all terms of Neb. Ct. R. § 3-316 of the disciplinary rules, and upon failure to do so, she shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V.
ANGEL R. LANDERA, APPELLANT.
826 N.W.2d 570

Filed February 22, 2013. No. S-11-940.

1. **Judgments: Appeal and Error.** When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Courts: Plea Bargains.** In Nebraska, a court is never bound by the plea agreement made between a defendant and the government.
3. **Plea Bargains.** A party to a plea agreement should not be given the benefit of implied terms when the party failed to negotiate such terms.
4. **Courts: Contracts.** Courts are not to rewrite contracts to include what the parties did not.
5. **Courts: Plea Bargains.** Courts implementing plea agreements should enforce only those terms and conditions actually agreed upon by the parties.
6. **Plea Bargains: Sentences.** A sentencing recommendation need not be enthusiastic in order to fulfill a promise made in a plea agreement.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and MOORE and PIRTLE, Judges, on appeal thereto from the District Court for Platte County, ROBERT R. STEINKE, Judge. Judgment of Court of Appeals affirmed.

Nathan J. Sohriakoff, Deputy Platte County Public Defender, for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

I. INTRODUCTION

The Nebraska Court of Appeals concluded that the State, having promised to recommend probation as part of its plea agreement with Angel R. Landera, violated the agreement when it recommended a term of incarceration as a condition of probation.[1] We granted the State's petition for further review in order to consider how courts should treat matters not explicitly addressed in a plea agreement and now hold that courts should enforce only those terms and conditions actually agreed upon by the parties. However, because the State effectively undermined its recommendation of probation and thereby violated its plea agreement with Landera, we affirm the decision of the Court of Appeals.

II. BACKGROUND

Landera entered into a plea agreement with the State after having previously pled not guilty to 2 counts of distribution of child pornography and 20 counts of possession of child pornography. The plea agreement was not reduced to writing, but was orally described to the district court as follows:

> [Public defender]: Your Honor, [Landera] is going to plead to Counts III, IV, VI, VII, XIII, XIV, XV, XVI, XVII and XX.
>
> . . . .
>
> [Public defender]: . . . The State will dismiss the balance of the charges and agree to recommend probation provided [that Landera] obtain a psychiatric evaluation and a sex offender evaluation from a reputable individual and follow through with all recommendations.
>
> THE COURT: [County attorney], does that accurately represent the plea agreement?
>
> [County attorney]: It does, Your Honor.
>
> THE COURT: Thank you. . . . Landera, your attorney has recited into the record a plea agreement reached in

[1] See *State v. Landera*, 20 Neb. App. 24, 816 N.W.2d 20 (2012).

> this case, which has been agreed to today by [the county attorney] on behalf of the State. Does that accurately represent the plea agreement as you understand it?
>
> [Landera]: Yes.
>
> THE COURT: Are there any other terms or conditions of the plea agreement that you believe exist that were not just now fully recited into the record?
>
> [Landera]: No.

Following acceptance by the court of the plea agreement, Landera withdrew his previous pleas of not guilty and entered guilty pleas to the 10 counts identified in the plea agreement (all for possession of child pornography). The court found him guilty on all counts. The 10 remaining counts were dismissed with prejudice in accordance with the plea agreement.

Prior to sentencing, the court ordered Landera committed to the Nebraska Department of Correctional Services at its Diagnostic and Evaluation Center (D&E) for a 90-day evaluation, because "the [c]ourt [was] of the opinion that imprisonment [might] be appropriate in this case but desire[d] more detailed information as a basis for determining the sentence to be imposed than has been provided by the presentence [report]."

Following completion of the 90-day evaluation, a sentencing hearing was held. At this hearing, the State made the following statement:

> Prior to reviewing the evaluation from D&E, the State was prepared to recommend probation, extensive probation, with challenging treatment. [Landera] is bright and that is evidenced by the fact he obtained a full ride pre-med scholarship. You know, he's [sic] obviously possesses a talent that a lot of people before the [c]ourt don't have. . . .
>
> In reviewing the presentence, again, for today's sentencing, along with the D&E evaluation, I'm struck and I can't recommend probation —

The State was interrupted at this point by Landera's attorney, who reminded the court that the State was bound by the plea agreement to recommend probation.

In the discussion that followed, the State claimed that it intended to stand by the plea agreement. However, the State also expressed grave concerns about Landera's ability to refrain from the use of child pornography and argued for the imposition of "punishment" because of the results of the 90-day evaluation.

In response, Landera's attorney argued that Landera was expecting "an unqualified recommendation of probation from the county attorney," but that the State had instead offered "an extremely qualified recommendation of probation." Landera's attorney concluded by asking the court to "honor the plea agreement" and "order probation."

Following allocution by both sides, the court sentenced Landera to 30 months' to 4 years' imprisonment on each count, to be served concurrently. The court specifically noted both at the sentencing hearing and in its written order that it determined Landera was not "a fit and proper person to be sentenced to a term of probation."

Landera appealed to the Court of Appeals, alleging, among other things, that the district court erred in failing to grant specific performance of the plea bargain after the State "explicitly indicated that it did not intend to follow through with the agreement."[2] Although the Court of Appeals focused considerable attention on the remedies dictated in *State v. Birge*[3] for breach of a plea agreement, it cited no authority for its conclusion that the State had in fact violated the plea agreement by recommending a term of incarceration as a condition of probation. Having reached that conclusion, the Court of Appeals vacated Landera's sentences and remanded the cause for resentencing by a different judge.[4]

The State filed a petition for further review, which we granted in order to provide further guidance on the interpretation of plea agreements.

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[2] Brief for appellant at 12-13.

[3] *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002).

[4] See *State v. Landera, supra* note 1.

III. ASSIGNMENT OF ERROR

The State argues on further review that the Court of Appeals erred by determining that the State violated the plea agreement with Landera.

IV. STANDARD OF REVIEW

[1] When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[5]

V. ANALYSIS

1. Treatment of Implied Terms in Plea Agreement

There are two widely accepted ways that courts treat terms and conditions not explicitly included in a plea agreement. One of these views, which the Court of Appeals effectively adopted, holds that terms and conditions not expressly included in a plea agreement were intentionally omitted. The alternative view is that courts should not enforce implied terms and conditions of a plea agreement, but enforce only those terms and conditions about which the parties did in fact agree. While we find that this latter approach is more consistent with existing Nebraska case law on the interpretation of plea bargains, we begin by providing a brief overview of both views.

[2] We digress to note that some of the federal court decisions arose from alleged violations of a federal procedural rule[6] permitting courts to accept plea agreements setting forth the penalties to be imposed and to become bound by the specified disposition. In Nebraska, a court is never bound by the plea agreement made between a defendant and the government.[7] Nevertheless, the federal cases are illustrative of the respective approaches employed to determine a party's obligations under a plea agreement. For our purposes, it does not matter whether the breaching party was the sentencing court or the

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[5] *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012).

[6] See Fed. R. Crim. P. 11(c).

[7] See *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003).

prosecuting attorney. We are concerned only with the proper analytical approach.

(a) Terms Not Expressly Included Considered Intentionally Omitted

The expansive interpretation of plea agreements embodied in the Court of Appeals' decision is consistent with early decisions from several of the federal circuit courts. One of the leading cases adopting an expansive interpretation of a plea agreement is *United States v. Runck*.[8] In that case, the Eighth Circuit considered whether the imposition of restitution as a condition of probation violated a plea agreement that provided for a maximum sentence of 3 years' imprisonment and a $1,000 fine. While recognizing that "it would be unmanageable and impractical to require every possible condition of probation to be included in a plea bargain," the court held that the imposition of a large amount of restitution "created a material change in the plea bargain."[9] Relying on the precedent of *Runck*, the First,[10] Second,[11] and Ninth[12] Circuits similarly held that when a plea agreement was silent on the matter of restitution, the imposition of restitution—even as a condition of probation—was precluded by such silence. In so holding, the Ninth Circuit explained that the failure to expressly provide in a plea agreement for restitution as a term of probation was "an intentional omission designed to preclude its imposition."[13] In contexts other than restitution, the Third[14] and Fifth[15] Circuits also interpreted silence in plea agreements as precluding prosecutors from recommending terms or conditions not expressly mentioned in the plea agreement.

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[8] *United States v. Runck*, 601 F.2d 968 (8th Cir. 1979).

[9] *Id.* at 970.

[10] See *United States v. Garcia*, 698 F.2d 31 (1st Cir. 1983).

[11] See *United States v. Burruezo*, 704 F.2d 33 (2d Cir. 1983).

[12] See *United States v. Kamer*, 781 F.2d 1380 (9th Cir. 1986).

[13] *Id.* at 1388.

[14] See *U.S. v. Gilchrist*, 130 F.3d 1131 (3d Cir. 1997).

[15] See *U.S. v. Munoz*, 408 F.3d 222 (5th Cir. 2005).

In practice, interpreting silence in a plea agreement as an intentional omission prevents the government from making any sentencing recommendations not explicitly addressed in the agreement and restricts the government to only those sentencing recommendations enumerated. In effect, the failure to include a specific term or condition in a plea agreement becomes an implicit promise by the government not to recommend that term or condition. At least one court interpreting plea agreements according to this approach has invoked the language of implicit promises, noting that the government "implicitly promised not to argue for an enhancement that was not part of the plea agreement."[16]

Significantly, however, the federal circuit courts that once espoused this position have since adopted the approach urged by the State in the instant case and now interpret plea agreements more strictly. Since 1995, the Eighth Circuit has consistently enforced only those terms and conditions actually addressed in a plea agreement,[17] contrary to its prior holding in *Runck*.[18] And within 10 years of their decisions interpreting silence as an intentional omission binding upon the government, as discussed above, the First,[19] Second,[20] and Ninth[21] Circuits each issued decisions refusing—rather vehemently, in the case of the First Circuit—to liberally interpret silence in plea agreements as they had done previously. In recent

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[16] See *id.* at 227.

[17] See, e.g., *U.S. v. Nguyen*, 608 F.3d 368 (8th Cir. 2010), *cert. denied* 562 U.S. 1076, 131 S. Ct. 679, 178 L. Ed. 2d 505; *U.S. v. Parker*, 512 F.3d 1037 (8th Cir. 2008); *U.S. v. Martinez-Noriega*, 418 F.3d 809 (8th Cir. 2005); *White v. U.S.*, 308 F.3d 927 (8th Cir. 2002); *U.S. v. Austin*, 255 F.3d 593 (8th Cir. 2001); *U.S. v. Cheek*, 69 F.3d 231 (8th Cir. 1995).

[18] *United States v. Runck, supra* note 8.

[19] See *U.S. v. Anderson*, 921 F.2d 335 (1st Cir. 1990).

[20] See *United States v. Abbamonte*, 759 F.2d 1065 (2d Cir. 1985), *overruled on other grounds, U.S. v. Macchia*, 41 F.3d 35 (2d Cir. 1994).

[21] See *U.S. v. Pomazi*, 851 F.2d 244 (9th Cir. 1988), *abrogated on other grounds, Hughey v. United States*, 495 U.S. 411, 110 S. Ct. 1979, 109 L. Ed. 2d 408 (1990).

unpublished cases, the Third[22] and Fifth[23] Circuits have also made this move to a more limited interpretation of plea agreements. It is to this more restrictive interpretive approach that we now turn.

(b) Only Terms to Which Parties Agreed Considered Part of Agreement

The State urges us to reject the approach adopted by the Court of Appeals—that terms and conditions not expressly included in a plea agreement were intentionally omitted and thus cannot be recommended by a prosecutor without breaching the plea agreement—and to instead hold that courts should enforce only those terms and conditions about which the parties did in fact agree. As will become evident below, the State's approach finds considerable support in federal case law.

In *United States v. Benchimol*,[24] a majority of the U.S. Supreme Court rejected the enforcement of "implied-in-law terms" of a plea agreement and held that "it was error for [the lower court] to imply as a matter of law a term which the parties themselves did not agree upon." Although the Court's analysis was not extensive, *Benchimol* provided important precedent upon which the federal circuit courts have built. The First,[25] Third,[26] Fourth,[27] Seventh,[28] Ninth,[29] and District of Columbia[30] Circuits all have cited to *Benchimol* as the basis for declining to enforce implied terms in plea agreements.

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[22] See *U.S. v. Wells*, 124 Fed. Appx. 735 (3d Cir. 2005).

[23] See *U.S. v. Traugott*, 364 Fed. Appx. 925 (5th Cir. 2010).

[24] *United States v. Benchimol*, 471 U.S. 453, 455-56, 105 S. Ct. 2103, 85 L. Ed. 2d 462 (1985) (per curiam).

[25] See, e.g., *U.S. v. Anderson, supra* note 19.

[26] See, e.g., *U.S. v. Moscahlaidis*, 868 F.2d 1357 (3d Cir. 1989).

[27] See, e.g., *United States v. Fentress*, 792 F.2d 461 (4th Cir. 1986).

[28] See, e.g., *U.S. v. Jimenez*, 992 F.2d 131 (7th Cir. 1993).

[29] See, e.g., *U.S. v. Johnson*, 187 F.3d 1129 (9th Cir. 1999); *U.S. v. Koenig*, 813 F.2d 1044 (9th Cir. 1987).

[30] See *U.S. v. Pollard*, 959 F.2d 1011 (D.C. Cir. 1992).

[3] Courts have justified the rejection of implied terms for varying reasons, often applying standards from contract law. Some courts have reasoned that a party to a plea agreement should not be given the benefit of implied terms when the party failed to negotiate such terms.[31] The First Circuit explained this reasoning as follows:

> If defendant had wanted to condition his plea on [a certain benefit,] he could have insisted that such a term be made part of the Agreement. He did not do so. Under the circumstances, we find no reason to grant him after the fact the benefit of a condition he failed to negotiate before the fact. To read the Agreement, *ex silentio*, to include [a certain term or condition] would give defendant more than is reasonably due.[32]

Contract law principles have also steered courts to focus on the affirmative promises made by the parties in the agreement and to recognize the limitations on their assent.[33] For example, in *United States v. Fentress*,[34] the Fourth Circuit rejected a defendant's assertion that the government had promised not to make any recommendations but those identified in the plea agreement by treating that agreement as a fully integrated contract. Because the court concluded that "[e]verything the government promised to do, it did," it held that the defendant could not now supplement the agreement "with unmentioned terms."[35] The court further explained its holding as follows:

> The prosecution owed [the defendant] no duty but that of fidelity to the agreement. Neither the Constitution nor the Federal Rules of Criminal Procedure requires that a plea agreement must encompass all of the significant actions that either side might take. If the agreement does not

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[31] See, e.g., *U.S. v. Williams*, 102 F.3d 923 (7th Cir. 1996); *U.S. v. Pollard, supra* note 30.

[32] *U.S. v. Anderson, supra* note 19, 921 F.2d at 338.

[33] See, e.g., *U.S. v. Streich*, 560 F.3d 926 (9th Cir. 2009); *In re Altro*, 180 F.3d 372 (2d Cir. 1999).

[34] *United States v. Fentress, supra* note 27.

[35] *Id.* at 464.

> establish a prosecutorial commitment on the full range of possible sanctions, we should recognize the parties' limitation of their assent.[36]

The basic premise underlying all of these explanations for the rejection of implied terms in plea agreements is that parties to such agreements should only be held to terms and conditions to which they actually agreed. This is the basic principle that was laid down by the U.S. Supreme Court in *Benchimol*.[37]

Courts that refuse to enforce implied terms as part of a plea agreement have found that a party breached a plea agreement for only two reasons: (1) for violating an express term of the agreement[38] or (2) for acting in a manner not specifically prohibited by the agreement but still incompatible with explicit promises made in the agreement.[39] In practice, therefore, this approach to the interpretation of plea agreements often results in a reliance on fine distinctions between actions, particularly in the context of recommendations made under the federal sentencing guidelines.[40] In *U.S. v. Parker*,[41] for example, the Eighth Circuit held that the application of career offender status did not breach a plea agreement that prohibited the parties from seeking departures or enhancements under the sentencing

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[36] *Id.*

[37] *United States v. Benchimol, supra* note 24.

[38] See, e.g., *U.S. v. Lovelace*, 565 F.3d 1080 (8th Cir. 2009); *U.S. v. Rivera*, 357 F.3d 290 (3d Cir. 2004), *abrogated on other grounds, Puckett v. United States*, 556 U.S. 129, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009); *U.S. v. Atkinson*, 259 F.3d 648 (7th Cir. 2001); *U.S. v. Ledbetter*, 172 Fed. Appx. 947 (11th Cir. 2006).

[39] See, e.g., *Dunn v. Colleran*, 247 F.3d 450 (3d Cir. 2001); *U.S. v. Mondragon*, 228 F.3d 978 (9th Cir. 2000); *U.S. v. Nolan-Cooper*, 155 F.3d 221 (3d Cir. 1998); *U.S. v. Brye*, 146 F.3d 1207 (10th Cir. 1998); *U.S. v. Canada*, 960 F.2d 263 (1st Cir. 1992).

[40] See, e.g., *U.S. v. Dahmen*, 675 F.3d 244 (3d Cir. 2012); *U.S. v. Martinez-Noriega, supra* note 17; *U.S. v. Medford*, 194 F.3d 419 (3d Cir. 1999); *U.S. v. Johnson, supra* note 29; *U.S. v. Smith*, 140 F.3d 1325 (10th Cir. 1998); *U.S. v. Pollard, supra* note 30; *U.S. v. Carrazana*, 921 F.2d 1557 (11th Cir. 1991); *U.S. v. Traugott, supra* note 23.

[41] *U.S. v. Parker, supra* note 17.

guidelines, because career offender status technically is neither a departure nor an enhancement. On the whole, it is fair to say that under this more limited approach to interpretation of plea agreements, the government has near-plenary ability to make any sentencing recommendation not explicitly precluded by the plea agreement or contradictory to one of its express terms.

(c) Conclusion Based on Nebraska Case Law

Having reviewed these two approaches, we now consider them in light of Nebraska case law—which demands that courts enforce only those terms and conditions about which the parties to a plea agreement did in fact agree.

[4] In its petition for further review, the State relied upon the analysis of the Nebraska Court of Appeals in *State v. Thompson*[42] to highlight that court's error in the instant case. In *Thompson*, the Court of Appeals rejected the argument that the State had waived its right to appeal a sentence as excessively lenient by promising in a plea agreement to "'remain silent at sentencing.'"[43] Relying upon the opinion of the First Circuit in *U.S. v. Anderson*,[44] which itself relied heavily upon the U.S Supreme Court's decision in *Benchimol*,[45] the Court of Appeals reasoned as follows:

> [T]he State's waiver of its right of appellate review must actually be part of the agreement rather than judicially created from a plea agreement that fails to even mention such a condition. In short, *we enforce the agreement that was made rather than expand it by judicial fiat*, and we hold that the State did not waive its statutory right to appellate review of the trial court's sentences.[46]

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[42] *State v. Thompson*, 15 Neb. App. 764, 735 N.W.2d 818 (2007).

[43] *Id.* at 773, 735 N.W.2d at 827.

[44] *U.S. v. Anderson, supra* note 19.

[45] *United States v. Benchimol, supra* note 24.

[46] *State v. Thompson, supra* note 42, 15 Neb. App. at 776, 735 N.W.2d at 828 (emphasis supplied).

The Court of Appeals also specifically noted that "[g]iven the general principle that courts are not to rewrite contracts to include what the parties did not, we find that what the plea agreement between [the defendant] and the State did not say is of the greatest import in resolving this issue . . . ."[47] This holding was in line with a previous opinion of the Court of Appeals[48] and a previous opinion of this court,[49] both of which enforced only those terms upon which the parties actually had agreed.

The decision of the Court of Appeals in the instant case is a departure from this precedent. By holding that the State breached its plea agreement with Landera by recommending probation "only with an additional term not contemplated when the plea agreement was made,"[50] the Court of Appeals erred. The expansive analytical approach would have the effect of ignoring the plain language of the agreement, creating a promise by the State not to recommend incarceration as a condition of probation, and expanding the plea agreement by judicial fiat.

[5] Because the approach to the interpretation of plea agreements advocated by the State is consistent with existing Nebraska case law and a large body of federal case law encompassing decisions of the U.S. Supreme Court and a majority of the federal circuit courts, we hold that courts implementing plea agreements should enforce only those terms and conditions actually agreed upon by the parties. We now

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[47] *Id.* at 773, 735 N.W.2d at 826.

[48] See *State v. Powers*, 10 Neb. App. 256, 264, 634 N.W.2d 1, 9 (2001) (State did not breach plea agreement by using letters as evidence of subsequent criminal activity because State "agreed in the plea agreement not to pursue any charges for the prior letters, but did not agree to never use the prior letters as evidence in a prosecution for subsequent criminal activity"), *disapproved on other grounds, State v. Smith*, 267 Neb. 917, 678 N.W.2d 733 (2004).

[49] See *State v. Gildea*, 240 Neb. 780, 782, 484 N.W.2d 467, 468 (1992) (terms of plea agreement "will not be extended beyond the bare terms of that agreement").

[50] *State v. Landera, supra* note 1, 20 Neb. App. at 34, 816 N.W.2d at 29.

apply this principle in the instant case to determine whether the State breached its plea agreement with Landera.

2. Whether State Breached Plea Agreement With Landera

Landera's plea agreement with the State contained two promises by each party. Landera promised to plead guilty to 10 of 22 counts in the information and to obtain a "psychiatric evaluation and a sex offender evaluation from a reputable individual and follow through with all recommendations." In return, the State promised to dismiss the remaining 12 counts and "to recommend probation." When asked by the court whether this description of the plea agreement "accurately represent[ed] the plea agreement as [he] underst[ood] it," Landera replied, "Yes." When asked whether there were "any other terms or conditions of the plea agreement that [he] believe[d] exist[ed] that were not . . . fully recited into the record," Landera responded, "No." We thus take these four promises to be the extent of Landera's plea agreement with the State.

Following the limited approach to interpretation of plea agreements, we refuse to read into this plea agreement an implied promise by the State not to recommend conditions of probation. The terms of the plea agreement included only two promises by the State: that it would (1) drop the remaining 12 counts against Landera and (2) recommend probation. The agreement did not include a promise by the State not to recommend conditions of probation. As the Court of Appeals' decision makes plain, to hold the State to any such promise requires a court to imply terms. We decline to do so. Rather, we enforce only the two promises actually made by the State, just one of which is at issue in this appeal.

The plea agreement between Landera and the State was silent as to conditions of probation. And one of the conditions of probation allowed by statute is incarceration in county jail.[51] As such, the State could have recommended incarceration as a condition of probation without breaching the plea agreement

[51] See Neb. Rev. Stat. § 29-2262(2)(b) (Cum. Supp. 2012).

and did not breach the plea agreement for the reason identified by the Court of Appeals.

But we find that the State did breach the plea agreement, albeit in a different manner, by not fulfilling its explicit promise to recommend probation. While the State made a perfunctory recommendation of probation during allocution, the tenor of its entire argument undermined its purported recommendation, thereby breaching the express term of the agreement.

At sentencing, the State began its comments by stating, "Prior to reviewing the evaluation from D&E, the State was prepared to recommend probation . . . ." A few sentences later, the State explicitly stated as follows: "In reviewing the presentence, again, for today's sentencing, along with the D&E evaluation, I'm struck and I can't recommend probation . . . ." Although the State was interrupted before finishing this sentence, these statements demonstrate that the State had changed its mind about recommending probation.

During the remainder of its comments, the State strongly suggested to the district court that it believed the court should impose incarceration *instead of probation*. It explained that the purpose of the 90-day evaluation was "to determine whether or not [Landera was] fit and proper for probation" and that Landera "had ninety days to get his act straight, to play along and he couldn't do it." The State also highlighted the predatorial nature of Landera's crimes. But the most telling portion of the State's allocution was its conclusion:

> I don't trust that if he is released without . . . punishment that he won't be inclined to reign in his impulse control. It's ninety days at D&E and he couldn't keep it under wraps for ninety days in a prison setting. So, yes, I am concerned about him being on the streets and walking past a school or looking at pornography again . . . .
>
> I don't understand how [Landera] would be able to function without continuing treatment programs . . . . But I also believe that there should be a punishment element and that should be made clear to [him]. I'd submit on that fact.

By focusing so heavily on the concept of punishment, Landera's failure to prove that he was "fit and proper for probation," and

concern about Landera's "being on the streets," the State made a powerful, albeit implicit, argument to the court that probation was simply not an appropriate sentence.

[6] We recognize that a sentencing recommendation need not be enthusiastic in order to fulfill a promise made in a plea agreement.[52] The State must not, however, effectively undermine the promised recommendation. The State's perfunctory adherence coupled with sentencing comments totally at odds with probation amounts to a failure to recommend probation. And by failing to recommend probation, it breached the plea agreement with Landera. Because we find that the Court of Appeals reached the correct result, albeit for the wrong reason, we affirm its decision to vacate Landera's sentences and remand the cause for resentencing by a different judge.

VI. CONCLUSION

We granted the State's petition for further review to consider how courts should treat terms and conditions not explicitly mentioned in plea agreements. Because the approach urged by the State is more consistent with existing Nebraska case law and the case law of a majority of the federal circuits, we find that the Court of Appeals erred in enforcing an implied promise by the State not to recommend an additional condition of probation. Rather, courts should enforce only those terms and conditions to which the parties actually agreed. Applying this standard to the instant case, we find that the State violated its plea agreement with Landera not by recommending incarceration as a condition of probation but by effectively arguing for incarceration *instead* of probation. Having reached the same result as the Court of Appeals by a different path, we affirm.

AFFIRMED.

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[52] See *United States v. Benchimol, supra* note 24.

CONNOLLY, J., concurring.

I concur in the majority opinion's judgment. I write separately because I do not agree with its reasoning. The U.S.

Supreme Court has explained that the substantial benefits of plea bargaining in the criminal justice system rest upon assumptions that the bargaining is fair:

> [A]ll of these considerations presuppose fairness in securing agreement between an accused and a prosecutor. It is now clear, for example, that the accused pleading guilty must be counseled, absent a waiver. . . . The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known. There is, of course, no absolute right to have a guilty plea accepted. . . . A court may reject a plea in exercise of sound judicial discretion.
>
> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that *when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled*.[1]

"Because a defendant pleading guilty pursuant to a plea agreement waives a number of fundamental constitutional rights, . . . the circumstances surrounding the plea agreement must comport with due process to ensure defendant's understanding of its consequences."[2] Accordingly, many federal courts have held that in determining whether the prosecution has breached a plea agreement, a court must consider whether the government's conduct is inconsistent with what the defendant would have reasonably understood when he or she entered

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[1] *Santobello v. New York*, 404 U.S. 257, 261-62, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971) (emphasis supplied). Accord *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

[2] *Spence v. Superintendent, Great Meadow Cor. Fac.*, 219 F.3d 162, 167 (2d Cir. 2000) (citations omitted). Accord *U.S. v. Lewis*, 633 F.3d 262 (4th Cir. 2011).

the plea.[3] Likewise, ambiguities in an agreement are construed against the government.[4]

So I have no quarrel with the general proposition that the parties must have agreed to the terms of the agreement. But in my view, the question is whether an objectively reasonable defendant, when agreeing to plead guilty in exchange for the prosecutor's promise to recommend probation, would have understood that the prosecution could nonetheless recommend a year of incarceration as a condition of probation. The Court of Appeals' decision essentially answered no to this question. I agree.

The prosecution did not specify that it was reserving the right to seek statutory conditions as part of its agreement to recommend probation. And it clearly could have included this term in the agreement if that had been its intent.[5] I believe the Court of Appeals correctly reasoned that we do not permit a party to a contract to prevail on unstated terms or conditions. And this reasoning must certainly apply when one of the parties has such a superior bargaining position.

Moreover, the majority's reasoning would require defendants to understand that Nebraska's probation statute permits a court to impose an initial term of incarceration as a condition of probation. That rule is neither universal nor the commonly understood meaning of probation.[6] At the very least,

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[3] See, *U.S. v. Larkin*, 629 F.3d 177 (3d Cir. 2010); *U.S. v. Sharma*, 703 F.3d 318 (5th Cir. 2012); *U.S. v. Herrera*, 928 F.2d 769 (6th Cir. 1991); *U.S. v. Rodriguez-Delma*, 456 F.3d 1246 (10th Cir. 2006); *U.S. v. Horsfall*, 552 F.3d 1275 (11th Cir. 2008).

[4] See, *U.S. v. Newbert*, 504 F.3d 180 (1st Cir. 2007); *U.S. v. Griffin*, 510 F.3d 354 (2d Cir. 2007) (abrogated on other grounds as recognized in *U.S. v. MacPherson*, 590 F.3d 215 (2d Cir. 2009)); *U.S. v. Wells*, 211 F.3d 988 (6th Cir. 2000); *U.S. v. O'Doherty*, 643 F.3d 209 (7th Cir. 2011); *U.S. v. Nguyen*, 608 F.3d 368 (8th Cir. 2010); *U.S. v. Ellis*, 641 F.3d 411 (9th Cir. 2011).

[5] See *State v. Naydihor*, 258 Wis. 2d 746, 654 N.W.2d 479 (Wis. App. 2002).

[6] See, *State v. Nuss*, 190 Neb. 755, 212 N.W.2d 565 (1973); Black's Law Dictionary 1322 (9th ed. 2009).

the prosecution's failure to reserve the right to seek conditions of probation created an ambiguity that should be construed against the State.

Most important, the facts show that the prosecution did not intend to reserve the right to recommend incarceration as a condition of probation when Landera entered his plea. Instead, the State had a change of heart after the court ordered Landera's sex offender evaluation. But that is exactly the kind of government conduct that the Due Process Clause prohibits. I believe that the majority opinion will raise serious constitutional questions whether a defendant has voluntarily and knowingly entered a plea of guilty, particularly if the court did not advise the defendant that it could confine him or her to a longer period in jail than what the defendant had agreed to in a plea agreement.[7]

McCormack, J., joins in this concurrence.

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[7] See *State v. Cutler*, 121 Ariz. 328, 590 P.2d 444 (1979).

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Filed February 22, 2013. Nos. S-11-1026, S-12-415.

1. **Sentences: Appeal and Error.** Whether a defendant is entitled to credit for time served and in what amount are questions of law. An appellate court reviews questions of law independently of the lower court.
2. ____: ____. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
3. **Sentences.** Credit for time served should be taken into account so that the effective sentence is within the statutory limits.
4. ____. With consecutive sentences, periods of presentence incarceration are credited against the aggregate of all terms imposed. With concurrent sentences, such periods are credited against the longest sentence, but are, in effect, applied against all the sentences.
5. **Sentences: Probation and Parole: Appeal and Error.** It is within the discretion of the trial court whether to impose probation or incarceration, and an appellate court will uphold the court's decision denying probation absent an abuse of discretion.