

UNITED STATES OF AMERICA -against- NIELS LAUERSEN and MAGDA BINION,
Defendants.

S2 98 Cr. 1134 (WHP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2004 U.S. Dist. LEXIS 14491

July 29, 2004, Decided

COUNSEL: [*1] Gerald L. Shargel, Esq., Law Offices of Gerald L. Shargel, New York, NY, Attorneys for defendant.

Nathaniel Z. Marmur, Esq., Stillman & Friedman, P.C., New York, NY, Attorneys for defendant.

James G. Cavoli, Assistant United States Attorney, New York, NY.

JUDGES: WILLIAM H. PAULEY III, District Judge.

OPINIONBY: WILLIAM H. PAULEY III

OPINION: MEMORANDUM and ORDER

WILLIAM H. PAULEY III, District Judge:

The defendant, Niels Lauersen, moves for bail pending resentencing on the grounds that the Supreme Court's opinion in *Blakely v. Washington*, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), suggests that Lauersen is serving an unconstitutional sentence, and that he has "likely completed any lawful sentence" that could now be imposed. At the heart of this application is Lauersen's view that the federal Sentencing Guidelines are unconstitutional. At trial four years ago, Lauersen's counsel preserved the issue of the validity of judicial fact-finding for Guidelines enhancements. (Trial Transcript at 6547-48, 7179, 7222.)

BACKGROUND

On January 9, 2001, Lauersen was convicted after a trial by jury of: (i) one count of conspiring to commit mail fraud, health care fraud, [*2] and making false statements relating to health care matters in violation of 18 U.S.C. § 371; (ii) one count of health care fraud in violation of 18 U.S.C. § 1347; (iii) eight counts of mail

fraud in violation of 18 U.S.C. § 1341; (iv) four counts of making false statements in relation to health care matters in violation of 18 U.S.C. § 1035; and (v) two counts of witness tampering in violation of 18 U.S.C. § 1512(b).

Before Lauersen was sentenced, he was arrested for violating his bail conditions. On March 21, 2001, this Court revoked bail and remanded Lauersen because he violated the conditions of his release by applying for a replacement Danish passport, and by falsely stating on the passport application that he had lost his Danish passport when in fact he had surrendered it in 1998 as a condition for pretrial release. (Transcript, dated March 21, 2001, at 2-7, 10-12.) Two days later, Lauersen moved for reconsideration of this Court's revocation of bail asserting that he never received the replacement passport. (Transcript, dated March 23, 2001 ("March 23 Tr. **[*3]** ") at 3.) In opposing that application, the Government submitted a certified mail receipt showing that the replacement passport was mailed by the Danish consulate and received at Lauersen's apartment by his doorman. (March 23 Tr. at 13-14.) The replacement passport was never recovered. On March 23, 2001, this Court denied Lauersen's application for reconsideration of bail on the ground that Lauersen was a flight risk. (March 23 Tr. at 18-19.)

On October 15, 2001, this Court sentenced Lauersen to 87 months imprisonment, followed by 2 years of supervised release, and restitution in the amount of \$ 3,240,597. This Court calculated the Sentencing Guidelines range of 87 to 108 months based on an offense level calculation of 29 and a criminal history category of I. The offense level was calculated as follows: (i) a base offense level of 6, pursuant to Section 2F1.1 because Lauersen was convicted of fraud; (ii) a 13-level enhancement pursuant to Section 2F1.1(b)(1)(N) based on an intended loss estimate of \$ 4,890,578 million; (iii) a 2-level enhancement pursuant to 2F1.1(b)(2)(B) because the fraud and false statement offenses involved more than minimal planning; (iv) a 4-level enhancement **[*4]** pursuant to Section 3B1.1(a) because Lauersen was a leader and organizer of the criminal activity, which involved more than five participants; (v) a 2-level enhancement pursuant to 3B1.3 because Lauersen, as a medical doctor, abused his position of trust relative to the defrauded insurance companies; and (vi) a 2-level enhancement pursuant to Section 3C1.1 because Lauersen was convicted of two counts of obstruction of justice. (Transcript, dated October 15, 2001 at 94-118.) Lauersen appealed and the Government cross-appealed.

The Second Circuit affirmed Lauersen's conviction but remanded for resentencing with a direction to the district court to impose the subsection 2F1.1(b)(8)(B) four-level enhancement and with the suggestion that the district court "exercise discretion to mitigate the effect of the enhancement by making a downward departure." *United States v. Lauersen*, 348 F.3d 329, 343 (2d Cir. 2003); accord *United States v. Lauersen*, 362 F.3d 160 (2d Cir. 2004). Lauersen applied for a writ of certiorari to the Supreme Court, arguing that his sentence was unlawful pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), **[*5]** because certain offense level enhancements were not found by a jury beyond a reasonable doubt. On May 14, 2004, the Supreme Court denied his petition. Lauersen's petition for a rehearing is pending before the Supreme Court.

At the present time, Lauersen has served approximately 40 months in prison.

DISCUSSION

The standards for release pending sentencing or appeal are governed by 18 U.S.C. § 3143(a)(1): "The judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. § 994 does not recommend a term of imprisonment, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released. . . ." Thus, the presumption is not in favor of bail. n1

- - - - - Footnotes - - - - -

n1 The Government questions the application of Section 3143(a) in a footnote, but argues substantively in its brief that even assuming Section 3143(a) applies, Lauersen's application for bail must be denied because he presents a serious risk of flight. See *United States v. Holzer*, 848 F.2d 822, 824 (7th Cir. 1988).

- - - - - End Footnotes- - - - - **[*6]**

Lauersen's contention that he is not a flight risk rests on the assumption that Blakely invalidates judicial factfinding for sentencing enhancements under the Guidelines. From that platform, Lauersen contends he has completed any term of imprisonment that can be imposed on him at resentencing because Blakely caps his Guidelines sentence at 21 months. Thus, he asserts that the risk of flight has dissolved. Blakely holds that the Sixth Amendment prohibits the sentencing judge from increasing the sentence above a statutory sentencing range based on facts that were neither reflected in the jury's verdict, nor admitted by the defendant. 124 S. Ct. at 2537-38.

If Blakely applies to the federal Guidelines, then it represents a tectonic shift in sentencing. However, the Supreme Court noted that "the Federal Guidelines are not before us, and we express no opinion on them." Blakely, 124 S. Ct. at 2538, n.9. As Judge Easterbrook aptly cautioned in dissent in *United States v. Booker*, "The Supreme Court alone is entitled to declare one of its decisions defunct. Even if later decisions wash away the earlier one's foundation, still the power to administer the coup de grace belongs to our superiors. The alternative is bedlam. . . ." 2004 U.S. App. LEXIS 14223, No. 03-4225, 2004 WL 1535858, at * 6 (7th Cir. July 9, 2004) **[*7]**) (citing *State Oil v. Khan*, 522 U.S. 3, 20, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997) and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989)); see also *United States v. Pineiro*, 2004 U.S. App. LEXIS 14259, No. 03-30437, 2004 WL 1543170, at *9 (5th Cir. July 12, 2004) (holding that to find the Guidelines unconstitutional is "a prerogative reserved unto the [Supreme] Court itself") . To dispel uncertainty and avoid "bedlam", the Second Circuit sitting en banc certified questions to the Supreme Court concerning the same issues implicated by Lauersen's application. See *United States v. Penaranda*, 2004 U.S. App. LEXIS 14268, Nos. 03-1055(L), 03-1062(L), 2004 WL 1551369, at *7-8 (2d Cir. July 12, 2004) (en banc).

This Court declines to add to the cacophony given the Second Circuit's recognition that the law is uncertain. Penaranda, 2004 U.S. App. LEXIS 14268, 2004 WL 1551369, at *5-8. If Lauersen's prognostication about the reach of Blakely is correct, it does not ineluctably follow that his term of imprisonment will be shorter than the prison time he has already served or will have served by the time of resentencing. [*8] If his prediction about Blakely's reach is mistaken, then Lauersen faces the prospect of a prison term greater than the 87 month term he received in October 2001.

In opposing this application for bail, the Government recounts Lauersen's prior violation of bail conditions and cites to several considerations that heighten the risk of flight. Specifically, Lauersen is not a United States citizen, but a citizen of Denmark; he has no family in the United States; he has no livelihood in the United States because his medical license has been revoked; he was convicted of crimes involving dishonesty and witness tampering; he may be deported upon the completion of his sentence of imprisonment based on a detainer lodged against him; and his replacement passport has never been located. In weighing these considerations, this Court concludes that Lauersen remains a risk of flight.

The Guidelines are constitutional until the Supreme Court says they are not. If the Supreme Court or the Second Circuit address the issue, Lauersen may petition this Court immediately for bail.

CONCLUSION

For the reasons stated above, Lauersen's application for bail pending resentencing is denied.

Dated: [*9] July 29, 2004
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III

U.S.D.J.