No. 23-

IN THE

Supreme Court of the United States

ANTHONY ROY SPAIN,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the fall of 2017, the Tenth Circuit Court of Appeals ruled that the Muscogee (Creek) Nation in Oklahoma had never been disestablished, and thus under 18 U.S.C. § 1153 only the federal courts have jurisdiction to try an Indian who commits murder on the Creek Nation. *See Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017).

While Oklahoma's appeal of that ruling was pending before this Court, Mr. Spain was charged with first-degree murder, in violation of Oklahoma law. Mr. Spain is an enrolled member of the Creek Nation, and the crime took place within the boundaries of the Creek Nation. He was prosecuted in an Oklahoma state court, where he pleaded guilty and was sentenced to life in prison with the possibility of parole. A little more than two weeks after sentencing, this Court held, in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), that the Creek Nation had never been disestablished and state jurisdiction was improper.

Mr. Spain's counsel never discussed with him challenging the state court's jurisdiction with him, even after *McGirt* was decided. Mr. Spain sent a note to the trial court, in which he directly asked to consult with them about the effect of *McGirt* on his case. The Oklahoma state courts instead read his note to renounce any claim to treatment as an Indian, and thus found him at fault for not timely appealing. This case presents the following question:

Were trial counsel ineffective, in violation of *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), for failing to consult with Mr. Spain about taking a direct appeal from his conviction, where doing so would not have been frivolous, and where the Sixth Amendment claim does not depend on the claimant's fault?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of this document.

RELATED PROCEEDINGS

- *State of Oklahoma v. Anthony Roy Spain*, No. PC-2023-1004 (Okla. Crim. App. filed Dec. 13, 2023)
- *State of Oklahoma v. Anthony Roy Spain*, No. CF-2019-5 (Okfuskee Co. Dist. Ct. filed Jan. 7, 2019)
- *United States v. Anthony Roy Spain*, No. 6:21-cr-3-RAW (E.D. Okla. filed Jan. 12, 2021)

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NO. 23-_____

ANTHONY ROY SPAIN, PETITIONER,

vs.

STATE OF OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

Anthony Spain respectfully petitions the Court for a writ of certiorari. The decision below is such an egregious deviation from the constitutional rule established in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), that an exercise of this Court's supervisory power is warranted to correct it.

DECISIONS BELOW

The decisions of the Oklahoma Court of Criminal Appeals first remanding the case to the trial court for further factfinding and then affirming the denial of postconviction relief are unreported, but included in the appendix at pages 9a and 1a, respectively. The orders of the Okfuskee County, Oklahoma, District Court, respecting Mr. Spain's application for postconviction relief are also unreported, but included in the appendix at 11a (original order) and 6a (additional findings on remand).

JURISDICTION

The Oklahoma Court of Criminal Appeals affirmed the denial of Mr. Spain's postconviction petition on March 27, 2024. This petition is timely. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment to the U.S. Constitution:

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 defence.

STATEMENT

Mr. Spain is an enrolled member of the Muscogee (Creek) Nation in Oklahoma. In 2019, he was accused of committing murder within the boundaries of the Creek Nation. Over a year earlier, the Tenth Circuit had held that the Creek reservation had never been disestablished by Congress, meaning that only the federal courts had jurisdiction to try Mr. Spain for the crime. *See Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020). He was nevertheless prosecuted in state court for the murder, and sentenced to life in prison with the possibility of parole.

It has never been disputed that Mr. Spain's trial counsel failed to discuss with him how *Murphy* might have affected the subject-matter jurisdiction of the state court.

His lawyers' failure to consult with him about appealing his conviction and sentence on the ground that the state court lacked jurisdiction to convict him violated his Sixth Amendment right to counsel. *See Roe v. Flores-Ortega*, 528 U.S. 470 (2000). By selectively reading a hand-written note from Mr. Spain that he sent a week after this Court decided *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the courts below denied him a delayed direct appeal because, they concluded, Mr. Spain disclaimed any desire to appeal his conviction and life sentence. But that note clearly expresses both Mr. Spain's understanding that he is an enrolled member of the Creek Nation and his desire to consult with his lawyer about how *McGirt* affected his case. The note thus reinforces the undisputed fact that counsel never discussed the jurisdictional issue with him—even after *McGirt* was decided—and thereby rendered ineffective assistance within the meaning of *Flores-Ortega*. Yet the courts below did not enforce the guarantees of the Sixth Amendment as articulated in *Flores-Ortega*. This Court should grant the petition.

1. On January 10, 2019, Mr. Spain was charged by criminal information with one count of first-degree murder, in violation of Okla. Stat. tit. 21, § 701.7(A). As he explained at the sentencing hearing, he shot and killed his mother-in-law during an argument. Mr. Spain retained Elton Jenkins, Esq., and Justin Jack, Esq., to represent him in connection with these charges.

Mr. Spain is an enrolled member of the Muscogee (Creek) Nation, and has 1/8 Creek blood quantum. He was enrolled on May 13, 1984, and was thus enrolled at the time of the crime in this case. The murder took place at 369197 West Highway 56, in Okemah, Oklahoma, which is in Okfuskee County and thus within the exterior boundaries of the Creek Nation.

On August 8, 2017, almost a year and half before Mr. Spain was charged, the United States Court of Appeals for the Tenth Circuit ruled that the Creek Nation had never been disestablished, such that under 18 U.S.C. § 1153 there was exclusive federal jurisdiction over a murder committed by an Indian within the boundaries of the Creek Nation. *See Murphy v. Royal*, 866 F.3d 1164 (10th Cir.), *on denial of rehearing*, 875 F.3d 896 (2017), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020). Mr. Spain's counsel thus should have known that the state trial court likely did not have jurisdiction to try him on the murder charge.

Even though the Tenth Circuit's ruling had been public for over a year before Mr. Spain was charged, his counsel did not seek to dismiss the murder charge against Mr. Spain at any time. Rather, on January 23, 2020, the day Mr. Spain's trial was to begin, he pleaded guilty to the murder charge on the advice of his counsel by entering a so-called "blind plea." "A 'blind' plea of guilty is a plea in which there is no binding agreement on sentencing, and punishment is left to the judge's discretion." *Medlock v. State*, 887 P.2d 1333, 1337 n.2 (Okla. Crim. App. 1994). Yet although they told the trial court that it was a blind plea, Mr. Jenkins and Mr. Jack had privately assured Mr. Spain that, in exchange for his guilty plea, he would receive a sentence of 45 years in prison with 35 years suspended. This understanding was neither confirmed with the prosecutor nor memorialized in writing. It was instead, as Mr. Spain understood it, the product of private negotiations with the prosecutor that took place in the judge's chambers before the change-of-plea hearing. Mr. Spain was not present for these negotiations. It has never been disputed that this understanding led Mr. Spain to plead guilty.

As the factual basis for the plea, Mr. Spain admitted that he shot Theresa Smith with a firearm "[a]t your residence out on 56 highway" in Okfuskee County, Oklahoma. The factual basis of the guilty plea did not support any *mens rea* associated with any degree of homicide, and particularly not the malice-aforethought element of first-degree murder as defined by Oklahoma law. The court accepted Mr. Spain's guilty plea and set the case for sentencing.

The sentencing hearing took place on June 23, 2020. The prosecutor began by asking the court to impose a life sentence that carried the possibility of parole after 37½ years. Defense counsel asked for an "85 percent" sentence, emphasizing Mr. Spain's acceptance of responsibility for the death of his mother-in-law.

The judge began his pronouncement of sentence by explaining, "Mr. Spain, the Court has known you for probably the last, what, 15 years." The judge recounted Mr. Spain's successful completion of drug court. He reminded Mr. Spain that he had punished the person who kidnapped his child. Then the judge imposed a life sentence with the possibility of parole, declining to suspend the sentence. He reminded Mr. Spain that he could move to modify the sentence within 60 months of the day of sentencing. And he advised Mr. Spain about his right to appeal, first by moving to withdraw his guilty plea and then, if that motion were denied, by appealing to the Oklahoma Court of Criminal Appeals. *See* Okla. Crim. App. R. 4.2.

By the time Mr. Spain was sentenced, the following events relating to the subject-matter jurisdiction of the state trial court had taken place:

- The Tenth Circuit Court of Appeals ruled that there was exclusive federal jurisdiction over a

murder committed by an Indian on the Creek Nation. *See Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017).

- This Court heard oral argument on November 27, 2018, in the State of Oklahoma's appeal of the Tenth Circuit's ruling in *Murphy*.
- The Oklahoma Court of Criminal Appeals had affirmed the denial of Jimcy McGirt's *pro se* petition for postconviction relief based on *Murphy*. *See McGirt v. State*, No. PC-2018-1057 (Okla. Crim. App. Feb. 25, 2019).
- October Term 2018 ended without a decision from this Court in *Murphy*, and the case was set for reargument.
- Jimcy McGirt asked this Court to review the Oklahoma court's decision in his case, and this Court granted review. *See McGirt v. Oklahoma*, 140 S. Ct. 659 (Dec. 13, 2019).
- This Court heard oral argument in *McGirt* on May 11, 2020.

In the face of these events, competent trial counsel would have taken steps after sentencing to preserve Mr. Spain's right to relief under *Murphy* (and ultimately *McGirt*) by filing a motion to withdraw the guilty plea under Rule 4.2. In view of *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), in which this Court held that federal jurisdiction was exclusive in cases like Mr. Spain's, the motion would ultimately have been successful. If counsel had filed such a motion, Mr. Spain would have preserved a challenge to the trial court's jurisdiction to convict and sentence him for first-degree murder, and the Oklahoma state courts would have vacated his conviction. *See Parker v. State*, 495 P.3d 653, 664 (Okla. Crim. App. 2021); *cf.*

State ex rel. Matloff v. Wallace, 497 P.3d 686 (Okla. Crim. App. 2021) (holding that *McGirt* does not apply retroactively to cases on collateral review), *cert. denied sub nom. Parish v. Oklahoma*, 142 S. Ct. 757 (2022). Mr. Jenkins and Mr. Jack did not, however, preserve Mr. Spain's right to take a direct appeal from his conviction in this way, just as they had never sought to dismiss the charges before *McGirt* was decided. Nor did they ever explain to Mr. Spain that a challenge to the the district court's jurisdiction was available to him at all.

2. On July 15, 2020, the trial court docketed a handwritten note from Mr. Spain, who was then confined in the Okfuskee County Jail. In the note (App. 14a), Mr. Spain expressed confusion about how the *McGirt* decision affected his confinement in light of the fact that he was an enrolled member of the Creek Nation, and expressly asked to discuss the situation with Mr. Jenkins:

> I want to let it be known that with all this Creek Nation new law going on that first of all I consider myself white or yes [*sic*] I'm born 90 percent white. My parents got me a roll number or CDIB which I know nothing about. I do not want to be thrown into a native culture or environment I know nothing about, nor do I want [to be] pulled from Okfuskee County or state DOC [illegible] at this time. I would like time to talk things over with my lawyer about this situation. But once again I consider myself white not native. But apparently I have a little touch of 1/8 Creek blood which I know nothing about. So me being white I'd like to continue on here at Okfuskee County state DOC until further notice from lawyer Elton Jenkins and I get a better understanding of all this shit. Thank you.

Nothing in the record indicates that the trial court took any action with respect to this note at the time.

3. In the wake of *McGirt*, a grand jury in the Eastern District of Oklahoma indicted Mr. Spain on one count of first-degree murder, in violation of 18 U.S.C. §§ 1111 and 1153; one count of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c); and one count of causing the death of a person while discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(j)(1). An assistant federal public defender from Arizona was appointed to represent him in connection with these charges. But in April 2022, after the Oklahoma Court of Criminal Appeals ruled that *McGirt* did not apply retroactively to void final convictions, *see Matloff*, 497 P.3d 686, the government moved to dismiss the indictment. The federal district court granted the motion.

4. Meanwhile, Mr. Spain filed for postconviction relief with the state trial court. As relevant here, he raised four grounds for relief. First, he contended that his trial counsel were ineffective in advising him to plead guilty to first-degree murder under the mistaken advice that he would receive a 45-year sentence with 35 years suspended. Second, he contended that his guilty plea was void because he did not admit any *mens rea* with respect to the homicide, and particularly not the malice aforethought required by Oklahoma law. *See* Okla. Stat. tit. 21, § 701.7(A); *Reynolds v. State*, 516 P.3d 249, 258 (Okla. Crim. App. 2022) (defining malice aforethought). Third, he contended that his trial counsel were ineffective in failing to file before sentencing a motion to dismiss for lack of subject-matter jurisdiction. Fourth, and most relevant here, he contended that trial counsel were ineffective for failing to consult with him about taking a direct appeal of his conviction so that he could challenge the trial court's jurisdiction based on the Tenth Circuit's ruling in *Murphy* and this Court's ruling in *McGirt*. *See generally Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

The state answered the petition. In that answer, it never denied that trial counsel's advice regarding the sentencing exposure under the guilty plea was deficient. It never denied that his guilty plea was void because the factual basis did not support the *mens rea* element for any degree of homicide. It never denied that trial counsel did not challenge the trial court's subject-matter jurisdiction before sentencing. And it never denied that trial counsel did not consult with Mr. Spain about taking a direct appeal from his conviction.

The trial court denied the petition in a one-page order. It said that Mr. Spain's "trial counsel were not deficient in perpetuating his defense. They obtained for Petitioner the most lenient sentence the law allowed for an individual who shot a woman in the head with a shotgun." (App. 12a) The court thus ruled, in conclusory fashion, that trial counsel were "not ineffective under the guidelines of" *Strickland v. Washington*, 466 U.S. 668 (1984). (App. 12a) The court made no specific findings with respect to Mr. Spain's discrete allegations of ineffective assistance of counsel, including the failure to consult with him about an appeal as described in *Flores-Ortega*.

5. Mr. Spain appealed the denial of his postconviction petition to the Oklahoma Court of Criminal Appeals, the state court of last resort for criminal cases. *See Meyer v. Engle*, 369 P.3d 37, 39 (Okla. Crim. App. 2016). That court noted that the trial court had failed to make findings with respect to Mr. Spain's request to take a delayed direct appeal under Oklahoma's procedure for doing so, and remanded the case to the trial court with instructions to do so. (App. 9a–10a)

On remand, the trial court pointed to Mr. Spain's July 15, 2020, hand-written note, and "inferr[ed]" from it that Mr. Spain "had not and did not wish to pursue an appeal."

(App. 8a) Accordingly, it recommended denying Mr. Spain's request for a delayed direct appeal.

The Oklahoma Court of Criminal Appeals agreed with the trial court, and so denied Mr. Spain's request for a delayed direct appeal. It observed that "Petitioner caused to be filed in the trial court a hand-written document expressly disclaiming any desire to be treated as a Native American in light of 'all this Creek Nation new Law going on.'" (App. 4a) Thus it agreed with the trial court that Mr. Spain had not been "denied an appeal through no fault of his own." (App. 4a)

This timely petition followed.

REASONS FOR GRANTING THE WRIT

Twenty-four years ago, this Court explained how the familiar two-prong test for ineffective assistance of counsel, *see Strickland v. Washington*, 466 U.S. 668 (1984), applies to situations where a prisoner contends that counsel's ineffective assistance deprived him of a direct appeal that he would have pursued if he had received proper advice. Under *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), in the absence of an express directive from the defendant about filing (or not filing) a notice of appeal, counsel has a duty to "consult" with the defendant about filing a notice of appeal whenever there are nonfrivolous grounds for appealing or the defendant reasonably demonstrates an interest in appealing. *Id.* at 478, 480. In situations where counsel shirks his duty to consult with the defendant about an appeal, the defendant makes out a successful ineffective-assistance claim if he can show that timely consultation would have led him to appeal. *Id.* at 484. Contrary to Oklahoma law, most courts hold that a successful claim under *Flores-Ortega* is a sufficient basis for granting a delayed direct appeal.

The courts below followed Oklahoma's state-law procedures for deciding whether to grant a delayed direct appeal. But they ignored the undisputed fact that Mr. Spain's counsel did not consult with him about filing an appeal as required by *Flores-Ortega*. They also ignored the undisputed fact that Mr. Spain's counsel made no effort to seek dismissal of the state-court prosecution in light of the percolating issue that the Creek Nation had never been disestablished, such that under 18 U.S.C. § 1153 only federal courts had jurisdiction to try him for murder. Instead, the courts below relied on an unsupported "inference" from a hand-written note that Mr. Spain sent from jail, in which he expressly asked for assistance from counsel in sorting through how *McGirt* applied to his case. A reasonable person in Mr. Spain's position would have wanted to appeal. Yet the courts below did not hold trial counsel to be ineffective for shirking their duties under *Flores-Ortega*, and did not grant him a delayed direct appeal on that basis. This Court should not countenance such an egregious departure from what the Sixth Amendment requires.

1. In view of *McGirt*, trial counsel had an obligation to consult with Mr. Spain about taking a direct appeal, and in failing to do so they deprived him of an appeal he would otherwise have taken.

A criminal defendant has "ultimate authority to make certain fundamental decisions regarding the case," including the decision to take a direct appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (citing *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977)). This Court has "long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Flores-Ortega*, 528 U.S. at 477 (citing *Peguero v. United States*,

526 U.S. 23, 28 (1999); *Rodriquez v. United States*, 395 U.S. 327 (1969)). And a "defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently." *Id.* (citing *Barnes*, 463 U.S. at 751). Mr. Spain's hand-written note does not, however, contain any express directive regarding whether to file (or not to file) a direct appeal. These well-established rules do not permit a court to rely on an "inference"—and an unsupported one at that—from a hand-written note to conclusively resolve counsel's duties with respect to filing (or not filing) a notice of appeal.

Mr. Spain has never asserted that he instructed his lawyers to file a notice of appeal. Nor has the state asserted that he did *not* instruct them to do so. So this case, like *Flores-Ortega* itself, involves an intermediate situation, where the record contains no evidence about explicit instructions one way or the other regarding an appeal.

In *Flores-Ortega*, this Court established a baseline constitutional duty on the part of criminal defense lawyers when it comes to their clients' right to a direct appeal. Counsel has "a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480. As the *Flores-Ortega* Court used it, the term "consult" "convey[s] a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Id.* at 478. "In making this determination, courts must take into account all the information counsel knew or should

have known." *Id.* at 480 (citing *Strickland*, 466 U.S. at 690). Because criminal defendants have a constitutional right to effective assistance of counsel in their first appeal as of right, *Evitts v. Lucey*, 469 U.S. 387 (1985), the rule in *Flores-Ortega* ultimately protects the defendant's sole prerogative to decide whether to take a direct appeal.

Under Oklahoma law, claims of ineffective assistance of trial counsel that "can be substantiated by a review of the appellate record" must be raised on direct appeal. *Woodruff v. State*, 910 P.2d 348, 351 (Okla. Crim. App. 1996) (citing *Berget v. State*, 907 P.2d 1078, 1083–84 (Okla. Crim. App. 1995)). One claim in his petition plainly meets this standard—the claim that the state trial court lacked jurisdiction to try and convict Mr. Spain for first-degree murder committed by an Indian in Indian country. This claim was hardly frivolous; on the day of sentencing, it had been the law of the Tenth Circuit for almost three years, and would become the law of the land just two and a half weeks later. Considering "all relevant factors," *Flores-Ortega*, 528 U.S. at 480, and discounting the "distorting effects of hindsight," *Strickland*, 466 U.S. at 689, a rational defendant in Mr. Spain's position would have wanted to appeal his conviction and sentence. Trial counsel thus shirked their duty of consultation under *Flores-Ortega*.

To show "prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Flores-Ortega*, 528 U.S. at 484. Apart from the jurisdictional issue, two aspects of the proceedings give rise to such a reasonable probability. First, Mr. Spain did not admit any *mens rea* for any degree of homicide, and particularly did not admit a killing with malice aforethought as defined by Oklahoma law. Under

Oklahoma law, this would make his guilty plea void for lack of a factual basis. *See Wester v. State*, 764 P.2d 884, 886 (Okla. Crim. App. 1988) (allowing defendant to withdraw a guilty plea when it lacks a factual basis). And it further suggests that counsel were ineffective for allowing the trial court to accept the plea. Second, Mr. Spain did not receive the sentence that he thought he bargained for—45 years in prison with 35 years suspended. This suggests a different kind of ineffective assistance in connection with the guilty plea. *See Missouri v. Frye*, 566 U.S. 134 (2012); *Lafler v. Cooper*, 566 U.S. 156 (2012). These two other defects suggest that Mr. Spain would have taken a direct appeal if his lawyers had consulted with him about the jurisdictional defect in the proceedings, because doing so would have given him an opportunity to start proceedings afresh in the only available court of competent jurisdiction.

All the circumstances of this case point in only one direction. Mr. Spain did not receive the sentence he bargained for, the trial court accepted a guilty plea with an inadequate factual basis, and it also had no jurisdiction to accept even a proper guilty plea. Trial counsel thus had a duty under *Flores-Ortega* to consult with him about taking a direct appeal. And he would have appealed if counsel had timely consulted with him. Based on these undisputed facts, Mr. Spain was entitled to relief under *Flores-Ortega*.

2. The Oklahoma state courts neither correctly articulated the governing legal standard nor correctly applied it to this case, and this Court has jurisdiction to review their rulings.

It has never been disputed that Mr. Spain's trial counsel did not consult with him about taking an appeal in the manner described in *Flores-Ortega*. Nor has it been

disputed that, at the very least, the issue regarding the trial court's subject-matter jurisdiction was not frivolous at the time of sentencing. The courts below instead "inferred" that even if counsel had consulted with Mr. Spain, he would not have wanted to appeal. The lower courts did not properly articulate the governing legal standard, and did not correctly apply it to the facts here. The Oklahoma state courts' disregard of what the Sixth Amendment requires justifies this Court's intervention. And because the Oklahoma state courts' rulings are not independent of federal law, this Court has jurisdiction to intervene here.

Start with what the hand-written note actually says. First, Mr. Spain expressly acknowledges that he is an enrolled member of the Creek Nation, with a 1/8 blood quantum. Next, he makes plain that he nevertheless does not consider himself to be Native American, and that he did not "want to be thrown into a native culture or environment I know nothing about." (App. 14a) Finally, he directly asks to talk to trial counsel about "all this Creek Nation new law going on" and how it affects his case. (App. 14a)

In the face of what the note plainly says, the trial court somehow "inferr[ed]" that Mr. Spain "did not wish to pursue an appeal." (App. 8a) The state appellate court agreed. Neither of the courts below applied *Flores-Ortega* to Mr. Spain's request for a delayed direct appeal. That failure was error for two reasons. First, Oklahoma law does not permit delayed direct appeals in cases like this one, where *Flores-Ortega* unequivocally requires one. Second, nothing in *Flores-Ortega* or in this Court's prior cases permitted the court to use this kind of "inference," either to excuse counsel's failure to consult with Mr. Spain or to find no *reasonable* probability that he would have appealed if there had been timely consultation. And

because the lower courts' ruling depends at least in part on *Flores-Ortega*, this Court has jurisdiction to intervene to correct the lower courts' errors.

A. Oklahoma denies a delayed appeal based on considerations that are outside the *Flores-Ortega* framework, contrary to the rules in other state and federal jurisdictions.

The courts below filtered Mr. Spain's *Flores-Ortega* claim through the Oklahoma Court of Criminal Appeals's rules for seeking a delayed direct appeal. "The procedures established for criminal proceedings in Oklahoma provide for an appeal out of time when a prisoner could not appeal or his appeal was not timely filed through no fault of his own." *Banks v. State*, 953 P.2d 344, 346 (Okla. Crim. App. 1998) (citing *Smith v. State*, 611 P.2d 276, 277 (Okla. Crim. App. 1980); Okla. Crim. App. R. 2.1(E)(1)). The procedure has two steps. First, the trial court "conduct[s] an evidentiary hearing and provide[s] findings of fact and conclusions of law." *Blades v. State*, 107 P.3d 607, 608 (Okla. Crim. App. 2005). Ultimately, though, the decision to allow a delayed appeal rests solely with the Oklahoma Court of Criminal Appeals. *Id.*; *see also Smith*, 611 P.2d at 277.

The standard for granting a delayed appeal under Oklahoma law is whether the defendant was denied "the exercise of any right of appeal that he possessed" "through no fault of his own." *Dixon v. State*, 228 P.3d 531, 532 (Okla. Crim. App. 2010). The fault determination includes considering "whether [the defendant] timely expressed a desire to appeal." *Id.* It also includes considering "whether [the defendant] was in fact unaware of his rights." *Lewis v. State*, 21 P.3d 64, 65 (Okla. Crim. App. 2001). A defendant's failure to make a timely request to withdraw a guilty plea, where "nothing in the record

indicat[es that] counsel did not timely and properly advise" the defendant about that requirement, is a permissible basis for faulting the defendant for not timely appealing. *Id.* at 64–65.

The Oklahoma Court of Criminal Appeals has held that the sentencing judge's advice regarding an appeal, where the sentencing hearing follows a guilty plea or a plea under *North Carolina v. Alford*, 400 U.S. 25 (1970), categorically relieves counsel of any duty of consultation under *Flores-Ortega*. That court acknowledged that in *Flores-Ortega* this Court rejected a *per se* requirement that counsel consult with the defendant about an appeal in every case. *Davis v. State*, 246 P.3d 1097, 1098–99 (Okla. Crim. App. 2011) (quoting *Flores-Ortega*, 528 U.S. at 480). But the court ultimately concluded that no duty of consultation arose in the face of the defendant's *Alford* plea, which it deemed to be "certainly not indicative of any desire to appeal." *Id.* at 1099. It rested this conclusion on this Court's statement in *Flores-Ortega* that a duty of consultation may not arise in cases of guilty pleas because a guilty plea "reduces the scope of potentially appealable issues" and may "indicate that the defendant seeks an end to judicial proceedings." *Id.* (quoting *Flores-Ortega*, 528 U.S. at 480).

This rule—on which the court below relied in this case (App. 4a)—commits the inverse of the error that the Court in *Flores-Ortega* faulted the Ninth Circuit for committing. In *Flores-Ortega*, the Court rejected the Ninth Circuit's rule that "impose[d] an obligation on counsel in *all cases* either (1) to file a notice of appeal, or (2) to discuss the possibility of an appeal with the defendant, ascertain his wishes, and act accordingly." 528 U.S. at 478 (emphasis added). Ineffective-assistance claims, the Court reiterated, require a "circumstance-specific reasonableness inquiry," and cannot be resolved

by *per se* rules. *Id.* But Oklahoma's rule that counsel are *never* required to consult with a defendant who pleads guilty (or enters an *Alford* plea) is equally inconsistent with the circumstance-specific inquiry that ineffective-assistance claims require.

Indeed, the sentence in *Flores-Ortega* that immediately follows the one on which the Oklahoma Court of Criminal Appeals relied acknowledges that a duty of consultation arises with respect to at least some defendants who plead guilty (or enter an *Alford* plea). "Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." *Flores-Ortega*, 528 U.S. at 480. The Court further posited that "courts evaluating the reasonableness of counsel's performance using the inquiry we have described will find, in the vast majority of cases, that counsel had a duty to consult with the defendant about an appeal." *Id.* at 481. The focus is on *counsel's* behavior, and whether that behavior met the duty of consultation under all the circumstances.

In fact, a duty of consultation can arise even if the defendant signs a plea agreement under which the defendant agrees to waive his right to appeal. Signing such an agreement might at first blush imply that the defendant seeks "a monolithic end to all appellate rights." *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019). But despite such a waiver, some claims are unwaivable—the validity of the waiver itself, at a minimum. *See id.* at 745. And "even a waived appellate claim can still go forward if the prosecution forfeits or waives the waiver." *Id.* (citing *United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006)). "Accordingly, a defendant who has signed an appeal waiver does not, in directing counsel to file a notice of

appeal, necessarily undertake a quixotic or frivolous quest." *Id.* And if counsel is not free to disregard an express directive in the face of an appeal waiver, *a fortiori* counsel may well have a duty of consultation under *Flores-Ortega*. Mr. Spain did not waive his right to direct appeal in any way. So the mere fact of his guilty plea cannot, as the lower courts believed, relieve counsel of their duty of consultation under *Flores-Ortega*.

In sum, Oklahoma's standard for granting a delayed appeal runs headlong into the requirements of *Flores-Ortega*, and forecloses an avenue of direct appeal where the Sixth Amendment requires one. Oklahoma allows the sentencing judge's generic advice about his appellate rights, *e.g.* Fed. R. Crim. P. 32(j)(1), to substitute for advice from counsel about "the advantages and disadvantages of taking an appeal." *Flores-Ortega*, 528 U.S. at 478. It allows an exemption from case-specific inquiries in an entire category of cases, contrary to this Court's consistent practice of declining to impose mechanical rules on courts adjudicating ineffective-assistance claims. *See Weaver v. Massachusetts*, 582 U.S. 286, 300 (2017) (citing *Strickland*, 466 U.S. at 696). It adds a no-fault element to a claim that does not have such an element. And most egregiously, it allows the defendant's silence to support a finding that the defendant is at fault for not timely appealing, without regard to any deficiency in counsel's consultation regarding an appeal.

Oklahoma's rule is thus different from the rule in other jurisdictions, where successful showings that (1) counsel shirked the duty to consult under *Flores-Ortega*, and (2) that timely consultation would with reasonable certainty have led the defendant to an appeal, would together result in a delayed appeal. *See, e.g.*, *United States v. Fabian-Baltazar*, 931 F.3d 1216, 1218 (9th Cir. 2019) (per curiam) (allowing a delayed appeal as a remedy

for violating *Flores-Ortega*). If a "criminal defendant demonstrates that his appeal of right has been frustrated by a violation of constitutional magnitude, the failure to file a timely notice of appeal may be excused and the constitutional violation remedied by the provision of an out-of-time appeal." *Collier v. State*, 834 S.E.2d 769, 777 (Ga. 2019). Where state law does not provide an express procedure for reopening the time to file an appeal in the face of ineffective assistance under *Flores-Ortega*, courts must ensure that the time is reopened in some appropriate way. *McBride v. Weber*, 763 N.W.2d 527, 535 (S.D. 2009) (Konenkamp, J., concurring); *see also United States v. Phillips*, 225 F.3d 1198, 1200–01 (11th Cir. 2000) (allowing for reentry of judgment to reopen the time for appealing following a *Flores-Ortega* violation); *Toston v. State*, 267 P.3d 795, 801–02 (Nev. 2011) (same); *Middlebrook v. State*, 815 A.2d 739, 743 (Del. 2003) (same); *Miles v. Sheriff*, 581 S.E.2d 191, 195 (Va. 2003) (same). The fact that Oklahoma is an outlier here justifies granting the petition on its own; additional flaws in the lower courts' reasoning will assure this Court that this case is a good vehicle for clarifying the law in this area.

B. The courts below relied on a selective reading of Mr. Spain's hand-written note to draw an "inference" about his desire not to appeal, overlooking his express request to consult with counsel.

The trial court read Mr. Spain's handwritten note and "inferred" from it that he did not wish to appeal his conviction. In making that inference, it disregarded Mr. Spain's express request to speak with his counsel about how *McGirt* affected his case. The state appellate court blessed this inference. But nothing in *Flores-Ortega* allowed the courts below to rely on an inference such as this, either to relieve counsel of the duty of consultation or

to conclude that a reasonable person in Mr. Spain's position would not have wanted to appeal.

As for the duty to consult: There was no direct evidence of Mr. Spain's wishes regarding an appeal, and so there was no basis to conclude that trial counsel were acting in a professionally reasonable manner by acceding to those wishes. *Cf. Flores-Ortega*, 528 U.S. at 477 ("We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable."). The note plainly expresses a desire to discuss the jurisdictional issue with counsel, which implies that counsel had never before done so, not even a week *after* this Court decided *McGirt*. And the jurisdictional issue was hardly frivolous, meaning that under *Flores-Ortega* the duty of consultation arose.

Yet the trial court saw no need to establish a factual record on whether trial counsel made a reasonable effort to discern Mr. Spain's wishes. The trial court's order is silent as to whether the duty of consultation arose in this case, just as it is also silent as to whether trial counsel in fact did consult with him as *Flores-Ortega* required. And the state appellate court rubber-stamped these aspects of the trial court's order.

As for prejudice: The trial court's no-harm-no-foul reasoning, based on its "inference" from Mr. Spain's hand-written note, is not consistent with the prejudice prong of *Flores-Ortega*. The trial court did not engage with the defects in the proceeding to which Mr. Spain would have been able to point as possible bases for an appeal—the discrepancy between the promised sentence and the one imposed, the lack of a factual basis for first-degree murder, and trial counsel's ineffective assistance relating to these things. Nor did it engage with the idea

that the jurisdictional question was not frivolous. Competent counsel who communicate regularly with their client would have known after sentencing that Mr. Spain was dissatisfied with the outcome and wanted a chance to fix it. Mr. Spain's counsel did not behave as competent lawyers would have. Nothing in the trial court's order comes close to explaining that even in the face of "reasonable advice from counsel about the appeal," Mr. Spain would not have "instructed his counsel to file an appeal." *Flores-Ortega*, 528 U.S. at 486.

The state appellate court agreed with the trial court, and so its reasoning suffers from the same flaws as the trial court's order. Furthermore, the appellate court characterized Mr. Spain's hand-written note as "expressly disclaiming any desire to be treated as a Native American." (App. 4a) But that simply is not what the note says. In the note, Mr. Spain expressly disavows any *cultural* connection to the Creek Nation—he does not want to be transferred to a prison where most other inmates are Indians. At the same time, he is expressly seeking further advice from his lawyer about the *legal* implications of *McGirt* on the state court's exercise of jurisdiction over him. But even if the state court's characterization of the note were correct, it is beside the point, because Mr. Spain's subjective desire cannot override the jurisdictional arrangement that Congress has set up.

This Court has consistently held that federal courts have exclusive jurisdiction by virtue of 18 U.S.C. § 1153 to prosecute Indians who commit murder in Indian country. *See United States v. John*, 437 U.S. 634, 651 & n.22 (1978); *see also Oklahoma v. Castro-Huerta*, 597 U.S. 629, 639 n.2 (2022) (positing a different theory of exclusive jurisdiction than in *John*). It is axiomatic that "subject matter jurisdiction may not be established by waiver, consent, or

stipulation." *Tucker v. Cochran Firm-Criminal Defense Birmingham, LLC*, 341 P.3d 673, 680 n.16 (Okla. 2014) (citing *State Insurance Fund v. JOA, Inc.*, 78 P.3d 534, 536 (Okla. 2003)); *see also United States v. McGaughy*, 670 F.3d 1149, 1155 (10th Cir. 2012) ("Subject matter jurisdiction cannot be conferred or waived by consent, estoppel, or failure to challenge jurisdiction early in the proceedings."). Whatever Mr. Spain's hand-written note may have said about his desire not to be treated as an Indian (even as he acknowledged that he is an enrolled member of the Creek Nation), he could not stipulate to state-court jurisdiction where it was expressly preempted by federal law. The state appellate court's reliance on Mr. Spain's "disclaimer" of his enrollment in the Creek Nation is thus insufficient to sustain its ruling that he would not have appealed his conviction and sentence after proper consultation with trial counsel.

Finally, the trial court pointed to the fact that it explained to Mr. Spain his appellate rights in open court at the end of the sentencing hearing. (App. 7a) This, however, is a red herring. That explanation cannot substitute for the duty of consultation, because the record here makes plain that this explanation was not "so clear and informative as to substitute for counsel's duty to consult." *Flores-Ortega*, 528 U.S. at 480. For one thing, the explanation did not allude to the possibility that the state trial court had no jurisdiction to enter the sentence it had just imposed. For another thing, it makes no room for the possibility—which the trial judge failed to acknowledge even on postconviction review—that the factual basis of the plea was incomplete because Mr. Spain made no admissions respecting the *mens rea* for any degree of homicide. Under *Flores-Ortega*, and contrary to the ruling on remand, the sentencing judge's reliance on its explanation of Mr. Spain's appellate rights does not relieve trial counsel of their duty of consultation.

C. The Oklahoma Court of Criminal Appeals's ruling is not independent of federal law, and so this Court has jurisdiction to review it.

Where, as here, a state court's ruling "does not rest on an independent state ground" of decision, this Court may properly exercise jurisdiction to review the ruling below. *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985). When "resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded." *Id.* at 75.

Here, although the court below cited *Flores-Ortega* and *Davis v. State*, 246 P.3d 1097, 1098–99 (Okla. Crim. App. 2011), it ultimately concluded that state law precluded Mr. Spain's request for a delayed direct appeal because he was at fault for failing to appeal. (App. 4a) The ruling below is at least ambiguous about why it was denying Mr. Spain's request for a delayed direct appeal—either he had not shown deficient performance under *Flores-Ortega*, or even if he had, other actions on his part showed that he was at fault for not requesting a direct appeal, whether or not he had shown ineffective assistance under *Flores-Ortega*. This ambiguity is a far cry from the required "plain statement," *see Michigan v. Long*, 463 U.S. 1032, 1041 (1983), that would insulate a state-court ruling from this Court's review. The state appellate court's decision here is at least "interwoven with the federal law," and this Court has jurisdiction to review it. *Florida v. Powell*, 559 U.S. 50, 56 (2010) (quoting *Long*, 463 U.S. at 1040).

3. This Court's intervention would explain to the Oklahoma courts that, even if they disagree with *McGirt*, such disagreement cannot justify refusing to enforce the guarantees of the Sixth Amendment.

When it decided *McGirt*, this Court was well aware that a ruling in favor of the defendant would unsettle the 113-year-old practice of state exercise of jurisdiction over major crimes committed in Indian country in Oklahoma. With great understatement, Justice Gorsuch prefaced his majority opinion with the observation that "the stakes are not insignificant." *McGirt*, 140 S. Ct. at 2460. In his dissenting opinion, the Chief Justice warned that a ruling in favor of the defendant would impair Oklahoma's "ability to prosecute serious crimes" and lead to "decades of past convictions" potentially being thrown out. *Id.* at 2482. "On top of that," he added, such a ruling would "profoundly destabilize[] the governance of eastern Oklahoma." *Id.* Two years later, Justice Kavanaugh explained that the "classification of eastern Oklahoma as Indian country has raised urgent questions about which government or governments have jurisdiction to prosecute crimes committed there." *Castro-Huerta*, 597 U.S. at 634.

Oklahoma state officials were not pleased with this Court's decision in *McGirt*. In his 2024 State of the State address, Oklahoma governor Kevin Stitt lamented, "Three years after *McGirt*, we are still operating under a confusing and conflicting patchwork of jurisdiction across our state." *Governor Stitt Delivers 2024 State of the State Address*, at <https://tinyurl.com/y35fxrkt>. When Oklahoma asked this Court to grant it concurrent jurisdiction over cases covered by 18 U.S.C. § 1152, it told this Court, "*McGirt* has pitched Oklahoma's criminal-justice system into a state of emergency." Pet. for Cert. at 19, *Oklahoma v. Castro-Huerta*, No. 21-429 (U.S. filed Sept. 17, 2021). When this Court ultimately did so, the

former Attorney General of Oklahoma praised the decision as "vindicat[ing] my office's yearslong effort to protect all Oklahomans—Indians and non-Indians alike—from the lawlessness produced by the *McGirt* decision." Adam Liptak, *Supreme Court Narrows Ruling for Tribes in Oklahoma*, N.Y. Times, Jun. 30, 2022, at A16. And Judge Gary Lumpkin of the Oklahoma Court of Criminal Appeals has prefaced multiple concurring opinions with protestations that he has voted to vacate convictions under *McGirt* solely because he is "[b]ound by my oath and the Federal-State relationships dictated by the U.S. Constitution" to do so. *E.g. Wadkins v. State*, 504 P.3d 605, 612 (Okla. Crim. App. 2022). Invoking a "quandary of ethics and morality," as well as his duty as a former Marine to "follow lawful orders" and to "resist unlawful orders," he believes that the dissenting opinion in *McGirt* "vividly reveals the failure of the majority opinion to follow the rule of law and apply over a century of precedent and history." *Id.* at 612–13. These officials' reactions to *McGirt* are consistent with this Court's predictions that the decision would upend law enforcement in half of the state, with negative reactions and active resistance to the change in the law.

Ultimately, though, this case is not about state or tribal sovereignty, or about the question whether an Act of Congress has disestablished an Indian reservation. This case is instead about the requirements of the Sixth Amendment. The question whether Mr. Spain's Sixth Amendment rights, as articulated in *Flores-Ortega*, were properly enforced by the state courts, is "distinct, both in nature and in the requisite elements of proof," from the question of jurisdiction that underlies that question. *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). To be sure, Mr. Spain's jurisdictional claim is a component of his *Flores-Ortega* claim. But "the two claims have separate identities and reflect different constitutional values."

Morrison, 477 U.S. at 375. Mr. Spain is primarily seeking "direct… protection of his personal right to effective assistance of counsel." *Id.* at 377. Oklahoma's chafing against the effects of *McGirt* cannot justify its failure here to enforce the guarantees of the Sixth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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