No.

IN THE

SUPREME COURT OF THE UNITED STATES

JURGEN MARKU,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the Florida Fifth District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether it is a violation of a criminal defendant's Confrontation Clause and Due Process Clause rights to allow the prosecution to inform the jury that a nontestifying codefendant has entered a guilty plea. *Cf. Bruton v. United States*, 391 U.S. 123 (1968) (holding that introduction of a codefendant's confession improper where cross-examination of the codefendant was not possible).

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

The Petitioner, JURGEN MARKU, requests the Court to issue a writ of certiorari to review the opinion/judgment of the Florida Fifth District Court of Appeal entered in this case on January 2, 2024 (A-3)[1] (rehearing denied on February 2, 2024 (A-5)).

D. CITATION TO ORDER BELOW

Marku v. State, 379 So. 3d 1160 (Fla. 5th DCA 2024).[2]

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257 to review the final judgment of the Florida Fifth District Court of Appeal.

F. CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." And the Fourteenth Amendment's Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law."

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[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

[2] Because the state appellate court did not issue a written opinion, the Petitioner was not entitled to seek review in the Florida Supreme Court. *See Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Petitioner was charged in Florida state court with first-degree felony murder, armed robbery, and conspiracy to commit armed robbery. The charges stemmed from a shooting incident that occurred on the evening of February 26, 2020, and Elias Alhirsh died as a result of the shooting incident.

The State's theory of prosecution at trial was that Lavonta Burrell and Andrew Rauco were the ones who robbed and shot Mr. Alhirsh – and although the State acknowledged that the Petitioner was *not* present when Mr. Alhirsh was robbed and shot, the State asserted that the Petitioner conspired with Mr. Burrell and Mr. Rauco and/or incited, caused, encouraged, assisted, or advised them to commit the robbery (as a principal). The theory of defense at trial was that the State's case was based on the testimony of Mr. Rauco – the person who shot Mr. Alhirsh – and that Mr. Rauco should not be believed because he had a motive to frame the Petitioner in an effort to reduce his charges and sentence.

The trial began on October 10, 2022, and concluded on October 13, 2022. At the conclusion of the trial, the jury found the Petitioner guilty of first-degree felony murder and armed robbery – but not guilty of conspiracy to commit armed robbery.

The Petitioner was sentenced at the conclusion of the trial. The trial court sentenced the Petitioner to life imprisonment. (A-6-11).

On direct appeal, the Petitioner argued that the trial court erred by allowing the State to inform the jury that a nontestifying codefendant (Mr. Burrell) entered a guilty plea to the murder and robbery charges. The Florida Fifth District Court of Appeal

rejected this claim and affirmed the Petitioner's convictions and sentence without explanation. (A-3).

H. REASON FOR GRANTING THE WRIT

The question presented is important.

The question presented in this case is as follows:

> Whether it is a violation of a criminal defendant's Confrontation Clause and Due Process Clause rights to allow the prosecution to inform the jury that a nontestifying codefendant has entered a guilty plea.

As explained below, the Petitioner requests the Court to grant his certiorari petition and thereafter consider this important question.

As set forth above, the State charged the Petitioner with first-degree felony murder, armed robbery, and conspiracy to commit armed robbery. The State's theory of prosecution was that Lavonta Burrell and Andrew Rauco were the ones who robbed and shot Elias Alhirsh – and although the State acknowledged that the Petitioner was *not* present when Mr. Alhirsh was robbed and shot, the State asserted that the Petitioner conspired with Mr. Burrell and Mr. Rauco and/or incited, caused, encouraged, assisted, or advised them to commit the robbery (as a principal).

Both Mr. Burrell and Mr. Rauco were charged with murder and robbery. During the Petitioner's trial, the State presented Mr. Rauco as a witness, but the State did *not* present Mr. Burrell as a witness. However, during opening statements, one of the prosecutors told the jury – over objection – that Mr. Burrell had entered a guilty plea to the murder and robbery charges:

> So as the investigation continues – and I want to get back to talking about Mr. Marku – they arrest Lavonta Burrell and Andrew Rauco. And on that video, Lavonta Burrell goes to the passenger side of Louie's vehicle and enters the center console, ultimately taking his cell phone, and Andrew Rauco goes to the driver's side, pulls out a gun and

engages in this armed robbery where he shoots and kills Louie.
They've been both arrested and pled guilty in this case.

MS. GALNOR [defense counsel]: Objection, Your Honor.

THE COURT: Legal basis?

MS. GALNOR: Relevance.

THE COURT: Overruled.

(A-16-17). Later, during the testimony of Detective B.H. Abbott, the State again informed the jury that Mr. Burrell had entered a guilty plea to the murder and robbery charges:

Q [by one of the prosecutors] After getting the DNA on the cigarette, did you speak with Lavonta Burrell?

A Yes, I did.

Q Okay. And when did you speak with Lavonta Burrell?

A I talked to him on December 20th, 2020.

Q And was he advised of his constitutional rights?

A He was.

Q And did you get to speak with him as well?

A Yes.

Q And did you arrest Lavonta Burrell in connection with this homicide and armed robbery?

A I did.

Q And do you know the status of Burrell's case?

A He's already pled guilty.

MR. SHUMARD [defense counsel]: Objection, relevance, Your

Honor.

THE COURT: Overruled.

(A-18-19). The Petitioner asserts that the trial court erred by allowing the State to inform the jury that Mr. Burrell entered a guilty plea to the murder and robbery charges.

Courts in this country have generally held that the admission of a guilty plea of a codefendant who is not subject to cross-examination is generally considered "plain" or fundamental error. The concern expressed by these courts is that the jury will conclude that because the other person pled or was convicted, the defendant at trial must also be guilty. As explained by the Eleventh Circuit Court of Appeals in *United States v. Eason*, 920 F.2d 731, 734 (11th Cir. 1990):

> The admission of Eason Sr.'s conviction must be assessed in the context of the applicable federal rules of evidence. Fed. R. Evid. 401 governs the admissibility of relevant evidence. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. A trial judge may exclude relevant evidence where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. We will not disturb the judge's determination absent an abuse of discretion. *United States v. Griffin*, 778 F.2d 707, 709 (11th Cir. 1985).
>
> In evaluating the judge's determination, it must be remembered that a jury "has an obligation to 'exercise its untrammeled judgment upon the worth and weight of testimony' and to 'bring in its verdict and not someone else's.'" *United States v. Sorondo*, 845 F.2d 945, 949 (11th Cir. 1988) (quoting *United States v. Johnson*, 319 U.S. 503, 519 (1943)). Where evidence of a coconspirator's conviction is admitted, however, a jury may abdicate its duty. "The jury may regard the issue of the remaining defendant's guilt as settled and the trial as a mere formality." *Griffin*, 778 F.2d at 711. For this reason, the admission of guilty pleas or convictions of codefendants or coconspirators not subject to

> cross-examination is generally considered plain error. *United States v. McLain*, 823 F.2d 1457, 1465 (11th Cir. 1987) (citations omitted).

(Footnotes omitted). In *Eason*, the Eleventh Circuit relied upon its earlier decision in *Griffin*, where the court explained:

> Due to the extreme and unfair prejudice suffered by defendants in similar situations, courts and prosecutors generally are forbidden from mentioning that a codefendant has either pled guilty or been convicted.[FN5] *See United States v. Baez*, 703 F.2d 453 (10th Cir. 1983); *United States v. Corona*, 551 F.2d 1386 (5th Cir. 1977); *United States v. Hansen*, 544 F.2d 778 (5th Cir. 1977). Convictions were reversed in both *Baez* and *Hansen* where the trial court informed the jury of a codefendant's guilty plea to explain that defendant's absence from trial. As the former Fifth Circuit noted in *Hansen*:
>
> > [T]here is no need to advise the jury or its perspective members that some one not in court, not on trial, and not to be tried, has pleaded guilty. The prejudice to the remaining parties who are charged with complicity in the acts of the self-confessed guilty participant is obvious.
>
> 544 F.2d at 780. The facts before us offer only a slight variation from *Hansen* and *Baez*. The *Baez* and *Hansen* juries were informed that an absent codefendant had pled guilty. Here the jury was informed that an absent witness had been adjudicated guilty for the arson underlying Griffin's indictment on fraud and conspiracy charges. There is no appreciable difference between informing a jury that a cohort has pleaded guilty and informing it that a cohort has been adjudicated guilty. *See United States v. Veal*, 703 F.2d 1224, 1229 (11th Cir. 1983). Our analysis is similarly unaffected by the fact that Gainey was not a codefendant at Griffin's trial. The prejudice here is the same as where a codefendant pleads guilty: the jury may regard the issue of the remaining defendant's guilt as settled and the trial as a mere formality. We also are unpersuaded by the government's contention that the prejudicial impact of Gainey's guilt was minimal. . . .
>
> Introduction of Gainey's guilt violated two of the most basic tenets of our criminal jurisprudence. First, the evidence against an accused must come from the witness stand in open court so that a defendant may confront his accusers. *Turner v. Louisiana*, 379 U.S. 466, 472-473 (1965). A verdict of guilt must be based on the evidence developed at the defendant's trial, *id.* at 472 (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)), not the evidence developed at some other defendant's trial. By

> taking judicial notice of Gainey's adjudication and reading Gainey's indictment to the jury, the trial court effectively barred Griffin's counsel from examining either the evidence at Gainey's trial or, alternatively, the motives behind a plea. *Cf. Bruton v. United States*, 391 U.S. 123 (1968) (introduction of codefendant's confession improper where cross examination of codefendant not possible). Second, guilt or innocence must be determined one defendant at a time without regard to the disposition of charges against others. In a conspiracy trial, which by definition contemplates two or more culpable parties, courts must be especially vigilant to ensure that defendants are not convicted on the theory that guilty "birds of a feather are flocked together." *Krulewitch v. United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring).
>
> We conclude that the district court abused its discretion by admitting evidence regarding the absence and adjudication of guilt of Griffin's coconspirator. Accordingly, we REVERSE and REMAND for a new trial.
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> [FN5: There are two exceptions to this rule. Where codefendants who plead guilty during the course of trial begin to disappear from the defense counsel's table, the trial court may comment that codefendants have been excused from trial for legally sufficient reasons that should have no bearing on the remaining defendants' guilt or innocence. *United States v. Jones*, 425 F.2d 1048, 1053–54 (9th Cir. 1970). Similarly, where a codefendant takes the witness stand, evidence of a guilty plea may be introduced to aid the jury in assessing the codefendant's credibility. *United States v. Baez*, 703 F.2d 453, 455 (10th Cir. 1983). Neither exception applies here.]

Griffin, 778 F.2d at 710-711 (footnote omitted). Ultimately, the Eleventh Circuit in *Eason* reversed for a new trial due to the error in allowing the Government to inform the jury that the codefendant had been convicted:

> It is a basic tenet of our criminal jurisprudence that "guilt or innocence must be determined one defendant at a time without regard to the disposition of charges against others." *Griffin*, 778 F.2d at 711. We conclude that the introduction of Eason Sr.'s conviction was highly prejudicial and violated this tenet, and that the district court thus abused its discretion by admitting the conviction despite Fed. R. Evid. 403. We thus REVERSE the conviction and REMAND the case for further proceedings.

Eason, 920 F.2d at 738 (footnotes omitted).

Other courts in our country have reached a similar conclusion. *See United States v. Mitchell*, 1 F.3d 235, 245 (4th Cir. 1993) ("In this case, the prosecution referred to the non-testifying co-conspirators' guilty pleas on a number of occasions and the district court failed to instruct the jury on this point as well. Thus, this was error as well, and we believe that it was prejudicial to the appellant."); *United States v. Jozwiak*, 954 F.2d 458, 459 (7th Cir. 1992) (explaining that the trial court granted mistrial after a prosecutor told the jury during his opening statement that four codefendants had pled guilty); *United States v. Halbert*, 640 F.2d 1000, 1004 (9th Cir. 1981) ("As a principle of general acceptance, the guilty plea or conviction of a codefendant may not be offered by the government and received over objection as substantive evidence of the guilt of those on trial."); *United States v. Austin*, 786 F.2d 986, 990-991 (10th Cir. 1986) ("Both Bates and Paterson contend that reversible error occurred when the Government, in its opening and closing statements and through the testimony of its chief witness and others, informed the jury that ten coconspirators had been previously tried and convicted for their parts in the conspiracy with which defendants here are charged. Although no objection was made to the initial references to the convictions, we nevertheless agree that defendants must be given a new trial.").

In *Eason*, the Eleventh Circuit stated:

> The problem confronting us was not the result of inadvertence; no witness volunteered or "blurted out" the fact that Eason Sr. had been convicted. The government deliberately introduced Eason Sr.'s conviction.

Eason, 920 F.2d at 734. *See also id.* at 738 n.11 ("As the body of our opinion indicates, there is no basis on which the prosecutor could have supported the introduction of the

conviction. When the prosecutor asked the question, he should have known that he was eliciting inadmissible and highly prejudicial evidence. Lawyers are not just adversaries; they are the court's counselors. The judge ought to be able to rely upon their counsel."). The same is true in the instant case. The fact that Mr. Burrell entered a guilty plea to the murder and robbery charges was not presented to the jury as a result of "inadvertence"; rather, the State *deliberately* informed the jury of Mr. Burrell's guilty plea – both in opening statements and during Detective Abbott's testimony.

Thus, pursuant to *Eason* and all of the other cases cited above, the Petitioner contends that the trial court erred by allowing the State to inform the jury that Mr. Burrell entered a guilty plea to the murder and robbery charges.

The error in allowing the State to inform the jury that Mr. Burrell had entered a guilty plea to the murder and robbery charges was *not* harmless. This was a close case. The State's star witness was Mr. Rauco, but Mr. Rauco – who, despite being the person who shot Mr. Alhirsh, was charged with only *second-degree murder* – had a clear incentive to frame the Petitioner in order to obtain a lower sentence. Mr. Rauco's credibility was a focal point of the trial – and yet the State being able to inform the jury that Mr. Burrell also entered a guilty plea improperly bolstered Mr. Rauco's credibility (i.e., the jury likely believed that Mr. Rauco must be telling the truth about the other people's alleged involvement – including Mr. Burrell's – because Mr. Burrell

admitted his guilt and entered a plea).[3] And obviously the jury did not believe all of Mr. Rauco's testimony, as the jury acquitted the Petitioner on the conspiracy count. As explained by the Eleventh Circuit in *Eason*:

> In asserting harmless error, the government relies on the jury's

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[3] During closing arguments, one of the prosecutors argued the following to the jury:

> Again, the law the judge will instruct you, you do not have to be there when the crime is committed to be a principal. So he did all of this in furtherance and left the scene so he wouldn't be the person putting the gun in the victim's face. But he sent someone to do it for him, and he assisted him in doing that.
>
> He must be treated as if he had done all the things the other person or persons did.
>
> *And I say persons because Andrew Rauco didn't go alone. He went with Lavonta Burrell.* And during this, Andrew Rauco went to the left side, to the driver, straight to the victim, and Lavonta Burrell went to the right to the passenger side, into the vehicle, trying to see what property, what all he could find. And . . . we know that Lavonta Burrell and Andrew Rauco, when they got in that car and they drove away from Sugar Mill, from Crown Point Road, they did have the victim's cell phone. And that cell phone is in evidence and it is property and it does have value. And even if they throw it out the window, it doesn't matter what they did with it later. They took that from the custody of the victim during the commission of that armed robbery.
>
> So, members of the jury, I submit to you, all three elements of first degree felony murder are met in this case. While engaged in the attempted to commit a robbery, Jurgen Marku's accomplice caused the death of the victim. And he was killed by a person other than Jurgen Marku, *but both of them were principals in the commission of this robbery*.
>
> . . . .
>
> This is so different than manslaughter because their intent here wasn't just some act that went wrong. Their intention was to rob the victim. *And that is what Andrew Rauco, Lavonta Burrell and this defendant did.*

(A-23-25, A-27) (emphasis added).

> acquittal of Eason Jr. on all counts of the FCIC fraud, the fraud that the government claims was the principal beneficiary of the double check and fictitious name scheme. The FHA was defrauded, the government asserts on appeal, merely because appellant failed to report his sales of corn and tobacco to the FHA; the double check and fictitious name scheme had nothing to do with the FHA. The two corn counts for which the jury convicted appellant, however, allege that appellant disposed of corn by selling it to M.J. Eason & Son and then converted the proceeds to his own use. Further, the government introduced evidence that appellant had received fictitious payee checks from his father/grain dealer. The indictment itself, as well as the government's evidence, thus necessarily establish that the alleged double check and fictitious name scheme were instrumental to the alleged FHA fraud. That the jury convicted appellant on the FHA corn counts and not on the FCIC counts does not establish that the introduction of Eason Sr.'s conviction was harmless error.
>
> The three tobacco counts for which the jury convicted appellant present a different situation regarding whether the introduction of Eason Sr.'s conviction was harmless error. It is true that these counts do not relate to the alleged double check and fictitious name scheme. Instead, these counts involve the alleged sale of tobacco in Eason Jr.'s wife's name at Alma Bright Leaf Warehouse. *Where a defendant is tried on several counts in one trial, highly prejudicial evidence is wrongfully introduced regarding some of those counts, and the jury convicts on those counts, we cannot know whether the jury was able to compartmentalize the evidence and the counts. That is, we cannot know whether the jury applied the improper evidence only to certain counts. See United States v. Mann, 557 F.2d 1211, 1217-1218 (5th Cir. 1977). We thus cannot say beyond a reasonable doubt that the introduction of Eason Sr.'s conviction was harmless error in regard to the tobacco counts.*

Eason, 920 F.2d at 737 (emphasis added).

The instant case is the appropriate case for the Court to decide whether it is a violation of a criminal defendant's Confrontation Clause and Due Process Clause rights to allow the prosecution to inform the jury that a nontestifying codefendant has entered a guilty plea. As explained by the Court in *Turner v. Louisiana*, 379 U.S. 466, 472-473 (1965):

> In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against

> a defendant shall come from *the witness stand* in a public courtroom where there is full judicial protection of the defendant's *right of confrontation, of cross-examination*, and of counsel.

(Emphasis added). In the instant case, the prosecution effectively *barred* the Petitioner's counsel from examining the motives behind Mr. Burrell's plea. Undersigned counsel asserts that the question presented in this case is important and has the potential to impact numerous criminal cases nationwide. By granting this petition, the Court will have the opportunity address this important question and thereafter provide guidance to trial courts and practitioners. Accordingly, for the reasons set forth above, the Petitioner prays the Court to grant his certiorari petition.

I. CONCLUSION

The Petitioner requests the Court to grant the petition for writ of certiorari.

Respectfully Submitted,

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