

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

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
v. ) CR. NO. 2:10cr186-MHT  
)  
MILTON E. McGREGOR, )  
)  
Defendant. )

**MOTION OF MILTON McGREGOR FOR ORDER  
ALLOWING SUBMISSION OF “THEORY OF DEFENSE”  
PROPOSED JURY INSTRUCTIONS AT OR NEAR THE END OF TRIAL**

Milton McGregor respectfully moves for an order that would either clarify or amend the time frame for submission of proposed jury instructions, such that “theory of defense” instructions could be submitted at or near the end of trial.<sup>1</sup>

Currently, as Mr. McGregor understands the relevant orders, proposed jury instructions are due on May 27, 2011.<sup>2</sup> *See* Doc. 655, p. 1 (ordering that deadlines pegged to trial date are to be calculated from the June 6 revised trial date); Doc. 650, pp. 5-6 (same); Doc. 316, p. 2 (“Proposed jury instructions are due seven days before the first day of jury selection). Mr. McGregor does not seek revision of that deadline in general. Mr. McGregor is not filing this motion as a way to avoid filing proposed jury instructions

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<sup>1</sup> This motion is based on the assumption, for the sake of argument, that there will be a trial.

<sup>2</sup> Monday May 30, the seventh day counted back from June 6, will be Memorial Day. If the Court does not contemplate electronic filing of proposed jury instructions on Memorial Day, then the due-date apparently falls backwards to the preceding Friday, May 27. *See* Fed. R. Crim. P. 45(a)(1)(C) (when due-date falls on a holiday, count to the next day that is not a weekend or holiday); Fed. R. Crim. P. 45(a)(5) (defining “next day” to mean counting further back, when counting backwards). Mr. McGregor is content with May 27, May 30 or May 31 as the general due-date, but does not want to be in a position where he files his proposed instructions on May 27 and the Government then reviews those over a long weekend before filing its own.

before trial. He plans to file very substantial proposals in that regard, by the pretrial deadline.

This motion is directed at one particular sort of jury instruction, the “theory of defense” instruction, where submission at or near the end of trial is more appropriate. Such a schedule will allow Mr. McGregor the opportunity to propose specific theory-of-defense charges that are meritorious in light of the evidence as it comes in at trial.

“Theory of defense” instructions are addressed in such cases as *United States v. Kottwitz*, 614 F.3d 1241, *revised on other grounds on rehearing*, 627 F.3d 1383 (11<sup>th</sup> Cir. 2010). As emphasized in *Kottwitz*, a good “theory of defense” instruction should have two qualities: (1) it should have some foundation in the actual evidence as it has come in during trial, and (2) it should be specifically and precisely tailored to the evidence at hand rather than being generalized.

A trial court is not free to determine the existence of the defendant's theory of defense as a matter of law; it is established by the defendant's presentation of an evidentiary and legal foundation and, once established, the defendant is entitled to jury instructions on that defense theory. *United States v. Ruiz*, 59 F.3d 1151, 1154 (11th Cir. 1995); *United States v. Williams*, 728 F.2d 1402, 1404 (11th Cir. 1984). The requested jury instruction should “precisely and specifically, rather than merely generally or abstractly, point [] to the theory of . . . defense.” *Morris*, 20 F.3d at 1117 (quotation marks and citations omitted). The law is clear that the defendant's burden is light as “any foundation in the evidence” is sufficient even if that evidence is of doubtful credibility, frivolous, imprudent, inconsistent, insufficient, unbelievable, or weak. *United States v. Opdahl*, 930 F.2d 1530, 1535 (11th Cir. 1991) (citation omitted); *United States v. Middleton*, 690 F.2d 820, 826 (11th Cir. 1982); *Strauss v. United States*, 376 F.2d 416, 419 (5th Cir. 1967). “[I]t 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.” *United States v. Edwards*, 968 F.2d 1148, 1153 (11th

Cir. 1992) (quotation marks and citation omitted).

*Kottwitz*, 614 F.3d at 1271. As further emphasized in *Kottwitz*, one of the crucial questions in the Court's decision whether to give a proposed theory-of-defense instruction is whether there is any evidence to support it. The Court does not weigh or determine the credibility of that evidence, but looks to see whether any such evidence (even if slim) exists. *Id.* at 1272-74.

Allowing the submission of theory-of-defense instructions at or near the end of trial will enhance the fairness and efficiency of the process, for the parties and for the Court. Mr. McGregor will be able to ensure that he is proposing charges that actually do have the required connection to evidence that has been admitted at trial. And he will be able to ensure that he is proposing charges that are precisely and specifically tailored to the case as it has been presented, rather than being too general or abstract. *See Kottwitz, supra* (emphasizing that theory-of-defense instructions should "precisely and specifically, rather than merely generally or abstractly, point to the theory of defense") (brackets and ellipses omitted). Similarly, the Court would benefit from the presentation of proposed instructions that are specific and factually-grounded in this respect.

Furthermore, there is no compelling reason to require submission of theory-of-defense charges on an earlier schedule. The Court will not be able to effectively assess whether such proposed charges should be given, or how they should be modified, until the Court has heard the evidence.

For the foregoing reasons, Mr. McGregor respectfully requests an order exempting



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**CERTIFICATE OF SERVICE**

I hereby certify that on March 29<sup>th</sup>, 2011, I filed the foregoing with the Clerk of the Court using the CM/ECF filing system, and that a copy of same will be served on the below listed counsel of record via such system:

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