



1 {1} Defendant appeals his conviction for criminal sexual contact of a minor in  
2 the second degree. We issued a calendar notice proposing to affirm. Defendant has  
3 responded with a memorandum in opposition. We affirm.

#### 4 **Appointment of Trial Counsel**

5 {2} Defendant continues to challenge the district court's refusal to replace his  
6 attorney. [MIO 6] In this case, Defendant was indigent and he was appointed a  
7 public defender. [RP 9] An indigent defendant has the right to appointed counsel,  
8 but not the right to the appointment of an attorney of his choice. *See State v.*  
9 *Lucero*, 1986-NMCA-085, ¶ 21, 104 N.M. 587, 725 P.2d 266. Accordingly, our  
10 calendar notice proposed to hold that the district court did not commit error in  
11 refusing to replace trial counsel with a different public defender.

12 {3} In his memorandum in opposition, Defendant argues that the district court's  
13 ruling on his motion to dismiss counsel requires a separate analysis from the  
14 consideration of whether he actually received ineffective assistance of counsel.  
15 [MIO 7] However, as this Court stated in *Lucero*, "[i]n order to dismiss the  
16 appointed counsel, a defendant must come forward and make a showing that  
17 failure to appoint substitute counsel will result in ineffective representation or  
18 prejudice to the defense." *Id.* In other words, at the time the motion is made, a  
19 defendant must show that ineffective assistance of counsel is likely to occur. Here,

1 there is no need to speculate on what could occur, because there has been a trial.  
2 As such, we consider below whether ineffective assistance actually occurred. To  
3 the extent that Defendant believes that the district court could have made more  
4 inquiries into the matter, we note that the court permitted Defendant to make his  
5 case, and thereafter presided over the trial and is presumed to have considered the  
6 adequacy of representation.

### 7 **Ineffective Assistance of Counsel**

8 {4} Defendant continues to claim that trial counsel was ineffective. [MIO 6] We  
9 will not decide an ineffective assistance of counsel claim on direct appeal unless a  
10 defendant makes a prima facie showing that counsel was incompetent and the  
11 incompetence resulted in prejudice to the defense. *See State v. Richardson*, 1992-  
12 NMCA-112, ¶ 4, 114 N.M. 725, 845 P.2d 819.

13 {5} Here, Defendant is arguing that trial counsel failed to regularly  
14 communicate with him, failed to proceed to trial in a manner Defendant endorsed,  
15 should have put forth a greater effort, and failed to adequately investigate the case.  
16 [MIO 11-12] Most of these claims appear to involve strategy that do not establish  
17 a prima facie showing of ineffective assistance of counsel. *See State v. Baca*,  
18 1997-NMSC-059, ¶ 25, 124 N.M. 333, 950 P.2d 776 (stating that “a prima facie  
19 case is not made when a plausible, rational strategy or tactic can explain the

1 conduct of defense counsel” (internal quotation marks and citation omitted)). In  
2 addition, the communications between Defendant and counsel are not matters of  
3 record subject to review on direct appeal. *See State v. Hunter*, 2001-NMCA-078, ¶  
4 18, 131 N.M. 76, 33 P.3d 296 (“Matters not of record present no issue for  
5 review.”). Finally, Defendant has not shown that he was prejudiced. *See In re*  
6 *Ernesto M., Jr.*, 1996-NMCA-039, ¶ 10, 121 N.M. 562, 915 P.2d 318 (“An  
7 assertion of prejudice is not a showing of prejudice.”). To the extent that  
8 Defendant’s claims may have merit, we believe that they are more properly  
9 addressed in a habeas corpus proceeding. *See Duncan v. Kerby*, 1993-NMSC-011,  
10 ¶ 4, 115 N.M. 344, 851 P.2d 466.

11 {6} For the reasons set forth above, we affirm.

12 {7} **IT IS SO ORDERED.**

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**MICHAEL D. BUSTAMANTE, Judge**

15 **WE CONCUR:**

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**MICHAEL E. VIGIL, Chief Judge**

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**M. MONICA ZAMORA, Judge**

