

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

|                      |   |               |                        |
|----------------------|---|---------------|------------------------|
| GABRIEL IBARRA,      | ) | No. 69617     |                        |
|                      | ) |               |                        |
| Appellant,           | ) | <b>E-File</b> | Electronically Filed   |
|                      | ) |               | Feb 02 2017 04:24 p.m. |
| v.                   | ) |               | Elizabeth A. Brown     |
|                      | ) |               | Clerk of Supreme Court |
|                      | ) |               |                        |
| THE STATE OF NEVADA, | ) |               |                        |
|                      | ) |               |                        |
| Respondent.          | ) |               |                        |
|                      | ) |               |                        |

**APPELLANT IBARRA'S RESPONSE TO STATE'S  
PETITION FOR REVIEW**

COMES NOW Appellant GABRIEL IBARRA, by and through Chief Deputy Public Defender HOWARD S. BROOKS, and files this Response to the State's Petition for Review filed November 23, 2016. The State seeks Review and Reversal of the Order Vacating Judgment and Remanding, filed November 8, 2016, by the Court of Appeals. This Response is filed pursuant to a Supreme Court Order, filed January 20, 2017, directing the Appellant to file this document.

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This Response consists of the following Memorandum of Points and Authorities, and incorporates all pleadings and papers on file in this case.

DATED this 2nd day of February, 2017.

Respectfully submitted,  
PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

By /s/ Howard S. Brooks  
HOWARD S. BROOKS, #3374  
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## POINTS AND AUTHORITIES

### FACTS & PROCEDURAL HISTORY

The appeal of the Judgement of Conviction derived from a straightforward scenario. The Court of Appeals summarized the facts:

The victim was sitting at a bus stop, texting on her cell phone, when appellant Gabriel Ibarra approached her and asked if he could use her phone to make a call. The victim agreed, and the two conversed for a few minutes while the victim typed in the phone number Ibarra provided her. She then handed Ibarra her phone. Ibarra, who was sitting to the right of the victim, accepted the phone and placed it to his left ear, then switched the phone to his right ear, further away from the victim, stood up, and started to walk away. The victim stood to follow Ibarra, who then ran away. The victim chased Ibarra into an apartment complex, where she lost visual sight of Ibarra. Using an iPhone-tracking application, the victim discovered her phone's location. Officers located Ibarra and found the iPhone in nearby bushes. The State charged Ibarra with larceny from the person, a felony. A jury convicted him following a two-day trial.” **Gabriel Ibarra v. State of Nevada, Order Vacating Judgment and Remanding** (Court of Appeals, filed November 8, 2016)(unpublished)(referenced as “Appellate decision hereafter).

The resolution of the appellate case was equally straightforward. The Court of Appeals found that two elements of the statute had not been proved by the State. Relying on the plain language of **NRS 205.270** which required that the taking occur without the consent of the victim, the Court noted that the victim voluntarily provided the cell phone to the Appellant. “Critically, it is undisputed that the victim gave Ibarra permission to use her phone and

deliberately handed her iPhone to Ibarra before he ran away with it. “*Appellate Decision* at 3. “To affirm would effectively read the element of consent out of the statute. This we cannot do.” *Id.* At 6-8. Furthermore, the statutory requirement that the property be taken “from the person of another” was not met because the Appellant did not invade the privacy of the victim by taking the phone. The Court relied on **Terral v. State**, 84 Nev. 412, 413-14, 442 P.2d 465, 465 (1968) in discussing the State’s failure to prove that element.

The Court of Appeals decision was written by Judge Gibbons; that decision, with footnotes, was seven and one-half pages in length. Judge Silver authored a two and one-half page concurring opinion; and Judge Tao wrote a seventeen page dissent. Judge Tao argued that a victim’s consent, when obtained by trickery or fraud, is not valid. Judge Tao also argued that reliance on **Terral** essentially changed the wording of NRS 205.270 by requiring that the victim’s privacy be invaded by the Appellant.

The State filed a Petition for Review on November 23, 2016. The State’s Petition adopts the argument proposed by Judge Tao: first, the State argues that the Court of Appeals relied on **Terral** and created a new “invasion of privacy” requirement not supported by the statutory language;

second, the State argues that the deliberate act by the victim of handing the phone to the Appellant could not be consensual.

### **ARGUMENT**

**THE STATE SEEKS TO EVISCERATE LEGISLATIVE INTENT; THE STATE CREATED A PROBLEM BY CHARGING THE WRONG CRIME, AND NOW THEY WANT THE SUPREME COURT TO FIX THAT PROBLEM BY CHANGING THE STATUTE.**

Neither Judge Tao's 17 page dissent nor the State's nine page Petition for Review addresses the most obvious and powerful statement of legislative intent with regards to the facts of this case.

The Appellant committed a crime, and the Legislature created statutes that provided criminal liability for the Appellant's criminal acts.

When a person is entrusted with property, and that person converts the property to his or her own use, the crime of embezzlement has occurred. Because the Appellant was entrusted with the telephone and he stole it, he committed the crime of embezzlement.

When a person obtains property by false pretenses, one commits the crime of obtaining property by false pretenses. If the Appellant's statement that he wanted to use the phone to make a call was a false pretense, then he committed this crime.

The Nevada Legislature provided criminal liability for embezzlement, **NRS 205.0832(1)(b)**, and obtaining property by false pretenses, **NRS 205.0832(1)(c)** in the theft statute. **NRS 205.0832**.

If the Nevada Legislature has provided precise criminal liability for the acts of the Appellant in **NRS 205.0832**, why does the State desire to re-interpret **NRS 205.270** to include acts of embezzlement or obtaining property by false pretenses? Well, the only reasonable answer is that the State made a mistake in their charging decision and the State now hopes the Supreme Court will remedy their error by re-defining the statute to fit the crime.

By creating laws that directly addressed the circumstances of this case, the Legislature revealed their intent: they intended that **NRS 205.0832**, not **NRS 205.270**, apply to the facts of this case.

**THE STATE'S ARGUMENT ATTEMPTS TO RE-WRITE NRS 205.270 TO ELIMINATE THE "CONSENT" LANGUAGE FROM THE STATUTE.**

The majority and concurring opinions of the Court of Appeals correctly state that Judge Tao's dissenting position would effectively eliminate the "consent" requirement from the statute and thereby violate the intent of the Legislature. If the Legislature has an intent to eliminate the

“consent” requirement, then the Legislature can accomplish that result by amending the statute.

**THE APPELLANT WILL NOT SUMMARIZE THE EXTENSIVE CASELAW CITED BY THE MAJORITY AND CONCURRING OPINIONS TO REBUT THE ARGUMENT BY THE DISSENTING JUDGE AND THE STATE OF NEVADA.**

The majority and concurring opinions of the Court of Appeals cite an extensive and impressive array of law to rebut the arguments of the dissenting opinion. The Appellant can see no utility in repeating that authority.

**SUMMARY**

The State erred by charging the wrong crime in this case. The facts of this case are precisely described by NRS 205.0832, which prohibits embezzlement and the obtaining of property by false pretenses. The Court of Appeals correctly vacated the judgment of larceny from the person in a case where the facts did not fit the statutory crime. The State’s Petition for Review should be denied.

DATED this 2nd day of February, 2017.

Respectfully submitted,  
PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

By /s/ Howard S. Brooks  
HOWARD S. BROOKS, #3374  
Deputy Public Defender

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this Answer to Petition for Review 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 213 in 14 point font of Times New Roman style.

I further certify that this Answer to Petition for Review complies with the type-volume limitations of NRAP 40, 40A and 40B because it is proportionally spaced, has a typeface of 14 points and contains 1,186 words which does not exceed the word limit of 4,667 and 7 pages which does not exceed the 10 page limit.

DATED this 2<sup>nd</sup> day of February, 2017.

PHILIP J. KOHN  
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**CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2nd day of February, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT  
STEVEN S. OWENS

HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

GABRIEL IBARRA  
2208 Sunrise Avenue, #5  
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BY /s/ Carrie M. Connolly  
Employee, Clark County Public  
Defender's Office