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

Court of Appeals of New Mexico
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2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,



Mark Reynolds

4 v.

No. A-1-CA-42697

5 **JEREMY LICON,**

6 Defendant-Appellant.

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

8 **Steven A. Romero, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Aarons Law PC

13 Stephen D. Aarons

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **WRAY, Judge.**

18 {1} Defendant appeals from the district court's order revoking his probation and
19 committing Defendant to the Department of Corrections. We issued a calendar
20 notice proposing to affirm. Defendant filed a memorandum in opposition, which we
21 have duly considered. Unpersuaded, we affirm.

1 {2} We proposed to affirm because the time limits for conducting an initial
2 hearing and commencing an adjudicatory hearing had been met and, even if they had
3 not been met, Defendant had not demonstrated prejudice from any delay. [CN 3-5]
4 See Rule 5-805(G), (L) NMRA. In his memorandum in opposition, Defendant does
5 not respond to these proposed conclusions. Where a party has not responded to the
6 Court’s proposed disposition of an issue, that issue is deemed abandoned. *See State*
7 *v. Salenas*, 1991-NMCA-056, ¶ 2, 112 N.M. 268, 814 P.2d 136.

8 {3} Instead, Defendant limits his argument in the memorandum to a single new
9 issue: because Defendant has since been acquitted of the charge on which the district
10 court based the revocation, revocation was improper. [MIO 3-4] We construe the
11 inclusion of this new argument as a motion to amend the docketing statement. *See*
12 *Rule 12-208(F) NMRA* (permitting amendment of the docketing statement “on good
13 cause shown”); *see also State v. Moore*, 1989-NMCA-073, ¶ 42, 109 N.M. 119, 782
14 P.2d 91 (explaining that the essential elements of good cause to amend a docketing
15 statement are that (1) the motion to amend is timely, (2) “the new issue sought to be
16 raised was either (a) properly preserved below or (b) allowed to be raised for the first
17 time on appeal,” and (3) the issue raised is viable), *superseded by rule on other*
18 *grounds as recognized in State v. Salgado*, 1991-NMCA-044, ¶ 2, 112 N.M. 537,
19 817 P.2d 730.

1 {4} For his new argument, Defendant relies on *Maes v. State*, 1972-NMCA-124,
2 84 N.M. 251, 501 P.2d 695. [MIO 4] In *Maes*, the district court revoked the
3 defendant’s probation after he was charged with a new crime. *Id.* ¶ 2. The defendant
4 was acquitted of the charge and filed a motion for post-conviction relief. *Id.* ¶¶ 1, 2.
5 The district court denied the motion and the defendant appealed. *Id.* ¶ 1. This Court
6 reversed the district court’s order and remanded for consideration of the motion,
7 holding that where a defendant is acquitted of charges on which a previous probation
8 revocation was based, revocation may be proper if it was based on proof that the
9 underlying conduct occurred. *Id.* ¶ 7. Conversely, if revocation was based solely on
10 the fact that the defendant was charged, the subsequent acquittal renders the
11 revocation improper. *Id.*

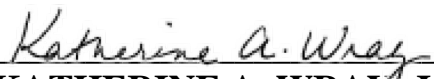
12 {5} Under *Maes*, Defendant’s newly asserted argument is colorable. However, by
13 raising this argument on direct appeal from his probation revocation, rather than by
14 post-conviction motion as in *Maes*, 1972-NMCA-124, ¶¶ 1-2, Defendant necessarily
15 asks this Court to address facts and evidence outside of the record in this case, which
16 we will not do. *See State v. Hunter*, 2001-NMCA-078, ¶ 18, 131 N.M. 76, 33 P.3d
17 296 (“Matters not of record present no issue for review.”). The question raised by
18 Defendant’s subsequent acquittal is whether the State established “with reasonable
19 certainty” that Defendant violated the conditions of probation, even though the State
20 did not prove beyond a reasonable doubt that Defendant committed the crime. *State*

1 v. *Guthrie*, 2011-NMSC-014, ¶ 14, 150 N.M. 84, 257 P.3d 904 (“A violation of the
2 conditions of probation must be established with such reasonable certainty as to
3 satisfy the conscience of the court of the truth of the violation” and “[i]t does not
4 have to be established beyond a reasonable doubt.” (alteration, internal quotation
5 marks, and citation omitted)); *Maes*, 1972-NMCA-124, ¶ 7. Defendant’s acquittal,
6 which he asserts would render his revocation improper, occurred in a different
7 underlying district court case and is therefore not part of the record here. Moreover,
8 Defendant’s acquittal occurred after he had already filed his notice of appeal in this
9 case. Because the relevant facts and proceedings necessary for review of
10 Defendant’s argument are beyond the scope of the record in this case and should be
11 decided in the first instance by the district court, this claim would be better addressed
12 by the district court in a habeas corpus or other post-conviction proceeding. *See*
13 *Maes*, 1972-NMCA-124, ¶¶ 1-2, 7; *see also* Rule 5-802(H)(5) NMRA (allowing a
14 district court to hold evidentiary hearings in habeas corpus proceedings); *cf.* *State v.*
15 *Melendrez*, 2014-NMCA-062, ¶ 32, 326 P.3d 1126 (stating that an ineffective
16 assistance effective assistance of counsel claim was best brought in a habeas corpus
17 proceeding, not on direct appeal, because it concerned matters not in the record). We
18 therefore deny the motion to amend. *See Moore*, 1989-NMCA-073, ¶ 42 (stating that
19 good cause for amending a docketing statement includes requirement for new issue
20 to have been preserved below).

1 {6} Based on the above, we conclude that Plaintiff has not demonstrated error in
2 our proposed disposition. *See Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124
3 N.M. 754, 955 P.2d 683 (“Our courts have repeatedly held that, in summary calendar
4 cases, the burden is on the party opposing the proposed disposition to clearly point
5 out errors in fact or law.”). We further conclude that because resolution of
6 Defendant’s newly asserted argument would require review of facts and evidence
7 not of record, any such claim would be more appropriately adjudicated in a habeas
8 corpus or other post-conviction proceeding.

9 {7} Accordingly, we affirm for the reasons stated in our notice of proposed
10 disposition.

11 {8} **IT IS SO ORDERED.**

12 
13 **KATHERINE A. WRAY, Judge**

14 **WE CONCUR:**

15 
16 **MEGAN P. DUFFY, Judge**

17 
18 **SHAMMARA H. HENDERSON, Judge**