

1 probation and the conditional discharge, and imposition of a sentence of the balance
2 of the maximum eighteen-year prison term.¹ Defendant also claims he received
3 ineffective assistance of counsel in connection with the revocation proceeding. We
4 affirm.

5 {2} This case has a lengthy procedural history. We have reviewed the entire
6 district and appellate court records, as well as the available recordings of the district
7 court hearings. However, because this is a memorandum opinion and the parties are
8 familiar with the background of the case, we reference only those facts and
9 procedural details that we deem relevant to our analysis.

10 **BACKGROUND**

11 {3} Defendant was indicted in 2011 on four counts of criminal sexual contact of
12 a minor (child under thirteen) in the second degree, in violation of Section 30-9-
13 13(B)(1). The alleged victim was his daughter. The crimes were alleged to have been
14 committed between 2005 and 2010. The prosecution of Defendant was held in
15 abeyance for several years while the privileged status of Defendant's
16 communications with a social worker was litigated. *See State v. Strauch*, 2015-
17 NMSC-009, ¶ 47, 345 P.3d 317 (holding that Defendant's communications with his
18 social worker were not privileged), *rev'g* 2014-NMCA-020, 317 P.3d 878.

¹The maximum sentence for each of the CSCM crimes to which Defendant pleaded is six years. *See* NMSA 1978, § 31-18-15(C) (2016, amended 2025).

1 {4} Following remand to the district court, Defendant agreed to plead guilty to the
2 three lesser degree offenses between 2005 and 2007, with the previously alleged
3 offenses to be dismissed. In a sentencing memorandum, Defendant's counsel urged
4 leniency, stressing that Defendant was an engineer employed at national defense
5 research institutions, and that a conditional discharge, *see* NMSA 1978, § 31-20-13
6 (1994), and probation would permit him to continue making valuable contributions
7 to society. At a July 2016 hearing, the district court accepted the plea agreement,
8 entered an order of conditional discharge as to the crimes to which Defendant
9 pleaded guilty, and placed him on probation for five years.

10 **Defendant's First Three Probation Violations**

11 {5} Between August 2016 and March 2017, the State filed three motions, along
12 with probation officers' supporting reports, charging Defendant with violating the
13 terms of his probation; each time, the State moved to revoke Defendant's probation.
14 On each occasion, the district court ultimately exercised leniency and continued
15 Defendant's conditional discharge and probation terms.

16 {6} The first report alleged that Defendant had not been truthful with his probation
17 officers, in particular, that in early August 2016, Defendant had lied to the officer
18 about his whereabouts and his possession of a smart phone. At an early September
19 2016 hearing, Defendant admitted the allegation and apologized for his error in
20 judgment. The district court revoked but then reinstated his probation.

1 {7} The second report alleged that in late September 2016, without first obtaining
2 permission from his probation officer, Defendant had visited a public park where
3 children could be expected to gather. At a November 2016 hearing, after Defendant
4 admitted to the violation, the district court again revoked but then reinstated his
5 probation. However, the court accepted the parties' joint proposal that, prior to
6 reinstating probation, Defendant would serve sixty days in jail. The court warned
7 Defendant that there was no room for another mistake.

8 {8} The third report alleged that Defendant had consumed a beer in February
9 2017. At an initial hearing, Defendant admitted the violation and the district court
10 accepted the admission. At the sentencing hearing in late April 2017, a psychologist
11 who had recently evaluated Defendant testified that she had diagnosed him with
12 Autism Spectrum Disorder (ASD), formerly known as Asperger's Syndrome, and
13 suggested his probation violations were attributable to the previously undiagnosed
14 condition. At the conclusion of the hearing, after stating that it did not believe
15 Defendant could handle probation, the court revoked Defendant's probation and
16 sentenced him to six years in prison.

17 {9} Defendant's counsel filed a motion to reconsider the sentence pursuant to Rule
18 5-801 NMRA. The district court held multiple hearings between December 2017
19 and October 2018. At several of these hearings, the court heard lengthy testimony
20 not only from the previously retained psychologist but also from a neuropsychiatrist.

1 Both witnesses further addressed the causal connection between Defendant's ASD
2 and his propensity to violate his probation terms, but opined that, with therapy, he
3 should learn to comply with the rules. However, the neuropsychiatrist testified that
4 if, following such therapy, Defendant continued to willfully violate his probation
5 conditions, there would be no reason to continue with probation.

6 {10} Following these hearings, the district court reinstated the original conditional
7 discharge and reinstated Defendant's probation for five years. The court stressed that
8 it usually did not give sex offenders even a second chance, but that it was attempting
9 to accommodate Defendant's ASD. The court emphasized that this was its fourth
10 attempt to work with Defendant but there would not be a fifth, and Defendant needed
11 to understand that he had to comply with even minor conditions. Defendant assured
12 the court that he understood that there was "no wiggle room."

13 **Defendant's Fourth Probation Violation and Revocation of His Probation**

14 {11} In August 2019, the State filed a fourth motion to revoke Defendant's
15 probation, based on a new report alleging further violations of his probation
16 conditions. The primary allegation was that beginning in late 2018 and continuing
17 into early 2019, Defendant had phoned, texted, and met with a former girlfriend who
18 had a history of driving while intoxicated and with whom his probation officer had
19 instructed him not to associate.

1 {12} At the beginning of the October 3, 2019 hearing on the motion, defense
2 counsel stated that Defendant would admit to violating this “association” condition.
3 Following questioning, the district court accepted the admission.

4 {13} Defendant’s neuropsychiatrist addressed the district court. He testified that
5 Defendant had been making progress with therapy but that more was needed.
6 Defense counsel argued that the association violations were not sufficiently
7 egregious to merit full revocation and imposition of a prison sentence, urged the
8 court to focus on steps to restore Defendant as a productive member of society, and
9 proposed a sanction of one year in jail but with continuation of the therapy. At the
10 conclusion of the hearing, the court expressed its frustration with Defendant’s
11 continued violations of his probation conditions, notwithstanding the court’s
12 repeated leniency. The court concluded, “Probation just doesn’t seem to work.” By
13 order (October 2019 Revocation Order) entered the following day, the court revoked
14 Defendant’s probation and conditional discharge, and imposed the balance of the
15 full eighteen-year sentence.

16 **Defendant’s Reconsideration Motion and Presentment Hearing**

17 {14} In early January 2020 Defendant filed pro se, again pursuant to Rule 5-801, a
18 motion for reconsideration (Reconsideration Motion) of the October 2019
19 Revocation Order. In the motion, Defendant did not dispute his violation of the terms
20 of his probation, and instead argued that he had been making progress on his therapy

1 with the neuropsychiatrist prior to the revocation of his probation; he had struggled
2 during his probation with a desire for companionship; incarceration reduced his
3 prospects for rehabilitation; and he was not a threat to the community.

4 {15} The district court held a hearing on the Reconsideration Motion on November
5 12, 2020. The court noted at the beginning of the hearing that, at Defendant's
6 request, new private counsel who had entered an appearance in early 2020, replacing
7 the counsel who had represented him at his October 2019 revocation hearing, would
8 be allowed to withdraw and thus Defendant would be representing himself.

9 {16} Defendant called as witnesses both the neuropsychiatrist who had previously
10 treated him and a new, second psychologist who had recently evaluated him. Both
11 witnesses testified that Defendant's potential for rehabilitation would benefit from
12 more therapy and/or a community or residential treatment program. The
13 psychologist attributed Defendant's impulsivity and poor judgment to his ASD, and
14 opined that, with the recommended further help, he had a 25 to 50 percent chance of
15 no further violations of his probation terms.

16 {17} The State called Defendant's former probation officer as its only witness. The
17 probation officer testified that Defendant's former girlfriend had contacted her
18 following the October 3, 2019 revocation and sentencing hearing. The probation
19 officer recounted the girlfriend's statements that, later that month, Defendant had

1 left several voicemails on her phone; the probation officer had listened to the
2 voicemails and characterized them as “harassment.”

3 {18} Following closing arguments, the district court noted that Defendant had
4 committed a heinous offense, and then again reviewed the multiple times the court
5 had shown leniency to him. The court also noted the new psychologist’s testimony
6 about Defendant’s impulsivity and poor judgment, and the court stated that it did not
7 think Defendant was going to change. Reiterating that “probation just does not
8 work,” the court stated that it would deny Defendant’s Reconsideration Motion.

9 {19} On April 29, 2021, the district court held a presentment hearing on the State’s
10 proposed order denying the Reconsideration Motion. When the court learned that
11 Defendant had not been provided a copy of the proposed order, it read the text of the
12 order into the record. Neither Defendant nor a public defender who had appeared on
13 Defendant’s behalf challenged or otherwise commented on the language of the order.
14 Later that day, the district court entered the order (April 2021 Reconsideration
15 Denial Order) as proposed by the State, which found that (1) no new issues were
16 raised in the Reconsideration Motion that would warrant reconsideration of the
17 October 2019 Revocation Order and (2) Defendant’s family experienced trauma

1 each time he filed a motion, and denied the Reconsideration Motion. Defendant
2 timely filed a notice of appeal of the order on May 25, 2021.²

3 **DISCUSSION**

4 {20} Initially, we address the scope of this appeal, and the standards of our review.
5 In his brief in chief, Defendant states that he is appealing both the October 2019
6 Revocation Order and the April 2021 Reconsideration Denial Order. He asserts,
7 among other errors, violation of his due process rights.

8 {21} An appeal from a decision of a district court is made by filing a notice of
9 appeal with the district court clerk. *See* Rule 12-202 NMRA. Rule 12-202(C)
10 requires that a copy of the order or judgment that is being appealed be attached to
11 the notice. Defendant’s May 25, 2021 notice of appeal states that he is appealing
12 from the April 2021 Reconsideration Denial Order, although a copy of the order is
13 not attached to the notice. A notice of appeal “should be construed to reach the merits
14 and not be dismissed by the use of strict or technical application of the rules.” *Baker*
15 *v. Sojka*, 1964-NMSC-234, ¶ 4, 74 N.M. 587, 396 P.2d 195; *cf. Lozano v. GTE*
16 *Lenkurt, Inc.*, 1996-NMCA-074, ¶ 13, 122 N.M. 103, 920 P.2d 1057 (holding that
17 where notice of appeal misstated date of judgment but copy of judgment was
18 attached, other parties received adequate notice that appellant was appealing

²In this opinion, we utilize, as the dates for Defendant’s filing of court papers while incarcerated, the dates on which he placed the documents in the facility’s internal mail system. *See* Rules 5-103(I); 12-307(G) NMRA.

1 judgment). Therefore, notwithstanding the missing attachment, the May 25, 2021
2 notice was sufficient to appeal from the April 2021 Reconsideration Denial Order.

3 {22} However, “a notice is sufficient only if intent to appeal from a specific
4 judgment can be fairly inferred from the notice.” *Mabrey v. Mobil Oil Corp.*, 1972-
5 NMCA-172, ¶ 14, 84 N.M. 272, 502 P.2d 297; *accord Sam v. Est. of Sam*, 2004-
6 NMCA-018, ¶ 8, 135 N.M. 101, 84 P.3d 1066, *rev’d on other grounds*, 2006-NMSC-
7 022, 139 N.M. 474, 134 P.3d 761; *State ex rel. Child., Youth & Fams. Dep’t v.*
8 *Michelle B.*, 2001-NMCA-071, ¶ 42, 130 N.M. 781, 32 P.3 790. Defendant did not
9 specify in his May 25, 2021 notice, that he was appealing the October 2019
10 Revocation Order, revoking his probation. On this basis, the State argues that the
11 present appeal is limited to challenging the district court’s April 2021
12 Reconsideration Denial Order.³

13 {23} Defendant contends that an order issued by our Supreme Court in connection
14 with this appeal authorizes his challenge of the October 2019 Revocation Order. By

³The April 2021 Reconsideration Denial Order was erroneously denominated “Order Denying Defendant’s Motion to Return Evidence.” However, the body of the order clearly stated that the court was denying Defendant’s Reconsideration Motion. Defendant made clear in his May 25, 2021 notice of appeal, that he was appealing the denial of the Reconsideration Motion.

The April 2021 Reconsideration Denial Order also stated that it denied Defendant’s “Motion to Suspend Sentence and to Reinstate Probation,” which he had filed on October 28, 2020. The May 25, 2021 notice of appeal does not specify that Defendant was appealing that motion. Therefore, that ruling is not part of this appeal.

1 order entered on October 25, 2022, this Court initially had dismissed this appeal as
2 untimely, because Defendant’s notice of appeal of the April 2021 Reconsideration
3 Denial Order was not filed in the district court until June 4, 2021, i.e., not within the
4 general filing deadline for notices of appeal established by Rule 12-201(A)(1)(b)
5 NMRA. Following its grant of Defendant’s petition for a writ of certiorari, our
6 Supreme Court reversed the Court of Appeals’ October 25, 2022 dismissal order.
7 *See Order, State v. Strauch, S-1-SC-39722 (N.M. Apr. 7, 2023) (Writ Order).* The
8 Court noted that, pursuant to Rule 12-307(G)(2), (4) NMRA, a prisoner’s pleading
9 is timely filed if it is placed in a prison’s internal mailing system within the time
10 otherwise permitted for filing, and therefore Defendant’s placement of his notice of
11 appeal in his prison’s internal mailing system on May 25, 2021 constituted timely
12 filing.

13 {24} The Writ Order stated that this case was remanded back to this Court “for
14 further proceedings *on the merits.*” (Emphasis added.) In our Supreme Court’s
15 mandate that followed the Writ Order, *see State v. Strauch, S-1-SC-39722 (N.M.*
16 *May 16, 2023)*, formally remanding this appeal back to this Court, the Supreme
17 Court reiterated it had instructed this Court “to rule *on the merits of the issues raised*
18 *in this matter*” and that “this cause is remanded for further proceedings, if any,
19 consistent and in conformity with the order of this Court.” (Emphasis added.)

1 Defendant argues that, by the emphasized language, the Supreme Court allowed him
2 to appeal the October 3, 2019 revocation.

3 {25} We question Defendant’s reading of the Writ Order. First, as identified in
4 Defendant’s May 25, 2021 notice of appeal, the April 2021 Reconsideration Denial
5 Order is the only “issue raised in this matter.” Second, the Writ Order addresses only
6 the issue of compliance with Rule 12-201(A); it does not address, much less resolve
7 in Defendant’s favor, other possible legal infirmities that might operate to bar this
8 Court from reaching the substantive merits of some or all of his arguments, including
9 his failure to identify the October 2019 Revocation Order in his notice of appeal.
10 Nevertheless, to minimize the potential for further appeals in this matter, we will
11 address Defendant’s challenge to the October 4, 2019, revocation of his probation.⁴

12 {26} We review a district court’s order revoking probation and one denying a Rule
13 5-801 motion to modify, i.e., reconsider, a sentence for abuse of discretion. *See State*
14 *v. Jimenez*, 2003-NMCA-026, ¶ 7, 133 N.M. 349, 62 P.3d 1231 (stating that
15 probation revocation will be reviewed for abuse of discretion), *rev’d on other*
16 *grounds*, 2004-NMSC-012, ¶ 1, 135 N.M. 442, 90 P.3d 461; *State v. Herbtsman*,
17 1999-NMCA-014, ¶ 8, 126 N.M. 683, 974 P.2d 177 (stating that “it is within the

⁴For the same reason, we decline to consider the State’s argument that Defendant’s appeal of the October 2019 Revocation Order is untimely because he did not file his notice, or his Rule 5-801 motion, within thirty days of October 4, 2019.

1 trial court’s discretion whether to modify a valid sentence”). “In order to establish
2 abuse of discretion, it must appear the trial court acted unfairly or arbitrarily, or
3 committed manifest error.” *Jimenez*, 2003-NMCA-026, ¶ 7 (internal quotation
4 marks and citation omitted). We review de novo claims of violation of due process
5 rights at a revocation hearing. *See State v. Castillo*, 2012-NMCA-116, ¶ 9, 290 P.3d
6 727.

7 **I. Defendant Waived Any Argument That the District Court Erred in**
8 **Determining at the October 3, 2019 Revocation Hearing That Defendant**
9 **Had Violated a Term of His Probation**

10 {27} When Defendant was first placed on probation in 2016, he agreed in writing
11 that he would “not associate with any person identified by my Probation/Parole
12 Officer as being detrimental to my Probation supervision, which may include
13 persons having a criminal record, other probationers and parolees, and victims or
14 witnesses of my crime or crimes.” As stated, his probation officer’s August 12, 2019
15 report, which was attached to the State’s fourth probation revocation motion, alleged
16 as “Violation No. 1” that, contrary to the probation officer’s instruction, Defendant
17 met with and had phone and text communications with his former girlfriend
18 beginning in late 2018 and continuing into 2019. Defendant argues, however, that
19 (1) at his October 3, 2019 revocation hearing, the State produced no admissible
20 evidence that he ever received any notice or warning not to associate with the former
21 girlfriend; and (2) the former girlfriend in any event was not a “criminal.” He also

1 appears to argue that the no-association probation condition, as applied to the former
2 girlfriend, was unreasonable and thus invalid.

3 {28} We reject Defendant’s arguments, because his admission to Violation No. 1
4 operates as a waiver of any factual or legal challenge to the district court’s revocation
5 decision other than on jurisdictional grounds.

6 Revocation of probation deprives an individual, not of the absolute
7 liberty to which every citizen is entitled, but only of the conditional
8 liberty properly dependent on observance of special [probation]
9 conditions. Because loss of probation is loss of only conditional liberty,
10 the full panoply of rights due a defendant in a criminal trial do not
11 apply.

12 *State v. Guthrie*, 2011-NMSC-014, ¶ 10, 150 N.M. 84, 257 P.3d 904 (alterations,
13 internal quotation marks, and citation omitted). We will assume without deciding
14 that no greater requirements would apply to establishing the validity of an admission
15 of a probation violation than those applicable to establishing the validity of a guilty
16 plea. *But cf. People v. Rial*, 249 N.W.2d 114, 115-16 (Mich. 1976) (declining to
17 impose same restrictions and standards on a defendant’s admission of probation
18 violation that are applicable to criminal defendant’s guilty plea).

19 {29} In New Mexico,

20 a plea of guilty or nolo contendere, when voluntarily made after advice
21 of counsel and with full understanding of the consequences, waives
22 objections to prior defects in the proceedings and also operates as a
23 waiver of statutory and constitutional rights, including the right to
24 appeal. Thus, *a voluntary guilty plea ordinarily constitutes a waiver of*
25 *the defendant’s right to appeal [their] conviction on other than*
26 *jurisdictional grounds.*

1 *State v. Chavarria*, 2009-NMSC-020, ¶ 9, 146 N.M. 251, 208 P.3d 896 (emphasis
2 added) (internal quotation marks and citations omitted). “Jurisdictional error refers
3 to an action taken by a court that does not have the power to adjudicate the question
4 involved. The sole question on appeal, then, is whether the district court had the
5 authority to proceed as it did, even if its decision was in error or was an abuse of the
6 court’s discretion.” *State v. Mortensen*, 2025-NMCA-026, ¶ 9, 576 P.2d 438
7 (citation omitted).

8 {30} Defendant’s admission satisfied these requirements for a guilty plea and, by
9 extension, a probation violation admission. At the beginning of the October 3, 2019
10 hearing, the district court closely questioned Defendant on his understanding of his
11 admission and its consequences. Defendant acknowledged: he had sufficient time to
12 discuss his admission with his counsel; he was satisfied with their advice; he was
13 giving up his right to question the State’s witnesses, testify himself, and call his own
14 witnesses; he was giving up his right to have the State carry its burden of proving
15 the probation violation allegations as well as his right to appeal; and by admitting to
16 Violation No. 1, he was “opening up [himself] to the full balance of [his] sentence.”

17 {31} Defendant appears to argue that, notwithstanding his admission, the State still
18 had to prove the violation. Defendant is mistaken. Ordinarily, “[i]n a probation
19 revocation proceeding, the [s]tate bears the burden of establishing a probation
20 violation with a reasonable certainty.” *State v. Leon*, 2013-NMCA-011, ¶ 36, 292

1 P.3d 493. Defendant’s acknowledgements freed the State from this burden: in
2 particular, the State no longer had to present testimony or other admissible evidence
3 to establish that, as alleged in the August 12, 2019 probation violation report, (1) the
4 probation officer had instructed Defendant not to associate with the former
5 girlfriend; and (2) contrary to his probation terms, he willfully had done so. His
6 challenges to the sufficiency of the evidence of his violations that he now makes on
7 appeal are therefore barred. *Cf. State v. Rickard*, 1994-NMCA-083, ¶ 13, 118 N.M.
8 312, 881 P.2d 57 (holding that guilty plea bars challenge to sufficiency of evidence
9 on appeal), *rev’d in part on other grounds*, 1997-NMSC-111, ¶ 1, 118 N.M. 586,
10 884 P.2d 477.

11 {32} Similarly, the State no longer had to establish the reasonableness of applying
12 the no-association probation condition to the former girlfriend. A probation
13 condition must be reasonably related to a defendant’s rehabilitation. NMSA 1978,
14 § 31-20-6(F) (2007). “To be reasonably related, the probation condition must be
15 relevant to the offense for which probation was granted.” *State v. Baca*, 2004-
16 NMCA-049, ¶ 18, 135 N.M. 490, 90 P.3d 509 (internal quotation marks and citation
17 omitted). Terms and conditions of probation can be set aside if they “(1) have no
18 reasonable relationship to the offense for which the defendant was convicted, (2)
19 relate to activity which is not in itself criminal in nature, *and* (3) require or forbid
20 conduct which is not reasonably related to deterring future criminality.” *State v.*

1 *Williams*, 2006-NMCA-092, ¶ 3, 140 N.M. 194, 141 P.3d 538 (alteration, internal
2 quotation marks, and citation omitted). Defendant appears to argue that barring him
3 from associating with the former girlfriend was not reasonably related to the CSCM
4 offense for which he was convicted, concerned an activity that itself was not criminal
5 in nature, and was not reasonably related to deterring future criminal activity.
6 However, his admission that he had violated the probation condition waived that
7 argument.

8 **II. Defendant Failed to Preserve Any Argument That the District Court**
9 **Erred in Considering Defendant’s Ex-wife’s Letter During Sentencing**

10 {33} At the October 3, 2019 hearing, State’s counsel disclosed that Defendant’s ex-
11 wife, the mother of the victim, had written a letter to the district court; a copy had
12 been provided to defense counsel. The letter is not in the court record that was
13 submitted to this Court. However, the court had characterized the letter as both
14 describing how Defendant had abused his daughter and stating that the ex-wife and
15 the daughter were having a difficult time moving forward, and then observed that in
16 sentencing it had to consider not just Defendant but also the community and the
17 victims. Defendant asserts that, in addition to making statements about his offense,
18 in the letter the ex-wife falsely stated that he had not paid child support and
19 improperly commented on his mental condition. Defendant acknowledges that his
20 defense counsel did not object to the court’s consideration of the letter.

1 {34} On appeal, Defendant argues that the letter was unfairly prejudicial in
2 violation of Rule 11-403 NMRA and a violation of his due process rights, because
3 it was “untested and not subject to confrontation.” We decline to consider this
4 argument: because Defendant did not raise these objections below, any abuse of
5 discretion or other error by the district court in considering the letter was not
6 preserved for review by this Court. *See* Rule 12-321(A) NMRA; *Moody v. Stribling*,
7 1999-NMCA-094, ¶ 45, 127 N.M. 630, 985 P.2d 1210 (“Due process claims are not
8 exempt from the fundamental requirement of preservation.”); *see also State v. Vigil*,
9 1982-NMCA-058, ¶ 18, 97 N.M. 749, 643 P.2d 618 (indicating that the
10 inadmissibility of hearsay may be waived in a probation revocation proceeding by
11 failure to object).

12 **III. The District Court Did Not Deny Defendant’s Due Process Rights or**
13 **Otherwise Abuse Its Discretion at the November 12, 2020 Hearing on His**
14 **Reconsideration Motion or the April 29, 2021 Presentment Hearing**

15 {35} As stated, at the November 12, 2020 hearing on Defendant’s Reconsideration
16 Motion Defendant’s probation officer testified about voicemail messages that
17 Defendant, calling from jail or prison facilities, had left on his former girlfriend’s
18 phone following his October 3, 2019 revocation and sentencing hearing. Defendant
19 did not object to any of this testimony.

20 {36} The district court afforded Defendant the opportunity to cross-examine the
21 probation officer. Defendant did not, however, ask any questions and instead began

1 to make his own comments about the voicemail messages. The court admonished
2 Defendant not to make any statements and instead only ask questions of the witness.
3 Defendant thereupon stated that he had no questions and the probation officer was
4 excused.

5 {37} At that point the district court allowed first Defendant and then State's counsel
6 to give closing argument. Defendant briefly commented on his inability to properly
7 prepare for the hearing due to the COVID pandemic and resulting lockdown at the
8 prison in which he had been incarcerated: he was allowed only limited time in the
9 prison library, and he was denied attorney calls and copies of his medical records.
10 Defendant then addressed at greater length his efforts at rehabilitation while in prison
11 during the past year, again notwithstanding the difficulties created by the COVID
12 pandemic and resulting prison lockdown. Defendant did not address the probation
13 officer's testimony in his closing.

14 {38} In a brief closing, State's counsel did not mention the probation officer's
15 testimony, but did assert that Defendant had molested his daughter over a period of
16 four years. Defendant did not object while counsel was speaking, but when the State
17 had finished Defendant asked to respond to counsel's argument. The court refused
18 the request, stating that Defendant had already made his argument.

19 {39} At the April 29, 2021 presentment hearing, Defendant did not address the
20 language of the proposed order. Instead, he again spoke, this time in considerable

1 detail, about the problems he said he had encountered at his prison facility that
2 hindered his ability to prepare for the November 12, 2020 hearing; and also
3 addressed at length the poor representation he claimed he received from the private
4 counsel whom he had engaged in early 2020, which he claimed also prevented him
5 from adequately preparing for the hearing on his Reconsideration Motion. The
6 district court eventually stopped him, stating that his complaints were more
7 appropriately addressed in a habeas corpus proceeding. Defendant interjected that at
8 the November 12, 2020 hearing, he was not able to address these points in his closing
9 statement. The court reiterated that it would not consider them, because they were
10 issues that arose after he was incarcerated following his October 2019 sentencing.

11 **A. The Probation Officer’s Testimony and State’s Counsel’s Closing**
12 **Argument**

13 {40} Defendant argues that the district court prevented him from objecting to or
14 rebutting the probation officer’s testimony and State’s counsel’s closing argument
15 at the November 12, 2020 hearing, and in doing so abused its discretion and deprived
16 him of his due process right to defend himself.

17 {41} Again, “[b]ecause loss of probation is loss of only conditional liberty, the full
18 panoply of rights due a defendant in a criminal trial do not apply.” *Guthrie*, 2011-
19 NMSC-014, ¶ 10 (alterations, internal quotation marks, and citation omitted). The
20 minimum due process requirements applicable to probation revocation include “an
21 informal hearing structured to assure that the finding of a probation violation will be

1 based on verified facts and that the exercise of discretion will be informed by an
2 accurate knowledge of the [defendant's] behavior.” *Id.* ¶ 11 (alteration, internal
3 quotation marks, and citation omitted). We will assume without deciding that the
4 same minimum due process requirements that apply in a probation revocation
5 hearing would apply in a hearing on a motion to reconsider the revocation.

6 {42} We are not persuaded that the district court violated Defendant’s due process
7 right or otherwise abused its discretion in limiting his ability to address the probation
8 officer’s testimony and/or the State’s argument at the Reconsideration Motion
9 hearing. With respect to the probation officer’s testimony, first, Defendant never
10 objected to it. Second, Defendant in fact had an opportunity to make, during his
11 closing argument, any statement he wished about the probation officer’s testimony,
12 since his argument immediately followed the testimony. He did not do so. As stated,
13 a defendant may waive due process violations by not objecting. *See Moody*, 1999-
14 NMCA-094, ¶ 45. Third, Defendant’s request to respond to counsel’s argument
15 cannot be viewed as a request to address that testimony, because counsel did not
16 mention it.

17 {43} With respect to State’s counsel’s argument, first, Defendant has not provided
18 any authority to support the premise to his argument, that his limited due process
19 rights in the context of revocation of his probation included a specific right to
20 rebuttal during closing argument. We are aware of no such authority. *See Lee v. Lee*

1 (*In re Adoption of Doe*), 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329
2 (stating that where arguments in briefs are unsupported by cited authority, the
3 appellate court will assume none exists). Second, although Defendant appears to
4 object to the factual accuracy of counsel’s statement about his abuse of his daughter
5 over the course of four years, because he pleaded guilty only to CSCM during a two-
6 year period, he never objected to the argument when it was made.

7 {44} Moreover, with respect to both the probation officer’s testimony and the
8 State’s argument, Defendant provides no basis for concluding that the district court’s
9 denial of the Reconsideration Motion was influenced, much less driven, by the
10 probation officer’s testimony or the comment by counsel. Rather, in its ruling that
11 followed the closing arguments, the court focused on the expert witnesses’ testimony
12 and stressed the same points it had made a year earlier, when it had revoked
13 Defendant’s probation: Defendant had committed a serious offense; the court had
14 already shown leniency several times; and, given the series of violations, probation
15 simply did not work. *See State v. Neal*, 2007-NMCA-086, ¶ 40, 142 N.M. 487, 167
16 P.3d 935 (declining to find due process violation in absence of any indication that
17 trial court “was swayed” by admission of letter during probation revocation hearing).

18 **B. Preparation for the Reconsideration Motion Hearing**

19 {45} Defendant argues that in not permitting him to present evidence and otherwise
20 fully address the obstacles he confronted attempting to prepare for the November

1 12, 2020 hearing on his Reconsideration Motion, first in his closing argument at that
2 hearing and then at the April 29, 2021 presentment hearing, the district court denied
3 his due process right to be heard. We disagree.

4 {46} First, the appropriate manner in and time at which to address any difficulty in
5 preparing for the November 12, 2020 Reconsideration Motion hearing would have
6 been to ask to delay the hearing either before or when it began. Moreover, the record
7 does not reflect that at that hearing the district court prevented Defendant, by either
8 imposing a time limit on how long he could address the court or limiting the subjects
9 he could address, from addressing the obstacles. Indeed, during his closing argument
10 Defendant did mention, albeit briefly, that he had not been able to prepare for the
11 hearing because at the prison he had been permitted only limited library time and he
12 was denied calls with his attorney and copies of his medical records. There is no
13 indication that, if Defendant had wished to address the court further regarding his
14 problems with the prison—or with his attorney—he would not have been permitted.

15 {47} Second, the limited purpose of the April 29, 2021 presentment hearing was to
16 provide both parties with an opportunity to address whether the proposed written
17 order accurately reflected the court’s oral ruling. *See In re Adoption of Homer F.*,
18 2009-NMCA-082, ¶ 28, 146 N.M. 845, 215 P.3d 783 (stating that the purpose behind
19 procedural rules governing presentment of proposed orders is to allow resolution of
20 disagreement about the language of court orders). Defendant does not assert that the

1 April 2021 Reconsideration Denial Order does not accurately reflect the district
2 court's November 12, 2020 oral ruling, or otherwise challenge the form of the order.
3 That being the case, any attempt by Defendant to present additional information or
4 argument directed at the propriety of the district court's October 2019 revocation
5 decision, effectively using the presentment hearing to urge further reconsideration
6 of the court's ruling on his motion to reconsider, would have been improper in any
7 event.

8 {48} Third, while Defendant generally complained at the presentment hearing that
9 the prison facility's and his former counsel's actions and inactions prevented him
10 from preparing for the November 12, 2020 hearing, he never identified to the district
11 court any specific information or argument—relevant to reconsideration of the
12 revocation decision—that he was unable to provide at the November 12, 2020
13 hearing as a result of these problems. He also does not provide such explanation in
14 his appellate briefing. We decline to speculate about the prejudice that Defendant
15 might have suffered as a result of the court's limitations on what subjects he could
16 address at the presentment hearing. *See State v. Duran*, 1988-NMSC-082, ¶ 12, 107
17 N.M. 603, 762 P.2d 890 (holding that to establish a due process violation, a
18 defendant must demonstrate prejudice), *superseded by rule on other grounds as*
19 *stated in State v. Gutierrez*, 1998-NMCA-172, ¶ 10, 126 N.M. 366, 969 P.2d 970,

1 *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37, 275 P.3d
2 110.⁵

3 {49} Fourth, we agree with the district court that Defendant’s complaints about the
4 prison and his counsel are properly addressed in a habeas corpus proceeding. *See*
5 Rule 5-802 NMRA; discussion *infra* Part IV.

6 **IV. Defendant Fails to Establish a Prima Facie Case of Ineffective Assistance**
7 **of Counsel**

8 {50} Defendant claims that, in several respects, he received ineffective assistance
9 of counsel at the October 3, 2019 revocation hearing. He claims that his counsel did
10 not investigate the alleged probation violations and then “advised” or “instructed”
11 him to plead to an unsubstantiated, legally insufficient probation violation. He

⁵On May 25, 2021, following entry of the Reconsideration Denial Order and on the same day that he filed his notice of appeal, Defendant filed a “Motion Objecting to Denying Motion to Return Evidence.” In that motion, Defendant addressed what he claimed was new evidence relating to his alleged probation violations in 2018 and 2019 (including the allegations of associating with the former girlfriend, which he had admitted and formed the basis for the district court’s revocation of his probation on October 3, 2019). Defendant contended that his counsel did not present this evidence at the revocation hearing and further that he was not able to present the evidence at the November 12, 2020 hearing on his Reconsideration Motion. The motion is essentially a motion to reconsider the denial of his Reconsideration Motion. The district court entered an order denying the motion on June 25, 2021, noting that Defendant had admitted to violating the terms of his probation.

In his brief in chief, Defendant briefly asserts the court erred in denying the motion. Even assuming Defendant had appealed the June 25, 2021 order, the arguments he advanced in his May 25, 2021 motion were waived by his admission that he violated the terms of his probation. *See* discussion *supra* Part I.

1 claims that counsel did not question his former girlfriend and the probation officer
2 about his communications with the girlfriend. He claims that counsel did not
3 challenge the letter that his ex-wife had written to the district court prior to the
4 October 3, 2019 revocation hearing. And he claims that counsel did not present
5 mitigating evidence. We review claims of ineffective assistance of counsel de novo.
6 *State v. Crocco*, 2014-NMSC-016, ¶ 11, 327 P.3d 1068; *State v. Aragon*, 2009-
7 NMCA-102, ¶ 8, 147 N.M. 26, 216 P.3d 276.

8 {51} Defendants in criminal proceedings have a constitutional right to effective
9 assistance of counsel. *State v. Cordova*, 2014-NMCA-081, ¶ 6, 331 P.3d 980. “For
10 a successful ineffective assistance of counsel claim, a defendant must first
11 demonstrate error on the part of counsel, and then show that the error resulted in
12 prejudice.” *Id.* (internal quotation marks and citation omitted).

13 {52} “When an ineffective assistance of counsel claim is first raised on direct
14 appeal, [the appellate court] evaluate[s] the facts that are part of the record.” *State v.*
15 *Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61. “If facts necessary to a
16 full determination are not part of the record, an ineffective assistance claim is more
17 properly brought through a habeas corpus petition, although an appellate court may
18 remand a case for an evidentiary hearing if the defendant makes a prima facie case
19 of ineffective assistance.” *Id.* “A prima facie case is made if [the d]efendant produces
20 enough evidence to allow the fact-trier to infer the fact at issue and rule in [the

1 d]efendant’s favor.” *Crocco*, 2014-NMSC-016, ¶ 14 (internal quotation marks and
2 citation omitted). “Without an adequate record, an appellate court cannot determine
3 that trial counsel provided constitutionally ineffective assistance.” *Id.* ¶ 15.

4 {53} A defendant establishes the attorney error element of an ineffective assistance
5 of counsel claim by demonstrating that defense counsel failed to exercise “the skill,
6 judgment, and diligence of a reasonably competent defense attorney.” *State v.*
7 *Hosteen*, 1996-NMCA-084, ¶ 5, 122 N.M. 228, 923 P.2d 595. Defense counsel’s
8 actions are presumptively reasonable; to overcome this “strong” presumption, *see*
9 *Lytle v. Jordan*, 2001-NMSC-016, ¶ 47, 130 N.M. 198, 22 P.3d 666, a defendant
10 must show the challenged action “could not be considered sound trial strategy.” *State*
11 *v. Miera*, 2018-NMCA-020, ¶ 31, 413 P.3d 491 (internal quotation marks and
12 citation omitted). A prima facie case of attorney error is not made “if there is a
13 plausible, rational strategy or tactic to explain the counsel’s conduct.” *Lytle*, 2001-
14 NMSC-016, ¶ 26 (internal quotation marks and citation omitted). To establish a
15 prima facie case of prejudice, a defendant must demonstrate that counsel’s errors
16 prejudiced their defense such that there was a reasonable probability that the
17 outcome of the case would have been different absent the error. *Aragon*, 2009-
18 NMCA-102, ¶ 16.

19 {54} The record in this case is insufficient to address Defendant’s claims that his
20 defense counsel did not adequately investigate or challenge the alleged probation

1 violations. The record reflects that the district court had scheduled the fourth
2 probation revocation motion to be heard on September 5, 2019, but the court granted
3 defense counsel’s request for a several-week postponement and a “full evidentiary
4 hearing.” The court then rescheduled the hearing for October 3, 2019. However, no
5 evidence is in the court record regarding what steps counsel took, or did not take,
6 during those four weeks to investigate the allegations in the probation violation
7 report. We do not know whether counsel interviewed the former girlfriend and/or
8 the probation officer and, if so, whether they determined that the allegations that
9 Defendant had been instructed not to contact the former girlfriend but nevertheless
10 texted, phoned and met with her were well-founded. *Cf. State v. Pamphille*, 2021-
11 NMCA-002, ¶ 41, 482 P.3d 1241 (stating that, where there was no evidence in the
12 record that defense counsel intentionally or negligently failed to investigate
13 allegedly key evidence, the defendant failed to establish prima facie case of
14 ineffective assistance of counsel). Importantly, we also do not know what evidence
15 supported the other probation violations alleged in the fourth probation violation
16 report, any one of which could support revocation and thus a conclusion that any
17 failure to investigate or oppose the allegation of contact with the former girlfriend
18 did not result in prejudice. *See Leon*, 2013-NMCA-011, ¶ 37 (stating that district
19 court’s revocation of probation will be upheld if sufficient evidence supports any
20 alleged violation). Thus, Defendant’s counsel rationally could have determined that

1 the better strategy was to admit the violation and focus their efforts on trying to
2 persuade the district court to impose a sanction less than probation revocation and
3 the full prison sentence. *Cf. Lytle*, 2001-NMSC-016, ¶ 50 (holding that, absent
4 showing that result of trial would have been different, defense counsel’s failure to
5 hire experts for consulting or testifying could not establish ineffective assistance of
6 counsel).

7 {55} The record also does not establish ineffective assistance of counsel with
8 respect to the ex-wife’s letter. As stated, a copy of the letter is not in the record. *See*
9 *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 65, 146
10 N.M. 853, 215 P.3d 791 (stating that “[i]t is the duty of the appellant to provide a
11 record adequate to review the issues on appeal”). Moreover, and even assuming that
12 the ex-wife was subject to subpoena, we do not know whether Defendant’s counsel
13 had interviewed her before the hearing and, if so, whether they determined that
14 calling her to testify at the probation revocation hearing would harm Defendant’s
15 position more than help it. *See State v. Orosco*, 1991-NMCA-084, ¶¶ 34-36, 113
16 N.M. 789, 833 P.2d 1155 (stating that a court “will not attempt to second-guess
17 tactics and strategy of trial counsel,” and noting that calling a witness was a “risky
18 proposition”). There also are no facts in the record that would establish that the
19 outcome of revocation hearing would have been different had the ex-wife testified.

1 {56} The same considerations—a lack of sufficient evidence to establish both
2 elements of a prima facie case of ineffective assistance of counsel—apply to
3 Defendant’s argument about mitigating evidence. Defendant argues that defense
4 counsel failed to apprise the district court that a neighbor friend had died prior to
5 “the violation,” causing him emotional trauma, and that he had also injured himself
6 in a serious bicycle accident prior to his text messages with the former girlfriend.
7 The timing of both incidents is unclear, given that, according to the probation
8 violation report in question, Defendant’s phone calls, texting and meetings with the
9 former girlfriend extended over a period of ten months. There also is no evidence
10 that Defendant informed his counsel of these events. Further, there is no indication
11 that this information would have persuaded the court to impose a lesser sanction for
12 the violations than revocation of probation and imposition of a prison sentence.

13 {57} We conclude that the record does not establish a prima facie case of
14 ineffective assistance of counsel, and we therefore decline to address the issue
15 further. Our decision does not, however, preclude Defendant from pursuing a habeas
16 corpus petition pursuant to Rule 5-802.

17 **CONCLUSION**

18 {58} Probation is an act of clemency, and New Mexico courts have broad authority
19 to revoke it. *Neal*, 2007-NMCA-086, ¶ 25 (citing *State v. Lopez*, 2007-NMSC-011,
20 ¶ 12, 141 N.M. 293, 154 P.3d 668). Given the facts and circumstances of this case—

1 most notably, the serious nature of Defendant’s crimes; the multiple times the district
2 court had shown leniency; Defendant’s repeated, admitted failures to comply with
3 his probation terms; and the expert testimony regarding the likelihood that he would
4 continue to violate—the district court did not abuse its discretion in revoking
5 Defendant’s probation and conditional discharge, and imposing a sentence of
6 imprisonment.


7 {59} We affirm the district court’s October 2, 2019 order, revoking Defendant’s
8 conditional discharge and probation, and imposing sentence; affirm the district
9 court’s April 29, 2021 order, denying Defendant’s “Motion for Reconsideration of
10 Sentence”; and deny Defendant’s claim of ineffective assistance of counsel.

11 {60} **IT IS SO ORDERED.**

12 
13 _____
HENRY M. BOHNHOFF, Judge Pro Tempore

14 **WE CONCUR:**

15 
16 _____
RICHARD C. BOSSON, Justice, retired
17 **Sitting by Designation**

18 
19 _____
MICHAEL D. BUSTAMANTE, Judge, retired
20 **Sitting by Designation**