

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH**

CRIMINAL ACTION NO. 5:06 CR-19-R

UNITED STATES OF AMERICA

PLAINTIFF

v.

STEVEN D. GREEN

DEFENDANT

**UNITED STATES' RESPONSE TO DEFENDANT'S
MOTION FOR COURT TO ORDER UNITED STATES TO PROVIDE
TRANSPORTATION, SECURITY, ESCORT AND TRANSLATION
SERVICES FOR DEFENSE INVESTIGATION OF CRIME SCENE**

Comes the United States, by counsel, in response to defendant Steven Green's Motion for the Court to Order the United States to Provide Transportation, Security, Escort, and Translation Services for Defense Investigation of the Crime Scene. For the reasons and authorities set forth below, and any others that may be adduced at a hearing on this matter, the defendant's eleventh-hour request for an "investigative trip" to Iraq should be denied.

I. Relevant Facts

The defendant was indicted twenty-six months ago. Indictment of 11/07/06, Doc. No. 36. Fourteen months ago, defense counsel petitioned the Court for an April 2009 trial date. Def. Letter of 11/13/07. At that time, counsel claimed that although his team had already "located and thoroughly interview[ed]" seventy witnesses, it needed additional time to conduct psychiatric and neurological evaluation of the defendant. *Id.* at 1. Among Green's other reasons for requesting such a significant trial delay was the then-perceived need to go to Iraq to view the crime scene

and locate and interview Iraqi civilians and deployed members of the U.S. military. In response, on December 18, 2007, the Court set a trial date of April 13, 2009, which was later amended to April 27, 2009.

Three months earlier, in response to a request made by the defendant, the United States produced a spread sheet with the name and last known address of approximately 150 soldiers, each one who had been assigned to the 101st Airborne, 502nd Infantry Regiment, 1st Battalion, Bravo Company, for the time period December 2005 through May 31, 2006. With respect to the defense's need for information concerning the crime scene, the United States has provided Green with nearly 200 pictures of the crime scene and Green's nearby traffic control point alone, as well as video recordings of the crime scene and numerous photographs of the surrounding area. The United States also provided the results of all forensic testing that could be performed on material recovered from the subject location by the Army's Criminal Investigation Division.

The United States provided the photographs of the crime scene and TCP2 to the defense in discovery on January 25, 2007, with additional photographs of the area produced in supplemental discovery on April 4, 2007. Video taken by military prosecutors and used during the course of military court martial proceedings was requested by the United States and also produced to defense counsel who have long complained that they were being denied access to materials the Army's prosecutors were producing to military defense counsel.¹

¹The Department of Justice having made extensive and repeated requests to the Department of Defense and the United States Army for information or materials requested by Green's defense counsel in discovery, although falling far outside DOJ's Rule 16 discovery obligations, the defense now argues that they must visit the crime scene in Iraq because DOJ prosecutors have worked "hand in glove" with Army prosecutors.

Not surprisingly, given the extensive discovery concerning the defense's requested witnesses and crime scene information, the defense made no further requests to view the crime scene.

However, last week, as the Court is well-aware, Green withdrew his notice of an insanity defense. Withdrawal of Intent of 01/14/08, Doc. No. 191. And now, thirty-one months after the defendant's arrest, and fourteen months after the defense requested discovery concerning military witnesses and the crime scene and received what they had requested from the United States, defense counsel suddenly has identified wholly new reasons to take a Court-ordered investigative trip to Iraq to visit the crime scene and surrounding area. Def. Motion of 01/12/09, Doc. No. 186. The defense team now claims to wish to interview unnamed, and apparently unknown, victim family members, neighbors, additional U.S. military personnel, and members of the Iraqi Army, whom the team speculates might provide, among other things, "insight regarding the ethnic make-up of the area" and other "cultural insight." *Id.* at 5. Green does not provide the specific identity of any such witness, their location, or provide any reason to believe such witnesses could be located, would be willing to speak with defense counsel, or to travel to the United States to testify at trial. Indeed, the defendant provides no reasonable grounds from which the Court could conclude that any of these theoretical witnesses exist, that they would be accessible to Green's defense team, or that they would provide relevant information that could not otherwise be obtained here in the United States.

II. Applicable Law

Instead of citing cases to support the position that the United States is required, or should be required, to bear the expense and burden of protecting a defense team in a war zone and

finding unnamed and unknown Iraqi civilians or foreign military personnel on Green's behalf, the defendant attempts to strong-arm the Court with the threat that not granting his demands will later amount to ineffective assistance of counsel. However, far from supporting his position, Green's case authority merely underscores that the defense work and investigation in this case, coupled with all of the discovery and material provided by the United States to supplement that investigation, ensures that the defense is more than adequately prepared for trial. Moreover, the defendant does not and cannot point to a single case in which the failure to visit a crime scene constitutes ineffective assistance of counsel.

Ineffective assistance of counsel claims are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). *Davis v. Jones*, 2009 WL 32710, at *4 (6th Cir. 2009) (slip copy). To establish ineffective assistance and obtain relief under *Strickland*, a petitioner must demonstrate that his counsel's performance was deficient and that this deficiency so prejudiced his defense as to render the trial unfair and the result unreliable. *Strickland*, 466 U.S. at 687. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Davis*, 2009 WL 32710, at * 4 (citing *Strickland*, 466 U.S. at 687). To satisfy the prejudice prong under *Strickland*, a petitioner "must show that a reasonable probability exists that, but for his counsel's unprofessional errors, the results of the proceeding would have been different." *Poindexter v. Mitchell*, 454 F.3d 564, 570 (6th Cir. 2006). The Sixth Circuit's review of counsel's performance is "highly deferential and counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (internal quotation marks omitted).

III. Discussion

Following these well-settled principles, the United States respectfully submits that the Court should deny the defendant's motion for a Court-ordered, government planned and escorted trip to Iraq.

As set forth above, the United States has provided to the defense voluminous evidence from the crime scene, including photographs, video, physical evidence, and forensic tests on the evidence. At this late juncture, nearly three years after the crime, there is simply nothing at the scene that is likely to be of probative value to the United States or the defense. Indeed, due in large part to the alleged obstructionist behavior of the defendant himself in setting one of the victims on fire, attempting to blow up the house, and attempting to cover up the crime, law enforcement never had an opportunity to seal the scene and perform a timely crime scene examination. Furthermore, months after the crime, once the defendant's alleged participation was discovered, crime scene recovery personnel attempted to retrieve physical evidence from the scene. All results of that crime scene examination were provided to the defense literally years ago. Due to the contamination of the scene and passage of time, the defendant has not shown that there is any reason to believe that anything of evidentiary value currently exists at the home where the murders and rapes occurred. The hope of recovering a nugget of information from a three-year-old crime scene or uncovering testimonial evidence in a war-torn area with unknown and unidentified witnesses is wholly speculative on the part of defense counsel..

Moreover, due to the precarious security situation in this part of Iraq, the undersigned prosecutors for the Department of Justice and FBI case agents have never been to the crime scene, and the military has to date advised them not to go. To present its case, the United States

will be relying solely on the very evidence and information it has provided to the defense. And given the security situation in Iraq, the undersigned prosecutors currently have no plans to visit the crime scene. Accordingly, there is simply no basis for the defendant's eleventh-hour request in this case.

Nevertheless, in an attempt to support their claim that they must go on a government-arranged and escorted trip to Iraq, and to buttress their idea that failure to visit a three-year-old crime scene and surrounding area in a war zone could be considered ineffective assistance of counsel, the defendant relies first on *United States ex rel. Spencer v. Warden, Pontiac Correctional Center*, 545 F.2d 21 (7th Cir. 1976). In *Spencer*, the state delayed arraignment and appointment of counsel until the day before the defendant's felony trial. *Id.* at 24. On the day of trial, defense counsel pleaded for a continuance because he did not have adequate time to prepare and discuss the case with his client. *Id.* at 22-23. In fact, counsel was so unprepared that he could not even give an opening statement. *Id.* at 23.

On appeal, the Seventh Circuit held that counsel's representation was ineffective for lack of pretrial preparation. *Id.* at 24. Of course, *Spencer's* facts could not be more dissimilar to this case. Steven Green's defense has not been thrown into the lap of an unprepared or inexperienced lawyers who have been forced to proceed to trial literally overnight. Rather, Green has assembled a host of lawyers and investigators that have been vigorously working his case for more than two years.

Green also relies on *Crisp v. Duckworth*, 743 F.2d 580 (7th Cir. 1984). In *Crisp*, the defendant's lawyer testified at a post-trial hearing that "he generally knows without investigating what information he wants to put before the jury." *Id.* at 583. In reviewing this statement on

appeal, the Seventh Circuit was “amaz[ed],” and stated, as the defendant cites in his motion, that “[i]nvestigation may help an attorney develop or even discover a defense, locate witnesses, or unveil impeachment evidence.” *Id.* And, of course, this has to be true.

But *Crisp* does not stand for the proposition that failure to view the crime scene or visit a war-torn area in search of unnamed and unknown witnesses may constitute ineffective assistance. In fact, *Crisp* holds otherwise. *Crisp* alleged that in addition to not visiting a crime scene located in Delaware County, Indiana, his lawyer made other mistakes: (a) he failed to interview the three witnesses to the victim’s murder; (b) his interviews with defense witnesses were limited to only a few minutes on the day each witness took the stand; (c) he failed to adequately prepare the defendant to testify; (d) he did not exercise a single peremptory challenge during jury selection; (e) he failed to make an opening statement; and (f) he made errors with respect to the jury instructions. *Id.* at 583, 587. In light of all these factors, the Seventh Circuit still found that counsel’s representation did not deprive the defendant of a fair trial under *Strickland*. *Id.* at 588.

The third case that defendant cites to support his application for a trip to Iraq is *United States v. Tucker*, 716 F.2d 576 (1983). But like *Spencer* and *Crisp*, *Tucker* in no way would require such a trip in order for Green’s attorneys to provide competent professional representation. In *Tucker*, the defendant was charged and convicted of conspiracy to defraud the United States and making false income tax returns. *Id.* at 578. The United States indicated that it would call approximately 80 witnesses and its pretrial discovery included 13,000 documents, including 3,000 pages of sworn statements. *Id.* at 581.

The Ninth Circuit agreed with the defendant’s claims that defense counsel should have hired an expert witness to assist in review of the documents (*id.* at 581), and that defense

counsel's client consultation was insufficient given that he had no more than seven hours of telephone conversations with the defendant, most of which was taken up with discussion of plea offers and attorney's fees (*id.* at 582). Furthermore, defense counsel did not undertake *any* pretrial investigation or attempt to interview a single government witness. *Id.* at 582-83. Based on this record, the court found that defense counsel was ineffective in his "failure to learn of readily available facts which might have afforded his client a legitimate justiciable defense." *Id.* at 583 (citing *McQueen v. Swenson*, 498 F.2d 207, 217 (8th Cir. 1974)).

There is no doubt that Green's defense team has more than demonstrated its competence in defending Green. The team has certainly not avoided approaching and employing experts to assist their efforts – counsel's mental health disclosure of September 15, 2008, alone reported that Green had been tested and evaluated by multiple experts. Furthermore, Green has employed a team of investigators that by November 2007 had already "thoroughly interviewed" seventy witnesses. Def. Letter of 11/13/07, at 1. But a trip to Iraq for such nebulous purposes (i.e. gaining "cultural insight" from members of the Iraqi Army, def. mot. at 5), especially in the late stage of this litigation, is neither required nor contemplated under *Tucker*. Indeed, the Ninth Circuit "realize[d] that the duty to investigate and prepare a defense is not limitless: it does not necessarily require that every conceivable witness be interviewed or that counsel must pursue 'every path until it bears fruit or until all conceivable hope withers.'" *Tucker*, 716 F.2d at 584 (citing *Lovett v. Florida*, 627 F.2d 706, 708 (5th Cir. 1980)).

Defendant's contention regarding the importance under *Strickland* of a crime scene investigation in Iraq is also not supported by defendant's string citations. *See Davis v. Alabama*, 596 F.2d 1214 (5th Cir. 1979) (failure to call expert medical witness or do any investigation

whatsoever in insanity case is a breach of a lawyer's duty to his client); *Morrow v. Parratt*, 574 F.2d 411 (8th Cir. 1978) (failure to interview eyewitnesses to crime incompetent); *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973) (“[i]n most cases a defense attorney . . . should interview not only his own witnesses but also those that the government intends to call, when they are accessible”); *United States v. Wolff*, 562 F.Supp. 140 (N.D. Ill. 1983) (counsel ineffective where counsel learned of the existence of five exculpatory witnesses before trial, but made no effort to investigate them). Here, there is certainly no reason to question the defense's investigation of an insanity defense or a failure to interview witnesses to the crime.

The fact is that it has never been the law that counsel is ineffective if they fail to visit the crime scene. Although defendants often claim ineffective assistance for this reason among a host of other reasons, the law does not reward those claims under *Strickland*. This was true during the time period of the cases cited by the defendant (cases from 25-35 years ago), as well as under more recent case law. For example, in *Washington v. Schriro*, 2008 WL 1836731 (D. Az. 2008) (slip copy), the defendant argued that counsel's failure to investigate the crime scene constituted ineffective assistance of counsel. *Id.* at *7. In *Schriro*, the court noted that the crime scene was days old before the crime was reported and had been cleaned. *Id.* Furthermore, the defendant was merely speculating about what counsel could have found, and the court denied the ineffective assistance claim. *Id.*

Moreover, the failure to travel to Mahmoudiyah, Iraq, just to view the home where the murders and rapes allegedly occurred cannot be considered ineffective assistance of counsel, especially given the volume of crime scene photos that the defendant has been provided in discovery. *See Fox v. Poole*, 2008 WL 1991103, *1 (E.D.N.Y. 2008) (slip copy) (failure to view

crime scene not ineffective assistance of counsel given the presence of crime scene photos).

Significantly too, while there is no legal or factual basis in support of the defendant's last minute request for a trip to Iraq, there are significant additional reasons to deny the request. As defendant's motion points out in detail, the area surrounding the crime scene in this case is dangerous. And as the Court and counsel can well imagine, a civilian's excursion into a war zone in Iraq would take weeks, if not months, of planning and require extensive coordination with at least three departments of the U.S. government and, of course, a foreign government.

In addition, as the defense mentions, U.S. military assets and the missions they support would have to be diverted to protect the lives of the defense team during their proposed field trip. Nonetheless, the defense proposes to take this trip without knowing where the victims' family members or unnamed neighbors might live. And Green does not list who in the Iraqi Army he would like to speak with, let alone provide their whereabouts, or whether such individuals could possibly give him the "cultural insight" he desires.

Furthermore, many of the goals of the proposed excursion could be accomplished by other means. The defense has indicated in prior mental health disclosures that it intends on calling former and current U.S. Surgeons General of the U.S. Army to discuss mental health procedures in combat. The defense may also subpoena members of the U.S. Army to speak to the frequency of roadside bombs in the area, changes in troop levels, and current uses of Traffic Control Points. Moreover, to the extent the United States is able to bring members of the victims' family to Kentucky for trial, the undersigned is, of course, amenable to making these individuals available for interviews by defense counsel if the witnesses are so willing.

The defense has had literally years to request and coordinate an investigative trip to Iraq. Waiting until now to attempt to view a contaminated three-year-old crime scene can only lead to further delay. The defendant has accused the United States of contributing to the delay by dragging its feet in declassifying information contained within a handful of U.S. Army internal investigations (“15-6 investigations”). According to counsel’s representations, there is no way his investigators could have contemplated an Iraq trip without the complete declassification of those reports. But as the United States pointed out in last week’s further proceeding, defense counsel was cleared to view the reports and has been privy to the information contained within since February 11, 2008²

IV. Conclusion

Strickland certainly does not require defense counsel to visit the crime scene, especially one that is nearly three years old and which will be represented in evidence with pictures and video, and where, because of the security situation, the undersigned attorneys for the United States and FBI case agents themselves have never visited. Furthermore, the defense fails to set forth a reasonable basis for the trip. Counsel merely identifies a number of vague and speculative investigative goals for the excursion and fails to provide the Court any credible reason to believe that the proposed trip stands any likelihood of success. In light of these factors, this Court should not permit an unwarranted trip that is not required by the law, that will provide nothing of any tangible or relevant use, that will tie up valuable military resources, and that can only result in unjust delay.

² The general subjects of each of the AR 15-6 investigations at issue are widely and publicly known, and have been well known by both parties from the outset of this case, and it is disingenuous, at best, to say that issues surrounding declassification have hindered the defense in their trial preparation. In most cases, those witnesses who gave statements in connection with any of the AR 15-6 investigations have testified on those same or similar issues during the Article 32 preliminary hearing, and at the court martial proceedings against Green’s co-conspirators, and have been available to the defense for interview on these subjects for months, if not years.

WHEREFORE, the United States requests that the defendant's motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 21, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to Scott T. Wendelsdorf, Federal Defender, Patrick J. Bouldin, Assistant Federal Defender, and Darren C. Wolff, counsel for defendant, Steven D. Green.

/s/ Marisa J. Ford

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