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1           **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2           **STATE OF NEW MEXICO,**

3           Plaintiff-Appellee,

4 v.

**NO. 34,394**

5           **ANGELO GRIEGO,**

6           Defendant-Appellant.

7           **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

8           **Michael Martinez, District Judge**

9           Hector H. Balderas, Attorney General

10          Santa Fe, NM

11          Jane A. Bernstein, Assistant Attorney General

12          Albuquerque, NM

13          for Appellee

14          Jorge A. Alvarado, Chief Public Defender

15          Will O'Connell, Assistant Appellate Defender

16          Santa Fe, NM

17          for Appellant

18           **MEMORANDUM OPINION**

19          **GARCIA, Judge.**

1 {1} Defendant appeals from the district court's order revoking his probation. We  
2 issued a first notice of proposed summary disposition, proposing to reverse. The State  
3 filed a response to our notice that we found persuasive. We issued a second notice,  
4 proposing to affirm. Defendant has filed a response to our second notice. We remain  
5 persuaded by the State's arguments, and affirm.

6 {2} We do not recount all the arguments Defendant has pursued in this case or our  
7 proposed analysis of those issues. Rather, we address only those arguments Defendant  
8 raises in response to our second notice, which he has pursued under the demands of  
9 *State v. Franklin*, 1967-NMSC-151, ¶ 9, 78 N.M. 127, 428 P.2d 982; and *State v.*  
10 *Boyer*, 1985-NMCA-029, ¶ 24, 103 N.M. 655, 712 P.2d 1. [Defendant's MIO 1]

11 {3} First, Defendant contends that the district court abused its discretion in revoking  
12 his probation because there was insufficient evidence of a violation. [Defendant's  
13 MIO 3-4] Defendant does not dispute that he admitted to his probation officer that he  
14 had used drugs while on probation. [Defendant's MIO 2; State's MIO 2-4; RP 148  
15 (from Case No. D-202-CR-2007-04508)] It also appears that a chemist testified that  
16 Defendant's urine test suggested that he had ingested methamphetamine two or three  
17 days before submitting the sample, given the low level of amphetamine in his sample.  
18 [Defendant's MIO 2] We are persuaded that the State met its burden to "introduce  
19 evidence that a reasonable and impartial mind would be inclined to conclude that the

1 defendant has violated the terms of probation.” *State v. Leon*, 2013-NMCA-011, ¶ 36,  
2 292 P.3d 493. Thereafter, the burden shifted to Defendant to “come forward with  
3 evidence to excuse non-compliance.” *Id.* (internal quotation marks and citation  
4 omitted). Because there is an absence of sufficient evidence excusing non-compliance,  
5 we are not persuaded that the district court abused its discretion by revoking  
6 Defendant’s probation. On these grounds, we affirm the district court’s revocation of  
7 Defendant’s probation.

8 {4} Defendant also argues that he was denied the effective assistance of counsel  
9 when his trial counsel did not permit him to testify. [Defendant’s MIO 4-8] Our  
10 second notice pointed out that Defendant’s arguments lack an explanation as to why  
11 the facts in the record show a prima facie case for this claim. We explained that there  
12 is no indication on the record that Defendant wanted to testify, but was counseled to  
13 the contrary. Nor was there any explanation in the record for why counsel advised  
14 against testifying. Defendant’s response to our notice does not provide this Court with  
15 any of the information we stated was lacking for a prima facie showing of ineffective  
16 assistance of counsel. “If facts necessary to a full determination are not part of the  
17 record, an ineffective assistance claim is more properly brought through a habeas  
18 corpus petition, although an appellate court may remand a case for an evidentiary  
19 hearing if the defendant makes a prima facie case of ineffective assistance.” *State v.*

1 *Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61. In the absence of  
2 sufficient information, Defendant has not established a prima facie case of ineffective  
3 assistance of counsel. Defendant may pursue his claim, however, in habeas  
4 proceedings. *See id.*

5 {5} Lastly, we observe that our second notice instructed the Appellate Public  
6 Defender to take steps to comply with our holding in *State v. Jones*, 1994-NMCA-  
7 045, 119 N.M. 53, 888 P.2d 935 (holding in cases of apparent conflict of interest on  
8 direct appeal, the Appellate Public Defender must either (a) file a waiver of the  
9 conflict, (b) make a showing of no conflict, or (c) move to withdraw and allow outside  
10 counsel to enter an appearance). The Appellate Public Defender has informed this  
11 Court that Defendant's counsel at the probation proceeding was not employed as a  
12 public defender at that time. We appreciate counsel's compliance with our request.

13 {6} For the reasons stated in our second notice and in this opinion, we affirm the  
14 district court's revocation of Defendant's probation.

15 {7} **IT IS SO ORDERED.**

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17 **TIMOTHY L. GARCIA, Judge**

18 **WE CONCUR:**

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**JAMES J. WECHSLER, Judge**

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2 **LINDA M. VANZI, Judge**