UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 02 CR 1050-3
	)	
v.	)	Honorable James B. Zagel
	)	
JOSEPH LOMBARDO, *et al.*	)	

GOVERNMENT'S RESPONSE TO DEFENDANT JOSEPH LOMBARDO'S OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT

Now comes the United States of America, by and through Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, and makes the following response to defendant Joseph Lombardo's[1] January 26, 2009, Objections to the Presentence Investigation Report [Doc. #1026]. For the reasons set forth below, Lombardo's objections must be overruled.

I. LOMBARDO'S DOUBLE JEOPARDY ARGUMENT

Lombardo argues that various sentencing enhancements discussed in his November 28, 2008, Pre-Sentence Investigation Report ("PSIR") are barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. *See* Doc. #1026 at 1-5, 20-24.

A. Summary of Lombardo's Double Jeopardy Argument

Lombardo alleges that two prosecutions in the early 1980s bar various PSIR sentencing enhancements because the sentences in those cases were "enhanced" because of his "role in the Outfit." *See* Doc. #1026 at 4-5 (arguing punishment for Outfit-related activities in the instant case is barred because "Lombardo has been twice punished based on his relevant conduct").

[1]As discussed in the January 9, 2009, Probation Officer's Supplemental Report, Lombardo's real name is actually "Giuseppi Lombardi."

1981 "Pendorf Prosecution"

On May 22, 1981, a Grand Jury in Chicago charged Lombardo and five co-defendants in an eleven-count indictment; the indictment alleged that the co-defendants between 1978 and 1979 conspired to bribe then-Senator Howard W. Cannon and committed a number of related offenses in furtherance of this conspiracy, such as violations of the Travel Act (Count Two) and the wire fraud statute (Counts Four through Eleven). *See* Government Exhibit A (*United States v. Allen M. Dorfman, et al.*, 81 CR 269 (Marshall, J.)); *see also* PSIR at lines 528-547; *United States v. Williams*, 737 F.2d 594 (7th Cir. 1984) (twenty-eight page opinion affirming convictions without single reference to Outfit). Lombardo was convicted following a trial, and on March 31, 1983, Judge Prentice Marshall sentenced him to 15 years incarceration. See PSIR at lines 528-547.

Lombardo rests his double-jeopardy sentencing argument on the claim that his sentence in the 1981 case was "enhanced because of his relationship with and status in the Chicago Outfit," Doc. #1026 at 2-3 (citing Judge Marshall's finding that Lombardo has "been an active functionary in that organization as it exists in Chicago"). Lombardo, without specific citation to the record, broadly claims his "relationship to the Outfit . . . . was indisputably the basis for Judge Marshall's imposition of an enhanced sentence." *Id*. at 4.

1983 "Strawman Prosecution"

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On April 1, 1986, following a jury trial, Lombardo was sentenced to 16 years in prison (to run concurrently with the Pendorf sentence). *See* PSIR at lines 548-64. According to Lombardo, the "government argued in aggravation [during the Strawman sentencing] that the Eboli/Shenker tapes showed Lombardo's status in the Chicago Outfit."

Lombardo contends he was "[i]n both cases . . . convicted of conspiracy, which together cover the time period from 1973 to 1983." Doc. #1026 at 1. Lombardo reasons that, because during both sentencings the Chicago Outfit was mentioned as an aggravating factor, his being sentenced for "overlapping" pre-1983 Outfit-related activities here violates the Double Jeopardy Clause of the United States Constitution. *See id.* at 1-5 ("Lombardo's relatinoship to the Outfit ... was indisputably the basis for Judge Marshall's imposition of an enhanced sentence"; "The government argued in aggravation that the Eboli/Shenker tapes showed Lombardo's status in the Chicago Outfit.").

B. Analysis

The fatal defect in Lombardo's theory is that Lombardo was never *prosecuted* for – yet alone ever *sentenced* on the basis of – his criminal involvement in Outfit-related illegal gambling, the massage parlor extortions, the attempted extortion of Morris Shenker, and the street tax collection from William "Red" Wemette. *See generally United States v. Morgano*, 39 F.3d 1358, 1367-68 (7th Cir. 1994) (holding that, where defendants could be convicted for both

RICO and predicate act offenses and the sentencing court considered predicate acts in assessing RICO sentence insofar as they were conduct relevant to RICO, receiving consecutive sentences for RICO conviction and substantive crime convictions did not violate defendants' double jeopardy rights as multiple punishments for the same "offense"); *see also United States v. Felix*, 503 U.S. 378, 389-92 (1992) (permitting prosecution for conspiracy or continuing criminal enterprise even if the defendant has previously been convicted of one or more of the substantive offenses on which the conspiracy or CCE charge is based.).

Moreover, there is no evidence that Lombardo ever withdrew from the conspiracy he joined in the 1970's, and that did not end until 2007.[2] *See generally United States v. Hargrove*,

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[2]Evidence presented at trial demonstrated that Lombardo still had an active influence on Outfit business after his incarceration in the early1980's. For example, according to trial witness Richard Cleary, between 1986 and 1988 defendant Schiro identified co-defendant Joseph Lombardo as his "boss," Tr. 4223 (Cleary: "I think I asked him a question about Tony Spilotro, and he basically -- I thought Tony Spilotro was basically his boss, and he basically told me no, it wasn't Tony, that it was Joey Lombardo.").

Moreover, Wemette, who early in the trial testified that he for some15 years payed weekly street tax to the Chicago Outfit (from 1974 to 1988, *see* Tr. 311), stated he had to obtain Outfit boss Lombardo's permission to get into business, and that he had to continue to pay Lombardo through Outfit collectors Frank Schweihs and Alva Johnson Rodgers (who admitted committing criminal acts for Lombardo) to protect his life and business. *See* Tr. 322-49. Wemette testified that, prior to going to prison, Lombardo in the 1980's instructed him to contact Lombardo's street tax collector Frank Schweihs if he (Wemette) "ever had any problems or difficulties . . . ." Tr. 345-47 (Q: "And I take it from your testimony, Mr. Wemette, that after Joseph Lombardo went to jail the street tax payments did not stop? A [Wemette]. No, they never stopped."). Schweihs thus carried out Lombardo's business on Lombardo's behalf while Lombardo was incarcerated. See also Tr. 259 (Outfit Expert James Wagner's testimony that Outfit bosses do not "retire").

Dr. Patrick Spilotro testified to a December 2002 conversation he had with Lombardo. Tr. 4974-75. Dr. Spilotro recalled Lombardo state[ing] that there were people from New York that came in and are trying to take over certain functions of the people in Chicago. . . . He displayed unhappiness to me. You know, that he wasn't happy with what was going on." Dr. Spilotro then explained that he understood Lombardo to be complaining about members of the "New York Syndicate" moving into the activities of the "people in the Outfit or syndicate." Tr. 4975. This conversation further demonstrates that Lombardo did not retire from the Outfit after

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II. STANDARD OF PROOF AT SENTENCING IS PREPONDERANCE, NOT BEYOND A REASONABLE DOUBT

Defendant next contends that the PSIR erred by not using the beyond-a-reasonable-doubt standard of proof to evaluate the evidence presented at trial. *See* Doc. #1026 at 5-6. The government was unable to locate any caselaw supporting this view of the law. However, there is ready support for the proposition that the appropriate standard of proof at sentencing was and is preponderance of evidence. *See generally United States v. Strode*, 2009 WL 80237, at *6 (7th Cir., Jan. 14, 2009) (noting that preponderance standard is applicable at sentencing); *United States v. Rollins*, 544 F.3d 820, 837-38 (7th Cir. 2008) (same); *United States v. Ellis*, 548 F.3d 539, 545-46 (7th Cir. 2008) (for obstruction of justice sentence enhancement, the burden is on the government to prove by a preponderance of the evidence that the defendant's false testimony was willful), *citing United States v. Shearer*, 479 F.3d 478, 484 (7th Cir. 2007); *United States v. Krasinski*, 545 F.3d 546, 551 (7th Cir. 2008) ("The government has the burden of proving the

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III. LOMBARDO'S "DUE PROCESS" AND "ALIBI" CLAIMS

Lombardo again argues that he has been "prejudiced by the thirty-plus year delay in the prosecution in any form with respect to the Seifert homicide." Doc. #1026 at 6. Lombardo contends this "delay" precluded him from presenting various pieces of evidence (such as his "alibi" claim) that, he contends, could have undermined the trial evidence of his guilt. *Id.* at 6-7. Lombardo has previously raised these arguments, *see* Doc. #743 at 11, the government has responded to them fully, *see* Doc. #839 at 37-38, and the Court has properly rejected them, *see* Doc. #905. *See generally United States v. Henderson*, 337 F.3d 914, 920 (7th Cir. 2003) ("The defendant may establish a due process violation if the prosecutorial delay caused actual and substantial prejudice to the defendant's right to a fair trial. A defendant must first show more than mere speculative harm but instead must establish prejudice with facts that are specific, concrete, and supported by evidence. If a defendant makes the proper showing, the burden shifts to the government to demonstrate that the purpose of the delay was not to gain a tactical advantage over the defendant or for some other impermissible reason. The government's reasons are then balanced against the prejudice to a defendant to determine whether a due process violation occurred.") (Citations and quotations omitted). There is no reason to re-visit Lombardo's flawed Due Process arguments at this stage in the proceedings.

IV. LOMBARDO'S MISCELLANEOUS OBJECTIONS TO PSIR

PSIR Lines 114-116: Lombardo complains that the information contained in the PSIR

comes "entirely from the government. . . ." Lombardo, however, ignores the hundreds of citation to the transcript, exhibits introduced at trial, taped conversations, etc., which is the evidence relied on by the jury to convict defendant.

PSIR Lines 114-116; Lines 146-167: Lombardo claims the PSIR's description of his involvement in the Seifert homicide is "legally and factually in error," and repeats his complaint that various pieces of evidence presented at trial were misinterpreted by the jury and that his "alibi" evidence somehow clears him of culpability. *See* Doc #1026 at 8, 9-13, 16. Lombardo, for the reasons set forth in *supra* Section III is wrong on both counts. The jury's finding of guilt was supported by ample evidence, and this finding is not legally infirm.

PSIR Lines 134-141: Lombardo takes issue with the PSIR's conclusion that he (Lombardo) during the course of the charged conspiracy, as F.B.I. Special Agent Michael Maseth stated, had supervisory responsibility for over 100 Outfit members and associates. Even assuming solely for the purpose of argument that SA Maseth's estimate is incorrect, Outfit boss Lombardo still is subject to the Section 3B1.1(a) organizer/leader enhancement. *See* PSIR Lines 288-300.

In terms of Lombardo's leadership role, consider the May 8, 1978, recording of mobsters Tony Spilotro and Frank Schweihs discussing a suspected informant. They resolve to consult with Lombardo about this problem, implying that he enjoyed a respected leadership position. *See* Government Exhibit May 8, 1978 Intercept; Government Exhibit May 8, 1978, Intercept - T; *see also* Tr. 524, 536-37. This is confirmed through statements made by Schiro. As noted above (page 4, note 1), trial witness Richard Cleary testified that defendant Schiro identified Lombardo

as his "boss," Tr. 4223, 4263l; *see also* Tr. 4245, 4262-63. (Lombardo during his testimony admitted knowing Schiro, *see* Tr. 5797).

Other evidence presented to the jury, including the Frattiano transcript, similarly establish Lombardo's leadership role with the Outfit, *see* Tr. 5199-5233 (Fratianno testifies that Lombardo identified Joseph Aiuppa as "the boss of the family," and described himself as Marshal Caifano's "capo"), as did the video and audio-taped meetings between former Old Town pornographic bookstore owner William "Red" Wemette and co-defendant Frank Schweihs. *See* Tr. 308-523.

The following mid-1990's exchange between Ann Spilotro and Lombardo underscores Lombardo's leadership position:

> A. [T]ell us what was said during your conversation with Mr. Lombardo in the mid 1990's concerning Michael and Tony Spilotro's murder.
>
> A. I asked him if he knew anything, and if he knew how or why they were killed, or who did it.
>
> Q. And what, if anything, did he say to you?
>
> A. He said that if he was -- meaning if he wasn't in prison, if he was out, that he -- that it wouldn't have happened.

Tr. 4565. *See also* Tr. 4972 (Dr. Patrick Spilotro describing a conversation he had in the 1990's with Lombardo during which Lombardo said "if he was there, [the Tony and Michael Spilotro murders] would never happen. If he was home [out of prison], it would never happen."); Tr. 4982 (Dr. Spilotro's description of a 2006 conversation with Lombardo during which Lombardo

in the context of the Spilotro murders said "doc, you get an order, you follow the order. You don't follow the order, you go [you get killed], too.").

The photograph of Lombardo at a restaurant with other members of the "mob elite" only serves to underscored the other evidence of Lombardo's leadership position within the Chicago Outfit. *See* Government Exhibit Photo 1. Nicholas Calabrese identified Lombardo in this photo, and identified him as a "Capo" for the Grand Avenue Crew. Tr. 2314.

PSIR Lines 270-279: Lombardo contends the PSIR erred by enhancing his total offense level on the basis of his obstruction of justice. Doc. #1026 at 13-15. According to Lombardo, he merely passively "agreed" to "remain in" Domonic Calarco's house "for a short period of time" while he was a "fugitive." Doc. #1026 at 14, 19. Lombardo claims he during this time merely "absented himself," Doc. #1026 at 15, and in his motion characterizes these fugitive days as a "nine-month hiatus." Doc. #1026 at 25.

The examples of obstructive conduct listed in Application Note 4(e) to Guideline Section 3C1.1, however, include willful failure to appear at judicial proceedings. *See generally United States v. Bolden*, 279 F.3d 498, 502 (7th Cir. 2002) ("A defendant's failure to appear is 'willful,' however, if the defendant knew that he was required to appear in court and 'voluntarily and intentionally' failed to do so."). Lombardo was properly convicted of the crime of obstructing justice in Count Nine, *see, e.g.*, Government Exhibit C (Lombardo's 2005 demand letter to this Court); see also Tr. 4916 ("Q. Did you have conversations with him where you encouraged him to turn himself in? A [Calarco]. Oh, we talked about it a lot. I always told him, "why don't you turn yourself in and you'd have an easier time." He says, "if I can get a bond, I'd go in tomorrow."), and the enhancement is entirely appropriate for Count One, and the enhancement

does not constitute "double counting." *See generally United States v. Vucko*, 473 F.3d 773, 776 (7th Cir. 2007) (no "double-counting" because of grouping rules).

PSIR Lines 565-78: Lombardo objects to the PSIR's criminal history computation. *See* Doc. #1026 at 20-24. According to Lombardo "[t]he seminal error in the point computation is the misplaced belief that the controlling time frame for determining point computation is the length of the conspiracy in Count One, mid-1960's to March 2007." Doc. #1026 at 20. Lombardo contends that he was not involved in the conspiracy after being released following the Pendorf and Strawman convictions discussed in Section I, *supra*. Lombardo, however, for the reasons set forth above continued to be involved in the conspiracy, and he certainly never as a matter of law (or fact) withdrew from it. The PSIR therefore correctly calculates Lombardo's criminal history and his advisory Guideline range.

V. SECTION 3553 CONSIDERATIONS

Lombardo claims his age and health, as well as the time since his "last identifiable offense," entitle him to a sentence below the PSIR's advisory Guideline calculation of life (based on criminal history category IV and a total offense level of 43). *See* Doc. #1026 at 24-25. Lombardo was an active Outfit boss. *See supra* page 4, footnote 1 (describing Lombardo's ongoing role in Outfit); *see also supra* pages 6-8 (describing Lombardo's leadership role in Outfit). As such, Lombardo over the years had direct – as well as command – responsibility for literally thousands of Outfit-related criminal acts.

Even more significantly, Lombardo has been found by a jury of his peers to have committed the brutal September 27, 1974, execution-style murder of Daniel Seifert while Mr. Seifert's wife was present, holding her 4-year-old son Joe (named after Lombardo) in her arms.

One can only speculate as to how much damage to society could have been prevented had Lombardo in the 1970's been convicted of that brutal murder and sentenced to imprisonment for life. Lombardo's case is in a sense an aggravated one, however; for over three decades Lombardo enjoyed the primary benefit of "getting away with" this murder, namely, freedom. This fact, combined with Lombardo's leadership role in the Outfit and his obvious contempt for the truth as put on display during his testimony, confirm the justness of a life sentence.

VI. CONCLUSION

Based on the foregoing, the PSIR properly calculated Lombardo's advisory Guideline range and criminal history category, and Lombardo's objections to the PSIR must therefore be overruled.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

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CERTIFICATE OF SERVICE

T. MARKUS FUNK, an Assistant United States Attorney assigned to the instant matter, hereby certifies that the attached GOVERNMENT'S RESPONSE TO DEFENDANT JOSEPH LOMBARDO'S OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT was served on January 30, 2009, in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

s/ T. Markus Funk
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In terms of Lombardo's leadership role, consider the May 8, 1978, recording of mobsters Tony Spilotro and Frank Schweihs discussing a suspected informant. They resolve to consult with Lombardo about this problem, implying that he enjoyed a respected leadership position. *See* Government Exhibit May 8, 1978 Intercept; Government Exhibit May 8, 1978, Intercept - T; *see also* Tr. 524, 536-37. This is confirmed through statements made by Schiro. As noted above (page 4, note 1), trial witness Richard Cleary testified that defendant Schiro identified Lombardo

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The following mid-1990's exchange between Ann Spilotro and Lombardo underscores Lombardo's leadership position:

> A. [T]ell us what was said during your conversation with Mr. Lombardo in the mid 1990's concerning Michael and Tony Spilotro's murder.
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The photograph of Lombardo at a restaurant with other members of the "mob elite" only serves to underscored the other evidence of Lombardo's leadership position within the Chicago Outfit. *See* Government Exhibit Photo 1. Nicholas Calabrese identified Lombardo in this photo, and identified him as a "Capo" for the Grand Avenue Crew. Tr. 2314.

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The examples of obstructive conduct listed in Application Note 4(e) to Guideline Section 3C1.1, however, include willful failure to appear at judicial proceedings. *See generally United States v. Bolden*, 279 F.3d 498, 502 (7th Cir. 2002) ("A defendant's failure to appear is 'willful,' however, if the defendant knew that he was required to appear in court and 'voluntarily and intentionally' failed to do so."). Lombardo was properly convicted of the crime of obstructing justice in Count Nine, *see, e.g.*, Government Exhibit C (Lombardo's 2005 demand letter to this Court); see also Tr. 4916 ("Q. Did you have conversations with him where you encouraged him to turn himself in? A [Calarco]. Oh, we talked about it a lot. I always told him, "why don't you turn yourself in and you'd have an easier time." He says, "if I can get a bond, I'd go in tomorrow."), and the enhancement is entirely appropriate for Count One, and the enhancement

does not constitute "double counting." *See generally United States v. Vucko*, 473 F.3d 773, 776 (7th Cir. 2007) (no "double-counting" because of grouping rules).

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V. SECTION 3553 CONSIDERATIONS

Lombardo claims his age and health, as well as the time since his "last identifiable offense," entitle him to a sentence below the PSIR's advisory Guideline calculation of life (based on criminal history category IV and a total offense level of 43). *See* Doc. #1026 at 24-25. Lombardo was an active Outfit boss. *See supra* page 4, footnote 1 (describing Lombardo's ongoing role in Outfit); *see also supra* pages 6-8 (describing Lombardo's leadership role in Outfit). As such, Lombardo over the years had direct – as well as command – responsibility for literally thousands of Outfit-related criminal acts.

Even more significantly, Lombardo has been found by a jury of his peers to have committed the brutal September 27, 1974, execution-style murder of Daniel Seifert while Mr. Seifert's wife was present, holding her 4-year-old son Joe (named after Lombardo) in her arms.

One can only speculate as to how much damage to society could have been prevented had Lombardo in the 1970's been convicted of that brutal murder and sentenced to imprisonment for life. Lombardo's case is in a sense an aggravated one, however; for over three decades Lombardo enjoyed the primary benefit of "getting away with" this murder, namely, freedom. This fact, combined with Lombardo's leadership role in the Outfit and his obvious contempt for the truth as put on display during his testimony, confirm the justness of a life sentence.

VI. CONCLUSION

Based on the foregoing, the PSIR properly calculated Lombardo's advisory Guideline range and criminal history category, and Lombardo's objections to the PSIR must therefore be overruled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

T. MARKUS FUNK, an Assistant United States Attorney assigned to the instant matter, hereby certifies that the attached GOVERNMENT'S RESPONSE TO DEFENDANT JOSEPH LOMBARDO'S OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT was served on January 30, 2009, in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 02 CR 1050-3
	)	
v.	)	Honorable James B. Zagel
	)	
JOSEPH LOMBARDO, *et al.*	)	

GOVERNMENT'S RESPONSE TO DEFENDANT JOSEPH LOMBARDO'S OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT

Now comes the United States of America, by and through Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, and makes the following response to defendant Joseph Lombardo's[1] January 26, 2009, Objections to the Presentence Investigation Report [Doc. #1026]. For the reasons set forth below, Lombardo's objections must be overruled.

I. LOMBARDO'S DOUBLE JEOPARDY ARGUMENT

Lombardo argues that various sentencing enhancements discussed in his November 28, 2008, Pre-Sentence Investigation Report ("PSIR") are barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. *See* Doc. #1026 at 1-5, 20-24.

A. Summary of Lombardo's Double Jeopardy Argument

Lombardo alleges that two prosecutions in the early 1980s bar various PSIR sentencing enhancements because the sentences in those cases were "enhanced" because of his "role in the Outfit." *See* Doc. #1026 at 4-5 (arguing punishment for Outfit-related activities in the instant case is barred because "Lombardo has been twice punished based on his relevant conduct").

[1]As discussed in the January 9, 2009, Probation Officer's Supplemental Report, Lombardo's real name is actually "Giuseppi Lombardi."

1981 "Pendorf Prosecution"

On May 22, 1981, a Grand Jury in Chicago charged Lombardo and five co-defendants in an eleven-count indictment; the indictment alleged that the co-defendants between 1978 and 1979 conspired to bribe then-Senator Howard W. Cannon and committed a number of related offenses in furtherance of this conspiracy, such as violations of the Travel Act (Count Two) and the wire fraud statute (Counts Four through Eleven). *See* Government Exhibit A (*United States v. Allen M. Dorfman, et al.*, 81 CR 269 (Marshall, J.)); *see also* PSIR at lines 528-547; *United States v. Williams*, 737 F.2d 594 (7th Cir. 1984) (twenty-eight page opinion affirming convictions without single reference to Outfit). Lombardo was convicted following a trial, and on March 31, 1983, Judge Prentice Marshall sentenced him to 15 years incarceration. See PSIR at lines 528-547.

Lombardo rests his double-jeopardy sentencing argument on the claim that his sentence in the 1981 case was "enhanced because of his relationship with and status in the Chicago Outfit," Doc. #1026 at 2-3 (citing Judge Marshall's finding that Lombardo has "been an active functionary in that organization as it exists in Chicago"). Lombardo, without specific citation to the record, broadly claims his "relationship to the Outfit . . . . was indisputably the basis for Judge Marshall's imposition of an enhanced sentence." *Id*. at 4.

1983 "Strawman Prosecution"

On September 30, 1983, Lombardo and his fourteen co-defendants were indicted by a Grand Jury in the Western District of Missouri. *See* Government Exhibit B (*United States v. Deluna, et al.*, 83-00124-01/15-CR-W-8, (Stevens, J.)); *see also United States v. Cerone*, 830 F.2d 938 (8th Cir. 1987) (affirming convictions and mentioning membership in organized crime

as facilitating conspirators' control over Teamsters). The indictment in eight counts charged Lombardo and his co-defendants with between 1974 and 1983 having conspired to engage in illegal gaming and related activities through various casinos, including the Stardust and the Fremont. *Id.*; *see also* PSIR at lines 548-64.

On April 1, 1986, following a jury trial, Lombardo was sentenced to 16 years in prison (to run concurrently with the Pendorf sentence). *See* PSIR at lines 548-64. According to Lombardo, the "government argued in aggravation [during the Strawman sentencing] that the Eboli/Shenker tapes showed Lombardo's status in the Chicago Outfit."

Lombardo contends he was "[i]n both cases . . . convicted of conspiracy, which together cover the time period from 1973 to 1983." Doc. #1026 at 1. Lombardo reasons that, because during both sentencings the Chicago Outfit was mentioned as an aggravating factor, his being sentenced for "overlapping" pre-1983 Outfit-related activities here violates the Double Jeopardy Clause of the United States Constitution. *See id.* at 1-5 ("Lombardo's relatinoship to the Outfit ... was indisputably the basis for Judge Marshall's imposition of an enhanced sentence"; "The government argued in aggravation that the Eboli/Shenker tapes showed Lombardo's status in the Chicago Outfit.").

B. Analysis

The fatal defect in Lombardo's theory is that Lombardo was never *prosecuted* for – yet alone ever *sentenced* on the basis of – his criminal involvement in Outfit-related illegal gambling, the massage parlor extortions, the attempted extortion of Morris Shenker, and the street tax collection from William "Red" Wemette. *See generally United States v. Morgano*, 39 F.3d 1358, 1367-68 (7th Cir. 1994) (holding that, where defendants could be convicted for both

RICO and predicate act offenses and the sentencing court considered predicate acts in assessing RICO sentence insofar as they were conduct relevant to RICO, receiving consecutive sentences for RICO conviction and substantive crime convictions did not violate defendants' double jeopardy rights as multiple punishments for the same "offense"); *see also United States v. Felix*, 503 U.S. 378, 389-92 (1992) (permitting prosecution for conspiracy or continuing criminal enterprise even if the defendant has previously been convicted of one or more of the substantive offenses on which the conspiracy or CCE charge is based.).

Moreover, there is no evidence that Lombardo ever withdrew from the conspiracy he joined in the 1970's, and that did not end until 2007.[2] *See generally United States v. Hargrove*,

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[2]Evidence presented at trial demonstrated that Lombardo still had an active influence on Outfit business after his incarceration in the early1980's. For example, according to trial witness Richard Cleary, between 1986 and 1988 defendant Schiro identified co-defendant Joseph Lombardo as his "boss," Tr. 4223 (Cleary: "I think I asked him a question about Tony Spilotro, and he basically -- I thought Tony Spilotro was basically his boss, and he basically told me no, it wasn't Tony, that it was Joey Lombardo.").

Moreover, Wemette, who early in the trial testified that he for some15 years payed weekly street tax to the Chicago Outfit (from 1974 to 1988, *see* Tr. 311), stated he had to obtain Outfit boss Lombardo's permission to get into business, and that he had to continue to pay Lombardo through Outfit collectors Frank Schweihs and Alva Johnson Rodgers (who admitted committing criminal acts for Lombardo) to protect his life and business. *See* Tr. 322-49. Wemette testified that, prior to going to prison, Lombardo in the 1980's instructed him to contact Lombardo's street tax collector Frank Schweihs if he (Wemette) "ever had any problems or difficulties . . . ." Tr. 345-47 (Q: "And I take it from your testimony, Mr. Wemette, that after Joseph Lombardo went to jail the street tax payments did not stop? A [Wemette]. No, they never stopped."). Schweihs thus carried out Lombardo's business on Lombardo's behalf while Lombardo was incarcerated. See also Tr. 259 (Outfit Expert James Wagner's testimony that Outfit bosses do not "retire").

Dr. Patrick Spilotro testified to a December 2002 conversation he had with Lombardo. Tr. 4974-75. Dr. Spilotro recalled Lombardo state[ing] that there were people from New York that came in and are trying to take over certain functions of the people in Chicago. . . . He displayed unhappiness to me. You know, that he wasn't happy with what was going on." Dr. Spilotro then explained that he understood Lombardo to be complaining about members of the "New York Syndicate" moving into the activities of the "people in the Outfit or syndicate." Tr. 4975. This conversation further demonstrates that Lombardo did not retire from the Outfit after

508 F.3d 445, 449 (7th Cir. 2007) (holding that inactivity alone does not constitute withdrawal from a conspiracy; to withdraw from a conspiracy, the defendant must terminate completely his active involvement in the conspiracy, as well as take affirmative steps to defeat or disavow the conspiracy's purpose). In fact, Lombardo during his testimony flatly denied ever being a member of the Chicago Outfit (or any other criminal group or conspiracy), *see, e.g.*, Tr. 5606 ("Q: Have you ever been a capo or a member of the Chicago Outfit? A [Lombardo]. Positively no."), thereby making his withdrawal from the charged conspiracy impossible.

II. STANDARD OF PROOF AT SENTENCING IS PREPONDERANCE, NOT BEYOND A REASONABLE DOUBT

Defendant next contends that the PSIR erred by not using the beyond-a-reasonable-doubt standard of proof to evaluate the evidence presented at trial. *See* Doc. #1026 at 5-6. The government was unable to locate any caselaw supporting this view of the law. However, there is ready support for the proposition that the appropriate standard of proof at sentencing was and is preponderance of evidence. *See generally United States v. Strode*, 2009 WL 80237, at *6 (7th Cir., Jan. 14, 2009) (noting that preponderance standard is applicable at sentencing); *United States v. Rollins*, 544 F.3d 820, 837-38 (7th Cir. 2008) (same); *United States v. Ellis*, 548 F.3d 539, 545-46 (7th Cir. 2008) (for obstruction of justice sentence enhancement, the burden is on the government to prove by a preponderance of the evidence that the defendant's false testimony was willful), *citing United States v. Shearer*, 479 F.3d 478, 484 (7th Cir. 2007); *United States v. Krasinski*, 545 F.3d 546, 551 (7th Cir. 2008) ("The government has the burden of proving the

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quantity of drugs attributable to a defendant for sentencing purposes by a preponderance of the evidence.").

III. LOMBARDO'S "DUE PROCESS" AND "ALIBI" CLAIMS

Lombardo again argues that he has been "prejudiced by the thirty-plus year delay in the prosecution in any form with respect to the Seifert homicide." Doc. #1026 at 6. Lombardo contends this "delay" precluded him from presenting various pieces of evidence (such as his "alibi" claim) that, he contends, could have undermined the trial evidence of his guilt. *Id.* at 6-7. Lombardo has previously raised these arguments, *see* Doc. #743 at 11, the government has responded to them fully, *see* Doc. #839 at 37-38, and the Court has properly rejected them, *see* Doc. #905. *See generally United States v. Henderson*, 337 F.3d 914, 920 (7th Cir. 2003) ("The defendant may establish a due process violation if the prosecutorial delay caused actual and substantial prejudice to the defendant's right to a fair trial. A defendant must first show more than mere speculative harm but instead must establish prejudice with facts that are specific, concrete, and supported by evidence. If a defendant makes the proper showing, the burden shifts to the government to demonstrate that the purpose of the delay was not to gain a tactical advantage over the defendant or for some other impermissible reason. The government's reasons are then balanced against the prejudice to a defendant to determine whether a due process violation occurred.") (Citations and quotations omitted). There is no reason to re-visit Lombardo's flawed Due Process arguments at this stage in the proceedings.

IV. LOMBARDO'S MISCELLANEOUS OBJECTIONS TO PSIR

PSIR Lines 114-116: Lombardo complains that the information contained in the PSIR

comes "entirely from the government. . . ." Lombardo, however, ignores the hundreds of citation to the transcript, exhibits introduced at trial, taped conversations, etc., which is the evidence relied on by the jury to convict defendant.

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