

No. 80215-1- I consolidated with 80216-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Appellant

v.

HAZEN GRAHAM SHOPBELL

And

ANTHONY EDWIN PAUL
Respondents.

BRIEF OF RESPONDENTS

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I. STATEMENT OF THE CASE

Paul and Shopbell owned Puget Sound Seafoods Distributors [PSSD]. They have alleged in their pleadings and in other litigation that because they are Native American, they have been targeted by other interests in the fishing industry. They alleged these charges arose out of racial animus by non-native fisherman and by a Department of Fish and Wildlife who have sided with the non-native interests. CP 311-332.

The charges resulted from an investigation led by Detective Wendy Willette of the Washington State Department of Fish and Wildlife [WDFW]. Willette had been investigating an (unnamed) crab poacher. Upon his arrest, the crab poacher told WDFW agents he sold his illegally harvested crab to PSSD. Agents also located a former PSSD employee who told them he had made the illegal purchase on behalf of PSSD on May 23, 2015.

Because of this information Willette obtained a search warrant for PSSD's financial records. In Willette's view, the financial records indicated additional violations of state fish regulations. Based upon her review, Detective Willett sought and received over 30 search warrants, including for the offices of PSSD and the homes of Shopbell and Paul.

On Monday, June 13, 2016, the warrants were served. This was just as Paul and Shopbell were preparing for the opening of the 2016 crab

fishing season. Detective Willette briefed other agents and told them that if Paul and Shopbell were located, they should be detained and questioned. During the search of Paul's home, the agents asked for access to Paul's safe. When Paul refused, the agents took the safe back to their offices and sawed it open. It appears the seized safe contained \$43,000 in currency, jewelry and lawfully possessed firearms. CP 52-54.¹

That same day both Paul and Shopbell were detained and arrested by WDFW agents at the Everett Marina without a warrant or probable cause. As Paul and Shopbell were being transported to another location for questioning, high level WDFW supervisors advised the arresting officers that "the suspects were to be advised that their interviews were strictly voluntary and that if they chose not to be interviewed" they would be returned to the marina and released. Both Paul and Shopbell refused to be interviewed. They were detained but released before being booked into jail. The record does not reveal the basis for their arrest that day. CP 38.

On June 22, 2016, WDFW served Paul with a notice of forfeiture of items seized from his home CP 52-54. The Notice was signed by Detective Willette. It cited RCW 64.50.505 – the controlled substances

¹ For clarity the respondents have cited to the comprehensive Clerk's Papers filed under Mr. Paul's case numbers.

statute as the basis for the forfeiture. *Id.* The Notice gave Paul 45 days to seek a hearing on WDFW's intent to take Paul's property. *Id.*

Rather than waiting on the forfeiture proceedings, on July 29, 2016, Paul and Shopbell filed a Complaint for Replevin and Return of Property seized during the searches in Thurston County Superior County. Paul CP 41-46. Because Shopbell's home was on tribal land, he filed a similar action in the Tulalip Tribal court. After these actions were filed, the WDFW determined it did not have a legal basis to retain some of the personal property seized by their agents and voluntarily returned those items to Paul and Shopbell. CP 46.

On August 12, 2016, WDFW agents interviewed Jamie Torpey, a former fish buyer for PSSD. Agents reviewed various records of clam purchases with her. She confirmed that she bought the clams from Tulalip tribal members. The clams were intended for use as bait. According to Torpey the clams were not dyed – a requirement for bait clams. See WAC 246-282-036. Torpey told Agent Willette that PSSD stored frozen clams at Marine View Cold Storage in Burlington, WA. CP 391.

Willette went to Marine View Cold Storage on August 15, 2016 and asserted that she had authority under RCW 77.15.096 to review the storage records for PSSD. According to her those records revealed that PSSD had clams stored there. At Marine View, Willette examined

PSSD's shipping and receiving reports. She examined totes and plastic bags belonging to PSSD. In her report she stated:

Only three totes appeared to contain clams. The clams I saw were placed in black plastic garbage bags or just loosely sitting inside the totes on top of other bait products. ... The clams I saw appeared to be butter clams and horse clams.

CP 392.

Based upon this observation, Willette stated that "none of it met the requirements for legal sale." She asked Marine View Cold Storage to "put a hold on the clams." *Id.*

In a later statement Willette said that she understood that the clams had been purchased by Swinomish tribal members. CP 211. She stated that the clams were harvested within the Swinomish "usual and customary" fishing areas. CP 212. She also admitted that her information established that the destroyed clams were for bait. *Id.*

After Willette left Marine View, Paul arrived to pick up the clams. Marine View informed him that Willette had placed a hold on the clams. Shortly thereafter Willette learned that Paul had attempted to retrieve his property. Willette also learned that Paul and Shopbell had served a subpoena on Marine View seeking copies of documents from them.

I received notification from Marine View Cold Storage that Anthony PAUL had attempted to retrieve the bait stored at their location the same evening I had placed a hold on the

product earlier in the day, 08/15/16. Marine View Cold Storage staff advised PAUL that WDFW had placed a hold on the bait. Tracey Isaac, Marine View Cold Storage's Human Resources Supervisor, forwarded me the first page of a subpoena for records in a civil case against WDFW from PAUL and SHOPBELL that she had received from them on 08/29/15. Isaac advised me that she sent all the requested records to Paul and Shopbell's attorney the same day.

CP 481-482.

On August 19, 2016, Detective Willette asked Child Protective Services to investigate the status and safety of Paul's minor children. A CPS worker arrived at Paul's residence and investigated. The record does not reveal any basis for Willette's referral. CP 126-129, 200.

That same week Paul was informed that WDFW had submitted a report to the Washington Department of Finance alleging the PSSD had failed to pay over \$6.5 million in state taxes. Paul disputed this allegation because the revenue was generated from exercising tribal fishing rights. Because the Tulalip tribe is a sovereign nation, tribal fishers are not subject to state tax statutes. CP 180-83.

On August 22, 2018, WDFW agents return to Marine Cold Storage without a warrant and seized 1,180 pounds of bait clams. Willette affirmatively stated in one of her search warrants she knew PSSD sells bait to fishermen. CP 177-78. The agents took pictures, kept 15 clams and destroy the rest. Before destruction the clams were commingled and

no record was kept of the species involved - horse, butter or cockle. There were also other types of frozen bait commingled with the clams. The clams were not inventoried. The pictures of seizure reveal that officers used tools such as sledge hammers to break up the frozen clams. The clams, but for the 15 saved, were destroyed at the Skagit County dump. Nothing in the WDFW reports indicate that the officers examined the frozen clams to determine if any were dyed. The pictures of the seizure suggest that not all of the plastic bags were opened. CP 484-515.

On August 16, 2016, Paul's lawyer wrote to WDFW and complained of the seizure. CP 193-94. The AG later responded and asserted that the seizure and destruction if the shellfish was permissible under RCW 69.30.020. CP 202.

On September 16, 2016, the AG for WDFW sent Paul a letter affirming the department's destruction of the clams.

That same day, Paul and Shopbell filed a request for a restraining or against the WDFW alleging retaliation and harassment in Thurston County Superior Court. CP 143-52.

In a later deposition Detective Willette stated that beginning in May 2016, she served 31 or 32 warrants for property, telephones records financial and bookkeeping services related to PSSD, Paul and Shopbell. CP 208-09, 373-74. The service of the search warrants on the defendants'

financial institutions caused those banks to close the accounts defendant's bank accounts. CP 319, CP 352-357.

Detective Willette submitted her investigation the Attorney General and the Pierce, King and Snohomish County prosecutors. All four agencies declined to prosecute. CP 219. Eventually Skagit County agreed to file the case.

Skagit County charged Shopbell and Paul with two counts of taking shellfish worth more than \$250.00 without a proper license, during a closed season or in violation of tribal law, in violation of RCW 77.13.630(2), Counts 1 & 2. Both counts were alleged to have occurred between December 28, 2015 and January 11, 2016. In addition, Paul and Shopbell were charged with three counts of unlawful shellfish trafficking in violation of RCW 77.15.260(1), Counts 3-5, all alleged to have occurred between February 11, 2016 and May 9, 2016. CP527-29.

The destroyed clams were the basis for the five criminal counts. CP 297. The State affirmatively represented that it intended to proceed using the total weight of clams weighted by WDFW, not just on the weight and value of the 15 clams preserved by the State.

Paul and Shopbell filed a motion and supplemental briefing arguing that all five counts should be dismissed on various grounds. Relevant here was the defense motion to dismiss because the State

illegally seized and destroyed the clams. RP 3-379, 404-526. Because the trial judge granted the defense motion on that basis and that ruling was dispositive of the charges, the judge did not need to decide the other issues. CP 530 -533.

In their successful motion, the defense argued that by destroying the clams the State had deprived them of exculpatory evidence. As a preliminary matter, the Paul and Shopbell argued WDFW had no authority to seize and destroy the clams without a warrant or other order from a court. They pointed out this illegal destruction deprived them of material exculpatory evidence in several ways.

First, the WDFW weighed the clams while they were covered in ice. And, the pictures reveal that other bait, including squid, mackerel and a piece of red meat were also included in the materials weighted. Thus, the defense could not refute the allegation that the destroyed clams were worth more than \$250 because the value of the clams depended upon an accurate calculation of their weight without the ice encasing them.

Second, because the WDFW had not thawed the clams before destroying them, the defense could not distinguish the variety of clams included. And the WDFW had not recorded the species destroyed – horse, butter or cockle. This information would have allowed the defense to compare the species of clam seized that day with the Treaty Shellfish

Receiving Tickets to determine where and when particular clams were harvested. The re-sorting and comingling of the bait clams by WDFW officers destroyed Mr. Paul's ability to do the tracing necessary to advance his defense that the bait clams were legally harvested under tribal rules and regulations, or where purchased by others and given to PSSD.

Counsel stated:

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

RP 58.

The Court asked why the clams were needed to determine if the clams were lawfully harvested. RP 63-64. Defense counsel explained:

So, it would have been by species. So, my surmise would be that if we had fish tickets for Cockle clams and we can say okay they bought Cockle clams from the Swinomish Tribe. Here's the weight. We add them all up, we go and separate all the clams by species and say, okay, this weight comes close to the amount of total weight on the fish receiving tickets for Cockle clams. Okay. We know where those came from. All right. Let's go to the Butter clams. Let's figure out where Butter clams come from. And then

we could have gone back and asked the tribal harvesters. You know, okay, like back in 2016 when you were harvesting Butter clams where would you go?

Then I assume they would be able to tell us oh, yeah, Butter clams grew here at this beach. And we harvested them this way because it was legal under our tribe regulation to do that. We could even call witnesses from the tribe to say oh, yeah, yeah that's totally appropriate. But we can't do that because we have no idea how many Cockle clams were in those totes. We have no idea how many butter clams. We have no idea the other species of clams that were in the totes that got destroyed. We really have no way to show in a concrete way. These came from here. This is how they were harvested. This is why it was appropriate and legal to do it that way.

RP 64-65.

Third the defense pointed out, while the WDFW had taken pictures of their destruction of the clams, the officers involved had removed the clams from their packaging in cold storage and commingled the groups. CP 483-515. By commingling the clams and failing to record the species, WDFW officers further destroyed the defendants ability to advance their defense there were bait clams harvested by members of the sovereign Tulalip tribe consistent with the tribal rules and regulations and, thus, were exempt from WDFW rules and regulations. Because these bait clams had been harvested from various locations, including the usual and customary Swinomish or Tulalip shellfish harvesting areas where tribal law does not require clams to be dyed, that the clams were collected, mixed, and

destroyed made it more difficult to show these clams were harvested legally under tribal law.

The trial court orally ruled:

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

In this particular case, however, I think the defendants have shown enough to me in the record that they are prevented from providing and creating a defense and countering the charges against them. I'm not going to dismiss the cases at this point in time.

It is troublesome to me about this issue of Fish and Wildlife shopping the prosecution. If somebody wants to additionally brief that issue I'm open to that; that can be noted up. And the issue of the interplay with the tribal rights versus the State regulations you briefed, apparently, Mr. Galanda; I'll take an opportunity to review that again.

If there's an additional order that might lead to a dismissal at least of your client or maybe both the defendants in this case I'll 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.

RP 79-81. This oral ruling was reduced to findings of fact and conclusions of law. CP 530-33.

The State appealed. CP 534-39.

II. RESPONSE ARGUMENT

A. LEGAL PRINCIPLES

The constitutional right to due process demands fundamental fairness and a meaningful opportunity to present a complete defense. *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994) (citing *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 S.Ed.2d 413 (1984)). Defendants have a right to have material evidence preserved for use at trial. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Two Supreme Court cases, *California v. Trombetta*, supra, and *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), control the issue. *Trombetta* concerned a driving under the influence case involving two drivers. The *Trombetta* court found that although breath samples taken from the defendant had not been preserved, the test results were nonetheless admissible. The court rejected the defendant's argument that the state had a duty to retain the samples for several reasons. The police officers were acting in good faith and according to normal procedure, the chance the samples would have been

exculpatory were slim, and the defendants had other means to prove their innocence. *Trombetta*, supra, 467 U.S. at pp. 488–490, 104 S.Ct. 2528.

“Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect’s defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value apparent before the evidence was destroyed, and be of such a nature that the defendant could not obtain comparable evidence by other reasonably available means.” *Id.* at 488–489, fn. omitted.

Youngblood explains the requirements for demonstrating a due process violation based on failing to retain evidence under somewhat different circumstances. *Youngblood* was a sexual assault case in which the state had failed to properly preserve fluid samples from the victim’s clothing and body. Unlike the situation in *Trombetta*, where the evidence was destroyed after all testing was complete, in *Youngblood*, only limited testing was initially performed to determine whether sexual contact had occurred. *Youngblood*, supra, 488 U.S. at p. 53, 109 S.Ct. 333. By the time more rigorous testing was attempted, it was no longer possible, because the victim’s clothing had been improperly refrigerated. *Id.* at p. 54, 109 S.Ct. 333. The defendant’s principal argument was mistaken identity, and he argued that if the victim’s clothing had been properly

preserved, the physical evidence might have exonerated him. The defendant was found guilty, and ultimately, the Supreme Court upheld the conviction.

The court stated: “The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” *Youngblood*, supra at 57. As explained in *Trombetta*, the court noted the problematic nature of determining the materiality of permanently lost evidence. The court also declined to impose on the police an absolute duty to retain and preserve anything that might possibly have some significance. *Id.* at p. 58, 109 S.Ct. 333.

Accordingly;

We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police’s obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve

potentially useful evidence does not constitute a denial of due process of law.

Youngblood supra at 58. The Court held, at worst, the conduct of the police in *Youngblood* could be characterized as negligent.

Thus, there is a distinction between *Trombetta*'s "exculpatory value that was apparent" criteria and the standard in *Youngblood* for "potentially useful" evidence. If the higher standard of apparent exculpatory value is met, the motion is granted in the defendant's favor. But if the best that can be said of the evidence is that it was "potentially useful," the defendant must also establish bad faith by the police or prosecution.

The Supreme Court applied *the Youngblood* test again in *Illinois v. Fisher* 540 U.S. 544, 124 S.Ct. 1200, 157 L.Ed.2d 1060 (2004). This evidence was a substance tested four times and had been determined to be cocaine. The defendant remained a fugitive for over 10 years, and by the time he was arrested and prosecuted, the evidence had been destroyed and could not be retested. "At most, respondent could hope that, had the evidence been preserved, a fifth test conducted on the substance would have exonerated him." *Id.* at 548. "[T]he applicability of the bad-faith requirement in *Youngblood* depended not on the centrality of the contested evidence to the prosecution's case or the defendant's defense, but on the

distinction between ‘material exculpatory’ evidence and ‘potentially useful’ evidence” and therefore *Youngblood’s* bad-faith requirement applies. *Id.* at 549.

Both the trial judge and the State appear to have conflated the two tests. Although not clear, the trial judge found that the destruction of the evidence met both the *Trombetta* and the *Youngblood* tests. For clarity, Paul and Shopbell use the following analytical approach to the issues. First, they will analyze whether the exculpatory value of the evidence was apparent to the WDFW under *Trombetta*. Second, they will discuss whether the evidence was “potentially useful” under *Youngblood* and whether the failure to retain it was bad faith?

B. THE DESTROYED CLAMS WERE MATERIALLY EXCLUPATORY.

The parties agree that the test under *Trombetta* is whether the clams possessed an exculpatory value apparent before the evidence was destroyed, and that Paul and Shopbell could not obtain comparable evidence by other reasonably available means. The State does not reference the elements of the charged crimes. But this Court cannot apply the *Trombetta* test without first examining the elements of the charged offenses.

As to Counts 1 and 2, RCW 77.15.630(2) provides that:

A person is guilty of unlawful fish and shellfish catch accounting in the first degree if the person commits an act described by subsection (1) of this section and:

- (a) The violation involves fish or shellfish worth two hundred fifty dollars or more;
- (b) The person acted with knowledge that the fish or shellfish were taken from a closed area, at a closed time, or by a person not licensed to take such fish or shellfish for commercial purposes; or
- (c) The person acted with knowledge that the fish or shellfish were taken in violation of any tribal law.

As to Counts 3 to 5, RCW 77.15.260(1) provides that

A person is guilty of unlawful trafficking in fish, shellfish, or wildlife in the second degree if the person traffics in fish, shellfish, or wildlife with a wholesale value of less than two hundred fifty dollars and:

- (a) The fish, shellfish, or wildlife is classified as game, food fish, shellfish, game fish, or protected wildlife and the trafficking is not authorized by statute or department rule; or
- (b) The fish, shellfish, or wildlife is unclassified and the trafficking violates any department rule.

RCW 77.08.010(60) says: “Trafficking” means “offering, attempting to engage, or engaging in sale, barter, or purchase of fish, shellfish, wildlife, or deleterious exotic wildlife.”

The Amended Information does not state which tribal law or statute or department rule Paul and Shopbell violated under these two charges. But there are dozens of department rules regarding the shellfish.

See generally WAC 220. The rules begin with listing many species of shellfish covered by the WAC's. WAC 220-320.010, There are different rules for commercially harvested shellfish, WAC 220-340 and shellfish harvested for personal use, WAC 220-320. Because the Amended Information was not specific as to underlying violations, Paul and Shopbell had to be prepared to demonstrate that the clams seized and destroyed were taken in a manner that complied with this welter of state and tribal regulations.

The State first argues that it is not a valid defense to claim that the clams were legally harvested on tribal land and, as a result, no fish ticket is required. AOB at 12. But the trial judge gave the State additional time to argue this point in the trial court. RP 533. The State did not accept that invitation.

In making the argument now, the State cites to a tribal code provision, a consent decree and a posting on a website. But these citations are irrelevant. The defendants' argument was the State has no jurisdiction over them for clams harvested by tribal fishermen on tribal land.

RCW 37.12.010 provides that:

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd

Congress, 1st Session), *but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked,*

It is the State's burden to establish that jurisdiction is appropriate in state court rather than tribal court. *State v. Squally*, 132 Wash. 2d 333, 340, 937 P.2d 1069, 1072 (1997). The prior cases regarding tribal jurisdiction clarify that this is a complex question. See e.g. *State v. Shale*, 182 Wash. 2d 882, 884, 345 P.3d 776, 777 (2015); *State v. Boyd*, 109 Wash. App. 244, 251, 34 P.3d 912, 915 (2001), *State v. L.J.M.*, 29 Wash. 2d 386, 918 P.2d 898 (1996).²

Thus, it was vitally important that the defendants had the seized clams, sorted by specie to defend against the state's assertion of jurisdiction. The search warrant affidavit drafted by WDFW Detective Willette demonstrates how determine painstaking it is to match the stored clams to the harvester or seller, the complexity of fish ticket accounting and the need to document where the shellfish were harvested. CP 72 -83. She lists out each transaction regarding PSSD on a spread sheet and matches payments, species and amount paid. By doing so she could match

² The State suggests that it was the defendants' burden to prove they were not subject to state jurisdiction. See e.g. Assignment of Error 1, AOB 3. This is incorrect.

certain shellfish with the harvester. CP 81. And, the identity of the harvester could establish that the State had no jurisdiction to prosecute the defendants.

The State also argues that agents of WDFW would not immediately recognize that the species, weight, location of harvest and methods of identifying where, when and by whom the clams were harvested would be material and exculpatory to any charges brought against Paul and Shopbell. This argument is foreclosed because the WDFW agents are trained on the complexities of the Fish and Wildlife regulations in this state which depend upon the season, species, season and location of the shellfish harvested. Again, Detective Willette's various written documents clarify that she is highly trained on the WDFW statutes and regulations and the relationship between tribal and state jurisdiction.

The State also appears to dispute that the defendants' cannot obtain comparable evidence by other reasonably available means. It appears that, in the State's view, the opportunity for cross-examination is "comparable evidence." See AOB at 14. But the State fails to cite any case that holds that the availability of cross examination *alone* cures any *Trombetta* issue. And, it is easy to understand why. If cross examination cured all *Trombetta* issues then there would never be a basis for reversal when the

state destroyed evidence. Every defendant has the right to cross-examination.

Further, it is unclear how the WDFW agents could know where the clams were harvested, whether the sellers were tribal members or the weight of the clams without ice. Thus, cross-examination would be futile. See e.g. *United States v. Zaragoza-Moreira*, 780 F.3d 971, 981–82 (9th Cir. 2015). Moreover, the State made it clear that the WDFW officers did not believe that any of information would establish a defense so cross-examination would be futile on that basis. *United States v. Cooper*, 983 F.2d 928, 932 (9th Cir. 1993)(General testimony about the possible nature of the destroyed equipment would be an inadequate substitute for testimony informed by its examination.); see also *United States v. Sivilla*, 714 F.3d 1168, 1174 (9th Cir. 2013)(“Photographs are inadequate because they are pixelated and difficult to decipher. Any expert witness presented only with the photographs would have concluded that next to nothing could be determined from them.”)

This Court should reject the State’s argument that the destroyed clams were material and exculpatory and uphold the trial court’s decision.

C. THE WDFW AGENTS ACTED IN BAD FAITH.

As to the *Youngblood* case, the trial court found that the clams were also potentially useful but did not make a finding of bad faith. This

Court, however, may affirm a trial court decision on any basis supported by the evidence and the record. *State v. Rafay*, 167 Wash.2d 644, 655, 222 P.3d 86 (2009). Here the record is replete with bad faith.

Our Supreme Court has not set out a test for what constitutes “bad faith.” In *Wittenbarger* the Court rejected the defendant’s bad faith claim by relying on the police having specific protocols to preserve breath samples from an alcohol breath testing device. The Court appeared to conclude that “bad faith” is precluded when the police have protocols in place and follow them. See also *State v. Groth*, 163 Wash. App. 548, 559, 261 P.3d 183, 190 (2011)

Here the “established procedure” are the state statutes that regulate WFWD. WDFW claimed it had the authority to do so to seize under RCW 69.30.050. It is true that the statute does permit the seizure and destruction of clams. But RCW Title 69 regulates food and drugs for human consumption. For example, Chapter 69.30 is preceded by chapters regulating eggs, RCW 69.25 and honey, RCW 69.28. Agent Willette knew these were bait clams and described them as such in her police reports. Thus, the statute did not apply to bait clams.³

³ The reason that statute permits the destruction of clams for human consumption and not bait clams is apparent. Clams intended for human consumption pose a clear danger to the

And that chapter has its own criminal penalties. RCW 69.30.140 states : “Except as provided in RCW 69.30.085(4), any person convicted of violating any of the provisions of this chapter shall be guilty of a gross misdemeanor.” Paul and Shopbell were not charged with violations of that chapter. The WDFW should not be permitted to pick and choose whether the clams were for human consumption or bait whenever it is more convenient for their case. If they want to rely on RCW 69.30.050 to justify the destruction of the clams, they should be limited to charging the gross misdemeanor set forth in the same chapter.

RCW 77.15.070 permits officers to

seize without warrant boats, airplanes, vehicles, motorized implements, conveyances, gear, appliances, or other articles they have probable cause to believe have been held with intent to violate or used in violation of this title or rule of the commission or director. However, fish and wildlife officers or ex officio fish and wildlife officers may not seize any item or article, other than for evidence, if under the circumstances, it is reasonable to conclude that the violation was inadvertent. The property seized is subject to forfeiture to the state under this section regardless of ownership. Property seized may be recovered by its owner by depositing with the department or into court a cash bond or equivalent security equal to the value of the seized property but not more than one hundred thousand dollars. Such cash bond or security is subject to forfeiture in lieu of the property. Forfeiture of property seized under this

public and need to be removed from the food chain immediately. The same is not true for bait clams.

section is a civil forfeiture against property and is intended to be a remedial civil sanction.

But nothing in the statute permits officers to destroy the items they have seized. The statute describes the proper procedure for forfeiture at length. The agents cannot claim they were unaware of proper forfeiture procedures because they gave notice of forfeiture as to the items seized from Paul's residence.

That seizure and destruction of the clams was not permitted under the statutes in effect in 2016 is further evidenced by the Legislature's amendment of RCW 77.15.100. See 2020 Wash. Legis. Serv. Ch. 38 (S.H.B. 2571) (WEST).⁴ The statute was amended to state:

Seized fish, shellfish, and wildlife may be returned to the environment or otherwise safely disposed of if storage is not practical under the circumstances, after the evidentiary value of the seized fish, shellfish, or wildlife has been preserved through photographs, measurements, biological samples, or other reasonable means. If an exculpatory value is clearly apparent in the seized fish, shellfish, or wildlife, and the exculpatory value is not otherwise reasonably obtainable, the fish, shellfish, or wildlife should be retained.

This statutory amendment provides of disposal only after careful consideration of the items exculpatory value and only if storage is not practical.

⁴ It is unclear whether this amendment was sought by WDFW in response to the suppression of the evidence in this case.

Opinions from other courts add additional criteria to the bad faith analysis. The actions of the WDFW meet all of the bad faith criteria examined in those cases. For example the Tenth Circuit Court of Appeals lists five factors courts should consider when determining bad faith: (1) whether the police were on notice that the defendant believed the evidence was exculpatory; (2) whether the defendant's belief that the evidence was exculpatory is corroborated by objective independent evidence; (3) whether the government was in control of the disposition of the evidence at the time they were provided notice of its exculpatory value; (4) whether the destroyed evidence was central to the case; and (5) whether the government offered an innocent explanation for the destruction of evidence. *United States v. Beckstead*, 500 F.3d 1154, 1159-61 (10th Cir. 2007).

Of particular importance is the issue of notice. WDFW was on notice that Paul and Shopbell wanted their property preserved and returned to them. WDFW agents destroyed the clams after learning that Paul had tried to retrieve them from storage. WDFW also knew that Paul and Shopbell immediately began legal proceedings and notified the AG of their objection to the seizure of the clams. See *United States v. Zaragoza-Moreira*, 780 F.3d 971, 981-82 (9th Cir. 2015)(The Government's

destruction of the evidence after receiving a discovery demand was “particularly disturbing.”).

The actions of the WDFW here meet the remaining criteria of the Tenth Circuit’s test. The defendants’ belief that the clams were exculpatory is corroborated by the fact that the specie of clam and the location of the harvest are critical to determining state court jurisdiction. The state had complete control of the clams when they were destroyed. Detective Willette had placed a hold on the clams at the storage facility. And she knew that the storage facility was honoring her order to hold the clams. There is no dispute the clams were the basis of the case against Paul and Shopbell. WDFW has not offered any innocent explanation for their destruction of the evidence.

Other courts have applied additional factors, such as the ease with which the evidence could have been saved, *United States v. Yevakpor*, 419 F. Supp. 2d 242, 247 (N.D.N.Y. 2006), whether the government delayed in responding to the defendant's requests to access the evidence, *United States v. Bohl*, 25 F.3d 904, 911-13 (10th Cir. 1994), whether the government disregarded established policies, *United States v. Elliott*, 83 F. Supp. 2d 637, 650 (E.D. Va. 1999), and whether the government selectively chose which portions of the evidence to keep and destroy, *Yevakpor*, 419 F. Supp. 2d at 251-52.

Again, the actions of the WDFW fit all of these criteria. There were not statutes or protocols permitting the destruction of the clams. The clams could have easily been maintained at Marine View Cold Storage. The Government did not delay in responding to the defendant's request for access to the clams. But the agents did act to destroy the evidence as soon as they knew Paul had been to the storage facility. And, the WDFW agents selected the small portion of the clams to retain before destroying the rest.

Detective Willette also knew that she could apply for a search warrant, without notice to the defendants, and seize the clams. She apparently also understood she could not destroy them without going through the forfeiture process. See RCW 77.15.070. But her actions suggest that she wanted to avoid having to make her case for forfeiture. Willette acknowledged the clams were bait and not for human consumption. Thus, there were no exigent circumstances that would necessitate their immediate destruction.

Detective Willette's attitude and disrespect for Paul and Shopbell's constitutional rights also support a finding of bad faith. She arranged for the arrest of Paul and Shopbell without a warrant or probable cause on the opening day of crab season. She improperly seized other property and attempted to forfeit it. She filed a baseless report of the Paul family to

CPS. She filed a baseless report to the Department of Revenue. And she was relentless in her quest to find a county willing to file charges. These actions go far beyond the actions that in bad faith findings in any of the cases cited above.

III. CONCLUSION

This Court should affirm the trial court and dismiss the State's appeal.

DATED this 27th day of May, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the date listed below, I served by First Class

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