

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	No. 2:10 -CR-186-MHT
v.)	
)	
RONALD E. GILLEY, et al.,)	
)	
Defendants.)	

**MOTION FOR ORDER ALLOWING SUBMISSION OF "THEORY OF DEFENSE"
PROPOSED JURY INSTRUCTIONS AT OR NEAR END OF TRIAL**

COMES NOW the Defendant, RONALD E. GILLEY ("Defendant" or "Mr. Gilley"), by and through the undersigned counsel, and respectfully moves this Honorable Court 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, according to the applicable orders, proposed jury instructions are due on May 27, 2011. *See* Ct. Doc. 655 at 1 (ordering that deadlines pegged to trial date are to be calculated from the June 6 revised trial date); Ct. Doc. 650, at 5-6 (same); and Ct. Doc. 316 at 2 ("Proposed jury instructions are due seven days before the first day of jury selection). Mr. Gilley does not seek revision of the referenced deadline generally. Nor is Mr. Gilley filing this Motion as a way to avoid submitting proposed jury instructions prior trial, as he plans to file very substantial proposed jury instructions, by the pretrial deadline.

Instead, the instant Motion is directed at one particular subset 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. Gilley 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 (11th 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) (citations omitted); *United States v. Middleton*, 690 F.2d 820, 826 (11th Cir. 1982); *Strauss v. United States*, 376 F.2d 416, 419 (11th 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. Gilley will be able to ensure that he is proposing instructions that actually do have the required connection to evidence that has been received at trial. He also 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 instructions on an earlier schedule. The Court will not be able to effectively assess whether such proposed instructions should be given, or how they should be modified, until the Court has heard the evidence.

For the foregoing reasons, Mr. Gilley respectfully requests an order exempting theory-of-defense instructions from the general pretrial deadline for submission of proposed jury instructions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 6th day of April, 2011, filed the foregoing with the Clerk of Court via CM/ECF and an electronic copy of the same has been sent to the following:

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