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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. 31,815**

5       **HAROLD L. MORRIS, JR.,**

6             Defendant-Appellant.

7       **APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**

8       **Lisa C. Schultz, District Judge**

9       Gary K. King, Attorney General

10       Santa Fe, NM

11       for Appellee

12       Harold Morris, Jr.

13       Los Lunas, NM

14       Pro Se Appellant

15                                       **MEMORANDUM OPINION**

16       **FRY, Judge.**

17             Defendant appeals from the district court's revocation of his probation. This

18       Court originally proposed to dismiss Defendant's appeal, given the filing of an

19       untimely notice of appeal. However, following this Court's decision in *State v. Leon*,

1 2013-NMCA-011, \_\_ P.3d \_\_, *cert. quashed*, \_\_-NMCERT-\_\_, \_\_ P.3d \_\_ (No.  
2 33,919, Jan. 2, 2013), to extend the presumption of ineffective assistance of counsel  
3 established in *State v. Duran*, 105 N.M. 231, 731 P.2d 374 (Ct. App. 1986), to appeals  
4 from probation revocation proceedings, this Court issued a second calendar notice  
5 proposing to apply *Leon* and reach the merits of Defendant’s appeal. Defendant does  
6 not oppose our application of *Leon* to his case, and we therefore proceed to the merits  
7 of Defendant’s appeal.

8         In this Court’s second calendar notice, we addressed Defendant’s argument that  
9 there was insufficient evidence to support the district court’s revocation of  
10 Defendant’s probation, and we proposed to affirm. In his memorandum in opposition,  
11 Defendant fails to indicate why this Court’s proposed disposition was in error. “A  
12 party opposing summary disposition is required to come forward and specifically  
13 point out errors in fact and/or law.” *State v. Ibarra*, 116 N.M. 486, 489, 864 P.2d 302,  
14 305 (Ct. App. 1993). Accordingly, we affirm on this issue.

15         In this Court’s second calendar notice, we also proposed to affirm with respect  
16 to Defendant’s claim that the district court should have sentenced him to rehabilitation  
17 rather than imprisonment. Specifically, Defendant contends that his medical  
18 conditions render the district court’s decision to sentence him to a term of  
19 imprisonment an abuse of discretion and that the sentence violates his Eighth

1 Amendment rights. [2d MIO 5] However, this Court pointed out in our second  
2 calendar notice that information regarding Defendant’s medical conditions was never  
3 presented to the district court. [CN 6] As a result, we cannot conclude that the district  
4 court abused its discretion by not considering such evidence. *See State v. Reynolds*,  
5 111 N.M. 263, 267, 804 P.2d 1082, 1086 (Ct. App. 1990) (“Matters outside the record  
6 present no issue for review.”). To the extent Defendant is arguing that his counsel was  
7 ineffective in presenting this evidence below, given the lack of evidence in the record,  
8 Defendant’s claim is better raised through habeas corpus proceedings. *See State v.*  
9 *Martinez*, 1996-NMCA-109, ¶ 25, 122 N.M. 476, 927 P.2d 31 (stating that “[t]his  
10 Court has expressed its preference for habeas corpus proceedings over remand when  
11 the record on appeal does not establish a prima facie case of ineffective assistance of  
12 counsel”).

13         In this Court’s second calendar notice, we also denied Defendant’s motion to  
14 amend the docketing statement to include (1) a claim of ineffective assistance of  
15 counsel, and (2) an argument that the district court erred in not dismissing the petition  
16 to revoke his probation because it was untimely under Rule 5-805 NMRA. We denied  
17 the motion to amend on the ground that the issues raised were not viable. [2d CN 8-  
18 10] Defendant continues to argue these issues in his second memorandum in  
19 opposition, but asserts no new reasons for their consideration. To the extent

1 Defendant's second memorandum in opposition may be construed as renewing his  
2 motion to amend his docketing statement to include the aforementioned issues,  
3 Defendant's motion is denied for the reasons stated in this Court's second notice of  
4 proposed disposition.

5         Additionally, Defendant has moved this Court, pursuant to *State v. Franklin*,  
6 78 N.M. 127, 129, 428 P.2d 982, 984 (1967), and *State v. Boyer*, 103 N.M. 655, 658-  
7 60, 712 P.2d 1, 4-6 (Ct. App. 1985), to amend his docketing statement to include a  
8 new issue. [2d MIO 1, 6] Defendant contends that his sentence is not in accordance  
9 with his plea agreement or the law because: (1) the district court only had seventeen  
10 years of jurisdiction and he has already served seventeen years, and (2) the district  
11 court did not have authority to sentence him to another term of probation. [Id. 6]

12         Defendant was originally sentenced to thirty-six years, but the district court  
13 suspended twenty-four years, requiring Defendant to serve twelve years and then a  
14 five year probationary period. [2d MIO 2] To the extent Defendant contends that the  
15 suspension of part of his sentence limited the district court's jurisdiction, Defendant's  
16 argument is misplaced. "The suspension . . . of a sentence is not a matter of right but  
17 is an act of clemency within the trial court's discretion." *State v. Follis*, 81 N.M. 690,  
18 692, 472 P.2d 655, 657 (Ct. App. 1970). Moreover, "[t]he sentencing court retains  
19 jurisdiction to revoke a suspended sentence for good cause shown at any time

1 subsequent to the entry of judgment and prior to the expiration of the sentence.” *State*  
2 *v. Baca*, 2005-NMCA-001, ¶ 15, 136 N.M. 667, 104 P.3d 533 (internal quotations  
3 marks and citations omitted). To the extent Defendant contends that the district court  
4 could not sentence him to another five year probationary period because Defendant  
5 had been sentenced to more than five years probation in the aggregate, this Court  
6 previously rejected a similar argument in *Baca*. *See id.* ¶ 18. Because we conclude  
7 that the issue Defendant seeks to raise is not viable, we deny Defendant’s motion to  
8 amend his docketing statement.

9 For the reasons stated above and in this Court’s second notice of proposed  
10 disposition, we affirm.

11 **IT IS SO ORDERED.**

12 \_\_\_\_\_  
13 **CYNTHIA A. FRY, Judge**

14 **WE CONCUR:**

15 \_\_\_\_\_  
16 **JAMES J. WECHSLER, Judge**

17 \_\_\_\_\_  
18 **M. MONICA ZAMORA, Judge**