

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA	)	Case No. 408-100
)	
	)	SECOND
	)	SUPERSEDING
v.	)	INDICTMENT
)	
	)	Violations:
ALFREDO F. RASCO, and	)	18 U.S.C. § 371
NIURKA RASCO	)	Conspiracy
)	
Defendants.	)	18 U.S.C. § 1347
	)	Health Care Fraud
)	
	)	18 U.S.C. § 1028A
	)	Aggravated Identity Theft
)	
	)	18 U.S.C. § 1001
	)	False Statements
)	
	)	18 U.S.C. § 2
	)	Aiding and Abetting

GOVERNMENT’S SUPPLEMENTARY RESPONSE TO DEFENDANT ALFREDO RASCO’S BRIEF IN SUPPORT OF MOTION TO DISMISS AND MOTION IN LIMINE

COMES NOW the United States of America, by and through its undersigned counsel, and hereby submits the following Supplementary Response to Defendant Alfredo Rasco’s Brief in Support of Motion to Dismiss and Motion in Limine (“Defendant’s Supplemental Brief”).

I. Introduction

On August 31, 2009, this Court held a hearing on various pretrial motions, including Defendants’ Joint Motion to Dismiss the Indictment and Motion in Limine To Exclude Proffer. (Doc. # 67, 68, 70, 71, 77 and 123) (“Defendants’ Motion”). During the course of the hearing, counsel for Defendant Alfredo Rasco raised a number of new legal and factual arguments not

previously raised in Defendants' Motion. At the conclusion of the hearing, the Court requested that Defendant Alfredo Rasco file a Supplemental Brief in support of these new arguments.

The issues to be addressed by Defendant Alfredo Rasco in Defendant's Supplemental Brief were: (1) "the specific language in the grand jury transcript and any specific counts of the indictment that totally rest upon the statements derived from Mr. Rasco or information furnished by Mr. Rasco that the defendant contends is essential to the government's case, or essential core information that could not have been developed from any other source;" (2) to establish "who has the burden" on the issue of the purported breach of the proffer agreement; and (3) "if there is some information, some shred of information, that was brought out in a grand jury transcript that was totally dependent upon Mr. Rasco, but it is not essential to the government's case, how is the defendant harmed by it?" See, Defendant's Supplementary Brief, Exhibit 3, Transcript of Motions Hearing of August 31, 2009, at 42-43.

Defendant's Supplemental Brief, filed on September 18, 2009, goes far beyond anything contemplated at the August 31, 2009 motions hearing. Defendant makes a number of wild allegations about this case, and false accusations against the undersigned Assistant United States Attorney and the case agent, including claims that the Government intentionally misrepresented facts during the motions hearing on August 31, 2009, and libelously false and outrageous claims that the undersigned and the lead case agent suborned perjury and committed perjury before the Grand Jury. These claims are so entirely without merit that they are worthy of sanctions by this Court.

Stripped of defense counsel's false accusations, Defendant's Supplemental Brief boils down to two claims: (1) that the government directly presented evidence about false diagnostic tests and relocating United Therapy from Florida to Georgia in violation of a proffer agreement

between Defendant Alfredo Rasco and the Government; and (2) that the government indirectly presented evidence obtained from Defendant Alfredo Rasco through testimony about statements made by Riccy Mederos, which Defendant Alfredo Rasco argues is also in violation of a proffer agreement between him and the Government. Neither point has merit, and Defendant's Motion should therefore be denied.

II. The Government did not Intentionally Misrepresent Facts to the Court.

Defendant falsely alleges in his Supplemental Brief that the Government intentionally misrepresented facts to the Court during the August 31, 2009 hearing about the investigation of Riccy Mederos, including the dates that Ms. Mederos was arrested, arraigned, and interviewed, in order "to cover up its unavoidable reliance on Mr. Rasco's immunized information."

The transcript of the August 31, 2009 hearing speaks for itself, and makes one thing clear—at no point did the Government intentionally misrepresent anything about this case, including the investigation of Riccy Mederos. As the Court noted repeatedly during the hearing, the arguments concerning Ms. Mederos raised by counsel at the hearing had never been raised before by counsel in any of the many pleadings filed by Defendant purporting to support Defendant's Motion. See Defendant's Supplementary Brief, Exhibit 3, Transcript of Motions Hearing of August 31, 2009, at 33 ("Well, that's an argument that you haven't made in your briefs."); *Id.* at 35-36 ("But the broader point that I don't see in your brief in Document 123 that they use anything Mederos said."); *Id.* at 36 ("You never made that point in your briefs."); *Id.* at 40-41 ("Well, see, the briefs have been expanded by what's been discussed here today—references to documents that I have never seen that are not attached to anything."). It was expressly because the factual and legal arguments made by counsel at the hearing were not included in any prior filing that the Court ordered supplemental briefing in the first place.

Faced with these newly-raised factual and legal arguments, the Government did its best to respond to specific questions about the dates and circumstances related to the arrest, arraignment and interview of Riccy Mederos. If mistakes were made, those mistakes could not reasonably have been construed, as defense counsel suggests in Defendant's Supplemental Brief, as intentional. Indeed, when defense counsel suggested during the August 31, 2009 hearing that the Government was intentionally providing misleading information, the Court asked defense counsel if she believed the Government was "fudging about all of this," and noted for defense counsel that "the Court records, public records, would show Ms. Mederos's involvement here, would it not?" *Id.* at 35. In response to these inquiries by the Court, defense counsel conceded that "it is what it is...I'm not saying they're [the Government] misrepresenting." *Id.* at 35.

Defense counsel raised these new issues on the date of the hearing and now accuses the Government of intentionally lying about details of those claims. Strikingly, defense counsel did not know the answers to the Court's questions, either, even though it is central to defense counsel's own new arguments. (*Id.* at 35 "I just don't—I don't know the dates, and it was over a year and a half ago, and we'll have to look."). Yet she accuses the Government of lying to the Court—a recurring theme in defense counsel's Supplementary Brief.

III. The Government did not Suborn Perjury and or Commit Perjury before the Grand Jury.

Not satisfied with falsely claiming that the Government misrepresented facts at the August 31, 2009 hearing, Defense counsel makes an even more outrageous and false claim in Defendant's Supplemental Brief--that the undersigned suborned perjury and the FBI case agent committed perjury in connection with testimony concerning Dr. Jenkins--specifically, that Dr. Jenkins was interviewed and denied authorizing the use of his name and identifying information

to bill Medicare for infusion therapy. That accusation is entirely unfounded and deserving of sanctions by this Court.

First, as the attached email makes clear, the undersigned believed at the time of the August Grand Jury session that Dr. Jenkins was interviewed in connection with this case. The email, sent **after** the Grand Jury presentation that resulted in the Second Superseding Indictment, specifically addressed Dr. Jenkins when the undersigned wrote “Dr. Wilbert Jenkins. I have nothing in the file on him—I know we spoke with him, but were the interviews memorialized in some kind of memo?” See, Redacted Email from Assistant United States Attorney Brian Rafferty to Special Agent David Graupner and Special Agent Mark A. Alig, dated August 13, 2009, attached hereto as Exhibit 1. This email alone puts to rest defense counsel’s claims about perjury and suborning perjury, but further scrutiny of her accusations is even more revealing.

Defense counsel leaves this Court with the false impression that the August 2009 Grand Jury proceeding was the first in which testimony was elicited about the unlawful use of Dr. Jenkins’s identity to commit health care fraud. Yet, agents testified similarly about the use of Dr. Jenkins’s identity to commit health care fraud in three prior grand jury sessions--in June 2008, September 2008, and in October 2008.¹ Defense counsel has these transcripts, even cites to portions of them in Defendant’s Supplemental Brief, and yet does not even bother to reference those portions of prior Grand Jury proceedings where the very same testimony was offered in the Grand Jury as part of her false accusations of perjury and suborning perjury. Instead, defense counsel states that she conducted a telephonic interview of Dr. Jenkins, claims that Dr. Jenkins advised her that he had not been interviewed, from which defense counsel leaps to the conclusion

¹ Highlighted excerpts of the transcripts of Grand Jury testimony from the June 2008 Grand Jury proceeding, at 54, 60; the September 2008 Grand Jury proceeding, at 17, 37-38; and the October 2008 Grand Jury proceeding, at 10-11, 40; are attached hereto as Exhibit 2.

that the undersigned must have suborned perjury and the case agent must have perjured himself in the Grand Jury.

It is particularly galling that defense counsel would rely upon a telephonic interview of Dr. Jenkins as a basis for claims of subornation of perjury and perjury against the undersigned and the lead case agent in this case, in view of what her own client has previously stated about Dr. Jenkins. In Defendant Alfredo Rasco's proffer on May 30, 2008, Defendant Rasco stated to government investigators, among other things, that "Dr. Jenkins began coming into the office "drugged up," and "was dealing with some type of sexual harassment issue," which is what led Dr. Jenkins to leave United Therapy. See, Defendant's Supplementary Brief, Exhibit 20, 302 of interview of Alfredo F. Rasco dated May 30, 2008. Indeed, Dr. Jenkins' license to practice medicine was suspended because of his own misconduct. For defense counsel, who has these interviews of her own client and even cites to them in Defendant's Supplemental Brief, to base accusations of perjury on the statements of Dr. Jenkins, who she knew from her own client had a history of serious misconduct and personal failings, is beyond the pale, but it does not end there.

On August 25, 2009, the Government interviewed Dr. Jenkins in response to defense counsel's false accusations, and several things of import are clear from that interview. First, Dr. Jenkins stated that when he was interviewed by defense counsel, defense counsel did not ask him a single question about the substance of the allegations in this case, his work at United Therapy, or the allegation that Defendant Alfredo Rasco and others used Dr. Jenkins' personal identifying information without his knowledge or consent to commit health care fraud. Instead, Dr. Jenkins stated that she asked him only whether or not he had been interviewed by Government agents, to which Dr. Jenkins admitted he advised defense counsel that he had not been interviewed. However, Dr. Jenkins also said that defense counsel also asked him to fill out an affidavit stating

he had never been interviewed by Government agents, and Dr. Jenkins flatly refused to fill out such an affidavit. Nowhere in Defendant's Supplement brief is there any indication that Dr. Jenkins refused to provide defense counsel with an affidavit. Instead, defense counsel omits that fact and leaps to the conclusion that because Dr. Jenkins told her over the phone that he had not been interviewed, the undersigned must have suborned perjury and the lead case agent must have perjured himself before the Grand Jury.

During that same interview, Dr. Jenkins told Government investigators that he had been interviewed by the Medical Board, Cahaba (the intermediary for Medicare in the State of Georgia), and the Drug Enforcement Administration, among others, and stated that these interviews "probably" involved United Therapy. Unlike defense counsel, who tellingly failed to ask Dr. Jenkins a single question about the substantive allegations in this case, Government agents did, going over with him the nature of his work at United Therapy. As defense counsel undoubtedly knew, or at least suspected, Dr. Jenkins confirmed what has been alleged in this case from the very beginning--his identity was used to bill for infusion therapy services without his knowledge or consent. Thus, at the conclusion of the interview by Government agents, Dr. Jenkins stated that in view of the many agencies that interviewed him in the past, he was "probably" interviewed by Government agents about United Therapy as well, and in any event, confirmed the essential facts alleged in the Second Superseding Indictment--he was not involved with infusion therapy at United Therapy, and did not grant anyone at United Therapy, including Alfredo Rasco, permission to use his identity to bill for infusion therapy services.

Defense counsel attacks the Grand Jury testimony concerning Dr. Jenkins' interview because she contends that her client was the "only source of information" about Dr. Jenkins. That claim is also flatly false. The Government had a multitude of sources aside from Defendant

Alfredo Rasco and aside from Dr. Jenkins himself, showing that Dr. Jenkins was not present at United Therapy during the infusion therapy and was not aware that it was even going on, including:

- The statement of Merry Perry, of which defense counsel has a copy, in which Perry states unequivocally that “Dr. Jenkins had no involvement with the infusion therapy.” See, Report of Interview of Merry Perry dated April 9, 2008, at 1, attached hereto as Exhibit 3;
- The statement of Deetral Scott, of which defense counsel has a copy, in which Scott stated that “the physician, if present at UT, was not involved with the IV treatment.” See, Report of Interview of Deetral Scott, dated May 21, 2008, at 2, attached hereto as Exhibit 4;
- The statement of Debra Myers, of which defense counsel has a copy, in which she states that “In July 2006 [at a time when bills were submitted by United Therapy for infusion therapy] no physician was present...Nurse practitioner Merry Perry handled all of the infusion at UT.” See Report of Interview of Debra Myers, dated May 13, 2008, at 1-2, attached hereto as Exhibit 5;
- The superbills for other health care services provided at United Therapy, all of which have been made available to defense counsel, and which show that Dr. Jenkins last signed a superbill for a patient treated at United Therapy in or about October 3, 2006, and thus stopped working at around that time [United Therapy submitted false claims for infusion therapy

purportedly performed by Dr. Jenkins after he left United Therapy, in November and December 2006] ;

- The superbills for infusion therapy at United Therapy conducted at or around the time of Dr. Jenkins limited employment, all of which have been available to defense counsel for over a year, and which reveal that Merry Perry signed those superbills and provided the infusion therapy, and not Dr. Jenkins; and,
- Invoices for infusion medications purchased at United Therapy, all of which have been available to defense counsel for over a year, showing that no infusion medications were purchased at United Therapy until October 2006, and thus bills for infusion treatment submitted in July, August and September 2006, were not only submitted for services not provided but also using Dr. Jenkins' name and provider number without his permission.

In short, the evidence is overwhelming that Defendant Alfredo Rasco and others used Dr. Jenkins' identification information to bill Medicare for false claims for infusion therapy services without his knowledge or consent. Moreover, that evidence has been available to defense counsel since her retention in this case, and is overwhelming even ignoring any statements provided by Defendant Alfredo Rasco or Dr. Jenkins themselves. And yet, defense counsel once again omits all of this information, in an effort to manufacture her false claims of perjury and subornation of perjury.

IV. Defendant's Remaining Claims that the Government Presented Proffer-protected information to the Grand Jury are without merit.

A. Relocating from Florida to Georgia

Defendant argues that information about relocating United Therapy from Florida to Georgia was presented to the Grand Jury and obtained from Defendant Alfredo Rasco. That allegation has been removed from the Third Superseding Indictment,² and thus renders this argument moot. In any event, prior to any interviews of Ms. Mederos or Defendant Alfredo Rasco, the Government was aware that individuals in the Southern District of Florida were seeking to relocate their schemes to defraud from that district to other districts, including the Southern District of Georgia, because of the increased law enforcement activity in South Florida. Agents investigating the fraud at United Therapy and United Medical first learned that Ms. Mederos provided that information about moving from Florida to Georgia from Michael Visbal, who was interviewed by Government agents on July 1, 2008, and who told Government investigators, among other things, that "health care fraud had become a hot issue in South Florida and there were easier opportunities in Georgia." See Form 302 Interview of Michael Visbal dated July 1, 2008, at 4 attached hereto as Exhibit 6.

Next, on July 22, 2008, Government investigators interviewed Fernando Visbal, who told Government investigators, among other things, that "the people in South Georgia were not used to identifying health care fraud and the Medicare beneficiaries in Southern Georgia were not as sophisticated as the beneficiaries in South Florida." See Form 302 of Interview of Michael Visbal dated August 27, 2008, attached hereto as Exhibit 7. The government next learned of the movement of fraudulent clinics from Florida to the State of Georgia on August 13, 2008, from Bahram Khanali, who was involved in another health care fraud case involving Ms. Mederos.

² The Third Superseding Indictment was returned by the Grand Jury for the Southern District of Georgia on October 7, 2009. A filed copy of the Third Superseding Indictment was not available at the time of this filing.

Mr. Khanali told Government investigators, among other things, that another person “recommended opening a new clinic in Georgia.” See Form 302 of Interview of Bahram Khanal dated October 13, 2008, at 2, attached hereto as Exhibit 8.

Thus, when SA Alig testified in the Grand Jury about relocating United Therapy to United Medical, SA Alig had ample evidence to support that testimony. Although it may not appear in the Form 302 of Interview of Ms. Mederos, it was SA Alig’s recollection at the time of his testimony that Ms. Mederos did state that she advised Defendant Alfredo Rasco to relocate to Florida, in the same manner that she advised others, including the Visbals, to relocate to Georgia; in the same way that Mr. Khanali was advised to move to Georgia; and in the same way that other investigators have learned that individuals involved in health care fraud in the Southern District of Florida were relocating to other districts, including the Southern District of Georgia, for the express purpose of continuing their fraudulent endeavors. Mr. Rasco was not the sole source of this information. In any event, Defendant’s arguments in this regard are mooted by the Third Superseding Indictment, in which the allegation is removed.

B. Diagnostic Tests and Diagnostic Codes

Defendant argues that the Government violated the proffer agreement by presenting evidence about “false diagnostic tests” because “Mr. Rasco is the sole source of the information about altering patient records by adding the necessary diagnostic code,” Id. at 9-10. That argument is simply wrong. At a hearing, the government expects the evidence will show, among other things, that by no later than April 2008, the government was aware that the diagnostic codes on bills submitted by United Therapy and United Medical were false, and the government knew of this information from a variety of different sources independent of Mr. Rasco.

First, before the Government even opened an investigation of United Therapy and United Medical, fraud investigators were already aware that part of the fraud committed in connection with “infusion therapy” involved, at times, false claims about the treatment codes and the diagnosis codes on claims submitted to Medicare. Investigators were aware that the fraud in “infusion therapy” involved the submission of claims for infusion therapy services that were not provided, or were not provided as billed, and for diagnoses, including the diagnosis of primary thrombocytopenia (the diagnosis here and which is signified on Medicare claim forms as diagnosis code 287.30), that Medicare beneficiaries were not really suffering from. Thus, even before Medicare investigators ever looked at United Therapy or United Medical, Medicare investigators were very much aware that fraud in “infusion therapy” very often if not always included fraud in connection with diagnostic codes and tests.

Second, by April 2008, when the Government opened its investigation of United Therapy, the Government was provided the data for every claim submitted to Medicare on behalf of United Therapy and United Medical for infusion therapy, and that data confirmed the earlier Medicare fraud alert about treatment codes and diagnostic codes. The red flag was up: for every patient treated at United Therapy and United Medical with infusion therapy, the patient allegedly was also diagnosed with primary thrombocytopenia. Thus, when this case was first referred for investigation, and before the Government had interviewed any witnesses, the Government was aware that every patient treated for infusion therapy purportedly suffered from the malady covered by diagnosis code 287.30, and that this diagnosis was undoubtedly false. A copy of one page of the claims data for United Therapy, which shows both the procedure code and the diagnosis code, is attached as Exhibit 9 for the Court’s review. All of this claims data for

infusion therapy at United Therapy and United Medical was made available to Defendants as part of discovery.

Third, on April 9, 2008, the Government interviewed Merry Perry, who was the Nurse Practitioner at United Therapy. During the course of that interview, Ms. Perry was asked numerous questions about the infusion therapy at United Therapy, and at no time does she indicate that any patient ever suffered from primary thrombocytopenia. Ms. Perry also stated, among other things, that in performing the infusion treatment at United Therapy, she would prepare a “superbill,” upon which she would indicate the procedures she performed on the patient and which was faxed to Defendant Alfredo Rasco and Defendant Riccy Mederos at the end of each day. Ms. Perry stated that the protocols for the infusion therapy were set by Defendant Alfredo Rasco, Iris Oswald and Riccy Mederos, and that these individuals showed her how to prepare the superbill. A copy of the interview of Merry Perry is attached as Exhibit 4 for the Court’s review.

Fourth, the Government obtained the medical records and superbills for United Therapy in response to a Grand Jury subpoena. A review of the medical records for the patients at United Therapy purportedly suffering from thrombocytopenia shows the absence of the regular blood tests that are required to diagnose, treat and monitor primary thrombocytopenia, and little or no other evidence that any of the patients at United Therapy ever suffered from this disorder. Moreover, a review of the superbills prepared by Merry Perry and which were faxed to Defendant Alfredo Rasco and Defendant Riccy Mederos, shows, among other things, that the diagnosis code for primary thrombocytopenia does not appear on any of the superbills for United Therapy. A copy of one such superbill is attached as Exhibit 10 for the Court’s review.

All of this information was made available to counsel as part of discovery, and yet in Defendant's Supplemental Brief, counsel mentions none of it. In any event, before Mr. Rasco ever mentioned anything about false diagnostic codes in his proffer, the Government already knew that the diagnostic codes that appeared on bills submitted by United Therapy were false, and so when Mr. Rasco confirmed this fact in his proffer, Mr. Rasco was merely confirming what the Government already knew, from multiple other sources. Thus, Defendant's claim that testimony about diagnostic tests was a direct violation of the August 2008 proffer agreement is without merit.

C. **Testimony about Statements of Riccy Mederos**

Defendant also argues that the Government violated Defendant's Proffer Agreement by indirectly presenting information obtained from Defendant Alfredo Rasco through the statements of Riccy Mederos. Little if any testimony about the statements of Riccy Mederos was presented to the Grand Jury that returned the Third Superseding Indictment, thus rendering this argument moot. To the extent that Defendant contends that this argument survives, this argument is also wrong.

First, defendant's argument relies almost exclusively on principles set forth in a case, United States v. Hampton, 775 F.2d 1479 (11th Cir. 1985), that is easily distinguishable here. In Hampton, the Government used immunized Grand Jury testimony of Witness 1 to convince Witness 2 to plead guilty and cooperate in a subsequent prosecution of Witness 1. In holding that this was a violation of a proffer agreement in that case, the Eleventh Circuit held that "the government made no effort...to establish the independence of [the guilty-pleading defendant's] testimony or to demonstrate the source of the evidence confronting [the guilty pleading defendant's] testimony at the time of the plea agreement." *Id.* at 1489

First, as set forth herein, nothing presented before the Grand Jury that returned the Second Superseding Indictment was obtained exclusively from Defendant Alfredo Rasco. Second, although Defendant claims that the Government knew “generally” about Riccy Mederos, that claim is also wrong. Should the Court order a hearing on this issue, the Government would offer substantial evidence confronting Defendant Riccy Mederos at the time of her plea agreement, including but not limited to:

- Riccy Mederos’ involvement in multiple schemes to defraud Medicare in and around the Southern District of Georgia, including the fraud at Savannah Medical Services, Inc., Longevity Care Services, and Towne Lake Rehab and Medical Center;
- Statements of coconspirators in these frauds, including the aforementioned statements of Michael Visbal, Fernando Visbal, Bahram Khanali;
- Riccy Mederos’ involvement in the hiring of doctors and other medical professionals at United Therapy;
- Riccy Mederos’ involvement in the application process for United Therapy and United Medical to begin billing Medicare for infusion services;
- Riccy Mederos’ involvement in the generation of the model superbill used at United Therapy to bill Medicare;
- Riccy Mederos’ involvement in the billing at United Therapy, including the fact that she was issued a unique identifier to bill for United Therapy, and the superbills from United Therapy were faxed to her office;
- Riccy Mederos’ involvement in the purchase of infusion therapy drugs on behalf of United Therapy and United Medical; and

- Evidence that the infusion fraud committed at United Therapy, including the concept of billing for 10 times the amount of medications actually infused, was virtually identical to similar frauds committed in the Southern District of Florida, where Riccy Mederos was located and in which Riccy Mederos was implicated.

Plainly, the evidence against Riccy Mederos was overwhelming at the time of her plea, and was obtained independent of anything that Defendant Alfredo Rasco stated during his proffer.

Third, Defendant fails to note a significant event that occurred immediately prior to the commencement of plea negotiations between defense counsel for Riccy Mederos and the Government, and which is specifically referenced in Ms. Mederos' plea agreement: the indictment of Riccy Mederos in another, unrelated Medicare fraud case in the Southern District of Georgia, U.S. v. Mateu et al., CR 409-108. The indictment in Mateu was unsealed on April 13, 2009, and by no later than April 27, 2009, the Government was engaged in active plea discussions with defense counsel for Ms. Mederos. With the second indictment, Defendant Riccy Mederos was faced with the prospect of trying to prevail at trial at not one but two cases, with the prospect of many more, both within and outside of the Southern District, on the horizon. Plainly, it was the prospect of numerous prosecutions, and not the proffers of Defendant Alfredo Rasco, that lead Riccy Mederos to plead guilty.

Finally, as further evidence that Defendant Riccy Mederos' decision to plead guilty was not motivated by the proffers of Defendant Alfredo Rasco, the Court need look no further than the pleadings in this case, and Defendant Riccy Mederos' Motion to Sever (Doc. 56) ("Severance Motion") based on the principles set forth in Bruton v. United States, 391 U.S. 123 (1968). In the Severance Motion, Defendant Riccy Mederos correctly points out that the statements of

Defendant Alfredo Rasco made during the proffers were not admissible against Defendant Riccy Mederos, as such admission would violate the Confrontation Clause of the Sixth Amendment. Thus, although Defendant Alfredo Rasco may claim that the statements he made during his proffers is what motivated Defendant Riccy Mederos to plead guilty, the fact is that those statements were not admissible against Defendant Riccy Mederos, and her decision to plead guilty had nothing to do with his proffers.

D. The Proffer Agreement Allows the Government to Use Defendant's Statements for Impeachment

Finally, Defendant argues that the proffer agreement as written precludes the Government from using statements made by Defendant to impeach Defendant, because there is no specific reference to Rule 410 within the proffer agreement. Paragraph 4 of the Proffer Agreement contains a specific provision governing the use of Defendant Alfredo Rasco's statements made during the proffers, and makes clear that the Government only promises that it will not use Defendant Alfredo Rasco's statements during its case in chief. Defense counsel has not shown any evidence that the proffer agreement was entered into unknowingly or involuntarily by Defendant, indeed it was signed by Defendant and his counsel, with no evidence to suggest that Defendant or his counsel did not sign it knowingly and voluntarily. Moreover, if one does look at the course of conduct of the parties, as urged by defense counsel in Defendant Supplemental Brief, that course of conduct reveals that all involved understood that the Government could use the Defendant's statements for impeachment at trial.

As support for the fact that the statements of Defendant Alfredo Rasco can be used to impeach at trial, the Court need look no further than the email authored by Alex Zipperer, Esq., Defendant Alfredo Rasco's prior counsel, and which is attached as Exhibit 4 to Defendant

Alfredo Rasco's Corrected Amendment to Defendants' Joint Motion to Dismiss The Indictment and Motion in Limine to Exclude Proffer (Doc. 68). In the email, drafted and sent in the midst of the discussions about the limits of the proffer agreement, Mr. Zipperer explains, among other things, that "The proffer letter should make clear that his [Alfredo Rasco's] statements will not be used against him except for impeachment." Thus, not only does the proffer agreement itself state the only limits on the use of the statements of Defendant Alfredo Rasco during the proffer, the email of Defendant Alfredo Rasco's own attorney make clear that those statements can be used for the purpose of impeachment.

V. Conclusion

There is no evidence that the Government intentionally misrepresented facts to the Court, and there is no evidence that the Government suborned perjury and committed perjury before the Grand Jury, and for defense counsel to make such false accusations is outrageous, unethical, and worthy of sanctions by this Court. Regarding Defendant's claims about the misuse of statements by Defendant Alfredo Rasco during proffer sessions to obtain the Second Superseding Indictment, the Government submits that at a hearing, those claims will be established as entirely without merit.

Respectfully submitted this 7th day of October, 2009.

Respectfully submitted,

JOSEPH D. NEWMAN
ACTING UNITED STATES ATTORNEY

/s/ Brian T. Rafferty

Brian T. Rafferty
Assistant United States Attorney
New York Bar No. 2809440

100 Bull Street, Suite 201
Post Office Box 8970
Savannah, Georgia 31412
(912) 652-4422

CERTIFICATE OF SERVICE

This is to certify that I have on this day served all the parties in this case in accordance with the notice of electronic filing (“NEF”) which was generated as a result of electronic filing in this Court.

Respectfully submitted,

EDMUND A. BOOTH, JR.
UNITED STATES ATTORNEY

/s/ Brian T. Rafferty

Brian T. Rafferty
Assistant United States Attorney
New York Bar No. 2809440

100 Bull Street, Suite 201
Post Office Box 8970
Savannah, Georgia 31412
(912) 652-4422