IN THE TRIAL COURTS FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs

JOSEPH HAZELWOOD,

Defendant.

No. 3AN 89-7217; 3AN 89-7218

OMNIBUS HEARING
DECEMBER 13, 1989
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BEFORE THE HONORABLE KARL JOHNSTONE
Superior Court Judge

Anchorage, Alaska
December 13, 1989
8:45 a.m.

APPEARANCES:

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EXHIBIT INDEX

PROCEEDINGS

DECEMBER 13, 1989

(Tape: C-3528)

(1808)

THE CLERK: ...presiding, is now in session.

THE COURT: Be seated. Are we ready to proceed to the next motion or is there something else we need to take up now with the other motions?

MR. MADSON: Your Honor, before we argue the next motion, while we were still discussing the motion we had yesterday, the motion to suppress, there's some material I'd like to have marked and filed, for the record, if I could, please?

Two items. One, we are not going to present Captain Hazelwood; he will not be testifying. But, in lieu of that, Your Honor, I know what the court said yesterday, but for the record, I still have an affidavit to present, and I'd like to have made part of the record.

THE CLERK: That would be Defendant's Exhibit S.

THE COURT: May I see it, please? (Pause) Mr. Linton was conducting the state's portion of the motion yesterday and I'm not sure what the position of the state is, if they still want to maintain some

distance, pending a petition for review of this court's review decision on the immunity issue between Mr. Linton and trial counsel, who are in court today, Mr. Cole and Mr. Adams.

I have no objection to calling Mr. Linton up, have him come up and review these documents, rather than having trial counsel up here. I take it you don't have a copy of them yet?

MR. COLE: I don't have a copy.

MR. MADSON: Your Honor, because of that issue the court just raised, I did not furnish a copy. I didn't know if that was the case. In talking to Mr. Linton yesterday, I believe the court's suggestion is correct. I think that's at least the plan I was told, that he is still going to maintain his initial approach to this case. So I did not give Mr. Cole a copy of this. I did give him, however, a copy of a case, and I do have some others I'd like to cite to the court.

THE COURT: Why don't we wait until we get Mr. Linton over here before we go any further on this issue. I don't know what Exhibit T is, but it sounds like it's something that has to do with a sensitive matter, and I think we'd better just get Mr. Linton here.

Why don't we go off the record a moment?

MR. COLE: I'll call him, if you like.

THE COURT: We can call him right here. Yes, we'll go off the record.

(Off record - 8:50 a.m.)

(On record - 8:55 a.m.)

THE COURT: Yes, while we were off record, Mr. Purden called Mr. Linton. It took a few minutes to get a hold of him and Mr. Linton indicated he'd be right over, so we'll just stay here on the record and wait for him.

MR. MADSON: I owe an apology, Your Honor. He was here initially and I told him we were not calling Captain Hazelwood, so he left. He felt -- obviously, he felt he was free to leave.

THE COURT: No harm. (Pause) Mr. Linton has just arrived. Mr. Cole and Mr. Adams, if you want to step outside?

(Pause)

Mr. Linton, defendant has marked for identification Exhibits S and T, which I have before me. If you want to come up here and take a look at them?

MR. LINTON: Yes, sir.

THE COURT: They refer to yesterday's motion.

I'm not sure what Exhibit T refers to. You'll have to clear us up on that.

MR. MADSON: The same thing, Your Honor. Now that Mr. Linton's here, I will. I didn't want to discuss it, of course, in his absence.

THE COURT: It's an affidavit of Captain Hazelwood, referring to his alleged knowledge of the agency's bulletin and other information pertaining to pilotage.

And what is Exhibit T? It looks like it's a transcript from Delozier?

MR. MADSON: Yes, Your Honor. That's a transcript -- part of a transcript, the testimony of Mark Delozier at the NTSB hearing. The reason I ask this be marked is to show the cooperation in the way the state officer was involved in the obtaining of the blood sample from the Coast Guard. It showed what he was doing. I can get to that in a moment.

If I can cite another case here to show state involvement along with federal officers in the obtaining or unlawful search, as I categorize it, but obtaining of the search -- of the blood sample, to show that the state was intimately involved in this. I think that illustrates it, along with Mr. Weeks, when he testified. Also, he mentioned the degree of state

and federal cooperation in this case.

And I wonder -- something that's already in the record, and that is the transcript of the search warrant that also bears on this question. And I don't know what number that was marked, Your Honor. It's the search warrant 3BA S89-7, April 1, and page nine also bears on this same issue, where, I think, Trooper Fox testified that they determined the best way to go with the blood sample was to use the Coast Guard authority. In other words, the state was intimately involved in that decision.

THE COURT: Mr. Madson, I'm sure that you were aware of evidence rule 104-D before you submitted the affidavit.

MR. MADSON: I can't quote it verbatim, Your Honor, but...

THE COURT: Yes, that answers your question, to some extent, that you raised yesterday.

MR. LINTON: Judge, I have no objection to Exhibit T.

THE COURT: Okay. Exhibit T is admitted.

DEFENDANT'S EXHIBIT T ADMITTED

MR. LINTON: I object to Exhibit S, for all the reasons we stated. I understood that we resolved it yesterday; that an affidavit would not be acceptable

and that the Captain would have to submit himself to cross examination if he wanted to do this. And when I came in this morning, before Your Honor came on the bench, I was told that he would not be taking the stand, and I took that as a statement that there was nothing else to be done. And so I left, and I apologize if I disrupted the court.

THE COURT: Nobody disrupted the court. I was not aware there was going to be an affidavit filed.

MR. LINTON: And I make the same objection as so stated.

MR. MADSON: Your Honor, I agree with Mr. Linton 100%. I know what the court said yesterday and I indicated to you this morning, I said I wanted it filed for the record and that was all. So, I...

THE COURT: Okay. I just wanted to make sure there is still going to be an objection and have Mr. Linton here to represent the state.

All right. The affidavit will not be used in consideration for the motion. The facts, as stated, will not be considered as facts, using just the affidavit as a basis for those facts. I'll accept it as part of the record for future purposes, but I will not be using that affidavit in making my decision.

MR. MADSON: That's fine. Your Honor, while

Mr. Linton is here, it would save me some trouble, instead of copying -- there's about three cases. I could just cite those cases to both the court and Mr. Linton, and I think it would just be easier.

The Court, yesterday, indicated that additional case law or additional authority up to 4:30 today would be accepted and I could just cite these cases, just a couple of them. In addition, the one I think Mr. Linton has a copy of the one I've already furnished the court, State vs. Williams. But State vs. Jones is, I think, appropriate, 706 PS 317.

THE COURT: Is that an Alaska case?

MR. MADSON: That's an Alaska case, yes. United States vs. Chevis Vernaza, V-e-r-n-a-z-a, that's 844 FS 1368. That's a Ninth Circuit case, a recent Ninth Circuit case. It stands for the proposition that federal courts will use -- will utilize the federal rules of evidence, and also if it's admissible under federal law, they will allow it, even though it's solely state officers who are involved and it's illegal under state law. Then in their Alaska case, State vs. Schraff, S-c-h-r-a-f-f, 544 PS 834, and that's all.

(Side conversation)

THE COURT: Thank you.

MR. MADSON: Thank you.

THE COURT: Before you leave, your motion to dismiss the indictment for failure to provide exculpatory evidence is denied.

I've made a determination that the evidence that you claim to be exculpatory is not substantially favorable to the defendant, that any inferences I would draw, that Captain Hazelwood would know some of that information, comes both ways, and I infer that he would know the agency bulletin, I infer that he would know all requirements. I think there is some doctrine that a person is, to some extent, deemed to be aware of the law, and my interpretation of it would cut both ways. It could be inculpatory as well as -- maybe to some slight extent, exculpatory.

First mate Cousins' statements, in my opinion, were not substantially favorable to the defendant. They could have been inferred to be slightly inculpatory as well, giving the defendant knowledge and inferring to the defendant that he should have known that first mate Cousins was not qualified, would make it somewhat inculpatory.

So definitely it's not potentially favorable to the defendant. So your motion to dismiss on those grounds is denied.

The others, I haven't finalized yet. We're still working on them. I will advise counsel of that in writing.

You are excused. You can call Mr. Cole back in.

(Pause)

(2769)

MR. LINTON: Your Honor, Mr. Cole stepped away for a moment. I think he will be right back.

(Pause)

THE COURT: Are you ready to proceed now, Mr. Cole?

MR. COLE: Yes.

MR. MADSON: Well, Your Honor, the state may have scored on their point, but I'm still in the game, and we'll start, I guess, in a rather haphazard manner, since my proposed schedule got off-track yesterday, and I guess I'll just randomly pick something, but maybe save the main one for dessert.

Some of these arguments, Your Honor, I am not going to orally argue some of the motions. I think they've been adequately briefed and would just be unnecessarily time-consuming to do them, but some of them, I think, a few words are necessary.

THE COURT: Can you tell me which ones you are

not going to argue?

MR. MADSON: I'm going to argue very little on failure to approve the element of property of another.

THE COURT: Which ones are you not going to argue?

MR. MADSON: Okay. Not going to, Exhibit "G", denying the right to a fair and impartial grand jury. There is probably no point in arguing number four on the second page there, motion to dismiss the DWI, because that is going to hinge on the suppression issue. So there is nothing to be said on that.

The same is true of number five, the information, reckless endangerment, because that's going to hinge on...

THE COURT: I'm having a hard time following which one. I've got a proposed schedule for argument at Omnibus Hearing, and I don't have a "G" on it.

MR. MADSON: You've got the first one then, Your Honor. There's, unfortunately, a second one.

THE COURT: Well, I don't have it.

MR. MADSON: I don't have an extra copy.

THE COURT: Did you file it?

MR. MADSON: Mr. Friedman was supposed to have filed it, Your Honor.

MR. FRIEDMAN: That's right.

MR. MADSON: Maybe he used the first one, too. That would be our error, if he did. We had an initial one, then it was changed.

THE COURT: I just don't have it. So let's take it by title and maybe we can -- which one are you not going to argue now?

MR. MADSON: Defendant was denied his right to a fair and impartial grand jury, will not be argued.

THE COURT: Now, I have one, it says C-1, pre-trial publicities and matters relating to grand jurors. Is that the same one?

MR. MADSON: That's the same one.

THE COURT: Okay. Different title, same one. I'll check that one off here.

MR. MADSON: Then motion to dismiss the DWI charge, count one. I don't know if that's listed separately there or not.

THE COURT: Okay. I have that. That's the motion to dismiss complaint, number two, DWI.

MR. MADSON: And that also would encompass count two, that's reckless endangerment.

THE COURT: Okay.

MR. MADSON: These, obviously, hinge on something else. So, it would be just redundant.

THE COURT: No oral argument on that either?

MR. MADSON: Right. And the motion to compel discovery and depose witnesses, I don't believe is necessary either. I think after that was filed, we did receive some additional discovery that answers our questions and we seem to be getting discovery on a...

THE COURT: So that's withdrawn at this time?

MR. MADSON: Yes, that's withdrawn.

THE COURT: Okay.

MR. MADSON: The others, I don't -- I believe if I argue some of them, it would be very, very little. So I don't want to say I won't, 'cause I might just have a few words to say.

THE COURT: Okay. Thanks.

MR. MADSON: I'd like to start with whether or not widely dangerous means includes crude oil. That's one of the motions which hinge on, of course, the indictment, which we believe, if our position is correct, the indictment should be dismissed.

Your Honor, this one is another very uncharted area that the legislature did not exactly give the court or counsel a road map as far as leading us to a clear and concise result. It's somewhat unfortunate that they didn't make it more clear, but on the other hand, I think they did give us a few clues as to what they meant. And that, obviously, is what this is all

about.

Talking about what did the Alaska Legislature intend when they came up with this definition of widely dangerous means. And, I think, to begin this analysis we have to go back again to look at the entire statute, not just this definition. And when it was passed, there's, I think, sub-part (A), paragraph A, which specifically deals with oil, and that's the portion of the statute that makes it unlawful to tamper with an oil facility, which arguably might, if not a tanker, at least the storage facility, the pipeline and everything else that's kind of ancillary to the tanker.

Now, the legislature in doing this, obviously, thought about oil. They considered oil and the effects of what would happen if somebody tampered with an oil facility, and primarily the pipeline, I would submit, since they were obviously quite concerned about this, and rightfully so. And in doing that, they were concerned about what would be the effects in the environment if somebody out there decided to put a bomb under the pipeline or do something that would obviously cause an oil spill.

Then the question is, when they came down to be, did they -- were they still thinking about crude oil? Were they thinking about oil at all when they

came down to the statute that's involved here, which is the criminal statute that says it's unlawful to act recklessly, to recklessly create a risk that you are going to spill crude oil? How you are going to do this by widely dangerous means? Okay.

So that leads us to the next thing is what's widely dangerous means? Does that include this substance, crude oil, that they were talking about in the first paragraph? I think the common sense approach to this would be they weren't, because it would have been logical, very logical, when they're dealing with the same identical statute and they're talking about oil and part of it. Why not very simply put oil in in the definition? And to my knowledge, no state has done that.

Now, the state in their argument has pointed to two states, Pennsylvania and Hawaii, neither of which have an identical definition section that the state of Alaska does. And so I think the analogy with those two states is certainly not appropriate. This is one where there is no real law on this subject. Nowhere can one find that a court has found crude oil to be widely dangerous means under a definition which is the same as or very similar to the one that the Alaska Legislature used when they passed this act.

It would then seem that if it is not clearly the legislative intent, I suppose the clearest legislative intent would be they'd have crude oil in here, and we wouldn't be arguing that, but they didn't do that. Now we're saying did they or didn't they intend to do this? It, again, would have been very simple to do it if they were considering oil, and they certainly were when they passed this.

Now, in addition, it's different from the model penal code. They made a substantial change. One of the things the legislature did is require that the substance or force be difficult to confine. This raises an ambiguity right here as to whether crude oil by itself is difficult to confine. Certainly a gallon isn't, 10 gallons, 55 gallons. Maybe when you get up to the size of the Exxon Valdez somebody can say, yeah, that's difficult to confine because it's so big. But is it? You've got seven-eighths of an inch of steel surrounding a large quantity of oil.

If you look at it in that perspective, that skin is extremely thin. It's like a baggy and nothing else. A very, very thin, almost skin around this quantity of oil. I don't think you could say it's difficult to confine. It's simple to confine, quite easy. The problem is, what happens when it's suddenly

lets loose. But it's not, I would submit, difficult to confine.

Then the legislature says if it's difficult to confine and it's capable of causing this damage, including -- and here's again what is important: When they say including fire, explosion, avalanche, poison, radioactive material, bacteria, collapse of a building or what, they didn't say, "or similar type things." This gets into the -- kind of the, I guess, specialized area of statutory construction and, unfortunately, when you step into that quagmire, it can lead you sometimes to safe, high ground, and other times you find yourself sinking rapidly.

As another judge once told me, the problem with statutory construction is you can basically find a rule to come out the way you want it to be. You can find some rule someplace that's going to say, yeah, that's exactly what I mean, and that's what the legislature did.

However, I found a rule, and I cited that in the brief and it leads us to where I think we should go, which is because the legislature defined these terms explicitly by implication, they intended to exclude others. Now, maybe that sounds overly technical but it is a well known and recognized form of

statutory construction, because the legislature didn't say "other similar type catastrophes," or they didn't use the word, "catastrophe." They did say, "here is what we mean," and they listed these items. Sutherland and others say "when they do that, you can certainly infer or imply that the legislature intended to exclude everything else." And crude oil isn't going to fall in these categories.

So, the other things I want to mention, again, Your Honor, is, I guess, the closest thing that might come to it, and I would submit it really doesn't; that's the Pennsylvania case the state cited in their opposition, which I believe is Commonwealth vs. Scatina (ph). That's the case where the gentleman in Pennsylvania decided to make a fast buck by allowing people to pour toxic waste down his bore hole into what he thought was an abandoned mine and the material would remain there forever and he'd become a wealthy man and nobody would know the difference. Unfortunately, it leaked, and when it leaked, it spread this sheen of material on the river in Pennsylvania. It spread for a long distance. But the material there wasn't crude oil, and I think that's important.

That case did not hold that crude oil -- there was a risk of catastrophe by the use of crude oil. We

don't even know from that opinion whether crude oil was there or not. It was probably waste oil from industrial products and crank cases of automobiles and things like this, in addition to a lot of other toxic material.

But the court there wasn't really dealing with the question of whether this was -- this came within their definition. The only thing they were concerned with was whether or not the evidence was sufficient to show that this risked a catastrophe. I guess where that puts us then is right back to square one.

The Hawaii statute doesn't help. It's certainly different. They use a term "other means of causing potentially widespread injury and damage." That's a pretty wide open, broad definition in contrast to Alaska, which defined it much more narrowly.

So, if you eliminate Hawaii and you eliminate Pennsylvania, it leads us right back to where we started from, which is the court has to come up with an answer. Again, there is no clear guidance here, and I would submit that unless the court finds that if, number one, crude oil is difficult to confine, which there is, I think, a substantial body of knowledge to the contrary, and, secondly, that it was the legislature intended it to come within the very

specified means of causing widespread damage such as fire, explosion, et cetera, et cetera. So, I would submit that on that ground, Your Honor, the indictment should be dismissed.

Thank you, Your Honor.

(3540)

MR. ADAMS: Mr. Madson said something that is correct. When you start getting in the statuary construction, you start dealing with quagmire. While the number one rule about statutory construction is you don't do it where you don't need to, and that's cited in Horowitz vs. Alaska Bar Association, if the meaning of a statute is plain, it should be enforced as it reads, without judicial modification or construction.

Because we're not dealing with fire, explosion, avalanche, poison, radioactive material, bacteria, collapse of building or flood, a widely dangerous means can be summarized as any difficult, confined substance, force or other means capable of causing widespread damage, and that's it.

We have 11 million gallons of oil; 250,000 barrels of oil leaked out of this vessel. If it was easily confined, if it was not just difficult to confine, then, I believe, on March 28th [sic], the morning after, there would have been booms around that

vessel and we wouldn't have the widespread devastation in Prince William Sound. So, there is absolutely no reason to go to judicial construction to find out what the meaning of this is; it's plain. In 1989 there are innumerable substances that can cause widespread devastation, and the state decided not to make a grocery list.

Now, with respect to statutory construction, if the court does feel the need to interpret the statute with extrinsic aides, then the most important one is the model penal code and other statutes similar to the model penal code. Now, Alaska passed this statute back during when the penal code was modified, I believe, back in the late '70s, and in the tentative draft -- the language of the tentative draft, the comments by the individuals who drafted the statute, they specifically said it was based on the model penal code. From that information I went to a number of different statutes that were based on the model penal code, including the Hawaii statute and information we have, by the Department of Law officials that were involved in drafting this, the Hawaii statute was followed quite closely when the Alaska Legislature passed their statute.

The Hawaii Legislature says the gravamen of

this offense, risking catastrophe, is the potential to cause widespread devastation. That's exactly what the Pennsylvania Supreme Court says. It's the potential to cause widespread devastation that leads us to -- it's the end-all. In one case the court held that a person in a paint factory who dropped a match into a five-gallon drum of acetone, I believe, risked a catastrophe, and the model penal code definition and the Hawaii Legislative decision, the Hawaii statutory definition, is quite close.

The only difference between the Hawaii definition and the Alaska definition, I believe, is that under Alaska's definition, it has to be difficult to confine. While crude oil in a vessel is not difficult to confine, when it becomes spilled, it is difficult to confine. It depends on where the thing is packaged.

When oil was in the ground, it's not difficult to confine, but as soon as you pump it out and have it in a pipeline, if someone -- if Alyeska recklessly risks something -- some damage to the pipeline and didn't take care of it and it caused widespread devastation, that crude oil would be difficult to confine.

Now, as far as the doctrine of ejusdem

generis, there are a couple things important about that. One is that it's limited to things similar --not very similar. As Mr. Hazelwood has cited in his brief, he uses the word, "very" to modify "similar". That's absolutely not the reading of the rule; it's the word "similar" to the things. You don't even get to that when there's no inconsistency between the general and specific language. You don't have to use this doctrine when there's no inconsistency, and there's no inconsistency in this general language. What they've done is they've laid out all the different -- not all, but an example of the types of things which can cause widespread devastation, and are difficult to confine, are flood, an avalanche, a fire, poison. Those things aren't confined to one specific area, they just run the gambit, radioactive material, and here we have crude oil. It's similar to a poison.

It's killed untold numbers of animals in Prince William Sound, just as a poison had. If someone had spilled 11 million gallons of cyanide in Prince William Sound, you can bet there would be a lot of animals dead. Just like we have here, where someone spilled 11 million gallons of crude oil, you've got untold numbers of otters, sea lions, eagles.

Your Honor, getting back to the part about not

construing a statute, not using extrinsic aides to interpret a statute. I think that's where the court should begin and should end because this statute doesn't need any extrinsic aides. It's contained within itself, and because oil, crude oil in a tanker that's been spilled, is difficult to confine, it's capable of causing widespread damage.

THE COURT: Mr. Madson, anything further?

MR. MADSON: Yes, Your Honor, just a comment or two. I think Mr. Adams' comments may be more appropriately found in the editorial page of the Anchorage News, but there are a couple of comments I'd like to make.

First of all, you can't look at just half a statute to determine legislative intent; you have to look at the whole thing. You can't read the statute as saying simply, "any difficult to confine substance, force or other means capable of causing widespread damage"; that's half of it. You go on and say: "including these items." And without doing that, without arguing at great length, I would say that the additional items on this -- in this definition, are exactly what Mr. Adams characterized as a grocery list.

They did make a list, otherwise there's no purpose in having the second half of that definition.

So when they said they wanted to define what is this kind of a damage that they're talking about, widespread damage, they said "here's what it is," and they list it. And they don't say, like the Hawaii statute did, and here is a vast, vast difference, and here's my whole point:

The Hawaii statute is totally different, and I don't know how we can look at legislative intent in Hawaii because that's certainly not the issue, but the last part of the Hawaii definition, when they say includes et cetera, et cetera, et cetera, they say "or any other material, substance, force or means capable of causing potential widespread injury or damage." They added the catch-all phrase on there to include other things. Alaska didn't. Maybe they didn't intend to, but we don't know. That's what we're trying to find out here.

But that makes a substantial difference between the two statutes. Yes, Alaska's was based on the model penal code, but if you look at the model penal code, it is substantially different and are different than what Alaska finally passed. So, "based on" is certainly something no one can argue with, but why did they change it and come up with this definition and not follow what Hawaii did or what Pennsylvania may

have done, which is also based on the model penal code? New York -- a number of other statutes that are from states that utilized this risk of catastrophe, which is in the model penal code, Alaska didn't do that.

I certainly can't tell this court what was in the minds of the Alaska Legislature. Presumably they didn't know either. This was passed all at the same time and part of a big package. But somewhere along the line, somebody did.

Now, unfortunately, we don't have the legislative history on this one to show why these changes were made. We just have to assume they were made and assume that the legislature considered this when they passed it. It's the only thing we can do, and since, I would say, that it is not clear, it is not completely clear that crude oil belongs in this definition, then we must use the other aides that are available. And in doing so, it leads us back into the -- and back to the same conclusion, I think, that it simply wasn't intended to belong there.

It's hard to believe, perhaps, that the legislature, with oil on their minds, so to speak, didn't intend to do that, but certainly when in the same statute they are talking about oil and its potential hazards and what could happen, if they were

really thinking about it, it would seem that this was the appropriate time and place to put that into the definition. They apparently chose not to.

Thank you.

(Pause)

(4196)

THE COURT: The defendant's motion to dismiss the indictment on the grounds that the spilling of 11 million gallons of crude oil does not create a risk of damage to property of another by the use of widely dangerous means is, insofar as the term, "widely dangerous means as applied," is denied.

MR. MADSON: We'll stay in the quagmire for a while longer, Your Honor, but this one is even, I think, clearer.

THE COURT: Is this property of another?

MR. MADSON: No.

THE COURT: Okay.

MR. MADSON: Well, I could certainly argue that. I just want to say a couple words on that.

The property of others, the motion, I think, has been pretty well briefed, and the real question here is who owns the fish, who owns the salmon down in Prince William Sound? And the state says, well, we don't, because they are a wild animal and nobody owns

them until they are actually confined in captivity. But Captain Hazelwood doesn't own them so, therefore, he has no right to risk damage to them.

The only thing I wanted to mention is -- I was thinking about this this morning, it raises, I think, a substantial risk, that the state could come back and recharge the defendant numerous times because he can't show which fish are owned by whom, and to keep creating this risk, based on ownership of fish which are not the defendants, we have a real potential problem for double jeopardy, as we can't specifically point to "X" number of fish and say they're each worth a dollar or two dollars each or anything like that.

One hatchery one time can say, well, there was a risk; based on the same Exxon Valdez spill, this one risked damage to $100,000.00 or more. A year later, as long as you're still within the statute of limitations, another one can come in and you can't say that these are different fish. I know it's kind of a strange thing, but so are fish that aren't confined.

So that's all I really wanted to say on that.

(Tape: C-3529)

(0088)

THE COURT: Mr. Adams.

MR. ADAMS: Your Honor, with respect to the

definition of property of another, it's set out and it's property that someone has an interest in but the defendant is not entitled to infringe upon. In this respect, I believe the case of Hughes vs. Oklahoma, a US Supreme Court case from 1979, is dispositive. It specifically states, "The state's interest in maintaining the ecological balance in its waters, in state waters, by allowing the removal of inordinate minnows, may well qualify as a legitimate local purpose."

We consider the state's interests in conservation and protection of wild animals as legitimate purposes, similar to state interests in protecting the health and safety of their citizens. The state has an interest in the management, conservation and control of the fish and wildlife in Prince William Sound. That's why they set seasons. That's why we have limited entry permits. That is a legitimate local purpose, and those fish are the property of Alaska as well as the fishermen down in Prince William Sound. They have a reliance interest and the Alaska Supreme Court has been real clear on that issue in Rudder vs. State. They called it the reliance interest of all individuals using a fishery.

In addition, Your Honor, the state presented

evidence about the damage to the beaches, and those were, without a doubt, the property of Alaska. Alaska owns those in fee title, and those were damaged. Cleanup damage was part of that, and that was what was risked.

THE COURT: Anything further before my reading, Mr. Madson?

MR. MADSON: No, Your Honor.

THE COURT: I'm denying that motion also.

MR. MADSON: Now, the next issue, and I think this one is certainly one that deserves a great deal of attention, and maybe it's unfortunate that the immunity question kept us here for the better part of two and a half weeks, and deserved a great deal of attention also, but when we look at the different statutes that are involved in this particular case, I think it becomes abundantly clear, without a great deal more argument, that the legislature, the Alaska Legislature, passed certain special acts that pertain to exactly the situation here.

The statutory construction from this point is extremely clear, and that is if there's a special state statute that pertains to the subject, especially pertains to the subject, that one should be applied and not the general one. Now, this court can't tell the

prosecutor what statute to come under; that's why we have a separation of powers. But this court can say in interpreting the legislative intent and looking at the various statutes, the state certainly can tell the prosecution, you cannot use this one because the legislature specifically enacted this act, this law to cover this very situation.

So, that leaves us the question, did they? Under Title 46, what did the legislature do there in Title 46 in 1977? They looked at oil, and they looked at it very closely, and they encompassed a great many things in oil and spilling of oil, and the intent was clear on that.

They said what we want to do is protect this state, protect the environment, and in doing so, we're going to enact these laws. And some of them, as we already know is that under Title 46, they said if you knowingly spill oil -- and they didn't say how much -- the state argues, well, there's a difference between a small spill and a big spill.

But if there's a difference in legislative intent, why didn't they say so? We have to assume, and I think correctly so, that when the legislature did not make a penalty consistent with the amount of oil that was spilled, but rather only with the defendant's

mental state, you can't assume that they meant only small spills and not big ones.

So, Captain Hazelwood then was charged by the state under the statute, oddly enough, for the same spill. So, if the state acknowledges that an 11 million-gallon spill is subject to prosecution under this statute, as well as a five-gallon one or 5,000-gallon one, doesn't this then come within the legislative intent that says, well, did you knowingly spill oil? Here's the penalty. If you negligently, that is criminal negligence to spill oil, here's a lesser penalty.

They looked at the exact problem they have here. Two minutes ago we heard, and we're going to hear again, over and over again, not the creation of the risk, but we're going to hear the result, and that's exactly why we're here today.

I would submit if Captain Hazelwood and the Exxon Valdez had narrowly missed Bligh Reef, we wouldn't be here. The creation of a risk would be just -- that happens quite often. Risk is created in Prince William Sound very often. We're here because of the result, and that result brings into play this statute and none other.

This situation is so like the Washington case,

I think it's Johnson vs. State, that's an old case out of the state of Washington where the legislature there said it is unlawful to take oysters from state oyster beds, plain old oyster beds. Now, the prosecution there looked at that statute and said, well, the penalty isn't big enough. Here's a guy that took oysters and we want to get him under the general theft penalty statute, stealing property that didn't belong to him. Long ago, I think it was in the early 1900s, the Washington Legislature said you can't do this. When the legislature specifically enacts a law, they could have made it -- the only reasons stealing oysters was unlawful was because the legislature said it was. And because they said stealing oysters is unlawful in this situation, that's the one that applies, and not a general statute. Otherwise, the state is left with virtually unfettered discretion to charge anything under any conceivable theory.

The point here, of course, is so clear that Title 46 covers this. Secondly, if Title 46 doesn't, then certainly Title 8 does, and that was also raised in the motion, I think, briefed, hopefully adequately there, but I'd like to comment, for a minute or two, on that.

That, of all things, is the pilot statute.

That's under business and professions under our code. And I think one might ask how in the world does a statute under business and professions pertain to the spilling of oil in Prince William Sound? And when one looks at the legislative intent, which there is no argument on this one, the cop of that bill when introduced is part of the record that was submitted as an exhibit to the motion, and what does it say? I mean the act covers marine pilots, state marine pilots in Prince William Sound; that's what it's for.

Now, that seems rather innocuous. It doesn't seem like it would be a crime or it shouldn't cover any criminal law, but it does. The legislature there said because of the danger of spilling oil in Prince William Sound and all the navigational hazards, the reefs, the rocks, the tankers, all the activity going on there, we recognize that risk, and here's what we're going to do about it. We are going to require that tankers of certain size have state pilots on-board.

And here's the other part, and this is exactly what fits our situation here. If past the pilot station, which they now believe, I believe, in most cases at least for pilotaged vessels, is Rocky Point. They say from there on where there's not a state pilot on-board, you must have a federally licensed pilot.

And isn't that what we're talking about here? That's the very situation. Now, the state's argument on this is -- and we'll get to that later on another topic, but they say, well, there's other things he did. And I would submit when the court is finally through with analyzing all the evidence, they'll come back to the conclusion that no, this is the only conceivable theory; that the mate, Cousins, didn't have this endorsement, therefore it fell within this particular statute. Clearly it fell within because, under their claim that is -- I'm not conceding that they're right, I'm just saying that for the purpose of this argument let's assume -- assume they're correct, that Captain Hazelwood violated this statute, Title 8, because he was below deck -- rather he was below the bridge, not on the bridge when Cousins didn't have this federal endorsement on his license.

As the court, I think, incorrectly categorized it, not qualified it -- I don't think it's a question of qualification, it means simply that you're qualified but the Coast Guard said that you have this endorsement which is necessary or may be necessary in certain waters. So, that's exactly what happened, and that's exactly what the statute was.

So, we have two statutes, and this one is even

clearer. Now, the unfortunate part of this argument for the state is the penalty isn't much. I mean it really makes it a darn shame when we can't penalize the guy for doing this. So they say, well, because the penalty isn't enough, we want to come within the general catch-all statute of criminal mischief, recklessly creating a risk.

One could go on and on about this, but I think it's adequately covered, and certainly when you have not only one but two statutes that the legislature dealt with, then there is nothing that could be clearer than under Title 8 -- or Title 46, for that matter, but particularly Title 8, when they say here's the risk we're trying to get around, to solve; we don't want this to happen. We don't want to spill oil down there, and here's the way we're going to do it.

In addition, the general statute here, and this is the first time, to my knowledge, it's ever been used in anything in a situation that even remotely comes close to this, but what we have here, oddly enough, is the greater statute, that is the felony statute actually emerges with and is kind of a greater included offense, if they will, rather than a lesser included.

I know this is really weird, but that's what

it comes out to with the oil spill statute, the misdemeanor, and here's how that happens. The misdemeanor statute says you have to prove criminal negligence at a minimal -- criminal negligence and spill oil. So there must be a spill and there must be criminal negligence.

Now, under Title 11, you have to show recklessness and a risk of the spill and damage -- that risk damage to property over $100,000.00. Now, the ludicrous result of all this is that how can one, under the present legislative intent and what they were trying to accomplish, how can a person be penalized up to five years in jail for creating a risk of a spill when if he not only creates it but he does it, it's only a misdemeanor? This is a total flip around from the normal course of events, where you have the lesser offense included in the greater.

I don't know what kind of jury instruction a person -- a judge could give to a jury in this one, but you have to have one before you can have the other.

Now, the state will say you don't have to have the spill, you just have to create the risk of it. But, again, you have to look at the differences, if any, between the two statutes and how they relate to the basic interests that is sought to be protected by

the state. What basic interests is the state trying to protect here? And that one's obvious; they're trying to protect the environment from crude oil. So, what differences are there in the statute? Well, one specifically says here's what happens if you do it, and the other one says well, maybe this is what happens if you create a risk, then it might happen.

I think, and I would challenge anyone to come up with any kind of case law that says this can be a logical result, and hopefully somehow in all this mess and all this quagmire of legalese and legal underbrush that we're dealing with here, that we can kind of eliminate that and head right for the big timber and say there has to be some common sense, something has to make some sense, and this doesn't. It just doesn't make any sense.

THE COURT: Are there any elements under the Title 11 charge offense that would not have to be charged under the Title 46 or Title 8?

MR. MADSON: Damage to property over $100,000.00. On that point, Your Honor, while recklessness...

THE COURT: How about the culpability, recklessness versus negligence?

MR. MADSON: That's what I was going to

comment on. Recklessness, under Title 11, while you have knowingly or criminal negligence under the other, Title 46, recklessness fits right in between those two, okay? Now, that says something right there. I mean it says that, you know, -- and again, on this topic, I think it's important to think of one other point here, and that is even though the statute says all that's required is criminal negligence, a person under -- I don't have the cite for it, but it's Title 11 under culpability -- culpable mental state, you cannot defend -- it is no defense that you act recklessly when the statute says all we need is criminal negligence.

And, you know, that kind of makes sense. You could imagine a situation where let's suppose somebody was tried under this very statute, and the statute stays criminal negligence, or even knowingly, for that matter, and the defendant testifies and the evidence is quite clear that -- and it's to the effect you can't convict me because I intended to do it. It's a higher mental state. I purposely went out there and poked holes in the pipeline, I did all these things. I wanted it to happen. That is no defense. You can still be convicted on that. So, the mental state kind of balances out and is encompassed by the lower mental state requirement of Title 46. I don't think that's

really an issue, nor do I think there's really a substantial issue on the elements. This goes to the multiplicities argument which I'm really not going to cover, but it seems that under Alaska law, they don't follow the rule that says you must look at each statute and see if there are different elements involved in each one.

I think under Alaska law they -- and that's the Witten (ph) analysis and all the rest of them that are for post-Witten (ph) cases, that say we're not going to do that, that's the old Blockbuster [sic], whatever it is, United States vs. Blockbuster [sic], or something like that. Anyway, under that analysis, they say we're not going to follow that. What we're going to do is just what I said, just a few minutes ago, we're going to look at the differences, if any, between the two statutes and how they relate to the interests that the state is seeking to protect.

Either they go from different points but come together and say well, this is what we're trying to accomplish, and we're not going to look at specific little elements, we're going to say -- or do they really mean the same thing? And if they do, then the question is, which one applies? And certainly the specific applies over the general. The rule of

leniency also applies in criminal cases if the lesser will prevail over the greater.

For all these reasons, Your Honor, I think it's abundantly clear that the special legislation enacted by our legislature should prevail over the general criminal law.

Thank you.

MR. ADAMS: Your Honor, with respect to the general special rule of statutory construction, it appears that there are two ways to interpret that rule of construction. And the first way is the Washington State vs Shriner, which is cited by both the defendant and the state, which requires that the general statute must be violated in each instance where a special statute is violated, otherwise the statutes are not concurrent and there's no problem with the general special rule of construction, where you only give the special statute power. Now, in the case of United States vs. Computer Science Corporation and Simpson vs. United States, the United States vs. Computer Science, the Fifth Circuit, I believe, or the Fourth Circuit, and Simpson and the US Supreme Court, they kind of carved out a little exception to that rule, from my interpretation, that where the legislative intent, through legislative history, is very clear that one

statute is to be the special statute and one statute is to be the general statute. You don't have to have the pure identity of elements.

So they probably have not applied that Washington rule a little bit. However, in the United States vs. Computer Science Corporation in the court of appeals, they stated that it has to be very clear that that's the legislative intent. And in the Fourth Circuit cited Simpson vs. US Supreme Court case and said that the Simpson analysis was correct, but they looked at the legislative history of that one statute which gave an aggravated sentence for someone who committed a felony in the possession of a handgun, and it specifically mentioned the other statute which was the more general statute. And in the Fifth or Fourth Circuit said that that type of language was absent -- it was absent in the mail fraud statute versus the Rico (ph) statute, and they said without that language there was no -- nothing to construe, and the federal government could go under both theories. And that language they used was the Blockberger (ph) test for double jeopardy, and the Blockberger (ph) test is a test that apparently the state doesn't use. However, speaking solely of the double jeopardy issues, whichever tests the state uses, it's premature to get

into that thing that says that issue.

If a restriction to a single punishment applies, if and when the time should ever arise when the defendants or some of them are found guilty, both for wire fraud and mail fraud on the one-hand and false claims against the United States on the other, whatever the answer to that question may be, however, it does not relate to the right of the government to prosecute under both the wire fraud or a mail fraud statute and a false claim statute.

Now, that language is important because the state of Alaska has the exact same language in a case called Robinson. It's in Robinson -- I've got the citation for that, it's 487 PS 681. In that case, they talk about multiplicitous charging, and they said that Witten (ph) provides specifically that only one sentence may be constitutionally imposed on the two counts charged him, herein, but says nothing about submission of both counts to the jury. We find no error in this case in submitting both counts to the jury for their consideration.

Now, with respect to getting back to that general versus special legislation, we have no identity of elements here. The major difference is the amount of damage that is risked in the criminal mischief

statute. Every time someone negligently spills five gallons of crude oil in the Port of Valdez, and it probably has happened numerous times before, there's a violation of Alaska's oil spill statute. However, under no circumstances would that violate the criminal mischief statute because there's no reckless risk, and it's the risk of damage in excess of $100,000.00. It simply doesn't exist.

Now, with respect to statement about the reason we're here is because -- not because of risk, but because of actual damages and that we wouldn't be here if the Exxon Valdez had missed that reef, if we had found out about it, he had missed that reef, we would definitely be here. But the bottom line is that it's the criminal mischief statute and the oil spill statute have both been violated and there's no reason the state cannot prosecute under both.

In Grey, a murder case back in the 1960s, the state was allowed to proceed on both a felony murder and a first degree murder, intentional killing, and the supreme court specifically said that was proper to give both charges to the jury and let them decide if the state's theories were proper.

And at that time, after the defendant was convicted of both, the oil spill statute and criminal

mischief statutes, then the court can decide whether double jeopardy issues come into play. But until he's convicted, there's no issue.

MR. MADSON: Well, Your Honor, unfortunately Mr. Adams missed the point. The point is, as I started out, whether the legislature intended to cover the subject by special legislation. We got a little bit off the track because there is an analogy that can rightfully be -- with regard to multiplicitous charging, which then gets us into the areas of whether it can go to the jury or not.

I would ask the court to be very careful in not stepping too far in this direction, because that's getting away from the major point here. And there are a number of Alaska cases that were cited for the very proposition that I've argued here, which the state, I would submit, has not adequately opposed, countered, that there is this proposition in Alaska, as everywhere else, that when it becomes clear that the legislature intended to cover the subject, not by identity of elements, but cover the subject as it relates to a basic interest ought to be protected, then that one prevails over and above a general statute that has the same interests, or could be arguably, at least, as the same interests.

As far as the damage is concerned, we talked about small amounts of damage. What about damage that was $90,900.00, not $100,000.00? I guess that's a misdemeanor. There's some magic involved in this $100,000.00 figure. They can't come up with a risk of damage that exceeds $100,000.00. The point here is the legislature did not set this amount. I don't think the court can add to a statute.

Really, what the court would be doing, I would submit, would be amending the statute by putting a judicial interpretation on the end of it that said, well, this only applies up to $100,000.00 under Federal Title 46. Over that, then we have to go to Title 11.

Well, with the legislature, with all their faults, I'm sure we can't look at it and say whether they should have done this or shouldn't have done it. We have to look at it and say this is what we did, and since they didn't put a upper limit on it, there is a logical, natural inference that there is no upper limit. We can't arbitrarily put one there.

THE COURT: Mr. Madson, I don't believe Title 46 or Title 8 was intended to cover all the conduct and circumstances, in this case where a tanker in excess of 200,000 dead weight tons went aground and spilled 11 million gallons of crude oil, and the devastation

occurring in this case. And it's clear that there is no such damage similarity or identical elements in 11 46, 42 and Title 46 and Title 8; there's different conduct and different circumstances.

The motion to dismiss the indictment on the grounds that the state didn't charge the defendant is denied.

I will concede, Mr. Madson, that your arguments are very graded. They're very interesting and they're very challenging, but they defy common sense, and if there was a common sense ruling to be made, I would deny it because of the common sense, but there are other legitimate reasons to deny it as well.

MR. MADSON: Well, Your Honor, I have to say that the legislature of this state is also creative and must defy common sense also. I have to share some of the credit.

THE COURT: All right. Thank you. Why don't we take a little break, Mr. Madson, and come back and argue the next one. Which one are you going to argue next, so we can gear up for it?

MR. MADSON: Well, Your Honor, I sense when I'm beaten. I'm going to argue the motion to dismiss for insufficient evidence, and I think I will probably wrap it up with that.

THE COURT: Okay. We stand in recess.

THE CLERK: Please rise. This court stands in recess, subject to call.

(Off record - 10:02 a.m.)

(On record - 10:26 a.m.)

(1169)

THE COURT: Be seated. Mr. Madson.

MR. MADSON: Going to the top of my list, Your Honor, I'm not so sure it's on the top of yours, but that's the motion to dismiss counts one, two and three, for insufficient evidence.

This one, Your Honor, does not deal with imaginative or creative argument. The issue was straight-forward, simple, and we know what the rule of law is, and that very simply is whether the evidence standing alone is sufficient for an indictment to result or a conviction to result.

Now, I'd like to take these -- count one first and work my way down the list. I think, Your Honor, that this one is one that I would urge the court to look very carefully at and review the grand jury testimony.

THE COURT: For the record, I should tell you I have read the grand jury transcript. I figured early-on I had to, so...

MR. MADSON: I was sure the court did. I was going to suggest that perhaps the court review it again in light of this argument. It may or may not create some other questions in the court's mind.

But I think the basic issue here is what's the main element here the state has to prove? And this is only one, and that is the element, the mental state of recklessness, that he was aware of -- Captain Hazelwood was aware of and consciously disregarded a substantial risk that this result occurred.

Well, it gets to the next question, what did he do that was reckless? What theory does the state have to support the allegation of recklessness and what theory was presented to the jury that they could use that theory and come up with an indictment that would by itself result -- that could result in a conviction?

Before this court was involved in the case, we filed a motion for a bill of particulars. I think if the court would have reviewed the grand jury testimony, and just looked at it from the defendant's point of view and read this, and you say to yourself, what are they doing here that -- what are they saying is reckless?

Now, Ms. Henry made comments to the grand jury, to begin with, and some of the evidence didn't

bear out what she said that she was going to prove. I think after we had the full hearing here, it became obvious why she said these things, because until she heard the witnesses, she had no idea what they were going to say or what theory they were going to use.

But, in any event, the state went ahead and with regard to the motion for a bill of particulars, would not file a specific response as to what theory. Judge Cutler said, "Well, I'm denying that for now, but I'm leaving that open -- we're leaving that open for now."

In response to our motion, the state has now come forth and said, here are our theories. Number one -- I assume this is a theory, because the state said "We're not going on just one element, the one theory that Hazelwood was reckless, because he turned over the command of the ship to Cousins who didn't have the endorsement."

There are other theories, and they are, I suppose, drinking in town some four hours before the fact. There's no evidence, of course, of the effects of alcohol on Captain Hazelwood before the grand jury, except that which is favorable. I think that's an important point. There is not one witness that even hints that he was under the influence. The testimony

is to the contrary. The state's response to that was, "Well, he was acting in a cavalier fashion because he drank in town before he got to the ship." I would submit that that is a cavalier fashion that is not the same or synonymous with recklessness, and I think the state would have to agree with that.

Secondly, if this were a civil case, somewhere along the line somebody would be saying, where's the connection here? Where's the causation factor? How does this become the proximate or a substantial cause of the result of the spill? Certainly having some drinks four hours before the fact in town had nothing to do with the spill. There isn't the slightest bit of evidence that one could even infer that this was, and there was a connection between the two. So, that theory is clearly out of the picture.

The next theory is, supposedly, the ice. The ice somehow was -- whatever the ice situation was, such that Captain Hazelwood acted recklessly in trying to avoid it. This gets a little more complicated for the fact that there was testimony here. The Court heard, in addition to Mr. Linton's opening statement that basically said there was ice, and this is routine to try to maneuver around the ice. The Coast Guard discussed that.

That gets us kind of in a muddy area because what was presented to grand jury, and solely there, was simply that going around the ice was a routine maneuver. The pilot, Edward Murphy, made that statement very clear. I mean it's also clear from the fact that the Exxon Valdez radioed the Coast Guard and said, "We're diverting out of the lanes because of ice." "No problem," the Coast Guard was not alarmed, it's a perfectly routine maneuver. So, that didn't cause anything; that theory is gone.

The speed of the vessel, somehow that was kind of thrown in there as perhaps it was going too fast for that area, for being in the ice. Well, if it was in the ice, maybe they'd have an argument, but there was no evidence to show, no evidence presented to grand jury that going around the ice required the ship to slow down, not one bit.

In fact, common sense, if you use that phrase, common sense in my opinion says if you're going to go through the ice, it's prudent to slow down because you've got to wind your way through it. On the other hand, if you're going around it, there's no purpose in slowing down. You maintain the ship's speed, you maintain everything else except your change of course.

So, certainly Captain Beevers was the key to

all this because he's the expert and he's the only one who can interpret what was done and aid and assist the grand jury in why things are done this way and what would be the result. And, obviously, he was in a position to say if something was clearly out of the ordinary, or something no prudent master would do, something that would be reckless, he was the person that would have said it. And he didn't. He didn't say anything about going around ice is reckless or anything else, the speed of the vessel was reckless, setting the course for Bligh Reef.

Without stepping up to the chart, Your Honor, it's obvious that if you want to go around a place coming down, flowing in a southerly direction, you have to turn farther south, get out of the lanes and go around it. You set your course, not intentionally for Bligh Reef. No matter where your course is set in Prince William Sound, if it's set in a direction that you don't turn, you're going to hit something besides water; you're going to hit a large rock.

That's totally meaningless because the evidence was the course was set to go around the ice, and certainly it was in a direction that, if not altered, would be Bligh Reef. And doing this was routine and common.

The failure of supposedly to communicate with Cousins, I mentioned this earlier in another argument, how the state grand jury was left with the impression that Captain Hazelwood did nothing, he just left the bridge. Kagan and others testified that there was -- at least Kagan testified there was conversation on the bridge before this happened. He didn't hear what was said. Again, I think we have to infer that what was said was, "Here's what you do, Mr. Cousins. When you get here, you change your course." There is certainly no evidence to the contrary. There is nothing that was presented that would show that Captain Hazelwood simply failed or neglected or intentionally let Cousins be the watch officer or have the con without some commands, some directions.

The Court has already ruled on the exculpatory evidence, which sum directly on this point, which says, here's what happened on the bridge at that time. The grand jury didn't have that, but on the other hand, what did they have to show the contrary? Is it enough to guess and speculate? I would submit it isn't.

The auto pilot was another theory that the state said -- in Ms. Henry's initial comments to the grand jury, that it was going to be on and not turned off, and consequently when the ship was tried to steer

it, it couldn't be done and they hit the rock.

That contrasts substantially and directly with the testimony because Kagan, who was the helmsman at the time, said it was off. He said Cousins, I believe, turned it off. They both may have reached towards it at the same time, but the auto pilot, whether it was a factor prior to that time or not, whether it should have been or shouldn't have been, and there's a little confusion here on this point, because I think Captain Beevers testified that -- or Murphy, one of the two, said something about "No, it wouldn't be prudent to have the auto pilot on in that area."

That area he was referring to was the narrows. Yeah, that would be correct; it wouldn't be prudent to have it on in the narrows where it wasn't. It was on in Valdez Arm where they did not say it would be prudent or not prudent. I believe the term they used was, well, that's up to -- I think Murphy said, "Well, that's up to the individual master as to whether it would be on or not." Certainly not negligent, certainly not reckless. And it certainly wasn't on. I mean how -- this court would have to, frankly, second guess and directly find that Kagan did not tell the truth when he said it was off. That simply can't be done.

And where does that leave us? The only possible theory; that Cousins had no endorsement on his license to pilot, to be a federally licensed pilot in Prince William Sound between Hinchinbrook and the pilot station. That's where it leaves us.

Now, this gets us to this very situation where the state says that isn't reckless. They have made an admission on pages 60 and 61 of their opposition. They have cited the court before, where they clearly say that this alone is not enough to show recklessness, and this alone is exactly the only possible theory under which there was some evidence presented that could show that as a result he did something wrong. Something he should have done or something he didn't do, and that, I suppose, you could argue was a factor in causing this disaster.

Now, this was important because the grand jury seemed to be concerned only with this particular theory. The court recalls the end of the grand jury when they say, well, we're confused about this pilotage thing, and that's where they get Beevers back there again to say, well, he should have been on the bridge. It's clearly apparent that the grand jury centered in on this particular theory, and it would seem apparent that this was the only one because they're assuming the

grand jury were reasonable people, that was the only thing they could zero in on was that theory.

So, I would like to go on, but first of all, before I leave that topic, I would ask the Court, since we have separate theories here that are alleged by the state, totally separate theories, I would respectfully ask the Court to rule on each one of these theories, and I think it's appropriate for this reason:

If we're at trial and there's insufficient evidence to show one of the other theories, certainly it's subject to a motion for a judgmental acquittal. Certainly if there are separate theories presented to the grand jury, we have the right to say this evidence on this theory is insufficient and therefore it should be ruled on, so we don't get into this -- a lot of irrelevant evidence that is not a condition to go to the trial jury as opposed to the grand jury. And I would urge the Court to follow my argument and rule on each one of these as to which one applies or even if they all do in some kind of a composite or altogether type of analysis.

THE COURT: I'm not sure I understand what you are asking the Court to do.

MR. MADSON: Your Honor, what I'm saying is that the state is saying here is why Hazelwood was

reckless; he drank in town, he left the -- another one, he left the bridge when Murphy was the pilot, and according to -- out to the pilot station, he wasn't on the bridge. The next theory is certainly that he somehow, in going around the ice, he was going too fast or something about this ice, which I, frankly, didn't quite follow. The next one is failure to communicate with Cousins and the auto pilot. These are all separate theories.

As I understand the state's argument, I may be incorrect in this, as I read it, they're saying because we raised the issue early on by saying the only thing we can see here is this pilotage thing. And their response was, oh, no, these other theories, and here they are. So, I am simply asking the Court to look at these individually and rule on them individually so we don't get a lot of, I think, a muddied up situation before a trial jury later on, and I think it really would. I think we have a right to this.

THE COURT: It sounds like you are asking the court to make some evidentiary rulings here, which is not, I think, the function of this hearing. This hearing is to determine whether the evidence -- all the evidence presented to the grand jury, and like most favorable to the state, and the inferences from that

evidence is adequate to persuade reasonably minded court jurors, unexplained or uncontradicted, would result in a conviction. I think I can look at all the evidence. I can't take one piece of evidence out and say it's not going to be admissible at trial unless there's a motion specifically on that point.

(1906)

MR. MADSON: I'm not asking the Court to rule on whether the evidence would be admissible or not. I'm asking the court, certainly, to make evidentiary findings on the grand jury testimony. I'm asking the court to look at the testimony regarding the auto pilot that was before the grand jury in saying whether or this was sufficient or it wasn't. Whether the state can come up with something in addition to that or totally on that theory, but more evidence at trial, that's a question that remains to be seen.

I'm not saying that this court is precluding the state from doing anything at trial. I was trying to make an analogy, and perhaps it was a bad one.

THE COURT: Okay. I'm not sure you were communicating that. What I intend on doing is making a decision based on all the evidence presented to the grand jury for counts one, two and three, and if I conclude that it's insufficient for count one, then

you'll have your motion granted. If all the evidence is sufficient, then it will be denied. I'm not going to single out one piece of evidence and say will this be enough by itself or not and then another piece of evidence to determine whether or not that would have been enough by itself. I'm going to look at all the evidence, Mr. Madson.

MR. MADSON: I understand what the court is saying, and I think the court is incorrect. I respectfully disagree...

THE COURT: Well, you know, there are two whole floors to go over that possibility in this building.

MR. MADSON: Oh, I'm sure it will be there eventually, but I'm saying, again, the argument I thought was fairly simple in this point.

Let's assume there's only one theory here, and that is the auto pilot, just one. If the court would rule on that, based on that evidence, I am simply saying that it's appropriate and necessary to rule on that. If it's a separate -- if the state contends it's a separate theory of recklessness, that it either is enough evidence or it isn't, but the court certainly can do whatever it feels appropriate.

I'm not going to, you know, spend the rest of

the day trying to convince the court otherwise. I've never succeeded in doing that in my life.

But with regard to count two, there ought to be something easy in this case, and this is it. Count two, insufficient evidence, this came to me later on and it struck me just right out of the blue. The first thing, I thought was pretty obvious was, we had to guess, speculate or use conjecture to see or determine from the evidence if Captain Hazelwood was trying to get off the reef is what the state is saying, he was trying to get off the reef.

Well, Beevers looked at all these charts, he analyzed the federal logs, he analyzed the course recorder, he did all these things and said, "Well, here's what the maneuver was." And a grand juror asked him, "Well, were the engines ever astern, ever put in the reverse position?" And he said, "No."

Common sense says if you run on a reef and you want to get off, you go backwards, not forwards. You do that with a car when you're stuck in the snow, you do all this. That was the obvious thing that struck me. There simply was no evidence on this to whether he was getting on or off.

And then secondly, what evidence was presented that if he was trying to get off, either by going

forward over the reef or sideways or any direction, what evidence was there that something was going to result that was in addition to the damage that already occurred? There wasn't any. Beevers didn't say anything.

I suppose you can say, well, gee, common sense says that if you're on the rock and you're trying to get off, you're risking this additional damage. Which leads me to the one that, I think, is a critical issue here. Suppose that were the case; suppose all this can be assumed and there is sufficient evidence upon all this, that he was getting off the reef, that there was a risk, that additional damage would result.

I would defy anyone to read that grand jury testimony and have any opinion in there, any opinion, any evidence that says on count two, which is a total and separate criminal charge, that there was damage that was likely to result that would exceed $100,000.00.

Now, this is extremely important because for the purpose of count two, we have to assume, because the evidence was presented in such a way that the ship hit the reef and oil was leaking, a lot of oil. A lot of witnesses said that. Everyone that was on-board said "there's oil, it's all over the place." Count two

has the same identical elements as count one, so if we assume there's no count one at all, the state is required to prove that the risk of additional damage exceeded $100,000.00, and that is -- here is this big puddle of oil that's rapidly spreading. They have to separate this out and say here's how much damage is a result for count one, and now, here's the additional damage for count two. And that is so obvious that it escapes the reader's attention when you go through it the first time.

But the important things here are, these are totally separate counts, and the elements have to be met in each identical one, and that one is totally lacking. There was tons of evidence in there from people about fisheries, about, you know, all these experts, what could happen, what might happen if the salmon later in the season are affected by this, how much damage would result? But we didn't hear one single word about the additional damage that would be necessary for count two. Not a dollar, not a million dollars, not anything. There is no way of knowing that. I would submit it's impossible to tell that.

You've got a huge amount of oil flowing on the top of the water. How could anyone say that the additional risk from doing this would be this amount or

another million gallons, half a million? There was no way anyone could do that.

Lastly then, count three is an easy one, too. Count three says it's combined recklessness. Captain Hazelwood is apt to be reckless before he hit the reef and after he hit the reef. And that's what three says. What count three says is basically what count one and two say. So, how can there be a separate charge which says exactly the same thing as count one and two? That makes absolutely no sense at all. It requires, in addition if count two fails, obviously count three would fail. But independent of that, count three has to fail just because the grand jury indicted on counts one and two. You can't combine them separately here, then together over here.

Thank you.

THE COURT: Mr. Cole, I'd like to have you address the wording of counts one and two and three and why it was necessary to indict on count three when you have count one and two, and why the language of count one and two in the first place, rather than just actions in striking Bligh Reef with the Exxon Valdez, those words rather than before and after and a combination of the two.

And I'll tell you right now, they seem to be a

little confusing, a little redundant and unnecessary, and you'll address that after you are finished with your argument.

MR. COLE: A couple things, Your Honor, that I think need to be cleared up. Mr. Madson uses the word "theory" a little bit differently, and he probably is taking it out of context. And I'm going to address that as we go through some of the things that you've noted.

I want to remind the court that what we're here for, and the court's already noted it; to look at the evidence and see whether there was sufficient evidence based on -- presented to the grand jury to support the indictment. A review of the case law says you look at the four corners of the grand jury transcript, you look at the exhibits presented, you look at the elements of the offense as charged and you say, taking all reasonable inferences in the light most favorable to the state, would the evidence be adequate to persuade reasonably minded persons that a conviction is warranted?

Mr. Madson has focused on the mental element of recklessness. As we're all aware, that's a very difficult thing to actually prove. That's why we set out in our brief about circumstantial evidence. That's

why we set out that that's an acceptable way of looking at it for trial jurors and it's an acceptable way for Your Honor.

As to the actual elements of the effects, the criminal mischief statutes are very clear. You have to have no right to do something, no reasonable ground to believe, recklessly create a risk of damage to the property of others. A person is reckless when they are aware of and consciously disregard a substantial and unjustifiable risk. And we submit, Your Honor, that during the course of Mr. Madson's memorandums, he mixes up risk of damage with actual damage, and that became apparent again today.

Mr. Madson says that we have to prove that Mr. Hazelwood was aware of and consciously disregarded a substantial and unjustifiable risk, that when he left the bridge with Greg Cousins -- Greg Cousins would run the Exxon Valdez up on the reef. And that's an exact quote on page 37 of his original document.

This is wrong because of two reasons. First it assumes that the only basis for recklessness, which Mr. Madson has again talked about today, is that one act of leaving Greg Cousins in charge, and that is not true. There were a number of acts; not theories, acts. And I'll get to the important distinctions of that in a

second.

Second, it assumes that the statute deals only with actual damages, that the ship would end up on the reef. Mr. Madson continually fails to make that distinction in his arguments. Actual damage only applies -- the element of actual damage only applies when a defendant is charged with criminal mischief in the first degree. So, Your Honor, you have to keep that in mind when we're going through these elements.

Now, I'd like to talk just for a second about what constitutes recklessness. Mr. Madson would like to say, look, I have one act and that's recklessness, and if it's not reckless, that's wrong. But that is not what the law is, and that is not what -- that just is beyond comprehension.

Let me give you an example. The best example is the manslaughter case. A person goes out, has too much to drink, gets behind the wheel of a car and drives off and causes a death. We charge that person with recklessly causing the death of another. Mr. Madson would say under his theory the reckless act was driving while drinking, but really that's only -- that's really broken down into two acts. The two acts are drinking in the first place and then the second is getting behind the wheel and driving. Because apart --

just by themselves, that one act is not reckless; it's not reckless to drink in a bar and it's not reckless to drive. But it's the combination of those acts that makes a person reckless.

Typically you have a lot of examples of that. I'm sure the court has sat up here and watched numerous manslaughter cases where it's not just the act of drinking and it's not just the act of driving, but then it's how you drive.

Always evidence comes in in manslaughter cases about how people were speeding, about how they were driving on the wrong side of the lane, about how they went through stop signs. None of those acts in and of themselves are theories of recklessness, which is what Mr. Madson continually referred to. By analogy, we have a number of acts which constitute reckless conduct with Mr. Hazelwood, and if you look at the indictment, that's how it was worded. It was the acts taken before the Exxon Valdez hit the reef. It was designed to be broad enough to encompass everything he did.

Now, let's begin at the beginning. It was a number of things that I cited in my brief, but Mr. Madson says, "Well, just drinking in and by itself is a insufficient act of recklessness." That's not the point, and Mr. Madson misses the point.

It doesn't take an expert to come in and show that drinking prior to taking on substantial responsibilities shows a sort of callousness toward responsibility. You don't have to be under the influence to have alcohol affect your judgment, and you don't have to have an expert testify to that. That's something that's common knowledge.

Mr. Hazelwood, the evidence was that he had drinks both before, at several different places before he went aboard. Let's talk about his position, because when in analyzing whether or not he was aware of and consciously disregarded, we need to look at how a reasonable captain in his position would act.

The responsibilities of a tanker captain are two-fold: Taking care of the responsibility of your crew, seeing to it that your cargo reaches its destination safely. A tanker captain knows -- he basically sits on what we would consider to be an ecological time-bomb. In assessing his performance, what you look at is, you look at it under the theory that I would consider more of a risk management theory. You do everything that you can to avoid the risk of becoming the actual incident. The risk in Mr. Hazelwood's case -- Captain Hazelwood's case, is that oil -- there will be an oil spill. And so in

evaluating his performance, you look at not only what he did but what he didn't do.

What he did was a number of things. He drank when he was supposed to be not -- when he went into town, before coming on-board. Number two, he is ultimately in charge of the tanker, even though the pilot, the state pilot navigates. The state pilot talked about that. So does the other crew members. He was not there to fulfill his responsibilities as the ultimate overseer and commander of this vessel. He was downstairs for nearly an hour and a half, and that's what the testimony was. When he came on deck, he avoided ice. We're not saying that the act of moving to avoid ice is reckless; we're talking about the manner in which it was done.

Just like it's not reckless to drive down the street and pass somebody on the other side, but it is reckless if you pass somebody when there's another car coming, for instance, and you have a head-on collision, and the manner in which you do it is one of the elements that constitutes recklessness.

In this case, the manner in which he did it was, and the testimony before the grand jury was, yes, you can go in to the other out-bound lane, but you weave and bob through the icebergs, you slow down, you

don't use automatic pilot under those situations, and that's what happened. That's the evidence that was presented to the grand jury. So, it's the manner that he did it. It's the little things, like failing to contact the Coast Guard after even leaving the northbound lane. They're indicative of his state of mind at the time and prior to the grounding of the Exxon Valdez.

Finally, it's the leaving of Greg Cousins in charge and going down below deck. Now, in analyzing that, you not only have to analyze his affirmative act of leaving the bridge, but you also have to analyze what he should have been -- what he could have done if he had been there and what he had an obligation to do, which is turn that vessel prior to hitting and grounding on Bligh Reef.

Those are affirmative acts that should have been taken that can be used in evaluating his performance in determining whether or not in this great scope, in the great scheme, whether these acts constituted recklessness. That's why the indictment was charged in that manner, and we believe the evidence that was presented to this grand jury clearly supports that.

Count two, the defendant claims that there was

no evidence that the captain was trying to get the ship off the reef. That was at page 46 of his original motion. Again, he stated that here in court today.

Now, Your Honor, in our notes, I understand that there are some problems with which grand jury transcript you are looking at, but in the grand jury transcript that's in five volumes, at pages 231 and 238 there is talk by Captain Beevers that indicates that he was trying to get the ship off the reef. And when you look at the documentation and the evidence that's presented there, you've got a ship that's grounded upon a reef, and Mr. Madson says, "Well, the most logical way to get something off a reef is to go backwards." Well, when you look at this, Your Honor, and you -- there was evidence about the radar and what radar systems they had, the ship was pointing in a direction -- I want to say about 270 degrees, which would be out toward the zone in the Prince William Sound area where he should have been, but behind him is nothing but mountains, there's an island there.

Second, it really doesn't make common sense to go backward when your ship has gone over a rock. And the reason is, especially in a situation like this where the ship goes over it and gets stuck on it, you know that the ship is going to go -- is not going to be

able to go backwards. If anything, it's only going to be going forward, because of the way the rocks lodge into the bottom of the ship. Regardless of that, when you look at the bell book and the course recorder, it's clear that when he came on-board, he continued ahead. There was a 15-minute break, 20-minute break, and he started ahead again.

The evidence before the grand jury was at some point Kunkel, the first mate, came up to him and said, "Look, you're barely stable. You might be able -- we might be able to get off, but we're not sure." He then came up approximately 15 minutes later and said, "We can't go anywhere." And I think it's clear, Your Honor, and I think -- I don't think an expert needs to testify that when you take and run a ship full ahead, squirming back and forth in an angle to turn the ship in order to try and dislodge it, that's a reasonable inference that can be drawn from the evidence that was presented to the grand jury.

Now, as to the actual danger, I would refer the court to page, in our documents, 580, when Mr. Kunkel was specifically asked, "What kind of dangers to the personnel on the ship and also to the areas around you would you perceive dangerous and damaged?" And his answer was, "I'm not quite sure that

you would -- what you would like me to say. The ship would sink. The fact that it was on a rock, it could break in half. The -- so much crude oil being released at once, there was a possibility of explosion, and then I'm sure every -- well -- one is quite well aware that the oil was spilled in the water."

There was a danger that had that ship become dislodged, it would have sunk. Greg Cousins told the captain that at the second time -- or no, Kunkel told the Captain that the second time he came up. He said, "If we get off, we'll -- there's a good chance we are so unstable that we could sink."

Now, it doesn't take a rocket scientist to figure out that if you sink, the whole load of this tanker is going to go out, causing tremendous damage, ecological damage to the environment.

That's not what happened here, and that really misses the point also because it's not the actual damage that could have occurred, but it's the risk of damage, which I keep coming back to. The statute is the risk of damage.

THE COURT: So, you are arguing that the risk of damage, an amount exceeding $100,000.00 to property of another, would be the risk of additional crude oil being released because of a possible sinking?

(3180)

MR. COLE: Capsizing. The mate said that the ship was unstable to float a second time, meaning that it would capsize.

Now, finally, as to count number three, Mr. Madson, in a cursory fashion, concludes if there is insufficient evidence to support either count one or count two, the indictment must be dismissed. He said that on page 35 of his motion. He provides no support either in his motion or in his comments today to support that particular proposition. Count three was added as an alternative theory to the grand -- it was added as an alternative theory if this case -- if and when this case went to trial.

We believe that the jury is entitled to look -- and if there is sufficient distinction between count one, the acts of count one and count two, to look at those actions separately. We also believe that if, in the absence of that, the jury should also be given the alternative to look at all these actions in one. So, that is why the indictment was created in the fashion that it was.

On one hand, we believe the evidence was sufficient to indicate that what he did before the Exxon Valdez was grounded constitutes recklessness. We

also believe that the actions that he took after the Exxon Valdez grounded were reckless. In the alternative, I believe, and there is sufficient support for this, that under an alterative theory, when you look at the collective acts, that Mr. Hazelwood, Captain Hazelwood, took over between the time he became a captain until after he released his command at about -- or when he turned the ship off at about 1:40, that that constitutes reckless conduct.

THE COURT: So, let me ask a couple questions. If the court found it wasn't sufficient evidence for number one and there wasn't sufficient evidence for number two, the court could find that the totality of his actions constituted the element of recklessness and the risk of amount of $100,000.00 more, or exceeding $100,000.00 to property. Is that what you are saying?

MR. COLE: Yes.

THE COURT: And isn't that what this case boils down to, isn't it really just one case, whether or not what happened, all the actions leading up to the spill constitute recklessness?

MR. COLE: Well, Judge, I suppose that you could look at it that way. Let me give you an example of why I don't think that that's necessary.

A person goes out and drives when he's

intoxicated and causes an accident, hurts somebody, and leaves the scene. Now, you could analyze that in terms of saying, well, there's really just one act, it was this person's reckless driving and everything flowed from the reckless driving. Not only did he hurt somebody but then he left. And, therefore, the really only appropriate charges are manslaughter.

Whereas, if -- you can also look at it as two distinct acts. You could look at it as an assault, manslaughter and a leaving the scene of the accident.

I'll give you another example. A person comes up to a store owner, points a gun at them, scares them, and then shoots maybe the skin off their little finger. Now, that could be in the process of a robbery. And let's say the state charges him with -- I believe the state could charge that person with two counts of assault; assault for threatening a person, placing them in fear of serious physical injury by means of a dangerous instrument, or recklessly causing physical injury by means of a dangerous instrument.

Under alternative theory and under the fact that those are two separate incidents, I believe that there is sufficient evidence in both of -- there is sufficient distinction between what occurred before and after to support a count of recklessness on each case.

THE COURT: Mr. Madson.

MR. MADSON: Well, I think I can thump on this terminally ill horse for just another minute or two, but I suppose I owe Mr. Cole an apology for assuming that the state was talking about alternative theories of recklessness. And I made that brash assumption based on page 22 of the brief, when they say "the defendant incorrectly assumes in his memorandum that the state's sole theory of the defendant's recklessness focuses on his failure to be on the bridge," et cetera, et cetera.

And on page 27, they also use the word "theory" again. Now, with it mysteriously becomes "acts." I don't think that's terribly important whether you use theory or acts. I think it was an appropriate way of responding to this memorandum when they say, "This isn't the only thing we say he did." 'Cause that, by itself is not enough.

Maybe I'm incorrect. All I'm saying is that these individual theories have to be separately supported by sufficient evidence. The court has already, I think, made the analogy, or else as stated, that composite of all this is what the court is really going to look for. Maybe I'm right and maybe the court is wrong, but in any event, I think, from looking at

this, when they talk about individual theories, and that falls right into Mr. Cole's argument when he said, "Let's look at a manslaughter."

If he's drinking, the man is intoxicated, we don't have to show in addition to that what specific acts that he committed which could be deemed reckless; that's Luprole (ph); that's State vs. Luprole (ph). I fully agree with that.

Let's take the analogy of that, which compares to this case, and say what if there is evidence that he may have had a few drinks, but there are 14 witnesses that say this man was not intoxicated or even the slightest bit impaired. Now, that's the situation we have here. Now, we want to get that drinking in front of that grand jury. We want to get it in front of the jury, in spite of all the evidence to the contrary, that it affected his judgment or anything else.

Well, in that analysis, let's say there was not enough evidence of intoxication, because we've got all these people saying, hey, he's perfectly fine. Then I think it's totally appropriate to say to the state, if it isn't alcohol, if his judgment was so impaired because he was drunk or under the influence, then what in the world was reckless when you're claiming this man committed manslaughter by driving in

a reckless manner? What did you do?

That's what we asked, and the state responded, "these things." Well, I can only say, Your Honor, that whether you look at them individually or look at them altogether, you've got to look at the causation. Mr. Cole says also I missed the point on the fact that it's only the risk of damage rather than the damage itself. I don't know how anybody could miss that point.

What Captain Hazelwood is allegedly doing that is reckless is that he is aware of and consciously disregard a risk, a substantial and unjustifiable risk that a result will occur. I don't care if you want to call it an oil spill or the ship hitting the reef, which causes the oil spill; it's exactly the same thing. I don't know why we got into that. I mean it's obvious what the risk was.

Lastly, I think I know what the court is coming to, or at least the direction, I think, the court is heading, but if not, I think, on count two, Mr. Cole has argued strenuously that there was a risk of something occurring, of additional damage occurring and additional oil spilling on count two. But the element has to be proven, that this additional amount is over $100,000.00. So, I would submit, Your Honor,

that under any application of these counts, whether to look in the elements of recklessness, whether looked at altogether or separately is simply insufficient. (3788)

THE COURT: Well, based on the record I have before me, the motion is going to be denied on all of them. I think that the evidence taken alone, uncontradicted, is by no means is dispositive of the issue after (indiscernible - unclear) but at this stage of the proceeding, the evidence taken alone, uncontradicted in light most favorable to the state here, in my opinion, would lead to a conviction and lead to the establishment of the elements of each of the counts. However, I'm going to order the state to -- and the defendant to commit briefing on why these three counts should not be consolidated into one count for trial purposes.

MR. MADSON: It has been somewhat briefed, Your Honor. Do you want additional briefing on that?

THE COURT: Yes, additional briefing on that. It seems to me that the issue hasn't been addressed fully and I need another shot at it by both the state and defendant.

You can give that to me by, I think, in probably a week, concurrently brief the issue before it

was answered. I want concurrent briefing on that.

MR. MADSON: I'm sorry. I was thinking of something else. What was the time limit on that, Your Honor?

THE COURT: A week. What other motions remain besides...

MR. MADSON: I'm not going to argue anymore, Your Honor.

THE COURT: So we are all talking about the same...

MR. MADSON: Basically, that was the multiplicity was the main one, the motion to consolidate, which was essentially the same thing, I think that...

THE COURT: Did you want to argue that though at this time?

MR. MADSON: No.

THE COURT: It didn't seem like you did.

MR. MADSON: I did not. I think we really kind of touched on that here in our argument here.

THE COURT: Okay, let's take up the motions that remain to be resolved without oral argument. Let's go down so we know which ones still are presenting. You've withdrawn the discovery motion. What other motions remain to be resolved?

MR. MADSON: The dismissal of the count two and count one of the information, Your Honor.

THE COURT: Okay. I've got that.

MR. MADSON: And I think that's...

THE COURT: Pre-trial publicity and matters relating to the grand jurors.

MR. MADSON: That's right.

THE COURT: The blood alcohol issue. Certain statements that were made by the defendant.

MR. MADSON: Pre-trial publicity prior to the grand -- at the time of the grand jury. I think that's one that hasn't been -- or has the court moved on that one?

THE COURT: Pre-trial matters and matters relating to grand jurors.

MR. MADSON: Yeah.

THE COURT: And the one you argued yesterday, in addition to blood alcohol, the statements made by the defendant,...

MR. MADSON: Yes.

THE COURT: ...Exhibit 69. And then the consolidation.

MR. MADSON: Yeah, I believe that's correct.

THE COURT: In additional briefing on the consolidation, Mr. Cole and Mr. Adams, I'd like to have

you present, if the court were to order a consolidated count, the consolidated count that you would be relying on.

MR. COLE: Yes, Your Honor.

MR. ADAMS: Excuse me, Your Honor. With respect to the motion for consolidation, in the original brief that Mr. Madson presented, it was addressed as a motion to consolidate, counts one and two into essentially a count three, and then when the supplemental memorandum was filed, there was a motion to dismiss count three. So, it's kind of in the alternative.

THE COURT: I understand. That's one of the reasons I need additional briefing. I'm not sure we're all on the same wave length. It seems to me the consolidation makes sense, but if there is some very good, legitimate legal reason why it shouldn't become consolidated, where there will be distinct prejudice to the state, then we ought to reconsider it. But, my opinion, so far, is that we're talking about one transaction here for which the defendant if found guilty would be sentenced but one time.

That's my common sense approach, but sometimes common sense and the law differ.

Do we need anything else today?

MR. MADSON: Your Honor, I think the main one we need to have a ruling on, of course, is the blood alcohol issue, because that could affect the -- have a highly substantial affect on what happens to other ones. I guess I'm just inquiring whether the court's going to issue a written opinion on that?

THE COURT: I am working on that now. You presented -- I think you both presented some novel issues on that and I'm looking for additional cases from both of you. I think I indicated to Mr. Linton and we're doing some research on it, too. It's a very interesting issue.

I'll try to get a written decision on all of these either in the form of an order, and in the case of the blood alcohol, I may give you a memorandum decision in order. I'm not sure of that yet, but I'll try to get a written order out on all the motions that have been argued except for the motion to consolidate.

I'll give you an additional week, which will be a week from today, to get those briefs in to me, and I'll give you a decision on that as soon as I can afterwards.

MR. MADSON: I just want to make sure that we're through, as far as being in court, and we're free to go our separate ways. We don't have to come back

tomorrow or any other time?

THE COURT: If you are not asking for additional argument on any of these motions, and since they are your motions -- now, are there any other motions that are in the works? I heard somewhere that Mr. Friedman or somebody -- one of the people in your office filed some additional motions yesterday. Is that accurate?

MR. MADSON: Not to my knowledge, Your Honor.

THE COURT: Okay.

MR. MADSON: I don't know where that would have come from. It certainly didn't come out of my office with regard to this case. I thought I exhausted my supply, my creativity is at an all-time low as a result of this case. Who knows?

THE COURT: I think it's at an all-time high.

MR. MADSON: Well, there may be -- something else might happen. We'll have to wait and see. I guess I'm in the same situation as the state by saying let's wait and see.

THE COURT: Okay. But there are no other motions pending or have been filed up to the present date that you are aware of?

(Tape: C-3530)

(0037)

MR. MADSON: Not even in rough draft.

THE COURT: Okay. Then it sounds like to me, in the absence of something occurring on these motions, that the integrity of the trial dates...

MR. MADSON: The only thing that might alter that, Your Honor, is the motion for stay, because Mr. Friedman is now working on the petition for review.

THE COURT: Of course.

MR. MADSON: I would anticipate doing the same, depending on -- at least what the court might rule on in the future.

THE COURT: Okay. I think that concludes oral argument on this, and we'll stand in recess, subject to further notice.

THE CLERK: Please rise. This court stands in recess, subject to call.

(0050)

(Off record - 11:24 a.m.)

END