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STATE OF NEBRASKA, APPELLEE, V. JAMES F. DELGADO, APPELLANT.

___ N.W.3d ___

Filed September 18, 2026. No. S-25-495.

1. **Waiver: Appeal and Error.** Whether a party has waived his or her right to appellate review presents a question of law.
2. ____: ____. The validity of an appeal waiver is a question of law.
3. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
4. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
5. ____: ____. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
6. **Effectiveness of Counsel: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.
7. ____: ____. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.
8. **Constitutional Law: Waiver: Appeal and Error.** A defendant can waive a constitutional right, including the right to appeal, if done knowingly and voluntarily.
9. **Waiver: Appeal and Error: Public Policy.** Appeal waivers do not violate Nebraska public policy.
10. **Waiver: Appeal and Error.** When determining whether to enforce a waiver of the right to appeal, an appellate court should consider three

factors: (1) whether the disputed appeal falls within the scope of the waiver of appellate rights, (2) whether the defendant knowingly and voluntarily waived his appellate rights, and (3) whether enforcing the waiver would result in a miscarriage of justice.

11. **Waiver: Proof: Appeal and Error.** The burden of proof is on the State to demonstrate that an agreement clearly and unambiguously waives a defendant's right to appeal.
12. **Waiver: Appeal and Error.** Waivers of the right to appeal are to be applied narrowly, with any ambiguities construed against the State and in favor of the defendant's right to appeal.
13. **Effectiveness of Counsel: Waiver: Appeal and Error.** A waiver of the right to appeal may not be knowing or voluntary if, for example, it is entered into upon the ineffective assistance of counsel or upon undue coercion.
14. **Sentences: Waiver: Appeal and Error.** It will generally be considered a miscarriage of justice to enforce an appeal waiver when the defendant seeks to appeal an illegal sentence, even though there exists an otherwise valid waiver.
15. **Effectiveness of Counsel: Waiver: Appeal and Error.** Ineffective assistance of counsel claims do not render an appeal waiver invalid except to the extent deficient representation in negotiating or advising on the waiver rendered it unknowing or involuntary.
16. **Plea Bargains: Contracts.** Generally, plea agreements are to be construed and enforced based upon contract principles. Consistent with such principles, Nebraska courts will not imply terms into plea agreements and instead will follow the rule that courts implementing plea agreements should enforce only those terms and conditions actually agreed upon by the parties.
17. **Sentences: Appeal and Error.** When sentences imposed within statutory limits are alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering well-established factors and any applicable legal principles.
18. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.
19. ____. The appropriateness of a sentence is necessarily a subjective judgment that includes the sentencing judge's observations of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

20. **Sentences: Appeal and Error.** It is not the function of an appellate court to conduct a de novo review or to reweigh the relevant sentencing factors.
21. **Effectiveness of Counsel: Proof.** Generally, to prevail on a claim of ineffective assistance of counsel under the framework established by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defense.
22. ____: ____. To show that counsel's performance was deficient, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.
23. ____: ____. To show prejudice in a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
24. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must properly raise on direct appeal any issue of trial counsel's deficient performance which is either known to the defendant or is apparent from the record. Any known or apparent issue of deficient performance not properly raised on direct appeal will be procedurally barred in a subsequent postconviction proceeding.
25. ____: ____. Defendants seeking to raise an ineffective assistance of counsel claim must specifically assign and specifically argue the alleged deficient performance and must do so with sufficient particularity.
26. **Effectiveness of Counsel: Records: Appeal and Error.** Allegations of deficient performance must include a description of the specific conduct alleged to constitute deficient performance, and that description must be particular enough to (1) allow an appellate court to determine whether the claim can be decided upon the trial record and (2) allow a district court reviewing a later postconviction motion to recognize whether the claim was raised on direct appeal.
27. **Effectiveness of Counsel: Appeal and Error.** Alleging deficient conduct with specificity requires more than generalities of inadequate preparation or failures to introduce beneficial evidence. An allegation is sufficiently specific when it addresses a specific issue that does not require additional information to understand precisely what the assignment attacks.
28. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that a claim of ineffective assistance of counsel is properly raised on direct appeal does not mean it can be resolved on direct appeal. The

determining factor is whether all the facts necessary to the analysis are part of the appellate record.

29. ____: ____: ____. An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires examination of facts not contained in the record.
30. **Trial: Attorneys at Law: Effectiveness of Counsel: Records: Appeal and Error.** If the record on direct appeal conclusively establishes either that trial counsel's performance was not deficient or that any deficient performance did not prejudice the defendant's defense, an appellate court can determine trial counsel was not ineffective.
31. **Effectiveness of Counsel: Records: Appeal and Error.** If the record on direct appeal does not conclusively establish or refute a claim of ineffective assistance, then the issue cannot be resolved on direct appeal and must be properly raised in a subsequent postconviction proceeding.

Appeal from the District Court for Hall County: ANDREW C. BUTLER, Judge. Affirmed.

Jerrod Jaeger, of Jaeger Law Office, P.C., L.L.O., for appellant.

Michael T. Hilgers, Attorney General, and Melissa R. Vincent for appellee.

FUNKE, C.J., CASSEL, STACY, PAPIK, FREUDENBERG, BERGEVIN, and VAUGHN, JJ.

STACY, J.

Pursuant to a plea agreement that included a waiver of the right to appeal, James F. Delgado entered a no contest plea to one felony count of distribution of a controlled substance and was sentenced to an indeterminate prison term of 10 to 20 years. Delgado then filed this appeal, assigning error to the trial court's discussion of the appeal waiver during the plea colloquy and challenging the sentence as excessive. He also asserts two claims that his trial counsel provided ineffective assistance.

For reasons we will explain, we reject one of Delgado's assigned errors and determine it is unnecessary to reach the other. Regarding his claims of ineffective assistance, we

conclude that one claim was insufficiently alleged and that the other was sufficiently alleged but cannot be resolved on the appellate record. We therefore affirm the district court's judgment.

I. BACKGROUND

On three separate occasions in the spring of 2024, Delgado sold methamphetamine to a confidential informant who was working with law enforcement. In February 2025, he was charged by information in the district court for Hall County with three counts of knowingly or intentionally manufacturing, distributing, or delivering methamphetamine in violation of Neb. Rev. Stat. § 28-416(1) (Cum. Supp. 2024). Due to differences in the amount of methamphetamine at issue, count I was charged as a Class ID felony, and counts II and III were charged as Class II felonies. Delgado pled not guilty to all counts.

1. Change of Plea

At a pretrial conference on May 13, 2025, the parties advised the court they had reached a plea agreement. When the court asked defense counsel to state the terms of the agreement on the record, the following exchange occurred:

> [Defense counsel:] Your Honor, the State agrees to dismiss Counts I and II in exchange for my client pleading to Count III.
>
> My client waives his right to seek a deferred judgment in the matter. Additionally, the State agrees to not move for a habitual [criminal] enhancement.
>
> THE COURT: Is that correct, [prosecutor]?
>
> [Prosecutor:] It is, Judge.
>
> There's a waiver of appeal on there as well, per the email. I don't know if that's sufficient for the Court's liking. I can mark the email as an exhibit after the fact, but there's [a] waiver of appeal as part of the conditions of the plea agreement.
>
> THE COURT: Is that correct, [defense counsel]?

> [Defense counsel:] That is correct, Your Honor.
>
> THE COURT: All right. So with that, [prosecutor], if you think it's necessary to submit that email, I'll give you the opportunity to do that.
>
> For today's purposes, a waiver of appeal is understood by the Court with that particular language. If you think it needs to be in the record, I'll leave that up to you.
>
> [Prosecutor:] Thank you.

It is unclear whether the State ever offered the email, but no such exhibit was included in the appellate record. During the plea hearing, neither the prosecutor nor the defense counsel recited the terms or scope of the appeal waiver. But when discussing the plea agreement with Delgado, the court stated, "[I]t's the Court's understanding . . . you're waiving your right to appeal this conviction[.] Is that the agreement you've reached?" to which Delgado replied, "Yes."

After a standard plea colloquy that addressed the rights Delgado was waiving by entering his plea and the possible penalties that could be imposed if the court were to accept his plea, the court made express findings that there was a sufficient factual basis for the plea and that Delgado was entering his plea freely, voluntarily, knowingly, and intelligently. The court accepted Delgado's no contest plea, found him guilty of the Class II felony charged in count III of the information, and dismissed the remaining counts. The matter was set for sentencing, and the court ordered the preparation of a presentence investigation report.

2. SENTENCING

At the sentencing hearing, defense counsel asked that Delgado be placed on a term of probation. He argued that Delgado was a military veteran who served in Vietnam and suffered from "posttraumatic stress," which left him unable to work and contributed to his abuse of controlled substances. Defense counsel referenced the Legislature's 2025 enactment of a veteran

justice program[1] and argued that although the legislation was not yet in effect,[2] placing Delgado on a term of probation would be consistent with the Legislature's intent and would allow him to receive mental health and substance use treatment through the U.S. Department of Veterans Affairs.

The State opposed a probationary sentence for Delgado and instead argued for a term of incarceration. It emphasized the serious nature of Delgado's convictions and his lengthy criminal history, which included prior convictions and imprisonment for distributing controlled substances.

Before pronouncing sentence, the trial judge stated that he had reviewed the information in the presentence investigation report and had considered all the relevant sentencing factors. The judge expressly noted Delgado's military service but explained that he did not consider Delgado to be a suitable candidate for probation, citing his lengthy criminal history, his prior convictions and prison sentences for distributing controlled substances, his high recidivism risk, and the fact that he had "not led a law-abiding life for a substantial period of time prior [to] this offense." Stating that a lesser sentence would depreciate the seriousness of the offense and promote disrespect for the law, the court imposed a prison sentence of 10 to 20 years, with credit for 140 days previously served. After pronouncing sentence, the court advised Delgado, "You do have the right to appeal this sentence," and no party objected or sought to clarify this advisement.

Delgado filed this timely appeal, represented by new counsel.

II. ASSIGNMENTS OF ERROR

On appeal, Delgado assigns, restated, that the trial court erred in (1) failing to inquire about the scope of the appeal

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[1] See 2024 Neb. Laws, L.B. 253, §§ 1 to 7 (codified at Neb. Rev. Stat. §§ 29-4801 to 29-4808 (Cum. Supp. 2024 & Supp. 2025)).

[2] See § 29-4808 (stating that §§ 29-4801 to 29-4807 will "apply on and after July 1, 2027").

waiver during the plea hearing and (2) imposing an excessive sentence. Additionally, he asserts that his trial counsel was constitutionally deficient in two respects: failing to advise him "on the effect of a waiver of appeal" and "not investigating mitigation evidence and presenting such to the sentencing court."

III. STANDARD OF REVIEW

[1-3] Whether a party has waived his or her right to appellate review presents a question of law.[3] Similarly, the validity of an appeal waiver is also a question of law.[4] On questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[5]

[4,5] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[6] An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.[7]

[6,7] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.[8] In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide

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[3] See, *State v. Thomas*, 311 Neb. 989, 977 N.W.2d 258 (2022); *Becher v. Becher*, 299 Neb. 206, 908 N.W.2d 12 (2018).

[4] *State v. Hamm*, 314 Neb. 311, 989 N.W.2d 719 (2023); *State v. Dye*, 291 Neb. 989, 870 N.W.2d 628 (2015).

[5] See *id*.

[6] *State v. Liech*, 320 Neb. 843, 30 N.W.3d 847 (2026).

[7] *Id*.

[8] *State v. Wilson*, 320 Neb. 728, 30 N.W.3d 165 (2026).

effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.[9]

IV. ANALYSIS

1. Waiver of Right to Appeal

As noted, the plea agreement in this case included what the parties described only as a "waiver of appeal." The State argues that we should construe that appeal waiver broadly and enforce it by limiting our appellate review, and Delgado argues the appeal waiver is not enforceable.

As the U.S. Supreme Court recently observed, nothing "literally prevents"[10] a criminal defendant from filing an appeal after agreeing to waive such right, and the "real-world effect of a waiver provision turns, and turns only, on whether the appeals court decides to enforce it."[11] We therefore address the enforceability of the appeal waiver as a threshold matter. We begin by reviewing the case law that governs waivers of the right to appeal in criminal cases, after which we address the parties' arguments.

(a) Case Law on Appeal Waivers

[8] The Nebraska Constitution provides that in both criminal and civil cases, "an aggrieved party shall be entitled to one appeal . . . as may be provided by law."[12] In the 2010 case of *State v. Anderson*,[13] we held that a "defendant can waive a constitutional right, including the right to appeal, if done knowingly and voluntarily." We elaborated on that principle in

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[9] *Id*.

[10] *Hunter v. United States*, ___ U.S. ___, 146 S. Ct. 1702, 1712, 225 L. Ed. 2d 272 (2026).

[11] *Id*.

[12] Neb. Const. art. I, § 23.

[13] *State v. Anderson*, 279 Neb. 631, 637, 781 N.W.2d 55, 60 (2010).

the 2015 case of *State v. Dye* [14] and in the 2023 case of *State v. Hamm*,[15] each of which we summarize in turn.

(i) State v. Dye

In *Dye*, a jury found the defendant guilty of several felonies. Before sentencing, the parties signed a written sentencing agreement that included a stipulated sentencing recommendation and the defendant's express waiver of "'any rights to appeal this case and to any post-conviction relief that [he] may otherwise be entitled.'"[16] After the trial court imposed a sentence that was consistent with the sentencing recommendation, the defendant filed a direct appeal, arguing the waiver was unenforceable and void as against public policy.

[9,10] Our opinion in *Dye* expressly held that "appeal waivers do not violate Nebraska public policy"[17] and went on to address what appellate courts should review before enforcing such a waiver. We explained in *Dye* that when determining whether to enforce a waiver of the right to appeal, appellate courts should consider three factors: "'(1) whether the disputed appeal falls within the scope of the waiver of appellate rights; (2) whether the defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice[.]'"[18]

[11,12] The *Dye* court also explained how an appellate court is to consider each of the three factors. With respect to the first factor, the *Dye* court explained that "the burden of proof is on the State to demonstrate that an agreement clearly and unambiguously waives a defendant's right to appeal."[19] Additionally, the *Dye* court adopted the rule that "waivers

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[14] *Dye, supra* note 4.

[15] *Hamm, supra* note 4.

[16] *Dye, supra* note 4, 291 Neb. at 992, 870 N.W.2d at 631.

[17] *Id*. at 997, 870 N.W.2d at 633.

[18] *Id*. at 998, 870 N.W.2d at 634.

[19] *Id*. at 999, 870 N.W.2d at 634.

of the right to appeal are to be applied narrowly, with any ambiguities construed against the State and in favor of the defendant's right to appeal."[20]

[13] With respect to the second factor, the *Dye* court clarified that a waiver of the right to appeal "may not be knowing or voluntary if, for example, it is entered into upon the ineffective assistance of counsel or upon undue coercion."[21] Relatedly, we recognized in *Dye* that "a waiver of appeal rights does not waive 'an ineffectiveness [of counsel] claim having to do with the waiver (or the plea agreement as a whole) and its negotiation.'"[22]

[14] And with respect to the third factor, the *Dye* court recognized it will generally be considered a miscarriage of justice to enforce an appeal waiver when the defendant seeks "'to appeal an illegal sentence, even though there exists an otherwise valid waiver.'"[23] As such, "even when a defendant has made a valid waiver of appeal rights, an appellate court may reverse a sentence that is outside of statutory limits or otherwise not authorized by law."[24] The U.S. Supreme Court recently endorsed a similar rule in the context of federal plea agreements, holding that "an appeal waiver is unenforceable when it would result in a miscarriage of justice."[25]

In *Dye*, we ultimately concluded that the issues raised on direct appeal fell within the scope of the appeal waiver, that the defendant knowingly waived his appeal rights, and that enforcing the waiver would not result in a miscarriage of justice. We therefore held "the proper remedy"[26] was to enforce the waiver and dismiss the appeal.

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[20] *Id*.

[21] *Id*. at 999, 870 N.W.2d at 635.

[22] *Id*.

[23] *Id*. at 1000, 870 N.W.2d at 635.

[24] *Id*.

[25] *Hunter, supra* note 10, 146 S. Ct. at 1713.

[26] *Dye, supra* note 4, 291 Neb. at 1001, 870 N.W.2d at 635.

(ii) State v. Hamm

In *Hamm*, the defendant and the State entered into a "'Plea and Sentencing Stipulation'" that included, among other provisions, the defendant's agreement to "'waive his right to appeal all issues, to the extent a waiver is permissible.'"[27] At the change-of-plea hearing, the trial court confirmed that the defendant had reviewed, understood, and signed the "'Plea and Sentencing Stipulation.'"[28] The court ultimately accepted the defendant's plea and imposed a sentence that was consistent with the parties' agreement. The defendant then filed a direct appeal, represented by new counsel, asserting that his trial counsel was ineffective in several respects. The State sought to enforce the appeal waiver, arguing the appeal should be dismissed in its entirety because the defendant had waived his right to appeal "all issues."[29] The defendant responded that his appeal waiver was "void because he would not have entered into it but for such ineffective assistance of counsel."[30]

[15] The *Hamm* court reviewed cases from other jurisdictions and ultimately held that "ineffective assistance of counsel claims do not render an appeal waiver invalid except to the extent deficient representation in negotiating or advising on the waiver rendered it unknowing or involuntary."[31] The U.S. Supreme Court recently endorsed a similar rule that "[a]n appeal waiver . . . is not knowing and voluntary if it was the product of ineffective assistance of counsel."[32]

On the record in *Hamm*, we concluded the defendant's claim of ineffective assistance did not render the appeal waiver

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[27] *Hamm, supra* note 4, 314 Neb. at 314, 989 N.W.2d at 723.

[28] Id. at 316, 989 N.W.2d at 724.

[29] *Id*. at 317, 989 N.W.2d at 724.

[30] *Id*.

[31] *Id*. at 320, 989 N.W.2d at 726.

[32] *Hunter, supra* note 10, 146 S. Ct. at 1711.

unenforceable because the allegedly deficient performance occurred *before* the appeal waiver was negotiated. We therefore enforced the waiver and dismissed the appeal after determining that the issues raised on appeal fell within the scope of the appeal waiver, that the defendant knowingly waived his appeal rights, and that enforcing the waiver would not result in a miscarriage of justice.

With the holdings from *Anderson*, *Dye*, and *Hamm* in mind, we turn to the parties' arguments regarding the enforceability of the appeal waiver in this case.

(b) Parties' Arguments

The State argues that all three *Dye* factors are satisfied on this record, and it asks us to enforce the appeal waiver. Regarding the first *Dye* factor, the State argues that the parties agreed to an "unqualified"[33] waiver and that all conceivable appeal rights fall within its scope. Regarding the second factor, the State argues there was "evidence that the agreement was knowing and voluntary,"[34] and regarding the third factor, the State argues that "enforcing the waiver would not result in a miscarriage of justice since Delgado's sentence is lawful and supported by the record."[35] However, the State concedes that under *Hamm*, the appeal waiver cannot be enforced against a claim that trial counsel's "alleged ineffectiveness rendered the appeal waiver invalid,"[36] and because Delgado is asserting such a claim, the State submits it is "permissible"[37] for us to consider it.

Anticipating the State's position on appeal, Delgado's first assignment of error presents alternative arguments as to why the appeal waiver is unenforceable. First, he argues "[t]here

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[33] Brief for appellee at 7.

[34] *Id*.

[35] *Id*.

[36] *Hamm, supra* note 4, 314 Neb. at 323, 989 N.W.2d at 728.

[37] Brief for appellee at 7.

was [an] insufficient record made"[38] regarding the terms and conditions of the appeal waiver because there is nothing in the record showing that he agreed to "giv[e] up his right to appeal the sentence and issues of ineffective assistance."[39] Alternatively, he argues that if we find that the scope of the waiver was unqualified, then the trial court erred by "fail[ing] to determine through inquiry whether [Delgado] knew he was giving an unqualified waiver of his appeal right."[40]

(c) Resolution

As the party seeking to enforce the appeal waiver, the State had the burden to prove, among other things, that Delgado clearly and unambiguously waived his right to appeal and that the instant appeal "'falls within the scope of the waiver of appellate rights.'"[41] As we will explain, because the State has not presented an appellate record that establishes the scope of the agreed-upon waiver, it is unable to satisfy the factors required to enforce the waiver in this direct appeal.

In both *Dye* and *Hamm*, the essential terms of the appeal waiver were placed on the record during the plea hearing. In *Dye*, the record established that the defendant agreed to "'waive *any* rights to appeal this case and to *any* post-conviction relief that [he] may otherwise be entitled.'"[42] And in *Hamm*, the record established that the defendant agreed to "'waive his right to appeal *all* issues, to the extent a waiver is permissible.'"[43] In both cases, because the record established the broad scope of the agreed-upon waiver, this court was able to determine whether the issues on appeal fell within that scope.

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[38] Brief for appellant at 11.

[39] *Id.* at 12.

[40] *Id.* at 11.

[41] *Dye, supra* note 4, 291 Neb. at 998, 870 N.W.2d at 634.

[42] *Id*. at 992, 870 N.W.2d at 631 (emphasis supplied).

[43] *Hamm, supra* note 4, 314 Neb. at 314, 989 N.W.2d at 723 (emphasis supplied).

But in this case, the essential terms of the appeal waiver were neither recited on the record nor included in the record. Instead, the State merely advised the trial court "there's [a] waiver of appeal as part of the conditions of the plea agreement," and defense counsel agreed without elaborating. The appellate record thus shows only that the parties agreed to some sort of waiver of the right to appeal—it is silent as to which appellate rights were waived and by whom. Unlike the express language of the appeal waivers enforced in *Dye* and *Hamm*, which left little doubt that the waivers were intended to be as broad in scope as permitted by law, the State here referenced an appeal waiver but never made a record of its terms or intended scope, even after being given an opportunity to do so.

At oral argument, the State urged us to broadly construe the record as establishing a "flat waiver" of all conceivable appeal rights, reasoning that "if there was a carve out, it was incumbent on one of the attorneys to say so." Our concurring colleague urges a similarly broad construction and suggests the appeal waiver agreed to here was "clearly a general waiver with no restrictions." We understand both the State and the concurrence to argue for a rule of construction under which all appeal waivers are presumed to be unlimited in scope unless the parties expressly state otherwise, but they do not cite any authority for such a presumption, and, ordinarily, "courts indulge every reasonable presumption *against* waiver of fundamental constitutional rights."[44] But, more importantly, such a presumption is contrary to the specific rule announced in *Dye* and is inconsistent with the settled rules

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[44] *State v. Manjikian*, 303 Neb. 100, 112-13, 927 N.W.2d 48, 59-60 (2019) (emphasis supplied) (citing *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). See, also, *Williams v. State*, 164 N.E.3d 724, 725 (Ind. 2021) (applying rule that "a plea agreement's generalized statement that the defendant 'waives [the] right to appeal,' without more, [is] insufficient to establish the knowing and voluntary waiver of the defendant's right to appeal his sentence").

in Nebraska that govern the construction and enforcement of plea agreements more generally.

[16] Generally, plea agreements are to be construed and enforced based upon contract principles.[45] Consistent with such principles, Nebraska courts will not imply terms into plea agreements and instead will follow the rule that "'courts implementing plea agreements should enforce only those terms and conditions actually agreed upon by the parties.'"[46] This rule of construction is intended to avoid "expanding the plea agreement by judicial fiat.'"[47] Here, the State advised the court only that the plea agreement included "a waiver of appeal," and, in response to that information, the court stated, "For today's purposes, a waiver of appeal is understood by the Court with that particular language."

Like the trial court, our understanding of the scope of the appeal waiver is limited to the particular language used by the parties when making a record of the agreement they reached. As such, the question we must answer is whether an agreement described by the State merely as "a waiver of appeal" should be construed broadly in favor of the State as an unlimited waiver of all available appeal rights or narrowly in favor of Delgado's right to appeal those issues not already waived by the entry of his voluntary plea.[48] Existing case law provides the answer to that question.

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[45] See *State v. Lara*, 315 Neb. 856, 2 N.W.3d 1 (2024), *cert. denied* ___ U.S. ___, 144 S. Ct. 2608, 219 L. Ed. 2d 1256.

[46] *Id*. at 869-70, 2 N.W.3d at 13.

[47] *Id*. at 870, 2 N.W.3d at 13.

[48] See, e.g., *State v. Dicken*, 321 Neb. 301, 34 N.W.3d 97 (2026) (voluntary entry of guilty or no contest plea waives every defense to charge, whether procedural, statutory, or constitutional, except those related to sufficiency of charging document, ineffective assistance of counsel, and lack of jurisdiction); *State v. Jaeger*, 311 Neb. 69, 970 N.W.2d 751 (2022) (voluntary entry of guilty or no contest plea does not waive alleged errors occurring at sentencing).

In *Dye*, we announced the rule that "waivers of the right to appeal are to be applied narrowly, with any ambiguities construed against the State and in favor of the defendant's right to appeal."[49] Applying that rule here, we must reject the State's invitation to broadly construe the scope of the waiver in this case to include every conceivable issue that might permissibly be waived under the law.[50] Instead, because the State's description of the appeal waiver was, at best, ambiguous as to the scope of what was being waived and by whom, we are required to construe the agreement against the State and in favor of Delgado's right to appeal.

For the sake of completeness, we note the trial judge made remarks on the record during both the plea hearing and the sentencing hearing that seemed to assume Delgado had waived the right to appeal his conviction but retained the right to appeal his sentence, and the State did not object to or correct such remarks. To the extent Delgado can be understood to argue that the judge's remarks and the State's failure to object should be considered when construing the scope of the appeal waiver, we are unpersuaded. As the U.S. Supreme Court recently emphasized, it is the intent of the parties and the terms of their agreement that matter when seeking to enforce a waiver of appeal rights; neither remarks by the trial court, nor the parties' silence in response to those remarks, can alter the terms of the parties' agreement.[51]

In summary, on this record, we must decline the State's request to enforce the appeal waiver on direct appeal. We do so not because of any failure on the part of the trial court, but

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[49] *Dye, supra* note 4, 291 Neb. at 999, 870 N.W.2d at 634.

[50] See *State v. Thompson*, 15 Neb. App. 764, 735 N.W.2d 818 (2007) (rejecting contention that State agreed to waive its right to appeal sentence as excessive, reasoning that oral description of parties' plea agreement did not include any such condition and court would not imply it based only on State's agreement to remain silent at sentencing).

[51] See *Hunter, supra* note 10.

because the State failed to clearly and unambiguously establish the terms and conditions of the waiver agreed to by the parties and, therefore, cannot carry its burden to prove that the issues Delgado raises on direct appeal plainly fall within the scope of that waiver. Our ruling in this regard makes it unnecessary to further address Delgado's first assignment of error, which was directed exclusively at the enforceability of the appeal waiver on direct appeal.[52]

2. Excessive Sentence Claim

[17] In Delgado's second assignment of error, he argues his prison sentence is "far in excess of that which is reasonable under the circumstances."[53] He concedes, however, that the sentence of 10 to 20 years' imprisonment is within the statutory limits for a Class II felony.[54] When sentences imposed within statutory limits are alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering well-established factors and any applicable legal principles.[55]

[18,19] Relevant sentencing factors customarily include the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.[56] While these factors should instruct a sentencing court, they do not comprise a mathematical formula that must be rigidly implemented.[57] Rather, they are among the relevant

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[52] See *Hauxwell v. Middle Republican NRD*, 319 Neb. 1, 20, 21 N.W.3d 34, 49 (2025) ("an appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it").

[53] Brief for appellant at 14.

[54] See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2024).

[55] *State v. Jones*, 318 Neb. 840, 19 N.W.3d 499 (2025).

[56] See *id.*

[57] See *id.*

factors that may be considered.[58] The appropriateness of a sentence is necessarily a subjective judgment that includes the sentencing judge's observations of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[59]

[20] Delgado does not contend that the court failed to consider these sentencing factors or that it considered any improper factors. Instead, he generally argues that the trial court did not give sufficient weight to several factors, including his age and his status as a veteran. But, as we often observe, it is not the function of an appellate court to conduct a de novo review or to reweigh the relevant sentencing factors.[60] Instead, having carefully reviewed the record for an abuse of discretion, we cannot say that the sentence imposed was clearly untenable or that it unfairly deprived Delgado of a substantial right or a just result. There is no merit to Delgado's excessive sentence claim.

3. Ineffective Assistance of Counsel

In this direct appeal, Delgado asserts two claims of ineffective assistance of counsel. First, he contends his trial counsel performed deficiently by failing to adequately advise him of the scope and consequences of the appeal waiver. Second, he contends trial counsel performed deficiently in failing to investigate and present mitigation evidence for consideration at sentencing. Before addressing these claims, we review the framework that guides our analysis of ineffective assistance of counsel claims raised on direct appeal.

[21-23] Generally, to prevail on a claim of ineffective assistance of counsel under the framework established by the U.S. Supreme Court in *Strickland v. Washington*,[61] the

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[58] See *id.*

[59] See *id.*

[60] See *State v. Starks*, 308 Neb. 527, 955 N.W.2d 313 (2021).

[61] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defense.[62] To show that counsel's performance was deficient, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.[63] To show prejudice in a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[64]

[24] Our cases hold that when a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must properly raise on direct appeal any issue of trial counsel's deficient performance which is either known to the defendant or is apparent from the record.[65] Any known or apparent issue of deficient performance not properly raised on direct appeal will be procedurally barred in a subsequent postconviction proceeding.[66]

[25-27] Defendants seeking to raise an ineffective assistance of counsel claim must specifically assign and specifically argue the alleged deficient performance, "and must do so with sufficient particularity."[67] Allegations of deficient performance must "include a 'description of the specific conduct alleged to constitute deficient performance,'"[68] and that description must be particular enough to (1) allow an appellate

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[62] *Id*. See, also, *State v. Lopez*, 321 Neb. 118, 32 N.W.3d 868 (2026).

[63] *Lopez, supra* note 62.

[64] *Id*.

[65] *Id*.

[66] *Id*.

[67] See *id.* at 149, 32 N.W.3d at 893. Accord *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019), *disapproved on other grounds, State v. Hagens*, 320 Neb. 65, 26 N.W.3d 174 (2025).

[68] *Lopez, supra* note 62, 321 Neb. at 149, 32 N.W.3d at 893 (quoting *State v. Rupp*, 320 Neb. 502, 28 N.W.3d 74 (2025)).

court to determine whether the claim can be decided upon the trial record and (2) allow a district court reviewing a later postconviction motion to recognize whether the claim was raised on direct appeal.[69] Alleging deficient conduct with specificity requires more than generalities of inadequate preparation or failures to introduce beneficial evidence.[70] An allegation is sufficiently specific "'when it addresses a specific issue that does not require additional information to understand precisely what the assignment attacks.'"[71]

[28-31] The fact that a claim of ineffective assistance of counsel is properly raised on direct appeal does not mean it can be resolved on direct appeal.[72] The determining factor is whether all the facts necessary to the analysis are part of the appellate record.[73] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires examination of facts not contained in the record.[74] Relatedly, if the record on direct appeal conclusively establishes either that trial counsel's performance was not deficient or that any deficient performance did not prejudice the defendant's defense, an appellate court can determine trial counsel was not ineffective.[75] However, if the record on direct appeal does not conclusively establish or refute a claim of ineffective assistance, then the issue cannot be resolved on direct appeal and must be properly raised in a subsequent postconviction proceeding.[76]

With this framework in mind, we turn to Delgado's claims of ineffective assistance.

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[69] *Id.*

[70] See *id.*

[71] See *id.* (quoting *Rupp, supra* note 68).

[72] *Lopez, supra* note 62.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

(a) Trial Counsel's Advice
Regarding Appeal Waiver

Delgado first asserts that his trial counsel was ineffective in failing to properly advise him regarding the scope and effect of the appeal waiver. Although we have declined to enforce the appeal waiver on direct appeal for the reasons already explained above, we nevertheless address this claim of ineffective assistance due to the possibility that a more developed record may show that the scope of the agreed-upon waiver encompassed more than just a direct appeal. Delgado argues that his trial counsel did not provide a "complete advisement . . . about the scope of the appeal waiver described in the plea hearing."[77] According to Delgado, his trial counsel advised him only that he "would not be able to appeal the finding of guilt"[78] but did not specify whether he could appeal the sentence or assert claims of ineffective assistance of counsel. Delgado argues that he relied on this advice when deciding whether to plead no contest and that if he had "been counseled effectively, he would have either insisted on going to trial or insisted that the appeal waiver be taken out of any plea agreement."[79]

We conclude this claim of ineffective assistance was alleged with sufficient particularity, but since the details of Delgado's conversations with his trial counsel are not contained in the appellate record, this claim cannot be resolved on direct appeal.

(b) Failure to Investigate and
Present Mitigating Evidence

For his second claim of ineffective assistance of trial counsel claim, Delgado broadly assigns that "[t]rial counsel performed deficiently by not investigating mitigation evidence

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[77] Brief for appellant at 12.

[78] *Id.* at 13.

[79] *Id.* at 14.

and presenting such to the sentencing court."[80] Under our case law, this conclusory allegation lacks the specificity required to raise a claim of ineffective assistance on direct appeal.[81]

Delgado's generalized reference to "mitigation evidence" does not describe with any specificity the allegedly beneficial evidence trial counsel failed to obtain or present. And although the argument section of Delgado's appellate brief provides some limited information about the allegedly deficient conduct, our cases "have been clear that the argument section should not be used to set forth, for the first time, what the allegedly deficient conduct was."[82] Because this allegation is insufficiently specific to raise a claim of ineffective assistance of counsel, we will not address it further.

V. CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

Affirmed.

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[80] *Id.* at 19.

[81] See *Lopez, supra* note 62.

[82] *Id*. at 153, 32 N.W.3d at 895.

Freudenberg, J., concurring.

I concur in the result of the majority opinion but write separately to respectfully disagree with the majority's position invalidating James F. Delgado's waiver of his appeal rights as part of his plea agreement with the State.

Delgado was originally charged with three drug distribution offenses, one Class ID felony and two Class II felonies. Each offense was apparently at risk to have its sentence enhanced pursuant to Nebraska's habitual criminal statute. However, before trial, Delgado and the State reached a plea agreement where Delgado agreed to enter a plea to one Class II felony, not seek a deferred judgment, and enter a "waiver of appeal." In exchange, the State agreed to dismiss the remaining criminal charges and not seek a habitual criminal enhancement of

Delgado's sentence. Trial counsel for Delgado and counsel for the State jointly set forth the terms of the plea agreement to the trial court. Delgado acknowledged he was "waiving [his] right to appeal this conviction" as part of the plea colloquy.

Pursuant to the terms of the plea agreement, Delgado entered a plea of no contest to one Class II felony. The trial court accepted the plea and dismissed the remaining counts as agreed to by the State. At the subsequent sentencing hearing, Delgado did not request a deferred sentence, and the State did not seek a habitual criminal sentencing enhancement.

With new counsel, Delgado filed an appeal, despite his waiver of such right as part of the consideration he provided in the plea agreement. The issue presented is whether Delgado's "waiver of appeal" encompassed his present claims that his sentence was excessive and trial counsel was ineffective by not presenting mitigation evidence at the sentencing hearing. It is noted that appeal waivers do not apply to claims challenging the process by which the waiver agreement was entered into, including ineffective assistance of counsel claims.[1] Thus, to the extent Delgado's third assignment of error falls into this category, it was not waived regardless of the appeal waiver.

The majority opinion "decline[s] the State's request to enforce the appeal waiver on direct appeal[,] because the State failed to clearly and unambiguously establish the terms and conditions of the waiver . . . and, therefore, cannot . . . prove that the issues Delgado raises on direct appeal plainly fall within the scope of that waiver." The majority opinion then goes on to address each of the issues raised in Delgado's appeal. To support its position, the majority relies on our prior holdings in *State v. Dye*[2] and *State v. Hamm*.[3]

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[1] See *State v. Hamm*, 314 Neb. 311, 989 N.W.2d 719 (2023).

[2] *State v. Dye*, 291 Neb. 989, 870 N.W.2d 628 (2015).

[3] *State v. Hamm, supra* note 1.

In *Dye*, this court found that appeal waivers do not violate public policy and adopted the three-step inquiry described in the majority opinion. In doing so, the *Dye* court relied on a case from the 10th Circuit Court of Appeals, *U.S. v. Hahn*.[4] The *Hahn* court emphasized the importance of enforcing plea bargains in criminal matters as a matter of public policy:

> Given the importance of plea bargaining to the criminal justice system, we generally enforce plea agreements and their concomitant waivers of appellate rights. . . . We do so, in large part, because public policy strongly supports such waivers as they benefit defendants, the government, and society at large.[5]

According to the *Hahn* court, the appeal waiver is an essential term of most plea bargain agreements. The court explained, "[A]ppellate waivers benefit the government by saving the costs of prosecuting appeals; and '[o]nly through the [efficient] dismissal of [an] appeal will the government receive the benefit of its bargain.'"[6]

In the present matter, there are no indications in the record that Delgado, at the time he entered the plea agreement, had any understanding other than he was waiving his appeal rights in exchange for the significant plea and sentencing benefits that he was to, and did in fact, receive. The "scope" of the waiver is clearly a general waiver with no restrictions. If any restrictions were to be included, Delgado, his trial counsel, and the State all had the opportunity to set them forth during their joint recitation of the plea agreement. No one attempted to claim anything less than a general waiver of appeal.

As the majority opinion recognizes, plea agreements are to be construed and enforced based upon contract principles.[7]

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[4] *U.S. v. Hahn*, 359 F.3d 1315 (10th Cir. 2004).

[5] *Id.* at 1318.

[6] *Id.* at 1325.

[7] *State v. Lara*, 315 Neb. 856, 2 N.W.3d 1 (2024), *cert. denied* ___ U.S. ___, 144 S. Ct. 2608, 219 L. Ed. 2d 1256.

But our prohibition against expanding plea agreements by judicial fiat has been in the context of refusing to supply unmentioned terms to give the defendant the benefit of a condition he failed to negotiate before the fact.[8] As quoted by the Nebraska Court of Appeals in *State v. Thompson*,[9] "'Under traditional contract principles, we should . . . treat[ ] a plea agreement as a fully integrated contract and enforce[e] it according to its tenor, unfestooned with covenants the parties did not see fit to mention.'"

The majority opinion does not treat Delgado's plea agreement as a fully integrated contract to be enforced according to its broad tenor. Instead, it concludes that it is the very lack of festoons that renders Delgado's appeal waiver too vague to be enforceable.

In essence, the majority believes the appeal waiver in the plea agreement was so indefinitely described that its terms and conditions cannot now be determined to permit its enforcement. The majority then severs this waiver from the plea agreement, giving Delgado the benefit of the dismissal of two charges and avoiding habitual criminal enhancement at sentencing, while depriving the State of its benefit from the parties' bargain.

The relevant question, however, should be whether the parties reached a mutual understanding on the terms of the agreement. On the record before us, there is no question that at the time Delgado entered his plea of no contest in this matter, he, his trial counsel, the State, and the trial court were comfortable that they understood the terms of the plea agreement, including his waiver of appeal. Delgado entered his plea in accordance with this understanding and received the benefits for which he bargained. It is unreasonable for this court to now disregard

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[8] See *State v. Landera*, 285 Neb. 243, 826 N.W.2d 570 (2013) (and cases cited therein).

[9] *State v. Thompson,* 15 Neb. App. 764, 775-76, 735 N.W.2d 818, 828 (2007), quoting *U.S. v. Anderson*, 921 F.2d 335 (1st Cir. 1990).

the trial court judge's acceptance of the plea agreement and find it lacking and unenforceable against one of the parties.

In *Dye*, we did not consider the defendant's waiver of "'any rights to appeal this case'" to be ambiguous but, instead, broad in scope.[10] Likewise, in *Hamm*, we upheld an agreement with the language "'waive his right to appeal all issues, to the extent a waiver is permissible.'"[11] The differences between the language used in those matters and what the trial court accepted here is negligible and not substantial enough to remove a benefit bargained for under the agreement.

Part of the relevant context of an appeal waiver in any plea agreement—and, thus, part of a reasonable understanding of its terms—is that, even without an appeal waiver, a voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional.[12] Waiver of the right to challenge a conviction on direct appeal is simply "one of the consequences of pleading guilty."[13] Thus, waiving such direct appeal challenges is an unlikely goal of a broad appeal waiver that is part of a larger agreement wherein the defendant pleads guilty or no contest to the charges. Doing so would be redundant. This is in line with the observation that "there is no mandatory litany that must be used in order to obtain a valid waiver of appellate rights[,] and a waiver will be enforceable if the record demonstrates that the defendant intentionally relinquishe[d] or abandon[ed] a known right that would otherwise survive a guilty plea."[14] To be meaningful, an express appeal waiver that is part of a plea agreement must waive something more than what is already waived by the plea itself.

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[10] *State v. Dye, supra* note 2, 291 Neb. at 992, 870 N.W.2d at 631.

[11] *State v. Hamm*, *supra* note 1, 314 Neb. at 314, 989 N.W.2d at 723.

[12] *State v. Hamm, supra* note 1.

[13] *Alvey v. State*, 911 N.E.2d 1248, 1249 (Ind. 2009).

[14] *People v. Johnson*, 14 N.Y.3d 483, 486, 929 N.E.2d 361, 362, 903 N.Y.S.2d 299, 300 (2010) (internal quotation marks omitted).

While it is the duty of the party seeking to enforce a term of a plea agreement to develop the record to support the enforcement for which the party is seeking, it is still very important for the trial court accepting the plea agreement to have a firm understanding of all the terms the trial court is promising the parties it will enforce by accepting their plea agreement. In the absence of such understanding, a trial court will be unable to enforce such terms when later asked by one of the parties to do so. However, in the present situation, I believe the trial court, as well as the parties, fully understood the term disputed here, but the majority opinion should behoove trial courts and parties to collectively develop records to ensure that benefits from the trial courts' approved plea agreements are not later negated on subsequent appellate review, as has happened here. As always, we encourage trial courts and parties to err on the side of clarity when making a record of the terms of a plea agreement.

Nevertheless, under the circumstances of this case, I respectfully believe the waiver is sufficiently definite in its breadth. Trial counsel for Delgado and the State set forth to the trial court the terms of the plea and what Delgado received in exchange. After the parties both acknowledged the "waiver of appeal" was part of the plea agreement, the court explained it would approve the plea agreement with the understanding of the waiver with the broad language presented. Neither defense counsel nor Delgado objected or made any attempt to limit the breadth of the waiver of appeal when the trial court stated that "a waiver of appeal is understood by the Court with that particular language." The record reflects that the agreement was in both parties' possession and was not ambiguous to their joint understanding at that time. Later, during the plea colloquy, the court addressed the rights Delgado was waiving by entering his plea and the possible penalties that could be imposed if the court were to accept his plea. Delgado confirmed to the court that he was "waiving [his] right to appeal this conviction."

If we are too quick to conclude that a broad "waiver of appeal" lacks any necessary terms and conditions to be enforceable for challenges like those presented here, then we

> threaten to damage the parties' ability to ascertain their legal rights when they sit down at the bargaining table and, more problematically for criminal defendants, [we] threaten to reduce the likelihood that prosecutors will bargain away counts . . . with the knowledge that the agreement will be immune from challenge on appeal.[15]

It appears that everyone present during the entry of Delgado's plea fully agreed upon the terms of the plea agreement. But now the majority opinion unreasonably requires, after the fact, more words be used to establish a general waiver of appeal, and it thereby negates a fairly bargained term of the agreement. Parties to a plea agreement should be held to the terms of their agreement, especially when such agreement has been approved by the trial court and one of the parties has already received their full benefits thereunder. This is contrary to the idea of fair dealing, and I cannot join the majority opinion's reasoning that the parties' joint recitation of the appeal waiver term was so insufficient to require such term be negated.

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[15] *U.S. v. Bradley*, 400 F.3d 459, 464 (6th Cir. 2005).

BERGEVIN, J., concurring.

I join the majority opinion of the court. I write separately because I am also concerned that the State is not receiving what it thought it bargained for under the plea agreement—to avoid appellate litigation.

My concurring colleague sets forth the importance of plea agreements and their concomitant waivers of appellate rights to our system of criminal justice.[1] I agree with the importance of these tools, and I think that for these tools to be effective, the parties, including the State, must be able to trust that the

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[1] See *U.S. v. Hahn*, 359 F.3d 1315 (10th Cir. 2004).

bargain they negotiated will be respected and enforced by appellate courts.

However, when seeking the benefit of an appeal waiver, it is incumbent upon the State to provide sufficient detail in the record on appeal to realize the benefits of its bargain.[2] I agree with the majority that in this case, the State failed to clearly and unambiguously establish the terms and conditions of the appeal waiver.[3] Therefore, I agree with the majority's resolution of that issue based on this court's precedent.

Nevertheless, I think that in subsequent appeals, this court should strive to provide clear guidance regarding what the State must include in the record to ensure that it will receive the benefit of a negotiated appeal waiver.

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[2] *Id.* (stating that appeal waivers are to be construed narrowly and that in determining scope of appeal waiver, ambiguities are read against government and in favor of defendant's appellate rights).

[3] See *State v. Dye*, 291 Neb. 989, 870 N.W.2d 628 (2015).