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SUPREME COURT

STATE OF NEVADA

SERGIO AMEZCUA, Petitioner, v. EIGHTH JUDICIAL DISTRICT COURT, Respondent.	DISTRICT CT. CASE NO. A-13-290090-A DEPT. 32 JUSTICE CT. CASE NO. 10M38321X JUSTICE CT. DEPT. NO. 10

Date of Hearing: _____
Time of Hearing: _____

PETITION FOR WRIT OF MANDAMUS OR ALTERNATIVELY PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Defendant, SERGIO AMEZCUA, by and through his attorney of record, MICHAEL D. PARIENTE, and petitions this Honorable Court to grant his petition for a writ of mandamus to order the Honorable Robert Bare, District Court Judge for Department No. 32 to order the Honorable Melanie Tobiasson, Justice of the Peace for Justice Court No. 10, to reverse Mr. Amezcua's conviction and grant Mr. Amezcua a trial before a jury of his peers. Alternatively, Mr. Amezcua files this petition for a writ of habeas corpus as a result of his unlawful detention from the denial of his right to a trial by jury. Mr. Amezcua recognizes this

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Honorable Court has previously ruled against him before he was convicted, but seeks to preserve error before the U.S. Supreme Court in his second attempt to ask the U.S. Supreme Court to grant certiorari on issue of whether he was wrongfully denied a jury trial now that he has been convicted of Battery Constituting Domestic Violence.

DATED this 1st day of August, 2013.

Respectfully submitted:

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MEMORANDUM OF POINTS AND AUTHORITIES

Mr. Sergio Amezcua has been charged with Battery Constituting Domestic Violence in violation of NRS 200.481, NRS 200.485, and NRS 33.018. Mr. Amezcua timely filed a notice for a jury trial pursuant to NRS 175.011which reads as follows:

> **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.
> (Added to NRS by 1967, 1424; A 1983, 749; 1987, 614; 1993, 1412)

On May 23, 2011, Justice of the Peace Melissa Saragosa denied Mr. Amezcua the right to have a jury of his peers decide whether the State proves its case beyond a reasonable doubt against

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him. Judge Saragosa reasoned that Battery Constituting Domestic Violence is not a serious offense warranting a jury trial. On February 9, 2012, this Honorable Court denied Mr. Amezcua's Petition for Writ of Mandamus. On October 29, 2012, the United States Supreme Court denied Mr. Mr. Amezcua's Petition for Writ of Certiorari. On May 9, 2013, Las Vegas Justice Court No. 10 convicted Mr. Amezcua of Battery Constituting Domestic Violence after having denied his request for a jury trial. On July 17, 2013, Clark County District Court No. 32 denied Mr. Amezcua's appeal.

The State of Nevada and the lower courts contends that Mr. Amezcua is not entitled to a jury trial because a conviction for misdemeanor Battery Constituting Domestic Violence carries a maximum term of imprisonment of six months rendering it a "petty offense" and thus does not entitle Mr. Amezcua to a jury trial. Mr. Amezcua contends that Blanton v. N. Las Vegas, 489 U.S. 538 (1989) and State v. Smith, 99 Nev. 806, 672 P.2d 631 (1983) do not apply to persons criminally charged with Battery Constituting Domestic Violence. Blanton defines "penalty" as follows:

> In using the word "penalty," we do not refer solely to the maximum prison term authorized for a particular offense. See United States v. Jenkins, 780 F. 2d 472, 474, and n. 3 (CA4), cert. denied, 476 U.S. 1161 (1986).
>
> Blanton v. N. Las Vegas, 489 U.S. 538, 542 (U.S. 1989).

I. A Writ of Habeas Corpus or a Writ of Mandamus are Appropriate Remedies

Where an accused is detained unlawfully by reason of violation of jurisdictional procedural requirements, denial of speedy trial, or other proper grounds, a district court may review the legality of the detention on habeas corpus. Sheriff, Clark County v. Hatch, 100 Nev. 664, 667

(Nev. 1984). In this case, Mr. Amezcua faces the denial of his constitutional right to a jury trial, which is a procedural requirement. Therefore, habeas corpus relief is proper.

Mandamus will lie to compel a public officer to perform an act "which the law especially enjoins as a duty resulting from an office". State Bar v. List, 97 Nev. 367, 368 (Nev. 1981). As the Nevada Supreme Court has held,

> [T]he established principles of law applicable to the function of this extraordinary writ, which may be stated thus: The acts or duties, the performance or nonperformance of which rests in whole or in part on the discretion or judgment of the inferior tribunal, board, or officer, will not be required by the writ of mandamus. On the other hand, duties which are in their nature purely ministerial, or which are by law clearly and specifically required to be performed, and in the performance of which no element of discretion may be exercised by the tribunal, officer, or board required so to do, will be compelled by the writ. The rule may be otherwise stated that the writ will lie to set in motion the machinery of the law, so to speak, whereby a specifically prescribed duty must be assumed by a given tribunal, board, or officer, but will not operate beyond the point where that tribunal, board, or officer has the right to exercise any degree of discretion and judgment. (High's Extraordinary Legal Remedies, sec. 24.) It needs no citation of authority to support the well-established rule that the writ of mandamus will not assume the function of a writ of error, nor will it serve to require the inferior tribunal to act in a particular manner or to enter any particular judgment or order. On the contrary, it serves only to compel the doing of some act which it is the clear, legal duty of the lower court in some way to do.
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> State ex rel. Freyesleben v. Ninth Judicial Dist. Court, 40 Nev. 163, 168 (Nev. 1916).

In this case, Mr. Amezcua argues that a writ of mandamus is appropriate because District Court Judge Robert Bare and Justice of the Peace Tobiasson violated their ministerial duties to afford Mr. Amezcua a jury of his peers to decide if the State can prove its case beyond a reasonable doubt. District Court Judge Bare and Justice of the Peace Tobiasson did not have the discretion to deny Mr. Amezcua's right to a jury trial because the offense of domestic violence, Mr. Amezcua argues, is a serious offense entitling him to a jury trial. District Court Judge Bare and Justice Tobiasson had a ministerial duty to permit Mr. Amezcua to have the State prove his case beyond a reasonable doubt to a jury of his peers because Battery Constituting Domestic

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Violence is a serious offense. Because the duty to give a defendant a jury trial for a serious offense is a ministerial duty, a writ of mandamus is the appropriate remedy.

II. Conviction for Domestic Violence Creates a Presumption That the Person Convicted is an Unfit Parent. This Consequence Makes Domestic Violence a Serious Offense Entitling Mr. Amezcua to a Jury Trial.

A person convicted of domestic violence faces serious consequences in family law courts. Specifically, a person convicted of domestic violence faces a presumption that he or she is an unfit parent:

NRS 432B.157 Presumption concerning custody when court determines that parent or other person seeking custody of child is perpetrator of domestic violence.

1. Except as otherwise provided in NRS 125C.210 and 432B.153, a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody of a child has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that it is not in the best interest of the child for the perpetrator of the domestic violence to have custody of the child. Upon making such a determination, the court shall set forth:

(a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and

(b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child.

2. If after an evidentiary hearing held pursuant to subsection 1 the court determines that more than one party has engaged in acts of domestic violence, it shall, if possible, determine which person was the primary physical aggressor. In determining which party was the primary physical aggressor for the purposes of this section, the court shall consider:

(a) All prior acts of domestic violence involving any of the parties;

(b) The relative severity of the injuries, if any, inflicted upon the persons involved in those prior acts of domestic violence;

(c) The likelihood of future injury;

(d) Whether, during the prior acts, one of the parties acted in self-defense; and

(e) Any other factors that the court deems relevant to the determination.

In such a case, if it is not possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 1 applies to each of the parties. If it is possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 1 applies only to the party determined by the court to be the primary physical aggressor.

3. A court, agency, institution or other person who places a child in protective custody shall

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not release a child to the custody of a person who a court has determined pursuant to subsection 1 has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child unless:

(a) A court determines that it is in the best interest of the child for the perpetrator of the domestic violence to have custody of the child; or

(b) Pursuant to the provisions of subsection 2, the presumption created pursuant to subsection 1 does not apply to the person to whom the court releases the child.

4. As used in this section, "domestic violence" means the commission of any act described in NRS 33.018.

NRS 125C.230 Presumption concerning custody when court determines that parent or other person seeking custody of child is perpetrator of domestic violence.

1. Except as otherwise provided in NRS 125C.210 and 125C.220, a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody of a child has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. Upon making such a determination, the court shall set forth:

(a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and

(b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child.

2. If after an evidentiary hearing held pursuant to subsection 1 the court determines that more than one party has engaged in acts of domestic violence, it shall, if possible, determine which person was the primary physical aggressor. In determining which party was the primary physical aggressor for the purposes of this section, the court shall consider:

(a) All prior acts of domestic violence involving any of the parties;

(b) The relative severity of the injuries, if any, inflicted upon the persons involved in those prior acts of domestic violence;

(c) The likelihood of future injury;

(d) Whether, during the prior acts, one of the parties acted in self-defense; and

(e) Any other factors that the court deems relevant to the determination.

In such a case, if it is not possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 1 applies to each of the parties. If it is possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 1 applies only to the party determined by the court to be the primary physical aggressor.

3. As used in this section, "domestic violence" means the commission of any act described in NRS 33.018.

A. <u>Mr. Amezcua has a substantive right to be an active father in raising his children.</u>

"A parent's interest in raising his or her child is a fundamental right. Parental termination

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proceedings implicate this fundamental right. We analyze substantive due process challenges to statutes impinging on fundamental constitutional rights under a strict scrutiny standard." Vincent L.G. v. State Div. of Child & Family Servs. (In re D.R.H.), 120 Nev. 422, 426-427 (Nev. 2004). "Embedded within the Fourteenth Amendment is a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.' The United States Supreme Court has recognized several fundamental interests including 'the interest of parents in the care, custody, and control of their children.'" Rico v. Rodriguez, 121 Nev. 695, 704 (Nev. 2005).

B. Because Mr. Amezcua's substantive right to raise his children is threatened by a domestic violence conviction, the Court must afford him a jury trial consistent with his procedural due process rights.

> [O]nce it is determined that the Due Process Clause applies, 'the question remains what process is due.' [Citation.]" (Loudermill, supra, 470 U.S. at p. 541.) "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (Morrissey v. Brewer (1972) 408 U.S. 471, 481 [33 L. Ed. 2d 484, 92 S. Ct. 2593].) "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (Mathews v. Eldridge (1976) 424 U.S. 319, 335 [47 L. Ed. 2d 18, 96 S. Ct. 893].)
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> Cook v. City of Buena Park, 126 Cal. App. 4th 1, 6 (Cal. App. 4th Dist. 2005)

Applying the first prong of the Mathews test to Mr. Amezcua's case, the private interest that will be affected is the right of Mr. Amezcua to raise his children. The second prong is the risk of an erroneous deprivation caused by a conviction for domestic violence. This criminal conviction creates the presumption that Mr. Amezcua is an unfit parent under NRS 432B.157 and NRS 125C.230. Third, the additional protection of a six-person jury trial to hold the State to its

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burden of proving its case beyond a reasonable doubt would help eliminate the risk that Mr. Amezcua does not face an erroneous deprivation because the State must convince six people, instead of one Justice of the Peace. Finally, the State's interest in fiscal and administrative burdens would be proportionately no greater than any of the other forty-eight states that permit jury trials for misdemeanors.

In conclusion, a criminal conviction for domestic violence would adversely affect Mr. Amezcua's fundamental rights to see his children and jeopardize the current and recently imposed child custody agreement entered into between himself and his ex-wife. The gravity of the consequences for him makes this a serious offense requiring the procedural protections of a jury trial.

Indeed, the Nevada Legislature deems domestic violence so serious an offense that it created this presumption that persons convicted of domestic violence are unfit parents and therefore not deserving of the right to see their children.[1] The fact that the Nevada Legislature has

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[1] Even before a conviction, the Nevada Legislature treats domestic violence as a serious offense. First, per NRS 178.484(7), a person arrested for domestic violence faces a mandatory 12-hour hold before release from incarceration. The mandatory minimum bail requirements for alleged (and as yet unconvicted) domestic battery arrestees increases from $3,000 to $5,000 for alleged second offenders and to $15,000 for alleged third offenders. See NRS 178.484(7). The enhanced bail for domestic battery arrestees with alleged prior convictions has no time limitation on the age of the alleged prior convictions per NRS 178.484(7)(b)(2) and (c). This contrasts with the enhanced penalties for multiple domestic violence convictions under NRS 200.485(1)(b) and (c) and (3)(b). Enhanced bail for domestic violence arrestees is harsher than for suspects arrested for any other misdemeanors. Enhanced bail for domestic violence charges do not require that the prior offense be committed within 7-year. All other offenses, such as DUI, which have enhanced bail, apply to defendants with prior offenses within the immediately preceding 7 years only. A defendant arrested for battery constituting domestic violence whom the arresting police believe has two prior convictions from 10 or more years ago will be held on $15,000 bail although it is only a misdemeanor charge with a minimum two-day jail sentence. See NRS 200.485(1)(a).

Unlike other misdemeanors, arrest is mandatory for a defendant suspected of domestic battery within 24 hours of the suspected offense. See NRS 171.137(1). In all other misdemeanor cases, the peace officer has discretion to issue a citation instead of arresting the suspect. See NRS

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passed this law to make it harder for persons convicted of domestic violence to see and raise their children indicates that it deems the offense serious in its attempt to protect children and families affected by domestic violence. The loss of the right of an accused to raise his or her own child is a substantial burden on the person convicted of domestic violence. It is for these reasons that the offense is serious. Had the Nevada Legislature not deemed domestic violence a serious offense, it would have never passed such a law creating a presumption that a person so convicted of domestic violence is presumed an unfit parent.[2]

II. The Loss of the Right to Possess a Firearm Makes a Conviction for Battery Constituting Domestic Violence a Serious Offense.

The U.S. Supreme Court held that the right to possess a firearm for self-defense is a fundamental right and cannot be abridged by the State. Specifically, the U.S. Supreme Court in McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) held that the Second Amendment is a fundamental right that is fully applicable to the States through the Fourteenth Amendment. McDonald further holds:

171.1771 and NRS 171.1772.

[2] In its effort to remain one of two states that prohibit jury trials for domestic violence charges, Mr. Amezcua expects the State will pin its hopes on Blanton footnote 8, which was relied on by the District Court which sided with it, which reads as follows:

> In performing this analysis, only penalties resulting from state action, e. g., those mandated by statute or regulation, should be considered. See Note, The Federal Constitutional Right to Trial by Jury for the Offense of Driving While Intoxicated, 73 Minn. L. Rev. 122, 149-150 (1988) (nonstatutory consequences of a conviction "are speculative in nature, because courts cannot determine with any consistency when and if they will occur, especially in the context of society's continually shifting moral values"). Blanton v. N. Las Vegas, 489 U.S. 538, 543 n.8 (U.S. 1989)

Mr. Amezcua argues that NRS 432B.157 and NRS 125C.230 are precisely the penalties passed by the Nevada Legislature and signed in to law by the Governor addressed in the above Blanton footnote.

> Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in Heller, we held that individual self-defense is "the central component" of the Second Amendment right. 554 U.S., at ___ , 128 S. Ct. 2783, 171 L. Ed. 2d, at 662; see also id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d, at 679 (stating that the "inherent right of self-defense has been central to the Second Amendment right"). Explaining that "the need for defense of self, family, and property is most acute" in the home, ibid., we found that this right applies to handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d, at 679 (some internal quotation marks omitted); see also id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d, at 679 (noting that handguns are "overwhelmingly chosen by American society for [the] lawful purpose" of self-defense); id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d, at 680 ("[T]he American people have considered the handgun to be the quintessential self-defense weapon"). Thus, we concluded, citizens must be permitted "to use [handguns] for the core lawful purpose of self-defense." Id., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d, at 680.
>
> McDonald v. Chicago, 130 S. Ct. 3020 (U.S. 2010).

Other courts have recognized the right to a jury trial in cases where a defendant faces lifetime prohibition of possession of a firearm as a consequence of a misdemeanor assault conviction not punishable by more than six months:

> In the present case the question is whether the lifetime prohibition of possession of a firearm in addition to 6 months imprisonment makes the offense serious under Blanton and therefore entitles Defendant to a jury trial. Citing USA v. Chavez, 204 F.3d 1305 (11th Cir. 2000), the Government argues that the lifetime prohibition on firearm possession does not make the penalty serious. The undersigned is unpersuaded by the court's reasoning in Chavez and concludes that the penalty is serious. In Chavez, the court focused on the fact that in 18 U.S.C. § 921 (a)(33)(B)(i)(II) Congress recognized that some domestic violence offenses do not carry the right to a jury trial even though a conviction results in the prohibition of firearm possession. However, the issue is not whether Congress recognized a right to a jury trial for domestic violence offenses. The issue is whether the penalty Congress attached to the offense was serious enough to entitle the Defendant to a jury trial under the 6th Amendment. Having examined that issue, the Court finds that a lifetime prohibition on the possession of a firearm is a serious penalty which entitles a Defendant to a jury trial under the 6th Amendment. Possession of a firearm for military purposes, self protection and sport has been an important aspect of American life throughout our history. Today, the issue of Governmental restriction of firearm possession is hotly debated. Substantial segments of American society hold strong opinions on the issue. Many advocate strict government restrictions on the ability to possess firearms while many others take the opposite view and consider firearms possession to be an integral part of their lives. In this context, the issue is very serious. Moreover, the categories of persons prohibited from possessing firearms under 18 U.S.C. § 922(g) and the penalties imposed under 18

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> U.S.C. § 924 for violating the prohibition (10 years) demonstrate that Congress views the prohibition as serious. The Court finds that a lifetime prohibition on the possession of a firearm is a serious penalty and, when combined with 6 months imprisonment, entitles a Defendant to the common-sense judgment of a jury. Defendant's Motion for a Jury Trial is GRANTED.
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> United States v. Smith, 151 F. Supp. 2d 1316, 1317-1318 (N.D. Okla. 2001).

In Clark County, Las Vegas Metropolitan Police Department has created a custom that a person even arrested for domestic violence must surrender his or her firearms and return his or her permit to carry a firearm. Even persons who have been arrested for domestic violence but have had their cases denied for prosecution face difficulty from Nevada state authorities in purchasing a firearm. These customs by state actors of treating persons accused of domestic violence and treating those accused, but later exonerated as if they have been convicted of domestic violence, violate their Second Amendment right to possess a firearm. "Counties and municipalities are [state actors] … for constitutional deprivations resulting from application of governmental custom or policy." Miranda v. Clark County, 319 F.3d 465, 469 (9th Cir. Nev. 2003).

In this case, Mr. Amezcua, together with thousands of men and women each year who are accused of domestic violence in Clark County, suffer an unconstitutional deprivation of their Second Amendment right to bear arms based solely on an accusation of domestic violence even if that accusation proves false and the charges are dropped. For those convicted of domestic violence, they are not permitted in Nevada to purchase weapons, and any guns seized from them will not be returned. It is for this reason that defendants are admonished of these risks they face by pleading guilty.

III. A Conviction for Domestic Violence Results in Deportation (Removal) from the United States.

A person convicted of domestic violence also faces imminent deportation for which there

can be no relief if that person is not a United States Citizen:

> INA 237 (8 USC 1227) (a) Classes of Deportable Aliens. Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:
>
> E) Crimes of Domestic violence, stalking, or violation of protection order, crimes against children and:
>
> (i) Domestic violence, stalking, and child abuse. Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

The U.S. Supreme Court recently held that deportation consequences are no longer collateral and are now considered substantive rights. See Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (U.S. 2010). Even a Lawful Permanent Legal Resident Alien who has lived in the United States for his entire life faces mandatory deportation if convicted of domestic violence.

Although Mr. Amezcua is a United States citizen, there are thousands of persons annually who are not citizens who are charged with domestic violence in Nevada. These persons, many of whom are lawful permanent aliens, face a lifelong banishment from the United States away from their families if they are convicted of domestic violence. Many of these defendants have become assimilated to the United States and have children who were born in the United States.

IV. Other Courts Have Held That Suspension of a Driver's License as a Result of a Conviction for a DUI Requires the Defendant be Given the Right to a Jury Trial.

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The Eighth Circuit Court of Appeals has held that a 15-year license revocation for a third conviction for DWI rebuts the presumption that a maximum term of imprisonment is petty:

> "The Supreme Court's analysis of the facts in Blanton supports our conclusion that adding the 15-year license revocation to the six month prison term resulted in a penalty severe enough to warrant a jury trial in this case. In Blanton a DWI conviction led to a penalty of up to six months imprisonment, a $1000 fine, a 90-day suspension of the offender's driver's license, and compelled attendance at an alcohol abuse education course. Because the maximum possible prison sentence did not exceed six months, the Court weighed the severity of the additional statutory penalties. The Court held that the $1000 fine was not "out of step" with a six month sentence, and that the required education course "[could] only be described as de minimis." 109 S Ct. at 1294 n. 9. With regard to the license suspension, the Court was unable to determine if the suspension ran concurrently with the prison term. But even if the suspension were consecutive, the court observed that the offender could obtain a restricted license after 45 days. A full suspension for 45 days and a partial suspension for another 45 days was not severe enough to raise sixth amendment concurs. Id. Far from ruling out consideration of license revocations, the Court's decision implies that license revocations are exactly the kind of "additional statutory penalties" we should consider. While a 90-day suspension was not severe enough to raise sixth amendment concerns, a 15-year revocation is a substantial burden on the offender that is completely "out of step" with a six month prison term. Upholding this conviction would permit the Nebraska legislature to defeat the right to a jury trial by keeping the prison sentence to no more than six months, while finding other severe penalties to punish what it considers to be a serious offense. We therefore conclude that Richter was denied his sixth amendment right to a jury trial.
>
> Richter v. Fairbanks, 903 F.2d 1202, 1205 (8th Cir. Neb. 1990).

V. Application of Law to Facts

In this case, Mr. Amezcua provided notice under NRS 175.011 demanding his right to trial by jury. If Mr. Amezcua is convicted of Battery Constituting Domestic Violence in violation of NRS 200.481, NRS 200.485, and NRS 33.018, he faces the loss of his right to possess a firearm even for self-defense, despite the fact that the U.S. Supreme Court in McDonald v. City of Chicago has held that the Second Amendment right to bear arms is a fundamental right incorporated through the Fourteenth Amendment to the States.

Additionally, Mr. Amezcua recently was granted shared custody of his children with his

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ex-wife, who is the complaining witness in this case. If Mr. Amezcua is found guilty, this will create a presumption that he is an unfit parent and put him at risk of permanently losing his children in Family Court.

For Mr. Amezcua, the loss of his children far outweighs the severity of the loss of a defendant's driver's license for fifteen years where the latter is entitled to a jury trial in another jurisdiction. Additionally, Mr. Amezcua's Second Amendment right to possess a firearm is at risk of being lost. These potential consequences create the need for an additional safeguard to ensure that Mr. Amezcua does not suffer a violation of his Due Process rights in the form of the loss of his Second Amendment right and the right to raise his children per the terms of his custody agreement.

VI. Conclusion

By allowing a judge and not a jury to convict a defendant of Battery Constituting Domestic Violence, a judge thus unconstitutionally has the ability to terminate a defendant's right to raise his or her own children because of the presumption the person convicted of domestic violence is now presumed an unfit parent under NRS 432B.157 and NRS 125C.230. This is exactly what occurred when Mr. Amezcua was convicted in his case. Now that Mr. Amezcua has been convicted, he is presumed to be an unfit parent and risks losing his children to his ex-wife – the complaining witness.

The fact that a defendant stands to lose his Second Amendment right upon conviction of misdemeanor Battery Constituting Domestic Violence makes this criminal offense anything but "petty." In fact, there is no other misdemeanor in the Nevada Revised Statutes where a defendant risks losing a federally protected constitutional right upon conviction. Indeed, the admonishment Nevada courts use warn a defendant that a conviction for domestic violence may subject a

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defendant to state prosecution for a violation of NRS 202.360 and to federal prosecution if the defendant is subsequently caught possessing a firearm.

While a defendant convicted of DUI suffers suspension of his or her license, that loss is only temporary as he or she can eventually re-apply to have his or her license privileges reinstated. A conviction for Battery Constituting Domestic Violence results in the permanent loss of a defendant's Second Amendment right. Because a defendant's Second Amendment right is at stake in a criminal complaint and accusation for Battery Constituting Domestic Violence, a defendant should be afforded the additional safeguard of a jury to decide his fate.

Additionally, there is no other misdemeanor crime in Nevada for which a conviction results in a lifelong banishment from the United States in the form of deportation. There is no other misdemeanor crime in Nevada for which a conviction subjects the defendant to losing his or her children. Being deported from the United States and separated from one's family is anything but "petty". And the loss of one's children due to a conviction for domestic violence is anything but "petty".

Mr. Amezcua has timely filed a demand for jury trial. The Court should set aside Mr. Amezcua's conviction and grant Mr. Amezcua the right to a jury trial in his case. Again, Mr. Amezcua recognizes that this Honorable Court has previously decided this issue against him but seeks to preserve error before the United States Supreme Court.

DATED this 1st day of August, 2013.

Respectfully submitted,

THE PARIENTE LAW FIRM, P.C.

MICHAEL D. PARIENTE, ESQ.
Nevada Bar No.: 9469

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330 South Third Street
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Attorney for Defendant

AFFIDAVIT OF COUNSEL

STATE OF NEVADA)
)
COUNTY OF CLARK)

I, MICHAEL D. PARIENTE, ESQ., being first duly sworn according to law, upon oath, deposes and says:

1. Your affiant is an Attorney at Law duly licensed to practice in all courts in the State of Nevada;

2. Your affiant is the Attorney of record for the Defendant herein;

3. Mr. Amezcua timely filed a demand for a jury trial.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

MICHAEL D. PARIENTE, ESQ.

SUBSCRIBED and SWORN to before me this 1st day of Aug; 2013.

NOTARY PUBLIC in and for said County and State.

SKYE ENDRESEN
Notary Public State of Nevada
No. 13-9853-1
My appt. exp. Jan. 17, 2017

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VERIFICATION

STATE OF NEVADA)
)ss:
COUNTY OF CLARK)

Sergio Amezcua, being first duly sword, deposes and states as follows:

That I am the Petitioner in the above-entitled action; that I have read the foregoing Petition for Writ of Mandamus or Alternatively Petition for Writ of Habeas Corpus and know the contents thereof, that the same is true of my own knowledge, except for those matters therein contained stated on information and belief, and as to those matters, I believe them to be true.

DATED this 26 day of July, 2013.

S. R. G.
Sergio Amezcua

SUBSCRIBED and SWORN to before me
this 26th day of July, 2013.

NOTARY PUBLIC in and for said
Clark County and State of NV

SKYE ENDRESEN
Notary Public State of Nevada
No. 13-9853-1
My appt. exp. Jan. 17, 2017

ROC
MICHAEL D. PARIENTE
Nevada Bar No. 9469
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Las Vegas, NV 89101
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Attorney for Defendant

SUPREME COURT

STATE OF NEVADA

SERGIO AMEZCUA, Petitioner, v. EIGHTH JUDICIAL DISTRICT COURT, Respondent.	DISTRICT CT. CASE NO. A-13-290090-A DEPT. 32 JUSTICE CT. CASE NO. 10M38321X JUSTICE CT. DEPT. NO. 10

RECEIPT OF COPY

RECEIPT OF COPY of the **PETITION FOR WRIT OF MANDAMUS OR ALTERNATIVELY PETITION FOR WRIT OF HABEAS CORPUS** is hereby acknowledged this ____ day of August, 2013.

DISTRICT ATTORNEY'S OFFICE:

_____
DISTRICT ATTORNEY
200 Lewis Ave.
Las Vegas, NV 89101

ATTORNEY GENERAL'S OFFICE

_____
ATTORNEY GENERAL
555 E. Washington, Suite 3900
Las Vegas, NV 89101

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of THE PARIENTE LAW FIRM, P.C., and that on the date shown below, I caused service to be completed by:

_____ personally delivering

X delivery via Las Vegas Messenger Service

_____ sending via Federal Express or other overnight delivery service

X depositing for mailing in the U.S. mail with sufficient postage affixed thereto

_____ delivery via facsimile machine to fax no. [fax number]

a true and correct copy of the attached document addressed to:

District Attorney David Roger
Clark County District Attorney
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

Attorney General Catherine Cortez Masto
Office of the Attorney General
555 E. Washington, Suite 3900
Las Vegas, NV 89101

DATED this 2nd day of August 2013.

Maria Flores, Legal Assistant

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