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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM PIERS , Defendant.	CASE A00-0104-01-CR 03-459 (HRH) MOTION TO VACATE CONVICTIONS AND SENTENCES AND REQUEST FOR EVIDENTIARY HEARING PURSUANT TO 28 U.S.C. § 2255; EXHIBITS A–C; DEFENDANT'S DECLARATION IN SUPPORT OF MOTION

Pursuant to 28 U.S.C. § 2255, the defendant, William Piers, though his attorney, Michael R. Levine, moves the Court to vacate his convictions and sentences on the grounds that he is being held in custody in violation of the laws and Constitution of the United States and that he is innocent of the crimes for which he has been convicted.

I. BACKGROUND

On October 19, 2000, William Piers was indicted on seven counts relating to the armed robbery of the Credit Union 1 credit union located at 1310 East Dimond Blvd., Anchorage, Alaska. Count 1 charged Mr. Piers, Donald Douglas Franklin and Raymond Hubbard with conspiracy to commit armed credit union robbery. Count 2 charged all three men with armed credit union robbery. Count 3 charged all three men with conspiracy to use or possess a firearm in relation to a crime of violence. Count 4 charged Mr. Piers and Mr. Hubbard with carrying a semi-automatic assault weapon in relation to a

crime of violence. Count 5 charged Mr. Piers, alone, with using a machine gun in relation to a crime of violence. Count 6 charged Mr. Piers, alone, with possessing a firearm with an obliterated serial number. Count 7 charged Mr. Piers and Mr. Franklin with attempted armed credit union robbery. Mr. Piers entered a plea of not guilty. Mr. Piers was represented at trail by attorney Rex Butler.[1]

Six days before the trial date, on January 30, 2001, Mr. Butler moved to withdraw as counsel for Mr. Piers. The United States District Court for the District of Alaska held an ex parte hearing on January 31 and denied the motion. On February 9, 2001, after a jury trial before the Honorable H. Russel Holland, during which Mr. Piers did not testify, Mr. Piers was convicted of the first six counts. He was acquitted on Count 7, attempted armed credit union robbery. On August 9, 2001, the District Court sentenced Mr. Piers to 468 months in federal prison.[2] During sentencing, Mr. Piers was represented by attorney Donald Marks.[3]

On appeal, Mr. Piers was represented by Donald Marks and attorney Fay Arfa,[4] and raised the following issues: (1) Mr. Piers was denied his Sixth Amendment right to counsel due to an irreconcilable conflict between Mr. Piers and Mr. Butler; (2) the

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[1] Rex Lamont Butler & Associates, 745 West 4th Ave., Suite 300, Anchorage, AK 99501-2136. (907) 276-3306.

[2] Mr. Piers was sentenced to 60 months on counts 1 and 6, and 108 months on counts 2 and 3, to be served concurrently. In addition, Mr. Piers was sentenced to 120 months on count 4, and 360 months on count 5, to be served concurrently. The term imposed for counts 1, 2, 3, and 6 is consecutive to the term imposed for counts 4 and 5.

[3] Marks & Brooklier, 10100 Santa Monica Blvd., Suite 800, Los Angeles, CA 90067. (310) 772-2287.

[4] Law Offices of Fay Arfa, 10100 Santa Monica Blvd., Suite 800, Los Angeles, CA 90067. (310) 479-0547.

District Court abused its discretion in denying Mr. Butler's Motion to Withdraw as counsel; (3) the evidence was insufficient to show that Mr. Piers fired the machine gun; (4) the evidence was insufficient to show that Mr. Piers knew the weapon was a machine gun; (5) the District Court failed to properly instruct the jury that Mr. Piers knew the firearm operated as a machine gun; (6) the District Court denied Mr. Piers due process by failing to issue a unanimity instruction to the jury that the firearm used was an automatic; (7) the District Court erred by failing to properly instruct the jury regarding accomplices; (8) the District Court denied Mr. Piers due process by determining at sentencing that Mr. Piers used an automatic machine gun; and (9) cumulative errors of the District Court required reversal.

On March 17, 2003, the Ninth Circuit affirmed Mr. Piers's convictions in *United States v. Franklin*, 321 F.3d 1231 (9th Cir. 2003). Though the Court of Appeals vacated the sentence imposed on Count 4, the decision had no effect on Mr. Piers's underlying 468- month sentence. Mr. Piers filed a petition for a writ of certiorari from the United States Supreme Court on June 13, 2003. The Supreme Court denied the petition on October 6, 2003. *Piers v. United States*, 124 S.Ct. 161 (2003).

II. GROUNDS FOR RELIEF

Mr. Piers is being held in custody in violation of the laws and the Constitution of the United States on the following grounds:

A. Ground One: Trial Counsel Rex Butler Rendered Ineffective Assistance of Counsel.

Trial Counsel Rex Butler committed numerous errors and took several unexplainable actions during the course of Mr. Piers's trial. Considered individually or as a whole,

these errors undermine confidence in the outcome of the case. Specific claims of ineffective assistance are set forth below.

1. *Mr. Butler rendered ineffective assistance under* Strickland v. Washington, *466 U.S. 668 (1984), by failing to make a timely Motion to Withdraw and substitute new counsel to represent Mr. Piers at trial.*

Mr. Piers and his mother, Mary Hutchison, repeatedly expressed dissatisfaction with Mr. Butler's performance in the months preceding the trial. Both Mr. Piers and Mrs. Hutchison unequivocally directed Mr. Butler to withdraw from the case on several occasions, well in advance of trial. Despite this, and though the attorney client relationship had irretrievably broken down many weeks earlier, Mr. Butler waited until a mere ten days prior to the trial date to file his motion to withdraw. The untimeliness of the motion was the chief grounds upon which the District Court relied in denying the motion. Further, the appellate court, in finding no abuse of discretion by the trial court in denying the motion, also based its decision in large part on the untimeliness of the motion. *Franklin*, 321 F.3d at 1238–39. Had Mr. Butler filed the motion when Mr. Piers and Mrs. Hutchison first fired him, the outcome of the motion would likely have been different. Mr. Butler's failure to file the Motion to Withdraw in a timely manner constituted ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).

2. *Mr. Butler rendered ineffective assistance under* Strickland v. Washington *by not effectively arguing the Motion to Withdraw.*

Trial counsel was ineffective under *Strickland*, 466 U.S. 668, in not competently arguing the motion to withdraw, and in not marshalling the relevant facts. During the ex parte hearing on the motion, Mr. Butler made no attempt to argue for his withdrawal. Rather, the record shows he spent the bulk of the hearing explaining away and attempting

to diffuse the obvious conflicts he shared with his client, Mr. Piers: "Unfortunately, . . . I think to a large degree [Mr. Piers] kind of -- maybe he's misunderstood the process to some degree" (Ex Parte Hearing 3); "There are a lot of things that you have to deal with at trial strategically" (*Id.*); "We have not neglected Mr. Piers's case, and all along we've . . . tried to explain that this is a very serious situation" (*Id.* at 5); "I've talked with the prosecutor . . . on a number of occasions to try and see if information that I had received, whether they had anything that remotely resembled it, because if it did, we certainly wanted to work with them in following up on it" (*Id.*).

Mr. Piers, meanwhile, explained to the Court in no uncertain terms why he felt Mr. Butler should not continue to represent him: "This is an ongoing problem with counsel, and I don't believe he has my best interest at heart" (*Id.* at 3); "Mr. Butler . . . you haven't acted upon the evidence that I've given you or the information, and I have proof to that effect" (*Id.*); "[W]hen Mr. Butler has seen me . . . [h]e's never responded to my questions. He hasn't provided me any legal counsel" (*Id.* at 4); "[Mr. Butler,] you haven't been doing anything" (*Id.* at 5); "[T]his is simply not true" (referring to explanations offered by Mr. Butler) (*Id.* at 6); "That's a lie" (referring again to explanations offered by Mr. Butler) (*Id.* at 7).

Though the Court gave Mr. Butler more than ample opportunity to argue the merits of the motion, the only reasonable inference to be made is that he filed the motion simply because Mr. Piers insisted on it, with no intention to argue it effectively. At no time did Mr. Butler provide the court with any reason or argument as to why the Court should grant the motion. In fact, Mr. Butler stated the opposite: "[I]f the case is to go forward, we'll be prepared to go forward. That's the bottom line." (*Id.* at 6).

3. *Mr. Butler rendered ineffective assistance under* Strickland v. Washington *by breaching his duty of loyalty and zealous advocacy by continuing to represent Mr. Piers at the hearing on the Motion to Withdraw despite having an actual conflict of interest.*

Trial counsel was ineffective under *Strickland*, 466 U.S. 668, in not moving the Court to appoint another attorney to argue the Motion to Withdraw. During the ex parte hearing on the motion, it became clear that Mr. Piers and Mr. Butler had an irreconcilable conflict. Mr. Piers made several statements evidencing this conflict and his loss of trust in Mr. Butler's loyalty and confidence: 1) "This is an ongoing problem with counsel, and I don't believe he has my best interest at heart" (Ex Parte Hearing 3); 2) "Mr. Butler . . . you haven't acted upon the evidence that I've given you or the information, and I have proof to that effect" (*Id.*); 3) "[W]hen Mr. Butler has seen me . . . [h]e's never responded to my questions. He hasn't provided me any legal counsel." (*Id.* at 4); 4) "[Mr. Butler,] you haven't been doing anything" (*Id.* at 5); 5) "[T]his is simply not true" (referring to explanations offered by Mr. Butler) (*Id.* at 6); 6) "That's a lie" (referring again to explanations offered by Mr. Butler) (*Id.* at 7). Nor did the court's denial of the motion assuage Mr. Piers's distrust. In a statement Mr. Piers prepared to be read to the jury (which the court did not permit, filing the statement under seal as part of the record), he reiterated his feelings: "[I]t is my firm opinion that . . . who my council [sic] will be has been mandated by the court, I have not received adequate legal council [sic] and I do not recognize my forced council [sic]." See Exhibit B.

Further, rather than acting as Mr. Piers's advocate, Mr. Butler was adversarial toward his client, virtually calling him a liar. Mr. Butler noted that he believed Mr. Piers had sent him on a "wild goose chase" (Ex Parte Hearing 6), that he "wonder[ed] . . . quite frankly, whether this is a figment of [Mr. Piers's] imagination or is the truth of the

matter" (*Id.* at 7), and that he had "to some degree lost some faith in being able to rely on information" Mr. Piers had given to him (*Id.* at 8). With such a blatant and obvious breakdown in the relationship, Mr. Piers essentially had no counsel at all.

4. *Mr. Butler rendered ineffective assistance under* Strickland v. Washington *by failing to adequately investigate Mr. Piers's claim that an uncharged member of the alleged conspiracy committed the robbery and fired the machine gun.*

Mr. Piers repeatedly asked Mr. Butler to investigate the existence and whereabouts of an uncharged member of the alleged conspiracy, known only as "Adam." According to Mr. Piers, Adam may well have been the individual who entered the bank, and also the individual who fired the Norinco assault rifle during the ensuing police chase. Mr. Butler not only failed to investigate; he accused his client of fabricating this individual. Ex Parte Hearing 6–7. Mr. Butler may also have misrepresented to the court the existence of evidence showing that Adam was, in fact, a real person. During the ex parte hearing on Mr. Piers's Motion to Withdraw, Mr. Butler offered the following explanation as to why he did not follow up on Mr. Piers's claim that Adam was involved:

> You know, just to -- I'm going to be honest on the tape. I think to some degree I've been sent on a wild goose chase. I'm looking for a person by a first name that I have nothing to follow up on. I've talked to the prosecutor to see if there's anywhere in the investigation of the case that this name has come up as the person who would've been the person who did the shooting in this case of this weapon at police officers. And the only -- *quite frankly, the only source of the information is my client*, and I've got a first name, a name Adam, you know, and go find him and things of that nature and nothing else to go on. And while I'm sure I don't have the statements of other witnesses that the state is not required to -- the government's not required to give to me until we get close to trial, I've in good faith gone on to Mr. Collins and I've asked him, and I believe in good faith he's responded no such thing has come up. *They've got one person [Raymond Hubbard] who's cooperating, who's debriefed, who knows more about what was going on than probably anyone else in the case, and, no, this name doesn't surface.*"

Id. at 7 (emphasis added).

However, contrary to Mr. Butler's claim that Adam's name never surfaced, Raymond Hubbard spoke about Adam in both his pre-trial statement to police officers and his testimony at trial. The following exchange occurred between Mr. Hubbard and Anchorage Police Officer Vanderveur the day of Mr. Hubbard's arrest:

> Q (Officer Nick Vanderveur): How'd you meet Will?
> A (Hubbard): A friend of mine.
> Q: Who's your friend that introduced you to him?
> A: Just a friend.
> Q: You don't remember his name?
> A: Yes -- *Adam.*
>
> * * *
>
> Q: You remember *Adam's* last name by chance or --
> A: --no I don't.
> Q: Okay. But *Adam* introduced you to Will.
> A: Yes.
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> * * *
>
> Q: Where'd you guys meet 'im [sic] at?
> A: Ah, his my -- friend's house.
> Q: *Adam's* house?
> A: Uhm um (positive).

Statement of Raymond Hubbard, 8–9 (emphasis added).

Further, during his testimony at trial, Mr. Collins questioned Mr. Hubbard about Adam:

> Q (Mr. Collins): Where did you meet Mr. Piers?
> A (Hubbard): At my -- *one of my friend's, Adam's house.*
>
> * * *
>
> Q: Did there come a time when someone else showed up among your --
> A: Yes.
> Q: -- during your discussions [with Mr. Piers regarding the bank robbery]? Who was that?
> A: My -- the -- *the guy named -- named Adam.*
> Q: *What's Adam's last name*, do you know?

A: I do not know.
Q: What's his description?
A: Red hair, about -- about my height, white. That's all I know.

RT 2-5, 2-19–20 (emphasis added).

Finally, though Mr. Butler told the court only a week earlier that nothing in the evidence "remotely resembled" a connection to the name "Adam," and that the name "doesn't surface" in any of the discovery documents, Mr. Butler cross-examined Mr. Hubbard extensively about Adam. As the attached exhibit shows, Mr. Hubbard clearly implicates Adam as a member of the alleged conspiracy. See Exhibit A.

Mr. Hubbard's statement and testimony establish that Adam—far from being "a figment of an imagination," as Mr. Butler described him to the court—was an active member of the alleged conspiracy. Mr. Piers's frequent requests to Mr. Butler to investigate Adam should have been pursued with vigor. Mr. Butler's decision not to investigate an issue with such clear implications regarding Mr. Piers's innocence was a dereliction of his duty as counsel. Mr. Butler rendered ineffective assistance in not adequately following up on this or other requests for investigation—claims that could have exonerated Mr. Piers, or at least enabled him to develop a defense. *Strickland*, 466 U.S. 668.

5. *Mr. Butler rendered ineffective assistance under* Strickland v. Washington *by failing to move to suppress or otherwise object to the use of Mr. Piers's post-arrest statement to Officer Bloodgood.*

Just after Mr. Piers's arrest, he was placed in a patrol car. Anchorage Police Officer Matthew Bloodgood asked Mr. Piers several questions without administering *Miranda* warnings. According to the record, Mr. Piers stated in response, "Everything is in my name, it's all mine." (RT 4-22). Despite this impermissible custodial

interrogation, Mr. Butler did not move to suppress the statement. Further, when the government introduced this statement through Officer Bloodgood's testimony at trial, Mr. Butler made no objections, nor did he move to strike the statement. RT 4-22. Such failure to protect the interests of Mr. Piers amounted to ineffective assistance. *Strickland*, 466 U.S. 668.

6. *Mr. Butler rendered ineffective assistance under* Strickland v. Washington *by failing to move to suppress or otherwise object to the use of Mr. Piers's post-arrest videotaped statements.*

After Mr. Piers's arrest, he was returned to the Anchorage Police Station and held for eighteen hours in handcuffs in an interrogation room. During this time, he was denied access to his lawyer, Fred Dewey, and was also struck by the officers. As shown by the videotape of the interrogation, prior to questioning Mr. Piers, Anchorage Police Detective Nick Vanderveur told Mr. Piers that he needed to administer his *Miranda* warnings. Before doing so, however, Officer Vanderveur informed Mr. Piers that he had already interviewed his "friend," (Raymond Hubbard) and that this could be Mr. Piers's only opportunity to present his side of things. At that point, Mr. Piers indicated that he had some things he wanted to say, and asked Officer Vanderveur to turn off the recording. Vanderveur switched off the audio tape, but left the video tape recording. Mr. Piers stated, among other things, "I know I already turned myself into a criminal and pretty much disgraced my family . . . obviously I'm gone for a long time" (RT 4-91). Officer Vanderveur then switched the audio tape recorder back on and read Mr. Piers his *Miranda* rights. Mr. Piers immediately requested to see his attorney, and Officer Vanderveur terminated the interview.

Despite this impermissible custodial interrogation, Mr. Butler made no attempt to move to suppress the statement. Further, he made no objection when the government introduced the statement at trial as substantive evidence (RT 4-91). Under the circumstances, this failure to attack the use of the statement constituted ineffective assistance. *Strickland*, 466 U.S. 668.

7. *Mr. Butler rendered ineffective assistance under* Strickland v. Washington *by failing to move for a change of venue.*

Mr. Butler was ineffective under *Strickland*, 466 U.S. 668, in failing to move the court to transfer venue. The record from the voir dire shows that the majority of the prospective juror pool as well as the jury that was eventually empanelled either 1) knew the officers involved personally; 2) were members of Credit Union 1, the credit union that was robbed; or 3) had watched or read parts or all of the extensive media coverage surrounding the robbery, which included the names of the suspects apprehended. RT 1-13–113. Mr. Butler made no attempt to transfer the trial to a more appropriate forum.

8. *Mr. Butler rendered ineffective assistance under* Strickland *by breaching his duty of loyalty and zealous advocacy by reserving his opening statement until the end of the government's case, then not giving one.*

After the government's opening, at Mr. Butler's request, the trial court informed the jury that "the defense is going to reserve its opening statement to a later time." RT 1-152. Thus, while the government presented its case, the jury had absolutely no defense theory as a backdrop against which to consider the evidence. Even more disturbing, however, is that notwithstanding Mr. Butler's assurance to the jury that he would give an opening statement, he did not give one even at the close of the government's case. As a result, Mr. Butler created an aura of uncertainty and deception surrounding Mr. Piers's defense. Mr. Butler undermined, if not destroyed, his credibility with the jury by stating

initially that he would give an opening statement at "a later time," then, without explanation, giving no opening statement at all. Mr. Piers's defense was further unfairly prejudiced because by failing to give an opening statement, the first time Mr. Butler addressed the jury directly he conceded Mr. Piers's guilt on the conspiracy counts. *See infra*, Part A.21.

9. *Mr. Butler rendered ineffective assistance under* Strickland v. Washington *by failing to object to the introduction of irrelevant and prejudicial evidence of imitation CIA identification documents.*

The government introduced as evidence false CIA identification badges and documents in Mr. Piers's and Douglas Franklin's names, found in Mr. Piers's bedroom and on his computer. Though Mr. Butler acknowledged they were irrelevant, he did not object to their admission. RT 4-7 (the day *after* the evidence was introduced, Mr. Butler stated to the Court, "I don't even know why CIA badges are even relevant in this case, to begin with. But we did let that in . . . ."). In fact, rather than objecting to the admission of the badges, he *stipulated* to their admissibility. RT 3-143, 144. The admission of this evidence was unfairly prejudicial to Mr. Piers, as it created an impression of Mr. Piers as an individual with a fixation on secretive, paramilitary-type activities. Mr. Butler rendered ineffective assistance under *Strickland*, 466 U.S. 668, in not asking the court be relieved from his stipulation and moving the court to strike the evidence after he recognized the irrelevancy.

10. *Mr. Butler rendered ineffective assistance under* Strickland v. Washington *by failing to object to the testimony of Steven Payne, FBI computer forensics expert, that 28 compact discs of data had been taken from Mr. Piers's computer.*

To avoid the danger of unfair prejudice, the court made a clear ruling outside the presence of the jury that the only evidence from Mr. Piers's computer that would be

admitted was Mr. Piers's and Mr. Franklin's resumes, the forms and photographs used to create the CIA identification badges, and a portion of a document containing information on obliterating the serial number from a firearm. RT 4-3–8. However, on direct examination of FBI computer forensics expert Steven Payne, the following exchange occurred:

> Q (government): Special Agent Payne, I've handed you what's been marked for identification as 55A. Do you recognize that, sir?
> A (Payne): Yes, I do.
> Q: And what is 55A?
> A: This is one of the CDs that I created from the results of the examination of Mr. Piers' computer.
> Q: And is that a portion of the results of the examination that -- of the -- Mr. Piers' Maxtor hard drive that you found in his computer?
> A: Yes, it is. *This is one of several CDs. There were -- there was so much data involved that it required the creation of approximately 28 CDs to hold all of the information that was seized from the computer evidence.*
> Q: *So that's 1 of 28?*
> A: *Yes, it is.*

RT 4-32 (emphasis added).

Thus, notwithstanding the court's clear admonition against it, Payne testified to the existence of a large amount of seizable data. To the jury, this testimony raised a negative inference that an enormous amount of incriminating evidence existed that they were not seeing—exactly the type of prejudice the court sought to avoid in its ruling on the subject. Mr. Butler neither objected to the line of questioning nor moved to strike the answers, despite the prejudice to his client.

11. Mr. Butler rendered ineffective assistance under Strickland v. Washington *by failing to object to irrelevant and unfairly prejudicial evidence as to the reaction of the public to the crime.*

During the government's direct examination of FBI Agent Lou Ann Henderson, Mr. Butler made no attempt object or strike the answers to a series of questions regarding

the public's immediate reaction and response to the crime. This failure to act allowed Ms. Henderson to testify to, among other things, the disruption caused to morning commuters, assistance to officers rendered by members of the public, and the police department's concern for public safety, including an allusion to a completely unrelated report of suspicious individuals at a nearby elementary school. RT 4-62–66. The testimony was not only irrelevant and cumulative; it was unfairly prejudicial and inflammatory in that it stoked the concerns the jurors held for public safety and children—matters unrelated to whether Mr. Piers committed the crime.

12. Mr. Butler rendered ineffective assistance under Strickland v. Washington *by failing to object to the government's use of a mannequin to display items of evidence not found together.*

At trial, the government introduced several articles of clothing allegedly worn by the robber. These items were not found together; however, the government displayed them to the jury as a single unit, dressing a mannequin in them. *See* RT 4-94. Presentation of evidence in this manner was irrelevant and unfairly prejudicial, and also created a danger of misleading the jury. Mr. Butler made no objection to the use of the mannequin. This deficiency constituted ineffective assistance, as it encouraged the jury to draw inferences about the state of the evidence and its connection to Mr. Piers that would otherwise not be made. *Strickland*, 466 U.S. 668.

13. Mr. Butler rendered ineffective assistance under Strickland v. Washington *by incompetently cross-examining Anchorage Police Officer Dan Reeder, undermining an otherwise strong defense as to the machine gun counts.*

Officer Reeder testified that he believed the person who fired the assault weapon at his patrol car had a goatee and was wearing a faded Carhartt jacket. RT 3-58, 60. This fit the uncontroverted description of Raymond Hubbard, not Mr. Piers. Mr. Butler,

however, then proceeded to elicit testimony from Reeder that he never actually saw the person who fired at his patrol car. RT 3-60. Government witness and co-conspirator Hubbard was the only other witness to offer any testimony regarding the identity of the shooter. Had Mr. Butler not completely nullified Officer Reeder's testimony regarding the shooter's identity, the jury would have been faced with two conflicting accounts regarding the shooter—one from an admitted co-conspirator with motive to fabricate his testimony, the other from a respected local police officer. Instead, the jury saw nothing to refute Hubbard's testimony regarding the shooter's identity, and convicted Mr. Piers of using a machine gun—a charge carrying a 30-year mandatory minimum sentence.

14. Mr. Butler rendered ineffective assistance under Strickland v. Washington *by failing to cross-examine government witness and forensic expert Robert Shem on whether the Norinco assault rifle, as fired, was an automatic or a semi-automatic.*

Mr. Piers was convicted of using a machine gun to further a crime of violence (Count 5), a charge carrying a mandatory minimum sentence of 30 years. The government's forensic expert, Robert Shem, examined the Norinco assault rifle used in the robbery. According to his testimony, the rifle was originally a semi-automatic, which had been modified to allow the user to fire the weapon either as a semi-automatic or an automatic. RT 3-79. Though his client, Mr. Piers, faced an additional 30 year sentence if the jury found that the rifle used was an automatic as opposed to a semi-automatic, Mr. Butler did not ask a single question during cross-examination of Mr. Shem regarding whether the rifle, as fired, was an automatic or a semi-automatic.

Had Mr. Butler made even a nominal inquiry of Mr. Shem, he could have established that at the very least it was uncertain whether the rifle was fired as an automatic or a semi-automatic, and in turn that it was at least uncertain whether the

shooter was aware that the rifle was capable of firing as an automatic. A 30-year sentence turned on this issue—Mr. Butler's failure to adequately cross-examine Mr. Shem constituted ineffective assistance. *Strickland*, 466 U.S. 668.

15. Mr. Butler rendered ineffective assistance under Strickland v. Washington *by failing to call a single character witness to testify to Mr. Piers's good character, honesty, and history of law-abiding behavior.*

Prior to trial, Mr. Piers presented Mr. Butler with a list of several individuals in the Anchorage community who were willing and able to testify to Mr. Piers's good character, honesty, and history of law-abiding behavior. Mr. Piers repeatedly asked Mr. Butler to put at least some of these individuals on the stand. Mr. Butler, however, failed to call a single character witness. In fact, Mr. Butler failed to call any witnesses at all for Mr. Piers's defense. Such a dereliction of the duties of loyalty and advocacy rendered Mr. Butler's assistance ineffective under *Strickland*, 466 U.S. 668, because evidence of good character may be sufficient, alone, to create a reasonable doubt of guilt. *E.g.*, *Michelson v. United States*, 335 U.S. 469, 476 (1948); *Weedin v. United States*, 380 F.2d 657, 660 (9th Cir. 1967).

16. Mr. Butler rendered ineffective assistance under Strickland v. Washington *by denying Mr. Piers his constitutional right to testify in his defense.*

Mr. Butler was ineffective under *Strickland*, 466 U.S. 668, in refusing to allow Mr. Piers to testify in his own defense. Mr. Piers had no prior convictions, and had indicated to Mr. Butler a strong desire to testify, as was his right. Mr. Piers's desire to testify was only increased as it became clear that Mr. Butler did not intend to give an opening statement, nor call any witnesses on behalf of the defendant. Nevertheless, Mr. Butler refused to allow Mr. Piers to take the stand, relying instead on his inept closing argument.

17. Mr. Butler rendered ineffective assistance under Strickland v. Washington *by not introducing the sound of Mr. Piers's distinctive voice, to allow the victim tellers to compare it to that of the robber.*

Mr. Piers has suffered his entire life from chronic sinusitis, and has a very distinct voice as a result. Mr. Piers communicated his desire to Mr. Butler to speak in open court, to allow the victim tellers—government witnesses—to compare his voice to that of the robber. Mr. Butler's assistance was ineffective in refusing to afford Mr. Piers this opportunity to secure compelling exonerating evidence. *Strickland*, 466 U.S. 668.

18. Mr. Butler rendered ineffective assistance under Strickland v. Washington *by failing to develop any coherent theory of defense.*

Mr. Butler abandoned his duties of zealous advocacy and effective assistance to Mr. Piers by failing to develop any coherent theory of defense. As noted above in Part A.8, Mr. Butler passed on his first opportunity to present a theory to the jury, by "reserving" his opening argument, then not giving one. Then, Mr. Butler rested at the end of the government's case, presenting no witnesses or evidence in Mr. Piers's defense. RT 4-112. Even the prosecution was taken aback by Mr. Butler's actions, as shown by its uncertainty as to which jury instructions to request ("I don't know what the theory of the defense is, because we didn't have any opening statement and the -- I can only infer from the types of questions asked on cross-examination." RT 5-5.). Finally, Mr. Butler's rambling, disjointed closing argument repeatedly referred to Mr. Piers's involvement in the alleged conspiracy (*see infra*, Part A.21). RT 5-28–49. Mr. Butler made, at best, a token attempt to refute or explain the circumstantial physical evidence against Mr. Piers. His closing focused almost exclusively on discrediting the testimony of the government's witness, Raymond Hubbard. Further, by conceding Mr. Piers's guilt on the conspiracy counts (*see infra*, Part A.21), Mr. Butler corroborated and confirmed the truth of much of

Hubbard's testimony, sabotaging his own argument by essentially refuting its main thrust—that Hubbard was not believable.

19. *Mr. Butler rendered ineffective assistance under* Strickland v. Washington *by failing to request a jury instruction that before the jury could convict Mr. Piers of Count Five, the jury had to find beyond a reasonable doubt that Mr. Piers knew the modified weapon operated as an automatic.*

The firearm used to support Mr. Piers's conviction on Count Five (use, carrying, or possession of a machine gun during or in furtherance of a crime of violence) was a modified semi-automatic Norinco assault rifle, capable of being fired either as a semi-automatic or as a fully automatic weapon. Mr. Butler did not request an instruction that required the jury to find beyond a reasonable doubt that Mr. Piers knew the modified weapon could be operated as an automatic. Because of this error, the appellate court reviewed the absence of such an instruction under a "plain error" standard. *United States v. Franklin*, 321 F.3d 1231, 1240 (9th Cir. 2003). Under that standard the Ninth Circuit Court of Appeals found the instruction given by the district court—that to convict, the jury must find that Mr. Piers "knowingly used or carried a machine gun"—was not plain error. *Id.* Had Mr. Butler requested the instruction, the Ninth Circuit would have applied de novo review. *See United States v. Patterson*, 292 F.3d 615, 629–30 (9th Cir. 2002). Under a de novo standard, the Ninth Circuit may well have vacated Mr. Piers's mandatory minimum sentence on the machine gun count.

20. *Mr. Butler rendered ineffective assistance under* Strickland v. Washington *by breaching his duty of loyalty and zealous advocacy in failing to adequately or effectively argue for his requested jury instruction regarding the credibility of testimony from co-conspirators who have pled guilty.*

The government's chief witness against Mr. Piers, Raymond Hubbard, pled guilty to a conspiracy pursuant to a plea agreement. Mr. Butler indicated his desire to instruct

the jury, in light of Hubbard's plea agreement, to view Hubbard's testimony with "distrust." Mr. Butler thought this was the model Ninth Circuit instruction. RT 5-4. In response, the government read the then-current model instruction to the court, which provided that such testimony should be considered "with great caution." RT 5-5. Rather than arguing the importance and necessity of his proposed instruction, Mr. Butler stated simply, "I preferred the old language, but we'll live with the new one." *Id.* If the jury had been instructed to view Hubbard's testimony with distrust, they may have done so and acquitted Mr. Piers on some or all counts. This failure to advocate on behalf of his client—one of many such failures—underscores the ineffectiveness of his counsel.

21. Mr. Butler rendered ineffective assistance under Strickland v. Washington *by conceding Mr. Piers's guilt on two counts during closing arguments.*

At the outset of his closing argument to the jury, Mr. Butler conceded Mr. Piers's guilt on the conspiracy charges: "We're not here today denying that Mr. Piers was a part of a conspiracy to rob Credit Union 1. There is no contesting that. We're not here to do that" (RT 5-29–30). Mr. Butler reiterated his client's guilt later in the argument: "Yes, ladies and gentlemen, my client was involved in a conspiracy to take money from Credit Union 1 Dimond Branch" (RT 5-33). Such a concession of guilt is prejudicial per se, and thus Mr. Butler's counsel was constitutionally ineffective. *See United States v. Swanson*, 943 F.2d 1070, 1074–76 (9th Cir. 1991); *Strickland*, 466 U.S. 668.

Further, Mr. Butler's concession of guilt on the conspiracy charges necessarily constituted an implicit admission of Mr. Piers's guilt to the overt acts required for the conspiracy. As such, Mr. Butler not only corroborated the otherwise questionable testimony of co-conspirator Raymond Hubbard, the government's chief witness against Mr. Piers, but also provided the government with fodder for their rebuttal to Mr. Butler's

closing. Indeed, the government took full advantage of Mr. Butler's mistake, arguing that the admission did, in fact, substantiate the evidence—including Mr. Hubbard's testimony—against Mr. Piers on the other charges. RT 5-50–55. See Exhibit C.

22. *Mr. Butler rendered ineffective assistance under* Strickland v. Washington *by failing to move for an acquittal under Criminal Procedure Rule 29 on the issue of whether there was sufficient evidence to show that Mr. Piers, rather than Raymond Hubbard, fired the Norinco assault rifle.*

Mr. Butler failed to move for an acquittal under Rule 29 that the evidence was insufficient to prove that Mr. Piers, rather than Hubbard, fired the Norinco assault rifle. As such, the Court of Appeals applied a plain error or manifest injustice standard of review. *United States v. Franklin*, 321 F.3d 1231, 1239 (9th Cir. 2003). Had Mr. Butler moved for an acquittal, the appellate court would have reviewed the court's decision to deny the Rule 29 motion de novo. *United States v. Hardy*, 289 F.3d 608, 612 (9th Cir. 2002). Though Mr. Piers is a "secreter"—one who's body tends to secrete the oils necessary to leave fingerprints and palm prints—Mr. Piers's fingerprints were not found on the rifle. RT 3-122, 127–131 (testimony of Mark Halterman, Anchorage Police Department fingerprint examiner). Further, as noted above in Part A.13, had Mr. Butler not completely nullified Officer Reeder's testimony that Mr. Hubbard, not Mr. Piers, was the shooter, a motion for acquittal under Rule 29 may well have been successful. Though the argument was insufficient under the plain error standard on appeal, it may well have been successful if Mr. Butler had made the appropriate motion at trial. Further, under a de novo standard, the Ninth Circuit could have found the denial of the motion to be reversible error.

B: Ground Two: Counsel at Sentencing, Donald Marks, Rendered Ineffective Assistance of Counsel.

1. Mr. Marks rendered ineffective assistance under Strickland v. Washington *by failing to raise an* Apprendi *error with respect to the sentence imposed on Counts 1 and 2.*

Defense counsel Donald Marks was ineffective at sentencing for not raising an *Apprendi* error with respect to the sentence imposed for Counts 1 and 2. Count 1 was conspiracy to commit armed credit union robbery. Count 1 was grouped with Count 2, armed credit union robbery. All parties agreed that the base offense level for the charge was 20. However, the court imposed a 9-level enhancement based on the following: 2 levels because the principal victim was a financial institution; 2 levels due to the physical restraint of the victim tellers; 3 levels because the loss to the credit union was over $250,000; and 2 levels because Mr. Piers was found to be an organizer. However, only the first enhancement—2 levels because the principal victim was a financial institution—was an element of any count found by the jury beyond a reasonable doubt. The remaining seven levels were argued for and found by the court during the sentencing phase. *See* Transcript of Imposition of Sentence 11, 18.

Mr. Piers's sentencing hearing took place on August 9, 2001. More than a year earlier, on June 26, 2000, the United States Supreme Court had decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), establishing the rule that any fact increasing the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. Despite the extensive coverage of *Apprendi* in the Criminal Law community, Mr. Marks failed to argue during sentencing that, under *Apprendi*, the seven-level enhancement imposed on Mr. Piers for Counts 1 and 2 should have been submitted to a jury and proven beyond a reasonable doubt. That such an argument was

meritorious is now without question. *Blakely v. Washington*, 124 S. Ct. 2531, 2537 (2004) (holding that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."); *United States v. Ameline*, 376 F.3d 967, 974 (9th Cir. 2003) (holding that the *Blakely* rule applies to the United States Sentencing Guidelines). Mr. Marks, in fact, argued twice that the proper standard for sentencing enhancements was a preponderance of the evidence. Transcript of Imposition of Sentence 8, 13. Mr. Marks's failure to argue the *Apprendi* issue cost Mr. Piers an additional seven levels to his base offense level.

2. *Mr. Marks rendered ineffective assistance under* Strickland v. Washington *by failing to argue for available downward departures.*

Chastity Monette, one of the victim tellers, testified that during the robbery, the robber removed the tape from her nose in order to permit her to breathe:

> Q. At any point did you have difficulty breathing?
>
> A. Yeah. When he -- when he started to wrap it around my mouth, he covered my nose, and I tried to tell him that I couldn't breathe or that he covered by nose. And he asked me, "I covered your nose?" I said yes. *And he unwrapped it from my -- my nose* and proceeded to wrap it around my mouth."

RT 1-167: 16-20 (emphasis added).

Mr. Marks did not bring this showing of compassion and concern for the life of another to the attention of the sentencing court, though it could have constituted grounds for a downward departure.

C. Ground Three: Appellate Counsels Fay Arfa And Donald Marks Rendered Ineffective Assistance of Counsel.

1. *Ms. Arfa and Mr. Marks rendered ineffective assistance under* Strickland v. Washington *by failing to effectively argue that Mr. Butler had an irreconcilable conflict with Mr. Piers and should have been relieved from representing him.*

Though appellate counsels Fay Arfa and Donald Marks raised the issue of the conflict between Mr. Piers and his trial counsel Mr. Butler, their assistance was ineffective because they neglected to draw the court's attention to the relevant parts of the record, stating only that "[t]he record clearly demonstrates that a serious conflict existed between Piers and his attorney which prevented the attorney from providing adequate representation." Def. App. Br. 15. This assertion severely understated the extent of the conflict; in fact, the record is rife with evidence of an irreconcilable conflict that went to the core of the attorney client relationship. *See supra* Part A.3. Far from being simply a "serious conflict," the attorney-client relationship had completely broken down—at the hearing on the Motion to Withdraw, Mr. Butler was acting as Mr. Piers's adversary, not his advocate.

2. *Ms. Arfa and Mr. Marks rendered ineffective assistance under* Strickland v. Washington *by failing to raise on appeal trial counsel Rex Butler's error in conceding Mr. Piers's guilt on the conspiracy counts.*

Under *Swanson*, 943 F.2d at 1074–76, Mr. Butler's concession of Mr. Piers's guilt as to the conspiracy counts was prejudicial per se. Thus, had the issue been raised on appeal, Mr. Piers would have prevailed and received a reversal on at least Counts 1 and 3. Failure to raise the issue at all constituted ineffective assistance of counsel under *Strickland*, 466 U.S. 668.

3. *Ms. Arfa and Mr. Marks rendered ineffective assistance under* Strickland v. Washington *by failing to raise* Apprendi *issues in appealing Mr. Piers's sentence.*

As noted above in Part B.1, Mr. Marks failed to raise any *Apprendi* issues at sentencing, despite substantial legal grounds to do so. In addition, both Mr. Marks and Ms. Arfa were ineffective in failing to raise the same issues on appeal.

4. *Ms. Arfa and Mr. Marks rendered ineffective assistance under* Strickland v. Washington *by raising an ineffective assistance of trial counsel claim on direct appeal, when the matter should have been raised by collateral attack.*

Claims of ineffective assistance of trial counsel are properly raised by collateral attack during the post-conviction phase, because "such a claim cannot be advanced without the development of facts outside the original record." *United States v. Reyes-Platero*, 224 F.3d 1112, 1116 (9th Cir. 2000). Ms. Arfa and Mr. Marks, however, raised the issue on direct appeal. Unsurprisingly, the Appellate Court found against Mr. Piers on the issue. Ms. Arfa and Mr. Marks were ineffective by failing to develop a full record of what had occurred during the trial phase, thus precluding Mr. Piers from recovery on the issue.

D. Ground Four: At Sentencing On Counts 1 And 2, The District Court Violated Mr. Piers's Fifth And Sixth Amendment Rights To A Jury Trial And To Due Process Of Law By Finding Enhancing Facts By A Preponderance Of Evidence, When Those Facts Must Be Found By A Jury Beyond A Reasonable Doubt.

Count 1 was conspiracy to commit armed credit union robbery. Count 1 was grouped with Count 2, armed credit union robbery. All parties agreed that the base offense level for the charge was 20. However, the court imposed a 9-level enhancement based on the following: 2 levels because the principal victim was a financial institution; 2 levels due to the physical restraint of the victim tellers; 3 levels because the loss to the credit union was over $250,000; 2 levels because Mr. Piers was found to be an organizer.

However, only the first enhancement—2 levels because the principal victim was a financial institution—was an element of any count found by the jury beyond a reasonable doubt. The remaining seven levels were argued for and found by the court during the sentencing phase.

Mr. Piers's sentencing hearing took place on August 9, 2001. More than a year earlier, on June 26, 2000, the United States Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), establishing the rule that any fact increasing the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. Recently, the Supreme Court clarified that the *Apprendi* rule applies equally to any facts that enhance maximum sentences within a guideline sentencing system. *Blakely v. Washington*, 124 S. Ct. 2531, 2537 (2004) (holding that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."); *United States v. Ameline*, 376 F.3d 967, 974 (9th Cir. 2003) (holding that the *Blakely* rule applies to the United States Sentencing Guidelines). The court's failure to apply the *Apprendi* rule cost Mr. Piers an additional seven levels to his base offense level.

As such, the sentence imposed violated Mr. Piers's Sixth Amendment right to a jury trial because the district court, not the jury, found the facts by a preponderance of the evidence with respect to the physical restraint of the victim tellers, the loss to the credit union of over $250,000, and that Mr. Piers was an organizer. The allegation with respect to loss and role in the offense were not even alleged in the indictment. None of these factors were proven to a jury beyond a reasonable doubt, thereby violating the rules of *Apprendi* and *Blakely*.

E. Ground Five: The District Court Violated Mr. Piers's Fifth Amendment Right To Due Process And His Sixth Amendment Right To Effective Assistance Of Counsel By Not *Sua Sponte* Appointing Substitute Counsel In Place Of Mr. Butler To Argue The Motion To Withdraw.

The district court violated due process of law by not *sua sponte* appointing a different lawyer to argue Butler's motion to be relieved. As noted above in Part A.3, during the ex parte hearing on the motion, it became clear that Mr. Piers and Mr. Butler had an irreconcilable conflict. Mr. Piers made several statements evidencing this conflict: 1) "This is an ongoing problem with counsel, and I don't believe he has my best interest at heart" (1/31/01 Hearing Transcript 3); 2) "Mr. Butler . . . you haven't acted upon the evidence that I've given you or the information, and I have proof to that effect" (*Id.*); 3) "[W]hen Mr. Butler has seen me . . . [h]e's never responded to my questions. He hasn't provided me any legal counsel." (*Id.* at 4); 4) "[Mr. Butler,] you haven't been doing anything" (*Id.* at 5); 5) "[T]his is simply not true" (referring to explanations offered by Mr. Butler) (*Id.* at 6); 6) "That's a lie" (referring again to explanations offered by Mr. Butler) (*Id.* at 7).

Further, rather than acting as Mr. Piers's advocate, Mr. Butler was adversarial toward his client, virtually calling him a liar. Mr. Butler noted that he believed Mr. Piers had sent him on a "wild goose chase" (*Id.* at 6), that he "wonder[ed] . . . quite frankly, whether this is a figment of [Mr. Piers's] imagination or is the truth of the matter" (*Id.* at 7), and that he had "to some degree lost some faith in being able to rely on information" Mr. Piers had given to him (*Id.* at 8). With such a blatant breakdown in the relationship, Mr. Piers essentially had no counsel at all.

The court should have appointed substitute counsel for Mr. Piers as soon as it became clear that the conflict between Mr. Piers and Mr. Butler was irreconcilable.

Failure to do so deprived Mr. Piers of his due process rights as well as his right to the effective assistance of counsel.

F. Ground Six: The Government Violated Mr. Piers's Due Process Rights And The Rule Of *Brady v. Maryland.*

The government violated Mr. Piers's due process rights under the Fifth Amendment as well as the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny by withholding from the defense an important part of the plea agreement with Ray Hubbard; to wit, that Mr. Hubbard was promised that the government would not pursue an investigation against his sister Megan, whose fingerprints were found on the map of the credit union found in Hubbard's backpack.

In addition, an evidentiary hearing is requested to determine whether an additional *Brady* violation occurred when the government withheld evidence of the existence of "Adam," an uncharged additional member of the alleged conspiracy. As noted above in Part A.4, Mr. Butler averred that he asked the prosecution whether they had discovered any reference to Adam during their investigations. According to Mr. Butler, the government responded that the name "Adam" had never surfaced. However, in the statement Raymond Hubbard gave to police the day of his arrest, he implicated Adam in the alleged conspiracy:

> Q (Officer Nick Vanderveur): How'd you meet Will?
> A (Hubbard): A friend of mine.
> Q: Who's your friend that introduced you to him?
> A: Just a friend.
> Q: You don't remember his name?
> A: Yes -- *Adam.*
>
> * * *
>
> Q: You remember *Adam's* last name by chance or --
> A: --no I don't.

Q: Okay. But *Adam* introduced you to Will.
A: Yes.

* * *

Q: Where'd you guys meet 'im [sic] at?
A: Ah, his my -- friend's house.
Q: *Adam's* house?
A: Uhm um (positive).

Statement of Raymond Hubbard, 8–9 (emphasis added).

Further, during trial, the government prosecutor, Mr. Collins questioned Mr. Hubbard about Adam's involvement in the alleged conspiracy:

Q (Mr. Collins): Where did you meet Mr. Piers?
A (Hubbard): At my -- *one of my friend's, Adam's house.*

* * *

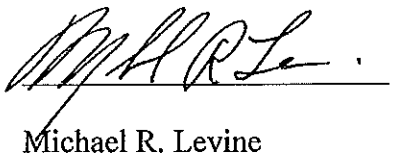
Q: Did there come a time when someone else showed up among your --
A: Yes.
Q: --during your discussions [with Mr. Piers regarding the bank robbery]? Who was that?
A: My -- the -- *the guy named -- named Adam.*
Q: What's Adam's last name, do you know?
A: I do not know.
Q: What's his description?
A: Red hair, about -- about my height, white. That's all I know.

RT 2-5, 2-19–20 (emphasis added).

According to Mr. Butler, the government initially claimed no knowledge of Adam. Mr. Hubbard, however, implicated Adam in a statement to police on the day of his arrest. In addition, during trial one week after Mr. Butler denied the existence of any discovery regarding Adam, the government questioned Mr. Hubbard on direct examination about Adam. It appears that relevant, possibly exculpatory evidence was withheld from Mr. Piers by the government during discovery, violating *Brady* and Mr. Piers's right to due process.

CONCLUSION

For the foregoing reasons, the Court should grant the motion and vacate Mr. Piers's convictions and sentences. In the alternative, the Court should grant an evidentiary hearing to further examine the claims raised above. In accordance with counsel's understanding of the local rules of the United States District Court for the District of Alaska, Mr. Piers will submit a brief addressing the legal merits of this petition no later than 30 days after the government files an answer. Local Habeas Corpus Rule 8.2.



Michael R. Levine
Attorney for Defendant

Sept. 29, 2004
Date

EXHIBIT A:
EXCERPTS FROM CROSS EXAMINATION OF RAYMOND HUBBARD, DISCUSSING "ADAM"

Q (Mr. Butler): Now, I think you testified earlier to this jury that you introduced Mr. Piers to Adam at Adam's house.
A: (Mr. Hubbard): No.
Q: You didn't --
A: I was introduced.
Q: --tell the jury that?
A: No, that's where I first met Piers.
Q: Was where?
A: At -- at -- at --
Q: Adam's house?
A: --Adam's house. Yes.

* * *

Q: How did you meet Adam, sir?
A: At -- at one of the -- the concerts I went to drunk, and then he -- then he -- then he was like, "Do you want to come over and drink?" I go, "Okay." And that's how I met him.
Q: Okay. And you went to Adam's house, right, sir?
A: Yes.
Q: Now, you testified to the grand jury that Adam was around in the course of planning this robbery, isn't that right?
A: Yes.
Q: On more than one occasion, wasn't he, sir?
A: Yes, sir.
Q: Give us Adam's address, please.
A: I don't know.
Q: Give us Adam's last name, sir.
A: I don't know.
Q: How old is Adam?
A: Around as old as me, I think. I'm not sure.
Q: How old is that?
A: Around 23, I'm -- I'm not sure, like I said.
Q: Okay. Adam was a friend of yours, wasn't he?
A: A friend that I went -- when I ever met him, I was -- I was partying with him.
Q: I mean, sir, have you ever referred to Adam as your friend?
A: Yes.
Q: Okay. Adam was your friend, wasn't he, sir?
A: Yes, but I have a lot -- a lot of -- of -- of people I call -- called my friend.

* * *

Q: All right. So this particular friend must have been a lot closer to you because you were willing to plan a bank robbery with this friend's knowledge, isn't that right, sir?
A: At first I did not -- did not -- did not plan it with him.
Q: Okay. Sir, you never objected to Adam being present, right?
A: Yes, I did.
Q: Okay. So you said, "I don't want Adam around."
A: I -- I said, "What is he do -- what is he do -- do -- what is he do -- what is he doing here," and I was told, and I'm like, "Well, I don't -- I don't -- what's -- what does he -- what does he have in -- in all this?"
Q: Now, what were you told when you asked, "What is Adam doing here?"
A: He said he -- Will told me, "He's just a friend of mine."

RT 2-98–101.

Q: Okay. Now, this friend of yours, Adam, that you partied with and you've been to his house and you met at a concert together, tell us -- describe him in detail for us. Tell us about his facial features and how tall he is and all of that.
A: I can't.
Q: Why?
A: He -- I've -- I've been locked up for a long time, sir.
Q: Sir, are we talking about events that happened on June 27th, last year, less than a year ago?
A: Less -- yes.
Q: And your testimony to this jury is that this person who's your friend who you partied with and you've gone to his house and what have you, you cannot give us the details of what he looks like?
A: That's true.

RT 2-102–03.

Q (referring to Hubbard's Grand Jury Testimony): Now, this young man named Adam, he was present during a number of the planning sessions that you had for the robbery, isn't that true?
A: No, just some of them.
Q: Okay. He was at -- this young named [sic] Adam was a -- was present at a few of the planning sessions.
A: Something like that.
Q: And, in fact, every now and then he'd chime in, wouldn't he?
A: Yes.
Q: So you knew from the fact that your friend Adam was chiming in about the robbery that there were at least three of you involved, right?
A: Yes.
Q: And then you got the name of Doug, and you figured, "Now there's four of us involved," right?
A: Yes.

RT 2-132–33.

Q: Well, tell me this, sir – or tell the jury this. Your position is there's other people who know about this robbery -- how many other people knew about it?
A: I just said --
Q: Name them all for the jury.
A: Me, Raymond Hubbard; Will -- William Piers; Doug; and Adam.

RT 2-139.

Q: Where was Adam when this [robbery] was going on, sir?
A: I don't know. Still don't know.
Q: Well, you've been to his house. Did you give the FBI an address?
A: I don't have his -- his address.
Q: Did you give them a neighborhood that he lived in?
A: No.
Q: Did you give them a street?
A: No.
Q: A block, anything?
A: No.
Q: Color of a house?
A: No.
Q: What is the color of the house?
A: I don't remember.
Q: What neighborhood does he live in?
A: I don't know.
Q: Can you give us a street?
A: No, sir.
Q: You don't want --
A: Not without --
Q: Adam caught, do you, sir?
A: Not without being sure of myself. I'm not sure.
Q: You've been to Adam's house more than once, sir, haven't you?
A: Drunk.
Q: Sir, you've been to Adam's house more than once.
A: Yes.

* * *

Q: Now, Adam also knew where were you [sic] going to be switching out the vehicles, didn't he?
A: Yes, he did.
Q: And Adam was also going to partake in some of the money, wasn't he?
A: I -- I don't know about that.
Q: Well, sir, I mean --

A: I assume so, yes.
Q: All right. And in order for Adam to partake in some of the money, he had get himself [sic] involved in the robbery, didn't he? Didn't he, sir?
A: I assume so.
Q: All right. And he knew what the dress was, the dress was those dark clothes, didn't he?
A: Yes.
Q: And he had dark clothes, didn't he?
A: I don't know.
Q: Sir --
A: I
Q: -- it was part of you all's plan and you knew Adam had dark clothes too, didn't you?

RT 145–47.

EXHIBIT B:

STATEMENT WRITTEN BY WILLIAM PIERS TO BE READ TO THE JURY AT HIS TRIAL (Filed Under Seal—Not Read At Trial)

MY NAME IS "W", I WAS GIVEN THE GIFT OF LIFE IN ANCHORAGE ALASKA ON OCTOBER 31 1974. I MEAN NO DISRESPECT TO THE COURT OR IT'S PROCESS(ES) AND I OFFER NO RESISTANCE, BUT IT IS MY FIRM OPINION THAT: WHO MY COUNCIL WILL BE HAS BEEN MANDATED BY THE COURT, I HAVE NOT RECIEVED ADEQUATE LEGAL COUNCIL AND I DO NOT RECOGNIZE MY FORCED COUNCIL. I HAVE BEEN HELD AGAINST MY WILL AND IN FEAR OF MY LIFE FOR OVER (7) MONTHS WITHOUT BAIL. BECAUSE OF THE AMOUNT OF TIME OF MY IMPRISONMENT, EVIDENCE HAS BEEN LOST THAT SHOULD HAVE BEEN COLLECTED AND ACTED UPON. I HAVE NOT BEEN ALLOWED TO COLLECT ANY EVIDENCE OR SUBPOENA ANYONE. THE [APD] AND [FBI] HAVE BEEN SELECTIVE IN THEIR COLLECTION OF EVIDENCE AND ~~[illegible]~~ HAVE IMPLICATED ME IN THIS CRIME TO WITNESSES. I HAVE BEEN IMPLICATED IN THIS CRIME TO THE PUBLIC THROUGH THE MEDIA SERVICE. MY CO-DEFENDANTS HAVE AN INTEREST IN IMPLICATING ME AND TO MY KNOWLEDGE MR. HUBBARD HAS IN FACT MADE A DEAL TO THAT EFFECT ALREADY. I HAVE BEEN THREATENED BY THE [APD] AND FEDE AGENTS. EVIDENCE HAS BEEN FABRICATED AND FALSIFIED. 42 YEARS PLUS, IS AN ABSURD AMOUNT OF TIME FOR SOME ONE WHO HAS NO CRIMINAL HISTORY AND MIGHT AS WELL BE A LIFE SENTANCE FOR A (26) YEAR OLD MAN WITH A DISEASE. I HAVE SPENT THE MAJORITY OF MY LIFE IN ROLES OF SERVICE TO THE PEOPLE, PROUDLY AND BY CHOICE. MY FAMILY, FRIENDS AND COMMUNITY WILL ATTEST TO MY CHARACTER, IF ONLY THEY WERE ALLOWED. THERE IS NO WAY I CAN RECEIVE A FAIR TRIAL, THIS TRIAL IS BIASED, [redacted] I AM HERE AGAINST MY WILL AND WORN OUT. THIS WILL BE MY ONLY STATEMENT AT THIS TIME.

AMERICORP - PEACECORP
DO NOT WASTE MY LIFE.

HAVE FAITH IN THE PEOPLE, THEY WILL NOT ALL BE FOOLED.

REMAIN VIGILANT, REMEMBER JUSTICE IS ON YOUR SIDE.

DO NOT FEAR DEATH, IT IS NOTHING BUT FREEDOM.

SALVS · POPVLI · SUPREMA · LEX · ESTO

NON · SVB · HOMINAE · SED · SVB · DEO · ET · LEGE

William G. Piers
SUNDAY, FEBRUARY 4, 2001

EXHIBIT C:

EXCERPTS FROM GOVERNMENT'S REBUTTAL CLOSING ARGUMENT

BY MR. COLLINS:

Ladies and gentlemen, my colleague here, Mr. Butler, stated during his closing that he had respect for the government; and I too have respect for Mr. Butler. But regardless of our feelings for one another or our respect for one another, what Mr. Butler said during his closing and what I have said and will say is not evidence. You're not supposed to use suspicion or speculation, as Mr. Butler advised you, and that's correct. The evidence before you is that of the physical evidence and the testimony of the witnesses, what they saw, what they heard, what they observed.

I don't know if any of you have had this experience, and I'm hoping that one of you at least has. Have you ever approached a group of children who are doing something that they ought not to be doing? The children might be members of your family, they might be your neighbor kids, or they might be kids that you know vaguely. And when you approach them, these children run away. But you in response grab one of the children because they've done something wrong. And the first thing out of that child's mouth is, "Yeah, I did it, but Billy and Susie did it too." We're not here today talking about Billy and Susie. We're here today to review the evidence against William Piers.

Today is the first time that we heard that Mr. Piers has acknowledged that he's a member of a conspiracy. What

evidence -- what was his role in this conspiracy? Upon what evidence are they now saying he's a member of the conspiracy? Is it the testimony of all the witnesses in this case? In that evidence, how much do we depend upon Raymond Hubbard's testimony to identify Mr. Piers as the man who was in the swamp?

What was his role in this conspiracy to which he's now admitting? He did not work at the credit union. He could not have provided the information about the layout of the credit union. Why was his Beretta in the back of a van? Why are his fingerprints on the plastic bags that were found in the back of the van? Why does this weapon, this Norinco, appear to fit within this gun case and -- that -- I'd point out to the indentation marks and the black marks here -- found in Mr. Piers's bedroom. Why does this wood-colored piece that bears the number 21112 bear the same numbers as that lifted from this Norinco that was converted into a machine gun? And why is there another wood part in among the parts to this Norinco? Is it because that was Mr. Piers's Norinco? I'd submit yes. Could these conceivably be the parts that Mr. Hubbard identified as being previously attached to this Norinco? I submit yes.

In Plaintiff's Exhibit 61 we see, as Agent Henderson described, the views from the various cameras. And on page 4 of Plaintiff's Exhibit 1 as well as Plaintiff -- on page 3, we

see Mr. Hubbard seated behind the steering wheel and we do not see anybody else seated in the front portion of the van. We do see on the top photograph of page 4 an arm cloaked in dark clothing. Mr. Butler pointed out that the person that was in dark crouched as if he knew where the cameras were located.

Page 5, we see a person in dark standing above the gate, whose head and shoulders appear above the gate to the teller station. There's no crouching there. We see later on, when things are going wrong, on page 6 a photograph that contains a dark figure crouching beneath the gate. But also in the photograph we see clearly the windows of the credit union. Would it be unreasonable to believe that perhaps if the police were in the area, there might be a police officer standing by the window who might see a person standing above the gate? You don't have to be a genius, you don't have to know where the cameras are located to fear that someone might see you standing behind the teller line.

Mr. Piers and Mr. Hubbard were like Keystone Cops at the Bronco. Neither one of them could get the door open. They both entered -- they both climbed into the Bronco through the front door. If there had been a third person, police officers arriving and if this was planned out, wouldn't that Bronco have already been started? Wouldn't they have acquired or used a vehicle that had more than two doors? Would that person have left the doors locked?

When you look at the photographs in Plaintiff's Exhibit 3, you'll see the inside of that Bronco. You'll see there was a bunch of junk. Was this third person a person of diminutive size, two feet high, three feet high, that could have hid beneath the bike in the back, that would not have been covered by the bags that were thrown in? The officers only identified two people running from the Bronco.

What part in this agreement did Mr. Piers play? Well, he at the time of his arrest stated, "I know I already turned myself into a criminal, but I'd like to do whatever it takes to work things out. But obviously I'm gone for a long time. And I'll be honest with you." He then asked, "Do you know if there's anybody else involved with me?" And when Detective Vanderveur said, "Yes," Mr. Piers said, "Is he okay?" He didn't say, "Are they okay?" And then he concluded by stating in question form, "Nobody else got hurt?" How would Mr. Piers have known that anybody's lives had been threatened and put in jeopardy unless he had been the second man?

The two tellers were bound, they were hog-tied, but they were left alive. The only injury that Alana Wooten suffered was when she cut herself trying to cut the plastic ties that had been wrapped around her. The only person whose life was really at -- put at risk that day -- the one person whose life perhaps would have disappeared in a flash was Officer Reeder. He's the only one whose life could have been

gone in an instant. The only thing that went through the head of Alana Wooten, Chastity Monette, and Dan Reeder, thankfully, that day was the fear of death. Not a bullet.

When you review this evidence, ladies and gentlemen, review it carefully. I agree with Mr. Butler, you cannot use pity, you cannot use anger. You must be the judges of the facts. But the facts in this case point directly to this man here. He is the one responsible for what happened that day. We must find him accountable for his actions. Mr. Hubbard has already acknowledged, as Mr. Butler pointed out, he's going to jail. You cannot use Mr. Butler's plea of guilty to find Mr. Piers guilty. You have to judge Mr. Piers on the facts in this case and use those facts in determining whether or not he's guilty. I ask that you find him guilty. Thank you.

THE COURT: Ladies and gentlemen, we're going to take another short break at this point. There's one administrative thing that we need to see to at this point. I imagine you all didn't order your lunch during our earlier break. Am I right about that? Would you please take care of ordering your lunch now, except for our alternates. And this is always the awkward part of these things. I need to tell you all that I can't let you sit with the rest of the folks now to deliberate on this case. I will be excusing you at this point. You're certainly welcome to stay and listen to the jury instructions if you wish to. But I can't let you start deliberating, which is going to

take place immediately after I read the instructions, because the law provides that only 12 jurors deliberate.

At the risk of belaboring this, I hope you understand that it was valuable to have you here. If someone had had a family emergency or become ill during the course of this trial, we would have had to start over again if we didn't have alternate jurors. So it's really important and valuable to have you here. But at this point it's your option whether you stay for the reading of the instructions or whether you leave us at this point, because I can't let you sit with the jury after I read the instructions.

We will take five minutes at this point. The 12 of you, please do arrange for your lunches at this point. Would counsel stay for a minute, because there's something I want to ask you before we go on. Would the jury excuse us at this point, please.

(Jury not present)

THE COURT: I got surprised on one thing when I was listening to the discussion of my instructions. If you'll look at instruction 27 and 29, those are the two instructions that work off of 924(c), and both of them include as a second count an alternate, whereby the second element can be made out by either using or carrying a firearm or because the firearm facilitated the transaction.

Mr. Collins, in arguing that, you put another factor

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM PIERS , Defendant.	CASE A00-0104-01-CR 03-459 (HRH) DECLARATION OF WILLIAM PIERS VERIFYING MOTION TO VACATE CONVICTIONS AND SENTENCES PURSUANT TO 28 U.S.C. § 2255

I, WILLIAM PIERS, DECLARE UNDER PENALTY OF PERJURY THAT:

I have read the Section 2255 motion to be filed by my attorney, Michael R. Levine, and I adopt and approve all of its provisions. I believe that all factual assertions in said motion are true and correct.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

DATED 9-27-2004 _____

WILLIAM PIERS

United States v. William Piers, CASE A00-0104-01-CR 03-459 (HRH)

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below I served the foregoing Motion to Vacate Convictions and Sentences and Request for Evidentiary Hearing Pursuant to 28 U.S.C. § 2255; Exhibits A–C; Defendant's Declaration in Support of Motion, by depositing a true copy of same in the United States Mails addresses as follows:

United States Attorney Timothy M. Burgess

United States Attorney's Office, District of Alaska

222 West Seventh Avenue, #9, Room 253

Anchorage, Alaska 99513

Dated Sept. 29, 2004

Michael R. Levine