

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

<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	<b>CR. NO. 2:10cr186-MHT</b>
	)	
<b>JAMES E. PREUITT,</b>	)	
	)	
<b>Defendant.</b>	)	

**MOTION OF JAMES E. PREUITT FOR ORDER  
ALLOWING SUBMISSION OF “THEORY OF DEFENSE”  
PROPOSED JURY INSTRUCTIONS AT OR NEAR THE END OF TRIAL**

COMES NOW the Defendant, James E. Preuitt, by and through his attorney of record and 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.

Currently, as Mr. Preuitt understands the relevant orders, proposed jury instructions are due on May 27, 2011. *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. Preuitt does not seek revision of that deadline in general. Mr. Preuitt is not filing this motion as a way to avoid filing proposed jury instructions before trial. He plans to file very substantial proposals in that regard, by the pretrial deadline.

This Motion is directed at one particular set 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. Preuitt 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 (11<sup>th</sup> Cir. 1995); *United States v. Williams*, 728 F.2d 1402, 1404 (11<sup>th</sup> 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 (11<sup>th</sup> Cir. 1991) (citations omitted); *United States v. Middleton*, 690 F.2d 820, 826 (11<sup>th</sup> Cir. 1982); *Strauss v. United States*, 376 F.2d 416, 419 (5<sup>th</sup> 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 (11<sup>th</sup> 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. Preuit will be able to ensure that he is proposing charges that actually do have the required connection to evidence that has been submitted 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. Preuit respectfully requests an order exempting theory-of-defense instructions from the general pretrial deadline for submission of proposed jury instructions.

RESPECTFULLY SUBMITTED this the 30th day of March, 2011.

**/s Ronald W. Wise**  
RONALD W. WISE, WIS0904  
Attorney for James E. Preuitt  
2000 Interstate Park Drive  
Suite 105  
Montgomery, Alabama 36109  
(334) 260-0003  
Telephone: (334) 260-0003  
Fax: (334) 260-8005  
E-Mail: [ronwise@aol.com](mailto:ronwise@aol.com)

**CERTIFICATE OF SERVICE**

I hereby certify that on March 30, 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:

Peter Ainsworth  
Brenda K. Morris  
Emily Rae Woods  
Lewis Franklin  
Steve Feaga  
Federal Bureau of Investigation  
One Commerce Street, Suite 500  
Montgomery, Alabama 36101

G. Doug Jones  
Haskell Slaughter Young & Rediker  
2001 Park Place North  
Suite 1400  
Birmingham, Alabama 35203

David McKnight  
Baxley, Dillard, Dauphin, McKnight  
& Barclift  
2008 Third Avenue South  
Birmingham, Alabama 35233

H. Lewis Gillis  
Thomas Means Gillis & Seay  
P.O. Drawer 5058  
Montgomery, Alabama 36103

J.W. Parkman, III  
Parkman, Adams & White  
505 20<sup>th</sup> Street North, Suite 825  
Birmingham, Alabama 35203

Susan G. James  
600 South McDonough Street  
Montgomery, Alabama 36104

Thomas M. Goggans  
2030 East Second Street  
Montgomery, Alabama 36106

Joe Espy, III  
Drawer 5130  
Montgomery, Alabama 36130

Jack Sharman  
Lightfoot, Franklin & White  
400 20<sup>th</sup> Street North  
Birmingham, Alabama 35203

William N. Clark  
Redden Mills & Clark  
505 North 20<sup>th</sup> Street, Suite 940  
Birmingham, Alabama 35203

**/s Ronald. Wise**  
OF COUNSEL