

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SKAGIT COUNTY

The State of Washington,) Skagit County Cause
) No. 18-1-00622-2
Plaintiff,)
) vs.)
) Hazen Shopbell)
) Anthony Paul)
) Defendant.)

VERBATIM REPORT OF PROCEEDINGS

THE HONORABLE BRIAN L. STILES
Skagit County Courthouse
Mount Vernon, Washington 98273

APPEARANCES:

For the Plaintiff: **EDWARD NORTON**
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office
605 S. Third Street Courthouse Annex
Mount Vernon, WA 98273

For the Defendant: **DAVID SMITH**
Anthony Paul Garvey Schubert Barer
1191 Second Avenue, Suite 1800
Seattle, WA 98101

For the Defendant: **GABRIEL GALANDA**
Hazen Shopbell Galanda Broadman, PLLC
8606 35th Avenue NE
Seattle, WA 98115

DATE: June 18, 2019

REPORTED BY: JENNIFER C. POLLINO, WA CCR #2221, RPR
OFFICIAL REPORTER

1 very helpful. If you look at my supplemental, second
2 supplemental declaration we hopefully provided you with color
3 copies of --

4 THE COURT: I did get color copies, and thank you for
5 that. We don't always get color copies, yeah.

6 MR. SMITH: So Exhibit YY shows several bags of black
7 plastic bags, six in total, that we understand to be the contents
8 of at least one or several of the totes. And I can't tell from
9 the picture whether the bags were the original containers that
10 the bait clams were in, but that's what it appears to be just
11 based on the photographs. But you can see they look like they
12 are kind of similar in some of the pictures in terms of the
13 species or type of clam. Then when you look at a close up, which
14 is Exhibit ZZ, you can see that basically the bags were contained
15 in a large quantity of ice that was probably, you know, in the
16 bags when the clams were put in there then stuck into the
17 freezer.

18 Then Exhibit AAA shows Fish and Wildlife officers
19 inspecting all four totes. You can see that they have the blue
20 one open and the three red ones open, and they are looking at the
21 contents. Again, from this picture what I believe it depicts is
22 that you can see that inside the totes there's a black plastic
23 bag they had the clams apparently grouped together for some
24 reason. That would have been by Puget Sound Seafood
25 Distribution, the owner.

1 Then you see in photograph, the next photograph in Exhibit
2 AA the sledge hammer that Fish and Wildlife agents were using to
3 apparently try to break up the frozen bait clams. And in the
4 process it looks like they damaged some. They certainly, you
5 know, were using force and mechanical means to try to break open
6 the clams. And the third picture in Exhibit AA shows a Fish and
7 Wildlife Officer actually using a hammer to try to break up the
8 contents.

9 Then Exhibit BBB shows what looks to be the contents of the
10 blue tote and inside, which is the next picture in BB, you can
11 see a piece of meat that was inside one of the totes.

12 And then Exhibit CC --

13 THE COURT: Can we go back while you are on BBB?

14 MR. SMITH: What's the circled area on the first page?
15 Is that emphasis by you, the yellow circle, and what does that
16 depict?

17 MR. SMITH: What we think it depicts is what is seen in
18 the next photograph.

19 THE COURT: The meat.

20 MR. SMITH: The meat. And the point I was trying to make
21 is just to illustrate is that when they got weighed, and I can't
22 tell exactly in the timeline when they weighed the totes. But
23 it's clear to me that you are looking at totes that contained ice
24 and other things than clams that were weighed. So we really
25 don't know the volume of bait clams because the weights

1 apparently that were recorded by Fish and Wildlife apparently
2 reflect other things than just the clams themselves, ice, other
3 species of bait, some meat that was in the totes.

4 Then Exhibit CC documents what I would describe as the
5 cavalier thoughtless way in which Fish and Wildlife agents simply
6 dumped the contents of the totes, making no attempt to do an
7 inventory of the contents, making no attempt to preserve through
8 photographs or other documentation what was actually inside the
9 totes. And so by weight again our calculation is that Fish and
10 Wildlife destroyed about 99 percent by weight of whatever was in
11 the totes; so like leaving less than one percent. I think it's
12 .03 percent of the contents, which consist of the four baggies
13 that contained 15 clams.

14 Now, it's of interest, I think significant, that if the
15 Court were to look at Exhibit DDD the first picture, I believe
16 shows that one of the clams that was not destroyed was dyed. And
17 the color is hard for me to describe from the picture. But
18 Officer Willette described it as a blue dyed clam. The State's
19 contention in this case has been that what made the possession of
20 the clams unlawful is that they were dyed. Well, we now know
21 that some of them were dyed. How many? We don't know because
22 Fish and Wildlife didn't do an inventory of the contents of the
23 totes before they destroyed the contents. So we don't know if
24 this was one dyed clam, if there were many dyed clams. We have
25 no idea at this point how many there were. We also don't know how

1 it got there because there's no inventory, and there's no way for
2 us to go backwards in time now to trace where the various clams
3 came from and then say okay. As we provided the Court a sample
4 of the treated shellfish receiving tickets as Exhibit EEE. You
5 can see these were all Swinomish Tribe harvested clams, and they
6 are described as Cockles.

7 Now, the difficulty is that we now have shellfish receiving
8 tickets for at least the Swinomish harvested clams that show that
9 certain clams, certain species were purchased by a representative
10 of Puget Sound Seafood Distribution, but we have no way of
11 tracing that purchase to the clams that were found in the Marine
12 Cold Storage Facility. We don't know if these were the same clams
13 or if these are different clams. So while these tickets are
14 helpful to the defense in terms of yes, the harvest of these
15 particular clams was done legally and properly under Swinomish
16 Tribal Law. What we don't know is were these the Cockle clams
17 that Fish and Wildlife seized on August 22nd, 2016 or were there
18 different clams?

19 So, again, the defense is handicapped materially because we
20 can't connect the dots that we should be able to connect to show
21 these clams are harvested here. This was proper under Federal
22 Law for this reason. They were sold to Puget Sound Seafood
23 Distribution. And they were kept this way for this reason as
24 appropriate under the Tulalip Tribal Laws and Regulations, and
25 then they were used for treating fishing activities. We can't

1 connect any of the dots anymore because the bait clams are gone.

2 The part that I find just very disturbing is that the
3 timeline, which I tried to recreate in my supplemental addendum
4 on page 2, shows that search of Mr. Paul's home and his arrest
5 without warrant took place on June 13th of 2016. On July 29th --
6 I'm sorry -- on June 22nd Fish and Wildlife sent Mr. Paul a
7 notice that they intended to forfeit some of the materials taken
8 from his home during the service of the search warrant.

9 Mr. Paul then files a replevin action to get his property
10 back on July 29, 2016 in Thurston County Superior Court. I have
11 every reason to believe that Detective Willette would have been
12 aware that that action would have been filed because the State of
13 Washington Attorney General's Office representing the Department
14 of Fish and Wildlife responded to the filing of that lawsuit.

15 Judge Anne Hirsch set a hearing on our motion for return of
16 property and replevin for October 3rd, 2016. Three days later,
17 August 15th Detective Willette goes to Marine View Cold Storage
18 and inspects the contents -- inspects the property and finds the
19 four totes of bait clams. She, we believe, was responsible for
20 CPS going to Mr. Paul's house on August 19, 2016 and for the
21 Department of Revenue sending a letter regarding purported
22 failure to file tax returns for tribal purchases and sales on
23 August 17th.

24 Now, there is no explanation offered by the State. Why?
25 When Detective Willette had been to Marine View Cold Storage and

1 had seen the clams, if she believed that their ownership or
2 possession was unlawful she could have placed a hold on it on
3 that day so it couldn't be released to the owner, Puget Sound
4 Seafood Distribution; so she had preserved the evidence on
5 August 15th, 2016.

6 No one has offered a reasonable explanation as to why she
7 went back with other agents on August 22, 2016 and decided to
8 destroy the evidence that she had placed a hold on on
9 August 15th. And I would invite Mr. Norton if you can provide a
10 reasonable explanation to give it to us, because I've never heard
11 why it was necessary, lawful, or appropriate for her to just make
12 the decision on her own to destroy the evidence that she had
13 secured on August 15th.

14 Puget Sound Seafood Distribution found out about the
15 seizure of the bait clams on August 24th, and at that point wrote
16 Assistant Attorney General Young, who was representing the
17 Department in the replevin case to say what's the deal here, why
18 are you, you know, why did you seize our stuff? The request was
19 made for a due process hearing with AG Young who wrote in a
20 letter saying no, you are not entitled to one. And it wasn't
21 until much later that defense realized that -- or sorry, Puget
22 Sound Seafood Distribution realized that Detective Willette had,
23 without any authorization from the Court, without any permission
24 from any judicial officer to my knowledge, has taken it upon
25 herself to destroy the clams. Then my client gets charged a

1 couple years later with a crime that basically is based on his
2 purported unlawful possession of the evidence Detective Willette
3 had destroyed two years earlier.

4 It is unimaginable to me that the Court could allow
5 something like this to -- a case like this to proceed to trial
6 where the defense has essentially been accused of possessing
7 something that we can no longer, the jury, the trier of fact, can
8 no longer see, examine, or identify as evidence supporting the
9 charge against them. So essentially we just have a bunch of paper
10 now and some photographs that tell us that there were bait clams.
11 We don't know where they came from, who owned them, how they got
12 in the possession of Puget Sound Seafood, how they got into the
13 totes because Detective Willette, without anybody's
14 authorization, decided to destroy the evidence. It's clear that
15 she has a malevolent motive of some sort for doing that, because
16 no reasonable law enforcement officer would think it's
17 appropriate for them to decide to destroy the evidence in a case.

18 THE COURT: Tell me how it impacts your defense
19 specifically. Tell me what you are concerned about.

20 MR. SMITH: My concerns are that I can tell the jury we
21 know they had some dyed clams. I don't know how many. I don't
22 know how they got there. I don't know what the back story is to
23 that. I can't say: Oh, look, here are the fish receiving
24 tickets from the Swinomish Tribe saying that they legally
25 purchased Cockle clams because I don't know what happened to

1 them. I can't say oh, and the weight that they are saying
2 commercial quantity, I don't really know what the quantity is
3 because they weighed them, a tote full of ice and other things,
4 and then just wrote down that number. And I don't know what
5 percentage of that number represents clams, what percent
6 represents other things, what percentage is ice. So I can't do
7 that.

8 So I'm going to stand up, if we went to trial, and tell the
9 trier of fact: Hey, my clients, you know, didn't do anything.
10 It was done by their employee, and they understood they had done
11 everything lawfully. Then the State will probably say: Oh, but
12 they harvested them, these clams, illegally. And I'm going to
13 say: Well, how do I know that? I don't know which clams you are
14 talking about. There is no evidence here. I don't know where
15 these came from.

16 You know, it puts, I think, the prosecution almost in a way
17 in a worse position that they are going to argue that there's
18 evidence that something was harvested illegally. And nobody is
19 ever going to know exactly what it was because the people who
20 harvested the clams won't be able to identify them because they
21 are destroyed. The fish receiving tickets we have are now
22 meaningless because nobody will be able to tie that ticket to
23 those clams. So it really just guts the whole case. It puts the
24 defense in an impossible position where we are arguing we did
25 something legally and right, and they are saying no you didn't.

1 But the trier of fact will never know actually what happened.

2 THE COURT: Sure. What is the interplay between Tribal
3 rights and the State's rights to regulate here in this case?

4 MR. SMITH: So the statute they relied upon we think is
5 inapplicable because that statute describes it as applicable to
6 people who are growing clams. So essentially they just took a
7 random RCW that had nothing to do with Puget Sound Seafood
8 Distribution, nothing to do with Indian tribes, tribal fisheries,
9 our clients as individuals. They simply said we are claiming the
10 right under this random law here regulating other people to
11 destroy your property. And you are not entitled to due process
12 of law. You are not entitled to a hearing. You are not
13 entitled to notice. You are not entitled to anything. And
14 after, if that wasn't a bad enough insult to our client's rights
15 to then charge them with a crime based on possession of things
16 that you've already destroyed is the height of a system that
17 would have to resemble what happens in Russian or other countries
18 where there's a show trial because it wouldn't be the American
19 system of justice that you can be charged with a crime on that
20 something the government had destroyed and no one can now see.

21 THE COURT: There was some discussion last year, and I
22 can't recall, about clams being taken then in usual and
23 accustomed areas, and without the clams there's no way to verify
24 that, or test that, or is there some test that can determine
25 where these clams came from and whether they were in a closed

1 season or not?

2 MR. SMITH: So it would have been by species. So my
3 surmise would be that if we had fish tickets for Cockle clams and
4 we can say okay they bought Cockle clams from the Swinomish
5 Tribe. Here's the weight. We add them all up, we go and
6 separate all the clams by species and say, okay, this weight
7 comes close to the amount of total weight on the fish receiving
8 tickets for Cockle clams. Okay. We know where those came from.

9 All right. Let's go to the Butter clams. Let's figure out
10 where Butter clams come from. And then we could have gone back
11 and asked the tribal harvesters. You know, okay, like back in
12 2016 when you were harvesting Butter clams where would you go?
13 Then I assume they would be able to tell us oh, yeah, Butter
14 clams grew here at this beach. And we harvested them this way
15 because it was legal under our tribe regulation to do that. We
16 could even call witnesses from the tribe to say oh, yeah, yeah
17 that's totally appropriate. But we can't do that because we have
18 no idea how many Cockle clams were in those totes. We have no
19 idea how many butter clams. We have no idea the other species of
20 clams that were in the totes that got destroyed. We really have
21 no way to show in a concrete way. These came from here. This is
22 how they were harvested. This is why it was appropriate and
23 legal to do it that way.

24 THE COURT: Some of the charges, at least under the
25 amended information, if I allow the amendment, talk about

1 commercial purposes and even dollar amounts. I assume that that
2 would be impacted as well in this case because you don't know the
3 weight. You don't know the value. You don't know how many
4 species, the different prices, and all that sort of thing.

5 MR. SMITH: Yes, Your Honor. Everything we would want to
6 show in the defense is compromised to the plight of being
7 impossible to demonstrate.

8 THE COURT: Are you asking for the suppression of any
9 kind of evidence relative to the clam versus a dismissal of all
10 of the charges? Is there a distinction? Or is it a practical
11 effect? I'll have to ask the Prosecutor that I suspect.

12 MR. SMITH: I think in terms of the proposed amended
13 information, suppression -- let me back up. I can certainly see
14 how the Court can look at this and say, well, you have the four
15 baggies containing the 15 clams so I'm not going to grant your
16 motion to suppress as to them because they are still here. But I
17 will grant your motion as to everything else. I think if the
18 Court were to enter that kind of an order on the suppression part
19 it would essentially mean that the charge that was proposed in
20 the amended information would be unsustainable because there
21 wouldn't be any commercial quantity. There wouldn't be enough by
22 weight or volume to establish that this was done for commercial
23 purposes.

24 If the Court were to grant the motion on that basis I still
25 think dismissal is the required remedy because this wasn't some

1 accidental destruction of evidence. This was a deliberate,
2 intentional, premeditated destruction of evidence that Detective
3 Willette had placed a hold on on August 15th, and then went back,
4 you know, seven days later and intentionally destroyed. That
5 separates this case from a typical case where the Court would
6 simply find suppression as an adequate remedy.

7 THE COURT: All right. Mr. Galanda.

8 MR. GALANDA: I'll be brief, assuming you received my
9 latest brief on treaty?

10 THE COURT: I did not. When did that come in?

11 MR. GALANDA: We submitted it on the 11th of June.

12 THE COURT: You know, the last thing that is in my
13 Odyssey, the scanning is June 6th, which is the supplemental
14 directive here.

15 MR. GALANDA: This is three-page brief that we took care
16 to have messengered here as well as working copies.

17 THE COURT: Tell me about it.

18 MR. GALANDA: In large part it's groundwork that I
19 covered with Your Honor, that I covered with Your Honor --

20 THE COURT: Before.

21 MR. GALANDA: But I wanted to make sure that we had a
22 full opportunity to present to Your Honor the treaty basis for
23 why, at least as to Mr. Shopbell, the original information or the
24 proposed amended information simply cannot be accepted by the
25 Court as lawful. I was --

1 THE COURT: What you are arguing does not apply to Mr.
2 Paul?

3 MR. GALANDA: Well, I'm arguing that in so far as Mr.
4 Shopbell has been accused of only telling an employee to buy the
5 clams. And I will challenge Mr. Norton in a minute or invite
6 him to challenge me with some assertion to the contrary. But
7 I've now briefed the idea that on April 26th and June 11th that
8 the only evidence the State has as to Mr. Shopbell is he
9 allegedly told Ms. Torpey to, quote, unquote, "buy the clams".
10 The clams were then purchased from a Tulalip tribal member on the
11 Tulalip Indian Reservation after they were harvested within Point
12 Elliott Treaty guaranteed usual and accustomed areas. There is
13 no crime for a Tulalip Indian to be involved with buying clams
14 from another Tulalip Indian on the Tulalip Indian Reservation
15 when those clams were harvested from U and A. US v. Washington
16 makes that very clear and the brief that I will make sure that
17 Your Honor gets that as of June 11th makes clear that the State
18 has no regulatory interest for police power unless it is for
19 off-reservation fishing activity. They have no right to impair
20 rights guaranteed to and reserved by Tulalip Indians to fish in
21 usual and accustomed areas, then whether it's to transact or
22 consume those fish within the Tulalip Indian country. That is
23 bedrock US v. Washington, bedrock Federal Indian Law, and that's
24 guaranteed by the Treaty of Point Elliott.

25 THE COURT: What if it could be proved or shown that it

1 was used for bait, which would be off reservation, wouldn't it,
2 or not?

3 MR. GALANDA: Again, Mr. Norton cannot show anything
4 other than a report from Ms. Willette that suggests Mr. Shopbell
5 asked an employee to buy the clams. He didn't say buy the clams
6 for bait. He didn't say buy the clams and take them off the
7 reservation. He didn't say buy the clams so we can take them off
8 the reservation. He didn't say buy the clams and sell them to
9 somebody else. He didn't say buy the clams and take them to the
10 marine storage facility in Burlington. He said simply buy the
11 clams, which were then bought by the employee from Tulalip at
12 Tulalip and harvested at Tulalip.

13 THE COURT: Isn't it an argument that don't fill out
14 tickets, and isn't that a separate issue?

15 MR. GALANDA: Well, Mr. Norton continues to misrepresent
16 that my client said something about fishing. He didn't. He
17 said, quote, unquote, "buy the clams" period, full stop. It's a
18 misrepresentation or a gross misrepresentation to say my client
19 said something else. He had nothing to do with the fish tickets
20 or an accounting of the alleged information in the amended
21 information, nor did he have anything to do with trafficking or
22 purported plans to do anything with the clams whatsoever. So if
23 you just look at US v. Washington and the Treaty of Point Elliott
24 and the law that I'm happy to recite to you that says that the
25 State has no police power regulatory interest unless the fishing

1 activity occurs off the reservation. Mr. Shopbell is immunized
2 from this prosecution. And I hope Mr. Norton can finally come up
3 with some evidence, having presented this argument on April 26th
4 and he said nothing. On June 11th he said nothing. And during
5 the last hearing he said nothing other than the State continues
6 to misrepresent that my client did something that he did not do,
7 which is something other than to just instruct someone to buy the
8 clams. The Treaty of Point Elliott immunizes my client from
9 prosecution, Your Honor.

10 THE COURT: Mr. Norton.

11 MR. NORTON: Your Honor, there's a lot to respond to
12 here, and most of my response is contained in my prior written
13 response to the Court. It is clear, Your Honor, that what the
14 officers did in this case was they took apart the clams in a
15 manner that counsel says, it's their testimony, the officer's
16 testimony that indicate that they only found one dyed clam
17 throughout the quantity of this. And the Court has the
18 representative photographs for that. And so to a certain extent
19 it is their testimony, whatever we were talking about, they would
20 say this is what we found, this is what we inspected, this is
21 what we found.

22 Your Honor, our contention is that the clams themselves are
23 not exculpatory. And that the clams stored in the manner was
24 wrong and improper, and that the clams themselves admittedly the
25 value would be in dispute at trial; in other words, what quantity

1 of this versus this versus that were bait clams, and that would
2 be factual dispute at trial. And the things that counsel has
3 recited regarding the fact that there was ice and things like
4 that. And maybe an amount of other items commingled within it;
5 although it appears to be a small amount, would go to the weight
6 of the evidence in this particular case.

7 And my representations as to the involvement of these
8 individuals are based upon the reports the officers submitted
9 therein at this time.

10 THE COURT: Okay. Mr. Smith any response?

11 MR. SMITH: I can only reemphasize just the inherent
12 unfairness of putting someone on trial for the possession of
13 something and then intentionally depriving them of the ability to
14 point out that the State's representations about what happened
15 are wrong. Essentially we're put in a position right now where,
16 if Mr. Norton's representation is accurate, a Fish and Wildlife
17 officer will testify: Well, I looked and there was only one blue
18 clam. Well, how do I know that's true? How do I know the officer
19 actually looked? If I don't have the clams, there's no
20 photograph showing that they did some thorough inventory
21 inspection. I would be forced to simply take the officer's word
22 or try to ineffectively probably cross examine the officer about
23 how they could be so certain there's only one dyed clam when
24 there is no way for me, or the jury, or a trier of fact to know
25 if the officer's testimony was accurate and credible. It's a show

1 trial. All I can do is simply have police officers stand up and
2 say this is what happened, and then have no way of effectively
3 cross examining them and pointing out some other evidence that
4 their testimony is inaccurate.

5 THE COURT: Okay. Anything, Mr. Galanda, anything else?

6 MR. GALANDA: Just to explain my point, Your Honor, you
7 heard Mr. Norton say nothing specific as to Mr. Shopbell at all.
8 The State continues to try to lump the defendants together for
9 purposes of defeating this motion. In its response to our
10 original set of motion papers the State said, quote, "WDFW deputy
11 agents were informed by Jaime Torpey the clams for which she had
12 been directed not to fill out any fish tickets, paid money at the
13 direction of Anthony Paul and Hazen Shopbell. I have now
14 repeatedly asked the State to proffer Your Honor and us some
15 information that specifically suggests Mr. Shopbell did something
16 other than say, quote, unquote, "buy the clams from a Tulalip
17 member harvested at Tulalip. The State again falls short.

18 The Boldt decision is crystal clear. Treaty fishing
19 rights, quote, reserved by the Indians cannot be qualified by the
20 State. The State has police power to regulate off-reservation
21 fishing only. Mr. Shopbell was not involved in any
22 off-reservation fishing activity, whether it involved fish
23 tickets, whether it involved alleged trafficking. He simply
24 asked somebody to buy clams at Tulalip from the Tulalip and
25 harvested at the Tulalip. That is not a crime, Your Honor.

1 THE COURT: You want to respond to that, Mr. Norton?

2 MR. NORTON: Your Honor, my response on the
3 jurisdictional issue primarily at the prior hearing is the
4 State's contention was that this was as alleged commercial
5 shellfish activity, not the individual activity of either of the
6 defendants that we're prosecuting. And our jurisdiction is based
7 upon that activity and the evidence. And we were asked, you
8 know, what connection do we have to Skagit County? One of the
9 business applications for Ms. Torpey to apply and sign on behalf
10 of Puget Sound Seafoods listed the Burlington address.

11 THE COURT: Okay. Well, that goes to the venue issue, I
12 suspect, Mr. Norton, tell me about one thing that was raised in
13 some of the materials was that the probable cause, I guess, was
14 shopped to other counties before it ended up in Skagit County to
15 be filed. Do you know any information about that?

16 MR. NORTON: Well, Your Honor --

17 THE COURT: And I know you were not the Prosecutor that
18 filed the charges.

19 MR. NORTON: No, I wasn't the Prosecutor. And the
20 history of those cases is not entirely known to me. I know that
21 Pierce County dismissed their prosecution. I know that the
22 information that I have is the Pierce County Prosecution was --
23 there also may have been some other legal factors in connection
24 with it as well.

25 THE COURT: Well, there's some discussion about an MOU, I

1 suspect between the tribe and the County or somebody.

2 MR. NORTON: Right. And that actually was dealt with by
3 Judge Svaren in the prior matter. And both jurisdictions and the
4 MOU and the decision of this office to prosecute versus King
5 County or Pierce County.

6 THE COURT: What do you mean already decided? I haven't
7 looked back. What do you mean by that?

8 MR. NORTON: There was previously a motion to dismiss for
9 lack of jurisdiction that was heard by Judge Svaren on a number
10 of issues and briefed by the parties. And that issue was denied
11 before this issue related to its issues were brought. And
12 prosecutors have a choice to prosecute or not to prosecute. And
13 as I know this Court knows, but I'll state it for the record,
14 prosecutors do have a lot of discretion to prosecute or not
15 prosecute. The decision not to prosecute we actually spend a lot
16 of time not prosecuting. And different prosecutors will come up
17 with different ideas on how to do that.

18 My concern discussing the Pierce County matter is I think
19 that there were, and honestly I didn't bring all of those
20 materials here, Your Honor, there was some discussion related to
21 the Pierce County matter that some representations may have been
22 made to the people involved in addition to the MOU. I heard
23 something about an extension of the season or something like that
24 that may have also been granted. I honestly don't know. I've
25 seen their paperwork. I've seen some of the things that have

1 been given and apparently an email, a very inappropriate email by
2 way of public disclosure came out. And I think it's best the
3 prosecutors either prosecute or not prosecute. And police
4 officers, whatever their feelings about the decision to prosecute
5 or not prosecute frankly shouldn't have been made. Honestly,
6 Your Honor, at the previous election there was discussion of I
7 think somebody did bad, but no reasonable prosecutor would
8 prosecute. I don't know that law enforcement should do that. I
9 honestly think prosecutors should charge or not charge and
10 certainly not ruminate about well it was close but I didn't
11 charge.

12 THE COURT: Well, no, what I'm getting at and maybe I'm
13 missing some materials but the Pierce County thing was maybe on a
14 different set of facts, correct me if I'm wrong. But then this
15 set of facts was shopped and not prosecuted by King County and
16 not prosecuted in Snohomish or somewhere and then shopped up here
17 to your office and charges were filed. I'll let you folks respond
18 in a second. I was just curious of whether there's any notes
19 that Mr. Johnson, the prior prosecutor that filed the charges,
20 knew that it had been shopped before to other counties and not
21 prosecuted.

22 MR. NORTON: Well, Your Honor, I filed my response on
23 November 27th of 2018 discussing some of these issues, Your
24 Honor. And the MOU specifically by its terms, which was signed
25 May 31st of 2017, states that it doesn't affect the

1 jurisdictional rights of the parties, and, of course, that it
2 cuts both ways. And that it also does not state it will control
3 investigations before its signing. And that it was executed after
4 the date of the violations. And, therefore, it does not, in
5 fact, control the case. The fact that a Prosecutor, and, again,
6 I think there was some other facts there that looked at that and
7 said okay I don't want to prosecute now. They are certainly
8 within their view, within their purview of the law doing it. The
9 fact that Mr. Johnson looked at the materials that had any time
10 and decided to prosecute is also within the prosecutor's
11 discretion. I'll leave the rest of it with those issues and
12 certainly counsel can respond. And, frankly, they have also
13 responded in writing as well.

14 THE COURT: Okay. I'll hear you from, Mr. Smith. I
15 don't want to dredge up issues that have already been determined
16 by Judge Svaren. So tell me about that. What did he decide?
17 You made a motion to dismiss it looks like last fall or last
18 winter.

19 MR. SMITH: We filed a motion to dismiss on
20 jurisdictional grounds. If I could just back up a little bit.

21 THE COURT: Sure.

22 MR. SMITH: What happened in Pierce County is a little
23 bit different than the posture of this case. So in Pierce County
24 the State, the Prosecutor's Office was unaware that Fish and
25 Wildlife had entered into an MOU with the Tulalip tribe. The

1 defendants in this case, the main defendants were a Joey Hatch,
2 Senior and Joey Hatch, Junior, they are members of the Tulalip
3 Tribe. They had been prosecuted for the same offenses that are
4 covered in the Fish and Wildlife report by the Tulalip Court. And
5 the MOU typically says that the defendant has been adjudicated in
6 tribal court; then the State isn't going to take jurisdiction
7 over that matter. And so that was one of the big reasons why the
8 Pierce County case was dismissed. Mr. Paul was really not even a
9 main target in that case. He was simply an ancillary player to
10 the Hatches, who were the subject of the all of the enforcement
11 actions going on.

12 This case arises out of the same case number. If the
13 Court were to look at just the Fish and Wildlife case number that
14 case number has been shopped to King County, Pierce County,
15 Snohomish County, and Kitsap County. And I know that because we
16 did a public records request to Fish and Wildlife, and to the
17 counties, and we know exactly the discussion. So there were
18 meetings held with representatives from Fish and Wildlife posted
19 by the King County Prosecutor's Office and other agencies,
20 including the Pierce County Prosecutor's Office. Ultimately
21 everybody but this county decided that they didn't want to
22 prosecute.

23 THE COURT: Okay. Do you want to respond at all, Mr.
24 Galanda?

25 MR. GALANDA: I would just observe for the record that

1 the Tulalip Tribe, and not to re-plow ground (indistinguishable),
2 did write a letter on a government-to-government basis, meaning
3 the chairman of the Tulalip Tribe wrote a letter to this County
4 asking the County to reconsider the charges filed because they
5 believed, the Tribe believed the charges violated the MOU and
6 also the Boldt decision. I will tell you an email from Wendy
7 Willette to Sloan Johnson it was directed as a, quote, unquote
8 "tactic".

9 THE COURT: Is that in the record?

10 MR. GALANDA: No, but I have it to make sure it's
11 available to Your Honor by public record. That was not a tactic.
12 That was a government-to-government move or gesture from one
13 sovereign to the subordinate of another sovereign to ask that
14 subordinate, State of Washington, to reconsider violating the
15 Treaty of 1855. I subserve it to you along the lines of the
16 question to suggest that there has been nefarious political
17 motive by DFW and the detectives to shop these charges to all of
18 those counties, finally resting them here. And I will also tell
19 you that several of those counties responded to DFW saying why
20 don't you prosecute this yourself. You have the power to do that
21 as a Prosecutorial (indistinguishable). So if Your Honor is
22 wondering why didn't DFW bring the charges himself? He shopped
23 it to four other prosecuting offices until it arrived here, then
24 deemed a Tulalip Tribal letter as a tactic.

25 THE COURT: Is there any -- and I know there were certain

1 transcripts and depositions of this one detective or wildlife
2 game officer about this issue?

3 MR. GALANDA: No.

4 THE COURT: About the shopping part, that was just by
5 public record's request?

6 MR. GALANDA: Well, she has admitted to all of the law
7 enforcement agencies that she had shopped charges. There are
8 other charges. She shopped money laundering charges, which were
9 never taken up by anybody. She has shopped charges in Pierce
10 County involving drug possession, which was subject to a motion
11 to dismiss. And then she had shopped any number of so-called
12 trafficking charges to all of those law enforcement agencies.

13 THE COURT: Well, here's what I'm going to do today --
14 anything else, Mr. Norton, for me?

15 MR. NORTON: Your Honor, I guess the only thing I would
16 say and understand I don't know whether counsel meant to suggest
17 that Fish and Wildlife has had the Attorney General's Office
18 prosecute this. I don't know if Fish and Wildlife themselves can
19 prosecute.

20 THE COURT: Well, that wasn't -- my concern is whether
21 it's been shopped and continued to be shopped until they found a
22 county prosecutor to finally file the charges or not.

23 MR. NORTON: My understanding of the law is that the
24 Attorney General's Office would represent the State as to these
25 charges, counsel -- at least that's my review of the statute.

1 MR. GALANDA: Your I stand corrected. I did mean the
2 Attorney General's Office. And Bill Sherman, in particular,
3 Assistant Attorney General on behalf of DFW, was advised by
4 numerous prosecuting attorneys' offices, including King County
5 and Pierce County. At the time this was King County. And that
6 he certainly had the prerogative to bring the charges himself as
7 an Assistant Attorney, so there's no misunderstanding.

8 THE COURT: Well, here's what I can do today in any
9 event, I would like to look at the treaty brief. Maybe it's
10 around the courthouse somewhere. I don't recall seeing it,
11 though, and it hasn't made it into the Odyssey system at least
12 the Judge's edition.

13 Did you see it?

14 THE CLERK: I have it in my edition.

15 THE COURT: You're kidding?

16 THE CLERK: Number 36. It was filed June 11th.

17 THE COURT: Mine only goes to June 6th.

18 In any event I don't recall reading it yet, and I have the
19 judge's system on this Odyssey system, and the Clerk has a
20 different one unfortunately.

21 Here's what I can do today I would allow the State's
22 amendment, proposed amendment to the information. I don't think
23 it's unduly prejudicial, substantially prejudices the defendants'
24 cases. Let's get that out of the way first.

25 There's lots of claims of retaliation by the Department of

1 Fish and Wildlife. Apparently there's a civil action. I don't
2 know if it's still pending or whether it's resolved and that sort
3 of thing. Many of those things I think go to that to make those
4 decisions on it. I think there is sufficient evidence from
5 Torpey at least to go forward on the issue of whether this is
6 just a corporate violation or individuals. I think that's a
7 factual question still left.

8 I am going to suppress the evidence relative to the
9 bait clams with the exception of those fees. I don't know what
10 that does to the State's case, whether that -- the State is going
11 to determine that. I think based upon what I've heard that is un
12 refuted in the record I believe the defendants have been
13 prevented an opportunity to investigate and create relevant
14 defenses in this particular case. And the fact that the
15 information was destroyed prevents them from doing that. And this
16 is solely based upon the record I have, gentlemen. I'm not
17 making any determination, a wide branching determination, that
18 this is inappropriate for law enforcement to dispose of large
19 portions of what they think is of some aspect of a criminal
20 incident of any sort. I think if, you know, burning acres of
21 marijuana is an example as illegal in keeping certain portions of
22 it I think that would be appropriate.

23 In this particular case, however, I think the defendants
24 have shown enough to me in the record that they are prevented
25 from providing and creating a defense and countering the charges

1 against them. I'm not going to dismiss the cases at this point in
2 time.

3 It is troublesome to me about this issue of Fish and
4 Wildlife shopping the prosecution. If somebody wants to
5 additionally brief that issue I'm open to that; that can be noted
6 up. And the issue of the interplay with the tribal rights versus
7 the State regulations you briefed, apparently, Mr. Galanda; I'll
8 take an opportunity to review that again. If there's an
9 additional order that might lead to a dismissal at least of your
10 client or maybe both the defendants in this case I'll take a
11 second look at that too. If anybody wants to additionally brief
12 that and do that within the next couple of weeks I can issue a
13 written order without you folks having to come back again.

14 Mr. Norton, I don't know what this does to the State's
15 position whether they think they can go forward on the case or
16 not. I'll leave that up to you, sir. I can do that ruling.

17 We should have at least on this 3.6 portion, if you will,
18 of the decision today some kind of findings in any event, just an
19 order just in case we need that for future appeal if need be.

20 Mr. Norton, what do you got?

21 MR. NORTON: Well, I guess given the Court is willing to
22 allow the amendment I would propose that being filed in the
23 normal course. I'm going to have to do some serious thinking
24 about ruling number four, suppressing the clams. And I guess the
25 Court would be suppressing all the clams but those retained?

1 THE COURT: Correct.

2 Mr. Smith, any other findings that you need to make from
3 your perspective today?

4 MR. SMITH: No, Your Honor. What I would suggest is that
5 I would collaborate with Mr. Norton and Mr. Galanda's proposed
6 findings and conclusions pursuant to Criminal Rule 3.6 (b) for
7 presentation at a date. Could the Court provide us with a date
8 for presentation right now?

9 THE COURT: No, you guys need to note that up. I
10 wouldn't have my calendar at this point in time, just to do that.
11 If you can circulate an order obviously with everybody's
12 signature you wouldn't have to note it up necessarily. Just send
13 it up and I'll sign it.

14 I'll hold on to the file for another couple weeks in case
15 anybody wants to do any additional briefing. I'll give you time
16 to look at the brief, Mr. Galanda.

17 If someone wants to provide me more information about the
18 issue of shopping. Just my gut reaction that's troublesome, Mr.
19 Norton, for me. Now maybe that's common practice in the
20 prosecutorial world.

21 MR. NORTON: Well, at this point --

22 THE COURT: Well, you are in the inevitable position of
23 not being the one who filed the charges, probably initial
24 discussions which led to those charges being had. If there's
25 more in the record or somebody wants to create more of a record

1 I'd consider that as well.

2 MR. SMITH: I'll try to do that.

3 THE COURT: Let's look at a two-week period of time.

4 MR. SMITH: May I ask a procedural question?

5 THE COURT: You may.

6 MR. SMITH: Would it be appropriate for me to waive
7 formal arraignment on the amended information and ask the Court
8 to enter pleas of not guilty on behalf of Mr. Paul.

9 MR. NORTON: That would be my suggestion at this time. I
10 would like to have the right, as it were, a better information
11 from the Court. I need to have a serious thought about what this
12 ultimately does to what I can do.

13 THE COURT: Yeah, I understand that. But technically we
14 can arraign them today.

15 MR. NORTON: That's what I'm saying. I would rather have
16 the right information.

17 THE COURT: Do you have an order, an advice of rights
18 form? We can probably go through the arraignment if you wanted
19 to today formally with your client.

20 MR. SMITH: Yes. I would prefer to do that right now.

21 THE COURT: We'll fill out an order that they were
22 arraigned today.

23 Mr. Paul, why don't you come forward, sir.

24 Mr. Smith, have you had an opportunity to review with your
25 client the amended information that's now been filed with the

1 Court?

2 MR. SMITH: Yes. Mr. Paul is aware of the amended
3 information and the charges contained therein.

4 THE COURT: Is he aware of the maximum penalties he's
5 facing on each charge?

6 MR. SMITH: Yes.

7 THE COURT: Mr. Paul, what is your full name and date of
8 birth?

9 THE DEFENDANT: Anthony Paul 5-11-78.

10 THE COURT: Sir, have you had a chance to review the
11 contents of the amended information that's now been filed with
12 the Court with your attorney?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Do you have any questions for me about the
15 general nature of the offenses or the penalties that you are
16 facing.

17 THE DEFENDANT: No, I don't.

18 THE COURT: We're going to note for the record not
19 guilty pleas to each, Count I through V. You're entitled to the
20 same Constitutional Rights you would have been advised of when
21 you were arraigned on the initial information. Do you have any
22 questions about how those rights would apply to you regarding
23 these charges?

24 THE DEFENDANT: No, Your Honor.

25 THE COURT: So, Mr. Norton, do you have a form order that

1 we can note and set further dates?

2 MR. NORTON: Your Honor, I apologize to the Court. I
3 didn't bring either of those with me today. I normally have a
4 stack of them. And maybe given what the Court has mentioned, Your
5 Honor, maybe counsel and I could put together an order that notes
6 that he was arraigned on the amended information.

7 THE COURT: You can actually run across and get your --
8 once I'm done here, can't you run and get a form at your
9 office --

10 MR. NORTON: Oh, certainly.

11 THE COURT: -- and bring it back while they are here and
12 they can sign it. All we need to note is the arraignment. I
13 think we have previously set dates already for trial confirmation
14 and the like, if the case is ongoing after today.

15 MR. NORTON: Right. The concern that I have is I know
16 counsel wants to put together the findings, and that's obviously
17 very appropriate, Your Honor. We have the 28th for an omnibus
18 hearing. And if the findings are all agreed that's pretty
19 straightforward. But if it's not that would be a lousy thing to
20 do on a Friday.

21 THE COURT: Let's do this. Let's arraign Mr. Shopbell
22 before we forget that process. Then we can fill out the other
23 details.

24 What's your full name, sir?

25 THE DEFENDANT: Stephen Graham Shopbell.

1 THE COURT: Is your date of birth May 17th, 1981?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: The State has filed an amended information
4 with the Court and the Court Clerk charging you with Counts I
5 through V. Have you had an opportunity to review a copy of that
6 document with your attorney?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: Do you understand the charges against you?

9 THE DEFENDANT: Yes.

10 THE COURT: And the maximum penalties you are facing on
11 each count?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: You are entitled to all those rights that you
14 would have been advised of when you were initially arraigned on
15 the initial charges, those same rights that apply to you on the
16 amended information. Any questions about those rights?

17 THE DEFENDANT: No, Your Honor.

18 THE COURT: We'll enter pleas of not guilty on Counts I
19 through V as well. Those will be filed with the Court. We have
20 some previous dates.

21 Mr. Norton, I'm going to urge you at this point in time --
22 we're going to take a short break, folks, instead of having you
23 come back and circulate. I'd like to, before you go today, just
24 confirm, even check box order that they were arraigned today and
25 confirm the next date. What I would do, we should probably still

1 obviously have written findings from at least today's hearing and
2 any future hearings. Though it may be appropriate for you
3 depending on your timing of your evaluation of the case of where
4 it goes from now before much more work is put in on everybody's
5 behalf. But I'll leave that up for you folks to decide that.
6 I'll be down in my Chambers. If you folks, once you come up with
7 this order as far as the arraignment today, you can call me back
8 if we need to go on the record. We can do that or just sign that
9 in Chambers as well and get copies to each defendant.

10 MR. GALANDA: In case you are not back on the bench on
11 this today, Your Honor, the matter of the treaty argument that
12 would be brought forward in the event of another hearing?

13 THE COURT: You can bring that now if you want.

14 MR. GALANDA: Well, I've already briefed it twice. I
15 suppose Mr. Norton would like an opportunity to brief it as well.
16 But I just want to know at what point the finish line would be.

17 THE COURT: Well, I was intending instead of you folks
18 coming back out give everybody a couple more weeks to respond to
19 that, give me a chance to review it. Then I can do that on --
20 which date is the next date?

21 MR. NORTON: June 28th is the next scheduled hearing,
22 Your Honor.

23 THE COURT: If I haven't issued a written ruling then on
24 that date I can give a determination too, if I haven't prior to
25 that time.

1 MR. GALANDA: That's what I was looking to. Thank you,
2 Your Honor.

3 THE COURT: Okay. So I'll be down in Chambers, Mr.
4 Morales.

5 Mr. Norton, if you could hustle across the parking lot and
6 grab that order for these gentlemen, I don't want them to have to
7 come back, that would be helpful. The Court Clerk would love
8 that too to have a court order before everybody goes. So you
9 folks can wait around a few more minutes we can get that taken
10 care. Okay. Thank you.

11
12 **(PROCEEDINGS ENDING AT 2:25 P.M.)**
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF WASHINGTON)
) ss: C E R T I F I C A T E
COUNTY OF SKAGIT)

I, JENNIFER CHRISTINE POLLINO, Official Court Reporter in and for the County of Skagit do hereby certify;

That the foregoing is a true and correct transcript of the proceedings held on _____.

Witness my hand on this _____ day of _____, 2019.

JENNIFER C. POLLINO, WA CCR #2221, RPR
Official Court Reporter