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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 CR (HRH) REPLY TO GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION FOR RELIEF PURSUANT TO 28 U.S.C. § 2255; EXHIBITS D–J

The defendant, William Piers, through his attorney, Michael R. Levine, submits the following Reply to the government's Opposition to Defendant's Motion for Relief Pursuant to 28 U.S.C. § 2255.

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ARGUMENT

I. An Evidentiary Hearing Is Required[1]

In a section 2255 proceeding, an evidentiary hearing must be granted "[u]nless the motion and the files and records of the case *conclusively* show that the prisoner is entitled to no relief." 28 U.S.C. § 2255 (emphasis added). In practice, the standard for section 2255 proceedings is the same as that for section 2254 proceedings; to wit, an evidentiary hearing is necessary if the facts alleged, if proven, would entitle the defendant to relief. *Norris v. Risley*, 878 F.2d 1178, 1180 (9th Cir. 1989) (citing *Townsend v. Sain*, 372 U.S. 293, 312–13 (1963); Rule 8 of Rules Governing Section 2255 Cases, Advisory Committee Note ("The standards for § 2255 hearings are essentially the same as for evidentiary hearings under a [section 2254] habeas petition . . . ."); Rule 8 of Rules Governing Section 2254 Cases, Advisory Committee Note (discussing the standard from *Townsend*). In the instant case, Mr. Piers requests an evidentiary hearing principally to develop the several claims of Mr. Butler's ineffectiveness.[2] Any or all of these allegations, if true, would warrant relief under 18 U.S.C. section 2255. Thus, an evidentiary hearing is required unless the government concedes the factual assertions made herein and in Mr. Piers's 2255 Motion, in which case the Court should grant Mr. Piers's 2255 Motion without an evidentiary hearing.

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[1] As used herein, "Resp." refers to the government's Opposition to Defendant's Motion for Relief Pursuant to 28 U.S.C. § 2255. "2255 Motion" refers to Mr. Piers's previously filed Motion to vacate Convictions and Sentences and Request for Evidentiary Hearing Pursuant to 28 U.S.C. § 2255. Exhibits A–C were attached to and filed with Mr. Piers's 2255 Motion. Exhibits D–J, referenced herein, are attached to this Reply.

[2] Though the ineffectiveness claims constitute the principal reason an evidentiary hearing is required, Mr. Piers further submits that an evidentiary hearing is required on the other claims raised in his 2255 Motion as well.

Though the government clouds the issue with statements that are irrelevant to the determination of whether to hold an evidentiary hearing,[3] the standard is straightforward. An evidentiary hearing is required because the motion, files and records[4] of the case do not show "conclusively" that Mr. Piers is entitled to no relief. 18 U.S.C. § 2255. Indeed, the allegations raised by Mr. Piers, if true, would warrant relief, and therefore an evidentiary hearing is required.

The Ninth Circuit case of *United States v. Burrows* illustrates the standard for an evidentiary hearing. 872 F.2d 915 (9th Cir. 1989). There, the Court reversed a district court's denial of a petitioner's section 2255 motion without an evidentiary hearing. *Id.* at 919. The *Burrows* court first reiterated the standard for ordering an evidentiary hearing, noting that "Section 2255 *requires* the district court to hold an evidentiary hearing '[u]nless the motions and

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[3] "Piers has provided no facts or specifics supporting or expanding upon his allegations. He has provided no explanation for the delay in coming forward with these facts. He does not alleged [sic] these two facts are newly discovered evidence. Piers offers no additional facts that would support any of his allegations." Resp. at 20. None of these assertions are relevant to the determination of whether to hold an evidentiary hearing, as they are not related to whether the facts as alleged, if true, would warrant relief. *Norris*, 878 F.2d at 1180.

[4] On this point, the government claims that its factual account "is supported by the trial transcripts and the statement of facts presented in *United States v. Franklin*, 321 F.3d 1231." Resp. at 5. However, the government has at the very least overstated some of the facts in this case, if not flatly misstated them.

As one example, the government claims that when the individuals involved in the getaway abandoned the van and switched to a second vehicle, "[p]olice saw that Piers was the only one carrying the Norinco." Resp. at 6–7. Such language indicates that multiple officers witnessed the vehicle switch and identified Mr. Piers. In fact only one officer, Paul Morino, witnessed the switch. Further, Officer Morino testified that he could not distinguish the facial features of the two individuals he saw exit the van and enter the second vehicle; at no time did Morino identify Mr. Piers as the man in dark clothing. RT 3-13. Nor did Morino testify that the firearm carried by the person in dark clothing was a Norinco or any other assault-type weapon. When pressed to describe the gun in more detail, Morino testified that he "could [not] describe[] it any further. It looked to be like a long-barreled rifle." RT 3-17. The appellate decision contains no reference whatsoever to the vehicle transfer. *United States v. Franklin*, 321 F.3d 1231 (9th Cir. 2003).

As the government provides no citations to the voluminous record throughout its factual recitation, and in light of the example above, the Court should view with caution any factual assertions made by the government.

files and records of the case conclusively show that the prisoner is entitled to no relief." *Id.* at 917 (quoting 28 U.S.C. § 2255) (emphasis added). Put another way, a district court must hold an evidentiary hearing unless the claims, "viewed against the record, either do not state a claim for relief or are so palpably incredible or patently frivolous as to warrant summary dismissal." *Id.* (citations omitted). Such is not the case here.

Moreover, "[a]n evidentiary hearing is usually required if the motion states a claim based on matters outside the record or events outside the courtroom." *Id.* (citations omitted) (holding an evidentiary hearing was required because the ineffective assistance claims raised by petitioner "raise[d] facts which occurred out of the courtroom and off the record").[5] Despite the government's claim to the contrary,[6] Mr. Piers's 2255 Motion contains numerous references to facts outside the record,[7] and also includes Mr. Piers's declaration under penalty of perjury that all factual assertions in his 2255 Motion are true and correct. In light of the above and the nature

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[5] References to facts outside the record are not a requirement for an evidentiary hearing. Rather, such references provide strong support for the need for one. *Burrows*, 872 F.2d at 917.

[6] "Piers has made no proffer of what other evidence he believes exists outside of the record of this case . . . ." Resp. at 2.

[7] With respect to the ineffective assistance of counsel claims alone, *see* 2255 Motion at 4 (Mr. Piers and his mother repeatedly expressed dissatisfaction with counsel's performance in the months preceding trial); *id.* (Mr. Piers and his mother directed Mr. Butler to withdraw as counsel on several occasions well in advance of trial); *id.* at 6 (referencing an ongoing irreconcilable conflict between Mr. Butler and Mr. Piers); *id.* at 7, 9 (Mr. Piers repeatedly asked Mr. Butler to investigate the whereabouts of Adam, and Mr. Butler failed to do so); *id.* at 8 (referring to Mr. Hubbard's post-arrest statement); *id.* at 10 (Mr. Piers was held for 18 hours in handcuffs in an interrogation room and denied access to his lawyer); *id.* at 15 (noting the uncertainty as to whether the rifle, as fired, was an automatic or a semi-automatic); *id.* at 16 (stating that prior to trial, Mr. Piers provided Mr. Butler with a list of individuals willing to testify on his behalf, and repeatedly directed Mr. Butler to call these people as witnesses); *id.* at 16 (Mr. Butler refused to permit Mr. Piers to testify in his own defense, though Mr. Piers repeatedly expressed his desire to do so); *id.* at 17 (Mr. Piers told Mr. Butler he wanted to speak in open court to allow the victim tellers to hear his voice). The above are examples, and not an exhaustive list of the references Mr. Piers makes to facts outside the record in support of the ineffective assistance and other claims.

of Mr. Piers's claims, an evidentiary hearing is required. *See, e.g.*, *United States v. Chacon-Palomares*, 208 F.3d 1157, 1159 (9th Cir. 2000) (reversing district court's denial of evidentiary hearing because defendant "alleged facts which, if true, might establish a right to relief"); *Burrows*, 872 F.2d at 919 (reversing district court's denial of evidentiary hearing); *Marrow v. United States*, 772 F.2d 525, 527 (9th Cir. 1985) (reversing district court's summary dismissal of 2255 motion without evidentiary hearing where claims based on "matters outside the record").

II. None Of Mr. Piers's Claims Are Procedurally Barred

A. Apprendi, Blakely, and Booker are retroactive.

The government claims that Ground Four of Mr. Piers's motion is procedurally barred because *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 124 S.Ct. 2531 (2004) are not retroactive. Resp. at 21–22. Mr. Piers argues in Ground 4, *infra*, that *Apprendi* and, by extension, both *Blakely* and *United States v. Booker*, 125 S.Ct. 738 (2005), are retroactive. Mr. Piers acknowledges that the Ninth Circuit has held *Apprendi* and *Blakely* are not retroactive to cases on collateral review. *Cook v. United States*, 386 F.3d 949 (9th Cir. 2004); *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002). However, the United States Supreme Court has not ruled on the issue. Mr. Piers submits that when the Supreme Court passes on the issue, it will hold that *Apprendi* and, by extension, *Blakely* and *Booker*, are retroactive. *See infra* Ground 4. As such, Mr. Piers's claim under Ground 4 is cognizable, and not procedurally barred. The government offers no other rebuttal to this claim.

B. None of the claims raised in the 2255 Motion were raised on direct appeal.

On pages 22–24 of its response, the government alleges that the following seven claims are procedurally barred because they were raised on direct appeal: Ground 1.1 (ineffective assistance for failing to make a timely motion to withdraw); Ground 1.2 (ineffective assistance

for failing to effectively argue the motion to withdraw); Ground 1.3 (ineffective assistance for continuing to represent Mr. Piers at the hearing on the motion to withdraw); Ground 1.19 (ineffective assistance for failing to request a jury instruction regarding knowledge of the operation of the firearm); Ground 1.20 (ineffective assistance for failing to argue for a requested jury instruction regarding credibility of co-conspirators); Ground 1.22 (ineffective assistance for failing to move for acquittal under Criminal Procedure Rule 29); and Ground 5 (due process and right to counsel violations because the Court did not *sua sponte* appoint substitute counsel to argue the motion to withdraw). Resp. at 23–24. As explained below, none of these claims were raised on direct appeal, nor were any of them addressed by the Ninth Circuit.

Six of the seven claims referenced above are claims of ineffective assistance of counsel. Mr. Piers did not raise any ineffective assistance of counsel claims on his direct appeal.[8] *See* Appellant's Opening Brief at 2–3. Likewise, the Ninth Circuit did not make any findings regarding the effectiveness of Mr. Butler's assistance, as that issue was not before the court. *United States v. Franklin*, 321 F.3d 1231 (9th Cir. 2003). Though some of the issues raised on direct appeal were indirectly related to some of the claims made in the 2255 Motion, the claims raised in the 2255 Motion are all based on ineffective assistance, and therefore a different legal standard must be applied to resolve them. *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). In *Morrison*, a defendant claimed ineffective assistance of counsel for failing to file a valid suppression motion. *Id.* at 371–72. The government argued the defendant's ineffective assistance claim was merely an attempt to litigate his defaulted suppression motion. The Court disagreed, holding that "[w]hile failure to make a timely suppression motion is the primary

[8] Claim 3.4 of Mr. Piers's 2255 Motion alleged ineffective assistance of appellate counsel for raising an ineffective assistance of *trial* counsel claim on direct appeal. The inclusion of this claim was a mistake by undersigned counsel, and counsel apologizes for any inconvenience. No claims of ineffective assistance of trial counsel were raised on appeal.

manifestation of incompetence and source of prejudice advanced by respondent, the two claims are nonetheless distinct, both in nature and in the requisite elements of proof." *Id.* at 374. The government's argument in the instant case conflates claims that are separate and "distinct, both in nature and the requisite elements of proof," and therefore must be rejected. *Id.*

Likewise, Mr. Piers did not raise on appeal the court's decision not to *sua sponte* appoint substitute counsel to represent Mr. Piers at the hearing on the motion to withdraw (Ground 5). For the same reasons as those cited in the preceding paragraph, the government's claim that Ground 5 is procedurally defaulted must be rejected. *Id.*

The government also claims the Ninth Circuit addressed "Piers' claim that a cumulation [sic] of trial errors required reversal of his conviction and sentence." Resp. at 24. This is incorrect. On direct appeal, Mr. Piers argued that the cumulative errors of the *district court* required reversal. In contrast, Mr. Piers argues in his 2255 Motion that the cumulative errors *of his trial counsel*, Rex Butler, warrant reversal under the ineffective assistance standard. 2255 Motion at 3–4; *infra* Ground 1.23. Just as Mr. Piers did not raise on appeal, and the Ninth Circuit did not address, any of the ineffective assistance claims raised in the 2255 Motion, Mr. Piers did not raise on appeal, nor did the Ninth Circuit address, a claim of ineffective assistance based on the cumulative errors of trial counsel. Ground 1.23 is not procedurally defaulted. *Morrison*, 477 U.S. at 374.

Aside from the unpersuasive procedural default arguments, the government has offered nothing to refute Grounds 1.1, 1.2, 1.3, 1.19, 1.20, 1.23 and 5. As such, the Court should treat these claims as unopposed by the government.

III. Specific Claims

Ground 1.1: ***Ineffective assistance of trial counsel by failing to make a timely Motion to Withdraw and substitute new counsel to represent Mr. Piers at trial.***

As noted in Part II.B, *supra*, and contrary to the government's contention, this claim is not procedurally defaulted. The government has offered no other rebuttal to this claim.

Mr. Piers and his mother, separately and together, repeatedly told Mr. Butler to withdraw from the case, beginning months before and continuing until the date of the trial.[9] Despite this, Mr. Butler waited until a mere ten days before trial to file the motion. As the Ninth Circuit pointed out on Mr. Piers's direct appeal, "[n]ew counsel would likely have needed a substantial continuance to comply with Mr. Piers's desired actions [to investigate and file pretrial motions]. Given these circumstances, Piers's motion [to substitute counsel] was untimely." *Franklin*, 321 F.3d at 1238. This is precisely the reason Mr. Butler should have filed the motion to withdraw earlier.

After Mr. Piers's arrest, Mr. Piers and his family paid Mr. Butler a total of $10,000, which consisted of a $7,500.00 retainer and $2,500.00 separately earmarked for investigation of Mr. Piers's case. Mr. Butler, however, did not hire an investigator, and did no investigation on his own.[10] Learning this, Mr. Piers and his family strongly reasserted to Mr. Butler their desire to have him withdraw from the case. Had he filed a timely motion, in light of the clear conflict

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[9] This assertion and all of the other factual assertions made herein and in Mr. Piers's 2255 Motion were attested to by Mr. Piers and/or his mother, Mary Hutchison, in conversations with undersigned counsel. A declaration under penalty of perjury, signed by Mr. Piers, was attached to his 2255 Motion. A similar declaration, signed by Ms. Hutchison, is attached to this pleading as Exhibit J. Due to Mr. Piers's incarceration at USP Victorville, CA, undersigned counsel has experienced difficulty sending mail to and receiving mail from Mr. Piers. As such, counsel was unable to obtain a signed declaration from Mr. Piers attesting to the truth of the factual assertions made in this Reply by the due date for the Reply. Undersigned counsel will file Mr. Piers's declaration in support of this Reply as soon as he is able to do so.

[10] Mr. Butler did not refund the $2,500.00 to Mr. Piers and his family.

between Mr. Butler and Mr. Piers, the motion would likely have been granted. Further, a substitute attorney would have had ample time to conduct an investigation and file any meritorious motions.

Mr. Butler's failure to file the motion in a timely fashion fell below an objective standard of reasonableness. Further, had the motion been filed, there is a reasonable probability—a probability sufficient to undermine confidence in the outcome—that the outcome would have been different. As such, Mr. Butler rendered ineffective assistance. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984).

Ground 1.2: ***Ineffective assistance of trial counsel by not effectively arguing the Motion to Withdraw.***

As noted in Part II.B, *supra*, and contrary to the government's contention, this claim is not procedurally defaulted. The government has offered no other rebuttal to this claim.

As detailed in Mr. Piers's 2255 Motion at pages 4–5, during the hearing on the motion to withdraw, Mr. Butler did not provide the court with any reasons or arguments as to why the Court should grant the motion; instead stating that he was "prepared to go forward. That's the bottom line." Ex Parte Hearing 6. Upon filing a motion, defense counsel has a duty to argue that motion with zealous advocacy—anything else would amount to dilatory tactics. "The Sixth Amendment right to counsel, of course, guarantees more than just a warm body to stand next to the accused during critical stages of the proceedings . . . ." *Delgado v. Lewis*, 223 F.3d 976, 980 (9th Cir. 2000). Moreover, not only did Mr. Butler fail to act as an advocate for Mr. Piers, but Mr. Butler actually assumed an *adversarial* role against Mr. Piers by telling the court that Mr. Piers was lying about the existence of Adam, an uncharged member of the conspiracy. 2255 Motion at 6–7.

Mr. Butler's failure to advocate on behalf of Mr. Piers at the hearing on the motion to withdraw fell below an objective standard of reasonableness. Further, there is a reasonable probability, sufficient to undermine confidence in the outcome, that had Mr. Butler argued the motion effectively, the outcome of the proceedings would have been different. Mr. Butler's assistance was ineffective. *Strickland*, 466 U.S. at 687–88, 694.

Ground 1.3: ***Ineffective assistance of trial counsel by continuing to represent Mr. Piers at the hearing on the Motion to Withdraw despite having an actual conflict of interest.***

As noted in Part II.B, *supra*, and contrary to the government's contention, this claim is not procedurally defaulted. The government has offered no other rebuttal to this claim.

An accused is entitled to effective counsel at every critical stage of the proceedings against him. *Coleman v. Alabama*, 399 U.S. 1, 7 (1970) (citing *Powell v. Alabama*, 287 U.S. 45, 69 (1932) and *United States v. Wade*, 388 U.S. 218, 226 (1967)). A request for appointment of new counsel is considered a critical stage. *United States v. Wadsworth*, 830 F.2d 1500, 1510 (9th Cir. 1987). Mr. Piers was constructively denied counsel when Mr. Butler offered no arguments as to why the motion to withdraw should be granted. *See Delgado*, 223 F.3d at 980. To avoid this, Mr. Butler should have had another attorney argue the motion to withdraw. *See Wadsworth*, 830 F.2d at 1510–11 (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).

Failure to do so fell below an objective standard of reasonableness. Further, there is a reasonable probability—one sufficient to undermine confidence in the outcome—that, had another attorney argued the motion, the outcome of the proceedings would have been different.

Mr. Butler's inaction constituted ineffective assistance of counsel. *Strickland*, 466 U.S. at 687–88, 694.

Ground 1.4: ***Ineffective assistance of trial counsel 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.***

The government claims that, "[b]y his own concession, Piers never provided any information about the full identity" of Adam. Resp. at 25. This puzzling statement is inaccurate—nowhere in Mr. Piers's 2255 Motion does he concede such a thing, nor could any statement found in the 2255 Motion be construed as such a concession. To the contrary, Mr. Piers provided Mr. Butler with a physical description and a detailed map to Adam's apartment.[11] Further, in addition to the several references to Adam found in the record and cited to in Mr. Piers's 2255 Motion on pages 8–9, Ray Hubbard testified to Adam's extensive involvement in the conspiracy during the Grand Jury proceedings on October 18, 2000.[12] *See* Exhibit D, October 18, 2000 Grand Jury Testimony of Raymond Hubbard, at 11–13, 16–17. With all of this information at his disposal, it is inexcusable that Mr. Butler did not investigate the matter.[13]

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[11] Mr. Piers also provided undersigned counsel with a hand-drawn map to Adam's apartment. Though not an exact copy of the map provided to Mr. Butler, it contains the same information, except that Mr. Piers reports that the map given to Mr. Butler was more detailed. An investigator hired by undersigned counsel, using only the map, located the apartment in Anchorage with no trouble. At this time—five years after the robbery—no one named "Adam" lives there. The defense team continues to investigate who was living in the apartment at the time of the robbery.

[12] In addition, immediately after being apprehended, Mr. Hubbard initially told the arresting officers there were three people in the Bronco. RT 3-247 (testimony of Anchorage Police Detective Phillip Brown). Mr. Hubbard later changed his story to say there were only two of them. *Id.*

[13] Likewise, this information shows the falsity of Mr. Butler's statements during the hearing on the Motion to Withdraw that Mr. Piers fabricated the existence of Adam. 2255 Motion at 6–7; Ex Parte Hearing at 6–8.

The government also accuses Mr. Piers of "wishful thinking" for using the phrase "Adam may well have been the individual" who entered the credit union. Resp. at 25. Though Mr. Piers is reluctant to engage in a battle of semantics, the Court should note that Mr. Piers used the phrase "may well have been" because Mr. Piers was *not* the individual who entered the credit union, nor the person who fired the machine gun. In light of the discovery in this case, it is reasonable to conclude that an individual named Adam was involved, and as such further investigation was necessary to determine the extent of Adam's involvement. 2255 Motion at 8–9. *See also id.*, Exhibit A.

The government also argues that since Mr. Piers has not provided "an account of what beneficial evidence such an investigation would have turned up," Mr. Piers has failed to meet the prejudice prong of *Strickland*, and therefore his ineffective assistance argument fails. Resp. at 25–26. However, the very case the government cites in support of this argument, *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994), refutes the government's stance. *James* did not hold that an account of what evidence would have been discovered is required to meet the prejudice prong. Rather, "[p]rejudice requires showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable." *Id.* (quoting *Strickland*, 466 U.S. at 687). Indeed, to prevail on the prejudice prong a defendant

> does not have to show by a preponderance of the evidence that the result of his case would have been different but for counsel's errors. "A reasonable probability [of a different outcome] is a probability sufficient to undermine confidence in the outcome."

Brown v. Myers, 137 F.3d 1154, 1157 (9th Cir. 1998) (quoting *Strickland*, 466 U.S. at 694). Ineffective assistance can be found even if hindsight shows that the investigation would likely have been fruitless (which is not the case here). *E.g.*, *Johnson v. Baldwin*, 114 F.3d 835, 839–40 (9th Cir. 1997) (finding ineffective assistance, though investigation would have led "only to

blind alleys or outright contradiction," because armed with that information, counsel could have confronted defendant with the difficulties of the defense, and chosen alternatives).

Other Ninth Circuit cases also support finding ineffective assistance for failure to investigate. *See Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002) (ineffective assistance for failing to investigate and present evidence that shooting was committed by petitioner's brother); *Brown*, 137 F.3d at 1156–58 (ineffective assistance for failing to investigate and present available evidence supporting defendant's alibi); *Johnson*, 114 F.3d at 838–39 (ineffective assistance for failing to investigate adequately, which resulted in a weak, unbelievable defense); *Jones v. Wood*, 114 F.3d 1002, 1010–11 (9th Cir. 1997) (failure to investigate other possible suspect required an evidentiary hearing on ineffective assistance of counsel).

Mr. Butler's failure to investigate Adam despite multiple indications that he not only existed, but was also highly involved in the robbery, fell below an objective standard of reasonableness. Mr. Butler's failure to investigate Mr. Piers's case at all, despite receiving $2500.00 from the family to do so, also fell below an objective standard of reasonableness. Further, there is a probability, sufficient to undermine confidence in the outcome of the case, that absent Mr. Butler's errors the outcome would have been different. Thus both *Strickland* prongs are met and Mr. Butler rendered ineffective assistance. *Strickland*, 466 U.S. at 687–88, 694.

Ground 1.5: ***Ineffective assistance of trial counsel by failing to move to suppress or otherwise object to the use of Mr. Piers's post-arrest statement to Officer Bloodgood, in which Mr. Piers said, "Everything is in my name, it's all mine."***

As to this ground, the government claims that Mr. Piers "relies entirely upon the record of Officer Bloodgood's trial testimony." Resp. at 26. The government also notes that Mr. Piers "does not present any evidence or statements from the officers who actually arrested him. He does not claim any officers struck hm [sic] before he made this statement." *Id.* According to the

government, this shows that Mr. Piers has not "established that competent counsel would have moved to suppress the statement based on all available information, not just the testimony of Officer Bloodgood." *Id.*

The government's argument is unpersuasive for two reasons. First, Mr. Piers does not rely "entirely upon the record of Officer Bloodgood's trial testimony," as the government asserts.[14] Rather, a review of the police reports of the officers involved shows that Mr. Piers was not administered his *Miranda* warnings; the government does not dispute this. Officer Bloodgood's testimony merely confirmed this claim, as it contains no information as to whether Mr. Piers was given his *Miranda* warnings. In addition, Mr. Piers's declaration under penalty of perjury, filed with the 2255 Motion, attested to the truth of the claims raised, and is further evidence that no *Miranda* warnings were issued.

Second, the government's true statement that Mr. Piers has not claimed he was struck by an officer prior to making this particular statement is irrelevant. Physical coercion is not a prerequisite to suppressing evidence for a *Miranda* violation. Indeed, suppression based on a *Miranda* violation often occurs in cases where there has not been any sort of physical abuse.

The government then cites *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994), for the proposition that the "performance of counsel is not considered ineffective when counsel fails to make a motion that he believes to be meritless." Resp. at 26. This is a mischaracterization of the *Lewis* opinion. The *Lewis* court did not hold that counsel cannot be considered ineffective for failing to make a motion he "believes to be meritless." Rather, the Court held that counsel was not ineffective, in that case, for failing to file a motion that "*would* be without merit." *Lewis*, 21

[14] The only place Mr. Piers relied upon the record of Officer Bloodgood's testimony was to relate the alleged statement of Mr. Piers, and to point out that Mr. Butler made no objections. 2255 Motion at 9–10.

F.3d at 346 (emphasis added). In other words, the focus was not on counsel's *belief* as to the merits of the motion, but rather on the merits of the motion itself. Indeed, several courts have found ineffective assistance for failing to file a meritorious motion to suppress. *E.g.*, *A.M. v. Butler*, 360 F.3d 787, 801 (7th Cir. 2004) (ineffective assistance of counsel for failure to file meritorious suppression motion; "at the very least, the admissibility of his statements . . . should have been vigorously challenged in pretrial motions by his counsel"); *Joshua v. DeWitt*, 341 F.3d 430, 440–42 (6th Cir. 2003) (ineffective assistance of counsel for failing to file a meritorious suppression motion, where there was "nothing in the record to reflect that Petitioner's trial counsel considered and declined to raise [the suppression issue] for strategic reasons"); *Northrop v. Trippett*, 265 F.3d 372, 383 (6th Cir. 2001) (ineffective assistance of counsel for failing to file meritorious suppression motion, where it was "difficult to imagine what tactical advantage, or cost, could justify [counsel's] decision"). *See also Morrison*, 477 U.S. at 384–90 (evidentiary hearing required to determine whether petitioner suffered prejudice due to counsel's failure to make obvious and meritorious objection to tainted evidence).

Here, there is no question that a suppression motion had merit. By asking Mr. Piers questions that were reasonably likely to elicit an incriminating response, Office Bloodgood subjected Mr. Piers to custodial interrogation without first administering *Miranda* warnings. This is the definition of an impermissible interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966) (warnings must precede custodial interrogation); *United States v. Melvin*, 91 F.3d 1218, 1222 (9th Cir. 1996) (person is in custody if "under the circumstances, a reasonable person would believe that he is not free to leave"); *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980) (interrogation includes express questioning as well as "any words or actions on the part of the police . . . that police should know are reasonably likely to elicit an incriminating response").

Mr. Butler's failure to challenge the admission of Mr. Piers's statements to Officer Bloodgood fell below an objective standard of reasonableness. Indeed, Mr. Piers's inculpatory statements were akin to a confession, "probably the most probative and damaging evidence that can be admitted against" a defendant. *Arizona v. Fulminante*, 499 U.S. 279, 292 (1991). Mr. Butler should have moved to suppress the statements. Further, there is a probability, sufficient to undermine confidence in the outcome of the case, that absent Mr. Butler's errors the outcome would have been different. *See, e.g., Alvarez v. Gomez*, 185 F.3d 995, 999 (9th Cir. 1999) (granting habeas petition where confessions were erroneously admitted, because without the confessions, there was "arguably" insufficient evidence to support the conviction). Thus both *Strickland* prongs are met and Mr. Butler rendered ineffective assistance. 466 U.S. at 687–88, 694.

Ground 1.6: ***Ineffective assistance of trial counsel by failing to move to suppress or otherwise object to the use of Mr. Piers's post-arrest videotaped statements, in which he said, "I know I already turned myself into a criminal and pretty much disgraced my family . . . obviously I'm gone for a long time."***

In response to this claim, the government states that Mr. Piers "has not established that it was made in response to any questioning," and that Mr. Piers "does not claim to have told Butler" that he was struck by an officer prior to making the statement. Resp. at 26–27.

Mr. Piers's 2255 Motion contains a detailed account of the events leading up to the statement, and it is clear that the statements were made pursuant to an impermissible custodial interrogation. The videotape of the interrogation confirms this. Government's Trial Exhibit 60. Despite the government's implied assertion to the contrary, "interrogation," for *Miranda* purposes, does not require explicit questioning. Rather, "interrogation" is "any words or actions on the part of the police . . . that police should know are reasonably likely to elicit an incriminating response." *Innis*, 446 U.S. at 300–01. Under the circumstances, Officer

Vanderveur should have known that telling Mr. Piers it could be his only opportunity to present his side of the story was "reasonably likely to elicit an incriminating response." *Id.*

Here, as in Ground 1.5, a suppression motion should have been filed. The videotape clearly shows that Mr. Piers was subjected to custodial interrogation without being administered his *Miranda* warnings—Officer Vanderveur stated explicitly that he needed to administer the warnings, and then proceeded with the interrogation without doing so. Government's Trial Exhibit 60. Whether Mr. Piers told Mr. Butler he was struck by officers is irrelevant to the question of whether a suppression motion should have been filed. The videotape was provided to Mr. Butler as part of the discovery. The videotape clearly shows an impermissible custodial interrogation under *Miranda* and *Innis*, and a damaging admission. A strong suppression motion should have been filed based on the videotape footage alone; that Mr. Piers was held for 18 hours in handcuffs, denied access to his lawyer, Fred Dewey, and struck by officers were additional factors that would have weighed heavily in favor of granting the suppression motion. Had Mr. Butler done any investigation, or spoke with Mr. Piers for more than a few hours in the seven months leading up to his trial, Mr. Butler would have learned these additional facts.

Like the statement in Ground 1.5, Mr. Piers's statement under this Ground was akin to a confession, "probably the most probative and damaging evidence that can be admitted against" a defendant. *Fulminante*, 499 U.S. at 292. As such, Mr. Butler's failure to challenge the admission of Mr. Piers's statements on the videotape, despite substantial grounds to do so, fell below an objective standard of reasonableness.

Further, there is a probability, sufficient to undermine confidence in the outcome of the case, that absent Mr. Butler's errors the outcome would have been different. *See id.*; *See also Alvarez*, 185 F.3d at 999. The government claims that the statements made by Mr. Piers in

Grounds 1.5 and 1.6 did not affect the outcome of the trial because they did not indicate guilt. However, if this were true, the government would not have introduced them at trial, nor relied upon them in closing arguments. RT 5-22, 5-53. Further, the government's Trial Brief, filed with the Court on January 29, 2001, states in the "Statement of Anticipated Evidentiary Facts" section that "Piers made admissions that he was responsible for the crimes that had been committed," thus directly contradicting the government's present claim that the statements did not indicate guilt. *See* Exhibit E, Government's Trial Memo, at 5. The government should not be permitted to "chang[e] its position over the course of judicial proceedings," because "such positional changes have an adverse impact on the judicial process." *Russell v. Rolfs*, 893 F.2d 1033, 1037–39 (9th Cir. 1990) (applying the doctrine of judicial estoppel to bar the government from making inconsistent arguments in a section 2254 proceeding).

The government's reliance on Mr. Piers's statements demonstrates the prejudice he suffered. Both *Strickland* prongs are met and Mr. Butler rendered ineffective assistance. 466 U.S. at 687–88, 694.

Ground 1.7: ***Ineffective assistance of trial counsel by failing to move for a change of venue.***

In response to this claim, the government baldly asserts that Mr. Piers has failed to meet either of the *Strickland* prongs for ineffective assistance, without speaking to the facts of the case. Regardless, the fact remains that the majority of the prospective jury pool and the actual jury empanelled 1) knew the officers involved personally; 2) were members of the credit union robbed; or 3) had watched or read the extensive media coverage; or a combination of the three. RT 1-13 to 1-113. FBI Agent Louann Henderson testified before the Grand Jury that the press covered the robbery "extensively," and that there were newspaper, television, and radio reports. *See* Exhibit F, July 18, 2000, Grand Jury Testimony of Louann Henderson at 37.

In light of this, Mr. Butler's failure to move for a change of venue fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687–88. As for the prejudice prong, the government has again misstated the standard. To prevail, Mr. Piers does not have to show that the court definitely would have granted the motion. Rather, the prejudice prong requires that there be a probability, sufficient to undermine confidence in the outcome of the case, that absent Mr. Butler's errors the outcome would have been different. *Id.* at 694. Mr. Piers has met this standard, and as such Mr. Butler rendered ineffective assistance.

Ground 1.8: ***Ineffective assistance of trial counsel by reserving his opening statement until the end of the government's case, then not giving one.***

The government claims that the timing of an opening statement, as well as the decision on whether to give one at all, "does not constitute a basis for a claim of ineffective assistance." Resp. at 29. In support, the government cites *United States v. Rodriguez-Ramirez*, 777 F.2d 454 (9th Cir. 1985) and *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998). However, neither of these cases was as explicit in their holdings as the government suggests.

For example, the *Rodriguez-Ramirez* court held that the timing and decision on whether to give an opening statement "is *ordinarily* a mere matter of trial tactics and *in such cases* will not constitute the incompetence basis for a claim of ineffective assistance of counsel." 777 F.2d at 458 (emphasis added). The instant case, however, was far from ordinary. Aside from the myriad *other* instances where Mr. Butler's tactics fell below an objective standard of reasonableness,[15] Mr. Butler first had the Court assure the jury that he would provide an opening statement at "a later time." RT 1-151 to 152. He then reneged on this promise and did not give

[15] See Claim 1.23, *infra*, for a summary of the errors made by Mr. Butler.

one.[16] As such, the first time Mr. Butler addressed the jury was in his closing argument, where he began by conceding his client's guilt to the conspiracy charges before proceeding with an incoherent closing argument. *See infra* Grounds 1.18, 1.21.[17]

For the reasons above and those stated in Mr. Piers's 2255 Motion, Mr. Butler's failure to give an opening statement after assuring the jury he would give one fell below an objective standard of reasonableness. 2255 Motion at 11–12. As also noted in the 2255 Motion, the failure to give an opening statement left the jury with an impression of deception and uncertainty. Later, when Mr. Butler reneged on his promise to give an opening statement, he undermined, if not destroyed, any credibility he had with the jury. His failure to give an opening statement became even more prejudicial when in closing argument—the first time Mr. Butler addressed the jury—he began by conceding his client's guilt. In light of all of this, there is a probability, sufficient to undermine confidence in the outcome of the case, that absent Mr. Butler's errors the outcome would have been different. Thus both *Strickland* prongs are met and Mr. Butler rendered ineffective assistance. *Stouffer v. Reynolds*, 214 F.3d 1231, 1233–35 (10th Cir. 2000) (ineffective assistance for, *inter alia*, failing to provide an opening statement after reserving one, failing to present a defense theory, and failing to conduct effective direct and cross-examinations of witnesses).

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[16] In contrast, the defense counsel in *Rodriguez-Ramirez* merely *delayed* his opening statement until the close of the government's case in chief. 777 F.2d at 457, 458.

[17] Similarly, the petitioner in *LaGrand* alleged ineffective assistance because his counsel did not give an opening statement, cross-examined only two witnesses, and was inexperienced. 133 F.3d at 1274. The Ninth Circuit found no ineffective assistance, examining the attorney's conduct over the course of the trial, and noting, *inter alia*, that he "filed several pretrial motions . . . as well as joining in motions filed by [co-defendant's] counsel. He persisted in pursuing the psychological test when the first results were inconclusive and finally obtained a usable result . . . ." *Id.* at 1275. In other words, the Court's ruling was not based solely on defense counsel's failure to give an opening statement, as the government suggests.

Ground 1.9: ***Ineffective assistance of trial counsel by failing to object to the introduction of irrelevant and prejudicial evidence of imitation CIA identification documents.***

Ground 1.10: ***Ineffective assistance of trial counsel 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.***

Ground 1.11: ***Ineffective assistance of trial counsel by failing to object to irrelevant and unfairly prejudicial evidence as to the reaction of the public to the crime.***

Ground 1.12: ***Ineffective assistance of trial counsel by failing to object to the government's use of a mannequin to display items of evidence not found together.***

For these four grounds, the government contends that Mr. Piers has failed to meet his burden under *Strickland* because Mr. Piers has "utterly failed" to establish that the items would have been excluded or that their exclusion would have changed the outcome of the trial. Resp. at 30. Again, the government misunderstands the *Strickland* standard. Mr. Piers is not required to show definitively that the items would have been excluded or that their exclusion would have changed the outcome of the trial. Rather, Mr. Piers must demonstrate a *reasonable probability*—a probability sufficient to undermine confidence in the outcome of the trial—that the outcome of the trial would have been different but for counsel's errors. *Strickland*, 466 U.S. at 694. Mr. Piers has met that standard. In addition, Mr. Butler's failure to object to any of this prejudicial yet irrelevant evidence falls below an objective standard of reasonableness. *Id.* at 687–88.

For example, the use of a mannequin to display the items allegedly worn by the robber should have been objected to because it "violated a constitutional guarantee of a fair trial, by injecting impermissibly suggestive factors into the trial process." *Guerra v. Collins*, 916 F.Supp. 620, 630 (S.D. Tex. 1995) (citing *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986)). Had Mr. Butler made an objection, the trial judge would likely have excluded this evidence. As such, Mr. Butler rendered ineffective assistance of counsel. *Crotts v. Smith*, 73 F.3d 861, 866–867 (9th Cir. 1996)

(ineffective assistance of counsel for failing to object to prejudicial evidence which likely would have been excluded if objection had been made).

Similarly, Mr. Butler sat mute while the prosecution asked Agent Henderson a series of questions regarding the public's immediate reaction to the robbery. 2255 motion at 13–14; RT 4-62 to 4-66. This allowed Agent Henderson to comment on the disruption to morning commuters, the assistance rendered by members of the public, and the police department's concern for public safety, including an allusion to an unrelated report of suspicious individuals at a nearby elementary school. *Id.* Such information was not only irrelevant to the question of whether Mr. Piers committed the acts he was accused of, but also highly and unfairly prejudicial to Mr. Piers. The testimony served to inflame the emotions of the jurors, particularly by implying that children at a nearby elementary school were in danger. As such, Mr. Butler should have moved for a mistrial after Agent Henderson gave her testimony. At the very least, Mr. Butler should have objected and moved the court to strike the testimony. Mr. Butler's failure to act resulted in a violation of Mr. Piers's rights, because "[d]ue process requires that the accused receive a fair trial by an impartial jury *free from outside influences*." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) (emphasis added). Moreover, when an "unacceptable risk is presented of impermissible factors coming into play," there is "inherent prejudice" to a defendant's right to a fair trial, and "reversal is required." *Musladin v. LaMarque*, 2005 WL 797565, *3 (9th Cir., Apr. 8, 2005) (quoting *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986)).

For the reasons stated here and those set forth in Mr. Piers's 2255 Motion at 12–14, Mr. Butler rendered ineffective assistance of counsel as to these four grounds. Mr. Piers's convictions and sentence should be vacated.

Ground 1.13: ***Ineffective assistance of trial counsel by incompetently cross-examining Anchorage Police Office Dan Reeder, undermining an otherwise strong defense as to the machine gun counts.***

Ground 1.14: ***Ineffective assistance of trial counsel 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.***

The government claims Mr. Piers's arguments on these grounds are "specious" for three reasons: 1) it "presumes Butler is not capable of conducting effective cross examination and did not conduct effective cross examination;" 2) "it presumes that another attorney would have accomplished a more favorable result;" and 3) "it presumes that if other counsel had conducted these cross examinations, their cross examination [sic] would have changed the outcome of the trial." Resp. at 31. The government, however, fails to address the substance of Mr. Piers's argument, offering only the rhetorical statement that "[t]his is nothing more than speculation; it is nothing more than wishful thinking." *Id.*

First, Mr. Piers does not presume that "Butler is not capable of conducting effective cross examination." Rather, Mr. Piers asserts that Mr. Butler did not conduct effective cross examination *in this case.* As for the government's claim that Mr. Piers presumes that Mr. Butler "did not conduct effective cross examination in this case," it is difficult to see how this has a detrimental effect on Mr. Piers's claim. Mr. Piers does not "presume" that Mr. Butler's cross examinations of Reeder and Shem were ineffective. Rather, the supporting evidence from the record clearly supports this assertion. 2255 Motion at 14–16.

Second, Mr. Piers agrees that there is an implicit assertion here that, had another attorney conducted the cross examinations, there would have been "a more favorable result." This is inherent in the first *Strickland* prong—that Mr. Butler's failure to act fell below an objective standard of reasonableness. 466 U.S. at 687–88.

Third, Mr. Piers does not "presume" that a more effective cross-examination would have changed the outcome the trial, nor is he required to show this. Again, the correct standard under *Strickland*'s prejudice prong is whether there is a *probability*, sufficient to undermine confidence in the outcome of the trial, that the outcome would have been different. 466 U.S. at 694.

An examination of Officer Reeder's testimony demonstrates Mr. Butler's ineffectiveness. Officer Reeder testified on direct that the person who fired the assault rifle at him had a goatee and was wearing a faded Carhartt jacket. RT 3-58, 60. It is undisputed that Mr. Piers's co-defendant, Ray Hubbard, wore a fake goatee and a faded Carhartt jacket that day, and was in the fleeing minivan. RT 2-31, 2-68 (testimony of Ray Hubbard); RT 2-202 (testimony of Anchorage Police Officer Aaron Roberts); RT 3-13, 3-44 (testimony of Anchorage Police Officer Paul Morino); RT 3-33 (testimony of Anchorage Police Officer Dan Reeder); RT 4-70 (testimony of Agent Henderson). *See also* Exhibit F, July 18, 2000, Grand Jury Testimony of Louann Henderson, at 15–16; Exhibit G, October 18, 2000, Grand Jury Testimony of Louann Henderson at 32. No one else allegedly involved in the robbery had a goatee or was wearing a Carhartt jacket. On cross examination, Mr. Butler elicited testimony from Officer Reeder that he never actually saw the person who fired the assault rifle at him. RT 3-60.

It is undeniable that, had Mr. Butler *not* elicited this testimony from Officer Reeder, the jury would have been left with testimony from a police officer that Ray Hubbard, not William Piers, was the shooter. The only other evidence regarding the identity of the shooter came from Mr. Hubbard himself—an admitted co-conspirator with a strong motive to fabricate his story.[18] In light of Officer Reeder's testimony that Hubbard was the shooter, competent defense counsel would not have cross-examined him on the subject. Mr. Butler's cross-examination, in contrast,

[18] No identifiable fingerprints were found on the Norinco assault rifle. RT 3-130 to 3-131 (testimony of Mark Halterman, Anchorage Police Department fingerprint examiner).

not only failed to assist his client, but his cross-examination actually caused *severe harm* to his client. Indeed, the issue underlying this claim is not simply Mr. Piers's alleged involvement in the conspiracy, but rather whether Mr. Piers was the individual who used, carried, and fired the machine gun—an offense carrying a mandatory minimum of 30 years. Thus, by negating Officer Reeder's direct testimony about the identity of the shooter, Mr. Butler cost Mr. Piers a consecutive mandatory *30 years* at sentencing. There is a probability sufficient to undermine confidence in the outcome that, had Officer Reeder's testimony regarding the identity of the shooter gone unchallenged, the outcome of the machine gun count (Count 5), at the very least, would have been different. *See Matthews v. Abramajtys*, 319 F.3d 780, 789–90 (6th Cir. 2003) (ineffective assistance for failing to capitalize on flaws in the government's case regarding identification of petitioner as perpetrator).

In addition, as noted in Mr. Piers's 2255 Motion at 15–16, Mr. Butler made no inquiry of Mr. Shem, the government's forensic expert, as to whether the Norinco assault rifle was fired as an automatic or a semi-automatic weapon. Such an inquiry was critical because, as discussed in detail in Ground 1.19, *infra*, Mr. Piers should not have been convicted of the machine gun count if he did not know the weapon operated as an automatic. *See United States v. Staples*, 511 U.S. 600, 619 (1994). Mr. Butler rendered ineffective assistance in this regard, as well as in regard to the inept cross-examination of Officer Reeder. *Stouffer*, 214 F.3d at 1234 (ineffective assistance for, *inter alia*, inept cross examination that not only failed to point out inconsistencies in the government's case, "but several times served to bring out even greater detail and emphasize incriminating evidence").

Ground 1.15: ***Ineffective assistance of trial counsel by failing to call a single character witness to testify to Mr. Piers's good character, honesty, and history of law-abiding behavior.***

The government claims that "Mr. Piers has neglected to identify . . . who these potential witnesses were." Resp. at 31–32. First, Mr. Piers is not required to identify specifically who these potential witnesses were in order to receive an evidentiary hearing. Again, the standard is that an evidentiary hearing must be held if the allegations, taken as true, would require reversal. *See supra* Part I. The evidentiary hearing is the proper setting for Mr. Piers to present these witnesses. Second, attached to this document as Exhibit H are letters from fifteen individuals attesting to Mr. Piers's good character. These letters were written on behalf of Mr. Piers at the request of him and his mother, *and were in Rex Butler's possession prior to trial.* Further, in addition to these letters, Mr. Piers's mother gave Mr. Butler a list of several individuals, including contact information, who were willing to testify on Mr. Piers's behalf.[19] Mr. Butler did not contact any of these individuals.

The government then once again applies the wrong standard for the *Strickland* prejudice prong, stating that Mr. Piers has not shown that the outcome of his trial would have been different had these people been called to the stand by the defense. To meet the prejudice prong, Mr. Piers must show only a reasonable probability that the outcome would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694. Mr. Piers has met this standard, because evidence of good character, standing alone, may be sufficient 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). Mr. Butler's failure to call *any* of these available witnesses to the stand—indeed, his failure to

[19] Some of these individuals wrote some of the support letters mentioned above.

even contact them—fell below an objective standard of reasonableness. *See, e.g.*, *Lord v. Wood*, 184 F.3d 1083, 1093–96 (9th Cir. 2000) (ineffective assistance for failing to present testimony of three witnesses for defense, where counsel decided against calling them without first interviewing them); *Kubat v. Thieret*, 867 F.2d 351, 368–69 (7th Cir. 1989) (ineffective assistance at sentencing for contacting only two of fifteen potential character witnesses, and presenting none of them at sentencing).

Ground 1.16: ***Ineffective assistance of trial counsel by denying Mr. Piers his constitutional right to testify in his defense.***

"Every criminal defendant is privileged to testify in his own defense. . . ." *Harris v. New York*, 401 U.S. 222, 225 (1971). The government attempts to dismiss this claim by stating that since Mr. Piers knew he had a right to testify and did not assert it, he waived it, citing *United States v. Nohara*, 3 F.3d 1239, 1244 (9th Cir. 1993), and *United States v. Edwards*, 897 F.2d 445, 446–47 (9th Cir. 1990). Resp. at 32–33. However, this case is like neither *Nohara* nor *Edwards*, where the defendant remained mute regarding his wish to testify. On the contrary, Mr. Piers repeatedly expressed his desire to speak in open court on his behalf, to both his attorney and the Court. At the time the government finished with its case in chief, the Court had already denied Mr. Piers's request to read a statement in open court. 2255 Motion at 6 and Exhibit B. Further, in the months leading up to trial, Mr. Piers repeatedly told Mr. Butler he wanted to testify, and Mr. Butler repeatedly instructed Mr. Piers that he would not be permitted to do so. In light of these circumstances, Mr. Piers did not knowingly waive that right, but rather that right was denied to him. *See, e.g.*, *Godinez v. Moran*, 509 U.S. 389, 400 (1993) (waivers of constitutional rights must be knowing and voluntary).

The government also contends that Mr. Piers has not shown that his failure to testify affected the outcome of the trial, because he "would have had a hard time denying" his

involvement in the robbery. Resp. at 33. First, despite the government's presumptive statement to the contrary, whether Mr. Piers would have been successful in denying his involvement was a question for the jury, not the government. Second, the government again misstates the *Strickland* standard. Mr. Piers does not have to show that his testimony would have resulted in a different outcome. Rather, Mr. Piers must show a probability sufficient to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694. Such an error by counsel gives rise to a reasonable probability that, but for the error, the outcome of the proceeding would have been different. Refusing to permit Mr. Piers to testify—a decision reserved solely for the defendant—in the face of his strong and expressed desire to do so fell below an objective standard of reasonableness. *Id.* at 687–88. Mr. Butler rendered ineffective assistance under *Strickland*. *Id.*

Ground 1.17: ***Ineffective assistance of trial counsel by not introducing the sound of Mr. Piers's distinctive voice, to allow the victim tellers to compare it to that of the robber.***

In response to this claim, which the government labels as "frivolous," the government states that "only incompetent counsel" would introduce the sound of Mr. Piers's voice and risk identification. Resp. at 32. The government cites no cases in support of its position, and several cases argue to the contrary. *See, e.g.*, *United States v. Dionisio*, 410 U.S. 1, 2 (1973) (holding that the use of voice exemplars for identification purposes was proper and did not violate Fifth Amendment privilege against self-incrimination); *State v. Valentine*, 630 N.W.2d 429, 434 (Minn. App. 2001) (trial court erred in refusing to allow defendant to introduce voice exemplar into evidence); *State v. Newman*, 541 N.W.2d 662, 674–75 (Neb. App. 1995) (noting that it is proper to permit defendant to introduce voice exemplar if the evidence is reliable); *State v. Tillett*, 351 So.2d 1153, 1154–55 (La. 1977) (error for trial court to refuse to permit defendant to submit a voice exemplar without subjecting himself to cross-examination). Defense counsel

should use any means at his disposal to show his client is innocent. Mr. Piers had a distinctive voice. Introduction of his voice while the victim tellers were on the stand would have shown that he was not the individual who entered the credit union, and Mr. Butler's failure to do so deprived Mr. Piers of a strong avenue of defense. *See, e.g.*, *Newman v. Hopkins*, 247 F.3d 848, 851–52 (8th Cir. 2001) (state court's exclusion of voice exemplar offered by defendant to support misidentification defense violated defendant's Sixth Amendment right to present a defense).

Mr. Butler's failure to introduce the sound of Mr. Piers's voice—evidence that could have proven that Mr. Piers was not the individual who entered the credit union—fell below an objective standard of reasonableness. Further, there is a probability, sufficient to undermine confidence in the outcome of the case, that absent Mr. Butler's errors the outcome would have been different. Thus both *Strickland* prongs are met and Mr. Butler rendered ineffective assistance. *Strickland*, 466 U.S. at 687–88, 694.

Ground 1.18: ***Ineffective assistance of trial counsel by failing to develop any coherent theory of defense.***

The government responds to this ground in passing in conjunction with its response to Mr. Butler's failure to provide an opening statement. Resp. at 28–29. The government asserts, without explanation, that failing to give an opening statement is "the same theory" as failing to develop a coherent defense theory. *Id.* This is not true. A defense lawyer could have a valid defense theory without providing an opening statement. Alternatively, a defense lawyer could give an opening statement but still fail to develop a coherent defense theory. It is unclear how these two separate and distinct grounds for ineffective assistance can be characterized as the "same theory." Regardless, *the government does not dispute that Mr. Butler did not develop a coherent theory of defense.*

The government's statement that Mr. Piers "seems to ignore the admonishment that what the attorneys say in either the opening or closing statements is not evidence" is also puzzling. Resp. at 30. Nowhere in Mr. Piers's motion does he suggest that what attorneys say in opening or closing is evidence. Rather, as detailed in Mr. Piers's 2255 Motion, Mr. Butler's failure to provide an opening statement was but one example of many that shows he failed to develop any coherent theory of a defense. *See* 2255 Motion at 17–18.

The government also admonishes Mr. Piers because "he himself does not present either a plausible or coherent theory of what he believes competent counsel would have submitted as a theory of defense." Resp. at 29–30. How this is relevant is unclear. In his role as an advocate, it is Mr. Butler's duty to develop a defense theory. That responsibility does not fall on the client, as the government suggests. Indeed, in cases where courts have found ineffective assistance for failing to develop a defense theory, no inquiry is made into whether the defendant presented an alternative theory in his or her motion for relief. *See, e.g.*, *Pavel v. Hollins*, 261 F.3d 210, 216–28 (2d Cir. 2001) (ineffective assistance for failing to prepare a defense theory and failing to call witnesses for the defense); *Stouffer*, 214 F.3d at 1233–35 (ineffective assistance for never making an opening statement, inept cross-examination, and failing to present a defense theory in closing); *Groseclose v. Bell*, 130 F.3d 1161, 1169–71 (6th Cir. 1997) (ineffective assistance of failing to develop a defense theory, evidenced by failing to conduct meaningful cross-examination, failing to object to any evidence, and failing to call any defense witnesses).

It is indisputable that failing to develop any defense theory falls below an objective standard of reasonableness. Further, when no defense theory has been developed, there is a probability, sufficient to undermine confidence in the outcome, that the outcome of the

proceeding would have been different had a defense theory been developed been presented. Thus, Mr. Butler rendered ineffective assistance under *Strickland.* 466 U.S. at 687–88, 694.

Ground 1.19: ***Ineffective assistance of trial counsel 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.***

Ground 1.20: ***Ineffective assistance of trial counsel by failing to adequately or effectively argue for his requested jury instruction regarding the credibility of testimony from co-conspirators who have pled guilty.***

As noted in Part II.B, *supra*, and contrary to the government's contention, these claims are not procedurally defaulted. The government has offered no other rebuttal to these claims. The failure to request or argue for critical jury instructions such as these constitutes a basis for ineffective assistance of counsel under *Strickland. See, e.g., Luchenburg v. Smith*, 79 F.3d 388, 392 (4th Cir. 1996) (ineffective assistance for failing to request instruction to clarify findings the jury had to make in order to convict).

As for Ground 1.19—Mr. Butler's failure to request an instruction that the jury must find beyond a reasonable doubt that Mr. Piers knew the firearm operated as an automatic—the Supreme Court examined a similar issue in *Staples*, 511 U.S. 600 (1994). The issue in *Staples* was whether the government is required to prove beyond a reasonable doubt that a defendant knew the firearm in question functioned as a machine gun, in order to sustain a conviction for unlawful possession of an unregistered machine gun. *Id.* at 602. The Court noted that "virtually any semiautomatic weapon may be converted, either by internal modification or, in some cases, simply by wear and tear, into a machinegun . . . . Such a gun may give no externally visible indication that it is fully automatic." *Id.* at 615. The Court concluded that the government "should have been required to prove that petitioner knew of the features of his [firearm] that brought it within the scope of the [criminal statute]." *Id.* at 619.

Pursuant to the logic in *Staples*, Mr. Butler should have requested a jury instruction that required finding beyond a reasonable doubt that Mr. Piers knew the weapon functioned as automatic before convicting him of this count. As noted in Mr. Piers's 2255 Motion at 18, because Mr. Butler did not request the instruction, the Ninth Circuit reviewed the lack of such an instruction under the "plain error" standard. *Franklin*, 321 F.3d at 1240. The *Franklin* court found that the instruction given by the district court—that 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 used a de novo standard of review. *See United States v. Wiseman*, 274 F.3d 1235, 1240 (9th Cir. 2001) ("We review de novo a denial of a defendant's jury instruction based on a question of law."). Under a de novo standard, there is a reasonable probability that the outcome of the appeal would have been different.

Likewise, had Mr. Butler requested an instruction regarding Mr. Piers's knowledge of the functionality of the weapon, the Court would likely have provided the instruction. As such, there is a reasonable probability—sufficient to undermine confidence in the outcome—that, but for Mr. Butler's errors, the outcome of the proceedings would have been different. Mr. Butler's failure to request the necessary jury instructions also fell below an objective standard of reasonableness. As such, he rendered ineffective assistance of counsel under *Strickland*, 466 U.S. at 687–88, 694.

Ground 1.21: ***Ineffective assistance of trial counsel by conceding Mr. Piers's guilt on two counts during closing arguments.***

The government misunderstands, at least in part, Mr. Piers's arguments on this ground. As such, the argument is restated below, with a more detailed legal analysis, including responses to specific contentions.

In *United States v. Swanson*, the Ninth Circuit held that a defense counsel's concession of guilt met the standard set forth in *United States v. Cronic*, 466 U.S. 648 (1984), for presumed prejudice; to wit, in conceding guilt on the only factual issues in dispute, defense counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991) (quoting *Cronic*, 466 U.S. at 659).

For this ground, Mr. Piers relies in part on *Swanson*, and despite the government's contention to the contrary, the *Swanson* holding is applicable to cases involving more than one charge. Though the facts before the *Swanson* court involved a case with only one charge, nowhere did the court state that its reasoning was not applicable to other cases. The crux of the *Swanson* decision was not the number of charges the defendant faced, but rather that counsel conceded guilt on the single charge in closing argument.

Mr. Butler, likewise, conceded Mr. Piers's guilt on both conspiracy charges: Count 1, conspiracy to commit armed credit union robbery, and Count 2, conspiracy to commit a violation of 18 U.S.C. § 924(c)(1)(A) (carrying a firearm during the commission of an armed robbery). As noted in the 2255 Motion, Mr. Butler told the jury, "We're not here today denying that Mr. Piers was part of a conspiracy to rob Credit Union 1. There is no contesting that. We're not here to do that." RT 5-29 to 5-30. Mr. Butler reiterated this 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. The government states that Mr. Butler conceded guilt on only one conspiracy charge, the conspiracy to commit armed credit union robbery. Resp. at 33–35. However, if Mr. Butler conceded Mr. Piers's guilt on the "conspiracy to commit *armed* credit union robbery" (Count 1) (emphasis added), then clearly these statements also conceded Mr. Piers's guilt on the conspiracy to use a firearm during the commission of the robbery (Count 2).

Further, by conceding guilt to the two conspiracy charges, Mr. Butler virtually conceded that Mr. Piers committed, or was liable for, each of the overt acts alleged as part of the conspiracy. This is basic conspiracy law: a member of a conspiracy is liable for all foreseeable acts in furtherance of the conspiracy taken by any other member of the conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 645–47 (1946).[20] Mr. Butler's concession of guilt on the conspiracy charges was unqualified—he did not specify which of the twenty overt acts alleged in the indictment he was conceding. As a consequence, he effectively affirmed the occurrence of the twenty overt acts alleged. These alleged overt acts—affirmed as true by Mr. Butler's concession—formed the substantive basis for the other charges in the indictment that Mr. Piers was convicted of. The twenty alleged overt acts described the execution of the robbery as having occurred in the manner the government's witnesses testified to at Mr. Piers's trial. Further, by conceding the conspiracies, Mr. Butler likewise affirmed as true the testimony of Raymond Hubbard—the witness whose credibility Mr. Butler was purportedly simultaneously attacking.

Contrary to the government's argument, by conceding guilt on the conspiracy charges, Mr. Butler conceded guilt and liability for all of the alleged overt acts, which in turn conceded guilt to the remaining offenses of conviction charged in the indictment. In other words, except for the attempted robbery of which Mr. Piers was acquitted, Mr. Butler effectively conceded "the only factual issues in dispute." *Swanson*, 943 at 1073.

In addition, as the government correctly points out, the *Swanson* decision relied on the *Cronic* holding. However, *Swanson* was but one application of the *Cronic* standard. An examination of *Swanson* shows that the underlying reasoning is equally applicable in Mr. Piers's

[20] Indeed, when Mr. Butler conceded guilt on the conspiracy charges, the government was "surprised," and in response, requested a jury instruction on the *Pinkerton* theory. The Court declined to give the instruction. RT 5-57.

case and not, as the government argues, limited to only those cases where one crime is charged. Resp. at 34.

The facts in *Swanson* are similar to those in the instant case: the defendant was on trial for bank robbery. 943 F.2d at 1071. Trial counsel for the defense called no witnesses, and in closing argument, defense counsel first stated that the evidence against his client was "overwhelming" and that he was not going to insult the jury's intelligence. *Id.* Later in the closing argument, defense counsel told the jury that he didn't think the defense case "really overall comes to the level of raising reasonable doubt." *Id.* Unsurprisingly, the jury convicted the defendant.

The defendant raised ineffective assistance on direct appeal, and the Ninth Circuit reversed his conviction, based on the *Cronic* standard—to wit, that "certain circumstances are so egregiously prejudicial that ineffective assistance of counsel will be *presumed.*" *Swanson*, 943 F.2d at 1072 (quoting *Stano v. Dugger*, 921 F.2d 1125, 1152 (11th Cir. 1991), and citing *Cronic*, 466 U.S. at 658) (emphasis added). Such circumstances exist where there has been "an actual breakdown in the adversarial process at trial." *Id.* (quoting *Toomey v. Bunnell*, 898 F.2d 741, 744 n.2 (9th Cir. 1990), and citing *Cronic*, 466 U.S. at 656–57).

The foundation for both the *Cronic* and *Swanson* decisions is the defendant's fundamental right to due process. Due process requires "proof beyond a reasonable doubt of *every fact necessary to constitute the crime with which he is charged.*" *Id.* at 1073 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)) (emphasis added). In addition, "[d]ue process commands that no man shall lose his liberty unless *the Government has borne the burden of* producing the evidence and *convincing the factfinder of his guilt.*" *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)) (emphasis by *Swanson* court). Thus, though the *Swanson* defendant was only

charged with one offense, this is not a prerequisite for application of the *Cronic* standard. The language of *Swanson* bears this out—the attorney in *Swanson* was ineffective because he "shouldered *part* of the Government's burden of persuasion." *Id.* at 1075 (emphasis added). More tellingly, the court added:

> We cannot envision a situation more damaging to an accused than to have his own attorney tell the jury that there is no reasonable doubt that his client was the person who committed the conduct that constituted the crime charged in the indictment.

Id.

In the instant case, Mr. Butler's conduct was even more egregious than the attorney in *Swanson*. The *Swanson* attorney told the jury that he did not "think" the defense case rose to a level of reasonable doubt. *Id.* Mr. Butler's language was even more damning to his client:

> We're not here today denying that Mr. Piers was part of a conspiracy to rob Credit Union 1. *There is no contesting that.* We're not here to do that. . . . Yes, ladies and gentlemen, *my client was involved in a conspiracy to take money from Credit Union 1 Dimond Branch.*

RT 5-29–30, 33 (emphasis added). In other words, Mr. Butler did not just tell the jury that he did not "think" he had raised a reasonable doubt; rather, he affirmatively told the jury that his client was guilty of conspiracy. This is presumptively prejudicial under *Cronic*. *See, e.g.*, *Osborn v. Shillinger*, 861 F.2d 612, 625 (10th Cir. 1988) ("an attorney who adopts and acts upon a belief that his client should be convicted 'fail[s] to function in any meaningful sense as the Government's adversary'") (quoting *Cronic*, 466 U.S. at 666).

Considering that the other offenses of conviction all stemmed from the overt acts alleged in the conspiracies on which Mr. Butler conceded guilt, it is clear that Mr. Butler "shouldered part of the Government's burden of persuasion." *Swanson*, 943 F.2d at 1075. After Mr. Butler's concession, the government no longer needed to prove beyond a reasonable doubt "every fact

necessary to constitute the crime[s] with which [Mr. Piers] was charged." *Id.* at 1073 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). As a result, Mr. Piers lost his liberty. This should never happen "unless *the Government has borne the burden* of producing the evidence and *convincing the factfinder of his guilt.*" *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)) (emphasis by *Swanson* court). The circumstances of the instant case were at least as egregious as the situation in *Swanson*, and as such the *Cronic* standard for ineffective assistance has been met. *Cronic*, 466 U.S. at 659.

The government states that the conspiracy to commit robbery of the credit union "was one of the least serious offense [sic] charged against Piers," and that Mr. Butler's "concession on the conspiracy count was not an express concession of guilt on the other charges." Resp. at 34.[21] It is true that Mr. Butler did not systematically concede guilt to each charge in the indictment. However, as noted above, by conceding guilt on the conspiracy charges and thus the underlying alleged overt acts, Mr. Butler conceded guilt on the other offenses of conviction.

The government also asserts that "Piers also seems to forget the jury acquitted him" of one charge, an attempted robbery. Resp. at 34. Mr. Piers has not forgotten that he was acquitted of one charge. Rather, that acquittal is further evidence of how prejudicial Mr. Butler's concessions were. Mr. Butler did not concede guilt on the attempted robbery charge. In addition, the alleged attempted robbery was the only charge or overt act in the indictment that could *not* be considered part of the conspiracies Mr. Butler conceded guilt on. In other words, Mr. Butler conceded guilt on the conspiracy charges, and in turn the jury convicted Mr. Piers of those charges as well as all of the other charges in the indictment that were part of the same

[21] As noted above, Mr. Butler's concession of guilt went to both conspiracy counts.

conspiracies. *In contrast, the jury acquitted Mr. Piers of the only charge his attorney did not concede guilt on.*

The government notes that evidence of the charge of attempted robbery "depended for the most part on Hubbard's testimony." Resp. at 34. Again, this is further support for Mr. Piers's argument. As stated in Mr. Piers's 2255 Motion, part of the reason Mr. Butler's concession was so egregious was that it "corroborated the otherwise questionable testimony of co-conspirator Raymond Hubbard." 2255 Motion at 19. Thus the government agrees with Mr. Piers that the jury convicted him of those offenses Mr. Hubbard testified about *and* Mr. Butler conceded, yet acquitted him of the one offense Mr. Hubbard testified about that Mr. Butler did *not* concede.

Similarly, the government's argument that Mr. Butler's concession was "a reasonable defense tactic to try maintain [sic] credibility in the jury's eyes while trying to shift their focus from the other more serious charges" is without merit. Resp. at 35. Conceding guilt on a charge in order to preserve credibility with the jury may occasionally be a valid tactic, particularly in capital cases with a separate penalty phase. However, in this case, after conceding Mr. Piers's guilt to the conspiracy charges, and thus to all of the other offenses of conviction alleged as overt acts of the conspiracy, there were no "more serious charges" to shift the jury's focus to. Moreover, Mr. Butler's ineffective cross-examination of Officer Reeder regarding the identity of the shooter negated any possible strategic decision to maintain credibility with respect to the most serious charge—the machine gun count carrying at 30-year mandatory minimum sentence. *See supra* Ground 1.13. Finally, as noted above, by conceding guilt to the conspiracies Mr. Butler bolstered the otherwise questionable testimony of Raymond Hubbard. In other words, Mr. Butler, while purportedly trying to paint Mr. Hubbard as a liar, *conceded that Mr. Hubbard*

told the truth. Mr. Butler's concession of guilt simply cannot be justified as a strategic decision to maintain credibility or shift focus.

In any event, the government's argument that Mr. Butler's concession of guilt was a strategic tactic is purely speculative. An evidentiary hearing is needed with testimony from Mr. Butler as to whether this was a strategic decision. Further, even if Mr. Butler were to testify that the decision was strategic, the Court would still need to determine, based on other evidence produced at the hearing, whether such tactics constituted *competent* defense strategy. This is true because merely labeling a decision as "tactical" or "strategic" does not immunize that decision from scrutiny as to its reasonableness. *See Silva v. Woodford*, 279 F.3d 825, 846 (9th Cir. 2002) ("an attorney's performance is not immunized from Sixth Amendment challenges simply by attaching to it the label of 'trial strategy'"); *United States v. Span*, 75 F.3d 1383, 1389 (9th Cir. 1996) (same). Indeed, certain defense tactics or strategies "may be so ill-chosen that they may render counsel's overall representation constitutionally defective." *Silva*, 279 F.3d at 846 (quoting *United States v. Tucker*, 716 F.2d 576, 586 (9th Cir. 1983)).

Even assuming, *arguendo*, that concession of guilt on the conspiracy charges was a reasonable strategic decision, Mr. Butler had a duty to discuss this strategy with Mr. Piers before going forward. *Florida v. Nixon*, 125 S.Ct. 551, 555 (2004) ("Defense counsel undoubtedly has a duty to discuss potential strategies with the defendant."). In *Nixon*, the Supreme Court found that defense counsel's failure to obtain *express* consent from his client to concede guilt in a capital trial did not automatically render counsel's performance deficient. There, counsel discussed his plan to concede guilt with his client several times. The defendant never verbally approved or opposed the plan. *Id.* at 557. Under these facts, counsel's performance was not deficient *per se*. *Id.* at 561–62. However, several times the Court commented on counsel's

"oblig[ation] to . . . explain his proposed strategy [to concede guilt] with" his client. *Id.* at 561. *See also id.* at 555 ("Defense counsel undoubtedly has a duty to discuss potential strategies with the defendant") (citing *Strickland*, 466 U.S. at 688). Mr. Butler, in contrast, never discussed with Mr. Piers the plan to concede guilt to the conspiracy charges, thus shirking his duty as an advocate for his client. As such, under this alternative theory, Mr. Butler rendered ineffective assistance. *Strickland*, 466 U.S. at 687–88, 694.

Finally, the government once again misstates the *Strickland* standard, by stating that Mr. Piers has not established that if Mr. Butler had not conceded guilt, the jury would have acquitted him on more charges. First, Mr. Piers submits that Mr. Butler's concession of guilt *presumptively* meets the *Strickland* standard under *Cronic*. Second, the prejudice prong of the *Strickland* standard is not a strict but-for test, but rather whether there is a probability, sufficient to undermine confidence in the outcome of the trial, that the outcome would have been different. 466 U.S. at 694. Mr. Piers suffered prejudice due to Mr. Butler's concessions. Indeed, in its rebuttal to Mr. Butler's closing argument, the government took full advantage of the mistake, arguing that the admission of guilt substantiated the evidence against Mr. Piers—including Mr. Hubbard's testimony—on the remaining counts. RT 5-50 to 5-55. *See also* 2255 Motion, Exhibit C. Mr. Butler's concessions also fall below an objective standard of reasonableness, and as such his assistance was ineffective. *Id.* at 687–88, 694.

Ground 1.22: ***Ineffective assistance of trial counsel 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.***

In addition to wrongly claiming that Mr. Piers raised this ground on direct appeal (see Part II.B, *supra*), the government argues that Mr. Butler did not render ineffective assistance because the claim "assumes the court would have granted the motion." Resp. at 35. Again, the

Strickland standard for ineffective assistance is not the "but-for" standard the government puts forth, but rather a "reasonable probability" standard. To wit, ineffective assistance exists if, but for counsel's errors, there is a "reasonable probability"—a probability "sufficient to undermine confidence in the outcome"—that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

The government also claims that "Mr. Piers' own argument—that the evidence just as likely pointed to Hubbard as the one who possessed the Norinco— . . . undermines his assumption that the court would have granted a judgement [sic] of acquittal on these two counts." Resp. at 35–36. First, nowhere does Mr. Piers argue that the evidence "just as likely pointed to Hubbard." Rather, Mr. Piers argues that "*the evidence was insufficient* to prove that Mr. Piers, rather than Hubbard, fired the Norinco assault rifle." 2255 Motion at 20 (emphasis added). Second, as previously noted, Mr. Piers does not assume that the court would have granted the motion. Rather, Mr. Piers argues that Mr. Butler's failure to move for acquittal on this charge created a reasonable probability that the outcome of the trial would have been different had he done so. *Strickland*, 466 U.S. at 694.

Finally, the government asserts that there can be no ineffective assistance because the Ninth Circuit, on direct appeal, found the evidence sufficient to support the convictions. Resp. at 36. However, as noted in Mr. Pier's 2255 Motion at 20, because Mr. Butler failed to move for a Rule 29 acquittal at trial, the Ninth Circuit applied a more stringent standard of review:

> Normally, sufficiency of the evidence claims are reviewed to determine whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *However, because Piers did not move for acquittal, our standard of review looks to plain error or the prevention of a manifest miscarriage of justice.*

Franklin, 321 F.3d at 1239 (internal quotations and citations omitted) (emphasis added). Mr. Piers stands on the arguments set forth in his 2255 Motion for this claim.

Ground 1.23: ***Ineffective assistance of trial counsel due to cumulative errors.***[22]

As noted in Part II.B, *supra*, and contrary to the government's contention, this claim is not procedurally defaulted. The government has offered no other rebuttal to this claim. Resp. at 24.

Each of the individual claims of ineffective assistance above are sufficient, on their own merits, to warrant reversal under *Strickland* and *Cronic*. In addition, the cumulative errors of Mr. Butler over the course of his representation of Mr. Piers rendered his assistance wholly ineffective under both *Strickland* and *Cronic*. As such, Mr. Piers's convictions and sentences must be vacated.

Under *Strickland*, counsel's performance is ineffective when 1) such performance falls below an objective standard of reasonableness, and 2) there is a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different. 466 U.S. at 687–88, 694. *Cronic* identified three situations in which the *Strickland* analysis is not required, because of circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658–59. One of those situations occurred in the instant case. To wit, Mr. Butler "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659.

Indeed, at every stage in the proceeding, Mr. Butler passed on opportunities to challenge the government's case. In the pretrial stages, Mr. Butler failed to investigate and present any

[22] This ground was raised in Mr. Piers's 2255 Motion at 3–4, but was not assigned an independent number. To facilitate this proceeding, Mr. Piers's ineffective assistance claim based on the cumulative errors of Mr. Butler has now been enumerated as Ground 1.23.

evidence on the involvement of Adam—clearly an additional, uncharged member of the conspiracy. *See supra* Ground 1.4. *See also* 2255 Motion at 7–9. In fact, despite receiving $2500.00 from Mr. Piers and his family, specifically earmarked for investigation, Mr. Butler did not even hire an investigator (nor did he return the funds to the Piers family). Mr. Butler met with Mr. Piers no more than three times in the six months prior to trial, for a total time of less than four hours. Mr. Butler did not file any suppression motions, despite there being at least two meritorious suppression issues. *See supra* Grounds 1.5 and 1.6. *See also* 2255 Motion at 9–10. In fact, with the exception of a motion to sever that Mr. Butler filed only at the insistence of Mr. Piers and his mother, Mr. Butler did not file any substantive pretrial motions whatsoever. Mr. Butler made no attempt to get a change in venue, despite the extensive media coverage and the entire venire's personal involvement in the case. *See supra* Ground 1.7. *See also* 2255 Motion at 11.

At trial, Mr. Butler gave no opening statement, despite assuring the jury he would do so. *See supra* Ground 1.8. *See also* 2255 Motion at 11–12. Mr. Butler's incompetent cross-examinations of key government witnesses actually strengthened the government's case against Mr. Piers, particularly with respect to the machine gun charge that carried a 30-year mandatory minimum sentence. *See supra* Grounds 1.13 and 1.14. *See also* 2255 Motion at 14–16. Mr. Butler did not challenge any of the government's numerous exhibits. *See supra* Grounds 1.9, 1.10, 1.11, and 1.12. *See also* 2255 Motion at 12–14. In fact, prior to trial, Mr. Butler *stipulated* to the admissibility of nearly every piece of evidence introduced by the government. *See* Exhibit I, Stipulation List from Rex Butler's Case File. For those items Mr. Butler did not stipulate to, he offered no objections when they were introduced by the government at trial, despite their irrelevance and highly prejudicial effects. *See supra* Grounds 1.9, 1.10, 1.11, and 1.12. *See also*

2255 Motion at 12–14. This is true despite the fact that, according to Mr. Butler's own words, he felt that some of these items—in particular the imitation CIA documents that Mr. Butler stipulated to prior to trial—were irrelevant. *See* 2255 Motion at 12 (Ground 1.9). *See also* Exhibit I. On the issue of the amount of data taken from the computer, Mr. Butler stood mute while the prosecution elicited evidence from FBI computer forensics expert Steven Payne that the court had just ruled inadmissible. *See* 2255 Motion at 12–13 (Ground 1.10). Mr. Butler did not object to the unfairly prejudicial and irrelevant evidence of the public's reaction to the robbery. *See* 2255 Motion at 13–14 (Ground 1.11). *See also supra* Ground 1.11. Mr. Butler did not object to the prosecution's improper use of a mannequin to display items that were not found together as a single unit. *See* 2255 Motion at 14 (Ground 1.12). *See also supra* Ground 1.12.

Mr. Butler did not put on any case-in-chief, instead resting at the close of the government's case: he did not call a single witness for the defense, despite having names of several individuals willing to testify on Mr. Piers's behalf; he did not introduce the sound of Mr. Piers's voice, though that could have shown that Mr. Piers was not the individual who entered the credit union; he refused to let Mr. Piers testify in his own defense. *See supra* Grounds 1.15, 1.16, and 1.17. *See also* 2255 Motion at 16–17. Mr. Butler failed to move for a Rule 29 acquittal. *See supra* Ground 1.22. *See also* 2255 Motion at 20. Mr. Butler did not develop a defense theory. *See supra* Ground 1.18. *See also* 2255 Motion at 17–18. Mr. Butler began his closing argument—the first time Mr. Butler even addressed the jury due to his failure to give an opening statement—by conceding Mr. Piers's guilt on the conspiracy charges and, in turn, all of the remaining charges stemming from the conspiracy. *See supra* Ground 1.21. *See also* 2255 Motion at 19–20. Mr. Butler did not argue for available jury instructions that would have been beneficial to his client. *See supra* Grounds 1.19 and 1.20. *See also* 2255 Motion at 18–19.

As the Supreme Court noted in setting forth the *Cronic* standard,

> The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. It is that very premise that underlies and gives meaning to the Sixth Amendment. It is meant to assure fairness in the adversary criminal process. Unless the accused receives the effective assistance of counsel, a serious risk of injustice infects the trial itself.
>
> Thus, the adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate. The right to effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Cronic, 466 U.S. at 655–57 (internal quotations and citations omitted).

In Mr. Piers's case, the process lost all "character as a confrontation between adversaries." *Id.* at 657.[23] This case warrants application of the *Cronic* standard. As a comparison, the Ninth Circuit found ineffective assistance under the *Cronic* standard in *Swanson*, where the defense attorney conceded his client's guilt in closing argument. Here, not only did Mr. Butler do the same, but also functionally abandoned his client throughout the trial, as shown by the recitation above.

Mr. Butler entirely failed to subject the prosecution's case to any meaningful adversarial testing, and as such rendered ineffective assistance under *Cronic* and *Swanson*. Alternatively, the litany of errors Mr. Butler made over the course of his representation of Mr. Piers, considered together, fell below an objective standard of reasonableness. Further, there is a probability, sufficient to undermine confidence in the outcome of the trial, that had Mr. Butler performed at

[23] In addition to the claims raised herein, undersigned counsel has been informed of the general spirit of camaraderie and good humor between Mr. Butler and Mr. Collins, manifested in their interactions with each other in the courtroom.

an acceptable level, the outcome of the proceeding would have been different. Thus, Mr. assistance was ineffective under the *Strickland* standard as well. 466 U.S. at 687–88, 694.

Ground 2.1: ***Ineffective assistance of sentencing counsel by failing to raise an Apprendi error with respect to the sentence imposed on Counts 1 and 2.***

As to this claim, the government argues that Mr. Piers cannot meet the *Strickland* criteria because "the Ninth Circuit had never held *Apprendi* precluded the court from applying the guidelines in the fashion it did in Mr. Piers' case." Resp. at 37. Further, the government also makes the unsubstantiated claim that Mr. Marks's decision to not raise *Apprendi* issues "was consistent with th [sic] practice of the overwhelming majority of counsel practicing in federal courts." *Id.* Neither of these arguments defeats Mr. Piers's claim of ineffective assistance.

First, the absence of controlling precedent for a meritorious argument does not defeat a claim of ineffective assistance. *See, e.g., United States v. Franks*, 230 F.3d 811, 814 (5th Cir. 2000) (ineffective assistance for failing to object to a sentencing enhancement where, though the Fifth Circuit had not ruled on the enhancement, three other circuits had ruled favorably for the defendant on the same issue). Second, the failure to raise an *Apprendi* argument was not "consistent with the overwhelming majority" of counsel practicing in federal courts. The *Apprendi* decision came down more than a year before Mr. Piers's sentencing. During that time, many defense counsels attacked sentencing enhancements under *Apprendi*. *See, e.g., United States v. Velasco-Heredia*, 249 F.3d 963 (9th Cir. 2001); *United States v. King*, 246 F.3d 1166 (9th Cir. 2001). In addition, several law review articles were written on the application of *Apprendi* to the Federal Sentencing Guidelines. *See, e.g.*, Stephen A. Saltzburg, *Due Process, History and Apprendi v. New Jersey*, 38 AM. CRIM. L. REV. 243 (2001); Andrew J. Fuchs, *The Effect of Apprendi v. New Jersey on the Federal Sentencing Guidelines: Blurring the Distinction Between Sentencing Factors and Elements of a Crime*, 69 FORDHAM L. REV. 1399 (2001).

Further, Justice O'Connor's dissenting opinion in *Apprendi* noted that the Court's decision "strongly suggests" that sentences under the Federal Sentencing Guidelines were unconstitutional. 530 U.S. at 550–51 (O'Connor, J., dissenting). Mr. Marks's failure to raise the issue fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687–88.

In addition, there is no question Mr. Piers suffered prejudice for Mr. Marks's decision not to raise the *Apprendi* claim. Under *Blakely* and now *Booker*, it is clear that such enhancements, as they were applied in Mr. Piers's case, are unconstitutional. *Blakely*, 124 S.Ct. 2531 (2004); *Booker*, 125 S.Ct. 738 (2005). Since *Apprendi* was decided well before Mr. Piers's sentencing, raising an *Apprendi* issue would have, at the very least, improved Mr. Piers's chances of prevailing on direct appeal, and would have allowed Mr. Piers to avoid the retroactivity hurdle he now faces on collateral attack (*see infra* Ground 4). As such, Mr. Marks's assistance at sentencing was ineffective. *Strickland*, 466 U.S. at 687–88, 694.

Ground 2.2: ***Ineffective assistance of sentencing counsel by failing to argue for available downward departures.***

The government claims this argument is "frivolous" because "to have made that argument, Piers would have had to admit he was the man who had robbed the credit union." Resp. at 38. This is incorrect. At the time of sentencing, Mr. Piers had already been found guilty of a conspiracy to rob the credit union. Further, at sentencing, the Court stated it was "convinced . . . that Mr. Hubbard's testimony was largely, almost wholly truthful." RT Sentencing Proceeding at 11. Mr. Hubbard's testimony was that Mr. Piers entered the credit union. Thus, in the view of the Court, it was Mr. Piers that entered the credit union. As such, Mr. Marks should have drawn attention to the concern for human life that the individual who entered the credit union exhibited. Mr. Marks could have done so without conceding that his client was the person

who entered the credit union, by making an argument in the alternative— a common practice among attorneys.

In addition, Mr. Marks, like Mr. Butler, failed to call a single character witness on behalf of Mr. Piers at sentencing. This is true despite the existence of several individuals who were ready, willing, and able to testify on Mr. Piers's behalf. *See* Exhibit H. Like Mr. Butler, Mr. Marks had the names and contact information for these individuals, but declined to contact any of them, or call them as witnesses at sentencing. This information was not only in the client file that Mr. Marks received from Mr. Butler, but Mr. Piers's mother verbally reminded Mr. Marks several times that these people were willing to testify for William, and offered to provide him with the same list if he could not locate the list in Mr. Piers's file. Had Mr. Marks called any of these individuals at trial, the district court may have found grounds for a downward departure.

Mr. Marks's failure to present this mitigating evidence constituted ineffective assistance of counsel under *Strickland*. *See, e.g.*, *Douglas v. Woodford*, 316 F.3d 1079, 1090–91 (9th Cir. 2003) (ineffective assistance for presenting only minimal mitigating evidence during sentencing in capital trial); *Smith v. Stewart*, 140 F.3d 1263, 1239 (9th Cir. 1998) (ineffective assistance for failing to present mitigating evidence during sentencing in capital trial); *United States v. Headley*, 923 F.2d 1079, 1083–84 (3d Cir. 1991) (ineffective assistance for failing to argue for downward adjustments at sentencing).

Ground 3.1: ***Ineffective assistance of appellate counsel by failing to effectively argue that Mr. Butler had an irreconcilable conflict with Mr. Piers and should have been relieved from representing him.***

Here, the government states that Mr. Piers is relying on an "unsubstantiated claim" that the record contains several instances of an irreconcilable conflict between Mr. Butler and Mr. Piers. However, this is far from an "unsubstantiated claim." Rather than reiterating the

numerous examples of the irreconcilable conflict, Mr. Piers refers the Court to his 2255 Motion, pages 4–7, and Grounds 1.1, 1.2, and 1.3, *supra*.

In addition, the government states that Mr. Piers's claim is unsubstantiated because the "court did not find such evidence of a [sic] irreconcilable conflict . . . when it originally considered the motion." Resp. at 39. This statement supports Mr. Piers's claim of ineffective assistance of appellate counsel. That the district court did not find a conflict is precisely the reason the issue warranted an appeal, and also the reason the issue should have been briefed more thoroughly.

Finally, the government notes that the "Ninth Circuit did not find any such evidence" of the irreconcilable conflict. Resp. at 39. Again, this statement is further support of the ineffective assistance of appellate counsel claim. The evidence in the record showed the conflict existed, as noted in Mr. Piers's 2255 Motion, pages 4–7, and Grounds 1.1, 1.2, and 1.3, *supra*. The reason the Ninth Circuit did not find the conflict is because appellate counsel failed to marshal the facts from the record. This constituted ineffective assistance under *Strickland*. 466 U.S. at 687–88, 694.

Ground 3.2: ***Ineffective assistance of appellate counsel by failing to raise trial counsel Rex Butler's error in conceding Mr. Piers's guilt on the conspiracy counts.***

Here, the government misunderstands Mr. Piers's arguments regarding his trial counsel's concession of guilt, stating that Mr. Butler conceded guilt only on one of the conspiracy counts. Mr. Butler conceded Mr. Piers's guilt on *both* conspiracy counts by conceding that he was involved in the conspiracy to rob the credit union. *See supra* Ground 1.21. The government then argues that, since Mr. Butler's closing argument did not constitute ineffective assistance, then appellate counsel's failure to raise the issue on appeal cannot be considered ineffective assistance.

For reasons stated above and in Mr. Piers's 2255 Motion, Mr. Butler's concession of guilt in his closing argument was prejudicial per se. *Swanson*, 943 F.2d at 1074–76. As such, appellate counsel should have raised the issue on appeal. Failure to do so constituted ineffective assistance of counsel. *See, e.g., Caver v. Straub*, 349 F.3d 340, 348–50 (6th Cir. 2003) (ineffective assistance of appellate counsel for failing to present claim that was much stronger than the issues counsel did raise).

Ground 3.3: ***Ineffective assistance of appellate counsel by failing to raise Apprendi in appealing Mr. Piers's sentence.***

The government states that "counsel could not raise an issue on appeal if no objection was made in the trial court." Resp. at 40. This is a misstatement of law. Counsel can always raise an issue on appeal that was not preserved at trial. Indeed, the Ninth Circuit, like all circuits, routinely considers such claims under the "plain error" standard. *See, e.g., Jones v. United States*, 527 U.S. 373, 388 (1999); *United States v. Burt*, 143 F.3d 1215, 1217 (9th Cir. 1998). Further, appellate counsel can be ineffective for failing to raise such an issue. *See, e.g., Roe v. Delo*, 160 F.3d 416, 418–20 (8th Cir. 1998) (ineffective assistance of appellate counsel for failing to request a "plain error" review of an issue not preserved for appeal). For the same reasons that Mr. Marks should have raised the *Apprendi* issues at sentencing, Mr. Marks and Ms. Arfa should have raised the issue on appeal. Failure to do so constituted ineffective assistance. *Strickland*, 466 U.S. at 687–88, 694.

Ground 3.4: ***Ineffective assistance of appellate counsel by raising an ineffective assistance of trial counsel claim on direct appeal, when the matter should have been raised by collateral attack.***

As noted in Note 8, *supra*, this claim was mistakenly included in the 2255 Motion. Mr. Piers withdraws this claim, as no arguments of ineffective assistance of trial counsel were raised on appeal.

Ground 4: ***Violation of due process and Fifth and Sixth Amendment rights by finding enhancing facts by a preponderance of the evidence, when those facts must be found by a jury beyond a reasonable doubt.***

As stated in Part II.A, *supra*, and contrary to the government's contention, this claim is not procedurally defaulted. For the reasons set forth below, *Apprendi* and its progeny, *Blakely* and *Booker*, are all retroactive.

1. The Supreme Court can make a new rule retroactive through a combination of cases.

In *Tyler v. Cain,* 533 U.S. 656 (2001), the United States Supreme Court held that a new rule of criminal procedure may be made retroactive through a series of that Court's cases:

> Justice BREYER observes that this Court can make a rule retroactive over the course of two cases. We do not disagree that, with the right combination of holdings, the Court could do this . . . . Multiple cases can render a new rule retroactive only if the holdings in those cases necessarily dictate retroactivity of the new rule.

533 U.S. at 666. In her concurrence, Justice O'Connor explained that the Court makes "a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule." *Id.* at 668–69 (O'Connor, J., concurring). Logic compels the retroactive application of *Apprendi* (and, by extension, *Blakely* and *Booker*) given the Supreme Court's recognition in *Schriro v. Summerlin*, 124 S.Ct. 2519 (2004), that the *Apprendi* rule implicates fundamental fairness, and, in a host of Supreme Court decisions, of the heightened accuracy afforded by the criminal law's standard of proof beyond a reasonable doubt (explained below).

2. Teague v. Lane mandates that newly recognized constitutional rules of criminal procedure be applied retroactively where the rule both: (1) Implicates the fundamental fairness of the proceeding; and (2) Heightens the accuracy or reliability of the outcome.

In the plurality decision in *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court announced that new procedural rules of constitutional law would generally not be applied

retroactively to cases on collateral review. That decision has since been adopted by a majority of the Court. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989) (overruled on other grounds). *Teague* and its progeny recognize two exceptions to the general principle that new rules of constitutional procedure are not retroactive.[24]

The second exception requires that a new rule be applied retroactively for "those procedures that are implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 311 (internal citations omitted). As the Court explained, such rules vindicate two discreet concerns: the fundamental fairness of the underlying proceeding, and the accuracy of that underlying criminal proceeding. *Saffle v. Parks*, 494 U.S. 484, 495 (1990). The *Teague* court explained that it was adapting a rule previously proposed by Justice Harlan: "We believe it desirable to combine the accuracy element of the *Desist*[25] version of the second exception with the *Mackey*[26] requirement that the procedure at issue must implicate fundamental fairness." *Teague*, 489 U.S. at 312; *see also id.* at 302–13 (discussing Justice Harlan's views in detail).

3. In Schriro, the Supreme Court recognized that the Apprendi rule satisfies Teague's fundamental fairness prong.

In *Schriro*, a five-justice majority concluded that the decision in *Ring v. Arizona*, 536 U.S. 610 (2002), applying *Apprendi* to Arizona's capital sentencing scheme, does not apply retroactively under *Teague*. 124 S.Ct. 2524–26. The Court began by reiterating *Teague*'s second exception for rules "implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* at 2523. The Court proceeded to parse these requirements: "That a new rule is

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[24] The first exception, not implicated here, is for "rules that place an entire category of primary conduct beyond the reach of the criminal law." *Sawyer v. Smith*, 497 U.S. 227 (1990) (citing *Teague*, 489 U.S. at 311).

[25] *Desist v. United States*, 394 U.S. 244, 256–69 (1969) (Harlan, J. dissenting).

[26] *Mackey v. United States*, 401 U.S. 667, 675–702 (1971) (Harlan, J. concurring).

'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is *seriously* diminished." *Id.* (quoting *Teague*, 489 U.S. at 313) (emphasis in original). The Court went on to examine and reject the Ninth Circuit's conclusion that *Ring* fell within the second *Teague* exception, concluding that judicial fact-finding under a reasonable doubt standard was not shown to "seriously diminish" the accuracy of the sentencing. *Id.* at 2524–26.

The *Schriro* majority's analysis of the second *Teague* exception began with a terse acknowledgment that the rule at issue was "fundamental," *id.* at 2523, and then proceeded through a detailed analysis of the accuracy prong of the second exception. *Id.* at 2524–26. In the end, the Court reiterated that the "right to a jury trial is fundamental to our system of criminal procedure," but held that the *Ring* rule should not apply retroactively because it does not seriously enhance accuracy. *Id.* at 2525–26.

The four dissenting justices disagreed, noting various reasons why jury findings are superior. *Id.* at 2528–31 (Breyer, J., dissenting). The dissent began its analysis by noting that "the majority does not deny that *Ring* meets the first criterion," by implicating fundamental fairness and the concept of ordered liberty. *Id.* at 2527. It was only on the second prong that the justices disagree. *Id.*[27]

[27] The majority, which had already noted the "fundamental" character of the underlying right, *Schriro*, 124 S.Ct. at 2523, did not take exception to the dissent's characterization of the Court's unanimity as to the first prong of *Teague*'s second exception analysis, although the majority did respond to three other "conten[tions]" of the dissent. *Id.* at 2526 & n.6.

4. *The Schriro Court's conclusion that Ring should not be applied retroactively does not apply to Apprendi, where the lower standard of proof undermines the accuracy of the proceeding's outcome, because the determination at issue in Ring was made under the beyond a reasonable doubt standard.*

In *Schriro*, the majority's analysis turned on its conclusion that the evidence that "judicial factfinding so 'seriously diminishes accuracy' . . . is simply too equivocal" to meet the second prong of *Teague*'s second exception to the general rule against retroactivity. 124 S.Ct. at 2525 (internal modifications omitted). That conclusion was limited to the *Ring* rule, however, "[b]ecause Arizona law already required aggravating factors to be proved beyond a reasonable doubt." *Id.* at 2522 n.1 (citing *State v. Jordan*, 126 Ariz. 283, 286, 614 P.2d 825, 828 (1980)). Because the rule at issue here allowed judicial factfinding under the diluted preponderance of the evidence standard, *Schriro*'s ultimate conclusion that accuracy is not "seriously diminished" where a judge makes findings beyond a reasonable doubt is inapposite.[28]

5. *Increasing the standard of proof from a preponderance of the evidence to beyond a reasonable doubt seriously enhances the reliability and accuracy of the outcome.*

The requirement of proof beyond a reasonable doubt is central to protecting the rights of the accused and the accuracy of criminal convictions. The Supreme Court has articulated the importance of that burden of proof in several contexts. In *Cage v. Louisiana*, the Court emphasized the vital role of the reasonable doubt standard in avoiding convictions based on factual error:

> [T]he Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 . . . (1970) . . . This reasonable-doubt standard "plays a vital role in

[28] Justice O'Connor recently indicated in dissent that *Schriro* mandates that *Apprendi* not be applied retroactively. *Blakely*, 124 S.Ct. at 2549 (O'Connor, J., dissenting). Justice O'Connor's statement in *Blakely* is dicta from a dissenting opinion and is contrary to the Court's reasoning in *Schriro*, in which she joined.

> the American scheme of criminal procedure." *Winship*, 397 U.S. at 363. Among other things, "it is a prime instrument for reducing the risk of convictions resting on factual error."

498 U.S. 39, 39–40 (1990) (some internal citations omitted) (overruled on other grounds).

Winship itself makes clear that the requirement of proof beyond a reasonable doubt is grounded upon accuracy concerns:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for a commission of a crime when there is reasonable doubt about his guilt.

397 U.S. 358, 364 (1970). The *Winship* Court specifically rejected the margin of error permitted by a preponderance standard:

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion at the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt. To this end, the reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.

Id. at 364.[29]

[29] The Court also highlighted society's discrete interest in a more accurate standard:

The Supreme Court has repeatedly recognized the enhanced accuracy mandated by the rules in *Winship* and *Mullaney v. Wilbur*, 421 U.S. 684 (1975).[30] In *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972), the Court gave the rule announced in *Winship* retroactive effect, because "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function." Subsequently, in *Hankerson v. North Carolina*, 432 U.S. 233, 240 (1977), the Supreme Court relied on *Ivan V.* and applied *Mullaney* retroactively, because "the rule was designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that 'substantially impairs the truth-finding function.'" *Id.* at 242.

> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Winship, 397 U.S. at 364; *see also Jackson v. Virginia*, 443 U.S. 307, 316-17 (1979) ("The *Winship* doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence."); *Francis v. Franklin*, 471 U.S. 307, 322 n.8 (1985) (referring to the government's burden to prove every element beyond a reasonable doubt as grounded in "bedrock due process principles"); *United States v. Nolasco*, 926 F.2d 869, 871 (9th Cir. 1991) ("The reasonable doubt standard gives substance to the presumption of innocence and instills confidence in the community that the innocent will not be condemned.").

[30] The *Mullaney* court held that, rather than requiring a defendant to prove by a preponderance that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter, the prosecution must prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation. 421 U.S. 684, 703–04 (1975).

The Ninth Circuit's model jury instructions further illustrate this point. *Compare* Ninth Cir. Model Jury Inst. - Crim. 3.5 (2004) (reasonable doubt),[31] *with* Ninth Cir. Model Jury Inst. - Civil 5.1 (2004) (preponderance).[32] A factfinder who is "firmly convinced" of the truth of the fact found has reached, *a priori*, a more reliable conclusion than if he or she had concluded the fact was "more probably true than not true." As a long line of Supreme Court cases illustrates, the criminal law's heightened standard of proof seriously enhances the accuracy of determinations.

6. After Schriro, the Ninth Circuit's opinions in United States v. Sanchez-Cervantes and United States v. Cook are no longer good law.

In *Sanchez-Cervantes* the Ninth Circuit concluded that the *Apprendi* rule should not be applied retroactively. 282 F.3d at 667. In *Cook*, the Ninth Circuit, relying *Sanchez-Cervantes*,

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[31] The instruction states:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.
>
> A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.
>
> If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

[32] The instruction states:

> When a party has the burden of proof on any claim [or affirmative defense] by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim [or affirmative defense] is more probably true than not true.
>
> You should base your decision on all of the evidence, regardless of which party presented it.

concluded that *Blakely* was not retroactive. 386 F.3d at 950. In *Miller v. Gammie*, however, the Ninth Circuit instructed appellate panels and district court judges not to follow a prior opinion from the Circuit courts when that opinion is "irreconcilable" with intervening Supreme Court decisions. 335 F.3d 889, 899–901 (9th Cir. 2003) (en banc). Because the rationale in *Sanchez-Cervantes* and *Cook* is logically repudiated by the *Schriro* decision, *Sanchez-Cervantes*—and, by extension, *Cook*—must no longer be followed.

In *Sanchez-Cervantes*, the panel analyzed *Apprendi*'s potential application to a federal prisoner's challenge to his sentence under 28 U.S.C. § 2255. 282 F.3d at 666–69. The *Sanchez-Cervantes* court recognized the two-part *Teague* test:

> The Supreme Court has stated that to qualify under *Teague*['s second exception, new procedural] rules must not only improve the accuracy of the trial but also must alter our understanding of the "bedrock procedural elements essential to the fairness of the proceeding."

Id. at 670 (citing *O'Dell v. Netherland*, 521 U.S. 151, 167 (1997)). The panel went on to hold that the *Apprendi* rule was not sufficiently "sweeping" or "bedrock" as to be considered "fundamental . . . within *Teague's* second exception." *Id.* at 669–70. In *Schriro*, as discussed *supra*, the Supreme Court unanimously agreed that the *Ring* rule—and therefore *Apprendi* and *Blakely*—involves fundamental fairness satisfying the first prong of *Teague*'s second exception. *See Schriro*, 124 S.Ct. at 2523 (Scalia, J.); *id.* at 2527–28 (Breyer, J., dissenting).

The *Sanchez-Cervantes* Court also made three brief references to the accuracy prong of *Teague*'s second exception, but its consideration improperly focused on the accuracy of the conviction rather than the sentence imposed. 282 F.3d at 669, 671. The panel began: "We do not believe that requiring the jury to make drug quantity determinations beyond a reasonable doubt will greatly affect the accuracy of convictions." *Id.* at 669. The panel's second reference to accuracy removes any doubt that the Court intended to focus upon the accuracy of *conviction*

even though the issue presented was the *outcome of the sentencing* proceeding: "The alleged *Apprendi* error only concerns an enhancement of the defendant's sentence based on a drug quantity finding by the judge. Therefore, the accuracy of the underlying conviction is not an issue." *Id.* As *Apprendi* made absolutely clear, it is not the label ("enhancement") that governs the analysis; the Constitution requires a jury finding beyond a reasonable doubt as to each fact, other than recidivism, establishing the applicable sentencing range. 534 U.S. at 494.[33]

The panel's final discussion of accuracy was in the context of dismissing Supreme Court precedent giving *Winship* and *Mullaney* retroactive effect. *Sanchez-Cervantes*, 282 F.3d at 671. The panel concluded that *Winship* and *Mullaney* presented serious questions as to the accuracy of the determination of guilt, drawing an artificial distinction, eschewed in *Mullaney* and repudiated by *Apprendi*, *Ring*, and *Blakely*. *Apprendi*, 530 U.S. at 494–95; *Ring*, 536 U.S. at 597–609; *Blakely*, 124 S.Ct. at 2538–40. *See also Ring*, 536 U.S. at 610 (Scalia, J., concurring).[34] In

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[33] [T]he New Jersey Supreme Court correctly recognized that

> "labels do not afford an acceptable answer." That point applies as well to the constitutionally novel and elusive distinction between "elements" and "sentencing factors." Despite what appears to us the clear elemental nature of the factor here, the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?

Apprendi, 530 U.S. at 494 (citations omitted).

[34] The fundamental meaning of the jury-trial guarantee of the Sixth Amendment is

> that all facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the crime, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

Ring, 536 U.S. at 610 (Scalia, J., concurring).

Mullaney, the Supreme Court condemned as unconstitutional Maine's attempt to characterize elements of its homicide statute as sentencing factors. 421 U.S. at 698.

The distinction drawn by the *Sanchez-Cervantes* court was also rejected by Blackstone centuries ago. 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, 2–3 (Legal Classics Library Special ed. 1983).[35] The framers of our constitution eschewed the distinction drawn by the *Sanchez-Cervantes* panel as well:

> Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, *and arbitrary punishments* upon arbitrary convictions have ever appeared to me to be great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the habeas corpus act, seems therefore to be alone concerned in the question. And both of these are provided for in the most ample manner in the plan of the convention.

THE FEDERALIST NO. 83 (Alexander Hamilton) (emphasis added).

The *Sanchez-Cervantes* panel also reasoned that the *Apprendi* rule would not have widespread application as "most sentences will not be affected by *Apprendi* because they fall within the statutory maximum of twenty years." *Sanchez-Cervantes*, 282 F.3d at 669. Once again, that Court's reasoning has been squarely rejected by the Supreme Court:

> Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the*

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[35] Blackstone states:

> [T]o know with precision what the laws of our country have forbidden, and the deplorable consequences to which a willful disobedience may expose us, is a matter of universal concern . . . .
>
> But even us in England, where our crown law is with justice supposed to be nearly advanced to perfection; where crimes are more accurately defined, and penalties less uncertain and arbitrary; where all our accusations are public, and our trials in the face of the world . . . . We shall occasionally find room to remark some particulars, that seem to want revision and amendment.

4 Blackstone, at 2–3.

> *facts reflected in the jury verdict or admitted by the defendant* . . . . [T]he relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* additional findings.

Blakely, 124 S.Ct. at 2537 (emphasis in original).

The *Sanchez-Cervantes* court attempted to bolster its conclusion that *Apprendi*'s rule does not satisfy *Teague*'s fairness prong by noting that the Circuit had applied harmless error analysis to *Apprendi* claims. *Sanchez-Cervantes*, 282 F.3d at 670. It concluded, "Therefore, it would seem illogical to hold that such error is a watershed rule that 'implicates the fundamental fairness of the trial.'" *Id.* (internal brackets omitted). The Supreme Court recently expressed its unanimous disagreement with the panel's logic. *Schriro*, 124 S.Ct. at 2523; *id.* at 2527–28 (Breyer, J., dissenting). *Sanchez-Cervantes* is no longer good law. *See Miller*, 335 F.3d at 899–901. The rule from *Apprendi* has been made retroactive to cases on collateral review by the combination of *Schriro* and other Supreme Court precedents. In turn, both *Blakely* and *Booker* are retroactive as well, in that, together, *Blakely* and *Booker* simply applied the *Apprendi* rules to the United States Sentencing Guidelines. As such, the holdings of *Apprendi*, *Blakely*, and *Booker* apply to Mr. Piers's case, and his convictions and sentences must be vacated as a result.

Ground 5: ***Violation of due process and Fifth and Sixth Amendment rights by not sua sponte appointing substitute counsel in place of Mr. Butler to argue the Motion to Withdraw.***

As noted in Part II.B, *supra*, and contrary to the government's contention, this claim is not procedurally defaulted. The government has offered no other rebuttal to this claim.

As detailed in his 2255 Motion, during the hearing on the Motion to Withdraw it became clear that an irreconcilable conflict existed between Mr. Piers and Mr. Butler. 2255 Motion at 4–7. *See also supra* Grounds 1.1, 1.2, and 1.3. This was a result of both Mr. Piers's complete loss of trust and confidence in his attorney as well as Mr. Butler's assumption of an adversarial role

against his client in claiming that Mr. Piers fabricated the existence of Adam. With such a breakdown in the relationship, Mr. Piers was effectively denied counsel at the hearing.

In *Wadsworth*, the Ninth Circuit held that a defendant's due process rights were violated where the court did not *sua sponte* appoint new counsel to represent the defendant at a hearing on a motion for substitute counsel. 830 F.3d at 1510–11. The facts of *Wadsworth* are functionally identical to Mr. Piers's case. In *Wadsworth*, the motion for appointment of new counsel was filed the day before trial. *Id.* at 1505. In the instant case, Mr. Butler did not file the Motion to Withdraw until 10 days before trial. In *Wadsworth*, the defendant stated that his attorney had failed to speak to him and investigate his side of the story. *Id.* at 1506. In the instant case, among other things, Mr. Piers stated at the hearing on the Motion to Withdraw that:

> all [Mr. Butler] has ever done is, you know, read a piece of paper that he's had that he could've handed to me. He's never responded to my questions. He hasn't provided me any legal counsel. It's been seven months, and I feel like I'm getting snowballed.

RT Ex Parte Hearing at 4. Mr. Butler did no investigation into Mr. Piers's case. Further, Mr. Butler only met with Mr. Piers three times in the months leading up to trial, for a total of less than four hours. The attorney in *Wadsworth* informed the court that his client had not cooperated with him "in any respect." 830 F.2d at 1507. In the instant case, Mr. Butler stated, among other things, that when he went to visit Mr. Piers, Mr. Piers refused to see him. RT Ex Parte Hearing at 3. Like the situation in *Wadsworth*, the record from the Ex Parte hearing shows that the relationship between Mr. Piers and Mr. Butler had become increasingly antagonistic, with Mr. Butler virtually calling his client a liar. *See* 2255 Motion at 6–8.

Under these circumstances:

> [T]he proceeding conducted by the court on the defendant's motions resulted in the denial to the defendant of his right to due process and the right to counsel *at that hearing.* An accused is entitled to counsel at every critical stage of the

> proceedings against him. There can be no question that these proceedings were critical. At issue was the right of the defendant to have counsel at trial and time to prepare his defense.
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> * * *
>
> [H]is attorney . . . provided the most damaging evidence against his client's demand that the court substitute competent counsel for his defense. Under the unusual circumstances of this case, the district court should have suspended the proceedings and appointed an attorney for the defendant at the competency of counsel hearing, as soon as it became apparent that [defense counsel] had taken an adversary and antagonistic position on a matter concerning his client's right to counsel and to prepare for trial. Had counsel been appointed for this proceeding, he would have undoubtedly pointed out to the court that the defendant was not responsible for [the untimeliness of the filing of a] motion for a substitution or to prepare for trial.

Wadsworth, 830 F.2d at 1510–11 (emphasis in original) (internal citations omitted).

There is no practical difference between *Wadsworth* and the instant case. The attorney in *Wadsworth* provided the "most damaging evidence against" his client's motion for substitute counsel. *Id.* at 1510. Mr. Butler, similarly, gave no argument or reason as to why the Court should grant the motion to withdraw, and also virtually called his client a liar. In fact, he essentially argued that the motion should *not* be granted, saying "[I]f the case is to go forward, we'll be prepared to go forward. That's the bottom line." TR Ex Parte Hearing at 6.

By not appointing counsel to represent Mr. Piers at the hearing, the Court denied Mr. Piers's right to counsel "at every critical stage of the proceedings against him." As such, his due process rights as well as his Sixth Amendment right to effective counsel were violated. *Wadsworth*, 830 F.2d at 1510. *See also Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000) ("to compel one charged with [a] grevious crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever") (internal quotations omitted); *Robinson v. Norris*, 60 F.3d 457, 459–60 (8th Cir. 1995) (petitioner functionally denied counsel when judge refused to

replace trial counsel with new attorney to file post-trial motion for new trial on grounds of ineffective assistance of counsel).

Ground 6: ***The government violated Mr. Piers's due process rights and the rule of Brady v. Maryland.***

In Mr. Piers's 2255 Motion, he asserts a *Brady* violation for, *inter alia*, the government's failure to provide the defense with details of an agreement with Ray Hubbard not to prosecute Mr. Hubbard's sister, Megan. 2255 Motion at 27–28. *The government does not deny that such an agreement existed.* Rather, the government states that such an agreement is not *Brady* material, because the evidence is not material to guilt or punishment. Resp. at 43. However, *Brady* material includes not only exculpatory evidence, but also information that could be used to impeach government witnesses. *Giglio v. United States*, 405 U.S. 150, 154 (1972). In *Giglio*, the defendant was convicted of passing forged money orders. *Id.* Following trial, the defendant discovered that the government had failed to disclose a promise of immunity made to the defendant's coconspirator, the only witness to the crime. *Id.* at 150–51. The Supreme Court reversed the defendant's conviction because "evidence of *any* understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Id.* at 154–55 (emphasis added). *See also United States v. Bagley*, 473 U.S. 667, 676–77 (1985) (plurality opinion) (impeachment evidence as well as exculpatory evidence is subject to *Brady* disclosure); *United States v. Blanco*, 392 F.3d 382, 387–94 (9th Cir. 2004) (finding *Brady* violation and remanding in light of government's failure to disclose available information that could have been used to impeach government witnesses); *Benn v. Lambert*, 283 F.3d 1040, 1054–59 (9th Cir. 2002) (finding *Brady* violation for withholding critical evidence that could have been used to impeach government witnesses).

In addition, during Mr. Hubbard's direct examination at trial regarding his plea agreement, the prosecution did not disclose the existence of an agreement not to prosecute Hubbard's sister, nor did the government make any attempt to correct this incomplete testimony. The failure to correct incomplete and/or false testimony regarding agreements between a witness and the prosecution constitutes a violation of the defendant's due process rights. *Hayes v. Brown*, 399 F.3d 972, 981–82 (9th Cir. 2005). In *Hayes*, the Ninth Circuit noted the prosecutor's "special role" in the American justice system "in the search for truth in criminal trials." *Id.* at 978. There, the prosecutor made a deal with the attorney of a prosecution witness, in which the government agreed not to prosecute the witness. However, the prosecutor instructed the witness's attorney not to inform the witness of the agreement, so that the witness could answer "truthfully" that no agreements had been made. The Ninth Circuit reversed the defendant's conviction because due process is violated not only by eliciting false evidence, but also by allowing false evidence to go uncorrected when it appears. *Id.* Similarly, by failing to correct Mr. Hubbard's incomplete testimony regarding the nature of his plea agreement, the government violated Mr. Piers's due process rights. *Id.*

Mr. Piers raised a second *Brady* claim in his 2255 Motion—that the government withheld information about the existence of Adam, the uncharged member of the conspiracy. *The government does not deny that it withheld information about Adam and his connection to the robbery.* Rather, the government claims that withholding information about Adam is not a *Brady* violation because Mr. Piers "has in no way established that any information about 'Adam' is material to his case." Resp. at 44. This statement is indefensible. As detailed in Mr. Piers's 2255 Motion, Adam was clearly an uncharged member of the conspiracy. This is evident on the record alone. 2255 Motion at 7–9, 27–28, and Exhibit A; *supra* Ground 1.4. Further, based on

this information, it can be inferred that Adam was the individual that actually entered the credit union and fired the machine gun. Clearly, contrary to the government's unsupported stance, information about Adam is highly material to this case.

In addition, this claim is based in part on the contention of Mr. Butler that the government told him the name "Adam" had never surfaced in the investigation. *See* 2255 Motion at 7; RT Ex Parte Hearing at 7. However, Mr. Hubbard's grand jury testimony clearly implicates Adam as a member of the conspiracy, as do his statements the day of his arrest. *See supra* Ground 1.4. If Mr. Butler's contention is true, the government withheld material information from Mr. Piers in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

CONCLUSION

For the foregoing reasons, and the reasons set forth in Mr. Piers's 2255 Motion, 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 therein.

Michael R. Levine
Attorney for Defendant

May 3, 2005
Date

EXHIBIT D:

OCTOBER 18, 2000 GRAND JURY TESTIMONY OF RAYMOND HUBBARD (EXCERPTS)

IN THE UNITED STATES DISTRICT COURT FOR THE STATE OF ALASKA

DISTRICT OF ALASKA

AT ANCHORAGE

UNITED STATES OF AMERICA,

Plaintiff,

vs

WILLIAM EDWARD PIERS, RAYMOND LEE HUBBARD, II, and DONALD DOUGLAS FRANKLIN, JR.,

Defendants.

_____/

GRAND JURY PROCEEDINGS
TESTIMONY OF RAYMOND HUBBARD
OCTOBER 18, 2000
PAGES 1 THROUGH 20

APPEARANCE:

United States Attorney's Office
Stephan Collins, Esq.
701 C Street, Room C-252
Anchorage, AK 99501
(907) 271-5071

that...

A Yes. They do not.

Q How long were you discussing this robbery prior to June 27th?

A It was first brought up to me a month and -- a month and three weeks before it went down.

Q So the latter part of April or May? Would that be accurate?

A Yeah. Uh-huh (affirmative).

Q During the time that you were discussing this, did someone else show up on the scene, and you were discussing the robbery?

A Yes.

Q And w ho was this fellow?

A A young man named -- named -- named Adam -- Adam.

Q When you were asking questions of Will, was Adam ever present?

A A few times.

Q When you asked Will a question about the plan, did he ever turn to Adam for the answers?

A No.

Q After you were talking -- asking Will these questions and discussing the plan, did you ever ask -- how many people -- at the time that Adam

showed up, how many people did you believe were involved in this plan to commit the robbery?

A Well, because he was not asking the questions to -- to Adam, while I was in the car, I suspected now, there was me, Will -- me, Will, Adam, and one other person.

Q Did you ever learn the identity of this other person?

A Yes.

Q How did you learn the identity of this other person?

A Through per -- persistently -- persistently asking who was his friend he was getting the information from.

Q And why did you want to know who this other person was?

A Wanted to know who else knew what was about to go down. Wanted to know who else knew that I was involved in this.

Q Did he ever tell you who this other person was?

A Yes.

Q And who did he identify as this other person?

A Doug.

Q And what was your reaction? How did you feel

after you found out that it was Doug?

A Um, that -- that -- that answered a lot of questions for me.

Q Did it make you feel a little bit more secure now?

A Yes.

Q As part of the plan, was there one objective to find a place to switch out vehicles?

A Yes.

Q Let me back up a little bit. What was the -- how did the plan include the use of vehicles? What were you going to do with vehicles?

A Once we achieved that bank robbery, we would drive to a spot and switch into another car and burn the car that was used in the bank rob -- in the bank robbery.

Q Did you ever participate in looking for this other spot?

A Yes.

Q And who else besides yourself was there?

A Will and Adam.

Q Did you go to one spot or a number of spots, looking for the right spot?

A A number of spots.

Q Was there any spot that Will expressed a

for this bank robbery.

Q Did you and Will discuss the purpose for the type of clothing and other things used in the robbery?

A Yes.

Q What was the purpose, for instance, the type of clothing?

A His -- the clothing the people wore to go inside was to -- to cover up -- cover up any exposed skin so no one would tell the skin color of the people, and a helmet to distort -- to distort the height, to avoid a positive ID.

Q Was there any mention of goggles or glasses or anything of that sort?

A Yes.

Q And for what purpose was...

A To -- to cover up -- to cover up any exposed skin.

Q When Will told you about this first attempt, did he tell you if there was anybody else involved?

A Yes.

Q And what did he tell you?

A There were two other people involved.

Q Did he tell you this before or after you

learned that Franklin -- Doug was the person providing the information?

A I don't know.

Q You don't remember?

A No.

Q When you were talking about this first attempt, were you and Will the only people present?

A No.

Q Who else was present?

A A young man named A -- a young man named A -- named Adam.

Q When Adam was present with you and Will, did he ever participate in the conversations about the plan?

A He participated in the way of, like, yes, no. He did, but not too descriptive. He was -- he was very quiet.

Q When the robbery was -- in the days before the robbery was committed, had you and Will discussed where you would acquire the vehicles that you were going to be using?

A They -- they -- excuse me -- they, um, vaguely -- they were just supposed to be a -- I was told they were just going to be aqu -- acquired.

EXHIBIT E:

GOVERNMENT'S TRIAL BRIEF, FILED JANUARY 29, 2001 (EXCERPTS)

ROBERT C. BUNDY
United States Attorney

STEPHAN A. COLLINS
Assistant U.S. Attorney
Federal Building & U.S. Courthouse
Room 253
222 W. 7th Avenue, #9
Anchorage, Alaska 99513-7567
(907) 271-5071

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. WILLIAM EDWARD PIERS, and DONALD DOUGLAS FRANKLIN, Defendants.	A00-104 Cr. (HRH) PLAINTIFF'S TRIAL BRIEF

I. STATEMENT OF THE CASE

This matter is set to commence trial on February 5, 2001 in Anchorage, Alaska. The defendant, William Edward Piers, has moved for a continuance of the trial date. The court has set a hearing on the motion for

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January 30, 2001. In anticipation that the court might deny the motion, the government is filing this trial brief.

The indictment in this case contains the following charges: Count 1, Conspiracy to Commit Armed Credit Union Robbery, in violation of 18 U.S.C. § 371; Count 2, Armed Credit Union Robbery, in violation of 18 U.S.C. § 2113(a)and (d); Count 3, Conspiracy to Commit a Violation of 18 U.S.C. § 924(c)(1)(A), in violation of 18 U.S.C. § 924(o); Count 4, Carrying a Semi-Automatic Assault Weapon During and in Relation to a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(A) & (B)(i); Count 5, Using a Machinegun During and in Relation to a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(A) & (B)(ii); Count 6, Possessing a Firearm with an Obliterated Serial Number, in violation of 18 U.S.C. § 922(k); and Count 7, Attempted Armed Credit Union Robbery, in violation of 18 U.S.C. § 2113(a)and (d). William Edward Piers is named in each and every count of the Indictment. Donald Douglas Franklin is charged only in Counts 1, 2, 3, and 7.

The United States is prepared to proceed to trial. While this matter will involve the presentation of at least 26 witnesses, this is not a complex trial. The United States is optimistic that if the trials proceed in an orderly fashion that it can complete its cases in chief in both cases respectively within four days.

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I. STATEMENT OF ANTICIPATED EVIDENTIARY FACTS

William Edward Piers and Donald Douglas Franklin were friends. Beginning sometime in February of 1999, Franklin worked at the Dimond Branch of Credit Union One. Credit Union One has been insured by the National Credit Union Administration Board since 1982 without interruption. Franklin worked at Credit Union One as a teller until he was fired on August 30, 1999. During his tenure as a teller, Franklin learned the internal security measures Credit Union used to protect itself and its assets. While Franklin worked at Credit Union One, he and Piers were roommates.

Shortly after he was fired, Franklin and Piers decided to commit armed robbery of the Dimond branch of Credit Union One. They devised a detailed plan on how to commit the robbery. They used Franklin's knowledge of the credit union's security measures to devise the plan. The plan included the use of firearms to commit the robbery and to intimidate anyone who might be present during the robbery.

They stole a van from the janitorial service used to clean the Dimond Branch and on October 15, 1999 went so far as to approach the Dimond Branch to accomplish their goal. Their plans were foiled when someone in the credit union

called in a suspicious vehicle report to the 911 dispatcher. They then took the van and destroyed it by fire.

After this attempt, Piers decided to follow through with the plan he and Franklin had devised. Piers recruited Raymond Hubbard, III, to accompany him during the robbery. In order to convince Hubbard that his plan was "foolproof," Piers told Hubbard that Franklin was the person supplying them with the "inside" information. Franklin had continued to supply Piers with information about the inner workings of the credit union.

On June 27, 2000, Piers and Hubbard approached the Dimond branch of Credit Union One. Piers, who was dressed all in black, entered the credit union and held two employees at bay with a firearm while he followed Franklin's instructions on how to take money out of the vault. Hubbard was driving the getaway vehicle, in which Piers had stored a Norinco, originally a semi-automatic rifle that had been converted into a machinegun. The Norinco, which was manufactured in China, had an obliterated serial. After Piers left the credit union with the money from the vault, he hopped into the van Hubbard was driving and unwrapped the machinegun he had stored in the van. Piers used the machinegun to shoot at the police officers who were in pursuit of him and Hubbard.

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Piers and Hubbard eventually crashed their getaway cars and were captured. Piers made admissions that he was responsible for the crimes that had been committed. Law enforcement officers ultimately interviewed Franklin who made statements implicating him the armed robbery and attempted armed robbery of the Dimond Branch of Credit Union One. The trials of Piers and Franklin have been severed.

III. EVIDENTIARY ISSUES

A. Stipulations

Both Piers and Franklin have entered into several stipulations with the government. The parties have stipulated that Credit Union One was insured by the National Credit Union Administration Board during the times alleged in the indictment. The parties have also stipulated to the chain of custody of items of evidence seized during the course of the investigation. As a result, the government will not be calling at least four witnesses to lay the foundation for these items of evidence. The parties are working on stipulating to the pretrial admission of certain pieces of evidence.

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EXHIBIT F:

JULY 18, 2000 GRAND JURY TESTIMONY OF FBI AGENT LOU ANN HENDERSON (EXCERPTS)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
Plaintiff,	)
vs.	)
WILLIAM EDWARD PIERS, RAYMOND LEE HUBBARD II, and DONALD DOUGLAS FRANKLIN, JR.,	)
Defendant.	)

THE TESTIMONY OF

LOUANN HENDERSON

BEFORE THE GRAND JURY

* * * * *

STEPHAN COLLINS, ASSISTANT UNITED STATES ATTORNEY
SAMUEL ALBANESE; GRAND JURY FOREMAN

* * * * *

Anchorage, Alaska
July 18, 2000
10:39 a.m.

PROCEEDINGS

(Grand Jury Exhibit 1 and 2 marked)

(On record)

LOUANN HENDERSON

having first been duly sworn under oath by the grand jury foreman, testified as follows:

JURY FOREMAN: Please be seated, state your name and spell it for the record?

A Louann Henderson. First name, L-o-u-a-n-n. H-e-n-d-e-r-s-o-n.

JURY FOREMAN: Thank you.

BY MR. COLLINS:

Q Agent Henderson, you work with the FBI?

A Yes, I do.

Q And you've been an FBI agent for how long?

A A little over 17 years.

Q Are you the case agent on a an investigation concerning William Edward Piers, Raymond Lee Hubbard II, and Donald Douglas Franklin, Junior.....

A Yes, I am.

Q .....concerning an incident that occurred on June 27th, 2000 here in Alaska, at the Credit Union 1 Federal Credit Union?

A Yes.

Q To begin with, is the Credit Union 1 an institution

MR. COLLINS: I'd advise the grand jury that a Norinko is specifically defined -- is included within the description or definition of a semi-assault -- semi-automatic assault weapon -- rifle.

A Yes. It's manufactured as a semi-automatic. Basically officers then observe Mr. Piers and Mr. Hubbard get into what we call a switch vehicle. It's a term again we use in law enforcement. In other words, they had another location already set up with a different vehicle, and Mr. Piers was observed getting into the driver's side of a stolen Ford Bronco.

I did not -- I failed to mention that the Chrysler van was also a stolen van.

Q How much prior -- how -- when was it stolen?

A The van was stolen on June 21st, six days before the robbery. And the Ford Bronco, which was a 1993 Ford Bronco red at the time that -- when they stole it, it was black at the time of the bank robbery. That was stolen in April of this year.

So they -- Mr. Piers is observed by law enforcement, and he was dressed again in all black, along with the face mask and everything, with the assault rifle, get into the driver's side of the Bronco. Mr. Hubbard, who again I described earlier, -- one thing I failed to note is he had on a tan or a light colored Carhart jacket,

which basically distinguished him from Mr. Piers. He was observed getting into the passenger side of the Ford Bronco. They then sped off.

They get out of the trailer court area. They're going westbound. They go over a grassy area, and they get onto Old Seward Highway. They're going north on Old Seward Highway, which is, you know, in front of the Sports Authority, to give you some reference. Mr. Piers loses control of the vehicles at that point in time. He hits the center median, which blows out one of the tires, and the car at that point in time turns westbound, and it's facing into the parking lot area of Tony's Chevrolet. They have a big showroom and -- down in that area off of Old Seward Highway, which is kind of directly across from the Sports Authority in that strip mall that I described earlier. He then punches the vehicle -- I'm sorry, accelerates the vehicle and goes into the parking lot of Tony's Chevrolet. Well, in the back of the parking lot is a big chain link fence. He shoots through the chain link fence, and the vehicle stops there.

At that point in time, officers again are still following these individuals, and there at that point in time is a number of officers surrounding that area.

Both immediately get out of the vehicle. Mr. Hubbard jumps out of the vehicle, and he is at this point in time

A Basically as the investigation went, on June 29th I interviewed a number of employees and determined that Mr. Piers had a roommate by the name of Donald Douglas Franklin, Jr. I went and interviewed Mr. Franklin on June 29th of 2000, two days after the robbery itself.

Q June 2- -- let me interrupt. June 27th was a Tuesday?

A Yes. Yes, it was a Tuesday.

Q And from the time that the incident occurred, how much press coverage was -- how much -- how well did the press cover this incident?

A Extensively.

Q Were there press and -- as well as news and radio reports?

A Yes.

Q Okay.

A Basically what occurred, I interviewed Mr. Franklin on three occasions. On the first occasion he was not that truthful. He did admit to me that in fact he was an employee, former employee of Credit Union 1, and that he specifically worked at the Dimond branch. He admitted that he was fired from there because he did not get along with the -- one of the senior tellers at the time. He stated that, yes, he did room with Mr. Piers during that time period. And as the first interview went, basically he indicated that he did give Mr. Piers a little

EXHIBIT G:

OCTOBER 18, 2000 GRAND JURY TESTIMONY OF FBI AGENT LOU ANN HENDERSON (EXCERPTS)

IN THE UNITED STATES DISTRICT COURT FOR THE STATE OF ALASKA

DISTRICT OF ALASKA

AT ANCHORAGE

UNITED STATES OF AMERICA,

Plaintiff,

vs

WILLIAM EDWARD PIERS, RAYMOND LEE HUBBARD, II and DONALD DOUGLAS FRANKLIN, JR.,

Defendants.

_____/

GRAND JURY PROCEEDINGS
TESTIMONY OF LOU ANN HENDERSON
OCTOBER 18, 2000
PAGES 1 THROUGH 34

APPEARANCE:

United States Attorney's Office
Stephan Collins, Esq.
701 C Street, Room C-252
Anchorage, AK 99501
(907) 271-5071

PROCEEDINGS

OCTOBER 18, 2000

Tape: GJ 00-13

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(On record - 10:45 a.m.)

LOU ANN HENDERSON

called as a witness before the grand jury , being first duly sworn upon oath, testified as follows:

(Oath administered)

WITNESS: I do.

GRAND JURY FOREPERSON: Please state your name and spell your last name for the record.

WITNESS: Lou Ann Henderson. H-E-N-D-E-R-S-O-N.

EXAMINATION OF LOU ANN HENDERSON

BY MR. COLLINS:

Q Agent Henderson, you previously testified before this grand jury, and you work for the FBI. Correct?

A Correct.

Q And you previously testified before this grand jury about the case of United States of America v. William Edward Piers, Raymond Lee Hubbard, II and Donald Douglas Franklin, Jr.?

A Correct.

objects. Like they had been purchased at the same place, possibly?

A No. Mr. Piers had on all black, basically. It was like BDUs. But Mr. Hubbard, fortunately, had on a tan colored coat, a black or blue baseball cap, a Fu Man Chu mustache/beard, and jeans. So he did not match up -- I mean, they didn't follow the plan, in that regard, which was good for us.

BY MR. COLLINS:

Q That prompts me to ask a question: Mr. Piers entered the bank with not only the firearms, but he had some communication equipment. Correct?

A Yes. A two-way radio.

Q And was he communicating with anybody during the time of the robbery, that the tellers could overhear?

A Yes. Mr. Hubbard.

Q What was the set-up of the radio that he was wearing? Mr. Piers?

A It was just a regular two-way radio that he had in one of his pockets, we're assuming.

Q Did he have any headsets?

A No.

Q You do not recall a recovery of a headset?

EXHIBIT H:

SUPPORT/CHARACTER REFERENCE LETTERS PROVIDED TO REX BUTLER AND DONALD MARKS

Macon Roberts
3221 E 142nd Ave.
Anchorage, Ak. 99516

December 9, 2000

re: William Edward Piers
D.O.B 10/31/74

To whom This May Concern:

I am a retired Probation Officer for the State of Alaska. I have known William's family since 1966, the year I arrived in the state. As a result I have known him since his birth. Given the long history I have with the family, we have not been such close friends that our friendship would obscure my objectivity.

As a former Probation Officer, it is important to point out that I have not dealt with him in a probationary capacity. To my knowledge he has no prior criminal record either as a juvenile or adult.

My assessment of William is he is not a violent person. Nor is he a very sophisticated or calculating individual, quite the contrary. Plagued with childhood illnesses which hampered his development, he is very immature and insecure.

The allegations for which William is charged are totally out of character for him. That just does not describe William .

Finally, should the Judicial System find him guilty, I think he can be rehabilitated without long term incarceration. My strong recommendation would be short term incarceration, long term probation and psychological counseling .

Thank you for your consideration.

Sincerely,

Macon Roberts

Macon Roberts, Probation Officer Ret.

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01/23/01

To whom this may concern.

This letter is about my friend William E. Piers. I would like you to know about the William I know. He is nice mannered, kind and is always honest.

Will helped my boyfriend and I when we didn't have a vehicle. If you were to sit down with him, you would see all of these things.

William, before this, has never been in jail and I don't think he should be.

He is compassionate and you could count on him when you need a shoulder to cry on. It's saddeness not having him around.

Thanks for your time.

Sincerely
Marina Trudelle

To whom it may concern,

I have known William Piers for the duration of about two years. I have known him as a good and moral person, and as a friend. I was displeased and suprised when I learned he had been incarcarated. Whether or not he is guilty is not up to me to decide, but I am positive that William Piers has a good heart and that he would never do harm to anybody intentionally. I ask that you try to understand him as a person before you pass judgement. I've been more than happy to have been a friend of Williams and I'm sure if you knew him as well as I do, you would understand what I mean. He has contributed to our community just as much as anybody else and deserves a fair and just trial. I hope that you will take into consideration all that I have written and discover that William is an honorable man. Thank you

Sincerely,

David Waldron

David Waldron

To Whom it may concern

I met William [illegible] a few years back and helped him get a job at Sears. He worked, in my opinion, very well with customers, and always had a smile for everyone he met. He was somewhat timid around people at first, but soon after would warm up to you. Very hard for me to believe this crime where ~~he~~ would ever do what he's been accused of. If William was anything he was shy and somewhat timid but very honest person.

[illegible signature]

[illegible: 7-12-01]

Dear Judge H. Russell Holland,

I am writing to you on behalf of William Piers. I have known this young man for over 15 years. He is not now, nor has he ever been, a violent person.

Even as a child William was never one to initiate any type of altercation. My daughter, Crystal, spent many recesses protecting him from playground bullies. (In fact, that is how they met each other.) Being frequently ill as a child William was always an easy target for more aggressive children. Even with all of that I never knew William to be the type of person that would plot revenge or try to get even with anyone who has hurt him.

William is a quiet young man who spent many hours doing community service works. William is respectful of his elders and authority, he loves his family and friends, and is staunchly loyal to his mother, uncles, and grandparents. His being in jail is like a nightmare that I can't awaken from.

I truly see no useful purpose in keeping William in jail for the rest of his life. Just look at his records! You will find that he has citations from the Community Council, he did well in school, and most importantly he has NO PRIOR CRIMINAL RECORD! Can the same be said of others in this situation?

I truly believe William will be a good and productive citizen once he is released. Please consider this as you make your decisions in his case. William does deserve a chance to live the life that he was always meant to. Thank you for your time in reading my letter.

Sincerely,

Robin Miller

ALASKA STATE LEGISLATURE

REPRESENTATIVE ALLEN KEMPLEN

December 11, 2000

To Whom It May Concern:

As constituents in my Legislative District, Mary Pierce and her son William Pearce, have been good neighbors and I have had many pleasant exchanges with them. As you are aware Mary's son William was recently charged in a criminal investigation. While William should certainly pay for any wrongful decisions which ultimately led him to participate in a crime, I do feel that William, as a first-time offender, was caught-up in an uncontrollable situation leading to an unfortunate circumstance.

As a first time offender and with a wonderful mother like Mary, William still has the potential of becoming a useful and productive member of society. I would certainly hope that when William is sentenced for any crime he is given every opportunity for rehabilitation. Prisons and small jail cells correlate to many examples of crime repetition and future lifetime sentences. A productive citizen is much more valuable than a life-time prisoner. While there is still an opportunity for intervention, a lengthy sentence will only hinder the future productivity and rehabilitation of William Pearce. If possible, please show leniency with William Pearce when considering his sentencing.

If you have any questions, please do not hesitate to call me anytime. Thank you for your time in considering this matter.

Respectfully,

Representative Allen Kemplen
Alaska State Legislature

SESSION (JAN - MAY)
STATE CAPITOL
JUNEAU, ALASKA 99801-1182
(907) 465-2435
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716 W. 4TH AVENUE, SUITE 240
ANCHORAGE, ALASKA 99501
(907) 269-0120
(907) 269-0122 FAX

Representative_Allen_Kemplen@legis.state.ak.us

Dear Sir!
Or Whome it may concern.

I have known this young man Williams since a baby & know him to be a very good young man.

Any thing you can do for him Pleuze do so. Thinking you in advance.

Thelma Brinson

Celeste Benson
1530 Orca Street
Anchorage, AK. 99501

January 9, 2001

To whom it may concern:

I was very saddened to hear that William Piers was involved in a serious crime. As I read the report in the paper I was shocked.

I watched William grow up. I watched him play with the neighborhood children. As a child he enjoyed picking berries from my yard and was always very well mannered when he visited me. I watched him laugh and play and grow up to be a fine young man.

William's mother has worked as a volunteer in the community for many years. We worked together in the Community Council for approximately 15 years. William also attended council meetings and helped with community clean-up projects. He was always interested in crime prevention and helped our neighborhood by reporting suspicious activity.

It is hard for me to believe that this young man is a hardened criminal. He needs help and the opportunity to turn his life around. William needs a program to help him build self-esteem and a way to be able to develop the skills that will help him deal with life in a positive and law-abiding way.

I hope you will be able to see William as a good human being and offer him the possibility to turn his life around.

Yours truly,

Celeste Benson

Celeste Benson

Dear Sir, I have Know William Piers for about 3 years. He is a good friend and kind person. I was shocked to hear of his incarseration. It is immpossible for me to imagine him doing the things he is being accused of.

William has lots of plans and dreams for the future. He wants to go to college, start his own buisness, and build his own house. He has done lots for the community as well. I can recall him helping people on numerous occations, one inpaticular stands out on my mind. There was a homeless man sitting outside in the dead of winter, and William took the time to bring him a hot meal. He is always willing to give.

William is not a violent man, I know in my heart he would never harm anyone. He likes biking, hiking, running and watching a good movie. He wants nothing more than to do these things again. What ever he may have done, he does not deserve life in prison. I am confident when ever he is released he will abide by the law and be a positive force tward all who meet him. If you look into his eyes you will see the same. Thank you for taking the time to listen.

Sincerly, Rogan [illegible]

98

November 16, 2000

To Judge Russell Holland Or
To Whom It May Concern

This note is in response to a young man, William Piers, who is presently incarcerated here in Anchorage.

I have known Mr. Piers to be a hard working young man. He has always been kind and respectable toward me.

Mr. Piers is willing to accept responsibility for anything he may have done.

Sending Mr. Piers to prison for a large number of years seems to be very unfair. Any consideration given to this young man will be greatly appreciated by anyone that knows him, especially by his family.

Thank You,

J.R. Barnhill

Scott Hutchison
2160 Westchester # 10
Manhattan, KS. 66503

Re: William E. Piers
D.O.B: 10-31-74

To Whom It May Concern,

2 January 2001

As a concerned Step-Father of William Piers, I'd like to state a few things about my Stepson. I have known William since approximately the summer of 1997 (June '97) when I first started dating his mother, Mary. Based on my observation of William from mid-1997 until I left Alaska in early March 1999; and, thereafter upon marrying William's mother in the Fall of 1999 (8SEP99), until the alleged offense, continuing to the present: The alleged criminal incident does not reflect the William that I know. Without knowledge of all the facts in this unfolding incident, I can only attest that such actions ascribed to William are wholly out of character for the young man that I have known for over the last several years.

My assessment is that William is a non-violent and non-criminally inclined young man, one nonetheless who suffers from a lack of social development as well as a dearth of positive life experiences to drawl upon. The reasons for his immature development are varied and can be traced to continuing physical ailments (e.g., Sinuitis) as well as severe teenage illness (i.e., a near fatal Brain Tumor removal). Also, a single parent household for much of his formulative years also seems to have complicated his full development.

With regard to character and personality, William is eager to please and befriend others. He would give the short of his back to one in need, and is unselfish in putting others ahead of himself—almost putting himself in peril at times. Far from being a ringleader, William is a classic follower, eager to avoid conflict and disagreement to the extreme. I can only conclude that his innocent naivety may have caught up to him, and that others may have used his personality against him in an adverse way. I am not sure he was fully cognizant in a competent legal sense, with respect to any alleged criminal act with the case at hand, just what he might have been getting loosely involved with or either the clear ramifications of such a course of action.

Again, without knowledge to all the unfolding facts gleamed from an on-going criminal investigation, I would nonetheless recommend that William be given short term (time served) incarceration, coupled with appropriate lengthy probation , as well as access to substantial psychological counseling assistance.

Thank you for your consideration.

Very Respectfully,
Scott E. Hutchison

and wife - Williams mother
of Marylee Wheaton Piers Hutchison

We would like for him to live with us.

CAPTAIN SCOTT E. HUTCHISON
U.S. ARMY
(785)539-3947
in anch. ak.
(907) 277-8218

100

AMERE GROUP

AMEREE GROUP

A COMMUNITY DEVELOPMENT GROUP

P.O. BOX 102479 ANCHORAGE, ALASKA 99510-2479 [907] 279-2254 OR [907] 561-7827

AMEREE GROUP CORPORATION

Homeless and Low-income multi-family special needs housing.

To: The Honorable Judge Holland
222 West 7th Ave
Anchorage, Alaska 99501

Dear Sir;

I am a Fairview Community Coordinator and a member of the Fairview Community Council. I am also a board member of the AMEREE Group Corporation a 501(c)(3) Nonprofit. Which networks with community leaders and businesses to assist parents and youth at risk in building a better quality of life for them-selves.

I wish to make this very important point to you on be-half of this young man, William Piers. I have known his mother for over many years. For the last 10 years, she has been working hard on trying to raise him without fear of being ill all his life. She has taught him how to live as a normal person and develop skills to handle the daily routine of life. But, as we see, there is a major event that he was involved in with two other young men. His childhood illness hampered his developing years. But as young man in our community he was able to handle responsibilities given him as task, to perform.

There are choices that we make in life that can make us successful or choices that not only destroy ones-self, but others as well. Williams Piers has been in the pass a hard worker and contributor to the community of Fairview. I wish to express to you, your Honor that, if you could consider a short term in the Alaska correctional system with mandatory counseling and rehabilitation. With strong life skill training, from the Alaska Vocation Rehabilitation Center and any other counseling agency, that will steer William in the right direction, and take the required necessary steps.

Thank you very much, your Honor, for your consideration of my letter of William Piers.

Sincerely;

Charles E. A. Stovall, Jr., Community Coordinator

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12/15/OO

To Whom It May Concern:

I have known William Piers since he was 10 years. I've been able to observe this young man and see how his character has developed into a responsible young adult.

He has had to endure numerous surgeries which has caused him to have some difficulties, especially those about life and the streets, this child was and still is clueless as to the evils and cruelty to this mean world.

This young man has lived a sheltered and Christian life. Therefore; he would not recognize a wolf in sheep's clothing.

I feel that those people that William might have been around at the time of the incident wanted a fall guy and William was available. Because of William's lack of life experiences he was easily deceived.

William has always been a civic leader in the community and received several awards. This young man was in the process of preparing himself to return back to college. He has a great deal to offer his community and fellow man.

It is his character/nature to be there to help others, he 's not an instigator, troublemaker, nor is he a violent person, he's always been there to lend a helping hand to others. .I believe with every fiber of my being that William would never do anything deliberate or otherwise to another human being. The others involved wanted a fall-guy.

William has never had a criminal record, and has not been involved in any infractions with the law. I recommend that he be released to return home to his mother and father who is in the armed forces.

I pray for relief for William Piers, and I thank you for taking time to read this letter.

Sincerely,

Daretha Tolbert

Daretha Tolbert

Wheaton
1526 Nelchina Street
Anchorage, Alaska 99501

Honorable Judge Russell Holland
or To Whom It May Concern

Your Honor

I am Agnes C. Wheaton, William E. Piers grandmother. Knowing this is a very long letter, I beg you to give William E. Piers leniency. His rehabilitation is well underway, he is so very sorry for whatever part he may have had in this, and has said he will never get involved with anyone or anything negative again. He has no record.

William is not a flight risk or a dangerous person. He is a very kind and gentle person. He is my only grandchild and I believe he is as much dumbfounded as I, that he has gotten into this situation. He has never been in trouble before this. I love him dearly. William is a trustworthy, helpful young man.

William would not do the things he is accused of and I don't believe he has the kind of intelligence to plan this. He is a follower. This is the first time he has ever been in trouble.

Please consider Fairness. William is not street wise. He is very naive. If he should have to go to jail, please let it be somewhere safe and where he could take classes and not be raped or killed.

He would be better off at his parents home. His step dad is in the army and his life would be structured and he could take classes or work or what ever you would allow him to do.

William E. Piers will die in Federal Prison as he is very gentle and believes everyone is good. He would not be able to survive. He is small built, physically. Jail is a death sentence.

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Wheaton
1526 Nelchina Street
Anchorage, Alaska 99501

William E. Piers has been sick all his life. Having Ear operations as a small child. He had two extremely serious sinusitus operations at 19 years of age and has had a constant sinus headache, allergies and related illnesses as an adult. However with all his health problems, he has never been in trouble and strives to overcome life's difficulties.

His mother planned on a new marriage and William got an apartment with Douglas Franklin for about a year. William was moving back home but D. Franklin could not live here on the property due to, in my opinion, his smoking and drinking and sneaky way of acting. He introduced William to Ray Hubbard. They visited and saw William at friends houses as well as Doug Franklin's father house.

William worked very hard painting the rooms and building a new closet and fixing the place in readiness for his Halloween birthday party. He did this early as he was going to college in July. William had his college loan and was very excited about going to college to become an electrician.

I have watched my grandson grow into a gentle, kind and helpful person. He may have turned 26 years old on Halloween but he has limited life experience. He is very, very naive and believes everyone is good. He is very loyal and easily convinced and led. He does not have street life experience. He was home due to illness and not out in the world.

William has always been very respectful and good to me. He has always helped me when I have asked him. He would get up in the middle of the night or any time to help any acquaintance that asked for help. He would come and volunteer my house when Doug Franklin, Ray Hubbard and others were left alone in his living areas.

105

Wheaton
1526 Nelchina Street
Anchorage, Alaska 99501

Please Sir, let William E. Pierce live with his parents and receive counseling and take some college classes.

Thanking you for reading this letter.

Sincerely
Mrs. Agnes V. Wheaton

1327 Kinnikinnick Street
Anchorage, Alaska 99508

November 30, 2000

Judge Russell Holland
Anchorage, Alaska

Dear Judge Holland:

I am writing with regards to my nephew, William Piers, and his case before you. I have no knowledge of the facts of the case nor the degree to which my nephew was involved, though I am greatly concerned, for his sake, to think he may well have been. Nevertheless I ask that you consider several points as his trial proceeds based on my admittedly limited perspective.

I recognize that the crimes for which William is charged reflect a disregard for life and property. The anger of the victims and the police at their assault and injury is justifiable, one that deserves public voice and redress. I, like most people, have been faced and afflicted by violence, and the violence of these crimes is dumbfounding to me. However, I respectfully remind your honor, that no less so is the violence of vengeance, whether it serves calculated personal ambitions or simply feelings of self-righteousness or vengeful satisfaction. These are crude and barbaric responses, not worthy of an educated society nor even of civilized victims. I hear more and more that we are a nation of values, and particularly of Christian values. In this vein, I remind you that Christ, when invited to begin the public stoning of a state criminal, declined, saying let he who is without sin hurl the first stone. I am not a Christian, yet I cannot think that Christ said this in sanction of wrongdoing, but rather as a reminder that none of us is innocent. Vengeance cannot be ours. In this case, I humbly request your honor guard especially, as I am confident you will, to see that the law is not overextended to allow perpetration of simply another crude public violence on top of the awful first.

This is not to say that I believe that no consequence should be met by the perpetrators of these crimes. To the extent that William (and others) was involved, as much as it truly hurts me to say it, he (and the others) must be punished to the extent each participated. I

don't believe, though, that this means that William should take the "fall" for every one involved. He should not be scapegoated for every other participant's actions simply because it provides the prosecutor—perhaps with a focus on an plea to the normal human vengefulness and self-righteousness that is a part of all of us—with an easier means to build a successful case. I understand that your honor must follow the law. You will also ultimately determine justice in William's case. I only wish you insight and wisdom as the trial proceeds and concludes so that justice is not made truly blind and all of us the littler for it, simply because of a desire to strike at a greater evil through one small individual.

Finally, your honor, though our life philosophies my differ, I would hope that we would agree that punishment simply to punish is not only dark-hearted but inefficient and wasteful. It costs a lot of money to imprison someone. I am uncertain as well that our prisons offer any real opportunity for rehabilitation, and fear that they serve only as incubators of anger, resentment, distrust and despair of any real self worth except ultimately within the fellowship of sociopaths. In my mind this means that where society truly needs protection, we must maintain imprisonment, but wherever there is any opportunity for redemption it is not only morally correct but economically and socially beneficial to recognize that opportunity and seize it. I believe it is true in William's case. He has never been in trouble before—of even the most minor sort. He has successfully held jobs and is intelligent, talented and generous, particularly for a 25 year old of today. I believe it is telling that the careers that he has tentatively pursued or studied include that of EMT, police officer and architect, with the intent to serve others in a creative way.

I have always felt that one of his weaknesses is that he has large dreams of professional accomplishment but some difficulty in persevering through the inevitable "learning curve". I have been heartened by his attitude and growing maturity in this regard lately. Just a week before he was involved in these crimes, he agreed to help me build a wood-fired sauna. For three days we worked very hard. William has limited carpenter skills so I initially gave him the tiresome job of carrying all the lumber to the off-road site. I was gratified when he cheerfully worked steadily and alone to accomplish this onerous "grunt" task (with no encouragement from me) and then worked every bit as hard as I did to accomplish a series of very strenuous tasks over the next several days. We founded and closed-in the building but did not quite complete the job, and when I paid him the amount I had promised him I was astonished and pleased that it was William that earnestly suggested we continue for a few more days to finish the job. "I'll do it for free" he said—in my mind he just wanted to have the satisfaction that a mature human being experiences when they finish a job, needing no outside acknowledgement to know that its good.

It particularly grieves me to have so recently witnessed a sign of some growing maturity in William and then see its potential dashed by one gruesomely foolish deed. I do not understand how William could have participated in the criminal actions he is charged with, but to the extent that he did, though it tears at my soul to acknowledge it, he must be punished. However, your honor, it would be a much greater tragedy and, I think, of no benefit to the community to inflict an excessive punishment that will only punish society, certainly in terms of dollars and potentially in terms of a productive human being. I know that your honor does not know me and certainly you must hear these pleas all too often. Still, I entreat you honor to carefully weigh William's past record. Consider his alleged participation in these criminal actions with a group of youthful peers whose actions surely must have stoked William's participation as much as he theirs. Weigh the possibility of a prosecutor's strategy to use those peers to convict him and a concomitant need to raise the villainy of William's actions in order to satisfy a not-unwarranted public fear and righteous outcry against all crime. Though it certainly cannot mitigate his actions, even the fact that no one was physically hurt—though perhaps fortuitous—I believe should be considered. Finally please consider my own admittedly subjective belief that William is at heart a good young man who I believe has the intelligence to recognize, correct and learn to avoid the mistake he may have made in participating in these events. Extreme punishment may only yield to ugly public vengeance, in this case at the cost of both society and my nephew. I place my confidence in your judgement and wish you wisdom and success in contemplating and rendering a moral—and rational—justice in his case.

Sincerely,

Scott R Wheaton

EXHIBIT I:

GOVERNMENT EXHIBIT SHEET FROM REX BUTLER'S TRIAL FILE, SHOWING STIPULATIONS

#	Item Description	Person Identifying /Admitting	Admitted
1	NCUA Insurance Certificate	Court	Stip
2 A	Black Plastic Ties	Chasity Monette	
2 B	Black Plastic Ties	Chasity Monette	
2 C	Black Plastic Ties	Chasity Monette	
2 D	Black Plastic Ties	Chasity Monette	
2 E	Black Plastic Ties	Chasity Monette	
2 F	Black Plastic Ties	Alana Wooten	
2 G	Black Plastic Ties	Alana Wooten	
2 H	Black Plastic Ties	Alana Wooten	
2 I	Black Plastic Ties	Alana Wooten	
2 J 2 K 2 l	Black Plastic Ties Duck Tape Duck Tape	Alana Wooten Chasity Alana	
3	Photo Album	Court	Stip
4 A	Hubbard Jacket	Court-Hubbard	Stip

4 B	Hubbard T-Shirt	Court-Hubbard	Stip
4 C	Hubbard Pants	Court-Hubbard	Stip
#	Item Description	Person Identifying /Admitting	Admitted
4 D	Hubbard Gloves	Court-Hubbard W of railroad track	Stip
4 E	Hubbard Vest	Court-Hubbard W of railroad track	Stip
4 F	Blue Fox Baseball Cap	Court-Hubbard near bronco	Stip
5	Money Bag	Court	Stip
6	Piers' Helmut	Court	Stip
7	Spent Casing Outside Van	Court	Stip
8 A	Casing Inside Van	Court	Stip
8 B	Casing Inside Van	Court	Stip
8 C	Casing Inside Van	Court	Stip
9	Ripped Black Plastic Bags	Court	Stip
10	Berretta	Court	Stip
11	Black Tape from Van	Court	Stip
12	Ignition Pieces	Court	Stip
13	Fake License Plate	Court	Stip
14	Flares	Court	Stip
15	Handheld Radios	Court	Stip

16 A	Norinco	Court	Stip
16 B	Ammo Bronco	Court	Stip
16 C	Shem Full Auto Lab Report	Shem	
#	Item Description	Person Identifying /Admitting	Admitted
16 D	Shem Ammo Report	Shem	
17	Car Theft Note	Court	Stip
18 A	Back Pack	Court	Stip
18 B 18 C	Robbery Plan Hubbard's Back Pack Halterman Report	Court Halterman	Stip
19	Shin pads	Court	Stip
20	Goggles	Court	Stip
21	Vest	Court	Stip
22	Black Web Belt	Court	Stip
23	Piers' Boots	Court	Stip
24	Gloves	Court	Stip
25	Green Long Sleeve Shirt	Court	Stip
26	Black Long Sleeve Shirt	Court	Stip
27	Black Tactical Pants	Court	Stip
28	Black Leather Belt	Court	Stip
29	Black Inside Pants Holster	Court	Stip

30	Black Face Mask	Court	Stip
31	Hand Cuff Key	Court	Stip
32 A	Ammo	Court	Stip
32 B	Ammo	Court	Stip
32 C	Web Belt 3 pouches	Court	Stip
33	Misc Web gear	Court	Stip
34	9mm pouch	Court	Stip
35 A	Piers' CIA badge	Court	Stip
35 B	Franklin's CIA Badge	Court	Stip
36	Holster Misc	Court	Stip
37	Utility Belt	Court	Stip
38	Utility Belt Cuff	Court	Stip
39	Fake ID paperwork	Court	Stip
40	Yellow Address Book	Court	Stip
41	Burgundy Address Book	Court	Stip
42	Headset radio	Court	Stip
43	Motorola Mic	Court	Stip
44	Utility Belt Radio Holster	Court	Stip
45	Ear Phones	Court	Stip
46	Lock Pick Set	Court	Stip
47	Vehicle Lock Pick Set	Court	Stip

48	"Add to Equip" note	Court	Stip
49	Cordura Rifle Case	Court	Stip
50 A	Ammo Box	Court	Stip
50 B	Two Clips	Court	Stip
50 C	Ammo box	Court	Stip
51 A	Plastic Rifle Case	Court	Stip
51 B	#21112 Original Parts	Court	Stip
51 C	Bolt Obliterated Serial #	Court	Stip
51 D	Cover with drill marks	Court	Stip
51 E	Firing Pin	Court	Stip
51 F	2 selectors	Court	Stip
51 G	Ground Bolt	Court	Stip
52	Calendar with Ops marked	Court	Stip
53	Computer Disk with Plan	Court	Stip
54	Computer Disk Plan	Payne	
55	Computer version Franklin Resume	Payne	
56	Dispatch Tape	Heun	
57	Tyee Lease Folder	D'Ette Owen	

#	Item Description	Person Identifying /Admitting	Admitted
58	Thomas Franklin Resume	Fred Thomas	
59	DMV Franklin	Henderson	
60	Piers' Confession Video	Henderson	
61	Bank Surveillance Video	Court-Henderson	
62	Franklin Sketch	Henderson	
63	Agreement		Stip
64	Map - big board	~~Bloodgood~~ Reeder APD	
55	(a) CD Disc	Payne FBI	
65	ariel photograph	Bloodgood APD	
55	(b) print out from AR=7 compute	Payne	
55	(c) resume of client	Payne	
55	(d) resume of Franklin	Payne	
54	(a) printout of plan	Payne	

EXHIBIT J:

DECLARATION OF MARY HUTCHISON

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 MARY HUTCHISON IN SUPPORT OF MOTION TO VACATE CONVICTIONS AND SENTENCES PURSUANT TO 28 U.S.C. § 2255

I, MARY HUTCHISON, declare under penalty of perjury as follows:

1. I am William Edward Piers's mother.

2. I have reviewed William Piers's Motion to Vacate Convictions and Sentences and Request for Evidentiary Hearing Pursuant to 28 U.S.C. § 2255. To the best of my knowledge, the factual assertions made therein are true and correct.

3. I have discussed William Piers's Reply to Government's Opposition to Defendant's Motion for Relief Pursuant to 28 U.S.C. § 2255 with Mr. Piers's attorneys, Michael Levine and Matthew McHenry. To the best of my knowledge, the factual assertions made therein 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 4-28-05 /s/ Mary Hutchison
MARY HUTCHISON

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United States v. William Piers, Case No. A00-0104 CR (HRH)

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below I served the foregoing Reply to Government's Opposition to Defendant's Motion for Relief Pursuant to 28 U.S.C. § 2255; Exhibits D–J, by depositing a true copy of same in the United States Mail addressed as follows:

Stephen A. Collins
Assistant United States Attorney
Federal Building & U.S. Courthouse
222 West Seventh Avenue, #9, Room 253
Anchorage, AK 99513-7567

Dated May 9, 2005

Michael R. Levine