

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RIGOBERTO CABRERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

APPENDIX

Rigoberto Cabrera #33513-018

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pro se

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-10772-J

RIGOBERTO CABRERA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Rigoberto Cabrera moves for a certificate of appealability, as construed from his notice of appeal, in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate. His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

/s/ Britt C. Grant
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-23627-CIV-COHN/REID
(CASE NO. 13-20339-CR-COHN)

RIGOBERTO CABRERA

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

**ORDER ADOPTING REPORT OF MAGISTRATE JUDGE AND DENYING MOTION
TO HOLD § 2255 MOTION IN ABEYANCE**

THIS CAUSE is before the Court upon the Report of Magistrate Judge [DE 14] ("Report") submitted by United States Magistrate Judge Lisette M. Reid regarding Movant Rigoberto Cabrera's Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [DE 9] and Movant's Motion to Hold § 2255 Motion in Abeyance [DE 16] (collectively, "Motions"). Pursuant to 28 U.S.C. § 636(b)(1), the Court has conducted a *de novo* review of the Motions, the Report, Movant's Objections [DE 18], the Government's Response to Movant's Objections [DE 19], and the record in this case, and is otherwise advised in the premises. Upon careful consideration, the Court will adopt the Report, overrule Movant's objections, and deny the Motions.

As detailed in the Report, Movant was convicted of numerous charges stemming from an income tax fraud scheme. DE 14 at 2-3. Movant and his associates filed returns for taxpayers and themselves which "fraudulently claimed unfounded refunds based on Form 2439, an obscure IRS form that allows taxpayers a refund for taxes already paid on previously taxed 'undistributed long term capital gains.'" United States

v. Cabrera, 635 F. App'x 801, 803-04 (11th Cir. Dec. 30, 2015). At trial, "[t]he government presented dozens of witnesses and scores of exhibits tying Cabrera to the fraudulent returns and to attempts to launder the proceeds." Id. at 804. The Eleventh Circuit described the government's case as "thorough and compelling." Id. After a five-day jury trial, Movant was found guilty of conspiracy to defraud the government with respect to claims, in violation of 18 U.S.C. § 286 (Count 1), eighteen counts of making false, fictitious and fraudulent claims, in violation of 18 U.S.C. § 287 (Counts 2 through 9, 11 through 20), conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349 (Counts 21), four counts of wire fraud, in violation of 18 U.S.C. § 1343 (Counts 22 through 25), conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) (Count 26), and four counts of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) (Counts 27 through 30).

Prior to sentencing, a Presentence Investigation Report ("PSI") was prepared which set forth a loss amount of \$10,242,667. Based on a total offense level 37 and criminal history category IV, the advisory guideline range was 292 to 365 months imprisonment. The Court overruled Movant's objections to the PSI, adopted the PSI's guideline calculations, and imposed a bottom of the guidelines range sentence of 292 months. DE-Cr 125.¹ Movant appealed his conviction and sentence, and the Eleventh Circuit affirmed. DE-Cr 148. Now, in his § 2255 Motion, Movant raises three grounds for relief:

1. Ineffective assistance of counsel in failing to object to the amount of intended loss;

¹ "DE-Cr" citations refer to docket entries in the related criminal proceedings, Case No. 13-20339-CR-COHN. "DE" citations refer to docket entries in the instant civil proceedings.

2. Ineffective assistance of counsel in failing to subpoena witnesses and documents and failing to use prior inconsistent grand jury testimony and documents in evidence to impeach the testimony of key government witnesses that the Movant had prepared the fraudulent tax return which served as the basis for Count 2 of the Superseding Indictment; and
3. That the Government violated Movant's due process rights by failing to comply with Giglio v. United States, 405 U.S. 150 (1972).

See DE 9. Movant has also filed a separate Motion to Hold § 2255 Motion in Abeyance wherein he states that he intends to seek relief pursuant to the First Step Act of 2018 ("First Step Act"), Pub. L. 115-391 and requests that the Court hold his § 2255 Motion in abeyance pending resolution of his forthcoming motion under the First Step Act. DE 16.

In her Report, Judge Reid concludes that Movant is entitled to no relief. First, with respect to Movant's counsel's failure to object to the amount of intended loss, Judge Reid found that Movant cannot establish deficient performance or prejudice under Strickland v. Washington, 466 U.S. 668 (1984) arising from counsel's failure to make this objection because the loss figure was correct. DE 14 at 16-18. Judge Reid also concluded that Movant's second claim fails because he has not shown that the result of the trial would have been different as to Count 2 had his counsel attempted to establish that Movant could not have filed the return which served as the basis for Count 2 because it was filed on the same date that Movant was released from immigration custody. Id. at 18-20. Judge Reid noted that while the initial indictment alleged that this return was filed on January 24, 2009—the day Movant was released from immigration custody—the superseding indictment correctly reflected that the fraudulent Form 2439 was not attached to the original form, but rather was attached to an amended return filed on or about May 7, 2009. Id. Finally, Judge Reid concluded

that Movant was entitled to no relief with respect to his third claim because he has not demonstrated that the Government's witnesses testified falsely or that the Government suborned perjury. Id. at 20-24.

Movant's Objections are essentially a repetition of the arguments he advanced in his Motion. First, he claims that Special Agent Calabrese's calculation of the intended loss figure that was in the PSI is speculative and unreliable. DE 18 at 3-4. The Court disagrees. The evidence linking Movant to the tax returns that formed the basis for Agent Calabrese's loss figure is overwhelming and certainly sufficient to satisfy the preponderance of the evidence burden that the Government bore at sentencing. Movant relies on Agent Calabrese's use of the word "could" in her Declaration² as support for his argument to the contrary. DE 18 at 2 ("her affidavit merely states that these additional tax returns '**Could**' be linked to Cabrera. This is far from the standard of proof required to use those tax returns as relevant conduct.") (emphasis in original). Clearly, however, this language in no way suggests that the Government was unable to prove the loss figure by a preponderance of the evidence.

Next, Movant's Objections relating to his second and third claims both primarily concern the testimony of the Government's witness Victoria O'Brien. DE 18 at 5-7. Movant claims that she identified January 24, 2009 as the filing date of the amended return that served as the basis for Count 2. Id. at 5. Thus, Movant argues that had his counsel clarified on cross-examination that the amended return was filed on that date, he could have shown that it would have been impossible for Movant to have filed the amended return because he was in custody on that date. Id. at 7. The Court agrees

² Agent Calabrese stated that, during her investigation, she "compiled a list of taxpayers whose tax filings could be linked to Cabrera." DE 11-2 ¶ 3.

with Judge Reid, however, that even if Movant's counsel had attempted to make this showing, the result of the trial would not have been different. This is because Ms. O'Brien's testimony was clear that it was the *original* return—not the fraudulent amended return—that was filed on January 24, 2009. See DE-Cr 138 at 150:3-21. While there is arguably some ambiguity in Ms. O'Brien's later testimony regarding the precise date the amended return was filed, Movant has not shown how he was prejudiced by his counsel's failure to attempt to resolve this ambiguity. That is, even if May 7, 2009 was the date the amended return was processed by the IRS—as Movant contends—as opposed to the date the amended return was received by the IRS, this would still not have shown that it would have been impossible for Movant to file the amended return due to his incarceration on January 24, 2009 because the evidence was that the amended return was filed by mail or filed as a walk-in some time after the original return was filed on January 24, 2009.

Finally, turning to Movant's Motion to Hold § 2255 Motion in Abeyance, the Court notes that this Motion was filed on December 8, 2019. DE 16. As of the date of this Order, over two months later, Movant has yet to seek relief under the First Step Act. Accordingly, the Court declines to hold Movant's § 2255 Motion in abeyance indefinitely pending Movant's forthcoming motion under the First Step Act. Additionally, it is unclear how Movant would benefit from the First Step Act in this case, given that none of Movant's charges involve crack cocaine. In light of the foregoing, it is hereby

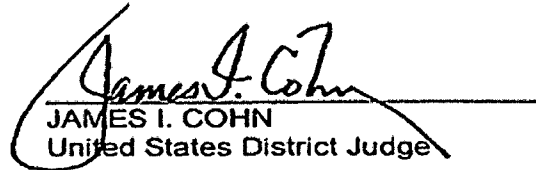
ORDERED AND ADJUDGED as follows:

1. The Report of Magistrate Judge [DE 14] is **ADOPTED** in its entirety.
2. Movant's Objections [DE 19] are **OVERRULED**.

3. Movant's Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [DE 9] is **DENIED**.
4. Movant's Motion to Hold § 2255 Motion in Abeyance [DE 16] is **DENIED**.
5. A certificate of appealability is **DENIED**. The Court notes that pursuant to Rule 22(b)(1) of the Federal Rules of Appellate Procedure, Movant may now seek a certificate of appealability from the Eleventh Circuit.
6. The Clerk of Court is directed to **CLOSE** this case for all purposes and **DENY** as moot all pending motions.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County,

Florida, this 12th day of February, 2020.


JAMES I. COHN
United States District Judge

Copies provided to:
United States Magistrate Judge Lisette M. Reid
Counsel of record via CM/ECF
Pro se parties via U.S. mail to address on file

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-23627-CV-COHN
CASE NO. 13-20339-CR-COHN
MAGISTRATE JUDGE REID

RIGOBERTO CABRERA,

Movant,

v.

UNITED STATES OF AMERICA,
Respondent.

REPORT OF MAGISTRATE JUDGE
RE MOTION TO VACATE - 28 U.S.C. § 2255

I. Introduction

Movant, **Rigoberto Cabrera** ("Movant"), has filed this *pro se* motion to vacate, pursuant to 28 U.S.C. § 2255, attacking the constitutionality of his convictions and sentences for conspiracy to file false claims and related offenses, entered following a jury verdict in Case No. 13-20339-CR-Cohn. For the reasons explained in detail below, Movant is not entitled to habeas corpus relief.

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B), S.D. Fla. Admin. Order 2019-02, and Rules 8 and 10 Governing Section 2255 cases in the United States District Courts.

II. Claims

Construing the § 2255 motion liberally as afforded *pro se* litigants, pursuant to *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)(*per curiam*), the Movant raises the following three grounds for relief:

1. He was denied effective assistance of counsel, where his lawyer failed to object to the amount of intended loss at sentencing, and then failed to raise the issue on appeal. [CV ECF No. 9, p. 3; CV ECF No. 8-1, p. 2].
2. He was denied effective assistance of counsel, where his lawyer failed to subpoena witnesses and documents, and failed to use prior inconsistent grand jury testimony and documents in evidence to impeach the testimony of key government witnesses that the Movant had prepared the fraudulent tax return, which served as the basis for Count 2 of the Superseding Indictment. [CV-ECF No. 9, p. 5; ECFF No. 8-1, p. 3].
3. The government violated the Movant's due process rights by failing to comply with *Giglio*.¹ [ECF No. 9, p. 9; ECF No. 9-1, p. 6].

III. Procedural Background

A. Indictment and Verdict

Movant was charged with and found guilty of conspiracy to defraud the government with respect to claims, in violation of 18 U.S.C. § 286 (Count 1), eighteen counts of making false, fictitious and fraudulent claims, in violation of 18 U.S.C. § 287 (Counts 2 through 9, 11 through 20), conspiracy to commit wire fraud,

¹*Giglio v. United States*, 405 U.S. 150 (1972).

in violation of 18 U.S.C. § 1349 (Counts 21), four counts of wire fraud, in violation of 18 U.S.C. § 1343 (Counts 22 through 25), conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) (Count 26), and four counts of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) (Counts 27 through 30), following a jury verdict. [CR ECF Nos. 50; 96; 126].

B. Sentence and Direct Appeal

Prior to sentencing, a Presentence Investigation Report (“PSI”) was prepared, grouping Counts 1, 2 through 9, and 11 through 20, because the offense level for these offenses is largely determined based on the total amount of harm or loss, pursuant to U.S.S.G. § 3D1.2(d). (PSI ¶ 19). The money laundering counts, Counts 26, and 27 through 30, were also grouped because the offense level is also based on the amount of harm or loss. (PSI ¶ 20). The fictitious claims/wire fraud counts were grouped together with the money laundering offenses. (PSI ¶ 21). The PSI determined that the underlying offense from which the laundered funds were derived was wire fraud, in violation of 18 U.S.C. § 1343, and set the base offense level at level 7. (PSI ¶ 23). Because the offense carries a statutory maximum term of twenty years imprisonment, and Movant was responsible for a loss of \$10,242,667, an additional twenty levels were added to the base offense level, pursuant to United States Sentencing Guidelines (“U.S.S.G.”) § 2B1.1(b)(1)(K) (U. S. Comm’n 2013). (PSI ¶ 23). An additional four levels were added to the base offense level based on

specific offense characteristics. (PSI ¶¶ 24-25). Four more levels were added because it was determined that Movant was an organizer or leader of the criminal activity which involved five or more participants or was otherwise extensive, pursuant to U.S.S.G. § 3B1.1(a). (PSI ¶ 27). The total adjusted offense level was thus set at level 37. (PSI ¶ 32).

Next, the probation officer determined Movant had a total of eight criminal history points, resulting in a criminal history category IV. (PSI ¶¶ 48-50). Based on a total offense level 37 and a criminal history category IV, the advisory guideline range was 292 to 365 months imprisonment. (PSI ¶ 80). Statutorily, as to Count 1, Movant faced zero to ten years imprisonment for violation of 18 U.S.C. § 286. (PSI ¶ 79). As to Counts 2 through 9 and 11 through 20, Movant faced a term of zero to five years imprisonment for violation of 18 U.S.C. § 287. (*Id.*). Regarding Counts 21 through 25, Movant faced zero to twenty years imprisonment for violation of 18 U.S.C. § 1343. (*Id.*). Finally, as to Counts 26 through 30, Movant faced a term of zero to twenty years imprisonment for violation of 18 U.S.C. § 1956(a)(1)(B)(i). (*Id.*). Pursuant to U.S.S.G. § 5G1.2(d), if the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. (PSI ¶ 80).

Movant filed objections to the PSI, claiming the probation officer erroneously failed to group the wire fraud counts with the money laundering counts, and erroneously added four levels based on specific offense characteristics on the basis that it constitutes double punishment for the same conduct. [CR ECF No. 116]. Movant further argued that the guidelines should have been computed under U.S.S.G. § 2B1.1 and not § 2S1.1, which would have resulted in a lower advisory guideline range. (*Id.*). Movant also requested a downward variance and that the court impose a reasonable sentence no greater than 180 months imprisonment. (*Id.*).

On January 24, 2014, Movant appeared for sentencing. [CR ECF No. 124]. The court overruled Movant's objections, adopted the PSI, and sentenced Movant to a total term of two-hundred and ninety-two months of imprisonment, consisting of: (1) one-hundred and twenty months of imprisonment as to Count 1; (2) sixty months of imprisonment as to Counts 3 through 9 and 11 through 20; (3) two hundred and forty months of imprisonment as to Counts 21 through 30; and, (4) a consecutive fifty-two months of imprisonment as to Count 2, to be followed by a total term of thirty-six months of supervised release, and imposed restitution in the amount of \$1,526,622. [CR ECF No. 126].

Movant prosecuted a direct appeal raising the following arguments: (1) there was insufficient evidence to support the convictions; (2) his due process rights and Fifth Amendment rights were violated by the government who failed to produce the

“uncharged false returns” prior to the testimony of a government witness; and, (3) the trial court erred in calculating Movant’s advisory guidelines. *See United States v. Cabrera*, 635 F. App’x 801 (11th Cir. Dec. 30, 2015)(unpublished); [CR ECF No. 148]. Certiorari review was denied on **October 3, 2016**. *See Cabrera v. United States*, 137 S.Ct. 176 (2016); [CR ECF No. 149].

For purposes of the federal one-year limitations period, the judgment of conviction in the underlying criminal case became final on **October 3, 2016**, when the Supreme Court denied certiorari review. *See Gonzalez v. Thaler*, 565 U.S. 134, 149-50 (2012); *Phillips v. Warden*, 908 F.3d 667, 672 (11th Cir. 2018). At the latest, Movant was required to file this motion to vacate within one year from the time his conviction became final, or no later than **October 3, 2017**. *See* 28 U.S.C. § 2244(d)(1)(A); *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1986); *Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008).

C. § 2255 Motions

Movant returned to this court timely filing his initial § 2255 motion to vacate on September 29, 2017, pursuant to the mailbox rule, after he signed and then handed it to prison officials for mailing. [CV ECF No. 1, p. 12]. *See Washington v. United States*, 243 F.3d 1299, 1301 (11th Cir. 2001). The movant filed his Amended § 2255 on October 23, 2017, after expiration of the one-year limitations period. However, the claims raised in the amended motion are timely because they relate back to the

timely filed initial motion. *See Davenport v. United States*, 217 F.3d 1341 (11th Cir. 2000).²

IV. Standard of Review

A. Section 2255

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on a final judgment, pursuant to 28 U.S.C. § 2255, are extremely limited. A prisoner is entitled to relief under § 2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a); *McKay v. United States*, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). Thus, relief under § 2255 is reserved for transgressions of constitutional rights, and for that narrow compass of other injury that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. *United States v. Frady*, 456 U.S. 152, 165 (1982); *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004)(citations omitted). If a court finds a claim under § 2255 valid, the court shall vacate and set the judgment aside and shall discharge the prisoner, grant a new trial, or correct the sentence. 28

²In *Davenport v. United States*, 217 F.3d 1341, 1346 (11th Cir. 2000), the Eleventh Circuit held that where a movant adds new claims in an amended § 2255 motion to vacate which do not relate back to claims raised in an initial timely filed motion, the new claims are time-barred. *See also Mayle v. Felix*, 545 U.S. 644 (2005).

U.S.C. § 2255. The burden of proof is on Movant, not the government, to establish that vacatur of the conviction or sentence is required. *Beeman v. United States*, 871 F.3d 1215, 1221-1222 (11th Cir. 2017).

To overcome a procedural default arising from a claim that could have been, but was not raised on direct appeal, Movant must demonstrate: (1) cause for failing to raise the claim and resulting prejudice; or, (2) that a miscarriage of justice excuses the procedural default because Movant is actually innocent. *See McKay v. United States*, 657 F.3d 1990, 1996 (11th Cir. 2011). The actual innocence exception is exceedingly narrow in scope as it concerns a petitioner's "actual" innocence, rather than his "legal" innocence. *Johnson v. Alabama*, 256 F.3d 1156, 1171 (11th Cir. 2001).

B. Ineffective Assistance of Counsel Principles

Where, as here, a defendant challenges counsel's effectiveness, he must demonstrate that: (1) counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). However, if Movant cannot meet one of *Strickland*'s prongs, the court does not need to address the other prong. *Strickland*, 466 U.S. at 697; *Brown v. United States*, 720 F.3d 1316 (11th Cir. 2013).

To show deficient performance, a movant must demonstrate that "no competent counsel would have taken the action that his counsel did take." *Gordon*

v. United States, 518 F.3d 1291, 1301 (11th Cir. 2008)(citations omitted). With regard to the prejudice requirement, Movant must establish that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Counsel, however, has no duty to raise non-meritorious claims. *Hittson v. GDCP Warden*, 759 F.3d 1210, 1262 (11th Cir. 2014). Courts may not vacate a conviction or sentence solely because the outcome would have been different, but for counsel's error, as it may grant the defendant a windfall to which the law does not entitle him. *Lockhart v. Fretwell*, 506 U.S. 364, 369-70 (1993); *Allen v. Sec'y, Fla. Dep't of Corr.*, 611 F.3d 740, 754 (11th Cir. 2010). Bare and conclusory allegations of ineffective assistance are also insufficient to satisfy the *Strickland* test. See *Blackledge v. Allison*, 431 U.S. 63, 74 (1977); *Boyd v. Comm., Ala. Dep't of Corr.*, 697 F.3d 1320, 1333-34 (11th Cir. 2012).

Finally, the Eleventh Circuit has recognized that given the principles and presumptions set forth above, "the cases in which habeas petitioners can properly prevail ... are few and far between." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000). The *Strickland* test does not require a showing of what the best or good lawyers would have done, but rather whether some reasonable lawyer could have acted in the circumstances as defense counsel acted. *Dingle v. Sec'y for Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007). In retrospect, where counsel's decision appears to have been unwise, it will have been ineffective only if it was "so

patently unreasonable that no competent attorney would have chosen it.” *Dingle v. Sec’y for Dep’t of Corr.*, 480 F.3d at 1099 (citations omitted).

A meritorious claim of ineffective assistance of counsel can, however, constitute cause for a procedurally defaulted claim. *See United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000). Ineffective assistance of counsel claims, however, are generally not cognizable on direct appeal and are properly raised by way of a § 2255 motion regardless of whether they could have been brought on direct appeal. *Massaro v. United States*, 538 U.S. 500, 503 (2003); *see also United States v. Patterson*, 595 F.3d, 1324, 1328 (11th Cir. 2010).

V. Facts Adduced at Trial

Because Movant raises claims relating to the testimony of government witnesses and evidence introduced at trial, the facts, as succinctly narrated by the Eleventh Circuit in *United States v. Cabrera*, 635 F. App’x at 803-04, follows:

The federal government discovered that Cabrera had masterminded an income tax fraud scheme that worked as follows. Cabrera and his associates would tell taxpayers they were entitled to tax refunds and offer to help the taxpayers get the refunds in exchange for a cut of the refund plus a fixed fee. Taxpayers who accepted the offer of services would give their names, W-2s, and other basic identifying information to Cabrera or his associates, who would electronically file the taxpayers’ returns. The returns fraudulently claimed unfounded refunds based on Form 2439, an obscure IRS form that allows taxpayers a refund for taxes already paid on previously taxed ‘undistributed long term capital gains.’ The capital gains identified in the taxpayers’ Form 2439s were falsely attributed to shell companies set up by Cabrera and his cohorts, who electronically filed substantially identical Form 2439s for dozens of people, including for Cabrera himself. In many cases, they

used unsuspecting third parties' unsecured wireless networks to file the returns, so that it looked like the returns came from people unaffiliated with the scam.

As a result of the scheme, the IRS erroneously paid millions of dollars in undue refunds. When the refunds arrived, Cabrera or an associate would coordinate with the taxpayers to collect Cabrera's share. Cabrera arranged with Elias Obando to create new shell companies with bank accounts into which Cabrera's share of the refunds were deposited. Thus laundered, the funds were then withdrawn and turned over to Cabrera.

. . . the government introduced spreadsheets generated by the IRS's electronic fraud detection system. The spreadsheets catalogued certain information about electronically-filed returns, including the name on the return, the internet protocol (IP) address from which the return was filed, and the date the return was filed. . . .

The government presented dozens of witnesses and scores of exhibits tying Cabrera to the fraudulent returns and to attempts to launder the proceeds. IRS agents testified about the striking similarities between all of the other Form 2439s involved in the case and Cabrera's own fraudulent return. An IRS agent told the jury that Cabrera had amended his fraudulent return only after the IRS agent threatened him with prosecution, and that Cabrera nevertheless persisted in lying about the amended return. Some taxpayers told the jury about meeting with Cabrera and agreeing to let him file their taxes in exchange for promises to pay a percentage of the refunds they received to companies controlled by Cabrera. The jury heard from Cabrera's associates who explained that he paid them to recruit taxpayers and that he either filed the fraudulent returns himself or instructed others how to file them. Obando told the jury that Cabrera had tasked him with setting up shell companies for use in laundering the proceeds from the scam. The government introduced bank records tracking the proceeds from the fraudulently obtained funds--from taxpayers' bank accounts into the accounts of shell companies Cabrera ran, and then into Cabrera's bank account. An IRS computer expert even showed the jury that Cabrera's electronic fingerprints were all over the documents used in the scam. And on and on. The government's case was thorough and compelling.

Near the end of its case-in-chief, the government called IRS agent Karyn Calabrese to testify about the nature and scope of Cabrera's scam. After Calabrese noted that some of the fraudulent returns had been submitted from Marcelle Boardman's unsecured residential IP address, the government asked if she had been able to link Boardman's IP address to any other returns, Calabrese responded: 'I think there were an additional 27 tax returns that we didn't present here,' at which point Cabrera's counsel objected and asked for a sidebar. At the sidebar, Cabrera's counsel argued that the reference to the additional 27 returns involved 'uncharged crimes' and information that had not been disclosed before trial. The district court overruled the objection and denied Cabrera's counsel's motion for a mistrial. The court then asked Cabrera's counsel if he wanted a curative instruction, to which Cabrera's counsel replied 'Okay[,] [t]hat is satisfactory.' The court promptly instructed the jury that Cabrera was 'only on trial for those crimes charged in the indictment and nothing more,' and the government continued examining Calabrese.

Later in Calabrese's testimony, the government asked if Carlos Mara's tax return--which was not among the returns for which the government charged Cabrera--was among those reflected in the spreadsheets. Cabrera's counsel objected and moved to strike, again arguing that the government was seeking to introduce evidence of uncharged crimes about which there had been no discovery. The court overruled Cabrera's objection and allowed the testimony because Calabrese was addressing returns that 'were all filed during the period of time that the conspiracy had been alleged in the indictment.' Calabrese proceeded to answer the government's question, explaining that Mara's return had been filed from an IP address associated with Cabrera and one of his shell companies, and that Mara's return was filed just a few weeks before Mara sent a sizable payment to that shell company. . . .

See United States v. Cabrera, 635 F. App'x at 803-05; [CR ECF No. 148].

VI. Discussion

A. Ineffective Assistance of Counsel Claims

1. Failure to Object to Intended Loss

In **claim 1**, Movant asserts that he was denied effective assistance of counsel, where his lawyer failed to object to the amount of intended loss at sentencing, and then failed to raise the issue on appeal. [CV ECF No. 9, p. 3; CV ECF No. 9-1, p. 2]. Movant maintains that he was held accountable for an intended loss amount of \$10,242,667, as set forth in the PSI, when the tax loss proven at trial was only \$1,526,622. [*Id.*]. In support of this claim, Movant attaches email communications between the probation officer, the government, and prosecution witness, IRS Agent Karin Calabrese. [*Id.*, Ex. 1]. He claims the incorrect intended loss amount resulted in a twenty-level increase, rather than a sixteen-level increase to his base offense level, thereby triggering a higher base offense level. [CV ECF No. 9-1, p. 2]. Movant suggests that the court considered one-hundred returns that were never presented at trial, and faults counsel for failing to raise the issue at trial and on appeal. (*Id.*:4).

The government has filed a response, arguing in pertinent part that, had counsel objected to the loss amount, the government would have presented testimony and evidence prepared by Special Agent Calabrese establishing the intended loss figure as set forth in the PSI. [ECF No. 11, p. 9; ECF No. 11-1, Ex. A]. In Agent Calabrese's Affidavit she explains she was the case agent, and during the

course of her investigation, she identified and compiled a list of at least 147 taxpayers whose tax filings could be linked to Movant's fraud scheme. [ECF No. 11-2, ¶¶ 2-3]. Of those, one of the tax returns belonged to Movant, and another to his coconspirator, Carlos Perez. [*Id.*, ¶ 3a]. These returns were linked to Movant through witness interviews, bank records, and the fact that the same IP addresses were used to file multiple returns. [*Id.*, ¶¶ 3-5]. She calculated the intended loss of \$10,242,667 by adjusting the tax return for all false items included by Movant not only from the Form 2439, but other false items such as fake Schedule C business and false Schedule A deductions. [*Id.*, ¶ 6]. For the remaining taxpayers not interviewed by the agent, the estimated intended loss was the requested tax refund amount. [*Id.*, ¶ 6b]. Calabrese explains that had she used the false items on the tax returns when calculating the loss amount, the loss figure would have been higher than \$10,242,667. [*Id.*].

As will be recalled, the PSI imposed a twenty-level enhancement to Movant's base offense level, pursuant to U.S.S.G. § 2B1.1(b)(1)(K), because Movant had responsible for a loss of \$10,242,667, which was more than \$7,000,000 but less than \$20,000,000. (PSI ¶ 29).

The U.S. Sentencing Guidelines apply a base offense level, and then increases the level based on the value of the loss caused. *See* U.S.S.G. § 2B1.1(a), (b)(1). The district court need only make a reasonable estimate of the loss suffered, and "is in a

unique position to assess the evidence and estimate the loss based upon that evidence.” *Id.* § 2B1.1 cmt. n.3(C). To properly calculate the loss requires consideration of all the acts and omissions that were part of the same scheme. *See United States v. Rodriguez*, 751 F.3d 1244, 1256 (11th Cir. 2014). “A participant in a conspiracy may thus be held responsible for the losses resulting from the reasonably foreseeable acts of co-conspirators in furtherance of the conspiracy.” *Id.* (internal quotation marks omitted).

Relevant conduct includes all acts and omissions committed by the defendant, as well as all reasonably foreseeable acts and omissions of others in furtherance of jointly undertaken criminal activity. U.S.S.G. § 1B1.3(a)(1)(A)-(B). To determine a defendant’s responsibility for the conduct of others, the court must ascertain the scope of the criminal activity that the defendant agreed to jointly undertake. *Id.* § 1B1.3 cmt. n.2. Relevant conduct attributable to the defendant includes the conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken. *Id.*

The scope of a defendant’s jointly undertaken criminal activity may not be the same as the scope of the entire conspiracy. *Id.* The defendant’s mere knowledge of the existence of a larger criminal undertaking and agreement to perform a particular act is insufficient to show that he agreed to participate in the entire criminal undertaking. *United States v. Hunter*, 323 F.3d 1314, 1320 (11th Cir. 2003).

However, the district court may consider any implicit agreement fairly inferred from the conduct of the defendant and others. *See* U.S.S.G. § 1B1.3, cmt. n.2. Sharing and mutuality are factors indicative of an agreement to participate in a larger criminal scheme. *See Hunter*, 323 F.3d at 1322. Other relevant factors include: (1) the extent of the defendant's knowledge of and participation in the undertaking, and (2) whether the defendant took steps to further the scheme. *See United States v. McCrimmon*, 362 F.3d 725, 732–33 (11th Cir. 2004).

The Eleventh Circuit has made clear that the conduct of participants in a fraud scheme was part of a defendant's jointly undertaken criminal activity where the participants, although acting on their own behalf, were aware of each other's activities and aided and abetted one another by sharing lead sheets of potential victims and sharing telephones. *United States v. Hall*, 996 F.2d 284, 285–86 (11th Cir. 1993).

Movant's reliance upon an "email chain" as a basis to conclude the amount of loss attributable to him is misleading because, as argued correctly by the government, those emails related to his coconspirator, Carlos Perez, as noted in the subject line of the emails. [CV ECF No. 11, p. 10]. In any event, given Agent Calabrese's declaration and supporting exhibit, Movant has not rebutted the finding that the loss amount set forth in the PSI was error. Therefore, he is not entitled to relief on this claim, challenging counsel's failure to pursue this issue.

Movant cannot establish deficient performance or prejudice under *Strickland* arising from counsel's failure to pursue this non-meritorious claim either at sentencing or on appeal given the nature and scope of Movant's involvement in the conspiracy. It was thus proper for the court to attribute the actions of all coconspirators to Movant as relevant conduct in calculating the intended loss amount. Movant had extensive knowledge of the scheme and an important role in furthering it, as he recruited individuals for the purpose of having their individual tax returns prepared with the promise that he could obtain substantial tax refunds for the taxpayers. *See United States v. McCrimmon*, 362 F.3d at 732-33.

Movant had access to the bank account for Regius Consulting, which was opened by Perez. (PSI ¶ 3). It was further established that Movant recruited and conspired with Elias Obando and Abelino Morraz to open several businesses (shell corporations) for the purpose of laundering the proceeds of his unlawful activity. (PSI ¶¶ 3, 8). The PSI notes that Movant was personally responsible for \$587,251.42 in laundered funds, and caused multiple false claims for income tax refunds to be filed with the IRS for an additional tax loss of \$10,242,667, resulting in an actual loss of \$1,526,622. (PSI ¶ 11). It was determined that the additional \$10,242,667 loss amount was derived from an additional one-hundred income tax returns that were filed during the same time period and in furtherance of the conspiracy, in accordance with relevant conduct. (PSI ¶ 10); *See* U.S.S.G. § 1B1.3, cmt. n.2. Given

Movant's role as a recruiter and based on his knowledge of the scheme, these tax returns were reasonably foreseeable to him. *See* U.S.S.G. § 1B1.3, cmt. n.2; *United States v. Johnston*, 620 F. App'x 839, 854–56 (11th Cir. 2015). Under these circumstances, Movant cannot establish deficient performance or prejudice arising from counsel's failure to pursue this non-meritorious claim. Relief is not warranted on claim 1.

2. Failure to Subpoena Witnesses and Documents and to Impeach Witnesses

In **claim 2**, Movant asserts that he was denied effective assistance of counsel, where his lawyer failed to subpoena witnesses and documents, and failed to use prior, inconsistent grand jury testimony and documents in evidence to impeach the testimony of key government witnesses who testified that Movant prepared the tax returns, which served as the basis for Count 2 of the Superseding Indictment. [CV ECF No. 9, p. 5; CV ECF No. 9-1, p. 3]. Movant states that a comparison of the initial Indictment and the Superseding Indictment reveals that the filing date of the Delgado tax return was changed from January 24, 2009 to May 7, 2009, notwithstanding Agent Calabrese's testimony before the grand jury in 2013 which indicated that the returns listed in Count 2 of the Indictment, and the date amounts referenced there were correct. [ECF No. 9, p. 5]. He suggests the government witnesses offered equivocal testimony regarding the filing of the amended return in order to confuse the jury. [*Id.*, pp. 6-7]. Movant claims it was impossible for him to

have filed the January 24, 2009 return because he was not released from immigration custody until January 24, 2009, the same date the IRS received the Delgado return. [*Id.* pp. 7-8]. Movant maintains it was counsel's duty to establish through cross-examination of government witnesses that the date the IRS received Delgado's tax return was January 24, 2009 and not May 7, 2009. [CV ECF No. 3, p. 5]. He further claims counsel should have subpoenaed immigration records to confirm Movant's January 24, 2009 release from immigration custody. [*Id.*].

Even if counsel had introduced evidence that Movant was in custody at the time Delgado's return was filed, this is of no consequence and would not have affected the outcome of the trial, especially in light of the Superseding Indictment and evidence adduced at trial which established that J.D.'s fraudulent tax return was filed on or about May 7, 2009. Movant has not demonstrated that the government's witness, Victoria O'Brien, or any of its other witnesses provided incorrect testimony regarding the filing of the fraudulent return. O'Brien did not dispute that an original return for J.D. was filed in January 2009, but the amended return, filed on May 7, 2009, would have had to have been mailed or filed as a walk-in. [CR ECF No. 138, pp. 149-54].

If counsel had attempted to impeach O'Brien regarding the filing of the return, the government maintains she did not testify before either of the grand juries. [CV ECF No. 11, p. 11]. Thus, no impeaching testimony would have been established.

Regardless, the error was of no import as the Superseding Indictment correctly charged that the return was filed on May 7th and not January 2009. The jury was instructed on weighing the credibility of the evidence and witnesses. On this record, Movant has not shown that the result of the trial would have been different, resulting in an acquittal as to Count 2, much less the remaining offenses. Therefore, he is not entitled to relief on this claim.

B. Prosecutorial Misconduct Claim

In **claim 3**, Movant asserts that the government violated his due process rights by failing to comply with *Giglio*. [ECF No. 9, p. 9; ECF No. 9-1, p. 6]. Movant claims there was overwhelming evidence that the “amended return,” introduced at trial as Exhibit 21, reveals that it was received by the Internal Revenue Service (“IRS”) on January 24, 2009. [ECF No. 9, pp. 9-10]. Movant suggests that the Superseding Indictment, and government witness testimony at trial provided fraudulent and perjurious testimony that the amended returns were received by the IRS on May 7, 2009 and not January 24, 2009. [*Id.*:10]. Movant maintains the government knew Movant was incarcerated between 2002 and January 24, 2009, and therefore could not have filed Delgado’s amended return. [*Id.*]. He maintains the government “bent” the facts to support their theory of the case. [*Id.*].

The government has filed a response, arguing that Movant is not entitled to relief on this claim. The government concedes that the initial Indictment alleged that

J.D.'s return was filed on or about January 24, 2009, but in preparing for trial, it realized that the fraudulent Form 2439 was not attached to the original return, but instead was attached to an amended return filed on or about May 7, 2009. [CV ECF No. 11, p. 11]. As a result, a Superseding Indictment was returned, which corrected the date of filing of J.D.'s false return to on or about May 7, 2009. [*Id.*]. Further, the government correctly argues that the jury was not misled by the testimony of its witness, Victoria O'Brien, who testified that the data she reviewed demonstrated that an amended return for J.D. was filed on or about May 7, 2009. [*Id.*; *see also* CR ECF No. 138, T.149-54].³ The government also argues that the information contained in the initial Indictment regarding the date of filing J.D.'s return could not have been used to impeach O'Brien because she did not testify before the grand juries who returned either the initial or superseding indictments. [*Id.*].

A new trial based on prosecutorial misconduct “is an extreme sanction which should be infrequently utilized.” *United States v. Accetturo*, 858 F.2d 679, 681 (11th Cir. 1988)(quoting *United States v. Pabian*, 704 F.2d 1533, 1536 (11th Cir. 1983)). The movant has not demonstrated here that the government witnesses, as alleged, testified falsely, much less that the government suborned perjury.

³The letter "T" in this Report refers to the transcripts of trial and sentencing that are part of the underlying criminal record under attack here.

It is well settled that the standard for federal habeas corpus review of a claim of prosecutorial misconduct is whether the alleged actions rendered the entire trial fundamentally unfair. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 642-45 (1974); *Hall v. Wainwright*, 733 F.2d 766, 733 (11th Cir. 1984). In assessing whether the fundamental fairness of the trial has been compromised, the totality of the circumstances are to be considered in the context of the entire trial, *Hance v. Zant*, 696 F.2d 940 (11th Cir. 1983), and, “[s]uch a determination depends on whether there is a reason-able probability that, in the absence of the improper remarks, the outcome of the trial would have been different.” *Williams v. Weldon*, 826 F.2d 1018, 1023 (11th Cir. 1988). No such showing has been made here.

In any event, in order to prevail on a *Giglio* claim, Movant must establish that the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material. *United States v. Vallejo*, 297 F.3d 1154, 1163-64 (11th Cir. 2002). Under *Giglio*, “the falsehood is deemed to be material ‘if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.’” *Id.* (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)). The government is also required to turn over to a criminal defendant any impeachment evidence that is likely to cast doubt on the reliability of a witness whose testimony may be determinative of guilt or innocence. *United States v. Jordan*, 316 F.3d 1215, 1226 n.16, 1253 (11th Cir. 2003).

Careful review of the record does not support Movant's claim that the government suborned perjury, much less that the prosecution was fabricated or based on lies. To the contrary, the fact that Movant takes issue with the testimony of the prosecution's witnesses does not mean that such testimony was untruthful or a product of misconduct on the part of the government. Moreover, the witnesses were subject to cross-examination by defense counsel regarding their credibility and the reliability of their testimony. Defense counsel conducted thorough and forceful cross-examination of the prosecution witnesses. It is apparent that the jury rejected the defense presented and, instead, believed the government's theory and strong evidence presented by the government.

Even if counsel had sought a mistrial based on the government suborning what Movant claims to be purported false testimony, no showing has been made in this collateral proceeding that the court would have granted the motion, much less that the outcome of the guilt phase portion of the proceeding would have been different, especially in light of the overwhelming evidence implicating Movant in the offenses. Thus, Movant is entitled to no relief on the claim. Under the totality of the circumstances present here, Movant has failed to establish prosecutorial misconduct. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 642-45 (1974); *Hall v. Wainwright*, 733 F.2d 766, 733 (11th Cir. 1984). Movant has not demonstrated a *Giglio* violation,

and further cannot establish that counsel was ineffective for failing to pursue this issue either at trial or on appeal. Relief is not warranted on this claim.

VII. Cautionary Instruction Re *Clisby*⁴ Rule

The Court is mindful of the *Clisby* rule that requires district courts to address and resolve all claims raised in habeas corpus proceedings, regardless of whether relief is granted or denied. *Clisby v. Jones*, 960 F.2d at 936-36; *Rhode v. United States*, 583 F.3d 1289, 1291 (11th Cir. 2009)(holding that *Clisby* applies to § 2255 proceedings). However, nothing in *Clisby* requires, much less suggests, consideration of claims or arguments raised for the first time in objections. If Movant attempts to raise arguments or further factual support for his claims in objections, the court should exercise its broad discretion and refuse to consider the arguments not raised before the magistrate judge in the first instance. *See Williams v. McNeil*, 557 F.3d 1287, 1291 (11th Cir. 2009)(citing *Stephens v. Tolbert*, 471 F.3d 1173, 1174 (11th Cir. 2006)(finding no abuse of discretion by the district court in declining to consider timeliness argument that was not presented to the magistrate judge)). This is so because “[P]arties must take before the magistrate, ‘not only their best shot but all of the shots.’” *See Borden v. Sec’y of Health & Human Services*, 836 F.2d 4, 6 (1st Cir. 1987) (quoting *Singh v. Superintending School Committee of City of Portland*, 593 F. Supp. 1315, 1318 (D. Me. Sept. 27, 1984)). Further, where a

⁴*Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992).

precise argument, subsumed within any of the foregoing grounds for relief, was not specifically addressed herein, all arguments and claims were considered and found to be devoid of merit, even if not discussed in detail here.

VIII. Evidentiary Hearing

In a habeas corpus proceeding, the burden is on Movant to establish the need for a federal evidentiary hearing. *See Chavez v. Sec’y, Fla. Dep’t of Corr.*, 647 F.3d 1057, 1060 (11th Cir. 2011). To determine whether an evidentiary hearing is needed, the question is whether the alleged facts, when taken as true, are not refuted by the record and may entitle a petitioner to relief. *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007); *Jones v. Sec’y, Fla. Dep’t of Corr.*, 834 F.3d 1299, 1318-19 (11th Cir. 2016). The pertinent facts of this case are fully developed in the record before the Court. Because this Court can “adequately assess [Movant’s] claim[s] without further factual development,” *Turner v. Crosby*, 339 F.3d 1247, 1275 (11th Cir. 2003), an evidentiary hearing is not warranted here. *See Schriro v. Landrigan*, 550 U.S. at 473-75; *Holmes v. United States*, 876 F.2d 1545, 1553 (11th Cir. 1989).

IX. Certificate of Appealability

A prisoner seeking to appeal a district court’s final order denying his § 2255 motion has no absolute entitlement to appeal, and to do so, must obtain a certificate of appealability (“COA”). *See* 28 U.S.C. § 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180, 183 (2009) (citing *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000); *Wilkinson*

v. Dotson, 544 U.S. 74, 78-83 (2005)). This Court should issue a certificate of appealability only if Movant makes “a substantial showing of the denial of a constitutional right.” *See* 28 U.S.C. § 2253(c)(2). Where a district court has rejected a movant’s constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. at 484. However, when the district court has rejected a claim on procedural grounds, Movant must show that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.* Upon consideration of the record as a whole, this Court should deny a certificate of appealability. Notwithstanding, if Movant does not agree, he may bring this argument to the attention of the district judge in objections.

X. Recommendations

Based on the foregoing, it is recommended that:

1. The motion to vacate be DENIED on the merits;
2. Final judgment be entered in favor of Respondent;
3. That no certificate of appealability issue; and,
4. The case CLOSED.

Any party who objects to this recommendation or anything in it must, within fourteen (14) days of the date of service of this document, file specific written objections with the Clerk of this court. Failure to do so will bar a *de novo* determination by the district judge of anything in the recommendation and will bar an attack, on appeal, of the factual findings of the Magistrate Judge. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Williams v. McNeil*, 557 F.3d at 1291 (finding district court has discretion to decline consideration of arguments not presented to the magistrate judge in the first instance).

Signed this 12th day of December, 2019.


UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-23627-Civ-COHN
(13-20339-Cr-COHN)
MAGISTRATE JUDGE P.A. WHITE

RIGOBERTO CABRERA,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

**ORDER REQUIRING MOVANT TO FILE FINAL,
SUCCINCT, AMENDED \$2255 MOTION**

The *pro se* movant has filed this \$2255 proceeding, in which he attacks the constitutionality of his convictions and sentences for conspiracy to defraud the United States and related offenses, entered following a jury verdict in **case no. 13-20339-Cr-Cohn**.

This case has now been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rule 8(b) of the Rules Governing Section 2255 Proceedings in the United States District Courts.

The movant has filed a 13-page motion (Cv-DE#1), and an additional 20 page supporting memorandum (Cv-DE#3) with attached exhibits. Together both filings exceed the length and form requirement under the federal and local rules governing the filing of \$2255 motion.

Although the movant is appearing *pro se*, he is required to comply with the Local Rules of the Southern District of Florida,¹

¹Specifically, Local Rule 1.1 provides that the Local Rules for the Southern District of Florida shall apply in all proceedings in civil and criminal actions except where otherwise indicated. Moreover, the local rules further mandate that petitions and motions, filed pursuant to U.S.C. §2254, §2241, and
(continued...)

the Federal Rules of Civil Procedure, and the Rules Governing Section 2255 Proceedings (2005). In that regard, the Rules Governing Section 2255 Proceedings, which have been adopted in this district, require that the motion be in substantially the form appended to the rules. See Rule 2(c), Rules Governing Section 2255 Proceedings in United States District Courts.²

The court has undertaken the review required by Rule 4(b),³ Rules Governing Section 2255 proceedings, and finds, for the reasons set forth herein, that the motion with supporting memorandum should not be served on Respondent until Movant has had an opportunity to cure deficiencies by filing one concise §2255 motion, raising therein all claims he wishes this court to consider. See 28 U.S.C. §2244(b) and §2255 ¶8. The movant need not file supporting exhibits with his motion. However he is instructed to complete the §2255 form provided properly, setting forth the claims therein as required, and in compliance with the page and line spacing limitations as required by the rules governing such filings. He is to refrain from incorporating by reference or otherwise stating "see attached," and instead is to set forth in the space provided each ground for relief he intends for this court

¹(...continued)
 §2255, as well as civil complaints filed under 42 U.S. §1983 and pursuant to Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), and must substantially follow the forms, if any, prescribed by the Court and obtained from the Clerk of the Court upon request. See Rule 88.2(a) (1-5).

²Likewise, under Rule 11 of the Rules Governing Section 2254 Petitions, district courts may apply the Federal Rules of Civil Procedure in habeas cases "to the extent that [the civil rules] are not inconsistent with any statutory provisions or [the habeas] rules." Mayle v. Felix, 545 U.S. 644, ___, 125 S.Ct. 2562, 2569, 162 L.Ed.2d 582 (2005); see also Fed.R.Civ.P. 81(a)(2) (the civil rules "are applicable to proceedings for ... habeas corpus"). Applying the pleading requirements in Fed.R.Civ.P. 8(a), the Supreme Court has determined that a civil complaint need only provide the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Mayle, 545 U.S. at ___, 125 S.Ct. at 2570 (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957)).

³Rule 4(b) provides, in pertinent part, that "[t]he judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party."

to review on his behalf. He is also cautioned against raising more than one claim in each section. In other words, he is to use each ground for relief to state only one claim. He may attach additional pages, but is reminded that the total page limitations must be in compliance with the rules governing such filings.

When the movant fails to set forth a legally sufficient claim for relief because he omitted the factual support for his claim on the form petition, or where the petition exceeds local rules and is a rambling narrative, its usefulness is substantially diminished. The movant is cautioned against listing more than one claim in each ground for relief. The claims should be numbered separately, and should each contain a succinct statement of the facts supporting that particular claim. The movant is advised that this Court will **NOT** permit piecemeal filings. Therefore, the Court will only consider claims raised by movant in one, concise, succinct amended §2255 motion. Furthermore, the Court will not act as researcher/investigator on a scavenger hunt for claims on movant's behalf. See Fils v. City of Aventura, 647 F.3d 1272, 1284 (11th Cir. 2011) (A court may not act as a movant's lawyer and construct the party's theory of liability from facts never alleged, alluded to, or mentioned during the litigation.). In this regard, the Eleventh Circuit has instructed:

[A]ll of these principles of law would mean nothing if district courts were required to mine the record, prospecting for facts that the habeas petitioner overlooked and could have, but did not, bring to the surface of his petition. Making district courts dig through volumes of documents and transcripts would shift the burden of sifting from petitioners to the courts. With a typically heavy caseload and always limited resources, a district court cannot be expected to do a petitioner's work for him. Cf. Adler v. Duval County School Board, 112 F.3d 1474, 1481 n.12 (11th Cir. 1997) (noting in a civil case that, absent plain error, "it is not our place as an appellate court to second guess the litigants before us and grant them relief...based on facts they did not relate."); Johnson v. City of Fort Lauderdale, 126 F.3d 1372, 1373 (11th Cir. 1997) ("[W]e are not obligated to cull the record

ourselves in search of facts not included in the statements of fact."). The Seventh Circuit memorably said that appellate judges "are not like pigs, hunting for truffles buried in briefs." United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991). Likewise, district court judges are not required to ferret out delectable facts buried in a massive record, like the one in this case, which was more than 25,000 pages of documents and transcripts.

Chavez v. Sec'y Fla. Dep't of Corr's, 647 F.3d 1057, 1059-60 (11th Cir. 2011). Those combined requirements means that a habeas movant must construct his claims. See also cf GJR Investments, Inc. v. County of Escambia, 132 F.3d 1359, 1369 (11th Cir. 1998).

Moreover, the amended \$2255 motion will be the operative movant. Movant is cautioned that failure to comply with this court's order requiring a succinct, concise, amended \$2255 motion may result in dismissal of this action. See Brutus v. International Revenue Service, 393 Fed.Appx. 682 (11th Cir. Aug. 23, 2010) (quoting Equity Lifestyle Properties, Inc. v. Florida Mowing & Landscape Serv., Inc., 556 F.3d 1232, 1240 (11th Cir. 2009) (Even so, dismissal under Rule 41(b) upon disregard of an order, especially where the litigant has been forewarned, generally is not an abuse of discretion.)).

When, however, a *pro se* petition might state a claim upon which relief can be granted, a district court should give a movant an opportunity to amend his motion instead of dismissing it. See Mederos v. United States, 218 F.3d 1252, 1253 (11th Cir. 2000). Given movant's *pro se* status, the Court will afford him an opportunity to amend his motion. Movant is cautioned, however, that mere conclusions of law, unsupported by any facts are insufficient to support a claim for federal habeas corpus relief. It is the

relationship of the facts to the claim asserted in the motion that is important. See Rule 2(e), Rules Governing Section 2255 Cases advisory committee note. See also Adams v. Armontrout, 897 F.2d 332, 334 (8th Cir. 1990) (holding that "a petitioner must state specific, particularized facts which...consist of sufficient detail to enable the court to determine, from the face of the petition alone, whether the petition merits further habeas corpus review."); Passic v. Michigan, 98 F.Supp. 1015, 1016 (E.D. Mich. 1951).

Movant is advised that the local rules require that a motion and its incorporated memorandum of law shall not exceed twenty (20) pages, absent prior permission from the Court. See Southern District of Florida, Local Rule 7.1(c)(2); United States v. Johnson, 2012 WL 4039683 (N.D. Fla. 2012) (noting that local rules apply, and requiring that movant submit his §2255 motion on the court approved form); see also, Brye v. Sec'y Dep't of Corr's, 228 Fed.Appx. 843 (11th Cir. 2007) (noting in context of a motion to proceed *in forma pauperis*, Fed.R.Civ.P. 41(b) authorizes a court to *sua sponte* dismiss an action for failing to comply with local rules, but should not be applied to *pro se* plaintiffs who has not been made aware of the rule prior to dismissal); see also, Moon v. Newsome, 863 F.2d 835, 837 (11th Cir.), cert. den'd, 493 U.S. 863 (1989). It is noted, however, that title pages preceding the first page of text, signature pages, certificates of good faith conferences, and certificates of service shall not be counted as pages for purposes of the local rules. See Local Rule 7.1(c)(2).

The use of a prescribed form, required by Rule 2(c) of the Rules Governing §2255 Proceedings, as well as, the Southern District of Florida Local Rules, was adopted for reasons of administrative convenience. This court, with its large volume of

habeas petitions, saves valuable time if it is not required to comb through unwieldy, lengthy motions. This saving would be lost if movant were allowed to file a petition form and then file a separate lengthy, unwieldy supporting memorandum, which would by far exceed the page limits authorized under the rules and become unduly burdensome to this court. Movant should thus be required to complete the form, even if he needs to attach pages setting forth succinctly additional grounds and supporting facts.

The movant is advised that he only has one year from the date his conviction became final within which to file a timely motion. The movant is further cautioned that any claims raised in his final amended motion should comply with the relation back doctrine, as enunciated in Davenport v. United States, 217 F.3d 1341 (11 Cir. 2000). In other words, any claims raised in the amended, operative motion, should relate back to the timely filed motion. Failure to do so may result in dismissal of the claims as time-barred. It is therefore

ORDERED AND ADJUDGED as follows:

1. For the reasons stated previously in this Order, the movant shall file an **amended \$2255 motion**, on the proper form, on or before **November 6, 2017**.

2. In his final amended \$2255 motion, the movant shall set forth each ground for relief with sufficient supporting facts. The movant is cautioned that he should ensure he provides his amended motion to prison authorities for mailing with sufficient time for the document to reach this court by the due date referenced above. The movant is also reminded that this pleading shall comply with

the local and federal rules, and shall **not exceed 20-pages**, as noted previously in this order. At this juncture, however, there appears to be no good cause for permitting such unwieldy filings.

3. To amend his petition, movant should completely fill out a new §2225 form, marking it "Amended Motion" and contain the case number for this proceeding to ensure that it is docketed in this case. Movant is instructed to refrain from incorporating by reference any prior filed pleadings or arguments as any "incorporation by reference" will not be considered by the Court. This amended motion shall be the sole, operative pleading considered in this case, and only the claims listed therein will be addressed by the court. Therefore, it should in no way refer to the original motion or any memoranda or supplements thereto. The amended motion shall completely replace all prior motions and supplements/amendments, and all earlier filings are hereby disregarded. See S.D.Loc.R. 15.1. The movant is further advised that any claims set forth in the amended petition must be timely filed, or it may be subject to dismissal pursuant to Davenport v. United States, 217 F.3d 1341 (11th Cir. 2000), as well as, any other procedural bars and defenses that may apply.

4. Movant is strongly encouraged to comply with the Local Rules which provide that his petition may not exceed twenty (20) pages absent leave of court and upon a showing of good cause. See S.D.Loc.R. 5.1(J)(3). Again, movant is advised that his failure to comply with this court's order may result in dismissal of this action. See Fed.R.Civ.P. 41(b); Brutus v. International Revenue Service, 393 Fed.Appx. 682 (11th Cir. Aug. 23, 2010) (quoting Equity Lifestyle Properties, Inc. v. Florida Mowing & Landscape Serv., Inc., 556 F.3d 1232, 1240 (11th Cir. 2009) (Even so, dismissal under Rule 41(b) "upon disregard of an order, especially where the

litigant has been forewarned, generally is not an abuse of discretion.").

5. The movant is further advised that submission of exhibits at this time is unnecessary. Respondent will be required to submit, in conjunction with its answer, those portions of the record that it deems relevant.

6. The movant is also to refrain from listing multiple arguments within one claim for relief. In other words, each claim should be numbered separately, and should contain a succinct statement of fact in support why relief is warranted as to that one issue.

7. The Clerk shall send movant a copy of the form for use in Section 2255 cases. The case number should be written on the form.

DONE AND ORDERED at Miami, Florida, this 5th day of October, 2017.

s/Patrick A. White
UNITED STATES DISTRICT JUDGE

cc: Rigoberto Cabrera, Pro Se
Reg. No. 33513-018
F.C.I. - Miami
Inmate Mail/Parcels
Post Office Box 779800
Miami, FL 33177

Noticing 2255 US Attorney
Email: usafis-2255@usdoj.gov

Supreme Court of the United States

Office of the Clerk

Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

October 3, 2016

Clerk
United States Court of Appeals for the Eleventh
Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: Rigoberto Cabrera
v. United States
No. 16-5085
(Your No. 14-10541)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott S. Harris", written in a cursive style.

Scott S. Harris, Clerk

**UNITED STATES COURT OF APPEALS
For the Eleventh Circuit**

No. 14-10541

District Court Docket No.
1:13-cr-20339-JIC-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

RIGOBERTO CABRERA,

Defendant - Appellant.

Appeal from the United States District Court for the
Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: December 30, 2015
For the Court: AMY C. NERENBERG, Acting Clerk of Court
By: Jeff R. Patch

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-10541

D.C. Docket No. 1:13-cr-20339-JIC-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RIGOBERTO CABRERA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(December 30, 2015)

Before ED CARNES, Chief Judge, MARTIN, Circuit Judge, and WALTER,*
District Judge.

* Honorable Donald E. Walter, United States Senior District Judge for the Western District of Louisiana, sitting by designation.

PER CURIAM:

Rigoberto Cabrera appeals his conviction and sentence for perpetrating an income tax fraud scheme.

I.

The federal government discovered that Cabrera had masterminded an income tax fraud scheme that worked as follows. Cabrera and his associates would tell taxpayers they were entitled to tax refunds and offer to help the taxpayers get the refunds in exchange for a cut of the refund plus a fixed fee. Taxpayers who accepted the offer of services would give their names, W-2s, and other basic identifying information to Cabrera or his associates, who would electronically file the taxpayers' returns. The returns fraudulently claimed unfounded refunds based on Form 2439, an obscure IRS form that allows taxpayers a refund for taxes already paid on previously taxed "undistributed long term capital gains." The capital gains identified in the taxpayers' Form 2439s were falsely attributed to shell companies set up by Cabrera and his cohorts, who electronically filed substantially identical Form 2439s for dozens of people, including for Cabrera himself. In many cases, they used unsuspecting third parties' unsecured wireless networks to file the returns, so that it looked like the returns came from people unaffiliated with the scam.

As a result of the scheme, the IRS erroneously paid millions of dollars in undue refunds. When the refunds arrived, Cabrera or an associate would coordinate with the taxpayers to collect Cabrera's share. Cabrera arranged with Elias Obando to create new shell companies with bank accounts into which Cabrera's share of the refunds were deposited. Thus laundered, the funds were then withdrawn and turned over to Cabrera.

A federal grand jury indicted Cabrera for conspiring to defraud the government by submitting false tax returns, making false, fictitious, or fraudulent claims on the government, conspiring to commit wire fraud, committing wire fraud, conspiring to launder money, and laundering money. Cabrera's case was tried before a jury for five days. On the first day, the government introduced spreadsheets generated by the IRS's electronic fraud detection system. The spreadsheets catalogued certain information about electronically-filed returns, including the name on the return, the internet protocol (IP) address from which the return was filed, and the date the return was filed. Although Cabrera objected on the ground that the IRS agent testifying about the spreadsheets was not sufficiently familiar with how they were generated, the district court overruled Cabrera's objection and admitted the spreadsheets into evidence.

The government presented dozens of witnesses and scores of exhibits tying Cabrera to the fraudulent returns and to attempts to launder the proceeds. IRS

agents testified about the striking similarities between all of the other Form 2439s involved in the case and Cabrera's own fraudulent return. An IRS agent told the jury that Cabrera had amended his fraudulent return only after the IRS agent threatened him with prosecution, and that Cabrera nevertheless persisted in lying about amended return. Some taxpayers told the jury about meeting with Cabrera and agreeing to let him file their taxes in exchange for promises to pay a percentage of the refunds they received to companies controlled by Cabrera. The jury heard from Cabrera's associates who explained that he paid them to recruit taxpayers and that he either filed the fraudulent returns himself or instructed others how to file them. Obando told the jury that Cabrera had tasked him with setting up shell companies for use in laundering the proceeds from the scam. The government introduced bank records tracking the proceeds from the fraudulently obtained refunds — from taxpayers' bank accounts into the accounts of shell companies Cabrera ran, and then into Cabrera's bank account. An IRS computer expert even showed the jury that Cabrera's electronic fingerprints were all over the documents used in the scam. And on and on. The government's case was thorough and compelling.

Near the end of its case-in-chief, the government called IRS agent Karyn Calabrese to testify about the nature and scope of Cabrera's scam. After Calabrese noted that some of the fraudulent returns had been submitted from Marcelle

Boardman's unsecured residential IP address, the government asked if she had been able to link Boardman's IP address to any other returns. Calabrese responded: "I think there were an additional 27 tax returns that we didn't present here," at which point Cabrera's counsel objected and asked for a sidebar. At the sidebar, Cabrera's counsel argued that the reference to the additional 27 returns involved "uncharged crimes" and information that had not been disclosed before trial. The district court overruled the objection and denied Cabrera's counsel's motion for a mistrial. The court then asked Cabrera's counsel if he wanted a curative instruction, to which Cabrera's counsel replied "Okay[,] [t]hat is satisfactory." The court promptly instructed the jury that Cabrera was "only on trial for those crimes charged in the indictment and nothing more," and the government continued examining Calabrese.

Later in Calabrese's testimony, the government asked if Carlos Mara's tax return — which was not among the returns for which the government charged Cabrera — was among those reflected in the spreadsheets. Cabrera's counsel objected and moved to strike, again arguing that the government was seeking to introduce evidence of uncharged crimes about which there had been no discovery. The court overruled Cabrera's objection and allowed the testimony because Calabrese was addressing returns that "were all filed during the period of time that the conspiracy has been alleged in the indictment." Calabrese proceeded to answer

the government's question, explaining that Mara's return had been filed from an IP address associated with Cabrera and one of his shell companies, and that Mara's return was filed just a few weeks before Mara sent a sizable payment to that shell company.

At the close of the government's case-in-chief and again at the close of all evidence, Cabrera moved for judgment of acquittal under Federal Rule of Criminal Procedure 29. The district court denied both motions. The jury found Cabrera guilty on all counts.

II.

The presentence investigation report calculated Cabrera's guidelines range by grouping together all closely related counts, as required by U.S.S.G. § 3D1.2. Because the counts involving fraud were closely related to one another and the counts involving money laundering were closely related to one another, the PSR bundled those counts into two groups. The PSR then grouped all the fraud counts with all the money laundering counts because Cabrera's money laundering convictions all involved funds from the fraud.

To calculate Cabrera's base offense level, the PSR, consistent with § 3D1.3(a), applied the guidelines section addressing the most serious of the grouped offenses. The most serious of the grouped offenses was money laundering, which is covered by § 2S1.1. Under § 2S1.1(a)(1), the base offense

level for Cabrera's money laundering conviction was the total offense level for the fraud from which the laundered funds derived. To calculate the total offense level for the fraud convictions, the PSR applied an enhancement under § 2B1.1(b)(10)(C) to account for the fact that the fraud involved "sophisticated means."

The PSR ultimately calculated that the total offense level for the fraud convictions was 29, meaning that under § 2S1.1(a)(1) the base offense level for the money laundering convictions was 29. To that base offense level, the PSR added levels to account for the specific characteristics of Cabrera's money laundering offenses, including two levels under § 2S1.1(b)(3) because the money laundering involved sophisticated means.

Cabrera objected that the PSR failed to group the fraud and money laundering accounts, exposing him to "impermissible double counting." He argued that the PSR improperly penalized him twice — once under § 2B1.1(b)(10)(C) of the guidelines and once under § 2S1.1(b)(3) of the guidelines — for the fact that his scheme had been sophisticated.

An addendum to the PSR responded that the guidelines required grouping the counts together as it had. In particular, the addendum explained that the enhancements for sophisticated means in the fraud and sophisticated laundering accounted for different aspects of the scheme. The sophisticated means

enhancement took into account the fact that Cabrera had used fictitious entities and shell corporations to attempt to conceal the fraud itself and his role in it. The sophisticated laundering enhancement was based on Cabrera's use of intermediaries and different shell corporations both to hide the origin of the funds from the fraud and to obscure his involvement in the cover-up.

Responding to the addendum, Cabrera reasserted his objection and argued that the rule of lenity required the court to interpret ambiguities in the guidelines' grouping requirements and sophistication enhancements in the ways most favorable to him. He maintained his objections to the PSR at sentencing, but the district court overruled them, finding by a preponderance of the evidence that both sophistication enhancements — one for fraud and the other for laundering — should apply. The district court adopted the PSR's guidelines calculations, concluding that Cabrera's guidelines range was 292–365 months. After rejecting Cabrera's request for a downward variance, the district court imposed a bottom of the guidelines range sentence of 292 months, plus \$1,526,622 in restitution. Cabrera timely appealed his conviction and sentence. He challenges the sufficiency of the evidence against him, the admission of Calabrese's statements about so-called "uncharged false returns," and the district court's guidelines calculations.

III.

We reject Cabrera's challenge to the sufficiency of the evidence against him. We will reverse a conviction on sufficiency grounds only if the defendant shows that "there is no reasonable construction of the evidence from which the jury could have found the defendant[] guilty beyond a reasonable doubt." United States v. Joseph, 709 F.3d 1082, 1093 (11th Cir. 2013). Cabrera has not made that showing for any of the charged counts. For example, he argues that there was no proof of his role in any of the conspiracies. But Obando testified at length that Cabrera was the impresario behind the fraud and the money laundering operation. Cabrera's clients told the jury how he had convinced them to let him prepare their taxes. Lissette Nunez, one of Cabrera's former employees, told the jury that the people involved in the fraud schemes "did the work for Rigo," and he paid them for it. And FBI Agent Neville Barrant testified that documents integral to the scam bore identification markers linking them to Cabrera. The jury could reasonably credit any or all of that testimony and rely on it to find beyond a reasonable doubt that Cabrera was instrumental in perpetrating the fraud. His sufficiency challenges on other bases are similarly belied by even the most cursory inspection of the record.

IV.

Cabrera's argument that Calabrese's testimony about "uncharged false returns" violated his Fifth Amendment right to a fair trial is also meritless. The

evidence.” United States v. Church, 955 F.2d 688, 700 (11th Cir. 1992). District courts, moreover, have “considerable discretion” to admit or exclude evidence under Rule 403. Lambert v. Fulton Cty., Ga., 253 F.3d 588, 596 (11th Cir. 2001). Because Calabrese’s challenged testimony was relevant to the scope and nature of the charged conspiracies, and because any prejudicial effect from the testimony was negligible — since the testimony merely highlighted information already in the spreadsheets — the district court did not abuse its discretion in admitting Calabrese’s testimony over Cabrera’s Rule 403 objection.

VI.

That leaves Cabrera’s arguments that the district court miscalculated his guidelines range. He contends first that the PSR failed to group the fraud and money laundering counts as required by U.S.S.G. § 3D1.2. But the PSR did group the fraud and money laundering counts together, just as Cabrera says it should have. In explaining the steps behind its calculations, the PSR states that: “The [fraud] counts are subsequently grouped together with the money laundering counts under § 3D1.2(c), pursuant to § 2S1.1, comment. (n. 6), since [Cabrera] is convicted of laundering funds and the underlying offense from which the laundered funds were derived.” Cabrera got exactly the type of grouping to which he says he was entitled.

Cabrera's other guidelines argument is that the district court engaged in impermissible double counting when, in calculating his guidelines range, it applied a two-level enhancement because the fraud involved sophisticated means and then another two-level enhancement because the money laundering was also sophisticated. According to Cabrera, the "sophisticated" conduct accounted for in each enhancement is the same, so that applying the enhancements together punishes him twice for the same harm. That argument misconceives the nature of the harm addressed by each enhancement. The sophisticated means enhancement in § 2B1.1(b)(10)(C) of the guidelines is directed at the fraud itself and applies when the fraudulent scheme, in its totality, is especially complex or intricate. See U.S.S.G. § 2B1.1, cmt. 9(B); United States v. Barrington, 648 F.3d 1178, 1199 (11th Cir. 2011). This enhancement applied to Cabrera's underlying crime, which involved filing fraudulent returns using an obscure tax form, routing those forms through stolen IP addresses, and stashing the proceeds in fake companies. The sophisticated laundering enhancement in § 2S1.1(b)(3), by contrast, covers the harm from laundering the proceeds of the fraud. See U.S.S.G. § 2S1.1, cmt. 5(A). This enhancement addresses the sophistication of the money laundering Cabrera undertook with Obando's help, not the scheme from which the funds were derived. Because the two enhancements recognize and punish different harms from fundamentally different conduct, application of both enhancements is not

“impermissible double counting,” which “occurs only when one part of the Guidelines is applied to increase a defendant’s punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines.” United States v. Dudley, 463 F.3d 1221, 1226–27 (11th Cir. 2006).

Also, we “presume that the Commission intended to apply separate guideline sections cumulatively unless [we are] specifically directed otherwise.” United States v. Stevenson, 68 F.3d 1292, 1294 (11th Cir. 1995). The guidelines do not forbid applying the sophisticated means and sophisticated laundering enhancements together. Instead, they expressly contemplate that the enhancements may be applied cumulatively so long as the conduct that is the basis for applying the sophisticated laundering enhancement is not the only conduct that is the basis for applying the sophisticated means enhancement. U.S.S.G. § 2S1.1(b)(3) & cmt. 5(B). The conduct — layering and the use of certain shell corporations — that is the basis for applying the sophisticated laundering enhancement to Cabrera is not the same as the conduct — including the use of an obscure IRS form and a different set of shell corporations — that is the basis for applying the sophisticated means enhancement to him. On these facts, the district court did not err in applying both enhancements.

Cabrera invites us to construe the guidelines in light of the rule of lenity, but that rule has no role in this case. It applies only if the provision being construed is

ambiguous after application of normal rules of statutory construction. United States v. Camacho-Ibarquen, 410 F.3d 1307, 1315 (11th Cir. 2005). There is no ambiguity about how the guidelines apply here.

For the first time in his reply brief, Cabrera raises two more arguments: (1) that the district court should have applied the guideline for wire fraud, not money laundering, to calculate his guidelines range; and (2) that the district court erred in finding that his money laundering activities were sophisticated. Because he raised neither argument in his opening brief, both arguments are forfeited. See United States v. Noriega, 676 F.3d 1252, 1260 n.2 (11th Cir. 2012).

AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN

District of

FLORIDA

UNITED STATES OF AMERICA

V.

RIGOBERTO CABRERA

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 0:13CR20339-COHN(s)-1

USM Number: 33513-018

Jose Herrera, Esq. AUSA, Dan Bernstein & Alejandro Soto

Defendant's Attorney

Date of Original Judgment: 1/28/2014

(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
☒ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.
☒ was found guilty on count(s) 1 thru 9 and 11 thru 30 of the Superseding Indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. 286	Conspiracy to defraud the government with respect to claims	3/30/2010	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/29/2014

Date of Imposition of Judgment

Signature of Judge

JAMES I. COHN,

DISTRICT JUDGE

Name of Judge

Title of Judge

1/29/2014

Date

DEFENDANT: RIGOBERTO CABRERA
CASE NUMBER: 0:13CR20339-COHN(s)-1

ADDITIONAL COUNTS OF CONVICTION

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. 287	Making false, fictitious, and fraudulent claims	5/7/2009	2
18 U.S.C. 287	Making false, fictitious, and fraudulent claims	3/17/2009	3
18 U.S.C. 287	Making false, fictitious, and fraudulent claims	3/18/2009	4
18 U.S.C. 287	Making false, fictitious, and fraudulent claims	3/23/2009	5
18 U.S.C. 287	Making false, fictitious, and fraudulent claims	3/28/2009	6
18 U.S.C. 287	Making false, fictitious, and fraudulent claims	3/14/2009	7
18 U.S.C. 287	Making false, fictitious, and fraudulent claims	4/15/2009	8
18 U.S.C. 287	Making false, fictitious, and fraudulent claims	4/15/2009	9
18 U.S.C. 287	Making false, fictitious, and fraudulent claims	5/22/2009	11
18 U.S.C. 287	Making false, fictitious, and fraudulent claims	6/18/2009	12
18 U.S.C. 287	Making false, fictitious, and fraudulent claims	5/22/2009	13
18 U.S.C. 287	Making false, fictitious, and fraudulent claims	8/21/2009	14
18 U.S.C. 287	Making false, fictitious, and fraudulent claims	1/23/2010	15
18 U.S.C. 287	Making false, fictitious, and fraudulent claims	1/27/2010	16
18 U.S.C. 287	Making false, fictitious, and fraudulent claims	1/29/2010	17

DEFENDANT: RIGOBERTO CABRERA
CASE NUMBER: 0:13CR20339-COHN(s)-1

ADDITIONAL COUNTS OF CONVICTION

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. 287	Making false, fictitious, and fraudulent claims	2/8/2010	18
18 U.S.C. 287	Making false, fictitious, and fraudulent claims	3/30/2010	19
18 U.S.C. 287	Making false, fictitious, and fraudulent claims	3/30/2010	20
18 U.S.C. 1349	Conspiracy to commit wire fraud	3/30/2010	21
18 U.S.C. 1343	Wire fraud	4/3/2009	22
18 U.S.C. 1343	Wire fraud	4/24/2009	23
18 U.S.C. 1343	Wire fraud	3/5/2010	24
18 U.S.C. 1343	Wire fraud	4/20/2010	25
18 U.S.C. 1956(h)	Conspiracy to commit money laundering	5/20/2010	26
18 USC 1956(a)(1)(B)(i)	Money laundering	3/8/2010	27
18 USC 1956(a)(1)(B)(i)	Money laundering	3/8/2010	28
18 USC 1956(a)(1)(B)(i)	Money laundering	5/4/2010	29
18 USC 1956(a)(1)(B)(i)	Money laundering	5/4/2010	30

DEFENDANT: RIGOBERTO CABRERA
CASE NUMBER: 0:13CR20339-COHN(s)-1

Judgment — Page 4 of 8

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of

120 Months as to Count 1 60 Months as to Counts 3 thru 9 and 11 thru 20 240 Months as to Counts 21 thru 30
Count 1 and Counts 3 thru 9 and 11 thru 30 to be served concurrently with each other 52 Months as to Count 2 to be served
consecutively to the sentence imposed in Count 1 and Counts 3 thru 9 and 11 thru 30 TOTAL SENTENCE 292 MONTHS

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: RIGOBERTO CABRERA
CASE NUMBER: 0:13CR20339-COHN(s)-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of

3 YEARS AS TO COUNTS 1 THROUGH 9 and 11 THROUGH 30 TO ALL RUN CONCURRENTLY WITH EACH OTHER.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record, personal history, or characteristics and shall permit the probation officer to make such notifications and confirm the defendant's compliance with such notification requirement.

DEFENDANT: RIGOBERTO CABRERA
CASE NUMBER: 0:13CR20339-COHN(s)-1

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Association Restriction - The defendant is prohibited from associating with co-defendant while on supervised release.

Cooperation with the IRS - The defendant shall cooperate fully with the Internal Revenue Service in determining and paying any tax liabilities. The defendant shall provide to the Internal Revenue Service all requested documents and information for purposes of any civil audits, examinations, collections, or other proceedings. It is further ordered that the defendant file accurate income tax returns and pay all taxes, interest, and penalties due and owing by him to the Internal Revenue Service.

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

Restitution with Imprisonment -

It is further ordered that the defendant shall pay joint and several restitution with co-defendant in the amount of \$1,526,622.00. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay \$25.00 per quarter toward the financial obligations imposed in this order.

Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: RIGOBERTO CABRERA
CASE NUMBER: 0:13CR20339-COHN(s)-1Judgment — Page 7 of 8**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

- A ☒ Lump sum payment of \$ 2,900.00 due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ **Joint and Several**

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Joint and Several Amount, and corresponding payee, if appropriate.

THE DEFENDANT SHALL PAY RESTITUTION IN THE AMOUNT OF \$1,526,622.00 JOINT AND SEVERAL WITH THE CODEFENDANT.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

DEFENDANT: RIGOBERTO CABRERA
CASE NUMBER: 0:13CR20339-COHN(s)-1

Judgment — Page 8 of 8

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 2,900.00	\$	\$ 1,526,622.00

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

TOTALS \$ _____ \$ _____

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

Page 1 of 17	FILED by TB	D.C.
ELECTRONIC		
SEP 10, 2013		
STEVEN M. LARIMORE CLERK U.S. DIST. CT. S.D. OF FLA. - MIAMI		

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 13-20339 CR-COHN-SELTZER(s)

**18 U.S.C. § 286
18 U.S.C. § 287
18 U.S.C. § 1343
18 U.S.C. § 1349
18 U.S.C. § 1956(h)
18 U.S.C. § 1956(a)(1)(B)(i)
18 U.S.C. § 2
18 U.S.C. § 981(a)(1)(C)
18 U.S.C. § 982(a)(1)**

UNITED STATES OF AMERICA

vs.

**RIGOBERTO CABRERA
and CARLOS PEREZ,**

Defendants.

SUPERSEDING INDICTMENT

The Grand Jury charges that:

GENERAL ALLEGATIONS

At all times relevant to this Superseding Indictment:

1. Defendant **RIGOBERTO CABRERA** resided in Miami-Dade County, within the Southern District of Florida.
2. Defendant **CARLOS PEREZ** resided in Miami-Dade County, within the Southern District of Florida.
3. Big Records, LLC ("Big Records") was a Florida Corporation incorporated on April 21, 2009, with **CARLOS PEREZ** as the sole registered agent and manager.
4. **CARLOS PEREZ** opened a bank account at Bank of America, in Miami-Dade County, in the name of Big Records on April 24, 2009.

5. Regius Consulting Group LLC ("Regius Consulting") was a Florida Corporation incorporated on March 3, 2009, with **CARLOS PEREZ** as the sole registered agent and manager.

6. **CARLOS PEREZ** opened a bank account at Bank of America, in Miami-Dade County, in the name of Regius Consulting on March 4, 2009.

7. Regius Financial Services, LLC ("Regius Financial") was a Florida Corporation incorporated on April 21, 2009.

8. Regius Investments Group LLC ("Regius Investments") was a Florida Corporation incorporated on April 21, 2009.

9. Tool Palace, Inc. ("Tool Palace") was a Florida Corporation incorporated on January 6, 2010.

10. Ultimate Tools, Inc. ("Ultimate Tools") was a Florida Corporation incorporated on February 3, 2010.

11. Durable Flooring, Inc. ("Durable Flooring") was a Florida Corporation incorporated on January 7, 2010.

12. The Internal Revenue Service ("IRS") was an agency of the United States Department of Treasury responsible for enforcing and administering the tax laws of the United States, and collecting taxes owed to the United States.

13. The IRS allowed United States individual taxpayers to file their tax returns electronically (e-file) by filing online directly or through a tax preparer.

14. The IRS required United States individual taxpayers to file their amended tax returns by physically mailing in a paper return to IRS offices.

15. An Internet Protocol or "IP" address was a unique series of numbers used to identify computers over the Internet. Every computer connected to the Internet had to have an IP address,

which made it possible to identify the account from which a transmission was sent on a particular date and time.

COUNT 1
Conspiracy to Defraud the Government With Respect to Claims
(18 U.S.C. § 286)

1. Paragraphs 1 through 15 of the General Allegations section of this Superseding Indictment are realleged and incorporated by reference as though fully set forth herein.

2. From on or about January 24, 2009, and continuing through on or about March 30, 2010, in Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

RIGOBERTO CABRERA and
CARLOS PEREZ,

did knowingly and willfully combine, conspire, confederate, and agree with each other and with persons known and unknown to the Grand Jury, to defraud the United States, and any department and agency thereof, that is, the Internal Revenue Service, by obtaining and aiding to obtain the payment and allowance of any false, fictitious and fraudulent claims, in violation of Title 18, United States Code, Section 286.

PURPOSE OF THE CONSPIRACY

3. It was the purpose of the conspiracy for the defendants and their co-conspirators to unjustly enrich themselves by submitting false tax returns claiming false credits and deductions, and receiving a percentage of the tax refunds received from the filing of the false returns.

MANNER AND MEANS OF THE CONSPIRACY

The manner and means by which the defendants and their co-conspirators sought to accomplish the purpose and object of the conspiracy included, among others, the following:

4. **RIGOBERTO CABRERA** and **CARLOS PEREZ** offered to prepare the individual income tax returns for taxpayers whom they recruited and caused to be recruited with the promise that the defendants would be able to obtain substantial tax refunds for the taxpayers.

5. In return for the preparation of these tax returns, the recruited taxpayers agreed to pay a percentage of the refunds they received to **RIGOBERTO CABRERA** and **CARLOS PEREZ**.

6. **RIGOBERTO CABRERA** and **CARLOS PEREZ** prepared and caused the preparation of false, fictitious and fraudulent federal income tax returns on behalf of the recruited taxpayers. The defendants attached or caused to be attached to the tax returns, IRS form 2439 that falsely and fraudulently claimed that the taxpayers were entitled to a tax credit.

7. **RIGOBERTO CABRERA** and **CARLOS PEREZ** also prepared and caused the preparation of false, fictitious and fraudulent federal income tax returns on behalf of the recruited taxpayers that claimed deductions to which the taxpayers were not entitled, including Schedule C attachments claiming fraudulent gross receipts and expenses.

8. Based on the false and fraudulent income tax returns, **RIGOBERTO CABRERA** and **CARLOS PEREZ** caused the IRS to wire tax refunds from the IRS to the taxpayers' bank accounts.

9. After the recruited taxpayers received their fraudulently obtained refunds from the IRS, **RIGOBERTO CABRERA** and **CARLOS PEREZ** would collect from the taxpayers a percentage of the funds as payment.

10. **RIGOBERTO CABRERA** and **CARLOS PEREZ** set up and had access to bank accounts for Big Records and Regius Consulting and would, in some instances, direct the taxpayers to pay them through checks made payable to those companies. In other instances, the defendants directed the taxpayers to pay them through checks made payable to companies that the defendants

controlled indirectly, such as Regius Financial, Regius Investments, and shell companies such as Tool Palace, Ultimate Tools, and Durable Flooring.

All in violation of Title 18, United States Code, Section 286.

COUNTS 2-20
False, Fictitious and Fraudulent Claims
(18 U.S.C. § 287)

1. Paragraphs 1 through 15 of the General Allegations section of this Superseding Indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about the dates set forth below, in Miami-Dade County, in the Southern District of Florida and elsewhere, the defendants identified below, knowingly made and presented, and caused to be made and presented, to the Internal Revenue Service ("IRS"), an agency of the United States, materially false, fictitious and fraudulent claims upon and against the United States and the IRS, specifically, false individual United States income tax returns and supporting documents, including Internal Revenue Service forms 1040, 1040X, and 2439, fraudulently claiming tax refunds in the amounts and on behalf of the taxpayers listed below, knowing such claims were false, fictitious and fraudulent:

<u>Count</u>	<u>Defendant(s)</u>	<u>False Claim</u>	<u>Taxpayer</u>	<u>Approximate Date of Claim</u>	<u>Approximate Refund Claimed</u>
2	RIGOBERTO CABRERA and CARLOS PEREZ	2008 amended individual income tax return	J.D.	5/07/2009	\$25,550
3	RIGOBERTO CABRERA and CARLOS PEREZ	2008 individual income tax return	W.W.	3/17/2009	\$36,167
4	RIGOBERTO CABRERA and CARLOS PEREZ	2008 individual income tax return	J.A.	3/18/2009	\$37,100

<u>Count</u>	<u>Defendant(s)</u>	<u>False Claim</u>	<u>Taxpayer</u>	<u>Approximate Date of Claim</u>	<u>Approximate Refund Claimed</u>
5	RIGOBERTO CABRERA	2008 individual income tax return	A.M.	3/23/2009	\$76,984
6	RIGOBERTO CABRERA and CARLOS PEREZ	2008 individual income tax return	R. R.	3/28/2009	\$47,544
7	RIGOBERTO CABRERA and CARLOS PEREZ	2008 individual income tax return	M.G.	3/14/2009	\$42,934
8	RIGOBERTO CABRERA and CARLOS PEREZ	2008 individual income tax return	L.G.	4/15/2009	\$45,952
9	RIGOBERTO CABRERA and CARLOS PEREZ	2008 individual income tax return	T.O.	4/15/2009	\$47,698
10	CARLOS PEREZ	2008 amended individual income tax return	CARLOS PEREZ	4/24/2009	\$42,180
11	RIGOBERTO CABRERA and CARLOS PEREZ	2008 amended individual income tax return	L.N.	5/22/2009	\$24,210
12	RIGOBERTO CABRERA	2008 individual income tax return	RIGOBERTO CABRERA	6/18/2009	\$544,584
13	RIGOBERTO CABRERA	2008 amended individual income tax return	M.M.	5/22/2009	\$56,881

<u>Count</u>	<u>Defendant(s)</u>	<u>False Claim</u>	<u>Taxpayer</u>	<u>Approximate Date of Claim</u>	<u>Approximate Refund Claimed</u>
14	RIGOBERTO CABRERA and CARLOS PEREZ	2008 amended individual income tax return	C.L.	8/21/2009	\$42,177
15	RIGOBERTO CABRERA	2009 individual income tax return	Y.R.	1/23/2010	\$73,973
16	RIGOBERTO CABRERA and CARLOS PEREZ	2009 individual income tax return	L.G.	1/27/2010	\$63,519
17	RIGOBERTO CABRERA	2009 individual income tax return	M.M.	1/29/2010	\$77,617
18	RIGOBERTO CABRERA	2009 individual income tax return	M.G.	2/08/2010	\$55,967
19	RIGOBERTO CABRERA	2009 individual income tax return	J.D.	3/30/2010	\$47,393
20	RIGOBERTO CABRERA	2009 individual income tax return	W.W.	3/30/2010	\$70,475

In violation of Title 18, United States Code, Sections 287 and 2.

COUNT 21
Conspiracy to Commit Wire Fraud
(18.S.C. § 1349)

1. Paragraphs 1 through 15 of the General Allegations section of this Superseding Indictment are realleged and incorporated by reference as though fully set forth herein.

2. From on or about January 24, 2009, and continuing through on or about March 30, 2010, in Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

**RIGOBERTO CABRERA and
CARLOS PEREZ,**

did willfully, that is, with the intent to further the object of the conspiracy, and knowingly combine, conspire, confederate and agree with each other, and others known and unknown to the Grand Jury, to violate Title 18, United States Code, Section 1343, that is, to knowingly and with the intent to defraud, devise and intend to devise a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, knowing that they were false and fraudulent when made, and, for the purpose of executing such scheme and artifice, transmitting and causing to be transmitted by means of wire communication in interstate and foreign commerce, certain writings, signs, signals, pictures, and sounds.

PURPOSE OF THE CONSPIRACY

3. It was the purpose of the conspiracy for the defendants and their co-conspirators to unjustly enrich themselves by submitting false tax returns claiming false credits and deductions, and receiving a percentage of the tax refunds received from the filing of the false returns.

MANNER AND MEANS

4. Paragraphs 4 through 10 of the Manner and Means section of Count 1 of this Superseding Indictment are realleged and incorporated by reference as though fully set forth herein as a description of the Manner and Means.

All in violation of Title 18, United States Code, Section 1349.

COUNTS 22-25
Wire Fraud
(18 U.S.C. § 1343)

1. Paragraphs 1 through 15 of the General Allegations section of this Superseding Indictment are realleged and incorporated by reference as though fully set forth herein.

2. From on or about January 24, 2009, and continuing through on or about March 30, 2010, in Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

RIGOBERTO CABRERA and
CARLOS PEREZ,

did knowingly and with intent to defraud, devise and intend to devise a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, knowing that the pretenses, representations, and promises were false and fraudulent when made, and did knowingly transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, certain writings, signs, signals, pictures and sounds for the purpose of executing the scheme and artifice.

PURPOSE OF THE SCHEME AND ARTIFICE

3. It was the purpose and object of the scheme and artifice for the defendants and their accomplices to unjustly enrich themselves by submitting false tax returns claiming false credits and deductions, and receiving a percentage of the tax refunds received from the filing of the false returns.

SCHEME AND ARTIFICE

4. Paragraphs 4 through 10 of the Manner and Means section of Count 1 of this Superseding Indictment are realleged and incorporated by reference as though fully set forth herein as a description of the Scheme and Artifice.

USE OF THE WIRES

5. On or about the dates enumerated as to each count below, in Miami-Dade County, in the Southern District of Florida, **RIGOBERTO CABRERA** and **CARLOS PEREZ**, as specified below, for the purpose of executing the aforesaid scheme and artifice to defraud, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, did knowingly transmit and cause to be transmitted, by means of wire communication in interstate and foreign commerce, certain writings, signs, signals, pictures, and sounds, as more particularly described below:

<u>Count</u>	<u>Defendant(s)</u>	<u>Approximate Date</u>	<u>Use of the Wires</u>
22	RIGOBERTO CABRERA and CARLOS PEREZ	04/3/2009	Wiring of tax refund in the approximate amount of \$36,167 from the IRS in Minneapolis, MN to W.W.'s Bank Atlantic account No. XXXXXXXXXX-2478 in Miami, Florida.
23	RIGOBERTO CABRERA and CARLOS PEREZ	04/24/2009	Wiring of tax refund in the approximate amount of \$47,544 from the IRS in Minneapolis, MN to R.R.'s Bank of America account No. XXXXXXXXXX-1687 in Miami, Florida.
24	RIGOBERTO CABRERA	03/5/2010	Wiring of tax refund in the approximate amount of \$53,075 from the IRS in Minneapolis, MN to M.G.'s Bank of America ^{WACHOVIA BANK} account No. XXXXXXXXXX-7827 in Miami, Florida. (DI) K.B.
25	RIGOBERTO CABRERA	04/20/2010	Wiring of tax refund in the approximate amount of \$70,475 from the IRS in Minneapolis, MN to W.W.'s Regions account No. XXXXXXXXXX-3676 in Miami, Florida.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT 26
Conspiracy to Commit Money Laundering
(18 U.S.C. § 1956(h))

Beginning on or about December 18, 2009, and continuing through on or about May 20, 2010, in Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendant,

RIGOBERTO CABRERA,

did willfully, that is, with the intent to further the object of the conspiracy, and knowingly combine, conspire, confederate, and agree with E.O. and with others known and unknown to the Grand Jury to violate Title 18, United States Code, Section 1956, that is, to knowingly conduct a financial transaction affecting interstate commerce involving the proceeds of specified unlawful activity, knowing that the property involved in the financial transaction represented the proceeds of some form of unlawful activity, and knowing that the transaction was designed in whole and in part to conceal and disguise the nature, the location, the source, the ownership, and the control of the proceeds of specified unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i).

It is further alleged that the specified unlawful activity is conspiracy to commit wire fraud and wire fraud in violation of Title 18, United States Code, Sections 1349 and 1343.

All in violation of Title 18, United States Code, Section 1956(h).

COUNTS 27-30
Money Laundering
(18 U.S.C. § 1956(a)(1)(B)(i))

On or about the dates specified as to each count below, in Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendant,

RIGOBERTO CABRERA,

did knowingly conduct and attempt to conduct a financial transaction affecting interstate commerce, which transaction involved the proceeds of specified unlawful activity, knowing that the property involved in the financial transaction represented the proceeds of some form of unlawful activity, and knowing that the transaction was designed in whole and in part to conceal and disguise the nature, the location, the source, the ownership, and the control of the proceeds of the specified unlawful activity, as set forth in each count below:

<u>Count</u>	<u>Approximate Date</u>	<u>Description of Financial Transaction</u>
27	3/8/2010	The deposit of approximately \$10,000 into Wachovia Bank Account xxxxxxxx5451 made payable to Durable Flooring Inc. from M.G.
28	3/8/2010	The deposit of approximately \$10,500 into TD Bank Account xxxxxx1715 made payable to Tool Palace Inc. from M.G.
29	5/4/2010	The deposit of approximately \$12,937 into TD Bank Account xxxxxx7420 made payable to Ultimate Tools from W.W.
30	5/4/2010	The deposit of approximately \$16,300 into TD Bank Account xxxxxx1715 made payable to Tool Palace Inc. from W.W.

It is further alleged that the specified unlawful activity is conspiracy to commit wire fraud and wire fraud in violation of Title 18, United States Code, Sections 1349 and 1343.

In violation of Title 18, United States Code, Sections 1956(a)(1)(B)(i) and 2.

FORFEITURE
(18 U.S.C. §§ 981(a)(1)(C), 982(a)(1))

1. The General Allegations and the allegations of Counts 21 through 30 of this Superseding Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of certain property in which one or more of the defendants, **RIGOBERTO CABRERA** and **CARLOS PEREZ**, have an interest.

2. Upon conviction of a violation of Title 18, United States Code, Section 1343 or 1349, as alleged in Counts 21 through 25 of this Superseding Indictment, the defendants, **RIGOBERTO CABRERA** and **CARLOS PEREZ**, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 981(a)(1)(C), made applicable by Title 28, United States Code, Section 2461(c), all property, real and personal, which constitutes, or is derived from, proceeds traceable to such violation.

3. Upon conviction of a violation of Title 18, United States Code, Section 1956, as alleged in Counts 26 through 30 of this Superseding Indictment, the defendants, **RIGOBERTO CABRERA**, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 982(a)(1), all property, real and personal, that was involved in such offense, and all property traceable to such property.

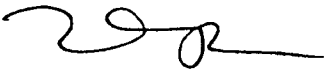
All pursuant to Title 18, United States Code, Sections 981(a)(1)(C), 982(a)(1) and 982(b)(1), Title 28, United States Code, Section 2461(c), and the procedures set forth in Title 21, United States Code, Section 853.

A TRUE BILL

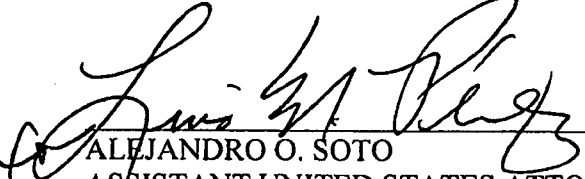
FOREPERSON



WIFREDO A. FERRER
UNITED STATES ATTORNEY



DANIEL BERNSTEIN
ASSISTANT UNITED STATES ATTORNEY



ALEJANDRO O. SOTO
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES OF AMERICA

CASE NO.

13-20339-CR-COHN(S)

vs.

RIGOBERTO CABRERA and
CARLOS PEREZ,

CERTIFICATE OF TRIAL ATTORNEY*

Defendants.

Superseding Case Information: 13-20339-CR-COHN

Court Division: (Select One)

X Miami Key West
 FTL WPB FTP

New Defendant(s)
Number of New Defendants
Total number of counts

Yes No X

0
30

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.
2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) Yes
List language and/or dialect Spanish

4. This case will take 14 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

(Check only one)

(Check only one)

I 0 to 5 days
II 6 to 10 days
III 11 to 20 days
IV 21 to 60 days
V 61 days and over

X

Petty
Minor
Misdem.
Felony X

6. Has this case been previously filed in this District Court? (Yes or No) No

If yes:

Judge: Cohn

Case No. 13-20339-CR-COHN

(Attach copy of dispositive order)

Has a complaint been filed in this matter?

(Yes or No) No

If yes:

Magistrate Case No.

Related Miscellaneous numbers:

Defendant(s) in federal custody as of

Defendant(s) in state custody as of

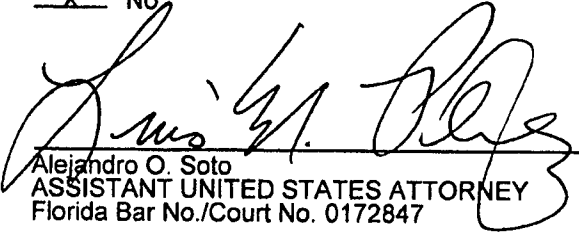
Rule 20 from the

District of

Is this a potential death penalty case? (Yes or No) No

7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? Yes X No

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? Yes X No


Alejandro O. Soto
ASSISTANT UNITED STATES ATTORNEY
Florida Bar No./Court No. 0172847

*Penalty Sheet(s) attached

REV 4/6/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: RIGOBERTO CABRERA 13-20339-CR-COHN(S)

Case No: _____

Count #: 1

Conspiracy to Defraud the Government with Respect to Claims

Title 18, United States Code, Section 286

*Max.Penalty: Ten (10) years' imprisonment

Counts #: 2-9, 11-20

False, Fraudulent and Fictitious Claims

Title 18, United States Code, Section 287

*Max.Penalty: Twenty (20) years' imprisonment as to each count

Count #: 21

Conspiracy to Commit Wire Fraud

Title 18, United States Code, Section 1349

*Max.Penalty: Twenty (20) years' imprisonment

Counts #: 22-25

Wire Fraud

Title 18, United States Code, Section 1343

*Max.Penalty: Twenty (20) years' imprisonment as to each count

Count #: 26

Conspiracy to Commit Money Laundering

Title 18, United States Code, Section 1956(h)

***Max. Penalty:** Twenty (20) years' imprisonment as to each count

Counts # 27-30

Money Laundering

Title 18, United States Code, Section 1956(a)(1)(B)(i)

***Max. Penalty:** Twenty (20) years' imprisonment as to each count

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: CARLOS PEREZ 13-20339-CR-COHN(S)

Case No: _____

Count #: 1

Conspiracy to Defraud the Government with Respect to Claims

Title 18, United States Code, Section 286

*Max.Penalty: Ten (10) years' imprisonment

Counts #: 29, 6-11, 14, 16

False, Fraudulent and Fictitious Claims

Title 18, United States Code, Section 287

*Max.Penalty: Ten (10) years' imprisonment as to each count

Count #: 21

Conspiracy to Commit Wire Fraud

Title 18, United States Code, Section 1349

*Max.Penalty: Twenty (20) years' imprisonment

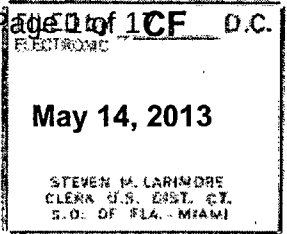
Counts #: 22-23

Wire Fraud

Title 18, United States Code, Section 1343

*Max.Penalty: Twenty (20) years' imprisonment as to each count

A-10



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
13-20339-CR-COHN/SELTZER
CASE NO. _____

18 U.S.C. § 286
18 U.S.C. § 287
18 U.S.C. § 1343
18 U.S.C. § 1349
18 U.S.C. § 1956(h)
18 U.S.C. § 1956(a)(1)(B)(i)
18 U.S.C. § 2
18 U.S.C. § 981(a)(1)(C)
18 U.S.C. § 982(a)(1)

UNITED STATES OF AMERICA

vs.

**RIGOBERTO CABRERA
and CARLOS PEREZ,**

Defendants.

INDICTMENT

The Grand Jury charges that:

GENERAL ALLEGATIONS

At all times relevant to this indictment:

1. Defendant **RIGOBERTO CABRERA** resided in Miami-Dade County, within the Southern District of Florida.
2. Defendant **CARLOS PEREZ** resided Miami-Dade County, within the Southern District of Florida.
3. Big Records, LLC ("Big Records") was a Florida Corporation incorporated on April 21, 2009, with **CARLOS PEREZ** as the sole registered agent and manager.
4. **CARLOS PEREZ** opened a bank account at Bank of America, in Miami-Dade County, in the name of Big Records on April 24, 2009.

5. Regius Consulting Group LLC ("Regius Consulting") was a Florida Corporation incorporated on March 3, 2009, with **CARLOS PEREZ** as the sole registered agent and manager.

6. **CARLOS PEREZ** opened a bank account at Bank of America, in Miami-Dade County, in the name of Regius Consulting on March 4, 2009.

7. Regius Financial Services, LLC ("Regius Financial") was a Florida Corporation incorporated on April 21, 2009.

8. Regius Investments Group LLC ("Regius Investments") was a Florida Corporation incorporated on April 21, 2009.

9. Tool Palace, Inc. ("Tool Palace") was a Florida Corporation incorporated on January 6, 2010.

10. Ultimate Tools, Inc. ("Ultimate Tools") was a Florida Corporation incorporated on February 3, 2010.

11. Durable Flooring, Inc. ("Durable Flooring") was a Florida Corporation incorporated on January 7, 2010.

12. The Internal Revenue Service ("IRS") was an agency of the United States Department of Treasury responsible for enforcing and administering the tax laws of the United States, and collecting taxes owed to the United States.

13. The IRS allowed United States individual taxpayers to file their tax returns electronically (e-file) by filing online directly or through a tax preparer.

14. The IRS required United States individual taxpayer to file their amended tax returns by physically mailing in a paper return to IRS offices.

15. An Internet Protocol or "IP" address was a unique series of numbers used to identify computers over the Internet. Every computer connected to the Internet had to have an IP address,

which made it possible to identify the account from which a transmission was sent on a particular date and time.

COUNT 1

**Conspiracy to Defraud the Government With Respect to Claims
(18 U.S.C. § 286)**

1. Paragraphs 1 through 15 of the General Allegations Section of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. From on or about January 24, 2009, and continuing through on or about March 30, 2010, in Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

**RIGOBERTO CABRERA and
CARLOS PEREZ,**

did knowingly and willfully combine, conspire, confederate, and agree with each other and with persons known and unknown to the Grand Jury, to defraud the United States, and any department and agency thereof, that is, the Internal Revenue Service, by obtaining and aiding to obtain the payment and allowance of any false, fictitious and fraudulent claims, in violation of Title 18, United States Code, Section 286.

PURPOSE OF THE CONSPIRACY

3. It was the purpose of the conspiracy for the defendants and their co-conspirators to unjustly enrich themselves by submitting false tax returns claiming false credits and deductions, and receiving a percentage of the tax refunds received from the filing of the false returns.

MANNER AND MEANS OF THE CONSPIRACY

The manner and means by which the defendants and their co-conspirators sought to accomplish the purpose and object of the conspiracy included, among others, the following:

4. **RIGOBERTO CABRERA** and **CARLOS PEREZ** offered to prepare the individual income tax returns for taxpayers whom they recruited and caused to be recruited with the promise that the defendants would be able to obtain substantial tax refunds for the taxpayers.

5. In return for the preparation of these tax returns, the recruited taxpayers agreed to pay a percentage of the refunds they received to **RIGOBERTO CABRERA** and **CARLOS PEREZ**.

6. **RIGOBERTO CABRERA** and **CARLOS PEREZ** prepared and caused the preparation of false, fictitious and fraudulent federal income tax returns on behalf of the recruited taxpayers. The defendants attached or caused to be attached to the tax returns, IRS form 2439 that falsely and fraudulently claimed that the taxpayers were entitled to a tax credit.

7. **RIGOBERTO CABRERA** and **CARLOS PEREZ** also prepared and caused the preparation of false, fictitious and fraudulent federal income tax returns on behalf of the recruited taxpayers that claimed deductions to which the taxpayers were not entitled, including Schedule C attachments claiming fraudulent gross receipts and expenses.

8. Based on the false and fraudulent income tax returns, **RIGOBERTO CABRERA** and **CARLOS PEREZ** caused the IRS to wire tax refunds from the IRS to the taxpayers' bank accounts.

9. After the recruited taxpayers received their fraudulently obtained refunds from the IRS, **RIGOBERTO CABRERA** and **CARLOS PEREZ** would collect from the taxpayers a percentage of the funds as payment.

10. **RIGOBERTO CABRERA** and **CARLOS PEREZ** set up and had access to bank accounts for Big Records and Regius Consulting and would, in some instances, direct the taxpayers to pay them through checks made payable to those companies. In other instances, the defendants directed the taxpayers to pay them through checks made payable to companies that the defendants

controlled indirectly, such as Regius Financial, Regius Investments, and shell companies such as Tool Palace, Ultimate Tools, and Durable Flooring.

All in violation of Title 18, United States Code, Section 286.

COUNTS 2-20
False, Fictitious and Fraudulent Claims
(18 U.S.C. § 287)

1. Paragraphs 1 through 15 of the General Allegations Section of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about the dates set forth below, in Miami-Dade County, in the Southern District of Florida and elsewhere, the defendants identified below, knowingly made and presented, and caused to be made and presented, to the Internal Revenue Service ("IRS"), an agency of the United States, materially false, fictitious and fraudulent claims upon and against the United States and the IRS, specifically, false individual United States income tax returns and supporting documents, including Internal Revenue Service forms 1040, 1040X, and 2439, fraudulently claiming tax refunds in the amounts and on behalf of the taxpayers listed below, knowing such claims were false, fictitious and fraudulent:

<u>Count</u>	<u>Defendant(s)</u>	<u>False Claim</u>	<u>Taxpayer</u>	<u>Approximate Date of Claim</u>	<u>Approximate Refund Claimed</u>
2	RIGOBERTO CABRERA and CARLOS PEREZ	2008 amended individual income tax return	J.D.	1/24/2009	\$25,550
3	RIGOBERTO CABRERA and CARLOS PEREZ	2008 individual income tax return	W.W.	3/17/2009	\$36,167
4	RIGOBERTO CABRERA and CARLOS PEREZ	2008 individual income tax return	J.A.	3/18/2009	\$37,100

<u>Count</u>	<u>Defendant(s)</u>	<u>False Claim</u>	<u>Taxpayer</u>	<u>Approximate Date of Claim</u>	<u>Approximate Refund Claimed</u>
5	RIGOBERTO CABRERA	2008 individual income tax return	A.M.	3/23/2009	\$76,984
6	RIGOBERTO CABRERA and CARLOS PEREZ	2008 individual income tax return	R. R.	3/28/2009	\$47,544
7	RIGOBERTO CABRERA and CARLOS PEREZ	2008 individual income tax return	M.G.	4/6/2009	\$42,934
8	RIGOBERTO CABRERA and CARLOS PEREZ	2008 individual income tax return	L.G.	4/15/2009	\$45,952
9	RIGOBERTO CABRERA and CARLOS PEREZ	2008 individual income tax return	T.O.	4/15/2009	\$47,698
10	CARLOS PEREZ	2008 amended individual income tax return	CARLOS PEREZ	4/24/2009	\$42,180
11	RIGOBERTO CABRERA and CARLOS PEREZ	2008 amended individual income tax return	L.N.	5/22/2009	\$24,210
12	RIGOBERTO CABRERA	2008 individual income tax return	RIGOBERTO CABRERA	6/18/2009	\$544,584
13	RIGOBERTO CABRERA	2008 amended individual income tax return	M.M.	7/24/2009	\$56,881

<u>Count</u>	<u>Defendant(s)</u>	<u>False Claim</u>	<u>Taxpayer</u>	<u>Approximate Date of Claim</u>	<u>Approximate Refund Claimed</u>
14	RIGOBERTO CABRERA and CARLOS PEREZ	2008 amended individual income tax return	C.L.	8/21/2009	\$42,177
15	RIGOBERTO CABRERA	2009 individual income tax return	Y.R.	1/23/2010	\$73,973
16	RIGOBERTO CABRERA and CARLOS PEREZ	2009 individual income tax return	L.G.	1/27/2010	\$63,519
17	RIGOBERTO CABRERA	2009 individual income tax return	M.M.	1/29/2010	\$77,617
18	RIGOBERTO CABRERA	2009 individual income tax return	M.G.	3/01/2010	\$55,967
19	RIGOBERTO CABRERA	2009 individual income tax return	J.D.	3/30/2010	\$47,393
20	RIGOBERTO CABRERA	2009 individual income tax return	W.W.	3/30/2010	\$70,475

In violation of Title 18, United States Code, Sections 287 and 2.

COUNT 21
Conspiracy to Commit Wire Fraud
(18.S.C. § 1349)

1. Paragraphs 1 through 15 of the General Allegations Section of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. From on or about January 24, 2009, and continuing through on or about March 30, 2010, in Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

**RIGOBERTO CABRERA and
CARLOS PEREZ,**

did willfully, that is, with the intent to further the object of the conspiracy, and knowingly combine, conspire, confederate and agree with each other, and others known and unknown to the Grand Jury, to violate Title 18, United States Code, Section 1343, that is, to knowingly and with the intent to defraud, devise and intend to devise a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, knowing that they were false and fraudulent when made, and, for the purpose of executing such scheme and artifice, transmitting and causing to be transmitted by means of wire communication in interstate and foreign commerce, certain writings, signs, signals, pictures, and sounds.

PURPOSE OF THE CONSPIRACY

3. It was the purpose of the conspiracy for the defendants and their co-conspirators to unjustly enrich themselves by submitting false tax returns claiming false credits and deductions, and receiving a percentage of the tax refunds received from the filing of the false returns.

MANNER AND MEANS

4. Paragraphs 4 through 10 of the Manner and Means Section of Count 1 of this Indictment are realleged and incorporated by reference as though fully set forth herein as a description of the Manner and Means.

All in violation of Title 18, United States Code, Section 1349.

COUNTS 22-25
Wire Fraud
(18 U.S.C. § 1343)

1. Paragraphs 1 through 15 of the General Allegations Section of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. From on or about January 24, 2009, and continuing through on or about March 30, 2010, in Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendants,

**RIGOBERTO CABRERA and
CARLOS PEREZ,**

did knowingly and with intent to defraud, devise and intend to devise a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, knowing that the pretenses, representations, and promises were false and fraudulent when made, and did knowingly transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, certain writings, signs, signals, pictures and sounds for the purpose of executing the scheme and artifice.

PURPOSE OF THE SCHEME AND ARTIFICE

3. It was the purpose and object of the scheme and artifice for the defendants and their accomplices to unjustly enrich themselves by submitting false tax returns claiming false credits and deductions, and receiving a percentage of the tax refunds received from the filing of the false returns.

SCHEME AND ARTIFICE

4. Paragraphs 4 through 10 of the Manner and Means Section of Count 1 of this Indictment are realleged and incorporated by reference as though fully set forth herein as a description of the Scheme and Artifice.

USE OF THE WIRES

5. On or about the dates enumerated as to each count below, in Miami-Dade County, in the Southern District of Florida, **RIGOBERTO CABRERA** and **CARLOS PEREZ**, as specified below, for the purpose of executing the aforesaid scheme and artifice to defraud, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, did knowingly transmit and cause to be transmitted, by means of wire communication in interstate and foreign commerce, certain writings, signs, signals, pictures, and sounds, as more particularly described below:

<u>Count</u>	<u>Defendant(s)</u>	<u>Approximate Date</u>	<u>Use of the Wires</u>
22	RIGOBERTO CABRERA and CARLOS PEREZ	04/3/2009	Wiring of tax refund in the approximate amount of \$36,167 from the IRS in Minneapolis, MN to W.W.'s Bank Atlantic account No. XXXXXXXXXX-2478 in Miami, Florida.
23	RIGOBERTO CABRERA and CARLOS PEREZ	04/24/2009	Wiring of tax refund in the approximate amount of \$47,544 from the IRS in Minneapolis, MN to R.R.'s Bank of America account No. XXXXXXXXXX-1687 in Miami, Florida.
24	RIGOBERTO CABRERA	03/5/2010	Wiring of tax refund in the approximate amount of \$53,075 from the IRS in Minneapolis, MN to M.G.'s Bank of America account No. XXXXXXXXXX-7827 in Miami, Florida.
25	RIGOBERTO CABRERA	04/20/2010	Wiring of tax refund in the approximate amount of \$70,475 from the IRS in Minneapolis, MN to W.W.'s Regions account No. XXXXXXXXXX-3676 in Miami, Florida.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT 26
Conspiracy to Commit Money Laundering
(18 U.S.C. § 1956(h))

Beginning on or about December 18, 2009, and continuing through on or about May 20, 2010, in Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendant,

RIGOBERTO CABRERA,

did willfully, that is, with the intent to further the object of the conspiracy, and knowingly combine, conspire, confederate, and agree with E.O. and with others known and unknown to the Grand Jury to violate Title 18, United States Code, Section 1956, that is, to knowingly conduct a financial transaction affecting interstate commerce involving the proceeds of specified unlawful activity, knowing that the property involved in the financial transaction represented the proceeds of some form of unlawful activity, and knowing that the transaction was designed in whole and in part to conceal and disguise the nature, the location, the source, the ownership, and the control of the proceeds of specified unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i).

It is further alleged that the specified unlawful activity is conspiracy to commit wire fraud and wire fraud in violation of Title 18, United States Code, Sections 1349 and 1343.

All in violation of Title 18, United States Code, Section 1956(h).

COUNTS 27-30
Money Laundering
(18 U.S.C. § 1956(a)(1)(B)(i))

On or about the dates specified as to each count below, in Miami-Dade County, in the Southern District of Florida, and elsewhere, the defendant,

RIGOBERTO CABRERA,

did knowingly conduct and attempt to conduct a financial transaction affecting interstate commerce, which transaction involved the proceeds of specified unlawful activity, knowing that the property involved in the financial transaction represented the proceeds of some form of unlawful activity, and knowing that the transaction was designed in whole and in part to conceal and disguise the nature, the location, the source, the ownership, and the control of the proceeds of the specified unlawful activity, as set forth in each count below:

<u>Count</u>	<u>Approximate Date</u>	<u>Description of Financial Transaction</u>
27	3/8/2010	The deposit of approximately \$10,000 into Wachovia Bank Account xxxxxxxxx5451 made payable to Durable Flooring Inc. from M.G.
28	3/8/2010	The deposit of approximately \$10,500 into TD Bank Account xxxxxx1715 made payable to Tool Palace Inc. from M.G.
29	5/4/2010	The deposit of approximately \$12,937 into TD Bank Account xxxxxx7420 made payable to Ultimate Tools from W.W.
30	5/4/2010	The deposit of approximately \$16,300 into TD Bank Account xxxxxx1715 made payable to Tool Palace Inc. from W.W.

It is further alleged that the specified unlawful activity is conspiracy to commit wire fraud and wire fraud in violation of Title 18, United States Code, Sections 1349 and 1343.

In violation of Title 18, United States Code, Sections 1956(a)(1)(B)(i) and 2.

FORFEITURE
(18 U.S.C. §§ 981(a)(1)(C), 982(a)(1))

1. The General Allegations and the allegations of Counts 21 through 30 of this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of certain property in which one or more of the defendants, **RIGOBERTO CABRERA** and **CARLOS PEREZ**, have an interest.

2. Upon conviction of a violation of Title 18, United States Code, Section 1343 or 1349, as alleged in Counts 21 through 25 of this Indictment, the defendants, **RIGOBERTO CABRERA** and **CARLOS PEREZ**, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 981(a)(1)(C), made applicable by Title 28, United States Code, Section 2461(c), all property, real and personal, which constitutes, or is derived from, proceeds traceable to such violation.

3. Upon conviction of a violation of Title 18, United States Code, Section 1956, as alleged in Counts 26 through 30 of this Indictment, the defendants, **RIGOBERTO CABRERA**, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 982(a)(1), all property, real and personal, that was involved in such offense, and all property traceable to such property.

All pursuant to Title 18, United States Code, Sections 981(a)(1)(C), 982(a)(1) and 982(b)(1), Title 28, United States Code, Section 2461(c), and the procedures set forth in Title 21, United States Code, Section 853.

A TRUE BILL

FOREPERSON



WIFREDO A. FERRER
UNITED STATES ATTORNEY



DANIEL BERNSTEIN
ASSISTANT UNITED STATES ATTORNEY



ALEJANDRO O. SOTO
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES OF AMERICA

CASE NO. _____

vs.

CERTIFICATE OF TRIAL ATTORNEY*

**RIGOBERTO CABRERA and
CARLOS PEREZ,**

Defendants.

Superseding Case Information:

Court Division: (Select One)

X Miami Key West
 FTL WPB FTP

New Defendant(s) Yes No
Number of New Defendants
Total number of counts

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.
2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) Yes
List language and/or dialect Spanish

4. This case will take 14 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

(Check only one)

(Check only one)

I	0 to 5 days	<u> </u>	Petty	<u> </u>
II	6 to 10 days	<u> </u>	Minor	<u> </u>
III	11 to 20 days	<u>X</u>	Misdem.	<u> </u>
IV	21 to 60 days	<u> </u>	Felony	<u>X</u>
V	61 days and over	<u> </u>		

6. Has this case been previously filed in this District Court? (Yes or No) No

If yes:

Judge:

Case No.

(Attach copy of dispositive order)

Has a complaint been filed in this matter?

(Yes or No)

No

If yes:

Magistrate Case No.

Related Miscellaneous numbers:

Defendant(s) in federal custody as of

Defendant(s) in state custody as of

Rule 20 from the

District of

Is this a potential death penalty case? (Yes or No) No

7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? Yes X No

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? Yes X No



Daniel Bernstein
ASSISTANT UNITED STATES ATTORNEY
Florida Bar No./Court No. 0017973

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

PENALTY SHEET

Defendant's Name: RIGOBERTO CABRERA

Case No: _____

Count #: 1

Conspiracy to Defraud the Government with Respect to Claims

Title 18, United States Code, Section 286

***Max.Penalty:** Ten (10) years' imprisonment

Counts #: 2-9 and 11-20

False, Fraudulent and Fictitious Claims

Title 18, United States Code, Section 287

***Max.Penalty:** Ten (10) years' imprisonment as to each count

Count #: 21

Conspiracy to Commit Wire Fraud

Title 18, United States Code, Section 1349

***Max.Penalty:** Twenty (20) years' imprisonment

Counts #: 22-25

Wire Fraud

Title 18, United States Code, Section 1343

***Max.Penalty:** Twenty (20) years' imprisonment as to each count

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: RIGOBERTO CABRERA

Case No: _____

Count #: 26

Conspiracy to Commit Money Laundering

Title 18, United States Code, Section 1956(h)

*Max.Penalty: Ten (10) years' imprisonment

Counts #: 27-30

Money Laundering

Title 18, United States Code, Section 1956(a)(1)(B)(i)

*Max.Penalty: Twenty (20) years' imprisonment as to each count

Count #:

*Max.Penalty:

Counts #:

*Max.Penalty:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: CARLOS PEREZ

Case No: _____

Count #: 1

Conspiracy to Defraud the Government with Respect to Claims

Title 18, United States Code, Section 286

*Max.Penalty: Ten (10) years' imprisonment

Counts #: 2-4, 6-11, and 14-15

False, Fraudulent and Fictitious Claims

Title 18, United States Code, Section 287

*Max.Penalty: Ten (10) years' imprisonment as to each count

Count #: 21

Conspiracy to Commit Wire Fraud

Title 18, United States Code, Section 1349

*Max.Penalty: Ten (10) years' imprisonment

Counts #: 22-23

Wire Fraud

Title 18, United States Code, Section 1343

*Max.Penalty: Twenty (20) years' imprisonment as to each count

A-11

From: Calabrese Karyn M (Reilly)
To: O'Brien Victoria
Subject: Question
Date: Friday, August 30, 2013 3:18:00 PM

Hey Vicky,

So we are trying to verify the exact dates of filing for the tax return counts we provided. The dates of the original tax returns are clear to me. But some of the dates of the amended returns are very confusing. Since these tax returns were frivolous filings the taxpayers sometimes sent in more than one amended return and the IMFOLT isn't tying to the dates of filing stamped on the returns, etc.

I am concerned with the following returns:

- 1.) Jessica Delagao 2008 1040X
- 2.) Michael Marin 2008 1040X

I am attaching the copies of the returns I provided in discovery. I am confused as to what date would be the correct date of filing. Please help!

Karyn Calabrese
Special Agent
Internal Revenue Service
7850 SW 6th Court
Plantation, FL 33324
Stop 6501 - KR
office: 954-423-7257
fax: 954-423-7655

A-12

STATUTORY & OTHER PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT FIVE

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

UNITED STATES CONSTITUTION, AMENDMENT SIX

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

TITLE 28, UNITED STATES CODE, SECTION 455

- (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceedings in which his impartiality might reasonably be questioned.
- (b) He shall also disqualify himself in the following circumstances:
 - (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;
 - (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.

- (3) Where he has served in governmental employment and in such capacity participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
- (4) He knows that he, individually or financially, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
- (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) is a party to the proceeding, or an officer, director or trustee of a party;
 - (ii) is acting as a lawyer in the proceeding;
 - (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - (iv) is to the judges knowledge likely to be a material witness in the proceeding;
- (e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

Title 28, United States Code, Section 2253

- (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review on appeal by the court of appeals for the circuit in which the proceeding is held
- (c) unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.