IN THE SUPREME COURT OF THE STATE OF NEVADA

Nathan Ohm, Petitioner, vs. Eighth Judicial District Court, and the Honorable Kathleen Delaney, District Court Judge, Respondents, and City of Henderson, Real Party in Interest.	)	Supreme Court Case No.: Electronically Filed Oct 19 2020 03:21 p.m. Elizabeth A. Brown Clerk of Supreme Court **PETITIONER'S APPENDIX INDEX** **Vol. III** **Bates 351-545**

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jurisdiction of a criminal case filed with that court to a justice court or another municipal court if… Such a transfer is necessary to promote access to justice for the defendant and the municipal court has noted its findings concerning that issue in the record."

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

Therefore, there is an available avenue by which Respondent can continue to meet its policy obligations inherent in prosecuting cases of battery domestic violence by transferring such prosecution to the Henderson Justice Court; as prosecution under one authority is worth no more or less than prosecution under another, general policy concerns such as victim safety and reduction of crime can still be satisfied. Additionally, this alternative avenue of prosecution also protects the accused's right to a jury trial in a manner that comports with *Andersen's* constitutional mandate.

CONCLUSION

For these reasons, Petitioner respectfully requests this Court issue a writ of Certiorari finding that the Henderson Municipal Court lacks jurisdiction to charge or adjudicate charges of misdemeanor battery domestic violence under either the NRS or Henderson Municipal Code; in the alternative, Petitioner requests this Court issue a writ of Mandamus requiring the Henderson Municipal Court to transfer battery domestic violence cases to the Justice Court pursuant to the process set forth in 5.0503(1)(b) so that Petitioner may invoke his fundamental right to a trial by jury.

Dated this 13 day of February, 2020.

MAYFIELD GRUBER & SHEETS
Respectfully Submitted By:

DAMIAN SHEETS, ESQ.
Attorney for Petitioner

VERIFICATION OF DAMIAN SHEETS, ESQ.

1. I am an attorney at law, admitted to practice in the State of Nevada.
2. I am the attorney handling this matter on behalf of Petitioner.
3. The factual contentions contained within the Writ of Mandamus or, in the Alternative, Petition for Writ of Certiorari are true and correct to the best of my knowledge.

Dated this 13 day of February, 2020.

MAYFIELD GRUBER & SHEETS
Respectfully Submitted By:

DAMIAN SHEETS, ESQ.
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 with 12 point, double spaced Cambria font.

2. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(c), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matte relied on is to be found.

I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13 day of February, 2020

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the _____ day of _____, 2020, I served a true and correct copy of the Petition for Writ of Mandamus or, In the Alternative, Petition for Writ of Certiorari to the last known address set forth below:

The Honorable Judge Mark Stevens
Henderson Municipal Court
Department 1
243 S. Water Street
Henderson, Nevada 89015

Henderson City Attorney's Office
243 S. Water Street
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EIGHTH JUDICIAL DISTRICT COURT
IN THE COUNTY OF CLARK, STATE OF NEVADA

NATHAM OHM,

Petitioner,

-vs-

HENDERSON MUNICIPAL COURT, AND THE HONORABLE MARK STEVENS, HENDERSON MUNICIPAL JUDGE,
City,

and

CITY OF HENDERSON,

Real Party in Interest

CASE NO.: A-20-810452-W
DEPARTMENT: XXV

HENDERSON MUNICIPAL COURT
CASE NOS: 19CR002297, 19CR002298

HEARING DATE: 05/19/2020
HEARING TIME: 9:00am

CITY OF HENDERSON'S OPPOSITION TO PETITIONER'S REQUEST FOR A WRIT OF MANDAMUS, OR IN THE ALTERNATIVE WRIT OF CERTIORARI

COMES NOW, the City of Henderson, by and through its attorney, MARC M. SCHIFALACQUA, Esq., Sr. Assistant City Attorney, and hereby opposes the Petition for Writ of Mandamus or, in the Alternative, Petition for Writ of Certiorari herein.

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STATEMENT OF THE CASE

On February 22, 2019, Nathan Ohm ("Petitioner") was arrested on two counts of Battery Constituting Domestic Violence, misdemeanor violations of NRS 33.018, 200.481, and 200.485. The Criminal Complaint charged Appellant in case 19CR002297 with one count of Battery Constituting Domestic Violence, alleging that Appellant "did strike Hailey Schmidt about the face and/or did get on top of her" on or about February 22, 2019, in the City of Henderson. And in case 19CR002298 with one count of Battery Constituting Domestic Violence, alleging that Appellant "did strike and/or did punch Marcuse Ohm one or more times" on or about February 22, 2019, in the City of Henderson. (*See* Complaint, City's Appendix, Bates at 031) Petitioner posted bail and was released from custody. On March 25, 2019, the Public Defender entered a plea of not guilty on behalf of Petitioner and the court set a trial date.

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

On or about October 21, 2019, City filed an amended complaint charging Petitioner with the same incidences of Battery Domestic Violence pursuant to Henderson Municipal Code § 8.02.055 (*See* City's Appendix, Bates at 002-003). Based on the Andersen case, Petitioner filed a written demand for a jury trial and on November 4, 2019 the lower court issued a briefing schedule. The lower court heard arguments for the briefs on December 16, 2019 and rendered its decision on January 13, 2019. While Petitioner claimed he was the victim of various constitutional violations, the lower court denied his motion because he is not entitled to a jury trial when charged with a violation of the city ordinance at issue. Petitioner next filed his interlocutory writ that seeks relief

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from this court even when a plain, speedy, and adequate remedy of law is available. The City of Henderson responds as follows.

ISSUES PRESENTED

1. Does the policy of judicial economy support this court's rare exercise of discretion to answer a request for extraordinary relief when a writ is pending in the Nevada Supreme Court where the issue of jurisdiction for municipal courts to conduct jury trials for misdemeanor charges of Domestic Violence was raised?

2. Is it essential for another court to reach the merits of Petitioner's claims after the lower court reviewed extensive briefing by each of the parties, considered lengthy oral arguments, and a plain, speedy and adequate remedy at law exists because a trial has not been held?

ARGUMENT

I. PETITIONER FAILS TO MEET THE STANDARD REQUIRED FOR A DISTRICT COURT TO INTERVENE PRIOR TO THE ENTRY OF A JUDGMENT OF CONVICTION.

City asks this court not to entertain Petitioner's writ. For this case, the rare exercise of a District Court's discretion to answer a request for interlocutory relief by way of writ of certiorari is contrary to judicial economy. Petitioner relies on reasoning from a Nevada Supreme Court case, Salaiscooper v. Eighth Judicial Dist. Court ex rel. Cty. of Clark, 117 Nev. 892, 906, 34 P.3d 509, 519 (2001), to argue a writ of Certiorari should issue. *See* Petitioners Writ at 13 (hereinafter "Pet. Writ"). That case however is distinguishable from his circumstances because there is currently a writ pending in the Nevada Supreme Court where the issue of jurisdiction was raised by the City, and briefing for that writ is closed.[1] *See* Hildt v. Dist. Ct. (City of Henderson), No.79605 (Nev. Filed Sept. 13, 2019). Additional arguments in *this* court will not assist the higher Court in clarifying a matter of statewide importance or subsequent appeals from lower courts. Salaiscooper v. Eighth Judicial Dist. Court ex rel. Cty. of Clark, 117 Nev. 892, 902, 34 P.3d 509, 516 (2001) (explaining unique reasons for intervention in a criminal case prior to entry of judgment of conviction.). Simply, the sole issue of jurisdiction that Petitioner relies on for a writ of certiorari to issue is already pending with the Court.

[1] http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=56574

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It is worth noting at this point that all of Petitioner's concerns raised in the lower court would be resolved if municipal courts have jurisdiction to conduct jury trials. As a result, arguing the issue of jurisdiction in this court will not assist the Nevada Supreme Court in any manner. During arguments on the motion, Petitioner's counsel was clear on the issue of jury trials:

> Your Honor, if you want to rule that this, the municipal court has the authority to do jury trials and its constitutionally mandated let's do it. You know, *let's do jury trials here*. This was not an attempt to get all of these battery domestic violence cases dismissed or transferred. *See* Oral Argument on Motion to Divest Jurisdiction, Pet. App. V.1., Bates 207 (emphasis added).

Petitioner's counsel then goes on to clarify that the relief they seek is trial by jury:

> I just, the point of doing this was to make sure that their rights are preserved, and they have now a fundamental right to a jury trial under the 6th amendment. So, if that right is going to be vested in this Court, that's fine. Let's do it that way. If the city wants to keep those cases here and have jury trials here. I am all for it... Id.

A writ of certiorari should therefore not issue to allow Petitioner to further argue his position on jurisdiction when his arguments in this court will not assist the Nevada Supreme Court in resolving a pending writ for the same issue. Petitioner has not demonstrated that unique circumstances exist for this court to issue a writ of certiorari when the Nevada Supreme Court already has the issue before it. This court should therefore deny his petition and remand the case to the lower court for a bench trial.

II. THERE IS NO CLAIM OF RELIEF TO SUPPORT A WRIT OF MANDAMUS.

Petitioner fails to make any claim that would support the issue of a writ of mandamus. While his petition includes a cursory review of the standard for the writ, he fails to assert any justification *or* legal basis for this court to issue a writ of mandamus. Pet. Writ at 12-13. In fact, Petitioner clarifies that his request for relief is **only** for a writ of certiorari:

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

While the title of his petition states he seeks relief in the alternative, the substance of his petition refines the relief he seeks. He seeks a writ of certiorari to address a matter of jurisdiction.

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He otherwise would have included some explanation or legal basis for why a writ of mandamus should issue. Yet, his petition only contains a standard of review for a writ of mandamus without any explanation or reasoning on how the lower court ran afoul to justify a writ of mandamus.

Perhaps a writ of mandamus would be appropriate if there was a claim that the lower court abused its discretion or acted in an arbitrary or capricious manner. State v. Eighth Judicial Dist. Court (Armstrong), 127 Nev. Adv. Op. 84, 267 P.3d 777, 779-80 (2011) (explaining writ will issue to control a manifest abuse or arbitrary or capricious exercise of discretion). That, however, is not before the court because he fails to offer *any* reason why a writ of mandamus should issue. Any justification for a writ of mandamus is refined to the narrow issue of jurisdiction over jury trials; this court need only to look to his section entitled "Relief Sought". Pet. Writ at 12. He could not be any clearer. Petitioner's issue is based solely on jurisdiction. And he is asking this court to make a ruling that the Nevada Supreme Court could overturn in the future. His prayer for relief therefore does not support judicial economy. Redeker v. Eighth Judicial Dist. Court of State of Nev. ex rel. Cty. of Clark, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006) (clarifying that courts consider "whether judicial economy and sound judicial administration militate for or against issuing the writ.") And Mandamus is also not available when the "**petitioner has a plain, speedy, and adequate remedy in the ordinary course of law**," Mineral County v. State, Dep't of Conserv., 117 Nev. 235, 243, 20 P.3d 800, 805 (2001), **and the opportunity to appeal a final judgment typically provides an adequate legal remedy.** Williams v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark, 127 Nev. 518, 524, 262 P.3d 360, 364 (2011) (emphasis added). A direct appeal of a final judgment provides a suitable legal remedy at law that would allow all the issues brought forth in the instant petition to be heard by the appellate court. As such, the Petitioner has a plain, speedy and adequate remedy in the ordinary course of law (a direct appeal), and thus City respectfully requests that the instant petition be denied on that basis.

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A review of Petitioner's prayer for relief reveals that his petition lacks any new or novel legal basis for the request. It appears that Petitioner argues that the lower court somehow abused its discretion when it ruled against him because the lower court "only conducted a limited analysis" of his equal protection claim. Pet. Writ at 22; *compare* Pet. Writ at 12: 13-18 (failing to provide any legal justification for a writ of mandamus to issue.) This, however, is simply not true.

As evidenced by Petitioner's volumes of appendices, there has been extensive briefing on the issues in the lower court along with lengthy oral arguments. *See* Pet. App. V.1., Bates pp. 001-216; 232-247. The record therefore demonstrates that the lower court was fully informed of the issues presented before rendering a decision. The record also establishes that the lower court carefully evaluated the issues briefed, pondered the oral arguments presented, and issued a thoughtful ruling after deliberating all the issues presented. Thus, this court should deny Petitioner's request for relief; however, if this court decides to consider the merits of his Petition, as discussed below, the prohibition against *ex post facto* laws is not offended.

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

Petitioner claims that the City of Henderson's domestic battery ordinance, Henderson Municipal Code ("hereinafter HMC") § 8.02.055, violates the federal and state prohibition against *ex post facto* laws, as applied to him. In short, Petitioner mistakenly complains that since his attack on his wife and father occurred before the enactment of HMC § 8.02.055[2], charging Petitioner under the City ordinance with no jury trial is prohibited. Since Petitioner's conduct was clearly illegal under state law when it occurred on February 22, 2019 (Domestic battery – NRS 200.481, 33.018), and the HMC provides for the exact same penalties and elements of the offense, the prohibition against *ex post facto* laws is not offended.

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

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The Henderson Municipal Court correctly ruled that application of HMC § 8.02.055 to Petitioner's charge does not run afoul of the prohibition against *ex post facto* laws. *See* Transcript of Decision on Motion to Divest Jurisdiction, Petitioner's Appendix Vol 2., Bates pp. 241-243. The lower court found that, while Petitioner's offense date in this case predated the municipal code enactment, Petitioner was not disadvantaged by the amendment of charges to the municipal code. Id. at 241-242. The court looked at the fact that the elements of domestic battery, as well as the punishment/sentencing structure, under the NRS and the HMC are identical.[3] Id. As the elements to prove the crime and the sentencing structure are the same between the NRS and the HMC, there can be no credible claim that charging any particular defendant under the HMC rather than the NRS disadvantages that defendant; Petitioner was on notice that his conduct was against the law, and what his potential punishment could be if convicted. The lower court also found that, when no loss of firearm rights is at issue, the loss of a jury trial isn't fundamentally unfair or unjust. Id. at 242:4-21. Finally, the lower court found that there was no difference in admissible evidence whether a bench trial or jury trial was given, and thus charging Petitioner under the HMC was not an *ex post facto* violation. Id. at 242-243. Petitioner argues that the lower court was incorrect, and should have found the law to be an impermissible *ex post facto* law on each of these grounds.

Petitioner also argues that the municipal code section at issue is an unlawful *ex post facto* law because of Petitioner's argument that Henderson Municipal Court never had jurisdiction over any case that requires a trial by jury. Pet. Writ at 21:8-18. As that argument is really about jurisdiction it is not addressed in this section; the Henderson Municipal Court's jurisdiction over cases of domestic battery are addressed in section VI *infra*.

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[3] The lower court did mistakenly cite to 2019 changes in battery constituting domestic violence second offense minimums as "2015" changes. Transcript of Decision on Motion to Divest Jurisdiction, Petitioner's Appendix Vol 2. at 242: 4. This misstatement is not material in any way to the court's findings.

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

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

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

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

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

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

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

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

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

As can be seen by comparison of the NRS and the HMC, and as is undisputed by Petitioner, the elements and punishments of the crimes of domestic battery are identical between the two sources of law. *See* statutory text of HMC § 8.02.050, HMC § 8.02.055, (City's Appendix, Bates at 002-003) and NRS 33.018, NRS 200.481, NRS 200.485, Id. at 004-010; *see also* City's Opposition to Motion to Divest, Pet. App. Vol 1., Bates 038-039. Because Petitioner's conduct was criminal under the NRS at the time of the incident, and because the penalties under the HMC are no harsher than the penalties under the NRS, retroactively applying the HMC to Petitioner's conduct does not violate *ex post facto* prohibitions.

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

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

Id. (emphasis added).

HMC § 8.02.055 passes this constitutional test. Simply, the definition of domestic battery as well as the punishment are the same under both the Nevada Revised Statutes and the HMC. Clearly, a defendant charged with HMC § 8.02.055 is not disadvantaged because the defendant

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could have been (and in the instant case already was) charged for the same violent conduct: domestic battery under NRS 200.485.

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

C. The perceived loss of a jury trial is not a new penalty or punishment, does not take away a right, and does not trigger a broader "manifest injustice" ex post facto analysis.

Petitioner further complains, with little citation to authority, that while the penalty and elements of domestic battery may be the same under both provisions (HMC & NRS), the loss of the right to a jury trial is punitive or manifestly unjust. Petitioner mistakenly reasons that Petitioner's loss of a right to jury trial somehow creates an *ex post facto* violation.

1. Loss of right to jury trial is not an ex post facto violation.

This exact issue has already been considered and rejected by the U.S. Supreme Court. In Collins v. Youngblood, 497 U.S. 37, 110 S.Ct. 2715 (1990), a newly enacted law permitted the appellate court to remedy an incorrect verdict, when under previous law Petitioner would have a right to a new trial by a jury. The Court held that "the right to a jury trial provided by the Sixth Amendment is obviously a 'substantial' one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* Clause." Id. at 51. Thus, the new law did not violate the *ex post facto* clause, even though it removed Petitioner's right to a **new** jury trial. Collins overturned Thompson v. Utah, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1898), where the Court held that a change in Utah law reducing the size of

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juries in criminal cases from 12 persons to 8 deprived Thompson of "a substantial right involved in his liberty" and violated the *Ex Post Facto* Clause. Id., at 352, 18 S.Ct., at 623.

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

Also, in U.S. v. Joyner, 201 F.3d. 61 (2nd Cir. 2000), the 2nd Circuit Court of Appeals considered whether retroactively applying a law that removed the right for a jury to decide whether a defendant convicted of arson resulting in death should be sentenced to the death penalty violated the *ex post facto* clause. After discussing Collins, the 2nd Circuit held that "a change in law that reduces or eliminates the jury's role in determining the crime or punishment of a does not violate the *Ex Post Facto* Clause because it does not change the substantive definition of the crime, increase the punishment, or eliminate any defense with respect to the offense of arson. Indeed, if removing the right to a new trial by jury does not violate the *Ex Post Facto* Clause, then, *a fortiori*, removing the right to sentencing by jury passes constitutional muster." Id. at 80.

Petitioner also makes an argument that charging Petitioner under the HMC removed his "vested right" to a jury trial. City responds in full to Petitioner's misplaced and nonsensical claims of the removal of a "vested right" in section V *Infra*.

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2. City's motivations for passing HMC § 8.02.055 do not violate fundamental fairness or create manifest injustice.

Petitioner argues that HMC § 8.02.055 violates the prohibition against *ex post facto* laws because not having a jury trial offends concepts of fundamental fairness and manifest injustice. As noted by Petitioner, the *ex post facto* clause "safeguards 'a fundamental fairness interest . . . in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." Peugh v. United States, 569 U.S. 530, 544 (2013), *quoting* Carmell v. Texas, 529 U.S. 513, 533 (2000).

In making his fundamental unfairness argument, Petitioner asks this court to look at the text of Henderson Municipal Ordinance 3632, which amended the HMC to add in domestic battery. Pet. Writ at 19:13-28, *See* Ordinance 3632, Petitioner's Appendix Vol. 2., Bates pp. 264-267. Petitioner's biased and cherry-picked reading of Ordinance 3632 focuses on the City's statements that the domestic battery ordinance was added into the HMC in response to the decision in Andersen. Petitioner paints this as a "vindictive" attempt to avoid a "newly recognized fundamental right" of a jury trial, when applied retroactively. Pet. Writ at 19: 10-16. A full reading of Ordinance 3632 shows otherwise.

Ordinance 3632 clearly states the City's purposes for adding domestic battery to the code: "battery constituting domestic violence is a widespread offense and the City of Henderson has a significant interest in protecting its citizens from this offense." Ordinance 3632, Petitioner's Appendix Vol. 2., Bates 264 ¶ 4. The Ordinance also states that, in response to the Andersen decision, there will be "anticipated legal challenges to the Municipal Court's jurisdiction to entertain and hold jury trials" (a prophecy fulfilled by the instant challenge wherein Petitioner is challenging the court's very authority to hear any domestic violence case), and that enacting a city ordinance is "important to protect the general health, safety, and welfare of the citizens of Henderson." Id. at ¶ 3. Put more directly, as soon as the Andersen decision was released, despite the Andersen court specifically remanding the case for that defendant to be given a jury trial in a

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municipal court, the City anticipated that defendants would next challenge a municipal court's authority to conduct jury trials. While the City is more than willing to begin conducting jury trials, it does not currently have the infrastructure or practical ability to conduct jury trials. As defendants are currently challenging City's very authority to conduct jury trials, taxpayer investment in jury trial infrastructure is basically impossible. This puts the City (and all other municipal jurisdictions in Nevada) in a very sticky circumstance, and effectively would grind the prosecution of domestic violence to a screeching halt. From a fuller reading of Ordinance 3632, it is clear that the City's motivation in adding domestic battery into the HMC was to be able to continue to protect its citizens from domestic violence by actually being able to prosecute domestic violence cases. Thus, Petitioner's claim of vindictive motivations is obviously unfounded.

Setting aside motivation, Petitioner also argues basic unfairness. Petitioner's argument basically goes that he was entitled to a jury trial when charged under the NRS, and that by amending his charges to reflect the new HMC § 8.02.055, the City has taken away his jury trial right. Petitioner's argument, however, conveniently ignores the fact that being charged under the HMC rather than the NRS, while having the same sentencing consequences, has fewer peripheral consequences. Specifically, when Petitioner was charged under the NRS, his right to own and bear firearms was at stake pursuant to NRS 202.360(1)(a). Since a conviction under municipal law is not a "misdemeanor crime of domestic violence as defined in 18 U.S.C. 921(a)(33)" as described in NRS 202.360(1)(a), a conviction for domestic battery under HMC § 8.02.055 does not impact a defendant's Second Amendment rights to gun ownership. Once the charge was amended to HMC § 8.02.055, Petitioner's Second Amendment firearms rights were no longer at issue. The Andersen Court made very clear that the triggering issue, changing a domestic battery charge from a petty to a serious offense, and thus requiring a jury trial, was the state law prohibition on the right to bear arms. Andersen, 448 P.3d at 1124 (2019). Thus, the City did not take away Petitioner's right to a jury trial; City took away ***the risk*** that Petitioner would lose his Second Amendment rights.

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This is precisely what the lower court found. The lower court stated that a "bench trial isn't fundamentally unfair or unjust," that the right to a jury trial "only attaches if it's a serious offense," and that the Supreme Court in Amezcua (before the gun prohibition had been enacted) found domestic battery to be a petty offense. Transcript of Decision on Motion to Divest Jurisdiction, Petitioner's Appendix Vol. 2., Bates 242:8-14. The lower court correctly assessed that, since City was not seeking to infringe upon Petitioner's gun rights, Petitioner was not facing a serious offense, and thus was not entitled to a jury trial. For these reasons, Petitioner's fairness arguments fail.

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

D. There is No Ex Post Facto Violation, as a Bench Trial Changes Neither the Rules of Evidence Nor Allows Less or Different Testimony than a Jury Trial.

Petitioner mistakenly argues that the evidence or testimony would be different at a bench trial than at a jury trial, and thus charging Petitioner under HMC § 8.02.055 would constitute an *ex post facto* violation. The United States Supreme Court has explained that *ex post facto* violations include "[e]very law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." Stogner v. California, 539 U.S. 607, 612, 123 S. Ct. 2446, 2449, (2003), *citing* Calder v. Bull, 3 U.S. 386, 390, 3 Dall. 386, (1798). The Stogner Court, looking to Calder, traced this prohibition back to *ex post facto* "abuses" by British Parliament, describing times Parliament passed laws that allowed governments to call one witness when the existing law required two, allowed courts to receive evidence without oath, requiring a wife to testify against her husband, or other uses of previously inadmissible evidence. Id. The Stogner court specifically references laws that changed or "violated the rules of evidence (to supply a deficiency of legal proof)." Id.

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In the instant case, there is no allegation that HMC § 8.02.055 changed any rules of evidence, yet Petitioner claims that being charged and tried under HMC § 8.02.055 creates an *ex post facto* violation. In support of his argument, Petitioner takes a quote from the Municipal Court's ruling, saying there would be "a change" because the judge would hear motions and writs during a bench trial, in addition to being the finder of fact; whereas, in a jury trial, the judge would not be the finder of fact. Pet. Writ at 24:10-12. However, this statement by the Municipal Court was not a finding that there is a change in *evidence*, but was merely a comment that there would be a difference in *procedure* between a bench trial and a jury trial as evidenced by the next lines. The Municipal Court continued on to explain that a bench trial "doesn't change what's legally admissible or what's admitted into a case." Transcript of Decision on Motion to Divest Jurisdiction, Petitioner's Appendix Vol. 2., Bates 243:3-7. The lower court specifically and correctly stated that a bench trial "doesn't change what's coming in as being admissible." Id. at 243:7-8.

Petitioner makes no allegation that being charged under the HMC permits the City to utilize evidence that would be inadmissible in a case charged under the NRS. There are not different rules of evidence for bench trials than there are for jury trials. Thus, despite Petitioner's assertion, there is no *ex post facto* violation based on a difference of evidence.

As explained *supra*, the elements of Petitioner's charge, regardless of whether he was charged under NRS 202.360 or HMC § 8.02.055, did not change, and the City had the same burden to prove. Similarly, the evidence allowed or admitted to prove these elements did not change when Petitioner's complaint was amended to charge him under HMC § 8.02.055. A bench trial is not unfair or unjust, and as Petitioner is not subject to losing his gun rights, he has no remaining right to a jury trial. As such, City did not violate the *ex post facto* clause when it amended Petitioner's complaint to charge him under HMC § 8.02.055.

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

Petitioner erroneously argues that a conviction under HMC § 8.02.055 qualifies as a predicate offense under the federal definition of "misdemeanor crime of domestic violence," contained in NRS 202.360, triggering a prohibition on possession of firearms. Petitioner further insists that being charged under HMC § 8.02.055 requires trial by jury. However, the lower court correctly found that municipal law convictions do not meet the federal definition of "misdemeanor crime of domestic violence," do not trigger the loss of firearm rights under Nevada state law, and do not require trial by jury. *See infra.*

Although the Sixth Amendment of the U.S. Constitution guarantees an individual the right to a jury trial, the right "does not extend to every criminal proceeding." Blanton v. N. Las Vegas Mun. Court, 103 Nev. 623, 629, 748 P.2d 494, 497 (1987), *aff'd sub nom.* Blanton v. N. Las Vegas, 489 U.S. 538 (1989). The right to a jury trial attaches only to "serious" offenses. Id. Defendants in cases involving "petty" offenses are not entitled to trial by jury. *See*, Lewis v. United States, 518 U.S. 322, 116 S. Ct. 2163 (1996); *citing* Duncan v. Louisiana, 391 U.S. 145 (1968); Amezcua v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 130 Nev. 45, 46–47, 319 P.3d 602, 603 (2014).

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

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serious offense, and those consequences were therefore irrelevant to determining whether a defendant would be entitled to a trial by jury for such an offense. Id.

It was the potential loss of firearm rights, this time under state law, that became the central issue only a few years later. After the Amezcua decision, the Nevada legislature in 2015 passed an amendment to NRS 202.360, the statute which prohibits the possession or control of firearms by some individuals. Specifically, the relevant portion of NRS 202.360 states:

> 1. A person shall not own or have in his or her possession or under his or her custody or control any firearm if the person:
>
> (a) Has been convicted in this State or any other state of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33) [...]

That legislative change, the Andersen Court said, was the basis for the distinction between Amezcua and Andersen: once the Nevada legislature added the additional penalty of the loss of gun rights under NRS 202.360 upon conviction, thereby indicating the elevation to a serious offense, the right to a trial by jury attached. Andersen v. Eighth Judicial District Court et al., 135 Nev. Adv. Op. 42, 448 P.3d 1120 (2019).

The crux of the issue of whether a domestic battery charge entitles a defendant to a jury trial, then, is the potential loss of gun rights pursuant to NRS 202.360. The 2015 amendment to NRS 202.360 criminalized possession or control of a firearm by a person convicted in Nevada or any other state of a misdemeanor crime of domestic violence *only* as defined in 18 U.S.C. § 921(a)(33). NRS 202.360; Andersen v. Eighth Judicial District Court et al., 135 Nev. Adv. Op. 42, 448 P.3d 1120 (2019). The Andersen Court explained that the legislature's amendment to NRS 202.360, by limiting the constitutional right to possession of a firearm, entitled those affected to trial by jury. Id., 135 Nev. Adv. Op. 42, 448 P.3d at 1124. If a criminal conviction would *not* trigger prohibition of firearms possession or ownership under NRS 202.360 —i.e., the amendment would not be applicable— the defendant would *not* be entitled to a trial by jury just as before under Amezcua.

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

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

> (33)
> (A) Except as provided in subparagraph (C),[2] the term "misdemeanor crime of domestic violence" means an offense that—
> (i) is a misdemeanor under **Federal, State, or Tribal [3] law**; and
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. [...]

(emphasis added).

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

1. The entire premise of Petitioner's faulty interpretation of the federal definition is based on a dissenting opinion.

Petitioner incorrectly contends that plain language of the federal definition covers Henderson's domestic violence municipal ordinance because the "actual conduct underlying the conviction would also be a misdemeanor under State law." Pet. Writ at 32:1-7. He bases this conclusion on a faulty interpretation of the word "offense" as used in the federal definition. Specifically, he claims that "[u]nder federal interpretation, an 'offense' refers to the underlying

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conduct that is criminalized." Pet. Writ at 28:1-6 (emphasis in original). This purported definition of "offense" is the cornerstone of his analysis. In support of his proposition, Petitioner quotes language from Texas v. Cobb, 532 U.S. 162, 186, 121 S. Ct. 1335, 1350 (2001). However, what he seems to intentionally omit is that **the quoted language used to support his definition of "offense" comes from the *dissenting* opinion in Texas v. Cobb.**

It is axiomatic that a dissenting opinion is not binding precedent. U.S. v. Ameline, 409 F.3d 1073, 1083 n.5 (9th Cir. 2005); Purcell v. BankAtlantic Financial Corp., 85 F.3d 1508, 1513 (11th Cir. 1996). Thus, Petitioner's definition of offense is not binding on this (or any other) Court. Yet, nowhere in his writ does Petitioner mention that he derives his definition of offense from Cobb's dissent or that the definition is non-binding. Petitioner's omission creates the misleading and false impression that his definition of "offense" is binding authority. In short, Petitioner bases his "plain language" argument on a definition that is incorrect, inapplicable, and, at best, aspirational. Further, not only is Petitioner's definition of "offense" incorrect, it is not even the only definition recognized by the Cobb dissent. The Cobb dissent acknowledges there are multiple uses for "offense" within the legal field, and that the definition depends on the context. Cobb, 532 U.S. at 177, 121 S. Ct. at 1346. Because the entire premise of Petitioner's plain language argument – that "offense" as used in the federal definition means conduct – is based on an incorrect and non-binding dissenting opinion, this Court should disregard Petitioner's analysis in whole.

Interestingly, the other definitional resources Petitioner presents for "offense" comport with the City's position: that "offense" as used in the federal definition means misdemeanor and felony violations of law, *i.e.* crimes. Pet. Writ at 28:7-13; OFFENSE, Black's Law Dictionary (11th ed. 2019). As discussed next, the plain language and relevant case law make clear that the federal definition excludes municipal convictions. Rather, the federal definition only pertains to convictions for violations of misdemeanor State, Federal, and Tribal Law that include the requisite elements.

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2. The plain language of the federal definition excludes municipal convictions.

Petitioner's plain language analysis of the federal definition wrongly equates the word "offense" to conduct. Instead, the word "offense" as used in the federal definition means violations of law, i.e. crimes. U.S. v. Shill, 740 F.3d 1347, 1351 (9th Cir. 2014) (citing *Black's Law Dictionary* (9th ed. 2009). Further, the plain language defines what category of offenses are considered "misdemeanor crimes of domestic violence." Specifically, 18 U.S.C. § 921(a)(33)(A) provides that "the term 'misdemeanor crime of domestic violence' means an offense that... is a misdemeanor under **Federal, State, or Tribal law**." (emphasis added). Thus, pursuant to plain language of the statute, domestic violence offenses (or crimes) codified under federal, state, or tribal law are included in the federal definition. Because municipal ordinances do not fit into any of those categories, they are not covered by 18 U.S.C. § 921(a)(33)(A).

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

Here, the definition is clear and lends itself to only one reasonable interpretation: Congress delineated only three sources of law from which predicate misdemeanor convictions qualify: Federal, State, and Tribal. There is nothing ambiguous about those terms, and none of them is "municipal." Accordingly, convictions under municipal law or code do not qualify. Nonetheless, Petitioner spends over two pages of his brief explaining what he contends is the "plain meaning" of the federal definition, never once addressing the jurisdictional source requirement. *See* Pet. Writ at

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25-30. Yet the plain meaning is clear on its face and does not require such lengthy explanations, does not require linking multiple statutes or referring to other terms of art defined by case law, and does not require reference to additional canons of statutory interpretation.[4]

In fact, Congress *did* delineate local sources of law in other sections of 18 U.S.C. § 922, (*see, e.g.*, 18 U.S.C. § 922(a)(2)(A)), but it chose to exclude local and municipal convictions from the definition of a "misdemeanor crime of domestic violence." This is particularly telling considering that Congress *added* Tribal law but *not* local law to the previous pair of State and Federal law sources with its amendment of the federal definition in 2006, while it also amended dozens of other portions of §921 to distinguish "local law" from state and federal law. *See generally* Violence Against Women Act, Pub. L. No. 109-162, § 908, 119 Stat. 2960 (2006). We can infer this was a deliberate choice to exclude local law from the federal definition. *See* Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003). Accordingly, it is clear that the legislative intent was to exclude local and municipal law convictions from the federal definition.

3. Petitioner's reliance on Hayes is misleading and misplaced.

In addition to Petitioner's plain language analysis being based upon faulty premises, his analysis under U.S. v. Hayes is similarly flawed. *See* United States v. Hayes, 555 U.S. 415, 129 S. Ct. 1079, 172 L. Ed. 2d 816 (2009). A large portion of Petitioner's argument rests on his analysis of this seminal case, but his description misstates the United States Supreme Court's analysis and holding. In order to better address Petitioner's explanation of the "conduct" vs. "offense" distinction as well as Petitioner's focus on his allegation of the City's confusion between "conviction" and "offense," a better understanding of Hayes can be useful.

Petitioner relies heavily on his faulty arguments that not only are "conduct" and "offense" interchangeable, but also that United States Supreme Court precedent supports his argument that

[4] Canons of statutory interpretation were fully briefed in the lower court and align with City's position. *See* Pet. App. V.1., Bates 49: 6-19. A discussion of the canons of statutory interpretation have been removed from this opposition as the court is not required to go beyond the plain language of the statute; however, the issue is cited for review at the court's discretion.

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underlying conduct is sufficient to prove a predicate conviction. Pet. Writ. at 26:16-18. Although Petitioner claims that the Hayes Court equated the term "offense" to "conduct," that is simply not the case. In fact, a search of the decision reveals that the word "conduct" appears *only* in the *dissent*.[5] **The Hayes Court never held that the predicate offense could be proved by the defendant's conduct.**

In Hayes, the Court was asked to determine a narrow question: "Must the statute describing the predicate offense include, as a discrete element, the existence of a domestic relationship between offender and victim?" Id., 555 U.S. at 421, 129 S. Ct. at 1084. Ultimately, the Court narrowly held "that the domestic relationship, although it must be established beyond a reasonable doubt in a § 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense." Hayes, 555 U.S. at 418, 129 S. Ct. at 1082. In Hayes, "offense" is referencing the statutory crime for which the defendant was convicted – the "predicate offense." When discussing "offense," the Hayes court refers to the statute under which the defendant was convicted and/or the crime the defendant was convicted of committing, not, as Petitioner suggests, the defendant's "conduct." The *relationship* can be proven by evidence outside the conviction itself, but the Court said nothing about the defendant's *conduct* being proven outside of the "discrete elements" of the statute under which the defendant was charged and ultimately convicted.

Instead, the Court explained that the Federal definition contains distinct parts. "As structured, § 921(a)(33)(A) defines 'misdemeanor crime of domestic violence' by addressing in clause (i) the meaning of 'misdemeanor' and, in turn, in clause (ii), 'crime of domestic violence.' Id., 555 U.S. at 423–24, 129 S. Ct. at 1085. Thus, the Court delineated the first distinction between parts of the "offense" for which the defendant must have been convicted in order to qualify for

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[5] The dissent, in fact, specifically argues against utilizing the defendant's conduct to prove up a predicate offense, *because doing so is against usual Supreme Court practice.* United States v. Hayes, 555 U.S. at 436, 129 S. Ct. at 1092–93, (C.J. Roberts, dissenting).

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firearm prohibition in the federal definition: there is the source of law requirement in clause (i) and the crime of domestic violence requirement in clause (ii).

The Court then further divided clause (ii) into two distinct parts, which is the actual substance of the decision. Utilizing statutory interpretation tools, the Court determined that the first part of clause (ii), the "force" element occurring before the phrase "committed by," must be included as an element of the crime for which the defendant is convicted, of the "offense" mentioned at the end of the text preceding clause (i) and (ii), but who the offense was *committed by*, or the *relationship*, need not be part of the convicting statute and can instead be proved by separate evidence. Id., 555 U.S. at 421–22, 129 S. Ct. at 1084. The Court determined, essentially, that the source of law and the "force" element must come from the convicting statute, but that the relationship could be proved by underlying facts.

More simply, the *conviction* for the *offense* must be one in which the convicting statute is (i) under the correct *source of law* (Federal, State, or Tribal) and (ii) contains the requisite *"force" element*(s), and that *offense* must have been *committed by* the defendant who had the requisite relationship with the victim (which does not have to be an element of the convicting statute and may be proved by underlying facts). Id.*; see also* Sessions v. Dimaya, 138 S. Ct. 1204, 1218, 200 L. Ed. 2d 549, n.5 (2018); Shirey v. Los Angeles Cty. Civil Serv. Com., 216 Cal. App. 4th 1, 9, 156 Cal. Rptr. 3d 517, 522 (2013).

The Court linguistically related clauses (i) and (ii) to "offense" and separated the relationship requirement out because of the "committed by" language. In relating the "force" element of clause (ii) to "offense," the Court recognized that the "force" element must be an element of the convicting statute. Petitioner's suggestion that the source of law requirement can be proved by outside evidence of the defendant's conduct despite its same relation to the "offense" term as the "force" element requirement is nonsensical. The Court's decision is properly read in accordance with the plain language of the statute: the source of law requirement refers to the statute

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under which the defendant was convicted for the predicate offense. This reading is further supported by the Court's following discussion:

> As of 1996, only about one-third of the States had criminal statutes that specifically proscribed domestic violence. See Brief for United States 23, n. 8.8 Even in those States, domestic abusers were (and are) routinely prosecuted under generally applicable assault or battery laws. See Tr. of Oral Arg. 19. And no statute defining a distinct federal misdemeanor designated as an element of the offense a domestic relationship between aggressor and victim. **Yet Congress defined "misdemeanor crime of domestic violence" to include "misdemeanor[s] under Federal ... law." § 921(a)(33)(A)(i)**. Given the paucity of state and federal statutes targeting domestic violence, we find it highly improbable that Congress meant to extend 18 U.S.C. § 922(g)(9)'s firearm possession ban only to the relatively few domestic abusers prosecuted under laws rendering a domestic relationship an element of the offense. See Barnes, 295 F.3d, at 1364 (rejecting the view that "Congress remedied one disparity—between felony and misdemeanor domestic violence convictions—while at the same time creating a new disparity among (and sometimes, within) states").

Hayes, 555 U.S. at 427, 129 S. Ct. at 1087–88 (emphasis added). The Court acknowledged that the federal definition required the source of law to be part of the "offense," the crime for which the defendant was convicted, the convicting statute. This passage does not fit with Petitioner's apparent argument that the conduct alone is sufficient and a municipal code conviction can qualify if the conduct would also violate the state domestic battery law. If the defendant's conduct could qualify under a State, Federal, or tribal law, then it would not matter whether how many states had domestic violence-specific statutes or whether a federal statute defined domestic battery because as long as the defendant had been convicted of a crime and his or her underlying conduct also violated some State, Federal, or Tribal law, the defendant could be prosecuted. If that were the Court's interpretation, then the Supreme Court would not have made the above argument.

Courts have subsequently discussed the federal definition in similar ways, making clear that the source of law requirement of clause (i) and the "force" element from the beginning of clause (ii) must be part of the "offense" described in the federal definition – also known as the convicting statute, the predicate offense, and other various similar terms. For example, one court opined: "To qualify as a *predicate misdemeanor conviction* for domestic violence *under federal law*, the criminal *statute under which the individual was convicted* must contain as an element "the use or

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attempted use of physical force, or the threatened use of a deadly weapon." Shirey v. Los Angeles Cty. Civil Serv. Com., 216 Cal. App. 4th 1, 9, 156 Cal. Rptr. 3d 517, 522 (2013) (emphasis added). Additionally, in another United States Supreme Court case discussing a different portion of § 921, the Court stated:

> For example, in creating an exception allowing gun possession despite a conviction for an antitrust or business regulatory crime, § 921(a)(20)(A) speaks of "Federal or State" antitrust or regulatory offenses. If the phrase "convicted in any court" generally refers only to domestic convictions, this language causes no problem. But if the phrase includes foreign convictions, the words "Federal or State" prevent the exception from applying where a foreign antitrust or regulatory conviction is at issue. Such illustrative examples suggest that Congress did not consider whether the generic phrase "convicted in any court" applies to foreign convictions.

Small v. United States, 544 U.S. 385, 386, 125 S. Ct. 1752, 1753, 161 L. Ed. 2d 651 (2005). Although the Small Court analyzed a different portion of § 921, it made a similar comparison between the "any court" and the source of law sections and reaffirmed that the Supreme Court reads the source of law requirement to say that the *conviction* must be for a crime under the source of law listed, not the "conduct" as Petitioner suggests.

When properly read, the Hayes decision certainly does not support Petitioner's proposition that the federal definition applies when the underlying conduct falls within the definition, regardless of the statute under which the defendant was convicted. Pet. Writ 26:24-25. The offense for which the defendant was convicted *must* be under Federal, State, or Tribal law.

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

Although the Hayes court did not, other federal courts have addressed this specific issue, interpreting 18 U.S.C. § 921(a)(33)(A)(i)'s application to convictions under municipal law, and those courts have applied a similar analysis. Although federal case law would ordinarily not be binding on Nevada courts, the issue at hand is unique because the statute that the lower court interpreted, and this court must also interpret, is a *federal* statute. Accordingly, federal case law interpreting the federal definition is particularly relevant and instructive in this instance. Notably,

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the federal courts that have addressed the issue have all come to the same conclusion as the lower court here: convictions under municipal law do not qualify under the plain language of the federal definition.

In U.S. v. Pauler, the defendant was convicted of violating 18 U.S.C. § 922(g)(9) for possessing a firearm after a prior conviction of domestic violence under Wichita, Kansas municipal code. United States v. Pauler, 857 F.3d 1073, 1075 (10th Cir. 2017). The Tenth Circuit considered whether a misdemeanor violation of a municipal ordinance met the jurisdictional source requirement under the federal definition. The Court rejected the Government's argument, finding that the Gun Control Act repeatedly distinguished between State and local jurisdictions, and the government had cited no examples in the Act where the term State was "even arguably meant to encompass both state and local governments or laws." Pauler, 857 F.3d at 1075. The Court applied several canons of statutory interpretation, finding that each weighed in favor of the defendant's interpretation that convictions under municipal law do not qualify as predicate offenses under the federal definition. The Court further opined:

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

Pauler, 857 F.3d at 1077 (emphasis added).

Ultimately, the Tenth Circuit held that a "a misdemeanor under Federal, State, or Tribal law" does not include a conviction under municipal ordinance. Id. at 1078. Accordingly, the

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defendant's municipal conviction did not qualify as a predicate offense, and he could not be convicted under 18 U.S.C. § 922(g)(9). Id.

In United States v. Enick (*See* United States v. Enick, City's Appendix, Bates at 011-013), the defendant was similarly charged with a violation of 18 U.S.C. § 922(g)(9). United States v. Enick, No. 2:17-CR-00013-BLW, 2017 WL 2531943, at *1 (D. Idaho June 9, 2017) (unpublished). The government alleged that his qualifying prior conviction was for misdemeanor assault under Spokane Municipal Code. The defendant filed a motion to dismiss, arguing that the prior conviction was not a qualifying predicate offense. The United States District Court for the District of Idaho found that a violation of municipal ordinance does not qualify under the definition of a "misdemeanor crime of domestic violence." The Court's analysis through several canons of construction, including plain language, legislative intent, (including examination of legislative history), and *expressio unius est exclusio alterius* revealed that Congress purposefully excluded local law from that definition, and found that a "misdemeanor crime of domestic violence" *only* includes "an offense that—(i) is a misdemeanor under Federal, State or Tribal law[.]" 18 U.S.C. § 921(a)(33)(A). Enick, 2017 WL 2531943, at *1. A violation of municipal code does not qualify under the federal definition. Id.

The U.S. District Court for the District of Nevada has also considered this issue. United States v. Wagner, No. 317CR00046MMDWGC, 2017 WL 4467544, at *1 (D. Nev. Oct. 5, 2017) (unpublished); United States v. Wagner, City's Appendix, Bates at 014-016. Wagner was charged with possession of ammunition under 18 U.S.C. § 922 (g)(1) and § 924(a)(2), and filed a motion to dismiss, arguing his predicate conviction under Reno Municipal Code did not qualify to make him a prohibited person under the definition contained in 18 U.S.C. § 922(g)(9)(A). The Court determined that the plain language of the federal definition was unambiguous and does not include municipal or local offenses. The Court also considered the government's public policy argument that the legislature enacted the Gun Control Act with the intent to keep guns out of the hands of

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domestic abusers, but it found that because the language of the statute was unambiguous, no other statutory interpretation was necessary. Nonetheless, the Court completed an exercise in addressing the legislative history, reaching the same conclusion as the courts in Enick and Pauler – observations of the legislative history led the Court to the conclusion that Congress *intended* to exclude local law from the qualifying predicate offenses. The Court concluded that the misdemeanor conviction under the Reno Municipal Code did not qualify as a predicate offense because it does not fall within the definition under 18 U.S.C. § 921(a)(33)(A)(i) and granted the motion to dismiss the Superseding Indictment. United States v. Wagner, 2017 WL 4467544, at *3. Wagner is a particularly telling analysis because a U.S. District Court interpreted the federal definition in light of a Nevada municipal ordinance and concluded that a conviction under a municipal law *in Nevada* does not qualify under the federal definition.

Petitioner's argument that these federal cases are inapplicable here because they did not address Petitioner's specific argument is unpersuasive. Each of the three courts analyzed the federal definition under 18 U.S.C. § 921(a)(33)(A)(i), and **all three federal courts concluded that the plain language of the federal definition excludes convictions under municipal law.** Significantly, the plain language is unambiguous. Whether Petitioner's argument is novel cannot change the plain language of the statute.

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

Even though the plain language and case law reveal that misdemeanor ordinances are not included in the federal definition, Petitioner nonetheless contends that Henderson's municipal ordinance is included because the conduct amounting to a domestic violence conviction under the HMC may also constitute domestic violence under state law. Petitioner relies upon U.S. v. Hayes to support that proposition. U.S. v. Hayes, 555 U.S. 415, 129 S. Ct. 1079 (2009). However, Hayes is not applicable here because, as discussed above, the Hayes court never considered whether a domestic violence offense charged under a local law is included in the federal definition of a

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"misdemeanor crime of domestic violence," and the Hayes court never said that the defendant's conduct was sufficient to prove a predicate offense.

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

In Pauler, the Tenth Circuit Court of Appeals also rejected the same claim Petitioner now makes: that local laws should be included in the federal definition on public policy grounds, namely that "the dangers of firearms in the hands of domestic violence offenders are the same regardless of the jurisdictional source of the individual's prior domestic violence conviction." Pauler, 857 F.3d 1073 at 1077. As stated above, the Court there considered public policy concerns but found that the plain language overrides such concerns. Id. The Wagner court considered the very same policy argument, rejecting the government's claim that Congress's goal to "keep guns out of the hands of domestic abusers" was controlling. Wagner 2017 WL 4467544 at *3 ((ECF No. 37 at 4 (quoting

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United States v. Hayes, 555 U.S. 415, 426 (2009)). Instead, the Wagner court agreed that plain language prevails, and municipal convictions do not fall under the federal definition. Wagner 2017 WL 4467544 at *3.

Finally, the Courts in Enick, Pauler, and Wagner all rejected Petitioner's claim that a domestic violence conviction under the HMC is included in the federal definition because it is covered by the "conviction in any court" portion of the statute. In Pauler, the court stated that "the issue here is not the type of court involved, but the type of offense, and §921(a)(33) provides that the only domestic violence convictions that qualify are convictions under "Federal, State, or Tribal law." Pauler, at 1077. The Wagner court also rejected the government's argument that the location of the conviction was determinative, recognizing that "the court of conviction is of no import." Wagner, 2017 WL 4467544 at *2. As the Wagner court noted, "[j]ust because the Reno Municipal Court could have convicted Wagner of a misdemeanor in violation of state law does not render all convictions by the same court convictions under state law." Id. In Pauler, the court recognized that "[t]he issue here is not the type of court involved, but the type of offense, and §921(a)(33) provides that the only domestic violence convictions that qualify are convictions under "Federal, State, or Tribal law." Pauler at 1077. Even if this Court finds the federal cases non-binding, the logic remains. The "any court" language means the defendant may be adjudicated in any court, not that any source of law may apply. In essence, a defendant could be convicted in a *municipal court* of a *State law* violation, and that conviction would nonetheless fit the federal definition. But a municipal law conviction in any court would not.

In Small v. United States, 544 U.S. 385, 387 (2005), the Supreme Court held that the phrase "any court" in 18 U.S.C. § 922(g)(1) encompasses only domestic, not foreign, convictions. In doing so, the Supreme Court recognized that a legislature's use of the phrases "any person" and "any court" "may or may not mean to include each and every person or court." Id. at 388. Moreover, the use of expansive language such as "any courts" only serves to further distinguish the

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decision by Congress to limit the definition of "misdemeanor crime of domestic violence" to convictions under "Federal, State, or Tribal law", which "is significant because Congress knew how to define the boundaries of [the crime] broadly when it so desired." Bloate v. United States, 559 U.S. 196, 206-207 (2010). If Congress intended a broader reach for the jurisdictional source requirement, it could have easily defined a "misdemeanor crime of domestic violence" as "any misdemeanor," just as it referred to "any person" or "any court" in § 922(g)(9). However, Congress chose to include only State, Federal, and Tribal laws, excluding local laws despite including them in other sections of § 922, and despite using the expansive term "any" in related sections as well. Therefore, the court where the conviction was adjudicated is not dispositive, but instead the source of law under which the defendant was convicted is.

Finally, Petitioner's argument that a conviction under the HMC qualifies as a predicate conviction because its language is similar to the domestic battery statute under the NRS fails. Again, the United States Supreme Court has explained: "As structured, § 921(a)(33)(A) defines 'misdemeanor crime of domestic violence' by addressing in clause (i) the meaning of 'misdemeanor' and, in turn, in clause (ii), 'crime of domestic violence.'" Hayes, 555 U.S. at 423, 129 S. Ct. at 1085. 18 U.S.C. § 922(g)(9) prohibits the possession or use of firearms by "any person [...] who has been convicted in any court of a misdemeanor crime of domestic violence." Petitioner attempts to divide "conviction" and "offense" into separate concepts, but that is an unfair reading of the statutory text in context. The plain language and a common sense reading of the statute clearly indicates that the conviction must be for a misdemeanor under Federal, State, or Tribal law, just as the conviction must include a crime of domestic violence (which includes as an element the force or violence requirement, and also the relationship as a requirement that must be proven). *See generally* discussion of Hayes, supra. The federal definition is meaningless without the context of the statutes of which it is a part; in this case, the prohibition of firearms requires a *conviction* for a misdemeanor crime of domestic violence. And Petitioner's interpretation

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complicates the statute far beyond the plain meaning and reads into the statute significant additional language.[6] Simply, the plain meaning of the federal definition is clear and unambiguous. Petitioner's attempts to muddy the waters are unpersuasive because municipal code convictions fall squarely outside the federal definition.

6. Petitioner's reliance on Perkins is irrelevant and misleading because Perkins was charged under state law, not municipal code and did not address a relevant issue.

Petitioner improperly relies upon the Perkins case for support of their argument that a conviction under the Henderson Municipal Code could suffice as a predicate offense for conviction under the federal firearms prohibition. U.S. v. Perkins, No. 2:12-CR-00354-LDG CW, 2012 WL 6089664 (D. Nev. Dec. 6, 2012). *See* United States v. Perkins, Petitioner's Appendix Vol 2., Bates pp. 268-270. Repeatedly, Petitioner highlights that Perkins had been convicted in North Las Vegas Municipal Court. *See* Pet.'s Writ at 33. City does not and has not disputed that a conviction out of a *municipal court* could qualify as a predicate offense... *as long as* it was charged under State, Federal, or Tribal law. City's argument is not that a conviction *from municipal court*, but that a conviction *under municipal code* does not qualify as a predicate offense under the federal definition. Certainly, a conviction under State, Federal, or Tribal law that was adjudicated in a municipal court would qualify as a predicate offense under the federal definition. As established previously, this argument is supported by the plain language of the federal definition, which requires a defendant to have been convicted in any court of an offense that is a misdemeanor under Federal, State, or Tribal law with a requisite element contained in 18 U.S.C. § 921(a)(33). For instance, an otherwise qualifying conviction under *State law* that was adjudicated in a *municipal court* would qualify, but an otherwise qualifying conviction under *municipal code* that was adjudicated in a *State court* would not.

[6] As noted above, canons of construction were fully briefed in the lower court. Specifically, relevant to this section, the omitted-case canon along with the negative-implication canon directly support City's position. *See* Opposition to Motion to Divest Jurisdiction, Pet. App. V.1., Bates, pp. 60:27- 62:28. These canons have been removed as the court is not required to go beyond the plain language of the statute; however, the issue is cited for review at the courts discretion.

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Defendant's focus on the court from which Perkins's conviction originated is misleading. It does not make a difference to the analysis whether Perkins's conviction was adjudicated in North Las Vegas Municipal Court or any other jurisdiction.

a. *Perkins* is irrelevant to the issue at hand because Perkins was not adjudicated under a municipal code.

Despite Petitioner's claim that Perkins is instructive, the case is, in fact, irrelevant to the issues at hand. Pet.'s Writ at 33:2; U.S. v. Perkins, No. 2:12-CR-00354-LDG CW, 2012 WL 6089664. Perkins's conviction is inapposite because Perkins was charged under State law, whereas Petitioner has been charged under a municipal code. Although he was prosecuted and adjudicated in North Las Vegas Municipal Court, he was charged initially with "Battery Domestic Violence No Priors" under the NRS. *See* Perkins Certificate of Court Disposition, City's Appendix, Bates at 017. The criminal complaint shows that Perkins was charged under NRS 200.485, the *state law* prohibiting Domestic battery. Id. at 018 The complaint also references "NLVCC 2.150," which is Section 2.150 of the North Las Vegas City Charter. Id. at 018 That section simply gives the City of North Las Vegas the authority to prosecute a state law violation in municipal court.[7]

On March 3, 2011, Perkins pleaded no contest to an amended charge of simple battery. Id. at 025 There is no indication whatsoever in the record that Perkins was charged under a municipal code after being charged under the NRS initially. Moreover, and more importantly, the City of North Las Vegas does not have a municipal code which covers the offense of battery, and, as far as the City is aware, did not at the time of Perkins's conviction in 2011.[8] Perkins could not have been

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[7] Section 2.150(2) of the North Las Vegas City Charter states: "Any offense made a misdemeanor by the laws of the State of Nevada shall also be deemed a misdemeanor in the City whenever such offense is committed within the City."

[8] A search of the term "battery" reveals that "Assault and Battery" was repealed by 1179 per the "Ordinance List 1946-2008" according to municode.com, the organization responsible for retaining records of the North Las Vegas Municipal Code. (accessed Dec. 10, 2019 at https://library.municode.com/nv/north_las_vegas /codes/ code_of_ordinances?nodeId=ORLI1946--2008NO1--2496). According to the same search, it was not replaced, and the next mention of criminal "battery" was with the passage of the North Las Vegas domestic battery code in 2019.

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charged under a municipal code that did not exist. Thus, Perkins was convicted of simple battery under the NRS, or *state law*.

Further, the Perkins case addressed the admissibility of evidence, not whether a conviction under a municipal code qualified as a predicate conviction. In Perkins, the court considered two questions. First, the government sought to exclude evidence of Perkins's misdemeanor battery conviction's later reduction to disturbing the peace, and second, the government sought to exclude evidence of Perkins's ignorance of the law. The court found that evidence of the reduction in the battery charge *after* Perkins's alleged possession of the firearms was irrelevant because what was relevant was his status of conviction at the time of the alleged offense and granted the government's motion to exclude. Perkins, No. 2:12-CR-00354-LDG CW, 2012 WL 6089664, at *2.

Second, the Court addressed whether Perkins could admit evidence that he did not know he was prohibited from possessing a firearm. Petitioner attempts to create the impression that the court addressed whether a municipal court conviction would prohibit his gun ownership. Pet.'s Writ at 33:15-19. Instead, the language in the opinion is significantly broader, and simply discusses Perkins's lack of knowledge in general that his possession of a firearm was prohibited under federal law. There is no indication the Perkins court focused on any other factors, such as whether the conviction occurred in municipal court, in making its decision.

Petitioner triumphantly points to the Perkins holding that the federal case against Perkins could proceed "because Perkins had been convicted of a 'misdemeanor crime of domestic violence'", and further claims that "[t]he Court did not distinguish between the source of law or the type of court from which the underlying conviction originated, so long as the conduct qualifies as a misdemeanor crime of domestic violence per 18 U.S.C. § 921(a)(33)(A)." Pet.'s Writ at 34:12-14. Petitioner completely misrepresents the Perkins holding, insinuating that the case could proceed despite coming from a municipal court. The "misdemeanor crime of domestic violence" that Perkins had been convicted of in municipal court was under *state law*. Therefore, the Perkins court

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never even discussed the source of law (i.e., state law versus municipal code) because **the source of law was not at issue**. Indeed, the Perkins court never addressed or decided that a conviction under municipal code, ordinance, etc. served as a valid predicate offense under the federal definition. It addressed completely different issues than are of concern here. Accordingly, the decision is irrelevant and Petitioner's use of the decision misleading.

Once again, Petitioner misrepresents the holding and analysis in the case cited for support of his argument. The Perkins court *never held* that Perkins's conviction qualified as a predicate offense because the *conduct* qualified under the federal definition, as Petitioner incorrectly states. Pet. Writ 34: 14-18. Instead, the Court found that the relevant inquiry was Perkins's status as person with a qualifying conviction *at the time* that he possessed the firearm. Thus, his already qualifying conviction was not later disqualified based on subsequent reduction to disturbing the peace because *at the time* he possessed the firearm, his "status" was that of a person convicted of a crime qualifying under the federal definition. Perkins, No. 2:12-CR-00354-LDG CW, 2012 WL 6089664, at *2. His qualifying conviction at the time was relevant and admissible, the later reduction was not. **The Perkins court never discussed the relevance of the underlying conduct of Perkins's conviction, and never so much as insinuated that the disturbing the peace conviction would have qualified under the federal definition had he been indicted for possessing the firearm after his plea had been changed to the lesser offense.**[9]

Interestingly, while Petitioner attempts to use an irrelevant case, City provided a more recent case from the same jurisdiction that is directly on point. As discussed previously, the United States District Court for the District of Nevada determined that the defendant's conviction under a municipal code did not qualify as a predicate offense because the conviction does not fall within the

[9] This specific argument of Petitioner's is particularly disingenuous because the purpose of withdrawing Perkins's plea to be amended to breach of peace in North Las Vegas Municipal Court after his federal indictment, and the reason defense counsel in his federal trial wished to have the evidence of the reduced conviction admitted, was to argue to the jury that the defendant's conviction for breach of peace did not qualify as a predicate offense.

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definition in 18 U.S.C. § 921(a)(33)(A)(i). U.S. v. Wagner, No. 317CR00046MMDWGC, 2017 WL 4467544, at *1 (D. Nev. Oct. 5, 2017). Even if Perkins had been charged under a municipal code (which he was not), and even if the Perkins court had previously upheld the use of a conviction under municipal code as a predicate conviction (which they did not and certainly did not consider or address), the District of Nevada has more recently considered the specific issue in Wagner and has made its position crystal clear by dismissing the Superseding Indictment. Thus, Perkins is inapplicable and unpersuasive.

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

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

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

Because NRS 202.360 relies on the federal definition of misdemeanor crime of domestic violence, and misdemeanor municipal convictions are excluded under the federal definition, they are necessarily also excluded as predicate convictions under NRS 202.360. Accordingly, a conviction under HMC § 8.02.055, which Defendant is charged with in the Amended Complaint, does not trigger the possible loss of gun rights under NRS 202.360.

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

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

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

In Amezcua, the Court explained that the right to a jury trial does not attach to petty offenses, and that there is a presumption that an offense for which the maximum penalty is six months or less is petty. Amezcua, 130 Nev. at 48–49, 319 P.3d at 604. **The presumption can only be overcome if Petitioner shows that it is clear that the legislature deemed the offense "serious" based on the severity of the additional penalties combined with the maximum jail**

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time. Id. Because first offense domestic battery is a misdemeanor with a maximum term of imprisonment of six months, it is a presumptively petty offense and it is Petitioner's burden to prove that the right to a jury trial attaches. NRS 200.485(1)(a)(1); HMC § 8.02.055; Amezcua, 130 Nev. at 49, 319 P.3d at 604.

In Amezcua, the Court determined that the defense failed to rebut the presumption that the offense was petty. Id., 130 Nev. at 50, 319 P.3d at 605. The Court also found that the potential loss of firearm rights under federal law and the possibility of deportation were collateral consequences that did not impact the Nevada legislature's determination of whether domestic battery was a serious offense and were therefore irrelevant. Id. The Court held that first-offense domestic battery was a "petty" offense, and that the right to a jury trial did not attach. Id.

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

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

A municipal conviction does not fall under the federal definition, and therefore does not invoke the penalty associated with NRS 202.360, so the basis for the Court's decision in Andersen

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disappears, and we are left with the court's decision in Amezcua. Without the application of NRS 202.360, the increased penalty does not apply, and the offense is again "petty." Accordingly, as the lower court correctly found, a defendant charged under municipal code, more specifically here HMC § 8.02.055, is charged with a petty offense and is not entitled to a jury trial.

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

Petitioner argues that Andersen nonetheless controls, despite the lower court's finding that NRS 202.360 is not invoked by a conviction under HMC § 8.02.055. However, applying the same analysis used in Amezcua and Andersen leads to the same conclusion: the legislative intent in passing HMC § 8.02.055 was absolutely to return Domestic battery to the same petty offense it was before the state legislature's amendment of NRS 202.360; thus returning it to the same status as applied when Amezcua was decided.

The right to a trial by jury afforded to defendants by the Sixth Amendment of the United States Constitution and Article 1, Section 3 of the Nevada Constitution does not extend to "petty" offenses, but it attaches only to "serious" offenses. Andersen v. Eighth Judicial Dist. Court in & for Cty. Of Clark, 135 Nev. Adv. Op. 42, 448 P.3d 1120, 1122–23 (2019) (*citing* Blanton v. City of N. Las Vegas, 489 U.S. 538, 541, 109 S.Ct. 1289, (1989); Duncan v. Louisiana, 391 U.S. 145, 159, 88 S.Ct. 1444, (1968); *see also* Blanton v. N. Las Vegas Mun. Court, 103 Nev. 623, 628-29, 748 P.2d 494, 497 (1987) ("[T]he right to a trial by jury under the Nevada Constitution is coextensive with that guaranteed by the federal constitution."), *aff'd sub nom.* Blanton, 489 U.S. 538, 109 S.Ct. 1289).

In determining whether an offense is "petty" or "serious," the Court considers indicators of society's perception of the seriousness of the offense, the most telling of which is the maximum penalty, established by the legislature. United States v. Nachtigal, 507 U.S. 1, 3, 113 S.Ct. 1072, (1993). To reiterate, the United States Supreme Court has determined that an offense with a maximum period of incarceration of six months or less is presumptively petty; to overcome this

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presumption, and to demonstrate that an offense is "serious" and warrants a jury trial, a defendant must "demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they **clearly reflect a legislative determination that the offense in question is a serious one.**" Blanton, 489 U.S. at 543, 109 S.Ct. 1289 (emphasis added). Conversely, then, if the legislative intent is for an offense to be petty, then no right to jury trial attaches and Petitioner cannot overcome the presumption.

Here, **the penalties associated with conviction of violation of HMC § 8.02.055 are *the same* as the penalties associated with a conviction of domestic battery analyzed in Amezcua, where the court held the offense was petty and did not warrant a jury trial.** The federal definition does not apply, so the increased penalty included in NRS 202.360 which made the difference in Andersen nonexistent.

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

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

B. The lower court's ruling.

The lower court's ruling can be helpful and provide useful context and guidance even though courts review questions of statutory interpretation de novo. State v. Catanio, 120 Nev. 1030,

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1033, 102 P.3d 588, 590 (2004). Here, the lower court's ruling regarding this particular issue begins on page 12 of the Motion Hearing transcript. *See* Transcripts, Decision on Motion to Divest Jurisdiction, Pet. App. V.2., Bates 243:15. The Court specifically found that the plain language of the federal definition excludes convictions under municipal law, and requires the State, Federal, or Tribal source of law. Id. at 244:10-13. The lower court agreed with City's arguments above and concluded that convictions for violation of the Henderson Municipal Code do not qualify under the federal definition and therefore do not fall under NRS 202.360. Id. at 243:15-244:21. Moreover, the lower court specifically found that domestic battery under the Henderson Municipal Code is a petty offense. Id. at. 245:21-25-246:1-2, 5; 250:23.

Petitioner's faulty interpretation of the federal definition is based on a dissenting opinion. Moreover, he unsuccessfully attempts to use irrelevant case law to fit his interpretation. As City established above, the plain language and relevant case law clearly exclude municipal ordinances from the federal definition. Thus, Petitioner is not entitled to a jury trial and this Court should deny Petitioner's Writ petition.

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

A. HMC § 8.02.055 does not affect a fundamental right, thus there can be no credible equal protection claim.

Criminal defendants have a fundamental right to a jury trial for "serious" offenses, but not for "petty" offenses. Since HMC § 8.02.055 does not disturb Petitioner's Second Amendment rights and is therefore a "petty" offense, there is no accompanying right to a jury trial pursuant to Andersen. Further, the prosecutor exercised the well-defined and protected authority to charge Petitioner with domestic battery under one legislative act (HMC), as opposed to another (NRS). As such, Petitioner's equal protection claim must fail.

Petitioner professes to be under a sense of "bewilderment" regarding the City's, and no doubt the U.S. and Nevada Supreme Court's, views on the constitutional right to a jury trial as well

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as the equal protection clause. *See* Pet. Writ at 51. City hopes to assuage Petitioner's bewilderment here.

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a ... trial by an impartial jury of the State ... wherein the crime shall have been committed." The states are bound by the Sixth Amendment jury trial guarantee through its incorporation into the Due Process Clause of the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). However, despite the broad pronouncement that the accused in "*all criminal prosecutions*" has the right to a jury trial, the Supreme Court in Duncan observed that "**[i]t is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States.**" Id. at 159, 88 S.Ct. 1444 (emphasis added).

The Supreme Court further explained the reasons for this exclusion. Historically, "petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions." Id. at 160, 88 S.Ct. 1444. Practically, "the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications." Id. The Supreme Court has further declared that the Federal Constitution "is to be interpreted in the light of the principles, which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by jury." Callan v. Wilson, 127 U.S. 540, 8 S. Ct. 1301 (1888), § 27:38. Jury trials—Constitutional rights, 9A McQuillin Mun. Corp. § 27:38 (3d ed.)

In Duncan, the Court concluded that "[c]rimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses." Id. at 159, 88 S.Ct. 1444. In

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Lewis v. United States, 518 U.S. 322, 326, 116 S.Ct. 2163 (1996), the U.S. Supreme Court reaffirmed that "[a]n offense carrying a maximum prison term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious."

Petitioner directly quotes (*see* Pet. Writ at 51) Brown vs. Louisiana, 447 U.S. 323, 100 S.Ct. 2214 (1980) for the sweeping proposition that "[t]he right to a jury trial...is a fundamental right...provided for **all** defendants," but Petitioner inexplicably omits the very next sentence of this U.S. Supreme Court decision which states, "[t]rial by jury in **serious** criminal cases has long been regarded as an indispensable protection against the possibility of governmental oppression ..." Brown v. Louisiana, 447 U.S. 323, 330, 100 S. Ct. 2214, 2221, (1980), *citing* Williams v. Florida, 399 U.S. 78, 87, 90 S.Ct. 1893, 1899, (1970) (emphasis added). Clearly, only serious cases confer a jury trial right onto a criminal defendant.

While the recently-decided Andersen case determined that misdemeanor domestic battery charged under the NRS is a "serious offense," due to the application of NRS 202.360 (prohibiting the possession of guns for those convicted of domestic battery under the NRS in cases where the parties' relationship meets the federal definition for domestic violence) (Anderson v. Eighth Judicial District Court, 135 Nev. Adv. Op. 42, pp 5-6 (2019)), the Nevada Supreme Court had previously determined that domestic battery misdemeanors (before the state gun limitations were enacted) were "petty offenses" that did not require jury trials. Amezcua v. Eighth Judicial District Court of the State of Nevada et al., 319 P.3d 602, 604 (2014), *cert. denied sub nom.* Amezcua v. Eighth Judicial Dist. Court of Nevada, Clark Cnty., 135 S. Ct. 59 (2014). Put more simply, before the domestic violence gun prohibition under state law, there was no constitutional right to a jury trial; after the enactment of the domestic violence gun prohibition, there is a right to a jury trial for cases charged under state law. Petitioner complains that the lower court erred by mentioning that the domestic laws changed in 2015, which predicated the Supreme Court's decision in Andersen.

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While the actual elements/penalties of the domestic violence statutes (NRS 200.481/200.485) were not changed in 2015, NRS 202.360 was indeed amended to include the gun prohibition for some domestic violence convictions. This fact was never in dispute. Any discrepancy in the municipal court's choice of words was simply semantics and was not germane to the court's ruling.

Petitioner primarily faults the municipal court for noting that Petitioner had a right to a jury trial when charged with domestic battery under the NRS, but not when charged under the HMC. *See* Pet. Writ at 44. According to Petitioner, the lower court's acknowledgement of this fact conclusively proves that the City or the Court somehow stripped away a "vested" fundamental right. And due to the interference with a "vested" fundamental right, the ordinance must somehow pass a strict scrutiny analysis to be valid. Again, Petitioner continues to peculiarly claim that his fundamental right to a jury trial fully "vested," when he was originally charged with domestic battery under the NRS.

"Vesting" is not a criminal law doctrine, and its application here is grossly misplaced. The "vested rights doctrine" is basically an application of equitable estoppel and traditionally applies in contract law, water rights law, property law or pension law types of cases. American West Dev., Inc. v. City of Henderson, 111 Nev. 804, 898 P.2d 110 (1995); Sandpointe Apts. v. Eighth Jud. Dist. Ct., 129 Nev. 813, 313 P.3d 849 (2013); Application of Filippini, 66 Nev. 17, 202 P.2d 535 (1949); Nicholas v. State, 116 Nev. 40, 992 P.2d 262 (2000). The mention of this civil law doctrine in the context of domestic abuse and whether a defendant has a constitutional right to a jury trial is erroneous to say the least.

The only true question here is whether the prosecutor possessed the discretion to charge Petitioner with domestic battery in violation of the municipal code, as opposed to state law. Provided there was probable cause to support the charge, and there is no claim of discrimination regarding a protected class, the prosecutor's discretion must be respected. Pursuant to binding caselaw from both the U.S. and Nevada Supreme Courts, the entire inquiry ends there.

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In general, prosecutors have wide-ranging discretion in what cases to file, and under what authority to file them. In Salaiscooper v. Eighth Judicial District Court ex rel. County of Clark, 117 Nev. 892, 903, 34 P.3d 509, 516 (2001), the Nevada Supreme Court clearly stated, "[i]ndeed, a district attorney is vested with immense discretion in deciding whether to prosecute a particular defendant that 'necessarily involves a degree of selectivity.'" *quoting* State v. Barman, 183 Wis.2d 180, 515 N.W.2d 493, 497 (Wis.Ct.App.1994). Further, **"so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file...generally rests entirely in his discretion."** Id. fn 5., *quoting* U.S. v. Armstrong, 517 U.S. 456, 464, 116 S.Ct. 1480 (1996) (emphasis added); Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663(1978).

In Hernandez v. State, 118 Nev. 513, 50 P.3d 1100 (2002), the defendant argued on appeal that he should not have been convicted of kidnapping under NRS 200.310 (category A felony), since his conduct was also a violation of NRS 200.359 (category D felony) for unlawfully removing his daughter from his wife's custody without a court order. According to the defendant, equal protection and fair trial principles were violated, due to the prosecutor's decision to charge one offense over another. The Nevada Supreme Court fully dismissed this constitutional attack, and upheld prosecutorial discretion in charging decisions. The Court stated, "[w]e have followed the United States Supreme Court's holding '**that neither due process nor equal protection were violated under federal constitutional principles by virtue of the fact that the government prescribed different penalties in two separate statutes for the same conduct.**' A defendant's rights are adequately protected in this area by the 'constitutional constraints' on a prosecutor's discretion, which prevent the prosecutor from selectively enforcing the law based on such unjustifiable criteria as race or religion." Hernandez v. State, 118 Nev. 513, 523, 50 P.3d 1100, 1107 (2002) (emphasis added).

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Further, in Sheriff, Clark Cty. v. Killman, 100 Nev. 619, 691 P.2d 434 (1984), the defendant contended that under Nevada's statutory scheme, the prosecutor had the discretion to charge him with either the offense of unauthorized signing of a credit card document, a felony under NRS 205.750, or the offense of unauthorized use of a credit card, a misdemeanor under NRS 205.760(2)(b). According to the defendant, since the prosecutor had the discretion to proceed under either of these two statutory offenses, which provide for disparate results in terms of the possible sentence, this statutory scheme violated his right to equal protection of the law. The Court held that, the statutory scheme in question would not violate equal protection even if the two statutes did state different penalties for the same conduct, provided the prosecutor's charging decision was constitutionally permissible (*e.g.* not based on discrimination). Id. At 621.

The United States Supreme Court also addressed this same issue in United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198 (1979). In Batchelder, the Court held that neither due process nor equal protection were violated under federal constitutional principles by virtue of the fact that the government prescribed different penalties in two separate statutes for the same conduct. Id. at 124–25, 99 S.Ct. at 2204–05. Instead, the Court held that a defendant's rights are adequately protected in this area by the "constitutional constraints" on a prosecutor's discretion, which prevent the prosecutor from selectively enforcing the law based on such unjustifiable criteria as race or religion. Id. at 125, 99 S.Ct. at 2204–05.

Like everything in criminal law, potential punishments for a particular crime yield to additional procedural and substantive rights. For instance, a criminal defendant would be afforded the constitutional right to an attorney in a criminal misdemeanor case under the Sixth Amendment, if the prosecutor sought jail time for a particular charge. Scott v. Illinois, 440 U.S. 367 (1979) (holding that the Sixth Amendment right to counsel only attaches if the defendant may be imprisoned upon conviction). However, if the prosecutor later chose to only seek a monetary fine without the threat of any jail time, the defendant would not be afforded the right to counsel under

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the Sixth Amendment. *See* NRS 178.397 (stating that "[e]very defendant accused of a misdemeanor for which jail time may be imposed...is entitled to have counsel assigned to represent the defendant). A prosecutor may always seek to prosecute a case in any constitutionally permissible manner, which may result in a lesser degree of actual punishment. When a defendant is no longer subject to enhanced penalties, certain procedural rights may no longer be constitutionally or statutorily required.

For example, the District Attorney may choose to charge a defendant with First Degree Murder. Pursuant to NRS 178.3971[10], that defendant would be entitled to a defense team consisting of at least two (2) or more attorneys. However, if the District Attorney later filed the charge of Second-Degree Murder instead, the defendant would no longer be statutorily afforded two separate defense attorneys. Did this hypothetical murder defendant have a "vested" right in two defense attorneys, since he was originally charged with an offense that carried more punishment? Does this automatically create an equal protection claim? Certainly not. Reduced penalties will always affect the constitutional or statutory rights afforded a criminal defendant. It is no different here.

In the instant case, the prosecutor simply chose to file the charge of domestic battery under the HMC (a petty offense) as opposed to the NRS (a serious offense). Absent any discriminatory practices by the City Attorney (none of which are alleged by Petitioner), the Nevada and U.S. Supreme Courts have been clear that the judiciary should not second guess a prosecutor's discretion to charge one offense over another, and a prosecutor's charging decision will not give rise to an equal protection claim.

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[10] **NRS 178.3971 Appointment of defense team for defendant accused of murder of first degree.** If a magistrate or district court appoints an attorney, other than a public defender, to represent a defendant accused of murder of the first degree in a case in which the death penalty is sought, the magistrate or court must appoint a team to defend the accused person that includes:

1. Two attorneys; and
2. Any other person as deemed necessary by the court, upon motion of an attorney representing the defendant.

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Petitioner may argue that this situation is somehow different since the alleged purpose of enacting the domestic battery ordinance was solely to strip away a domestic abuser's right to a jury trial. Nothing could be further from the truth. The express purpose of enacting the domestic battery ordinance was always well-defined by the Henderson City Council – the City has an unwavering interest in the protection of victims of violent crime. Since it remains unsettled regarding the City's authority to conduct jury trials, this ordinance was entirely necessary to continue to hold violent offenders accountable in the City of Henderson.

In short, domestic violence victims, who are attacked by their abusers in Henderson *are* the City of Henderson's victims, not Clark County's. No such guarantee of continued victim safety could be made if these cases were sent to the Clark County District Attorney's Office – an extraordinary, yet horribly overburdened agency.

B. Petitioner's comparison to unrelated cases in the Henderson Justice Court is improper, since all misdemeanor domestic battery defendants are treated similarly in Henderson.

Petitioner mistakenly claims that since domestic abusers charged with domestic battery by the City of Henderson in Henderson Municipal Court are being charged under a different legal authority than domestic abusers charged by the state of Nevada in the Henderson Justice Court, that HMC § 8.02.055 creates an equal protection violation. This mistaken claim fails because equal protection is not at issue; prosecutorial discretion is wide-ranging as related to charging authority. Equal protection is also not impacted because no actual classification is created, and no fundamental right is impacted. Finally, even if HMC §8.02.055 created a classification that impacted a fundamental right, the code section is a narrowly-tailored law created and used for the compelling state interests of public safety, reduction of domestic violence, and victim protection.

Here, all Petitioner has shown is that he is charged with domestic battery under the HMC, as opposed to the NRS. Based on that fact, he makes the leap of logic to assert an equal protection violation for the rights afforded to an unconnected hypothetical defendant charged under a wholly

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separate legislative act. Petitioner's argument is as confusing as it is unrelated to equal protection principles.

Since there is no fundamental right affected here, equal protection can only be implicated when *a particular law* treats similarly situated people differently. In re Candelaria, 126 Nev. 408, 417, 245 P.3d 518, 523 (2010). The threshold question in an Equal Protection analysis is whether a statute treats similarly situated people disparately. Rico v. Rodriguez, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005); Vickers v. Dzurenda, 134 Nev. Adv. Op. 91, 433 P.3d 306, 308 (Nev. App. 2018). Equal Protection is not impacted when two different jurisdictions make separate prosecutorial decisions and charge cases under an entirely distinct body of law.

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

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

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law versus state law (or city ordinance). This alone does not create an equal protection violation or even trigger an equal protection analysis.

The specific issue has been considered by the Nevada Supreme Court previously. In Hudson v. City of Las Vegas, 81 Nev. 677, 679, 409 P.2d 245, 246 (1965), the Court explained Petitioner's position, as follows:

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

Similar to the defendant in Hudson, Petitioner herein argues that he is entitled to a jury trial simply because he would be allowed a jury trial in the different jurisdiction (Henderson Justice Court) under the NRS instead of being tried in Henderson Municipal Court under the ordinance. As the Municipal Court correctly quoted, the Hudson Court held that "there is no statutory guarantee of trial by jury when municipal ordinances and state statutes co-incide." Hudson, 81 Nev. at 681, 409 P.2d at 247. The Hudson Court further explained that an act that violates both state statutes and municipal codes can be punished by either agency without violating constitutional principles. Id.

The defendant in Hudson was charged with a municipal ordinance violation for contributing to the delinquency of a minor. In 1965, NRS 186.010 prohibited the same misdemeanor offense and statutorily allowed a jury trial under state law. Subsequently, the entire Chapter 186 of NRS was repealed in 1967 by Assembly Bill 81, page 1472, Chapter 523, Statutes of Nevada 1967. *See* Assembly Committee on Judiciary, Legislative History, City's Appendix, Bates at 029-031 (noting that defendants were allowed jury trials for violations of NRS 186 prior to its repeal).

Petitioner mistakenly contends, without citation, that the "Nevada Supreme Court held that there was no violation because it was not entitled to a jury trial under *either* state of municipal law." Pet. Writ at 54. Petitioner completely misstates and misconstrues Hudson. The Nevada Supreme Court noted that the defendant *did* have a statutory right to a jury trial for this particular

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misdemeanor, when charged under the NRS, but since municipal violations were never considered serious cases under the common law, no jury trial was required for the ordinance violation. Thus, even though the language of the statute and the ordinance mirrored each other, the defendant did not have a right to a jury trial for the ordinance violation. Id. at 681.

Petitioner's reliance on the municipal court's analysis of the facts in Hudson does not detract from Hudson's straightforward ruling – no jury trial is required where state law is copied in the ordinance and defendant could potentially have had a jury trial under state prosecution. *See also* Sheriff, Washoe Cty. v. Wu, 101 Nev. 687, 688, 708 P.2d 305, 305 (1985) ("[i]t is well settled that a municipality may pass ordinances prohibiting acts already prohibited by state statute.")

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

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

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jury trial did not violate equal protection). So long as defendants charged with the violation of the same law, statute, or ordinance are treated similarly, there is no equal protection violation.

The Henderson City Attorney had the clear discretion to charge Petitioner with domestic battery under the HMC, as probable cause existed for the charge. Since this is an appropriate use of prosecutorial discretion, Petitioner's constitutional challenge must fail.

C. HMC § 8.02.055 does not create a constitutionally protected classification.

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

However, Petitioner alleges that since justice courts and municipal courts have overlapping jurisdiction over misdemeanor crimes in Nevada, and since different prosecutors are making different decisions in those different courts, that equal protection is implicated. Petitioner seems to allege that the charging statute and/or jurisdiction create a classification, but the City is aware of no legal authority to support such a claim. Petitioner's argument relies on the **incorrect** assumption that misdemeanor arrests for domestic battery charges in Henderson are distributed by act of prosecutor decision between the Henderson Justice Court and the Henderson Municipal Court, despite Petitioner's admission that he is unaware of how the cases are distributed between the two courts.[11]

Virtually all misdemeanor domestic battery cases that occur within the City of Henderson are heard in the Henderson Municipal Court and prosecuted by the Henderson City Attorney's Office. From January 1, 2019 through mid-December 2019 (when City drafted their opposition on

[11] Petitioner admits that he "is aware of no specific algorithm that determines whether misdemeanor offenses are charged in Justice versus Municipal Court when both courts have concurrent jurisdiction." Pet. Writ at 46. Petitioner then mistakenly alleges that charges are distributed between the Justice and Municipal Courts by some act of prosecutorial discretion. Id.

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the municipal court level), there were 829 new cases of domestic battery filed in the Henderson Municipal Court. By contrast, only 19 charges of misdemeanor domestic battery were filed in the Henderson Justice Court in the same time frame.[12] Most, if not all, of the misdemeanor domestic battery cases filed in the Henderson Justice Court are for defendants that are alleged to have committed an accompanying felony. Those cases must go to the Henderson Justice Court to be initially arraigned and potentially bound over to District Court to handle the felony. Currently, there are **zero** cases of misdemeanor domestic battery set for jury trial in the Henderson Justice Court.

Misdemeanor charges of all kinds, including domestic battery, that have an accompanying felony charge must be filed in the same court by rule. *See* NRS 173.115.[13] In short, HMC § 8.02.055 does not treat offenders differently; the overwhelming majority of misdemeanor domestic battery defendants in Henderson are being adjudicated in the Henderson Municipal Court, as opposed to Henderson Justice Court. Once again, Petitioner's claim that domestic abusers are treated differently under the city ordinance as opposed to the state law for domestic violence distorts the purpose of this important constitutional protection.

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

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

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

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

3. The provisions of subsection 2 do not apply:

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

(Clark County District Attorney's Office) treat an unrelated defendant or set of facts. Since the municipal code treats all similarly situated defendants equally, there can be no credible equal protection claim.

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

Even if the court finds that HMC §8.02.055 creates a classification, and that Petitioner is part of a protected class or somehow infringes upon a fundamental right, the ordinance still does not violate equal protection as it is narrowly tailored to serve a compelling state interest.

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

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

Domestic violence is, undisputedly, a very serious problem in Nevada. Prosecuting domestic violence is essential to public safety, to reducing acts of domestic violence, and to

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protecting victims of domestic violence. As domestic violence is a major cause of death in Nevada at an alarmingly high rate, the ability to prosecute domestic violence is a compelling government interest of the City of Henderson. "Reducing domestic violence is a compelling government interest." United States v. Knight, 574 F. Supp. 2d 224, 226 (D. Me. 2008), *citing* United States v. Lippman, 369 F.3d 1039, 1043 (8th Cir.2004), *cert. denied,* 543 U.S. 1080, 125 S.Ct. 942, 160 L.Ed.2d 824 (2005). *See also* People v. Jungers, 127 Cal.App.4th 698, 704 (2005) (elimination of domestic violence is a compelling state interest).

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

Overall, application of HMC §8.02.055 is narrowly-tailored for the compelling government interest of reducing domestic violence. If fundamental rights are not infringed and a suspect class is not involved, the statute "will survive an equal protection attack so long as the classification withstands 'minimum scrutiny,' *i.e.,* is rationally related to a legitimate governmental purpose." Arata v. Faubion, 123 Nev. 19, 23, 161 P.3d 244, 248 (2007). As described immediately above, HMC § 8.02.055 can survive strict scrutiny, so it certainly meets the basic requirements of

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minimum scrutiny. There has been no equal protection violation by charging domestic battery defendants under the HMC.

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

VI. THE LOWER COURT CANNOT BE "DIVESTED" OF JURISDICTION OVER THIS CASE, AND PETITIONER IS NOT ENTITLED TO A JURY TRIAL.

Petitioner argues that the Henderson Municipal Court lacks the legal authority to conduct a jury trial and petitions this Court to "divest" the Henderson Municipal Court of its jurisdiction over this case. To bolster that argument, Petitioner recycles from Sections "B" and "C" of his Petition. As discussed in detail in Section IV herein, Petitioner's interpretation of the federal definition of misdemeanor domestic violence is incorrect and contradicts federal case law. Likewise, Petitioner's contention that concurrent jurisdiction between courts is an equal protection violation is inapposite, as discussed in detail in Section V above. Moreover, "divestment" (which is actually a "transfer") is unavailable under the NRS. Despite Henderson Municipal Court having authority to conduct jury trials in battery domestic violence cases, City is proceeding under the Municipal Code, so Petitioner is not legally entitled to a jury trial. Petitioner cannot show there is any lack of access to justice when charged under HMC § 8.02.055.

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

Petitioner seeks to persuade this Court to transfer (City will use the more common word "transfer" instead of divest) domestic battery cases to the Justice Court. Despite nothing in the NRS refers to the act of "divesting," nor to a Court's divestment of a case, Petitioner cites to NRS 5.0503 to persuade this Court for transfer. Nothing in that statute legally permits this case to be transferred. NRS 5.0503 states:

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Transfer of original jurisdiction of criminal case to justice court or another municipal court.

1. A municipal court may, on its own motion, transfer original jurisdiction of a criminal case filed with that court to a justice court or another municipal court if:

(a) The case involves criminal conduct that occurred outside the limits of the city where the court is located and the defendant has appeared before a magistrate pursuant to NRS 171.178;

(b) Such a transfer is necessary to promote access to justice for the defendant and the municipal court has noted its findings concerning that issue in the record; or

(c) The defendant agrees to participate in a program of treatment, including, without limitation, a program of treatment made available pursuant to NRS 176A.250, 176A.280, 453.580 or 458.300, or to access other services located elsewhere in this State.

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

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

(emphasis added).

A case can only be transferred if it falls into one of three categories. Notably, transfer is never required; it is discretionary by the municipal court, and it is only permissible if the statutory prerequisites are initially met. First, under Section 1(a), a case may transfer if it occurred outside the City (i.e. when the Henderson Municipal Court has no jurisdiction to hear the case). In the instant case, the incident occurred inside the city limits of the City of Henderson. Therefore, Section 1(a) does not permit a transfer.

Second, under Section 1(c), a case may transfer if a defendant agrees to a program of treatment for mental illness or intellectual disabilities (NRS 176A.250), a veteran's treatment program (NRS 176A.280), or a program for treatment of alcohol or controlled substance

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addictions (NRS 453.580) (exceptions to participation exist, such as a crime against a child or domestic violence under NRS 33.018).

Last, under Section 1(b) (the Section Petitioner relies upon) a case may be transferred if ". . . such a transfer is necessary to promote access to justice for the defendant and the municipal court has noted its findings concerning that issue in the record."

Above all, a case **cannot be transferred** even if a defendant satisfies Section 1(c), or under 1(b) **unless** "a plea agreement has been reached or [there has been] a final disposition of the case" as required by Section 2. Clearly, there is no plea agreement in this case, and the case has not been finally disposed of, so there is no statutory basis by which Petitioner's case can be legally transferred.

B. Petitioner is not deprived of access to justice since there is no right to jury trial when charged under HMC §8.02.055.

Petitioner's claim that he has no access to justice in Municipal Court because City will not provide him with a jury trial fails as noted throughout this Response. Charging Petitioner under HMC § 8.02.055 precludes a jury trial. As this Court knows, NRS 202.360 ties loss of gun rights to 18 U.S.C. § 921(a)(33), which as discussed *supra*, requires a conviction under Federal, State or Tribal law. Municipal law is excluded in the federal code. No gun rights are lost with a municipal conviction for domestic battery. The case can proceed in the Municipal Court with no legal infirmities. Petitioner receives full access to justice that he is entitled to under law.

Petitioner requests a transfer that he is not entitled to under the law. No issue exists regarding access to justice since he is not entitled to a jury trial. No plea agreement exists, nor is there a final disposition. Petitioner incorrectly argues that if transferred to Justice Court, there is a final disposition. A final disposition must occur *before* a case qualifies for transfer. Moreover, there must be a predicate showing that Petitioner is entitled to a jury trial under HMC § 8.02.055 before transfer. Yet, the law clearly shows that no right to a jury trial exists

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under the HMC crime of domestic battery. Nevada recognizes that a trial of an ordinance violation in municipal court without a jury is not a violation of due process when a violation of state law for the same offense provides a defendant with a jury trial. Hudson v. City of Las Vegas, 81 Nev. 677, 409 P.2d 245 (1965).

Petitioner cannot show there is a lack of access to justice when he is not entitled to a jury trial and his treatment is equal to other misdemeanor defendants in the Municipal Court.

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

Petitioner advocates for transfer to Justice Court because it has concurrent jurisdiction over NRS-based crimes of domestic battery. If transferred, the statutory scheme is misapplied as discussed above and sets bad precedent, since the Henderson Municipal Court has original jurisdiction of a case charged under HMC § 8.02.055.

The Henderson Municipal Court "has the jurisdiction to hear, try and determine all cases, whether civil or criminal, for the breach or violation of any city ordinance or any provision of" Chapter 266 of a police or municipal nature, and shall hear, try and determine cases in accordance with the provisions of those ordinances or of Chapter 266. NRS 266.555. The City of Henderson has original jurisdiction of this case, and it should remain with the Henderson Municipal Court. City of Las Vegas. v. Eighth Judicial Dist. Court of State ex rel. County of Clark, 122 Nev. 1041, 1047, 146 P.3d 240, 244 (2006). Since statutes and case law clearly support the City, this Court should deny Petitioner's petition for writ of mandamus.

D. Henderson Municipal Court may conduct jury trials.

As discussed above, while Petitioner is not legally entitled to a jury trial and City is not seeking to conduct a jury trial in this case, Henderson Municipal Court has legal authority to conduct misdemeanor jury trials because of the ruling in Andersen.

Although the lower court denied Petitioner's motion, that court made a finding regarding the legal authority of municipal courts to conduct jury trials, which was particularly astonishing

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because neither party requested it and it was totally unnecessary given that it denied Petitioner's motion specifically finding that Petitioner was not entitled a jury trial. This Court should give no weight to the lower court's unsolicited and unwarranted finding since it was not an issue properly before it.

Petitioner errs when he argues that the Henderson Municipal Court cannot conduct jury trials for domestic violence cases. The Henderson Municipal Court can conduct those jury trials when required by state or federal constitutional law. The prohibition against jury trials in municipal courts (pursuant to NRS 266.550) does not apply to municipal courts in a city incorporated under a special charter. Donahue v. City of Sparks, 111 Nev. 1281, 903 P2d 225 (1995). Like the City of Sparks in Donahue, the City of Henderson is incorporated under a special charter passed by the Legislature in 1971. Henderson City Charter, Chapter 266, Statutes of Nevada 1971, Article I, Section 1.010.

In Donahue, a city incorporated "under a special charter" is not subject to a statutory prohibition against jury trials in municipal courts and the Court ultimately concluded that "absent an express grant of authority, a municipal court lacks discretion to order a jury trial where one is not required by state or federal constitutional law." Id. at 1282-1283, 226-227. Thus, alternatively, if state or federal constitutional law requires a jury trial, the Municipal Court may conduct one.

The constitutional necessity for Henderson's Municipal Courts to conduct jury trials became manifest in the Nevada Supreme Court's Andersen decision on September 12, 2019. Andersen v. Eighth Judicial District Ct., 135 Nev. Adv. Op. 42, 448 P.3d 1120 (2019).

The Andersen decision explicated that when a defendant's charge impacts Second Amendment gun rights, a jury trial is "required by state and federal constitutional law." Once again, since City is proceeding under the Municipal Code, Petitioner is not legally entitled to a jury trial.

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Both the NRS and the Henderson Municipal Charter clearly show that municipalities have the legal authority to conduct jury trials under Nevada's domestic battery statute, NRS 200.485. Coupled with the Nevada Supreme Court's Andersen decision, there is clear authority to conduct jury trials for domestic battery cases.

1. The Henderson City Charter precludes the applicability of NRS 266.550.

The argument that Henderson Municipal Court should be divested of jurisdiction to conduct jury trials based on NRS 266.550(1) is incorrect. It states in relevant part: "The municipal court shall have such powers and jurisdiction in the city as are now provided by law for justice courts . . .. The trial and proceedings in such cases must be summary and without a jury."

Yet, there is an important exemption that undercuts this argument. NRS 266.005, entitled "Inapplicability to certain cities," states in its entirety:

> Except as otherwise provided in a city's charter, the provisions of this chapter shall not be applicable to incorporated cities in the State of Nevada organized and existing under the provisions of any special legislative act or special charter enacted or granted pursuant to the provisions of Section 1 of Article VIII of the Constitution of the State of Nevada.

The City of Henderson is an incorporated city within the State of Nevada. Moreover, it is "organized and existing" under a special charter. Thus, application of NRS 266.550 to the City is not through the Nevada Revised Statutes, but through its charter. *See also* Donahue v. City of Sparks, 111 Nev. 1281, 1282–83, 903 P.2d 225, 226 (1995) (finding that the City of Sparks is an incorporated city existing under a special charter, and thus is not subject to NRS 266.550, the statutory prohibition against jury trials in municipal courts).

The "Municipal Court" section of the Henderson City Charter permits governance of NRS Chapters 5 and 266, but only to the extent that it is "not inconsistent with this Charter." *See* Henderson City Charter Section 4.015. (Emphasis added). Prohibiting a city from exercising its judicial powers over battery domestic violence offenders is clearly inconsistent with the Charter's

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purpose, which is to provide for the public health, safety and general welfare of its citizens. *See* Henderson City Charter Section 1.010.

The inconsistency of NRS 266.550 to the Henderson City Charter is further shown by Henderson City Charter Section 2.140(2), providing that a misdemeanor battery (or any misdemeanor) is deemed to have been committed against the City. Clearly, the Charter's purpose is frustrated when City is unable to prosecute or sentence individuals that have committed batteries in the City of Henderson.

Although a transfer to justice court can potentially be accomplished pursuant to NRS 5.053, "a transfer may only become effective after a notice of acceptance is returned by the justice court . . ..If a justice court refuses to accept the transfer of a case, the case **must** be returned to the municipal court." (Emphasis added). Thus, a transfer of cases to justice court is not automatic or mandatory. Without a notice of acceptance, these cases are to be returned to the municipal court, where they would have to be dismissed. That would be an absurd result that is contrary to the public health, safety and welfare of the City of Henderson, and directly conflicts with Henderson's Charter's purpose. So, NRS 266.550 does not apply to the City of Henderson, either by statute or under the terms of the City Charter.

Also, assuming arguendo that NRS 266.550 was applicable to the City of Henderson, the requisite liberal interpretation would grant the Henderson Municipal Court authority to conduct jury trials. The construction of charters as set forth in Henderson's City Charter Section 1.010(1) provides:

> Preamble; Legislative Intent. Section 1.010
>
> In order to provide for the orderly government of the City of Henderson and the general welfare of its citizens the Legislature hereby establishes this Charter for the government of the City of Henderson. It is expressly declared as the intent of the Legislature that all provisions of this Charter be liberally construed to carry out the express purposes of the Charter and that the specific mention of particular powers

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> shall not be construed as limiting in any way the general powers necessary to carry out the purposes of the Charter.

(Emphasis added).

As set forth above, Chapter 266 is only applicable through the Charter's provisions, and any application should be liberally construed to effectuate the Charter's purpose. As such, whenever statutes are ambiguous or are in conflict with each other, they should be applied in a way that accomplishes a public safety and general welfare goal.

With that in mind, NRS 266.550 is ambiguous and contradictory on its face as it states:

> The municipal court shall have such powers and jurisdiction in the city as are now provided by law for justice courts, wherein any person or persons are charged with the breach or violation of the provisions of any ordinance of such city or of this chapter, of a police or municipal nature. The trial and proceedings in such cases must be summary and without a jury.

The first sentence provides that municipal courts have the same powers and jurisdiction as justice courts. If justice courts have the power and jurisdiction to conduct jury trials, then the municipal courts have this same power and jurisdiction.

NRS 266.550 is both ambiguous and contradictory. The final sentence's phrase "without a jury" patently contradicts the explicit power granted in the first sentence. Pursuant to Henderson City Charter Section 1.010, it should be read to accomplish the purposes and objectives of the Henderson City Charter, i.e. to provide for the general welfare of its citizens. Hence, it should be interpreted that municipal courts have the same power and jurisdiction to conduct jury trials as justice courts.

Moreover, Chapter 5 of the NRS is also applicable to municipal courts. *See* Henderson City Charter Section 4.015. However, unlike NRS 266.550, it is applicable to municipal courts by City Charter and as a direct statutory authority as it does not have a default inapplicability. Any conflict between the two chapters must be resolved in favor of Chapter 5 and its statutes.

"NRS 5.050 plainly grants municipal courts jurisdiction to entertain criminal actions charging a misdemeanor violation." City of Las Vegas v. Las Vegas Mun. Court, 110 Nev. 1021,

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1023, 879 P.2d 739, 740 (1994). Accordingly, under the terms of NRS 5.050(2), municipalities have jurisdiction to charge battery domestic violence offenses. It would be absurd for municipalities to be able to charge the offense, but not possess the jurisdiction to entertain trials and sentence the offenders.

Furthermore, NRS 5.073 provides:

> Conformity of practice and pleadings to those of justice courts
>
> (1) The practice and proceedings in the municipal court must conform, as nearly as practicable, to the practice and proceedings of justice courts in similar cases . . ..

Since justice courts may now conduct jury trials for serious misdemeanor charges, municipal courts must conform to these same proceedings and will possess jurisdiction to conduct jury trials. In applying a liberal interpretation of competing statutes to achieve the purpose of the Charter, NRS 5.073 would govern, not NRS 266.550.

2. Municipal Courts should be granted the clear authority to hold jury trials to comply with the Andersen decision.

While City does not believe that Petitioner's case qualifies for a jury trial under the analysis in Section IV, the parties disagree if City can legally conduct a jury trial and the effect of the Andersen decision. City requests that this Court unequivocally state that municipal courts have the constitutional authority to conduct battery domestic violence jury trials pursuant to the Andersen decision.

To be clear, City believes that the Henderson Municipal Court has authority to conduct jury trials complying with the constitutionally-based Andersen decision. Andersen overrides any provision of statute or city charter to the contrary. Since, City's view is not universally held, municipalities must have a clear mandate from this Court for planning and conducting jury trials.

In Andersen, "[g]iven that the Legislature has indicated that the offense of misdemeanor domestic battery is serious, it follows that one facing the charge is entitled to the right to a jury trial." Andersen, 448 P.3d at 1124. The City of Las Vegas was the real party in interest in the

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Andersen case, and it originated in the Las Vegas Municipal Court. The Nevada Supreme Court remanded the Andersen case to the District Court with an order to vacate the conviction, and ultimately, referred the case to the Las Vegas Municipal Court to set the jury trial. The Nevada Supreme Court obviously remanded the Andersen case for a jury trial but did not expressly state that the Las Vegas Municipal Court had the authority to conduct that jury trial.

City believes that the only correct interpretation of Andersen is that the Nevada Supreme Court authorized municipal courts to hold jury trials for certain misdemeanor battery domestic violence offenses to comply with the 6th Amendment. However, that interpretation is not collective. In short, the City (and all municipalities in Nevada) need clarity if municipal courts are authorized to conduct jury trials pursuant to the Andersen decision in order to properly and responsibly plan for these trials.

Undoubtedly, the Henderson City Attorney has the legal authority to charge a defendant with the crime of domestic battery (NRS 200.481, 200.485, 33.018) in the Henderson Municipal Court.

The City of Henderson was incorporated pursuant to a charter in 1971. Henderson City Charter, Chapter 266, Statutes of Nevada 1971, Article I, Section 1.010. Through this special legislative act, City was expressly granted the authority to prosecute violations of state law that occur within the City of Henderson. Henderson City Charter Section 2.140(2) states, "[a]ny offense made a misdemeanor by the laws of the State of Nevada shall also be deemed to be a misdemeanor in the City whenever such offense is committed within the City." Then, Henderson City Charter Section 3.060 provides that the Henderson City Attorney shall "[d]etermine whether the City should initiate any judicial . . . proceeding, and [p]erform such other duties as may be designated by the City Council or prescribed by ordinance." Further, in 1974, the City Council, pursuant to its express legislative authority in Section 3.060, enacted Henderson Municipal Code 8.02.010, which states:

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> The commission of any act within the corporate limits of the City of Henderson by any person or persons, or the failure to perform any duty imposed by law which is defined as an offense and made a misdemeanor under the laws of the State of Nevada is declared to be, and shall constitute a misdemeanor when said act is committed, or said duty omitted, within the corporate limits of the City of Henderson.

Certainly, the City of Henderson may prosecute the crime of domestic battery (NRS 200.481, 200.485, 33.018) in the Henderson Municipal Court. The question remains though – did Andersen grant municipalities the right to hold jury trials for battery domestic violence when charged under the state law?

Municipalities traditionally derive their power and authority from the Nevada Constitution, their respective charters or the Nevada Revised Statutes. *See* NRS 268.001. None of those sources directly authorize municipal courts to conduct jury trials. NRS 175.011 does not even mention municipal courts when discussing jury trials. Furthermore, the Nevada Supreme Court has held that because municipal courts are created by statute, their jurisdiction is limited to that granted by statute. McKay v. City of Las Vegas, 106 Nev. 203, 205, 789 P.2d 584, 585 (1990).

Moreover, at first glance, NRS 266.550 expressly forbids municipal courts from conducting jury trials. However, since the City of Henderson was incorporated pursuant to a city charter, as opposed to the general laws of NRS Chapter 266, it does not appear that NRS 266.550 would apply to the City of Henderson. In Blanton v. N. Las Vegas Mun. Court, 103 Nev. 623, 628, 748 P.2d 494, 497 (1987), the Nevada Supreme Court held that NRS 266.550 does not apply to incorporated cities and stated:

> Las Vegas and North Las Vegas, whose municipal courts are the subject of the instant dispute, are incorporated cities existing under the provisions of special legislative acts. See 1983 Nev.Stat. Ch. 517 at 1391–1437; 1971 Nev.Stat. Ch. 573 at 1210–1229. Consequently, the statutory prohibition against the holding of jury trials in the municipal courts, see NRS 266.550, does not apply to the cases presently before this court.

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In a footnote, the Nevada Supreme Court then mentioned that "[t]he other cities with special charters are Boulder City, Caliente, Carlin, Carson City, Elko, Gabbs, Henderson, Reno, Sparks, Wells and Yerington." Blanton, 103 Nev. at 628, 748 P.2d at 497, fn.5.

The City of Henderson is an incorporated city existing under a special charter and therefore is not subject to the statutory prohibition against holding jury trials in municipal court. However, in Donahue v. City of Sparks, 111 Nev. 1281, 1283, 903 P2d 225, 226 (1995), the Nevada Supreme Court stated that even though the City of Sparks was also enacted under a special charter,

> there are no procedures or provisions in the Nevada Revised Statutes, Sparks City Charter or the Sparks Municipal Code for summoning or selecting juries in municipal court. We conclude that absent an express grant of authority, a municipal court lacks discretion to order a jury trial where one is not required ***by state or federal constitutional law***.

(Emphasis added.)

Pursuant to the Nevada Supreme Court's decision in Andersen, the Henderson City Attorney undoubtedly has the legal authority to charge a defendant with the crime of domestic battery (NRS 200.481, 200.485, 33.018) in the Henderson Municipal Court.

Since without a clear directive, it remains uncertain whether jury trials may be conducted in municipal courts. City requests that clarification here. Pursuant to Andersen, the U.S. and Nevada Constitutions require a jury trial for a defendant charged with misdemeanor battery domestic violence under state law, whenever a defendant's Second Amendment firearms rights are in jeopardy. A defendant's constitutional rights generally overrides any statutory prohibitions. *See* e.g. Reno v. Howard, 130 Nev. 110, 318 P.3d 1063 (2014) (finding that a defendant's Confrontation Clause rights override NRS 50.315 requirement that a bona fide dispute must be alleged in demanding phlebotomist); Flores v. State, 121 Nev. 706, 120 P.3d 1170 (2005) (State not entitled to rely upon NRS 51.315 to introduce child witness's out-of-court statements as it violated defendant's Sixth Amendment right to confrontation). And, pursuant to Donahue, if state or federal constitutional law requires a jury trial, the municipal court may conduct a jury trial to fulfill those

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rights. The Nevada Supreme Court granted municipal courts the ability to hold jury trials on battery domestic violence offenses under the state law, in compliance with the 6th Amendment. And further, the judicial branch has the inherent powers to regulate its own affairs. Blackjack Bonding v. City of Las Vegas Mun. Court, 116 Nev. 1213, 1218–19, 14 P.3d 1275, 1279 (2000). Those affairs include the right to conduct jury trials pursuant to Andersen.

City respectfully requests that this Court expressly state that municipal courts now constitutionally possess the authority to conduct jury trials for misdemeanor battery domestic violence offenses when a defendant's firearm possession rights are affected. Without this clarification, it remains difficult, if not impossible, for municipalities to financially plan to conduct jury trials in their respective municipal courts.

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

In section "D" of his Petition, Petitioner primarily argues that the Henderson Municipal Court lacks authority to conduct jury trials, preventing this court from hearing this case. Petitioner's argument relies on the erroneous assumption that Andersen entitles every defendant charged with domestic battery, in every court in Nevada, to a jury trial. Yet, whether the Henderson Municipal Court has the legal authority to conduct jury trials became moot when the City filed its Amended Complaint (which charges Petitioner with domestic battery under the HMC, (*See* Amended Complaint, City's Appendix, Bates at 032) because, as explained at length in Section V above, defendants charged under the HMC are not entitled to a jury trial.

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

Petitioner argues that the prosecution of battery domestic violence cases under HMC § 8.02.055 (HMC) without a jury trial violates the Henderson City Charter[14] because HMC is

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

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repugnant to the United States Constitution, the Nevada Constitution and the Nevada Revised Statute. He alleges that repugnancy exists since the code's purpose is to circumvent his "fundamental constitutional right" to a jury trial. Yet, no such fundamental right in the instant matter and thus no repugnancy exists.

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

There is no fundamental constitutional right to a jury trial for *all* criminal matters. The right to a jury trial, as established by the Sixth Amendment of the United States Constitution and Article 1, Section 3 of the Nevada Constitution, does not extend to offenses categorized as "petty" but attaches only to crimes that are considered "serious" offenses. Andersen v. Eighth Judicial District Court et al., 135 Nev. Adv. Op. 42, 448 P.3d 1120, 1122-23 (2019), *citing* Blanton v. City of N. Las Vegas, 489 U.S. 538, 541(1989); Duncan v. Louisiana, 391 U.S. 145, 159 (1968); and, Blanton v. N. Las Vegas Mun. Court, 103 Nev. 623, 628-29, 748 P.2d 494, 497 (1987) ("[T]he right to a trial by jury under the Nevada Constitution is coextensive with that guaranteed by the federal constitution.")

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

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

If Petitioner means to argue that enacting a municipal code with a different penalty or outcome from the same crime charged under the NRS is somehow problematic, that argument also fails. He apparently contends that HMC § 8.02.055 is repugnant to the NRS and U.S. Constitution

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because it has a lesser penalty that does not invoke the loss of firearm rights under NRS 202.360, thus not triggering the right to a trial by jury. His argument fails on several levels. HMC § 8.02.055 does not conflict with state domestic battery law provisions, nor NRS 202.360(1)(a)1.

The Henderson City Council properly acted within the authority granted by the State Legislature in its City Charter when it enacted HMC § 8.02.55. In Henderson's City Charter, the State Legislature granted the City of Henderson power to enact and enforce ordinances prohibiting behavior which violates state law, provided the penalties do not exceed those in state law. Specifically, Section 2.080(3) of the Henderson City Charter provides: "The City Council may enforce ordinances by providing penalties not to exceed those established by the Legislature for misdemeanors." The inclusion of Section 2.080(3) is a deliberate choice by the legislature: it indicates that the legislature *intended* for the Henderson City Council to provide for penalties that are different from those established by the state legislature for misdemeanors, as long as the municipal ordinance did not include a harsher penalty than state law. Although the legislature expected and granted the authority to the Henderson City Council to prohibit the same conduct as state law, the legislature also expected and granted authority to the Council to impose different penalties than state law. This unambiguous language indicates that differing penalties between state and municipal laws that prohibit the same conduct do not conflict and are legally permissible.

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

The Legislature clearly did not view a City ordinance prohibiting conduct already prohibited by state law as directly conflicting with state law, or else it would not have granted the City

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

The Nevada Supreme Court long ago established that "a municipality may pass ordinances prohibiting acts already prohibited by state statute." Sheriff, Washoe County v. Wu, 708 P.2d 305, 101 Nev. 687 (1985) *citing* Hudson v. City of Las Vegas, 81 Nev. 677, 409 P.2d 245 (1965); Ex Parte Sloan, 47 Nev. 109, 217 P. 233 (1923) *abrogated by* Waller v. Fla., 397 U.S. 387, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970)[15]. In Wu, the defendant challenged the jurisdiction of a Justice Court to preside over a traffic violation that occurred within the jurisdiction of a City Municipal Court. In reversing a grant of habeas corpus, the Wu court clarified that concurrent jurisdiction exists between a justice court and municipal court for offenses occurring within the municipality when the conduct violates both a municipal ordinance and a state statute for petty offenses. Wu at 690, 306.

In support of its reasoning, the Wu court cited both Hudson and Sloan to announce "[i]t is well settled that a municipality may pass ordinances prohibiting acts already prohibited by state statute." Id. at 688, 305. Decided well after the abrogation of Sloan, the Nevada Supreme Court once again used its previous reasoning to support its position that municipalities can exercise their police powers to pass ordinances identical to state statutes:

> There is a conflict of authority upon this question. The decided weight of authority, however, is to the effect that **the same act may constitute an offense both against the state and a municipal corporation**. "Indeed," says Judge

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

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> Cooley, in his work on Constitutional Limitations (7th ed.) p. 279, "an act may be a penal offense under the laws of the state, and further penalties, under proper legislative authority, be imposed for its commission by municipal by-laws, and the enforcement of the one would not preclude the enforcement of the other." (emphasis added).

Ex Parte Sloan at 115, 235; *see also* Ex Parte Siebenhauer, 14 Nev. 365 (1879). Wu at 688–89, 306.

The Court ultimately held in Wu that concurrent jurisdiction does not conflict with the Constitution if jurisdiction is proper. Wu at 690, 306.

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

Petitioner alleges HMC § 8.02.055 is repugnant to U.S. and state law, but he does not expound much further except to say that the conflict lies in the difference in jury trial. However, the City has shown above through ample analysis of statutory authority and case law that a jury trial is not a fundamental right in trials for petty crimes, and a difference in penalty does not cause a fatal conflict unless the municipal code prescribes a penalty that exceeds the state law penalty, which is not the case here.

HMC § 8.02.055 plainly does not conflict with state domestic battery provisions or NRS 202.360. To the contrary, HMC § 8.02.055 defines the misdemeanor domestic battery in precisely the same way as state law, and it works *within* the definition contained in NRS 202.360 as amended by the Nevada State Legislature in 2015. Having different outcomes for convictions under NRS domestic violence statutes and HMC § 8.02.055 does not mean the two irreconcilably conflict. In

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fact, the differing outcomes is precisely *because* of how the legislature defined a misdemeanor crime of domestic violence in its amendment to NRS 202.360. That definition exempts convictions under municipal law, like HMC § 8.02.055, from qualifying as predicate offenses to prohibit firearm possession. 18 U.S.C. § 921(a)(33)(i) (the term "misdemeanor crime of domestic violence" means an offense that "(i) is a misdemeanor under Federal, State, or Tribal [3] law [...]"); United States v. Pauler, 857 F.3d 1073, 1078 (10th Cir. 2017) (holding that a "a misdemeanor under Federal, State, or Tribal law" does not include a conviction under municipal ordinance). The definition contained within 18 U.S.C. § 921(a)(33), and incorporated within NRS 202.360, distinguishes convictions under state law from those under municipal law, which is what causes the alleged conflict to which Petitioner refers. Accordingly, there is no actual conflict between NRS 202.360, the NRS domestic battery statutes, and HMC § 8.02.055; only a distinction in outcomes for convictions under state and local law because *NRS 202.360 creates that distinction itself* within the amendment added by the state legislature. **That a conviction under HMC does not trigger the right to a jury trial is not because HMC § 8.02.055 conflicts with NRS provisions, but because such convictions are excluded as predicate offenses by the text of NRS 202.360 itself.**

Finally, Petitioner's claim that demoting an offense from serious to petty to avoid the requirement of a jury trial is somehow repugnant to state and Constitutional law is erroneous. There is no right to a jury trial under the United States Constitution for domestic battery with the penalties associated with HMC § 8.02.055. *See* Amezcua v. Eighth Judicial Dist. Court of State ex rel. County of Clark, 130 Nev. 45, 46-47, 319 P.3d 602, 603 (2014). Courts have upheld the validity and constitutionality of a statute that reduces the penalty of an offense to eliminate the right to a jury trial. For example, in State v. Nakata, 878 P.2d 699, 76 Haw. 360 (1994), the Hawaii state legislature amended the DUI statute by reducing the penalties for a 1st offense DUI with the intent of eliminating the right to a jury trial. Id. at 701. In Nakata, the court held that reduction in penalties in order to eliminate the right to a jury trial was constitutional because the new law

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"affects only the procedural determination of whether appellants will be tried by a judge or jury; their right to a fair and impartial trial has not been compromised or divested in any way." Id. at 715. Similarly here, under HMC § 8.02.055, Petitioner still has a right to a fair and impartial trial. Thus, not only is HMC § 8.02.055 not in conflict with the NRS, it also passes constitutional muster.

The Henderson Municipal Court does not lack jurisdiction and may prosecute battery domestic violence cases under the HMC without violating the Henderson City Charter.

CONCLUSION

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

DATED this 29 day of April, 2020.

NICHOLAS G. VASKOV
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By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of April, 2020, I served a true copy of the foregoing CITY OF HENDERSON'S OPPOSITION TO PETITIONER'S REQUEST FOR A WRIT OF MANDAMUS, OR IN THE ALTERNATIVE WRIT OF CERTIORARI via Odyssey, the Eighth Judicial District Court's electronic filing and service system, and addressed to the following:

Damian R. Sheets, Esq.
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City of Henderson Employee

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

Nathan Ohm, Petitioner, vs. Henderson Municipal Court, and the Honorable Mark Stevens, Henderson Municipal Judge, Respondent, and City of Henderson, Real Party in Interest.	Case No.: A-20-810452-W Dept. No: XXV Municipal Court Case No.: 19CR002297; 19CR002298 **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI**

COMES NOW, Petitioner Nathan Ohm, by and through his attorney of record, DAMIAN SHEETS, ESQ. of the firm Nevada Defense Group, hereby submits this Reply in Support of Petition for Writ of Mandamus or, In the Alternative, Petition for Writ of Certiorari.

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MEMORANDUM OF POINTS AND AUTHORITIES

A. This Court Has Full Authority to Entertain the Properly Filed Writ

Petitioner will first address the procedural arguments raised by Real Party in Interest City of Henderson (hereinafter "City"). First, the City asks this Court "not to entertain Petitioner's writ" as a matter of judicial economy because "there is currently a writ pending in the Nevada Supreme Court where the issue of jurisdiction was raised," namely *Hildt v. Dist. Ct. (City of Henderson)*, Docket No. 79605.

Respectfully, Petitioner finds the City's arguments somewhat disingenuous. Briefing on *Hildt* began on September 13, 2019 and the last reply brief was filed on January 13, 2020. However, another writ petition was filed to the Eighth Judicial District Court raising issues similar to the instant case on January 23, 2020 (see, *Cullen v. City of Henderson*, A-20-809107-W). In that case, despite it also being filed after the close of briefing in *Hildt*, the City did not raise any judicial economy arguments and responded to the petition on the merits. If the City did not believe judicial economy precluded a substantive response in *Cullen*, the City is estopped from arguing in this case that judicial economy is such a significant consideration that it warrants preclusion of this Court's review entirely. The circumstances in the Nevada Supreme Court are no different in this case as when *Cullen* was filed.

Additionally, the City implies that *Hildt* is considering and will ultimately decide the jurisdictional issue, but that is also not entirely accurate. The writ petition filed in *Hildt* did *not* raise the question of jurisdiction; however, the City raised it for the first time in their Answering Brief even though it was not raised by the petitioner and not briefed in the lower

court. In fact, virtually all of the responsive pleadings and *amicus* filings in *Hildt* focus on the entirely separate issue of retroactivity and retroactive application of *Andersen*'s jury trial mandate, which is not an issue raised here.

Further, the City fails to note that the reply brief in *Hildt* specifically objected to the City's jurisdiction argument because it was not properly raised before the Nevada Supreme Court. More importantly, and somewhat ironically, the briefing in *Hildt* asked the Nevada Supreme Court *not* to consider the improperly raised jurisdictional argument because the same arguments were being fully developed in the Eight Judicial District Court, namely with *Cullen* and the instant case. The following is an excerpt from the reply brief filed in *Hildt*:

> As noted above, the jurisdictional issue was neither raised nor addressed before the Henderson Municipal Court or the District Court in this case. It is raised for the first time in the Answering Brief filed by Real Party in Interest, and as such was not properly raised for this Court's consideration. Other challenges that fully explore the argument and positions of the various parties on the merits are pending before the Municipal Courts as well as the Eighth Judicial District Court in light of *Andersen*. It would accomplish little to adjudicate the jurisdictional claim in this case, with no lower court record, when alternative cases that are fully articulating the jurisdictional component of *Andersen* are soon to be decided by the lower courts.

Therefore, there will be no "judicial economy" saved by waiting for the Nevada Supreme Court's decision in *Hildt* when there is a substantial likelihood that the issue of jurisdiction will not be heard or decided on the merits.

The City further claims that "all of Petitioner's concerns raised in the lower court would be resolved if municipal courts have jurisdiction to conduct jury trials." Petitioner finds this statement to be quizzical; even if the Nevada Supreme Court rules that Municipal Courts have jurisdiction to conduct jury trials, that does not resolve the question of whether

cases charged under the Municipal Code, rather than the NRS, require jury trial (which is arguably the primary issue raised in this case).

The only way that the jurisdictional decision would resolve "all of Petitioner's concerns" as the City suggests would be if the City stipulated that charges filed under the Municipal Code require a jury trial. Unless the City is willing to offer this stipulation, the majority of issues and arguments raised in the instant petition continue to exist regardless of any jurisdictional ruling. Assuming the Nevada Supreme Court rules on the improperly raised jurisdictional argument, a finding that the Municipal Courts do have jurisdiction to conduct jury trials does not resolve the issue of whether defendants are entitled to this jury trial when charged under the Municipal Code. On the other hand, a finding that the Municipal Courts do not have jurisdiction to conduct jury trials still does not preclude the City from trying to argue that defendants are not entitled to a jury trial under the Code in the first instance.

For these reasons, *Hildt* will not resolve the issues raised by way of the instant petition, and no "judicial economy" will be saved by waiting for the Nevada Supreme Court's ruling.

Next, the City argues that a Petition for Writ of Mandamus was not properly alleged because petitioner "failed to assert any justification or legal basis for this court to issue a writ" because "Petitioner's issue is based solely on jurisdiction." Petitioner is unsure of how the City can claim Petitioner's "sole" issue is jurisdiction when the vast majority of briefing was dedicated to a non-jurisdictional issue, namely whether the City can escape the

constitutional jury trial mandate by simply charging an individual under the Code versus state statute.

A Petition for Writ of Certiorari is appropriate because Petitioner notes that "the District Court would otherwise lack jurisdiction to hear a direct interlocutory appeal, [and] there is no other plain, speedy and adequate remedy at law to challenge the jurisdictional issues raised herein" (Petition, 14). The City does not seem to dispute that a Petition for Writ of Certiorari is the proper procedural vehicle to raise these claims.

Additionally, a Petition for Writ of Mandamus is appropriate because it exists to "enforce the performance of an act which the law enjoins as a duty, especially resulting from an office, or to compel the admission of a party to the use and enjoyment of a right to which he is entitled and from which he is unlawfully precluded by such inferior tribunal" (Petition, 12). Petitioner made this claim for relief when it requested an order "directing the Henderson Municipal Court to divest itself of jurisdiction, or alternatively provide Petitioner, and those similarly situated, a trial by jury" (Petition, 12). Petitioner requested a jury trial in the lower court, and it was denied. Thus, a writ of mandamus is proper to "compel the admission of a party to the use and enjoyment of a right to which he is entitled and from which he is unlawfully precluded," that right being a trial by jury.

For these reasons, the instant Petition has properly raised appropriate issues for this Court's consideration.

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B. The Henderson Municipal Code, Applied Retroactively, Constitutes an Unlawful Ex Post Facto Violation

The City argues that because the Henderson Municipal Code and Nevada Revised Statute "have the same elements and penalties," there can be no *ex post facto* violation. This was pre-emptively addressed by Petitioner:

> Respondent would likely argue here that the Amended Complaint does not constitute an *ex post facto* violation because the Code is substantively identical to the law contained in the Nevada Revised Statutes under which offenders were previously charged. Therefore, the Amended Complaint neither criminalizes an offense that was not previously criminal, nor does it enhance or alter the punishment for the offense; these are perhaps the more common types of *ex post facto* challenge under state law, see, e.g., *Miller v. Warden, Nev. State Prison*, 112 Nev. 930, 933, 921 P.2d 882, 883 (1996), but they are not the only types. Federal law has not construed "disadvantaged" as limited only to retroactive criminalization or punishment. Rather, the Courts have taken a much broader approach by specifically recognizing at least four distinct types of *ex post facto* law in addition to a fifth catch-all category recognizing a specific interest of "fundamental fairness."

The primary position argued by Petitioner is that the Henderson Municipal Code fits within the "fundamental fairness" category because its explicit purpose is to avoid a jury trial as a newly recognized constitutional right. The City's response on this point is fairly limited, arguing only that Petitioner's "biased and cherry-picked reading of Ordinance 3632" paints an inaccurate picture of the purpose of the Ordinance. Petitioner cannot engage in a "biased and cherry-picked" reading of the same when the *complete* Ordinance, including the complete preamble, was provided for this Court's review. It states:

> [1] 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
>
> [2] 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
>
> [3] 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
>
> [4] 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, does ordain:

Three of the four paragraphs in the preamble explicitly state that the purpose of enacting the Ordinance is to circumvent and avoid the Nevada Supreme Court's ruling in *Andersen.* Thus, Petitioner finds it completely ironic that the City accuses Petitioner of "cherry-picking" language in the Ordinance to support its position, when the City's response asks this Court to read only the language in paragraph [4] and to effectively ignore the other 75% of the Ordinance's language. With all due respect, Petitioner did not choose the language in the City's Ordinance.

The City argues that "Petitioner's claim of vindictive motivations is obviously unfounded," but the Ordinance is so clear that misinterpretation is impossible: the *very purpose* of enacting the Ordinance was to avoid the jury trial mandate in *Andersen.* Petitioner

can respect that the City "does not currently have the infrastructure or practical ability" to conduct jury trials, but this is not a basis to deny that right altogether, especially one so unquestionably fundamental as a right to trial by jury. When jury trials were first provided for in the Nevada Constitution, execution was significantly more difficult and expensive than it is today, as many Nevada townships had such small populations that residents of neighboring towns had to be brought in on horseback in order to create a sufficient jury pool. If jury trials can be organized by horseback in the late 1800s, surely the courts can create the necessary infrastructure in 2020.

When the U.S. Supreme Court announced the right to counsel in *Gideon v. Wainwright,* was there the infrastructure to immediately provide every indigent defendant with an attorney at government expense? When the Supreme Court required the government to disclose exculpatory evidence in *Brady v. Maryland* in 1963, was there a communication infrastructure immediately in place between prosecutors and defense counsel? Yet, now these are considered some of the most fundamental landmark cases in the history of American jurisprudence. If legal history has taught us one thing, it is that constitutional rights are often time-consuming; they're often expensive; they're often difficult. But that does not make them any less necessary, nor any less fundamental. The City's "anticipated legal challenges" and lack of "infrastructure or practical ability" to provide a fundamental constitutional right is not a basis to deny it.

Petitioner did not allege that the purpose of the Ordinance was to somehow seek revenge against criminal defendants; but the Ordinance itself makes clear that its purpose is to avoid jury trials. "Every law that takes away, or impairs, rights vested, agreeably to

existing laws, is retrospective, and is generally unjust, and may be oppressive." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91 (1798). "There is plainly a fundamental fairness interest in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell v. Texas*, 529 U.S. 513, 516, 120 S. Ct. 1620, 1624 (2000).

The City's sole counter to the fundamental fairness aspect focuses on paragraph [4] of the Ordinance, that "is a widespread offense and the City of Henderson has a significant interest in protecting its citizens from this offense." This is an accurate statement, and Petitioner does not dispute the City of Henderson has somee interest in protecting its citizens. However, there is one gaping flaw in the City's position: transferring cases to the County for prosecution accomplishes the same goals. Prosecution under County authority is no better or worse than prosecution under City authority.

There is no reason why the City cannot temporarily transfer jurisdiction to the County for prosecution while it gets the necessary infrastructure for jury trials in place. Prosecution in Henderson Justice Court meets the City's goals of protecting its citizens, arguably even moreso than enacting the Ordinance, which has done little more than bring domestic violence prosecutions to a complete standstill while these numerous procedural, substantive and jurisdictional issues are resolved. Thus, if the City's ultimate concern is really in protecting its citizens by prosecuting cases of battery domestic violence, it could temporarily transfer cases to the Justice Court for prosecution while it arranged its infrastructure to meet its constitutional obligations, rather than expend its resources fighting to defend an Ordinance that was enacted to avoid them.

The City's substantive legal response to Petitioner's *ex post facto* argument relies on three cases: *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715 (1990), *State of Hawaii v. Nakata*, 76 Haw. 360, 878 P.2d 699 (Hi. 1994), and *U.S. v. Joyner*, 201 F.3d 61 (2nd Cir. 2000). As an initial matter, *Nakata* and *Joyner* are facially inapplicable. *Nakata* removed the right of a trial by jury for misdemeanor DUI offenses. However, these jury trials are the result of a *statutory* grant of authority rather than constitutional mandate (as DUI charges remain "petty" offenses under the Sixth Amendment); thus, because the jury trial is a matter of statutory privilege rather than constitutional right, rescinding this statutory authority does not implicate constitutional concerns. Similarly, *Joyner* deals exclusively with the right of a jury in sentencing, not the ultimate determination of guilt or innocence. This, too, is likewise not a constitutional requirement under the Sixth Amendment, and therefore the law can be legitimately subject to modification without constitutional implications. In this case, on the other hand, the Nevada Supreme Court has ruled that charges of Battery Domestic Violence are serious offenses that require a jury trial under the Sixth Amendment.

Therefore, the City's only applicable substantive response is its reliance on *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715 (1990). However, the City's reliance on *Youngblood* is misplaced, as *Youngblood* provides substantial support for Defendant's position in this context. In *Youngblood*, the petitioner was convicted of trial by jury in the State of Texas for aggravated sexual abuse; the jury further decided his punishment of life imprisonment plus a $10,000 fine. *Id.* at 3. At the time of the conviction, Texas law did not permit a jury to impose a fine in addition to a term of imprisonment. *Id.* As a result, once the petitioner's conviction was affirmed through direct appeal, he sought to declare the judgment invalid due to the fine

imposed by the jury, and requested a second trial by jury. *Id.* Prior to his challenge being heard, however, Texas passed a law that permitted the appellate court to "reform an improper verdict that had assessed a punishment not authorized by law." *Id.* The Texas appellate court invoked the new law, removed the fine from the judgment, and thereafter denied the petitioner's request for a new trial. *Id.* The petitioner challenged the new law as an impermissible *ex post facto* violation, and the Supreme Court granted certiorari.

The City relies on a single quotation from *Youngblood* taken out of context with its reasoning. The question addressed in *Youngblood* was whether a "procedural" change to a jury trial was an *ex post facto* violation, noting that Youngblood was initially convicted by jury trial, but the verdict was procedurally invalid because the jury also imposed a fine. Indeed, it is this "procedural" versus "substantive" change that was the focal point of the Supreme Court's analysis:

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

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

> This Court's decision in *Duncan* v. *Missouri, supra*, subsequently adopted that phraseology:

> An *ex post facto* law is one which … in short, in relation to the offence or its consequences, alters the situation of a party to his disadvantage; but the prescribing of different modes or procedure and the abolition of courts and creation of new ones, *leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime*, are not considered within the constitutional inhibition.
> …
> We think the best way to make sense out of this discussion in the cases is to say that by simply labeling a law "procedural," a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause. *Collins v. Youngblood*, 497 U.S. 37, 45-46, 110 S. Ct. 2715, 2721 (1990).

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

The procedural versus substantive change formed the basis for the Court's conclusion in *Youngblood*. Thus, the City's quotation from *Youngblood* is taken largely out of context; *Youngblood* held that even "procedural changes" can, and often do, implicate the *Ex Post Facto* Clause, but changing from the Sixth Amendment's specific requirement of a 12-person

jury to a state law requirement of a 6-person jury is a valid change. Significantly, the challenged law in *Thompson* was solely regarding the *formation* of the jury, not the complete *availability* of the right to a jury trial itself, which is the issue contested here. Because the accused was still granted a trial by jury, the Supreme Court reasonably asserted that the accused's rights in going from a 12-person jury to a 6-person jury were not violated in a manner to constitute an *ex post facto* violation.

Along that same line of reasoning, Petitioner can find no case, nor did the City cite to one, where the complete retroactive removal of a constitutionally required right is a legitimate procedural alteration of the law. In this case, on the other hand, the Nevada Supreme Court has ruled that charges of Battery Domestic Violence are serious offenses that require a jury trial under the Sixth Amendment. A law that is specifically designed to circumvent this right completely does trigger an *ex post facto* violation pursuant to the Supreme Court's holding in *Youngblood*. The City's Ordinance does not propose a procedural change to the right to a jury trial, but rather the complete substantive removal of this right.

C. The Plain Language of the Federal Definition of a "Misdemeanor Crime of Domestic Violence" Includes the Municipal Ordinance that Criminalizes the Same Conduct as State Statute

The City claims that Petitioner's federal definition analysis is somehow incorrect because "offense" does not mean "conduct," but rather means "violations of law." This premise is completely illogical. Petitioner cannot ascertain how replacing "offense" with "violations of law" renders a different result; the City cannot reasonably argue that one can commit a violation of law without engaging in unlawful conduct, as such a position would be

facially nonsensical. As a "violation of law" requires the commission of "conduct," the analysis – even under the City's position – does not change.

The City's replacement with "conduct" as "violations" has the same ultimate result – that it relates to the "commission of the offense," which is precisely what is identified in *Hayes.* The City is estopped from offering any contrary argument because the City expressly recognized such in the lower court proceedings:

> Instead, "offense" is used by the *Hayes* court relating to the "use or attempted use" of force requirement that must be part of the conviction, not to describe the relationship portion of the clause that need not be a predicate element of the convicting statute… Essentially, the Court found that the convicted predicate offense must have as an element the force requirement *committed by* a person with the appropriate relationship to the victim (City's Opposition, 27) (emphasis in original).

Petitioner agrees with the City that "offense" requires an element "committed by" a person with the appropriate domestic relationship. There is no dispute here. The City cannot on one hand claim that "offense" does not mean "conduct," while simultaneously admitting that "offense" requires the "commission" of an act. Conduct *is* the commission of an act.

One thing an offense is *not*, however, is a conviction. The City's position is simply that "offense" and "conviction" are synonymous and interchangeable. In its argument, the City uses the phrase "predicate convictions" repeatedly instead of "predicate offense." The City used the terms interchangeably in the lower court proceedings as well.

However, while the City may take issue with Petitioner's interpretation of "offense" as "conduct," the City has provided no support for its own federal interpretation. This Court has been presented with two competing interpretations – one that defines "offense" in

reference to conduct or the commission of an act (Petitioner's interpretation), and one that defines "offense" as synonymous with "conviction" (the City's interpretation). While the City claims that one place where "offense" is equated with "conduct" comes from a dissenting opinion (which is an irrelevant argument because definitions are typically *dicta* in any event), what the City cannot refute is the adoption of Petitioner's interpretation in *Hayes*, nor did the City address the voluminous case law that would directly contradict its position.

Hayes remains good law, and the concise language from *Hayes* is dispositive: "a person 'commits' an 'offense.'" For additional clarification, the Court immediately follows this with a quotation from the controlling Ninth Circuit case *United States v. Belless*, reaffirming that one "commits" an offense, but one does not "commit" a conviction. "The purpose of the statute is to keep firearms out of the hands of people whose past violence in domestic relationships makes them untrustworthy custodians of deadly force. That purpose does not support a limitation of the reach of the firearm statute to past misdemeanors where domestic violence is an element of the crime charged as opposed to a proved aspect of the defendant's *conduct* in *committing* the predicate offense." *United States v. Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003) (emphasis added).

The City's interpretation of federal law that would synonymize "offense" with "conviction" simply does not hold up. Controlling federal law defines "offense" in relation to the "commission" of an act, or "proved aspect of the defendant's conduct." One "commits an offense," but one does not "commit a conviction." Offense and conviction are neither synonymous nor interchangeable, and the use of two different terms in the federal statute establishes they have different meanings. Thus, while the City may take issue with the fact

that one source out of roughly four that would define "offense" as relative to conduct comes from a dissenting opinion, the City's interpretation that would treat "offense" as synonymous with "conviction" has no support whatsoever and is simply incorrect as a matter of law.

In order to reach the City's desired conclusion, the City is asking this Court to insert pivotal language into federal law where it does not exist. The following brief excerpt from the City's Opposition is illustrative: "More simply, the conviction for the offense must be one in which the convicting statute is (i) under the correct source of law (Federal, State or Tribal) and (ii) contains the requisite "force" element(s), and that offense must have been committed by the defendant who had the requisite relationship with the victim" (City's Opposition, 23). The applicable federal law states:

> Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that—
> (i) is a misdemeanor under Federal, State, or Tribal law; and…

The City's argument makes it clear that the only way to reach its conclusion is to insert the following bracketed language:

> Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means a [conviction for an] offense that—
> (i) is a misdemeanor under Federal, State, or Tribal law; and…

The City's interpretation is contrary to the substance of existing federal law, contrary to the interpretations of existing federal law, and would require the rogue judicial insertion of language that does not appear in the existing federal law. While the City claims that canons of statutory interpretation would favor its position (a claim which Petitioner disputes), the plain language only supports Petitioner's interpretation. An offense is not a conviction, is not

synonymous with a conviction, and different terms were used in different locations within the same federal statute, thus making clear the difference is intentional and designed to convey two separate meanings. Under the City's interpretation, a "conviction" and an "offense" are identical and interchangeable, but this is simply belied by the plain language of the statute itself.

It is not the predicate *conviction* that must be a misdemeanor under federal, state or tribal law, it is the predicate *commission* of an offense. As applied to subsection (i), the federal definition requires that the "offense," or the underlying commission of an act, is a misdemeanor under Federal, State or Tribal law. Since the Code and the NRS punish the same conduct, the commission of an act or "offense" that violates the Code is also an "offense" or act committed that violates State law. As such, it fits within the federal definition as set forth in 18 U.S.C. § 921(a)(33)(A), and a jury trial is required.

Lastly, Petitioner avers that the City's position is directly contrary to the strong policy interests clearly delineated by the Ninth Circuit, which supports Petitioner's interpretation and the plain language of the federal law. Specifically, the City is trying to use *Hayes* and existing law to *limit* firearm restrictions on convicted domestic abusers: if a domestic abuser is charged and convicted under County law, he or she cannot own a firearm; if a domestic abuser is charged and convicted under Municipal law, under the City's position, he or she can still own a firearm. This does not comport with the City's purported interest in protecting its citizens. More importantly, this does not comport with the public policy identified in *Hayes*, a significant factor given the Ninth Circuit's general tendency not to rely on public policy arguments:

> Congress' less-than-meticulous drafting, however, hardly shows that the legislators meant to exclude from § 922(g)(9)'s firearm possession prohibition domestic abusers convicted under generic assault or battery provisions… By extending the federal firearm prohibition to persons convicted of "misdemeanor crime[s] of domestic violence," proponents of § 922(g)(9) sought to "close this dangerous loophole." *United States v. Hayes*, 555 U.S. 415, 421, 129 S. Ct. 1079, 1084 (2009) (internal citations omitted).

The issue in *Hayes* was whether a simple battery conviction against a qualifying domestic relation could escape the firearm provision by being prosecuted under a simple battery law rather than a *domestic* battery law. The Ninth Circuit held that by focusing on the facts which underlie the commission of the offense, not the name or title of the conviction, the purpose of the federal law was to "close this dangerous loophole" – the same loophole the City asks this Court to apply, simply by calling the charging source a "code" rather than "statute" even though they are substantively identical and both criminalize the same underlying acts of domestic violence.

The City complicates and conflates the analysis in an attempt to muddle the most simple interpretation of the plain language of the statute – an offense is an offense, and a conviction is a conviction; an "offense" relates to the act/commission of conduct, and a "conviction" relates to the proof that such an act/commission occurred beyond a reasonable doubt. The plain reading of the statute requires a conviction in any court (which the parties agree includes Municipal Courts) that arises from an act/commission of conduct which would be a violation of State, Federal or Tribal law. This is the cleanest, most literal reading of the federal statute that requires no complex interpretation beyond the plain language

itself; it is the interpretation adopted in *Hayes* by the United States Supreme Court and reaffirmed in *Belless* by the Ninth Circuit. To briefly reiterate:

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

The Henderson Municipal Code is a misdemeanor offense. It has, as an element, the use of force. It requires the use of force be committed by a person who has a specified domestic relationship with the victim. Therefore, the Henderson Municipal Code is an offense that qualifies under 18 U.S.C. § 921(a)(33)(A). Despite the City's attempt to muddle this extraordinarily simple application of law by drawing on cases which address different issues and arguments,[1] the language in *Hayes*, combined with the plain language of the federal statute, is very simple to apply and equally conclusive.[2]

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[1] The City repeatedly relies on the same three non-controlling cases to claim that "Petitioner's interpretation of the federal definition has been rejected by federal courts" (Opposition, 28: 20). Petitioner responds, as he did pre-emptively in the Opening Brief, that *all three* of these cases are inapplicable because they analyzed a separate and unrelated argument that the word "State" should be interpreted to include "Municipal." "Wagner argues that the plain meaning of 'State law' found at section 921(a)(33)(A)(i) means state law while the government argues that the term includes local laws." *United States v. Wagner*, 2017 U.S. Dist. LEXIS 165876 (D. Nev. Oct. 5, 2017) (citing *United States v. Enick*, 2017 U.S. Dist. LEXIS 89140 (D. Idaho June 9, 2017); *United States v. Pauler*, 857 F.3d 1073, 1078 (10th Cir. 2017) (rejecting the government's argument that "State" should be read to mean "state and local")).

[2] Although the City claims that Petitioner's use of *United States v. Perkins* was "improper" and "misleading," Petitioner will not address these arguments because Petitioner provided the entirety of the *Perkins* case as an appendix exhibit, thereby allowing this Court to make its own reasoned determination of *Perkins*' applicability based on the parties' respective interpretations.

D. Unrestricted Prosecutorial Discretion Does Not Allow the Government to Determine When a Defendant Can Exercise a Fundamental Constitutional Right

The City acknowledges that the only distinction between charging an individual under the Nevada Revised Statute, as opposed to the Henderson Municipal Code, is that the former warrants a jury trial whereas the latter (under the City's interpretation) does not. The Prosecution has completely unfettered discretion to determine which authority will be the basis of the charge when more than one authority has concurrent jurisdiction; by correlation, the Prosecution has unfettered discretion to determine whether the accused can exercise his right to a jury trial. Petitioner maintains that such complete discretion, without any guiding principles or uniform rules of application, constitutes an equal protection violation because the Government can choose, at its whim, whether to grant or deny a vested fundamental right to the accused.

The City first takes issue with Petitioner's use of the word "vested." However, the City's analysis on the "vested rights doctrine" is misplaced and irrelevant to the case at hand. Petitioner maintains that the right to a jury trial became vested as soon as *Andersen* was issued; this is clearly not an implication of the "vested rights doctrine" as it relates to water rights or pension law, but rather merely using the term "vested" in its colloquial dictionary definition "secured in the possession of or assigned to a person" or "protected or established by law or contract."[3] Ironically, the City's attempt to conflate the simple term "vested" into a confusing and inapplicable interpretation of the "vested rights doctrine" is a perfect example

[3] Lexico Oxford Dictionary Online, available at https://www.lexico.com/en/definition/vested.

of the same efforts by the City to conflate the federal term "offense" into a confusing and inapplicable interpretation of federal statute under 18 U.S.C. § 921(a)(33)(A).

When Petitioner stated that the right to a jury trial had vested, this is a wholly accurate statement; the right to a jury trial was "secured" to defendants upon the passing on *Andersen*, and "protected or established by law" in this same regard. Thus, when Petitioner argued that unfettered prosecutorial discretion cannot be the basis to infringe upon a vested right, the City's analysis of the "vested rights doctrine" under water rights law is irrelevant and does not refute the argument.

Rather, the City maintains that such unfettered and unrestricted discretion is acceptable and "must be respected" (City's Opposition, 44: 27). Petitioner would respectfully disagree; while the Prosecution maintains discretion over *some* charging decisions, this does not translate to complete discretion in every aspect of the charging process. Notably, the cases cited by the City provide for discretion over decisions such as whether to prosecute and what charges to bring. These decisions undoubtedly must carry a degree of discretion because the prosecution must determine what charges, if any, are supported by probable cause.

However, the City could not provide one case that would allow this same level of discretion over the availability of a Defendant's constitutional rights, and Petitioner submits there is none. The very purpose of enacting the Constitution of the United States was to protect the citizens from government overreach by enshrining fundamental rights and liberties, such as a trial by jury, to those accused of a crime; it would do little to further that

purpose if the government had complete discretion to determine when the accuse can exercise these rights under the guise of "prosecutorial discretion."

Although the City argued to the lower court that a trial by jury under the Sixth Amendment was not a fundamental right, the City seems to have largely abandoned that argument (as it is contrary to centuries of established case law). However, the City continues to assert that "Equal [P]rotection is also not impacted because no actual classification is created, and no fundamental right is impacted" (City's Opposition, 48: 21). The City's own position, however, is that charging under State/County authority would permit a jury trial as a fundamental right under *Andersen*, but charging under Municipal authority does not. Thus, it is nonsensical for the City to contradict its own position by claiming that no fundamental right is impacted depending on the jurisdiction in which a person is charged. If a jury trial is a fundamental right, and the availability of a jury trial is dependent on the charging authority, then "prosecutorial discretion" to determine the charging authority impacts a fundamental right.

Nonetheless, the City argues in the alternative that even if strict scrutiny is triggered, "the code section is a narrowly-tailored law created and used for the compelling state interests of public safety, reduction of domestic violence, and victim protection" (City's Opposition, 48: 23). Petitioner would also point out a particularly interesting paragraph from the City's Opposition:

> In short, domestic violence victims, who are attacked by their abusers in Henderson *are* the City of Henderson's victims, not Clark County's. No such guarantee of continued victim safety could be made if these cases were sent to the Clark County District Attorney's Office – an extraordinary, yet horribly overburdened agency. (City's Opposition, 48: 9) (emphasis in original).

It is statements such as these that should make the Court wonder, is the City's desire to prosecute simply a territorial battle to keep cases? The City of Henderson affirms the purpose of the Code is to protect its citizens, but the only difference between the jurisdictions is that prosecuting in Municipal Court would allow domestic abusers to *keep* firearms. How is denying a jury trial and permitting convicted abusers to keep guns "narrowly tailored" to public safety and victim protection?

The City then tries to analogize the distinction between county and municipal prosecution to state and federal prosecution. Specifically, the City argues that it is entirely permissible to charge a defendant by "different prosecutorial decisions by different prosecutorial agencies" because federal authorities can charge for the same conduct as state authorities without violating Equal Protection. However, case law has established that state and federal authorities have individual sovereign jurisdiction, and therefore it does not violate double jeopardy or equal protection principles to be prosecuted in both jurisdictions for the same offense. There has long been a "general principle that a federal prosecution is not barred by a prior state prosecution of the same person for the same acts." *Abbate v. United States*, 359 U.S. 187, 194, 79 S. Ct. 666, 670 (1959)

That is entirely different from concurrent jurisdiction, such as between county and municipal authority, where prosecuting in both jurisdictions for the same offense *would*

violate double jeopardy and equal protection principles. "Because the justice court and municipal courts derive their authority from the State of Nevada, they are not separate sovereigns for double jeopardy purposes and may not both punish Seay for the same offense." *Seay v. Eighth Judicial Dist. Court of State*, 2013 Nev. Unpub. LEXIS 1765 (2013). Under *Seay*, the City's analogy of the instant case to a state/federal jurisdictional distinction is unavailing.

The City then relies on a very limited and "cherry-picked" excerpt from *Hudson v. City of Las Vegas,* 81 Nev. 677, 409 P.2d 245 (1965). However, the two sentences selected by the City are grossly misleading, as *Hudson's* ultimate ruling utilizes reasoning which, applied post-*Andersen,* would actually reach the opposite conclusion. *Hudson* argued that it was unlawful to charge him under the Municipal Code, where he would not be entitled to a jury trial, whereas if he were charged under the State Statute, he would be entitled to a jury trial. This is a near identical situation to the instant case.

However, the *Hudson* Court held there was no violation specifically because he was not entitled to a jury trial under *either* Municipal Code or State Statute. The Court conducted an extensive analysis of why "petty offenses" are not entitled to a jury trial, regardless of whether the offense is charged under Municipal or State authority. However, this reasoning was overturned in *Andersen*, which held that defendants *are* entitled to a jury trial for domestic battery under State authority. If *Hudson*'s ruling was premised on there being no difference in the right to a jury trial regardless of the charging authority, the Supreme Court's decision in *Andersen* directly impacts that ruling because now there is a difference in the

right to a jury trial depending on the charging authority. Therefore, what the City terms the "straightforward ruling" in *Hudson* is no longer good law.

Lastly, the City claims that no classification is created between the different charging authorities. Petitioner had argued, both to this Court and to the lower court, that prosecutorial discretion determines whether offenses that occur in concurrent county/municipal jurisdiction are charged under State Statute or Municipal Code. The City takes issue with the "incorrect assumption that misdemeanor arrests for domestic battery charges in Henderson are distributed by an act of prosecutor discretion between the Henderson Justice Court and the Henderson Municipal Court" (City's Opposition, 52: 18) (emphasis in original). However, while the City has noted on more than one occasion that this assumption is "incorrect," the City has failed to provide the "correct" answer, despite multiple opportunities to do so. If it is not prosecutorial discretion, then what is it? If the City is going to claim (repeatedly) that this assumption is "incorrect," Petitioner would appreciate the City supplying the "correct" answer.

Instead, the City only argues that "virtually" all and "most" domestic violence cases are prosecuted in Henderson Municipal Court, rather than Henderson Justice Court. Nonetheless, there *are* cases prosecuted under both authorities. Whether it's one case or a thousand, the fact that "most" go to one place does not alleviate the premise that prosecutorial discretion governs this decision, particularly when no uniform or guiding standards exist to mandate any consistent course of conduct.

As applied to this case, there is no standard at all to determine whether a person who commits the same conduct is charged under Nevada Revised Statutes – and thus is entitled

to a trial by jury as a fundamental right under the Sixth Amendment – or whether that same person is charged under the Henderson Municipal Code, which the City asserts precludes the jury trial right. The United States Supreme Court selected a definition of "arbitrary" in *United States v. Carmack*, 329 U.S. 230, 243 n.14, 67 S. Ct. 252, 258 (1946): "Arbitrary" is defined by Funk & Wagnalls New Standard Dictionary of the English Language (1944), as "1. . . .; without adequate determining principle; . . ." and by Webster's New International Dictionary, 2d Ed. (1945), as "2. Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned; . . . ." *Id.* (ellipses in original).

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

E. The Municipal Court Must Divest Itself of Jurisdiction Because it Cannot Lawfully Accommodate a Defendant's Constitutional Right to Trial by Jury

Although the City takes issue with Petitioner's use of the term "divest" instead of "transfer," Petitioner maintains that the proper terminology when "transferring" jurisdiction

of a case is "divesting" one authority of jurisdiction and "vesting" jurisdiction in another. The same terminology is used in appellate and post-conviction practice. When a notice of appeal is filed in District Court, jurisdiction is "transferred" from the District Court to the Supreme Court. However, again, the proper terminology is to say the District Court has been "divested" of jurisdiction over the case, and jurisdiction has "vested" with the Supreme Court. *See, e.g.*, *Mack-Manley v. Manley*, 122 Nev. 849, 852, 138 P.3d 525, 528 (2006) ("As a properly filed notice of appeal vests jurisdiction in this court, the district court is divested of jurisdiction to consider any issues that are pending before this court on appeal"). Nonetheless, while an interesting academic exercise, the difference in terminology is purely semantic, and plays no substantive role in the analysis.

The City concludes that NRS 5.0503 cannot apply because the "statutory prerequisites" are not met. Specifically, the City writes that a case cannot be transferred because a plea agreement has not been reached, nor a final disposition of the case determined, as required by Section 2. This is incorrect. The City failed to address or respond to Petitioner's argument – a finding that jury trials are required would constitute a "final disposition" of the case. Specifically, a "final disposition," also referred to as a "final order" or "final judgment," is defined as "one that disposes of all issues and leaves nothing for future consideration." *Sandstrom v. Second Judicial Dist. Court*, 121 Nev. 657, 659, 119 P.3d 1250, 1252 (2005); *Elsman v. Elsman*, 54 Nev. 28, 30, 3 P.2d 1071, 1072 (1931) (stating that a final judgment disposes of all issues and leaves nothing for future consideration). "A judgment or decree is final that disposes of the issues presented in the case, determines the costs, and leaves nothing for the future consideration of the court. When no further action of the court

is required in order to determine the rights of the parties in the action, it is final." *Perkins v. Sierra Nev. Silver Mining Co*., 10 Nev. 405, 411 (1876). Therefore, a finding that a jury trial is required may constitute a "final disposition" when combined with the corresponding ruling that the Henderson Municipal Court is precluded from conducting jury trials.

While Petitioner personally has no preference as to whether jury trials are held in the Justice or Municipal Court and will happily do so in either jurisdiction, Petitioner does believe the law does not jurisdictionally permit the Municipal Court to conduct jury trials. The City relies, as it did in the lower court, on *Donahue* to conclude that because the City of Henderson is incorporated under a special charter, the statutory prohibition on jury trials in NRS 266.550 does not apply.

The jury trial prohibition in NRS 266 also contains a caveat that it will apply to cities incorporated under a special charter if the special charter explicitly recognizes the applicability of the NRS. See, NRS 266.005 ("*Except as otherwise provided in a city's charter*, the provisions of this chapter shall not be applicable to incorporated cities in the State of Nevada organized and existing under the provisions of any special legislative act or special charter…") (emphasis added). In this case, the Henderson Municipal Court expressly concluded that the Henderson City Charter *does* incorporate NRS 266, and therefore incorporated the jury trial prohibition in NRS 266.550. This is a factual finding of the lower court, based on the plain language of the Henderson City Charter, and should not be disturbed absent a clear error.

The City acknowledges that its Charter "permits governance of NRS Chapters 5 and 266," but argues that 266.550 is specifically excluded from incorporation because it is

"inconsistent" with the Charter; the City argues that incorporating the jury trial prohibition in NRS 266.550 is "clearly inconsistent with the Charter's purpose, which is to provide for the public health, safety and general welfare of its citizens" (City's Opposition, 61: 27). The City's position fails for a number of reasons. First, the City does not argue that the jury trial prohibition is "inconsistent with this Charter," but rather that it is "inconsistent with the Charter's *purpose*," a very important distinction. Nothing in the Henderson City Charter expressly permits trial by jury, and thus the prohibition of such is not inconsistent with the Charter. That should end the inquiry.

Nonetheless, Petitioner still disagrees that the jury trial prohibition is inconsistent even with the Charter's purpose. As stated previously, there is no legitimate connection between "public health, safety and general welfare" and permitting domestic abusers to keep guns. If the City's position were correct, then municipalities should be able to prosecute felonies as well; prohibiting felony prosecution is also "inconsistent with the Charter's purpose," but the City cannot reasonably argue that felony prosecutions in municipal courts are lawful. In the same regard, precluding one specific type of misdemeanor offense because the constitution demands a right the City cannot legally provide is not "inconsistent" with the Charter in any meaningful respect.

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CONCLUSION

For these reasons, Petitioner respectfully requests this Court issue a writ of Certiorari finding that the Henderson Municipal Court lacks jurisdiction to charge or adjudicate charges of misdemeanor battery domestic violence under either the NRS or Henderson Municipal Code; in the alternative, Petitioner requests this Court issue a writ of Mandamus requiring the Henderson Municipal Court to "transfer" battery domestic violence cases to the Justice Court pursuant to the process set forth in 5.0503(1)(b) so that Petitioner may invoke his fundamental right to a trial by jury.

Dated this 13 day of May, 2020.

NEVADA DEFENSE GROUP
Respectfully Submitted By:

/s/ Damian Sheets
DAMIAN SHEETS, ESQ.
Attorney for Petitioner

VERIFICATION OF DAMIAN SHEETS, ESQ.

1. I am an attorney at law, admitted to practice in the State of Nevada.
2. I am the attorney handling this matter on behalf of Petitioner.
3. The factual contentions contained within this Reply Brief are true and correct to the best of my knowledge.

Dated this 13 day of May, 2020.

NEVADA DEFENSE GROUP
Respectfully Submitted By:

/s/ Damian Sheets
DAMIAN SHEETS, ESQ.
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 with 12 point, double spaced Cambria font.

2. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(c), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matte relied on is to be found.

I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13 day of May, 2020

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Respectfully Submitted By:

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 13 day of May, 2020, I served a true and correct copy of the Petition for Writ of Mandamus or, In the Alternative, Petition for Writ of Certiorari to the last known address set forth below:

The Honorable Judge Mark Stevens
Henderson Municipal Court
Department 1
243 S. Water Street
Henderson, Nevada 89015

Henderson City Attorney's Office
243 S. Water Street
Henderson, Nevada 89015

/s/ Kelsey Bernstein
Employee of Nevada Defense Group

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Steven D. Grierson
CLERK OF THE COURT

TRAN

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

NATHAN OHM, Plaintiff, vs. HENDERSON MUNICIPAL COURT, ET AL, Defendants.	)	Case No. A-20-810452-C Dept. No. 25

WRIT OF MANDAMUS

Before the Honorable Kathleen Delaney

Tuesday, May 19, 2020, 9:00 a.m.

Reporter's Transcript of Proceedings

REPORTED BY:

BILL NELSON, RMR, CCR #191
CERTIFIED COURT REPORTER

APPEARANCES:

For the Plaintiff: Kelsey Bernstein, Esq.

For the Defendants: Marc Schifalacqua, Esq.

Las Vegas, Nevada, Tuesday, May 19, 2020

* * * * *

THE COURT: Nathan Ohm versus Henderson Municipal Court.

One housekeeping matter.

Of course if you were here in court, you would see that my full staff is here, my Court Reporter is here, and if either of you would like to have the transcript of this proceeding, then you would need to request it in advance.

If you were in the courtroom, you would see the signage.

I know Miss Bernstein's been here quite a bit.

I don't know if we have had you up here, Mr. Schifalacqua, but we now require requests in advance for the matter to be reported if anybody wants it.

There's no opportunity to create the transcript subsequent and have any kind of an official record, that way there would be the minutes, but that's all you would have.

Would either party would like to have this matter reported this morning?

MS. BERNSTEIN: The Petitioner would, Your Honor.

THE COURT: We'll go ahead and give you the

information now.

I appreciate that.

I have two Court Reporters that cover the docket, and the Reporter I have present today is Bill Nelson.

Mr. Nelson's number if you need to reach him is 702-360-4677.

He will of course reach out as well, but he will write the matter.

I will then ask, so far so good, that you both speak slowly and enunciate with your arguments, so we be sure we don't miss anything.

The prior matters we had on the calendar were a little lengthier than we anticipated. We thank you for your patience this morning.

We also had some difficulties, one because or more of the counsel were very muffled or however they were speaking into whatever phones, it wasn't quite as easy to follow.

Both of you, I could hear you very well when you responded to the call, so I think we're in good shape.

We'll just jump right in.

I have obviously on the calendar today something that is a first impression for this Court.

I appreciate there may have been other matters like this that likely are pending in other departments,

but my first impression for this matter here, and it is styled as a Petition For Writ of Mandamus, or in the alternative a Writ for Certiorari.

Where the argument seems to go would led itself for a Certiorari, not a Mandamus, but it is a Writ of Mandamus, and in it it asks -- I don't want to dispense of too much of that argument, I think there's so much more meaty stuff to get to, but I do perceive here that Mandamus is something that is being argued and can be considered just from the aspect of there was a lower Court determination, there was the full hearing as discussed, evidence was taken, and there was a determination made.

And I think iit is being brought to the Court's attention that there was either an abuse of discretion there, or it is an extraordinary remedy, we understand that, but if there was an abuse of discretion acting in an arbitrary or capricious manner, we could review it from that circumstance.

But I do think Mandamus is available.

I think Certiorari would beg us to proceed differently and perhaps require more of the record than is available to us now.

But I don't perceive an impediment to considering the relief. Whether or not the relief will be granted

is another issue entirely.

And that's where I really wanted to focus the argument.

Does either of you want to speak this morning just to whether or not both forms of relief can be argued for today?

Miss Bernstein.

MS. BERNSTEIN: No, Your Honor.

I think if you are willing to consider sort of the underlying information, I think under the Mandamus umbrella that is fine, as long as it gets considered one way or the other.

THE COURT: Mr. Schifalacqua, I do want to give you the opportunity to make some record if you think the Court's in error in saying if you consider Mandamus in these circumstances -- I know that was a portion of your argument, I don't want to short-cut that.

Anything you want to highlight there?

MS. BERNSTEIN: Not much, Your Honor.

I think you said, if you're considering Mandamus, what the standard would be, the abuse of discretion is arbitrary, capricious, if that's where we are proceeding, we'll simply argue it on the merits at that point.

THE COURT: I think that is really where this

case goes is, let's really talk about what occurred in these underlying circumstances, and there's a lot of for lack of a better way to say it sort of finger pointing at what lead us to the point that this Defendant, now petitioner, Mr. Ohm was being prosecuted under the Henderson code, and whether or not that is the focus that is appropriate here or not, is to some degree a first-blush issue for the Court because what has been argued is, look, this happened, he got prosecuted under the code, subsequent to passage and for whatever circumstances were at play, but he did get prosecuted.

The Court has proceeded, the Court did vet the issue of whether or not there was -- the lower Court did vet the issue whether or not there was any ex post facto issue, any other issue would preclude the Court from going forward, and ultimately whether or not there was a trial entitlement under the code prosecution, and really to me it's sort of that decision the Court has to look at and say, is it appropriate timewise, is it appropriate substance wise for this Court to take that on.

One of the things that is raised by Mr. Schifalacqua is, this is an issue already pending before our ultimate Appellate Court.

I don't know if we have any insight as to when

that might be either argued if required or decided, but there is that issue already pending.

Then ultimately isn't there really just a plain remedy to the Writ regardless of how we can consider the record, isn't there already a remedy to go forward with the bench trial, go forward with the outcome, and then ultimately determine from there what you want to appeal and what you want to focus on?

I know I've sort of summarized more than asked a question, and I appreciate I'm not trying to be confusing there, I always think it's important for counsel to know sort of how I reviewed the documentation and sort of where my thought process is.

If I had not asked it, really it would be why is there not a plain speedy remedy of going forward with the trial, even if you feel strongly it should be a jury and not a bench, and then ultimately following the outcome, then going up on appeal as needed to challenge that.

Why is that not the appropriate mechanism here, Miss Bernstein?

MS. BERNSTEIN: Thank you, Your Honor.

So I guess that sort of does tie in for Writ of Certiorari. The reason we plead that in the alternative is, both require an out-of-Court remedy at law.

The Petition is -- The lower Court exceeded its jurisdiction, that is one of the main issues we have here.

You can kind of break down the Petition for the main -- the definition of a misdemeanor crime of domestic violence equal protection jurisdictional argument.

THE COURT: Miss Bernstein, I'm going to ask one favor.

If you could, slow down a touch, and then you did cut out a little bit there right as you sort of lead into there are four things, and then it sort of cut out, and then I think we missed the first of the four.

So if you could, repeat that, please.

MS. BERNSTEIN: Sure.

The four kind of subject patterns, main categories of the Writ, one of them is the ex post facto --

THE COURT: It just cuts out, and when it does, my Reporter can't write it, and we're going to have to stop you and ask you to repeat.

So if there is anything you can do to speak more slowly, and enunciate, and try to not lose words, because there's enough gap for these gaps to not lose your words, it would be helpful.

MS. BERNSTEIN: Understood, Your Honor.

I apologize.

THE COURT: So ex post facto is the first.

Go on.

MS. BERNSTEIN: Whether or not it fits into the federal definition of the misdemeanor crime of domestic violence.

The third is the equal protection argument and strict scrutiny arguments.

The last is the jurisdictional issue.

So part of the reason we plead it in the way that we did is because the Petitioner's view of the necessity of a jury trial would preclude the Municipal Court from having jurisdiction, and so when the Municipal Court made a ruling on this issue, it ultimately determined that it had jurisdiction, whereas Petitioner's position is that it did not.

So -- and part of the reason that it is permitted as an interlocutor Writ, we now have to wait for if there's a conviction because a jurisdictional challenge can be raised at any time under the lower Court by proceeding to trial or sentencing, all of that would be in excess of the Court's jurisdiction.

So judicial economy would actually be recognized and prefer the Petition be brought in an interlocutory

manner, rather than go through that entire proceedings, which may be null from the beginning, only to have it reversed and sent back.

And that's similar reasoning with the Mandamus argument is, there's no claimed speedy adequate remedy at law because there's no statutory or legal authority for an interlocutory direct appeal, it would have to be by way of an extraordinary Writ Petition, and it's not uncommon to raise interlocutory issues, whether it's from the Municipal Court to the District Court. Or the District Court to the Supreme Court by way of an extraordinary Writ. Specifically a Mandamus.

You see it frequently with a denial of a pre-trial Habeas Petition if you have a motion to dismiss an Indictment, and that is denied, something would essentially impact the entire proceedings, the Court's have recognized a specific policy would be in favor of considering those claims on the merits now, rather than going through the whole spiel so to speak, only to come back and say, no, it should have been done this way from the beginning.

So the Petitioner in this case does not have a remedy because any further exercise of the lower Court function could be either in violation of the law, or in excess of its jurisdiction.

Additionally, the obvious statewide ramifications of this ruling will favor a determination now, rather than as I indicated before going through the entire process only to have it come back.

THE COURT: Can I ask you -- Go ahead.

Sorry.

I thought you paused.

MS. BERNSTEIN: I was for a second.

Go ahead.

THE COURT: Can I ask you -- I don't mean to ask what possibly could seem like an ill-informed or dumb question, but I think we need to sort of flush this out since it's at the heart of your argument.

Why would the necessity of a jury trial preclude Muni Court jurisdiction?

MS. BERNSTEIN: Sure.

So that just kind of bounces into the very last prop of it, which is the challenge to the ultimate Court -- or Municipal Court's ultimate jurisdiction to hear jury trials, and that is based on the Proposition NRS 2666 that specifically precludes Municipal Courts from holding a jury trial.

THE COURT: But doesn't the Anderson decision from the Supreme Court to some degree effectively override that?

MS. BERNSTEIN: It would only override if there was a conflict, but if there's no conflict, then the two statutes in harmony is in effect, and that's what is going on here, it's not actually a conflict to have a constitutional mandate to hold a jury trial and then make a specific sub-set of cases say the Municipal Court can't conduct jury trials, we're not in -- saying the Municipal Court should cease from functioning, were not saying that every case must be transferred elsewhere, but there is several ways for the city to seek to exist as an entity.

THE COURT: Miss Bernstein, you have gotten a little fuzzy again.

You have indicated you're not asking the Court to find the Muni Court doesn't exist, and you indicated that obviously in the Muni Court would have to determine how to proceed, but that that really there's no conflict with this statute that -- or with the lack of jurisdiction Muni Court would have as understood to have trials.

I want to make sure you get a chance to finish that out.

I do have a question, but maybe just repeat that last part to make sure we didn't miss it.

MS. BERNSTEIN: Sure.

To summarize the argument, there isn't a conflict that would cause that Supreme Court's ruling to override the NRS, that they can exist independently, and the Municipal Court can still achieve all of its goals, all of its policies by simply transferring battery/domestic violence cases for prosecution to the Justice Court.

So that way the constitutional mandate can still be satisfied and the Nevada statute that prohibits jury trials can still be satisfied in a way that the Municipal Court can continue to regularly function.

THE COURT: Okay.

So this baits my follow-up question.

I didn't mean to interrupt you, but I don't want to lose my thought.

Isn't all of this though ultimately an academic discussion?

Because rather than the Henderson Municipal Court or Henderson itself going that route to address the Henderson decision, it went the other route, it went a route to pursue the prosecution under a code, which then in turn would not require a trial, so doesn't this entire argument really just boil down to, is the code ex post facto?

MS. BERNSTEIN: I would not say so, Your Honor, because the primary difference under transferring the

cases to Justice Court versus prosecuting under the code is that Defendants are still granted their constitutional rights to a jury trial, so the constitutional mandate is satisfied when they transfer the cases to the Justice Court by prosecuting under the Municipal code, and the City's position is they are not entitled to a jury trial, that actually would create the conflict because it's denying the constitutional mandate to be abused on the basis of the code versus the NRS which kind of gets back into the heart of the remainder of the Writ.

So my position would be that transferring the cases to Justice Court accomplishes every goal, while recognizing how each authority can operate independently to achieve the same purpose.

THE COURT: Okay.

Anything else before I go over to Mr. Schifalacqua?

Of course I'll give you a chance for rebuttal as well, but anything else?

MS. BERNSTEIN: I'm assuming just on the issues we're talking about, not on everything, right?

THE COURT: Well, the issues we're talking about, but I'm focusing on these issues because these are the ones I think may ultimately be determinative, so if you

want to cover more, again I read the briefings, but if you want to cover more, do that now, so I can then give Mr. Schifalacqua the opportunity to make a full response as well.

MS. BERNSTEIN: Sure.

So the only other thing I would bring up that I raised it briefly in my reply, but I would like to kind of bring the Court's attention to it is the City's argument they made for the first time that prosecuting under county authority is somehow less worthy of prosecution under Municipal authority.

The city specifically said in their answer to the Petition that there is not the same guarantee of victim safety as if they were prosecuted under the Justice Court umbrella instead of Municipal.

I do take serious issue with that. I do not believe that is a legitimate line of reasoning.

I think that prosecutions, regardless of the jurisdiction, should be given equal weight.

So I was somewhat surprised to see the City come out and say the Henderson prosecution should be granted more weight than county prosecutions.

I also would like him to address that a little bit as well.

THE COURT: Thank you.

Mr. Schifalacqua.

MR. SCHIFALACQUA: Thank you so much, Your Honor. And thank you, Miss Bernstein.

I really when looking at this I think the Court hit the nail on the head, we can really boil this down to really one question is:

What is the petitioner really asking Your Honor to do, and why?

When we get to that answer, it's actually absolutely they are asking this Court to dictate really where the executive branch in Henderson files misdemeanor domestic battery cases, and to get into which agency and which Court and which charge will be filed where.

That is simply never something that has really ever happened in Henderson, Las Vegas, Nevada, and Miss Bernstein's a very good writer, wrote well over a hundred pages in both the Petition as well as the reply, and they did not give you one case, Judge, something like this ever happened where a Court has reviewed something and unilaterally ordered the transfer of a particular brand of case from one jurisdiction over to another when clearly the one jurisdiction can handle that level of crime. It's not as though we're filing gross misdemeanors or something like that.

And there's a reason why it never happened, Judge, anywhere, and it's because our Supreme Court's always been very clear about this, if there's a law that is enacted, and councils and legislatures have that right under their police powers, and the prosecutor decides to charge one charge over the other if there's probable cause and no act of discrimination of any type, and none of those are being alleged here.

Court's aren't getting into the middle of that, not getting into the middle of that discretion.

So this is really not, Your Honor, about them getting a jury trial. They don't really want a jury trial in my estimation.

The reason I say that is, first of all, they are saying, not only find the code illegal or invalid, but saying we can't make laws about this, but also rules, the Municipal Court can't hear, so they couldn't file any type of domestic battery charge there.

So they want it both ways, just really don't want the case heard, and that's why it's not about the rights.

What city council's meeting on this in Henderson, if I can briefly say why they did what they did, they always held the victim in public safety in their goals, non-stop put their money behind it, and in my years as

City Attorney it's part of that, and certainly on domestic battery cases we take a hard line out here.

They knew in the Blanson (Phonetic) decision from 1987 Chief Justice Gunderson summed it up well, and he said, a decision of this Court that would require jury trials in the prosecution of DUIs in that case would require tremendou expense to the municipality of the State, and further went on to say, procedures and summons for the selection of jurors in Municipal Court do not exist. A decision requiring jury trials in the Municipal Court could not be implemented until such procedures were developed.

This Court is not in a position to legislate the procedures to be followed in such cases, and the legislature of this State is not principally there to fill this void.

Those things ring now more true now than ever.

There hasn't been a history of doing jury trials in municipalities. I'm all for it, but it can't happen at the drop of a hat, and can't happen without some guidance either from the Supreme Court or legislature.

The reason I say that, Judge, is that you do jury trials all the time, you know how expensive and how complicated they become, there's rules, and NRS 175 is the directing guide, Your Honor, about how to do these

trials with challenges and procedures and peremptories, and how do you summons the jury, and what does the pool need to look like, they don't have that for municipalities.

We can guess, but that is not good, and that is why they can make an order, whatever you want you can't implement it until there's some practical things that take place, and so they were caught with what to do.

Just charge everything as simple battery.

That is not an option here, or is it, counsel, that is not right, domestic violence is a serious issue.

As Miss Bernstein would want to transfer all cases, if that is even such a thing, but the District Attorneys office, there's no agreement to take cases, nor could they. It would really be kind of academic in a way. I don't know how that would even happen, taking hundreds, if not thousands, of cases and dropping them from the City on the County's doorstep and without anymore resources somehow think that victims are going to get some form of justice, some of which would obviously be passed the statute of limitations, wouldn't be able to be refiled.

So domestic violence doesn't stop though for the legislature to convene, or for our Supreme Court to give some further guidance.

Victims have rights under Marcy's law to get speedy justice just as much as Defendants do.

And the City counsel knew that, and while they would have liked to provide jury trials, we still need guidance about how to do them, and clear authority to do them.

We clearly I believe do have the authority.

Anderson was the Supreme Court case from the Municipal Court in Las Vegas, and it was remanded to do the trial, that is about as clear as it gets, we can do them, but as you can see, Your Honor, not everyone agrees with that.

So it's very difficult for a city council to allocate hundreds of thousands of dollars when there's challenges of the authority, and that's where they were, there needed to be legislation, needed to be more guidance, but in the meantime just not prosecuting cases wasn't the option.

So they really don't have the right to make the law. They have good reason to make the law.

So the only question is:

Is the law valid?

I'll hit very quickly on the challenge, it's not ex post facto.

THE COURT: Before you go there, because I really

do think that that is sort of at the heart of this dispute, but I want to hold off on that because I want to sort of wrap up this discussion now because if that's why I posed the question, I said it may sound like a dumb question, but that's why I posed the question of whether or not the fact that Anderson now would tell us that a jury trial is required in a DV case because of the serious nature of it, that it precludes the Muni Court from having jurisdiction.

I agree with your assessment, Mr. Schifalacqua, on that point, which is the Henderson case came up from Muni Court, came back, I think it creates myriads of difficulties for the Muni Court to figure out how to do it, but not precluded.

I don't believe now that the Anderson decision came down from doing it, so that's why to me it's not a jurisdictional issue, it is an issue of the way Henderson chose to proceed, did they do so validly, so before we get to that argument I want to come back to Miss Bernstein, see if she has anything further.

I know you already argued it, Miss Bernstein. I'm not trying to have you re-argue the arguments you already made, but your argument there is a statute that Muni Court can't do jury trials, how has that not been overridden by the Anderson decision, and isn't it

possible, and aren't we likely to see in fact Muni Courts conducting trials in these cases in the future?

MS. BERNSTEIN: Personally, Your Honor, I hope we do, and that is something that I mentioned to the Henderson Municipal Court, and the lower argument was that if the City was willing to stipulate that the code requires a jury trial, I'll waive the jurisdictional defect to conduct the jury trials there.

Quite frankly, I'm not personally concerned with where they happen.

Now, I do believe the law says it's precluded, but I made my record on that, and I understand Your Honor's ruling.

My goal is to make sure that these Defendants are able to validly exercise the fundamental rights the Nevada Supreme Court has recognized for them.

Whether that is in Justice Court or Municipal Court, like I said, I made my record, so I'll let that stand.

But if I can just briefly respond to the City's arguments, I do have a little bit of a problem with the City trying to qualify this as a separation of powers interfering with the executive branch or the legislature not being able to keep up.

It's clear that there is a precedent for

requiring certain types of cases to be filed in certain jurisdictions because it's common knowledge that misdemeanors can be filed in either city or county, but gross misdemeanors and felonies can only be filed under county jurisdiction.

So it's not as though this would be something that is completely unprecedented, and that is what is interesting is, that the Nevada Supreme Court recognized the right to a jury trial and as fundamental under the Sixth Amendment, which is essentially treating it as though it were a felony just for purposes of granting that right.

So it would be the exact same situation where the cases would have to be filed under county authority just as though it were a misdemeanor because it has certain rights attached to it that are associated with felonies based on the seriousness of the offense. I do also hit on this in my brief pretty well, but I do find it somewhat odd, even ironic, that the City is really trying to push this policy of victim protection, victims have rights under Marcy's law, they have the right for a speedy trial, and yet the sole decision between the Municipal code versus the NRS is that by precluding a jury trial, you're essentially allowing convicted domestic abusers to keep firearms, that does not go for

victim protection or public safety.

The same interests that they are trying to utilize to pass this ordinance is directly contrary to them, versus if they devised jurisdiction and transferred the cases over to county.

So I'm not immune to the City's argument of practicality, but simply financially difficult to conduct a jury trial, and the City stated that can't happen at the drop of a hat, but at the same time Anderson was passed September of 2019, we are in May of 2020, no progress has been made.

I understand that it can't happen right away, but that argument might have a little bit more bite to it if they at least have been trying to set it up, or trying to make it happen, rather than relying on the ordinance to just say, nope, we don't have to do it at all.

So I think that those interests, the protection of speedy trial favors transferring the cases, even if temporarily transferring the cases, for prosecution to the Justice Court, at least under Your Honor's ruling saying they have the authority at least until the time if Municipal Court is able to conduct jury trials.

THE COURT: This is something weighing back over to the ex post facto argument, that thing you just commented about where you think it may be -- I think

that flows on your side as well, because sort of this argument that the statutes are the same, such that they sorry, the statute and the code are the same, such that they beg there has to be a jury trial, then really sort of also I think negates an argument it's ex post facto because if it's the same, then we're not enhancing penalties, we're not retroactively damaging a party, we're just conducting a DV case, but I really want to focus more on this and come back to Mr. Schifalacqua, that it really seems to boil down to what controls here.

Does it control that the Anderson case tells us that in every DV case because of the nature of the case the Defendant's entitled to a jury trial, does that control, or what controls the fact that the City of Henderson is doing its best to promote the safety of its citizens?

I take those arguments at face value, and it has developed a Municipal code under which it can engage in the same prosecutions arguably without the need for a jury trial because that would not be required for a code enforcement, but really what the code is doing is prosecuting a DV.

So I guess how are we supposed to -- Don't we have to I guess is a better question, completely discount the Anderson case if we're going to allow the

City to proceed with prosecuting DVs in the way that they've chosen to do by code?

MR. SCHIFALACQUA: Is that to me, Your Honor?

THE COURT: It is.

I'm sorry.

That is to you.

MS. BERNSTEIN: Without opposition --

THE COURT: It wasn't to you because again it seems to me I'm hearing everything you're saying, I take it at face value, city council did exactly what it did for exactly the reasons you say so, but effectively what it has done, has it not, is create a way to prosecute a DV without giving a jury trial, and the Anderson case specifically appears to require that a DV case have a jury trial, so how can that be allowed to exist?

MR. SCHIFALACQUA: I think because we need to go through exactly what the words in Anderson are saying and whether or not it was that broad.

It wasn't that broad.

We start first with 2014 they say, first offense domestic battery not a serious offense, not a jury trial.

We move ahead to 2015 when the legislature amended 2036, our gun prohibition statute, add in a domestic violence conviction as a predicate to having

essentially be prosecuted for having a gun later, just like an ex-felon would.

So the question is:

Did that law include all domestic violence convictions?

And it certainly -- The Henderson City council how the legislature decided to limit the amount of convictions that can qualify for a predicate to affect your second amendment rights, Anderson never overruled a it, simply said, which can't -- then the legislature added these provision, then bolstered it over the line for lack of a better word, but if you look at it, they didn't bump it over the line for all domestic violence convictions, the legislature chose to limit the amount that would qualify as to affect your second amendment rights, so it was simply how the legislature decided how to define what qualifies to affect your second amendment rights, and they did exclude Municipal code conviction, and that seemed pretty clear in the other sections.

You have the case from Judge Miranda Du from District Court here in Nevada, the 10th Circuit as well as a Muni case and sayd, when you're basing it on the federal definition of domestic violence, Municipal code convictions just don't qualify, they didn't write it that way.

They could have said, you can get prosecuted for being a prohibited person, but they didn't do that. They limited it.

So when we're talking about where Anderson got, they got there if the conviction affects your rights.

If it doesn't, Amescua (Phonetic) is still good law.

THE COURT: So you're taking the position that Miss Bernstein stated, which is, you would prosecute under the Muni code, if you are prosecuting under the Muni code, you would not be -- the second amendment rights would not be affected, and therefore that is why this can continue to exist.

But how has that not been completely inconsistent with the argument of trying to promote the safety of the citizens, or are they just distinct arguments?

MR. SCHIFALACQUA: No.

That's a good point, and a good question, Judge, but I think you go back to what you mentioned earlier, talking academia versus reality.

Some of the things about this, again the only alternative other than we handle this, and be well-staffed to do this, these are victims here in Henderson, not someone else's victims, if I'm not, and we can do it, we simply transfer, if that is even a

thing, to the county.

We need to look at what is going to happen, are convictions going to occur, and that is something was considered by the city council.

Thousands of cases on an overburdened system, nobody loves the DA like me, but that doesn't mean they are equipped to do it, thousands of cases moving them from the City to the county with no additional resources.

Does anybody think those will by handled appropriately?

That is what the City council viewed. They said, this is a short-term thing also, Your Honor, they said they want to move to jury trials.

We're actually working on plans, I'm not sure why Miss Bernstein would say that I know the inner workings, we're working on these things, but again they take time, and domestic violence isn't stopping, so you can either transfer, or grab a pickup truck an bring all your files over to the county, half of which are beyond the statute of limitations so couldn't be refiled, so again it's not in opposition because you're not getting convictions, the conviction here is still enhanceable, you still get the same counseling, you still get a level of supervision, two days in jail, and so a lot of the

things for a domestic violence are there.

Is it a great thing we can't at this point take the guns away?

No, it's not, but were working towards it.

The worst thing though, Your Honor, what city council -- a worse thing is not prosecuting, having them all fall by the way side.

THE COURT: Miss Bernstein, any final arguments to make?

MS. BERNSTEIN: Yes, Your Honor.

Just again to address the City's argument, I would disagree with the City's proposition that Anderson did not overrule Amiscua. I think it directly overrules it with regards to battery/domestic violence cases by changing the classification from petty to serious, and so I would -- also don't agree with the City to an extent that whether or not domestic violence qualifies for a jury trial is at least under the more strict ruling in Anderson.

Now you can take the public policy argument Anderson was designed to apply to all domestic violence cases and to go into that really briefly, as Your Honor pointed out, Anderson was from a Municipal Court, so I don't think that there's really any type of argument that Anderson doesn't apply to Municipal Courts.

The fact the code was passed after Anderson, the City's going back to Anderson saying, well, they didn't specify convictions under -- the Municipal code were included because when Anderson was issued, those Municipal codes didn't even exist.

The City passed the Municipal code long after Anderson was issued, so it's not as though the Nevada Supreme Court can go back and revise its decision and say, by the way, we also meant to include Anderson's mandate to be new laws that you guys are passing as well, even though they are for the same charge, carry the same penalties, and criminalize the same conduct.

THE COURT: But that begs the question right there, does this Court truly have the authority that you want it to exercise, which is to tell the executive branch of the Henderson -- the City of Henderson it can't do this under Anderson, or you're invoking the Anderson decision ultimately to say, Anderson says that all DVs have to be a jury trial?

I don't know that I read Anderson the same way you are reading it, but let's just say for hypothetical purposes that Anderson in that time in that context said, yes, this was what has to occur if the prosecution's coming under a statute, and now the City of Henderson decided to create a code under which it can

engage in the same prosecutions without the trial and -- but not affect the second amendment rights, which is the underpinning arguably of Anderson, and you're asking me to say.

I can't do that.

How do I have the authority to do that?

MS. BERNSTEIN: You are not overreaching your judicial authority anymore than the Henderson Municipal Court trying to file on a felony.

You tell them, no, you can't do it.

It's the exact same precedent, you have a right typically associated with felonies, it's recognized under the six amendment, and that that needs to be handled in a certain --

THE COURT: You just cut out completely there.

Sorry.

You have the right, but it needs to be handled, then it went away.

MS. BERNSTEIN: I don't remember exactly what I said honestly, but handled in the way that you would normally I think handle a felony, with those rights that are attached to it, the same way that the Henderson Municipal Court can't prosecute a felony domestic violence charge as a misdemeanor, but you have gross misdemeanors as well, so the classification of the

offense hasn't changed, but the rights associated with it -- or the penalty I should say associated with it have elevated that charge to almost like a felony level or a higher level in the sense that it's sharing rights typically associated with a felony, so I don't believe that you're really infringing on the executive branch at all.

Whether you have the complete authority to say whether or not a law passed was constitutional or unconstitutional, I don't think that that really is the discussion, but in terms of dictating where and when they can file, that goes also to the discretion argument.

If the Court can't say what rights the Defendants have, then we're just essentially saying, okay, we're going to leave it up to the Prosecutor, leave it up to the government to decide whether they want to charge out of the NRS, in which case you would be entitled to a jury trial, or whether they feel like charging you under the code, in which you're not.

That level of discretion cannot exist when it comes to a fundamental constitutional right, and that is why Your Honor making this ruling does not violate any separation of power arguments.

You have the authority to say that this arbitrary

level of complete discretion -- and going back to the brief, the City says, it's an incorrect assumption to say the discretion where these cases are filed, but at the same time there were cases that were charged as misdemeanors in Henderson and were others charged as misdemeanors -- in Henderson Justice, and others charged as misdemeanors in Henderson Municipal.

There's no clear guiding principle, no alga-rhythm right now, there's nothing saying where the cases need to go.

So as a controlling District Court for you to come in and say, the Constitution forces this certain type of case to be heard in a certain jurisdiction because that jurisdiction is the only one with the legal authority to grant those rights, that's all you're doing, you are setting it up so the Defendants can invoke the rights the Nevada Supreme Court has recognized, you are not telling the executive branch what they can and cannot do.

THE COURT: Mr. Schifalacqua, any final remarks today?

MR. SCHIFALACQUA: Thank you so much, Your Honor.

Very briefly, I would just say that you are subject to having your second amended rights stricken, therefore the corresponding rights is different, and

that happens all the time, a Prosecutor brings a charge and maybe files a different charge later.

Again, if there's probable cause, and no discrimination going on, that is really left to the executive branch.

What your potential penalties are only gives way to what procedural due process rights you're going to have.

An example of murder first or second, you may have different rights in a number of counts and things like that, if the Prosecutor files a second degree charge here, you don't have the rights, that happens all the time so, if your not subject to certain penalties, there may not be certain rights.

A murder case may be treated very differently procedurally than a speeding case, that is how our system is.

So I would just say, the Court could be guided by the Hernandez and Tillman decision, talk about when there's different laws that are enacted, and which one is filed upon is really within the executive branch of discussion.

Again, we're not filing felony or gross misdemeanor cases here, it's clear we can enact ordinances and clearly can enforce those ordinances in

Municipal Court.

I do appreciate attention to this, Judge.

THE COURT: Thank you.

It would be very tempting to say, oh, I want to chew on this some more and come back next week and think about it, and then render my decision, but in all candor I don't think my decision would change even if I spent more time.

I spent a lot of time because this was an issue of first impression for me to looking at it, trying to figure out where the arguments would flow, how to ultimately distill it down, and whatever the ultimate decision is here, one thing I'm very thankful for is both of you I think have made brilliant arguments, brilliant briefs, brilliant oral arguments today, I think we have a fantastic record, so whatever comes out of this, and however this may be challenged, and whatever may transpire from here, hopefully it is a good foundation for the ultimate decision.

I don't know what that ultimate decision would be in terms of what I'm going to rule here today and how that might be viewed, but I'm ultimately going to determine that it is appropriate for this Court to deny the Petition for Writ of Mandamus, or in the alternative Writ of Certiorari, and I am -- One thing I would note

for -- in no order of importance -- that I'm going to give you my thoughts on, I'm just going to give them to you and go from there, distill it down to Mr. Schifalacqua for preparing the order, but if you look at the recent printout of the Amescua, however you pronounce that case, decision, it does say ultimately, severe negative treatment, does not say overruled, it does say to some degree superseded by statute as stated in Anderson, Eighth Judicial District Court, but it says, severe negative treatment, but I think really what the argument here today brings home to me is, that if the Muni Court were still proceeding as it had been proceeding, certainly that would be precluded by Anderson and require a jury trial and be proceeding under the particular statutory scheme, and would require the jury trial, and may very well be the Muni Court's will proceed and begin doing their jury trials, and I think ultimately that is what Anderson does mandate as to those forms of prosecution.

I think ultimately though there's no preclusion for jurisdiction of the Muni Court simply because they've been mandated to do a jury trial by Anderson, and are not in a position out of the gate, as Mr. -- or box, as Mr. Schifalacqua put it, to do so.

But here's what happened that I don't think is

under scrutiny now, and I don't think that case referenced as being pending, if I understand the time frames, is scrutinizing this particular issue, which is after the Anderson decision came down, the City of Henderson made a choice to engage in Municipal code to engage in prosecutions of these matters, without then including the types of penalties that occasion the Supreme Court determines that domestic violence cases have thoe forms of penalties dictate a jury trial.

I think the Henderson City counsel was entitled to make the decision that it wanted to have a form of prosecution that did not carry with it the same strength and penalty, which in turn then if you read the Anderson decision would not carry with it the requirement for a jury trial.

I think Anderson attempted to address something that the Supreme Court felt was important.

I think it did so in a way without giving the additional guidance would be obviously necessary for the lower Court to be able to carry out that directive, but perhaps that will be forthcoming, but at the end of the day Henderson -- the City of Henderson in proceeding to create the Municipal Court code, and City of Henderson proceeding to prosecute under the Municipal Court code, is simply something not precluded by Anderson, and I

don't think that this Court can or should address by the Petition for Writ of Mandamus, or alternative Writ of Certiorari, I don't think it's outside of their jurisdiction to have proceeded the way they are proceeding, I don't think it's abuse of their discretion, or they acted in arbitrary or capricious to do this, I think it's quite the opposite.

I think the only issue raised by what Henderson has done here, and again motives aside, and any opinions the Court may hold what those motives may have been, at the end of the day I think Mr. Schifalacqua is being candid on the thought process and what they did, but the only issue I see then is in play is whether or not this is an ex post facto violation, and that charging the Petitioners under the code was somehow either illegal or improper, and I don't find that to be the case.

The ex post facto prohibition I don't believe comes into play for the reasons argued by the State that these are essentially the same shall we say, they don't retroactively apply to disadvantage the Defendants, don't change the definition of the crime, don't increase the penalties, in fact arguably they lessen the penalties, and simply the argument that as the perceived loss of a jury trial, that is a new penalty or punishment, doesn't take a right away, it's not the

manifest injustice I think the ex post facto would contemplate, in fact it's the opposite.

Whether or not the City made a smart decision to prosecute these things in a way that does not implicate second amendment does not implicate the seriousness of penalty that would mandate jury trial is their choice to make, but this is not an ex post facto violation in the Court's opinion, it was not illegal and improper, and ultimately I think the City of Henderson has the right to make this decision.

Again, whether an Appellate Court would ultimately disagree with me and say that their intent was that all DVs no matter what the penalty is should be jury trials, then I would respect that decision.

I don't think that is what Anderson says, I don't think that that is what is required of this Court to find, and ultimately I don't think that this Court would be properly exercising its own discretion to tell the City of Henderson it can cannot do what it is doing at this time.

So I think that the situation is that the matter must proceed under the Municipal code, they will proceed as intended as a bench trial, there will be on outcome.

Ultimately, if there is further challenge to this now, which is possible on further Writ up to the Supreme

Court, that's fine.

If the Defendant chooses to wait until he sees what the outcome of that bench trial is, and then dispute they should have had a jury trial, and dispute that the penalties are effectively still serious enough to warrant the jury trial, I think that appeal option is also available, either avenue the Defendant wishes to pursue here, or Petitioner more correctly in my case, which is to pursue is certainly understandable.

But I have to make this call based on how I distilled this down, and the way I've distilled thing down is again Henderson did not overreach its jurisdiction, it is not without jurisdiction of course to conduct the jury trials, but at the end of the day what we're really looking at is, it's prosecution under a Muni code with lesser penalties, which I do not believe implicate the Anderson underpinnings philosophies or decisions, or is contrary to Anderson to allow them to proceed as they have intended to proceed.

Mr. Schifalacqua, I'm going to burden you with preparing the findings of fact conclusions of law and order in this matter.

I think we cannot just have an order that says there -- I think we have a very, very good record.

I think we need a very, very good order also.

So I'm go to task you with preparing it.

I'm going to ask obviously Miss Bernstein have the opportunity to review.

I would like to have it in if at all possible within 10 days of the receipt of the transcript if that's what you wish to work from, or if you believe you can proceed as is, then that's fine, but I would like to not have to chase it down is my point, I guess. I don't have the staff capabilities right now with everything we're triaging with Covic to chase down orders.

So let's just make sure we get it.

MR. SCHIFALACQUA: Of course, Your Honor.

Thank you.

THE COURT: Thank you both for your time today.

Thank you for your patience while it took so long to get to you.

Each of our cases on today took about an hour each, and I didn't anticipate it, and I thank you very much.

And the last thing I would say is, I do hope there is a challenge somewhere meaningfully to what is happening to get clarification, but I'm making the best call I can make with the information that is available to me, so I appreciate your patience with that.

MR. SCHIFALACQUA: Thank you, Your Honor.

We appreciate it.

MS. BERNSTEIN: One question on my end.

It is likely going to be further Writed I guess would be the way to say it, and it will also likely be consolidated with the other District Court Petition because we're awaiting a ruling, which I actually like, it makes the Supreme Court more likely to take it up --

THE COURT: I'm not familiar with what happened in the other departments.

MS. BERNSTEIN: So the other department the Petition was granted, but a stay was ordered.

I was wondering if Your Honor would do the same thing in this case and just issue a temporary stay, so that everything can go up at once, and that way we're not being essentially forced to continue with the case while it's on appeal.

THE COURT: So we have opposite determinations here from.

So what would be going up would be two cases with opposite determinations, is that correct?

MS. BERNSTEIN: Correct.

MR. SCHIFALACQUA: Judge, we haven't gotten the order in that case, but we think so.

THE COURT: Okay.

THE COURT: What's your position on the stay

request?

MR. SCHIFALACQUA: I don't oppose it, Judge.

THE COURT: I think it makes sense, it does especially if the stay's granted in the other matter, I think it makes sense to have a stay here.

Normally I would make you file your motion, although technically under this you don't have to have a motion, just a clear indication a stay would not necessarily be granted here to ask up above, but in this particular case I think it makes sense to stay this matter from further movement in the lower Court level, or stay the matter in the District Court level to allow the challenge to be determined.

I think this is determinative of our case, and I think the decision in the other one you're waiting for the order is determinative there, so we're kind of complete, and it's ripe, whether it be for appeal or Writ, that is always the tricky rub, which is what is our posture, but if you further Writ this, or you appeal this, however you get up there, getting two cases from opposite positions up there is ideal I think to hopefully get a good view and good resolution and in some timely fashion, and I think staying the matters for that is appropriate.

So I would grant a stay of this case, and I think

that in turn would operate I think to grant a stay of all matters, but I can't 100 percent speak for whether Henderson would agree with me that staying this matter also operates to stay the bench trial, but at the end of the day I think the intent here is to let's see what our Appellate Court says about what should be occurring, and for that reason I'll grant the stay that I have the authority to grant, but I think is ultimately to my decision.

MR. SCHIFALACQUA: You got it, Judge.

I'll make sure that is in the order.

THE COURT: Thank you both so much.

MS. BERNSTEIN: Thank you, Judge.

MR. SCHIFALACQUA: Thank you, Your Honor.

(Proceedings concluded.)

REPORTER'S CERTIFICATE

I, Bill Nelson, a Certified Court Reporter in and for the State of Nevada, hereby certify that pursuant to NRS 2398.030 I have not included the Social Security number of any person within this document.

I further Certify that I am not a relative or employee of any party involved in said action, not a person financially interested in said action.

_____/s/ Bill Nelson_____

Bill Nelson, RMR, CCR 191

C E R T I F I C A T E

STATE OF NEVADA)
) ss.
CLARK COUNTY)

I, Bill Nelson, RMR, CCR 191, do hereby certify that I reported the foregoing proceedings; that the same is true and correct as reflected by my original machine shorthand notes taken at said time and place.

/s/ Bill Nelson

Bill Nelson, RMR, CCR 191
Certified Court Reporter
Las Vegas, Nevada

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ORDD

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DISTRICT COURT
CLARK COUNTY, NEVADA

NATHAN OHM,

Petitioner,

vs.

HENDERSON MUNICIPAL COURT, and THE HONORABLE MARK STEVENS, HENDERSON MUNICIPAL JUDGE,

Respondent.

AND

CITY OF HENDERSON,

Real Party in Interest

Case No: A-20-810452-W
Dept No. XXV

HMC Case Nos: 19CR002297
19CR002298

HEARING DATE: May 19, 2020
HEARING TIME: 9:00 A.M.

ORDER DENYING PETITION FOR WRIT OF MANDAMUS AND/OR CERTIORARI

THIS CAUSE having come on for hearing before the Honorable Kathleen Delaney, District Court Judge, on the 19th day of May, 2020, the Real Party in Interest being represented by Marc Schifalacqua, Esq., Senior Assistant City Attorney, and the Petitioner being represented by Kelsey Bernstein, Esq. of the law firm Nevada Defense Group;

As a result of the briefing in the lower court, this court granted a waiver to the page limitation for the instant Petition for Writ of Mandamus and/or Certiorari ("Petition") and Opposition thereto. As this is a matter of first impression for this Court, briefing and argument from the lower court provided additional guidance for this decision. *See* Reporter's Transcript of Proceedings, Writ of Mandamus, at 4:22-23. So, too here the parties submitted comprehensive briefs for this Court's review. That is why any reference to findings of facts

or conclusions of law not specifically stated in the minute order or as noted in the Transcripts of Proceedings are referenced and adopted by way of citation to the record;

For the reasons stated herein, this Court DENIES the Petition. Having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On February 22, 2019, Nathan Ohm ("Petitioner") was arrested on two counts of Battery Constituting Domestic Violence, misdemeanor violations of NRS 33.018, 200.481 and 200.485. The Criminal Complaint charged Petitioner in case 19CR002297 with one count of Battery Constituting Domestic Violence, alleging that he "did strike Hailey Schmidt about the face and/or did get on top of her" on or about February 22, 2019, in the City of Henderson. And in case 19CR002298 with one count of Battery Constituting Domestic Violence, alleging that he "did strike and/or did punch Marcuse Ohm one or more times" on or about February 22, 2019, in the City of Henderson. City of Henderson's Opposition to Defendant's Motion to Dismiss, Petitioner's Appendix Vol. 1., Bates 31:2-16.

2. On September 12, 2019, the Nevada Supreme Court released the opinion of Andersen v. Eighth Judicial District Court et al., 135 Nev. Adv. Op. 42, 448 P.3d 1120 (2019). City of Henderson's Opposition to Defendant's Motion to Dismiss, Petitioner's Appendix Vol. 1., Bates 31:21-24.

3. Henderson Municipal Code (hereinafter "HMC") § 8.02.055 (Battery Constituting Domestic Violence) was unanimously passed by the Henderson City Council on October 15, 2019 and took effect on October 18, 2019. On or about October 21, 2019, City

filed an Amended Criminal Complaint charging Petitioner with the same incidences of Battery Domestic Violence pursuant to Henderson Municipal Code § 8.02.055. Based on the Andersen case, Petitioner filed a written demand for a jury trial and on November 4, 2019, the lower court issued a briefing schedule. The lower court heard argument on December 16, 2019 and rendered its decision on January 13, 2019. While Petitioner claimed he was the victim of various constitutional violations, the Henderson Municipal Court rejected these claims and upheld the Henderson domestic battery ordinance as constitutionally and legally sound. City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 1:19-27.

4. Petitioner thereafter filed a Petition for Writ of Mandamus and/or Certiorari with the Eighth Judicial District Court. On May 19, 2020, the Court held argument on the Petition.

5. The Henderson City Council had the legal authority to enact the domestic battery ordinance in question, HMC § 8.02.055. Further, the Henderson City Council balanced policy considerations when deciding to enact this ordinance, and neither abused their discretion nor acted in an arbitrary or capricious manner. Reporter's Transcript of Proceedings, Writ of Mandamus, at 39:10-15; 40:8-16.

6. In general, a city council has the right to enact ordinances, and the Nevada Supreme Court in Andersen v. Eighth Judicial District Court et al., 135 Nev. Adv. Op. 42, 448 P.3d 1120 (2019), did not preclude municipalities from enacting an ordinance for domestic battery. Reporter's Transcript of Proceedings, Writ of Mandamus, at 38:20-24.

7. The reasoning in Amezcua v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 130 Nev. 45, 50, 319 P.3d 602, 605 (2014), that first offense domestic battery constituted a "petty" offense was not expressly overruled by Andersen v. Eighth Judicial District Court et al., 135 Nev. Adv. Op. 42, 448 P.3d 1120 (2019). Rather, the Nevada Supreme Court in Andersen found that the additional statutory penalty of the deprivation of a defendant's Second Amendment rights added by the Nevada Legislature in 2015, elevated domestic battery to a "serious" offense requiring a jury trial. Without that additional penalty (firearms prohibition), domestic battery would remain a petty offense under the Amezcua decision for jury trial purposes. Reporter's Transcript of Proceedings, Writ of Mandamus, at 38:6-19.

8. Because NRS 202.360 is not triggered by a conviction under HMC § 8.02.055, and the increased penalty associated with the legislature's passage of NRS 202.360 was the basis of the Court's decision in Andersen, Amezcua applies, and the Petitioner is not entitled to a jury trial. Since HMC § 8.02.055 does not disturb Petitioner's Second Amendment rights and is therefore a "petty" offense, there is no accompanying right to a jury trial pursuant to Andersen. Reporter's Transcript of Proceedings, Writ of Mandamus, at 38:6-19; City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 37:9-12.

9. There is no *ex post facto* violation in this case. The elements of the crimes, defenses, and penalties are the exact same for both the NRS and HMC versions of domestic battery. A defendant charged with HMC § 8.02.055 is not disadvantaged because the defendant could have been (and in the instant case already was) charged for the same violent

conduct: domestic battery under NRS 200.485. Further, the perceived loss of a right to a jury trial does not implicate *ex post facto* concerns. Reporter's Transcript of Proceedings, Writ of Mandamus, at 40-41:8-2.

10. Because Petitioner's conduct was criminal under the NRS at the time of the incident, and because the penalties under the HMC are no harsher than the penalties under the NRS, retroactively applying the HMC to Petitioner's conduct does not violate *ex post facto* prohibitions. Reporter's Transcript of Proceedings, Writ of Mandamus, at 40-41:8-2.

11. A conviction under HMC § 8.02.055 does not qualify as a predicate offense under the federal definition of "misdemeanor crime of domestic violence," contained in NRS 202.360, triggering a prohibition on possession of firearms. As such, the lower court correctly found that municipal ordinance convictions do not meet the federal definition of "misdemeanor crime of domestic violence," do not trigger the loss of firearm rights under Nevada state law, and do not require trial by jury. City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 16:6-11.

12. The federal courts that have addressed the issue appear to have also come to the same conclusion as the lower court here: convictions under municipal law do not qualify under the plain language of the federal definition. City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 25-28.

13. There is no Equal Protection violation in this case. In general, prosecutors have wide-ranging discretion in what cases to file, and under what authority to file them. Absent any discriminatory practices by the City Attorney, none of which are alleged by

Petitioner, the Nevada and U.S. Supreme Courts have been clear that the judiciary should not second guess a prosecutor's discretion to charge one offense over another, and a prosecutor's charging decision(s) will not give rise to an equal protection claim. City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 41-56.

14. Equal protection is also not impacted by HMC § 8.02.055 because no actual classification is created, and no fundamental right is impacted. City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 41-56.

15. HMC § 8.02.055 does not conflict with state domestic battery provisions or NRS 202.360. HMC § 8.02.055 defines the misdemeanor domestic battery in the same way as state law, and it works within the definition contained in NRS 202.360 as amended by the Nevada State Legislature in 2015. Having different outcomes for convictions under NRS domestic violence statutes and HMC § 8.02.055 does not mean the two irreconcilably conflict. In fact, the differing outcomes is expected because of how the legislature defined a misdemeanor crime of domestic violence in its amendment to NRS 202.360. That definition exempts convictions under municipal law, like HMC § 8.02.055, from qualifying as predicate offenses to prohibit firearm possession. Reporter's Transcript of Proceedings, Writ of Mandamus, at 27:8-15; City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 41-56.

16. Although a jury trial would not be required for this ordinance violation, the municipal court does have jurisdiction to conduct a jury trial for domestic battery when

charged under the NRS. Reporter's Transcript of Proceedings, Writ of Mandamus, at 42:10-19.

CONCLUSIONS OF LAW

1. Both the federal and state constitutions prohibit the passage of *ex post facto* laws. U.S. Const. art. I, § 10; Nev. Const. art. 1, § 15. The Nevada Supreme Court has consistently held that a law is *ex post facto* when it "retroactively changes the definition of a crime or increases the applicable punishment." Cole v. Bisbee, 422 P.3d. 718, 134 Nev. Adv. Op. 62 (2018). This prohibition forbids the passage of laws that impose punishments for acts that were not punishable when they were committed or impose punishments in addition to those prescribed at the time of the offense. Weaver v. Graham, 450 U.S. 24, 28, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). Accordingly, to be prohibited as *ex post facto*, a law must both operate retrospectively and disadvantage the person affected by it by either changing the definition of criminal conduct or imposing additional punishment for such conduct. Id. For purposes of *ex post facto* analysis, a retrospective law is one that "changes the legal consequences of acts completed before its effective date." Id. at 31, 101 S.Ct. 960. *See also* State v. Eighth Jud. Dist. Ct. (Logan D.), 129 Nev. 492, 510–11, 306 P.3d 369, 382 (2013). Reporter's Transcript of Proceedings, Writ of Mandamus, at 40-41:8-2; City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 7:3-15.

2. In Collins v. Youngblood, 497 U.S. 37, 110 S.Ct. 2715, (1990), the United States Supreme Court was presented with the question "whether the application of a Texas statute, which was passed after City's crime and which allowed the reformation of an

improper jury verdict in City's case, violate[d] the *Ex Post Facto* Clause of Art. I, § 10." Id. at 39, 110 S.Ct. at 2717. In summarizing the meaning of the *ex post facto* clause, the Court stated:

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute [(1)] which punishes as a crime an act previously committed, which was innocent when done[, (2)] which makes more burdensome the punishment for a crime, after its commission, or [(3)] which deprives one charged with [a] crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*."

Id. at 42, 110 S.Ct. at 2719 (*quoting* Beazell v. Ohio, 269 U.S. 167, 169–70, 46 S.Ct. 68, 70 L.Ed. 216 (1925)). Reporter's Transcript of Proceedings, Writ of Mandamus, at 40-41:8-2; City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 9:12-25.

3. In State of Hawaii v. Nakata, 76 Haw. 360, 878 P.2d 699 (Hi. 1994), the state legislature amended the DUI statute by reducing the penalties for a 1st offense DUI with the intent of eliminating the right to a jury trial. Id. at 701. The statute was to apply retroactively to all active 1st offense DUI cases. Id. Using Collins as guidance, the Hawaii Supreme Court held that the retroactively applying the new law did not violate the *ex post facto* clause because the new law "affects only the procedural determination of whether appellants will be tried by a judge or jury; their right to a fair and impartial trial has not been compromised or divested in any way. We fail to see any substantial prejudice which would result to appellants from the retrospective application of a non-jury trial." Id. at 715. City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 11:3-14.

4. Although the Sixth Amendment of the U.S. Constitution guarantees an individual the right to a jury trial, the right "does not extend to every criminal proceeding." Blanton v. N. Las Vegas Mun. Court, 103 Nev. 623, 629, 748 P.2d 494, 497 (1987), aff'd sub nom. Blanton v. N. Las Vegas, 489 U.S. 538 (1989). The right to a jury trial attaches only to "serious" offenses. Id. Defendants in cases involving "petty" offenses are not entitled to trial by jury. See, Lewis v. United States, 518 U.S. 322, 116 S. Ct. 2163 (1996); citing Duncan v. Louisiana, 391 U.S. 145 (1968); Amezcua v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 130 Nev. 45, 46–47, 319 P.3d 602, 603 (2014). City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 16:11-20.

5. In Amezcua, the Nevada Supreme Court determined that the legislature had not elevated the statutory framework criminalizing domestic battery above "petty" to "serious," and therefore the right to a trial by jury did not attach. Amezcua v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 130 Nev. 45, 50, 319 P.3d 602, 605 (2014). The Court also considered the potential loss of firearm rights under federal law after a misdemeanor conviction of domestic battery under Nevada law, but concluded that was a collateral consequence that did not impact the Nevada Legislature's determination of whether domestic battery was a serious offense, and those consequences were therefore irrelevant to determining whether a defendant would be entitled to a trial by jury for such an offense. Id. Reporter's Transcript of Proceedings, Writ of Mandamus, at 38:6-15; City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 16-17:20-2.

6. It was the potential loss of firearm rights, this time under state law, that became the central issue only a few years later. After the Amezcua decision, the Nevada legislature in 2015 passed an amendment to NRS 202.360, the statute which prohibits the possession or control of firearms by some individuals. Specifically, the relevant portion of NRS 202.360 states:

> 1. A person shall not own or have in his or her possession or under his or her custody or control any firearm if the person:
> (a) Has been convicted in this State or any other state of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33) […].

Reporter's Transcript of Proceedings, Writ of Mandamus, at 38:6-15; City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 17:3-10.

7. The legislative change referenced in paragraph 6, above, the Andersen Court said, was the basis for the distinction between Amezcua and Andersen: once the Nevada legislature added the additional penalty of the loss of gun rights under NRS 202.360 upon conviction, thereby indicating the elevation to a serious offense, the right to a trial by jury attached. Andersen v. Eighth Judicial District Court et al., 135 Nev. Adv. Op. 42, 448 P.3d 1120 (2019). Reporter's Transcript of Proceedings, Writ of Mandamus, at 38:6-15; City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 17:11-16.

8. The crux of the issue of whether a domestic battery charge entitles a defendant to a jury trial, then, is the potential loss of gun rights pursuant to NRS 202.360. The 2015 amendment to NRS 202.360 criminalized possession or control of a firearm by a person

convicted in Nevada or any other state of a misdemeanor crime of domestic violence only as defined in 18 U.S.C. § 921(a)(33). NRS 202.360; Andersen v. Eighth Judicial District Court et al., 135 Nev. Adv. Op. 42, 448 P.3d 1120 (2019). The Andersen Court explained that the legislature's amendment to NRS 202.360, by limiting the constitutional right to possession of a firearm, entitled those affected to trial by jury. Id., 135 Nev. Adv. Op. 42, 448 P.3d at 1124. If a criminal conviction would not trigger prohibition of firearms possession or ownership under NRS 202.360 —i.e., the amendment would not be applicable— the defendant would not be entitled to a trial by jury just as before under Amezcua. City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 17:17-28.

9. NRS 202.360 relies upon the definition of misdemeanor domestic violence as it is defined by 18 U.S.C. § 921(a)(33), which states:

> (33) (A) Except as provided in subparagraph (C),[2] the term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under **Federal, State, or Tribal law**; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. […]

City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 18:2-13.

10. In U.S. v. Pauler, the Tenth Circuit considered whether a misdemeanor violation of a municipal ordinance met the jurisdictional source requirement under the federal definition. The Court rejected the Government's argument, finding that the Gun

Control Act repeatedly distinguished between State and local jurisdictions, and the government had cited no examples in the Act where the term State was "even arguably meant to encompass both state and local governments or laws." Pauler, 857 F.3d at 1075. The Court applied several canons of statutory interpretation, finding that each weighed in favor of the defendant's interpretation that convictions under municipal law do not qualify as predicate offenses under the federal definition. Ultimately, the Tenth Circuit held that a "a misdemeanor under Federal, State, or Tribal law" does not include a conviction under municipal ordinance. Id. at 1078. Accordingly, the defendant's municipal conviction did not qualify as a predicate offense, and he could not be convicted under 18 U.S.C. § 922(g)(9). Id. City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 26-27:4-2.

11. In United States v. Enick , the defendant was charged with a violation of 18 U.S.C. § 922(g)(9). United States v. Enick, No. 2:17-CR-00013-BLW, 2017 WL 2531943, at *1 (D. Idaho June 9, 2017) (unpublished). The United States District Court for the District of Idaho found that a violation of municipal ordinance does not qualify under the definition of a "misdemeanor crime of domestic violence." City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 27:3-18.

12. The U.S. District Court for the District of Nevada has also considered this issue. United States v. Wagner, No. 317CR00046MMDWGC, 2017 WL 4467544, at *1 (D. Nev. Oct. 5, 2017) (unpublished). The Court determined that the plain language of the federal definition was unambiguous and does not include municipal or local offenses. The

Court also considered the government's public policy argument that the legislature enacted the Gun Control Act with the intent to keep guns out of the hands of domestic abusers, but it found that because the language of the statute was unambiguous, no other statutory interpretation was necessary. Wagner is a telling analysis because a U.S. District Court interpreted the federal definition in light of a Nevada municipal ordinance and concluded that a conviction under a municipal law *in Nevada* does not qualify under the federal definition. City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 27-28:19-13

13. In Salaiscooper v. Eighth Judicial District Court ex rel. County of Clark, 117 Nev. 892, 903, 34 P.3d 509, 516 (2001), the Nevada Supreme Court clearly stated, "[i]ndeed, a district attorney is vested with immense discretion in deciding whether to prosecute a particular defendant that 'necessarily involves a degree of selectivity.'" *quoting* State v. Barman, 183 Wis.2d 180, 515 N.W.2d 493, 497 (Wis.Ct.App.1994). Further, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file…generally rests entirely in his discretion." Id. fn 5., *quoting* U.S. v. Armstrong, 517 U.S. 456, 464, 116 S.Ct. 1480 (1996); Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663(1978). City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 45:2-12.

14. In Hernandez v. State, 118 Nev. 513, 50 P.3d 1100 (2002), the defendant argued on appeal that he should not have been convicted of kidnapping under NRS 200.310 (category A felony), since his conduct was also a violation of NRS 200.359 (category D

felony) for unlawfully removing his daughter from his wife's custody without a court order. According to the defendant, equal protection and fair trial principles were violated, due to the prosecutor's decision to charge one offense over another. The Nevada Supreme Court dismissed this constitutional attack and upheld prosecutorial discretion in charging decisions. The Court stated, "[w]e have followed the United States Supreme Court's holding 'that neither due process nor equal protection were violated under federal constitutional principles by virtue of the fact that the government prescribed different penalties in two separate statutes for the same conduct.' A defendant's rights are adequately protected in this area by the 'constitutional constraints' on a prosecutor's discretion, which prevent the prosecutor from selectively enforcing the law based on such unjustifiable criteria as race or religion." Hernandez v. State, 118 Nev. 513, 523, 50 P.3d 1100, 1107 (2002). City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 45:12-27.

15. In Sheriff, Clark Cty. v. Killman, 100 Nev. 619, 691 P.2d 434 (1984), the defendant contended that under Nevada's statutory scheme, the prosecutor had the discretion to charge him with either the offense of unauthorized signing of a credit card document, a felony under NRS 205.750, or the offense of unauthorized use of a credit card, a misdemeanor under NRS 205.760(2)(b). According to the defendant, since the prosecutor had the discretion to proceed under either of these two statutory offenses, which provide for disparate results in terms of the possible sentence, this statutory scheme violated his right to equal protection of the law. The Court held that, the statutory scheme in question would not violate equal protection even if the two statutes did state different penalties for the same

conduct, provided the prosecutor's charging decision was constitutionally permissible (*e.g.* not based on discrimination). Id. At 621. City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 46:1-12.

16. The United States Supreme Court also addressed this same issue in United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198 (1979). In Batchelder, the Court held that neither due process nor equal protection were violated under federal constitutional principles by virtue of the fact that the government prescribed different penalties in two separate statutes for the same conduct. Id. at 124–25, 99 S.Ct. at 2204–05. Instead, the Court held that a defendant's rights are adequately protected in this area by the "constitutional constraints" on a prosecutor's discretion, which prevent the prosecutor from selectively enforcing the law based on such unjustifiable criteria as race or religion. Id. at 125, 99 S.Ct. at 2204–05. City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 46:12-20.

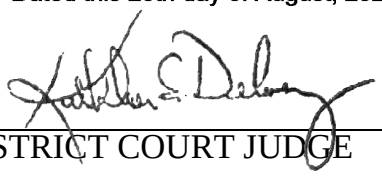
17. In Hudson v. City of Las Vegas, 81 Nev. 677, 679, 409 P.2d 245, 246 (1965), the Court held that "there is no statutory guarantee of trial by jury when municipal ordinances and state statutes coincide." Hudson, 81 Nev. at 681, 409 P.2d at 247. The Hudson Court further explained that an act that violates both state statutes and municipal codes can be punished by either agency without violating constitutional principles. Id. City of Henderson's Opposition to Petitioner's Request for Writ of Mandamus, or in the Alternative Writ of Certiorari, at 50-51:3-10.

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Mandamus and/or Certiorari shall be, and it is, hereby DENIED.

IT IS FURTHER HEREBY ORDERED that the imposition of this order is STAYED pending potential appeal or petition to the Nevada Supreme Court.

DATED this _____ day of _____, 2020.

Dated this 26th day of August, 2020



DISTRICT COURT JUDGE

4EA A5E 19DA ED6D
Kathleen E. Delaney
District Court Judge

Respectfully submitted,

By:_____
MARC M. SCHIFALACQUA, ESQ.
Nevada State Bar No. 10435
Attorney for Real Party in Interest

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Nathan Ohm, Plaintiff(s) vs. Henderson Municipal Court, Defendant(s)	CASE NO: A-20-810452-W DEPT. NO. Department 25

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Denying was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 8/26/2020

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If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 8/27/2020

Brian Reardon

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