IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO. 2:10-cr-186-MHT**
	)	
THOMAS E. COKER,	)	
	)	
Defendant.	)	

TOM COKER'S MOTION FOR AND BRIEF IN SUPPORT OF A THEORY OF DEFENSE INSTRUCTION AT OR NEAR THE CLOSE OF TRIAL

COMES NOW TOM COKER, by and through his attorney of record and respectfully moves for an order that would allow the submission of a "theory of defense" instruction at or near the end of trial.[1] As grounds for and in support of his motion, Coker states as follows:

Coker is entitled to a theory of defense instruction and such instruction should be submitted at or near the close of trial. A proper theory of defense instruction is required to have two qualities, that necessitate the instruction be submitted at or near the close of the presentation of evidence in the case. These include that it (1) should have some

[1] To the extent that this requires an amendment to the current scheduling order, Coker requests an extension. Proposed jury instructions are currently due on May 27, 2011 (Doc. 316 p. 2 "proposed jury instructions are due seven days before the first day of jury selection".)

foundation in the actual evidence as it has come in during the trial, and (2) should be specifically tailored to the evidence at hand rather than being generalized. *United States v. Kottwitz,* 614 F.3d 1241, *revised on other grounds on rehearing,* 627 F.3d 1383 (11th Cir. 2010).

The Eleventh Circuit is very clear in this area of law – Coker has the right to have the jury instructed on his theory of defense, separate and apart from instructions given on the elements of the charged offense. *United States v. Opdahl,* 930 F.2D 1530 (11th Cir. 1991). In *Opdahl* the Eleventh Circuit reversed a conviction for the failure to give a theory of defense instruction noting that "[t]he law is clear that the defendant 'is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility.'" *Id.* at 1535.

In *U.S. v. Ruiz*, 59 F.3d 1151 (11th Cir. 1995) the Eleventh Circuit reversed a conviction and remanded for a new trial. In doing so, the Court concluded that the trial court's failure to give the requested theory of defense instruction left the jury "without proper guidance for their deliberations". *Id.* at 1155. In *U.S. v. Edwards*, 968 F.2d 1148 (11th Cir. 1992) the Eleventh Circuit reversed and remanded another conviction due to the trial court's failure to give a theory of defense instruction. The Court noted that this was based on longstanding binding precedent from the Fifth Circuit. "As set out by our predecessor court in *United States v. Lewis*, 592 F.2d 1282, 1285 (5th Cir.1979), it has

long been established in this Circuit that it is reversible error to refuse to charge on a defense theory for which there is an evidentiary foundation and which, if believed by the jury, would be legally sufficient to render the accused innocent." *Id.* at 1153.

In *U.S. v. Arias*, 431 F.3d 1327 (11th Cir. 2005) the Court summarized the Eleventh Circuit and Supreme Court precedent on this issue when it reversed and remanded another case for a new trial given the trial court's failure to allow a theory of defense instruction. The Court wrote:

> A criminal defendant has the right to a jury instruction on his theory of defense, separate and apart from instructions given on the elements of the charged offense. See *Mathews v. United States*, 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988); *United States v. Ruiz*, 59 F.3d 1151, 1154 (11th Cir.1995). If the proposed instruction presents a valid defense and there has been "some evidence" adduced at trial to support the defense, a trial court may not refuse to charge the jury on that defense. Ruiz, 59 F.3d at 1154. The burden of presenting evidence sufficient to support a jury instruction on a theory of defense is "extremely low." Id. "[T]he defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." *United States v. Lively*, 803 F.2d 1124, 1126 (11th Cir.1986) (internal marks omitted). In reviewing the evidence adduced, the court must view the evidence in the light most favorable to the accused. *Ruiz*, 59 F.3d at 1154.

Id. at 1340.

Because Coker is entitled to such an instruction, assuming he meets this "extremely low" threshold and since the instruction is to be specifically and precisely tailored to the evidence presented at trial, Coker requests that he be allowed to present such an instruction at or near the close of all the evidence.

Respectfully submitted,

/s/ David McKnight

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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