Nebraska Law Review

Volume 93 | Issue 2 Article 6

2014

Ineffective Assistance of Counsel in Nebraska: The Scope of the Nebraska Supreme Court's Analysis in *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013), and the Effects of the Postconviction Procedural Default Rule

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Note*

Ineffective Assistance of Counsel in Nebraska: The Scope of the Nebraska Supreme Court's Analysis in *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013), and the Effects of the Postconviction Procedural Default Rule

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I. INTRODUCTION

Criminal defendants have a constitutional right to effective assistance of counsel.[1] In Nebraska, defendants can enforce this right either on direct appeal or through a postconviction proceeding.[2] In either forum, a defendant must show that his counsel's performance was deficient.[3] When determining whether counsel's performance was deficient, the court must not judge counsel's performance in hindsight, but from his perspective at the time he provided the assistance.[4] Judging counsel's actions from his perspective at the time he rendered assistance is a difficult task on direct appeal, because the trial record does not reflect why an attorney did something or what he knew when he did it—it only reflects the act or decision itself. This difficulty is particularly relevant when an ineffectiveness claim turns on trial strategy and not an obvious mistake of law or other inappropriate attorney behavior. Because the record is inadequate, ineffective assistance claims that turn on trial strategy are usually deferred to a postconviction proceeding when raised on direct appeal, where an evidentiary hearing can be used to reveal the motives behind counsel's chosen strategy.[5]

Recently, the Nebraska Supreme Court took up two ineffectiveness claims on direct appeal that rested on trial strategy: *State v. Faust*[6]

1. *See infra* subsection II.A.1.
2. *See infra* subsection II.A.2.
3. State v. Filholm, 287 Neb. 763, 848 N.W.2d 571 (2014).
4. Strickland v. Washington, 466 U.S. 668, 689 (1984). *See infra* subsection II.A.2.
5. *See infra* notes 25–37 and accompanying text.
6. 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved on other grounds*, State v. McCulloch, 742 Neb. 636, 743 N.W.2d 727 (2007).

and *State v. Rocha*.[7] The court overturned both convictions, reasoning in each case that because the court could not conceive of any reasonable trial strategy supporting the attorney's approach, there was no reason to wait for an evidentiary hearing on the matter.[8] It concluded that it would have been a waste of judicial time to defer the ineffectiveness claims for an evidentiary hearing on counsels' motives because the ineffectiveness was clear on the trial record.[9]

This Note argues that the Nebraska Supreme Court extended the scope of its review of ineffectiveness claims in *Rocha*, and the test the court applied in *Rocha* needs reform. Part II explains the standard for ineffective assistance claims under *Strickland v. Washington*[10] and examines the Nebraska Supreme Court's analysis in *Faust*. Part III looks closely at the *Rocha* decision, and Part IV compares the analyses employed by the Nebraska Supreme Court in *Faust* and *Rocha*. It argues that although the court claimed its decision in *Rocha* was in line with *Faust*, the court's reasoning in *Rocha* actually expanded the scope of the court's review of ineffective assistance claims significantly. It asserts that, consistent with the court's concern for conservation of judicial resources, the Nebraska Supreme Court should reform the test it applied in *Rocha*.

Subsection IV.B argues that reforming the *Rocha* test is not enough to correct Nebraska's approach; the Nebraska Supreme Court should also stop applying the postconviction procedural default rule to the claims. Nebraska's use of the procedural default rule pressures defendants into raising ineffectiveness claims on direct appeal that could never be resolved there, a result inconsistent with the policies behind the rule. Nebraska's appellate courts must then address the claims prematurely, potentially wasting judicial resources[11] and harming defendants.[12] Additionally, in a postconviction proceeding, more resources are wasted when the court must analyze whether the claim is defaulted before it can turn to the merits.[13] The sounder policy, endorsed by the Supreme Court of the United States and the great majority of states, is to allow defendants to bring ineffectiveness claims in the first instance in a collateral proceeding,[14] no matter the

7. 286 Neb. 256, 836 N.W.2d 774 (2013) (per curiam).

8. *Faust*, 265 Neb. at 876, 660 N.W.2d at 872; *Rocha*, 286 Neb. at 265, 836 N.W.2d at 781.

9. *Faust*, 265 Neb. at 876, 660 N.W.2d at 872; *Rocha,* 286 Neb. at 265, 836 N.W.2d at 781.

10. 466 U.S. 668, 684 (1984).

11. *See infra* subsection IV.B.2.b.

12. *See infra* subsection IV.B.2.b.

13. *See infra* notes 132–134 and accompanying text.

14. In this Note, the terms "postconviction review" and "collateral review" are used interchangeably.

state of the record.[15] This dual reform is necessary to conserve Nebraska's judicial resources and protect Nebraska defendants.

II. BACKGROUND

A. Ineffective Assistance of Counsel Claims

1. Sixth Amendment Right to Counsel

Under the Sixth Amendment to the Constitution of the United States, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[16] The Sixth Amendment guarantees more than the right to just any counsel—"the right to counsel is the right to effective assistance of counsel."[17] This right "exists, and is needed, in order to protect the fundamental right to a fair trial."[18] Courts judge whether counsel provided effective assistance under the standard set out in *Strickland v. Washington*.[19]

Under *Strickland*, a court must reverse a defendant's conviction because of ineffective assistance if the defendant can show two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[20]

The standard for attorney performance is "reasonably effective assistance."[21] The Court in *Strickland* also cautioned that "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it was proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."[22] To prevent this, a court must make every effort "to evaluate the conduct from counsel's perspective at the time"[23] and to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[24] *Strickland*'s presumption of

15. *See infra* section IV.B.
16. U.S. CONST. amend. VI.
17. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).
18. Strickland v. Washington, 466 U.S. 668, 684 (1984).
19. *Id.*
20. *Id.* at 687.
21. *Id.*
22. *Id.* at 689.
23. *Id.*
24. *Id.* at 694.

reasonableness creates a difficult hurdle for direct appellate review of ineffectiveness claims based on counsel's trial strategy.

2. Appellate Review and Claims of Ineffective Assistance

The state of the trial record makes ineffectiveness claims an awkward fit for direct appellate review.[25] Generally, an appellate court will only consider issues that were raised at trial and therefore preserved in the record.[26] There are two rationales for this rule. First, when an issue is not raised at trial, evidence relevant to the issue is not introduced, and therefore the appellate court "has no factual basis, or at best a shaky basis, on which to make a decision."[27] Second, because such an issue was not addressed by the lower court, the appellate court must act as fact finder to resolve it.[28] Appellate courts' function is to review decisions of lower courts for error; they rarely act as fact finders and do not have the resources to do so.[29] Therefore, in general, when an issue is raised for the first time on appeal, "it will be disregarded, as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition."[30] Ineffectiveness claims do not function well in the appellate framework because they cannot be raised at the trial level—trial counsel cannot raise ineffective assistance claims against themselves.[31] The lower court, therefore, cannot make factual findings on the matter, and the appellate court has no decision to review.[32]

Jurisdictions' approaches to appellate review of ineffectiveness claims fall into three main categories:

> (1) jurisdictions that require litigants to raise ineffective assistance claims on direct appeal or risk losing the claim in a subsequent collateral proceeding; (2)

25. See Thomas M. Place, *Deferring Ineffectiveness Claims to Collateral Review: Ensuring Equal Access and a Right to Appointed Counsel,* 98 KY. L.J. 301, 309–10 (2010) for a discussion of the challenges ineffectiveness claims bring to the appeal process.

26. DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, APPELLATE COURTS IN THE UNITED STATES 55 (1994); State v. Rocha, 286 Neb. 256, 262, 836 N.W.2d 774 (2013) (per curiam) ("Absent plain error, we ordinarily will not address an issue that was not raised in the trial court.").

27. MEADOR & BERNSTEIN, *supra* note 26, at 56. Meador and Bernstein explain further that "the appellate court lacks the benefit of the trial judge's views on the matter, views that might contribute to a sounder appellate resolution." *Id.*

28. Commonwealth v. Grant, 813 A.2d 726, 734 (Pa. 2002), *clarified on denial of reargument,* 821 A.2d 1246 (Pa. 2003).

29. *Id.*

30. State v. Green, 238 Neb. 328, 346, 470 N.W.2d 736, 750 (1991).

31. Place, *supra* note 25, at 302 & n.9. The trial record is "devoted to issues of guilt or innocence." Massaro v. United States, 538 U.S. 500, 505 (2003).

32. *Massaro*, 538 U.S. at 505 ("[T]he record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse.").

> jurisdictions that prohibit ineffective assistance claims from being reviewed on direct appeal under any circumstances; and (3) jurisdictions that permit the consideration of ineffectiveness claims on direct appeal, but only when all the facts necessary to decide the claim appear in the trial record.[33]

Nebraska falls into the first category for certain ineffectiveness claims: When appellate counsel is different from trial counsel, "a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review."[34] Nebraska courts decline to address the great majority of ineffectiveness claims, citing an insufficient record; the claims are then deferred for postconviction review.[35] The postconviction process provides defendants a state avenue to correct errors of "constitutional proportion" when they could not be raised or addressed on direct appeal.[36] Postconviction review in Nebraska is governed under § 29-3001 of the *Nebraska Revised Statutes*, which calls for a prompt hearing unless the record clearly shows that the claimant is either entitled to relief or his claim is meritless.[37]

III. ANALYSIS

A. *Ineffective Assistance of Counsel in Nebraska:* State v. Faust

The Supreme Court of Nebraska reversed a judgment on direct appeal for a claim of ineffective assistance of counsel involving trial strategy for the first time in 2003 in *State v. Faust*.[38] In the case, Faust was convicted of two counts of first-degree murder and sen-

33. State v. Thompson, 20 A.3d 242, 255 (N.H. 2011) (citing Woods v. State, 701 N.E.2d 1208, 1211 (Ind. 1998)).

34. State v. Young, 279 Neb. 602, 607, 780 N.W.2d 28, 33–34 (2010).

35. State v. Faust, 256 Neb. 845, 886, 660 N.W.2d 844, 879 (2003) (Stephan, J., dissenting), *disapproved on other grounds*, State v. McCulloch, 274 Neb. 636, 743 N.W.2d 727 (2007). See State v. Rocha, 286 Neb. 256, 273 & n.4, 836 N.W.2d 774, 786 & n.4 (Stephan, J., dissenting) for an extensive list of Nebraska cases where ineffectiveness was raised on direct appeal and subsequently deferred by the court.

36. State v. Whitmore, 238 Neb. 125, 131, 469 N.W.2d 527, 531 (1991). The Nebraska Legislature adopted the state's postconviction procedure after the Nebraska Supreme Court denied a Nebraska prisoner's habeas corpus petition in Case v. State, 177 Neb. 404, 129 N.W.2d 107 (1964) The United States Supreme Court granted certiorari to determine "whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees," Case v. State of Neb., 381 U.S. 336, 337 (1965), but the Nebraska Legislature's action relived them of answering the question.

37. NEB. REV. STAT. § 29-3001 (Reissue 2008 & Cum. Supp. 2014).

38. 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved on other grounds*, State v. McCulloch, 274 Neb. 636, 743 N.W.2d 727 (2007).

tenced to consecutive terms of life imprisonment[39] when her counsel did not object to prejudicial evidence.[40] The court noted that although it had never reversed a conviction on direct appeal for ineffective assistance, "other jurisdictions have recognized that in some rare circumstances, a reasonable trial tactic or strategy cannot exist."[41] The court explained:

> When reversing a judgment for ineffective assistance of counsel without an evidentiary hearing for failure to object to evidence, appellate courts have considered the lack of plausible strategy, the egregious nature of the error, the prejudice incurred, the effect of judicial errors, and the effect of other trial errors.[42]

The court then looked closely at a similar Massachusetts case, *Commonwealth v. Gillette*.[43] It noted that the Massachusetts court "considered the egregious nature of the error and the prejudice that resulted."[44] The *Gillette* court reversed the conviction in that case because the evidence in question was "highly prejudicial and unquestionably, any ordinary fallible lawyer would have sought to keep it out of the case."[45] The *Faust* court also discussed with approval an Ohio court's reversal of a conviction where the Ohio Court of Appeals concluded an attorney let in highly prejudicial evidence and "noted that where the defense is substantially weakened because of an unawareness of a rule of law basic to the case, the accused is denied effective assistance of counsel."[46]

Turning to Faust's case, the court stated, "it is clear from a review of the record that everyone was on the wrong page."[47] The court concluded that the lower court and the attorneys "made a mistake of law" regarding the applicable evidentiary rule.[48] The court set out a narrow holding:

> When the inadmissible evidence that is presented has such a high level for jury prejudice and confusion, there is no strategy or reason for a defense attorney to sit back and allow such evidence to be heard without objection. Simply put, when the error was so egregious and resulted in such a high level of prejudice, no tactic or strategy can overcome the effect of the error, which effect was a fundamentally unfair trial. In that rare case, a determination of

39. *Id.* at 849, 660 N.W.2d at 854. She received additional time for weapons charges. *Id.*

40. *Id.* at 872, 660 N.W.2d at 870.

41. *Id*. at 873, 660 N.W.2d at 870.

42. *Id.*

43. 600 N.E.2d 1009 (Mass. Ct. App. 1992).

44. *Faust*, 265 Neb. at 874, 660 N.W.2d at 871.

45. *Id.* (quoting *Gillette*, 600 N.E.2d at 1011) (internal quotation marks omitted).

46. *Id.* at 874–75, 660 N.W.2d at 871 (discussing State v. Cutcher, 244 N.E.2d 767 (Ohio Ct. App. 1969)).

47. *Id.*

48. *Id.*

> the issue of ineffective assistance of counsel does not require an evidentiary hearing.[49]

In such a case, the court reasoned, an evidentiary hearing for factual findings is not necessary, and the defendant's constitutional right to counsel must be vindicated immediately.[50]

Justice Kenneth Stephan dissented, arguing that "the strong presumption that trial counsel acted reasonably cannot be overcome by speculation regarding strategy."[51] He would have deferred the claim to Nebraska's postconviction review process.[52] Former Chief Justice John Hendry joined in the dissent. The court did not reverse another conviction for ineffective assistance until *State v. Rocha*[53] in July of 2013.

B. *State v. Rocha*

1. Facts and Procedural History

Eric Rocha was convicted of first-degree sexual assault of a child and four counts of child abuse.[54] The charges were tried together in one trial,[55] and Rocha was found guilty on all counts.[56] He received forty years to life for the sexual assault conviction and three to five years for each child abuse conviction.[57] He appealed, claiming in part, that:

> (1) his trial counsel was ineffective in failing to move to sever the sexual assault charge from the child abuse charges, [and] (2) his trial counsel was ineffective in failing to request a limiting instruction preventing the jury from considering the evidence of sexual assault to convict him of child abuse charges and vice versa.[58]

2. Majority Opinion

The Nebraska Supreme Court concluded Rocha's charges were improperly joined[59] and overturned his conviction.[60] In doing so, it used much, but not all, of the key language set out in *Faust*:

> [C]onsidering the obvious risks to Rocha of proceeding with a joint trial on the charges, we can conceive of no justifiable reason for counsel's failure to object to the misjoinder and failure to move to sever. "[W]here no plausible explana-

49. *Id.* at 875, 660 N.W.2d at 872.
50. *Id.*
51. *Id.* at 887, 660 N.W.2d at 879 (Stephan, J., dissenting).
52. *Id.* at 887, 660 N.W.2d at 879–80.
53. 286 Neb. 256, 836 N.W.2d 774 (2013) (per curiam).
54. *Id.* at 257, 836 N.W.2d at 777.
55. *Id.*
56. *Id.* at 261, 836 N.W.2d at 779.
57. *Id.*
58. *Id.* at 261–62, 836 N.W.2d at 779.
59. *Id.* at 265, 836 N.W.2d at 781.
60. *Id.* at 272, 836 N.W.2d at 786.

> tion for an attorney's actions exists, to require the defendant to file a postconviction action can be only a waste of judicial time."[61]

The court remanded the case for a new trial.[62]

3. Dissenting Opinion

In his dissenting opinion, Justice Kenneth Stephan, joined by Justice William Cassel, asserted that the court overturned Rocha's conviction "without a complete factual record to support its conclusion."[63] He focused on the ultimate sticking point for ineffectiveness claims—the trial court did not address the question of counsel's effectiveness, and therefore there were no factual findings to review on the record.[64] Justice Stephan referred to the majority's approach of overturning a conviction when they "can conceive of no reasonable strategic reason" for counsel's decision as their "'we know it when we see it' approach," and asserted that such a method is "unsound."[65] Justice Stephan posed several "what if" questions that, in his opinion, might have justified Rocha's counsel's actions, but could never be answered without an evidentiary hearing.[66] He lamented:

> I submit that the majority cannot "conceive" of a strategic explanation for counsel's performance at trial because it does not know all the facts and has eliminated the procedural means of acquiring them. The majority's approach violates a fundamental principle of appellate review in criminal cases—a principle codified for over 90 years—that no judgment in a criminal case may be set aside if the court considers that no substantial miscarriage of justice has

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61. *Id.* at 265, 836 N.W.2d at 781 (quoting State v. Faust, 265 Neb. 845, 876, 660 N.W.2d 844, 872 (2003) (Stephan, J., dissenting), *disapproved on other grounds*, State v. McCulloch, 274 Neb. 636, 742 N.W.2d 727 (2007)).

62. *Id.* at 272, 836 N.W.2d at 786.

63. *Id*. (Stephan, J., dissenting).

64. *Id.* at 273, 836 N.W.2d at 786.

65. *Id.* at 276, 836 N.W.2d at 788.

66. *Id.* at 278–79, 836 N.W.2d at 790. He asked:

> What if counsel testified that given the absence of any physical evidence of sexual or physical abuse and Rocha's insistence on testifying in his own defense, counsel concluded that that the best strategy for obtaining acquittal on all charges was to have a single trial in which he would seek to create reasonable doubt as to the credibility of the complaining witnesses, rather than moving to sever the charges and thus giving the State two opportunities to cross-examine Rocha and obtain felony convictions? . . . I think it is possible, if not probable, that a district court hearing this testimony would conclude that this strategy was reasonable from defense counsel's perspective at trial and was therefore not ineffective assistance of counsel. In such a scenario, Rocha's otherwise valid criminal convictions would not be overturned.

Id. The court responded: "Putting aside whether the dissent's possible answers are actually probable or convincing, this 'what if' routine could be done for any case on appeal. It is just another way for the dissent to argue that ineffective assistance claims should always be reserved for postconviction review." *Id.* at 264, 836 N.W.2d at 781 (majority opinion).

> actually occurred. Without having the facts in the record, an appellate court cannot assess whether a miscarriage of justice has occurred.[67]

Finally, Justice Stephan noted that the court was concerned that following the postconviction process in Rocha's case would be a waste of judicial time.[68] He countered that it is never a waste of judicial time to follow standard procedures and warned that the majority's approach "could, in this case or another, lead to what would truly be a judicial waste of time: an unnecessary retrial."[69]

IV. ARGUMENT

A. The Nebraska Supreme Court Should Clarify Its Standard for Future Cases

1. *The Court's Analysis in* Rocha *Could Be Interpreted as Creating a Broader Rule than That Articulated in* Faust

The way the court formulated and applied its ineffectiveness rules in *Rocha*[70] was arguably broader than the reasoning it applied in *Faust*.[71] Notably, in *Faust*, the court determined from the record that Faust's counsel and the trial court made a mistake—the record evidenced that they misinterpreted a statute, and counsel did not object to prejudicial evidence as a result.[72] The court used counsel's misunderstanding to put itself in counsel's shoes at the time he made his decision not to object;[73] it could then infer that counsel was likely operating based on a misunderstanding of the law.[74] The court's statement that it was "unable to conceive of any reasonable trial strategy"

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67. *Id.* at 279, 836 N.W.2d at 790 (Stephan, J., dissenting) (citing NEB. REV. STAT. § 29-2308 (Reissue 2008)).
68. *Id.*
69. *Id.*
70. *Rocha*, 286 Neb. 256, 836 N.W.2d 774.
71. State v. Faust, 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved on other grounds*, State v. McCulloch, 274 Neb. 636, 742 N.W.2d 727 (2007).
72. The court explained:

> It is clear from the record that the trial court and attorneys involved in this case failed to read and understand § 27–405. As a result, Faust's counsel initially objected to improper character evidence and then failed to continue to object as more prejudicial evidence was piled on. Here, Faust's attorney, along with the prosecutor and the court, made a fundamental mistake of law. *The situation was not one where a reasonable trial tactic or strategy was employed*, and indeed, no strategy could be reasonable when the result would be a fundamentally unfair trial.

Id. at 872, 660 N.W.2d at 870 (emphasis added).
73. The court's decision was consistent with *Strickland's* requirement that the court judge counsel's actions from his perspective at time he made the decision. *See* Strickland v. Washington, 466 U.S. 668, 689 (1984).
74. *See supra* note 72. Justice Stephan argued this conclusion was speculation. *See Faust,* 265 Neb. at 887, 660 N.W.2d at 879 (Stephan J., dissenting).

was offered secondarily, *after* the first statement inferred that it was "clear from the record" that counsel and the trial court made a mistake.[75] The court used the evidence of the mistake to formulate a narrow rule, stating:

> Simply put, when the *error was so egregious* and resulted in such a high level of prejudice, no tactic or strategy can overcome the effect of the error, which effect was a fundamentally unfair trial. In that rare case, a determination of the issue of ineffective assistance of counsel does not require an evidentiary hearing.[76]

Faust's counsel's "egregious" error sets the case apart from *Rocha.* In *Rocha*, the Nebraska Supreme Court could not infer counsel was mistaken. The court never referred to counsel's choices as "error" or described them as "egregious."[77] Rather, the court disregarded the *Faust* court's "error" language and applied the following rule:

> [W]here the record on direct appeal rebuts [the] presumption [of reasonableness], we may address the issue [of ineffective assistance]. Essentially, that presumption is rebutted when counsel's *decision* cannot be justified as part of any plausible trial strategy . . . . "[W]here no plausible explanation for an attorney's actions exists, to require the defendant to file a postconviction action can be only a waste of judicial time."[78]

The distinction between Faust's counsel's "error" which was "egregious" and Rocha's counsel's "decision" is significant. That the Nebraska Supreme Court based its decision in *Rocha* on the counsel's decision—rather than record evidence of the *reason* for the decision—demonstrates the court may be willing to loosen its ineffectiveness test and overturn more convictions on direct appeal. In *Faust*, the court held as it did in part because it was clear from the record that counsel misunderstood the law. The court could not infer from *Rocha*'s record that Rocha's counsel was mistaken; however, the court still overturned his conviction. By doing so, the Nebraska Supreme Court went beyond its analysis in *Faust*, overturning Rocha's conviction without facts in the record to allow it to judge counsel's actions from what he knew at the time.

2. The Court Has a Strong History of Deferring Claims for Postconviction Review

With the exception of *Faust* and *Rocha*, the Nebraska Supreme Court has consistently deferred ineffectiveness claims for postconvic-

75. *Id.* at 875, 660 N.W.2d at 871 ("We further note that had the law been determined correctly the first time the issue was raised, the problem we face in this case would not exist.").

76. *Id.* at 875, 660 N.W.2d at 871–72 (emphasis added).

77. The court did state that the charges were "improperly joined together." State v. Rocha, 286 Neb. 256, 265, 836 N.W.2d 774, 781 (2013) (per curiam).

78. *Id.* at 263–65, 836 N.W.2d at 780–81 (emphasis added) (citing *Faust*, 265 Neb. at 876, 660 N.W.2d at 872).

tion review because of insufficient records.[79] For example, in *State v. Huston*,[80] Huston claimed on direct appeal that his counsel was ineffective for failing to object to certain evidence and failing to renew an objection at trial.[81] The court noted the strong presumption afforded to trial counsel and reasoned:

> Because of this deference, the question whether the failure to object was part of counsel's trial strategy is essential to a resolution of Huston's ineffective assistance of counsel claims. *There is no evidence in the record that would allow us to determine whether Huston's trial counsel consciously chose as part of a trial strategy not to object to the evidence identified on appeal.* Therefore, because the record is insufficient to adequately review Huston's claims of ineffective assistance of counsel, we do not reach these claims on direct appeal.[82]

The court was faced with a similar situation in *State v. Freemont*,[83] where Freemont appealed from a second-degree murder conviction.[84] He made multiple ineffectiveness claims, including that his attorney failed to "elicit evidence of third-party guilt" and make certain objections.[85] The Nebraska Supreme Court declined to address the claims, reasoning:

> There is nothing in the present record that reflects why counsel did or did not elicit certain testimony during cross-examination. *And we have no way of determining whether action taken by counsel was misguided or based upon sound strategic motive.* A resolution of this question would require an evidentiary hearing, and we thus determine that it is not appropriate for review on direct appeal.[86]

In *State v. Poe*,[87] Poe alleged in his motion for postconviction relief that his counsel was ineffective for failing to present certain testimony,[88] and the lower court denied the motion without an evidentiary hearing.[89] The Nebraska Supreme Court reversed the lower court's dismissal, stating "[w]e have no evidence concerning trial counsel's strategy. Under these circumstances, trial counsel's strategy is a matter of conjecture."[90] The court remanded the case for an evidentiary hearing regarding counsel's strategy.[91]

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79. *Faust*, 265 Neb. at 886–87, 660 N.W.2d at 879 ("In the limited number of cases in which we . . . have reached the issue of ineffective assistance of counsel on direct appeal, the record presented questions of law, not questions of trial strategy.").
80. 285 Neb. 11, 824 N.W.2d 724 (2013).
81. *Id.* at 29, 824 N.W.2d at 738.
82. *Id.* at 30, 824 N.W.2d at 738–39 (emphasis added).
83. 284 Neb. 179, 817 N.W.2d 277 (2012).
84. *Id.* at 181, 817 N.W.2d at 284.
85. *Id.* at 205, 817 N.W.2d at 299.
86. *Id.* at 206, 817 N.W.2d at 299 (emphasis added).
87. 284 Neb. 750, 822 N.W.2d 831 (2012).
88. *Id.* at 772, 822 N.W.2d at 847.
89. *Id.* at 773, 822 N.W.2d at 848.
90. *Id.* at 774, 822 N.W.2d at 848–49.
91. *Id.* at 776–77, 822 N.W.2d at 850.

Huston, *Poe*, and *Freemont* are a few of the many cases that demonstrate the Nebraska Supreme Court's general reluctance to address counsel's trial strategy on direct appeal.[92] Under *Rocha*, it is possible that cases similar to these may be addressed on direct appeal in the future.

3. The Test Articulated in Rocha *Should Be Reformed*

Whether or not the court's decision in *Rocha* was appropriate on its facts, the case expanded the Nebraska Supreme Court's net for ineffectiveness claims, and it may allow Nebraska courts to cast their reach even further in the future. The test the Nebraska Supreme Court articulated in *Rocha* opens the door for more convictions to be overturned on direct appeal because it allows courts to speculate as to counsel's trial strategy without any limiting language. Such an effect could waste judicial recourses,[93] which is what the *Rocha* Court was trying to avoid.[94] The Supreme Court of the United States cautioned

92. The court also employed similar reasoning in State v. Sidzyik, 281 Neb. 305, 795 N.W.2d 281 (2011), despite its doubts about counsel's motivation. In *Sidzyik*, when counsel failed to object when the prosecutor breached the plea agreement by speaking at sentencing, the court deferred review. It reasoned that although it was "difficult to imagine" what advantage not objecting to the breach could offer to the defendant, "[i]t is not clear from the record . . . whether Sidzyik's counsel did not object to the breach of the plea agreement based on trial strategy." *Id.* at 313–14, 795 N.W.2d at 288–89. *See also* State v. Young, 279 Neb. 602, 609, 780 N.W.2d 28, 35 (2010) (declining to review defendant's ineffectiveness claim because it was based on trial strategy); State v. Lindsay, 246 Neb. 101, 108, 517 N.W.2d 102, 107 (1994) (affirming lower court's denial of relief because counsel's challenged decision was based on trial strategy).

93. *See supra* text accompanying note 69.

94. State v. Rocha, 286 Neb. 256, 265, 836 N.W.2d 774, 781 (2013) (per curiam) (citing State v. Faust, 265 Neb. 845, 876, 660 N.W.2d 844, 872 (2003), *disapproved on other grounds*, State v. McCulloch, 274 Neb. 636, 742 N.W.2d 727 (2007)). Other courts have criticized approaches similar to the Nebraska Supreme Court's test in *Rocha*, reasoning that it "inverts the analysis." Bone v. State, 77 S.W.3d 828, 836 (Tex. Crim. App. 2007). *See also* Jackson v. Leonardo, 162 F.3d 81, 87 (2d Cir. 1998) (Meskill, J., concurring in part and dissenting in part) ("[I]t . . . bespeaks judicial arrogance to assume that counsel's failure is indefensible."). For example, in *Mata v. State*, 226 S.W.3d 425 (Tex. Crim. App. 2007) the lower Texas court employed the "no conceivable trial strategy test" and overturned the defendant's conviction. *Id.* at 430–31. The Texas Court of Criminal Appeals reversed, reasoning that it did not matter that the lower court could not conceive of a reason for counsel's action because "the fact remains that the appellate record is still silent as to *why* trial counsel failed to so object. Therefore, the appellant has failed to rebut the presumption that trial counsel's decision was in some way—be it conceivable or not—reasonable." *Id.* Justice Stephan used the same reasoning to discount the "no conceivable trial strategy" test in his dissenting opinion in *Rocha*, reasoning that any conclusion stemming from the court's test must be "pure conjecture, i.e., the formation or expression of an opinion without sufficient evidence for proof" because the record does not disclose trial coun-

against just this sort of result in *Strickland*.[95] Revision of the *Rocha* test is necessary. The Nebraska Supreme Court should revise the test it applied in *Rocha* to ensure that it upholds *Strickland*'s mandates. A return to the court's language in *Faust* or a clearer standard by which to judge ineffectiveness claims would help diminish the risk that the language from *Rocha* could be applied too broadly.

4. A Return to Faust *or a Clearer Standard*

The Nebraska Supreme Court should consider returning to the language it used in *Faust*. Under strict adherence to *Faust*, Nebraska appellate courts would only address ineffectiveness claims based on trial strategy in truly extreme cases.[96] Otherwise, the claims would be addressed through postconviction review. Requiring stricter adherence to the *Faust* standard could help reduce the risk of unnecessary retrials because its firm language may ensure that the appellate courts overturn convictions only where an egregious error has occurred that no strategy could overcome.

The Nebraska Supreme Court could also consider adopting the even firmer language used by several other states. For example, before the Supreme Court of Maine chose to completely prohibit consideration of ineffectiveness claims on direct appeal,[97] the court would not overturn a conviction on direct appeal unless "the appeal record, within its own confines, establishe[d] *beyond possibility of rational disagreement* the existence of representational deficiencies."[98] The New Hampshire Supreme Court's language is similarly strict. The court will only review ineffectiveness on direct appeal "in the extraordinary case where the factual basis of the claim appears *indisputably* on the trial record."[99] Maryland also employs strict language, recognizing that "there may be exceptional cases where the trial record reveals counsel's ineffectiveness to be so blatant and egregious that review on appeal is appropriate."[100] Any of these stricter standards could protect against the waste of judicial resources. The court

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sel's reasons for his strategic choices. *Rocha*, 286 Neb. at 277, 836 N.W.2d at 789 (Stephan, J., dissenting) (internal citation and quotation marks omitted).

95. *See supra* notes 22–24 and accompanying text.

96. *Faust*, 265 Neb. at 875, 660 N.W.2d at 872.

97. State v. Nichols, 698 A.2d 521, 522 (Me. 1997).

98. *Id.* at 521 (emphasis added).

99. State v. Thompson, 20 A.3d 242, 257 (N.H. 2011) (emphasis added).

100. Mosley v. State, 836 A.2d 678, 686 (Md. 2003) (citation and internal quotation marks omitted). *See also* Hills v. State, 78 So.3d 648, 652 (Fla. Dist. Ct. App. 2012) ("[A]ppellate courts make an exception to this rule when the ineffectiveness is obvious on the face of the appellate record, the prejudice caused by the conduct is indisputable, and a tactical explanation for the conduct is inconceivable." (citation omitted)).

could also choose to do away with appellate review of ineffectiveness claims entirely.[101]

B. Ineffectiveness Claims Should Be Excluded from Procedural Default Rules

Although an articulation of a clearer standard by which to judge ineffectiveness claims is necessary, more needs to be done to truly address the problems with appellate review of ineffectiveness claims in Nebraska. The Nebraska Supreme Court's procedure for the claims is inconsistent with the goals of appellate review and negatively impacts Nebraska courts and defendants. The court should consider allowing defendants to bring ineffectiveness claims for the first time on collateral review, regardless of the state of the record; this simple change would ease pressure to raise and address ineffectiveness claims on direct review. If such a change had been made before *Rocha*, the court may have never heard his ineffectiveness claims on direct appeal.

1. The Postconviction Procedural Default Rule

Under the post-conviction procedural default rule, a defendant may not "secure review of issues which were or could have been litigated on direct appeal."[102] Nebraska applies the postconviction procedural default rule to ineffectiveness claims when appellate counsel is different from trial counsel and the issue of ineffectiveness was known to the defendant or apparent from the record.[103] Nebraska is one of the few jurisdictions left in the country that still subjects ineffectiveness claims to its postconviction procedural default rule.[104]

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101. While a number of states have chosen to completely forgo appellate review of ineffectiveness claims, that approach has drawbacks as well. *See infra* note 109 and accompanying text.

102. State v. Marshall, 269 Neb. 56, 62, 690 N.W.2d 593, 601 (2005) (citing NEB. REV. STAT. §§ 29-3001 to -3004 (Reissue 1995)). For a closer look at the history of the development of Nebraska's procedural default rule, see Supplemental Brief for Appellant at 13–20, State v. Molina, 271 Neb. 488, 713 N.W.2d 412 (2006) (No. S-04-1230), 2005 WL 5878131, at *13–20.

103. *See supra* subsection II.A.2.

104. *See* Place, *supra* note 25, at 310 n.69; State v. Thompson, 20 A.3d 242, 255 (N.H 2011) ("The first approach, which requires defendants to either bring an ineffectiveness claim on direct appeal or forfeit it forever, appears to be followed by only a few states and has been repeatedly criticized by the United States Court of Appeals for the Tenth Circuit."); Commonwealth v. Grant, 813 A.2d 726, 734–35 & n.13 (Pa. 2002) (noting federal courts generally defer ineffectiveness claims to collateral review, and "an overwhelming majority of states indicate a general reluctance to entertain ineffectiveness claims on direct appeal").

2. Subjecting Ineffectiveness Claims to Procedural Default Frustrates the Purpose of the Procedural Rules

In *Massaro v. United States*,[105] the Supreme Court of the United States declared that the "[r]ules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time."[106] It also observed that the procedural default rule is designed "to conserve judicial resources and to respect the law's important interest in the finality of judgments."[107] The Court then unanimously ruled against applying the procedural default rule to ineffectiveness claims under the federal postconviction statute.[108] It rightly observed that applying the procedural default rule to ineffectiveness claims frustrates the objectives of appellate review[109] and that, ordinarily, the best place to litigate ineffectiveness claims is the district court.[110] These observations should guide Nebraska's approach to its own procedural default rule.

a. The Wrong Forum at the Wrong Time

It is clear that direct appellate review is the wrong forum for almost all ineffectiveness claims.[111] Nebraska's application of the pro-

105. 538 U.S. 500 (2003). Although not binding on the Nebraska Supreme Court, the reasoning employed by the Court in *Massaro* is instructive regarding the effects of Nebraska's current procedure. State v. Rocha, 286 Neb. 256, 273–75, 836 N.W.2d 774, 787 (Stephan, J., dissenting) (2013) (relying heavily on the Supreme Court's analysis in *Massaro*).

106. *Massaro*, 538 U.S. at 504 (internal quotation marks omitted).

107. *Id.*

108. *Id.* at 509.

109. *Id.* at 504. Many jurisdictions have chosen to do away with direct review of ineffectiveness claims entirely. State v. Thompson, 20 A.3d 242, 255–57 (N.H. 2011); Place, *supra* note 25, at 311–12 nn.74–75. For a different perspective, see Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims,* 92 CORNELL L. REV. 679 (2007). Primus argues that the current system for review of ineffectiveness claims is inefficient; ineffectiveness claims may not be heard until years after trial, which can result in defendants with shorter sentences never getting the opportunity to make the claim. She argues that appellate attorneys should be allowed, in limited circumstances, to open trial records and develop ineffectiveness claims. *Id*.

110. *Massaro*, 538 U.S. at 505. See Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings,* CRIM. JUST. 6, 7–8 (2009–2010), for a review of the problems deferring ineffectiveness claims may cause for defendants.

111. *See supra* subsections II.A.2 & IV.A.1. *See also* Guinan v. United States, 6 F.3d 468, 473–74 (7th Cir. 1993), *abrogated by Massaro*, 538 U.S. 500 ("The trial judge is best situated to assess overall performance and prejudice, yet a claim of ineffective assistance presented on direct appeal asks the court of appeals to act without the district judge's views."); United States v. Mala, 7 F.3d 1058, 1063 (1st Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994) (stating it is the trial court, not the appellate court, that is in the "best position to assess both the quality of the legal representation afforded to the defendant in the district court and the impact of

cedural default rule to ineffectiveness claims encourages the claims to be raised in this ill-suited forum by causing appellate counsel to feel compelled to raise the claim on direct appeal or risk losing the claim forever.[112] In *Massaro*, the Court explained that subjecting the claims to the procedural bar can "create perverse incentives for counsel on direct appeal."[113] To ensure a claim is not waived, "counsel would be pressured" to bring the claims, "regardless of merit."[114] When counsel is forced to raise ineffectiveness claims before they are developed, defendants' constitutional right to effective counsel is put at risk. A valid claim could easily be prematurely vanquished on direct appeal, barring the defendant from the opportunity for an evidentiary hearing on the claim later.[115]

The pressure warned of by the Supreme Court is evident in Nebraska. For example, in *State v. Derr*, Derr raised ineffective assistance on direct appeal.[116] In his brief, Derr requested the court to find that the record was insufficient to resolve his ineffectiveness claims

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any shortfall in that representation"); State v. Rocha, 286 Neb. 256, 273, 836 N.W.2d 774, 786 (2013) (Stephan, J., dissenting) ("[A]n appellate court usually cannot and should not consider ineffective assistance of counsel claims on direct appeal from a criminal conviction"). *See generally* Corzo v. State, 806 So. 2d 642, 645 (Fla. Dist. Ct. App. 2002); State v. Straw, 709 N.W.2d 128, 133 (Iowa 2006); Rowland v. State, 219 P.3d 1212, 1218 (Kan. 2009); State v. Sidzyik, 281 Neb. 305, 311, 795 N.W.2d 281, 287 (2011); State v. Young, 279 Neb. 602, 609, 780 N.W.2d 28, 35 (2010); State v. Jackson, 646 N.W.2d 676, 676 (N.D. 2002). Some courts have eliminated direct review of ineffectiveness claims because it places the appellate court in the role of fact-finder with respect to counsel's performance. *See, e.g.*, State v. Nichols, 698 A.2d 521, 522 (Me. 1997).

112. *Massaro,* 538 U.S. at 504. *See also* Woods v. State, 701 N.E.2d 1208, 1216–17 (Ind. 1998) (rejecting the procedural default rule because it places appellate counsel in "a nasty dilemma: if he seeks reversal on the basis of ineffective assistance of trial counsel, the judgment is almost certain to be affirmed, barring the raising of the issue in collateral proceedings; if he does not, the government may contend in any collateral proceeding that he should have") (quoting Guinan v. United States, 6 F.3d 468, 472 (7th Cir. 1993), *abrogated by Massaro*, 538 U.S. 500); State v. Thompson, 20 A.3d 242, 255 (N.H. 2011) (stating that the threat of procedural default "forces appellate counsel to choose between the difficult and risky route of attempting to litigate an ineffectiveness claim on direct appeal or waiting for a collateral proceeding and risking forfeiture").

113. *Massaro*, 538 U.S. at 506.

114. *Id.* Some argue that the preference for deferral is bad for defendants because there is no right to counsel in postconviction proceedings. *See* Primus, *supra* note 110, at 8. This is, indeed, a significant drawback of the deferral approach.

115. *Massaro*, 538 U.S. at 506–07; Guinan v. United States, 6 F.3d 468, 476 (7th Cir. 1993) (Easterbrook J., concurring), *abrogated by Massaro*, 538 U.S. 500 ("Lawyers who raise ineffective-assistance claims on direct appeal do their clients a grave disservice, because the inevitable loss will prevent the accused from raising the same claim later, when factual development would permit accurate resolution."). See State v. Williams, 259 Neb. 234, 239, 609 N.W.2d 313, 318 (2000) for an example of a claim barred from postconviction review in Nebraska.

116. State v. Derr, 19 Neb. App. 326, 809 N.W.2d 520 (2011), *rev'd by* State v. Filholm, 287 Neb. 763, 848 N.W.2d 571 (2014).

and defer the claims until the postconviction review stage.[117] He did not make any argument in his brief regarding the merits of his ineffectiveness claims.[118] We can infer from this unusual strategy that Derr's counsel was concerned that his ineffectiveness claims were not sufficiently developed for direct review, but he raised them to avoid the risk of procedural default.[119] The court acknowledged Derr's request for deferral, but ruled against his claim because he did not sufficiently allege prejudice,[120] insuring that Derr could not raise his ineffectiveness claim on collateral review.[121] If Derr's counsel had not been compelled by the threat of procedural default to raise his ineffectiveness claim on direct appeal, it is possible that Derr would have been able to discover sufficient facts to support the claim during the postconviction process.[122] Courts in other jurisdictions have acknowl-

117. Brief for Appellant, Derr, 19 Neb. App. 326, 809 N.W.2d 520 (2011) (No. A-11-000101), 2011 WL 2037079, at *11.

118. *Derr*, 19 Neb. App. at 329, 809 N.W.2d at 522. The court noted that he briefly recited how his counsel was deficient, but he did not allege how his counsel's performance prejudiced him. *Derr*, 19 Neb. App. at 329, 809 N.W.2d at 522.

119. *Derr*, 19 Neb. App. at 328–29, 809 N.W.2d at 522. *See also* Supplemental Brief for Appellant, *supra* note 102, at 20 ("The effect of the Nebraska rule is to require new appellate counsel to engage in the absurd and futile practice of specifying all allegations of ineffective assistance in the direct appeal brief, even though . . . there has been no facts regarding counsel's ineffectiveness or prejudice presented to the district court.").

120. *Derr* at 330, 809 N.W.2d at 523.

121. Derr could still raise ineffective assistance of *appellate* counsel in a collateral proceeding. The Supreme Court of Indiana has explained why this route is not a substitute for ineffective assistance of trial counsel:

> Some have suggested that waiver of a trial ineffectiveness claim is inconsequential . . . because there always remains a possible claim of ineffective assistance of appellate counsel. The argument goes that because the same claim may be repackaged as a challenge to appellate counsel's failure to raise trial counsel's effectiveness on direct appeal, the substance of the claim is addressed in either event. However . . . the right to challenge appellate counsel's performance is not equivalent to a direct challenge to trial counsel's representation.
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> . . . [I]neffective assistance of appellate counsel requires the petitioner to overcome the double presumption of attorney competence at both trial and appellate levels. This is no mere quibble. Appellate lawyers must make difficult judgment calls in narrowing a broad range of possible claims to a select few that are thought to have the best chance of success. . . . Accordingly, there are situations in which a claim of ineffective assistance of trial counsel will succeed on the merits but fail if forced to overcome the presumption of effective appellate counsel.

Woods v. State, 701 N.E.2d 1208, 1220–22 (Ind. 1998) (citations omitted).

122. *See*, *e.g.*, State v. Poe, 284 Neb. 750, 822 N.W.2d 831 (2012), discussed *supra* subsection IV.A.2. In *Poe*, the lower court denied the defendant's motion without an evidentiary hearing, and the Nebraska Supreme Court ruled that his petition merited one. *See also* State v. Dunster, 262 Neb. 329, 631 N.W.2d 879 (2001) (denying defendant's claim of ineffectiveness due to a conflict of interest without an evidentiary hearing); Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel,* 2004 UTAH L. REV. 1, 3

edged that the procedural default rule creates such a risk. For example, the Court of Appeals for the Eleventh Circuit observed in *United States v. Griffin*[123]:

> If an appellate court elects to consider the issue and study the record on appeal in relation to it, an assertion of ineffective assistance may appear totally without merit in light of that record. The temptation is strong in such instances to go ahead and decide the issue against appellant on the presumption that doing so will reduce the workload of the district court. Succumbing to the temptation, however (1) adds unnecessarily to the workload of the appellate court . . . [and] (3) may deny appellant an opportunity to develop the issue on a proper record.[124]

Where, as in Nebraska, counsel is pressured by the procedural rule to bring nearly every ineffectiveness claim on direct appeal, the risk of the harm *Griffin* described increases; the appellate court must address the claims when most simply do not belong there.[125]

The Nebraska Supreme Court recently disapproved of *Derr* in *State v. Filholm*,[126] but the changes it made are not enough to remedy Nebraska's approach. Under *Filhom*, the Nebraska Supreme Court held that a defendant must specifically allege his counsel's deficient performance, but he is not required to allege how he was prejudiced.[127] In reaching this holding, the court noted that because of the state of the trial record, "to require an appellant to allege prejudice from ineffective assistance on direct appeal would require him or her to allege facts in detail that are likely not within the appellate record or known to the defendant without further inquiry."[128] The court also concluded that requiring a defendant to allege prejudice on direct appeal is a waste of judicial time and resources.[129] In these statements, the court essentially acknowledged ineffectiveness claims are rarely ready for direct review, but the solution it adopted does not fix that problem. *Filholm* will help ensure defendants like Derr will not lose potentially colorable claims before they can gather their facts, but it does not change the fact that defendants will continue to feel no choice but to raise ineffectiveness claims in this inappropriate forum.

(2004) (asserting that some judges may be more likely to rule against ineffectiveness claims because "looking back at a final result, courts might regard that outcome as inevitable").

123. 699 F.2d 1102 (11th Cir. 1983).

124. *Id.* at 1108 n.14.

125. Application of the procedural default can also keep defendants from accessing federal postconviction remedies because federal courts must respect adequate and independent state grounds for denying the claims. Eve Brensike Primus, *Effective Trial Counsel After Martinez v. Ryan: Focusing on the Adequacy of State Procedures,* 122 YALE L.J. 2604, 2608 (2013).

126. 287 Neb. 763, 848 N.W.2d 571 (2014).

127. *Id*. at 768, 848 N.W.2d at 577.

128. *Id*. at 770–71, 848 N.W.2d at 579.

129. *Id.* at 770, 848 N.W.2d at 578.

b. Inefficiencies Created by Procedural Default

Applying the procedural default rule to ineffectiveness claims creates inefficiencies for Nebraska courts.[130] The pressure to bring claims on direct appeal wastes resources because the court must address claims it can rarely decide.[131] The Supreme Court of the United States recognized that procedural default of ineffectiveness claims wastes resources at two levels. First, appellate courts must "waste time and resources attempting to address some claims that were meritless and other claims that, though colorable, would be handled more efficiently if addressed in the first instance by the district court on collateral review."[132] Then, on collateral review, the court "must engage in a painstaking review" of the record to determine if the claim could be supported by the record, and thus should have been brought on direct review.[133] The Court described this process as "searching for needles in haystacks" and concluded that it did not "see the time or

130. One court has concluded that application of procedural default to only those ineffectiveness claims apparent on the record causes "disarray" and has not "served well the judicial process." *United States v. Griffin*, 699 F.2d 1102, 1108 (1983). *See also* United States v. Galloway, 56 F.3d 1239, 1241 (10th Cir. 1995) (discussing whether to apply the procedural default to ineffectiveness claims under a similar federal law, the court stated application of procedural default has "doubtless resulted in many claims being asserted on direct appeal only to protect the record. This, of course, unnecessarily burdens both the parties and the court."). In *State v. Lawson*, a North Carolina court of appeals recognized the inefficiencies the rule causes, stating:

> [I]t is likely that counsel will err on the side of bringing claims for ineffective assistance of counsel on direct review even when they cannot be accurately determined at such a stage. Thus, at risk of losing the right to collateral review in state court, a defendant is in effect required to assert ineffective assistance of counsel claims, and our Court then determines whether an ineffective assistance claim was brought prematurely before the claim can progress under state collateral review. We agree with the United States Supreme Court that such a procedure does not in reality foster efficient use of judicial resources.

State v. Lawson, 583 S.E.2d 354, 361 (N.C. Ct. App. 2003). For an excellent description of the inefficiencies the default rule creates for appellate counsel, see Supplemental Brief for Appellant, *supra* note 102, at 25–29.

131. While discussing an approach similar to Nebraska's, the Indiana Supreme Court noted that it raises a "thorny problem." Because the postconviction court must decide whether the ineffectiveness claim should have been raised on direct appeal and is thus waived before addressing its merits, the court "will have to undertake the difficult task of seeing the case through appellate counsel's eyes, possibly long after the direct appeal was decided." Such an exercise by the appellate court wastes time "on both direct appeal and collateral review in satellite litigation over the application of a complicated waiver standard." Woods v. State, 701 N.E.2d 1208, 1219 (Ind. 1998). *See also Griffin*, 699 F.2d at 1109 ("An election to decide whether the record on appeal is adequate for decision on the issue . . . adds to the burgeoning workload of appellate judges in a particular case.").

132. Massaro v. United States, 538 U.S. 500, 505 (2003).

133. *Id.* at 507.

wisdom in requiring a court to spend time on exercises that, in most instances, produce no benefit."[134]

One could argue the procedural default rule allows for the court to dispose of at least some claims without sending them to the postconviction process, and therefore resources not spent on an evidentiary hearing are saved. The United State Supreme Court also addressed this concern in *Massaro*, reasoning that "few such claims will be capable of resolution on direct appeal and thus few will benefit from earlier resolution. And the benefits of the . . . rule in those rare instances are outweighed by the increased judicial burden the rule would impose in many other cases."[135] The risk of harm to defendants and the inefficiencies caused by the rule cannot be outweighed by the very few ineffectiveness claims disposed of on direct appeal.

3. Proposed Change for Ineffectiveness Claims

The Nebraska Supreme Court should stop applying the procedural default rule to ineffectiveness claims and adopt a rule such as that adopted by the Supreme Court of New Hampshire in *State v. Thompson*.[136] Under the *Thompson* rule, a defendant has a choice—he can raise an ineffectiveness claim either on direct appeal or on collateral review.[137] The claim is not defaulted if he chooses to wait until collateral review, no matter the state of the record.[138] The choice is desirable over a blanket prohibition of the claims on direct review because it allows defendants with extraordinary claims, clear from the record, to vindicate their rights as soon as possible.[139] The Supreme Court of Indiana adopted a similar approach in *Woods v. State*,[140] with an important change: the choice is permanent. Once the defendant chooses to raise an ineffectiveness claim on direct appeal, he is barred from raising any such claim on collateral review.[141] This addition in *Woods* ensures that only "the most confident appellants" will assert an ineffectiveness claim on direct appeal.[142] Such a requirement communicates the court's preference for collateral review and its recognition

134. *Id.*
135. *Id.* at 507–08. *See also Woods*, 701 N.E.2d at 1218 (noting that while one could suggest that eliminating procedural default could lead to an onslaught of hearings which cause a burden on judicial resources, "if a hearing is necessary, it is not a significantly different burden on trial courts to consider the allegations of a postconviction claim").
136. 20 A.3d 242 (N.H. 2011). Several other states have adopted a similar approach. Place, *supra* note 25, at 311–12 & nn.74–75.
137. *Thompson*, 20 A.3d at 257.
138. *Id.*
139. *Id*.
140. 701 N.E.2d 1208 (Ind. 1998).
141. *Id.* at 1220.
142. *Id.*

that very few ineffectiveness claims are appropriate for direct review.[143]

The Nebraska Supreme Court should adopt a rule such as that in *Thompson* or *Woods*. By doing so, it would express a clear preference that ineffectiveness claims be adjudicated first in the forum most adept to review them. Such a change would benefit both defendants and Nebraska courts, avoiding injustice and the waste of scarce judicial resources.

V. CONCLUSION

The Nebraska Supreme Court's approach to ineffectiveness claims needs reform. The *Rocha* test expanded the scope of the Nebraska Supreme Court's review of ineffectiveness claims, which could allow appellate courts to overturn convictions without evidence on the record to judge trial counsel from his perspective at the time of trial. This approach may waste judicial resources because the court may overturn convictions that might have stood. The risk of wasting judicial resources is increased by the court's insistence on applying the postconviction procedural default rule to ineffectiveness claims because the rule encourages the claims to be raised on direct appeal, when they would be better addressed on postconviction review. Furthermore, the procedural default rule harms defendants by limiting their ability to enforce their constitutional right to effective assistance of counsel, a consequence that strikes at the very heart of Nebraska's responsibilities to its citizens—the responsibility to provide every defendant with effective assistance of counsel and the responsibility to provide the means to hold the government accountable when it fails to do so.

There is no easy solution for the best way to adjudicate claims of ineffective assistance of counsel because the unique nature of the claims makes their review difficult. Despite these difficulties, the Nebraska Supreme Court should stop applying the procedural default rule to ineffectiveness claims and adopt an approach that allows, but does not require, the claims to be raised on direct appeal. Such a solution strikes a balance between conserving the judicial resources of the state and affording defendants the best opportunity to enforce their constitutional right to effective counsel.

143. Nebraska would then be in line with the "overwhelming majority of jurisdictions" that prefer ineffectiveness to be addressed on collateral review. *Thompson*, 20 A.3d at 257–58.