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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

AMERICA, f, lant.	CASE A00-0104 CR (HRH) DEFENDANT'S OBJECTIONS TO MAGISTRATE JUDGE ROBERT'S RECOMMENDATION REGARDING MOTION TO VACATE

it, William Piers, through his attorneys, Michael R. Levine and Matthew G. he following objections to Magistrate Judge Roberts's Recommendation s's Motion to Vacate his convictions and sentence (Recommendation).[1] oves the District Court, the Honorable Russel Holland, to make a *de novo* ich contested finding, as the law requires. Rules Governing § 2255 8(b); 28 U.S.C. § 636(b)(1); *Orand v. United States*, 602 F.2d 207, 208–09 1 short, Mr. Piers objects to every adverse material factual finding and legal Recommendation. Specific written objections follow.

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l has made every effort to limit the length of these objections, they exceed the 5- ed by the Court. As such, Mr. Piers has filed, contemporaneously with these tion to Allow Written Objections to Exceed Five Pages.

Procedural Ruling	Objection and Explanation
2. Judge Roberts did not recuse himself after issuing a premature recommendation.	On October 24, 2005, before the parties had an opportunity to present arguments under the briefing schedule set at the August 2005 evidentiary hearing (Evid. Hrg. 281–84), Judge Roberts filed a 50-page recommendation to deny the 2255 motion (Docket No. 244). This recommendation was withdrawn upon defense motion, and Mr. Piers moved Judge Roberts to recuse himself, arguing that by prematurely making his decision without the benefit of argument, to remain on the case would compromise the appearance of impartiality. The motion was denied.[3] The denial of the Motion to Recuse was an abuse of discretion, made clear by the fact that nearly the entire 50-page premature recommendation is included verbatim in Judge Roberts's latest 70-page recommendation, including even the incorrect Docket Number (203) that was associated with the premature recommendation. Rec. 1.

II. Objections To Factual Findings

Magistrate Finding	Correct Finding
1. Mary Hutchison's testimony did not indicate when she fired Rex Butler. Rec. 9	Ms. Hutchison testified that she fired Mr. Butler at least as early as November of 2000, or three months prior to the trial, and also voiced her unhappiness with Butler "many, many times." Evid. Hrg. 238. On page 33 of the Recommendation, Judge Roberts notes that Ms. Hutchison fired Mr. Butler in November of 2000, thus contradicting the statement on page 9 of the Recommendation.

[3] For reasons not known to undersigned counsel, Mr. Piers's Motion to Recuse and Judge Roberts's order denying said motion are missing from the docket for Mr. Piers's case.

Magistrate Finding	Correct Finding
5. Mr. Butler chose not to give an opening statement because he did not want to give away, or provide a "blueprint" of, the defense. Rec. 12, 52.	Butler did not recall not giving an opening statement, or what his reasoning was. He testified that "sometimes" he does not give an opening so as not to give away the defense, but said nothing to that effect with respect to Mr. Piers's case specifically. Evid. Hrg. at 72–74.
6. Mr. Butler thought the CIA badges introduced at trial were innocuous, and chose to "downplay" their existence. Rec. 12, 53.	Butler did not recall the CIA badges or what he thought of them. Evid. Hrg. 76. He testified that he "*probably* thought they were innocuous at best." *Id.* at 78. He never testified that he chose to "downplay" them.
7. Mr. Butler "successfully object[ed]" to an attempt by the government to introduce evidence seized from Mr. Piers's computer, including an "anarchist hand book." Rec. 12.	Butler did not object at all, successfully or otherwise, nor did the government attempt to introduce such evidence. In fact, it was the *government's* suggestion to keep out portions of the "Anarchist's Cookbook" to which the Court refers. Trial 4-3 to 4-7.
8. It is not evident from the video whether Mr. Piers knew he was being videotaped. Rec. 12.	Mr. Piers asked the officers to switch off the recording device. Evidentiary Hearing Defense Exhibit C. If he knew he was still being videotaped, he would have requested that the video be turned off as well.
9. Mr. Butler considered the videotape different from *Rhode Island v. Innis* because of the "interplay of the officer wanting to read the *Miranda* warnings to Piers." Rec. 13.	Mr. Butler testified that he thought the *Innis* doctrine only applies if officers at some point begin direct questioning. Evid. Hrg. 83–90, 86. This is incorrect. Post. Hrg. Arg. 19–26, Post. Hrg. Reply 16–17. Butler also testified that in his mind, to file a motion based on *Miranda*, "your client's got to testify," which is also incorrect. Evid. Hrg. 63. Butler also assumed that *Miranda* warnings had been given earlier because Mr. Piers supposedly knew the warnings by heart. *Id.* at 85. Butler agreed that if there were any grounds to suppress the statement, he should have moved to do so. *Id.* at 67.
10. When Raymond Hubbard was arrested he stated that Adam's name was "Jonathan Cutty." Rec. 13.	Mr. Hubbard stated initially that *his own* name was Jonathan Cutty. Trial 226. Hubbard was always consistent in describing Adam.

Magistrate Finding	Correct Finding
15. There is no evidence of any bad language being exchanged between Mr. Butler and his client. Rec. 24. The relationship between Mr. Butler and Mr. Piers was not antagonistic or quarrelsome. Rec. 40.	The record is rife with evidence of the contentiousness of the relationship, and displays bad language as well as antagonistic and quarrelsome relations. 2255 Motion 4–8; Reply 6–9; Post Hrg. Arg. 4–9; Post Hrg. Reply 6–9. *See also* transcript of the Ex Parte hearing on the Motion to Withdraw; 2255 Motion Exhibit B (letter from Mr. Piers to the Court). The Recommendation itself notes that Butler told the Court that Mr. Piers was lying, and that Piers levied "strong accusations" against Mr. Butler. Rec. at 27.
16. Mr. Butler consulted with Mr. Piers prior to conceding his guilt in closing arguments. Rec. 25.	There is no evidence that Butler consulted with Piers prior to conceding guilt. Butler had no recollection of discussing his plan to concede guilt with Mr. Piers. Evid. Hrg. 125. He also testified that it was the attorney's decision, and implied that even if the client instructed him not to do so, he would do so anyway. *Id.* at 125–127. All other evidence suggested that during the trial Mr. Butler and Mr. Piers were not even speaking to each other. Post Hrg. Reply 4–5.
17. Mr. Piers was not denied any knowledge or information about Mr. Hubbard's reference to Adam prior to trial. Rec. 28-29.	Mr. Butler represented to the Court in the Ex Parte hearing on the Motion to Withdraw that the government had assured him that the name "Adam" had never "surfaced" in their investigation. Ex Parte 7. *See also* 2255 Motion 7; Reply 65. Butler testified that he "had no information about Adam," though he specifically inquired of the government about Adam. Evid. Hrg. 33. This is so despite Hubbard's repeated references to Adam during his statement to police and his Grand Jury testimony. *Statement of Raymond Hubbard*, 8–9 (Evidentiary Hearing Exhibit A); Reply Exhibit D (October 18, 2000 Grand Jury Testimony of Raymond Hubbard) at 11–13, 16–17; Trial 2-5, 2-19–20 (testimony of Raymond Hubbard). FBI Agent Henderson also testified that prior to trial the government was looking for an individual named Adam, based on statements made by Hubbard. Trial 4-99–100, 4-137–40; Evid. Hrg. 222–23 (testimony of Lou Ann Henderson).

Magistrate Finding	Correct Finding
23. The Motion to Withdraw was not based upon a conflict (thus there was no reason for another attorney to argue the motion to withdraw). Rec. 40.	As noted by the Ninth Circuit, Mr. Butler wrote that "his motion [to withdraw was] based on 'the break down in attorney client communications.'" *United States v. Franklin*, 321 F.3d 1231, 1237 (9th Cir. 2003). For evidence of the extensive conflict between Butler and Piers, *see* 2255 Motion 4–8; Reply 6–9; Post Hrg. Arg. 4–9; Post Hrg. Reply 6–9.
24. Mr. Butler "did not abandon his adversarial [sic] role in representing Piers at the hearing on the Motion to Withdraw." Rec. 40.	Presumably the Court intended to say Butler did not abandon his *advocacy* role in representing Piers at the hearing. However, during the hearing Mr. Butler *never* argued that the motion should be granted, and in fact assumed an adversarial role against his client. *See* transcript of Ex Parte Hearing. *See also* 2255 Motion 4–6; Reply 8–9; Post Hrg. Arg. 6–8. This is despite having been fired by Mr. Piers "many times" "well before trial." Evid. Hrg. 18–19.
25. It is not accurate to say that no investigation was done. Mr. Butler did not fail to investigate Adam. Rec. 41.	There is no evidence whatsoever of any independent investigation done by Butler. Butler testified that he did not recall hiring an investigator. Evid. Hrg. 13, 46. Butler could not recall a single act of investigation he performed. *Id.* at 46–55. *See also* Post Hrg. Arg. 9–16. Butler's case file contained no memorandum, receipts, or notes regarding any investigation. Evid. Hrg. 235. Butler did no independent investigation, instead relying on the government's investigation, which falls below an objective standard of reasonableness for a defense attorney. Evid. Hrg. 140–41. Post Hrg. Arg. 12–16.
26. Criticizing Mr. Butler for not interviewing Mr. Piers's co-defendants "overlooks the canons of ethics what would prevent an attorney from contacting another criminal defendant who has separate counsel." Rec. 42.	Mr. Butler could have contacted the co-defendant's attorneys and requested interviews. This routine practice would not have violated any ethical canons.
27. The "lack of further investigation" did not prevent Mr. Butler and Mr. Piers from communicating. Rec. 43.	Butler's idleness only increased Piers's lack of confidence in him. *See, e.g.*, 2255 Motion Exhibit B (letter from Mr. Piers to the Court).

Magistrate Finding	Correct Finding
34. Mr. Piers acknowledges that Butler attempted to refute or explain the circumstantial evidence against Mr. Piers. Rec. 66.	This misconstrues Mr. Piers's pleadings. The actual statement referred to by the Court, taken entirely out of context, is, "Mr. Butler made, at best, a token attempt to refute or explain the circumstantial physical evidence against Mr. Piers." 2255 Motion at 17.
35. The rifle used in the getaway was found in Mr. Piers's bedroom. Rec. 67.	The rifle used in the getaway was recovered from the Bronco driven by the robbers. Trial 2-131. No rifle was ever found in Mr. Piers's bedroom, nor was there any evidence or testimony suggesting so.

III. Objections To Legal Findings

Magistrate Findings	Correct Findings
1. The Recommendation is based upon consideration of the evidence adduced at the evidentiary hearing "and the arguments of counsel." Rec. 2.	The Recommendation does not address several arguments made in Mr. Piers's various pleadings, nor does it address Mr. Piers's claim of ineffective assistance of counsel based on cumulative error (Claim 1.23). Reply 41–45; Post Hrg. Arg. 56–64. The unaddressed arguments are too numerous to list in the limited space available. Mr. Piers respectfully requests that the District Court review all of Mr. Piers's prior pleadings: 2255 Motion, Reply (Docket No. 216), Post Hrg. Arg. (Docket No. 247), and Post Hrg. Reply (Docket No. 252), as well as the government's responses to each.
2. If Mr. Butler had called character witnesses, it may have opened the door to other evidence seized from Mr. Piers's computer. Rec. 10. A reasonably competent attorney would weigh the risk that character evidence could open the door to prejudicial evidence. Rec. 62.	Butler could have filed a motion in limine to keep the other evidence out, which may have been granted. A reasonable attorney would have filed a motion in limine to determine this before deciding not to call any character witnesses, or to even contact them.

Magistrate Findings	Correct Findings
9. The District Court's failure to sua sponte appoint new counsel to represent Mr. Piers at the hearing on the Motion to Substitute Counsel was not a due process violation, because it was not clear that the conflict was irreconcilable. Rec. 26–27.	The Recommendation does not address *United States v. Wadsworth*, 830 F.2d 1500, 1510–11 (9th Cir. 1987) (defendant's due process rights violated where defendant should have had new counsel to argue the motion to substitute counsel, when it was clear that current counsel had taken an "adversary" position on the matter). The record is rife with evidence of an irreconcilable conflict. 2255 Motion 4–8; Reply 6–9; Post Hrg. Arg. 4–9; Post Hrg. Reply 6–9. *See also* transcript of the Ex Parte hearing on the Motion to Withdraw; 2255 Motion Exhibit B (letter from Mr. Piers to the Court). The Recommendation itself makes reference to "the breakdown of attorney-client relationship" that existed even after Butler had purportedly tried to "work with Piers in preparation for trial." Rec. at 34.
10. Mr. Piers had a fair opportunity to present evidence to the jury that Adam was involved in the conspiracy. Rec. 29.	Mr. Piers did not have this opportunity. He was in custody before trial, and his attorney did no independent investigation regarding Adam or anything else. Post Hrg. Arg. 9–16. Without investigation, there could be no evidence to present.
11. Mr. Piers claims that prejudice must be presumed, and he points to no specific prejudice caused by Butler's late filing of the motion to withdraw. Rec. 34. *Daniels v. Woodford* is inapplicable. Rec. 35.	1) Prejudice must be presumed where a client goes to trial represented by an attorney with whom he is not communicating. *Daniels v. Woodford*, 428 F.3d 1181, 1199–1200 (9th Cir. 2005) (holding that cases where there is a "breakdown in communication" prior to trial represent the "paradigm" for situations where "prejudice must be presumed"). Piers was not speaking with Butler, let alone communicating with him. Post. Hrg. Arg. 4–6. 2) Where prejudice is presumed, there is no need to demonstrate specific prejudice. 3) There is specific prejudice here—a client is prejudiced when forced to trial with an attorney with whom the client is not communicating.
12. It was reasonable for Mr. Butler to assume that the government was investigating Adam, and in turn for Mr. Butler to rely on the government to do so. Rec. 42.	As caselaw and the ABA Standards for Criminal Justice state, it is entirely unreasonable to rely on the investigation of an adverse party in lieu of independent investigation in a criminal case. Post. Hrg. Arg. 14–15.

Magistrate Findings	Correct Findings
17. A reasonably prudent attorney may have concluded that Mr. Piers's videotaped statements were volunteered and not the product of interrogation. Rec. 47.	A reasonably prudent defense attorney understands the doctrine of *Rhode Island v. Innis*, 446 U.S. 291 (1980), and under that standard, the statements were a product of interrogation. Butler testified that he thought *Innis* only applied if there was actual questioning, which is clearly wrong. Evid. Hrg. 85–26. The statements were in direct response to a classic interrogation technique. Post Hrg. Arg. 19–26.
18. Statements that are not in response to any question but are spontaneous are not excluded under *Miranda*. Rec. 47.	Under *Rhode Island v. Innis*, interrogation includes not only direct questioning, but any acts or statements by law enforcement officers that are "reasonably likely to elicit an incriminating response." 446 U.S. 291 (1980). Mr. Piers's statements were not spontaneous, but a response to the officer's classic interrogation technique. Post Hrg. Arg. 19–26.
19. Counsel is not ineffective by failing to file a motion that he reasonably believes to be meritless. Rec. 47.	Counsel is not ineffective by failing to file a motion that he "*knows*" is without merit, after conducting necessary research. *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (cited by the Court in support of its finding). *See also* Reply 13–14. If Butler had researched the issue, he would have understood that under *Innis*, interrogation includes more than direct questioning. Counsel can be ineffective for failing to file a meritorious suppression motion, and the motion in this case would have had great merit based on *Innis*. Post Hrg. Arg. 19–26.
20. Mr. Piers has not established how the admission of his statements were prejudicial, because he did not admit that he committed the robbery or conspired to commit robbery. Rec. 47.	A full unambiguous confession to all charges is not the only statement that can cause prejudice. The admission of Piers's statements were extremely damaging, as shown by the government's reliance on them during trial, particularly in closing arguments. Reply 16–17; Post Hrg. Arg. 16–26.
21. Mr. Piers has not suggested what would have been a plausible theory to present in the opening statement. Rec. 51.	Mr. Piers suggested several plausible arguments to make during an opening statement. Post Hrg. Arg. 28.

Magistrate Findings	Correct Findings
28. Whether the person firing the weapon knew it was capable of being fired as an automatic has "little bearing" on the shooter's guilt or innocence. Rec. 56–57, 58.	The shooter's knowledge of whether the weapon was capable of being fired as an automatic has great bearing on the issue of guilt. If a person does not know that a gun is capable of being used as an automatic, he cannot be convicted of "knowingly" using an automatic weapon—a requirement for conviction under the machine gun statute. Reply 30–31; Post Hrg. Arg. 37–38, 52.
29. Knowledge that a firearm can function as an automatic for purposes of sentencing may be proved by circumstantial evidence, and the sentencing judge heard the trial testimony. Rec. 59.	Mr. Piers's claim in this regard focuses on a *jury instruction* at trial, and on whether Mr. Piers should have been *convicted* of the machine-gun charge. 2255 Motion 18; Reply 30–31; Post Hrg. Arg. 52. What the sentencing judge heard is irrelevant to the claim.
30. The jury instructions did not violate *United States v. Staples*, 511 U.S. 600 (1994). Rec. 60.	The Recommendation offers no analysis in support of this statement, nor does it address any of Mr. Piers's arguments to the contrary. Reply 30–31; Post Hrg. Arg. 52.
31. Butler was not deficient for failing in closing to call the jury's attention to the fact that co-defendant Franklin used Piers's address on Nelchina Street as a forwarding address to show that Franklin had access to Piers's bedroom and computer, because the "address was Piers' family's address and would have implicated Mr. Piers as well. Rec. 66	Mr. Piers was already implicated. Evidence was found in the home on Nelchina Street. Establishing that Franklin had access to the Nelchina Street home would not have harmed Mr. Piers in any way, as the jury already knew that Mr. Piers had access to that residence.
32. Mr. Butler's closing argument adequately assisted the jury in analyzing the evidence "although he could have developed his theory f defense better." Rec. 67.	Butler failed to develop his purported theory of defense in any way. During closing, he omitted a myriad of evidence that supported it, due to his own exhaustion and his belief, according to his testimony, that if jurors had already heard the evidence, there was no need to present it to them in closing. 2255 Motion 17–18; Reply 28–30; Post Hrg. Arg. 42–52.
nited States v. Swanson, 943 F.2d 1070 ir. 1991) is inapplicable because there is an one count here. Rec. 68	Nothing in *Swanson* limits its holding to cases where there is only one count charged. The key is whether Mr. Butler "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991). Reply 31–39; Post Hrg. Arg. 53–55.

In summary, Mr. Piers's convictions were a direct result of his trial counsel's inadequacies. Had the trial been conducted properly, there would have been more than ample evidence to acquit Mr. Piers of machine gun count, at the very least, if not all charges.

In the 26 years prior to his 2001 trial, Mr. Piers demonstrated a commitment to his community and public service. He had no prior convictions of any kind. Quite the contrary—as shown by the numerous letters of support given to his trial counsel before his trial, Mr. Piers was honest, hard-working, law-abiding, and an upstanding citizen. He is now unjustly serving a 39 year sentence stemming from an incident where, by all accounts, no one was even injured.

We strongly urge you to grant a pardon or to otherwise commute Mr. Piers's sentence. If we can provide further information, please contact us as 503.546.3927.

Very Truly Yours,

Michael R. Levine

Matthew G. McHenry

Attorneys at Law