

STATE V. BURKHOLDER

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CHARLOTTE BURKHOLDER,
Defendant-Appellant.**

No. A-1-CA-36367

COURT OF APPEALS OF NEW MEXICO

March 8, 2018

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY, James Waylon Counts,
District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

Bennett J. Baur, Chief Public Defender, Santa Fe, NM, Steven J. Forsberg, Assistant
Appellate Defender, Albuquerque, NM, for Appellant

JUDGES

MICHAEL E. VIGIL, Judge. WE CONCUR: JULIE J. VARGAS, Judge, DANIEL J.
GALLEGOS, Judge

AUTHOR: MICHAEL E. VIGIL

MEMORANDUM OPINION

VIGIL, Judge.

{1} Defendant appeals her convictions for aggravated assault with intent to kill, aggravated battery (deadly weapon), and tampering with evidence. We issued a calendar notice proposing to affirm. Defendant has responded with a memorandum in

opposition and a motion to amend the docketing statement. For the reasons discussed below, we hereby deny the motion to amend and affirm the district court judgment.

{2} Motion to Amend: Defendant has moved to amend the docketing statement to add the issue of whether double jeopardy requires merger of her conviction for aggravated assault with intent to kill and her conviction for aggravated battery (deadly weapon). [MIO 2] See Rule 12-208(F) NMRA (providing that the Court may allow an amendment of the docketing statement upon a showing of good cause). As Defendant concedes [MIO 2], her argument is contrary to the holding in *State v. Cowden*, 1996-NMCA-051, ¶ 10, 121 N.M. 703, 917 P.2d 972. Accordingly, we deem the issue to be not viable. See *State v. Moore*, 1989-NMCA-073, ¶ 42, 109 N.M. 119, 782 P.2d 91, *superseded by rule on other grounds as stated in State v. Salgado*, 1991-NMCA-044, 112 N.M. 537, 817 P.2d 730.

{3} Issue: Defendant's sole issue in the docketing statement claimed that trial counsel was ineffective. Our calendar notice proposed to hold that she had not established a prima facie showing of ineffective assistance of counsel and, to the extent that Defendant considers the issue to have merit, it is more appropriately addressed in a habeas corpus proceeding. Defendant's memorandum in opposition does not dispute the correctness of our calendar notice. See *State v. Mondragon*, 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003 (noting that a party responding to a summary calendar notice must come forward and specifically point out errors of law and fact), *superseded by statute on other grounds as stated in State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374

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

{5} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

JULIE J. VARGAS, Judge

DANIEL J. GALLEGOS, Judge