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NATHALIE HUYNH, ESQ.
State Bar No. 5997
520 Holcomb Avenue
Reno, Nevada 89502
(775) 829-9220
(fax) 348-9315

Counsel for *Amicus Curiae*
the Republic of Serbia

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NOTARY PUBLIC
BY *[Signature]*
DEPUTY

**IN THE SECOND JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE**

AVRAM VINETO NIKI,

Petitioner,

vs.

E. K. McDANIEL, Warden, and
CATHERINE CORTEZ MASTO, Attorney
General of the State of Nevada,

Respondents.

Case No. CR94P2264
Dept. No.: VII

(Death Penalty Habeas Corpus Case)

**MOTION FOR LEAVE TO FILE BRIEF
OF THE REPUBLIC OF SERBIA AS AMICUS CURIAE**

The government of the Republic of Serbia ("Serbia") requests leave to submit a brief as amicus curiae in support of Petitioner Avram Vineto Nika's petition for writ of habeas corpus. This motion is based upon the attached memorandum of points and authorities and the entire file in this matter.

DATED this 10th day of August, 2011.

Respectfully submitted,

[Signature]
Nathalie Huynh
520 Holcomb Avenue
Reno, Nevada 89502
Counsel for *Amicus Curiae*
the Republic of Serbia

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 1. Mr. Nika is a citizen of Serbia and is currently on death row in Ely, Nevada. His
3 petition for *habeas corpus* challenges a number of violations of applicable U.S. Federal and
4 Nevada State law, including failures of his trial counsel to provide effective assistance of
5 counsel by contacting the Serbian Consulate and his first post-conviction counsel to take
6 appropriate steps to provide evidence resulting from this failure. Petition for Writ of
7 Habeas Corpus, Nika v. McDaniel, Case No. CR94P2264, (Apr. 20, 2010) at 165-69.

8 2. Serbia wishes to submit this *amicus* brief to assist the Court in fully understanding
9 the importance to Serbia of consular assistance to its national Mr. Nika and the effect of
10 counsel's failure to seek consular assistance for Mr. Nika's trial. Serbia considers the denial
11 of consular access to its nationals arrested, detained, or incarcerated abroad as a matter of
12 the utmost importance. Moreover, Serbia's interest is all the more compelling when the life
13 of one of its nationals is at stake, as it is here. Serbia and the United States are parties to
14 two treaties that govern the countries' consular relations: (1) the 1963 Vienna Convention
15 on Consular Relations and the 1882 Consular Convention between the United States and
16 Serbia. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S.
17 261 (hereinafter "Vienna Convention") and (2) Convention between the United States of
18 America and His Highness the Prince of Serbia, Defining the Rights, Immunities and
19 Privileges of Consular Officers, Dec. 27 1882, 22 Stat. 968, U.S.T. 320 (hereinafter "1882
20 Bilateral Consular Convention"). Serbia's interest as *amicus curiae* extends not only to
21 seeing that the life of its national is protected, but also to ensuring that its treaty rights are
22 upheld by the State of Nevada and, by extension, the United States.

23 3. Attached to the instant motion is the Brief of the Republic of Serbia as *Amicus*
24 *Curiae* in Support of Petition for Writ of Habeas Corpus.

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Affirmation Pursuant to NRS 239B.030

The undersigned affirms that the preceding document does not contain the social security number of any person.

Dated this 10th day of August, 2011.

Respectfully submitted,


Nathalie Huynh
520 Holcomb Avenue
Reno, Nevada 89502
Counsel for *Amicus Curiae*
the Republic of Serbia

1 1955
2 NATHALIE HUYNH, ESQ.
3 State Bar No. 5997
4 520 Holcomb Avenue
5 Reno, Nevada 89502
6 (775) 829-9220
7 (fax) 348-9315

8 Counsel for *Amicus Curiae*
9 the Republic of Serbia

10 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE**
11 **STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE**

12 AVRAM VINETO NIKA,
13
14 Petitioner,

15 vs.

16 E. K. McDANIEL, Warden, and
17 CATHERINE CORTEZ MASTO, Attorney
18 General of the State of Nevada,

19 Respondents.

Case No. CR94P2264
Dept. No.: VII

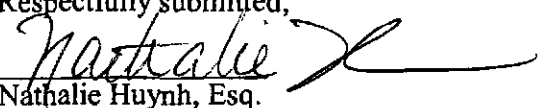
(Death Penalty Habeas Corpus Case)

20 **BRIEF OF THE REPUBLIC OF SERBIA AS AMICUS CURIAE**
21 **IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS**

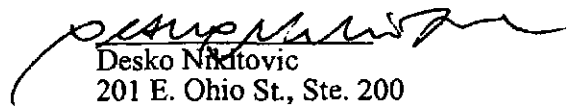
22 The government of the Republic of Serbia hereby files this brief in support of Petitioner
23 Avram Vineto Nika's petition for writ of habeas corpus. This brief is based upon the attached
24 memorandum of points and authorities and the entire file in this matter.

25 DATED this 9th day of August, 2011.

26 Respectfully submitted,

27 

28 Nathalie Huynh, Esq.
520 Holcomb Avenue
Reno, Nevada 89502
Counsel for *Amicus Curiae*
the Republic of Serbia



Desko Nikitovic
201 E. Ohio St., Ste. 200
Chicago, IL 60611
Consul General of
the Republic of Serbia

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTEREST OF AMICUS CURIAE**

3 1. The Republic of Serbia respectfully submits this brief as *amicus curiae* in support of the
4 petition of its national, Mr. Avram Vineto Nika, for writ of *habeas corpus*. Mr. Nika is a citizen of
5 Serbia and is currently on death row in Ely, Nevada. His petition for *habeas corpus* challenges a
6 number of violations of applicable U.S. Federal and Nevada State law, including failures of his trial
7 counsel to provide effective assistance of counsel by contacting the Serbian Consulate and his first
8 post-conviction counsel to take appropriate steps to provide evidence resulting from this failure.
9 Petition for Writ of Habeas Corpus, Nika v. McDaniel, Case No. CR94P2264, (Apr. 20, 2010) at
10 165-69.

11 2. Serbia submits this *amicus* brief to assist the Court in fully understanding the importance to
12 Serbia of consular assistance to its national Mr. Nika and the effect of counsel's failure to seek
13 consular assistance for Mr. Nika's trial. Serbia considers the denial of consular access to its
14 nationals arrested, detained, or incarcerated abroad as a matter of the utmost importance. Moreover,
15 Serbia's interest is all the more compelling when the life of one of its nationals is at stake, as it is
16 here. Serbia and the United States are parties to two treaties that govern the countries' consular
17 relations: the 1963 Vienna Convention on Consular Relations and the 1882 Consular Convention
18 between the United States and Serbia. Vienna Convention on Consular Relations, Apr. 24, 1963,
19 21 U.S.T. 77, 596 U.N.T.S. 261 (hereinafter "Vienna Convention") and Convention between the
20 United States of America and His Highness the Prince of Serbia, Defining the Rights, Immunities
21 and Privileges of Consular Officers, Dec. 27 1882, 22 Stat. 968, U.S.T. 320 (hereinafter "1882
22 Bilateral Consular Convention"). Serbia's interest as *amicus curiae* extends not only to seeing that
23 the life of its national is protected, but also to ensuring that its treaty rights are upheld by the State
24 of Nevada and, by extension, the United States.

25 **II. INTRODUCTION**

26 3. The State of Nevada has failed to give adequate consideration to the failure by both Mr.
27 Nika's trial counsel and first post-conviction counsel to seek Serbian consular assistance throughout
28 Mr. Nika's legal proceedings. Consular assistance is a right protected in the United States by the

1 Vienna Convention and emphasized in the 1882 Bilateral Consular Convention. This *amicus* brief
2 describes the importance of the Vienna Convention and consular assistance under U.S. and
3 international law. Mr. Nika was particularly vulnerable to the denial of consular assistance due to
4 his inability to speak English and his lack of familiarity with the U.S. legal system and culture;
5 vulnerabilities consular assistance is meant to ameliorate.

6 4. When presented with Mr. Nika, a foreign defendant, reasonable trial counsel should have
7 contacted his consulate to seek any mitigating evidence available to mount an effective defense in
8 a capital trial. In this case, the Serbian Consulate could and would have provided, among other
9 things, government documents within its possession relating to Mr. Nika, such as school and military
10 records, interpretation and translation services, arrangements for meetings with witnesses in Serbia,
11 and briefings related to the marginalized Serbian Roma minority of which Mr. Nika is a member.
12 Additionally, the Republic could and would have monitored Mr. Nika's legal team from the outset,
13 and advised, supplemented or even replaced it as needed. Serbia has provided this type of assistance
14 in other criminal cases and, indeed, attempted to do so in this case when it was finally informed of
15 Mr. Nika's situation. Mr. Nika's right to consular assistance was eviscerated by his counsel's failure
16 to inform him of this right and to contact the Serbian Consulate on his behalf, as Mr. Nika's initial
17 counsel planned to do before he removed himself for a conflict of interest. There can be no doubt
18 that trial counsel's failure to act amounted to ineffective assistance of counsel that prejudiced Mr.
19 Nika at trial.

20 5. Mr. Nika's counsel at the first post-conviction phase was also ineffective for failing to
21 articulate with any reasonable degree of specificity the prejudice caused to Mr. Nika by his trial
22 counsel's failure to contact the Serbian Consulate. Serbia would have been able to support post-
23 conviction counsel by providing the requisite evidence to establish that Mr. Nika was prejudiced at
24 his initial trial. The inability of his post-conviction team to describe this prejudice altered the
25 outcome of Mr. Nika's post-conviction proceedings.

26 6. Serbia has grave doubts as to the validity of the death sentence rendered against Mr. Nika.
27 These doubts are exacerbated by the lack of consular assistance that Serbia could and would have
28 provided had it been properly informed either by the State of Nevada or Mr. Nika's counsel. The

1 Republic of Serbia respectfully submits that, under the circumstances, this Court should grant Mr.
2 Nika's petition for a writ of *habeas corpus*.

3 **III. ARGUMENT**

4 **A. Consular Notification and Protection Is Vital to Ensure that a Detained Foreign
5 National Receives Due Process and Has Access to a Fair Trial**

6 7. The Vienna Convention is a multilateral treaty codifying consular practices between states,
7 including the United States and Serbia, which the United States ratified in 1969. Vienna
8 Convention, 21 U.S.T. 77. In the words of the International Court of Justice, the Vienna Convention
9 establishes "an interrelated regime designed to facilitate the implementation of the system of
10 consular protection." LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 492 (June 27); Avena and
11 Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 39 (March 31).

12 8. Article 36(1)(b) of the Vienna Convention – a provision of great importance to Mr. Nika's
13 case – requires the United States to inform a foreign national "without delay" of his right to have his
14 consulate notified of his arrest or detention. Vienna Convention, art. 36(1)(b), 21 U.S.T. at art.
15 36(1)(b). Also, under Article 36(1)(c) of the Vienna Convention, consular officers are empowered
16 to assist a detained foreign national by visiting him in prison, conversing and corresponding with
17 him, and arranging for his legal representation. Id. at art. 36(1)(c).

18 9. The United States has considered consular conventions, such as the Vienna Convention, to
19 be self-executing treaties under Article VI of the U.S. Constitution. U.S. Dep't of State, Consular
20 Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other
21 Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to
22 Assist Them 46 (3d ed., 2010); see also U.S. Const., Art. VI, cl. 2. As self-executing treaties,
23 consular conventions are binding on federal, state and local officials without any additional
24 implementing legislation by Congress. Consular Notification and Access, 16.

25 10. The 1882 Bilateral Consular Convention, which the United States and Serbia signed in 1881
26 and ratified in 1882, is also currently in force. Consular Notification and Access, 55 (2d ed., 2003);
27 Consular Notification and Access, 56, 65 (3d ed., 2010). The existence and survival of the 1882
28 Bilateral Consular Convention is itself strong evidence of the importance long attached by both the

1 United States and Serbia to the mutual consular protection of their nationals abroad.

2 11. Consular assistance is important to protect individuals arrested in a foreign legal system. For
3 a detained foreign national, his consulate can serve as an important link between what is familiar and
4 what is unknown, and may also provide information and resources otherwise unavailable to his trial
5 counsel. See Ledezma v. State, 626 N.W.2d 134, 152 (Io. 2001). The consulate, once notified, can
6 provide assistance to the detained foreign national and his counsel to help alleviate the difficulties
7 he faces with respect to language, culture, financial constraints, legal representation, gathering
8 evidence, locating witnesses in his home country, and obtaining mitigating evidence in capital cases,
9 such as Mr. Nika's.

10 12. The right of consular assistance—or at least the option of requesting such assistance—is vital
11 to ensure that a foreign national receives due process and access to a fair trial because “it levels the
12 playing field and puts him in the same situation as a citizen of the detaining country.” See Linda
13 Jane Springrose, Strangers in a Strange Land: The Rights of Non-Citizens Under Article 36 of the
14 Vienna Convention on Consular Relations, 14 Geo. Immigr. L.J. 185, 197 (1999); see also The Right
15 to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of
16 Law, Advisory Opinion OC 16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶¶ 117, 119–20, 137 (Oct.
17 1, 1999) (stating that a foreign national's right to be promptly informed that he may obtain consular
18 assistance enables “the accused to fully exercise other rights that everyone enjoys under the law,”
19 such “that nonobservance of a detained foreign national's right to information, recognized in Article
20 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due
21 process of law.”).

22 13. Indeed, the United States has recognized the importance of consular assistance in protecting
23 its nationals abroad. 7 U.S. Dep't of State, FOREIGN AFFAIRS MANUAL § 412 (June 9, 2011).
24 The U.S. Department of State has expressed that:

25 [o]ne of the most important functions of consular officers is to protect and assist
26 private U.S. citizens or nationals traveling or residing abroad. Few of our citizens
27 need that assistance more than those who have been arrested in a foreign country or
imprisoned in a foreign jail. Id.

28 14. As further evidence of the importance of consular assistance, Senator Patrick Leahy recently

1 introduced the Consular Notification Compliance Act of 2011 to facilitate the United States'
2 compliance with Article 36 of the Vienna Convention. Consular Notification Compliance Act of
3 2011, S. 1194, 112th Cong. (2011). This proposed legislation would give federal courts jurisdiction
4 to review petitions filed by foreign nationals convicted and sentenced to death in the United States
5 for alleged violations of Article 36(1)(b) or (c) of the Vienna Convention. *Id.* § 4(a)(1).

6 15. The Executive Branch's strong support for this bill was set forth in the *amicus curiae* brief
7 submitted by the Solicitor General in Leal Garcia v. Texas. Brief for the United States as Amicus
8 Curiae in Support of Application for a Stay, Leal Garcia v. Texas, 564 U.S. __ (2011), available at
9 [http://sblog.s3.amazonaws.com/wp-content/uploads/2011/07/SG-amicus-in-Leal-execution-7-1-](http://sblog.s3.amazonaws.com/wp-content/uploads/2011/07/SG-amicus-in-Leal-execution-7-1-11.pdf)
10 [11.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2011/07/SG-amicus-in-Leal-execution-7-1-11.pdf) (last accessed, August 2, 2011). *But see*, Leal Garcia v. Texas, 564 U.S. __ (2011). The State
11 Department and the Justice Department have also expressed their strong support for the Consular
12 Notification Compliance Act of 2011, as illustrated by a joint letter Secretary of State Clinton and
13 Attorney General Holder sent to Senator Leahy. Letter from Hillary Rodham Clinton, Sec'y of State,
14 and Eric H. Holder, Jr., Attorney Gen., to Senator Patrick J. Leahy (June 28, 2011), (available at
15 <http://leahy.senate.gov/imo/media/doc/ConsularNotification-Packet.pdf>) (last accessed, August 2,
16 2011). In their letter, Secretary Clinton and Attorney General Holder emphasized that:

17 [f]or U.S. citizens arrested abroad, the assistance of their consulate is often essential
18 for them to gain knowledge about the foreign country's legal system and how to
19 access a lawyer, to report concerns about treatment in detention, to send messages to
20 their family, or to obtain needed food or medicine. Prompt access to U.S. consular
21 officers prevents U.S. citizen prisoners from being lost in a foreign legal system. *Id.*

22 16. Therefore, it is apparent that a detained foreign national's access to consular assistance is
23 vital to both due process and access to a fair trial.

24 **B. Counsel's Failure to Take Advantage of Consular Assistance Is Ineffective
25 Assistance of Counsel**

26 17. It is the Republic of Serbia's position that, at the very least, counsel is ineffective in a capital
27 case when he or she is presented with an apparent foreign national who cannot speak English, and
28 then fails to contact that individual's consulate. The United States Supreme Court has left open, and
indeed, in some circumstances, has cited with approval the proposition that the *Vienna Convention*
can be given meaning in the context of ineffective assistance of counsel. *See Sanchez-Llamas v.*

1 Oregon, 548 U.S. 331, 364, n. 3 (Ginsburg, J., concurring in judgment); Medellín v. Texas, 552 U.S.
2 491, 537 (Stevens, J., concurring in judgment).

3 18. Several state courts and at least one U.S. federal circuit court have held similarly. See, e.g.,
4 Valdez v. State, 46 P.3d 703, 710 (Okla. Crim. App. 2002); Osagiede v. United States, 543 F.3d 399,
5 409–12 (7th Cir. 2008); Ledezma, 626 N.W.2d at 152 (noting that “all criminal defense attorneys
6 representing foreign nationals should be aware of the rights to consular access as provided by Article
7 36, and should advise their clients of this right”); Commonwealth v. Gautreaux, 941 N.E.2d 616, 620
8 (Mass. 2011). In Valdez v. State, the Oklahoma Criminal Court of Appeals reversed the defendant’s
9 death sentence, holding that the Court could not “have confidence in the jury’s sentencing
10 determination and affirm its assessment of a death sentence” when the petitioner’s trial counsel knew
11 that his client was a Mexican national and failed in his duty to inform his client that he had the right
12 to contact his consulate, which would have led to the discovery of “very significant and important
13 evidence bearing upon the Petitioner’s mental status and psyche at the time of the crime.” Valdez,
14 46 P.3d at 710. With respect, the Republic of Serbia submits that the State Courts of Nevada should
15 give effect to the Vienna Convention in such a manner in the present case.

16 19. Nevada applies the Strickland test for determining whether counsel was ineffective at trial
17 or at any other phase of a criminal proceeding. Strickland v. Washington, 466 U.S. 668, 686–88
18 (1984); Warden v. Lyons, 100 Nev. 430, 432–33 (1984). Under Strickland, counsel is ineffective
19 if his or her performance fell below an objective standard of reasonableness and thereby prejudiced
20 the defense. Strickland, 466 U.S. at 688, 692. To determine what the objective standard of
21 reasonableness is in a given case, a court may look at relevant professional standards. Id.

22 20. At the time of Mr. Nika’s trial, the 1989 version of the “American Bar Association’s
23 Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases” (hereinafter
24 the “1989 ABA Guidelines”) would have applied. The 1989 ABA Guidelines mandate that trial
25 counsel must conduct a wide-ranging social and medical history of a defendant in a capital case.
26 They state that counsel should, among other things:

27 “explore the existence of . . . potential sources of information relating to
28 the offense, the client’s mental state, and the presence or absence of any
aggravating factors under the applicable death penalty statute and any mitigating
factors” (1989 ABA Guidelines, Sec. 11.4.1 D2B);

1 “[c]ollect information relevant to the sentencing phase of trial including,
2 but not limited to: medical history . . . ; educational history . . . ; military history . .
3 . . ; employment and training history . . . ; family and social history . . . ; prior adult
 and juvenile record; prior correctional experience; and religious and cultural
 influences” (Id. at Sec. 11.4.1 D2C);

4 “[o]btain names of collateral persons to verify, corroborate, explain and
5 expand upon information obtained [regarding relevant evidence in the sentencing
 phase]” (Id. at 11.4.1 D2E);

6 “consider interviewing potential witnesses, including . . . witnesses
7 familiar with aspects of the client’s life history that might affect the likelihood
8 that the client committed the charged offense(s), possible mitigating reasons for
 the offense(s); and/or other mitigating evidence to show why the client should not
 be sentenced to death” (Id. at 11.4.1 D3B); and

9 “maintain close contact with the client throughout preparation of the case,
10 discussing (inter alia) the investigation, potential legal issues that exist or develop,
 and the development of a defense theory” (Id. at 11.4.2.).

11 21. In this context, failure to contact a foreign national’s consulate can be analogized to defense
12 counsel’s failure to develop mitigating or exculpatory evidence generally. A reasonable attorney,
13 when confronted with a Serbian national, would have appreciated that to obtain the possibly
14 mitigating and exculpatory evidence typically required in a capital case as listed in the 1989 ABA
15 Guidelines, he or she would have to contact the Serbian Consulate. This would have led counsel
16 ineluctably to the Vienna Convention, as the Treaty’s object and purpose is to allow the Serbian
17 Consulate to assist nationals such as Mr. Nika in exactly this manner, by providing government
18 documents, potential witnesses, translators and interpreters, among other things, and having these
19 admitted to U.S. courts. Indeed, Mr. Nika’s trial counsel had a *duty* under Strickland to investigate
20 thoroughly all the law and facts relevant to his client, which would have included relevant consular
21 treaties. See Strickland, 466 U.S. at 690.

22 22. Here, the Court need not look to a hypothetical reasonable defense counsel. Mr. Nika’s
23 initial counsel, Mr. John Morrow, wrote in Mr. Nika’s file that defense counsel *would* need to
24 contact “the diplomatic services” of the Serbian Consulate. See Petition for Writ of Habeas Corpus,
25 at 22 (citing Ex. 95). A reasonable lawyer, Mr. Morrow, proposed exactly the action that the
26 Republic of Serbia argues should take place under the relevant treaties. Trial counsel, Mr. John
27 Ohlson, appointed after Mr. Morrow’s withdrawal for conflict of interest, inexplicably failed to take
28 the necessary action outlined by Mr. Morrow. The impact of this failure was compounded by Mr.

1 Ohlson's acknowledgement that he could not even communicate with his client, Mr. Nika, without
2 an interpreter – which the Serbian Consulate certainly could and would have provided if notified.

3 Id. at p. 24.

4 23. Despite these blatant errors at trial, Mr. Nika's first post-conviction counsel provided the
5 Supreme Court of Nevada only with cursory evidence on how Mr. Nika was prejudiced by trial
6 counsel's failures. See Nika v. State, 198 P.3d 839, 854–55 (Nev. 2008) (“Nika failed to identify
7 what mitigation evidence the consulate could have provided. . .”). Reasonable post-conviction
8 counsel would have solicited from the Republic of Serbia assistance conducting a mitigation
9 investigation in Serbia, assistance locating documents from Mr. Nika's past, interpretation and
10 translation services, and the filing of the *amicus* brief and Consulate statements provided now, to
11 show prejudice at his initial trial. As demonstrated further in Section C below, Serbia has been able
12 to assist Mr. Nika's current counsel in describing with specificity the types of assistance it could
13 have provided. The failure of post-conviction counsel to take this obvious path resulted in a failed
14 post-conviction appeal for Mr. Nika based on his trial counsel's failure to contact the Consulate.

15 **C. Serbia Would Have Provided Substantial Assistance to Mr. Nika if Any of Its**
16 **Consular Officials Had Been Notified of His Arrest, Detention and Trial**

17 24. As the Republic of Serbia could and would have provided significant assistance to Mr. Nika,
18 the failure of Mr. Nika's trial counsel to inform Mr. Nika that such assistance was available rendered
19 him ineffective and prejudiced the trial outcome. Strickland v. Washington, 466 U.S. 668 (1984).
20 The failure of Mr. Nika's first post-conviction counsel to establish this prejudice was further
21 ineffective assistance. Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997).

22 **1. Serbia Has a History of Aiding its Nationals Abroad**

23 25. There have been relatively few cases of Serbian nationals facing legal proceedings in the
24 United States that have reached the Republic's attention. At every opportunity, however, Serbia has
25 provided substantial assistance to its nationals once informed of their circumstances.

26 26. For example, in 2010, a Serbian couple living in California was arrested and separated from
27 their children amid allegations of sexual abuse. Serbia's Consul General in Chicago, Mr. Desko
28 Nikitovic, was informed of the case and, believing the allegations to be largely the result of a

1 misunderstanding of Serbian culture and hence unfounded, came to the family's defense. In so
2 doing, Mr. Nikitovic had the full support of the Serbian Government. He raised funds to pay for
3 attorneys, hired renowned Serbian psychoanalysts to offer testimony on cultural differences, and
4 worked closely with the couple's counsel. See California Custody Battle Sparks Overseas Outrage,
5 Associated Press, Jan. 15, 2011 ("Serbia is now providing funds for the father's attorney, and its
6 Consul General in Chicago, Desko Nikitovic, is advocating on behalf of the couple."). The father,
7 against whom charges were filed and ultimately dropped, was quoted as saying "(Child Protective
8 Services) has been under great pressure to admit they made a mistake, from our lawyers and the
9 Serbian diplomacy headed by Consul (Desko) Nikitovic and others. I understood that (Interior
10 Minister) Ivica Dacic was here and that he was promised things would be sorted out in the
11 foreseeable future." Couple Reunited With Children, Recordnet.com, February 17, 2011. Thanks
12 in large part to these efforts, the prosecution dropped the charges against the couple and the family
13 was reunited.

14 27. Similarly, Serbia has invested substantial time and resources in Mr. Nika's case. Although
15 regrettably informed of Mr. Nika's arrest long after he had been convicted and sentenced to death,
16 Mr. Nikitovic and other representatives of the Serbian Government have facilitated interviews with
17 Mr. Nika's family members, obtained his school and other official records, and provided information
18 regarding the marginalized Roma minority population of Serbia, and have provided substantial
19 translation services free of charge, all for Mr. Nika's appeal.

20 28. Beyond an obligation to help all of its nationals navigate foreign legal systems, the Republic
21 of Serbia is further motivated by its commitment to human rights. *First*, Serbia acceded in 2001 to
22 the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at
23 the abolition of the death penalty, and abolished the death penalty in all circumstances in 2002. As
24 far as Serbia is aware, Mr. Nika is the first Serbian national to be sentenced to death since the United
25 States reinstated the death penalty. The Republic has chosen to intervene in part to prevent Mr. Nika
26 from suffering a sentence that has been banned in his home country.

27 29. *Second*, Serbia strives to take its place in a modern Europe, and hopes ultimately to join the
28 European Union. To this end, the Republic has signed and ratified the European Convention on

1 Human Rights, as well as a Stabilization and Association Agreement with the European Union, both
2 of which urge the equal treatment of minority groups. Recently, as part of its compliance with
3 international law, Serbia arrested and extradited Ratko Mladić and Goran Hadiz to the International
4 Criminal Tribunal for the former Yugoslavia.

5 30. Through its consulate, Serbia has been able to provide to Mr. Nika's current counsel
6 *information on the Roma people and their complex place within Serbian society*. The Republic
7 wishes only that it had had the opportunity to share this insight during Mr. Nika's trial, when it could
8 have impacted his conviction and sentencing.

9 **2. Serbia's Cooperation Would Materially Have Aided Mr. Nika's Defense**

10 31. The Republic's interventions to protect the rights of Serbian nationals abroad demonstrate
11 a clear pattern of engagement. The Republic has provided extensive assistance to post-conviction
12 counsel in this very case. If a Serbian consular office had been contacted at an appropriate stage of
13 Mr. Nika's criminal trial, it is reasonable to assume that the Republic would have taken similar steps
14 to aid in his defense before he was sentenced to death. This aid would have fallen into two principle
15 categories: legal representation and mitigating evidence.

16 **a. Serbian consular officials would have recognized the ineffective**
17 **assistance being provided to Mr. Nika by trial counsel and would**
have helped to improve his representation

18 32. In addition to basic consular functions, if Serbian consular officials had been informed of Mr.
19 Nika's status prior to – or even during – his criminal trial, the Republic would quickly have learned
20 that Mr. Nika's trial counsel had visited Mr. Nika only a few times to prepare his capital case, and
21 only seldom with an interpreter. Just as Serbia's Consul General was able to do for the Serbian
22 family accused of sex crimes in California, Serbian consular officials would have been able to
23 improve Mr. Nika's legal representation. They could have arranged to retain more experienced *pro*
24 *bono* or paid counsel (as was the case in California), or assisted the existing legal team. A
25 representative of the Consulate's office could have attended court hearings to ensure that counsel
26 was performing effectively. The Consul General or some other government official could have met
27 with Mr. Nika privately to determine whether he was satisfied with his representation and receiving
28 all of the assistance he required. At the very least, the Republic would have ensured that Mr. Nika

1 had competent interpretive services.

2 33. Once the Republic became aware of Mr. Nika's plight post-conviction, it liaised with
3 international organizations and law firms. Since January 2010, Serbian officials have worked with
4 Reprieve, a non-profit international organization that provides assistance to indigent persons facing
5 the death penalty in the form of legal expertise, government liaison, investigative assistance and
6 support. Reprieve was able to assist in legal strategy and evidence-gathering in Nevada and Serbia.
7 Serbia also retained undersigned Nevada State counsel on Mr. Nika's behalf. Alongside Nevada
8 counsel, and with Reprieve's assistance, Serbia was also able to consult on a *pro bono* basis with one
9 of the world's largest and oldest international law firms, Freshfields Bruckhaus Deringer LLP, on
10 the issues of international law cited in this *amicus curiae* brief. Both Reprieve and Freshfields have
11 a presence across the United States and Europe, which could have been leveraged for legal research
12 and factual investigations relevant to Mr. Nika's defense at an earlier stage. If Serbia had been
13 notified of Mr. Nika's status at an earlier date, organizations like Reprieve and Freshfields could
14 have been employed to strengthen Mr. Nika's legal defense in the first instance, rather than in federal
15 *habeas* proceedings.

16 34. In addition, the Serbian Consulate in Chicago has translated multiple legal pleadings from
17 English to Serbian free of charge to ensure that Mr. Nika understands and can be an active
18 participant in the litigation of his case. Until the Office of the Federal Public Defender undertook
19 his representation, Mr. Nika never received adequate interpretation or translation services throughout
20 the entire course of these criminal proceedings. The interpreter who assisted during the trial spoke
21 a *strange dialect and Mr. Nika did not understand him*. Neither trial counsel nor prior post-
22 conviction counsel ever had a single document or legal pleading translated into Mr. Nika's native
23 Serbian. Trial counsel often met with Mr. Nika without an interpreter present, and prior post-
24 conviction counsel never met with Mr. Nika with the assistance of an interpreter. As a result, Mr.
25 Nika could not have been an active participant in his litigation, and certainly could not act to ensure
26 that his rights were being protected. If trial or prior post conviction counsel had notified the
27 Consulate of Mr. Nika's situation, it would have ensured that Mr. Nika had competent interpretation
28 and translation services provided free of charge throughout these proceedings. There is a reasonable

1 probability that if Mr. Nika had received adequate translation assistance, he would have been a more
2 active participant in the litigation, and the results of the proceeding would have been different.

3 **b. Serbia would have facilitated the gathering of mitigating evidence**
4 **critical to Mr. Nika's defense**

5 35. Mr. Nika alleges in his *habeas* petition that his personal and cultural background were highly
6 relevant to the events leading to his arrest. Petition for Writ of Habeas Corpus, at 21–22, 26, 32–61.
7 *His difficult family life growing up, his exposure to pesticides, his trouble in school and his*
8 *membership in the marginalized Roma ethnic minority of Serbia are just some critical pieces of*
9 *mitigating evidence that effective trial counsel should have put to the jury in Mr. Nika's criminal*
10 *trial. Instead, trial counsel simply presented the testimony of Mr. Nika's estranged wife and sister-*
11 *in-law who had only known Mr. Nika for five years, who knew nothing about his upbringing in*
12 *Serbia, and whose testimony was far more damaging than helpful. If trial counsel had contacted the*
13 *Serbian Consulate, it would have assisted both in conducting an extensive mitigation investigation*
14 *in Serbia, and in facilitating travel to Reno for Mr. Nika's family in order to provide testimony on*
15 *Mr. Nika's behalf. The Consulate would also have assisted in locating and paying for mental health*
16 *experts, cultural experts, and any other experts that would have been helpful to Mr. Nika's defense.*

17 36. Mitigating evidence about a defendant's upbringing tends to humanize the defendant in the
18 *eyes of the jury, particularly in a case such as Mr. Nika's, where the prosecution relied heavily on*
19 *his identity as an outsider. The state portrayed Mr. Nika as an evil foreigner who murdered a hard*
20 *working family man that stopped to render aid. Evidence that Mr. Nika was himself a hard working*
21 *family man who had been beaten by his alcoholic father, forced to work in pesticide covered fields*
22 *and chemically toxic glass factories as a child due to his family's poverty, and discriminated against*
23 *due to his membership in a marginalized ethnic group, could have balanced the impact of the state's*
24 *negative characterization of Mr. Nika on the jury. Consular officials or defense counsel can*
25 *sometimes use mitigating evidence to persuade prosecutors not to seek the death penalty, and there*
26 *is evidence suggesting that this might have been possible in Mr. Nika's case. Petition for Writ of*
27 *Habeas Corpus, at 18.*

28 37. As discussed in Section B above, effective defense counsel must conduct a broad and

1 thorough investigation of the defendant's background, mental condition, and life experiences to
2 gather evidence to defend against the imposition of the death penalty. The 1989 ABA Guidelines
3 specify the kinds of evidence that should be pursued in capital cases. Mr. Nika's initial public
4 defense team recognized the role that the Serbian Consulate could play in obtaining such critical
5 mitigating evidence—but trial counsel never contacted the Consulate once that initial team withdrew.

6 38. The Consul General has confirmed that his office was able and willing to facilitate the types
7 of assistance to which Mr. Nika was entitled in his trial in 1994–1995. Even though the Republic
8 closed its Consulate in Chicago in 1992, consular functions were absorbed by the Serbian Embassy
9 in Washington, DC, until the Consulate was reopened in 2002. Petition for Writ of Habeas Corpus,
10 Ex. 124. In the words of Consul General Desko Nikitovic:

11 In the event that the attorneys for Mr. Nika . . . [had] addressed the Embassy, they
12 would have been able to obtain assistance in the sense that they would have been able
13 to contact the parents and relatives of Mr. [Nika] as well as the competent authorities
14 of the Republic of Serbia and inform them about this case. Also, the Embassy could
15 have requested additional information in [the] possession of those authorities, and
16 submit the data to Mr. [Nika's] attorneys.

17 If contacted, the Embassy could have explained to Mr. Nika . . . the differences
18 between the American legal system and the Serbian legal system, particularly with
19 regards to the right to counsel, the right against self-incrimination, and the state's
20 burden of proof. The Embassy could also have intervened by convincing the court
21 to allow them to explain cultural differences that are relevant to Mr. [Nika's]
22 culpability. Ex. 124.

23 39. Not only *could* Serbia have provided crucial assistance in gathering many of the types of
24 evidence that Mr. Nika now alleges are improperly absent from the trial record, Serbia *did provide*
25 *and continues to provide* such evidence – albeit too late to have influenced the jury in the first
26 instance. In addition to the family contacts, school records and Roma population briefings discussed
27 in Section C.1. above, the Consul General facilitated a visit to Serbia by Mr. Nika's current counsel,
28 reflecting that a similar visit could have been arranged much earlier, for trial counsel. Petition for
Writ of Habeas Corpus, Ex. 124. The Consul General continues to work with Mr. Nika's counsel
to locate additional mitigating evidence, such as military and medical records, and will continue to
do so.

40. International, U.S. Federal and Nevada State law all indicate that Mr. Nika's trial counsel
should have contacted Serbian consular officials as a critical component of providing effective

1 assistance. The 1989 ABA Guidelines, trial counsel's own inherited case file, and common sense
2 point to the same result. Once contacted, the Republic would have initiated the assistance it
3 customarily provides. Thus, the prejudicial results of trial counsel's ineffective assistance could
4 have been avoided.

5 41. Even later, it would have been relatively straightforward for Mr. Nika's first post-conviction
6 counsel to request appropriate affidavits or *amicus* briefs from the Republic. Such evidence of
7 prejudice at Mr. Nika's trial would likely have impacted the outcome of Mr. Nika's post-conviction
8 appeals.

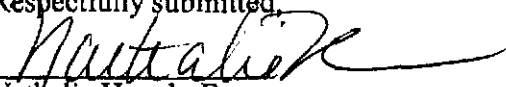
9 **III. CONCLUSION**


10 42. For the reasons stated above, *amicus curiae* the Republic of Serbia respectfully requests that
11 the Court grant Mr. Nika's Petition for Writ of *Habeas Corpus* (Post-Conviction).

12 The undersigned does hereby affirm that the preceding document does not contain the social
13 security number of any person.

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Respectfully submitted,


Nathalie Huynh, Esq.
520 Holcomb Avenue
Reno, Nevada 89502
Counsel for *Amicus Curiae*
the Republic of Serbia


Desko Nikitovic
201 E. Ohio St., Ste. 200
Chicago, IL 60611
Consul General of
The Republic of Serbia

1 **CERTIFICATE OF SERVICE**

2 In accordance with Rule 5 of the Nevada Rules of Civil Procedure, the undersigned
3 certifies that on the th day of August, 2011, I served a true and correct copy of the foregoing
4 document(s) described as follows in the manner set forth below:

5 **MOTION FOR LEAVE TO FILE BRIEF OF THE REPUBLIC OF SERBIA AS**
6 **AMICUS CURIAE** by:

7 Placing an original or true copy thereof in a sealed envelope placed for collection and
8 mailing in the United States Mail, at Reno, Nevada, postage prepaid, following
ordinary business practices.

9 Facsimile (FAX).

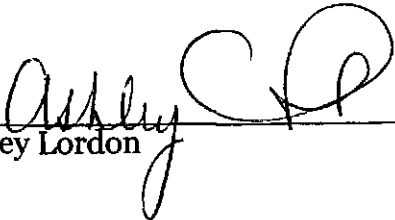
10 Federal Express or other overnight delivery.

11 Bootleg Courier Service.

12 addressed as follows:

13 Terrence McCarthy (Bootleg Courier Service)
14 Washoe County District Attorney's Office
15 Appellate Division
One South Sierra Street
Reno, Nevada 89501

16 Heather Fraley (U.S. Mail)
17 Assistant Federal Public Defender
18 Law Office of the Federal Public Defender
411 East Bonneville, Suite 250
Las Vegas, Nevada 89101

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21 Ashley Lordon

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