

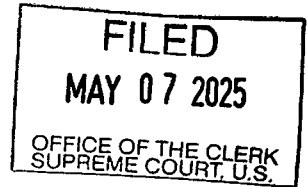
24-7257

NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED  
STATES

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ORIGINAL



ALEJANDRO R. DUARTE,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

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On Petition for a Writ of Certiorari to the  
Nebraska Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

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ALEJANDRO R. DUARTE, Pro Se  
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Omaha, NE 68117  
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## QUESTIONS PRESENTED

### I.

In a he-said-she-said case involving allegations of physical assault with self-defense being raised as an affirmative defense, is defense counsel ineffective for failing to offer easily attainable medical evidence to support defendant's claim that he was physically incapable of doing what he was accused of due to a recent injury and surgery?

### II.

Can an appellate court deem an issue on appeal waived by relying on just the issues disclosed in a preliminary disclosure statement of issues for appeal rather than reviewing the issues that were actually argued by the intermediary appellate court and argued in brief format to that same intermediary appellate court?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Alejandro R. Duarte respectfully petitions the Court for a writ of certiorari to review the opinion and judgment entered by the Nebraska Court of Appeals on January 14, 2025, and the denial of further review by the Nebraska Supreme Court on March 17, 2025.

**Opinions Below**

The decision of the Nebraska Court of Appeals affirming Alejandro R. Duarte's convictions and determining that he waived his ineffective assistance of counsel arguments can be found at State of

Nebraska v. Alejandro R. Duarte, A-24-0083 (2025). A copy of the Nebraska Court of Appeals' opinion is appended to this Petition (App. 1A). The Nebraska Supreme Court's decision denying further review on March 17, 2025, is appended to this Petition (App. 1B). The District Court's decision affirming the County Court's conviction on January 11, 2024, is appended to this Petition (App. 1C).

### Jurisdiction

The judgment of the Nebraska Court of Appeals was entered on January 14, 2025 (App. 1A). Duarte petitioned for further review with the Nebraska Supreme Court on February 13, 2025. The Nebraska Supreme Court denied further review on March 17, 2025. Duarte invokes this Court's jurisdiction under 28 U.S.C. §1254(a), having timely filed this petition for a writ of certiorari within ninety days of the Nebraska Supreme Court's decision denying further review.

### Constitutional Provisions Involved

Alejandro Duarte's Petition for a Writ of Certiorari involves the Sixth Amendment right to competent counsel and the Fourteenth Amendment right to due process of law:



U.S. Const. Amend. XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Statement of the Case

Alejandro Duarte was charged with committing a misdemeanor assault against his lifelong female friend and his ex girlfriend after learning they were in a romantic relationship with one another. His defense was that they came at him and he used reasonable force to protect himself. At the time of the encounter, he was just three weeks removed from surgery to his repair a labral tear on his left shoulder and repair his bicep. The friend's version was that Duarte grabbed his ex and threw her, chucking her before getting to her and pushing her down. The ex girlfriend testified Duarte pulled her down to the ground with both arms after initially testifying he had thrown her down to the ground like a rag doll. Duarte's trial counsel performed deficiently when he failed to present his medical evidence in support of Duarte's defense. His counsel failed to offer testimony, documentation and imaging that Duarte had made his counsel aware of from his doctor regarding the surgery that he had on February 17, 2022, just three weeks prior to the incident that occurred on March 11, 2022. The doctor disconnected his torn tendons and repaired the ends to the bone with stitches. This left his shoulder fragile and extremely weak. The evidence would have supported Duarte's testimony that he could not physically do

what the two testified he did. Similarly, Dr. Conroy evaluated him at a follow-up appointment on March 17, 2022, and there was no new trauma detected. Even if Duarte went against medical advice, took off his sling, and threw them around with both shoulders, he would have had new trauma the following week. He did not. Additionally, Duarte was going through a chiropractor who was able to testify and provide documentation that Duarte was substantially limited four months after surgery. This further would have established that he was physically incapable three weeks post-surgery of doing what they stated. None of this medical testimony or evidence was offered in his defense.

On appeal to the District Court of Nebraska, Duarte's submitted a statement of errors which included an assignment that he received ineffective assistance of trial counsel in failing to present Defendant's evidence at trial. Additionally, Duarte submitted a brief arguing his errors. The District Court ruled against Duarte. On the issue of receiving ineffective assistance of counsel, the District Court found that the witnesses his counsel failed to call would not have provided any useful testimony or even admissible testimony because they were not present at the location during the incident. The Nebraska Court of Appeals found that he did not preserve the

issue on appeal because he initially stated the assignment of error too vaguely.

### 1. Ineffective Assistance of Counsel

Duarte's counsel did not offer any medical evidence or testimony concerning his recent shoulder and bicep surgery, the physical limitations that resulted, and the lack of new damage at a follow-up visit shortly after the incident.

#### i. District Court

Petitioner raised this issue as one of his assignment of errors to the District Court of Douglas County, Nebraska arguing that he received ineffective assistance of counsel in failing to produce his evidence at trial. The District Court issued an Order on January 11, 2024, holding that "Ultimately, the witnesses trial counsel failed to call at trial would not have provided any useful testimony or even admissible testimony as these witnesses were not at the location when the assaults took place."

#### ii. Nebraska Court of Appeals

On appeal to the Nebraska Court of Appeals, Petitioner raised the issue in a similar fashion. The

Nebraska Court of Appeals in their decision filed on January 14, 2025, held that “. . . these allegations do not meet the specificity requirement of State. v. Mrza, 302 Neb. 931, 926 N.W.2d 79 (2019).”

iii. Nebraska Supreme Court

Petitioner petitioned for further review by the Nebraska Supreme Court. Petitioner assigned as one of the issues that the Court of Appeals erred in finding that he had not preserved this issue. On March 17, 2025, the Nebraska Supreme Court denied further review.

**2. Failure to Preserve his Issue**

As stated above, the Nebraska Court of Appeals found he had waived his assignment of error because alleging that his counsel failed to present his evidence at trial was not specific enough to cover medical evidence.

i. Nebraska Supreme Court

Petitioner petitioned for further review by the Nebraska Supreme Court. On March 17, 2025, the Nebraska Supreme Court denied further review.

Reasons for Granting the Writ

I. Ineffective Assistance of Counsel.

Amendment VI of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST, Amend. VI. To establish ineffective assistance of counsel, a defendant has the burden to show that (1) counsel performed deficiently—that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area and (2) this deficient performance actually prejudiced him in making his defense. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In the present case, Duarte's trial counsel performed deficiently when he failed to present his medical evidence in support of Duarte's defense. His counsel failed to offer testimony, documentation and imaging that Duarte had made his counsel aware of from his doctor regarding the surgery that he had on February 17, 2022, just three weeks prior to the incident. Duarte had surgery to repair a labral tear on his left shoulder and repair his bicep. The doctor disconnected his torn tendons and repaired the ends to the bone with stitches. This left his shoulder fragile and extremely weak. The evidence would have

supported Duarte's testimony that he could not physically do what the two testified he did. Similarly, he was evaluated at a follow-up appointment on March 17, 2022, and there was no new trauma detected. Even if Duarte went against medical advice, took off his sling, and threw them around with both shoulders, he would have had new trauma the following week. He did not. That is not all. Duarte was going through a chiropractor who was able to testify and provide documentation that Duarte was substantially limited four months after surgery. This further would have established that he was physically incapable three weeks post-surgery of doing what they stated.

Had this evidence been presented, the trier of facts would have had to go against scientific evidence to find Mr. Duarte guilty. This evidence completely refuted the testimony of the two named victims. Because Duarte's counsel was aware of it and this came down to a credibility determination, it should have been presented at trial. Failure to present the evidence prejudiced Duarte and allowed the Court to find him guilty.

## **II. Failure to Preserve his Issue.**

Amendment XIV of the United States Constitution provides: "All persons born or

naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST, Amend. XIV.

In the present case Duarte alerted the District Court, his first level of direct appeal, to his assignment of error that his trial counsel failed to adduce his evidence at trial. This District Court denied that argument by making a general finding that any such evidence would not have mattered or been relevant because those persons were not present during the assault. In order to continue his challenge and preserve the issue for a later postconviction action, Duarte asserted his argument on appeal to the Nebraska Court of Appeals. The Nebraska Court of Appeals determined he had waived that issue by not being more specific on appeal to the District Court. This finding has the effect of preventing him from any further litigation in postconviction proceedings. This ruling made no sense because he specifically argued the medical evidence to the District Court. The District Court did not limit his argument. This



decision by the Court of Appeals was a denial of his right to due process.

Conclusion

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

ALEJANDRO R. DUARTE, Petitioner,

A handwritten signature in black ink, appearing to read 'A.R. Duarte', is written over a horizontal line.

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