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

THE STATE OF WASHINGTON,)
)
 Plaintiff.)
)
 vs.)
)
 HAZEN GRAHAM SHOPBELL,)
)
)
 Defendant.)
)
)

NO: 18-1-00621-29

**MEMORANDUM IN RESPONSE TO
DEFENDANTS’ PRETRIAL MOTIONS**

JURISDICTION

Whether a challenge to the State’s criminal jurisdiction is legitimate turns on whether the crime took place within “Indian Country” and the extent of the State’s assumption of jurisdiction over that portion of Indian Country pursuant to RCW Chapter 37.12. Indian Country includes land within a reservation. 18 U.S.C. sec. 1151.

RCW 37.12.010 codifies the State’s assumption of criminal liability over Indians and Indian Country except that such jurisdictional assumption “shall not apply to Indians when . . . within an established Indian reservation . . .” (with certain inapplicable exceptions).

1 The State bears the burden of establishing that jurisdiction lies in the State court; ordinarily
3 this burden is met by presenting evidence that any or all of the essential elements of the offense
5 occurred “in the state.” State v. L.J.M., 129 Wn.2d 386, 392 (1996). In order to dispute State
7 jurisdiction, the defendant must present “some evidence” that the situs of the crime is within the
9 boundaries of an Indian reservation and that he is a member of a recognized Indian tribe which has
11 personal jurisdiction over him. L.J.M., 129 Wn.2d at 394-395. Where the situs of the crime is not
13 disputed, then there is no factual matter for the jury to decide and the jurisdictional issue is a
15 question of law for the trial court. L.J.M., 129 Wn.2d at 396.

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21 TREATY FISHING RIGHTS

23 Treaty rights constitute an affirmative defense which must be proved by the one who
25 asserts it. State v. Petit, 88 Wn.2d 267, 269-270 (1977); State v. Moses, 79 Wn.2d 104, 110 (1971);
27 State v. Courville, 36 Wn. App. 615, 622 (1983). Such a defense requires a showing that there is
29 treaty harvesting occurring and there is no genuine state conservation concern. Petit, 88 Wn.2d at
31 269-70. A non-Indian does not have such a defense and must establish that they are related to the
33 treaty Indian. See generally, State v. Price, 87 Wn. App. 424, 429-430, (1997). The assertion of
35 this affirmative defense does not defeat the State’s jurisdiction.

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41 CONSENT DECREE

43 The Shellfish Sanitation Consent Decree (“Rafeedie Consent Decree” “Consent Decree”)
45 is a binding agreement that addresses the scope of State authority to regulate treaty shellfishing.
47 Pursuant to the Consent Decree, the State and the Tulalip Tribe (among other tribes) “have agreed
49 . . . to participate in a cooperative investigatory and regulatory program . . .” United States v.

1 Washington, 19 F. Supp. 3d 1126, 1136 (W.D. Wash. 1994). The Tribe has “acknowledged a
3 willingness to abide by state regulation of treaty shellfishing activities to protect public health, so
5 long as such regulation is reasonable and necessary, non-discriminatory, and meets appropriate
7 standards.” Id. The Tribe has agreed that the compliance provisions of the NSSP manual would
9 govern treaty shellfishing activities. Id.

11 The Tribe bears “primary responsibility for enforcement of shellfish sanitation laws against
13 its members and shellfishing permittees within its reservation, any tribal trust lands, or within the
15 tribe’s usual and accustomed areas.” Section VI.B.

17 “The state shall bear primary responsibility for the enforcement of state sanitation laws
19 against: 1) non-Indians; 2) any Indian where the violation occurs outside of any Indian reservation,
21 Indian trust lands, and outside the usual and accustomed fishing places of the tribe of which the
23 violator is a member . . .” Section VI.C.

25 The tribes “may assume primary responsibility for inspection and licensing of shellfish
27 operations subject to its jurisdiction by obtaining FDA recognition . . .” United States v.
29 Washington, 19 F. Supp. 3d at 1142. There is nothing in the record to indicate that the Tulalip
31 Tribe assumed this responsibility. Furthermore, a state-licensed company is not subject to the
33 tribe’s jurisdiction.
35

37 Where the tribe has not assumed “primary responsibility”, the state has primary
39 responsibility and, “[a]ccordingly, the state shall license, certify, and inspect operations over which
41 it retains primary responsibility.” United States v. Washington, 19 F.Supp. 3d at 1143.
43

45 Under the enforcement provision, the State bears “primary responsibility for the
47 enforcement of state shellfish sanitation laws against: 1) non-Indians; 2) any Indian where the
49 violation occurs outside of any Indian reservation, Indian trust lands, and outside the usual and

1 accustomed fishing places of the tribe of which the violator is a member; . . .” United States v.
3 Washington, 19 F. Supp. 3d at 1150. The tribe bears “primary responsibility for enforcement of
5 shellfish sanitation laws against its members and shellfishing permittees within its reservation, any
7 tribal trust lands, or within the tribe’s usual and accustomed areas.” United States v. Washington,
9 19 F. Supp. 3d at 1149.

11
13 CHARGES

15 The defendants are charged in Counts 1 and 2 with Unlawful Fish and Shellfish Catch
17 Accounting in the First Degree. The essential elements are the charges are:
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21
23 On or about and between December 28, 2015, and January 11, 2016,

25 The defendant

27 Who was licensed as a wholesale fish dealer, or was acting in that capacity

29 Received for commercial purposes

31 Shellfish worth \$250 or more

33 And failed to document the shellfish with a fish receiving ticket (FRT) properly filled out

35 And/or failed to submit the FRT to the Department of Fish and Wildlife (DFW) as
37 required.

39 Puget Sound Seafood Dist, LLC, (PSSD) was a business licensed with the State of
41 Washington in 2015 and 2016. The managers of the company were listed as Hazen Shopbell and
43 Anthony Paul with a business address in Tacoma, WA. In 2015 and 2016, PSSD was licensed by
45 DFW as a Wholesale Fish Dealer.
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1 Jamie Torpey¹ was an employee of the company and was a Fish Buyer on behalf of the
3 company during the charged time periods. During the charged time frame, Torpey purchased
5 almost 2000 pounds of clams from Merle Hayes, Carnegie Hayes, and Dayson Parks, writing five
7 checks to them in payment. One check was written to Dayson Parks in the amount of \$147.00, two
9 checks were written to Merle Hayes totaling \$927.70, and two checks were written to Carnegie
11 Hayes totaling 652.50. The checks were company checks and appear to have been signed by
13 Anthony Paul. Upon receiving these clams on behalf of PSSD, Torpey did not issue or submit any
15 FRTs as required. PSSD did not issue or submit any FRTs as required.
17

19 In a recorded interview in August of 2016, Detective² Wendy Willette and Torpey
21 discussed these five checks and the fact that there were no FRTs associated with them. In this
23 context, Torpey said that Shopbell and Paul had told her to buy clams from “these guys.” Then the
25 following exchange occurred:

27 Willette: So did you do fish tickets for these guys?

29 Torpey: No, that’s why Anthony and Hazen had told me or Anthony, yeah,
31 Anthony and Hazen had told me to go buy their clams and just write the
33 checks. So I did. And like I said, after a couple of them I was like, wait a
35 minute, I don’t think this is right.
37

39 Willette: Just so I’m clear. Anthony Paul told you to go buy clams from these
41 individuals and not fill out fish tickets.
43

45
47 ¹ Jamie Torpey is now Jamie Gregory, but for the sake of consistency with past filings and the reports in this case,
the State refers to her as “Jamie Torpey” herein.

49 ² Wendy Willette is now Sergeant Willette but, again, for the sake of consistency with past filings and the reports in
this case, the State refers to her as “Detective Willette” herein.

1 Torpey: Yes.

3
5 After purchasing these clams, Torpey had become concerned that the purchases were not
7 legal. At a later point in the interview, Torpey indicated that she had told Paul she believed the
9 purchased clams were illegal “and we should not be doing this. I’m not doing this.” She also
11 indicated that, “Cause when they sent me to go get them Hazen was the one harassing me to go
13 get them. It’s like, you need to go get, you need to go buy these clams. They’re digging right now.
15 Dah, dah, dah, dah. And I went to pick them up and after I bought these I stepped back and was
17 like, I’m not doing that again.” Torpey went on to explain that she had purchased these clams from
19 Carnegie Hayes’s residence. Torpey again elaborated on Shopbell’s role, “Well, they said they dug
21 them and they had clams that w-, they wanted to sell us for bait clams. And Hazen had called me
23 up and said, hey, we’ve got clams we can buy for bait. Go pick them up. And, ah, and I did.”

27 Those clams ended up in Marine View Cold Storage in Burlington, WA, to be used as bait.
29 It is believed that these are the clams that Willette seized in August, 2016. The clams were not
31 tagged or dyed as required by law for bait clams.

33 Three theories of criminal liability support the charges as to Anthony Paul and Hazen
35 Shopbell. Evidence supports jurisdiction for these charges under all of these theories, any or all of
37 which a jury could find based on the evidence.

39
41 First, Jamie Torpey committed the criminal act and because Paul explicitly solicited her
43 to do so and because Shopbell implicitly solicited her to do so, they are her accomplices pursuant
45 to RCW 9A.08.020. Although the situs of these crimes was on the reservation, Torpey is not a
47 tribal member. The State would clearly have had jurisdiction over Torpey for her act. Because
49 the defendants are accomplices to the nontribal member who committed the crime, and because

1 the defendants were not present at the situs of the crime on the reservation, the State asserts that
3 it maintains jurisdiction over the defendants.

5 Second, Shopbell and Paul caused the criminal conduct to be performed on behalf of PSSD
7 and, pursuant to RCW 9A.08.030(3), they are each criminally liable. Jurisdiction is retained
9 because PSSD is not “an Indian” or a tribal member. Rather a state-licensed company has had
11 criminal conduct committed in its name and Shopbell and Paul are criminally liable for having
13 caused that conduct.

15 Third, Jamie Torpey committed the criminal act as an agent of the company PSSD. PSSD
17 had the duty to ensure that FRTs were properly submitted. Pursuant to RCW 9A.08.030(4),
19 Shopbell and Paul are criminally liable for PSSD’s failure to discharge that duty. Because PSSD
21 is a state-licensed company and not “an Indian” or a tribal member, State jurisdiction is retained.
23 Additionally, because the situs of PSSD and the situs of the clams at the time of the failure to
25 submit the tickets was not on tribal land, State jurisdiction is retained.
27

29 The defendants are charged in Counts 3-5 with Unlawful Trafficking in Fish, Shellfish, or
31 Wildlife in the Second Degree. The essential elements are the charges are:
33

- 35 On or about and between February 11, 2016, and May 9, 2016,
- 37 The defendant
- 39 Trafficked in fish or shellfish
- 41 Valued at less than \$250
- 43 The fish was classified as shellfish
- 45 And the trafficking was not authorized by statute or rule of DFW.
- 47
- 49

1 On multiple occasions between February 11, 2016, and May 9, 2016, Jamie Torpey, acting
3 as an agent of PSSD, sold or bartered bait clams to fishers/harvesters. There is no statute or rule
5 that authorized this activity because a shellfish operation license is required in order to do so and
7 PSSD did not have a shellfish operation license.

9 Three theories of criminal liability support the charges as to Anthony Paul and Hazen
11 Shopbell. Evidence supports jurisdiction for these charges under all of these theories, any or all of
13 which a jury could find based on the evidence.

15 First, Jamie Torpey committed the criminal act of trafficking in shellfish without the proper
17 license. But her act was done for the benefit of the defendants. Receiving the financial benefit of
19 her actions, they had to have known about it. At no point in the lengthy period of time where
21 Torpey was committing these acts did the defendants tell her to stop. The defendants knew they
23 didn't have the proper license. By providing the clams to Torpey for later sale and/or barter, and
25 by not getting the proper license, the defendants aided Torpey in her commission of the offense.
27 RCW 9A.08.020(3). The exact situs of where this trafficking occurred is unknown. It is unlikely
29 that the defendants will be able to dispute State jurisdiction by presenting "some evidence" that
31 the situs was within the boundaries of an Indian reservation. L.J.M., 129 Wn.2d at 394-395.
33 Additionally, Torpey is not a tribal member. The State would clearly have had jurisdiction over
35 Torpey for her act. Because the defendants are accomplices to the nontribal member who
37 committed the crime, the State asserts that it maintains jurisdiction over the defendants.
39

41 Second, Shopbell and Paul caused the criminal conduct to be performed on behalf of PSSD
43 and, pursuant to RCW 9A.08.030(3), they are each criminally liable. Jurisdiction is retained
45 because PSSD is not "an Indian" or a tribal member. Rather a state-licensed company has had
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1 criminal conduct committed in its name and Shopbell and Paul are criminally liable for having
3 caused that conduct.

5 Third, Jamie Torpey committed the criminal act as an agent of the company PSSD. PSSD
7 had the duty to obtain a shellfish operation license if it wanted to traffic in shellfish. Pursuant to
9 RCW 9A.08.030(4), Shopbell and Paul are criminal liable for PSSD’s failure to discharge that
11 duty. Because PSSD is a state-licensed company and not “an Indian” or a tribal member, State
13 jurisdiction is retained.
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17
19 RESPONSE TO JOINT MOTION TO DISMISS PER 8.3(b)

21 The defendants argue that the State’s Bill of Particulars is inadequate and constitutes a
23 discovery violation that justifies a dismissal. The State asserts that the Bill of Particulars addressed
25 all of the questions that this Court previously ordered it to address.

27 The defendants argue that because Torpey said something different to defense counsel in
29 December of 2021, from what she said in 2016 to Detective Willette, that the newer statement
31 must be true and “[i]t is the height of bad faith for the prosecution to ignore [the newer statement]
33 by its star witness and to instead make factual assertions that it now knows are untrue.” It is not
35 unheard of for witnesses to change their statements. That is why attorneys are permitted to impeach
37 them and/or refresh their recollection during trial testimony. What Torpey will say during trial,
39 when she is under oath, remains to be seen. But, the fact of the matter is, that in a prior recorded
41 statement Torpey indicated clearly that Anthony Paul instructed her to not complete any fish
43 tickets.
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1 RESPONSE TO JOINT MOTION TO DISMISS PER 8.3(c)

3 The defendants make no argument on this issue but simply presents additional
5 documentation. The State asserts that the additional documentation should not change the court’s
7 prior ruling on this motion.
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11 RESPONSE TO SHOPBELL SUPPLEMENTAL MOTION TO DISMISS PER 8.3(c)

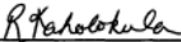
13 Shopbell argues that because there is not evidence that he explicitly told Torpey to not
15 complete FRTs, Counts 1 & 2 should be dismissed per Knapstad. The State asserts that, for reasons
17 asserted previously in this Response, the evidence is sufficient to go to trial on Counts 1 & 2 as to
19 Mr. Shopbell.
21

23 Shopbell also argues that because the situs of the crimes in Counts 1 & 2 is on reservation
25 land, that it necessarily did not happen in the State of Washington. Shopbell sites no case or law
27 in support of this assertion. An act that occurs on tribal land in Washington is also an act that has
29 occurred in the State of Washington. Whether the state court has jurisdiction to hear the matter is
31 a different question. But, unquestionably tribal reservations in Washington are situated in the State
33 of Washington.
35

37 Shopbell next argues that this Court should dismiss Counts 3 – 5 because there was no
39 information in the Bill of Particulars that they happened in the State of Washington. The State
41 asserts that given all the circumstances it can be inferred that the crimes occurred in the State of
43 Washington. PSSD was a state-licensed company. Jamie Torpey was acting on their behalf.
45 Evidence shows that the bait clams were provided to fishers/harvesters who used the bait clams,
47 in the State of Washington, within a day or two of receiving them. Alternately, since the defendant
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1 just made this motion, the State would ask for this Court to reserve on ruling until the State has
3 time to contact the appropriate witnesses.

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7 DATED THIS 2nd day of January, 2022.

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11  _____ **WSBA #25026**
13 Rosemary Kaholokula
15 Chief Criminal Deputy Prosecuting Attorney
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