

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

2 **STATE OF NEW MEXICO,**

Court of Appeals of New Mexico
Filed 3/28/2024 10:38 AM

3 Plaintiff-Appellee,



Cynthia A. Hernandez-Madrid
Acting Chief Clerk

4 v.

No. A-1-CA-41088

5 **RODNEY GONZALEZ,**

6 Defendant-Appellant.

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

8 **Jane Shuler Gray, District Court Judge**

9 Raúl Torrez, Attorney General
10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender
13 Santa Fe, NM
14 Steven J. Forsberg, Assistant Appellate Defender
15 Albuquerque, NM

16 for Appellant

17 **MEMORANDUM OPINION**

18 **YOHALEM, Judge.**

19 {1} Defendant appeals from a district court order revoking his probation. We
20 issued a calendar notice proposing to affirm. Defendant has responded with a
21 memorandum in opposition, in which he raises a new issue, which we treat as a
22 motion to amend. We deny the motion and affirm the district court.

1 **Motion to Amend**

2 {2} In cases assigned to the summary calendar, this Court will grant a motion to
3 amend the docketing statement to include additional issues if the motion (1) is
4 timely, (2) states all facts material to a consideration of the new issues sought to be
5 raised, (3) explains how the issues were properly preserved or why they may be
6 raised for the first time on appeal, (4) demonstrates just cause by explaining why the
7 issues were not originally raised in the docketing statement, and (5) complies in other
8 respects with the appellate rules. *See State v. Rael*, 1983-NMCA-081, ¶ 15, 100 N.M.
9 193, 668 P.2d 309. This Court will deny motions to amend that raise issues that are
10 not viable, even if they allege fundamental or jurisdictional error. *See State v. Moore*,
11 1989-NMCA-073, ¶ 42, 109 N.M. 119, 782 P.2d 91, *overruled on other grounds by*
12 *State v. Salgado*, 1991-NMCA-044, 112 N.M. 537, 817 P.2d 730.

13 {3} Here, Defendant is attempting to raise the issue of whether his underlying
14 sentence is illegal. [MIO 2] Defendant points out that his plea agreement did not rule
15 out a habitual enhancement of his sentence, and Defendant admitted to the prior
16 conviction. [RP 68] If imposed, a habitual enhancement would not be subject to
17 suspension or deferment. [MIO 2] *See* NMSA 1978, § 31-18-17 (2003). Defendant's
18 argument is that the district court did not comply with this mandatory provision
19 when it did not impose an actual sentence at the time of the original sentence. [RP
20 82] However, the original sentence was the product of a plea agreement, where the

1 State had agreed to hold off seeking habitual enhancement, reserving the right to
2 bring a supplemental information in the event that Defendant violated probation. [RP
3 68] This reservation is a common practice, and reflects the State’s broad charging
4 discretion. *See State v. Leyba*, 2009-NMCA-030, ¶ 21, 145 N.M. 712, 204 P.3d 37
5 (stating that “the [s]tate [has] broad discretion to seek habitual offender
6 enhancement[s]”). As such, we do not deem Defendant’s new issue to be viable.

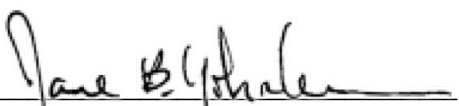
7 **Issue in the Docketing Statement**

8 {4} Defendant’s sole issue in the docketing statement challenged the sufficiency
9 of the evidence to support the revocation of probation. Our calendar notice proposed
10 to affirm. Defendant’s memorandum in opposition does not challenge the proposed
11 affirmance. We therefore deem the issue to be abandoned. *See State v. Johnson*,
12 1988-NMCA-029, ¶ 8, 107 N.M. 356, 758 P.2d 306 (explaining that when a case is
13 decided on the summary calendar, an issue is deemed abandoned when a party fails
14 to respond to the proposed disposition of that issue).

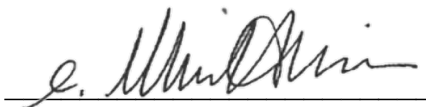
15 **CONCLUSION**

16 {5} For the reasons set forth above, we affirm.

17 {6} **IT IS SO ORDERED.**

18 
19 **JANE B. YOHALEM, Judge**

1 **WE CONCUR:**

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3 **J. MILES HANISEE, Judge**

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5 **ZACHARY A. IVES, Judge**