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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SKAGIT

STATE OF WASHINGTON,

Plaintiff,

v.

HAZEN GRAHAM SHOPBELL,

Defendant.

Co-Defendant:  
ANTHONY PAUL, 18-1-00622-29

NO. 18-1-00621-29

REPLY IN SUPPORT OF (1)  
MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS AMENDED  
INFORMATION DUE TO BAD FAITH  
AND (2) MOTIONS TO DISMISS  
AMENDED INFORMATION  
PURSUANT TO CrR 8.3(b) AND CrR  
8.3(c)

**I. INTRODUCTION**

The State does not controvert Defendant Hazen Shopbell’s proof that all of the claim bait at issue in Counts I through V was harvested and transferred within Tulalip lands and usual and accustomed fishing grounds (“U&A”). Mr. Shopbell has demonstrated actual prejudice from the Washington State Department of Fish and Wildlife (“WDFW”) prosecutorial “shopping.” The Rafeedie Consent Decree in *U.S. v. Washington* clearly governs. The destruction of evidence was done in bad faith insofar as it violated both WDFW policy and the Rafeedie Consent Decree. This Court has never heard argument on the Rafeedie Consent Decree; at last word it invited further briefing on Treaty rights violations. The State’s response concedes the prosecution lacks evidence to establish the essential elements of the felony offenses charged—*i.e.*, that any of Counts I through

V were committed “in the state.” Dismissal is therefore appropriate.<sup>1</sup>

## II. ARGUMENT

### A. The State proffers no evidence to controvert Defendant’s proof that the clam bait was harvested and transferred exclusively within Tulalip’s lands and U&A.

In support of his *Knapstad* motion, Mr. Shopbell offered evidence that all of the allegedly purchased clam bait (Counts I and II) and illegally harvested clam bait (Counts III through V) was harvested and transferred either on the Tulalip Reservation or within the U&A.<sup>2</sup> See Motion to Dismiss Count Pursuant to CrR 8.3(c) (Sept. 16, 2021), Appendix A, at pp. 124, 130-131<sup>3</sup>, 294-295; Declaration of Gabriel S. Galanda in Support of Defendant’s Motion to Dismiss Count Pursuant to CrR 8.3(c) (Sept. 16, 2021), Ex. A (Bates Nos. 000439-000457). Needing to only offer “some evidence” showing that the transfer<sup>4</sup> of the clam bait occurred within Tulalip Tribal jurisdiction<sup>5</sup>, Mr. Shopbell has pointed to specific evidence that both the harvests and transfers of that bait occurred at Tulalip or within the U&A.<sup>6</sup> *Id.*; *State v. L.J.M.*, 129 Wn.2d 386, 394 (1996) (emphasis in original; citations committed). Mr. Shopbell thereby satisfied his “burden of contesting” the State’s jurisdiction. *Id.* at 394 (defendant need only “point to evidence that has been produced and presented to the court, which, if true, would be sufficient to defeat state jurisdiction.”).

<sup>1</sup> Mr. Shopbell also incorporates by reference co-Defendant Anthony Paul’s reply brief arguments, especially regarding the lack of accomplice liability.

<sup>2</sup> The prosecution admits it cannot charge fishing “crimes occurring on reservations or usual and accustomed locations.” State’s Response to Motion to Dismiss (Nov. 18, 2021) at 2-3 (citing *State v. Comenout*, 173 Wash.2d 235, 238 (2011)); see also Supp’l Galanda Decl., Ex. A at 8 (quoted *infra*).

<sup>3</sup> See also Second Supplemental Declaration of Gabriel S. Galanda (Oct. 11, 2021) (“Second Supp’l Galanda Decl.”), Ex. A at 130-131, which two pages were inadvertently omitted from Mr. Shopbell’s motion papers.

<sup>4</sup> RCW 77.15.630(4)(a), .630(4)(b); *State v. Yon*, 159 Wash. App. 195 (2010) (quoting RCW 77.08.010).

<sup>5</sup> *U.S. v. Washington*, 19 F. Supp. 3d 1126, 1149 (W.D. Wash. 1994) (“Rafeedie Consent Decree”) (Tulalip exercises “primary responsibility for enforcement of shellfish sanitation laws against its members . . . within its reservation, any tribal trust lands, or within the tribe’s usual and accustomed areas.”); see *Settler v. Lameer*, 507 F.2d 231, 240 (9<sup>th</sup> Cir. 1974) (affirming tribal court authority over tribal member fishing violations in a tribe’s U&A).

<sup>6</sup> The State’s allegations in Counts I and II that the clam bait was illegally “taken from a closed area, at a closed time” in violation of tribal law,” also fall within the Tribes’—not the State’s—jurisdiction. *U.S. v. Washington*, 19 F. Supp. 3d at 1149-1150; see also Supp’l Galanda Decl., Ex. A at 8 (quoted *infra*).

1 In response, the State proffered *no* evidence that any harvest or transfer of any clam bait  
2 occurred beyond Tulalip’s territorial jurisdiction. *See* Opposition (Oct. 6, 2021); *id.*, Appendices.  
3 The State failed to carry its “burden by presenting evidence that any or all of the essential elements  
4 of the alleged offense[s] occurred ‘in the state.’” *Id.* at 392. More specifically, the State failed to  
5 make a “prima facie showing that jurisdiction exists,” which failure this Court can evaluate and  
6 resolve as a matter of law. *Id.* at 394; *State v. Pink*, 144 Wash. App. 945, 950 (Div. 2 2008) (state-  
7 tribal territorial jurisdiction is a question of law).<sup>7</sup> The Amended Information can and should now  
8 be dismissed for want of state jurisdiction under CrR 8.3(b). *Seymour v. Superintendent of Wash.*  
9 *State Penitentiary*, 368 U.S. 351, 359 (1962); *Comenout*, 173 Wash.2d at 238 (quoting Felix S.  
10 Cohen, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 6.04[1], at 537 (2005)).

11 **B. The Rafeedie Consent Decree governs the alleged shellfish offenses.**

12 Rather than proffer some—any—evidence that the alleged offenses occurred beyond the  
13 Tulalip Reservation or within the U&A, the prosecution clings to an argument that the Rafeedie  
14 Consent Decree “is not applicable here.” Opposition at 6. To prop up this straw man, the  
15 prosecution argues that Mr. Shopbell has not been charged with “shellfish sanitation violations.”  
16 *Id.* Then, in the same breath, the prosecution asserts that the “possibility of undyed and uncertified  
17 clams getting smuggled into the stream of commerce for human consumption presents significant  
18 health risks.” *Id.* at 10. The prosecution cannot have it both ways; the Rafeedie Consent Decree  
19 applies to these charges. There is nothing to suggest that the Rafeedie Consent Decree applies  
20 only to charges brought under RCW Chapter 69.30 and not to charges such as these brought under  
21 RCW Chapter 77.15. The latter chapter was simply an attempt by the legislature “to revise and  
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23 <sup>7</sup> The State is wrong that “the assertion of a treat [sic] rights defense . . . is not relevant to the determination of a motion  
24 to dismiss under *Knapstad*.” Opposition at 11. The State is also wrong that Mr. Shopbell is “conflating a jurisdiction  
25 argument” with a Treaty rights affirmative defense. *Id.*, at 10; *L.J.M.*, 129 Wn.2d at 394. Mr. Shopbell’s jurisdictional  
challenge is properly brought under *Knapstad* as a *prima facie* challenge to an information—i.e., the State cannot  
prove that any or all of the essential elements of Counts I through V occurred “in the state.” *See id.* at 392, 394.

1 recodify the criminal laws governing fish and wildlife.” RCW 77.15.005. The Rafeedie Consent  
2 Decree applies broadly to “treaty shellfishing activities” and is not limited to actual harvesting.  
3 *U.S. v. Washington*, 19 F. Supp. 3d at 1136.

4 Further, the prosecution feigns that “to the State’s knowledge” the Tulalip Tribes have not  
5 assumed primary shellfish enforcement under *U.S. v. Washington. Id.* at 5. Tulalip, however, has  
6 in fact assumed primary or “self-regulating” status—according to WDFW—a fact the Tribes  
7 reminded the State of on August 8, 2018 when objecting to this prosecution as violative of federal  
8 law. Declaration of Gabriel S. Galanda in Support of Defendant’s Motion Amended Information  
9 Due to Bad Faith (Sept. 16, 2021) (“Galanda Decl.”), Ex. B (Tulalip: “WDFW has formally  
10 recognized the Tulalip Tribal government’s authority as a ‘self-regulating’ tribe.”). Det. Willette,  
11 and apparently also the prosecution, dismissed the Tribes’ assertion of Tulalip Treaty rights as a  
12 “tactic” and “game.” Second Supp’l Galanda Decl., Ex. B (“[W]e learned yesterday that the Tulalip  
13 Tribe is trying the same tactic with Skagit. I’ve been advised that Skagit isn’t going to play their  
14 game and plans to continue with prosecution.”) (emphasis added).<sup>8</sup> In any event, the Rafeedie  
15 Consent Decree governs, and precludes, Counts I through V.

16 **C. Defendant is in fact prejudiced by a “shopped” state court prosecution of  
17 charges that belong in Tulalip Court, where the statute of limitations lapsed.**

18 The State claims Mr. Shopbell has “failed to establish any actual prejudice” resulting from  
19 the undisputed fact that after (a) the Tribe declined to prosecute and (b) the Tulalip statute of  
20 limitations lapsed, Defendant, Det. Willette unsuccessfully “shopped” these charges to the U.S.

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21 <sup>8</sup> WDFW’s racial animus towards Mr. Shopbell and Mr. Paul must be noted. Galanda Decl., Ex. H at 7 (“In my  
22 analysis of DFW interaction with the Western Washington Indian country in this matter, more specifically the Tulalip  
23 Tribes, descriptors such as ‘dirty,’ ‘greedy,’ and ‘not so smart’ have racial connotations to [Mr. Shopbell and Mr.  
24 Paul] who are members of the Tulalip Tribes. . . . In Detective Willette’s interview with Jonathan Richardson, she  
25 called it ‘reverse racism’ in [regard to Mr. Shopbell and Mr. Paul’s] dealing with their own tribe.”); Second Supp’l  
Galanda Decl., Ex. C (calling Mr. Shopbell “not so smart” and Mr. Paul “dirty” and “greedy”). It is decidedly not  
racist for Tulalip tribal members to buy and sell shellfish among each other. That’s a legitimate exercise of Treaty  
rights, as affirmed by the Boldt Decision. *U.S. v. Washington*, 384 F. Supp 312, 434 (W.D. Wash. 1974) (affirming  
“the taking of fish for commercial purposes” pursuant to the Stevens Treaties).

1 Department of Justice, the Washington State Attorney General, and Snohomish, King, and Pierce  
2 Counties, before Skagit County initiated this prosecution.<sup>9</sup> Opposition at 8; Galanda Decl., Ex. C  
3 at 143-144, 251; Ex. F; Ex. G; Ex. J at 22.

4 The prejudice that must be shown is “prejudice affecting the defendant’s right to a fair  
5 trial.” *State v. Michielli*, 132 Wash.2d 229, 240 (1997). Requiring Mr. Shopbell to face these  
6 shopped charges after the statute of limitations would have expired had they been brought in the  
7 proper forum—the Tulalip Tribal Court—obliterates his right to a fair trial. *See State v. Chavez*,  
8 111 Wn.2d 548, 558 (1988) (recognizing that prosecutorial delay can form the basis for a due  
9 process violation resulting in the dismissal of charges). Dismissal pursuant to CrR 8.3(c) is  
10 therefore appropriate.

11 **D. The State’s bad faith destruction of the clam bait violated WDFW policy as well  
12 as the Rafeedie Consent Decree.**

13 As a matter of WDFW’s own policy, the State knows that it lacked jurisdiction to  
14 investigate Tribal members for alleged shellfish violations that arise within the U&A, under the  
15 Rafeedie Consent Decree. 19 F. Supp. 3d at 1149. WDFW policy is clear: “**If violations occur  
16 within the tribe’s U&A, the Officer should report the violations to tribal authorities.**” Supp’l  
17 Galanda Decl., Ex. A at 8 (emphasis added). WDFW Detective Wendy Willette should have  
18 reported the alleged clam bait violations to the Tulalip Tribe, and preserved the clam bait and the  
19 status quo, instead of destroying that evidence. *U.S. v. Washington*, 19 F. Supp. 3d at 1149-1150.

20 Assuming *arguendo* that the State had the right to destroy the clam bait—it did not (*id.*)—  
21 Detective Willette still violated WDFW policy by not preserving 1 out of every 10 clams or clam  
22 bags as evidence. Second Supp’l Galanda Decl., Ex. D [Dutton] at 44-45. According to WDFW

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23 <sup>9</sup> During a June 18, 2019 hearing, this Court remarked: “It is troublesome to me about this issue of Fish and Wildlife  
24 shopping the prosecution. If somebody wants to additionally brief that issue I’m open to that; that can be noted up.”  
25 Having obtained a dismissal of the Information, Mr. Shopbell opted to not incur the additional expense of preparing  
or noting up another motion. *See Findings of Fact and Conclusions of Law Pursuant to CrR3.6(b)* (July 19, 2019).

1 Property Evidence Custodian Gregory Dutton: “If you seized ten bags, then—or 20 bags, we would  
2 recommend one in ten of those packages, you know, so you would end up with two representative  
3 samples. If you have, you know, ten clams, period, then one of the ten would be sufficient.” *Id.*  
4 That policy “safeguard” exists to prevent a detective from arbitrarily destroying shellfish evidence.  
5 *Id.* Here, of the 1,180 pounds of clams she seized, Detective Willette preserved only 15 clams.  
6 *State v. Shopbell*, 17 Wash. App. 2d 1013 (2021), 2021 WL 1530261, at \*3. It would have been  
7 quite simple for Det. Willette to preserve one in ten clams from each of the bags of bait depicted  
8 in Ex. E to the Second Supp’l Galanda Decl. Instead, Det. Willette preserved one out of every  
9 several thousand clams, also in violation of WDFW policy.

10 The Amended Information must, therefore, be also dismissed due to investigatory bad faith  
11 for violation of both federal and agency protocol, pursuant to CrR 8.3(b).

12 **E. This Court has never heard argument that the State violated the Rafeedie Consent**  
13 **Decree.**

14 The State incorrectly claims that Judge Davin Svaren “heard this jurisdictional claim and  
15 rejected it” and further, that this Court “found” jurisdiction notwithstanding Mr. Shopbell’s Treaty  
16 prior rights assertion. Opposition at 2. First, the State’s violations of the Rafeedie Consent Decree  
17 have never been previously asserted by Mr. Shopbell (or Mr. Paul). It is not too late to challenge  
18 the State’s inability to make a *prima facie* showing that the alleged offenses occurred “in the state,”  
19 or to assert the State’s violation of jurisdictional provisions in a federal consent decree. *L.J.M.*,  
20 129 Wn.2d at 392, 394; *State v. Barry*, 184 Wash. App. 790, 800 (Wash. Ct. App. Div. 2 2014)  
21 (“Nothing in the local rule[s] appears to prevent dismissal of charges up to and through trial.”).

22 Second, this Court’s finding of jurisdiction on July 18, 2019, expressly reserved ruling on  
23 Mr. Shopbell’s assertion “that the State prosecution would violate the Point Elliott Treaty” and the  
24 Boldt Decision. *U.S. v. Washington*, 384 F. Supp 312. Supplement to Joinder of Anthony Paul’s  
25 Motion to Suppress Evidence or in the Alternative, to Dismiss Pursuant to CrR 8.3(b) (June 11,

1 2019); Findings of Fact and Conclusions of Law Pursuant to CrR3.6(b) (July 19, 2019) at 3 n.1.<sup>10</sup>  
2 Now, Mr. Shopbell asserts the Rafeedie Consent Decree as well as newly developed evidence that  
3 shows this prosecution falls beyond the State's jurisdiction.

4 **III. CONCLUSION**

5 Dismissal of the Amended Information is now appropriate under CrR 8.3(b) and 8.3(c).

6 DATED this 11<sup>th</sup> day of October, 2021.

7 GALANDA BROADMAN, PLLC

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10 Gabriel S. Galanda, WSBA# 30331  
11 Attorneys for Defendant Shopbell

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21 <sup>10</sup> Also during the June 18, 2019 hearing, this Court explained:

22 And the issue of the interplay with the tribal rights versus the State regulations you briefed,  
23 apparently, Mr. Galanda; I'll take an opportunity to review that again. If there's an additional order  
24 that might lead to a dismissal at least of your client or maybe both the defendants in this case I'll  
25 take a second look at that too. If anybody wants to additionally brief that and do that within the next  
couple of weeks I can issue a written order without you folks having to come back again.

Again, having obtained a dismissal, Mr. Shopbell also opted to not incur the additional cost of further asserting his Treaty rights. *See* Findings of Fact and Conclusions of Law Pursuant to CrR3.6(b).

REPLY IN SUPPORT OF (1) MEMORANDUM IN SUPPORT OF MOTION  
TO DISMISS AMENDED INFORMATION DUE TO BAD FAITH AND (2)  
MOTIONS TO DISMISS AMENDED INFORMATION PURSUANT TO  
CrR 8.3(b) AND CrR 8.3(c) - 7

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1 **CERTIFICATE OF SERVICE**

2 I, Wendy Foster, declare as follows:

3 1. I am now and at all times herein mentioned a legal and permanent resident of the  
4 United States and the State of Washington, over the age of eighteen years, not a party to the  
5 above-entitled action, and competent to testify as a witness.

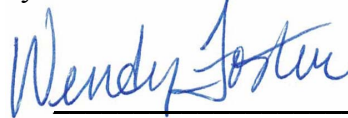
6 2. Today, I caused the foregoing documents to be filed in the above-captioned court  
7 and served via email on the following counsel of record:

8 Rosemary H. Kaholokula  
9 Edwin N. Norton  
10 Skagit County Prosecuting Attorney  
11 605 S. Third Street  
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24 Attorneys for Defendant Anthony Paul

25 The foregoing statement is made under penalty of perjury and under the laws of the State  
of Washington and is true and correct.

Signed at Seattle, Washington, this 11th day of October 2021.

  
Wendy Foster