

No. 21-5541

ORIGINAL

Supreme Court, U.S.  
FILED

AUG 17 2021

OFFICE OF THE CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

DAN KENNY DELVA

— PETITIONER

(Your Name)

vs.

UNITED STATES OF AMERICA

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT APPEALS ELEVENTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

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(Your Name)

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(City, State, Zip Code)

(Phone Number)

**QUESTION(S) PRESENTED**

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Whether it is debatable Mr. Delva was denied a Sixth Amendment right under the United States Constitution to effective assistance of counsel when his trial counsel failed to file a motion to sever Delva's trial from that of his brother Bechir?

## **LIST OF PARTIES**

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## **RELATED CASES**

## TABLE OF AUTHORITIES CITED

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CASES	PAGE NUMBER
<u>Buck v. Davis</u> , 137 S.Ct. 759 (2017) .....	3
<u>Engle v. Linahan</u> , 279 F.3d 926 (11th Cir. 2001) ...	10
<u>Miller-El v. Cockrell</u> , 537 U.S. 322 (2003) .....	10,13
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<u>Strickland v. Washington</u> , 466 U.S. 668 (1984) .....	13
<u>United States v. Delva</u> , 2021 U.S. App. LEXIS 8721 .	1
<u>United States v. Singleterry</u> , 646 F.2d 1014 (5th Cir. 1981) .....	12

### STATUTES AND RULES

- 18 U.S.C. §1028A(a)(1)
- 18 U.S.C. §1029(a)(3)
- 18 U.S.C. §1029(b)(2)
- 28 U.S.C. §2253(c)(2)
- 28 U.S.C. §2255

### OTHER

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

**[X] For cases from federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at 2021 U.S. App. LEXIS 8721; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[X] is unpublished.

**[ ] For cases from state courts:**

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 25, 2021.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 10, 2021, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including May 10, 2021 (date) on April 16, 2021 (date) in Application No. A D.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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Under the Federal Constitution's Sixth Amendment, an accused's right to the effective assistance of counsel is recognized not for the right's own sake, but because of the effect that the right has on the ability of the accused to receive a fair trial; absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

Pursuant to 28 U.S.C. §2255, a prisoner in federal custody may move the court which imposed sentence to vacate, set aside or correct the sentence if it was imposed in violation of federal constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. §2255.

A certificate of appealability will not issue absent a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253. When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See Davis v. Buck, 137 S.Ct. 759, 773-74, 197 L.Ed.2d 1 2017).

## STATEMENT OF THE CASE

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A cooperating source, McKenzie Francois, told federal agents that Bechir and Kenny Delva were conducting identity theft and tax fraud operations out of a townhouse located within a gated community complex in Miramar, Florida. Acting on this information, the agents set up an undercover operation with Francois, which targeted the townhouse. On June 9, 2014, Special Agents Kevin Deslauriers, Brian Eustice, and Geofrey Goodwin from Homeland Security Investigations and Special Agent Brad Cohen from the Internal Revenue Service (IRS") met with Francois at a staging location. The agents equipped Francois with a video and audio recording device in a backpack and followed him to the townhouse in question. One agent parked his car with a view of the townhouse's front door, while other agents parked where they could observe the building's rear.

At approximately 12:05 p.m., Francois entered the townhouse and stayed for about an hour. Bechir, Kenny and others were present in the townhouse at that time. While inside, Francois took several pictures with his cell phone and texted them to the agents. The pictures showed: (1) individuals sitting on a couch using laptops; (2) a money counter; (3) a white shoebox lid flipped upside down with numerous debit cards and papers containing personal identifying information inside setting on top of an ottoman; and (4) an AR-15 rifle leaning against a wall. The personal identifying information included individual's names, dates of birth, and Social Security numbers, which is refer to as "PII."

The video recording covertly captured by Francois depicted papers listing PII and debit cards visible on the ottoman and a rifle leaning against a wall.

After leaving the townhouse, Francois met with the agents again and confirmed that individuals in the townhouse were conducting fraud activities. Francois also told the agents that individuals noticed a law enforcement officer outside the townhouse and were worried that they were being surveilled.

At about 2:00 p.m., Agent Eustice returned to the townhouse and saw several vehicles lined up in front of the residence. Agent Eustice first saw an unidentified male put a bag into the back of a white Camry and drive away from the townhouse. Agent Eustice tried to follow the car, but lost it at the front gate. Agent Eustice then saw another male, later identified as Bechir, walk down a hallway to the townhouse door. Bechir left the townhouse carrying three white shoeboxes and a black backpack, which he loaded into a Mercedes-Benz vehicle. Bechir then departed the townhouse (Unit 105, Building 2492) and drove along the main Centergate Drive. After driving around a curve in the road, Bechir got off that main drag and turned into one of the other apartment communities within the complex. Bechir parked and began walking away from the car. By this time, two other agents had joined Agent Eustice at the scene, and they approached Bechir together. When asked, Bechir denied owning the Mercedes and refused to provide the officers with any identification. The agents then handcuffed Bechir and eventually placed him in the back of a police car. Looking in the windows of the parked Mercedes, Agent Eustice saw the three shoeboxes that Bechir had loaded into the car. He

noticed that one box was ajar and appeared to have credit cards inside.

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At approximately 4:15 p.m., Agent Deslauriers returned to the scene after watching the undercover video. Part of the recorded conversation was a Haitian Creole, which Agent Deslauriers did not understand.

When Agent Deslauriers arrived, Agent Eustice fully briefed him on what had transpired with Bechir. Agent Deslauriers recognized Bechir from the undercover video. When he looked in the back of the Mercedes, he also saw the boxes. The boxes looked similar to the box lid Agent Deslauriers saw in Francois' pictures and on the undercover video.

Based on the video, the pictures, and the information provided by Francois, Agent Deslauriers believe there was PII and fraudulent credit cards in the box. Agent Deslauriers then opened the Mercedes door, did a cursory search of the boxes, and found stacks of credit cards and papers listing PII. He took a few photographs and then replaced everything.

Agent Goodwin secured a search warrant and returned to the townhouse around 8:30 p.m. The agents then conducted a thorough search of the Mercedes and the townhouse. Within the three boxes in the Mercedes, the agents found (1) hundreds of prepaid debit cards, (2) Bechir's T-Mobile bill, (3) a bill addressed to Kenny, and (4) documents containing PII, including notebooks, handwritten lists, and Excel spreadsheets.

In the townhouse, the agents discovered a safe with \$29,000 inside, two money counters, and more credit cards and documents listing PII. The agents also found (1) tax guidelines from

Republic Bank and Trust Company, (2) documents listing an electronic filing identification number ("EFIN") for Gustavo Cruz of Cruz Tax Services, (3) a box of prepaid debit cards, (4) a Playhouse Gentlemen's Club VIP card in Bechir's name, and (5) a letter to Kenny from the IRS. The agents also found two rifles and a handgun, with corresponding magazines and rounds of ammunition, and receipts showing that Kenny had purchased the firearms.

After searching the townhouse, the agents apprised Bechir of his Miranda rights and interviewed him. Bechir told the agents that all of the personal identify information (the PII) was his. Bechir had obtained the information (the PII), which he called "fos" and "infos," from an online database, using a login and password. Bechir told the agents that he used the personal identifying information (the PII) to file fraudulent tax returns online using an EFIN that he bought on the street for \$5,000. Bechir would receive the tax refunds on debit cards, which he used at ATMs to withdraw cash. Bechir admitted that the money the agents found in the townhouse was from tax fraud. He also said the Mercedes belonged to him and Kenny had an Audi in the garage. When asked about the firearms, Bechir told the agents that the guns belonged to Kenny.

In his signed written statement, Bechir also admitted to conducting fraud activities and keeping firearms at the townhouse for protection from getting robbed:

I'm Bechir Delva, [and] freely and willingly admit that the money I store in the safe and all the fraud activities here at 2492 Centergate Drive,

Miramar, Florida, Unit 105, are mine. The money in the safe is from fraud and [I] have conducted fraud here. I had legal guns here, rifles and handguns. I kept them here for protection from getting robbed. The Agents did not arrest or question Kenny on June 9, 2014, as he had left the townhouse by the time they searched it.

In August 2015, a federal grand jury charged both Bechir and Kenny with: (1) one count of conspiracy to possess 15 or more unauthorized access devices, i.e., Social Security numbers and debit cards issued to other people, in violation of 18 U.S.C. §1029(b)(2) ("Count 1"); (2) one count of possession of 15 or more unauthorized access devices, in violation of 18 U.S.C. §1029(a)(3) ("Count 2"); and (3) five counts of aggravated identity theft, in violation of 18 U.S.C. §1028A(a)(1) ("Counts 3-7"). The Delvas pleaded not guilty, and the case proceeded to a joint trial, in February 2016, which lasted five days.

During the trial Agents Deslauriers, Eustice, Goodwin, and Cohen described the event on June 9, 2014, including testifying as to Bechir's post-Miranda interview statements and written confession. The government introduced two Excel spreadsheets that were found in Bechir's car.

Bechir testified that, after the Agents handcuffed him, they eventually took him back to the townhouse, but he denied making any statements to the Agents that day. When confronted with his written post-Miranda statement, Bechir explained that he was scared and wrote exactly what an Agent told him to write.

On cross-examination, Bechir testified that he would go to the townhouse once in a while to play videogames and basketball,

but he was rarely there. When Bechir arrived on June 9, Francois' counsins were on their computers, and the guns, papers, and debit cards were in the townhouse.

The government then confronted Bechir with portions of the undercover video. After viewing the clip Bechir admitted to seeing Kenny on the video recording, but denied that Kenny was using a computer.

Bechir testified that Kenny bought the firearms found in the townhouse, Bechir said that they were there for recreational use at a gun-range-not to protect the stolen identities or tax fraud proceeds.

Kenny did not testify and the defense rested. This was the only evidence the government presented to linked Delva and Bechir,

## REASONS FOR GRANTING THE PETITION

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"[A] certificate of appealability may issue... only, if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). To make a substantial showing of the denial of a constitutional right a §2255 movant must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322 (2003); see also Slack v. McDaniel, 529 U.S. 473 (2000); Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001).

Delva has a Sixth Amendment right under the United States Constitution to have effective assistance of counsel during a critical stage of the proceeding.

Delva complained in his §2255 that his counsel failed to move to sever his case from that of Bechir.

"[A] district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial could compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Id.

It is debatable that reasonable jurists could debate whether (or, for that matter, agree that) counsel's representation fell below an objective standard of reasonableness, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

And Delva was prejudiced by counsel's failure to move to sever his case from that of Bechir.

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In his §2255 Delva asserted that he was prejudiced by being tried jointly with his brother, Bechir. Counsel knew that Bechir was going to take full responsibility for the conduct charged. If trial had been severed Bechir would have offered Delva had no knowledge of the fraud. The only evidence procedure against Delva was that Delva had purchased legal firearms.

Delva argues a district court can grant a severance under Rule 14 when there is a serious risk that a joint trial could compromise a specific trial right of one of the defendants. In this case Bechir had admitted that although Delva bought firearms for recreational use, he was the one who moved the assault rifle from his parent's house to the townhouse. Delva argues that given this exculpatory evidence on his behalf, whatever need he may have had to cross-examine Bechir evaporated.

Delva argues during opening statement in this case his counsel told the jury that "Dan Delva and Bechir Delva are on trial together. You're gonna see Dan Delva never filed a false tax return... Delva never possessed any of these cards... You're not gonna see that he filed any tax returns. You're not gonna see that he gathered or bought what they refer to as personal identifying information... Mr. Delva was never found in possession of any of the massive evidence that was collected from a car and from the house. See Trial Transcript a 199-201.

The government was allowed to introduce evidence that "the brothers kept the firearms for their own protection" to link Delva to Bechir as co-conspirators, and used this evidence to show Delva

participated in the alleged crimes. This prejudicial attempt was used to taint Delva's character through guilt by association. A defendant's guilt may not be proven by showing that he is related to an "unsavory" person. See United States v. Singleterry, 646 F.2d 1014 (5th Cir. 1981). The attempt to show guilt by association was error.

The redacted statement given by Bechir had nothing to do with his testimony that "the brothers kept the firearms for their own protection." Id. Bechir's signed written statement in which the government and trial counsel agreed to stipulate to what "Bechir admitted to... keeping firearms at the townhouse from getting robbed." Id.

Delva and Bechir had been charged in a seven-count indictment, with one count of conspiracy in violation of 18 U.S.C. §1029(b)(2), one count of possession of 15 or more unauthorized access devices in violation of 18 U.S.C. §1029(c)(3) and five counts of aggravated identify theft in violation of 18 U.S.C. §1028A(a)(1). Count One of the indictment described the course of conduct of Delva and Bechir as alleged overt acts of conspiracy. Counsel was aware doing a post-Miranda statement Bechir told the Agents that all of the personal identifying information (the PII) was his. Bechir had obtained the information (the PII), which he called "fos" and "infos," from an online database, using a login and password. Bechir told the Agents that he used the personal identifying information (the PII) to file fraudulent tax refunds online using an EFIN that he bought on the street for \$5,000. Bechir would receive the tax refunds on debit cards, which he used at ATMs to withdraw cash. Bechir admitted that the money the Agents found in the townhouse was from tax fraud. And when asked about the

firearms, Bechir told the Agents that the guns belonged to Kenny.

Delva submits that he has shown a specific prejudice resulting from his trial counsel's failure to sever his case from that of Bechir's and his Sixth Amendment claim can be decided in a different manner. Delva argues had his trial counsel moved to sever Delva's trial and presented this exculpatory evidence that counsel knew prior to trial there was a reasonable probability the motion would have been granted. Delva argues without the testimony that "the brothers kept the firearms for their protection" being entered into evidence there is no other evidence to link him to Bechir in this case. Delva argues that the district court and the court of appeals denial conflict with Miller-El v. Cockrell, 537 U.S. 322 (2003) ("reasonable debate" standard for a certificate of appealability; and Strickland v. Washington, 466 U.S. 668 (1984) (a defendant's right to effective assistance of counsel)).

A certificate of appealability should issue on this denial of Sixth Amendment constitutional right.

Respectfully submitted,



\_\_\_\_\_  
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## **CONCLUSION**

The certificate of appealability should be granted.

Respectfully submitted,

  
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