

E X H I B I T A

United States Court of Appeals For the First Circuit

No. 17-1556

MAXIMO BRITO-TEJEDA,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

Before

Howard, Chief Judge,
Torruella, Lynch, Thompson,
Kayatta and Barron, Circuit Judges.

ORDER OF COURT

Entered: May 23, 2019

The petition for panel rehearing is denied. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:

Maximo Brito-Tejeda
Seth R. Aframe

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UNITED STATES,

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Before

Howard, Chief Judge,
Torruella and Kayatta, Circuit Judges.

JUDGMENT

Entered: March 14, 2019

We have reviewed the record and the request of the petitioner, Maximo Brito-Tejeda ("Brito"), for a certificate of appealability. We see no debatable claims to be advanced, see Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Barefoot v. Estelle, 463 U.S. 880, 893 n. 4 (1983), so we deny the request.

The ineffective assistance claim related to drug quantity is not debatable. See United States v. Zapata, 589 F.3d 475, 483-84 (1st Cir. 2009). To the extent that Brito seeks to advance a claim that his attorney provided ineffective assistance by recommending that he make certain concessions as to drug quantity, we see no debatable claim that the advice did not amount to a reasonable strategic decision. See Varga-De Jesús v. United States, 813 F.3d 414, 418-19 (1st Cir. 2016). Likewise, we see no debatable claim that it was erroneous for the court to impose the enhancement under U.S. Sentencing Guidelines Manual § 2D1.1(b)(12) or that his attorney's failure to oppose the enhancement constituted ineffective assistance. See United States v. Jones, 778 F.3d 375, 385 (1st Cir. 2015). Reasonable jurists could not disagree over the question of whether Brito was entitled to a minor role adjustment pursuant to U.S. Sentencing Guidelines Manual § 3B1.2 such that his attorney provided ineffective assistance by failing to pursue the adjustment. Finally, we see no debatable claim that Brito's attorney provided ineffective assistance by failing to file a direct appeal. Brito claims that he asked his attorney to file a notice of appeal, that she promised she would visit him to discuss the matter, but that she failed to visit him and

failed to file a notice of appeal on his behalf. See Garza v. Idaho, No. 17-1026, -- U.S. --, 2019 WL 938523 (U.S., Feb. 27, 2019); Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000). Brito has not claimed before now, however, that he specifically instructed his attorney to file an appeal on his behalf; indeed, in response to a show cause order issued by the district court in the section 2255 proceeding, he claimed instead that he had not filed a direct appeal because his attorney had specifically advised him not to appeal. In any event, as he did not develop a factual basis for his claim in the district court, despite having had the opportunity to do so during the evidentiary hearing, reasonable jurists could not disagree over the question of whether the claim is forfeited. See Turner v. United States, 699 F.3d 568, 586 (1st Cir. 2012).

The request for a certificate of appealability is denied, and the appeal is terminated. The request for appointment of counsel is denied.

By the Court:

Maria R. Hamilton, Clerk

cc:

Maximo Brito-Tejeda
Seth R. Aframe

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Maximo Brito-Tejeda

v.

Civil No. 16-cv-540-PB

United States of America

JUDGMENT

In accordance with the Order by Judge Paul Barbadoro issued May 9, 2017, denying the Petitioner's motion to vacate sentence, judgment is hereby entered.

By the Court,



Daniel J. Lynch, Clerk
United States District Court

Date: May 9, 2017

cc: Stanley W. Norkunas, Esq.
Seth R. Aframe, Esq.