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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. 35,580**

5       **RODNEY GONZALEZ,**

6             Defendant-Appellant.

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

8       **Lisa B. Riley, District Judge**

9       Hector H. Balderas, Attorney General

10       Santa Fe, NM

11       for Appellee

12       Bennett J. Baur, Chief Public Defender

13       Kathleen T. Baldrige, Assistant Appellate Defender

14       Santa Fe, NM

15       for Appellant

16                                       **MEMORANDUM OPINION**

17       **GARCIA, Judge.**

18       {1}     Defendant appeals his convictions for possession of heroin, methamphetamine,

1 marijuana, and for tampering with evidence. Defendant has responded with a  
2 memorandum in opposition and a motion to amend the docketing statement. For the  
3 reasons discussed below, we hereby grant the motion to amend, but it does not prevent  
4 us from issuing an opinion at this time. We affirm.

### 5 **MOTION TO AMEND**

6 {2} Defendant has filed a motion to amend the docketing statement to add a new  
7 issue. [MIO I] In cases assigned to the summary calendar, this Court will grant a  
8 motion to amend the docketing statement to include additional issues if the motion (1)  
9 is timely, (2) states all facts material to a consideration of the new issues sought to be  
10 raised, (3) explains how the issues were properly preserved or why they may be raised  
11 for the first time on appeal, (4) demonstrates just cause by explaining why the issues  
12 were not originally raised in the docketing statement, and (5) complies in other  
13 respects with the appellate rules. *See State v. Rael*, 1983-NMCA-081, ¶ 15, 100 N.M.  
14 193, 668 P.2d 309. This Court will deny motions to amend that raise issues that are  
15 not viable, even if they allege fundamental or jurisdictional error. *See State v. Moore*,  
16 1989-NMCA-073, ¶¶ 42-43, 109 N.M. 119, 782 P.2d 91, *overruled on other grounds*  
17 *by State v. Salgado*, 1991-NMCA-044, 112 N.M. 537, 817 P.2d 730.

18 {3} Here, Defendant is seeking to add a challenge to the sufficiency of the evidence  
19 to support his conviction for possession of marijuana. Because the marijuana was

1 found in the same baggie as the heroin and methamphetamine, our analysis in the  
2 calendar notice on the other sufficiency challenges applies equally to the marijuana  
3 conviction. Accordingly, Defendant has had the opportunity to respond to our legal  
4 and factual analysis on this issue, and we incorporate our calendar notice for purposes  
5 of addressing the marijuana possession conviction.

6 **SUFFICIENCY**

7 {4} Defendant continues to challenge the sufficiency of the evidence to support his  
8 convictions for possession of heroin, methamphetamine, and marijuana. [MIO 3] A  
9 sufficiency of the evidence review involves a two-step process. Initially, the evidence  
10 is viewed in the light most favorable to the verdict. Then the appellate court must  
11 make a legal determination of “whether the evidence viewed in this manner could  
12 justify a finding by any rational trier of fact that each element of the crime charged has  
13 been established beyond a reasonable doubt.” *State v. Apodaca*, 1994-NMSC-121, ¶  
14 6, 118 N.M. 762, 887 P.2d 756 (internal quotation marks and citations omitted).

15 {5} In order to convict Defendant, the evidence had to show that Defendant  
16 knowingly was in possession of heroin, methamphetamine, and marijuana. [RP 106-  
17 108] Here, officers detained Defendant at a convenience store, and had placed him in  
18 handcuffs. [MIO 2; DS 3] A woman approached, and Defendant stated that it was his  
19 sister, and he wanted to give her a hug before being taken away. [MIO 2; DS 3] As she

1 approached, Defendant was observed reaching into his pocket and seemed to be  
2 pulling something out. [MIO 2; DS 4] When they hugged, Defendant was observed  
3 transferring something to the woman. [DS 4] Officers instructed the woman to show  
4 what Defendant had placed in her hand, and she showed them a baggie that contained  
5 heroin, methamphetamine, and marijuana. [MIO 2-3; DS 4] In light of this evidence,  
6 we conclude that the jury could reasonably determine that Defendant had knowingly  
7 been in possession of heroin, methamphetamine and marijuana. Although Defendant  
8 claims that there was insufficient evidence of constructive possession, the jury was  
9 also instructed on actual possession [RP 109], and in this case there was evidence of  
10 actual possession.

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

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

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**TIMOTHY L. GARCIA, Judge**

15 **WE CONCUR:**

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**JAMES J. WECHSLER, Judge**

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**MICHAEL E. VIGIL, Judge**