

IN THE SUPREME COURT OF THE STATE OF NEVADA

GABRIEL IBARRA,)	No. 69617	
)		Electronically Filed
Appellant,)	E-File	Apr 10 2017 10:13 a.m.
)		Elizabeth A. Brown
v.)		Clerk of Supreme Court
)		
THE STATE OF NEVADA,)		
)		
Respondent.)		
)		

**APPELLANT IBARRA'S SUPPLEMENTAL BRIEF IN RESPONSE
TO SUPREME COURT ORDER DATED FEBRUARY 28, 2017**

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COMES NOW Appellant GABRIEL IBARRA, by and through Chief Deputy Public Defender HOWARD S. BROOKS, and files this Response.

The Supreme Court has granted review and ordered the parties to brief two issues: whether Ibarra’s deceit in asking to borrow the cellular phone while intending to steal it rendered the taking “without the other person’s consent” as required by **NRS 205.270** for conviction; and whether the **Terral** “invasion-of-privacy” element is contrary to the plain language of **NRS 205.270**.

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DID IBARRA'S DECEIT IN ASKING TO BORROW THE PHONE WHILE INTENDING TO STEAL THE PHONE RENDER THE TAKING "WITHOUT THE OTHER PERSON'S CONSENT" AS REQUIRED BY NRS 205.270?

With all due respect to the Nevada Supreme Court, this question cannot be answered. The question creates an absurd result; the result is contrary to public policy; and the result violates legislative intent.

If we conclude, in the context of **NRS 205.270**, that a person's request for property is deceitful, and that deceit vitiates any consent, thereby confirming the elements of the crime of Larceny from the Person, then the language of the statute, and the ostensible consent requirement, is meaningless. Any time a person requests property from another, and the person steals that property, then the crime of Larceny from the Person has occurred.

Consider the possibilities: A person requests a book from another; the book is not returned; if the request was deceitful, then the crime was Larceny from the Person. After all, the person handed the book to the culprit and the consensual act of handing the book to the culprit was caused by the deceitful conduct of the culprit who obviously intended to steal the book because he or she did not return the book. When a person requests that a food vendor sell him or her food, and the person walks away without

paying for the food, the crime of Larceny from the Person will have occurred because, of course, the request must have been deceitful. Anytime a person hands property to another, and steals that property, the crime of Larceny from the Person will have occurred. This is absurd.

The real absurdity is apparent when we consider the public policy implications of such a conclusion. Under the current law as commonly understood and practiced, the crime of Larceny from the Person occurs when someone walks up to a person and grabs something, without the consent of that person. The grabbing must take something held by the victim, or something attached to the victim's body. This is the lesson of Terral v. State, 84 Nev. 412, 442 P.2d 465 (1968).

Under current law, as generally practiced, if someone asks another for property, and tells a lie to obtain the property with the consent of the victim, then the crime of misrepresentation has occurred. **NRS 205.0832.**

These two crimes have different penalties. Larceny From the Person carries a more severe penalty, pursuant to **NRS 205.270**, than does Misrepresentation, pursuant to **NRS 205.0832.**

The different penalties are justified. Which of the following situations is more traumatic for a victim? A person walks up and asks for your phone. You give the phone to him, and he walks away. In the other, a person walks

up to you, grabs your phone from your hands, and runs away. The Appellant submits the second situation is more serious, and much more traumatic for the victim. Therefore, the current law makes sense as a matter of public policy.

The State's arguments in this case, and the Supreme Court's question regarding consent, seeks to subsume the crime of Misrepresentation into the crime of Larceny from the Person. That result violates good public policy.

Also, that result violates the intent of the Legislature. The Legislature created two separate crimes: Misrepresentation and Larceny from the Person. Nothing in the legislative intent suggests the Legislature intended to subsume the crime of Misrepresentation within the parameters of Larceny from the Person.

This entire line of reasoning, which focuses not on the ostensible consent, but rather focuses on whether the consent was deceitfully obtained, produces an absurd result which violates good public policy and legislative intent.

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DOES *TERRAL V. STATE* IMPOSE AN “INVASION OF PRIVACY” REQUIREMENT CONTRARY TO THE PLAIN LANGUAGE OF NRS 205.270?

NRS 205.270 provides as follows:

A person who, under circumstances not amounting to robbery, with the intent to steal or appropriate to his own use , takes property from the person of another, without his consent is guilty of the crime of Larceny From the Person.

The origin of the “invasion-of-privacy” requirement articulated in **Terral** is the statutory requirement that property be taken “from the person of another.” The “person of another” requirement logically leads to an “invasion-of-privacy.” The operative language is “takes property from the person of another.” When property is taken from the general vicinity of a person, logic dictates that the property be taken from the person’s “presence” or from the actual body of the person. If property is taken from the actual body of the person, or if property is taken when it is attached to the person, one can reasonably conclude that an invasion of the “zone of privacy” that cloaks a body and all that attaches to it has occurred. Therefore, **Terral v. State’s** language is derived from the statutory language.

The State admits that **Terral** is correct in distinguishing between a taking “from the person” versus a taking “from the presence” of a victim. But the State argues that **Terral’s** “privacy” requirement is contrary to the

statutory language. That argument is wrong. The “privacy” requirement articulated in **Terral** is consistent with the statutory language and is logically derivative from the statutory language.

SUMMARY

The present statutory scheme makes sense. It honors legislative intent and serves a valid public policy purpose. What happened in this case is simple: The State of Nevada prosecuted the wrong crime because they wanted the more serious penalty associated with Larceny from the Person rather than the penalty associated with Misrepresentation, which accurately described the crime that happened. The Court of Appeals recognized the error, and reversed the conviction. The State now wants the Supreme Court to change the law and absorb the crime of Misrepresentation within the parameter of Larceny from the Person. If this is done, the result will be absurd; the result will violate good public policy; and the result will violate Legislative intent. The decision of the Court of Appeals should be affirmed. The Petition for Review should be denied.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

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

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 6 pages which does not exceed the 10 page limit.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief 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 sanctions in

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

DATED this 10th day of April, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 10th day of April, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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

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