No. 01-10822-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

JOSE TECUM,
Defendant/Appellant

On Appeal from the United States District Court
for the Middle District of Florida
Fort Myers Division

BRIEF FOR THE UNITED STATES AS APPELLEE

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United States v. *Tecum*
01-10822-JJ

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Counsel for Appellee United States of America hereby certifies, in accordance with F.R.A.P. 26.1 and 11th Cir. R.26.1-1, that the following persons may have an interest in the outcome of this case:

1. Darlene Calzon Barror, Esquire, Appellant's Attorney
2. Ralph F. Boyd, Jr., Assistant Attorney General
3. Maria Choz
4. Susan French, Esquire, Assistant United States Attorney
5. Miseal Itzep, K'Iche Interpreter
6. Douglas Molloy, Esquire, Assistant United States Attorney
7. Paul I. Perez, United States Attorney
8. Andrea Picciotti-Bayer, Attorney, Department of Justice
9. Jessica Dunsay Silver, Attorney, Department of Justice
10. The Honorable John E. Steele, Trial Court Judge
11. Jose Tecum, Defendant
12. Maria Tecum
13. Alina Vallenilla, Spanish Interpreter

STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe that oral argument is necessary for the Court to resolve this appeal.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued):

TABLE OF CITATIONS

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

RULES:

MISCELLANEOUS:

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Defendant, Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

STATEMENT OF JURISDICTION

The district court had jurisdiction over this case pursuant to 18 U.S.C. 3231, as the defendant, Jose Tecum, was charged with offenses against the laws of the United States. A second amended judgment was entered on March 8, 2001 (R. 116). Tecum filed a timely notice of appeal on February 8, 2001 (R. 113). This court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291 and 18 U.S.C. 3742.

STATEMENT OF ISSUES

1. Whether Tecum Was Provided Adequate Interpreting Services.

2. Whether the District Court Abused Its Discretion By Admitting a Customs Office Record Into Evidence.

3. Whether Tecum Was Denied His Right to a Fair Trial When the United States Marshals Temporarily Restrained Him During Trial.

4. Whether Tecum Was Denied Effective Assistance of Counsel During Trial.

STATEMENT OF THE CASE

Jose Tecum was found guilty of violating several federal laws when he kidnaped a young Guatemalan woman by threats of violence and inveiglement from her family home in remote Guatemala, smuggled her across the U.S.-Mexico border, transported her to and harbored her in his home in Florida, and forced her to perform domestic and agricultural work and submit to his sexual demands. Tecum appeals his conviction, arguing that the interpreting services provided him during trial were inadequate, the admission into evidence of a United States Customs Service record documenting his entry into the United States was in error, and he was denied a fair trial because officers of the United States Marshals Office temporarily restrained him during trial. Tecum also claims that he was denied effective assistance of counsel.

Statement of Facts

In the Summer of 1999, Jose Tecum kidnaped Maria Choz from her family home in Patachaj, Guatemala, a remote mountain village four hours from Guatemala City. Tecum stalked Choz and threatened to kill her or any of her family members if she did not go with him. He took personal items from Choz and told her that he would use *brujeria* – witchcraft – to ensure that she never left his side. Tecum forcibly raped Choz and claimed that Choz was his possession and that she must leave her family to live in his home (R. 125 at 51-65). Tecum then

sequestered Choz and her newborn child at his house in Patachaj, not allowing her to leave without his escort (*id.* at 66-68). During that time, Tecum denied medical attention to the baby and the baby died (*id.* at 68-69).

Shortly thereafter, Tecum smuggled Choz into the United States, arriving in Eloy, Arizona (*Id.* at 78-79; Amended Presentence Report (PSR) at ¶ 15). Tecum then arranged for the two to travel to Madera, California, where Choz was forced to work with Tecum picking grapes for approximately fifteen days (R. 125 at 79-80; PSR at ¶ 15). Choz never received any money for her work (R. 125 at 80). Tecum then arranged for them to travel to the apartment in Immokolee, Florida that Tecum shared with his wife, Maria Tecum, and their three children (*id.* at 81-85). Once in Immokolee, Jose Tecum procured fraudulent identification and immigration documents for Choz and obtained agricultural work for her so that she could repay him for the costs of smuggling her into the United States (*id.* at 83-86; PSR at ¶¶ 15, 16). Tecum also forced Choz to perform household tasks and submit to his sexual demands (R. 125 at 85, 89; PSR at ¶ 16).

On November 18, 1999, local law enforcement officers responded to a domestic violence call made by Maria Tecum at the apartment in Immokolee and arrested Jose Tecum (PSR at ¶ 12). The following day, a victim's advocate with the local Sheriff's department visited the Tecums' apartment (PSR at ¶ 13, R. 126 at 133). During interviews with Maria Tecum and Maria Choz, the advocate learned that Jose Tecum had smuggled Choz into the United States (R. 126 at 138).

On January 4, 2000, federal law enforcement agents executed a search

warrant at the Tecum apartment and seized various forms of counterfeit identification cards in the name of Maria Choz, including a Social Security card found in Jose Tecum's wallet (PSR at ¶ 17). Jose and Maria Tecum were then arrested for alien smuggling (*ibid.*).[1] As part of the federal investigation, federal agents interviewed Choz's family in Guatemala, who corroborated that Jose Tecum had threatened to harm them should they interfere with his taking Choz with him (*id.* at ¶ 18).

Trial Proceedings

On April 12, 2000, a seven-count Superseding Indictment was returned against Jose Tecum (R. 49).[2] The Superseding Indictment charged that Tecum (1) kidnaped Maria Choz in Guatemala and transported her into the United States and across state lines, in violation of 18 U.S.C. 1201; (2) held Choz in a state of involuntary servitude, in violation of 18 U.S.C. 1584; (3) brought Choz and others illegally into the United States, in violation of 8 U.S.C. 1324(a)(1)(A)(i); (4) concealed, harbored, and shielded Choz from detection, in violation of 8 U.S.C. 1324(a)(1)(A)(iii); (5) transported Choz within the United States, in violation of 8 U.S.C. 1324(a)(1)(A)(ii); (6) made false material representations before a

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[1] On April 12, 2000, Maria Tecum, pursuant to a written plea agreement, pled guilty to having knowledge that harboring an illegal alien, a felony, had occurred, concealing and failing to make known that felony to authorities, in violation of 18 U.S.C. 4 (Misprison of a Felony) (R. 48).

[2] Appellant's Opening Brief fails to mention the Superseding Indictment, describing only the original three-count Indictment against Tecum (Br. at v-vi).

magistrate judge, in violation of 18 U.S.C. 1623; and, (7) conspired with others to counterfeit and use official documents in the name of Choz, in violation of 18 U.S.C. 1546(a) and 371 (*ibid.*).

A three-day jury trial was held from October 17 until October 19, 2000 (R. 125, 126, 127) (trial transcripts). The district court, pursuant to the Court Interpreters Act, 28 U.S.C. 1827, utilized the services of two certified interpreters during trial – a Spanish-English interpreter and a Quiche-English interpreter.[3] The Quiche interpreter provided simultaneous, word-for-word interpretation of all non-Quiche testimony and argument for the benefit of Jose Tecum, interpreted for a government witnesses who testified in Quiche, aided the Spanish interpreter when witnesses testifying in Spanish used Quiche colloquialisms, and interpreted during Tecum's testimony.

On October 19, 2000, a jury found Tecum guilty of Counts One through Five and Count Seven (R. 96)[4]. Tecum was sentenced to be imprisoned for terms of 108 months as to Counts One through Five and 60 months as to Count Seven to run concurrently, a three year term of supervisory release, and was fined $568.40 in restitution (R. 116). On February 8, 2001, Tecum filed a timely notice of appeal (R. 113).

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[3] Quiche is "a Mayan language of Guatemala." *The Random House Dictionary of the English Language* at 1585 (1987).

[4] On October 19, 2000, at the close of the government's case, the district court judge entered a judgment of acquittal as to Count Six (R. 96).

STANDARD OF REVIEW

Because Appellant did not object during trial to the adequacy of interpreting services or his temporary restraint by U.S. Marshals during trial proceedings, this Court reviews these claims for plain error. *United States* v. *Clark*, 274 F.3d 1325, 1326 (11th Cir. 2001). The district court's admission of evidence under a hearsay exception is reviewed for a "clear * * * abuse of * * * discretion." *Hines* v. *Brandon Steel Decks*, 886 F.2d 299, 302 (11th Cir. 1989). When capable of being considered on direct appeal, ineffective assistance of counsel claims are reviewed *de novo*. See *United States* v. *Andrews*, 953 F.2d 1312, 1327 (11th Cir.), cert. denied, 505 U.S. 1210 (1992).

SUMMARY OF THE ARGUMENT

The district court provided Tecum, a non-English speaker, with a Quiche interpreter throughout his trial. This interpreter provided simultaneous, word-for-word interpretation of the proceedings, consistent with the Court Interpreters Act, 28 U.S.C. 1827. Tecum asserts several claims based on the interpreting services provided during trial. At no point during the trial, however, did Tecum notify the district court of these alleged problems. Only now, on appeal, does Tecum argue that he was unable to understand what occurred during trial and unable to assist in his defense. This claim is completely without foundation. Tecum also claims that he was prejudiced by the court's appointment of two interpreters to assist during the trial – a Quiche interpreter and a Spanish interpreter. Rather than prejudice Tecum, the court's appointment of these two interpreters assured that Tecum, the

witnesses and the jury would be able to understand the multi-lingual proceeding. Finally, Tecum asserts that he was entitled to have an interpreter at counsel table and to receive written translations of his indictment and "other court documents" in his native Quiche. Neither the Court Interpreters Act nor the Constitution, however, require such actions.

Appellant also claims he was denied a fair trial by the admission of a U.S. Customs Service document recording his entry into the United States and because the U.S. Marshals temporarily restrained him during trial. Both claims are unsupported by legal authority. First, Appellant suffered no undue prejudice as a result of the district court's admission into evidence of the U.S. Customs Service document since this document was properly admitted under the public records exception to the hearsay rule. *United States* v. *Brown*, 9 F.3d 907, 911 (11th Cir. 1993), cert. denied, 513 U.S. 852 (1994). Second, the steps taken by the U.S. Marshals to maintain order during the proceedings and protect the security of a government witness were appropriate and in no way prejudiced Tecum. See *Holbrook* v. *Flynn*, 475 U.S. 560, 572 (1986).

Finally, Tecum contends he was denied effective assistance of counsel during trial. While this Court does not generally review such claims on direct appeal, see *United States* v. *Le*, 256 F.3d 1229, 1241 (11th Cir. 2001), cert. denied, 122 S.Ct. 1103 (2002), the record here is sufficient to conduct such a review. *United States* v. *Andrews*, 953 F.2d 1312, 1327 (11th Cir.), cert. denied 505 U.S. 1210 (1992). Contrary to Tecum's assertion, his trial counsel's decision not to call

certain witnesses and not to raise particular questions on cross-examination were reasonable strategy choices. See *Waters* v. *Thomas*, 46 F.3d 1506, 1512 (11th Cir.), cert. denied, 516 U.S. 856 (1995); *Fugate* v. *Head*, 261 F.3d 1206, 1219 (11th Cir. 2001). Furthermore, Tecum has failed to show that the outcome of his trial would have been any different had his lawyer performed as he now desires. *Ibid*.

ARGUMENT

I. TECUM RECEIVED ADEQUATE TRANSLATION OF HIS TRIAL PROCEEDINGS.

Tecum argues that he was denied his rights under the Court Interpreters Act, 28 U.S.C. 1827, and the Sixth Amendment due to inadequate translation services during trial (Br. at 1-7 and 9-11) and the district court's failure to provide written Quiche translations of his indictment and other court documents (Br. at 7-9). Because Appellant never notified the trial court of these objections, the Court reviews these claims for plain error. *United States* v. *Clark*, 274 F.3d 1325, 1326 (11th Cir. 2001).

The Court Interpreters Act, 28 U.S.C. 1827, provides that a criminal defendant who relies upon a language other than English has a right to a court-appointed interpreter when his ability to understand the proceedings or ability to communicate with counsel would be impaired without one. The Act "while underscoring the importance of ensuring the highest quality translations for non-English speaking defendants, does not create new constitutional rights for

defendants or expand existing constitutional safeguards." *United States* v. *Joshi*, 896 F.2d 1303, 1309 (11th Cir.), cert. denied, 498 U.S. 986 (1990). The ultimate question is whether any inadequacy in the interpretation "made the trial fundamentally unfair." *Valladares* v. *United States*, 871 F.2d 1564, 1566 (11th Cir. 1989) (citation and quotation omitted).

The district court obtained the services of a Spanish interpreter for witnesses who did not speak English. The court also directed that a Quiche interpreter assist Tecum, even though Tecum did not make the request until the day of trial.[5]

Tecum incorrectly describes the interpreting services provided during his trial, claiming that he "was not provided a Quiche interpreter through the conclusion of trial" (Br. at 1). While the Spanish interpreter was released after testimony had ended, R. 127 at 306, the Quiche interpreter remained throughout the entire trial proceeding (R. 127 at 376). In fact, the district court held a recess and did not allow counsel to make their closing arguments until the Quiche interpreter

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[5] Although Tecum now claims he is unable to comprehend Spanish, there is considerable evidence to the contrary. First, Tecum chose to give his own testimony in Spanish (R. 126 at 259-260) (October 18, 2000, trial transcript). Second, the district court concluded that Appellant was able to communicate using a Spanish interpreter during the arraignment on the Superseding Indictment (Clerk's minutes, April 25, 2000) (Attachment A). Third, numerous Spanish-speaking witnesses testified that Tecum spoke and understood Spanish (R. 126 at 185-186) (trial testimony of I.N.S. Agent Juanita Santana), (R. 126 at 160) (trial testimony of Adel Trevino), (R. 126 at 170) (trial testimony of Raul Roman), (R. 126 at 210) (trial testimony of Gregoria Alva-Garcia). Nevertheless, out of an abundance of caution, the government identified a certified Quiche interpreter to assist during trial (Clerk's minutes, August 30, 2000) (Attachment B) and the district court appointed this Quiche interpreter after Tecum requested it on the day of trial (see Clerk's minutes, October 17, 2001) (Attachment C).

arrived at the courtroom (R. 127 at 306-307).

Tecum also claims that the trial proceedings were subject to "English to Spanish, Spanish to Quiche and reverse translations" that created "countless irregularities" (Br. at 4). The Quiche interpreter – who was also fluent in Spanish – specifically stated that when a witness testified in Spanish, he interpreted directly from the witness's testimony and not from the Spanish-English interpretation (R. 125 at 45). Furthermore, even though the Appellant chose to testify in Spanish, the Quiche interpreter continued to interpret the questions into Quiche for Appellant (R. 126 at 259-260).

Rather than constituting error, the district court's appointment of both a Spanish-speaking and Quiche-speaking interpreter insured that Tecum, the jury, and the court would be able to understand the multi-lingual proceedings. For example, when Maria Choz, the victim, testified in Spanish, she twice used Quiche colloquialisms (R. 125 at 55-56 and 94). Because the Spanish-speaking interpreter was unfamiliar with these terms, the Quiche interpreter was called upon by the court to explain the meaning of the terms (*ibid*). Furthermore, although the Quiche interpreter was primarily appointed to assist Tecum, the court also used him to interpret during the Quiche testimony of Miguel Antonio Choz, the victim's father. The court specifically instructed the Quiche interpreter to speak loudly enough so that Tecum could understand the proceedings (R. 126 at 121).

Despite the steps taken by the district court to guarantee Tecum could comprehend the proceedings, he now claims that he was confused. To support this

claim, Tecum cites portions of his own testimony (Br. at 3). While parts of Tecum's testimony were rambling and non-responsive, they hardly constitute proof of an unaddressed language barrier. If Tecum did not understand questions posed by counsel, he had every opportunity to bring that to the court's attention. In *Valladares*, 871 F.2d at 1566, this Court specifically noted the importance of notifying the district court during trial of problems with translation services, stating: "[o]nly if the defendant makes any difficulty with the interpreter known to the court can the judge take corrective measures. To allow a defendant to remain silent throughout the trial and then, upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse."

Tecum also contends that his ability to communicate with his counsel may have been adversely affected because the Quiche interpreter may not have been at his side throughout the trial (Br. at 9-10). While the Court Interpreters Act provides for simultaneous interpretation of the proceedings, it does not require simultaneous interpretation of attorney-client communications. *United States* v. *Johnson*, 248 F.3d 655, 663 (7th Cir. 2001). Tecum's citation to *United States* v. *Tapia*, 631 F.2d 1207 (5th Cir. 1980), to support his asserted entitlement is unavailing. In *Tapia*, the record on appeal did not indicate whether an interpreter was provided at all to a non-English speaking defendant. *Id.* at 1208-1209. The panel remanded the case in order to determine whether an interpreter was used during the proceedings and, if not, whether such failure prevented the defendant from assisting his counsel or inhibited his comprehension of the proceedings. *Id.* at

1209-1210. In contrast, as stated above, the Quiche interpreter was present throughout the trial.

Finally, Tecum asserts that he was denied his right to receive copies of his indictment and "other critical court documents" in Quiche (Br. at 7). Neither the Constitution nor the Court Interpreters Act entitles Tecum to written translation of these documents. *Sanders* v. *United States*, 130 F. Supp. 2d 447, 449 (S.D.N.Y. 2001). Tecum's reliance on *United States* v. *Mosquera*, 816 F. Supp. 168 (E.D.N.Y. 1993), is misplaced. In *Mosquera*, a single interpreter provided simultaneous interpretation for 18 Spanish-speaking defendants in complex proceedings involving 10,000 documents and 550 transcripts. *Id.* at 170. Finding that the interpreter could not adequately keep each defendant apprised of what was transpiring, the court *sua sponte* ordered the indictment and certain other documents be translated into Spanish. *Ibid*. In contrast, Tecum was the only defendant at the time of trial and the proceeding was not complex or document intensive. Furthermore, the record demonstrates that Tecum clearly comprehended the charges against him (see Clerk's minutes, April 25, 2000) (Arraignment on Superceding Indictment) (Attachment A) ("Court inquired of defendant as to whether or not he is able to communicate using the Spanish interpreter provided, and Court is satisfied he can communicate using Spanish language.").

II. THE COURT PROPERLY ADMITTED INTO EVIDENCE THE UNITED STATES CUSTOMS SERVICE RECORD DOCUMENTING TECUM'S ENTRY INTO THE UNITED STATES UNDER THE PUBLIC RECORDS EXCEPTION TO THE HEARSAY RULE

Tecum, without citing any legal authority, asserts that he was severely prejudiced by the admission of a United States Customs Service record documenting his entry into the United States and, therefore, is entitled to a new trial (Br. at 12). The Customs record indicates that Tecum entered the United States through legitimate points of entry in October, 1998, and June, 1998 (R. 126 at 150). There is no record of his entry in September 1999. This refuted Tecum's claim that he entered the country legally and not with Maria Choz (R. 126 at 272, 288, 293). The district court's admission of this document over defendant's objection that it was inadmissible hearsay (see R. 126 at 149-150) was a proper exercise of its discretion.

Before introducing the Customs Service document into evidence, the government established, through testimony of a Customs agent, that the regular and customary procedure of the U.S. Customs Service is to document and keep summary records of passenger arrivals into the United States (R. 126 at 148). The Customs agent also testified that the summary record was certified as authentic (*Ibid.*).[6] This record is clearly admissible into evidence under the public records exception to the hearsay rule.

Public records can be admitted into evidence, as an exception to the hearsay

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[6] Tecum has not challenged the authenticity of the summary record.

rule. Fed. R. Evid. 803(8)(B). While this rule excludes matters observed by law enforcement personnel in criminal matters, this limitation was not intended to apply to "documents recording routine, objective observations, made as part of the everyday function of the preparing official or agency." *United States* v. *Brown*, 9 F.3d 907, 911 (11th Cir. 1993), cert. denied, 513 U.S. 852 (1994). Where, as here, the admitted record was developed long before the alleged offense and was based on routine Customs Service operations, the limitation in the public records hearsay exception does not apply. See also *United States* v. *Puente*, 826 F.2d 1415, 1418 (5th Cir. 1987) (admission of Customs Service record of license plate numbers of vehicles passing through the border); *United States* v. *Orozco*, 590 F.2d 789, 793-794 (9th Cir.), cert. denied, 442 U.S. 920 (1974)(same).

III. THE UNITED STATES MARSHALS PROPERLY RESTRAINED TECUM AFTER HE THREATENED THE VICTIM DURING HER TRIAL TESTIMONY

Tecum also argues that he is entitled to a new trial because he was unduly prejudiced when the United States Marshals restrained him during the trial (Br. 13). Tecum does not cite any legal authority for this claim, nor does he fully describe the events which led to his brief restraint. As the victim, Maria Choz, began to testify, Tecum stood up and began shouting at her in Quiche (R. 125 at 46). U.S. Marshals approached Tecum and forced him to sit down in his chair. The district court immediately granted the government's request that the jury leave the courtroom and instructed Tecum, outside of the presence of the jury, to refrain from addressing any of the witnesses (R. 125 at 46-48). After Choz returned to the

stand, she explained that Tecum had told her to falsely testify that another person brought her to the United States (R. 125 at 78).

Because Tecum never requested relief from the trial court – either in the form of curative instructions, a motion for a mistrial, or a motion for a new trial – this Court's review is for plain error. *United States* v. *Clark*, 274 F.3d 1325, 1326 (11th Cir. 2001).

In *Illinois* v. *Allen*, the Supreme Court explained:

> It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.

397 U.S. 337, 343 (1970). Recognizing that "all criminal trials cannot be conducted in a crystalline palace," *Allen* v. *Montgomery*, 728 F.2d 1409, 1413 (11th Cir. 1984), this Court has similarly noted that "the necessity of courtroom security sometimes outweighs a defendant's right to stand before the jury untainted by physical reminders of his status as an accused." *Ibid.*

The U.S. Marshals took reasonable steps to maintain order during the trial proceedings and protect Maria Choz. The Supreme Court, in *Holbrook* v. *Flynn*, 475 U.S. 560 (1986), rejected a claim by a habeas petitioner that conspicuous uniformed armed guards present at trial unduly prejudiced the jury. The Court first rejected the idea that the deployment of security personnel should, like the practice of shackling, be closely scrutinized and instead held that "a case-by-case approach

is more appropriate." 475 U.S. at 568-69. The Court articulated the standard:

> All a federal court may do in such a situation is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.

475 U.S. at 572. Applying the *Holbrook* standard, it is clear that Tecum's right to a fair trial was in no way prejudiced by the U.S. Marshals. Furthermore, the trial court minimized any prejudice that could have flowed from Tecum's own actions by immediately directing the jury to leave the courtroom and by reprimanding Tecum out of the jury's presence.

IV. TECUM'S ATTORNEY DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL

Although this Court generally does not consider claims of ineffective assistance of counsel on direct appeal, *United States* v. *Le*, 256 F.3d 1229, 1241 (11th Cir. 2001), cert. denied, 122 S.Ct. 1103 (2002), such claims can be reviewed when there is sufficient evidence in the trial record to allow this Court to do so. *United States* v. *Andrews*, 953 F.2d 1312, 1327 (11th Cir.), cert. denied, 505 U.S. 1210 (1992). The United States agrees with Tecum that there is no need to resort to evidence outside of the record to review these claims.

To succeed on a claim of ineffective assistance, Tecum must show "both incompetence and prejudice." *Chandler* v. *United States*, 218 F.3d 1305, 1312 (11th Cir. 2000), cert. denied, 531 U.S. 1204 (2001). "The standard for counsel's performance is 'reasonableness under prevailing professional norms.'" *Id.* at 1313

(quoting *Strickland* v. *Washington*, 466 U.S. 668 (1984)). This Court has recognized that "[n]o absolute rules dictate what is reasonable performance for lawyers." *Chandler*, 218 F.3d at 1317. Instead, "[c]ounsel's performance is entitled to 'highly deferential' judicial scrutiny, and 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" *Fugate* v. *Head*, 261 F.3d 1206, 1216 (11th Cir. 2001) (quoting *Strickland*, 466 U.S. at 689)).

Tecum argues that his trial counsel was incompetent because he failed to call certain witnesses to testify on his behalf (Br. at 17). This Court, however, has recognized that the issue of "[w]hich witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." *Waters* v. *Thomas*, 46 F.3d 1506, 1512 (11th Cir.), cert. denied, 516 U.S. 856 (1995). Further, counsel's failure to call the specific witnesses identified by Tecum was reasonable. For example, Maria Tecum pled guilty to Misprison of a Felony in relation to the harboring and concealing of Maria Choz (R. 48). Calling her as a witness would most certainly have subjected her to harmful cross-examination. See *Chandler*, 218 F.3d at 1321 (likelihood of harmful cross-examination made decision not to call a witness reasonable). Similarly, it was not necessary to call witnesses to "educate the jury of Quiche customs" (Br. at 16) or testify about Tecum's "reputation as a hard and responsible worker at his

job" (Br. at 19). There were other witnesses, particularly the defendant himself, who provided information on Quiche culture and his work ethic (R. 125 at 43-44 (testimony of Byron Lemus); R. 126 at 264-270, 279 (testimony of Jose Tecum)). As this Court has recognized, "[c]onsidering the realities of the courtroom, more is not always better." *Chandler*, 218 F.3d at 1319. Furthermore, Tecum does not explain how any additional witnesses would have altered the result of the proceeding.

Tecum also asserts that his counsel was ineffective in failing to cross-examine certain government witnesses (Br. at 19-21). This Court, however, has held that "[t]he decision as to whether to cross-examine a witness is 'a tactical one well within the discretion of a defense attorney.'" *Fugate*, 261 F.3d at 1219 (quoting *Messer* v. *Kemp*, 760 F.2d 1080, 1090 (11th Cir. 1985)). Ineffective assistance should not be found simply because "other testimony might have been elicited from those who testified." *Foster* v. *Dugger*, 823 F.2d 402, 406 (11th Cir. 1987), cert. denied, 487 U.S. 1241 (1988). Tecum's allegations in this respect are simply insufficient to overcome the presumption of adequate representation. Moreover, absent a showing of a single instance where cross-examination could have affected the outcome of the trial, Tecum has not satisfied the prejudice requirement of an ineffective assistance of counsel claim. See *Fugate*, 261 F.3d at 1219.

CONCLUSION

The judgment against Tecum should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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