CITY OF HENDERSON
CITY ATTORNEYS' OFFICE – CRIMINAL DIVISION
243 WATER STREET, MSC 711
HENDERSON NV 89015

IN THE SUPREME COURT OF THE STATE OF NEVADA

NATHAN OHM,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, COUNTY OF CLARK; AND THE HONORABLE KATHLEEN DELANEY, DISTRICT COURT JUDGE,

Respondents,

and

CITY OF HENDERSON,

Real Party in Interest.

CASE NO: 81960

APPENDIX TO MOTION TO CONSOLIDATE
VOL I

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 03:16 p.m. Elizabeth A. Brown Clerk of Supreme Court District Court Case: A-20-810452-W Municipal Court Case: 19CR002297; 19CR002298 **PETITION FOR WRIT OF CERTIORARI**

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ROUTING STATEMENT

Petitioner respectfully requests this Petition be heard and accepted, pursuant to NRS 34.020(3), in that the Eighth Judicial District Court, Department 25, passed upon the constitutionality of a municipal ordinance, to wit: Henderson Municipal Code § 8.02.055.

DATED this 16 day of October, 2020.

NEVADA DEFENSE GROUP
Respectfully Submitted By:

Kelsey Bernstein

KELSEY BERNSTEIN, ESQ.
Attorney for Petitioner

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2. Whether the District Court erred by finding that a conviction under Henderson Municipal Code § 8.02.055 does not qualify as a misdemeanor crime of domestic violence pursuant to 18 U.S.C. § 921(a)(33)(A) and therefore does not require a trial by jury;
3. Whether the District Court erred by finding that Henderson Municipal Code § 8.02.055 does not create an equal protection violation or, in the alternative, that any classification is lawful under a rational basis analysis;
4. Whether the District Court erred by finding that jurisdiction over domestic violence cases remains in the Henderson Municipal Court;
5. Whether municipal courts have the legal authority to conduct jury trials for misdemeanor battery domestic violence charges.

II. Statement of the Facts

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

On or about February 22, 2019, Petitioner Nathan Ohm was arrested and charged with two counts of misdemeanor Battery Domestic Violence in the Henderson Municipal Court, and subsequently entered a plea of not guilty. He was originally charged under NRS 200.485, Nevada's Battery Domestic Violence statute. On September 12, 2019, while Petitioner's case was still pending, the Nevada Supreme Court issued *Andersen v. Eighth Judicial District Court*, 135 Nev. Adv. Op. 42 (2019), which held that "[b]ecause our statutes now limit the right to bear arms for a person who has been convicted of misdemeanor battery constituting domestic violence, the Legislature has determined that the offense is a serious one. And given this new classification of the offense, a jury trial is required." *Id.*

Subsequent to *Andersen*, on or about October 15, 2019, City of Henderson passed Ordinance No. 3632, which amended the Henderson Municipal Code

8.02.055 (hereinafter "Code") specifically to create a municipal code-based violation for the offense of Battery Domestic Violence (Petitioner's Appendix, hereinafter "PA," 264). The Code and the NRS are substantively identical.

After enacting the Code, City of Henderson amended the criminal complaint against Petitioner on or about October 24, 2019. The sole amendment consisted of altering the source of the charge from the previously listed NRS, where a jury trial would be required under *Andersen*, to the newly enacted Code, where City of Henderson argues a jury trial is not required. This amendment, in addition to the ruling in *Andersen*, prompted Petitioner to file a Motion to Divest Jurisdiction from the Henderson Municipal Court on November 14, 2019 (PA 1). City of Henderson filed an Opposition on December 5, 2019, and Petitioner filed his Reply on December 11, 2019 (PA 30; 112). City of Henderson subsequently filed a Sur-Reply (without leave of the Court) approximately one judicial day before the scheduled argument, but at the hearing the Municipal Court indicated that it had not received the Sur-Reply and thus would not consider it. Excluding the Sur-Reply, briefing on the matter totaled approximately 139 pages.

Oral argument was heard on December 16, 2019, with a formal decision to be given January 13, 2020 (PA 143; 232). On that date, the Municipal Court

orally denied the Motion, but no written order was provided to or requested from the parties; however, transcripts were subsequently prepared.

On or about February 13, 2020, Petitioner filed a Petition for Writ of Mandamus or, In the Alternative, Petition for Writ of Certiorari in the Eighth Judicial District Court (PA 288). City of Henderson filed its Opposition on April 30, 2020 (PA 356). Petitioner's Reply in Support was filed on May 13, 2020 (PA 439). Oral argument was heard on May 19, 2020, and on August 26, 2020, an Order was filed denying the Petition pursuant to the Court's oral ruling. (PA 472; 528)

III. Relief Sought

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

IV. Standard of Review

Petitioner respectfully requests this Court entertain the instant Petition for Writ of Certiorari; acceptance is appropriate because the District Court passed a judgment on the constitutionality of a city ordinance, it is an issue of

first impression, and ruling would resolve a split among the Eighth Judicial District Court.

NRS 34.020(3) states:

> In any case prosecuted for the violation of a statute or municipal ordinance wherein an appeal has been taken from a Justice Court or from a municipal court, and wherein the district court has passed upon the constitutionality or validity of such statute or ordinance, the writ shall be granted by the appellate court of competent jurisdiction...

In *Cornella v. Justice Court*, 132 Nev. 587, 591 (2016), the Nevada Supreme Court found that "NRS 34.020(3) authorizes our review of a certiorari petition when a district court has examined the constitutionality or validity of a statute on appeal from a conviction in justice or municipal court for a violation of that statute." In the instant petition, the Eighth Judicial District Court ruled upon the constitutionality of Henderson Municipal Code § 8.02.055. Based on the precedential case law, the Nevada Supreme Court has the authority to entertain the instant petition for writ, and rule upon the constitutionality of the Code.

However, while no direct appeal has been taken in this case, Petitioner submits the interlocutory writ filed and heard in the Eighth Judicial District Court satisfies the requirements of NRS 34.020(3). In the alternative, this Court has ruled that certain pre-trial matters which nevertheless originate in Justice

or Municipal Court may be considered in an interlocutory capacity by way of a Petition for Writ of Certiorari. Even if not specifically deemed a Writ Petition, the Court is empowered to treat an interlocutory appeal as the proper Writ. This issue was addressed by the Nevada Supreme Court in *Salaiscooper v. Eighth Judicial Dist. Court*, 117 Nev. 892 n.2, 34 P.3d 509, 514 (2001):

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

Additionally, the issues presented here are issues of first impression, which have traditionally been heard. *Hiibel v. Sixth Judicial Dist. Court ex rel. County of Humboldt*, 118 Nev. 868, 871, 59 P.3d 1201, 1204 (2002).

Finally, and perhaps the most compelling reason to grant the instant petition comes from *City of Las Vegas v. Eighth Judicial Dist. Court ex rel. County of Clark*, 118 Nev. 859, 861, 59 P.3d 477, 479 (2002) (abrogated on other

grounds), where this Court granted a writ of certiorari to address a District Court split on the constitutionality of a city ordinance. In that case, and as here, two separate courts "reached contrary conclusions" regarding the constitutionality of a criminal statute. *Id.* The Court held that it would "entertain a petition for extraordinary relief in order to resolve a split of the authority among lower courts." *Id.* Here, the constitutionality of Henderson Municipal Code § 8.02.055 was ruled upon, twice, by separate Eighth Judicial District Court departments, resulting in opposite decisions. *See, Steven Cullen v. City of Henderson*, Case No. A-20-809107-W (finding the Henderson Municipal Code unconstitutional).[1]

Petitioner petitions this Court to recognize the necessity of its writ for certiorari, rule on this issue of first impression, and resolve the split in the District Court.

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[1] The City of Henderson has filed a Petition for Writ of Certiorari that is pending before this Court, *see* Docket No. 81714.

ARGUMENT

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

Article I, § 9 of the United States Constitution prevents federal and state governments from enacting any *ex post facto* laws to matters which have been "commenced or prosecuted." U.S. CONST. Art. I. § 9.; *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 382 (1798). The *ex post facto* clause has been broadly interpreted by the United States Supreme Court. "[O]ur decisions prescribe that two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 964 (1981).

In this case, Petitioner contends the Amended Criminal Complaint filed against him by Real Party in Interest City of Henderson violates the state and federal constitutional prohibition against *ex post facto* laws. The only substantive amendment to the complaint was altering the source of the conduct's criminality from the Nevada Revised Statutes to the recently enacted Henderson Municipal Code. However, Petitioner's conduct was alleged to have occurred on February 22, 2019, and the Code under which he is now charged

was enacted by Ordinance on or about October 15, 2019. Therefore, there is little question that Petitioner is being charged under a law that had not yet been enacted when the conduct allegedly occurred. As a result, the first criterion for an invalid *ex post facto* law – that it apply retrospectively – is satisfied. The remaining issue, then, is only whether the law "disadvantages the offender affected by it."

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

Federal law has not construed "disadvantaged" as limited only to retroactive criminalization or punishment. Rather, the Courts have taken a much broader approach by specifically recognizing at least four distinct types

of *ex post facto* law in addition to a fifth catch-all category recognizing a specific interest of "fundamental fairness."

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

Stogner's recitation of the four common types of *ex post facto* (and "similar") laws have been traced back to historical roots of manifest injustice, particularly when the Ex Post Facto Clause itself was enacted to "restrict governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 964 (1981); *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915). Indeed, the Courts strongly caution against *ex post facto* laws and their consistent ties to passions which

may grow from the "feelings of the moment." "Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-38 (1810).

Notions of manifest injustice and fundamental fairness have been inextricably intertwined with *ex post facto* analysis since the inception of the United States Constitution. From 1798 to modern day, the Courts have built the foundation of *ex post facto* analysis on these hallmark policies. "All these, and similar laws, are manifestly unjust and oppressive. In my opinion, the true distinction is between *ex post facto* laws, and retrospective laws. Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law: The former, only, are prohibited. Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91 (1798). "In each instance, the government refuses, after the fact, to play by

its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell v. Texas*, 529 U.S. 513, 516, 120 S. Ct. 1620, 1624 (2000).

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

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

"fundamental fairness," "manifest injustice," "vindictiveness," or those laws which, applied retrospectively, are "unjust or oppressive."

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

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

> WHEREAS, in *Andersen v. Eighth Judicial District Court*, 135 Nev. Adv. Op. 42 (2019), the Nevada Supreme Court held... the offense of misdemeanor battery domestic violence under NRS

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

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

The concerns noted as the basis for enacting the law are "anticipated legal challenges" to jury trials as well as "practical challenges" of holding jury trials. However, this reasoning offers unrivaled clarity that the law was enacted entirely as a reaction to the Nevada Supreme Court's recognition of jury trials as a fundamental right in *Andersen*. A law which is so clearly designed and

intended to subvert the availability of a fundamental right can go by no other words than "vindictive," "fundamentally unfair," "manifestly unjust" and "oppressive."

Although this is the primary basis on which Petitioner maintains the Code and Amended Criminal Complaint constitute an unlawful *ex post facto* law, there are also two alternative theories on which to reach the same conclusion. First, an *ex post facto* law is also specifically recognized when the law changes the testimony or evidence to be received. The distinction between charging the offense under the Nevada Revised Statute versus the newly enacted Code is simply that under Statute, the defendant is entitled to a jury trial, whereas under the Code, City of Henderson maintains they are not (although Petitioner disagrees with City of Henderson's position for the basis outlined in § B, *infra*). A law which alters the availability of a trial by jury is one that changes the testimony or evidence received; during a bench trial, the Judge acts as a trier of law and a trier of fact, and will often hear evidence or testimony in relation to his or her role as the trier of law (for example, pre-trial motions, writs, evidentiary hearings, and suppression challenges). Such testimony or evidence would not be heard by the jury, whose role is exclusively that of trier of fact. A

bench trial versus a jury trial does result in substantive changes to the evidence received by the body ultimately responsible for determining guilt or innocence.

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

In conclusion, whether analyzed as a substantive change in the evidence received, altering the criminality of the offense, or under the most dispositive category of "fundamental unfairness" and "manifest injustice," the amendment to a retrospective law which is specifically designed to avoid the implementation of a constitutional and fundamental right is an unlawful *ex post facto* amendment. Therefore, the Code cannot be applied retroactively to actions "commenced or prosected" before the Code's adoption.

When analyzing the *ex post facto* issue, both the Municipal Court and District Court failed to address Petitioner's main argument, that the *purpose* of the Code was explicitly designed to subvert the right to a jury trial. The argument is not whether a bench or jury trial is just or unjust, but rather that the focus of an *ex post facto* analysis looks to the underlying motivation of *why* the law was passed.

Significantly, with regards to the ex post facto analysis, the Henderson Municipal Court also found that prior to amending the criminal complaint in Petitioner's case, *his right to a trial by jury had vested*; the ruling by the Eighth Judicial District Court did not disturb or otherwise refute this factual finding:

> SHEETS: ... Are you concluding that when Andersen came out that a defendant charged under the NRS had a vested right to a jury trial but that it's okay that, that vested right is removed for the reasons that you laid out under the initial ex post facto analysis you did? I'm just trying to figure out because you were kind of silent as to whether or not Mr. Ohm had a right to a jury trial before the amendment of the statute or the addition of the municipal code and are you concluding that he had that right to a jury trial when he was originally charged in department under the Nevada Revised Statute?
> COURT: Under the NRS of course he has a right to a jury trial as long as it fit within that description of the domestic battery under the federal provision that I stated previously the –
> SHEETS: And then, that's actually my follow up – ... (January 13, 17: 11; PA 248).

This is a very significant fact for purposes of the instant analysis; returning to *Calder v. Bull*, "Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law: The former, only, are prohibited. **Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust**, and may be oppressive." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91 (1798) (emphasis added). Recognition that Petitioner had a vested right to a jury trial prior to being charged under the Code strongly supports the unconstitutionality of amending Petitioner's complaint; prior to enactment of the Code, Petitioner had a vested right to a jury trial.[2]

Subsequent to the enactment of the Code, however, Petitioner no longer has a right to a jury trial (under the lower court's ruling). As a result, charging Petitioner under the Code has directly taken away and impaired a vested right, thereby facially triggering the *ex post facto* prohibition.

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[2] At the District Court, City of Henderson argued that Petitioner's use of the word "vested" implicated the "vested rights doctrine." However, Petitioner maintains that the right to a jury trial became vested as soon as *Andersen* was issued; this is not an analysis of the "vested rights doctrine" as it relates to water rights or pension law, as argued by the City, 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."

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

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

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

> NRS 202.360 Ownership or possession of firearm by certain persons prohibited; penalties.
>
> 1. A person shall not own or have in his or her possession or under his or her custody or control any firearm if the person:
>
> (a) Has been convicted in this State or any other state of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33)...

City of Henderson has taken the position that a violation under the Municipal Code does not fall within the definition of "misdemeanor crime of

domestic violence" as set forth in 18 U.S.C. § 921(a)(33); under this construction, a conviction under the Code would not trigger the firearm restriction as set forth in NRS 202.360, and pursuant to *Andersen*, would therefore also not require trial by jury. Petitioner respectfully disagrees, and maintains that a conviction for domestic violence under the newly enacted Code does in fact fall within the definition as set forth in federal statute.

As a preliminary matter, it is significant to note that the Code is verbatim to the Nevada Revised Statute criminalizing battery constituting domestic violence, NRS 200.485(1)(a). The Code and Statute are substantively identical.[3]

There is no doubt that a conviction for battery domestic violence under NRS 200.485(1)(a) results in firearm restrictions warranting a jury trial, as that was the specific holding announced in *Andersen*. The basis on which the Code would purportedly escape this requirement cannot be to any substantive alterations in the law (given the identical language of the Code and Statute), but rather is only by virtue of it being a Municipal Code rather than State statute.

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[3] The Municipal Code and NRS are identical with the singular exception, not relevant to the instant analysis, that the most recent 2019 amendment to the NRS battery domestic violence statute (increasing the penalties for a second offense from a minimum of ten days in custody to twenty) was not adopted in the Code, which lists the minimum penalty still as ten days.

The ultimate question, therefore, is whether a Municipal Code that criminalizes the same conduct as the State statute also meets the definition of a "misdemeanor crime of domestic violence" under 18 U.S.C. § 921(a)(33). If the Code falls within the federal definition, the Code will also trigger the firearm provision of NRS 202.360 and subsequently, pursuant to *Andersen*, will require a jury trial.

Both Petitioner and City of Henderson appear to agree on this factual premise: if the Municipal Code qualifies as a "misdemeanor crime of domestic violence" under 18 U.S.C. § 921(a)(33)(A), the firearm restriction in NRS 202.3650 will apply, and a trial by jury is required.

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

Two pertinent definitions apply to the first analysis: the actual criminalization of possessing a firearm by certain individuals, and the definition of a "misdemeanor crime of domestic violence." The possession of a

firearm by prohibited individuals is made a federal offense pursuant to 18 U.S.C. § 922(d)(9), which states in pertinent part:

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

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

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

To link the two statutes together, it is a federal crime to possess a firearm (thus also warranting a jury trial in State court) if a person has been convicted in "any court" of "an offense that is a misdemeanor" under State, Federal or Tribal law which involves the use or attempted use of force against a qualifying domestic relation. Significantly, Congress used two unique terms in the two

statutes, one being a "conviction" and the other being "offense." The two are neither synonymous nor interchangeable, and the distinction is significant.

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

The Courts distinguish this from a "conviction," which requires an additional finding of guilt under an established burden of proof. "Where a defendant has been convicted of an offense, meaning 'the guilt of the defendant has been established,' including 'by guilty plea,' but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence." *United States v. Mendez-Sosa*, 778 F.3d 1117, 1119 (9th Cir. 2015). "The word 'conviction' is

susceptible to two meanings - an ordinary or popular meaning which refers to the finding of guilt by plea or verdict, and a more technical meaning which refers to the final judgment entered on a plea or verdict of guilty. Even with reference to criminal cases, in which a technical meaning might be expected, sometimes '[a] plea of guilty is tantamount to conviction.'" *Transamerica Premier Ins. Co. v. Miller*, 41 F.3d 438, 441 (9th Cir. 1994) (citations omitted).

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

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

By its plain language, a Municipal Court conviction for domestic violence under the Municipal Code qualifies as a "conviction in *any* court" per 18 U.S.C. § 922(d)(9) (emphasis added). Therefore, as the last step in a plain language analysis, if the conviction is for an "offense that is a misdemeanor under Federal, State or Tribal law" that involves the use of force against a qualifying domestic relation, it meets the statutory definition of a "crime of domestic violence" under 18 U.S.C. § 921(a)(33)(A).

The distinction between "conviction" and "offense" is pertinent here; the examination is not concerned with the actual finding of guilt, but whether the "offense," i.e. the *conduct*, "is a misdemeanor under Federal, State or Tribal law."

This interpretation was formally analyzed and adopted by the U.S. Supreme Court in *United States v. Hayes*, 555 U.S. 415, 418, 129 S. Ct. 1079, 1082

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

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

> "misdemeanor crime[s] of domestic violence," proponents of § 922(g)(9) sought to "close this dangerous loophole." *United States v. Hayes*, 555 U.S. 415, 421, 129 S. Ct. 1079, 1084 (2009) (internal citations omitted).

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

Petitioner maintains the Code qualifies as a federal "misdemeanor crime of domestic violence" under both the State law and Federal law interpretations. As noted previously, the newly enacted Henderson Municipal Code is identical to the language in the Nevada Revised Statute, both of which criminalize the same conduct that constitutes domestic violence under the same definition. Therefore, a conviction beyond a reasonable doubt that an individual violated the Municipal Code means the actual *conduct* that is the basis of that conviction

would also be a misdemeanor under State law, since the identical prohibition and language in the Code and Statute means the law applies to identical conduct. Because the Code and Statute contain no substantive distinction, conduct that violates the Code is conduct that would also violates state statute, and vice-versa.

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

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

This Court need only fill in the blanks: the Henderson Municipal Code is a misdemeanor offense that (1) has, as an element the use of force and (2) is committed by a person against a qualifying domestic relation. The conduct that is a misdemeanor under the Code is a misdemeanor under State law because it

is identical to the NRS. Therefore, the Code qualifies as a misdemeanor crime of domestic violence.

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

Perkins filed a Motion to dismiss his federal case. Addressing the Motion, the Court held that a federal charge of being a prohibited person in possession of a firearm is a "status offense." "This line of authority establishes that the fact of consequence is whether, on the dates on which the defendant possessed a weapon, he had been convicted of a misdemeanor crime of domestic violence. The North Las Vegas Municipal Court's November 20, 2012 order granting the defendant's motion to withdraw his prior plea, and adjudicating him guilty of disturbing the peace, has no effect on that status." *Id.*

The Federal Court's recognition that the federal charge is a "status offense" is significant. The Federal District Court granted the Government's

Motion in Limine to preclude Defense Counsel from presenting the actual name of the conviction that was underlying the federal firearms charges (with regard to that reduction to disturbing the peace) precisely because the firearms charge is a status crime, i.e. governed by the status of whether the underlying predicate *conduct* meets the federal definition of a misdemeanor crime of domestic violence at the time the firearm is possessed, rather than the name or title of the ultimate conviction.

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

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

Hayes definition, is a "conviction in any court" that would make possession of firearms a State and federal crime. As such, an alleged violation of the Municipal Code also results in the same firearm restrictions under NRS 202.360 because a conviction is a "misdemeanor crime of domestic violence" under 18 U.S.C. § 921(a)(33)(A), and pursuant to *Andersen*, a jury trial is required.

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

- "A predicate offense must be a misdemeanor conviction under 'Federal, State or Tribal Law' to fit within the federal definition" (City's Opposition, 19; PA 48).
- "It is clear the Hayes court felt it was unquestionable that clause (i) (the jurisdictional source requirement) is a defining requirement of the predicate conviction" (City's Opposition, 27; PA 56).
- "The source of law underlying the conviction must have been 'Federal, State or Tribal'" (City's Opposition, 30; PA 59)
- "Congress using expansive language such as 'any courts' only serves to further distinguish its decision to limit the definition of 'misdemeanor crime of domestic violence' to convictions under 'Federal, State or Tribal law'" (City's Opposition, 30; PA 59)

- "The plain language and a common sense reading of the statute clearly indicates that the conviction must be for a misdemeanor under Federal, State or Tribal law" (City's Opposition, 31; PA 60)
- "The federal definition can be read to create an affirmative understanding of the jurisdictional sources that qualify for predicate offense convictions" (City's Opposition, 33; PA 62)
- "The omission of such language indicates that Congress intended the firearm prohibition to apply only to those who had been convicted of Federal, State or Tribal law" (City's Opposition, 33; PA 62)
- "That source of law requirement requires that the conviction must either be a federal conviction, a state conviction or a tribal conviction and so, that's why this Court needs to deny that part of the motion..." (Transcripts, December 16, 38: 19; PA 180).

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

City of Henderson argued that "[a] predicate offense must be a misdemeanor conviction under 'Federal, State or Tribal law' to fit within the federal definition" (City's Opposition, 19; PA 48); this transposition of "conviction" and "offense" reveals the fundamental flaw in its reasoning. To fit

CITY OF HENDERSON
CITY ATTORNEYS' OFFICE – CRIMINAL DIVISION
243 WATER STREET, MSC 711
HENDERSON NV 89015

IN THE SUPREME COURT OF THE STATE OF NEVADA

NATHAN OHM,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, COUNTY OF CLARK; AND THE HONORABLE KATHLEEN DELANEY, DISTRICT COURT JUDGE,

Respondents,

and

CITY OF HENDERSON,

Real Party in Interest.

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within the federal definition, there must be a "conviction" in any court of an "offense" that is a misdemeanor under Federal, State or Tribal law. Contrary to City of Henderson's assertions, the law does not require a "conviction under Federal, State or Tribal law." Similarly, the law does not require "an offense that is a misdemeanor conviction under Federal, State or Tribal law." It simply requires an "offense that is a misdemeanor under Federal, State or Tribal law."

The only requirement for a "conviction" is that it can occur in "any court," which by its plain language includes municipal courts. Next, the "offense" must be a misdemeanor under Federal, State or Tribal law. Again, it does not state a misdemeanor *conviction* under Federal, State or Tribal law; rather the offense, i.e. the *conduct*, must be a misdemeanor under Federal, State or Tribal law. As City of Henderson conceded, and as the Henderson Municipal Court also recognized, the same conduct both violates the Code and NRS given laws' respective identical content. Therefore, *conduct that amounts to a violation of the Code is an offense that is also a misdemeanor under State law.* Under the plain language of the statute, "Federal, State or Tribal law" must be the basis of the offensive conduct, not the source of the ultimate conviction.

Returning again to the language in *Hayes*, "§ 921(a)(33)(A) defines 'misdemeanor crime of domestic violence' as a misdemeanor offense that (1)

'has, as an element, the use [of force],' and (2) is committed by a person who has a specified domestic relationship with the victim..." *Hayes*, 555 U.S. at 421. *Hayes* make it clear that the federal definition of a "crime of domestic violence" requires a conviction in any court of an offense that contains specific elements, namely the use of force and that such force is directed against a qualifying domestic relation. The Henderson Municipal Code applies on all counts.

Additionally, the City's argument and position regarding a conviction was already articulated (and not adopted) in the *Hayes* dissent; the primary basis for dissent was the Court having previously analyzed a "predicate offense" based on the statutory definition of the conviction, rather than the underlying conduct, in other instances. Specifically, the dissent notes that when interpreting the Armed Career Criminal Act, the Court looked "only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Hayes*, 555 U.S. at 436. The dissent's disagreement serves to highlight the majority's focus on the "particular facts" and underlying conduct of the offense, without regard to the title, source or name of the final conviction.

Although City of Henderson argued that "Federal, State or Tribal law" must be the source of law for the conviction, the City provided no controlling

authority to support its position, which would act to overrule *Hayes* by adopting the dissenting view.

Rather, City of Henderson relied on one case from the Tenth Circuit and two District-level cases, but City of Henderson also acknowledged that all three of these cases examined an argument that is entirely different than what Petitioner raises here. Specifically, the Tenth Circuit case addressed whether the definition of "State law" should be expanded to include municipal law. "There, the government argued that 'State' in 18 U.S.C. § 921(a)(33)(A)(i) should be read to mean 'state and local'" (PA 50). The same arguments were made in the two unpublished, District cases relied on by the City. "Again, the government argued that the term 'State' law should be interpreted to include violations of local laws" (PA 52). However, since Petitioner does not seek to expand the facial definition of the word "State," the cases cited (and the conclusions based on that specific argument) are inapposite to this analysis.

City of Henderson further argued that using "offense" as synonymous with "conduct" is erroneous, but then acknowledges that *Hayes* uses "offense" to as relating to the "use or attempted use" of force requirement – the required *conduct* that must exist to qualify under 18 U.S.C. § 921(a)(33)(A). Further, City

of Henderson's position is directly belied by the Supreme Court's majority reasoning in *Hayes*.

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

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

To that end, the concise language from *Hayes* is dispositive: "a person 'commits' an 'offense.'" For additional clarification, the Court immediately follows this with a quotation from the controlling Ninth Circuit case *United States v. Belless*, 338 F.3d 1063, 1066, reaffirming that "One can 'commit' a crime or an offense." *Hayes* makes it clear that "offense" means the conduct committed by the individual. If "offense" specifically relates to "conduct" in subsection (ii) of the federal definition per *Hayes*, the same definition must apply in subsection (i), to which the same preamble term "offense" also applies. For this reason, the City's repeated argument that "offense" in subsection (i) relates to the conviction, but in subsection (ii) relates to conduct, is without merit. One commits an offense, but one does not commit a conviction.

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

For these reasons and those raised above, the Henderson Municipal Code qualifies as a "misdemeanor crime of domestic violence" under the federal

definition in 18 U.S.C. § 921(a)(33)(A), further clarified in *Hayes*. As such, a conviction for battery domestic violence under the Code triggers the firearms restrictions in NRS 202.360, and per the this Court's ruling in *Andersen*, a trial by jury is required.

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

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

> It was further held in that case that the city might enact ordinances not inconsistent with the state laws regulating such matters (gambling and prostitution) within its territorial

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

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

Although Petitioner maintains the position that even charges for misdemeanor battery domestic violence under the Code nonetheless require a trial by jury (see § B, *supra*), assuming City of Henderson's position is correct

that this is not the case, an equal protection violation ensues. Specifically, given there are two courts capable of exercising simultaneous concurrent jurisdiction, the only substantive difference between charges brought under County authority versus City authority is the availability of a fundamental right. This jurisdictional distinction means that of two equally situated individuals, one criminal defendant will be entitled to a jury trial, whereas the other will not.

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

precisely tailored to serve a compelling governmental interest." *Plyler v. Doe*, 457 U.S. 202, 217 n.15, 102 S. Ct. 2382, 2395 (1982).

In this case, the Nevada Supreme Court held that charges of battery domestic violence which carry subsequent restrictions on firearm ownership, whether under federal or state law, warrant a jury trial as a "serious offense" under the Sixth Amendment to the United States Constitution. "It is well established that the right to a jury trial, as established by the Sixth Amendment of the United States Constitution and Article I, Section 3 of the Nevada Constitution, does not extend to those offenses categorized as 'petty' but attaches only to those crimes that are considered 'serious' offenses... the right affected here convinces us that the additional penalty is so severe as to categorize the offense as serious." *Andersen*, 135 Nev. Adv. Op. 42 at 6-7. The right to a trial by jury under the United States and State constitution is well-recognized as a fundamental right. "But, as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 57 S. Ct. 809, 811-12 (1937). As set forth in *Maxwell v. Dow*, 176 U.S. 581, 610, 20 S. Ct. 448, 458 (1900):

> The judgment of his peers here alluded to, and commonly called, in the quaint language of former times, a trial per pais,

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

In the instant matter, City of Henderson's position that charges for battery domestic violence under the Municipal Code do not warrant a jury trial, whereas charges for battery domestic violence under the Nevada Revised Statute do require a jury trial, creates a classification that directly impairs a fundamental right.

As such, because the Code directly removes the vested fundamental right of a trial by jury, the Code is "presumptively unconstitutional" unless the government can establish that it passes a strict scrutiny inquiry. "Under the Equal Protection Clause, if a classification 'impinges upon a fundamental right explicitly or implicitly protected by the Constitution,... strict judicial scrutiny' is required, regardless of whether the infringement was intentional." *Mobile v. Bolden*, 446 U.S. 55, 113, 100 S. Ct. 1490, 1518 (1980) (citing *San Antonio*

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

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

Further, that the governmental body at issue here is a municipality, rather than the State itself, does not remove or lessen the applicability of equal protection. "The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State... Although the forms and functions of local government and the relationships among the various units are matters of state concern, it is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment. The actions of local government are the actions of the State. A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law." *Avery v. Midland Cty.*, 390 U.S. 474, 479-80, 88 S. Ct. 1114, 1117-18 (1968).

In addition to traditional equal protection analysis, the Code is also problematic in that it specifically allows for *arbitrary* denial of a fundamental right. Petitioner is aware of no specific algorithm that determines whether misdemeanor offenses are charged in Justice versus Municipal Court when both courts have concurrent jurisdiction. Therefore, it appears that prosecutorial discretion governs the jurisdiction in which charges are brought. Given that the same charges brought in one court require trial by jury and charges brought in

the other court do not, prosecutorial discretion remains the basis on which criminal defendants are granted or denied this fundamental right. The enactment of the Ordinance, and City of Henderson's position that jury trials are not required, thus creates a quandary which has no solution so long as jurisdiction remains concurrent between the two courts.

Petitioner had argued, both to the Municipal Court and the District 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; PA 81) (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.

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 City and County 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 here, 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, Petitioner continues to assert, until City of Henderson 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.

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

Regarding the first premise, a large percentage of City of Henderson's written and oral opposition was based on a selective or discriminatory prosecution analysis (see, Transcripts, December 16, 45: 13; PA 187). "They're saying that, hey two people are prosecuted one goes to justice court, one goes to Henderson [Municipal]. What the test requires Your Honor, is that you have

to show that the people similarly situated, some of them are not being prosecuted and some of them are" (Transcripts, December 16, 46: 6; PA 188). However, Petitioner affirmed that he was *not* making a selective prosecution claim, and therefore the entire discriminatory prosecution analysis is inapposite. "This is not that they're choosing to prosecute some people but not others, you know even the example that I gave where it's two people who commit the same conduct one is going to justice court, one is going to municipal they're still both being prosecuted. So, this is not an instance of selective prosecution and truthfully, I don't believe that that analysis has any place in our argument. This is not a selective prosecution claim" (Transcripts, December 16, 61: 21; PA 203).

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

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

> saying have a fundamental right to a jury trial. This actual last case abrogated these last two." So, there is actually no legal basis to support their argument that there is a fundamental right to a jury trial... (December 16, 42: 22; 44: 5; PA 184).

City of Henderson's position that a jury trial under the Sixth Amendment is not a fundamental right is somewhat quizzical, as the right to a trial by jury is constantly recognized as one of, if not *the* most fundamental right protected by our constitution. Nonetheless, it should be apparent that a jury trial under the Sixth Amendment is in fact a fundamental right. "Moreover, in view of our heritage and the history of the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right... Trial by jury in a court of law and in accordance with traditional modes of procedure after an indictment by grand jury has served and remains one of our most vital barriers to governmental arbitrariness. These elemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or convenience." *Reid v. Covert*, 354 U.S. 1, 9, 77 S. Ct. 1222, 1226-27 (1957). "The right to jury trial guaranteed by the Sixth and Fourteenth Amendments 'is a fundamental right, essential for preventing miscarriages of

justice and for assuring that fair trials are provided for all defendants.'" *Brown v. Louisiana*, 447 U.S. 323, 330, 100 S. Ct. 2214, 2221 (1980) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968)).

Regarding City of Henderson's third point, it argued that prosecutorial discretion permits them to decide, for whatever reasons it deems fit, to decide if individuals are prosecuted under County versus City authority, even after recognizing that the outcome of this decision determines whether the accused is afforded a jury trial or not for the same conduct. The Henderson Municipal Court agreed that City of Henderson maintains this discretion: "So, in this case there is no indication that individuals are being treated differently that are charged with this ordinance[sic] and also the prosecutor sometimes has discretion as a charging authority and isn't required that they have do it whether ordinance or NRS. They have the ability to make that decision and as indicated there is no classification as a protected class anybody that is charged with domestic battery..." (Transcripts, January 13, 14: 15; PA 245).

The City maintains that such unfettered and unrestricted discretion is acceptable and "must be respected" (City's Opposition, 44: 27; PA 73). 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 are 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 accused can exercise these rights under the guise of "prosecutorial discretion."

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; PA 411) (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?

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

is ultimately charged. As a result, City of Henderson has the ability to arbitrarily determine when criminal defendants are able to exercise a vested fundamental right.

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

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

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

Nevada's statutory grant of authority to the municipalities over criminal matters that permit trials which are only summary and without a jury.

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

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

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

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

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

> NRS 175.011 Trial by jury.
> 1. In a district court, cases required to be tried by jury must be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the State. A defendant who pleads not guilty to the charge of a capital offense must be tried by jury.

> 2. In a Justice Court, a case must be tried by jury only if the defendant so demands in writing not less than 30 days before trial. Except as otherwise provided in NRS 4.390 and 4.400, if a case is tried by jury, a reporter must be present who is a certified court reporter and shall report the trial.

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

City of Henderson may argue that Nevada Revised Statute 5.073 grants this authority. The statute states, in pertinent part: "1. The practice and proceedings in the municipal court must conform, as nearly as practicable, to the practice and proceedings of justice courts in similar cases. An appeal perfected transfers the action to the district court for trial anew, unless the municipal court is designated as a court of record as provided in NRS 5.010. The municipal court must be treated and considered as a justice court whenever the

proceedings thereof are called into question." However, using NRS 5.073 as a purported grant of authority over jury trials creates a series of problems and statutory contradictions.

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

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

Additionally, when there are two conflicting statutory provisions, the more specific will typically control over the more generally worded statute.

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

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

> The Nevada Supreme Court held that the prohibition against jury trials in municipal courts (pursuant to NRS 266.550) does

> not apply to municipal courts in a city incorporated under a special charter. *Donahue v. City of Sparks*, 111 Nev. 1281, 903 P.2d 225 (1995). The City of Sparks, Nevada is incorporated under a special charter. Sparks City Charter, Chapter 470, Statutes of Nevada 1975, Article I, Section 1.010. Like the City of Sparks, the City of Henderson is a city incorporated under a special charter, which was passed by the Legislature in 1971. Henderson City Charter, Chapter 266, Statutes of Nevada 1971, Article I, Section 1.010. In 1995, the Nevada Supreme Court held in Donahue that a city incorporated "under a special charter" is not subject to a statutory prohibition against jury trials in municipal courts. *Donahue* at 1282-1283, 226 (City's Opposition, 61; PA 90).

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

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

> Where it states essentially that based on a special charter these provisions don't apply. So, that would indicate that

> Henderson because it is a special charter it would be exempt from 200.550. However, so, it would put us back to where you could do jury trials in municipal court in Henderson because it is a special charter and therefore 266.550 would not apply. However, you have Henderson Municipal Code 4.015 and it says, there is a municipal court for the City of Henderson consist of at least one department, each department must be presided over by a municipal court judge that has such power and jurisdiction as prescribed in and is in all respects which are not inconsistent with this chapter governed by the provisions of chapter 5 and 266 of the NRS, which relates to municipal courts. That brings us back to 266 being incorporated into the HMC. So, the plain reading of HMC seems to incorporate 266 which would include 266.550 which prohibits conducting a jury trial in municipal court. So, although I think if it was – if the municipal code didn't say it's governed by 266 of the NRS then the prohibition wouldn't come into effect. Because it is a special charter but I think by doing that by the HMC saying it's governed by 266 and how the power and authority is provided and 266.550 says unless we summary them without a jury in conclusion based on the current legislation NRS 266.550 and HMC 4.015 incorporating 266 the Henderson Municipal Court at the current date doesn't have current authority to conduct a jury trial without a state legislative change... (January 13, 5: 22; PA 236).

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

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

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

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

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

The District Court held that *Andersen's* holding acted to effectively overrule the statutory jury trial prohibition in municipal courts; the Court

reasoned that if a jury trial is constitutionally required, then by necessity, the courts (including municipal courts) tasked with prosecuting battery domestic violence cases must inherently have the authority to satisfy this requirement by conducting jury trials. In so holding, the District Court concluded that the constitutional requirement of a trial by jury overruled the statutory prohibition on jury trials in municipal courts.

The District Court's analysis and reasoning relies on the premise that the constitutional requirement and statutory prohibition are in conflict – thereby resulting in one "overruling" the other. When read in harmony, however, this need not be the case.

The constitutional requirement of a trial by jury for battery domestic violence cases does not mandate that such trials take place in any specific jurisdiction; because the Henderson Justice Court and Henderson Municipal Court exercise concurrent jurisdiction, *Andersen*'s mandate may still be satisfied by transferring cases from the Municipal to the Justice Court.

There is an existing statute which would provide for lawful transfer; jury trials for battery domestic violence cases can lawfully be held without violating any statute; and the statutory prohibition on jury trials in municipal courts would remain undisturbed. The City's generalized interests in protecting its

citizens and prosecuting domestic battery cases would be equally satisfied through prosecution in the Justice Court. In summation, jurisdictional transfer would allow *Andersen*'s jury trial requirement to be fully exercised in a manner that does not conflict with any existing statutory provision, and while still adhering to the City's overarching interests in prosecuting crime.

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CONCLUSION

For these reasons, Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari.

Dated this 16 day of October, 2020.

NEVADA DEFENSE GROUP
Respectfully Submitted By:

Kelsey Bernstein

KELSEY BERNSTEIN, ESQ.
Attorney for Petitioner

VERIFICATION OF KELSEY BERNSTEIN, 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 Petition are true and correct to the best of my knowledge.

Dated this 16 day of October, 2020.

NEVADA DEFENSE GROUP
Respectfully Submitted By:

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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 14 point, double spaced Cambria font.

2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7)(A)(ii) because it is proportionally spaced, has a monospaced typeface of 14 points or more and contains 15,874 words.

3. 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 16 day of October, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 16 day of October, 2020, I served a true and correct copy of the Opening Brief to the last known address set forth below:

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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.

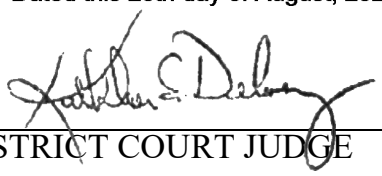
17. In Hudson v. City of Las Vegas, 81 Nev. 677, 679, 409 P.2d 245, 246 (1965), the Court held that "there is no statutory guarantee of trial by jury when municipal ordinances and state statutes coincide." Hudson, 81 Nev. at 681, 409 P.2d at 247. The Hudson Court further explained that an act that violates 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)	CASE NO: A-20-810452-W
vs.	DEPT. NO. Department 25
Henderson Municipal Court, Defendant(s)	

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

Shari Hewes	Shari.Hewes@cityofhenderson.com
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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	Henderson City Attorney's Office Attn: Brian Reardon, Esq P.O. Box 95050 Henerson, NV, 89009

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF HENDERSON,
Petitioner

vs.

HON. TREVOR ATKIN, and the EIGHTH JUDICIAL DISTRICT COURT,
Respondent

and,

STEVEN CULLEN,
Real Party in Interest.

CASE NO:

District Court Case No. A-20-809018-W
Dept. No: 8

HMC Case No: 19CR008881
Dept. No: 3

PETITION FOR WRIT OF CERTIORARI

CITY ATTORNEYS' OFFICE – CRIMINAL DIVISION
243 WATER STREET, MSC 711
HENDERSON NV 89015

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Attorneys for Petitioner, CITY OF HENDERSON

ROUTING STATEMENT

The City of Henderson requests this petition be heard and accepted, pursuant to NRS 34.020(3), in that the Eighth Judicial District Court, Dept. 8 passed upon the constitutionality of a municipal ordinance – Henderson Municipal Code § 8.02.055.

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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE ISSUES

1. Whether the district court erred by finding, without explanation, that Henderson Municipal Code ("HMC") § 8.02.055 is unconstitutional as an *ex post facto* law when the ordinance does not alter the definition of battery constituting domestic violence (hereinafter "domestic battery") nor increase the applicable punishment.

2. Whether the district court erred by finding HMC § 8.02.055 in direct conflict with NRS 202.360, when NRS 202.360 expressly excludes domestic battery convictions based on a municipal ordinance violation.

3. Whether municipal courts have the legal authority to conduct jury trials for misdemeanor domestic battery charges.

STATEMENT OF THE CASE AND FACTS

On September 19, 2019, the City of Henderson (hereinafter "Petitioner") charged Steven Cullen (hereinafter "Cullen") by way of Criminal Complaint with Battery Constituting Domestic Violence – NRS 200.481(1)(a), 200.485(1)(a), 33.018, Henderson Municipal Charter, Section 2.140. (*See* Petitioner's Appendix p. 001). On October 17, 2019, Cullen filed a Notice of Demand for Jury Trial or Alternatively Motion to Dismiss (hereinafter "Notice/Motion"). On October 21, 2019, Petitioner filed an Amended Criminal Complaint, which changed the charging authority from the NRS to Henderson Municipal Code (hereinafter "HMC") § 8.02.055. (*See* Petitioner's Appendix p. 002). Later, on October 28, 2019, Cullen filed a Motion to Dismiss the City's Amended Criminal Complaint

on the grounds that the municipal ordinance violates the *ex post facto* clause and conflicts with NRS 202.360(1). This motion was set for hearing on November 4, 2019, but was continued for briefing.

On December 19, 2019, argument was held, and the parties were given leave, after argument, to file a supplemental briefing. Cullen filed a supplemental reply on December 23, 2019. Petitioner filed its Opposition to the Supplemental Reply on December 31, 2019.

The Honorable Henderson Municipal Court Judge Rodney Burr issued his decision on January 13, 2020, denying both of Cullen's motions.

Cullen then filed Defendant's Petition for Writ of Mandamus in the Eighth Judicial District Court on January 23, 2020, where it was assigned to Dept. 8, Judge Trevor Atkin. A briefing schedule was subsequently set. On February 19, 2020, the City of Henderson filed its Answer to Defendant's Petition for Writ of Mandamus. On March 19, 2020, Judge Trevor Atkin granted Defendant's Petition for Writ of Mandamus via a brief minute order. (*See* Petitioner's Appendix p. 003). The District Court ordered Henderson Municipal Court Judge Rodney Burr to grant the request for jury trial, but the order did not find the ordinance unconstitutional or specify any reasoning for the decision.

On April 13, 2020, Petitioner filed a Motion for Reconsideration and/or Clarification of Order Granting Writ of Mandamus and for Stay of Order Granting

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Writ of Mandamus. Oral arguments were held on May 14, 2020, wherein the District Court agreed to reconsider and clarify the previous Order. The District Court subsequently filed a written order on June 19, 2019, which held that HMC § 8.02.055 constituted an *ex post facto* law as applied to Cullen, and that HMC § 8.02.055 directly conflicted with NRS 202.360. (*See* Petitioner's Appendix pp. 004-09). Additionally, the District Court determined that the Henderson Municipal Court possesses the lawful authority to conduct jury trials for misdemeanor domestic battery offenses, and, once again, directed Judge Burr to grant Cullen's request for jury trial. (*See* Petitioner's Appendix p. 008).

At the request of the Petitioner, the lower court granted an immediate stay of the writ of mandamus pending review by the Nevada Supreme Court.

STANDARD OF REVIEW

Petitioner respectfully requests that this Court entertain the instant petition for writ of certiorari. Acceptance of the writ is appropriate in this case because the District Court passed a judgment upon the constitutionality of a city ordinance, it is an issue of first impression, and ruling would resolve a split amongst the Eighth Judicial District Court.

NRS 34.020(3) states:

> In any case prosecuted for the violation of a statute or municipal ordinance wherein an appeal has been taken from a Justice Court or from a municipal court, and **wherein the district court has passed**

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> **upon the constitutionality or validity of such a statute or ordinance, the writ shall be granted** by the appellate court...

(emphasis added).

In Cornella v. Justice Court, 132 Nev. 587, 591 (2016), this Court found that "NRS 34.020(3) authorizes our review of a certiorari petition when a district court has examined the constitutionality or validity of a statute on appeal from a conviction in justice or municipal court for a violation of that statute." 132 Nev. 587, 591, 377 P.3d97, 100 (2016). In the instant petition, the Eighth Judicial District Court ruled upon the constitutionality of HMC § 8.02.055. Based on the precedential case law, there is no doubt that the Nevada Supreme Court has the authority to entertain the instant petition for writ, and rule upon the constitutionality of HMC § 8.02.055.

Further, unlike repetitious petitions for writ of certiorari, issues of first impression have traditionally been heard; "[w]e conclude this is properly before this court pursuant to NRS 34.020(3), because the constitutionality of NRS 171.123(3) presents an issue of first impression. Accordingly, we will address the merits of Hiibel's constitutional challenge . . .." Hiibel v. Sixth Judicial Dist. Court ex rel. Cty. of Humboldt, 118 Nev. 868, 871, 59 P.3d 1201, 1204 (2002). Here, this Court is also faced with an issue of first impression.

Finally, and perhaps the most compelling reason to grant the instant petition comes from City of Las Vegas v. Eighth Judicial Dist. Court ex rel. Cty. of Clark,

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118 Nev. 859, 861, 59 P.3d 477, 479 (2002) (abrogated on other grounds), where this Court granted a writ of certiorari to address a District Court split on the constitutionality of a city ordinance. In that case, and as here, two separate courts "reached contrary conclusions" regarding the constitutionality of a criminal statute. Id. The Court held that it would "entertain a petition for extraordinary relief in order to resolve a split of the authority among lower courts." Id. Here, the constitutionality of HMC § 8.02.055 was ruled upon, twice, by separate Eighth Judicial District Court departments, resulting in opposing decisions. *See* Nathan Ohm v. Henderson Municipal Court, Case No. A-20-810452-W, Dept. 25 (*See* Petitioner's Appendix pp.089-106) (upholding the constitutionality of HMC § 8.02.055).

The City of Henderson petitions this Court to recognize the necessity of its writ for certiorari, rule on this issue of first impression, and resolve the split in the District Court, under the authority granted by NRS 34.020(3).

BACKGROUND

I. HENDERSON MUNICIPAL CODE § 8.02.055 – A NECESSARY AND PRACTICAL SOLUTION IN THE ABSENCE OF STATEWIDE DIRECTION

On average, the Henderson City Attorney's Office files and resolutely prosecutes more than 1,000 cases of domestic battery per year in the Henderson Municipal Court. Pride and priority are placed in these cases. Proper resources are

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allocated to ensure just outcomes and victim safety. In Henderson, the case results prove this, repeatedly.

On September 12, 2019, this Court released Andersen v. Eighth Judicial District Court et al., 135 Nev. Adv. Op. 42, 448 P.3d 1120 (2019), which held that the 2015 legislative amendment to NRS 202.360 elevated misdemeanor domestic battery (NRS 200.485, 33.018) to a serious offense under the Sixth Amendment. While Andersen's holding was somewhat straightforward, the decision unfortunately raised many more questions than answers. How can municipalities practically conduct jury trials without proper resources? What rules of uniform practice do municipalities follow when conducting jury trials, as none are present in the Nevada Revised Statutes relating to municipalities? Where does a municipality summon their jury pool from – the city or county? Are municipalities allowed some time to physically construct jury services facilities and jury boxes before implementation?

Thankfully, many of these questions were already addressed by this Court in Blanton v. N. Las Vegas Mun. Court, 103 Nev. 623, 748 P.2d 494 (1987). This Court acknowledged, in the unanimous Blanton decision, that even if jury trials were to be ordered by the Supreme Court for some misdemeanor offense(s), implementation cannot practically occur without statewide legislation. This Court stated:

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> Moreover, a decision of this court mandating jury trials in DUI cases would create numerous unresolved administrative problems. **Procedures for the summons and selection of jurors in the municipal courts do not exist. A decision requiring jury trials in the municipal courts 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. Further, the legislature of this state, which meets once every two years, is not presently in session to fill the void.**

Blanton v. N. Las Vegas Mun. Court, 103 Nev. 623, 634–35, 748 P.2d 494, 501–02 (1987) (emphasis added). This Court also noted the financial and logistical problems of the immediate requirement to conduct misdemeanor jury trials without legislative action.

> Several serious policy considerations reinforce our conclusion that we should not abandon our holding in Smith. First, a non-jury trial in a misdemeanor case is speedy and inexpensive. On the other hand, a decision of this court requiring jury trials in the prosecution of DUI offenses in the municipal court would result in tremendous expense to the municipalities of this state. **For example, courtrooms would require renovation, and in some cases expansion or replacement, in order to accommodate jurors. The increased time required to conduct jury trials would in many instances occasion a need for municipalities to employ more judges and more personnel, and to build still further courtrooms.** These expenses would be exacerbated because, in DUI cases, the prosecutor is prohibited by statute from engaging in plea bargaining. See NRS 484.3792(3). The resulting expense to the municipalities may actually deter the prosecution of DUI offenses. Thus, requiring jury trials in municipal courts for DUI cases could mandate a lack of action against those who drink and drive.

Id. (emphasis added). This Court's practical wisdom in Blanton provided a guide regarding how municipalities should handle the aftermath of the Andersen

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decision. In short, the implementation of misdemeanor jury trials is wholly impractical absent statewide legislation regarding rules of procedure and funding.

Perhaps the biggest and most serious question has never directly been answered by either Blanton or Andersen – are municipal courts allowed to conduct jury trials for misdemeanor domestic battery? In the wake of the Andersen decision, defendants facing charges of misdemeanor domestic battery began either demanding jury trials in "speedy" course (knowing that infrastructure was not in place to grant the request), or challenging the City's very authority and ability to conduct jury trials; the effect of either strategy was to challenge the City's very authority to continue to prosecute crimes of domestic violence. The practical effects of the Andersen decision essentially brought the City's ability to prosecute domestic abusers to a halt.

The City began seeking solutions. Dismissing over 1,000 cases and theoretically 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, was not a practical or morally responsible option.[1] Simply

[1] Domestic violence is, undisputedly, a very serious problem in Nevada. Prosecuting domestic violence is essential to public safety, to reducing acts of domestic violence, and to protecting victims of domestic violence. As domestic violence is a major cause of death in Nevada at an alarmingly high rate, the ability to prosecute domestic violence is a compelling government interest of the City of Henderson. "Reducing domestic violence is a compelling government interest." United States v. Knight, 574 F. Supp. 2d 224, 226 (D.Me. 2008), *citing* United

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asking victims of violent crime to wait two years or more for statewide legislative fix was neither a legal nor ethically appropriate option either. *See* Nev. Const. Art. 1, § 8A (a victim of a crime has the right "[t]o the timely disposition of the case following the arrest of the defendant.").

After Andersen, for public safety reasons, the City needed a way to continue prosecuting domestic abusers during the current and ongoing temporary time when prosecutions for battery domestic violence under the NRS by the City are unclear. Determined to continue addressing the serious domestic violence problem and to help victims of violent crime, Henderson found the "way" by passing a local ordinance. Ordinance No. 3632, was introduced before the Henderson City Council on October 15, 2019, proposing the law that is now codified as HMC § 8.02.055. HMC § 8.02.055 mirrors the domestic battery prohibited conduct and penalties under NRS 200.485 (in conjunction with NRS 33.018); the only difference is the lack of invocation of the gun prohibition when charging under the municipal code.

During the October 15, 2019 City Council Meeting in which the ordinance was introduced, Nicholas Vaskov, the Henderson City Attorney, presented the

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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).

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Andersen decision to the council and listed the various options and concerns for the City moving forward.

> For the first time, the Nevada Supreme Court held that those charged under Nevada's law with . . . a misdemeanor domestic battery are entitled to a trial by jury. The court reached this conclusion because a Nevada law also provides that anyone convicted under the State's domestic battery statute is prohibited from owning or possessing a firearm. According to the court, this prohibition on firearms makes convictions under the State's domestic battery statute a serious crime, requiring trial by jury.
>
> This decision leaves the City with a couple of options. We could charge all domestic battery cases as simple battery. We don't think that's a good idea. Domestic battery is a distinct crime from simple battery, and we think it should be recognized and charged as such.
>
> We could also refer all of our domestic violence cases to the District Attorney for prosecution in Justice or District Court. That would burden an already overtaxed county court system with more than 1,000 cases from the city alone, and probably more than 7,000 valley wide with all the other local governments. We didn't think that makes sense and we don't think that that's in the best interest of justice or the victims.
>
> We could enact a city ordinance . . . making domestic violence battery a crime under the Henderson Municipal Code and charge our cases accordingly. We think that's the best approach and that's what's before you this evening.
>
> Charging domestic violence under our Municipal Code allows the City to better protect victims by . . . monitoring those convicted through terms imposed by our courts, including counseling and other special programs that protect victims and help avoid . . . recidivism. This approach is consistent with what other local governments are doing. We've coordinated with our sister cities in Las Vegas and North Las Vegas on this. This approach is also supported by our Municipal Court and -- and our Municipal Court judges.
>
> That said, we do consider this a short-term solution. Longer term, we intend to build the infrastructure necessary to hold jury trials.

/ / / / /

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City Council Meeting, Bill No. 3376, Amendment to Henderson Municipal Code Chapter 8.02, pg 2, lines 9 – 15, pg 3 lines 1 – 15 (Oct. 15, 2019) (*See* Petitioner's Appendix p. 011-012).

Further, the ordinance clearly states the City's purposes for adding domestic battery to the municipal 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." (*See* Petitioner's Appendix pp. 107-110). 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 Cullen is challenging the municipal 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.

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 municipal court, the City anticipated that defendants would next challenge a municipal court's authority to conduct jury trials. As defendants are currently challenging the City's very authority to conduct jury trials, taxpayer investment in jury trial infrastructure is basically impossible. This put the Petitioner (and all other municipal jurisdictions in Nevada) in a position with no

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good solution, and effectively ground the prosecution of domestic violence to a screeching halt. 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, pending further statewide legislative action.

Chief Justice Gunderson's words in Blanton ring true today louder than ever – a Supreme Court "decision requiring jury trials in the municipal courts could not be implemented" without statewide legislative action. Blanton, 103 Nev. at 35. We are the heirs to the Chief Justice's thoughtful words.

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II. BOTH PARTIES AGREE THAT A CONVICTION UNDER HMC § 8.02.055 DOES *NOT* AFFECT A DEFENDANT'S SECOND AMENDMENT RIGHTS.

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 Cullen's Second Amendment rights and is therefore a "petty" offense, there is no accompanying right to a jury trial pursuant to Andersen.

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.

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. 130I (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 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."

Until recently, under this Court's 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 Cullen

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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, 448 P.3d 1120 (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. Notably, Amezcua is still good law; Andersen did not overturn it.

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 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.

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It was the potential loss of firearm rights that became the central issue only a few short years later in Andersen. As discussed supra, this 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 in NRS 202.360, the right to a trial by jury attached. Id.

Since 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. Pursuant to the federal definition under 18 U.S.C. §

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921(a)(33)(A)(i) (and thus under NRS 202.360), in order to be considered a predicate conviction of the misdemeanor crime of domestic violence, the offense must be "a misdemeanor under Federal, State, or Tribal law." The federal definition does not include convictions under a municipal code.[2] Accordingly, a conviction under HMC § 8.02.055, which Cullen is charged with in the Amended Complaint, does not trigger the possible loss of gun rights under NRS 202.360.

In the instant case, the parties agree that Cullen's Second Amendment rights would not be affected by a conviction under HMC § 8.02.055. Given that agreement, it is clear that Amezcua is the controlling case, rather than Andersen. Since Amezcua controls, Cullen is not entitled to a jury trial.

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ARGUMENT

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

The lower court found, with almost no explanation, that HMC § 8.02.055, violates the constitutional prohibition against *ex post facto* laws, as applied to Cullen. In short, Cullen mistakenly complains that since his attack on his wife occurred before the enactment of HMC § 8.02.055, charging him under the City ordinance was unconstitutional.

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[2] Three separate federal courts have already determined that a municipal ordinance conviction cannot provide the predicate offense to strip a defendant's gun possession rights under 18 U.S.C 924(a)(33). (*See* Petitioner's Appendix p. 030-040).

However, Cullen's conduct was certainly illegal under state law when it occurred on September 8, 2019 (Battery Constituting Domestic Violence – NRS 200.481, 33.018), and since the HMC provides for the exact same penalties and elements of the offense, the prohibition against *ex post facto laws* is not offended.

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

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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 confidently summarized 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).

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Just as the United States Supreme Court had years before, this 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, this Court 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 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)).

As can be seen by comparison of the NRS and the HMC, and as is undisputed by Cullen, the elements and punishments of the crimes of domestic battery are identical between the two sources of law. *See* statutory text of HMC §

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8.02.050, HMC § 8.02.055, (Petitioner's Appendix p. 041-042) and NRS 33.018, NRS 200.481, NRS 200.485, (*See* Petitioner's Appendix p. 043-050).

The elements of domestic battery under the NRS are: (1) willful and unlawful use of force or violence upon the person of someone, (2) with whom the defendant shares a domestic relationship. The penalties under the NRS are imprisonment for 2 to 180 days, 48 to 120 hours of community service, a fine of $200 to $1,000, and weekly counseling for 6 to 12 months. (*See* Petitioner's Appendix p. 047-050). These penalties and elements are identical to those in HMC § 8.02.055. (*See* Petitioner's Appendix p. 041-042).

Because Cullen'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, the *ex post facto* prohibition is not violated.

The crime of domestic battery was already prohibited by state law on September 8, 2019 (date of Cullen's offense), thus Cullen'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, and 200.485, further showing that Cullen was on notice that the act of domestic battery was prohibited at the time of the offense, which ensures no *ex post facto* violation.

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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 of "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 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 [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. at 43, 110 S.Ct. at 2719 (emphasis added). HMC § 8.02.055 passes this constitutional test.

Additionally, the HMC does nothing to alter or remove any defenses that a defendant may assert. Here specifically, Cullen's ability to assert a trial defense has not been curtailed by the ordinance. If a defense were being altered or

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removed, then perhaps a defendant would have an *Ex Post Facto* Clause violation argument on such grounds. Unfortunately for Cullen here, that is not the case.

Also, the removal of the right to a jury trial does not factor into this analysis. 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. Using Collins as guidance, the Hawaii Supreme Court held that 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.

Overall, the District Court gave no legal analysis as to why it held that the *Ex Post Facto* Clause had been violated in this case. Rather, the order contains the bare assertion that: "[m]oreover, in his particular case, the criminal charges filed against him violate the *Ex Post Facto* Clauses of the United States Constitution and the Nevada Constitution." (*See* Petitioner's Appendix p. 008). There is no further reasoning, apart from the conclusory statement that: "it was violative ... for the reasons and legal basis cited within Cullen's Petition for Writ of Mandamus." Without any rationale or legal basis to strike the ordinance, the District Court's

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decision was clearly erroneous. For the above reasons, HMC § 8.02.055 does not violate the *Ex Post Facto* Clause.

II. HMC § 8.02.055 DOES NOT CONFLICT WITH NRS 202.360(1).

The District Court wrongfully found, without supporting reasoning, that HMC § 8.02.055 was invalid, finding that it directly conflicts with NRS 202.360. (*See* Petitioner's Appendix pp. 004-009). The Henderson City Council had clear legislative authority to enact HMC § 8.02.055. Further, HMC § 8.02.055 does not conflict with NRS 202.360(1).

A. HMC § 8.02.055 was lawfully enacted by the Henderson City Council pursuant to the direct authority granted by the Nevada Legislature

The Nevada Legislature has granted the City of Henderson the clear and direct authority to enact municipal ordinances that criminalize behavior for which criminal statutes already exist under state law. Without any legal basis or specific allegation of conflict, Cullen complained to the lower court that that HMC § 8.02.055 somehow directly conflicts with NRS 202.360. Simply stating something boldly and repeatedly does not make it so. Cullen's claims of conflict were baseless.

Notably, the statute Cullen claimed as the authority for his argument, NRS 266.321, is inapplicable to the City of Henderson. NRS 266.005 sets forth which cities are covered by the provisions of Chapter 266. It provides:

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> 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.

NRS 266.005 (emphasis added). The City of Henderson is an incorporated city existing under the provisions of **special legislative acts**. As such, the provisions of NRS 266 are inapplicable, unless specifically provided in the City's Charter. *See* Blanton v. North Las Vegas Mun. Court, 748 P.2d 494, 497 n.5, 103 Nev 623, 628 n.5 (1987) (holding that the provisions of NRS 266 are inapplicable to cities with special charters, including the City of Henderson). Because NRS 266.321 does not even apply to the City of Henderson, Petitioner's claim that HMC § 8.02.055 conflicts with state law pursuant to NRS 266.321 is wholly without merit. Petitioner has provided no other authority under which to analyze his claim, except his own repetitive claims of "it conflicts," and so it must fail.

Undoubtedly, the Henderson City Council properly acted within the authority granted by the State Legislature in its City Charter when it enacted HMC § 8.02.055. In Henderson's City Charter, the Nevada State Legislature granted the City of Henderson the ability to enact and enforce ordinances prohibiting behavior that is also a violation of state law, provided the penalties do not exceed those in state law. Specifically, Section 2.080(3) of the Henderson City Charter provides: "The City Council may enforce ordinances by providing penalties not to exceed

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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.

The Legislature also delegated to the City the authority to exercise police powers by way of local ordinances. Henderson City Charter § 2.140; *see also* NRS 268.018 ("Except when specifically prohibited by law, an incorporated city by ordinance may establish as a city misdemeanor offense any offense which is a misdemeanor pursuant to the laws of the State of Nevada."). Thus, the City of Henderson clearly has the authority to enact an ordinance prohibiting conduct that also constitutes an offense under state law, as long as the penalties prescribed are not more severe.

A common sense reading of Section 2.080(3) of the Charter leads to the conclusion that the Legislature did not view a City ordinance prohibiting conduct

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already prohibited by state law as directly conflicting with state law, or else it would not have granted the City authority to enforce such ordinances. Rather, the conflict occurs when the penalty exceeds that set forth in state law. Accordingly, as HMC § 8.02.055 has identical prohibited conduct and penalties to NRS 200.481 and 200.485, HMC § 8.02.055 is not in conflict with state law.

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

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

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687, 688, 708 P.2d 305, 305 (1985). Decided well after the abrogation of Sloan, the Nevada Supreme Court once again used its previous reasoning to support its position that municipalities can exercise their police powers to pass ordinances identical to state statutes:

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

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

The Court ultimately held in Wu that concurrent jurisdiction does not conflict with the Constitution if jurisdiction is proper. Sheriff, Washoe Cty. v. Wu, 101 Nev. 687, 690, 708 P.2d 305, 306 (1985). Moreover, the Court should reconcile statutes which may appear to be in conflict and attempt to read the provisions in harmony. Beals v. Hale, 45 U.S. 37, 51, 11 L. Ed. 865 (1846); Szydel v. Markman, 121 Nev. 453, 457, 117 P.3d 200, 202–03 (2005). *See also*, Richardson v. Responsible Dog Owners of Texas, 794 S.W.2d 17, 19 (Tex.1990) (holding that even though the Legislature has enacted a law addressing the subject

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matter in question does not mean the subject matter is completely preempted. A state law and city ordinance will not be held repugnant to each other if the court can reach a reasonable construction that leaves both in effect.). Importantly, in Nevada, the reviewing court presumes that a statute is constitutional, and a party who challenges the constitutionality of the statute must clearly show its invalidity. Martinez v. Maruszczak, 123 Nev. 433, 448-49, 168 P.3d 720, 730 (2007). Here, Cullen has wholly failed to show that HMC § 8.02.055 is invalid through any specific argument.

Next, Cullen broadly contends that, "the Nevada Legislature has already outlawed possession or ownership a firearm by a person convicted of misdemeanor battery constituting domestic violence." (*See* Petitioner's Appendix p. 079). Cullen's argument is both overreaching and incorrect. As stated above, not all domestic battery convictions will provide the basis to legally strip a defendant of their right to possess a firearm. NRS 202.360(1), by narrowly defining the crime of domestic violence, excludes municipal convictions from being the predicate offense, which would prohibit firearm possession. Once more, pursuant to Andersen, if a defendant's gun possession rights are not affected, Amezcua's holding remains controlling, and a jury trial would not be constitutionally mandated.

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Cullen also argued to the District Court that the City of Henderson is a political subdivision of the State of Nevada, and somehow, that reality demonstrates that the City cannot adopt its own municipal ordinance outlawing domestic battery. Cullen is misguided. While the City of Henderson derives its authority from the Nevada Constitution and the Nevada Legislature, there remains a clear grant of authority from the Nevada Legislature to enact and enforce municipal ordinances, which have counterparts in state law. *See* sections 2.080(3) & 2.140 – Henderson City Charter. Further, there is no state statute (or case law for that matter) that prohibits municipalities from enacting domestic battery ordinances.

In addition, Cullen argued to the lower court that somehow NRS 200.485 disallows municipalities from enacting ordinances prohibiting domestic violence and prohibits prosecutors from filing this charge under a municipal ordinance. Again, NRS 200.485 neither supports that proposition nor prohibits a municipality from outlawing domestic violence. NRS 200.485 also does not limit prosecutorial discretion from charging domestic violence under a city's municipal ordinance, as opposed to state law.[3]

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[3] Cullen cited in the district court NRS 200.485(11), which states, "in every judgment of conviction or admonishment of rights issues pursuant to this section," the court shall inform the defendant about being a prohibited firearms possessor. Again, NRS 200.485 simply refers to a domestic violence conviction under "this section," meaning under NRS 200.485. This statute does not limit a municipality

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Petitioner has the lawful authority to enact ordinances that prohibit an act that is also prohibited by statute, such as obstructing a public officer, resisting a public officer, assault, battery, harassment, disorderly conduct, theft, trespass, injury to property, coercion, and possessing drug paraphernalia. Each of these crimes is illegal under both the NRS and HMC.

B. HMC § 8.02.055 works within the definition of NRS 202.360, not against it

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 crime of misdemeanor domestic battery the same way as state law, and it works *within* the definition contained in NRS 202.360, as amended by the Nevada State Legislature in 2015.

Cullen argued to the lower court that HMC § 8.02.055 somehow irreconcilably conflicts with state law and, thus, was improperly enacted by the Henderson City Council. Cullen wholly failed to support or develop his allegations of conflict with state law, except to say that the conflict lies in the difference in penalty where under HMC § 8.02.055, Cullen's gun rights are not affected. However, a difference in penalty does not cause a fatal conflict, unless

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from enacting its own domestic violence ordinance. (*See* Petitioner's Appendix pp. 068-088).

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the municipal code prescribes a penalty that exceeds the state law penalty, which is not the case here.

HMC § 8.02.055 and NRS 202.360 plainly do not conflict as shown in the above *ex post facto* analysis. In fact, the two laws are, functionally, in perfect unison (exact same elements of the offenses and prescribed penalties).

Notably, HMC § 8.02.055 is in full compliance with state law and works within the definition contained in NRS 202.360(1), as amended by the Nevada State Legislature in 2015. As shown above, a conviction for domestic battery under the Nevada Revised Statutes may lead to the loss of a defendant's firearm rights under NRS 202.360(1), a conviction for domestic battery under HMC § 8.02.055 would not. The difference in outcomes is precisely due to how the Nevada Legislature chose to define the predicate misdemeanor crime of domestic violence in NRS 202.360(1).

NRS 202.360(1), by relying exclusively on the federal definition of domestic violence, is plainly written to exclude municipal law convictions from forming the basis of a prohibited person firearm charge. The United States Supreme Court recently stated that "when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 1749 (2020).

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Cullen further claimed that HMC § 8.02.055 unlawfully avoids the requirement to hold jury trials for all defendants charged with domestic battery. However, this oversimplifies and misstates the holding in Andersen v. Eighth Judicial District Court et al., 135 Nev. Adv. Op. 42, 448 P.3d 1120 (2019), NRS 202.360, and the definition of "misdemeanor crime of domestic violence" contained therein. It is precisely that statutory definition which exempts convictions under municipal law, like HMC § 8.02.055, from qualifying as predicate offenses to prohibit firearm possession.

That there are different outcomes for convictions under NRS domestic violence statutes and HMC § 8.02.055 does not mean the two irreconcilably conflict. In fact, the difference in outcomes is precisely *because* of how the legislature chose to define the misdemeanor crime of domestic violence in its amendment to NRS 202.360. 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 Cullen 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

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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.

III. THIS COURT SHOULD AFFIRM THE LOWER COURT'S FINDING THAT MUNICIPAL COURTS HAVE THE AUTHORITY TO HOLD JURY TRIALS FOR DOMESTIC BATTERY CHARGES.

Petitioner requests that this Court affirm the lower court's finding that municipal courts have the authority to accommodate and administer jury trials. In his order, Judge Atkin found in footnote 3: "[t]his Court at the conclusion of the hearing, at the request of the City of Henderson, recognized that the City of Henderson possesses the authority to accommodate and administer jury trials." (*See* Petitioner's Appendix p. 005).

In short, Petitioner believes that the Henderson Municipal Court does have the authority to hold jury trials to comply with the constitutionally-based Andersen decision. Any provision of statute or city charter to the contrary would certainly be overridden by the Andersen decision. However, this view is not universally held. Quite simply, the Petitioner (and other municipalities) must have a clear mandate from this Court in order to conscientiously plan to conduct this and other jury trials.

In Andersen, this Court stated, "[g]iven that the Legislature has indicated that the offense of misdemeanor domestic battery is serious, it follows that one

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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 Andersen case, and Mr. Andersen's case originated in the Las Vegas Municipal Court. The 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 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.

Petitioner believes that the correct (and only) interpretation of the Andersen decision is that the Nevada Supreme Court authorized municipal courts to hold jury trials for certain misdemeanor battery domestic violence offenses (when firearm rights are in jeopardy) to comply with the 6th Amendment. However, that interpretation is not collective. In short, Petitioner needs clarity regarding whether municipal courts are authorized to hold jury trials pursuant to the Andersen decision in order to responsibly plan for these trials.

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 applies to the City of Henderson. In Blanton v. N. Las Vegas Mun. Court, 103 Nev. 623, 628, 748 P.2d 494, 497 (1987), the

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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." In a footnote, the 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. In Donahue v. City of Sparks, 111 Nev. 1281, 1283, 903 P2d 225, 226 (1995), the 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."

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Thus, without a clear directive, it remains uncertain whether domestic battery jury trials may be conducted in municipal courts. Petitioner requests that clarification here. Pursuant to Andersen, the United States 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. Pursuant to Donahue, if state or federal constitutional law dictates the necessity of a jury trial, the municipal court may then conduct a jury trial to fulfill those rights. The City of Henderson believes that this Court acknowledged the City of Henderson's (and other municipalities') authority to conduct jury trials by remanding the Andersen case to Las Vegas Municipal Court for a jury trial. Further, the judicial branch has the inherent powers to regulate its own affairs. Blackjack Bonding v. City of Las Vegas Mun.

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Court, 116 Nev. 1213, 1218–19, 14 P.3d 1275, 1279 (2000). Here, those affairs include the right to conduct domestic battery jury trials pursuant to Andersen.

CONCLUSION

Based upon the above arguments, the City of Henderson respectfully requests that this Court grant the Petition for Writ of Certiorari.

DATED this 31 day of August, 2020.

NICHOLAS VASKOV
Henderson City Attorney

By: _____

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VERIFICATION

MARC M. SCHIFALACQUA, ESQ., being first duly sworn under oath, subject to the penalty for perjury pursuant to Nevada law, and in conformity with NRS 53.045, deposes and says as follows:

1. I am an attorney duly licensed to practice before all courts in the State of Nevada, over 18 years old and competent to testify as to the matters herein;
2. I am the attorney of record for the Petitioner, CITY OF HENDERSON, in the above matter;
3. I make this Verification based upon facts within my own knowledge, save and except as to those matters alleged upon information and belief, and as to those matters, I believe them to be true; and,
4. I have personal knowledge pertaining to the facts stated herein, or have been informed of these facts and believe them to be true.

DATED this 31 day of August, 2020.

MARC M. SCHIFALACQUA, ESQ.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition complies with the formatting requirements of NRAP 32(a)(5), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Petition has been prepared in a proportionally spaced typeface using Word 365 in 14-point Times New Roman.

2. I further certify that this Petition complies with the page- or type-volume limitations of NRAP 21(d) because, excluding the parts of the Petition excepted by NRAP 32(a)(7)(C) it is proportionately spaced, has a typeface of 14 points or more, and contains 8,789 words.

3. Finally, I hereby certify that I have read this Petition, 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 Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 31 day of August, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31 day of August, 2020, a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI was served via electronic service through the Court's electronic filing system per NEFCR 9 to the following:

N/A

and that the same was served via US mail, certified postage prepaid, and addressed as follows:

Michael D. Pariente, Esq.
3960 Howard Hughes Parkway Ste 615
Las Vegas, NV 89169

Hon. Trevor Atkin
Eighth Judicial District Court
Regional Justice Center, Dept. 8
200 E. Lewis Avenue
Las Vegas, NV 89101

City of ~~Henderson~~ Employee

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DAO

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CITY OF HENDERSON

Plaintiff/Respondent,

vs.

STEVEN CULLEN.

Defendant/Petitioner.

DIST. COURT CASE NO.: A-20-809107-W

DEPT NO.: VIII

MUNI. COURT CASE NO.: 19CR008881

MUNI. COURT DEPT. NO.: 3

DECISION AND ORDER

I.
Procedural History

This matter has as its genesis the September 8, 2019 arrest of Defendant/Peitioner, Mr. Steven Cullen ("CULLEN"), who was initially charged with misdemeanor battery constituting domestic violence under NRS 200.481(1)(a), NRS 33.018 and Henderson City Charter 2.140. Shortly thereafter, the Henderson City Council enacted the new domestic violence ordinance codified as City Ordinance 3632[1] on October 15, 2019. Two days later, on October 17, 2019, the Henderson City Attorney's Office amended the charges against CULLEN to one count of Battery Constituting Domestic Violence, charged under Henderson Municipal Code (HMC) § 8.02.055.

CULLEN in the lower court filed a Demand for Jury Trial and Motion to Dismiss requesting the Henderson Municipal Court either dismiss the Amended Criminal

[1] Henderson Municipal Code (HMC) § 8.02.055.

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Complaint or grant him a jury trial.[2] Henderson Municipal Court Judge Rodney Burr denied CULLEN's motion in a written decision on January 13, 2020.

CULLEN thereafter filed a Petition for Writ of Mandamus with this Court on January 23, 2020. CULLEN's prayer within his Petition for Writ of Mandamus was for issuance of an order requiring Judge Burr to afford him a jury trial, or in the alternative, dismiss the amended criminal complaint. The basis of his prayer was again, that HMC § 8.02.055 violates the *Ex Post Facto* Clause and is in direct conflict with NRS 202.360(1)(a) and thus in contradiction of NRS 266.321(1) and (2). Plaintiff/Respondent City of Henderson ("HENDERSON") filed its Answer to Cullen's Petition on February 19, 2020. Counsel for the parties thereafter agreed to submit the matter on their respective briefs.

This Court entered a Minute Order on March 19, 2020, GRANTING CULLEN's Petition for issuance of Writ of Mandamus, ordering Judge Burr to provide him the requested jury trial. The corresponding written Order was filed with the Eighth Judicial District Court Clerk on April 11, 2020; however, it did not identify ether the facts or legal basis upon which the Writ of Mandamus was issued.

Plaintiff/Respondent HENDERSON filed an Amended Motion for Reconsideration and/or Clarification of Order Granting Writ of Mandamus and For Stay of Order Granting Writ of Mandamus on April 13, 2020 to which Defendant/Petitioner CULLEN filed an Opposition. Oral argument was entertained by this Court on May 14, 2020 via telephone conference which concluded with this Court agreeing to reconsider and clarify its April 11, 2020 Order. This Court at the conclusion of the hearing ruled that its previous Order of April 11, 2020 granting CULLEN's Petition for Writ of Mandamus stood and that Judge Burr was ordered to provide CULLEN his requested jury trial.[3] This Court at the conclusion of the hearing also granted HENDERSON's request for an immediate stay of the instant Order to allow for review by the Nevada Supreme Court.

II.
Factual Background

The legal backdrop of CULLEN's arrest was the Nevada Legislature's well-intentioned desire to afford victims of domestic violence additional protections. It did this in 2017 by amending the penalties associated with a conviction under NRS 200.485(1)(a) such that persons convicted of domestic violence under NRS 200.485 are prohibited from owning, possessing or having under his or her control any firearm. It was this added penalty, touching upon a person's Constitutional right to bear arms, which caused the Nevada Supreme Court in *Andersen v. Eighth Judicial District Court*, 135 Nev. 321, 448 P.3d 1120 (2019) to revisit its decision in *Amezcua v. Eighth Judicial District Court*, 130 Nev.

[2] The basis cited by Cullen in his motion was that newly enacted (HMC) § 8.02.055 violates the *Ex Post Facto* clause of the United States Constitution and Nevada Constitution and impermissibly conflicts with NRS 202.360(1)(a).

[3] This Court at the conclusion of the hearing, at the request of the City of Henderson, recognized that the City of Henderson possesses the authority to accommodate and administer jury trials.

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45, 319 P.3d 602 (2014).[4] The *Andersen* Court succinctly explained its reasoning and disitinction from *Amezcua* as follows:

> In *Amezcua*, we held that a federal regulation restricting a convicted domestic batterer's possession of a firearm was not a direct consequence of a Nevada conviction for misdemeanor domestic battery. (Citation omitted.) In so holding, we relied partly on the United States Supreme Court's reasoning 'that the statutory penalties on other States are irrelevant to the question *whether a particular legislature deemed a particular offense 'serious'.*" (Citations omitted.) But now, although not included in the statue proscribing misdemeanor domestic battery, our Legislature has imposed a limitation on the possession of a firearm in Nevada that automatically and directly flows from a conviction for misdemeanor domestic battery. In our opinion, this new penalty – a prohibition on the right to bear arms as guaranteed by both the United States and Nevada Constitutions – 'clearly reflect[s] a legislative determination that the offense [of misdemeanor domestic battery] is a serious one." (Original emphasis.) Id. at 324.

The consequential impact of *Andersen* was that persons charged with misdemeanor battery constituting domestic violence were entitled to a jury trial, for if convicted of the charged offense, they faced the "serious" consequence of losing Constitutional their right to bear arms.

Plaintiff/Respondent, HENDERSON, within a month of the *Andersen* decision, enacted HMC §8.02.055. Notably, and critical to the instant analysis, this ordinance removes as a penalty of conviction of Battery Constituting Domestic Violence, the prohibition of owning/possessing/controlling a firearm. Thus, falling under an *Amezcua* analysis versus an *Andersen* analysis as it pertains to whether a right to a jury trial attaches to the charged offense.

III.
Issues Before the Court

1. Does this Court have the authority to consider and grant CULLEN's Petition for Writ of Mandamus?

2. Does HMC §8.02.055 impermissibly conflict with NRS 202.360(1)(a) and (1)(b)?

3. Does HMC §8.02.055, as applied to Defendant/Petitioner CULLEN, violate the Ex Post Facto Clauses of the United States Constitution and the Nevada Constitution?

[4] The *Amezcua* Court concluded that the offense of first-offense domestic battery and the penalties then attached thereto did NOT "clearly indicate a determination by the Nevada Legislature that this is a serious offense to which the right to a jury trial attaches." *Amezcua*, 130 Nev. at 50, 319 P.3d at 605.

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IV.
Discussion

This case presents an intersection of Constitutional rights, legal protections for victims of domestic violence, and a municipality's authority to regulate its judicial affairs. The Nevada Legislature in its desire to afford victims of domestic violence additional protection enacted NRS 202.360 which proscribed that a person shall not own/possess/control a firearm if they have been convicted in this State or any other state of a misdemeanor crime of domestic violence. This duly enacted statute adversly impacts a person's Constitutional right to bear arms if convicted, and thus, deemed a "serious" offense under the *Andersen* reasoning, thereby invoking a person's Sixth Amendment right to request a speedy, impartial, jury trial.

The practical consequence of the Nevada Legislature's enactment of NRS 202.360 and the Nevada Supreme Court's decision in *Andersen* has presented HENDERSON and municipalities throughout the State with a Hobson's choice – provide persons charged with battery constituting domestic violence a jury trial if requested, or amend their municipal codes to remove the penalties enacted by the Nevada Legislature in NRS 202.360. HENDERSON chose the latter, asserting it possessed the inherint power to do so, citing *In Donahue v. City of Sparks*, 111 Nev. 1281, 903 P.2d 225 (1995) and *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 14 P.3d 1275 (2000).

Plaintiff/Respondent HENDERSON in its Amended Motion for Reconsideration and/or Clarification of Order expounded upon the practical implications it faced following the *Andersen* decision, explaining that The Henderson Municipal Court handles between 1,100-1,200 cases of Battery Constituting Domestic Violence every year and that no defendant facing such a charge has ever received a jury trial. (See, p.5, lines 9-12.) As to specific details in the "post-*Andersen* climate" HENDERSON offered the following:

> The Henderson Municipal Court has no infrastructure in place to handle jury trials at this time. There are no jury boxes or deliberation rooms in the Henderson Municipal Courts. There is no jury commissioner, nor the entity charged with sending jury summonses or otherwise empaneling a jury. There are no allocated resources to immediately begin conducting jury trials. Perhaps more importantly, defendants are challenging the Henderson Municipal Court's authority to conduct a jury trial on a daily basis in this post-Andersen climate.
>
> Many of these defendants won't actually want a jury trial, but they will be advised by their defense attorneys that simply demanding a jury trial will tie up their case for months or years before trials can be set, delaying justice for the 1,100-1,200 victims in these cases who have a constitutional right to 'the timely disposition of the case following the arrest of the defendant.'...The decision by this Court that Petitioner is entitled to a jury trial, without clear, articulated reasoning for the basis of Petitioner's right will have far-reaching consequences, negatively impacting prosecution of

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domestic violence and impairing the constitutional rights of victims.

Id. pages, 5-6, lines 19-7. This Court is neither unsympathetic to HENDERSON's post-*Andersen,* situation, nor is it naïve to the practical consequences of how future accused domestic battery cases will be charged or negotiated. However, this Court is duty bound to follow and interpret the Constitution and duly enacted laws of the Nevada Legislature as written. It is also bound by the doctrine of Stare Decisis.

Plaintiff/Petitioner CULLEN has asserted that Henderson's enactment of HMC §8.02.055 was impermissible, as it is in direct conflict with NRS 202.360. Moreover, in his particular case, the criminal charges filed against him violate the *Ex Post Facto Clauses* of the United States Constitution and the Nevada Constitution.

V.
Order

This Court having reviewed all the moving papers filed on behalf of the parties and entertaining oral argument of the parties on May 14, 2010, hereby GRANTS Respondent HENDERSON's motion for reconsideration and/or clarification to the limited extent it agrees that clarification of its April 11, 2020 Order Granting Petitioner CULLEN's Petition for Writ of Mandamus requires clarification.

This Court AFFIRMS its Order of April 11, 2020 believing it was a proper exercise of discretion that it possessed the authority to consider CULLEN's Petition for Writ of Mandamus, as the issues raised therein involved important issues of law and public policy for the reasons and legal basis cited in CULLEN's Petition for Writ of Mandamus.

This Court AFFIRMS its Order of April 11, 2020 based on the finding that even assuming *arguendo* HENDERSON possessed the inherent powers to regulate its own affairs as it pertained to its judiciary, HMC §8.02.055 is in direct conflict with NRS 202.360 for the reasons and legal basis cited in CULLEN's Petition for Writ of Mandamus, in particular, NRS 266.321 and HCC §2.140.

This Court AFFIRMS its Order of April 11, 2020 based on the finding that even assuming *arguendo* HENDERSON's enactment of HMC §8.02.055 was permissible and not afoul of NRS 266.321, it was violative of the *ex post facto* clauses contained within the United States Constitution and the Nevada Constitution for the reasons and legal basis cited within CULLEN's Petition for Writ of Mandamus.

Dated: June 19, 2020.

Trevor L. Atkin
District Court Judge, Department 8

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Certificate of Service

I hereby certify that on the date filed, a copy of this Order was electronically served on all parties registered through the Eighth Judicial District Court EFP system or mailed to any party or attorney not registered with the EFT system.

Lynne Lerner
Judicial Executive Assistant

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