice court requiring a jury trial or a... municipal code and not having a jury.”
14 All of these three factual predicates from the *Hudson* case form the basis for the Municipal
15 Court’s conclusion that “I find that they are allowed to charge it in either court.” However,
16 upon a cursory reading of the case, *all three* of these factual premises are false.

17
18 In *Hudson*, the charge of contributing to the delinquency of a minor was not a gross
19 misdemeanor or felony under state law, but rather a misdemeanor under *both* state statute
20 and municipal code. Indeed, the Nevada Supreme Court specifically recognized that Hudson
21 was charged under a local ordinance that “incorporates by reference certain acts which had
22 been declared misdemeanors by the state and makes them misdemeanors under local law.”
23 *Hudson v. Las Vegas*, 81 Nev. 677, 678, 409 P.2d 245, 246 (1965) (underline added).
24
25
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1 This distinction is significant because it goes to the second premise of the Municipal
2 Court's reasoning, that "it's the same act and one is without a jury, the other one was with a
3 jury." This is precisely what the Nevada Supreme Court held is *not* the case. Hudson
4 premised his argument on the legal theory that misdemeanors were entitled to jury trials
5 in state court, which is why charging him under the municipal code (where he would not be
6 afforded a jury trial) was unlawful. The Nevada Supreme Court held there was no violation
7 because it was not entitled to a jury trial under *either* state or municipal law. "The basis of
8 his argument is that since the municipal ordinance under which he is charged is identical in
9 language with that of the state statute, which allows a jury trial had he been prosecuted by
10 the state, he is constitutionally entitled to a jury trial. Since the municipal court of Las
11 Vegas does not hear jury trials, it is, he contends, without jurisdiction. Although the United
12 States Constitution specifically provides for trial by jury, such right to a jury trial does not
13 include the trial of numerous offenses, commonly described as "petty," which were
14 summarily tried without a jury by justices of the peace..." *Id.* at 679. The Supreme Court
15 then further analyzed why the crime of contributing to the delinquency of a minor would
16 not be entitled to a jury trial under *Ruhe* and its progeny, which held that "the
17 constitutional provision for a jury trial has not been considered as extending such right but
18 simply as confirming and securing it as it was understood at common law. The offense
19 charged in this complaint was unknown at common law." *Id.*

24 Lastly, the Municipal Court claimed that *Hudson* ruled "when there a municipal
25 ordinance and a state statute and they coincide and the prosecution can decide whether to
26 charge it in justice court requiring a jury trial or a... municipal code and not having a jury."
27

1 However, the *Hudson* case has no mention of prosecutorial discretion whatsoever. In fact, it
2 never considered the issue of the prosecutor's discretion to charge under specific
3 authorities at all. The challenge in *Hudson* was simple: Hudson alleged he would be entitled
4 to a jury trial under state law, therefore he should be entitled to a jury trial under the
5 municipal code for the same charge. The Nevada Supreme Court ruled that Hudson was *not*
6 entitled to a jury trial under state law, because contributing to the delinquency of a minor is
7 a petty offense, and therefore there is no violation for charging him under the municipal
8 code that also precludes a jury trial.
9

10
11 In the instant case, the Municipal Court relied on *Hudson* to conclude that it was
12 acceptable to charge Petitioner under the municipal law, where he would not be entitled to
13 a jury trial, whereas if Petitioner were charged under state law, he would be entitled to a
14 jury trial. In actuality, *Hudson* reached a completely different conclusion: Hudson was not
15 entitled to a jury trial under *either* state or municipal law, and therefore prosecutors had
16 discretion to charge him in either jurisdiction. It did not address the question of
17 prosecutorial discretion when the defendant *is* entitled to a jury trial under one authority
18 and not the other, as the right to a jury trial for *any* misdemeanor offense was not
19 recognized in Nevada until *Andersen* over fifty years later.
20

21
22 As a result, the factual premises relied on the Henderson Municipal Court are
23 factually inaccurate and do not provide any legal support to the Municipal Court's ultimate
24 conclusion that such an unfettered level of discretion is permissible when this discretion
25 permits prosecutors to decide when a defendant is, or is not, entitled to exercise a
26 fundamental right.
27
28

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

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

21 ///

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

3 1. Petitioner's Argument

4
5 The City cannot maintain jurisdiction over misdemeanor battery domestic violence
6 cases for several reasons: first, due to the application of federal law to the Municipal Code
7 (see § B, *supra*); second, there is an unconstitutional Equal Protection violation that results
8 from concurrent jurisdiction where one court requires a fundamental right and the other
9 seeks to avoid it (see § C, *supra*); third, jurisdiction must be divested based on Nevada's
10 statutory grant of authority to the municipalities over criminal matters that permit trials
11 which are only summary and without a jury.
12

13
14 Nevada Revised Statute 266.550(1) formally grants authority over criminal charges
15 to municipalities and details the concurrent jurisdiction between the two courts. "The
16 municipal court shall have such powers and jurisdiction in the city as are now provided by
17 law for justice courts, wherein any person or persons are charged with the breach or
18 violation of the provisions of any ordinance of such city or of this chapter, of a police or
19 municipal nature." However, the same statute also contains a very significant caveat: "The
20 trial and proceedings in such cases must be summary and without a jury."
21

22 While NRS 266.550 grants municipal courts power and jurisdiction akin to those of
23 justice courts, it also explicitly precludes jury trials in municipal courts. See also, *Blanton v.*
24 *North Las Vegas Municipal Court*, 103 Nev. 623, 627 (1987) ("NRS 266.550 provides
25 municipal courts with the power and jurisdiction of justices' courts, except that the statute
26 precludes municipal courts from conducting jury trials"). Under any recognized canon of
27
28

1 statutory interpretation, the plain language of NRS 266.550 prohibits municipal courts
2 from presiding over jury trial cases.

3 “It is well established that, when interpreting a statute, the language of a statute
4 should be given its plain meaning.” *We the People Nevada v. Miller*, 124 Nev. 874, 881, 192
5 P.3d 1166 (2008). Thus, when a statute is facially clear, a court should not go beyond its
6 language in determining its meaning. *Nev. State Democratic Party v. Nev. Republican Party*,
7 256 P.3d 1, 5 (2011) (quoting *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438
8 (1986)); *Las Vegas Taxpayer Comm. v. City Council*, 125 Nev. 165, 177, 208 P.3d 429 (2009)
9 (explaining that a statute’s meaning is plain when it is “facially clear”).
10
11

12 Both the municipal and justice courts are courts of limited jurisdiction with
13 concurrent jurisdiction to prosecute misdemeanors committed within the city limits. “The
14 municipal courts have jurisdiction of all misdemeanors committed in violation of the
15 ordinances of their respective cities...” NRS 5.050(2). The same act or conduct may violate
16 both a city ordinance and a state statute. See, *Hudson v. City of Las Vegas*, 81 Nev. 677, 409
17 P.2d 245 (1965).
18

19 The prohibition on jury trials in municipal courts is further clarified in NRS 175.011.
20 The statute states:
21

22 NRS 175.011 Trial by jury.

23 1. In a district court, cases required to be tried by jury must be so
24 tried unless the defendant waives a jury trial in writing with the
25 approval of the court and the consent of the State. A defendant who
26 pleads not guilty to the charge of a capital offense must be tried by jury.

27 2. In a Justice Court, a case must be tried by jury only if the
28 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.

1 The statute contains two explicit provisions, the first requiring a trial by jury in the
2 District Court, and the second provision requiring trial by jury in Justice Court if requested
3 at least 30 days before trial. The statute does not contain any specific provision for the
4 Municipal Court, nor was it drafted in a manner to permit application to another type of
5 judicial authority. The statute that provides the same powers of the Justice Court to the
6 Municipal Court, on the other hand, contain the express prohibition *against* trial by jury.
7 These two statutes are clear, unambiguous, and not in conflict with one another when read
8 in their entirety.
9

10
11 Respondent may argue that Nevada Revised Statute 5.073 grants this authority. The
12 statute states, in pertinent part: “1. The practice and proceedings in the municipal court
13 must conform, as nearly as practicable, to the practice and proceedings of justice courts in
14 similar cases. An appeal perfected transfers the action to the district court for trial anew,
15 unless the municipal court is designated as a court of record as provided in NRS 5.010. The
16 municipal court must be treated and considered as a justice court whenever the
17 proceedings thereof are called into question.” However, using NRS 5.073 as a purported
18 grant of authority over jury trials creates a series of problems and statutory contradictions.
19

20
21 Reading the statute in this manner to permit jury trials creates a facial conflict with
22 NRS 266.550, which explicitly prohibits them. Virtually every guideline of statutory
23 interpretation would reject this proposition.
24

25 First and foremost, statutes should not be interpreted in a manner that would create
26 a conflict with another statute. “[T]he canon against reading conflicts into statutes is a
27 traditional tool of statutory construction...” *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630
28

1 (2018). “This court ‘avoid[s] statutory interpretation that renders language meaningless or
2 superfluous,’ and ‘whenever possible . . . will interpret a rule or statute in harmony with
3 other rules or statutes.’” *Williams v. State Dep’t of Corr.*, 402 P.3d 1260, 1262 (Nev. 2017)
4 (citing *Watson Rounds v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 79, 358 P.3d 228, 232
5 (2015)). Using the generally worded “conformity” statute to conflict with an explicit
6 prohibition in another chapter of the Nevada Revised Statute would violate this basic
7 maxim.
8

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

2
3 In its written opposition to Petitioner's Motion to Divest Jurisdiction, Respondent
4 argued that the prohibition of NRS 266.550 did not apply to Henderson because the
5 municipality was incorporated by special charter.

6 The Nevada Supreme Court held that the prohibition against jury trials
7 in municipal courts (pursuant to NRS 266.550) does not apply to
8 municipal courts in a city incorporated under a special charter.
9 *Donahue v. City of Sparks*, 111 Nev. 1281, 903 P.2d 225 (1995). The City
10 of Sparks, Nevada is incorporated under a special charter. Sparks City
11 Charter, Chapter 470, Statutes of Nevada 1975, Article I, Section 1.010.
12 Like the City of Sparks, the City of Henderson is a city incorporated
13 under a special charter, which was passed by the Legislature in 1971.
14 Henderson City Charter, Chapter 266, Statutes of Nevada 1971, Article
15 I, Section 1.010. In 1995, the Nevada Supreme Court held in *Donahue*
16 that a city incorporated "under a special charter" is not subject to a
17 statutory prohibition against jury trials in municipal courts. *Donahue* at
18 1282-1283, 226 (City's Opposition, 61).

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

25 In this case, the Henderson Municipal Court expressly concluded that the Henderson
26 City Charter did in fact incorporate NRS 266, and therefore incorporated the jury trial
27 prohibition in NRS 266.550:
28

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

16 Utilizing the Code to prosecute battery domestic violence cases without the benefit
17 of a trial by jury also violates other portions of the Henderson Municipal Code. Specifically,
18 Section 2.080(1) provides: "The City Council may make and pass all ordinances, resolutions
19 and orders not repugnant to the Constitution of the United States or the State of Nevada, or
20 to the provisions of Nevada Revised Statutes or of this charter, necessary for the municipal
21 government and the management of the affairs of the City, and for the execution of all the
22 powers vested in the City." In this case, the Ordinance is "repugnant to the Constitution of
23 the United States" and the Nevada Revised Statute because its purpose is to circumvent the
24 availability of a fundamental constitutional right. The Nevada Supreme Court determined
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1 in *Andersen* that charges of misdemeanor battery domestic violence carry penalties
2 sufficient to categorize the offense as “serious” rather than “petty.” Therefore, pursuant to
3 Nevada precedent such as *Blanton v. N. Las Vegas Mun. Court*, 103 Nev. 623, 629 (1987)
4 (holding rights in the Nevada Constitution to be “coextensive with that guaranteed by the
5 federal constitution”), classifying the charge as a “serious” one creates a vested
6 constitutional interest in a trial by jury under both Article III of the Nevada Constitution as
7 well as the Sixth Amendment to the United States Constitution.
8

9 After formally recognizing the existence of this fundamental right, the Henderson
10 Ordinance was enacted to avoid this right that would otherwise be available under state
11 statute. As such, the substance and purpose of the Code is “repugnant” to the Constitutions
12 of Nevada and the United States. It also directly contradicts the Nevada Supreme Court,
13 where the right to a trial by jury for these charges was explicitly recognized.
14

15 For all of these reasons, the Municipal Courts lack jurisdiction to preside over a jury
16 trial due to the express statutory prohibition as well as the Code’s repugnancy to the
17 Nevada and Federal Constitutions. As a charge of battery domestic violence prosecuted
18 under the Municipal Code still nonetheless warrants a trial by jury based on the federal
19 definition that examines the underlying conduct, the Municipal Court must be divested of
20 jurisdiction.
21

22 However, the result of divesting jurisdiction need not mandate outright dismissal. A
23 specific statute exists which details the process for transferring the jurisdiction of a case
24 from the Municipal Court to the Justice Court in this instance. Specifically, NRS
25 5.0503(1)(b) provides: “A municipal court may, on its own motion, transfer original
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27
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