



1 **MEMORANDUM OF LAW**

2 The State writes that, “Thus, in Nevada, unlike in Connecticut, the death penalty is still the  
3 “consensus” and still the law.”<sup>1</sup> Respectfully, that consensus needs re-examination to determine  
4 whether the basic mores of our “evolving standards of decency” reflect whether, as determined  
5 by the judiciary, the death penalty today constitutes cruel and unusual punishment.<sup>2</sup> The mere  
6 fact that not a single person has been put to death by the State of Nevada in a decade  
7 underscores the fact that judicial re-examination of this issue is necessary.

8 The State cites Justice Scalia’s opinion in Marsh for support that the tide of consensus, even  
9 as examined through the judicial prism of the interpretation of “cruel and unusual” punishment  
10 clause of the Eighth Amendment, and Article 1 § 8 of the Constitution of the State of Nevada,  
11 has not changed.<sup>3</sup> Justice Scalia’s position on the killing of innocent people is that, “Like other  
12 human institutions, courts and juries are not perfect. One cannot have a system of criminal  
13 punishment without accepting the possibility that someone will be punished mistakenly. That is  
14 a truism, not a revelation. But with regard to the punishment of death in the current American  
15 system that possibility has been reduced to an insignificant minimum.”<sup>4</sup>

16 This statement is striking for several reasons. To begin with, Justice Scalia believes that he  
17 is speaking for the consensus when he states that you essentially have to spill innocent blood to  
18 have a death penalty. The remainder of the free world is not in this “consensus.” Similarly,  
19 Justice Scalia’s observation that most exonerations come, “As a consequence of the sensitivity  
20 of the criminal justice system to the due process rights of defendants ... “virtually none” of  
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24 <sup>1</sup> Opposition at p.8 referencing Connecticut v. Santiago, attached to original motion.

<sup>2</sup> This standard was enunciated in Trop v. Dulles, 356 U.S. 86, 101 (1958)

<sup>3</sup> Kansas v. Marsh, 548 U.S. 163 (2006) Opposition at p.9.

<sup>4</sup> Marsh, id, 2538-2539 (2006) as cited in Opposition at p.10.

1 these reversals, however, are attributable to a defendants “actual innocence”<sup>5</sup> is fundamentally  
2 flawed.

3 If courts throughout this country routinely overturn death penalty verdicts because of system  
4 failures how can it logically be argued that the system can be counted upon to protect the  
5 innocent? Justice Scalia’s opinion in Marsh came a decade ago information. Since then, data  
6 and DNA has been compiled proving that he is simply wrong.<sup>6</sup> Justice Scalia will never admit  
7 his error – this truism is underscored by the exoneration of Henry McCollum.<sup>7</sup> In Glossip,  
8 Justice Scalia derides Justice Breyer’s determination that it does not seem likely that the death  
9 penalty has a significant deterrent effect.

10 While nothing that resembles proof is posited by Justice Scalia to support the opinion that  
11 the death penalty still deters those who might kill, he wrote, “But we federal judges live in a  
12 world apart from the vast majority of Americans. After work we retire to homes in placid  
13 suburbia or to high-rise co-ops with guards at the door. We are not confronted with the threat of  
14 violence that is ever present in many Americans’ everyday lives. The suggestion that the  
15 incremental deterrent effect of capital punishment does not seem “significant” reflects, it seems  
16 to me, a let-them-eat-cake obliviousness to the needs of others.”<sup>8</sup> It is Justice Scalia that needs  
17 to survey common American landscape.

18 Counsel has yet to meet a client that was deterred in any fashion by Nevada’s death penalty.  
19 It has been a decade since anyone has been put to death here in Nevada and the benefits of a  
20 death sentence, among those who are accused of murder, seen to outweigh those of a life  
21 without sentence. Those benefits extend to the automatic appeals pursuant to Supreme Court  
22 Rule 250 and an appellate process with appointed counsel which eclipses that sentenced to life

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23 <sup>5</sup> Id.

24 <sup>6</sup> See Fn. 13 and 14 of original motion.

<sup>7</sup> Id.

<sup>8</sup> Glossip, attached as Exhibit C to original motion at p.13/47.

1 without parole. Incredibly, even the single cell accommodations given to Nevada death row  
2 inmates are preferred to the other living arrangements given to prisoners sentenced to life  
3 without parole. At some point, according to the dissent in Glossip, the factors which determine  
4 whether the death penalty is cruel and unusual punishment should be revisited by the judiciary.  
5 Counsel respectfully submits that this time has arrived.

6 **CONCLUSION**

7 It is respectfully submitted that Defendant's motion be granted.

8 DATED this 12<sup>th</sup> day of February, 2016.

9 /s/ GARY A. MODAFFERI

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6 **DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

7 THE STATE OF NEVADA,  
8 Plaintiff,  
9 vs.  
10 NORMAN BELCHER,  
11 Defendant.

CASE NO.: C270562  
DEPT. NO.: VI

13 **CERTIFICATE OF SERVICE**

14 I HEREBY CERTIFY that on the 12<sup>th</sup> day of February, 2016, I served a true and correct  
15 copy of the foregoing **REPLY TO STATE'S OPPOSITION TO DEFENDANT'S**  
**MOTION TO DECLARE DEATH PENALTY UNCONSTITUTIONAL** upon the  
16 following:

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19 /s/ Erika W. Magana  
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An Employee of Turco & Draskovich, LLP