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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. A-1-CA-36752

5 **EDWARD REYES,**

6 Defendant-Appellant.

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

8 **Benjamin Chavez, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 C. David Henderson, Assistant Public Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **VIGIL, Judge.**

18 {1} Defendant appeals from convictions for aggravated battery against a household

19 member and aggravated stalking after entering into an unconditional plea agreement.

1 [RP 49-53, 57-60] We issued a notice of proposed summary disposition proposing to
2 dismiss the appeal, and Defendant has responded with a memorandum in opposition.
3 Having considered Defendant's response, we continue to believe that dismissal is
4 warranted in this case. Therefore, for the reasons set out below and in our notice of
5 proposed summary disposition, we dismiss.

6 {2} In our notice, we discussed the fact that Defendant's plea agreement did not
7 reserve any issues for appeal, and pointed to case law indicating that an unconditional
8 plea like the one entered into by Defendant in this case waives a defendant's right to
9 challenge his convictions or sentence on direct appeal. *State v. Chavarria*, 2009-
10 NMSC-020, ¶¶ 9, 17, 146 N.M. 251, 208 P.3d 896. We also noted the difficulty posed
11 by the fact that a defendant may not attack a plea agreement for the first time on
12 appeal, but must instead file a motion to withdraw the plea in district court before
13 requesting relief from this Court. *State v. Andazola*, 2003-NMCA-146, ¶ 25, 134 N.M.
14 710, 82 P.3d 77. Defendant's memorandum in opposition acknowledges our citations
15 to *Chavarria* and *Andazola* and attempts to distinguish the cases. In addition,
16 Defendant seeks to add a new issue. [MIO 3] For the reasons that follow, we deny
17 Defendant's motion to amend and dismiss.

18 {3} First, we understand Defendant to suggest that *Chavarria* was undermined by
19 the Supreme Court's decision in *State v. Rudy B.*, 2010-NMSC-045, 149 N.M. 22, 243

1 P.3d 726. Relying on *Rudy B.*, Defendant argues that waiver of appeal in a plea
2 agreement does not divest this Court of jurisdiction. [MIO 2, 7-8] Because Defendant
3 challenged the condition “promptly at sentencing, the hearing at which it was first
4 contemplated,” [MIO 2] Defendant suggests that this Court should consider the issue
5 raised on direct appeal. [MIO 2] We are not persuaded. *Rudy B.* simply acknowledges
6 that there is a difference between waiver of the right to an appeal and jurisdiction to
7 hear an appeal. 2010-NMSC-045, ¶ 12. In this case, as we explained in our calendar
8 notice, because Defendant did not reserve any issues in his plea agreement, he waived
9 the right to appeal. *See id.* (recognizing the “well-established principle that a voluntary
10 plea of guilty or nolo contendere ordinarily constitutes a waiver of the defendant’s
11 right to appeal his conviction on other than jurisdictional grounds.” (internal quotation
12 marks and citations omitted)).

13 {4} Second, Defendant seeks to amend the docketing statement to include the issue
14 of whether the “blanket condition of probation resulted in an illegal sentence within
15 the . . . meaning of *Chavarria*.” [MIO 3] However, we continue to believe that his
16 remedy, if any, lies in an action filed in the district court rather than via direct appeal
17 to this Court. *See id.* ¶ 17 (noting that a defendant can either enter a conditional plea
18 to reserve issues for appellate review or, following the imposition of a sentence, may
19 file motions to remedy an illegal sentence pursuant to Rule 5-801 NMRA or Rule 5-

1 802 NMRA). Because this issue is not viable, we deny Defendant’s motion to amend.
2 *See State v. Moore*, 1989-NMCA-073, ¶¶ 36-51, 109 N.M. 119, 782 P.2d 91
3 (explaining that this Court will deny motions to amend that raise issues that are not
4 viable, even if they allege fundamental or jurisdictional error), *superceded by rule on*
5 *other grounds as stated in State v. Salgado*, 1991-NMCA-044, 112 N.M. 537, 817
6 P.2d 730.

7 {5} Lastly, Defendant attempts to distinguish *Chavarria* on the basis that it “rests
8 on concepts of knowing waiver.” [MIO 3] He argues that because the plea agreement
9 said nothing about the no-contact order as a condition of probation, he had no notice
10 that his sentence would include such a provision and the sentence was therefore not
11 in accord with his agreement. [MIO 3-4, 13-15] Again, we point out that Defendant
12 failed to move to withdraw his plea agreement. Accordingly, he cannot “attack the
13 plea for the first time on direct appeal.” *See, e.g., State v. Andazola*, 2003-NMCA-146,
14 ¶ 25, 134 N.M. 710, 82 P.3d 77 (holding that if a defendant fails to file a motion in the
15 trial court to withdraw a plea, the defendant cannot attack the plea for the first time on
16 appeal). At this juncture, “he is limited to seeking relief in collateral proceedings.” *Id.*
17 Further, we point out that the plea agreement clearly contemplates that Defendant may
18 need to serve a period of probation. [RP 49-53] The district courts have broad
19 discretion to effect rehabilitation and may impose conditions “designed to protect the

1 public against the commission of other offenses during the term, and which have as
2 their objective the deterrence of future misconduct.” *State v. Donaldson*, 1983-
3 NMCA-064, ¶ 33, 100 N.M. 111, 666 P.2d 1258 (citation omitted). Defendant was
4 convicted of aggravated battery against a household member and aggravated stalking;
5 the mother of his children was the victim of these crimes. [MIO 1] In light of this
6 history of domestic violence, it was entirely reasonable and foreseeable that the
7 district court would impose the no-contact condition in an effort to deter Defendant
8 from further terrorizing either the victim or the children, who were indirectly
9 victimized by Defendant’s crimes. *Cf. State ex rel. Children, Youth & Families Dep’t*
10 *v. Joe R.*, 1997-NMSC-38, ¶ 32, 123 N.M. 711, 945 P.2d 76 (observing that father
11 effectively neglected child by murdering mother); *State v. Trujillo*, 2002-NMCA-100,
12 ¶ 20, 132 N.M. 649, 53 P.3d 909 (recognizing the risk of harm to a child’s emotional
13 health as a result of witnessing a violent attack on her mother); *State v. Garcia*,
14 2005-NMCA-065, ¶¶ 12-13, 137 N.M. 583, 113 P.3d 406 (upholding a condition of
15 probation that prohibited the defendant from having further contact with minors,
16 including his own children, on grounds that the condition was reasonably related to
17 achieving the sentencing goal of deterring further criminal conduct). Thus, to the
18 extent that Defendant claims that he had no notice that this condition might be
19 imposed, we are not persuaded—the condition that Defendant have no contact with

1 his victim is clearly foreseeable and a standard condition of probation. *See* N.M. Corr.
2 Dep't Prob. & Parole Div., *Standard Probation Supervision*,
3 <http://cd.nm.gov/ppd/ppd.html> (last visited March 21, 2018).

4 {6} Based on the foregoing as well as the discussion in our notice of proposed
5 summary disposition, we dismiss Defendant's appeal.

6 {7} **IT IS SO ORDERED.**

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MICHAEL E. VIGIL, Judge

9 **WE CONCUR:**

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LINDA M. VANZI, Chief Judge

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STEPHEN G. FRENCH, Judge