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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. 35,393

5 **KYLE PATRICK AVERY,**

6 Defendant-Appellant.

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

8 **Briana Zamora, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 Becca Salwin, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **BUSTAMANTE, Judge.**

1 {1} Defendant seeks to appeal from an amended judgment and sentence filed on
2 October 26, 2015. This Court issued a notice of proposed disposition proposing to
3 dismiss Defendant's appeal. Defendant filed a memorandum in opposition, which we
4 have duly considered. Unpersuaded, we dismiss Defendant's appeal.

5 {2} In this Court's notice, we proposed to dismiss Defendant's appeal because (1)
6 the amended judgment and sentence does not appear to be a final, appealable order
7 [CN 2-3]; (2) Defendant had not filed a notice of appeal in the district court [CN 3-4];
8 and (3) Defendant's convictions are based on an unconditional plea agreement [CN
9 4-5]. We further stated that to the extent that Defendant raised a sentencing issue in
10 his informal docketing statement, it appears that the amended judgment and sentence
11 had addressed his concern. [CN 5] Finally, we noted that to the extent that Defendant
12 may wish to argue that ineffective assistance of counsel caused him to enter into the
13 plea agreement, this argument depends on facts that are not before this Court. [Id.]
14 Therefore, we suggested that an ineffective assistance of counsel argument should be
15 raised in post-conviction habeas corpus proceedings rather than for the first time in
16 this appeal. [Id.]

17 {3} In our notice of proposed disposition, we also acknowledged that Defendant had
18 filed two petitions for writ of habeas corpus in this Court; however, we stated that we
19 do not have jurisdiction to consider either petition. [CN 6] The first petition—the

1 Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State
2 Custody, filed February 1, 2016—seeks relief under federal law. [Id.] The second
3 petition—the Petition for Writ of Habeas Corpus, filed February 26, 2016—should
4 have been filed in the district court, pursuant to Rule 5-802 NMRA, and is not
5 properly before this Court. [Id.]

6 {4} In response to our notice, Defendant contends that his appellate counsel filed
7 a notice of appeal in the district court on June 2, 2016, after we issued our notice of
8 proposed disposition. [MIO 2] This does not remedy the procedural defects in this
9 case. *See Govich v. N. Am. Sys., Inc.*, 1991-NMSC-061, ¶ 12, 112 N.M. 226, 814 P.2d
10 94 (recognizing that to properly invoke this Court’s jurisdiction, a party must comply
11 with the appellate rules governing the time and place in which to file the notice of
12 appeal); *Trujillo v. Serrano*, 1994-NMSC-024, ¶ 14, 117 N.M. 273, 871 P.2d 369
13 (reaffirming that the timely filing of a notice of appeal is a mandatory precondition to
14 our exercise of jurisdiction to hear an appeal); *see also State v. Peppers*,
15 1990-NMCA-057, ¶ 21, 110 N.M. 393, 796 P.2d 614 (declining to extend the
16 conclusive presumption of ineffective assistance of counsel adopted in *State v. Duran*,
17 1986-NMCA-125, 105 N.M. 231, 731 P.2d 374, to appeals from guilty or no contest
18 pleas).

1 {5} Defendant also asserts that his trial counsel provided ineffective assistance of
2 counsel that led to his involuntary and invalid plea. [MIO 2-5] As discussed in our
3 notice of proposed disposition, “[h]abeas corpus proceedings are the preferred avenue
4 for adjudicating ineffective assistance of counsel claims, because the record before the
5 trial court may not adequately document the sort of evidence essential to a
6 determination of trial counsel’s effectiveness.” *State v. Grogan*, 2007-NMSC-039, ¶ 9,
7 142 N.M. 107, 163 P.3d 494 (alteration, internal quotation marks, and citation
8 omitted); *see also State v. Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61
9 (“When an ineffective assistance claim is first raised on direct appeal, we evaluate the
10 facts that are part of the record. If facts necessary to a full determination are not part
11 of the record, an ineffective assistance claim is more properly brought through a
12 habeas corpus petition[.]”).

13 {6} For the reasons stated in our notice of proposed disposition and herein, we
14 dismiss Defendant’s appeal.

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

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18

MICHAEL D. BUSTAMANTE, Judge

19 **WE CONCUR:**

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2 **TIMOTHY L. GARCIA, Judge**

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4 **J. MILES HANISEE, Judge**