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 motion of the defendant for special order on travel to and from any needed hearings for motions or re-sentencing. Not for the first time, defendant has presented intriguing arguments. Defendant was convicted by a jury of four counts of tax evasion. On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the convictions, but reversed his sentence and remanded for re-sentencing. *See United States v. Chisum,* 2007 WL 2769647 (10th Cir.).

Much of the present motion is devoted to plaintiff's complaints about how difficult it is to do legal research and writing while incarcerated. The Court does not doubt the truth of these complaints in the slightest. The rub is whether these complaints can be translated into a legal basis for defendant's request "for an order of immediate release from prison, or in the alternative a specific court order . . . for furlough transfer, at defendant's expense for any needful hearings. . . . " The Court has no authority to simply order immediate release from prison.

In requesting a "furlough transfer", defendant refers to a Bureau of Prisons policy statement which the Court has been unable to locate or find cited in case law. The Court has, however, found a similar provision in 28 C.F.R. §570.32(a)(8), which authorizes the Warden to grant a furlough to an eligible inmate "[t]o appear in a criminal court proceeding, but only when the use of a furlough is requested or recommended by the applicable court or prosecuting attorney." As was noted in *United States v. Dellorfano*, 1995 WL 337087 (E.D.Pa.), *aff'd*, 106 F.3d 387 (3d Cir.1996), 28 C.F.R. §570.34(a) permits the Warden to grant a furlough only to prisoners with "community" custody status, or to those with "out" status under the terms of subsection (b)[1]. The Court doubts that defendant possesses either status, but this is unknown.

The Court declines to recommend a furlough. The re-sentencing has been scheduled for November 15, 2007. While defendant correctly notes he has attended all previous hearings, having now experienced incarceration, even a brief furlough might give rise to a flight temptation. Also, there seems little benefit at this point to defendant having more freedom for legal research, because the issue has been narrowed to a factual finding as to whether the Court grants a sentencing enhancement under §3B1.1(c) of the Sentencing Guidelines. The resolution now largely involves testimony, rather than case law.

Defendant insists his motion is <u>not</u> a request for release on bond. Such a request would likely also have been denied. A convicted defendant has no constitutional right to

[1]The furlough under subsection (b) is only for the purpose of transferring directly to another institution or for obtaining local medical treatment not otherwise available at the institution.

bail. *United States v. Olis*, 450 F.3d 583, 585 (5th Cir.2006). Therefore, any right to bail derives from 18 U.S.C. §3143, which establishes a presumption against its being granted. *Id.* Neither subsection (a) or (b) of the statute literally applies to someone in defendant's situation. Two circuit courts have, however, interpreted the more restrictive subsection (b) to apply to a defendant who is awaiting re-sentencing but whose convictions have been affirmed. *See United States v. Krilich*, 178 F.3d 859, 860-61 (7th Cir.1999); *Olis*, 450 F.3d at 586-87. Because defendant does not seek bail under the statute, this Court need not issue a ruling on that issue.

Finally, defendant states that "[i]f it is the court's intention to resentence within the guidelines based on the jury verdict alone;[sic] defendant will waive that hearing, and proceed to appeal from that final decision. That is not necessarily the Court's intention. Pursuant to the Tenth Circuit mandate, a possible issue at sentencing remains the application of the sentencing enhancement under §3B1.1(c). The application of an enhancement based upon judge-found facts results in a sentence beyond "the jury verdict alone." Since defendant represents himself, he should be present to conduct examination and cross-examination of witnesses.

In any event, the issue of sentencing waiver is uncertain. Rule 43(a)(3) F.R.Cr.P. states that a defendant must be present at sentencing. An exception is provided at Rule 43(c)(1)(B), which states in part that a defendant who was initially present at trial (in a noncapital case) waives the right to be present when he is "voluntarily absent" during

sentencing. This seems to apply to a defendant who absconds prior to sentencing, not to one who is in custody. For a defendant in custody, is a written waiver sufficient, or does not the concept of "voluntary" absence require its own hearing to determine the voluntariness of the waiver? Little is gained if the defendant must appear for a "voluntariness" hearing while seeking to avoid appearing at sentencing. The Court urges the defendant to be present at the re-sentencing hearing.

It is the Order of the Court that the motion for special order (#150) is hereby DENIED.

ORDERED THIS 29th DAY OF OCTOBER, 2007.

Dated this 29th Day of October 2007.

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