

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

2 Opinion Number: _____

3 Filing Date: **JUNE 28, 2016**

4 **NO. 34,478**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellant,

7 v.

8 **JENNIFER LASSITER, a/k/a**

9 **JENNIFER RUSSELL,**

10 Defendant-Appellee.

11 **APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY**

12 **John A. Dean Jr., District Judge**

13 Hector H. Balderas, Attorney General

14 Santa Fe, NM

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16 Albuquerque, NM

17 for Appellant

18 Arlon L. Stoker

19 Farmington, NM

20 for Appellee

1 **OPINION**

2 **ZAMORA, Judge.**

3 {1} Defendant Jennifer Lassiter entered a plea of no contest to drug trafficking,
4 contrary to NMSA 1978, Section 30-31-20 (2006), and she was sentenced by the
5 district court. The State appeals, arguing that the district court erred in sentencing
6 Defendant for second degree drug trafficking instead of first degree drug trafficking
7 for a second or subsequent offense. For the following reasons, we affirm.

8 **BACKGROUND**

9 {2} In 2009 Defendant was charged with trafficking methamphetamine. Defendant
10 entered a guilty plea to a first-offense drug trafficking charge and received a
11 conditional discharge order, pursuant to NMSA 1978, Section 31-20-13(A) (1994).
12 Without entering an adjudication of guilt, the district court ordered that Defendant be
13 placed on probation for a period of three years. In 2010, Defendant was granted early
14 release from probation. The district court entered an order of conditional discharge
15 dismissing the drug trafficking charge.

16 {3} In 2013 Defendant was arrested and charged with trafficking methamphetamine
17 and tampering with evidence. Defendant entered a plea of no contest to the drug
18 trafficking charge. The State argued that the conviction was a second offense
19 punishable as a first degree felony under Section 30-31-20(B)(2). Defendant argued

1 that she should be sentenced as a first time offender since the previous charge was
2 dismissed after she completed the terms of the conditional discharge. The district
3 court did not consider the prior conditional discharge as a prior drug trafficking
4 offense and sentenced Defendant for a first offense under Section 30-31-20(B)(2).
5 This appeal followed.

6 **DISCUSSION**

7 **Standard of Review**

8 {4} Whether the conduct underlying Defendant’s conditional discharge in the 2009
9 drug trafficking case constitutes an “offense” under the enhancement provision of the
10 trafficking statute, Section 30-31-20(B), is a question of statutory interpretation we
11 review de novo. *See State v. Holt*, 2016-NMSC-011, ¶ 9, 368 P.3d 409. In
12 interpreting statutory language, “our main goal . . . is to give effect to the
13 Legislature’s intent.” *State v. Hall*, 2013-NMSC-001, ¶ 9, 294 P.3d 1235. “To discern
14 the Legislature’s intent, [this] Court looks first to the plain language of the statute,
15 giving the words their ordinary meaning, unless the Legislature indicates a different
16 one was intended.” *State v. Almanzar*, 2014-NMSC-001, ¶ 14, 316 P.3d 183
17 (alteration, internal quotation marks, and citation omitted). However, “[i]f the
18 language of the statute is clear and unambiguous, we must give effect to that language
19 and refrain from further statutory interpretation.” *State v. Chavez*, 2016-NMCA-016,

1 ¶ 7, 365 P.3d 61 (internal quotation marks and citation omitted), *cert. granted*,
2 2016-NMCERT-001, ___ P.3d ___. Where “the relevant statutory language is
3 unclear, ambiguous, or reasonably subject to multiple interpretations, then [this]
4 Court should proceed with further statutory analysis.” *Almanzar*, 2014-NMSC-001,
5 ¶ 15.

6 **Defendant’s Conditional Discharge**

7 {5} In 2009 Defendant entered a guilty plea to a drug trafficking charge and
8 received a conditional discharge pursuant to Section 31-20-13. Section 31-20-13(A)
9 provides that:

10 When a person who has not been previously convicted of a felony
11 offense is found guilty of a crime for which a deferred or suspended
12 sentence is authorized, the court may, without entering an adjudication
13 of guilt, enter a conditional discharge order and place the person on
14 probation on terms and conditions authorized by [NMSA 1978,]
15 Section[] 31-20-5 [(2003)] and [NMSA 1978, Section] 31-20-6 [(2007)].
16 A conditional discharge order may only be made available once with
17 respect to any person.

18 {6} Under Section 31-20-13(A), a court entering an order of conditional discharge
19 must also place the defendant on probation. Upon successful completion of probation,
20 the charges against the defendant must be dismissed without an adjudication of guilt.
21 *See, e.g., State v. C.L.*, 2010-NMCA-050, ¶ 8, 148 N.M. 837, 242 P.3d 404 (holding
22 that after successfully completing probation pursuant to a Section 31-20-13
23 conditional discharge order, the defendant received the benefit of having the case

1 against her dismissed without an adjudication of guilt). A conditional discharge
2 entered without an adjudication of guilt is not considered a conviction. *See State v.*
3 *Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374 (stating that a defendant granted a
4 conditional discharge pursuant to Section 31-20-13 is not considered a convicted
5 felon or prohibited from possessing a firearm under NMSA 1978, Section 30-7-
6 16(C)(2) (2001)); *see also State v. Herbstman*, 1999-NMCA-014, ¶ 20, 126 N.M.
7 683, 974 P.2d 177 (holding that a defendant granted a conditional discharge pursuant
8 to Section 31-20-13, who is neither adjudicated guilty nor convicted, is not required
9 to register as a convicted sex offender).

10 **The Term “Offense”**

11 {7} The State acknowledges that a conditional discharge is not considered a
12 conviction under New Mexico law. However, the drug trafficking statute does not
13 prescribe an enhanced sentence after a defendant’s first conviction, but rather after
14 the first *offense*. *See* § 30-31-20(B) (“A person who violates this subsection is: (1) for
15 the first offense, guilty of a second degree felony . . .; and (2) for the second and
16 subsequent offenses, guilty of a first degree felony[.]”). Therefore, the State argues
17 that the conditional discharge entered in Defendant’s 2009 drug trafficking case
18 should be considered a first offense for the purpose of enhancing her current drug
19 trafficking sentence.

1 {8} Section 30-31-20 does not define the term “offense” as it is used in that section.
2 The State asserts that an offense is simply an illegal act, whereas a conviction is a
3 legal judgment that a person is guilty of a crime. This view is oversimplified. In its
4 most basic form, an “offense” is defined as “[a] violation of the law[or] a crime.”
5 *Black’s Law Dictionary* 1250 (10th ed. 2014). However, the term “offense” carries
6 many connotations. *See id.* (“‘The terms ‘crime,’ ‘offense,’ and ‘criminal offense’ are
7 all said to be synonymous, and ordinarily used interchangeably. ‘Offense’ may
8 comprehend every crime and misdemeanor, or may be used in a specific sense as
9 synonymous with ‘felony’ or with ‘misdemeanor,’ as the case may be, or as signifying
10 a crime of lesser grade, or an act not indictable, but punishable summarily or by the
11 forfeiture of a penalty.’ ” (quoting 22 C.J.S. *Criminal Law* § 3, at 4 (1989)). The
12 State’s blurred distinctions between an illegal act and a criminal offense and these
13 broad connotations do not provide much guidance in determining whether the
14 conduct underlying the conditional discharge constitutes an offense.

15 {9} As the State noted, a conditional discharge has legal and practical
16 consequences. The language of Section 31-20-13 indicates that a conditional
17 discharge is a punishment for underlying criminal conduct. A conditional discharge
18 may not be entered unless there is an initial finding of guilt on the underlying
19 conduct. *Id.* Upon a finding of guilt on the underlying criminal conduct, the defendant

1 is placed on probation, which New Mexico courts have long recognized as a form of
2 punishment. *See State v. Villalobos*, 1998-NMSC-036, ¶ 12, 126 N.M. 255, 968 P.2d
3 766 (“[I]t has been judicial policy to use probation as an acute form of punishment
4 and a rehabilitation tool.”); *State v. Baca*, 2004-NMCA-049, ¶ 17, 135 N.M. 490, 90
5 P.3d 509 (“Probation is a form of criminal sanction; it is one point on a continuum
6 of possible punishments.” (alteration, internal quotation marks, and citation omitted));
7 *State v. Donaldson*, 1983-NMCA-064, ¶ 33, 100 N.M. 111, 666 P.2d 1258 (“A judge,
8 in fashioning the terms of probation, may impose conditions reasonably related to the
9 probationer’s rehabilitation, which are designed to protect the public against the
10 commission of other offenses during the term, and which have as their objective the
11 deterrence of future misconduct.” (citation omitted)). Accordingly, New Mexico
12 courts have consistently recognized a conditional discharge under Section 31-20-13
13 as punishment for criminal conduct. *See In re Treinen*, 2006-NMSC-013, ¶ 3, 139
14 N.M. 318, 131 P.3d 1282 (“A *sentence* of conditional discharge may be imposed
15 under Section 31-20-13(A)[.]” (emphasis added)); *Harris*, 2013-NMCA-031, ¶ 7
16 (stating that “the conditional discharge statute contemplates that a defendant will be
17 subject to probation during his *sentence*” (emphasis added)); *Vives v. Verzino*, 2009-
18 NMCA-083, ¶ 15, 146 N.M. 673, 213 P.3d 823 (referring to a conditional discharge
19 as a type of “punishment”); *Herbstman*, 1999-NMCA-014, ¶ 11 (recognizing that “a

1 conditional discharge is a permissible reduction of *sentence* under Rule 5-801(B)
2 [NMRA]” (emphasis added).

3 {10} Moreover, a defendant who receives a conditional discharge will face some
4 long-term consequences. The entry of a conditional discharge order precludes the
5 defendant from receiving a conditional discharge for subsequent charges. *See* § 31-
6 20-13. The criminal charges and conditional discharge order will remain part of the
7 defendant’s criminal record, even after the completion of probation. *See C.L.*, 2010-
8 NMCA-050, ¶¶ 7, 15 (explaining that the conditional discharge statute does not
9 implicitly grant the district court the authority to order the expungement of the
10 defendant’s criminal records upon the successful completion of the terms of
11 probation); *Toth v. Albuquerque Police Dep’t*, 1997-NMCA-079, ¶ 8, 123 N.M. 637,
12 944 P.2d 285 (“Courts which recognize an inherent power to expunge arrest records
13 have tempered this power by requiring that it be exercised sparingly and only in
14 extraordinary circumstances.”). As we discuss in greater detail below, a defendant
15 who has received a conditional discharge under Section 31-20-13 can be classified
16 as a habitual offender. *See* NMSA 1978, § 31-18-17 (2003). The State argues that the
17 various consequences stemming from a conditional discharge support the inference
18 that an “offense” includes the conduct underlying a conditional discharge, because
19 if the underlying conduct was not found to be a criminal offense the imposition of

1 criminal penalties would be unconstitutional. *See* N.M. Const. art. II, § 18 (“No
2 person shall be deprived of life, liberty[,] or property without due process of law[.]”).
3 We are not the least persuaded by the State’s argument. Section 31-20-13 effectively
4 renders the “offense” unavailable for purposes of guilt adjudication if the conditional
5 discharge is successful, ultimately resulting in no adjudication of guilt. We can see
6 no rational interpretative basis on which to permit enhancement of penalties received
7 in a conviction of a separate crime using an “offense” as to which Defendant was
8 never adjudicated guilty.

9 {11} The fact that the conduct underlying a conditional discharge may fit within the
10 broad dictionary definition of the term “offense,” does not clearly indicate to us that
11 the Legislature intended for that conduct to be the basis for enhanced sentences under
12 Section 30-31-20. *See State v. Martinez*, 2006-NMCA-068, ¶ 5, 139 N.M. 741, 137
13 P.3d 1195 (cautioning appellate courts to be careful in the application of the plain
14 meaning rule as “its beguiling simplicity may mask a host of reasons why a statute,
15 apparently clear and unambiguous on its face, may for one reason or another give rise
16 to legitimate . . . differences of opinion concerning the statute’s meaning” (alteration,
17 internal quotation marks, and citation omitted)). In 1993, when the Legislature
18 enacted the conditional discharge statute, it also amended the habitual offender statute
19 to “specifically include conditional discharge orders as usable for habitual offender

1 sentence enhancement purposes, as well as prior convictions.” *Herbstman*, 1999-
2 NMCA-014, ¶ 20 (internal quotation marks omitted); *see* § 31-18-17(B) (defining a
3 “habitual offender” as an individual that has incurred “prior felony convictions that
4 were parts of separate transactions or occurrences[,] *or conditional discharge under*
5 *Section 31-20-13*” (emphasis added)). By contrast, the drug trafficking statute, which
6 existed in 1993, was not similarly amended to expressly authorize an enhanced
7 sentence based on a prior conditional discharge. *See* § 30-31-20. We presume that the
8 Legislature was aware of Section 30-31-20 when it enacted the conditional discharge
9 statute. *State v. Maestas*, 2007-NMSC-001, ¶ 21, 140 N.M. 836, 149 P.3d 933 (“We
10 presume that the [L]egislature is well informed as to existing statutory and common
11 law[.]” (internal quotation marks and citation omitted)). If the Legislature wanted to
12 authorize sentence enhancement for a drug trafficking offense based on a prior
13 conditional discharge, as it did in the habitual offender statute, it could have amended
14 Section 30-31-20 accordingly. *Cf.* § 31-18-17(B) (authorizing sentence enhancements
15 for individuals that have incurred “prior felony convictions that were parts of separate
16 transactions or occurrences[,] *or conditional discharge under Section 31-20-13*”
17 (emphasis added)); *see Harris*, 2013-NMCA-031, ¶ 3 (noting that the enactment of
18 the conditional discharge statute set forth “that a conditional discharge order could

1 not serve as a conviction unless a particular statute expressly so stated” (internal
2 quotation marks omitted)).

3 {12} The State also argues that the Legislature’s use of the term “offense” rather
4 than the term “conviction” suggests that the Legislature intended to allow
5 enhancement based on something other than a conviction. *See* § 30-31-20(B); *cf.*
6 NMSA 1978, § 66-8-102(E), (F) (2010) (prescribing enhanced sentencing for second
7 and third *convictions* for driving while under the influence of drugs and alcohol).
8 However, the Legislature’s decision not to amend the trafficking statute to include
9 enhancement based on a prior conditional discharge, as it did the habitual defender
10 statute, suggests that the Legislature may have intended not to authorize such an
11 enhancement. We are mindful that statutes, such as Section 30-31-20, that authorize
12 more severe punishment are considered highly penal and should be strictly construed.
13 *See State v. Moya*, 2007-NMSC-027, ¶ 6, 141 N.M. 817, 161 P.3d 862. We will not
14 read into a statute words that are not there. *See State v. Trujillo*, 2009-NMSC-012,
15 ¶ 11, 146 N.M. 14, 206 P.3d 125. It is the Legislature’s exclusive responsibility to
16 define crimes, not the judiciary’s. *See Martinez*, 2006-NMCA-068, ¶ 9 (noting that
17 “by the constitution of the [s]tate the Legislature is invested with plenary legislative
18 power, and the defining of crime and prescribing punishment therefor are legislative
19 functions” (alterations, internal quotation marks, and citation omitted)); *see also* N.M.

1 Const. art. III, § 1 (providing for division of powers of government between
2 legislative, judicial, and executive branches); *State v. Fifth Judicial Dist. Ct.*, 1932-
3 NMSC-023, ¶¶ 8-9, 36 N.M. 151, 9 P.2d 691 (noting that the Legislature makes the
4 laws, the executive branch executes the laws, and the judiciary construes the laws).

5 {13} We have considered the language of Section 30-31-20, along with the statute’s
6 history and background, overall structure, and function within our criminal statutes.
7 *See State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939. In our
8 considerations, it seems that more questions have arisen than answers in determining
9 what constitutes an offense within the context of this statutory provision. While the
10 practical application would be that this is the second time Defendant has been
11 charged with the crime of trafficking, the legal effect of the conditional discharge
12 dismisses the first trafficking charge without an adjudication of guilt. The Legislature
13 is best suited with the task of clarifying what should be considered as an offense for
14 sentence enhancement purposes.

15 {14} We conclude that Section 30-31-20 is ambiguous because it neither defines the
16 term “offense” as it is used in the statute, nor states whether a drug trafficking offense
17 can be enhanced based on a prior conditional discharge. We also conclude that
18 Section 30-31-20 does not clearly and unequivocally alert a person in Defendant’s
19 position to the possibility of enhancing her subsequent drug trafficking sentence as

1 a result of her prior conditional discharge. “The rule of lenity constrains us to
2 narrowly construe a penal statute to give clear and unequivocal warning in language
3 that people generally would understand concerning actions that would expose them
4 to penalties.” *State v. Maldonado*, 2005-NMCA-072, ¶ 13, 137 N.M. 699, 114 P.3d
5 379 (internal quotation marks and citation omitted). Here, we are confronted with “an
6 insurmountable ambiguity regarding the intended scope” of Section 30-31-20.
7 *Maldonado*, 2005-NMCA-072, ¶ 13 (omission, internal quotation marks, and citation
8 omitted). “[T]he rule of lenity should be applied after other principles of statutory
9 construction fail to eliminate a reasonable doubt as to legislative intent.” *Id.*
10 Accordingly, we hold that the term “offense,” as used in Section 30-31-20, is
11 ambiguous and, therefore, Defendant’s conditional discharge cannot be used for the
12 purpose of enhancing Defendant’s drug trafficking sentence. As a result, we need not
13 address Defendant’s remaining arguments.

14 **Disparate Treatment**

15 {15} The State argues that our holding could result in disparate treatment for
16 similarly situated defendants. The State suggests that two defendants convicted for
17 drug trafficking could be sentenced differently if one defendant previously received
18 a conditional discharge for trafficking and the other defendant did not. The defendant
19 with the conditional discharge would be sentenced as a first time offender and the

1 other defendant would not. The State presents this scenario as a purely hypothetical
2 situation predicting that fundamental unfairness will arise. Because the State points
3 to no disparate treatment or fundamental unfairness relevant to this case, we do not
4 address this issue. Any attempt to do so would be purely advisory. *See State v.*
5 *Trujillo*, 1994-NMSC-066, ¶ 12, 117 N.M. 769, 877 P.2d 575 (noting that appellate
6 courts do not give advisory opinions on purely hypothetical issues).

7 **CONCLUSION**

8 {16} For the foregoing reasons, we affirm Defendant’s sentence for drug trafficking
9 as a second degree felony.

10 {17} **IT IS SO ORDERED.**

11 _____
12 **M. MONICA ZAMORA, Judge**

13 **WE CONCUR:**

14 _____
15 **MICHAEL E. VIGIL, Chief Judge**

16 _____
17 **JONATHAN B. SUTIN, Judge**