NO. 96171-9
(Court of Appeals NO. 34651-0-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON,

STATE OF WASHINGTON, RESPONDENT

v.

DUSTIN JAMES EGUIRES, APPELLANT

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

II. COURT OF APPEALS DECISION

At issue is the unpublished court of appeals decision filed on July 3, 2018, in Division Three of the Court of Appeals. *See State v. Eguires*, No. 34651-0-III, 2018 Wash. App. LEXIS 1536 (July 3, 2018).

III. ISSUES PRESENTED FOR REVIEW

1. Did either trial counsel provide ineffective assistance by failing to file a *Franks v. Delaware* suppression motion premised on the affiant's alleged failure to inform the magistrate that the property was on Yakama Nation tribal land?
2. Did the trial court act within its discretion by noting, among other omitted evidence, the absence of a sworn statement from Eguires and transcript of the telephonic search warrant affidavit when denying Eguires' CrR 4.2(f) motion?

IV. STATEMENT OF THE CASE

Eguires was charged with twelve counts of second degree identity theft and one count of carrying a firearm onto school premises in Yakima County Superior Court cause number 15-1-01517-1. Clerk's Papers (CP) at 4–6. The charges were based on September 29, 2015, events at both

White Swan High School and Eguires' residence in Yakima County, Washington. *Id.* at 2.

A school bus driver observed Eguires take a black rifle out of a truck and place it into a sedan on high school premises. *Id.* at 18. The high school was placed on lockdown. *Id.* Yakama Nation Tribal Police officers arrived and located a truck belonging to Eguires. *Id.* The bus driver told Yakima County Sheriff's Office deputies that Eguires had left with the rifle in the sedan. *Id.*

Yakama Nation Tribal Police officers responded to Eguires' residence and spotted Eguires with the rifle. VRP 9/29/15 at 6; CP at 75 (noting that "[a] short time later we were notified that a YNPD officer had spotted the blue car at Dustin's house"). Yakima County Sheriff's Office deputies arrived and found Eguires rummaging through a blue duffle bag. CP at 18. Deputies handcuffed Eguires and advised him of his *Miranda* rights. *Id.* Eguires first told the affiant deputy that he did not have a rifle. *Id.* While the affiant was filling out the search warrant, Eguires informed him that "the gun was on the table." *Id.*

Deputies obtained a search warrant for Eguires' house and property. *Id.* at 18–19. During the execution of the search warrant, deputies found a .22 Savage rifle on a bench outside of the residence. *Id.*

at 18. They also observed a variety of identification cards inside of the duffle bag. *Id.* at 18–19.

Deputies re-contacted the judge and asked to amend the search warrant to allow a search of the cards and paperwork found inside the duffle bag. *Id.* at 19. After the judge authorized the amendment, deputies uncovered a variety of documents belonging to third parties including five drivers' licenses, a tribal enrollment card, a social security card, and a W-2 form. *Id.* Eguires claimed that a person known as "Cricket" had brought the bag to his residence three weeks earlier. *Id.*

In addition to cause number 15-1-01517-1, Eguires had two other cases pending before the Yakima County Superior Court—15-1-01771-39 and 16-1-00019-39. VRP 6/17/16 at 21. Two attorneys represented Eguires in the three cases. VRP 5/17/16 at 4, 7.

On 15-1-01517-1, Eguires faced a standard range sentence of 43 to 57 months for each count of second degree identity theft and up to 364 days in jail for carrying a firearm onto school premises. CP at 9. Eguires' counsel (hereinafter "plea counsel") negotiated a plea deal with the State in which Eguires would plead guilty to each count in cause number 15-1-01517-1 in return for an exceptional sentence of eighteen months and dismissal of the other two cases in their entirety. *Id.* at 11.

On May 17, 2016, Eguires entered an *Alford* plea to each count in 15-1-01517-1. VRP 5/17/16 at 6; CP at 7–16. Sentencing was scheduled for June 8, 2016. VRP 5/17/16 at 18. The sentencing hearing was later reset to June 17, 2016. VRP 6/17/16 at 22. On June 8, 2016, a new attorney (hereinafter "motion counsel") contacted the State and plea counsel about substituting into the case. *Id.* On June 16, 2016, motion counsel filed a CrR 4.2(f) motion to withdraw Eguires' plea. CP at 20–22. The State requested that the trial court proceed with the sentencing hearing. VRP 6/17/16 at 29. Motion counsel argued that *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978), and *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), provided a basis for Eguires to withdraw his plea. VRP 6/17/16 at 24; *see also* CP 20–22. The court reset the sentencing hearing for June 29, 2016, as the court had not had an opportunity to review motion counsel's filings. VRP 6/17/16 at 30. The court allowed motion counsel to substitute in on 15-1-01517-1. *Id.* at 33. On June 21, 2016, motion counsel filed additional briefing in support of Eguires' motion to withdraw his guilty plea. CP at 30–34.

After hearing argument from counsel, the court ruled that:

> The analysis is – I think that Mr. Mason has gone through is – is a great description of the analysis one would go through in preparing

and dealing with a client during the course of the investigation, but we're in a somewhat different posture today. I believe I'm doing the plea docket tomorrow, and I think there are 13 cases set, roughly. My concern, in part, is that if I were to accept Mr. Mason's argument today, each and every one of the cases that are set for tomorrow would be subject to an argument that, well, we didn't discuss this, so we didn't discuss that.

Every case would be completed on the most tenuous of grounds. It is – and I accept, Mr. Mason, your comment that this is not about the colloquy; this is about the – whether or not Mr. Eguires' decision was a knowing, intelligent, and voluntary decision. I don't have a sworn statement from Mr. Eguires describing anything. I have your representation. I am not given an opportunity to balance credibility as to whether or not conversations occurred.

This is the time, day and date set for this motion. I don't have any information that the conversations you allege didn't occur. Perhaps they did occur. Perhaps you didn't like the conversation, didn't like the odds that were given to him. And at the end of the day, this is what a lot of this is, is that I think my odds would be better.

I don't have the search warrant. I can't make findings that would allow me to reopen the case, because I don't have enough information.

I – whether or not your theory of the case is accurate is one that, during the active portion of the case, we could have litigated. Certainly you may have lost, you may have won. I can't

> – I don't have enough information to make a – a reasoned analysis and say, I think you would have won. I can't say that the results from Mr. Eguires today would have been any different, because I don't know who would have won. You have raised some questions, but that's the extent of it.
>
> I don't – frankly, I think the foundation – the denial of your motion is I simply don't have enough information with which to make a decision. You indicate there is a huge and significant issue. It could be. I don't find there is a manifest injustice. I don't – I cannot find that the statements did or didn't occur. I don't have enough information. And I can't make a finding that you would have won the motion to suppress, because I don't have any information really with which to analyze that, other than to say you might have, you might not have.

VRP 6/29/16 at 62–64.

At a reset sentencing hearing on July 5, 2016, Eguires was sentenced in accordance with the plea deal—a downward departure of eighteen months served concurrently, no community custody, and legal financial obligations. CP at 44–50.

The Court of Appeals held that the "trial court did not err in determining that Mr. Eguires was required to present the pertinent evidence" in support of his CrR 4.2(f) motion to withdraw plea. *Eguires*, 2018 Wash. App. LEXIS 1536 at *11. Further, the court ruled that, even had the relevant evidence been in the record, Eguires "still does not

demonstrate a reasonable probability that a motion for a *Franks* hearing would have been granted" based on the affiant's alleged misrepresentations concerning the firearm's location and Eguires' statement. *Id.* at *17–18.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

RAP 13.4(b) states that:

> A petition for review will be accepted by the Supreme Court only:
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b)

A. Eguires' claimed *Franks* issue is neither supported by the record nor reviewable pursuant to RAP 13.4(b)

Eguires argues that he received ineffective assistance of counsel during the CrR 4.2(f) motion hearing. Petition for Review at 3. Eguires asserts that, had motion counsel raised the alleged *Franks* issue premised on search warrant jurisdiction, there is a reasonable probability that the trial court would have granted Eguires' CrR 4.2(f) motion. *Id.*

Strickland controls when evaluating ineffective assistance of counsel claims. In order to prevail, Eguires must demonstrate that defense counsel's performance was deficient and that he, as a result, suffered prejudice. *Strickland*, 466 U.S. at 687; *see also State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Deficient performance occurs when defense counsel's representation falls below an objective standard of reasonableness. *In re Det. of Moore*, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009). A defendant challenging the effectiveness of counsel must overcome the strong presumption that counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Prejudice occurs when there is a reasonable probability that, but for defense counsel's deficient performance, the outcome of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

In order to show that he was actually prejudiced by any alleged ineffectiveness, Eguires "bears the burden of showing . . . that the result of the proceeding would have been different but for counsel's deficient representation." *McFarland*, 127 Wn.2d at 337. It is therefore Eguires' burden to demonstrate that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 335.

"There is . . . a presumption of validity with respect to the affidavit supporting the search warrant." *Franks*, 438 U.S. at 171. Under *Franks*,

> [t]o mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

Id. "A tolerance for factual inaccuracy is inherent to the concept of probable cause." *State v. Chenoweth*, 160 Wn.2d 454, 475, 158 P.3d 595 (2007). Courts give "great deference to the magistrate's determination of probable cause and view the supporting affidavit for a search warrant in a commonsensical manner rather than hypertechnically." *Id.* at 477. Doubts are resolved in "favor of the warrant's validity" and "[t]he fact that the affiant's information later turns out to be inaccurate or even false is of no consequence if the affiant had reason to believe those facts were true." *State v. Olson*, 74 Wn. App. 126, 130, 132, 872 P.2d 64 (1994). "The *Franks* test for material misrepresentations has also been extended to

material omissions of fact." *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

Eguires' alleged *Franks* issue, and by extension Eguires' asserted ineffective assistance of counsel claim, is not supported by the record. Issues related to jurisdiction to execute the search warrant on tribal land were neither raised nor decided upon by the Court of Appeals. *See State v. Halstein*, 122 Wn.2d 109, 130, 857 P.2d 270 (1993) ("An issue not raised or briefed in the Court of Appeals will not be considered by this court."). Further, Eguires' supporting evidence, *see* Petition for Review Appendices A, B, and C, has not been authenticated, *see* ER 901(a), and is not properly part of the record on review. *See* RAP 9.1(a).[1]

Critically, Eguires' asserted *Franks* issues is premised upon an unsupported assumption—that the affiant deputy knew the property was on tribal land. Eguires states that "it appears that the deputy seeking authorization to execute a search warrant . . . failed to inform the judge that [the property] is tribal land owned by the Yakama Nation and that the premises sought to be searched were owned by a member of the Yakama Nation." Petition for Review at 8. There is no evidence in the record that

[1] The State has simultaneously filed a Motion to Strike Improper Portions of Petition for Review that addresses Eguires' improper argument and appendices.

the affiant was aware of either fact when authoring the search warrant affidavit. Eguires' claimed *Franks* issue must be premised on either a "deliberate falsehood" or a statement made in "reckless disregard for the truth." *See Franks*, 438 U.S. at 171. As Eguires cannot demonstrate that the affiant knew the facts that were allegedly misrepresented or omitted, Eguires cannot demonstrate a "reasonable probability" that his alleged *Franks* motion would have been successful. *See McFarland*, 127 Wn.2d at 335. Accordingly, the record does not support Eguires' alleged ineffective assistance of counsel claim.

Further, Eguires makes no attempt to analyze the four criteria upon which this Court bases a decision to accept review. Eguires simply claims that "[t]here is a fair question of the scope of jurisdiction of a district court of the State of Washington to issue a warrant for the search of premises on an Indian tribe." Petition for Review at 8. Although Eguires cites a number of Yakama Nation sources, Eguires admits that those sources do "not specifically address search warrants." *Id.* at 12. Eguires does not cite Washington State case law mandating suppression as a remedy for non-compliance with tribal procedures. As Eguires has failed to show how his asserted issue satisfies any of the four requirements for review under RAP 13.4(b), this Court should decline to review Eguires' case.

B. The Court should decline to review the trial court's CrR 4.2(f) decision as Eguires has failed to articulate any reason supporting review

Eguires asserts that the Court of Appeals erred in "affirming the trial court's requirement that petitioner provide an affidavit and complete transcript in order to be entitled to a 'Franks' hearing seeking withdrawal of his guilty plea." Petition for Review at 3. Eguires, however, fails to address this issue in the petition. As Eguires has failed to provide "[a] direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument," this Court should decline to accept review. RAP 13.4(c)(7).

VI. CONCLUSION

Eguires has failed to satisfy any of the RAP 13.4(b) criteria. Eguires' claimed *Franks* issue is not supported by the record on review and was not adjudicated by the Court of Appeals. Eguires has failed to support his second asserted issue. As such, Eguires' petition for review should be denied.

Dated this 28th day of August, 2018.

STATE OF WASHINGTON

/s/Michael J. Ellis
MICHAEL J. ELLIS, WSBA # 50393
Deputy Prosecuting Attorney
Attorney for Respondent

DECLARATION OF SERVICE

I, Michael J. Ellis, state that on August 28, 2018, by agreement of the parties, I emailed a copy of ANSWER TO PETITION FOR REVIEW to Mr. Jack Fiander at towtnuklaw@msn.com.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 28th day of August, 2018, at Yakima, Washington.

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August 28, 2018 - 3:01 PM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	State of Washington v. Dustin J. Eguires
Superior Court Case Number:	15-1-01517-1

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