



The Impact of the *Andersen* Decision on Firearm Laws in Nevada

BY MICHAEL D. PARIENTE, ESQ.

The *Andersen*¹ decision has undeniably had the most significant impact on firearm laws in Nevada since 1864, when Nevada became a state. Prior to the *Andersen* decision issued September 12, 2019, where a unanimous Nevada Supreme Court ruled a defendant charged with misdemeanor battery constituting domestic violence (NRS 200.485) had the right to a jury trial, a person charged with this offense had no right to a jury and faced lifelong forfeiture of his or her Second Amendment right if convicted of this misdemeanor offense. This situation meant a defendant charged with misdemeanor battery constituting domestic violence could only have a judge, and not a jury, determine their guilt, and if found guilty, forever lose their Second Amendment right. Not even sealing one's record for this offense restores the lifelong Second Amendment forfeiture.

In fact, from 1864 until the *Andersen* decision, no defendant in Nevada had the right to a jury trial for any misdemeanor offense. Generally, a misdemeanor offense is considered “petty” in Nevada, where the maximum term of imprisonment is six months or less, meaning a defendant does not have the right to a jury trial. However, as the court in *Andersen* held, when the Legislature attaches punishments that do not punctuate the six-month limit, they are considered “serious,” warranting a jury trial.

Loss of Second Amendment Rights: From Collateral to Direct and from Petty to Serious

In 2009, Sergio Amezcua was charged with misdemeanor battery constituting domestic violence. He filed a demand for a jury trial, claiming he faced the loss of his Second Amendment right at the federal level if convicted of the misdemeanor battery domestic violence charge. The Nevada Supreme Court disagreed, holding in *Amezcua v. Eighth Judicial District Court*² that Amezcua had no right to a jury trial. The court reasoned the loss of his Second Amendment right was at the federal level, and since at that time *Amezcua* was decided, Nevada had no law criminalizing possession of a firearm by a defendant previously convicted of misdemeanor domestic violence.

The Nevada Supreme Court deemed the Second Amendment loss collateral, not direct, because the loss did not automatically and immediately flow from any Nevada law. Therefore, the court reasoned, Amezcua's charge of misdemeanor battery constituting domestic violence was “petty” because the maximum term of imprisonment was



Purple ribbons are worn in recognition of Domestic Violence Awareness Month in October.

The amendment not only prohibited those after the law's 2015 passage from owning or possessing firearms if they were convicted of battery constituting domestic violence, but it also prohibited those from owning or possessing firearms if convicted prior to 2015.

six months, and the Nevada Legislature had done nothing to criminalize Amezcua's possession of a firearm if he was convicted of this misdemeanor battery domestic violence offense. However, this was little consolation to Amezcua since, at the federal level, Amezcua was arguably prohibited from owning or possessing a firearm even for self-defense. This outcome meant Amezcua could be prosecuted in federal court in Nevada under the Lautenberg Amendment of the Gun Control Act of 1968 if caught owning or possessing a firearm after his misdemeanor battery domestic violence conviction.

Christopher Andersen

In 2014, Christopher Andersen was arrested for misdemeanor battery constituting domestic violence. In 2015, the Nevada Legislature amended NRS 202.360, Nevada's law prohibiting possession or ownership of firearms by certain people such as felons. The amendment added those convicted of battery constituting domestic violence in Nevada or anywhere in the U.S. to the list of those prohibited from owning

or possessing firearms. The amendment not only prohibited those after the law's 2015 passage from owning or possessing firearms if they were convicted of battery constituting domestic violence, but it also prohibited those from owning or possessing firearms if convicted prior to 2015.

For example, someone convicted of battery constituting domestic violence in 1970 in Nevada or anywhere else in the U.S. would face prosecution under this 2015 amendment to NRS 202.360, Nevada's prohibited person in possession of a firearm statute. Under the 2015 amendment, they are now barred from owning or possessing firearms per NRS 202.360. And if convicted of violating NRS. 202.360, a felony, this person faces an underlying prison sentence between one to six years, although a district court judge may grant a sentence of probation.

A person convicted of misdemeanor battery constituting domestic violence

faces up six months in jail and a maximum \$1,000 fine. At the time Andersen was arrested, he had no right to a jury trial because Nevada was one of a handful of states that prohibited jury trials for anyone prosecuted for a misdemeanor. A six-month sentence is deemed "petty," not requiring a jury trial. Andersen challenged the 2015 amendment to NRS 202.360, arguing that he should be permitted to have a jury trial because the loss of his Second Amendment right reflects the Legislature's intent to treat misdemeanor battery constituting domestic violence as "serious." He argued that even though the maximum exposure he faced if convicted was six months,

the six-month "petty" offense presumption was rebutted by the Legislature, taking away his right to own or possess firearms.³ The Nevada Supreme Court agreed with Andersen, holding the 2015 amendment reflected the intent of the Legislature to treat the offense as "serious," and thus Andersen had the right to a jury trial.

The extent of Andersen's impact on gun rights in Nevada has yet to be determined. Of import, the Nevada Supreme Court ruled the loss of Andersen's

Second Amendment right upon being convicted of misdemeanor battery constituting domestic violence is a "direct consequence" because it flows from the Nevada Legislature's 2015 amendment of NRS 202.360 which, as discussed above, prohibits certain persons from owning or possessing firearms. Defendants pleading "guilty" or "no contest" to misdemeanor battery constituting domestic violence must be admonished that they are forever giving up their right to own or possess firearms under the Second Amendment. This is because the loss is a direct consequence – "direct" because the Nevada Legislature has mandated the Second Amendment forfeiture. Defendants must be admonished of all

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“direct consequences” when pleading “guilty” or “no contest” in order for a plea to be accepted as knowingly and voluntarily entered into. A plea entered into that is not knowingly and voluntarily entered into is unconstitutional.

The author and John G. Watkins, of counsel with the Pariente Law Firm, P.C., have filed challenges to convictions where defendants pleaded guilty to felonies but were never admonished they were forever losing their Second Amendment rights, a direct consequence of NRS 202.360(2), which prohibits those convicted of felonies from owning or possessing firearms. Absent evidence in the record the defendant was accordingly admonished or knew they were forever giving up their Second Amendment right as a direct consequence of pleading guilty to a felony offense, the plea is invalid and must be withdrawn.

The Nevada Supreme Court recently determined a defendant pleading guilty to a felony charge of Driving Under the Influence (DUI) Resulting in Death or Substantial Bodily Harm must be admonished of the minimum fine in order for the plea to be considered knowingly and voluntarily entered into. In *Banka v. Eighth Judicial District Court*⁴, the court allowed the defendant to withdraw his guilty plea because he was not admonished of the minimum \$2,000 fine because, the court reasoned, the plea was not knowingly and voluntarily entered. The same can be said about the myriad of felony guilty plea agreements taken by district court judges where none of the defendants was admonished that they were forever losing their Second Amendment right and subject to prosecution under NRS 202.360(2) if ever caught owning or possessing a firearm.

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ENDNOTES:

1. *Andersen v. Eighth Judicial District Court*, 135 Nev. 321, 448 P.3d 1120, 135 Nev. Adv. Op. 42 (2019)
2. *Amezcuva v. Eighth Judicial District Court*, 130 Nev. 45, 319 P.3d 602, 130 Nev. Adv. Op. 7 (2014)
3. It should be noted that, although a defendant convicted of misdemeanor battery constituting domestic violence may seal their conviction after seven years from when they are released from confinement or when their probationary term expires, whichever is later, they may not restore their Second Amendment right unless the governor of Nevada specifically restores this right in a pardon. A general pardon by the governor does not restore a defendant's Second Amendment right after the defendant has been convicted of battery constituting domestic violence.
4. *Banka v. Eighth Judicial District Court*, 476 P.3d 1191, 136 Nev. Adv. Op. 81 (2020)

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