No. 22-7033

IN THE

SUPREME COURT OF THE UNITED STATES

DEANDRE FORREST, PRO SE,

PETITIONER,

V.

UNITED STATES OF AMERICA

RESPONDENT.

ON PETITION FOR A WRIT OF CERTORARI TO

THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTORARI

DEANDRE FORREST, PRO SE,
FED.REG. 66552-061
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P.O. BOX 6001
ASHLAND, KENTUCKY 41105

QUESTION(S) PRESENTED

1. Whether Forrest's Sixth Amendment was violated when his counsel conceeded his guilt during trial?

2. Whether the Sixth Circuit Court of Appeals Erred in denying Forrest's request for a Certificate of Appealability?

LIST OF PARTIES

[XX] 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

1. Forrest v. United States, 2022 U.S. App. LEXIS 26644 (6th Cir. 2022)(Rehearing en banc).
2. Forrest v. United States, 2022 U.S. App. LEXIS 19142 (6th Cir. 2022)(COA denied).
3. Forrest v. United States, 2021 U.S. Dist. LEXIS 232495 (S.D. OH, 2021).
4. Forrest v. United States, 2021 U.S. Dist. LEXIS 15067 (S.D. OH, 2021).
5. Forrest v. United States, 2021 U.S. Dist. LEXIS 73353 (S.D. OH, 2021).

Habeas Court Opinions

6. Forrest v. United States, Case No. 2:17-cr-00158.
7. Forrest v. United States, Case No. 2:20-cv-00775.
8. Forrest v. United States, Case No. 21-4226.

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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

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

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

[XX] reported at United States v. Forrest, No. 21-4226; 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[ ] is unpublished.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

[XX] reported at United States v. Forrest, 2:20-cv-00775; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.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

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

The date on which the United States Court of Appeals decided my case was November 8, 2021.

[ ] No petition for rehearing was timely filed in my case.

[XX] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 7, 2022, 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. § 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 PROVISION AT ISSUE:

SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

STATUTORY PROVISIONS INVOLVED:

18 U.S.C. §846

18 U.S.C. §841

18 U.S.C. §924(c)

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

This case involves 1.) whether the Sixth Circuit Court of Appeals decision is consistent with the Court's decisions in **Slack, Miller-El and Buck,** and 2.) whether trial counsel was ineffective when he conceded Mr. Forrest's guilt during trial?

On July 20, 2017 the Southern District of Ohio returned eight (8) counts of indictment against Mr. Forrest as follows:

COUNT ONE, Conspiracy to Distribute Crack Cocaine in violation of 21 U.S.C. §846;

COUNTS TWO, THREE AND FOUR, Knowingly and Intentionally Distributing a Substance or Mixture Which Contained Detectable Amounts of Cocaine Base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(2)(C);

COUNT FIVE, Knowingly and Intentionally Distributing 280 Grams or More of a Mixture of Substance Which Contained Detectable Amounts of Cocaine Base, in violation of 21 U.S.C. §§841(a)(1) and 841 (b)(1)(a)(iii), and 18 U.S.C. §2;

COUNT SIX, Knowingly and Willingly Possessed With The Intent to Distribute 280 Grams or More of a Substance Containing Cocaine (Crack) in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(C), and 18 U.S.C. §2;

COUNT SEVEN, Knowingly and Intentionally Possessed With Intent to Distribute a Substance Containing Detectable Amounts of Cocaine in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(C), and 18 U.S.C. §2;

COUNT EIGHT, Possession of Firearms in Furtherance of a Drug-Trafficking Crime(s) in violation of 18 U.S.C. §924(c) and 18 U.S.C. §2.

The government dismissed Count Seven of the Indictment. In June of 2018, a jury convicted Mr. Forrest of ALL Counts and returned 180 Months of impri-

sonment. (120 Months for the drug charges and 60 Months consecutive for the gun charge).

On February 15, 2019, the Sixth Circuit affirmed Mr. Forrest's conviction and sentence. **United States v. Forrest, 763 F.App'x 466,468-69 (2019).** On February 10, 2019, Mr. Forrest filed his 28 U.S.C. §2255 Motion to vacate. On March 04, 2021, the district court granted Mr. Forrest an evidentiary hearing as to whether his trial counsel violated his constitutional right to effective assistance of counsel in light of **McCoy v. Louisiana**, by conceeding Mr. Forrest's guilt during trial.

On August 11, 2021, the magistrate judge issued a Recommended Disposition denying Mr. Forrest's §2255 motion to vacate. On December 6, 2021, the district court adopted the magistrate's recommendation in whole-cloth denying Forrest's §2255. On July 12, 2022, the Sixth Circuit Court of Appeals denied Forrest's request for a Certificate of Appealability ("COA"). On September 22, 2022, the Sixth Circuit Court of Appeals denied Mr. Forrest's request for a rehearing en banc.

ARGUMENT

The question for the Supreme Court is whether Mr. Forrest was denied his right to autonomy under the Sixth Amendment and/or his counsel's ineffectiveness by commiting "structural-error" by conceeding the defendant's guilt at critical stages of trial, rendering the proceedings "fundamentally unfair"?

1. Trial Strategy

In this matter, the defense counsel testified at the evidentiary hearing that his strategy was to plea guilty on Counts Two, Three and Four, the less serious charges in an attempt to avoid the more serious Conspiracy charge in Count One, so that Forrest may get credit for acceptance of responsibility under the sentencing guidelines. However, during the plea hearing, the government and the Court clearly intended to use Counts Two, Three and Four to prove the Count One Conspiracy Charge, the most serious charge. The defendant was never in agreement with trial counsel's strategy as evidenced in the transcript of the proceedings. **[DE 46, Pg.ID 103-106]:**

U.S. ATTORNEY: Your Honor, the government is certainly not opposed to Mr. Forrest entering a guilty plea to Counts 2 through 4 of the indictment. I would, however, point out that those counts fall within the time frame of the scope and conduct alleged in Count 1, which is the conspiracy count, and just make clear that we would intend to still introduce evidence of those crimes at trial to prove the conspiracy.

THE COURT: Well, not only would you be able to introduce evidence, it

seems to me you would be able to introduce his guilty plea and any statement that he may make in support of that guilty plea.

THE COURT: So what about that, Mr. McNamara? That seems to me that's a real concern.

MR. McNAMARA: I disagree about the relevancy. Counts 2, 3, and 4 are different than the other counts in the indictment in that they involve specific sales of comparatively small quantities of cocaine, an ounce or less, on three separate dates to the same confidential informant. They are -- that person ... whether or not these could be subject of comment at trial, I suppose, would depend on whether there's evidence to establish the existence of a conspiracy and I'm not --

THE COURT: But if there is, then do you -- do you disagree that the Government may be entitled to have the guilty plea introduced into evidence and any statement he may make about committing these -- these offenses?

MR. McNAMARA: The conspiracy count didn't contain specific factual allegations, but it did allege, I think, October of '16 through June of '17, and these fall withing that time period.

THE COURT: And it would be the Government's intention to introduce evidence regarding the commission of these offenses as overt acts committed by this defendant during the conspiracy?

U.S. ATTORNEY: Yes, Your Honor..And to prove the existence of the conspiracy, I am not -- I don't want to get into an evidentiary hearing here today at this hearing, but they are drug sales from the same house which -- the day on which his co-conspirator was arrested.

THE COURT: What do you think about that, Mr. McNamara?

MR. McNAMARA: Not knowing entirely what the Government's other evidence is going to be, I remain skeptical about the admissibility of the guilty plea and the statements --

THE COURT: Well, let's suppose it is admissible. Then now have you -- have you properly represented your client or do we have **a case of inadequate counsel built in here? ...**

THE COURT: So, Mr. Forrest, do you understand that any statement that you make make in pleading guilty to Counts 2, 3, and 4 may be admissible against you at trial as a proof of the conspiracy count?
I see him shaking his head and looking at you, Mr. McNamara.

MR. McNAMARA: He does not understand entirely.
(emphasis added)

Furthermore, during trial, defense counsel believed that by conceeding Counts 2, 3 and 4 would bolster and focus on the Count One Conspiracy charge. The government's position and the court's opinions aligned. The government cited authority pursuant to to several cases.

During the opening argument, Mr. McNamara stated to the jury, "so after you've heard all the evidence, I think you will find Mr. Forrest **guilty** of the three sales of cocaine and not guilty of any Conspiracy or any firearm violations. **[DE 110, Pg.ID 630].** And during closing, defense counsel argued that, Mr Forrest is responsible for selling powder cocaine to an undercover ATF - paid informant three times ... three sales, he did that. Those are Counts 2, 3, and 4 of the indictment. They have not been contested ... there's no dispute. He will be held accountable and punished accordingly, appropriately, that he committed. **[Trial Trans. 114 at 1119-1120].**

However, Mr. Forrest situation is in stark contrast to defense counsel's, the government and the court's position. Given the facts and circumstances of of this case, the court's instruction to the jury clearly states, "if you find Mr. Forrest guilty of Counts 2,3, and 4, then you **must find him guilty**

of Count One, the Conspiracy. [DE 114, Pg.ID 1165].

Unlike the authority cited by the court and the government, because Counts 2,3, and 4 are inherently **intertwined** with the Conspiracy charge, effectively defense counsel conceded Forrest's **GUILT** on ALL charges. Indeed, Mr. McNamara's "strategy" was to ensure his client was found guilty of all charges!

The Evidentiary Hearing

The evidentiary hearing was solely based of whether Mr. McNamara asked Mr. Forrest for permission to concede his guilt and did he agree with his "strategy?"

During the evidentiary hearing, counsel offered reasons for his "trial strategy" to plead guilty to Counts 2,3 and 4. **[DE 191, Pg.ID 1666]:**

Q. Have you - did you ever tell Mr. Forrest that you were going to concede his guilt at trial?

A. Yes.

Q. When?

A. We talked about it several times, even before we tried to do it formally in the courtroom. And I can explain why we did that, if you want to know, but, mostly, it had to do with getting credit for acceptance of responsibility under the sentencing guidelines.

During further questioning by the court, Mr. McNamara finally admits, **"I don't know that I ever sat down with him again and said, here's the new plan, it's exactly like the old one, we're going to do it." [DE 191, Pg.ID 1700, ¶¶ 21-23].**

Mr. McNamara's statement that he never sat down and discussed with Mr. Forrest that his "new plan was just like the old plan," concerning their conversation during the **"PLEA HEARING"** where he recommended Forrest plea guilty to Counts 2-4 of the indictment. His explanation to Forrest and the Court was that Count One was **not relevant** to the other counts of the indictment, despite the U.S. Attorney and the district judge making it abundantly clear that indeed they were, and the government could and would use Counts 2-4 to **prove** the Count One Conspiracy charge.

Clearly, Mr. McNamara never explained his **"new plan"** (which was the old plan) to concede Forrest's guilt at trial. Throughout the proceedings Mr. Forrest remained adamant that he was **not** in agreement with counsel's "plan" to plead him guilty to any charge in the indictment at any time. This is the reason Forrest insisted on going to trial to contest **all** charges in the indictment.

Even the defendant realized during the plea hearing that Counts 2-4 would be used to convict him of the Conspiracy charge **but counsel did not.** Despite Mr. Forrest's objection, Mr. McNamara proceeded with his "new plan" without Forrest's knowledge or consent.

THE CONSPIRACY CHARGE

The main reason Mr. Forrest decided to proceed to trial was to contest the fact that, "a government agent or informant cannot be the only other member of the conspiracy." **See: United States v. Mahkimetas, 991 F.2d 379, 383 (7th Cir. 1993)**(joining nine other Circuits, the court noted that a conspiracy "may [not] be formed between a criminally-motivated person and a government agent or informer"); **Montgomery v. United States, 853 F.2d 83 (2nd Cir. 1988); United States v. Escobar de Bright, 742 F.2d 1196 (9th Cir. 1984).**

Moreover, There is neither true agreement nor meeting of the minds when individual "conspires" to violate the law with only one other person and that person is a government agent; individuals must conspire with at least one bona fide co-conspirator to meet formal requirements of a conspiracy. Confidential informants and government agents cannot serve as a second party to conspiracy. **See: United States v. Dimeck, 24 F.3d 1239 (10 Cir. 1994); United States v. Schmidt, 947 F.2d (9th Cir. 1991).**

Indeed, Count One originated from Count Two which occurred precisely on the same date, which involved a "buy" from an ATF Agent on October 21, 2016. Mr. Young (the government's alleged co-conspirator) was never in the scope of the authorities until June 15, 2017, eight months later. Therefore, Mr. Young could not have been a co-consiprator, but rather the ATF Agent working for the government. **[DE 62, Pg.ID 186-87; The Indictment].**

Therefore, the government's charges in the indictment was defective from the beginning and Mr. Forrest stands convicted on the district court's

procedural error and trial and appellate counsel's ignorance of the elements of the Count One Conspiracy charge.

STRUCTURAL ERROR

In **McCoy v. Louisiana, 584 U.S. 138, S.Ct. 1500, 200 L.Ed. 281 (2018),** the Supreme Court held that admitting guilt in a criminal trial when the client opposes it, even when the evidence is overwhelming, is a structural-error and violates the client's right to autonomy under the Sixth Amendment.

The Supreme Court also held, that trial counsel must discuss any possible concession of guilt and can only concede guilt in a criminal trial if the defendant either agrees to such concession or otherwise acquiesces. As the Court held in **McCoy**, ["C]ounsel, in any case, must still develop a trial strategy and discuss it with his/her client. **See: Nixon, 543 U.S. 178,** explaining why in his/her view, conceding guilt would be the best option. But if, after consultation, the defendant does not agree to concede his guilt as to the charges made by the prosecution, "it [is] not open to [counsel] to override [the defendant's] objection." **Florida v. Nixon, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004).** "Defense counsel is obligated to explain such a strategy to the defendant and may move forward such strategy only if the defendant consents or otherwise acquiesces." **(Id. at 178).**

Here the district court is flatly wrong in concluding that Forrest's Constitutional deprivation claim did not violate **McCoy**, but rather **Nixon.** The facts and circumstances of Forrest's claims do not fit the profile of in the court's conclusion.

By conceding Forrest's guilt of any Count of 2,3, or 4 is a complete surrender of the entire defense and **not a valid trial strategy** given the facts and circumstances of this case and certainly **not** aligned with the defendant's wishes.

The district court's error belied in it's belief that Mr. McNamara had in fact, devised the strategy whereby Forrest would concede guilt on the less serious charge, in an attempt to avoid conviction on the more serious Conspiracy charge. The record proves that Forrest gave no such consent to McNamara. In fact, counsel admits as much during the evidentiary hearing.

The government argued that Forrest was similarily situated with **United States v. Darden, 708 F.3d 1225 (11th Cir. 2013).** In **Darden**, the defendant was accused of committing robbery on two different occasions. The first robbery had minimal evidence to convict and the second robbery, after confrontation with the store clerk and his arrest shortly thereafter, he confessed to the second robbery. Because the evidence of the second robbery was overwhelming, his counsel pled him guilty and focused on the first robbery where the evidence of his guilt was minimal since both counts of robbery were not intertwined, therefore tactical retreat was deemed to be effective assistance of counsel. However, the **Darden Court** found that because counsel had conceded guilt to both of his robberies that it was **ineffective assistance**, because it was a **complete surrender.**

"[T]here is a distinction which can and must be drawn between ... tactical retreat and ... a complete surrender." **Clozza v. Murray, 923 F.2d 1092 (4th Cir. 1990).** Mr. McNamara's **complete surrender of the entire defense** by conceding guilt on Count's 2,3 and 4 resulted in a **"fundamentally unfair" trial.**

In fact, Mr. Forrest had no knowledge of his counsel's "strategy" following the Plea Hearing and did not consent to counsel's strategy to concede his guilt to Counts 2,3 and 4, in order for the jury to find him guilty of the conspiracy charge.

The record clearly demonstrates defense counsel's ignorance of relevant case law. When counsel conceded guilt in the "opening statement" at trial jurists of reason would not conclude this represented a reasonable trial strategy or tactical retreat, but rather, complete surrender. The effect of this admission of guilt was immeasurable, because any reasonably situated juror would most certainly be swayed by a defendant's own lawyer conceding his client's guilt. The jury must have wondered who Mr. McNamara was representing, Mr. Forrest or the government?

The Appellate Court's Denial of A Certificate of Appealability ("COA") Was Unreasonable.

The Sixth Circuit Appellate Court's denial of Forrest's request for a "COA" was unreasonable and contrary to the holdings in **Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed. 932 (2003), and, Buck v. Davis, ___, ___,___, 137 S.Ct. 759, 197 L.Ed.2d 1, (2017).**

In the recent Supreme Court opinion in **Buck**, the Court held, that the Fifth Circuit exceeded the limited scope of the "COA" analysis. The "COA" statute set forth a two step process. An initial determination of whether the claim of Constitutional deprivation is debatable and whether it represents an appeal taken in normal course.

Mr. Forrest only became aware of the government's intention of using Counts 2,3 and 4 to prove the Count One Conspiracy charge during the plea hearing. Mr. Forrest insisted on going to trial to fight the conspiracy charge. No one in their right mind would have agreed with his counsel's decision to concede guilt on Counts 2,3 and 4 where the court's instructions to the jury clearly state, "if you find Mr. Forrest guilty of Counts 2,3 and 4, then you automatically convict him on Count One." **[DE 114, Pg.ID 1165].** Mr. McNamara's strategy was simple, have Forrest concede his guilt to the jury at trial.

The issues were made clear to Mr. McNamara during the plea hearing of both the government's intentions and the court's opinion that, if Forrest admitted guilt to Counts 2,3, and 4 at trial, then the jury was to **AUTOMATICALLY** find him guilty on the Count One Conspiracy charge. Moreover, during the post-conviction evidentiary hearing, it became apparent that Mr. McNamara never obtained Forrest's consent to offer his guilt on any charge to the jury, in order to avoid the conspiracy charge.

The case in **Forrest** is readily distinguishable from **Nixon**. The district court in Forrest claims that he objected to defense counsel's strategy only after the verdict which is not supported by the record. During the Plea Hearing, the court clearly explained to Mr. Forrest and his defense counsel that the government intended to use Counts 2,3 and 4 to prove the Count One Conspiracy charge, regardless of whether Mr. McNamara believed it relevant or not. Mr. Forrest insisted on going to trial to prove his innocence of the Conspiracy charge. Forrest specifically, told his counsel **not** to concede his guilt at trial, but he did regardless.

Chief Justice Robert's in writing for the Court, held that the "COA" inquiry is not coextensive with "merits analysis." "The question for the Fifth Circuit was not whether **Buck** had shown extraordinary circumstances. The courts should limit it's examination during the "COA" stage to a threshhold inquiry of the merits of the claims and ask only if the district court's decision was **"debatable."**

A "COA" may issue if the petitioner has made a substantial showing of the denial of a Constitutional right and demonstrates that jurists of reason could debate whether ... the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. **Slack v. McDaniel, 529 U.S. 484 (2000).**

Mr. Forrest's claims of Constitutional deprivation could not have been resolved in any different manner. This is the only proper proceeding. Forrest argues that his Sixth Amendment rights were violated when his trial counsel conceded his guilt at trial without his consent and over his objection. **McCoy v. Louisiana, 584 U.S. 138 S.Ct. 1500, 200 L.Ed. 281 (2018).** Jurists of reason would all agree, Mr. McNamara's representation fell well-below any reasonable standard by admitting his client's guilt to the jury effectively surrendering his liberty.

CONCLUSION

Mr. Forrest was unconstitutionally denied his right to autonomy and effective assistance of counsel under the Sixth Amendment where Mr. McNamara created "structural-error" by conceding his guilt at "critical stages" of the proceedings. Mr. McNamara did not consult with Forrest regarding his decision to concede Forrest's guilt at trial nor develop a trial strategy or explain why in his view, conceding guilt was in Forrest's best interests. Finally, counsel conceded his client's guilt without his knowledge or consent.

In the interest of justice and to correct the Constitutional deprivation that this case represents, the Supreme Court should VACATE and REMAND the case back to the district court for further proceedings.

02/21/2023
DATE

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Penalty of Perjury

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Deandre Forrest
Deandre Forrest