

COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal; Adams District Court; Honorable Tomee Crespín; and Case Number 14CR1158	DATE FILED: January 2, 2020 11:50 AM FILING ID: A11AD4A652FA3 CASE NUMBER: 2019CA965
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant CYNTHIA MARIE VIGIL	
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OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 9,491 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the Defendant-Appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

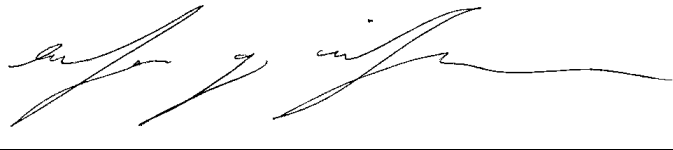


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ISSUES PRESENTED

1. Did the district court violate Vigil's due process rights by revoking her deferred sentence where it failed to find the violation was based on an "informed exercise of discretion" or was "substantial," where the record reflects the request for revocation was based on a misunderstanding of the law regarding medical marijuana and an over-two-year-old alleged positive test for alcohol?
2. Did the district court violate Vigil's right to due process by revoking her deferred sentence based in part on alleged missed drug tests on dates which predated the missed drug tests' dates named in the revocation complaint?
3. Did the district court further violate Vigil's right to due process and equal protection by revoking her sentence based on her missed drug tests since the record does not reflect a willful violation but rather an inability to pay?
4. Is a remand for a new revocation hearing necessary if this Court finds one ground for revocation was invalid but affirms the other?
5. Should the case be remanded for correction of the mittimus and a resentencing on the correct offense because the district court erroneously entered a conviction for "reckless manslaughter," a class 4 felony, instead of the correct conviction of "attempt to commit manslaughter," a class 5 felony, and thus applied the wrong presumptive sentencing range?

STATEMENT OF THE CASE AND FACTS

Cynthia Marie Vigil appeals the revocation of her deferred judgment and sentence, which led to the entry of a judgment of conviction and sentence in this case.

Vigil was originally charged with reckless manslaughter, a class 4 felony. (CF, pp 17-18.) The charge was based on her alleged role in the accidental death of a male acquaintance on April 17, 2014. The man was a fellow passenger in a van that Vigil's boyfriend was driving; the man fell under the van and was run over. He was dead when the police arrived. (*See* CF, pp 4-9.)

Vigil contested her culpability in the events that led to the man's death and originally took the case to trial in May of 2015. After asking several questions during trial about Vigil's involvement, the jury could not reach a verdict and a mistrial was declared. (CF, pp 211-217 (questions to witness); 219-222 (deliberation questions).)

On August 12, 2015, Vigil entered into a four-year deferred sentence agreement with the 17th Judicial District Attorney's Office, pursuant to which she agreed to plead guilty to criminal attempt to commit manslaughter.¹ She also

¹ The agreement also deferred the entry of a judgment of conviction on Vigil's plea. But, for ease of reference, this brief uses simply "deferred sentence."

pleaded to an added count of third degree assault, a class 1 misdemeanor, and was sentenced to four years of probation on that count.² (CF, pp 325-326, 330-332, 336-340; *see generally* TR 8/12/15.) §§ 18-3-104, 18-2-101(1),(4), C.R.S.

A little over three years later, on September 28, 2018, the probation department filed a Summons and Complaint for Revocation of Probation based on Vigil's use of medical marijuana, and the prosecution subsequently filed a Motion to Revoke the Deferred Sentence based on the complaint. (CF, pp 354-357, 364-365.) An evidentiary hearing was held on January 28, 2019. The district court, relying on a single positive test for alcohol in 2016 and missed drug tests, found Vigil had violated the terms of her deferred sentence. The court did not address Vigil's medical marijuana use. (TR 1/28/19, pp 34-36; CF, pp 336-338.)

The court entered the conviction on Vigil's felony plea and sentenced her to two years in community corrections. (TR 1/28/19, pp 36:7-24; CF, pp 389-340.) Vigil now appeals.

² Though the court also erroneously revoked this probation sentence, because Vigil will have served this sentence by the conclusion of this appeal, that portion of the appeal is moot. *See People v. Garcia*, 2014 COA 85, ¶ 10 (“[A] defendant's appeal of an order revoking probation is rendered moot after the defendant completes the resulting term of imprisonment.”).

SUMMARY OF THE ARGUMENT

Because the revocation of a deferred sentence is a deprivation of conditional liberty, and because the State has no interest in an erroneous revocation, due process requires an informed exercise of a probation officer's or district attorney's discretion to support a complaint for the revocation of a deferred sentence. Due process further requires that any revocation be based on a substantial violation of the deferred sentence agreement. Here, Vigil's probation officer was misled by the district attorney's office to believe that Vigil could not use medical marijuana while on her deferred sentence. But the terms of probation generally cannot restrict medical marijuana use. Because Vigil's probation officer filed for revocation based on misinformation regarding Vigil's medical marijuana use, and because the court failed to find whether the remaining alleged violations were substantial, the revocation should be vacated.

The case should be remanded for the probation officer to properly exercise his discretion (given the legality of Vigil's medical marijuana use) or, alternatively, for the court to determine whether the probation officer made an informed exercise of his discretion or whether Vigil substantially violated her deferred sentence's terms. Additionally, due process requires the State to timely pursue probation violations that they believe are worthy of revocation. They failed to do so here, and it was

therefore unfair for the court to revoke Vigil's deferred sentence based on a two-plus-year-old positive alcohol test, particularly without determining whether it was a substantial violation.

The vacation of the court's revocation order is required because the remaining ground for the court's revocation order—the missed drug tests—also cannot survive review. The missed drug tests cannot support Vigil's revocation because she did not receive notice of all the dates that the court relied upon in revoking her deferred sentence, and, moreover, there was evidence in the record that Vigil's noncompliance was based on her indigence. Without a willful violation, due process and equal protection prohibit revocation resulting in imprisonment on this ground.

If both the positive alcohol test and the missed drug test violations are found to be invalid, the revocation order must be vacated. However, even if only one condition is found invalid, reversal and remand is nonetheless required so the court, probation, and the district attorney may exercise their discretion to determine whether revocation was appropriate here.

Finally, remand is required for a reconsideration of Vigil's sentence and a correction of her mittimus because she pleaded guilty to attempt to commit manslaughter, a class 5 felony, but the court entered a conviction on reckless

manslaughter, a class 4 felony, and therefore misapprehended the correct presumptive sentencing range.

ARGUMENT

- 1. The district court violated Vigil’s due process rights by revoking her deferred sentence without finding the violation was “based on an informed exercise of discretion” or was “substantial,” where the record reflects her revocation was based on a misunderstanding of the law regarding medical marijuana and an over-two-year-old alleged positive alcohol test.**

A. Standard of review and preservation.

This Court reviews de novo whether a defendant’s due process rights have been violated in revocation proceedings. *People v. Calderon*, 2014 COA 144, ¶ 23. This issue is preserved because defense counsel argued that revocation was not lawful here because no order prohibited Vigil’s medical marijuana use. (TR 1/28/19, pp 17:14-15; 30:8-32:12.)

B. Relevant facts

- i. Vigil obtained her medical marijuana card and was authorized to use medical marijuana while on pre-trial supervision.*

While on pre-trial supervision, Vigil completed her medical marijuana application and obtained a physician’s recommendation for a medical marijuana card. The district attorney objected to Vigil’s use of medical marijuana despite her authorization, but the district court refused to second-guess the physician’s judgment. It noted that it would not enter an order prohibiting a defendant from

taking any other prescribed drug and permitted Vigil to use her medical marijuana while on pre-trial supervision. (See TR 8/20/14, pp 2:15-8:13.)

ii. *August 12, 2015: The Deferred Sentence Agreement and the Terms and Conditions of Probation did not mention medical marijuana.*

On August 12, 2015, Vigil entered into a deferred sentence agreement with the 17th Judicial District Attorney's Office. She agreed to plead guilty to criminal attempt to commit manslaughter, a class 5 felony. The agreement provided for Vigil's judgment and sentence to be deferred for four years and it contained ten written conditions. (CF, pp 336-340; see generally TR 8/12/15.)

As relevant here, Term #2 provided, "That [Vigil] receive and comply with probation supervision and comply with all terms and conditions of probation" and Term #4 provided, "That [Vigil] shall not use or possess alcohol for the period of the deferred sentence." Though the later-filed revocation complaint alleged that "Term #14" was violated by Vigil's missed drug tests, there was no "Term #14" in the agreement. Medical marijuana was also not mentioned. (CF, pp 336-340).

Terms and Conditions of Probation were also entered by the district court on the same date. As relevant here, Term #7 provided that Vigil "will submit to drug and alcohol testing as directed by probation." Term #14 was unrelated to drug testing and provided that "If convicted of a felony, I will sign a waiver of extradition

agreeing to waive all formal proceedings and return to Colorado in the event I am arrested in another state.” Medical marijuana was again not mentioned. (CF, pp 324-325.)

iii. 2015-2017: Vigil continued to medicate with marijuana while supervised by the probation department and, due to her success on probation, was moved to minimal supervision.

After she had been on probation for about one and a half years, Vigil was transferred to a new probation officer, who had a “minimum caseload,” which indicated Vigil was fully compliant with probation. She continued to use medical marijuana during this time. (TR 1/28/19, pp 14:6-13; 16:11-17:1.)

iv. September 2017: The district attorney informed the probation department that defendants on deferred sentences cannot use medical marijuana.

Around the same time, the 17th Judicial District’s District Attorney’s Office changed its stance regarding medical marijuana use, and Vigil’s probation officer was told by his supervisors to defer to the district attorney’s position that medical marijuana use was not permitted for individuals on a deferred sentence. (TR 1/28/19, pp 9:23-18.)

On September 8, 2017, Vigil’s probation officer first informed her that she could not use medical marijuana due to the district attorney’s position. Vigil continued to medicate with marijuana but otherwise largely complied with

probation. She continued to appear for her scheduled probation appointments and to make restitution payments. (*Id.* at 10:8-25; 17:7-18:19.)

On February 1, 2018, Vigil's probation officer contacted another district attorney to ask how to handle Vigil's continued use of medical marijuana. That district attorney noted that the medical marijuana use was not clearly prohibited under the deferred sentence agreement, but told the probation officer to request that Vigil discontinue her use. He also asked the probation officer to tell her that she would not be punished for past medical marijuana use, but that her continued use could result in a revocation. Vigil continued to medicate with marijuana but also continued to appear for her probation appointments and to make payments on her restitution. (*Id.* at 18:20-25).

v. *July 11, 2018: The new district attorney assigned to Vigil's case suggests that Vigil's probation officer file a complaint.*

On July 11, 2018, a new district attorney was assigned to Vigil's case. After reviewing the case, she suggested the probation officer file a complaint for revocation of probation based on Vigil's continued medical marijuana use. (TR 1/28/19, pp 20:16-21:9; CF, p 368.)

- vi. *September 28, 2018: Relying on the district attorney's suggestion, probation filed a Summons and Complaint for Revocation of Probation and Special Report asking the court for guidance regarding Vigil's medical marijuana use.*

On September 28, 2018, the probation department filed a Summons and Complaint for Revocation of Probation and a Special Report.

The "Special Report" explained the ongoing confusion regarding whether Vigil was authorized to use medical marijuana. It concluded that "Medical Marijuana seems to be the pressing issue and probation is respectfully seeking direction from the court in this matter." (CF, p 357).

The Complaint alleged that Vigil violated two terms of her deferred sentence, Term #4 and Term #14. It alleged Vigil violated Term #4 by testing positive for marijuana five times between December 8, 2017 and July 12, 2018, and by testing positive for alcohol one time over two years before, on July 26, 2016. The Complaint also alleged that Vigil violated Term #14 because, "Between October 18, 2017 and September 26, 2018, [Vigil] has failed to submit approximately 14 random drug screens." (CF, p 354).

Vigil denied the allegations and requested a hearing. (CF, p 358; TR 10/24/18, pp 3-4.)

Vigil continued to appear for her appointments with probation until the probation officer told her to stop in November. In December, Vigil restarted her drug testing on her own accord and submitted three tests which were positive for marijuana. (TR 1/28/19, pp 21-22.)

On December 5, 2018, the district attorney filed a “Motion to Revoke Deferred Sentence.” The motion explained that a condition of the deferred sentence was that Vigil follow all the conditions set forth by probation and that she failed to follow the conditions of probation as set forth in the September 28, 2018 “Special Report” and revocation complaint. (CF, pp 364-369.)

vii. January 28, 2019: The revocation hearing focused on medical marijuana, but the court did not determine whether Vigil’s medical marijuana use was a violation. It instead relied on alleged technical violations to revoke her deferred sentence.

The court held a revocation hearing on January 28, 2019, which focused on Vigil’s continued medical marijuana use. Vigil’s probation officer testified and reported there was significant confusion about whether Vigil could use medical marijuana while on her deferred sentence. (TR 1/28/19 at p 9:17-21; *see also id.* at pp 9:23-12:1) Defense counsel sought to ask Vigil’s probation officer, “if it wasn’t for the DAs policy regarding use of marijuana while on probation, it doesn’t sound

like you would have filed a complaint in this case?” But the court refused to permit the question, finding it irrelevant. (*Id.* at p 12:19-21.)

The probation officer also discussed Vigil’s one positive test for alcohol, on July 26, 2016, and her missed drug tests, including missed tests on dates not mentioned in the revocation complaint. (*Id.* at pp 8:2-18; 9:11-12.)

The district court took judicial notice of the Terms and Conditions of Probation and the Consent for Entry of Deferred Sentencing. (*Id.* at p 33:14-24.)

Though the revocation complaint alleged violations of Terms #4 and #14, the court relied on Terms #2 and #4 of the Consent for Entry of Deferred Sentencing to revoke Vigil’s deferred sentence. Term #4 provided that Vigil “shall not use or possess alcohol for the period of the deferred sentence.” Term #2 provided that Vigil must “receive and comply with probation supervision and comply with all terms and conditions of probation.” The court also noted Term #7 of the Terms and Conditions of Probation, which provided that Vigil “will submit to drug and alcohol testing as directed by probation.” (TR 1/28/19, p 34:1-5; CF, pp 336-338.)

The court found Vigil violated those conditions when she tested positive for alcohol on July 26, 2016, and when she missed the random drug tests. (TR 1/28/19, pp 35:23-36:3.) The court did not consider any missed drug tests after the revocation was filed on September 27, 2018, and it did not consider Vigil’s medical marijuana

use, even though the probation officer's Special Report specifically requested direction on this matter. (TR 1/28/19, p 35:2-19.) It did, however, rely on missed drug tests on dates not listed on the revocation complaint. (*Id.* at 35:23-36:3.)

Based on the violations, the court revoked Vigil's deferred sentence, after she had completed over three years of the four-year term. The court then entered a conviction on the class 4 felony of Reckless Manslaughter, though Vigil had pleaded guilty to the class 5 felony of attempt to commit manslaughter. (TR 1/28/19, p 36:22-25.)

In the Presentence Investigation Report (PSI), Vigil's probation officer stated he did not view Vigil as high risk and "for the most part she reported to probation and hasn't re-offended. The main issue is her smoking marijuana while on a deferred sentence." (CF, p 381.) The report primarily recommended Vigil be re-sentenced to probation. (CF, p 385.) The court sentenced Vigil to two years in community corrections. (TR 4/9/19, p 14:13-21; CF, pp 389-340.)

C. Because the terms of deferred sentencing agreements cannot exceed the terms authorized by the probation statute, the district attorney could not prohibit Vigil's medical marijuana use.

A deferred sentence, as authorized by statute, is a dispositional alternative to the traditional guilty plea. *Finney v. People*, 2014 CO 38, ¶ 14. Under section 18-1.3-102(1), C.R.S., a court may defer entry of a judgment of conviction and

imposition of a sentence on a defendant's guilty plea for up to four years. If the defendant fully complies with the conditions of the deferred sentence, the previously-entered guilty plea is withdrawn and the charges are dismissed with prejudice. *Id.*

Though a deferred sentence agreement is between the defendant and the district attorney's office, it is nonetheless a creature of statute. The statute authorizes the court to accept a deferred sentence. § 18-1.3-102(1), C.R.S. And the statute authorizes the district attorney to enter into these agreements, subject to statutory constraints on the terms imposed. § 18-1.3-102(2), C.R.S.

Specifically, under section 18-1.3-102(2), C.R.S., the conditions imposed in a deferred sentence agreement "shall be similar in all respects to conditions permitted as part of probation." *See also People v. Manzanares*, 85 P.3d 604, 607 (Colo. App. 2003) ("a person with a deferred judgment is supervised by the probation department and must comply with conditions similar to probation conditions"). The terms of probation are also derived from statute and, thus, must be authorized by the General Assembly. *People v. Bishop*, 7 P.3d 184, 187 (Colo. App. 1999); § 18-1.3-204, C.R.S.

Section 14 of article XVIII of Colorado's Constitution authorizes the use of medical marijuana in Colorado. The General Assembly has clarified that the

authorized use of medical marijuana under the Constitution shall *not* be considered another offense such that its use constitutes a probation violation, except if the probation was granted for a violation of the medical marijuana regulations. § 18-1.3-204(1)(b), C.R.S. It also explicitly prevents courts from imposing conditions of probation which prohibit the authorized possession or use of medical marijuana except (1) when probation is imposed due to certain marijuana-related convictions or (2) when the trial court makes a finding, based on material evidence, that the prohibition is “necessary and appropriate” to accomplish the goals of sentencing. § 18-1.3-204(2)(a)(VIII), C.R.S.; *see also Walton v. People*, 2019 CO 95. The deferred sentencing statute “does not delegate to the probation department or any other supervising agency the legislative power to go beyond these statutorily authorized terms and conditions.” *Bishop*, 7 P.3d at 187.

D. Due process requires an informed exercise of a probation officer’s or district attorney’s discretion when petitioning for the revocation of a deferred sentence; furthermore, the court must find the probation violation was substantial.

Either a probation officer or the district attorney may file a complaint for revocation of probation or for revocation of a deferred sentence. *See* §§ 18-1.3-102(2), 16-11-205(5), C.R.S. When the State seeks to revoke a deferred sentence, the accused is entitled to the same procedural safeguards as a defendant facing revocation of parole or probation. *See* § 18-1.3-102(2) (in a proceeding to revoke a

deferred judgment, “the procedural safeguards required in a revocation of probation hearing shall apply”); *Finney*, 2014 CO 38, ¶ 15. Thus, before the State may revoke someone’s liberty, it must provide:

- Written notice of the claimed violation(s);
- If arrested, a preliminary hearing at the time of arrest to determine if there is probable cause;
- Disclosure of the evidence against the probationer;
- The “opportunity to be heard in person and to present witnesses and documentary evidence[.]”
- “[T]he right to confront and cross-examine adverse witnesses[.]”

Morrissey v. Brewer, 408 U.S. 471, 485, 489 (1972) (applying these requirements to parole revocations); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (same for probation revocations); *People v. Allen*, 973 P.2d 620, 622 (Colo. 1999) (same for deferred sentence revocations); U.S. Const. amend. XIV; Colo. Const. art. II, §25. The prosecution normally bears the burden of establishing that the accused has violated the terms of her deferred sentence by a preponderance of evidence. § 18-1.3-102(2), C.R.S.

However, “consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature

of the government function involved as well as of the private interest that has been affected by governmental action.” *Morrissey*, 408 U.S. at 481 (quoting *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)). Because defendants’ interest in avoiding a criminal conviction and possible imprisonment are strong, and because the court generally lacks the discretion to reinstate a deferred sentence, due process requires a more searching judicial review of the State’s reasons for initiating a revocation in the deferred sentencing context. Specifically, in the deferred sentence context, fundamental fairness requires the district court to find that an informed exercise of the probation officer’s discretion supports the petition for revocation or, alternatively, the court should be required to find that any violation was a substantial, not just a “technical” or isolated, breach or violation of the defendant’s agreement with the district attorney.

First, an “informed exercise” or “substantial violation” test protects the private interests affected by deferred judgment revocation, which are significant. Due process is implicated by deferred sentence revocations because the defendant’s conditional liberty that the State seeks to revoke implicates the core values of unqualified liberty and inflicts a “grievous loss.” *Morrissey*, 408 U.S. at 482 (discussing due process for parole violation revocations); *see also Gagnon*, 411 U.S. at 782 (“Probation revocation, like parole revocation, is not a stage of a criminal

prosecution, but does result in a loss of liberty.”); *The Consequences of Conviction: Sanctions Beyond the Sentence under Colorado Law* (2014), available at <http://www.coloradodefenders.us/wp-content/uploads/2015/01/consequences-of-conviction.pdf> (last visited Nov. 15, 2019) (enumerating the collateral consequences of criminal convictions).

Second, an “informed exercise” or “substantial violation” test recognizes and balances the complex nature of the government function with respect to deferred sentencing. The purpose of deferred sentencing is to give courts the power to impose alternative sentences that benefit a defendant when the interests of justice would be served. *Pineda-Liberato v. People*, 2017 CO 95, ¶ 36. Though a deferred sentence primarily benefits the accused, it also helps society by keeping the accused integrated in society while she gains necessary skills to avoid further criminal behavior and it alleviates the costs of prosecuting or incarcerating that individual. *See Morrissey*, 408 U.S. at 477 (explaining parole helps reintegration and saves society from the costs of keeping individuals in prison).

Despite these complex interests, both the government’s and the individual’s, most of the discretionary decisions in the deferred sentence context are left to the State—specifically to individual district attorneys and individual probation officers. First, the district attorney exercises his discretion to enter into a deferred sentence

agreement and to delineate its terms; his discretion is checked only by the court's acceptance of the agreement and the legislature's limits on its terms. See § 18-1.3-102, C.R.S. Then the probation department typically supervises the defendant, and probation officers exercise their discretion in the reporting of any alleged violations, whether they report to the district attorney or to the court. Without an "informed exercise" or "substantial violation test," this exercise of discretion would be left virtually unfettered.

In the deferred sentence context, if due process does not require a judicial test reviewing this exercise of discretion for fairness before finding the deferred sentence agreement has been "breached," the district court has no choice but to enter a judgment of conviction once a violation of a deferred sentence condition—technical or substantial—has been found. See § 18-1.3-102(2), C.R.S. ("The stipulation shall specifically provide that, upon a breach by the defendant of any condition regulating the conduct of the defendant, the court shall enter judgment and impose sentence upon the guilty plea."); *People v. Widhalm*, 642 P.2d 498, 500 (Colo. 1982) (interpreting the predecessor deferred sentence statute to foreclose any judicial discretion after it finds a violation of the deferred sentence). In contrast, in the probation context, the court has the discretion to reinstate probation if the violation was insubstantial or if probation requested revocation erroneously but arbitrarily

included technical violations. § 16-11-206(5), C.R.S. The court’s discretion in the probation context again implies the necessity of judicial review in the deferred sentence context for the “informed exercise of discretion” or a “substantial violation” in order to achieve fundamental fairness.

The due process requirement that a probation officer make an informed exercise of his or her discretion and that revocations should be based on substantial violations is also confirmed by a close reading of the Supreme Court’s case, *Morrissey*, which addressed the due process requirements for parole revocations. The Court first recognized that “[i]mplicit in the system’s concern with [supervision] violations is the notion that the [supervisee] is entitled to retain his liberty as long as he *substantially* abides by the conditions of his [supervision].” *See Morrissey*, 408 U.S. at 479 (emphasis added). It explained that, in practice, a parole or probation officer ordinarily does not move to revoke supervision unless he thinks that the violations are so serious and continuing that they indicate the supervisee is not adjusting properly and cannot be counted on to avoid antisocial activity. *Id.* at 479.

The Supreme Court went on to explain that society, as well as the supervisee, “has an interest in not having [supervision] revoked . . . because of erroneous information or because of an erroneous evaluation of the need to revoke.” 408 U.S. at 484. In particular, “society has a further interest in treating the [supervisee] with

basic fairness: fair treatment in [. . .] revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.” *Id.*

Given this implicit entitlement of supervisees to maintain their conditional freedom absent a substantial probation violation, and society’s interest in avoiding misinformed and arbitrary revocations, it is clear that due process requires a greater degree of process for deferred sentence revocations, specifically some check on this exercise of the State’s discretion. And this check is particularly vital when a revocation complaint arbitrarily includes technical alleged violations, even though it is clear that the complaint was motivated by a substantial alleged violation.

These due process principles and the reasoning supporting their application were also recognized in *People v. Loveall*, 231 P.3d 408, 416 (Colo. 2010). There, the Colorado Supreme Court implicitly recognized that fundamental fairness relies on an informed exercise of discretion to bring fairness to revocation proceedings when technical violations are arbitrarily alleged. The *Loveall* court found that while a single probation violation could justify a district court's decision to revoke, “it is substantially less clear whether the probation officer *would* exercise his or her discretion to seek revocation” when one of the grounds motivating his or her revocation was found to be invalid. *Id.* at 416. In reaching this result, the court reasoned that the revocation of a probationary sentence based on a technical

violation is fundamentally unfair given that, in practice, revocation petitions are typically overbroad. The court recognized that probation officers usually only move for revocation based on *substantial* departures from the terms of probation, yet the officer's revocation complaint will generally include every alleged violation, whether "serious" or merely "technical." *Id.* Accordingly, after one of the grounds for revocation was found to be invalid on appeal, the Supreme Court affirmed the court of appeals' remand for a new revocation hearing on the probationary sentence, even though other grounds supported the revocation. *Id.*

Thus, pursuant to *Loveall* and *Morrissey*, in the deferred sentence context, fundamental fairness requires the district court to find that an informed exercise of the probation officer's discretion supports the petition for revocation and that any violation was a substantial, not just a "technical" or isolated, breach of the defendant's deferred sentence agreement with the district attorney.

As a result, here, where the probation officer and the district attorney's office erroneously evaluated the need to revoke and arbitrarily added allegations of technical violations to the revocation complaint, the court's failure to review this erroneous exercise of discretion and its failure to determine whether any of the remaining violations were substantial, violated Vigil's right to due process and require the vacation of the revocation order.

E. Reversal is required because the district attorney and the probation officer incorrectly believed Vigil's medical marijuana use violated the conditions of her deferred judgment.

Here, relying on the district attorney's position that Vigil could not use medical marijuana, Vigil's probation officer moved to revoke her deferred judgment based on her medical marijuana use. But the district attorney had not prohibited and could not have prohibited Vigil's use of medical marijuana as a condition of her deferred sentence under sections 18-1.3-102, C.R.S. and 18-1.3-204, C.R.S. Thus, this basis for revocation relied on an erroneous exercise of the State's discretion, in violation of due process. Because the court did not find that the remaining violations were substantial, vacation of the revocation order is required.

The district attorney here sought to unilaterally and illegally impose a new deferred sentence condition prohibiting Vigil from using medical marijuana. Not only is there no basis for adding a term to the agreement, but the term the district attorney sought to impose was barred by statute. Under subsections (1)(b) and (2)(a) of section 18-1.3-204, courts are generally prohibited from restricting medical marijuana use as a term of probation. These subsections became effective on May 8, 2015, almost three months before Vigil entered her deferred sentence agreement on August 12, 2015, and remained in effect at the time of revocation.

The district attorney did not dispute that Vigil was authorized to use medical marijuana under Colorado’s Constitution and the record reflects that she maintained an active medical marijuana card. (TR 1/28/19, p 22:17-20). Moreover, the district attorney never attempted to show that the statutory pre-requisites for a medical marijuana prohibition had been met: Vigil’s conviction was not marijuana-related and the district attorney never asked the court to make findings about whether a prohibition on Vigil’s use of medical marijuana was “necessary and appropriate” to accomplish the goals of sentencing. *Cf.* § 18-1.3-204(2)(a)(VIII), C.R.S. To the contrary, the trial court had permitted Vigil to use medical marijuana pre-trial and the deferred sentencing agreement was silent on the topic. Accordingly, no condition of Vigil’s deferred sentence could prohibit her use of medical marijuana, and any revocation complaint based on that authorized use lacked probable cause.

Yet, the district attorney repeatedly misled Vigil’s probation officer to believe that Vigil *was* prohibited from using medical marijuana and encouraged the probation officer to file a revocation based on that use, which the probation officer eventually did. The probation officer’s complaint and his Special Report show that solely the medical marijuana use motivated the revocation. Specifically, the Special Report focuses almost entirely on Vigil’s medical marijuana use and states: “Medical Marijuana seems to be the pressing issue and probation is respectfully

seeking direction from the court in this matter.” (CF, p 357.) But, particularly absent the due process protections required by *Loveall* and *Morrissey*, a revocation hearing is not an opportunity for the court to provide “direction” to probation about the terms of a probationer’s deferred sentence.

Indeed, had probation requested court guidance regarding medical marijuana via any other avenue but a revocation proceeding, and had the court provided accurate guidance to probation (and to the district attorney), it appears that Vigil would have been permitted to finish out her deferred sentence and been spared a felony conviction. Further, had the court properly considered whether (1) an informed exercise of Vigil’s probation officer’s discretion supported the petition for revocation or (2) any violations were substantial, as opposed to technical, breaches of Vigil’s agreement with the district attorney, the court would have been unable to revoke Vigil’s deferred sentence here. In such circumstances, due process requires something more than the unfair process that resulted in Vigil’s revocation.

And this due process error harmed Vigil because it was clear from the record that she would not have faced a revocation hearing had her probation officer (and the district attorney’s office) not been misinformed about the legality of her medical marijuana use. *See Hagos v. People*, 2012 CO 63, ¶ 12 (an error is harmful if it “substantially influenced the verdict or affected the fairness of the trial

proceedings”). Even in the PSI, Vigil’s probation officer maintained that his primary concern with continuing probation was Vigil’s medical marijuana use. *See United States v. Hamilton*, 708 F.2d 1412, 1415 (9th Cir. 1983) (finding revocation was an abuse of the court’s discretion where “there [was] nothing in the record to indicate that [the defendant] engaged in any sort of antisocial or opprobrious conduct for which probation should be revoked.”).

To the extent there is any ambiguity in the record regarding which violation was the true basis of the revocation complaint here, Vigil should not be prejudiced by this lack of clarity. Any lack of clarity stems from the district court prohibiting defense counsel from asking Vigil’s probation officer, “if it wasn’t for the DAs policy regarding use of marijuana while on probation, it doesn’t sound like you would have filed a complaint in this case?” (TR 1/28/19, p12:19-21.) The court found this question was irrelevant, but *Loveall* makes clear that the probation officer’s calculus regarding which violations warrant revocation is relevant in revocation proceedings, on appeal, and on remand. *See* 231 P.3d at 416. Such questioning is relevant and necessary to protect society’s interest in avoiding revocations based on erroneous evaluations of the need to revoke—and such an erroneous evaluation and revocation occurred here. *See Morrissey*, 408 U.S. at 484.

The vacation of the court's revocation order is thus required, as is a remand for the probation officer to withdraw his misinformed petition for revocation, on which the district attorney based their subsequent motion to revoke the deferred sentence. On remand, Vigil's deferred sentence should also be reinstated. Alternatively, at the very least, on remand the district court should be required to make the findings necessary for its ruling to comport with due process.

F. The district court also violated Vigil's right to due process when it revoked Vigil's deferred sentence based on a two-year-old positive alcohol test.

Fundamental fairness also prohibits the revocation of Vigil's deferred sentence based on a single two-plus-year-old positive alcohol test, and therefore her revocation cannot be affirmed on this ground either.

In accord with principles of fundamental fairness, Colorado case law has recognized that the revocation of a deferred sentence should be not based on stale claims. *See People v. Silcott*, 494 P.2d 835, 837, 177 Colo. 451, 453–54 (1972) (finding it fundamentally unfair to revoke a defendant's probation for his prior failure to make payments after accepting payments for a period of several months); *see also Manzanares*, 85 P.3d at 608 (finding defendant's deferred sentence cannot be revoked based on an alcohol violation that occurred at least two years prior when probation dismissed a revocation complaint after it knew of the violation and

defendant extended his deferred sentence in reliance on the dismissal of that complaint).

The same principle has been recognized in federal cases, where it is again based on notions of fundamental fairness. *See United States v. Hamilton*, 708 F.2d 1412, 1414 (9th Cir. 1983) (“The district court's discretion does, however, have limitations, and we have authority to review revocation decisions for fundamental unfairness or for an abuse of discretion.”). The Ninth Circuit has recognized that at some point known probation violations become stale or waived and thus cannot be used to revoke probation. *Id.* at 115 (finding a three-year-old violation to be too stale). And the Fifth Circuit has recognized that an unreasonable delay in bringing charges of violations does not serve either the interests of society or of the probationer. *United States v. Tyler*, 605 F.2d 851, 853 (5th Cir. 1979) (finding charges the probation officer knew of for a year or more were too stale).

Thus, here, the district court’s reliance on Vigil’s single positive test for alcohol on July 26, 2016, to revoke her deferred sentence—an isolated probation violation that was over two years old when the revocation complaint was filed—violated principles of fundamental fairness and due process. Though due process forbids reliance on stale claims generally, fairness in this regard could also be assured by applying a substantial violation test. Here, this single technical breach,

without more, is not a substantial violation of Vigil's deferred sentence agreement with the State.

Though the staleness of this violation was not raised at the revocation hearing, unpreserved errors are reviewed for plain error. Here, this error was obvious and substantial. *See People v. Sandoval*, 2018 CO 21, ¶ 11 (an error is plain if it is obvious and substantial). The age of this alleged violation obviates Vigil's reliance on her probation officer's decision not to pursue a revocation and her inability to defend against such a stale claim. Vigil continued to report to probation and substantially complied with those terms and conditions for two years after this alleged violation occurred. And, two years later, it seems unlikely she could recall, much less defend against, this violation. Accordingly, it was obvious that it was fundamentally unfair for the court to rely on this violation to revoke her deferred sentence. *See Sandoval*, 2018 CO 21, ¶ 12 (an error is obvious if it contravenes Colorado case law or well-known legal principles); *see also Silcott*, 494 P.2d at 837, 177 Colo. at 453–54; *Manzanares*, 85 P.3d at 608.

And this error was substantial, since without this alleged violation only the missed drug tests support the court's revocation, and as the next sections show, that ground too fails under scrutiny. But even if only this ground for revocation is invalid, the probation officer may not have filed the complaint and the court may not

have revoked Vigil's deferred sentence based on only the missed drug tests. Reversal and a remand is therefore required to determine whether the court, and the State, would exercise their discretion to revoke based on any remaining valid alleged violations. *See Loveall*, 231 P.3d at 416; *see also* Part 4, below.

2. The district court violated Vigil's right to due process when it revoked her deferred sentence without adequate notice that the court would rely on missed drug tests outside the dates of October 18, 2017 through September 26, 2018.

A. Standard of review and preservation.

Consistent with principles of due process, those facing revocation of a deferred sentence must be given adequate notice of the alleged violations or charges against which they must defend. *Bishop*, 7 P.3d at 188; *accord People v. Robles*, 209 P.3d 1173, 1174 (Colo. App. 2009). Whether an accused received constitutionally sufficient written notice of a claimed violation is a mixed question of law and fact. *Robles*, 209 P.3d at 1174. An appellate court defers to the trial court's factual findings, but its conclusions of law are reviewed de novo. *Calderon*, 2014 COA 144, ¶ 31. Because this issue is raised for the first time on appeal, review is de novo since the district court made no factual findings. Reversal is required because this error was plain.

B. Relevant facts

As relevant here, the revocation complaint gave Vigil notice that her probation and deferred sentence was being revoked because “[b]etween October 18, 2017 and September 26, 2018 [Vigil . . .] failed to submit approximately 14 random drug screens.” (CF, p 354.) Vigil had been originally informed that the district attorney disapproved of her medical marijuana use in September of 2017. And at her revocation hearing, Vigil’s defense counsel argued the missed drug tests, which, according to the complaint, all post-dated the erroneous notice that Vigil’s continued medical marijuana use could result in revocation, should not result in her revocation since the missed tests likely resulted from the marijuana misinformation. (See TR 1/28/19, p 31:18-23.)

The court ultimately revoked Vigil’s deferred sentence based on her probation officer’s testimony that Vigil missed drug testing on seven dates which preceded the noticed dates—December 15, 2015; December 23, 2015; December 26, 2015; January 23, 2016; February 6, 2016; February 20, 2016; March 2, 2016—as well as the dates within the range of which Vigil received notice. (See TR 1/28/19, p 35:2-16.)

C. Analysis

The accused has a constitutional and statutory right to written notice of the condition of probation or of her deferred sentence that she is alleged to have violated. *Calderon*, 2014 COA 144, ¶ 30; U.S. Const. amend. XIV; Colo. Const. art. II, § 25; § 16-11-205(5), C.R.S. The statutory right requires that, among other things, the accused shall receive notice of “the violation charged and the condition of probation alleged to have been violated, including the date and approximate location thereof.” § 16-11-205, C.R.S.

The State’s and the court’s failure to give Vigil notice of the specific dates of the violations which the court relied on in revoking her deferred sentence was plain error. *See Sandoval*, 2018 CO 21, ¶ 11 (an error is plain if obvious and substantial). First, an error is obvious if it contravenes well-settled legal principles and Colorado case law. Here, the error was obvious because it violated Vigil’s long-recognized due process and statutory right to notice of the specific probation violations with which she was charged. *See, e.g., People v. Moses*, 64 P.3d 904, 908 (Colo. App. 2002) (“A probationer has a due process right to be informed of the specific probation violations with which he or she is charged prior to a probation revocation hearing.”); *accord People v. McKitchens*, 655 P.2d 858, 860 (Colo. App. 1982);

Calderon, 2014 COA 144, ¶ 30; U.S. Const. amend. XIV; Colo. Const. art. II, § 25; § 16-11-205(5), C.R.S.

Second, this error was also substantial. The error handicapped Vigil’s ability to defend against the revocation charges since she was not aware she needed to defend against the missed drug tests pre-dating the medical marijuana confusion. Vigil’s defense against this violation relied entirely on their timing. Without notice of the earlier missed tests, defense counsel had no reason to know Vigil needed to defend against those earlier missed tests, which the court ultimately relied on. *Cf. Robles*, 209 P.3d at 1175 (finding notice was constitutionally sufficient in part because the defendant did not claim that the form of notice compromised his ability to present a defense at the revocation hearing). Though the court relied on some missed drug tests that Vigil and her counsel had notice of, this error may still have resulted in Vigil’s revocation because her counsel may have entirely changed her defense strategy if she had been given sufficient notice. As explained below, Vigil may have been able to show that she only missed the drug tests due to her inability to pay, and not because she willfully violated the terms of her deferred sentence.

Regardless, because this lack of notice violated Vigil’s right to due process, reversal is required. *See Calderon*, 2014 COA 144, ¶ 31 (“Failure to provide written

notice is a violation of due process that requires reversal.”); *accord McKitchens*, 655 P.2d at 860.

3. The district court violated Vigil’s right to due process when it revoked her deferred judgment and sentence based on her missed drug tests since the record does not reflect a willful violation but rather an inability to pay.

A. Standard of review and preservation.

Constitutional challenges to sentencing determinations are reviewed de novo. *Sharrow v. People*, 2019 CO 25, ¶ 27. This error was not preserved, likely because the controlling opinion, *Sharrow*, was published in April of 2019, after the revocation hearing, which occurred in January. Accordingly, it is reviewed for plain error. *See Cardman v. People*, 2019 CO 73, ¶¶ 18-19.

B. Relevant facts

The probation revocation complaint alleged that Vigil violated “Term #14: Between October 18, 2017 and September 26, 2018, the defendant has failed to submit approximately 14 random drug screens.” (CF, p 354.) The district court relied on Vigil’s missed drug tests as one of the two grounds it found justified the revocation of her deferred sentence.

Before the revocation hearing, Vigil’s probation officer’s “Special Report” explained that Vigil has “struggled financially and with her monitored sobriety” while on probation. The Report also explained that though “[p]robation has assisted

the defendant by submitting numerous vouchers for random drug screens,” Vigil had “continued to miss several drug tests.” (CF, pp 356-357.) At the revocation hearing, Vigil’s indigence was not discussed, though she was represented by an attorney from the public defender’s office. (See TR 1/28/19, p 1.) Instead, the public defender argued the missed drug tests resulted from the continued confusion surrounding Vigil’s medical marijuana use.

However, before sentencing, the PSI reflected that Vigil explained that she “did not submit the urine screens because she was unable to afford them” and that she “stated that she was not provided with vouchers despite [her probation officer] ‘promising them’ to her.” (CF, p 382.)

C. Applicable law

Due process and equal protection requires that when a defendant asserts she lacks the financial means to comply with a nonpayment condition of probation, the district court cannot revoke probation and impose imprisonment without first determining whether she failed to comply with probation willfully or failed to make sufficient bona fide efforts to acquire resources to comply with probation. *Sharrow*, 2019 CO 25, ¶ 42; U.S. Const. amends. V, XIV; Colo. Const. art. II, §§16, 25; see also *Bearden v. Georgia*, 461 U.S. 660, 667-668 (1983). The prosecution bears the

burden of proving by a preponderance of the evidence that the violation was willful or that bona fide efforts were not made. *Sharrow*, ¶¶ 47-48.

D. Analysis

Here, Vigil’s deferred sentence was revoked and she was sentenced to imprisonment—community corrections—based on her alleged failure to submit required drug tests. Though defense counsel did not specifically argue that Vigil could not afford the required drug testing at the hearing, it appears probation was aware of her financial struggles. Moreover, probation’s “Special Report,” the appointment of the public defender, and, eventually, the PSI, made the court aware that Vigil likely could not afford to pay for drug testing.

Specifically, because the court took judicial notice of the “Special Report,” which noted that Vigil had received vouchers for her drug test and that she had “struggled financially,” the court was on notice of Vigil’s financial struggles. Moreover, though filed after the revocation hearing, the PSI also specifically put the court on notice that Vigil herself believed her missed drug tests were solely the result of her inability to pay since it reflected that “she did not submit the urine screens because she was unable to afford them” and not because she willfully missed the tests. *See Sharrow*, ¶ 44 (“it is incumbent on the defendant to assert that his lack of financial means prevented him from complying with a nonpayment condition of

probation.”). Given this notice to the court, combined with the court relying on unnoticed missed drug tests, Vigil should not be harmed by her counsel’s failure to raise this defense at the revocation hearing.

Once the district court was put on notice that Vigil had “struggled financially”—whether by probation’s “Special Report,” or by the appointment of the public defender, or by the PSI—the district court’s failure to make any findings regarding whether Vigil willfully violated this condition of her deferred sentence was an error under *Sharrow*. 2019 CO 25, ¶ 42; *see also Williams v. People*, 2019 CO 101, ¶¶ 34-35 (requiring the court to make factual findings before revoking probation based on failure to pay).

This error obviously violated the rule of *Sharrow* at the time of appeal. *See Sandoval*, 2018 CO 21, ¶ 12 (an error is obvious if it contravenes Colorado case law). It was substantial because it undermined the fairness of Vigil’s revocation proceeding: the revocation proceeding here deprived Vigil of conditional freedom because, through no fault of her own, she lacks the financial means to comply with this term of her deferred sentence. *Sharrow*, ¶ 39. And, because the district court’s reliance on the positive test for alcohol cannot stand, this erroneous violation would be the only remaining basis for the court’s revocation order.

Thus, reversal and a remand for additional findings regarding Vigil's financial status is required. If she is unable to comply with drug testing due to her indigence, this ground cannot be relied on to revoke her deferred sentence or, at the very least, imprisonment can only be required if there is no adequate alternative to fulfill the State's sentencing interests. *See Sharrow*, ¶ 42; *see also Williams*, ¶¶ 34-35. A remand is also required to permit the State to knowingly exercise their discretion in determining whether to request the revocation of Vigil's deferred sentence in light of any remaining valid alleged violations. *See Loveall*, 231 P.3d at 416; *see also* Part 4, below.

4. A remand is necessary if this Court finds one ground for revocation is invalid, but the remaining one is affirmed.

A. Standard of review and preservation.

Because this issue concerns a remedy on appeal, rather than a district court error, it need not have been preserved in the district court.

When one of multiple grounds for revoking a deferred sentence has been found invalid on appeal, but others have been affirmed, this Court reviews de novo whether “the record clearly shows the trial court would have reached the same result even without consideration of the improper factors.” *Loveall*, 231 P.3d at 416-17 (quotation omitted). If the record does not clearly support that conclusion, a remand for further proceedings is required. *Id.*

B. Application

As the Colorado Supreme Court recognized in *Loveall*, where one or more grounds for revoking probation are set aside on appeal, it becomes unclear whether “the probation officer *would* exercise his or her discretion to seek revocation—or, for that matter, whether the district court would remain willing to revoke— based solely on the remaining violation.” *Id.* at 416 (emphasis in original).

Hence, this Court should remand here because the record fails to clearly show that the “court would have reached the same result even without consideration of the improper factors.” *Id.* (quotation omitted). As explained above, none of the court’s grounds for revoking Vigil’s deferred sentence were valid, and the court’s revocation order should therefore be vacated. But even if this Court finds a valid ground for revocation remains, reversal and a remand is required under *Loveall* because it is substantially unclear whether the State would have petitioned for revocation without the medical marijuana use issue, much less whether the State would have moved for revocation had it known that either of the two remaining grounds for revocation were invalid.

5. The case should be remanded for a correction of the mittimus and a resentencing because the district court mistakenly entered judgment of conviction on reckless manslaughter, a class 4 felony, instead of criminal attempt to commit manslaughter, a class 5 felony.

A. Standard of review and preservation

When a court sentences a defendant on a crime different from that which she pleaded guilty to, the error is structural. *See Medina v. People*, 163 P.3d 1136, 1138, 1141-1142 (Colo. 2007) (finding the same in the context of a jury verdict).

Though typically a district court's sentencing decisions will not be overturned absent an abuse of discretion, a court abuses its discretion if it misapprehends the scope of its discretion in imposing a sentence. *See People v. Rice*, 2015 COA 168, ¶ 9. In such cases, a remand is required for reconsideration of the sentence within the appropriate sentencing range. *Id.*

B. Relevant facts

Vigil's Consent for Entry of Deferred Sentencing, signed by both her and the district attorney, reflects an agreement for a deferred sentence to "criminal attempt to commit manslaughter," a class 5 felony. (CF, pp 336-340). *See* §§ 18-3-104, 18-2-101(1),(4), C.R.S. At the disposition hearing, the district court advised Vigil that she was entering an agreement for a deferred sentence to "criminal attempt to commit manslaughter," a class 5 felony, and described the possible penalties for a class 5 felony. (TR 8/12/15, pp 11:5-9; 15:7-15.) Yet, the Conditions of Probation

document entered the same date states the probation conditions relate to a deferred for “reckless manslaughter (F4).” (CF, p 324.)

And after the district court found Vigil had violated her deferred sentence, it entered a conviction for “reckless manslaughter,” a class 4 felony, instead of “attempt to commit manslaughter,” a class 5 felony. (TR 1/28/19 p 36:22-25; CF, pp 389-390.) The PSI then analyzed Vigil’s case under the mistaken belief that she was convicted of the class 4 felony of reckless manslaughter (though the PSI still recommended Vigil be sentenced to probation). (CF, pp 377, 384-386.) The defense requested probation and the prosecution did not request a range at the sentencing hearing.

The court sentenced Vigil to two years in community corrections. (CF, pp 389-390.) This would be the minimum presumptive sentence for a class 4 felony, which entails a sentence range of two to six years in the department of corrections or community corrections, but is in the middle of the presumptive range for a class 5 felony, which entails a sentencing range of one to three years in the department of corrections or community corrections. *See* § 18-1.3-401(1)(a)(V)(A), C.R.S.

C. Analysis

Even if Vigil’s revocation is upheld, she is still entitled to a correction of her mittimus to reflect the correct conviction for “attempt to commit manslaughter,” a

class 5 felony, and to a resentencing. Though Vigil entered into a deferred sentence by pleading guilty to “criminal attempt to commit manslaughter,” the district court erroneously entered a conviction on “reckless manslaughter” instead.

Clerical mistakes in judgments, arising from oversight or omission, may be corrected by the court at any time. Crim. P. 36. When the district court entered a conviction for “reckless manslaughter,” a class 4 felony, it appears it committed a clerical mistake in entering the wrong conviction and the wrong class of felony. This clerical mistake in the judgment should be corrected on remand. *See* Crim. P. 36.

Remand is required because this clerical error resulted in the district court misapprehending the correct presumptive sentencing range, since the record fails to clarify which range the court applied. The court appeared to believe it was sentencing Vigil on a class 4 (instead of a class 5) felony, and thus it may have erroneously believed that what would have been the midpoint of the correct presumptive range for a class 5 felony was, instead, the minimum possible presumptive sentence, given that it believed it was applying the presumptive sentencing range for a class 4 felony. *See* § 18-1.3-41(1)(a)(V)(A), C.R.S. This error requires this Court to vacate Vigil’s sentence and remand the case. *Rice*, 2015 COA 168, ¶ 9; *see also Medina*, 163 P.3d at 1138, 1142-1143 (when a court sentences a defendant on a crime different from that on which the jury’s verdict is

based, such an error is a structural sentencing error requiring the sentence be vacated).

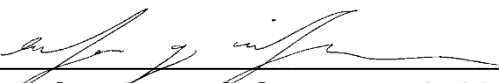
On remand, Vigil's mittimus should be corrected to reflect a conviction for "attempt to commit manslaughter," a class 5 felony, and the court should reconsider her sentence in light of the appropriate presumptive sentencing range of one to three years in the department of corrections or community corrections. *People v. Linares-Guzman*, 195 P.3d 1130, 1137 (Colo. App. 2008) ("Where a trial court misapprehends the scope of its discretion in imposing sentence, a remand is necessary for reconsideration of the sentence within the appropriate sentencing range."); *People v. Lancaster*, 2015 COA 93, ¶ 57 (remanding where the record was insufficient to allow the reviewing court to determine the court's understanding of the sentencing range); *see also People v. Smalley*, 2015 COA 140, ¶¶88-90 (remanding for correction of the mittimus to reflect the correct felony classification).

CONCLUSION

For the reasons expressed in Parts 1 through 3, this Court should vacate Vigil's conviction and the district court's order revoking Vigil's deferred judgment and sentence. If this Court reverses some but not all of the grounds for revocation, for the reasons expressed in Part 4, it should reverse and remand this case for a hearing to determine whether the State would exercise its discretion to seek revocation on

the remaining grounds. Finally, as explained in Part 5, Vigil's conviction must be vacated and corrected and remand is required for a reconsideration of Vigil's sentence within the appropriate sentence range.

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CERTIFICATE OF SERVICE

I certify that, on January 2, 2020, a copy of this Opening Brief was electronically served through Colorado Courts E-Filing on L. Andrew Cooper of the Attorney General's Office through their AG Criminal Appeals account.