

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case No. CR-05-043-RAW
)	
JIMMY C. CHISUM,)	
)	
Defendant.)	

ORDER

Before the Court is the second motion of the defendant for release pending appeal. In July, 2006, the Court denied the defendant’s first motion for release (see Order #126) shortly after defendant had filed his notice of appeal. The appeal has now been pending for several months, and the Court questions its jurisdiction over this motion. The Tenth Circuit states that “[a]lthough the filing of a notice of appeal usually divest[s] the district court of further jurisdiction, the initial determination of whether a convicted defendant is to be released pending appeal is to be made by the district court.” *United States v. Meyers*, 95 F.3d 1475, 1488 n.6 (10th Cir.1996). This principle may not apply, however, when defendant files a second motion after the first motion has been denied by the district court.

Moreover, the present motion does not recite the pertinent provisions of 18 U.S.C. §3143, which governs release pending appeal. Instead, it relies upon a recent Supreme Court decision to argue that this Court committed error at sentencing. In substance, therefore, the present motion more closely resembles a motion pursuant to 28 U.S.C. §2255.

A district court should consider a §2255 motion while a direct appeal is pending only in

“extraordinary circumstances.” See *United States v. Prows*, 448 F.3d 1223, 1228 (10th Cir.2006). The Court declines to recharacterize the motion as one pursuant to §2255, but in an abundance of caution will nevertheless address the motion on the merits.

The Tenth Circuit holds that, even after *United States v. Booker*, 543 U.S. 220 (2005), judicial fact-finding under an advisory guideline system is perfectly permissible so long as supported by a preponderance of the evidence. See *United States v. Hall*, 473 F.3d 1295, 1312 (10th Cir.2007); *United States v. Magallanez*, 408 F.3d 672, 685 (10th Cir.2005)¹.

Defendant argues that this authority is now “void” in light of *Cunningham v. California*, 127 S.Ct. 856 (2007), which also reversed a sentence based upon judicial fact-finding. He contends that now any fact used in sentencing must be found by the jury under the standard of beyond a reasonable doubt. This Court is not persuaded. The majority in *Cunningham* expressly stated that “California’s [determinate sentencing law] does not resemble the advisory system the *Booker* Court had in view.” *Id.* at 870. See also *United States v. Grier*, 475 F.3d 556, 565 (3rd Cir.2007)(“There can be no question . . . that the right to proof beyond a reasonable doubt does not apply to facts relevant to enhancements under an advisory Guidelines regime.”). The *Grier* decision was rendered post-*Cunningham* and stated the Supreme Court’s decision “does not affect our opinion in this case.” 475 F.3d at 565 n.6.

¹See also *United States v. Trujillo-Terrazas*, 405 F.3d 814, 818 (10th Cir.2005)(“By rendering the Guidelines discretionary, the Court saved the process of judicial factfinding from unconstitutionality under the Sixth Amendment.”).

Quite recently, the Tenth Circuit addressed the issue of judicial fact-finding and the preponderance standard. After citing and reaffirming prior authority, some of which is cited above in this Order, the Tenth Circuit noted that the appellant had filed a motion to supplement briefing in order to bring the *Cunningham* decision to the court's attention. The Tenth Circuit stated in its final sentence: "*Cunningham* does not impact our analysis in this case." *United States v. Hurt*, 2007 WL 756435 (10th Cir.)(Mar.14, 2007).

It is the Order of the Court that the motion of the defendant for release pending appeal (#146) is hereby DENIED.

ORDERED THIS 16th DAY OF MARCH, 2007.

A handwritten signature in black ink that reads "Ronald A. White". The signature is written in a cursive style and is positioned above a horizontal line.

Ronald A. White
United States District Judge
Eastern District of Oklahoma