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

2 **STATE OF NEW MEXICO,**

Court of Appeals of New Mexico

Filed 2/14/2024 12:58 PM

3 Plaintiff-Appellee,

4 v.

No. A-1-CA-41125

  
Cynthia A. Hernandez-Madrid  
Acting Chief Clerk

5 **MARCIAL E. ROMERO,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

8 **T. Glen Ellington, 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 **MEDINA, Judge.**

19 {1} Defendant appeals the revocation of his probation, challenging the sufficiency  
20 of the evidence to establish the violation and asserting that he was denied due process  
21 during the revocation hearing. We issued a notice of proposed summary disposition  
22 proposing to affirm. Defendant has filed a response in which he expressly abandons  
23 the issues raised in the docketing statement.

1 {2} Defendant also raises a new argument in his response, which we will construe  
2 as a motion to amend the docketing statement. In cases assigned to the summary  
3 calendar, this Court will grant a motion to amend the docketing statement to include  
4 additional issues if the motion (1) is timely, (2) states all facts material to a  
5 consideration of the new issues sought to be raised, (3) explains how the issues were  
6 properly preserved or why they may be raised for the first time on appeal, (4)  
7 demonstrates just cause by explaining why the issues were not originally raised in  
8 the docketing statement, and (5) complies in other respects with the appellate rules.  
9 *See State v. Rael*, 1983-NMCA-081, ¶¶ 7-8, 10-11, 14-17, 100 N.M. 193, 668 P.2d  
10 309. This Court will deny motions to amend that raise issues that are not viable, even  
11 if they allege fundamental or jurisdictional error. *See State v. Moore*, 1989-NMCA-  
12 073, ¶¶ 36-51, 109 N.M. 119, 782 P.2d 91, *overruled on other grounds by State v.*  
13 *Salgado*, 1991-NMCA-044, ¶ 2, 112 N.M. 537, 817 P.2d 730.

14 {3} Pursuant to the motion to amend, Defendant argues that he was induced to  
15 enter the underlying plea agreement by the promise of an illegal sentence and that  
16 the sentence imposed was in fact illegal. [MIO 1-8] We understand the facts and  
17 proceedings relevant to this issue as follows. On August 23, 2021, Defendant  
18 pleaded guilty to two counts of shoplifting (over \$500). [RP 109-119] The plea  
19 agreement contained terms stating that the State may seek to impose habitual  
20 offender enhancements should Defendant later violate probation. [RP 113; MIO 2]

1 We understand Defendant to argue that the provisions of the Habitual Offender Act  
2 are mandatory, and the State does not have discretion to hold its enforcement in  
3 abeyance. Defendant argues that he was therefore induced to enter the plea  
4 agreement by the promise of an illegal sentence, the sentence he received was illegal,  
5 and the plea agreement is void. [MIO 2-6]

6 {4} Defendant relies on language in this Court’s opinion in *State v. Sedillo*, 1971-  
7 NMCA-003, ¶ 9, 82 N.M. 287, 480 P.2d 401, for the proposition that prosecutors  
8 have no discretion in deciding whether to bring habitual offender proceedings. [MIO  
9 4] *See id.* (“There is no merit to the claim that our statutory law gives the district  
10 attorney discretion as to whether he will invoke the habitual criminal provision.”).  
11 However, this statement in *Sedillo* is not essential to its holding and is thus  
12 nonbinding dicta. *See State v. Johnson*, 2001-NMSC-001, ¶ 16, 130 N.M. 6, 15 P.3d  
13 1233 (stating that while the “Court of Appeals should give [Supreme Court dicta]  
14 adequate deference,” it is not binding authority); *see also Ruggles v. Ruggles*, 1993-  
15 NMSC-043, ¶ 22 n.8, 116 N.M. 52, 860 P.2d 182 (stating that dictum is a statement  
16 “unnecessary to [a] decision of the issue before the Court . . . no matter how  
17 deliberately or emphatically phrased”).

18 {5} We understand Defendant to assert that this Court’s statement in *Sedillo* was  
19 not dicta because the Court’s view that the prosecutor had no discretion was central  
20 to its determination that there was no constitutional violation. [MIO 7-8] We

1 disagree. This Court’s holding that there was no constitutional violation in *Sedillo*  
2 was not dependent on any determination that the prosecutor had no sentencing  
3 discretion and was premised on an assumption that there was uneven enforcement  
4 of the Habitual Offender Act occurring in practice. *See Sedillo*, 1971-NMCA-003,  
5 ¶ 10.

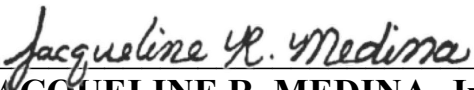
6 {6} Moreover, our Supreme Court has reaffirmed a prosecutor’s discretion in  
7 bringing habitual offender proceedings. *See State v. Trujillo*, 2007-NMSC-017, ¶ 10,  
8 141 N.M. 451, 157 P.3d 16 (stating that a “prosecutor may seek a[] habitual-offender  
9 enhancement at any time following conviction, as long as the sentence enhancement  
10 is imposed before the defendant finishes serving the term of incarceration and any  
11 parole or probation that may follow that term” and “[i]f the [s]tate exercises its  
12 discretion and seeks such an enhancement during the appropriate time frame, the  
13 trial court is obligated to impose the enhancement once the defendant is proven to  
14 be a habitual offender” (internal quotation marks and citation omitted)).  
15 Accordingly, we conclude that Defendant was not induced to enter the plea  
16 agreement by the promise of an illegal sentence, nor was he subject to an illegal  
17 sentence by any language suggesting that certain habitual offender proceedings  
18 would be held in abeyance, and we reject his argument that the plea agreement was  
19 void.

1 {7} Defendant also argues that the plea bargaining process in this case was a  
2 violation of equal protection because the State threatened to impose habitual  
3 offender on enhancements if Defendant chose to exercise his constitutional right to  
4 a trial. [MIO 6] However, Defendant has not sufficiently developed this argument  
5 apart from a block quotation to an encyclopedia discussing selective prosecution,  
6 and therefore, the issue is not adequately developed for our review. *See State v.*  
7 *Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (stating that appellate courts are  
8 under no obligation to review unclear or undeveloped arguments); *see also State v.*  
9 *Duttle*, 2017-NMCA-001, ¶ 15, 387 P.3d 885 (“For this Court to rule on an  
10 inadequately briefed constitutional issue would essentially require it to do the work  
11 on behalf of [the d]efendant.”); *State v. Clifford*, 1994-NMSC-048, ¶ 19, 117 N.M.  
12 508, 873 P.2d 254 (reminding counsel that the appellate courts are not required to  
13 do their research).

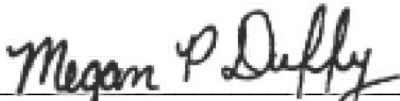
14 {8} Finally, Defendant argues that the plea agreement violates the separation of  
15 powers doctrine because it shifts sentencing authority to the prosecutor and away  
16 from its proper place in the judicial and legislative branches. This contention,  
17 however, has been considered and rejected by our Supreme Court. *See Sedillo*, 1971-  
18 NMCA-003, ¶¶ 9-10 (holding that the predecessor statute to NMSA 1978, Section  
19 31-18-17 (2003) did not violate separation of powers and that uneven enforcement  
20 of the Habitual Offender Act does not make the law unconstitutional).

1 {9} For these reasons, we conclude that the issues raised in Defendant's motion  
2 to amend the docketing statement are not viable. We therefore deny the motion to  
3 amend and affirm the district court. *See State v. Ibarra*, 1993-NMCA-040, ¶ 13, 116  
4 N.M. 486, 864 P.2d 302 (indicating that if the issue, which the defendant seeks to  
5 add to the docketing statement is not viable, the motion to amend will be denied).

6 {10} **IT IS SO ORDERED.**

7   
8 JACQUELINE R. MEDINA, Judge

9 **WE CONCUR:**

10   
11 MEGAN P. DUFFY, Judge

12   
13 JANE B. YOHALEM, Judge