IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	**(**	
	(	
VS.	**(**	**NO: 2-cr-1050**
	(	
JOSEPH LOMBARDO	**(**	

MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. SEC. 2255 AND MEMORANDUM OF LAW IN SUPPORT

COMES NOW, JOSEPH LOMBARDO, your Petitioner in the instant case, by the undersigned attorney, who respectfully files this Memorandum with points of law in support of his Motion to Vacate, Set Aside, or Correct Sentence, pursuant to 28 U.S.C. Section 2255, and in support thereof, states as follows:

STATEMENT OF JURISDICTION

This United States District Court for the Northern District of Illinois, Eastern Division, has jurisdiction over all offenses against the criminal laws of the United States which take place in that district, under 18 U.S.C. Section 3231, 21 U.S.C. Section 41(a)(1)(b)(1)(A), 21 U.S.C. Section 846, and 28 U.S.C. Section 2255.

STATEMENT OF THE CASE

On April 25, 2005, fourteen individuals, including Petitioner Joseph Lombardo, were charged in a First Superseding Indictment. Two arrest warrants were thereafter issued for Petitioner, the second of which identified him as a fugitive (after he had written the district court a letter). Petitioner was arrested on January 13, 2006. Petitioner and his co-defendants were charged in a Third Superseding Indictment on March 8, 2007. In said indictment, Petitioner was charged in count one with the offense of racketeering conspiracy, in violation of Title 18, United States Code, Section 1962(d). He was also charged alone in count nine with the offense of obstruction of justice, in violation of Title 18, United States Code, Section 1512(c)(2). He entered a plea of not guilty to all charges.

Prior to trial, Petitioner filed a motion to dismiss Count One of the indictment based upon the statute of limitations, and said motion was denied by the district court. Petitioner then proceeded to a trial by jury and moved for a judgment of acquittal after the government rested its case, pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The district court summarily denied that motion.

Petitioner then proceeded to offer evidence on his behalf, and at the close of his case (and the close of all of the evidence), moved for a judgment of acquittal on counts one and nine, pursuant to Rule 29. The court entered and continued these motions. After the completion of closing arguments, the district court denied Petitioner's motions and issued its instructions on the law. The jury, subsequently, returned a verdict of guilty on counts one and nine.

The trial then turned to the question of enhanced punishment, based upon murders alleged in the indictment. No additional evidence was presented by the parties, and the

hearing consisted of the parties' attorneys' arguments to the jury. The jury then returned a special verdict finding that Petitioner had committed the first degree murder of Daniel Seifert in violation of Illinois law. Petitioner's subsequent motion for a judgment of acquittal on counts one and nine and his motion for a new trial pursuant to Rules 19 and 33 of the Federal Rules of Criminal Procedure were denied by the district court, in its Memorandum Opinion and Order. On February 2, 2009, Petitioner was sentenced to a term of life imprisonment and a concurrent term of 168 months imprisonment on count nine. Furthermore, a restitution order in the amount of $7,450,686.67 was entered against Petitioner (subsequently amended to $4,422,572.89), as well as a forfeiture judgment for $16,105,756. On February 13, 2009, Petitioner timely filed his notice of appeal of those judgments.

On May 1, 2012, the United States Court of Appeal for the Seventh Circuit affirmed the decision of the district court and denied Petitioner's appeal. A writ of certiorari was timely filed to the U.S. Supreme Court on November 23, 2012 and denied on March 25, 2013. A petition for rehearing was filed on April 12, 2013 and denied on June 3, 2013. Petitioner timely files this Petition under 21 U.S.C. 2255 before this Honorable Court.

FACTS OF THE CASE

Pursuant to the indictment in this cause, Petitioner was charged with engaging in racketeering conspiracy, "(f)rom approximately the middle of the 1960's through the date of the return of this indictment. . . " The indictment further alleged that Petitioner and others were members of the "Chicago Outfit," who conspired to engage in numerous

unlawful activities, including murder, extortion, illegal gambling, juice loans and obstruction of justice. Petitioner was alleged to have been a member of the "Grand Avenue Crew" and was further accused to have engaged in criminal activities, including murder. The indictment also specified that Petitioner was alleged to have committed the September 27, 1974 murder of Danny Seifert in Bensenville, Illinois, and (based upon that alleged conduct) was subject to an enhanced sentence of life in prison if convicted of the racketeering conspiracy charge.

At trial, the evidence introduced against Petitioner by the government (which included both documentary and testimonial material), was largely decades-old and historical in nature, arguably inflammatory and highly prejudicial. One item continually referred to by the government was "Government Exhibit Photo 1," a 1976 photograph, also known as the "Last Supper" photograph. Said photograph featured Petitioner in the company of alleged Outfit bosses at a Chicago Italian restaurant favored by older members of the Italian-American community. Petitioner was identified in this photo by retired IRS agent Robert Pinta, government informant William Wemette, and retired FBI agent Arthur Pfizenmayer. While Petitioner has acknowledged that it is him in this picture (which was taken decades before the indictment was returned in this cause), he has maintained that he was having dinner at the restaurant with a friend and was simply greeting a member of the dinner party whom he knew casually. Government informants and other witnesses testified to Lombardo's illegal activities that occurred more than 30

years before he was charged in this cause (Immateriality and statutes of limitations notwithstanding).[1]

The government also introduced numerous recordings and other evidence already used in the prosecution and conviction of Petitioner in the "Pendorf" and "Strawman" investigations, also known as United States v. Dorfman, et al., 542 F. Supp. 345 (N.D. Ill. 1982). The government also submitted documents from the matter of United States v. DeLuna, et al., No. 83-00124-09, filed in the Western District of Missouri.

The government also introduced evidence regarding the murder of Seifert, calling former Assistant U.S. Attorney Matt Lydon to testify that Lombardo and others had been charged in 1974 with defrauding the Teamster's pension fund through a company called Gaylur Products. Petitioner was charged, in the "Teamsters Case," as a result of a transfer of over $5000 to a company called International Fiberglass and then, allegedly, to Lombardo. Lydon also testified that Seifert was a part owner of and worked at International Fiberglass, where Petitioner was also alleged to have worked.

According to Lydon, Siefert was the only witness linking Petitioner to this alleged fraudulent scheme. Lydon testified that in 1971 Seifert was prepared to testify that Petitioner's role in the scheme included receiving two checks totaling $5250 for non-existent products. On September 27, 1974, Seifert was murdered, and subsequently the charges against Petitioner were dismissed.

One of the government's key witnesses in the current case was Seifert's widow, who was present at her husband's plastics manufacturing business when masked men

[1] It is also worth noting (and reflective of the prejudice to Petitioner resulting from the government's years-long delay in bringing this prosecution) that none of the men featured in the "Last Supper" photograph were available to Petitioner as defense witnesses, because they had all died in the interim.

shot and killed him. She knew Petitioner prior to this incident and testified that she "Got the feeling" that he was one of the men there by his size and the way he moved. However, she did not identify Petitioner as one of the killers to the local police, the FBI, or the coroner's office at the time of the killing. She also testified that she told FBI agent Peter Wacks a few weeks after the murder that she believed that Petitioner had been present. Said testimony was categorically refuted by Wacks, who testified as a defense witness.

The government also introduced additional evidence that: 1. Petitioner had purchased police radio scanners in the past and that one of the cars recovered near the murder site had a similar scanner (readily available at any number of electronics stores) in its trunk, and: 2. that one of Petitioner's fingerprints was on the title application of the recovered vehicle (which was purchased many months before the Seifert murder).[2] All of this evidence relating to the Seifert murder was readily available decades prior to the current case.[3]

Government witness Rodgers testified that he saw Petitioner the morning after the Seifert murder, and Petitioner allegedly talked about how the crew had gotten away and that Seifert would no longer be able to testify against him. Transcript, page 626. Star government witness Nick Calabrese, an acknowledged murderer, testified that reputed

[2] It is interesting to note that the government did not provide (nor did counsel attempt to obtain) Petitioner with the opportunity to inspect said title application, which would have provided an opportunity to harvest and test DNA material from the alleged fingerprint. Rather, Petitioner was given only a photocopy. Counsel also failed to pursue Petitioner's explanation for why his fingerprint might, legitimately, have been on the title application. Said application had been notarized by International Fiberglass's secretary, Lili Bajac. Petitioner was often at that office to meet with his boss Irv Weiner or Danny Seifert and would move the papers on Bajac's desk to find the newspaper often buried underneath to read while waiting; his fingerprints, unavoidably ending up on some of the papers. Unfortunately, by the time of trial, Lili Bajac was the only surviving witness who could testify to these facts and counsel failed to subpoena her.

[3] There is no question that the government's delay in bringing this prosecution of Petitioner for the death of Seifert compromised his ability to defend himself; for no other reason than so many potential defense witnesses had died or otherwise become unavailable in the interim. Counsel was ineffective for failing to bring this to the attention of the court.

mobster John Fecarotta told him that he was present with Petitioner when Seifert was murdered in 1974. Calabrese admitted he had no personal knowledge of Petitioner's involvement since he considered it a rumor, and that he himself had killed Fecarotta in 1986, such that there were no statements by Fecarotta given to anyone (other than admitted murderer Calabrese) regarding the matter. Transcript, pp.2620-27, 2888-90, 2903-04

Typical of the decades-old material presented by the government was a February 8, 1983 transcript of the testimony of Jimmy Fratianno before the Honorable Judge Prentice Marshall at Petitioner's sentencing hearing in the Dorfman case, which enumerated alleged meetings in either 1974 or 1975 involving Fratianno with Petitioner and other alleged members of the Chicago Crime Syndicate. For his role in that case Petitioner was imprisoned from December 17, 1982 to November 13, 1992, at which time he was put on probation.

At trial, Petitioner introduced evidence regarding his statute of limitations defense, combined with his withdrawal from any conspiracy existing on December 9, 1992, via a full-page ad/notice placed in three Chicago daily papers shortly after he was released from prison. Petitioner maintained that his ad/notice established that he was not a member of any conspiracy, nor was he engaged in any criminal activities for many years (including the five years constituting the five year limitations period for the crimes alleged in the government's indictment). A jury instruction was given on withdrawal and Petitioner's theory of defense. Petitioner alleged that he had made an affirmative statement of withdrawal and that it had been done in a fashion to notify both law enforcement and/or other members of the conspiracy. Furthermore, any co-conspirators

were reasonably likely to know about it before they carried through with any further acts of the alleged conspiracy. Moreover, it was the government's burden to prove beyond a reasonable doubt that Lombardo did not withdraw from the conspiracy prior to April 21, 2000.

> The full page ad/notice, which was read in its entirety to the jury, read as follows:
>
> I am Joe Lombardo. I have been released on parole from Federal Prison. I never took a secret oath with guns and daggers, pricked my finger, drew blood or burned paper to join a criminal organization. If anyone hears my name used in connection with any criminal activity please notify the F.B.I., local police and my parole officer Ron Kumke.

Two days after the publication of this notice, an article was published on page 3 of the Chicago Tribune further publicizing this notice and detailing Petitioner's history, as well as discussing his declaration that he was no longer engaged in criminal activities. The existence of the ad/notice and the article in the Tribune were stipulated to by the parties.[4] Additional evidence regarding Petitioner's withdrawal from any conspiracy was adduced by way of government-recorded conversations between defendant Frank Calabrese, Sr., and government informant Frank Calabrese, Jr. Said conversations further substantiated that the FBI did not know who the Outfit bosses were and that the FBI mistakenly believed that Petitioner ran a criminal organization after his release from prison, despite his public notice denying same and the complete lack of any government evidence to the contrary. Even star government witness and admitted murderer Nick Calabrese, clearly referring to Petitioner's non-involvement in criminal activity, testified that if a member of

[4] Within the body of said article, were quotes from law enforcement officials reflecting their knowledge of Petitioner's intent to withdraw from any extant conspiracy. Counsel was ineffective for failing to subpoena these individuals whose testimony would have established the effectiveness of Petitioner's ad/notice in informing law enforcement of his withdrawal from any conspiracy. Moreover, such testimony would have established that the ad/notice was not, in fact, a "stunt."

the Outfit is "put on the shelf," he is "not to do any kind of illegal activity at all." Transcript, page 2696.

The government then attempted to show that Petitioner had not, in fact, withdrawn from any conspiracy by introducing the testimony of two members of the Spilotro family: Ann Spilotro and Dr. Patrick Spilotro, with reference to the well-publicized demise of the husband and brother of each. According to Ann Spilotro, Lombardo claimed that the Spilotro brothers, whom he had considered family friends (having known them since they were small children), would never have been murdered if he had not been in jail at the time (although how he would have prevented it was a matter on which the government offered no testimony). Transcript, pp.4563-66, 4575, 4603-04. Patrick Spilotro, a dentist who was a government informant for over two decades, testified that he had known Petitioner since he was a child and that he had treated Petitioner as a dentist. Dr. Spilotro testified that in 1993 Petitioner had told him that "they had taken his people (Spilotro's brothers) away from him." Transcript, page 4970. Spilotro testified also that in 2002, in another conversation with Petitioner, Petitioner had expressed that he was unhappy about New York people coming in and trying to take over Chicago. Transcript, page 4974. Additionally, Spilotro testified that he had assisted Chicago Police in apprehending Lombardo after he was adjudged a fugitive. Transcript, pp.4971-72. Other than this, there was no other testimony or evidence offered by the government regarding Petitioner's withdrawal (or supposed failure to withdraw) from the conspiracy.

Additionally, while testifying in his own behalf, Petitioner testified that he did not kill Seifert, and although he ran an illegal dice game from 1976 to 1982, he was not a

member of the Chicago Outfit. Transcript, pp. 5607, 5614-15. He also testified that he had an alibi regarding the time of the murder of Seifert in that he was having breakfast at a Chicago restaurant and returned to his car and found that his wallet, driver's license, and other items were missing from the glove compartment. Returning to the same restaurant, he notified two Chicago policemen, who advised him to make a police report at a Chicago Police station. Transcript, pp. 5720-22. Petitioner then testified that, after reporting the loss at the police station and giving a copy of the police report to an Officer Orsi, he obtained a duplicate license from the Secretary of State's office on the same date. Transcript, pp5722-23, 5926-27. Due to the fact that Officer Orsi had passed away prior to the trial at issue, testimony regarding this alibi, including the police report of Officer Orsi, was barred by the district court, which deemed it hearsay. Likewise, a motion to reconsider was denied. Transcript, pp. 5960-61, 5966-72. The government also emphasized that, when interviewed about the Seifert murder, Petitioner did not mention the stolen wallet. Transcript, pp.5912-13.[5]

Without objections from defense counsel, government prosecutor Markus Funk was permitted to argue that Petitioner's alibi was "completely and utterly bogus." Transcript, page 7324. Furthermore, Funk displayed an arrest photograph of Lombardo on the large screen in the courtroom, and argued that Petitioner looked like Saddam Hussein.[6] Transcript, page 7324. Defense objections to the clearly inflammatory comparison were overruled. Transcript, pp.7465-66.

[5] Ironically, despite the government's choice to make much of Petitioner's failure to mention the wallet, it is common knowledge in the criminal prosecution/defense community that defense attorneys advise their clients not to talk to law enforcement, which is, after all, their 5th Amendment Constitutional right. Ergo, it was disingenuous for the prosecution to make this argument and ineffective for counsel to fail to object.

[6] Petitioner submits that there was no relevant reason for the prosecution to make such an observation other than to inflame a jury, which was still suffering in the wake of 9/11/2001. This grossly inflammatory statement, in and of itself, provided grounds for a mistrial then -- and now, for reversal.

Petitioner was also barred from introducing records from the United States Probation Office for the period of November 13, 1992 through July 17, 2002, during which time Petitioner was under the supervision of that office. Record, 1071 at 17. Petitioner argued that the records would show no reports of violations and that this fact would be consistent with his claim that he had withdrawn from any alleged conspiracy. Furthermore, if he had engaged in unlawful conduct during that time, given his notoriety, it would have been reported. Transcript, pp. 5334-42.

Petitioner further argued that he was entitled to entry of a judgment of acquittal because of his withdrawal defense. Transcript, pp. 5334-42. The court denied that motion, stating that a jury was entitled to find beyond a reasonable doubt that he did not withdraw, based upon his demeanor on the witness stand and his unconvincing explanations for his actions. Record, 906 at 3, n.2. Indeed, the court stated that the jury might conclude that the advertisement Petitioner placed in the newspaper, particularly when considered alongside his colorful testimony, was nothing more than a "stunt." Record, at 3, n. 2.

INEFFECTIVENESS GENERALLY

Petitioner asserts that counsel's representation (or lack thereof) constituted ineffective assistance of counsel. Claims of ineffective assistance are weighed against the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 697 (1983), and Wiggins v. Smith, 539 U.S. 510, 522, 524 (2003). The standard is whether: (1) defense counsel's performance fell below an objective standard of reasonableness to be expected

of professional attorneys, and: (2) whether there is a reasonable probability that the outcome of the proceedings would have differed but for the deficiency of the legal representation. Whether counsel was ineffective is a question of mixed law and fact subject to independent review. The Court is required to review, specifically, what counsel allegedly failed to do, and whether or not there was some reasonable basis for counsel's inaction.

"First, the defendant must show that counsel's performance was deficient." Strickland at 687. To be "deficient," counsel's performance must be "outside the wide range of professionally competent assistance." Id., at 688. Next, "the defendant must show that the deficient performance prejudiced the defense." Id., at 687. Moreover, to show "prejudice," a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is probability sufficient to undermine confidence in the outcome." Id., at 694.

A claim of ineffective assistance of counsel is not a vehicle for placing blame, but a measure of prejudice to the defendant. Id., at 687. Counsel is expected to independently investigate all of the facts and circumstances of the case and all of the laws pertaining to that case. Id. at 690-691. Counsel is expected to consult with the defendant prior to trial and prior to sentencing in order to properly represent the defendant. "Reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. at 691.

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ARGUMENT

I. DEFENSE COUNSEL PROVIDED CONSTITUTIONALLY INADEQUATE REPRESENTATION OF COUNSEL BY FAILING TO PROPERLY INVESTIGATE THE EVIDENCE PRESENTED TO HIM BY THE GOVERNMENT.

As part of its prosecution of petitioner for conspiracy, the government produced voluminous evidence, most of which pertained to events that occurred decades before the indictment of Petitioner in the instant case. Because of the various exceptions to the hearsay rule available to the government in conspiracy prosecutions, an effective defense could have been mounted by a defense counsel that reviewed all of the documents, identified possible areas of impeachment of prosecution witnesses, and then assembled his own rebuttal evidence and witnesses to expose the tenuous probative value of such outdated testimony. This defense counsel failed to do anything of the sort, despite the uncontroverted fact that he was granted additional financial resources by the court to hire additional counsel and cover investigative expenses. "Though there may be unusual cases when an attorney can make a rational decision that investigation is unnecessary, as a general rule an attorney must investigate a case in order to provide minimally competent representation." Crisp v. Duckworth, 743 F. 2d 580, 583 (7th Cir. 1984).

Defense counsel, despite being granted these additional financial resources, was unable or unwilling to properly marshal these resources to investigate the decades-old evidence of the government and to gather the facts and witnesses necessary to properly impeach them. United States v. Wolf, 787 F.2d 1094, 1100 (7th Cir. 1986). Defense counsel's failure to call disinterested alibi witnesses to discredit the prosecution's theory of the case constituted ineffective assistance of counsel. Montgomery v. Petersen, 846 F.2d 407 (7th Cir. 1988). Defense counsel was further ineffective because, although he had ample opportunity, counsel failed to construct a viable defense theory supported by disinterested witness testimony, and instead, inadvisably, put his client on the witness stand, while ignoring (and failing to object to or comment upon) the fact that the prosecution's case was built on the testimony of an admitted murderer, double-hearsay testimony, and decades-old facts and recollections. Harris v. Reed, 894 F. 2d 871, 878-79, (7th Cir. 1990).

Defense counsel is responsible for investigating all facts provided him by his client and all other sources, including those provided by the government. Failure to do so constitutes inadequate representation of counsel. Counsel is not required to investigate matters already known or understood by him, or that have no relevance to the issue of guilt or innocence under the government's indictment. In a prosecution such as the one faced by Petitioner, the failure to properly investigate and present rebuttal witnesses (other than Petitioner) illustrated that such failure was not a strategic decision but uncontroverted evidence of inadequate performance. Montgomery v. Petersen, 846 F. 2d 407, 412 (7th Cir. 1988). In this case, where Petitioner's notoriety placed him at a

strategic disadvantage in his quest to obtain a fair trial,[7] defense counsel had an obligation to review the documents, investigate the pertinent facts, and advise his client of tactics that would serve his best interests based thereupon. The prejudice to the Petitioner, as reflected in the record of the case, is painfully clear.

As noted by the courts in the area of inadequate representation of counsel:

> Investigation is crucial for several reasons. First, the proper functioning of our adversary system demands that both sides prepare and organize their case in advance of trial…Second, in a very practical sense, cases are won on the facts. Proper investigation is critical not only in turning up leads and witnesses favorable to the defense, but in allowing counsel to take full advantage of trial tactics such as cross-examination and impeachment of adverse witnesses.

United States v. Decoster, 624 F. 2d 196 at 293 (D.C. Cir, 1979).

Clearly in this cause, that level of investigation was not performed by defense counsel, to Petitioner's detriment. The cumulative prejudice to the interests of Petitioner is unassailable. "[A]ny amount of [additional] jail time has Sixth Amendment significance. Glover v. United States, 531 U.S. 198, 203 (2001).

II. DEFENSE COUNSEL PROVIDED CONSTITUTIONALLY INADEQUATE REPRESENTATION BY FAILING TO INTERVIEW AND CALL WITNESSES AND INTRODUCE EVIDENCE SUGGESTED BY HIS CLIENT.

At every stage of the proceeding after his appointment, Petitioner's defense and trial counsel failed to, both, follow the suggestions of Petitioner and do the proper investigative and organizational trial work necessary to present a defense. Defense

[7] **Petitioner submits that this is, unfortunately, an indisputable fact of which this Honorable Court cannot help but take judicial notice.**

counsel should have done extensive investigation and interviews of exculpatory witnesses suggested to him by Petitioner from a long list of potential candidates; formulating a possible defense based upon his interviews with those individuals. These individuals included Lili Bajac, the secretary at International Fiberglass, Police Officer Bruce Gand, Private Investigator Anthony Pellicano, and Police Captain William Anhart, all of whom were alive at the time of trial and available to testify. Instead, defense counsel did virtually nothing and only perfunctorily contacted several individuals -- ultimately finding himself in a position where the few he had chosen to reach out to were unwilling or unavailable to testify. Thus, counsel ensured that Petitioner's testimony would be his only defense.

Defense counsel failed to properly rebut the government's argument that the placement of his public notice in a newspaper of general circulation in December of 1992 was a "stunt,"[8] or to make a proper record for appeal regarding the subject of the newspaper notice. Said failure helped to undermine Petitioner's principal defense to the conspiracy charge (i.e. that he had effectively withdrawn) that he was eventually convicted of and which resulted in his life sentence. Defense counsel failed to introduce testimony or subpoena law enforcement personnel who could have testified that they had read the notice, thus proving the effectiveness of Petitioner's intended withdrawal. Counsel could also have introduced evidence that placing notices in newspapers of general circulation is a perfectly acceptable method by which to satisfy various legal requirements set forth in various provisions of Illinois law. It is well-settled law in

[8] While it seems apparent that the prosecution borrowed this "stunt" notion from the verbiage used by the court in denying Petitioner's motion for acquittal (based on his withdrawal via the newspaper ad/notice), it is worth noting that the prosecution presented not one scintilla of evidence to prove that the ad/notice was, in fact, a "stunt."

Illinois that "Service by Publication" of similar newspaper notices is acceptable to establish jurisdiction of a state court in in-rem proceedings, including mortgage foreclosure matters, as well as default dissolution of marriage actions. 735 Illinois Rules of Civil Procedure, 5/2-201, et seq.

In an action where Petitioner was at risk of being accused of participating in a conspiracy that was allegedly formed decades before the current indictment, with individuals whom he may or may not have had contact with, defense counsel failed to conform to normal standards of legal competence by failing to properly advance this "publication" theory and support it with competent evidence. Defense counsel failed to properly defend Petitioner despite the fact that there was, other than the discredited testimony of Seifert's widow, which directly contradicted her statement made to the FBI immediately after the murder, **no evidence** of Petitioner's involvement in the murder of Danny Seifert.[9]

Defense counsel failed to subpoena and introduce Chicago Police Department records of the police report made to Chicago Police Officer Orsi reflecting Petitioner's presence at the police station at the time Seifert was killed. Said report was made in the ordinary course of police department business. Basic evidence law dictates that records "kept in the regular course of business" should overcome the obvious hearsay objection made by the government, because of the death of Officer Orsi. Rule 803, Federal Rules of Civil Procedure. Defense counsel also failed to properly investigate or to introduce

[9] Mrs. Seifert never saw the face nor heard the voice of the masked, alleged killer and postulated that it had been Petitioner based solely on the "agile" way he moved – because Petitioner had once been a boxer. Further, the FBI agent to whom she claimed to have identified Petitioner testified that she never did so. In light of these facts, it would seem that even the most modestly competent trial counsel should have been capable of creating a reasonable doubt in at least one member of the jury.

witnesses and evidence to aggressively rebut the government's contention that Petitioner had participated in or in fact purchased the automobile used in the murder of Seifert.[10]

Defense counsel also failed to hire any handwriting or fingerprint experts to cast doubt upon the government's theory that Petitioner had executed the purchase documents for the automobile used by the killer in the murder of Danny Seifert. The government introduced evidence that there were 6 fingerprints taken off of that vehicle, but not one of them was that of the Petitioner. Counsel also failed to obtain the pictures, fingerprints, and writing exemplars given by Petitioner to FBI agent Gus Kemp in 1974, at the time of Seifert's murder, which corroborated the complete lack of involvement by Petitioner in Seifert's death. Counsel failed to produce the radio allegedly left in the getaway car in the Seifert murder. He never subpoenaed the investigative material collected by the FBI regarding the Seifert murder, including witness statements and other collected evidence which had been in the possession of the FBI and government prosecutors for decades prior to the newest indictment, and clearly had been deemed by them to be insufficient to charge **anyone**, with Seifert's murder. "Counsel has a duty to contact a potential witness unless counsel can make a rational decision that investigation is unnecessary." Montgomery at 413 (7th Cir. 1988). Investigation was extraordinarily necessary in the instant case. It just went undone.

"It is axiomatic among trial lawyers and judges that cases are not won in the courtroom but by the long hours of laborious investigation and careful preparation and study of legal points which precede the trial." Decoster, at 293.

[10] For example, neither the salesman who sold said automobile nor his female assistant had been unable to identify Petitioner as the buyer of the vehicle. But counsel did not produce either of them.

III. DEFENSE COUNSEL PROVIDED CONSTITUTIONALLY INADEQUATE REPRESENTATION OF COUNSEL BY FAILING TO MOUNT A CREDIBLE DEFENSE.

Petitioner was in prison from 1982 to 1992 for a previous offense. During that period of time he received no incident reports. Subsequently, he was under direct and intensive supervision of the United States Probation Office, and as a high-profile probationer, he was under constant scrutiny. Despite that fact, the government introduced no evidence of **any** illegal activity by Petitioner that happened while he was in prison or after his release from prison in 1992, up until his successful discharge from probation in 2002.

Defense counsel also provided inadequate representation of counsel by failing to advise Petitioner of the urgent need to promptly present himself to federal authorities when notified that they were seeking his arrest in this cause. Petitioner, who at the time was in his late seventies and in uncertain health, wrote the district court judge for guidance on whether or not he should turn himself in. Petitioner maintains that his defense counsel never advised him that he had to be present by a certain date or be charged with a crime for not doing so.

Despite that fact, and the fact that there was **no evidence** that Petitioner violated any laws from 1982 to the date of his indictment in 2005, defense counsel failed to introduce witnesses to establish that fact to rebut the hearsay testimony of an admitted murderer and other government informants that claimed to show that Petitioner was still involved in a conspiracy of crime. Counsel failed to emphasize that there were no

victims or witnesses to come forward to testify on behalf of the government despite the intense publicity received by the Petitioner's prosecution. Despite this reality, defense counsel failed to mount a credible defense, relying instead solely upon the testimony of Petitioner. Counsel failed to interview and call as rebuttal witnesses any individuals who might have supported Petitioner's theory of defense, and his claim that he had led a crime-free life since 1982. This failure to explore other theories and mount a credible defense constituted inadequate representation of counsel. Groseclose v. Bell, 130 F. 3d 1161 (6th Cir. 1997). Defense counsel offered only the Petitioner in this regard, to Petitioner's prejudice.[11]

Defense counsel committed many other prejudicial errors in his representation of Petitioner, and failed to properly object to Petitioner's PSR report, which claimed that he was the head of a large street "crew," despite the fact that the report named **no one** who was a member. No government witness was able to testify, even in a hearsay fashion, as to whom the members of Petitioner's "crew," might be. Nevertheless, defense counsel was unable to introduce evidence or witnesses to rebut this unchallenged government allegation, or fashion an objection to have this unproven allegation stricken.

Defense counsel also failed to counsel his client that he was entitled to participate in a Rule 29 proceeding that he was not notified of until after it was completed outside of his presence. Also, defense counsel failed to aggressively object to the ex-parte contact between the court and certain members of the jury (again – outside the presence of Petitioner) after one juror reported two others who had stated that they had decided

[11] It should go without saying that a defense based solely on the testimony of a man with Petitioner's reputation (deserved or not) was bound to fail.

their verdict after the government's case. The court interviewed the "reporting juror," the foreperson and the two who had predetermined their verdicts and ultimately removed the two members of the jury who said they'd already reached a decision. But counsel was ineffective for failing to insist on a full investigation into why they felt the way they did; what was actually said and took place in the jury room; and whether any of the other jurors had been tainted. Furthermore, once counsel was aware of the potential jury taint, he was ineffective for failing to move for a mistrial.

Defense counsel's behavior at Petitioner's trial also failed to meet Strickland standards in his representation of his client. The government prosecution of Petitioner, a fixture in local newspapers hungry for news about alleged Chicago mob activities, relied upon arguably tenuous evidence, which was decades old. The "theory" of the prosecution called for the government to tie together a variety of elements: bits of admittedly hearsay testimony, purported recollections of conversations, reputed actions as recounted by convicted felons of dubious veracity, and the characterization of evidence in a light most favorable to the government. This compilation of questionably reliable "evidence" made a persuasive little bundle for a jury that was all too willing to believe what the government wanted them to about Joey "the clown" Lombardo. Lombardo was, after all, a "bad guy" they had long read about and must have been guilty of whatever the government saw fit to accuse him of.

Defense counsel failed to present any evidence to rebut Count 9 of the indictment, charging Petitioner with obstruction of justice for failing to promptly appear in court when the indictment against him was first returned. Certainly, Petitioner's age, overall health, and his layman's lack of sophistication in legal affairs provided many

possibilities for a vigorous defense of this allegation.[12] Nonetheless, defense counsel offered no defense of any sort. An attorney's failure to put on a defense and call important fact witnesses constitutes ineffective assistance of counsel. Pavel v. Hollins, 261 F. 3d 210 (2d Cir. 2001).

Defense counsel also owed his client a duty of loyalty to refute the closing arguments of government prosecutors who took extreme liberties with the limited evidence at their disposal, but he failed to do so. Counsel failed to object when one prosecutor called his client's alibi "bogus." Perhaps counsel's greatest sin, transcending ineffectiveness and qualifying as an active attack on his own client was when he said, in his own closing, that his client did not testify truthfully at all times during his testimony, stating that "parts of his testimony that were credible and there were parts that weren't truthful," and that at times his client "was lying." Halprin Closing Argument, page 7561. With that one statement, defense counsel sabotaged his own client, and probably ensured his conviction. Since it seems clear that counsel was not going to move for a mistrial based on his own ill-advised statement, Petitioner avers that this Honorable court should have stepped in and declared a mistrial, sua sponte. As the court did not see fit to so declare at that time and, as counsel's statement was clearly beyond the pale and sealed Petitioner's conviction, Petitioner further argues that this Honorable Court should take the opportunity presented by this motion to remedy the injustices done at trial and vacate his conviction.

[12] At the very least, Petitioner's letters seeking the guidance of the court were evidence of his good faith desire to comply with the letter of the law.

IV. DEFENSE COUNSEL PROVIDED CONSTITUTIONALLY INADEQUATE REPRESENTATION OF COUNSEL BY FAILING TO PROPERLY COUNSEL HIS CLIENT AGAINST TESTIFYING ON HIS OWN BEHALF.

Putting a criminal defendant on the stand is a risky proposition in the most favorable of circumstances. But, in this instance, it was yet more evidence of defense counsel's constitutionally inadequate representation of counsel. Petitioner's testimony, for which he was minimally prepared by defense counsel, subjected him to possible obstruction of justice charges and resulted in his loss of any criminal responsibility points, lengthening his sentence. In the context of defense counsel's unwillingness to properly investigate and prepare a credible defense, the foreseeable damage precipitated by Petitioner's testimony becomes an even more significant barometer of counsel's ineffective assistance.

Defense counsel knew or should have known that Petitioner's testimony, standing alone and without sufficient corroborating evidence or witnesses to support it, would be problematic and would not, by itself, overcome the government's case. In fact, logic dictates that counsel's complete failure to present any defense evidence other than Petitioner's testimony might well have led the jury to the mistaken belief that there was no other exculpatory evidence to be had. Moreover, Defendant, at that time, was unemployed, divorced, living modestly, and already approaching 80 years of age. He was not immune to the normal human frailties and the dulling of faculties that necessarily follow the attainment of such an advanced age. It became all the more important for

defense counsel to investigate and introduce evidence so that the burden of the defense case would not have to be borne, completely, by an elderly man in ill health.

CONCLUSION

As previously set forth, the standard of review for determining whether ineffective assistance of counsel is present is set forth in Strickland v. Washington, 466 U.S. 668 (1984). Petitioner has clearly shown, in multiple instances, that "counsel's performance was deficient," and "outside the wide range of professionally competent assistance." Id. at 688. Petitioner has also shown the requisite element of serious prejudice in every phase of the instant proceedings, by showing a "reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." Id. at 694. In Wade v. Armontrout, 798 F.2d 304 (8th Cir. 1986), the case was remanded for an evidentiary hearing on the claim that defense counsel provided ineffective assistance by not investigating any possible defense witnesses, not presenting any alibi evidence, or offering any evidence at trial. The Petitioner herein, Joseph Lombardo, is no less deserving than Mr. Wade. . . in fact, he is more so. To reach such conclusion, we need look no further than the fact that counsel called his own client a "liar" in front of the jury. Petitioner is aware that he has a negative reputation in this community. But, to find that Petitioner was not the victim of "ineffective assistance" by his trial counsel would require this court to be blinded by that reputation to what actually happened in the courtroom. Petitioner beseeches this Honorable Court to grant him the due process and vacation of conviction to which, these facts cry out, he is entitled.

Petitioner has clearly sustained his burden that "unless the files and records of the case conclusively show that the prisoner is entitled to **no relief** (emphasis added) the court shall…grant a prompt hearing thereon." 28 U.S.C. Section 2255(b). As the Third Circuit has recognized, "this is not a high bar for habeas petitioners to meet." United States v. Lilly, 536 F.3d 190, 195 (3d Cir. 2008). Surely, Petitioner is not entitled to "no relief." These facts dictate that he is entitled to great relief.

A "district court abuses its discretion if it fails to hold an evidentiary hearing when the files and records of the case are inconclusive as to whether the Movant is entitled to relief." United States v. Lilly, 536 F.3d 190, 195 (3rd Cir. 2008). Unlike Lilly, cited *infra*, Petitioner submits that his entitlement to relief is quite clear as is the fact that his trial counsel failed him in Constitutional proportions.

And while Petitioner, unavoidably, has a notorious reputation in this community, which some seem to believe justifies subjecting him to ongoing abuse,[13] he is, make no mistake, entitled to the protections of the United States Constitution and this federal court remains constitutionally obligated to protect his rights. For "[o]nly by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land." Bridges v. Wixon, 326 U.S. 135, 166, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945).

[13] One need look no further than the Special Administrative Measures the Attorney General of these United States imposed on Petitioner without due process and has just renewed (without due process) for a second year; subjecting the 85 year-old, wheelchair-bound Petitioner to full-time isolation among other indignities.

WHEREFORE, Defendant/Petitioner respectfully moves this Honorable Court grant his Section 2255 Petition and set aside his conviction or, in the alternative, order an immediate evidentiary hearing, appoint counsel to represent him in subsequent proceedings, and grant him a reasonable bail during the pendency of the proceeding.

Respectfully Submitted,

By: */s/David Jay Bernstein*

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CERTIFICATE OF SERVICE

I, David Jay Bernstein, Esq., attorney for Joseph Lombardo, do hereby certify that a true and correct copy of Reply was duly served on all attorneys of record by filing same on the Court's CM/ECF system, this 30th day of May, 2014, which will automatically and electronically provide such copy to said attorneys of record.

Signed: */s/David Jay Bernstein*
David Jay Bernstein