IN THE SUPREME COURT OF THE STATE OF NEVADA

NATHAN OHM,
Petitioner,

vs.

HON. KATHLEEN DELANEY, and the EIGHTH JUDICIAL DISTRICT COURT,
Respondents,

and,

CITY OF HENDERSON,
Real Party in Interest.

CASE NO: 81960

District Court Case No: A-20-810452-W
Dept. No: 25

HMC Case No: 19CR002297
19CR002298
Dept. No: 1

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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MEMORANDUM OF POINTS AND AUTHORITIES

ISSUES

Should a Writ of Certiorari issue when a District Court: 1) allows a city to prosecute domestic violence under a municipal ordinance instead of the Nevada Revised Statute that has the same elements and penalties, and then 2) remands the case to a Municipal Court for further proceedings because the defendant is not entitled to a jury trial for the petty offense when his second amendment rights are not in jeopardy.

STATEMENT OF THE CASE AND FACTS

On February 22, 2019, the City of Henderson (hereinafter "City") filed a criminal complaint charging Nathan Ohm ("Ohm") with two counts of Battery Constituting Domestic Violence – NRS 200.481(1)(a), 200.485(1)(a), 33.018, Henderson Municipal Charter, Section 2.140. See City's Appendix, Bates 001 (hereinafter styled CA 001). On September 12, 2019, the Nevada Supreme Court released an Opinion in the case of Andersen v. Eighth Judicial District Court et al., 135 Nev. 321, 448 P.3d 1120 (2019).

On or about October 21, 2019, City filed an amended Criminal Complaint charging Ohm with the same incidences of Battery Domestic Violence pursuant to Henderson Municipal Code § 8.02.055. CA 002. Based on the Andersen case,

Ohm filed a written demand for a jury trial, and on November 4, 2019, the Municipal Court issued a briefing schedule. After briefing and arguments, the court rendered its decision on January 13, 2019. While Ohm claimed that he was the victim of various constitutional violations, the court denied his motion because he was not entitled to a jury trial when charged with a violation of the city ordinance at issue.

Ohm next filed a Petition for Writ of Mandamus in the Eighth Judicial District Court on February 13, 2020, where it was assigned to Dept. 25, the Honorable Judge Kathleen Delaney. After briefing and oral arguments, Judge Delaney denied Ohm's Petition. The Petition was formally denied in a written order on August 26, 2020. See Petitioner's Appendix Vol 3., Bates 529 (hereinafter styled 3 PA 529). The order denied all issues Ohm raised in his pleadings and during oral arguments. 3 PA 528. The written order also noted that the Henderson City Council balanced policy considerations when deciding to enact the ordinance at issue, and that the Henderson City Council neither abused their discretion nor acted in an arbitrary or capricious manner. 3 PA 530. Additionally, the District Court determined that the Henderson Municipal Court possesses the lawful authority to conduct jury trials for misdemeanor domestic battery offenses. 3 PA 533-34.

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

STANDARD OF REVIEW

Ohm requested that this Court entertain the instant petition for writ of certiorari. While City originally opposed the issue of a writ because Ohm possessed an adequate remedy at law (bench trial), City agrees acceptance is appropriate 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. See NRS 34.02093; see also Cornella v. Justice Court, 132 Nev. 587, 591 (2016); Hiibel v. Sixth Judicial Dist. Court ex rel. Cty. Of Humboldt, 118 Nev. 868, 871, 59 P.3d 1201, 1204 (2002); City of Las Vegas v. Eighth Judicial Dist. Court ex rel. Cty. Of Clark, 118 Nev. 859, 861, 59 P.3d 477, 479 (2002). This is a matter of statewide importance that requires clarification for victims of domestic violence.

ARGUMENT

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

Ohm erroneously argues that convictions under HMC § 8.02.055 qualify as predicate offenses under the federal definition of "misdemeanor crime of domestic

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violence," adopted in NRS 202.360 (hereinafter "TFD"), triggering a prohibition on possessing firearms, therefore requiring jury trials. However, the lower court correctly found that such convictions do not meet TFD, do not trigger the loss of firearm rights under Nevada law, and do not require jury trials.

The Sixth Amendment guarantees the right to jury trials for "serious" offenses, not "petty" offenses. Amezcua v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 130 Nev. 45, 46–47, 319 P.3d 602, 603 (2014) (finding the legislature had not intended domestic battery to be "serious," so the right to a jury trial did not attach). Following Amezcua, the Nevada Legislature amended NRS 202.360 to criminalize possession of a firearm when the defendant "[h]as been convicted in this State or any other state of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33)."

That legislative change is the distinction between Amezcua and Andersen: the amendment, by limiting the constitutional right to possession of firearms under state law, entitled those affected to jury trials. Andersen v. Eighth Judicial District Court et al., 135 Nev. 321, 324, 448 P.3d 1120, 1124 (2019). Accordingly, if a criminal conviction would *not* trigger prohibition of firearms possession under NRS 202.360, the defendant would *not* be entitled to a jury trial. See Amezcua, supra.

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

The plain language of NRS 202.360 criminalizes possession of a firearm by a person "convicted in this or any other State of a misdemeanor crime of domestic violence" *only* "as defined in 18 U.S.C. § 921(a)(33)." Ohm highlights several other phrases in the federal code but glosses over the mandatory jurisdictional source of law requirement (hereinafter "JSLR"), under which local law convictions are disqualified. NRS 202.360, 18 U.S.C. § 921(a)(33)(A)(i).

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

NRS 202.360 and TFD require a conviction for an offense that is a misdemeanor under Federal, State, or Tribal law. The plain language of the statute is clear, an offense under a municipal ordinance is not covered.

Primarily, this issue is narrow at best: whether convictions under HMC § 8.02.055 (hereinafter "HMCBDV") qualify as predicate convictions under the following statutory scheme:

> 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[. (T)he 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

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> 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. (...)] NRS 202.360; 18 U.S.C. § 921(a)(33).

NRS 202.360 (inserting TFD).

When a statute "is clear on its face, a court cannot go beyond the statute in determining legislative intent." Id.; see also State v. Catanio, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). This Court has consistently ruled that the clear and plain statutory language is controlling. State v. Lucero, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011); We the People Nevada v. Secretary of State, 124 Nev. 874, 881, 192 P.3d 1166, 1170–71 (2008).

Here, the language is clear with only one reasonable interpretation. Congress delineated three sources from which predicate misdemeanor convictions qualify: Federal, State, and Tribal. No ambiguity exists, and none of the sources is "municipal."

Nonetheless, Ohm exhaustively explains what he contends is the "plain meaning" of TFD, never once addressing the JSLR. Yet, the plain meaning is facially clear and does not require such lengthy explanations.[1]

[1] Analysis beyond the plain language, including canons of statutory interpretation, were fully briefed in the lower court and align with City's position. 1 PA 46-62.

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Congress *did* include the word "local" in other sections of 18 U.S.C. § 922 (see, e.g., 18 U.S.C. § 922(a)(2)(A)), but chose to exclude local and municipal convictions from TFD. C.f., Violence Against Women Act, Pub. L. No. 109-162, § 908, 119 Stat. 2960 (2006) (adding Tribal law to TFD and amending dozens of other portions of §921 to distinguish "local law" from state and federal law). We can infer this choice was deliberate. See Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003).

Although federal case law would ordinarily not be binding on Nevada courts, this issue is unique because this Court must interpret federal statutory language. The federal courts that have addressed this issue all agree with the lower court: municipal law convictions do not qualify under the plain language of TFD.

In United States v. Pauler, the defendant was convicted for violating 18 U.S.C. § 922(g)(9) (the federal equivalent to NRS 202.360) for possessing a firearm after a prior conviction of domestic violence under Wichita, Kansas municipal code. 857 F.3d 1073, 1075 (10th Cir. 2017). The Tenth Circuit, after applying several canons of statutory interpretation, found each– most importantly the plain language– led to the conclusion that municipal law convictions are *not* predicate offenses under TFD's JSLR. The Court further opined that it would be inappropriate to find otherwise, despite the public policy goal of keeping guns out of the hands of abusers, when the plain language must control. Id., at 1077.

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Ultimately, the court held that a "a misdemeanor under Federal, State, or Tribal law" excludes convictions under municipal ordinances, prohibiting the defendant's conviction under 18 U.S.C. § 922(g)(9). Id., at 1078; see also United States v. Enick, No. 2:17-CR-00013-BLW, 2017 WL 2531943, at *1 (D. Idaho June 9, 2017) (unpublished) (finding that the plain language of TFD excludes municipal law convictions) (*included for reference at* CA 005-007).

The Nevada United States District Court similarly held that a conviction under Reno Municipal Code did not make the defendant a prohibited person under TFD, noting that, although the municipal court could have convicted a defendant of a state law misdemeanor, his conviction nonetheless did not meet TFD. United States v. Wagner, No. 317CR00046MMDWGC, 2017 WL 4467544, at *1, *3 (D. Nev. Oct. 5, 2017) (unpublished) (*included for reference at* CA 008-010). The Court also considered that the Gun Control Act was enacted to keep guns out of the hands of domestic abusers but found that because the statutory language was unambiguous, no other statutory interpretation was necessary. Nonetheless, the Court stated the legislative history demonstrated that Congress *intended* to exclude local law convictions from the qualifying predicate offenses. Accordingly, the Court dismissed the Superseding Indictment. Id., at *3.

The alleged novelty of Ohm's argument cannot change plain statutory language. All three federal courts that analyzed 18 U.S.C. 921(A)(33)(a),

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notably all post-Hayes, infra, concluded that the plain language unambiguously excludes municipal law convictions.

Moreover, Congress itself acknowledged that 18 U.S.C. 921(A)(33)(a) excludes municipal law convictions when proposing the Violence Against Women Reauthorization Act of 2019 (VAWA), containing an amendment to TFD to include "municipal" In the JSLR. VAWA, H.R. 1585, 116th Cong. § 801 (2019-2020) (available at https://www.congress.gov/bill/116th-congress/house-bill/1585/text). Even Congress agrees municipal law convictions are excluded under current law.

2. Ohm's interpretation of the federal definition is based on a specious argument, a dissenting opinion, and an incorrect interpretation of case law.

"Offense" does not mean "conduct." Despite the plain language, Ohm improperly re-frames the argument by focusing on what constitutes a federal crime, redefines "offense" using out-of-context language from a dissent, and misinterprets case law. The plain language of NRS 202.360, however, requires a conviction to meet the JSLR of TFD.

It is specious to consider the language of 18 U.S.C. § 922(d)(9), including "convicted in any court," because NRS 202.360 *only* adopted 18 U.S.C. §

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21(a)(33)(A).[2] Any consideration of additional federal statutory language is outside the realm of analysis.

Ohm incorrectly contends that TFD covers HMCBDV because the *conduct* underlying a HMC conviction would also violate state law. That defies common sense – it does not matter what law a person's conduct *could* have broken; it matters under what law the conviction was secured.

In arguing that "offense" and "conduct" are interchangeable, Ohm cites Texas v. Cobb, 532 U.S. 162, 186 (2001). However, Ohm intentionally omits that his definition of "offense" comes from the *dissent*, despite the City noting this flaw previously below. Id.; See United States v. Ameline, 409 F.3d 1073, 1083 n.5 (9th Cir. 2005) (dissenting opinions are not binding). Ohm's omission creates the misleading and false impression of binding authority. But even the Cobb dissent acknowledges there are multiple uses for "offense" within the legal field depending on the context. Cobb, 532 U.S. at 177.

While Ohm's analysis wrongly equates the word "offense" to "conduct," "offense" in the context of TFD actually means violations of law, *i.e.* crimes. See United States v. Shill, 740 F.3d 1347, 1351 (9th Cir. 2014) (citing *Black's Law Dictionary* (9th ed. 2009)) (discussing what qualifies as a predicate conviction

[2] In fact, NRS 202.360 specifically limited convictions to those in "this State or any other State," whereas 18 U.S.C. § 922(d)(9) includes convictions in "any court."

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offense relating to 18 U.S.C. § 2422(b)). Ohm claims NRS 202.360 is not concerned with a finding of guilt; however, it specifically requires a conviction. For example, under Ohm's interpretation, a defendant could have been convicted of *any* municipal misdemeanor in any court, but if the *conduct* underlying the valid conviction would have also qualified as a misdemeanor domestic battery under NRS, then the conviction would make the defendant a prohibited person under TFD. That is significantly more expansive than NRS 202.360 and TFD,[3] requiring the prosecution to introduce the underlying facts of predicate convictions at trial. See Sanders v. State, 96 Nev. 341, 343, 609 P.2d 324, 326 (1980) ("the prosecution should only be allowed to prove the fact, instead of the nature, of a prior conviction...").

Ohm's reliance on and analysis under Hayes is similarly flawed. See United States v. Hayes, 555 U.S. 415 (2009). A careful reading of Hayes negates Ohm's version of the "conduct" vs. "offense" distinction, as well as Ohm's other faulty allegation regarding the City's confusion between "conviction" and "offense."

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[3] Even if this Court agrees with Ohm's convoluted interpretation, or believes there is ambiguity, the rule of lenity requires this Court to find that a narrower class of prior offenses qualify under NRS 202.360. See United States v. Davis, 139 S. Ct. 2319, 2333, 204 L. Ed. 2d 757 (2019) ("the rule of lenity[teaches] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor.) Here, the rule of lenity would apply to a defendant charged under NRS 202.360, not to support Ohm's position in this case.

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Ohm incorrectly contends that the Hayes Court equated the term "offense" to "conduct," but the Hayes court never considered whether domestic violence offenses charged under local law are included in TFD or found that the defendant's conduct was sufficient to prove a predicate offense.

Hayes addressed a narrow question: "[m]ust the statute describing the predicate offense include, as a discrete element, the existence of a domestic relationship between offender and victim?" Id., at 421. Hayes never considered the JSLR. Ultimately, the Court narrowly held "that the domestic *relationship*, although it must be established beyond a reasonable doubt in a § 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense." Id., at 418 (emphasis added).

Hayes broke into distinct parts the "offense" for which the defendant must have been convicted under TFD. "As structured, § 921(a)(33)(A) defines 'misdemeanor crime of domestic violence' by addressing in clause (i) the meaning of 'misdemeanor' and, in turn, in clause (ii), 'crime of domestic violence.'" Hayes, at 423–24. Clause (ii) is subsequently divided again into (1) the "use of force" element which, like the JSLR, must be proven through the statute of conviction, and (2) who the convicted crime was *committed by*, i.e. the relationship, which may be proven externally from the conviction. See also Shirey v. Los Angeles Cty. Civil Serv. Com., 216 Cal. App. 4th 1, 9, 156 Cal. Rptr. 3d

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517, 522 (2013) ("To qualify as a *predicate misdemeanor conviction* for domestic violence *under federal law*, the criminal *statute under which the individual was convicted* must contain as an element "the use or attempted use of physical force, or the threatened use of a deadly weapon." [emphasis added]); Small v. United States, 544 U.S. 385, 386, 125 S. Ct. 1752, 1753, 161 L. Ed. 2d 651 (2005) (finding that the JSLR means the conviction must be under the appropriate source of law in § 921(a)(20)(A)).

A subsequent court summarized Hayes as follows:

> The Supreme Court concluded that the phrase "an offense that ... has, as an element, the use or attempted use of physical force" was subject to the categorical approach, while the phrase "committed by" a person who has a domestic relationship with the victim, focused on a defendant's conduct and was subject to the circumstance-specific approach. Hayes, 555 U.S. at 421-22; see also United States v. Doss, 630 F.3d 1181, 1197 (9th Cir. 2011) (analyzing 18 U.S.C. § 3559(e)(1) and concluding that the phrase "a prior 'sex offense' conviction" required application of a categorical approach and the phrase "in which a minor was the victim" called for application of a circumstance-specific approach and had to be proven beyond a reasonable doubt by the Government at trial).

United States v. Casey, No. 2:20-CR-0020-RAJ, 2020 WL 1940446, at *2 (W.D. Wash. Apr. 22, 2020), appeal dismissed, No. 20-30106, 2020 WL 4792585 (9th Cir. June 24, 2020). The JSLR of section (i) is subject to the same categorical approach as the use of force element of section (ii) requiring proof of conviction, while the relationship portion of section (ii) is subject to the circumstance-specific approach. Essentially, the Hayes court held the *relationship* can be proven by

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evidence outside the conviction itself but said nothing about the defendant's *conduct* being proven outside of the "discrete elements" of the statute under which the defendant was charged and ultimately convicted.

The clause at issue here is the definition of misdemeanor in section (i), whereas Hayes focused on section (ii). To qualify under TFD, though, a conviction must meet both the section (i) and section (ii) requirements. A conviction under local law, like HMCBDV, does not meet the JSLR of section (i). The relationship is what can be proved outside of the conviction, but the conviction itself must be under the appropriate JSLR and contain the appropriate force element.

Further, unlike in Hayes, this Court need not examine the legislative intent to determine whether Congress intended to include local laws because the plain language is unambiguous. See Wagner, 2017 WL 4467544 at *3 (citing United States v. Williams, 659 F.3d 1223, 1225 (9th Cir. 2011)); Enick, 2017 WL 2531943 at *2. But even if this Court wishes to look at the legislative intent, the Federal District Court in Enick found the legislative history of TFD "strongly suggests that Congress *purposefully* excluded local law from the list of predicate offenses." Id. (emphasis added). The Tenth Circuit also rejected the public policy argument. Pauler, 857 F.3d 1073 at 1077.

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Separately, Ohm improperly relies upon an inaccurate depiction of U.S v. Perkins to claim "offense" means conduct. No. 2:12-CR-00354-LDG CW, 2012 WL 6089664 (D. Nev. Dec. 6, 2012) (reference 2 PA 268-70). Perkins's conviction is inapposite because Perkins was charged under *State law*, whereas Ohm has been charged under a *municipal code*. See Perkins Certificate of Court Disposition, CA 011-022. In Perkins, the court considered the admissibility of the later reduction of his misdemeanor battery conviction to disturbing the peace.

Ohm triumphantly points to the Perkins holding that the federal case against Perkins could proceed and further claims that "[t]he Court did not distinguish between the source of law or the type of court from which the underlying conviction originated, so long as the conduct qualifies as a misdemeanor crime of domestic violence per 18 U.S.C. § 921(a)(33)(A)." Pet.'s Writ at 25. Ohm once again misrepresents the Perkins holding and analysis. The "misdemeanor crime of domestic violence" of which Perkins had been convicted in municipal court was under *state law*, not *municipal* law.

Furthermore, Perkins *never held*, as Ohm claims, that the conviction qualified as a predicate offense because the *conduct* qualified under TFD. Instead, the Court held the relevant inquiry was Perkins's status as a person with a qualifying conviction *at the time* that he possessed the firearm. The subsequent reduction to disturbing the peace was irrelevant because *at the time* he possessed

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the firearm, his "status" was that of a person convicted of a crime qualifying under TFD. Perkins, at *2. The Perkins court never discussed the underlying conduct of Perkins's conviction, and never even insinuated that the disturbing the peace conviction would have qualified under TFD had he possessed the firearm *after* his conviction was reduced.[4]

Ohm attempts to divide "conviction" and "offense" into separate concepts, while arguing that "conduct" and "offense" are interchangeable, but that is an unfair reading of the statutory text in context. Ohm's fill-in-the-blanks exercise also omits the JSLR. Ohm's attempts to muddy the waters are unpersuasive because municipal law convictions fall squarely outside TFD.

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

When the firearms prohibition of NRS 202.360 does not apply, neither does the right to a trial by jury for a domestic battery offense.[5] Compare Amezcua, 130 Nev. at 46–47, 319 P.3d at 603 with Andersen, 135 Nev. at 324, 448 P.3d at 1124. Because NRS 202.360 excludes municipal law convictions, no gun penalty

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

[5] For example, a defendant charged with the state law crime of domestic battery upon their parent does not meet TFD. Such a defendant would not risk losing their gun rights and, therefore, is not entitled to a jury trial.

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is associated with a conviction under HMCBDV. Violation of HMCBDV is a misdemeanor with a maximum term of imprisonment of six months— a presumptively petty offense— and it is Ohm's burden to prove 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. Ohm cannot do so considering the plain language of NRS 202.360.

To overcome said presumption, Ohm must "demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a serious one." Blanton, 489 U.S. at 543, 109 S.Ct. 1289. Conversely, then, if the legislature intends for an offense to be petty, then no right to jury trial attaches and Ohm cannot overcome the presumption. The legislative intent could not be any clearer in this instance. HMCBDV was passed specifically with the intent to remove the NRS 202.360 penalty, make the offense "petty" per Amezcua, and continue to legally hold bench trials. Accordingly, one facing the charge is *not* entitled to the right to a jury trial.

For all the reasons above, Convictions under the HMC do not evoke the right to a jury trial, and this Court must deny the Petition.

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

A. The ordinance at issue does not impede a fundamental right.

Ohm's equal protection argument is baseless. Ohm cites to cases that do not suggest in any way that access or denial to a jury trial creates a classification entitled to an Equal Protection analysis. The cases Ohm cited involved (a) education funding for undocumented children (b) a law that determines the number of jurors (c) electoral systems that discriminate against minorities (d) reimbursement for abortions under Medicaid (e) a law that impinges on the right to marry— clear classifications that provoked an Equal Protection analysis. None of these cases addressed the issue here: there is no fundamental right to a jury trial for a petty offense. That issue is settled. See Blanton v. N. Las Vegas Mun. Court, 103 Nev. 623, 629, 748 P.2d 494, 497 (1987), aff'd sub nom. Blanton v. City of N. Las Vegas, Nev., 489 U.S. 538, 109 S. Ct. 1289, 103 L. Ed. 2d 550 (1989) (discussing right to a jury trial only for serious offenses). See discussion, supra.

The only true question here is whether the prosecutor possessed the discretion to charge Ohm with domestic battery in violation of the municipal code, as opposed to state law. Provided there was probable cause to support the charge, and there is no claim of discrimination regarding a protected class, the prosecutor's

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discretion must be respected. Pursuant to binding caselaw from both the U.S. and Nevada Supreme Courts, the entire inquiry ends there.

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

For example, 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. Hernandez argued the prosecutor's decision to charge one offense over another violated equal protection and fair trial

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principles. This Court fully dismissed this constitutional attack, and upheld prosecutorial discretion in charging decisions 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, 118 Nev. at 523, 50 P.3d at 1107 (emphasis added). The reasoning in Hernandez also aligns with The United States Supreme Court case that addressed similar constitutional attacks against prosecutorial discretion. United States v. Batchelder, 442 U.S. 114 (1979).

Like everything in criminal law, additional potential punishments for a particular crime yield to additional procedural and substantive rights. For instance, a criminal defendant would be afforded the constitutional right to an attorney in a criminal misdemeanor case under the Sixth Amendment, if the prosecutor sought jail time for a particular charge. Scott v. Illinois, 440 U.S. 367 (1979). However, if the prosecutor later chose to only seek a monetary fine without the threat of any jail time, the defendant would not be afforded the right to counsel under the Sixth Amendment. NRS 178.397. A prosecutor may always seek to prosecute a case in

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any constitutionally permissible manner, and when a defendant is not subject to enhanced penalties, certain procedural rights are no longer required.

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

In the instant case, the prosecutor chose to file the charge of domestic battery under the HMCBDV (a petty offense) as opposed to the NRS (a serious offense). Absent any discriminatory practices by the City Attorney, which Ohm has not alleged, the Nevada and U.S. Supreme Courts have been clear that the judiciary should not second guess a prosecutor's discretion to charge one offense over another, and a prosecutor's charging decision will not give rise to an equal protection claim.

Ohm's situation is no different. He alleges the purpose of enacting HMCBDV was solely to strip away a domestic abuser's right to a jury trial.

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Nothing could be further from the truth. The express purpose of enacting the HMCBDV was always well-defined by the Henderson City Council — the City has an unwavering interest in the protection of victims of violent crime. Since challenges against the City's authority to conduct jury trials remain, HMCBDV was necessary to continue to hold violent offenders accountable in the City of Henderson.

No guarantee of victim safety could be made if these cases were sent to the Clark County District Attorney's Office – an extraordinary, yet horribly overburdened agency.

B. Domestic battery defendants are treated similarly in Henderson.

HMCBDV does not violate equal protection. Ohm's claim fails because equal protection is not at issue; prosecutorial discretion is at issue, and it is wide-ranging as related to charging authority. Even if HMCBDV created a classification that impacted a fundamental right, the code section is a narrowly-tailored law created for the compelling state interests of public safety, reduction of domestic violence, and victim protection.

Since there is no fundamental right affected here, equal protection can only be implicated when *a particular law* treats similarly situated people differently. In re Candelaria, 126 Nev. 408, 417, 245 P.3d 518, 523 (2010). The threshold question in an Equal Protection analysis is whether a statute treats similarly

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situated people disparately. Rico v. Rodriguez, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005); Vickers v. Dzurenda, 134 Nev. 747, 748-49, 433 P.3d 306, 308 (2018). Equal Protection is not impacted when two different jurisdictions make separate prosecutorial decisions and charge cases under an entirely distinct body of law.

Ohm has not shown, or even alleged, that the enforcement of the HMCBDV is either based on a lack of probable cause or intentionally discriminatory against a protected class. Whether or not a completely unrelated defendant is, or is not, entitled to a jury trial in a separate jurisdiction or charged under a different statute has no bearing on the constitutionality of the decision to charge Ohm under the Henderson Municipal Code.

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

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rights simply because they were charged under federal law versus state law (or city ordinance). This alone does not create an equal protection violation or even trigger an equal protection analysis.

Interestingly, in his instant petition, Ohm retreats from legal authority that informed the lower courts that this specific issue has been considered by this Court previously. See Petition for Writ of Mandamus, 2 PA 340-42; Cf Pet.'s Writ at 40-41 (removing section addressing Hudson to instead rely on argumentum ad passions)[6]. In Hudson v. City of Las Vegas, 81 Nev. 677, 679, 409 P.2d 245, 246 (1965), the Court explained the Petitioner's position, as follows:

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

Similar to the defendant in Hudson, Ohm argues that he is entitled to a jury trial simply because he would be allowed a jury trial in a different jurisdiction (Henderson Justice Court) under the NRS. However, the Hudson Court held that

[6] City addressed Ohm's reckless claim of a territorial dispute during oral argument in District Court. See Transcripts, Petition for Writ of Mandamus Vol 3., pp. 489-492. Additional background for the practical and policy considerations for prosecution of domestic violence can also be referenced in the companion case, Steven Cullen v. Henderson Municipal Court, Case No. A-20-809107-W, Dept. 8. CA 023-030 (explaining background of Ordinance No. 3632).

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"there is no statutory guarantee of trial by jury when municipal ordinances and state statutes co-incide." Hudson, 81 Nev. at 681, 409 P.2d at 247.

The defendant in Hudson was charged with a municipal ordinance violation for contributing to the delinquency of a minor. In 1965, NRS 186.010 mirrored the ordinance but statutorily allowed a jury trial under state law. Subsequently, the entire Chapter 186 of NRS was repealed in 1967 by Assembly Bill 81, page 1472, Chapter 523, Statutes of Nevada 1967. See Assembly Committee on Judiciary, Legislative History, CA 038-040 (noting that defendants were allowed jury trials for violations of NRS 186 prior to its repeal).

In the lower courts, Ohm mistakenly contended, without citation, that the "Nevada Supreme Court held that there was no violation because it was not entitled to a jury trial under *either* state of municipal law." See Petition for Writ of Mandamus, 2 PA 341. Ohm completely misstated and misconstrued Hudson. The Nevada Supreme Court noted that the defendant *did* have a statutory right to a jury trial for this particular misdemeanor, when charged under the NRS, but since municipal violations were never considered serious cases under the common law, no jury trial was required for the ordinance violation. Thus, even though the language of the statute and the ordinance mirrored each other, the defendant did not have a right to a jury trial for the ordinance violation. Id. at 681.

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Ohm's previous reliance on the municipal court's analysis of the facts in Hudson does not detract from Hudson's straightforward ruling – no jury trial is required where state law is copied in an ordinance and a defendant could potentially have had a jury trial under state prosecution. Hudson v. City of Las Vegas, 81 Nev. 677, 682, 409 P.2d 245, 248 (1965). So long as defendants charged with the violation of the same law, statute, or ordinance are treated similarly, there is no equal protection violation.

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

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

However, Ohm alleges that since justice courts and municipal courts have overlapping jurisdiction over misdemeanor crimes in Nevada, and since different prosecutors are making different decisions in those different courts, that equal protection is implicated. Ohm seems to allege that the charging statute and/or jurisdiction create a classification, but the City is aware of no legal authority to support such a claim. Ohm's argument relies on the **incorrect** assumption that misdemeanor arrests for domestic battery charges in Henderson are distributed by

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act of prosecutor decision between the Henderson Justice Court and the Henderson Municipal Court, despite Ohm's admission that he is unaware of how the cases are distributed between the two courts.[7]

Virtually all misdemeanor domestic battery cases that occur within the City of Henderson are heard in the Henderson Municipal Court and prosecuted by the Henderson City Attorney's Office. From January 1, 2019 through mid-December 2019 (when City drafted their opposition on the municipal court level), there were 829 new cases of domestic battery filed in the Henderson Municipal Court. By contrast, only 19 charges of misdemeanor domestic battery were filed in the Henderson Justice Court in the same time frame.[8] Most, if not all, of the misdemeanor domestic battery cases filed in the Henderson Justice Court are for defendants that are alleged to have committed an accompanying felony.

Misdemeanor charges of all kinds, including domestic battery, that have an accompanying felony charge *must* be filed in the same court by rule. NRS 173.115. Once again, Ohm's claim that domestic abusers are treated differently

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7 Ohm admits that he "is aware of no specific algorithm that determines whether misdemeanor offenses are charged in Justice versus Municipal Court when both courts have concurrent jurisdiction." Pet.'s Writ at 36. Ohm then mistakenly alleges that charges are distributed between the Justice and Municipal Courts by some act of prosecutorial discretion. Id.

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

under the city ordinance as opposed to the state law for domestic violence distorts the purpose of this important constitutional protection.

Equal Protection examines whether a singular law treats individuals differently based on immutable characteristics, not where a case is tried or under which statute or code. Since the municipal code treats all similarly situated defendants equally, there can be no credible equal protection claim.

D. HMC § 8.02.055 is Narrowly-Tailored for a Compelling State Interest.

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

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

Following the Andersen decision in September 2019, defendants facing charges of misdemeanor domestic battery began challenging the City's authority and ability to prosecute crimes of domestic violence. The practical effects of the

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Andersen decision essentially brought the City's ability to prosecute domestic abusers to a halt because the municipal court's authority to conduct jury trials is unclear. The City currently has over 1,000 open domestic battery cases, with new cases being filed every day. Dismissing over 1,000 cases and handing the cases over to the Clark County District Attorney's office to re-file in Henderson Justice Court, without a grant of funding to handle such a huge surge in caseload, is not a practical or realistic option.

Domestic violence is, undisputedly, a very serious problem in Nevada. See Domestic Violence Fact Sheet, CA 049-050. 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 States v. Lippman, 369 F.3d 1039, 1043 (8th Cir.2004), cert. denied, 543 U.S. 1080 (2005). See also People v. Jungers, 127 Cal.App.4th 698, 704 (2005) (elimination of domestic violence is a compelling state interest).

After Andersen, the City needed a way to prosecute domestic abusers during the temporary time during which prosecutions for domestic battery under the NRS

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are challenged. The uncertainty of authority is necessarily temporary, as either: (1) the legislature will clarify the authority, or (2) the Nevada Supreme Court will clarify it as cases are currently being challenged. HMCBDV mirrors the prohibited criminal conduct and penalties under NRS 200.485 (in conjunction with NRS 33.018). Defendants charged under the HMC and under the NRS are subject to the same conduct being criminalized, with exact penalties; the only difference is the lack of the gun prohibition when charging under the HMC. Thus, HMCBDV is narrowly tailored to have as limited effect as possible and to keep domestic violence victims safe by prosecuting domestic violence.

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

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III. MUNICIPAL COURTS OF INCORPORATED CITIES POSSESS THE AUTHORITY TO CONDUCT JURY TRIALS.

Ohm argues that the lower court incorrectly held that a municipal court possesses the authority to conduct jury trials because doing so creates a statutory conflict that is repugnant to the Constitution. To be sure, the Nevada Supreme Court, on occasion, recognizes the need to invalidate statutes to ensure certain constitutional protections remain. See cases cited infra at 37. In fact, this Court has not suggested in any manner that the statutes or legal principles that Ohm relies on for his arguments created any tension in their previous holdings. As a result, this Court should clarify that municipal courts of incorporated cities possess the authority to conduct jury trials when charging a domestic batterer under the NRS because it is required by state and federal constitutional law.

A. Henderson Municipal Court may conduct jury trials.

Henderson Municipal Court has legal authority to conduct misdemeanor domestic battery jury trials because of this Court's ruling in Andersen. The Henderson Municipal Court can conduct jury trials when required by state or federal constitutional law. See Transcripts, 3 PA 513; Order Denying Writ of Mandamus, 3 PA 528-544, See also Order Denying Writ of Mandamus, CA 043-047).

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The prohibition against jury trials in municipal courts (pursuant to NRS 266.550) does not apply to municipal courts in a city incorporated under a special charter. Donahue v. City of Sparks, 111 Nev. 1281, 903 P2d 225 (1995). Like the City of Sparks in Donahue, the City of Henderson is incorporated under a special charter passed by the Legislature in 1971. Henderson City Charter, Chapter 266, Statutes of Nevada 1971, Article I, Section 1.010.

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

The constitutional necessity for the Henderson Municipal Court to conduct jury trials became manifest in the Andersen decision. Andersen, 135 Nev. 321, 448 P.3d 1120; see discussion of Andersen, supra. Andersen explicated that when a defendant's charge impacts Second Amendment gun rights, a jury trial is "required by state and federal constitutional law." Id. at 322-324, 448 P.3d at 1122-1124. Both the NRS and the Henderson Municipal Charter taken together with the

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Andersen decision establish the authority for municipal courts of incorporated cities to conduct jury trials for domestic battery cases.

1. Henderson's City Charter precludes the applicability of NRS 266.550.

NRS 266.550 does not divest the Henderson Municipal Court of jurisdiction. Municipalities, like Henderson, are excluded from the restrictions of NRS 266.550 when incorporated under a special charter. NRS 266.005. Thus, application of NRS 266.550 to the City is not through the Nevada Revised Statutes, but through its charter. Donahue, 111 Nev. 1281, 1282–83, 903 P.2d 225, 226.

Henderson's City Charter permits governance of NRS Chapters 5 and 266 for Municipal Courts, but only to the extent that it is "**not inconsistent with this Charter.**" Henderson City Charter Section 4.015 (emphasis added). Prohibiting a city from exercising its judicial powers over domestic violence is inconsistent with the Charter's purpose, which is to provide for the public health, safety, and general welfare of its citizens. Henderson City Charter Section 1.010; Order Denying Writ of Mandamus, CA 043-047.

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

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jurisdiction. Thus, the jury trial restriction of NRS 266.550 does not apply to the City of Henderson, either by statute or under the terms of the City Charter.

Even if NRS 266.550 was applicable, the requisite liberal interpretation would grant the Henderson Municipal Court authority to conduct jury trials. Henderson's City Charter Section 1.010(1) states that "the specific mention of particular power shall not be construed as limiting in any way the general powers necessary to carry out the purposes of the Charter." See Preamble to Henderson City Charter, CA 037. Chapter 266 is only applicable through the Charter's provisions, and any application should be liberally construed to effectuate the Charter's purpose. As such, whenever statutes are ambiguous or conflict with each other, they should be applied in a way that accomplishes a public safety and general welfare goal.

With that in mind, City posits that NRS 266.550 is ambiguous and contradictory on its face. The first sentence of the statute provides that municipal courts have the same powers and jurisdiction as justice courts. NRS 266.550. If justice courts have the power and jurisdiction to conduct jury trials, then the municipal courts have this same power and jurisdiction. The final sentence's phrase "without a jury" contradicts the explicit power granted in the first sentence. Id. Pursuant to Henderson City Charter Section 1.010, it should be read to

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accomplish the purposes and objectives of the Henderson City Charter, i.e. to provide for the general welfare of its citizens.

Moreover, Chapter 5 of the NRS is also applicable to municipal courts. See Henderson City Charter Section 4.015. However, unlike NRS 266.550, it is applicable to municipal courts by City Charter and as a direct statutory authority as it does not have a default inapplicability. Any conflict between the two chapters must be resolved in favor of Chapter 5 and its statutes. "NRS 5.050 plainly grants municipal courts jurisdiction to entertain criminal actions charging a misdemeanor violation." City of Las Vegas v. Las Vegas Mun. Court, 110 Nev. 1021, 1023, 879 P.2d 739, 740 (1994). Accordingly, under the terms of NRS 5.050(2), municipalities have jurisdiction to charge battery domestic violence offenses. It would be absurd for municipalities to be able to charge the offense, but not possess the jurisdiction to entertain trials and sentence the offenders. See also NRS 5.073.550 (explaining municipal courts must conform to these same proceedings as justice courts.). In applying a liberal interpretation of competing statutes to achieve the purpose of the Charter, NRS 5.073 would govern, not NRS 266.550.

2. This Court should clarify that Andersen grants authority to Municipal Courts to conduct jury trials.

To be clear, City believes that the Henderson Municipal Court has authority to conduct domestic battery jury trials to comply with the constitutionally-based Andersen decision. And each District Court to address the issue reached the same

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conclusion. Order Denying Writ of Mandamus, 3 PA 533-534; See also Steven Cullen v. Henderson Municipal Court, Case No. A-20-809107-W, Dept. 8, CA 032; Christopher Lee Andersen v. City of Las Vegas, Case No. C-20-350740-A, Dept. 19, CA 043-047. To comply with a defendant's constitutional rights, Andersen overrides any provision of statute or city charter to the contrary. However, since City's view is not universally held, municipalities must have a clear mandate from this Court for planning and conducting jury trials. In short, the City (*and all incorporated cities in Nevada*) need clarity that municipal courts are authorized to conduct jury trials pursuant to Andersen.

At first glance, NRS 266.550 expressly forbids municipal courts from conducting jury trials, but it does not apply because the City of Henderson was incorporated pursuant to a city charter. This Court has held that NRS 266.550 does not apply to incorporated cities like Henderson. Blanton v. N. Las Vegas Mun. Court , 103 Nev. 623, 628, 748 P.2d 494, 497, fn.5. However, in Donahue v. City of Sparks, 111 Nev. 1281, 1283, 903 P2d 225, 226 (1995), this Court stated that even though the City of Sparks was also enacted under a special charter its court lacked "discretion to order a jury trial where one is not required ***by state or federal constitutional law***." (Emphasis added.) It is now required by state and federal constitutional law to hold a jury trial when a defendant is charged with domestic battery under state law. Andersen, 135 Nev. at 324, 448 P.3d at 1124.

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Pursuant to this Court's decision in Andersen, the Henderson City Attorney undoubtedly has the legal authority to charge a defendant with the crime of domestic battery (NRS 200.481, 200.485, 33.018) in the Henderson Municipal Court. Also, as stated in Andersen, the U.S. and Nevada Constitutions require a jury trial for a defendant charged with misdemeanor battery domestic violence under state law. Id. at 322-324, 448 P.3d at 1122-1124. A defendant's constitutional rights generally overrides any statutory prohibitions. See e.g., Reno v. Howard, 130 Nev. 110, 318 P.3d 1063 (2014) (finding that a defendant's Confrontation Clause rights override NRS 50.315 requirement that a bona fide dispute must be alleged in demanding phlebotomist); Flores v. State, 121 Nev. 706, 120 P.3d 1170 (2005) (State not entitled to rely upon NRS 51.315 to introduce child witness's out-of-court statements as it violated defendant's Sixth Amendment right to confrontation). These binding precedents thwart Ohm's argument that NRS 266.550 or NRS 175.011 controls. And, pursuant to Donahue, if state or federal constitutional law requires a jury trial, the municipal court may conduct a jury trial to fulfill those rights. Moreover, the judicial branch has the inherent powers to regulate its own affairs. Blackjack Bonding v. City of Las Vegas Mun. Court, 116 Nev. 1213, 1218–19, 14 P.3d 1275, 1279 (2000). Those affairs include the right to conduct jury trials pursuant to Andersen.

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B. Henderson Municipal Code § 8.02.055 is not repugnant to the Constitution.

Ohm argues that the prosecution of HMCBDV without a jury trial is repugnant to the United States Constitution, the Nevada Constitution and NRS. He alleges that repugnancy exists since the code's purpose is to circumvent his "fundamental constitutional right" to a jury trial. Yet, no such fundamental right exists in the instant matter and thus no repugnancy exists. See discussion of petty offense, supra pp. 16-18.

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

Ohm apparently contends that HMCBDV is repugnant to the NRS and U.S. Constitution because it has a lesser penalty that does not invoke the loss of firearm rights under NRS 202.360. His argument fails on several levels.

First, City acted within the authority granted by the State Legislature in its City Charter when it enacted HMCBDV. Specifically, Section 2.080(3) of the Henderson City Charter allows ordinances as long as penalties do not "exceed those established by the Legislature." 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, but not greater than, those established by the state legislature for misdemeanors. This

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illustrates that the legislature expected and granted authority to the City to impose different penalties than state law.

Second, the Legislature also delegated to the City of Henderson the authority to exercise police powers by way of local ordinances. Henderson, Nevada, Municipal Code § 2.140; see also NRS 268.018 (granting charter cities the authority to establish by ordinance a misdemeanor offense that is also a misdemeanor under state law). Thus, the City has clear authority to enact an ordinance prohibiting conduct that also constitutes an offense under state law if the penalties prescribed are less. A conflict only occurs when the penalty *exceeds* that set forth in state law. Since the HMC does not implicate a defendant's Second Amendment right, its penalties are *less severe* than those in NRS.

Third, the Nevada Supreme Court long ago established that "a municipality may pass ordinances prohibiting acts already prohibited by state statute." Sheriff, Washoe Cty. v. Wu, 101 Nev. 687, 688, 708 P.2d 305, 305 (1985) citing Hudson v. City of Las Vegas, 81 Nev. 677, 409 P.2d 245 (1965); Ex Parte Sloan, 47 Nev. 109, 217 P. 233 (1923) abrogated by Waller v. Fla., 397 U.S. 387, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970)[9]. In Wu, the defendant challenged the jurisdiction of a

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

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Justice Court to preside over a traffic violation that occurred within the jurisdiction of a City Municipal Court. The Wu court clarified that concurrent jurisdiction exists between a justice court and municipal court for offenses occurring within the municipality when the conduct violates both a municipal ordinance and a state statute for petty offenses. Wu at 690, 306. In support of its reasoning, the Wu court cited both Hudson and Sloan to announce "[i]t is well settled that a municipality may pass ordinances prohibiting acts already prohibited by state statute." Id. at 688, 305.

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

Ohm alleges HMCBDV is repugnant to U.S. and state law, but he does not expound much further except to say that the conflict lies in the difference in jury trial. However, as discussed above, a jury trial is not a fundamental right in trials

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for petty crimes, and a difference in penalty does not cause a fatal conflict unless the municipal code prescribes a penalty that exceeds the state law penalty.

HMCBDV does not conflict with state domestic battery provisions or NRS 202.360. To the contrary, HMCBDV defines the misdemeanor domestic battery in precisely the same way as state law, just with lesser penalties, and it works *within* the definition contained in NRS 202.360. Having different outcomes for convictions under NRS domestic violence statutes and HMCBDV does not mean the two conflict. In fact, that there are differing outcomes is precisely *because* of how the legislature defined a misdemeanor crime of domestic violence in its amendment to NRS 202.360. That definition exempts convictions under municipal law from qualifying as predicate offenses to prohibit firearm possession. See 18 U.S.C. § 921(a)(33)(i); United States v. Pauler, 857 F.3d 1073, 1078 (10th Cir. 2017) (holding that a "a misdemeanor under Federal, State, or Tribal law" does not include a conviction under municipal ordinance). The federal definition incorporated in NRS 202.360 distinguishes convictions under state law from those under municipal law. Accordingly, there is no actual conflict between NRS 202.360 and HMCBDV; 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.

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Indeed, when the legislature amended NRS 202.360 they chose the federal definition even though it specifically limited the source of law required for the conviction. During testimony debating the proposed amendment, Committee Counsel informed Legislators the federal definition required "an offense that is a misdemeanor under **federal, state, or tribal law**" to qualify. See Testimony from Nevada Assembly Committee on Judiciary, Senate Bill 175, April 23, 2015, pp. 30-31, CA 041-042 (emphasis added). The Nevada Legislature intentionally approved a narrow definition of domestic violence in NRS 202.360(1)(a) to predicate gun prohibition. The express intent of this amendment could not be clearer – only a limited number of misdemeanor domestic battery convictions in Nevada will predicate gun prohibition.

Ohm's claim that demoting an offense from serious to petty to avoid the requirement of a jury trial is somehow repugnant to state and Constitutional law is erroneous. There is no right to a jury trial under the United States Constitution for domestic battery with the penalties associated with HMCBDV. See Amezcua, 130 Nev. 45, 46-47, 319 P.3d 602, 603.

Finally, other courts have upheld the validity and constitutionality of a statute that reduces the penalty of an offense to eliminate the right to a jury trial. See State of Hawaii v. Nakata, 76 Haw. 360, 878 P.2d 699 (Hi. 1994).

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C. Ohm's case cannot be transferred to Justice Court.

NRS 5.0503 does not allow Ohm's case to be transferred. See NRS 5.0503; see also City's Opposition to Petition for Writ, 3 PA 419-420. It is important to note that even if Ohm satisfied the statutory requirements, a case **cannot be transferred unless** a plea agreement has been reached or there is a final disposition of the case. Here, there is no plea agreement or a final disposition. Without a notice of acceptance from justice court, these cases would be returned to the municipal court, where they would have to be dismissed. That would be an absurd result that is contrary to the public health, safety, and welfare of the City, and directly conflicts with the purpose of City's Charter.

CONCLUSION

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

DATED this 22 day of February, 2021.

NICHOLAS VASKOV
Henderson City Attorney

By: _____
MARC M. SCHIFALACQUA, ESQ.
Sr. Assistant City Attorney
Nevada Bar 10435
Attorney for Real Party in Interest,
CITY OF HENDERSON

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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 Respondent, 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 22 day of February, 2021.

MARC M. SCHIFALACQUA, ESQ.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition 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 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, pursuant to this Court's order of December 17, 2020, allowing 10,000 words, this brief contains 9,942 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 22 day of February, 2021.

MARC M. SCHIFALACQUA, ESQ.
Nevada State Bar No. 010435
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CITY OF HENDERSON

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22 day of February, 2021, 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:

Kelsey Bernstein, Esq.
Damian Sheets, Esq.

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

Hon. Kathleen Delany
Eighth Judicial District Court
Regional Justice Center, Dept. 25
200 E. Lewis Avenue
Las Vegas, NV 89101

City of Henderson Employee

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