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IN THE TRIAL COURTS FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT  
AT ANCHORAGE

STATE OF ALASKA,  
Plaintiff,

vs

JOSEPH HAZELWOOD,  
Defendant.

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

TRIAL BY JURY  
MARCH 7, 1990  
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H & M Court Reporting  
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BEFORE THE HONORABLE KARL JOHNSTONE  
Superior Court Judge

Anchorage, Alaska  
March 7, 1990  
8:40 a.m.

APPEARANCES:

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1 PROCEEDINGS

2 MARCH 7, 1990

3 (Tape: C-3657)

4 (332)

5 (Jury not present)

6 THE CLERK: The Superior Court with the  
7 Honorable Karl Johnstone presiding is now in session.

8 THE COURT: Thank you. We'll talk about  
9 Exhibit 153 now. Relevancy objection, is that what  
10 I'm going to hear from the state?

11 MR. MADSON: That's the material the court  
12 examined in camera?

13 THE COURT: Well, that's right. I also,  
14 pursuant to counsel's approval, spoke to Mr. Kagan's  
15 attorney in chambers about this material.

16 MR. MADSON: Your Honor, it's relevancy plus  
17 lack of foundation, really. There's no showing that  
18 this has been connected to Captain Hazelwood in any  
19 way. That he knew about it; had access to it; read it,  
20 or had any knowledge of it whatsoever.

21 THE COURT: Mr. Cole, do you have some sort of  
22 theory that I may not be understanding. It seems to me  
23 that you are going to have to show that Captain  
24 Hazelwood had access to this or knew about the material  
25 contained in his personnel file before it would come in

1 -- before it had any meaning.

2 MR. COLE: Well, our theory, Your Honor, is  
3 that -- first of all, we believe that that evidence  
4 should be presented to show that he should have known  
5 Mr. Kagan was incompetent. And what that shows is,  
6 other people have evaluated Mr. Kagan during short  
7 trips; found him to be incompetent, and Captain  
8 Hazelwood should have drawn the same conclusion.

9 Based on that and on the evidence that was  
10 presented by Mr. Cousins, that he related this  
11 information...

12 THE COURT: Related what information?

13 MR. COLE: That Mr. Kagan had problems that  
14 was uncomfortable with the situation. Mr. Kunkel  
15 indicated that he had sailed with him in the past; that  
16 he had had steering problems in the past. That  
17 information and the information from Captain Stalzer,  
18 who told Captain Hazelwood that this person had a  
19 problem and that he should watch him closely.

20 THE COURT: Well, my question still comes down  
21 to -- when you say "should have known this  
22 information". How could he have possibly known  
23 anything contained in Mr. Kagan's personnel file. I  
24 mean, if you say "he should have known", is there some  
25 access he had to it that he didn't take advantage of?

1 MR. COLE: It's not those actual documents.  
2 It's, should have known how he performed. Those  
3 documents show how other tanker captains have examined  
4 Mr. Kagan in his prior performance and reached the  
5 conclusions that they had in short periods of time.  
6 We're offering it to prove that Captain Hazelwood, no  
7 different than any other tanker captain, should have  
8 been able to recognize these acts as he observed Mr.  
9 Kagan and drawn similar conclusions as those that are  
10 maintained in there.

11 THE COURT: Okay. I'm going to deny the  
12 application to admit these. This document, Exhibit  
13 153, contains medical information. It contains  
14 voluminous information that is very personal to Mr.  
15 Kagan. There is no indication that this file was  
16 accessible to Captain Hazelwood. There's no  
17 information that he knew about this file, or knew the  
18 contents of this file, and therefore it has no meaning.

19 You've admitted in evidence witnesses  
20 testimony to the effect that Captain Hazelwood was told  
21 about Mr. Kagan, but you're not going to be able to get  
22 this file in. So that's...

23 MR. COLE: Judge, could I just ask one other  
24 question. There is an evaluation in there by Mr.  
25 Kunkel. We would ask that that be placed in. He was

1 impeached on that. I think the jury should be able to  
2 see what Mr. Kunkel actually wrote down in his  
3 evaluation. He said that he evaluated it in 1985.  
4 That's inconsistent with the statements that he gave in  
5 court, and we believe that that particular evaluation  
6 should come in.

7 THE COURT: Well, we'll take care of that some  
8 other time. That's not how you proposed this to me,  
9 and I don't know which one you're talking about. This  
10 is about a one inch thick sheath of documents. So you  
11 could approach the bench and retrieve this document.  
12 And at such time as you find the one you are referring  
13 to, show it to counsel and we could argue it during a  
14 break.

15 MR. COLE: I have one other matter to take up,  
16 Your Honor.

17 THE COURT: All right.

18 MR. COLE: That is, based on the conversations  
19 of Mr. Madson yesterday, my review of the record and  
20 Mr. Prouty's testimony, we would move at this time,  
21 pursuant to Criminal Rule 70 to amend the information  
22 which charges Captain Hazelwood with operating a  
23 watercraft while intoxicated, to include 28.35.030 (a)  
24 (2), which is basically the .10 statute.

25 I think the evidence supports that, given Mr.



1 Prouty's statement. The rule says that this can be  
2 done at any time. This is not an additional type of  
3 count. It's not another count. It's just the same  
4 count under a different theory. And the only  
5 limitation that the court should take into  
6 consideration is that whether or not the substantial  
7 rights of the defendants are prejudiced.

8 And I would note that I have a copy of Mr.  
9 Madson's opening statement...

10 THE COURT: This is 28.38.030 (2)?

11 MR. COLE: Yes.

12 THE COURT: Well, before you get any farther,  
13 how do you overcome the very first line that says,  
14 "When, as determined by a chemical test taken within  
15 four hours after the alleged offense was committed."  
16 Or, did I miss something?

17 MR. COLE: Well, Your Honor, that goes to our  
18 theory that we filed a trial memorandum a long time ago  
19 that the court hasn't taken up that Captain Hazelwood  
20 was operating a watercraft during the time -- the whole  
21 time that he is on board that vessel. The vessel is  
22 being used as a commercial tanker, within four hours.  
23 He doesn't get relieved until 11 o'clock that night.  
24 We filed a trial memorandum on that way prior to the  
25 trial even beginning. At 11 o'clock he's still

1 operating this watercraft. And that was our theory at  
2 the beginning.

3 THE COURT: At 11 o'clock in the morning?

4 MR. COLE: Yes. That's what the whole purpose  
5 of the trial memorandum that we filed at the beginning.  
6 This is not like what we consider as operation a motor  
7 vehicle.

8 THE COURT: The statute says, "When, as  
9 determined by a chemical test, taken within four hours  
10 after the alleged offense was committed, there is 0.10%  
11 or more, by weight of alcohol in the person's blood, or  
12 100 milligrams or more of alcohol per 100 milliliters  
13 of blood, or when there is 0.10 grams or more of  
14 alcohol per two ten liters of the person's breath."

15 Now, as I understand it, there is no chemical  
16 test that reflects that much. You have to back it off  
17 of the .061.

18 MR. COLE: That's correct.

19 THE COURT: Mr. Madson?

20 MR. MADSON: Well, Your Honor, I think there  
21 is two problems here. One is, Mr. Cole related -- he  
22 said to get in the four hour period the court has to  
23 make a finding that whatever Captain Hazelwood did at a  
24 time when the engines were shut down, nothing was going  
25 on. He's just sitting there after the test was taken,

1 and doing absolutely nothing, or even the four hours  
2 prior to that time. When nothing is occurring and the  
3 ship is incapable of being operated.

4 The court has to make a finding that this  
5 constitutes operation, so that it could come within the  
6 four hour period.

7 Now, Mr. Cole's correct. We filed trial  
8 memorandums on that and I think the issue is really  
9 very, very simple. What the state was doing in that  
10 memorandum was trying to show that this should come  
11 within the context of the definition of operation a  
12 motor vehicle, as determined by our various courts of  
13 appeal.

14 And there, because the legislature did not  
15 define what "operate a motor vehicle" means, the court  
16 did it for them. And they basically said, since  
17 there's no definition by the legislature, we hold that  
18 the motor vehicle doesn't have to be movable. In other  
19 words, a guy could be convicted of drunk driving while  
20 he's stuck in the ditch, totally incapable of moving  
21 the vehicle, but the vehicle still has to be operable  
22 in that sense. Conley vs. the Division of Motor  
23 Vehicles, at least infers that the vehicle must be  
24 operable but not necessarily movable.

25 But we have the situation here where there is

1 a definition of "operate a water craft". And it says  
2 that it is to navigate or use a vessel which is used  
3 for or capable of being used for transportation on  
4 water.

5 Now, that makes it pretty clear that whatever  
6 you want to call it, it has to be used for, and more  
7 importantly, capable of being sued for transportation.  
8 That means, moving something from point A to point B.  
9 The only logical explanation for that. And in that  
10 sense, then, when the vessel is stuck on a reef, it  
11 obviously is not within that definition. So that's the  
12 first problem.

13 The second one is, if you don't have the .10  
14 theory under the four hour rule, because, as the court  
15 has pointed out, it requires the test to be taken  
16 within that period. I think certainly they can use the  
17 results, and the court has already held this, based on  
18 Williams vs. State. They can use the results to relate  
19 back to infer that he would be impaired because this  
20 would be consistent with a high blood alcohol reading.  
21 But to say that you can go further outside that four  
22 hour period and say you were guilty under the statute  
23 just doesn't follow. All that statute says is that  
24 essentially if you take this test within this time,  
25 then within this period of time, the legislature has

1 determined that the test is valid enough and the time  
2 period is close enough that it is logical and it  
3 follows that one could be convicted. But outside that  
4 time period, you could still use the test, but not to  
5 show the .10 theory.

6 MR. COLE: My only response is that I don't  
7 believe Mr. Madson has accurately set forth what the  
8 definition of use of a motor craft is. It's using or  
9 capable of being used. This tanker was capable of  
10 being used in the transportation, because it was being  
11 used as that. It had oil right there. Now, maybe it  
12 wasn't going anyplace at that time, but it was capable  
13 of being used as a water craft.

14 THE COURT: Okay. Your application is denied,  
15 Mr. Cole. If the legislature had intended this to mean  
16 that you could relate back to 10% it would have said  
17 that. The statute is couched in terms of there being a  
18 10% or more by weight of alcohol at the time the  
19 chemical is taken. So we'll proceed on the basis of  
20 the original information charging under the influence.

21 Are we ready now with the jury?

22 THE CLERK: Yes.

23 THE COURT: Let's bring the jury in.

24 (900)

25 (Jury present)

1 RICHARD PROUTY

2 recalled as a witness, having previously been sworn  
3 upon oath, testified as follows:

4 CROSS EXAMINATION OF MR. PROUTY

5 BY MR. MADSON:

6 Q Good morning, Mr. Prouty.

7 A Good morning.

8 Q Yesterday you spent a considerable period of  
9 time telling the jury about your experience and  
10 credentials in the field of alcohol and studies  
11 regarding alcohol and the physiology on human  
12 beings, right?

13 A Yes, sir.

14 Q If I understand correctly, you did not get  
15 your Ph.D., but came close to it. In other words  
16 you didn't do your dissertation?

17 A That's correct.

18 Q It appears, however, that that didn't harm  
19 your career very much. It seems like you have a  
20 good responsible job in the same field?

21 A To date, yes, sir.

22 Q Mr. Cole asked you about studies you have done  
23 yourself in this particular area. From what you  
24 told us yesterday, I heard you say something  
25 about a study you did in North Dakota involving a

1 number of people, controlled drinking setting  
2 sort of things?

3 A Yes, part of it was done there, yes.

4 Q Where else was it done?

5 A Well, I estimated, having evaluated some 300  
6 to 400 subjects over a period of time. The  
7 majority of those were in North Dakota. I say  
8 "the majority"; certainly more than half. During  
9 my tenure in North Dakota, I also served as a  
10 consultant to the Bureau of Criminal Apprehension  
11 Laboratories for the state of Minnesota, who had  
12 a similar breath testing program as what we did  
13 in North Dakota. And I was an invited lecturer  
14 and participant, also, in their training program,  
15 which was essentially marvelled after my program  
16 in North Dakota.

17 Not just by coincidence, the director was a  
18 protege of mine, one of my graduate students. So  
19 there were a number of people there. I also did  
20 some in Maryland during graduate studies.

21 Q Excuse me for interrupting, but are you  
22 talking about actual studies in Minnesota that  
23 you participated in?

24 A Yes, I participated in some of those.

25 Q By the way, do you know Mr. Thomas Burr there

1 from that...

2 A By name I do.

3 Q In Minnesota?

4 A Yes.

5 Q Getting back to the -- well, the studies you  
6 did. If I understand correctly people consumed  
7 known quantities of alcohol in a social setting,  
8 then you would ask them questions or ask them to  
9 do certain things -- certain tasks, to evaluate  
10 performance as they went up the scale on alcohol  
11 -- blood alcohol levels, right?

12 A Yes. And down the scale, also.

13 Q And this was done in a social setting?

14 A The drinking was, yes.

15 Q Sit around. You furnished the drinks, I take  
16 it?

17 A Surely.

18 Q Sounds like a good party.

19 A It's very educational, as a matter of fact.

20 Q And, anyway, when -- you mentioned -- I guess  
21 the part I was concerned about the most, was the  
22 driver's simulation thing. This was done in  
23 connection with operating a motor vehicle, that  
24 study, wasn't it?

25 A Yes. That's why most of these studies have



1           been done in that area.

2           Q           Sure. To see how well a person could drive or  
3           operate after they've consumed alcohol, right?

4           A           That's correct.

5           Q           And who sponsored this or paid for this. Was  
6           it a state or federal grant of some kind?

7           A           It was actually both, Mr. Madson, in my  
8           program in North Dakota. It was partially funded  
9           by the State of North Dakota monies that were  
10          appropriated dollars. My program was also  
11          supported by what was called 407 monies. This is  
12          a classification of federal dollars.

13          Q           Okay. I don't need to go...

14          A           From the federal government, as well as the  
15          Minnesota programs.

16          Q           And was somebody else involved in the study  
17          with you, the North Dakota one, for instance. I  
18          mean, was it just you or others?

19          A           My staff, yes.

20          Q           Did you publish anything on that?

21          A           The studies -- yes, I have one publication on  
22          this.

23          Q           Where was that published?

24          A           This was a publication that was done during  
25          the same training programs utilizing the drinking

1 subjects and which we also evaluated screening  
2 testing devices that were being used at that time  
3 for roadside testing.

4 Q You mean portable Breathalyzers, is that what  
5 you're saying?

6 A If you wish to call it that. Portable breath  
7 testing instruments that were being introduced in  
8 this country and this was an evaluation study.  
9 And, incidentally, that study was also funded by  
10 the Insurance Institute of Highway Safety in  
11 Washington, D.C. That was published in 1970.

12 Q In 1970?

13 A Yes, sir.

14 Q When was the last study you did on this  
15 subject?

16 A I would say in the late '70s -- somewhere  
17 between the late '70s mid '80s, because, as I  
18 said, even after I moved to Oklahoma, I  
19 participated in a number of these drinking  
20 experiments and observations in Minnesota as a  
21 guest participant, as well as I have done the  
22 same thing on several occasions in Oklahoma in  
23 their testing programs. But's been certainly not  
24 within the last five to seven years.

25 Q Is it fair to say, sir, that the research in

1 this subject is kind of on-going? There are a  
2 number of people doing continual research  
3 projects on this topic?

4 A I would say, yes.

5 Q And would you say you were certainly not the  
6 only expert in the field of alcohol?

7 A I certainly would not ever say that.

8 Q Would you agree that there is some  
9 disagreement among the experts in this field?

10 A In what area.

11 Q How about absorption rates, for example.  
12 Elimination rates?

13 A I don't know exactly what you mean,  
14 "disagreements". Different people observed  
15 different things, depending upon the -- you know,  
16 the way the drinking experiments are conducted.  
17 This is one of the major reasons why those of us  
18 in the field use ranges for prediction. You  
19 know, blood alcohol concentrations and rates of  
20 absorption, rather than giving a finite number.

21 Q Sure. For instance, you said that normally on  
22 elimination rates it's .01 to .03, that's the  
23 general range of 95% of the population?

24 A Yes, sir.

25 Q Is it true, sir, that other researchers have

1 found more extremes than this? In other words,  
2 down to, say, .004 to .04?

3 A I have seen such numbers published, yes.

4 Q So you have seen material like that published?

5 A I have seen that published.

6 Q It extends the absorption or elimination  
7 rates, rather? More than .01 to .03?

8 A I haven't seen ranges in great exception to  
9 that range, but I have seen individual reports of  
10 single measurements that were made outside those  
11 limits. That would be within that 5% I would  
12 presume.

13 Q Then how about -- you didn't talk at all about  
14 absorption rates now yesterday Maybe you did  
15 but I may have missed it.

16 Now, people don't absorb alcohol exactly the  
17 same, do they? I mean, me, your, or anybody  
18 else?

19 A No. In fact, there is a slight difference  
20 between male and females on absorption, but  
21 there's not so much a sex difference or  
22 individual difference as far as physical size.  
23 It depends up on the concentration of the  
24 beverage you are consuming, the total amount, of  
25 course, and the presence of food stuff in the

1           stomach influences the absorption.

2           Q           Now, generally, don't people more or less  
3           agree -- experts more or less agree that after  
4           the last drink is consumed within an hour or two  
5           -- say, an hour and a half, the vast majority of  
6           people are supposed to have absorbed all the  
7           alcohol.

8           A           I would say that's a reasonably fair  
9           statement, yes.

10          Q           Would you agree that some researchers have  
11          found that it could be longer than that? Even up  
12          to three hours?

13          A           I have seen that published, yes.

14          Q           So is it fair to say that there is, again, a  
15          range of absorption rates which may -- are  
16          somewhat flexible -- it isn't definite or it  
17          isn't certain, is that correct?

18          A           Oh, certainly.

19          Q           Now, you, then, yesterday said -- you took one  
20          point. There is a .061 blood alcohol reading at  
21          a given time, right?

22          A           Yes, sir.

23          Q           Now, if I understand correctly, you cannot say  
24          that the urine test that was performed about the  
25          same time can be used by itself -- just by itself

1 to determine what a person's blood alcohol  
2 reading was at some prior time.

3 A In itself alone, in my opinion, no.

4 Q So looking at the blood test, then, you have  
5 1. taken at one particular point in time, right?

6 A Correct.

7 Q And then by your hypothesis, you can take that  
8 point and using these different elimination rates  
9 and project backwards and get hypothetical, at  
10 least, blood alcohol rates or levels, rather, at  
11 a given time.

12 A Within the predicate that was offered, yes.

13 Q And, of course, that predicate, as you stated,  
14 assumes certain things?

15 A Yes.

16 Q Of course, it assumes that within this entire  
17 period of time the subject did not consume any  
18 alcohol. In other words, I think Mr. Cole told  
19 you yesterday, you have to assume that drinking  
20 in Captain Hazelwood's case stopped at 8:00, and  
21 no drinking occurred after that?

22 A I think that was -- yes.

23 Q Now, what about Moussy beer. Now, you  
24 indicated it's a very low alcohol content, but it  
25 has some alcohol, does it not?

1 A Well, I don't really know that it has any.  
2 I've never tested Moussy beer. I've tested many,  
3 many different brands of beer in the laboratory.  
4 Frankly, it's one I never heard of until I was  
5 exposed to this case. The label reflects that  
6 it's not contained in excess of 0.5% by volume.  
7 That doesn't tell me that it has any alcohol in  
8 it at all, but it says that it should not be...

9 Q But it could contain...

10 A Yes, sir. It should not be in excess of .5%.

11 Q You didn't personally test it to see whether  
12 it did or not?

13 A I did not.

14 Q Then, sir, I would imagine that even if it has  
15 a very low alcohol content, if you drink a large  
16 quantity of the stuff you are increasing the  
17 amount of alcohol regardless of how small it is?

18 A No. That wouldn't happen, Mr. Madson, with a  
19 beverage that has that low a concentration. If  
20 one were to even assume that it did, in fact,  
21 have .5%, the body's rate of elimination -- the  
22 processes that I elaborated on somewhat yesterday  
23 -- the rate of elimination of the body is such  
24 that it exceeds -- actually a human body of  
25 someone weighing 160, 170 pounds, can eliminate 9

1 grams of alcohol per hour. And one Moussy beer,  
2 if it did contain .5% by volume, only contains  
3 1.8 grams. So one could continuously drink such  
4 a beverage and never accumulate a significant  
5 blood alcohol.

6 Q In your opinion you are eliminating faster  
7 than you can take it in, is that what you are  
8 saying?

9 A Or at the same rate or faster, yes, sir.

10 Q However, if a person drank, say, between 7:00  
11 and 8:00 that morning. In other words, drinking,  
12 supposedly, according to your hypothesis, stopped  
13 at 8:00 p.m. But the following morning, let's  
14 say within three hours of the time the test was  
15 taken of alcohol other than Moussy was drank.  
16 Let's say something -- regular alcohol. That  
17 would, of course, throw your hypothesis out the  
18 window, so to speak?

19 A If I understood your question, Mr. Madson,  
20 that...

21 Q I don't know if I understood my question  
22 either.

23 A It was a bit complex. You said assume that  
24 something other than Moussy's were drank at some  
25 time later in this time period, 4:00, 5:00, 6:00.



1           What influence would this have upon a bad  
2           calculation?

3           Q           Right.

4           A           Obviously, it would impair such a calculation.

5           Q           Impair to the point where it certainly has a  
6           reduced forensic or scientific value?

7           A           Yes, sir. And it's all dependent, Mr. Madson,  
8           on -- they hypothetical doesn't give me anything  
9           to work with, I mean, as far as the amount of  
10          alcohol.

11          Q           Yeah. All you've got is one point, isn't it?  
12          I mean, that's essentially it. You've got .06,  
13          and you got to work with that?

14          A           That's correct.

15          Q           Now, on that particular subject you came up  
16          with some figures yesterday, and I don't pretend  
17          to be an expert, but let me see if I can put this  
18          on here. You mentioned a bell curve. Is this  
19          what you are kind of referring to?

20          A           Sort of.

21          Q           Only sort of.

22          A           Well, a bit more of a straight line on the  
23          descending phase.

24          Q           This part here you mean?

25          A           The down slope on the other side. You had it

1 tailing off for some reason there.

2 Q Okay. But to illustrate my point. And  
3 certainly if you want to come up and do it,  
4 please do. But this, of course, is the -- well,  
5 you're talking about the elimination rates,  
6 right? Let's say .01.

7 A We've used different elimination rates there.

8 Q But let's just assume we put this on here to  
9 scale, okay. And you can change that to .008, if  
10 you want -- change this upward. But just as a  
11 rough scale. If I understand correctly, what  
12 you're saying is that 95% of the population, from  
13 your studies, would show that -- would fall  
14 between here and over here somewhere?

15 A I'm sorry. I understand why the bell shaped  
16 curve, right. You're talking about the  
17 elimination rates?

18 Q Right.

19 A Yes, sir, 95% would fall between .01 and .03.

20 Q And then at the center I think you said it was  
21 about .018, is that correct?

22 A Yes, sir.

23 Q And so the vast majority of people, then,  
24 should fall in this range -- the average range?

25 A That's right, yes, sir.

1 Q So if you take this figure, which is 20% less,  
2 as you indicated yesterday, and come up -- go  
3 backwards from -- let's see, what time -- I think  
4 you said it was around 10:30, right, a.m., the  
5 test was taken?

6 A That was my understanding, yes, sir.

7 Q Assuming it was 10:50, would that change  
8 anything? Twenty minutes later?

9 A Not of any real consequence.

10 Q Okay. Assuming, also, the drinking stopped at  
11 7:30 and 8:00 p.m., would that change anything  
12 significantly?

13 A No, sir.

14 Q So, you said that you could come up with a  
15 figure of about .14 at midnight then?

16 A Yes, sir.

17 Q And that would be almost 11 hours earlier?

18 A Yes, sir. Ten and a half to 11 hours.

19 Q Mr. Prouty, you indicated that you testified  
20 over a thousand times?

21 A I said somewhere between 800 and 1,000 times,  
22 yes.

23 Q Well, in that range, if my calculations are  
24 correct, even in 30 years, that's more than one a  
25 month, is that fair to say?

1 A I haven't calculated it out, but I would trust  
2 your arithmetic.

3 Q Well, assuming thee was a thousand. In 30  
4 years, that comes to over -- yeah -- according to  
5 me that's more than two a month, according to my  
6 math. But if it's 800 it would be less than  
7 that.

8 A There have been periods of time that I've  
9 testified five days in a week.

10 Q Five different cases?

11 A Five different cases.

12 Q In one week?

13 A Yes, sir.

14 Q Is it fair to say, sir, that your testimony in  
15 prior cases wasn't on the retrograde  
16 extrapolation in all situations?

17 A In all of these? Oh, no, sir.

18 Q Well, what -- I mean, you had a variety of  
19 things you testified about, right?

20 A Oh, yes.

21 Q Because you do other work besides this?

22 A Yes, sir, I do.

23 Q In retrograde extrapolation cases -- now,  
24 again, that's taking the point and working  
25 backwards based on certain assumptions, right?

1 How many times would you say you testified?

2 A Oh, dozens. I really don't know. I don't  
3 have these quantified, Mr. Madson. I testify  
4 about things other than alcohol, too, as you  
5 might have known.

6 Q Oh, that's what I thought you said earlier.

7 A Yes.

8 Q But my question was, if you can recall? Just  
9 give an approximation.

10 A No, I really can't give a number that I would  
11 be confident with. But several dozen times --  
12 maybe 50 times. I don't know.

13 Q Okay. But my point is, in those 50 times,  
14 what was the widest range of time that you were  
15 asked to go backwards. What's the outside limit  
16 in your prior cases?

17 A I do not know what was the widest range, but I  
18 can this that this case incorporates a bad  
19 calculation for a longer period of time that I  
20 have ever been asked to do.

21 Q You've never been asked to do one -- to go  
22 back this far before?

23 A No. There's a first time for everything, I  
24 guess.

25 Q Would you agree, sir, the farther you have to

1 go back the less forensic value the test may have  
2 because of the variables and assumptions that you  
3 have to make?

4 A No, I would not agree with that statement.

5 Q Well, let's do this then. If the drinking  
6 stopped at 7:30 and there is no drinking, the  
7 test is taken at 10:50 the next morning -- the  
8 blood test -- why don't you go backwards a little  
9 bit more then. Instead of stopping at midnight,  
10 let me ask you to assume something else. Assume  
11 the average absorption rate occurs. And let's  
12 say one hour after the drinking, from 7:30 -- and  
13 it's absorbed by 8:30. Would you disagree with  
14 that, that's within the realm of possibility?

15 A That the last drink is absorbed within an  
16 hour?

17 Q Yes.

18 A That's certainly possible, yes.

19 Q So at 8:30 then, the subject -- let's say,  
20 Captain Hazelwood -- if he stopped drinking at  
21 7:30, an hour later he should be approaching his  
22 peak...

23 A Depending upon what he had to drink prior to  
24 7:30, yes.

25 Q I want you to refer to your sketch that you

1           drew yesterday.

2           A           Surely.

3           Q           That's the time scale? This is blood alcohol  
4           content?

5           A           Yes, sir.

6           Q           So, in other words, if the drinking -- let's  
7           say -- this is what -- say if it stopped at 7:30,  
8           that would be your starting point, is that right?

9           A           This would be the starting point where  
10          drinking started. In other words, there's no  
11          alcohol.

12          Q           Okay. No alcohol here. That's right. I'm  
13          sorry. And as drinking continues, blood alcohol  
14          increases over time. And if this -- in the scale  
15          -- if we had hours down here -- if you had an  
16          hour, let's say, here, and you are approaching --  
17          the drinking stopped, assuming here at 7:30,  
18          okay?

19          A           Right.

20          Q           Then as you said, depending on what he had to  
21          drink and perhaps what he had to eat, certainly,  
22          the absorption might be delayed some.

23          A           That's right.

24          Q           But in any event, since there is no more  
25          alcohol being consumed within, say, 90 minutes by

1 most experts' opinions, all the alcohol is  
2 absorbed, you reach the peak.

3 A Right.

4 Q You don't get any higher than that?

5 A That's correct.

6 Q And that could be 8:30, 9:00?

7 A That's possible, yes.

8 Q Then do your calculations, sir, based on  
9 retrograde extrapolation, going back, let's say,  
10 from -- using the same blood alcohol test -- but  
11 carry it back, instead of midnight -- carry it  
12 back to 9:00 or 8:30. What do you get?

13 A Could we use 8:30 so we have an even number of  
14 hours?

15 Q Oh, sure. Whatever figure you are comfortable  
16 with, sure.

17 (Pause)

18 A If we use the time frame of 8:30 and we go to  
19 10:30, this is 14 hours. And if one uses the  
20 elimination rates that I used with the 20%...

21 Q No, the same figures...

22 A 008.

23 Q Right.

24 A Yes. This would mean an average elimination  
25 of .112% during that time frame, and if you add



1           that to the .06, it would be about a .17.

2           Q           Now let me flip that back where you drew the  
3           figures yesterday. What was that figure, again,  
4           by the way?

5           A           .17.

6           Q           Before I leave this -- well, I think it's on  
7           here (indicating). Before we leave the bell  
8           shaped curve here, you took this figure of .008  
9           and came up with a figure of 0.14, right?

10          A           Yes, sir.

11          Q           Now, that, of course is on the very, very low  
12          end of the scale?

13          A           Yes, sir.

14          Q           Now, since this is a bell shaped curve and you  
15          don't know what Captain Hazelwood's elimination  
16          rate actually is, the chances are he could be  
17          anyplace in here, right?

18          A           That's right.

19          Q           And if you want to talk chances, chances are  
20          he would be more in this lumpy part right her?

21          A           That's correct, sir.

22          Q           And if you want to take this and say, well,  
23          assuming his elimination rate is .008, you could  
24          just as well make the same assumption that's .03?

25          A           That's correct. We did that here.

1 Q And if you do that, you get a .37, which is  
2 extremely intoxicated, isn't it?  
3 A Yes, sir.  
4 Q Now, could you do the same calculations as  
5 you've done here, only put the time 8:30 on here,  
6 and put that down? Could you do that?  
7 In other words, instead of 12:05, write in  
8 8:30 and then do calculations.  
9 A We're talking about 8:30 p.m. the day before?  
10 Q Yes, that's correct. I realize it might take  
11 some time so don't feel rushed.  
12 A Sure. I wouldn't let you rush me.  
13 Q Maybe it's kind of a test.  
14 (Pause)  
15 A Okay.  
16 Q Sir, could you step forward to the board then  
17 and put those one? I'd just as soon have it all  
18 in your writing, as long as you did most of that.  
19 And if you would, after the 12:05, put "a.m.",  
20 and at 8:30 put "p.m." so we could keep those  
21 straight.  
22 A Okay. Why don't I put the 8:30 up here, if  
23 you'd like.  
24 Q Well, wherever you want. It doesn't make any  
25 difference. There was more space between the

1 other two, but I don't care, wherever you feel  
2 comfortable. I guess it makes more sense to put  
3 it where you wanted it.

4 (Pause)

5 (2256)

6 A Those are the numbers that I got. Do those  
7 agree with yours?

8 Q I didn't do it. I'll take your word for it.

9 A May I sit down?

10 Q Sure. Please. Now, sir, one of the things  
11 about retrograde extrapolation is that you  
12 certainly would feel a lot more confident,  
13 wouldn't you, in your results if you had  
14 witnesses that would confirm that the person  
15 appeared to be intoxicated at the time you get a  
16 certain blood alcohol reading?

17 A No, I would not.

18 Q You would not?

19 A No, sir.

20 Q In no situation?

21 A No, sir.

22 Q In other word, if you had -- let's just take  
23 the hypothetical, the 8:30 p.m., okay? You came  
24 up with a .20. That's pretty intoxicated, isn't  
25 it?

1 A Yes, it is.

2 Q Wouldn't you agree, sir, that most people  
3 would exhibit or manifest signs of intoxication  
4 at that level?

5 A Well, I would not agree with that  
6 categorically, Mr. Madson, because I think I  
7 testified yesterday -- if I didn't make it clear,  
8 I wish to make it clear here today -- that visual  
9 observation is not the best index of measuring  
10 intoxication. And I did testify that I have seen  
11 a number of people that are .20 that would not  
12 outwardly demonstrate any clinical manifestations  
13 of intoxication.

14 I would say this: that certainly more than  
15 half the population would, but when you are  
16 dealing with one given specific subject, I could  
17 not say that.

18 Q By the way, do you happen to know a Dr.  
19 Michael Propst from Alaska?

20 A I met Dr. Propst a couple weeks ago as a  
21 matter of fact.

22 Q Did you consult with him regarding this case?

23 A No.

24 Q Did you consult with him on the subject of  
25 alcohol in general?

1 A No, I haven't consulted with him at all.

2 Q But you met him?

3 A Yes, I met him.

4 Q I mean, just a chance meeting at an airport,  
5 or what happened?

6 A No, I met him with Mr. Cole, and I, and Ms.  
7 Henry visited his office for a short period of  
8 time. Oh, I think that was about the -- it was  
9 the first weekend I was here. I think it was on  
10 the 23rd, 4th, 5th of February.

11 Q Dr. Propst was retained by the State also on  
12 the same...

13 A It's my understanding that he was.

14 Q Yeah. Do you feel that he is a competent  
15 expert in the field, as you are?

16 A You asked me two questions.

17 Q I don't mean, as competent, but competent,  
18 okay.

19 A In the field of alcohol?

20 Q Uh-huh (affirmative).

21 A No, sir, I do not.

22 Q You don't feel he is?

23 A No, sir, I do not.

24 Q You don't feel he is?

25 A No, sir.

1 Q Competent in that field?  
2 A I said, "As I am."  
3 Q As you are?  
4 A Yes, sir.  
5 Q But would you consider him to be an expert?  
6 MR. COLE: Objection. That calls for a legal  
7 conclusion.  
8 MR. MADSON: I don't think so, Your Honor. I  
9 think he could tell who is an expert in a particular  
10 field as well as -- probably better than most people.  
11 THE COURT: Your object that calls for a legal  
12 conclusion is overruled.  
13 Q (Mr. Prouty by Mr. Madson:) Would you say  
14 that he is at least an expert?  
15 MR. COLE: Objection. Lack of foundation.  
16 Q Well, if you don't know whether he is or not,  
17 you can certainly say so, Mr. Prouty.  
18 A Well, I would like to qualify...  
19 THE COURT: Just a minute.  
20 A ...my answer.  
21 THE COURT: Just a minute. Where are you  
22 going with this?  
23 MR. MADSON: Well, Your Honor, what I'm going  
24 to do is ask Mr. Prouty if he agrees with the statement  
25 made by Dr. Propst.

1 THE COURT: That's what I thought. You're  
2 going to get around to the right one here soon. Now,  
3 if it's hearsay...

4 MR. COLE: Hearsay.

5 THE COURT: ...and...

6 MR. MADSON: Well, Your Honor, it is, but he's  
7 an expert and he relies on hearsay.

8 THE COURT: No, but he said he hasn't relied  
9 on this. You're not going to get that in, Mr. Madson.

10 Q (Mr. Prouty by Mr. Madson:) So you didn't  
11 rely on anything Dr. Propst told you or anything  
12 he read?

13 A That's absolutely correct.

14 Q Anyway, you said that from your personal  
15 observation you have seen people at a .20 that  
16 didn't show or manifest signs of intoxication?

17 A Yes. A couple of lawyers, as a matter of  
18 fact.

19 Q A couple lawyers. Well, they're probably  
20 pretty good at it. Did you have any for  
21 volunteers for your test?

22 A I've had a number of them, yes. I conducted  
23 several studies with attorneys, and judges, other  
24 professional groups.

25 Q Police officers?

1 A Police officers, physicians.

2 Q Let's go up a little bit more. Let's take the  
3 average. Just your average Joe Blow. At that  
4 time he's got a .31. Now, at a .31, would you  
5 agree that most people, if not all people, would  
6 show obvious signs of intoxication at .31?

7 A I would agree that most people would.

8 Q And there is still a rare individual that  
9 would not show any signs at all?

10 A That's correct.

11 Q Well, sir, you mentioned yesterday about  
12 statutes in various states that have different  
13 levels of blood alcohol as a criteria for  
14 intoxication, right?

15 A We addressed that generally.

16 Q Yes. States have the right to put whatever  
17 number they want in there.

18 A Certainly. This is by legislation.

19 Q Now, let's assume the state law is, a person  
20 to be guilty of being under the influence -- okay  
21 -- under the influence of operating a motor  
22 vehicle, then he has to be noticeably impaired at  
23 his...

24 MR. COLE: I object to that. That's not what  
25 the law is.



1 MR. MADSON: Well, one second and I'll give it  
2 to you, word-for-word.

3 THE COURT: Counsel approach the bench,  
4 please.

5 (2567)

6 (Whispered bench conference as follows:)

7 (Indiscernible bench conference.)

8 (End of whispered bench conference)

9 (2584)

10 Q (Mr. Prouty by Mr. Madson:) Well, Mr. Prouty,  
11 let me ask you this: you say from your studies  
12 and your observations you would not -- you did  
13 not detect noticeable signs of intoxication in a  
14 person, let's say, with a .20 blood alcohol?

15 A That's correct.

16 Q Is it fair to say that in many situations you  
17 did?

18 A Yes, sir, that is true.

19 Q Is it fair to say in the majority of  
20 situations you did?

21 A I would say so. More than 50%, certainly.

22 Q And is it fair to say that someone else  
23 observing the same person at the same time might  
24 disagree with you?

25 A Well, I've been disagreed with a lot of times.

1           Certainly.  People out of the prerogative would  
2           disagree.

3           Q           The two of us could look at something and we  
4           could have a total disagreement as to my opinion  
5           and your opinion, and that would include whether  
6           a person is intoxicated?

7           A           I think I said yes, that it's in the eyes of  
8           the beholder.

9           Q           Let's say, now, at .31 blood alcohol -- if a  
10          person has a .31, according to your extrapolation  
11          backwards.  If you had witnesses that could  
12          testify that the person was staggering, falling,  
13          doing all these other things that are consistent  
14          with intoxication, that would verify your  
15          conclusion, wouldn't it?  Or, certainly  
16          corroborate it?

17          A           Right.  The greater observations would  
18          corroborate the analytical data.

19          Q           On the other hand, at a .31, if nobody -- in  
20          other words, when I say "nobody", let me rephrase  
21          that.  Let's say a number of people observed the  
22          individual at that time and detected no signs of  
23          intoxication.  That would tend to not corroborate  
24          your result, would it not?

25          A           Obviously, that's true.  Yeah.

1 Q So, visual observations are important, aren't  
2 they? Whether they are yours or somebody else's.  
3 A They are of some value, but they are not a  
4 definitive index of intoxication.  
5 Q Would you say they are as good a value or less  
6 valuable than your extrapolation backwards for a  
7 period of 14 hours?  
8 A I would say less valuable.  
9 Q In other words, you put a great deal of faith  
10 in this extrapolation theory?  
11 A I do, yes.  
12 Q Now, are you familiar with Dr. Dubowski (ph),  
13 sir?  
14 A Curt Dubowski, yes, sir.  
15 Q Who is he?  
16 A Curt Dubowski is the director of the State  
17 Chemical Test Board for the State of Oklahoma.  
18 He's also on the faculty of the Department of  
19 Medicine at the Health Sciences Center at the  
20 University of Oklahoma.  
21 Q Have you ever utilized -- you've seen works  
22 that he's done, and studies he's done, and papers  
23 he's written?  
24 A Oh, much of his work, yes.  
25 Q For instance, have you ever read, "Absorption,

1 Distribution, Elimination of Alcohol, Highway  
2 Safety Aspects"?

3 A If you would show me the article I could tell  
4 you. I probably have. I've read a great deal of  
5 Curt's work.

6 Q I can't give you the date on this because this  
7 copy is blurry, I'm sorry. But maybe you  
8 could...

9 A Do you know where this was published?

10 Q Studies on Alcohol.

11 A Yes, I think I have reviewed this article some  
12 time in the past.

13 Q Would you agree, sir, that Dr. Dubowski is one  
14 of the foremost authorities on the subject of  
15 alcohol in the country?

16 A He's been considered by some, yes. He's very  
17 knowledgeable in the field.

18 Q Now, would you agree, for instance, with Dr.  
19 Dubowski if he said that the rate of alcohol  
20 absorption, after intake, is greatly influenced  
21 by the nature and concentration of the alcoholic  
22 beverage, the food intake, and a multitude of  
23 other physical biological and psychological, and  
24 time factors?

25 A Not in total context, no. I would agree with

1 his former statement. I don't know where  
2 psychological factors interplay.

3 Q I'm sorry, I made a mistake. Physiological.

4 A Okay.

5 Q All these sciences kinda mingle together after  
6 a while. Physiological.

7 A I don't think -- I can't recall, Mr. Madson,  
8 right off the top of my head, a significant  
9 physiological factor that's going to influence  
10 the rate of absorption of alcohol. But the  
11 amount consumed, the concentration, the presence  
12 of food, yes.

13 Q Did you...

14 A It does vary.

15 Q Did you ever see a study of his that indicated  
16 that he found that blood alcohol concentration --  
17 that is, the last time from the time the alcohol  
18 intake ended until it was absorbed to the peak,  
19 varied from 14 to 138 minutes?

20 A I don't recall it in that context. How many  
21 hours is 138 minutes?

22 Q Well, 60 minutes in an hour, so we've got 60  
23 plus...

24 A Over two hours?

25 Q Yes.

1 A I don't remember that particular prophecy or  
2 report by him, but certainly in keeping with my  
3 own observations, it can take that long.

4 Q Now, getting back to your curve regarding time  
5 and blood alcohol content. The curve you drew  
6 here is -- on the declining phase at least, seems  
7 to be relatively straight?

8 A Yes, sir.

9 Q Would you agree that Dr. Dubowski has found  
10 that there can be a lot of variations in this?

11 A Dr. Dubowski has made such reports, yes.

12 Q By the way, do you know how you got to be  
13 called as the consultant by the State in this  
14 case? Who referred you to them?

15 MR. COLE: Objection. Relevance.

16 MR. MADSON: Well, I was wondering if it was  
17 Dr. Dubowski by any chance?

18 THE COURT: I'll let him answer the question.

19 A I don't know where it all started. Dr.  
20 Dubowski knows that I am a consultant on this  
21 case.

22 Q But you don't know how it came about though,  
23 is my question. Is that what you're saying?

24 A Not totally, no. I was first contacted by Mr.  
25 Cole by phone.

1 Q Would you agree, sir, that if you had two  
2 blood tests taken, let's say, an hour apart, two  
3 hours apart, something like that. That could at  
4 least give you substantial more information as to  
5 whether or not the person -- the subject was in  
6 the declining phase of alcohol elimination, or  
7 still going on absorbing?

8 A Not in itself alone, Mr. Madson. It depends  
9 on, number one, how the tests were done. And,  
10 number two, when the tests were done.

11 Q So there is...

12 A You can have two tests and get the same  
13 number.

14 Q Well, let's say an hour apart?

15 A That's possible.

16 Q What's possible, same number?

17 A Yes.

18 Q How about two hours?

19 A That's possible.

20 Q So that doesn't really give you much more  
21 information, even if you had two blood tests  
22 taken?

23 A It gives more, but it certainly doesn't close  
24 all of the gaps. The absorption time, or the  
25 time since the last drink is the most important





1 Q You don't know whether he would agree or  
2 disagree with you in a case involving  
3 extrapolation back 10 to 14 hours, is that fair  
4 to say?

5 MR. COLE: Objection. Relevance and hearsay.

6 MR. MADSON: I'll withdraw it.

7 A I...

8 THE COURT: Don't answer the question. The  
9 question has been withdrawn.

10 A Yes, sir.

11 Q I take it it has been some time since you saw  
12 this particular paper by Dr. Dubowski? You said  
13 you remember reading it.

14 A I think I reviewed that paper sometime ago for  
15 another case that I was working on. I don't  
16 trust my recall to remember everything that he  
17 wrote in that article.

18 Q Would you agree in his summary and  
19 conclusions..

20 MR. COLE: Objection. I'm going to object at  
21 this point. There's been no showing that this witness  
22 relies on the opinions of Dr. Dubowski in any way, this  
23 is simply hearsay.

24 MR. MADSON: Your Honor, he's read this paper,  
25 and he's certainly not -- he's indicated Dr. Dubowski

1 is a well respected expert in the field. I think I'm  
2 certainly entitled to cross examine him to see if other  
3 experts as knowledgeable as he is would disagree on the  
4 same subject.

5 THE COURT: You haven't laid a foundation to  
6 get it under 803.18. Objection as to hearsay is  
7 sustained.

8 Q (Mr. Prouty by Mr. Madson:) Mr. Propst...

9 A Prouty.

10 Q Mr. Prouty, excuse me. I'm so used to seeing  
11 Dr. Propst here. Mr. Prouty, you've known Dr.  
12 Dubowski personally?

13 A I've known Curt personally and professionally  
14 for more than 25 years.

15 Q And you agree that he is an expert in this  
16 field?

17 A Within what context, Mr. Madson. I know the  
18 legal definition of an expert.

19 Q Well, would you say he's knowledgeable in the  
20 field of alcohol?

21 A He certainly is knowledgeable in the field of  
22 alcohol.

23 Q Is he as knowledgeable as you are in this  
24 field?

25 A I certainly think that he is.

1 Q And you've read his works?  
2 A I have.  
3 Q And you've read the one I've been referring to  
4 here?  
5 A I read extracts of it this morning.  
6 Q Have you utilized any of his works, in  
7 particular this one -- this paper, in anything  
8 that you've used in the past in this case or  
9 others?  
10 A Not that I recall. Certainly not that paper.  
11 Q Well, is it because you just disagree with it?  
12 A I have already testified that I disagree with  
13 certain excerpts that you have quoted from the  
14 paper.  
15 MR. MADSON: Well, Your Honor, I think I  
16 should be permitted to ask about other excerpts and see  
17 if he disagrees or agrees with these. There's another  
18 expert in the field who has written substantial  
19 articles on it, and is knowledgeable.  
20 THE COURT: You've not established that the  
21 document you have, the pamphlet or the extract from a  
22 pamphlet or a publication through this witness is a  
23 reliable authority -- by this witness, or through any  
24 witness, so you haven't laid a proper foundation yet.  
25 Q Well, Mr. Prouty, would you agree that this is

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a reliable article written by a reliable authority?

A Not in its entirety, Mr. Madson, because I just disagreed with some portions of the paper.

Q Does that make it unreliable?

A That portion of it does.

Q Because you disagree with it?

A You're asking me, sir, yes.

Q I know, I'm asking you.

A Yes.

Q So you don't rely on anything Dr. Dubowski has said in this paper because you disagree with it?

MR. COLE: Objection, Your Honor. He hasn't even showed him the whole paper.

MR. MADSON: He's read it. I'll be glad to show him again.

THE COURT: Mr. Madson, that's an incorrect characterization of what the witness said. He said, "read extracts from it". You don't even have a date on it. You don't even know where it came from, Mr. Madson. So the objection is sustained.

MR. MADSON: Your Honor, I've showed it to the witness and it is on here -- or, it comes from the date, and I'll be glad to ask the witness to take his time and read it, if the court permits, and then allow

1 me to ask questions.

2 THE COURT: I'll permit you to look at  
3 Evidence Rule 803.18 at this time and perhaps that will  
4 assist you somewhat.

5 MR. MADSON: Well, I'm afraid it won't Your  
6 Honor, as long as the witness believes that this isn't  
7 reliable, so I'll just go on.

8 THE COURT: That's correct. So the objection  
9 is sustained.

10 Q (Mr. Prouty by Mr. Madson:) Now, getting to  
11 the heart of what I think you said yesterday, Mr.  
12 Prouty. You said that alcohol can affect people  
13 in various ways, and you went into some detail  
14 about how that occurs. For example, I think you  
15 said it affects -- it's a progressive thing,  
16 right?

17 A Yes, sir.

18 Q For instance, the first thing that might be  
19 affected, I think you said, would be, maybe  
20 judgment -- decision making?

21 A I think I said inhibitions first.

22 Q Okay. I'm trying to find where I wrote it.  
23 Inhibitions. That's things that one normally  
24 wouldn't do for moral or legal reason, perhaps,  
25 but with enough alcohol your inhibitions might be

1 release -- lessen to the point, you would do what  
2 you wouldn't otherwise do, is that correct, sir?

3 A Yes. I think I characterized it as your moral  
4 or social breaks. Alcohol has been described as  
5 having an affect of unraveling the knitted sleeve  
6 of care.

7 Q Sounds like Shakespeare.

8 A That's exactly where it came from.

9 Q Then, sir, what's the next thing?

10 A Reasoning, judgment, problem solving, decision  
11 making.

12 Q Now, in the studies that you did, how did you  
13 relate decision making, judgment, problem  
14 solving, to observations of people under the  
15 influence.

16 A Well, part of it would have been from the  
17 testing that was done with a number of the  
18 subject, as far as using driving simulators,  
19 where you are presented -- you are familiar with  
20 driving simulators. You have a video screen, and  
21 it's as though you are behind the wheel of a car.  
22 And certain situations are presented that you  
23 have to evaluate as to how you are going to  
24 respond. And they more frequently make poorer  
25 evaluations of that traffic situation, and make

1 an improper response. Now, this is one way of  
2 doing it.

3 Also, it's on a question...

4 Q That's actually physically controlling a make  
5 believe automobile?

6 A Right. But before they...

7 Q You're behind the wheel and doing all the  
8 steering?

9 A Right. In the four step phase thing that we  
10 discussed yesterday, before you take an action  
11 you first have to make a decision what that  
12 action is going to be. And that involves  
13 reasoning and judgment.

14 Q Could you give us an example. In other words,  
15 on your simulator, does something come out of the  
16 intersection and requires the driver to make a  
17 decision, or -- I don't quite understand how it  
18 works.

19 A That's a very good analogy. That's done  
20 sometimes.

21 Q So his reaction time could be affected as to  
22 whether he decided to step on the brake or not?

23 A Reaction time can be affected, but that's not  
24 part of the decision-making, that follows.

25 Q What decision-making are we talking about

1           here?

2           A           Well, you just gave a good analogy, is that if

3           you're approaching an intersection at a certain

4           speed, and a vehicle or possibly a pedestrian

5           appears somewhere adjacent to that intersection,

6           as to whether you slowed the car down, whether

7           you speed it up, whether you even recognize that

8           that object is there.

9           The situation has to be evaluated. This

10          information has to be processed by the brain, and

11          then a judgment made as to what one is going to

12          do with that situation.

13          Q           In other words, you kinda recognize the

14          problem and decide how to avoid it or solve it,

15          right?

16          A           Yes, sir.

17          Q           And you said this can be observed, right?

18          A           I beg your pardon.

19          Q           This can be observed. You can see this in the

20          individual. His decision-making -- you know, how

21          he makes a decision or how he doesn't?

22          A           No, you don't see his mental process, you see

23          the end result.

24          Q           No, but you see what he does?

25          A           Sure.



1 Q In other words, if you see this subject  
2 reacting too late, and he runs over the  
3 hypothetical pedestrian, you can say that was  
4 poor judgment and poor reasoning, poor decision-  
5 making?

6 A And combined, possibly, with poor reaction  
7 time possibly.

8 Q And certainly people exercise bad judgment to  
9 be not -- when they're sober?

10 A Most definitely.

11 Q So you can't say just because bad judgment is  
12 exercised you automatically are intoxicated?

13 A Oh, unequivocally not.

14 Q Now let's take your situation again, decision-  
15 making or judgment. Suppose in another situation  
16 the subject is not doing it himself. Let's say  
17 he doesn't have to decide that himself, but he  
18 can consult after he -- let's say he's at a .20  
19 blood alcohol, for instance. He's intoxicated.  
20 But he, before making that decision, could refer  
21 to a sober person and say, "Here's what I think.  
22 What do you think about it?", and relying on the  
23 sober person's judgment in addition. Does that  
24 change anything as far as you are concerned, in  
25 the person's as affected by alcohol?

1 I know that's kinda silly, but...

2 A That's rather convoluted, Mr. Madson. You  
3 asked me, is that affecting his judgment, but you  
4 just said he didn't make the judgment, someone  
5 made it for him. I don't...

6 Q Well, let's say he made it with the help of a  
7 sober individual? Or, at least he had a sober  
8 person tell him, "I think it's okay. What you  
9 want to do is okay."

10 MR. COLE: Objection.

11 THE COURT: Just a minute. Maybe you could  
12 rephrase it, Mr. Madson, I'm having a difficult time  
13 following it, too.

14 MR. MADSON: You know, I think I probably am  
15 too, but I'll try to do it myself.

16 Q (Mr. Prouty by Mr. Madson:) Judgment is  
17 normally an individual thing, is it not?

18 A Surely.

19 Q But oftentimes, would you agree, sir, that  
20 when you make a decision -- want to make a  
21 decision, you might rely on other people's input  
22 in addition to your own? You might want to ask  
23 somebody, "What do you think about me doing such  
24 and such."

25 A Oh! This is done all the time, of course, in,

1           like, staffing a given situation; get the opinion  
2           of other people; weigh those and make the  
3           decision yourself is what you're gonna do.

4           Q           So the fact that one is intoxicated, then --  
5           let's say he's intoxicated, but still relies upon  
6           the opinions or judgment of others who are not  
7           intoxicated -- I guess what -- I'm trying to ask  
8           a question and I don't know what it is.

9           A           If you don't know what the question is, I  
10          don't know how to answer it.

11          Q           Let me think about it for a while. This  
12          hypothetical person who is intoxicated who relies  
13          upon the hypothetical person who isn't, to at  
14          least help him make up his mind as to what he  
15          should or should not do, then, wouldn't you say  
16          that the alcohol factor certainly is not as  
17          important in the individual making up his mind or  
18          using bad judgement, I guess is what I'm trying  
19          to say. Alcohol by itself.

20          A           Mr. Madson, I'm afraid I can't answer the  
21          question. If I understand what you're saying --  
22          do you understand?

23          Q           Do I?

24          A           Yes.

25          Q           I think so. Maybe we'll trade places and try

1           that.

2           A           If this individual is a...

3                   MR. COLE: Judge, I object. You know, this

4           isn't clear enough you can't answer it.

5           Q           If you can't answer it, sir, I'm not going to

6           prolong it, okay.

7           A           I'm afraid I can't, Mr. Madson. I'm sorry.

8           Q           But just to sum up, then. Judgment is an

9           individual thing that may or may not be affected

10          by alcohol, right?

11          A           It's always affected by alcohol in all people.

12          Q           But it may be affected to a very minimal

13          extent or it might be affected to a great extent,

14          right?

15          A           I don't know that I can agree with that

16          statement.

17          Q           One drink is going to affect your judgment, is

18          that right?

19          A           It certainly can, yes.

20          Q           It can. Will it?

21          A           In a lot of people, yes.

22          Q           But not in everybody?

23          A           No, sir.

24          Q           And certainly people can exercise bad judgment

25          or make mistakes without any alcohol?

1 A Oh, certainly, Mr. Madson.

2 Q Did you bring your whole file here with you

3 today?

4 A Yes. This is all I have here.

5 Q Did you...

6 A Oh, you mean everything that I've looked at in

7 this case?

8 Q Yes.

9 A Oh, no.

10 Q Did you lose some of it yesterday?

11 MR. COLE: Objection. Relevance.

12 MR. MADSON: Well, Your Honor, I think I could

13 go into this to idea of judgment and mistake.

14 MR. COLE: Can we approach the bench?

15 THE COURT: Okay. Do you want to approach the

16 bench. Come on up.

17 (3969)

18 (Whispered bench conference as follows:)

19 MR. MADSON: He lost some of his file on the

20 17th floor window yesterday last night. He opened the

21 door and the window was open and it blew out. He had

22 to go down and retrieve the things. I just want to see

23 if that's a mistake he made (indiscernible -

24 whispering).

25 THE COURT: I don't think it has any probative

1 value.

2 (End of whispered bench conference)

3 (4000)

4 Objection sustained on relevance.

5 MR. MADSON: That's all I have, Mr. Prouty.

6 Thank you.

7 (4000)

8 REDIRECT EXAMINATION OF MR. PROUTY

9 BY MR. COLE:

10 Q Mr. Prouty, I assume over the years you've  
11 testified in a number of cases where a person was  
12 impaired by alcohol and was stopped for either  
13 driving while under the influence or manslaughter  
14 cases, or assault cases, is that correct?

15 A Oh, yes.

16 Q In the cases that you testified to, and those  
17 people that you found to be impaired, did they  
18 always make poor judgments on everything they did  
19 while they were behind the wheel of the car?

20 A Well, no. That's, of course, impossible to  
21 evaluate, their entire driving experience, if I  
22 understand your question, Mr. Cole.

23 Q Well, did they do things right in driving the  
24 car?

25 A If they had an accident that they caused, they

1           didn't, of course.

2           Q           Not everything right, but they...

3           A           Sure.

4           Q           Did the fact that there were not two blood  
5           tests drawn in this case change any of your  
6           conclusions?

7           A           No, sir, it did not.

8           Q           I would like to talk for a minute about Mr.  
9           Madson's table here. If the person stopped  
10          drinking at 8:00, rather than 7:30, as Mr. Madson  
11          said, and if he had a slice of pizza at around  
12          8:00, how would that affect the absorption rate  
13          of alcohol?

14         (Tape: C-3657)

15                 ...if he had a slice of pizza at around 8  
16          o'clock how would that effect the absorption rate  
17          of alcohol.

18          A           If he had his last alcohol at 8:00 and around  
19          that time had pizza, well this would slow down  
20          the rate of absorption of alcohol.

21          Q           And when you say slow down the rate of  
22          absorption what do you mean?

23          A           Well, I think I testified yesterday, Mr. Cole,  
24          that as soon as alcohol is taken into the body  
25          absorption begins. That is, some of the alcohol

1 will immediately start passing through the wall  
2 of the stomach, and more particularly through the  
3 small intestine. And that's where the major part  
4 of the alcohol is absorbed, not from the stomach  
5 but in the upper portion of the gut immediately  
6 below the stomach. And in order for the alcohol  
7 to be absorbed in the small intestine, it's first  
8 got to get out of the stomach.

9 If there is food present in the stomach, then  
10 the food physically gets in the way of the  
11 alcohol and slows the passage of the alcohol from  
12 the stomach into the small intestine where it is  
13 readily absorbed.

14 So, it gets in the way of it, it slows it  
15 down. It takes longer for that alcohol to be  
16 absorbed.

17 Q And would you expect, then, a longer period of  
18 time, then, for instance for a person to peak at  
19 his alcohol level?

20 A Certainly. That would be the end result.

21 Q So, this wouldn't necess -- you're not saying  
22 that this necessarily -- the 8:30 time was that  
23 time that...

24 A No, sir. I think the predicate of Mr.  
25 Madson's question was to assume that all of the



1 alcohol was absorbed at that point.

2 Q Now, Mr. Madson asked you a question about  
3 Moussy beer. Did you run any experiments that  
4 would give the jury an idea about how much --  
5 what would happen if a person had a number of  
6 Moussy beers between, say, 5:00 and 7 o'clock,  
7 and how that would effect his blood alcohol  
8 content?

9 A Yes. I did.

10 Q Would you explain that and tell the jury what  
11 your results on that were?

12 A The -- I first calculated what the alcohol  
13 content would be, the total amount of alcohol  
14 that would be present in one 12 ounce bottle of  
15 Moussy beer assuming that it was, in fact, .5  
16 percent alcohol. So, that would be a maximum  
17 amount unless it was illegally manufactured.

18 Then I converted that to grams of alcohol,  
19 which is 1.8 grams per 12 ounce bottle, total.

20 And, then, I converted that to fluid ounces of  
21 pure ethyl alcohol.

22 And then I took a scenario of a person  
23 drinking 16 Moussy beers over an hour and 15 to  
24 an hour and 30 minute time period.

25 Q At about what time?

1 A As I recall it was like, 5:00 to 6:30,  
2 something in there.

3 And, then, that would be a total of over a  
4 gallon and a half of beer. But drinking at a  
5 rate of one of those 12 ounce bottles every five  
6 minutes. And then computed what the blood  
7 alcohol concentration would be at any point in  
8 time beyond that after 6:30.

9 (166)

10 Q And what was -- did it ever reach .06 -- .061  
11 by, say, 10:30 that evening?

12 A It wouldn't even approach that, no.

13 Q Now, Mr. Madson spoke to you about the  
14 different ranges that you set up on the -- on the  
15 board and he asked you -- pointed out that the  
16 fact that you used .008 as -- as your standard  
17 elimination rate.

18 A Yes, sir.

19 Q Are you aware of other forensic toxicologists  
20 that use the .008 that you use?

21 A Yes.

22 Q Would you give -- give the jury and idea of  
23 who those people are -- or person is?

24 A The -- this is the common procedure that's  
25 followed by the RCMP throughout Canada...

1 Q RCMP...

2 A Royal Canadian Mounted Police -- in their  
3 program.

4 This -- using this factor is done, also by Dr.  
5 A. W. Jones, Dr. Wayne Jones of Sweden.

6 Q Who is Dr. Jones?

7 A Dr. Jones is currently the director of the --I  
8 think they call it the Alcohol Toxicology  
9 Institute. This is a state laboratory in Lutzig  
10 (ph), Sweden. I can't spell it, but it's right  
11 outside of Stockholm. And he directs the  
12 laboratory that performs all the blood alcohol  
13 determinations that are done in the country of  
14 Sweden. And he is very extensively published,  
15 and is internationally recognized as an authority  
16 in the field of alcohol.

17 I know for a fact that this is the procedure  
18 which is used by him, which is commensurate with  
19 mine, from his -- some of his publications, as  
20 well as from having discussed this particular  
21 arithmetic manipulation personally. I've had  
22 occasion to discuss this procedure with him.

23 Q And have you attended workshops were  
24 retrograde extrapolation, or back calculation has  
25 been discussed?

1 A Yes. I have.

2 Q And in the workshops, in your conversations  
3 with other experts in this field have the values  
4 that -- are the values that you've placed up on  
5 the board consistent with your discussions with  
6 other individuals?

7 A Yes. They are.

8 Q Now, Mr. Madson asked you whether or not -- if  
9 you just had urine alone, you could make -- draw  
10 conclusions about the alcohol content of  
11 someone's blood. Remember that?

12 A Yes.

13 Q Do you believe that the urine sample alone is  
14 of no value in this case?

15 A No. I don't. That has not been my testimony.

16 Q Would you explain that again?

17 A They -- I would have to go back and repeat  
18 what I testified to earlier, Your Honor.

19 (320)

20 MR. MADSON: Your Honor, I think it's been  
21 asked and answered. My question didn't go to no value  
22 at all. It simply can't be used to determine, by  
23 itself, blood alcohol at an earlier time and he said  
24 no. It can't.

25 THE COURT: I think the witness has clearly

1 said he would have to repeat it again.

2 MR. COLE: No. That's fine. I don't have any  
3 problem with that. I just wanted to clear up that  
4 point.

5 Q (Mr. Prouty by Mr. Cole:) Now, were you asked  
6 to run a -- a scenario given the number of drinks  
7 that have been testified in this case that would  
8 -- to determine whether or not that was a  
9 possible to get to a, say .14, or a .17 at 8  
10 o'clock -- or 12:05 that evening?

11 A Yes. I was.

12 Q And would you explain to the jury what the  
13 results of that were?

14 A The -- I used the drinking scenario that was  
15 presented by your office, that I -- was related  
16 to me was in evidence in this case of some 5  
17 vodka drinks being consumed sometime after  
18 noontime in the early afternoon between their and  
19 prior to 8 o'clock that evening.

20 I assumed that the vodka was 100 proof, or 50  
21 percent by volume. And I assumed that they were  
22 ounce and half drinks, or shots of vodka. And I,  
23 also, assumed that there were two Moussy beers  
24 consumed between 8:00 and 8:30 p.m. that evening.

25 And by using the low elimination rate of .008

1 and by using the various -- lowest distribution  
2 factor that has been recorded for alcohol in the  
3 various compartments of the body, I computed that  
4 the blood alcohol concentration under that  
5 scenario, using the two very lowest factors,  
6 could have been in the neighborhood of a .15 --  
7 .16 at 12:05 p.m. that evening.

8 Q And that was consistent with what it would  
9 have been at .1 -- at 12:05, if you had  
10 backtracked?

11 A Yes, sir. In the same ballpark.

12 Q I have nothing further.

13 THE COURT: All right. Mr. Madson, I take it  
14 it will take a while for you on this.

15 MR. MADSON: Your Honor, probably five  
16 minutes.

17 THE COURT: Okay.

18 MR. MADSON: I'm -- as near as I can figure  
19 on.

20 THE COURT: Maybe you can give Mr. Prouty some  
21 liquid.

22 (Pause)

23 (440)

24 \*

25 \*

1                    RECROSS EXAMINATION OF MR. PROUTY

2        BY MR. MADSON:

3        Q            Okay, sir, with regard to Mr. Cole's series of  
4                    questions he asked about the change from 7:30 to  
5                    8 o'clock in the time period of last drink,  
6                    right?

7        A            Yes, sir.

8        Q            And he also asked about having the slice of  
9                    pizza.

10                   Even making these assumptions, and assuming  
11                   those to be correct, they aren't gonna change the  
12                   absorption peak very much in terms of time, will  
13                   it? It'll delay it some, but in your opinion not  
14                   a great deal?

15        A            Quantitatively I -- I really can't say. But  
16                   it certainly would extend that time, Mr. Madson,  
17                   possibly 30 minutes, possibly longer.

18        Q            Okay. 30 minutes, m maybe?

19        A            Or longer, possibly.

20        Q            So, instead of your figures 8:30, it would be  
21                   9 o'clock?

22        A            Or sometime shortly after that.

23        Q            But, fair to say, sir, from your knowledge of  
24                   the field, and your expertise, that the  
25                   retrograde extrapolation topic is one of

1 controversy among experts in this field?

2 A There has been debate, yes.

3 Q In other words, they don't all agree?

4 A I've never seen two experts agree on anything  
5 con -- in total.

6 Q And lastly Mr. Cole asked you about the number  
7 of drinks that coincide, or -- correlate with  
8 your hypothesis. You assumed five vodka drinks,  
9 1-1/2 ounce each, at 100 proof, right?

10 A That's correct.

11 Q And starting some time in early afternoon?  
12 What was that early afternoon time?

13 A As I recall it was around 1 o'clock or 1:30,  
14 or something like that.

15 Q Well, let me ask you, sir, if that would --  
16 your opinion would change if you had to assume  
17 that the drinking began at, say, 4:00 or 4:30 and  
18 stopped at 7:30, first; that there were three to  
19 four vodka drinks and nobody knows whether they  
20 were 80 proof, or 100 proof, or one ounce, or  
21 ounce and a half? Would that change the figures  
22 you came up with?

23 A You said there was only three or four...

24 Q Uh-huh (affirmative).

25 A ...drinks. Obviously, that in itself is going



1 to change it. And if we -- you said the  
2 assumption is that it's not 100 proof, what would  
3 it be, less than 100 proof, obviously, that would  
4 change it.

5 Q How 'bout the time? Starting later instead of  
6 1:30?

7 A And finishing when?

8 Q And finishing at 7:30 -- between that and 8  
9 o'clock.

10 A It would interplay some, but not as much as  
11 the two earlier changes.

12 Q Obviously less drinks it's gonna...

13 A Sure.

14 Q Yeah. Then, obviously the -- what we're  
15 talking about here, really, isn't it the amount  
16 of total alcohol that was consumed?

17 A Sure. And when.

18 Q And, certainly that number of drinks that you  
19 just related -- assuming Mr. Cole's assumptions  
20 that he gave you are correct, okay? So you come  
21 up with a .10 -- 14 -- 15, or 16, I think you  
22 said...

23 A Well, it's 15 -- 16, somewhere in there.

24 Q And that, of course, is taking the absolute  
25 lowest of the elimination rates?

1 A That is correct.

2 Q That's well outside the 95 percentile?

3 A That is correct. It is outside the 95  
4 percentile.

5 Q And there's no more basis for doing that than  
6 there is to take the other extreme, .03?

7 A By -- what basis?

8 Q Well, I mean, you just made this assumption,  
9 why can't you...

10 A This was -- this was a scenario.

11 Q Okay.

12 A It could very well be done with an 03, or an  
13 018. I just didn't have occasion to do that.

14 Q Okay. And 018's the average. Certainly that  
15 number of drinks isn't going to come up to a .25,  
16 or a .30 at 8:30 or thereabouts, is it? Even --  
17 even...

18 A Using the average elimination rate of 018...

19 Q Yeah.

20 A ...three or four drinks, no. It would not  
21 reach a .25.

22 Q Thank you. I don't have any other questions.

23 THE COURT: Mr. Cole.

24 MR. COLE: No. I don't have anything.

25 THE COURT: May the witness be excused from

1 further participation?

2 MR. MADSON: Yes. I believe so, Your Honor.

3 THE COURT: Okay, sir. You're excused.

4 (Witness excused)

5 A Thank you.

6 (600)

7 THE COURT: Mr. Cole?

8 MR. COLE: Your Honor, the last part is just  
9 moving in evidence. I believe it's evidence 32, the  
10 guard log. We'd move for the admission of that. I  
11 believe that...

12 MR. MADSON: No problem; no objection.

13 THE COURT: It's admitted.

14 EXHIBIT 32 ADMITTED

15 MR. COLE: I believe yesterday the tape 117,  
16 the inbound tape. That was provisionally admitted.  
17 The outbound tape.

18 THE COURT: That was admitted.

19 MR. COLE: Exhibit 151 and 152.

20 THE COURT: Those tapes, for the record, were  
21 21, 117, 120. 117 was provisionally admitted.

22 MR. MADSON: With regard to 152 -- 151, Your  
23 Honor, there's no objection.

24 THE COURT: 151 is admitted.

25 EXHIBIT 151 ADMITTED

1 MR. MADSON: 152, I would object.  
2 THE COURT: May I see it, please?  
3 MR. MADSON: Yes.  
4 (Pause)  
5 THE COURT: Why don't we take this up at a  
6 break. I don't remember the foundation for this. What  
7 witness did you use it with?  
8 MR. MADSON: That's been stipulated to.  
9 THE COURT: The foundation is, it's stipulated  
10 to.  
11 MR. MADSON: That it's a business record, yes.  
12 THE COURT: Relevancy is your objection?  
13 MR. MADSON: That's correct.  
14 THE COURT: Overruled.  
15 MR. MADSON: Well, Your Honor, could I make  
16 one more. It's relevancy and lack of foundation  
17 showing Captain Hazelwood had anything to do with this,  
18 or that it was ever given to him, or that he ever see  
19 it.  
20 THE COURT: Overruled.  
21 Mr. Cole?  
22 EXHIBIT 152 ADMITTED  
23 MR. COLE: Your Honor, the state would rest at  
24 this time.  
25 THE COURT: That completes the state's

1 evidence in this case, but that does not complete the  
2 case. The defendant will be shortly presenting  
3 evidence. In the meantime, we ought to take up some  
4 matters outside of your presence. I don't know how  
5 long it will take. I imagine it will take an hour,  
6 maybe a little longer. I trust that you've got some  
7 things to do in the jury room. It looks like you've  
8 been living there for a while, with the microwaves and  
9 everything.

10 Don't discuss the case in any fashion  
11 whatsoever. You haven't heard it all, and it would be  
12 improper for you to start forming or expressing  
13 opinions. And we'll call you back as soon as we can.  
14 I'll excuse you now.

15 (Jury not present)

16 Why don't we take a break, and when we come  
17 back, if you have applications you can make them at  
18 that time. We'll hear argument at that time.

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

21 (Off record - 10:15 a.m.)

22 (On record - 10:35 a.m.)

23 (Jury not present)

24 THE COURT: You may be seated.

25 THE COURT: Any applications.

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MR. MADSON: Yes, Your Honor.

Of course, at this stage of the proceedings it's incumbent upon the defendant to ask for a motion for -- or move to -- ask the court to grant a judgment of acquittal based on the fact that the evidence reviewed in the light most favorable to the State is insufficient to go to the jury. Well aware of that very high standard. Well aware of the fact that it is not often granted. However, in this case there certainly is a substantial reason to do so.

Looking at the cases in general, and I'm not going to take a great deal of time on this, but I think the real heart of the case comes down to recklessness under the criminal mischief statute, and recklessness under the reckless endangerment statute.

The recklessness, of course, is the same definition. It's exactly the same except criminal mischief requires the added element of knowledge of a risk of damage to property to another in the amount of \$100,000 or more while the misdemeanor charge simply is damage to property, or to persons. It still has to be a substantial risk. And I want to center my argument just on that 'cause the court has certainly heard the testimony and I'm not gonna make a final argument here.

Just that from what has been testified to, and

1 looking at it even in that light most favorable to  
2 State, what I think we have here is a judgment call at  
3 around 11:55 p.m. by Captain Hazelwood. That's where  
4 the recklessness has to come in.

5 And I say that because earlier than that going  
6 through the Narrows, there's been absolutely no  
7 testimony that there was any risk -- any substantial  
8 risk at all. The only evidence on this was Captain  
9 Beevers, who said I would have been on the bridge; I'm  
10 another pair of eyes; I could be there in case  
11 something happened. He couldn't define what that case  
12 might be, or even the chance of that happening. And  
13 the court heard no other evidence that going through  
14 the Narrows without a captain on the bridge when  
15 there's all kinds of other competent people, including  
16 a pilot, presented any kind of a risk, let alone a  
17 substantial one.

18 Jumping ahead, then, as far as after the  
19 grounding, I think the court has already tentatively,  
20 but correctly ruled that whatever Captain Hazelwood did  
21 at that point, or didn't do, would have no effect since  
22 there was no risk.

23 So, that brings us to the middle here. And  
24 that really is where the State's only argument can lie.  
25 And that is whether or not it was reckless for Captain

1 Hazelwood to leave the bridge for a short period of  
2 time when Greg Cousins was up there with -- in command  
3 of the ship and making the turn that he was instructed  
4 to do, or agreed to do, depending on how you view the  
5 evidence.

6 And that -- the argument really is, did  
7 Captain Hazelwood know, since the State has to prove,  
8 that based on his knowledge, experience, and all these  
9 other factors that he not only should have known under  
10 the negligence standard, but that higher level that he  
11 did, in fact, know that when he left the bridge there  
12 was a substantial risk that damage to property of  
13 \$100,000 or more would occur. And there's the heart of  
14 the case.

15 And from the evidence the court has heard  
16 there is nothing to indicate that there was this  
17 substantial risk factor, let alone the knowledge.

18 The State's argument is basically Captain  
19 Hazelwood should have know that Kagan was not the most  
20 competent helmsman in the world.

21 The evidence, even taken in a light most  
22 favorable would be that he was told that other people  
23 said, "Hey, we don't think this guy steers very well,"  
24 although the difference between steering and following  
25 a simple command was brought out over and over again.



1 And there was no evidence, none at all that Captain  
2 Hazelwood knew that Kagan could not follow a 10 degree  
3 right rudder turn.

4 And then, we have the next element, which is,  
5 of course, that he'd have to also assume -- not only  
6 assume, but know -- that there's a substantial risk  
7 that Greg Cousins wouldn't notice five rudder  
8 indicators that the rudder was actually turned. And  
9 that raises the substantial risk to a factor of sheer  
10 speculation and -- and nothing but guesswork.

11 So, on the issue of recklessness which applies  
12 on both those charges I think the State has certainly  
13 failed to present sufficient evidence.

14 On the negligent discharge charge it is  
15 basically the same, certainly after the grounding,  
16 because it doesn't matter whether you are criminally  
17 negligent or reckless as far as the impossibility of  
18 the risk is concerned.

19 The definition of criminal negligence the  
20 court fully understands, I'm sure, is different in that  
21 -- the only difference is it makes the -- the defendant  
22 in a situation where he should have been aware of  
23 something, but wasn't, as opposed to being actually  
24 aware of and consciously disregarding the risk. But,  
25 the risk remains the same. That's the important thing.

1 The risk is always exactly the same, which has to be  
2 substantial.

3 After the grounding, of course, there would be  
4 no risk because there was no chance of the ship getting  
5 off the reef. That's been brought out over and over  
6 again.

7 Getting back to the time period, then, of  
8 around 11:55 and 12:00 between then and the grounding,  
9 unfortunately, there's no lesser included offense,  
10 otherwise the State would have a good argument that --  
11 at least as to a negligence standard -- Captain  
12 Hazelwood should have known that there was this risk,  
13 but didn't. But, there is no such thing so that  
14 certainly doesn't apply in a lesser included standard.  
15

16 But at least as far as negligent discharge of  
17 oil's concerned the factors that go into whether he  
18 would be guilty or not still apply. The only  
19 difference is, should he have known? Would a  
20 reasonable person in his circumstance -- reasonable  
21 captain should have known that when he left the bridge  
22 there was this substantial risk that was going to occur  
23 because of the two people that were up there to carry  
24 it out.

25 And I would say, Your Honor, that even under

1 that lower degree of mental state there was  
2 insufficient evidence. So, even under the negligent  
3 discharge statutes the evidence is insufficient.

4 (1050)

5 My main argument, and the one I really want to  
6 stress here, though, is the one on DWI. This one is  
7 truly unique, and perhaps all we need now is the theme  
8 from Star Wars because the State is asking this judge  
9 to boldly go where no judge has ever gone before, and  
10 that is to find that there was actual, physical control  
11 by Captain Hazelwood when he was never near the  
12 physical components of the ship -- near in the sense  
13 that he could actually physically control it.

14 In my research, Your Honor, there has never  
15 been any case in the history of this country that I can  
16 find where a person -- I take it back. There is one  
17 and I'll get to that in a minute -- where a person who  
18 is -- I'll take it back. There's not -- where a person  
19 who is intoxicated is charged with DWI and convicted  
20 because he happens to be in the vehicle, or has the  
21 authority to direct the control of the vehicle, but  
22 doesn't have the actual physical control.

23 Now, Conley vs Division of Motor Vehicles, the  
24 most -- probably most recent case by our appellate  
25 court on this subject indicates in there -- and I had a

1 copy of it earlier and probably scattered it around,  
2 but basically Conley agrees with the proposition that  
3 to operate a motor vehicle -- first of all, it is not  
4 defined by statute. It isn't there. So, the judges  
5 have to -- the appellate court has to do it.

6 And the rule that -- "operate" certainly means  
7 a lot of things. It's in a broader context than  
8 driving, for instance. But they did say in there that  
9 it involves the exclusive control -- physical control -  
10 - exclusive physical control of a motor vehicle.

11 Now that must mean something when they use the  
12 word exclusive. It also means something when they say  
13 physically because all the cases who've defined this  
14 mean just that. They say you have to physically  
15 control it.

16 Now, I have found a couple of cases that  
17 distinguish between the authority, or the right to  
18 control versus the actual physical control. And those  
19 case, unfortunately, are in a -- in a civil context.

20 But, for instance, Farmer's Insurance Company  
21 vs Ridgeway, it's 602 SW 2d 823, distinguishes and says  
22 there's a vast difference. There is a difference  
23 between the right to control and having the actual  
24 physical control of a vehicle. This  
25 has never been done in a criminal context before.

1           Now, as I pointed out earlier there was one  
2 case. It's a Tennessee case, Williams vs State 352 SW  
3 2d 230. There, a person was convicted of DWI when he  
4 actually was sober and gave the keys to a drunk person  
5 and sat there in the front seat with him while the  
6 drunk drove the car belonging to the person who was  
7 sober.

8           The Tennessee court said he could be convicted  
9 under aiding and abetting theory, a theory of  
10 accessory, because he assisted in the commission of the  
11 crime, willingly participated in it.

12           Now we've just got the converse. The State is  
13 claiming that Captain Hazelwood was intoxicated, and  
14 therefore, he, for the purposes of DWI has to have  
15 actual physical control.

16           Now, on the other hand under the recklessness  
17 statute they're saying he didn't have direction and  
18 control because he wasn't on the bridge. It's kind of  
19 a convoluted argument that doesn't make much sense to  
20 the overall context of this case.

21           I assume that they would argue that when he  
22 came on the bridge, he then assumed the actual physical  
23 control as well as direction and control. But nowhere  
24 -- nowhere at all can I find any case -- and I,  
25 frankly, would defy the State to do so -- that a

1 intoxicated person can be convicted of DWI when they  
2 have the right to control any type of motor vehicle, or  
3 vessel, and yet don't physically control it.

4 This is analogous to the situation where  
5 intoxicated person gets into a cab and he wants to go  
6 home. He's had too much to drink, gets into a cab and  
7 he has the absolute right to control where he's gonna  
8 go in that cab. He can say I want you to go down this  
9 street, turn left, take me home.

10 Now, certainly the cab driver, then, is the  
11 person in physical control of the vehicle, and  
12 certainly it doesn't follow that the passenger, who has  
13 the right to control the direction of the vehicle --  
14 physical control, if you will -- can be charged or  
15 convicted of DWI. It just doesn't make any sense. And  
16 that's exactly the situation that we have here.

17 Captain Hazelwood -- assuming for the sake of  
18 argument that he's intoxicated, when he says to  
19 somebody turn -- Mr. Cousins, when you get down to this  
20 point, abeam of Busby Island I'd like you to do the  
21 following -- do such and such. And he does that. But  
22 he doesn't do it right.

23 This is like telling the cab driver to take me  
24 home, go down to that intersection and turn left. And  
25 unfortunately, the sober cab driver doesn't do that;

1 goes right on through the intersection and hits a  
2 school bus. Why is it the passenger's fault? Even  
3 though he had the right to control the direction of the  
4 vehicle.

5 The answer is because he didn't have exclusive  
6 physical control. And I think that's the heart of this  
7 whole case. I -- I simply can not find any law that  
8 gets to the situation as broadly as this is defined by  
9 all courts. And the reason, of course, it's defined  
10 broadly is because of the danger involved in people  
11 operating motor vehicles, because of their  
12 intoxicatedness.

13 But that danger is substantially lessened, in  
14 fact, it's decreased to the point of non-existence if  
15 the intoxicated person merely can say what they want  
16 done but the sober person is the one who physically has  
17 to do it.

18 So, with that, Your Honor, I think the counts  
19 should all be -- the court should rule that a judgment  
20 acquittal should be granted on all counts.

21 (1323)

22 MR. COLE: Judge, just let me start at the  
23 beginning. There's a number of arguments Mr. Madson  
24 has set out.

25 Essentially we believe the evidence is

1 overwhelming that the -- that has been presented --  
2 that the evidence that's been presented in this case  
3 shows A, that Captain Hazelwood was reckless on the  
4 nights in question, the 23rd and the 24th; he was  
5 reckless both as to the risk to the vessel of this oil  
6 spill and to the safety of his crew members; and 2,  
7 that he was impaired; and 3, that he was operating a  
8 motor vehicle -- or a watercraft.

9 First, Mr. Madson has appeared to place an  
10 issue Count I of the indictment, which reads, "Having  
11 no right to do so, or any reasonable grounds to believe  
12 he had such a right he recklessly created a risk of  
13 damage to the property of others in an amount exceeding  
14 \$100,000 by widely dangerous means."

15 The evidence in this case of Captain  
16 Hazelwood's reckless actions, and recklessness is  
17 defined under our statute as being aware of and  
18 consciously disregarding a substantial and  
19 unjustifiable risk, the risk must be a gross deviation  
20 from the standard of care that a reasonable person  
21 would exercise under similar circumstances, and 3,  
22 intoxication -- if a person does not recognize this  
23 risk because of intoxication that's not a defense.

24 What were the risks that are involved? Well,  
25 we know, Your Honor, from the testimony that has been



1 given that there is a risk whenever tankers containing  
2 oil are operating. There's always a risk of spill.  
3 That's why we take steps to make sure and assure for  
4 their safe procedure.

5 Now, the extent of that risk depends on what  
6 actions are taken. In this case we had evidence of  
7 Captain Hazelwood's alcohol use. Now that use began in  
8 the afternoon of the 23rd where he was in a bar from  
9 1:45 -- 2 o'clock, and the evidence in this case is  
10 that around 2:45 where he had several drinks. He was,  
11 again, seen in the Pipeline Club from between 4 o'clock  
12 and 7:00 to 7:30. And from there he went to the Pizza  
13 Palace where he was seen having another vodka drink.

14 Witnesses were questioned. There was at least  
15 five drinks that were admitted to. And these were by  
16 people who were drinking -- the people that were with  
17 him -- his crew members were drinking at the same time.

18 Now, in our society people are aware of the  
19 risk of drinking and how it effects your judgment and  
20 your sight -- your judgment and your decision making.

21 The next thing that showed -- that contributed  
22 to the reckless conduct in this case is that he -- and  
23 I'm jumping out to the -- the Narrows -- out past the  
24 Narrows, because I agree with Mr. Madson that there has  
25 to be some causal connection between reckless activity,

1 bad judgment and the actual risk that it's created.

2 In that case you have Captain Hazelwood facing  
3 a potential ice field which you saw drawn here, and he  
4 was obviously aware that that ice field presented a  
5 risk because he took steps to avoid it. He didn't go  
6 through it. He went around it. It was clear to him  
7 that that represented a risk.

8 Now, it's equally obvious, and all the tanker  
9 captains testified that land represents a risk to  
10 tanker captains, too. And they both represent risks of  
11 oil spills. Especially when you're fully laden.

12 Now, he placed the vessel in an unsafe and  
13 hazardous condition. He did it by his actions of  
14 turning to a heading of 180 degrees.

15 He placed the vessel on autopilot. We believe  
16 that the evidence could be looked at to, in this case,  
17 show -- and there is sufficient evidence. And when you  
18 take it in light of the evidence that's presented that  
19 putting that vessel on autopilot contributed to that  
20 accident because he left the bridge with it on. And  
21 there is substantial disagreement on how -- on why this  
22 vessel did not turn until 12:01. But it didn't turn  
23 until 12:01. And there's a couple different scenarios,  
24 but one of 'em certainly is that that autopilot was on  
25 and the other two people didn't realize it.

1           Captain Hazelwood, before leaving the bridge,  
2 placed the vessel on load program up, essentially going  
3 to a full sea speed.

4           He left the bridge.

5           When he left the bridge he left it with a  
6 third mate that was not licensed or experienced. That  
7 was the testimony of Bob Beevers.

8           He knew that Kagan was not competent to handle  
9 this type of situation. That's a reasonable inference  
10 given the facts that he was given by Kunkel, Stalzer  
11 and LeCain. They all testified they had conversations  
12 about the problem that Mr. Kagan had.

13           He also failed to give adequate instructions  
14 and Mr. Madson has made a big deal throughout this  
15 whole trial about 10 degree turns, simple turns, the  
16 simple turn -- that was never given by Captain  
17 Hazelwood. Captain Hazelwood stood over, the evidence  
18 was. He didn't go to a chart. He didn't lay a track  
19 line. He didn't give a rudder angle. All he said --  
20 he's standing over a radar and he points his finger  
21 there and he says, "Turn here someplace and then get me  
22 back in the lane," and then walks away from his  
23 situation.           All those actions, in addition,  
24 show that he was aware of, and yet he consciously  
25 disregarded the risk. There's no doubt he was aware of

1 this risk because he took actions to avoid it.

2 And to say that he's not aware of a risk when  
3 he's going in 180 degree heading in a track line that's  
4 taking him right on Bligh Reef is to not give tanker  
5 captains any credit at all for the experience that they  
6 have. They know exactly what they're facing. He has a  
7 radar in front of him. He can see Bligh Reef right in  
8 front of him.

9 Now, that he was consciously disregarded that  
10 risk is evidence because of the fact that he took these  
11 actions that he did; that he placed the vessel on  
12 autopilot instead of keeping at maneuvering speed -- or  
13 he placed it on autopilot rather than keeping it in  
14 helm -- helm speed; that he placed the vessel in load  
15 program up; and that he left the -- the bridge in the  
16 first place.

17 Aware of and consciously disregard a  
18 substantial and unjustifiable risk, and it must be a  
19 risk of a gross -- must be of such a nature that it  
20 constitutes a gross deviation.

21 Well, there have been four people that have --  
22 the court has heard in this case that indicated that  
23 this was a gross deviation from the standard of care in  
24 leaving the bridge in the predicament that the ship was  
25 entering, one of them Captain Deppe.

1 He said, when asked point blank, "Where are  
2 you on this vessel when your ship is right here?" He  
3 said, "I'm on the bridge." "I'm on the bridge." "I'm  
4 on the bridge.

5 Captain Stalzer, "My personal position is I'm  
6 on the bridge all the out from the Port of Valdez no  
7 matter what."

8 Captain Beevers, "I'm on the bridge. That's  
9 where my responsibility is not only because of the  
10 pilotage break, but also because of the hazardous  
11 situation."

12 And, finally, the defendant, himself, in his  
13 own statements, both to the troopers -- well,  
14 essentially to the troopers and to Mr. Myers was, "I  
15 should have been on the bridge."

16 Those admissions indicate that this was a  
17 gross deviation from the standard of care that tanker  
18 captains would exercise.

19 We're not talking about sailing out in the  
20 sea, or the ocean. We're talking about a condition  
21 where he has been boxed in by ice. And the maps,  
22 themselves, say use extreme caution and care in these  
23 certain circumstances.

24 In addition, Your Honor, as to the evidence of  
25 what occurred after the grounding I think that there

1 are several things that support a finding of  
2 recklessness on Captain Hazelwood's failure to  
3 sufficiently take steps to agree -- or take steps to  
4 assure the safety of this vessel.

5           The evidence was presented in this case that  
6 one, he was trying to get it off the reef. 2, that he  
7 did not take adequate soundings. 3, that he did not  
8 adequately protect the crew.

9           Those -- but the essential reckless conduct in  
10 that is attempts to maneuver the vessel, not knowing  
11 what was around you.

12           At this point I think that the court has ruled  
13 fairly -- has shown that the fact that the -- the  
14 factual impossibility keeps the State from arguing that  
15 that is reckless, trying to get it off the reef.  
16 However, I do believe that the evidence supports the  
17 fact that trying to maneuver a vessel backward and  
18 forward when you don't know what is on each side of you  
19 -- when you stand -- when you run the risk of poking  
20 more holes on your port side by these maneuvers is a  
21 risk that is a gross deviation from the standard of  
22 care that other people would exercise in that  
23 circumstance.

24           So, those are my arguments on Mr. Madson's  
25 statement.

1 I can't -- I've heard Mr. Madson on the  
2 negligence discharge say on a number of occasions that  
3 it's criminally negligent. I don't believe that's  
4 correct. He only has to be negligent. It's a civil  
5 standard that is applied in criminal cases. I can cit  
6 the court a case -- I wasn't aware of -- that that was  
7 what their argument was, but I can cite the court a  
8 case where the court of appeals in one of the fishing  
9 cases that I was involved in that was a strict  
10 liability said that negligence can apply to criminal  
11 cases where you're charging a fisherman with going over  
12 the line, is what I remember the case to be.

13 And, so, there is not a necessity of criminal  
14 negligence. The statute, itself, says negligence, not  
15 criminal negligence. And there's more than sufficient  
16 evidence of that simply by Captain Hazelwood's  
17 statements, themselves.

18 As to the driving while under the influence  
19 -- operating a watercraft while intoxicated charge,  
20 obviously it would have helped me in my argument if Mr.  
21 Madson had provided me with these citations prior to  
22 coming in here and arguing. And I don't have any  
23 research for you at this time.

24 However, Your Honor, the evidence is clear as  
25 to the -- the evidence is enough to support the fact

1 that he was intoxicated, so I believe what Mr. Madson  
2 is really saying is that there's a lack of evidence  
3 that he is operating a watercraft.

4 There is a special definition for the  
5 operation of a watercraft. Without being prepared at  
6 all, I think the court can look at what the Coast Guard  
7 considers operating a water craft. I think that's a  
8 good indication of what people had in mind.

9 In addition to that, Captain Hazelwood was  
10 operating this, I believe, under the definition, from  
11 the time he was at the con. Driving a vessel of this  
12 size is not like driving a motor vehicle in the sense  
13 of the physical way that this is maneuvered. The  
14 captain, the person who has the con is the one who  
15 actually is doing the steering -- is doing -- is making  
16 the changes in the course. The helmsman merely is  
17 nothing more than an extension -- or should be an  
18 extension of the steering wheel. It's the captain.  
19 It's the person at the con who is -- has the control of  
20 this -- of the navigation of this vessel.

21 Captain Hazelwood had the con from 11:24 when  
22 the pilot was dropped off 'til he left the bridge at  
23 11:53. In addition, he had the con when he came back  
24 up after 12:11 a.m. until approximately 1:40 p.m. that  
25 morning. We would -- without -- and obviously, I'm not



1 prepared when Mr. Madson walks in, but I believe that  
2 the Coast Guard -- a common sense reading of the -- the  
3 statute, and any research that we can do would  
4 demonstrate that he was operating a watercraft.

5 And so I have nothing further.

6 (1956)

7 THE COURT: Mr. Cole?

8 MR. COLE: Uh-huh (affirmative).

9 THE COURT: You cited Lathan (ph) and Jacobson  
10 to support your theory that the defendant can still be  
11 found guilty of operating a motor vehicle even if the  
12 motor vehicle's incapable of being moved. Lathan, the  
13 vehicle went into a snowbank. After he went into a  
14 snowbank and the defendant was unable to extricate it,  
15 he decided to turn the engine on and keep warm and  
16 drank part of a 12 pack. The court found that he was  
17 -- he could be charged and found guilty of operating a  
18 motor vehicle because he had control of it.

19 Does there come a time when -- that the  
20 vehicle, or the watercraft become so disabled that it  
21 no longer can be considered operating a watercraft or  
22 motor vehicle? Let's -- for example, let's take a  
23 motor vehicle that's been in an accident and the rear  
24 end is crushed in and the vehicle can not move. Such  
25 damage to it that the -- it could never move without

1 substantial repairs. And after that, the person wants  
2 to keep warm, the engine still runs, he has a few  
3 drinks, is that person operating a motor vehicle at  
4 that time?

5 (Pause)

6 MR. COLE: Your Honor, I can't separate that  
7 from the situation where a car is so stuck, which is  
8 what the court of appeals said, even the fact -- even  
9 if it's stuck and it's impossible for it to come out --  
10 I don't see any difference between that and the  
11 hypothetical that you've given me.

12 And I would -- I would say that in that  
13 situation the court of appeals has ruled that we have a  
14 very broad definition of what it means to operate a  
15 motor vehicle.

16 I believe that the reason is because of the  
17 risk. We don't want people claiming -- otherwise  
18 people just go the other way with your hypothetical.  
19 If they had claimed that -- that -- that because the  
20 vehicle was stuck there was no risk, then the next  
21 thing would have been, well, I didn't have -- the keys  
22 -- I had the keys in my pocket so it wasn't a risk.

23 And the court of appeals says the legislature  
24 wanted to put all this stuff to an end, so they gave a  
25 very broad definition of what it means to operate a

1 motor vehicle to stop defenses like that.

2 And, so, I believe that your example is just  
3 nothing more than the exact facts that the court has  
4 decided on in -- when the vehicle's in a snowbank.

5 THE COURT: In this case the Exxon Valdez, the  
6 evidence, I think, is undisputed. It was never gonna  
7 move forward with the capabilities that were available.  
8 It had to be floated off. And it didn't get floated  
9 off for several days. And I  
10 think that the testimony was 17,000 tons aground.

11 Is it your theory that that's similar to being  
12 stuck in a snowbank? And that the captain, who is  
13 still the captain and has the control to turn the  
14 engines on, but can not move the vehicle under any  
15 circumstances is operating the vehicle? Watercraft?

16 MR. COLE: Yes. Yes.

17 THE COURT: And that -- your theory is that  
18 while he can't move the vessel, he can still discharge  
19 the oil. He can still transfer oil. He can still  
20 issue commands on the vessel, operate the vessel in  
21 other ways other than navigating it, or moving it  
22 across the water.

23 MR. COLE: It says, "use or capable of being  
24 used." That's a...

25 THE COURT: What does "capable of being used"

1 mean?

2 (2150)

3 MR. COLE: What's capable? It doesn't have to  
4 be, but it means capable of being used, in essence. It  
5 has the potential for being used in that -- in that  
6 type of situation.

7 THE COURT: Well, doesn't the definition say,  
8 "Operate a watercraft means to navigate, or use a  
9 vessel used or capable of being used as a means of  
10 transportation on water for recreation or commercial  
11 purposes...?"

12 Your interpretation of the term "used" means  
13 to be used to unload oil, or to do other things on  
14 board the ship such as maintain it, maintenance things,  
15 and it doesn't mean used as a means of transportation?

16 Well, let me ask you this. Would you concede  
17 that that vessel after it went aground was no longer  
18 capable of being used as a means of transportation at  
19 that time?

20 MR. COLE: Was no longer capable of being  
21 used?

22 THE COURT: As a means of transportation at  
23 that time?

24 MR. COLE: No. I would not. I would think  
25 that it is capable of being used because it was used

1 within a week and a half.

2 THE COURT: Okay. The next question I have  
3 for you before you sit down is are you aware of any  
4 cases at all, contrary to your position, that exist for  
5 the proposition that -- or that support your  
6 proposition, or set forth your proposition that the  
7 defendant is not actually in control if he's someplace  
8 else, like in the back seat of the car -- of his  
9 vehicle, that he has got some sort of power or control,  
10 or not actually at the wheel, but he could be charged,  
11 not under an accomplicery [sic] but as a principle for  
12 DWI?

13 MR. COLE: Judge, no. I'm not aware of either  
14 way. And I apologize for that, but I expect that --  
15 that -- well, I just -- I just haven't done any  
16 research on it. I've got to stress, again, that I  
17 don't believe that anybody meant the same type of  
18 control of a watercraft when they were talk -- when  
19 they made a distinction between motorcraft and  
20 watercraft.

21 Let me rephrase that. There's a reason why  
22 they put a different definition for operate a  
23 watercraft than to operate a motor vehicle. They could  
24 have -- if they thought that they wanted to have 'em  
25 the same they would have used the same definition.

1           So, obviously they intended something a little  
2 bit different, and they intended something broader in  
3 operating the watercraft because that is the only way  
4 that you'd take into consideration the realities of the  
5 matter of how these vessels are operated.

6           The reality of the situation is that although  
7 the helmsman may steer the wheel he only does it at the  
8 command of who's at the -- on the con.

9           THE COURT: The watch officer.

10          MR. COLE: The watch officer or the captain.  
11 Whoever is at the con.

12          THE COURT: Well, what if the captain is not  
13 at the con? What if he's down below, or it's not his  
14 watch and he's got his four hours, or eight hours of  
15 rest and he's intoxicated. He goes down there and has  
16 some drinks, but he's not on watch, the officer of the  
17 day is on watch, first mate for example, can the  
18 captain be charged with DWI at that stage if it goes  
19 aground? Or, at any -- even if it doesn't go aground.  
20 Can he be charged with DWI?

21          MR. COLE: If he never comes up on the bridge,  
22 and goes straight to his room?

23          THE COURT: He goes off -- on his sleep, or  
24 rest and the first mate comes up on his watch and the  
25 captain's down below drinking? Can he be charged for

1 DWI when the first mate is operating the vehicle -- the  
2 motor -- the watercraft?

3 MR. COLE: Well, I'd have to know whether he  
4 was -- under the Coast Guard definition of operating a  
5 watercraft there's no doubt that that's correct, that  
6 he could be charged.

7 Under the state definition of operating...

8 THE COURT: Does it make any difference that  
9 he has the power to exercise control at any time as the  
10 captain?

11 MR. COLE: Can I just...

12 THE COURT: Sure. These are difficult  
13 questions, I understand. I don't know the answers  
14 myself on -- to some of them.

15 (Side conversation)

16 MR. COLE: Now, in your hypothetical, Your  
17 Honor, you asked me if he's on the bridge, has control,  
18 has the con, then he goes downstairs, turns it over to  
19 another mate, and then he starts drinking and while  
20 he's drinking down there the vessel grounds, or has an  
21 accident...

22 THE COURT: It doesn't make any difference.  
23 Forget the vessel doing anything. It's being operated.

24 MR. COLE: I -- under that scenario, unless he  
25 has some duty to be up on the bridge, if it's just as

1 you say, just a watch, I doubt that under our state law  
2 that's operating.

3 I do believe that under Coast Guard law that  
4 is operating, because they're very broad and they say  
5 it's basically you come on the vessel. And you're  
6 intoxicated, then you're DWI.

7 But, I don't think those are the facts of our  
8 case. 1, I can distinguish 'em because Captain  
9 Hazelwood had a duty to be on the bridge the whole  
10 transit. 2 -- that was by law.

11 2, he had a duty to be on there according to  
12 the Exxon policy, and that was because they were in a  
13 hazardous situation. And that required the master and  
14 another watch stander.

15 3, he was on -- did have the con from 11:24.

16 And I think -- the other thing that I think  
17 the court needs to remember is that these vessels are  
18 different from motor vehicles in that in a motor  
19 vehicle one person can do everything. You can steer  
20 and you can push the throttle and that's it.

21 But, that's not what happens on a tanker. The  
22 throttle is eight feet away. And the person that's  
23 steering is right there. And these things are set up  
24 specifically for more than one person to control the  
25 navigation. And the captain, or whoever has the con is



1 the person that controls the operation of that vessel.  
2 To argue otherwise does not take into account the  
3 realistic situation that exists on these tankers.

4 In addition to that Captain Hazelwood had the  
5 con then, and he also had the con after it was  
6 grounded, from -- as we said. So, that's how I would  
7 distinguish that. But I can understand your concerns.

8 THE COURT: Thank you.

9 (2590)

10 Mr. Madson, I've got a question for you before  
11 you start.

12 MR. MADSON: Sure.

13 THE COURT: The evidence that I've heard so  
14 far is that Captain Hazelwood was on the con at some  
15 time from the time the vessel left Valdez until it --  
16 the engines were finally shut off. He was in charge of  
17 that vessel at some time. And the evidence as I  
18 understand it that he had a -- in a light most  
19 favorable to the state -- he had five vodkas of unknown  
20 amount and the evidence is that his judgment was  
21 impaired several stages on the way out. And are we --  
22 do we have to focus on the grounding here, to determine  
23 whether or not he was under the influence while...

24 MR. MADSON: Oh, no.

25 THE COURT: ...operating a watercraft?

1 MR. MADSON: No, no. Not at all.

2 THE COURT: So, at any time if he was in -- on  
3 the con, exercising control as the master of that  
4 vessel, from the con on the way out from Valdez to --  
5 up until the time the engine was finally shut down,  
6 won't that suffice to get by your motion on a judgment  
7 of acquittal for operating a watercraft while under the  
8 influence?

9 MR. MADSON: No, sir. I don't believe so.

10 Let me, again, let's look at -- the definition  
11 of operate a watercraft. Let's look at operate an  
12 aircraft, right above it. That means "to use,  
13 navigate, taxi, or pilot an aircraft in the airspace  
14 over the state."

15 Under that broad definition, the way the state  
16 wants to approach this, let's assume that there's a --  
17 somebody charters a plane. He wants to take -- I want  
18 to charter a plane to go out fishing and there's the  
19 guy that owns it. And we all get in the plane. Turns  
20 you, the owner, the guy in control of the plane, let's  
21 say, is drunk. But the guy that's actually piloting is  
22 sober.

23 And I tell the guy going fishing -- the guy  
24 that owns -- the drunk guy that owns the plane, has a  
25 right to control it. He says where do you want to go

1 and I say, you make up your own mind, you're in charge,  
2 you should go where you think best. And he starts  
3 directing the -- the actual pilot, the one in physical  
4 control of the plane to take him various places. Now,  
5 there's no question under my scenario that the  
6 owner/director/controller would be drunk, would be  
7 legally intoxicated. But, what is he doing that  
8 presents a real danger to others when the person  
9 actually on the controls is sober. And I think there's  
10 what we have to look at.

11 So, I don't think it matters at all. I think  
12 that's why there has to be actual, physical control.

13 And Conley...

14 THE COURT: You mean that Captain Hazelwood  
15 would have to have his hands on the steering  
16 mechanism...

17 MR. MADSON: Absolutely.

18 THE COURT: ...in order -- at any time to be  
19 convicted of operating a watercraft while under the  
20 influence?

21 MR. MADSON: Conley seems to say exclusive  
22 control, even of a stationary vehicle. And on this  
23 point the court reads something -- I think it's  
24 important to look at Conley in this context again.

25 The court mentioned difference between being

1 able to get -- the vessel not being able to get off the  
2 reef, but it's totally -- it's not moveable.

3 Now, there's, of course, there's a difference  
4 of opinion here because if the guy -- if it was a car I  
5 would agree with the State. It wouldn't matter. But,  
6 it's not. And I think we have to focus on what the  
7 court did -- the definition of being capable of being  
8 used as a means of transportation on water.

9 Once that vessel was on the reef and stuck  
10 there in the manner that you've heard, that did not  
11 become a means of transportation on water. It was  
12 nothing more than a -- a storage tank holding oil. And  
13 that's all it was good for at that point, until steps  
14 were taken to actually refloat it and change it back to  
15 a vehicle that could be used for transportation.

16 Now, Conley also says something in there. And  
17 it's kind of overlooked, but it's in there. And they  
18 mention the maneuverable -- operability -- movability  
19 requirement and agree. The Supreme court says, "Yeah.  
20 There's no requirement it has to move." But, they go  
21 on and talk about something called operability.

22 And in that case they simply said that there  
23 was insufficient -- or enough evidence over a civil  
24 standard that the vehicle was operable when the person  
25 was getting into it and gonna put the key into it and

1 was gonna go. And that's enough for DWI purposes  
2 because the evidence showed, at least for a civil  
3 standard, that it was operable.

4 So, they make a distinction, and I think a  
5 correct one between a vehicle that will operate and one  
6 that will simply not -- can not be moved.

7 Now, I think in the context of the Exxon  
8 Valdez you had certainly both. It couldn't be moved  
9 and it wasn't even operable as a means of  
10 transportation on water.

11 THE COURT: You kind of slid away from my  
12 question.

13 MR. MADSON: I'm good at that.

14 THE COURT: My question is -- I noticed that.  
15 My question is at -- you believe that he has to  
16 actually be on the control wheel, itself, before he  
17 could ever be convicted of operating a motor -- a  
18 watercraft while under the influence.

19 MR. MADSON: Your Honor, under what I believe  
20 to be Jacobson vs State and Conley and Lathan, where  
21 they say exclusive control, they talk about -- the  
22 court talks about actual, physical control. In every  
23 definition that, frankly, I've seen, and I -- I can  
24 assure you, Your Honor, I have torn the library apart  
25 trying to find one case, just one, where a person who

1 did not -- was not the actual driver could be charged  
2 with DWI. And I told the court about the only one that  
3 I could find.

4 So, I would say absolutely. And I'm not  
5 trying to avoid the question. I'm saying...

6 THE COURT: I've heard several witnesses say  
7 that they rarely, if ever, touched the wheel. That's  
8 always given to a...

9 MR. MADSON: That's right.

10 THE COURT: I mean, not even a mate -- an able  
11 bodied seaman is the person who normally does that  
12 ministerially task.

13 MR. MADSON: Right.

14 THE COURT: So, the master -- he could be dead  
15 drunk on the con and he could never be charged and  
16 convicted of operating a motor -- watercraft while  
17 intoxicated?

18 MR. MADSON: No, sir. Under the Coast Guard,  
19 under the federal rules, he certainly...

20 THE COURT: Under state law?

21 MR. MADSON: Under state law, he could not.

22 I think the court also has to look at Title V  
23 and say why. Why is this statute in here? Why is this  
24 definition. Because Title V under operating a  
25 watercraft while intoxicated, which is exactly the same

1 thing says you can only do it for recreational vessels.  
2 The legislature clearly intended not to get in this  
3 situation where who's operating and who is doing what,  
4 because what the statute was designed to do was put the  
5 guy that's going out fishing, and he's waterskiing on a  
6 Saturday afternoon and has a few beers and gets drunk,  
7 put him in the same situation as the guy who goes to  
8 the tavern and has a few beers and wants to drive home.  
9 Puts them both in exactly the same position, but it  
10 certainly wasn't designed for this -- this situation of  
11 who is -- actually has physical control.

12 I don't believe the legislature had this in  
13 the remotest corner of their minds when this was  
14 passed.

15 That's the only thing I wanted to mention,  
16 Your Honor. It isn't too critical, but in the context  
17 of the State's argument I found it interesting, at  
18 least, that they put on witnesses -- they call  
19 witnesses who testify, such as Kagan and Cousins, on  
20 autopilot and other factors, such as the degree of  
21 risk, and then turn around and ask the court, taking  
22 the evidence in the light most favorable to the state  
23 you must disregard the testimony -- the only way it'll  
24 support their theory.

25 With that, I -- unless, the court had some

1 other questions, I -- I understand the -- the question  
2 here about the DWI because, frankly, it's been  
3 pondering in my mind for quite a while. And I -- I  
4 wish I could give the court more authority one way or  
5 the other. And, frankly, I've given everything I could  
6 find.

7 (3018)

8 THE COURT: The test in determining whether a  
9 motion for judgment acquittal should be granted as --  
10 after taking the evidence in a light most favorable to  
11 the non-moving party and all the favorable inferences  
12 from that evidence, this court feels that a reasonable  
13 mind could not differ on whether the state has proved  
14 its case beyond a reasonable doubt, then the court  
15 should grant a motion for judgment acquittal.

16 In this case on Count I of the -- the  
17 indictment as amended using these tests as a guide, the  
18 evidence in a light most favorable to the state and the  
19 inferences from that evidence in a light most favorable  
20 to the state is that the captain -- the defendant,  
21 Captain Hazelwood, had numerous or substantial amount  
22 to drink before boarding the vessel; that he knew that  
23 his able bodied seaman, Kagan, had some steering  
24 difficulties; he knew that the third mate, Gregory  
25 Cousins, did not possess the required pilotage; he knew



1 that ice was present in the area; he knew it was night;  
2 he knew that Bligh Reef was in the area; he knew the  
3 visibility was poor on occasion; he went below with  
4 this knowledge, knowing that he was operating a loaded  
5 tanker of some 200 plus, thousand tons, containing  
6 crude oil, and he went below to do some paperwork at  
7 this time in what I consider to be dangerous waters  
8 based on the light -- evidence most favorable to the  
9 state.

10 Also, the evidence is that experts have  
11 testified that his conduct was reckless. And the  
12 testimony is that there was a -- at that time the -- a  
13 risk that Captain Hazelwood knew existed, was aware of  
14 and disregarded. And the risk was that the vessel  
15 might come in contact with the shore, which Captain  
16 Hazelwood knew was a rocky shore and could result in  
17 exactly what happened.

18 Based on this test, viewing the evidence in a  
19 light most favorable, and the inference from that  
20 evidence most favorable to the non-moving party, the  
21 State, reasonable minds could differ on whether the  
22 State has proved its case beyond a reasonable doubt.  
23 So, the motion as to Count I as amended is denied.

24 The motion to dismiss  
25 Count II -- correction, Count II of the information, a

1 misdemeanor, is denied for the same reasons.

2 Essentially the same information was available, the  
3 same evidence in a light most favorable to the state is  
4 present.

5 As to Count III, the negligent discharge of  
6 oil, having dismissed or denied the motion to dismiss  
7 on recklessness, negligence being a lesser degree of  
8 culpability or state of mind, that motion is also  
9 denied.

10 On Count I of the information the evidence is  
11 that the defendant drank substantial amounts before  
12 getting on board the vessel; that he departed the  
13 Valdez area as master of the vessel. The evidence is  
14 that the master is in charge of that vessel, or should  
15 be in charge of that vessel on the way through the  
16 Narrows on out until at least to Bligh Reef.

17 Based on the testimony before me he was -- the  
18 defendant was the only one that had the required  
19 pilotage that should have been on that vessel; that he  
20 was, indeed, on the con on several occasions after  
21 having drank the -- the alcoholic beverages that we've  
22 heard.

23 The evidence is that he would have been  
24 impaired, or otherwise under the influence with that  
25 amount of alcohol, based on the last witness'

1 testimony.

2           There is evidence that his judgments were bad  
3 on the way out. That's evidence of impairment. His  
4 judgments were bad all the way up to trying to remove  
5 the vessel from the -- from the reef. That shows  
6 impairment from the time he left Valdez until the  
7 engines were finally shut down.

8           I don't believe it's necessary that he has to  
9 actually, manually control the wheel. From the  
10 evidence I've heard he is in direct control of that  
11 vessel, and it would be akin to mutiny for somebody to  
12 disregard his commands, and he gave commands on the way  
13 out.

14           So, at some stage from the time he left to the  
15 time the engines were finally shut down he was in a  
16 light most favorable to the non-moving party operating  
17 a watercraft, as the term is defined, while under the  
18 influence. Reasonable minds could differ on that.

19           As for when the vessel was shut down, I'm  
20 gonna take under advise the -- the question of whether  
21 or not the defendant was still operating a watercraft  
22 as the term is defined. My inclination, and it's not a  
23 final one, is that he was not -- not as the definition  
24 is used in our statute. It differs somewhat from a  
25 motor vehicle. In this case the Exxon Valdez, it's



1 full name and spell your last name?

2 A My name is Emily Kaiser, K-a-i-s-e-r.

3 THE CLERK: Your current mailing address,  
4 ma'am?

5 A Box 246, Valdez.

6 THE CLERK: Your current occupation?

7 A I own a business in Valdez -- shop owner.

8 DIRECT EXAMINATION OF MS. KAISER

9 BY MR. MADSON:

10 Q Mrs. Kaiser or Ms.?

11 A Ms.

12 Q Have you ever testified before?

13 A Yes, in Valdez.

14 Q So you know the procedure here?

15 A Yes.

16 Q Let me ask you a few questions, ma'am. You  
17 said you have a business in Valdez. What  
18 business is that?

19 A I have a hobby shop and Kelly's Floral.

20 Q And how long have you had those businesses?

21 A Twenty-one years for the Hobby Hut.

22 Q You've lived in Valdez 21 years?

23 A Right.

24 Q Now, do you remember back on March 23 of this  
25 last year, just prior to the infamous oil spill?

1 A Yes, I do.

2 Q Do you recall having a gentleman come in your  
3 shop by the name of Hazelwood to make a purchase?

4 A Yes.

5 Q By the way, do you recognize Mr. Hazelwood?

6 A Yes, I do.

7 Q Is that the person you saw on March 23?

8 A Yes, it is.

9 Q Why don't you just tell the jury basically  
10 what happened and the time, that you recall.

11 A Well...

12 MR. COLE: I'm going to object if it's going  
13 to be a narration. That's the purpose of asking  
14 questions.

15 THE COURT: I think that's a proper objection,  
16 Mr. Madson, because I don't know what this witness is  
17 going to say. The witness may say things that would  
18 have legitimate objections.

19 MR. MADSON: I'll put it in the question-  
20 answer form, Your Honor.

21 Q (Ms. Kaiser by Mr. Madson:) You said you saw  
22 Mr. Hazelwood come in there, ma'am.

23 A Yes.

24 Q Do you recall the time approximately?

25 A Approximately between 2 and 3 o'clock.

1 Q And could you -- from your records that you  
2 gave me last night, and I want to hand you what  
3 has been marked as Exhibit AS, and ask you if you  
4 have seen that before?

5 A Yes, I have.

6 Q What is that, ma'am?

7 A It's my telephone bill at the time that I sold  
8 Mr. Hazelwood flowers.

9 Q And is that a true and accurate copy of the  
10 telephone receipt?

11 A Yes, I got this from the telephone company.

12 MR. MADSON: Your Honor, I would offer Exhibit  
13 AS in evidence at this time.

14 THE COURT: Objection?

15 MR. COLE: Could I just see it? No objection.

16 THE COURT: It's admitted.

17 Q (Ms. Kaiser by Mr. Madson:) Now, according to  
18 the telephone records, ma'am, first of all,  
19 explain why there was a telephone record at all  
20 involved in this?

21 A Well, I have a Telenet machine that I put his  
22 credit card through.

23 Q Now we might be getting ahead of ourselves.  
24 Did Captain Hazelwood purchase anything there?

25 A Yes. He ordered some flowers to send back to

1                   Huntington, Long Island.

2           Q           Then how was this purchase made?

3           A           With a credit card.

4           Q           And what do you do when a credit card purchase

5                   is made?

6           A           I put it into my Telenet machine and I got an

7                   approval on the card, and then I call the order

8                   into the town that it was ordered to go to.

9           Q           And when you say "put it in", you actually

10                   physically take the card...

11          A           I physically take the card and put it through

12                   the machine.

13          Q           And then this, somehow is recorded as a

14                   telephone call?

15          A           Right.

16          Q           What is the purpose of doing that, to put that

17                   card through there?

18          A           So that I get credit approval. Because,

19                   sometimes, cards are declined.

20          Q           And let me ask you, did you observe anything

21                   else with regard to the time that Captain

22                   Hazelwood was in there? Any other documents?

23                   Let me show you what has been marked, for

24                   instance, Exhibit AT, as in "Tom", and ask you...

25                   MR. MADSON: Mr. Cole, I think you've seen



1 this already.

2 Q If you would examine this, particular where  
3 the line is kind of darkened through that. And  
4 let me ask you, ma'am, if that refers to the same  
5 transaction, as far as you know?

6 A Uh-huh (affirmative). Of my shop.

7 Q And what was the transaction -- the purchase -  
8 - how much was it?

9 A I don't recall right now what it was. I don't  
10 remember.

11 Q And according to those documents you've  
12 examined there, your telephone records, what was  
13 the time where you actually physically put the  
14 card through the machine?

15 A Well, according to this it was 2:30 -- 1402.

16 Q 1402. That translates into what time. You  
17 said between two and three. Would that be two  
18 minutes after two or two minutes after three?

19 A After two.

20 Q So at two minutes after two, that's the time  
21 you physically put the card through?

22 A Right.

23 Q Did you have a chance to talk to Captain  
24 Hazelwood for any length of time?

25 A Yes. I didn't know who he was at the time.

1 We talked about Huntington, Long Island, because  
2 that's where I come from, Long Island.

3 Q That's why you could remember the  
4 conversation?

5 A Yes, because we talked about Long Island.

6 Q Ma'am, have you had experience in observing  
7 persons who are under the influence of alcohol?

8 A Yes, I have.

9 Q Based on your personal experience, did you  
10 observe anything in Captain Hazelwood's demeanor,  
11 or the way he walked, or physical actions to  
12 indicate he was under the influence?

13 A No, he wasn't. He was sober.

14 Q Thank you, ma'am. I don't have any other  
15 questions.

16 MR. MADSON: But I would offer Exhibit AT into  
17 evidence, Your Honor.

18 THE COURT: Any objection? AT is the one you  
19 said you had seen already.

20 MR. COLE: I object to that one, yes.

21 THE COURT: Your grounds?

22 MR. COLE: It's hearsay.

23 THE COURT: May I see the document, Mr.  
24 Madson?

25 MR. MADSON: Yes, Your Honor. I will also

1 show you something else. Offered as a business record,  
2 Your Honor.

3 (Pause)

4 THE COURT: Have you shown this to Mr. Cole?

5 MR. MADSON: Yes, I have.

6 THE COURT: Mr. Cole is correct, Mr. Madson.  
7 You need to have the witness come in. It's an  
8 affidavit, but that's not adequate. You need a  
9 witness. Objection sustained.

10 MR. MADSON: Your Honor, the witness is in New  
11 York.

12 THE COURT: I understand that.

13 MR. MADSON: Your Honor, I would ask the court  
14 to inquire, if the state has any legitimate objection  
15 to the contents of this, other than technical hearsay?  
16 In other words, they contest the authenticity of this.

17 That question was put to me numerous times in  
18 this trial, and evidence was admitted, and I think I  
19 should have...

20 THE COURT: Counsel approach the bench,  
21 please.

22 (3982)

23 (Whispered bench conference as follows:)

24 THE COURT: How long have you had knowledge of  
25 that affidavit?

1 MR. COLE: We just got this ourselves  
2 (indiscernible - whispering).  
3 MR. MADSON: (Indiscernible - whispering).  
4 THE COURT: The objection was hearsay and it  
5 was sustained. Do you withdraw your...  
6 UNIDENTIFIED SPEAKER: (Indiscernible -  
7 whispering).  
8 THE COURT: When you made your objection to  
9 hearsay did you know about that affidavit?  
10 MR. COLE: Yes, I knew about it.  
11 THE COURT: Then why did you make it, if  
12 you're not going to make it now?  
13 MR. COLE: I object to it (indiscernible -  
14 whispering).  
15 THE COURT: You still object to it?  
16 MR. COLE: Yeah. I'm not saying I will not  
17 (indiscernible - whispering), but I want to look into  
18 it first (indiscernible - whispering).  
19 MR. MADSON: Your Honor, why don't we just  
20 hold it in reserve then until Mr. Cole has a chance to  
21 examine it.  
22 THE COURT: All right.  
23 (End of whispered bench conference)  
24 (4062)  
25 THE COURT: The objection is still sustained.

1 If you change your mind, Mr. Cole, you can let us know  
2 later.

3 MR. COLE: Yes, I will.

4 THE COURT: Oh, I'm sorry, I thought you were  
5 completed.

6 MR. MADSON: I'm just about to be. I have  
7 another question.

8 Q (Ms. Kaiser by Mr. Madson:) Ms. Kaiser, do  
9 you recall the time Captain Hazelwood left your  
10 place at all? Do you have any recollection of  
11 that?

12 A Well, some time between two and three. I  
13 didn't look at my watch.

14 Q Thank you very much. No other questions.

15 CROSS EXAMINATION OF MS. KAISER

16 BY MR. COLE:

17 Q Good afternoon, Ms. Kaiser, how are you?

18 A Just fine, thank you.

19 Q March 23, that was how many days before  
20 Easter, do you remember?

21 A I forgot when Easter was. I was sending out a  
22 lot of Easter arrangements.

23 THE COURT: I can't hear you, you are going to  
24 have to speak up.

25 A Oh, I'm sorry. I was sending out a lot of

1 Easter arrangements. I don't recall the date.

2 Q How many other flower stores are there in  
3 Valdez?

4 A One other shop.

5 Q And that was last year, there was one other  
6 one. Were you pretty busy during this time?

7 A Yeah, I was busy, but not that busy that I  
8 don't remember Mr. Hazelwood, because of his Long  
9 Island deal.

10 Q Okay. Do you remember talking to a police  
11 officer shortly after this happened?

12 A I spoke to quite a few people who came in and  
13 talked to me about it.

14 Q Have you been shown any of your other  
15 statements by Mr. Madson, that you gave right  
16 after the grounding?

17 A No.

18 Q Do you remember an interview at the Hobby Hut  
19 by a Trooper Alexander?

20 A Uh-huh (affirmative).

21 Q Do you remember him asking you about what time  
22 Captain Hazelwood came in or left?

23 A I think everybody asked me that. They all  
24 asked me that question.

25 Q Do you remember telling him you weren't sure

1           when he came in?

2           A           I said I thought it was between two and three.  
3                       I think I told all of them that, but I wasn't  
4                       positive about the time, but I thought it was  
5                       between two and three. I didn't look at my  
6                       watch.

7           (Tape: C-3660)

8           (000)

9           Q           Were there other people in the store at that  
10                      time?

11          A           There were quite a few people in the store at  
12                      the time.

13          Q           Do you handle credit cards, MasterCard, or  
14                      American Express cards differently?

15          A           No, they all go the same into my Telenet  
16                      machine.

17          Q           And I assume that's when -- after you ran the  
18                      American Express card through the Telenet, that  
19                      was about the end of your dealings with Captain  
20                      Hazelwood?

21          A           Uh-huh (affirmative).

22          Q           And he must have left within a short time  
23                      after that?

24          A           Probably, yes.

25          Q           A couple minutes. Would that be fair to say,

1 a couple minutes after that?

2 A Uh-huh (affirmative).

3 Q And your store, it's right across the street

4 from the Pipeline Club, isn't that right?

5 A I'm next door to the Shop-Rite Market.

6 Q And what would it take, maybe a minute or two

7 to walk across the street to the Pipeline Club

8 from your store?

9 A Not very long.

10 Q Less than a minute?

11 A No, it would take more than that. Two or

12 three minutes. There's a lot of traffic on that

13 street.

14 Q But if there isn't any traffic you could walk

15 right across. It's just right across the street.

16 A Oh, of course, just like Shop-Rite is next

17 door, or other places. Glacier Bar is next door.

18 Q You could actually see the Pipeline Club from

19 your shop, can't you?

20 A I don't look out the window, I'm too busy.

21 Q But if you wanted to you could see it?

22 A Well, I would have to kinda look around -- go

23 back and look through other windows, not just

24 where I stand to do business.

25 Q You don't know where Captain Hazelwood went



1 after he left?

2 A I have no idea. If I would ask my customers,  
3 they would tell me to mind my own business where  
4 they go after they leave my shop.

5 Q I have nothing further.

6 REDIRECT EXAMINATION OF MS. KAISER

7 BY MR. MADSON:

8 Q Ms. Kaiser, you don't know whether Captain  
9 Hazelwood stayed around and browsed around your  
10 shop for a while; went into the hobby shop, or  
11 anything like that?

12 A When he first came in he just browsed around,  
13 yes.

14 Q Well, it's fair to say that you don't know the  
15 time he left, or how long he might have stayed,  
16 or where he went?

17 A Well, I would say he was in there at least a  
18 half hour. I don't know where he went after he  
19 left. I never thought to think about it.

20 Q Thank you, ma'am. I have no other questions.

21 THE COURT: You may step down. You're  
22 excused. You may call your next witness.

23 (Witness excused)

24 THE COURT: Mr. Madson, would you stop your  
25 witness, she's got one of the exhibits.

1 Call the name of your next witness, please?

2 MR. MADSON: It's Mr. Dudley, Your Honor.

3 (Oath administered)

4 A Yes, I do.

5 CHARLES DUDLEY

6 called as a witness in behalf of the defendant, being  
7 first duly sworn upon oath, testified as follows:

8 THE CLERK: Sir, would you please state your  
9 full name and spell your last name.

10 A My full name is Charles Dudley, D-u-d-l-e-y.

11 THE CLERK: And your current mailing address?

12 A P. O. Box 2325, Valdez.

13 THE CLERK: Your current occupation?

14 A Right now I'm working as an operator for  
15 Ship's Escort Response Vessel System there in  
16 Valdez.

17 THE CLERK: Thank you.

18 DIRECT EXAMINATION OF MR. DUDLEY

19 BY MR. MADSON:

20 Q Mr. Dudley, what exactly do you do now in  
21 Valdez? What is the nature of your job?

22 A My job is to stand by for another major oil  
23 spill that may develop in the Port of Valdez, as  
24 an operator for deployment of boom and clean-up  
25 operations.

1 Q Have you had this job for some time, or is  
2 this recent employment?  
3 A This is recent employment as of 1 June of last  
4 year, sir.  
5 Q What were you doing back on March 23 of this  
6 last year?  
7 A I was employed by American Guard and Alert as  
8 security, which is contracted by Alyeska. I was  
9 the gate guard on that evening, sir.  
10 Q Gate guard where, sir?  
11 A On the main gate for Alyeska.  
12 Q Alyeska Terminal?  
13 A Yes, sir.  
14 Q Why don't you -- what, exactly, was the nature  
15 of your job? I mean, what were you supposed to  
16 do?  
17 A My job at the main gate was to allow vehicle  
18 traffic to enter the gate after it's been  
19 inspected, and had received the proper authority.  
20 And pedestrian traffic were routed from the  
21 vehicle gate to the security guard -- through the  
22 front entrance that has a security guard itself.  
23 Q And, sir, why don't you explain, for instance,  
24 if crew members of one of the tankers went into  
25 town and came back by cab, what would be your

1 procedure once a cab arrived at the gate guard  
2 there?

3 A Once the cab arrived with seamen or any other  
4 pedestrians or passengers, they were to be  
5 stopped at the inbound gate. That's the gate  
6 going into the terminal.

7 Q Is that where you were located?

8 A Yes, sir.

9 Q And then I would step behind the cab and  
10 inspect the cab as I was walking behind it, going  
11 to the rear, and the passengers would then  
12 disembark from the vehicle. And I would have a  
13 legal size piece of tablet paper showing the  
14 names of all the seamen of all the vessels who  
15 have gone ashore. And I would then receive the  
16 Merchant Mariners document from each of the  
17 individuals...

18 A The mariners document, is this a card or  
19 something?

20 A Yes, sir, a Z card. A Z card or some other  
21 form of identification that had a photograph on  
22 the document.

23 I would then check their names off the list,  
24 verified by their Z card, and by the individual  
25 themselves, and I would return the Z card back to

1 the individual. And then they would proceed  
2 through the security building to where the guard  
3 inside would then check any luggage they may have  
4 and kinda eyeball the individual for possible --  
5 any type of contraband, whatever it may be.

6 Q What about signs of intoxication? Would your  
7 job entail looking for intoxication at all?

8 A Yes, sir. What we ended up doing would be,  
9 when the individual would walk by, he would -- if  
10 he seemed to be excessively intoxicated, I would  
11 then notify the guard inside to kinda eyeball  
12 this individual and kinda watch him, for his own  
13 safety, not so much as for security -- it's  
14 simply for himself. Then I would check the  
15 vehicle -- inspect the vehicle for any alcoholic  
16 beverages that may be hidden inside the cab  
17 itself. But as far as doing a test on an  
18 individual, no, sir.

19 Q Was this a similar procedure being used on  
20 March 23 of last year?

21 A Yes, sir.

22 Q Do you recall an incident about 8:30 that  
23 evening with regard to a seaman from the Exxon  
24 Valdez?

25 (321)

1 A A cab driver dropped off three -- I assume  
2 three people, to the best of my knowledge, and we  
3 went through that procedure, yes, sir.

4 Q Okay. You said you wrote their names on a  
5 pad, right?

6 A Yes.

7 Q What happened to that piece of paper?

8 A Well, at the end of the shift, after the  
9 vessel left, or at the end of my shift, we would  
10 end up just throwing them away.

11 Q Did you take that information and put it  
12 anyplace else?

13 A Yes, sir. We put it on log.

14 MR. MADSON: Excuse me, Your Honor, I have to  
15 approach the clerk. I don't have the exhibit number of  
16 the deck log, or a gate log.

17 (Pause)

18 Q Sir, let me hand you what has been marked as  
19 Plaintiff's Exhibit 32, and ask you if you could  
20 recognize that document?

21 A Yes, sir. It's one of our pages to our gate  
22 log.

23 Q Is that your writing on there?

24 A The time is, sir. The 2024, that is my  
25 handwriting.

1 Q And 2024 is what time in layman's terms?  
2 A That's 24 minutes after 8, sir.  
3 Q And at that time who did you log in?  
4 A I logged in a Mr. Robeson, Mr. Klawnsnik [sic]  
5 and Mr. Hazelwood, sir.  
6 Q Do you know Mr. Hazelwood personally?  
7 A No, sir.  
8 Q Would you recognize him if you saw him today?  
9 A After the media, yes, sir.  
10 Q Is he in the court today?  
11 A Yes, sir.  
12 Q Does that appear -- in your opinion, is that  
13 the person you saw at that time on March 23?  
14 A Yes, sir.  
15 Q Now, sir, let me ask you this. From your  
16 observations of Captain Hazelwood at that time  
17 and place, did you observe anything that caused  
18 you to believe he may be under the influence of  
19 alcohol?  
20 A No, sir.  
21 Q Would you explain where you saw him and what  
22 you saw him doing? Where he had to walk, and  
23 things like this.  
24 A Like I say, the cab pulls up and passengers  
25 disembark, I'm standing behind the cab. And when

1 the individuals come up to me they hand me their  
2 Z card. And we was approximately an arm's length  
3 away from one another. They hand me their Z  
4 card; I check them off; and I hand the Z card  
5 back to the individuals. And when they left me I  
6 would direct them toward the main door of the  
7 security building, and that's where they would  
8 have to go through their screening process to get  
9 into the terminal.

10 Q How far would this walk be, sir?

11 A I estimate approximately maybe 50 to 65 feet.  
12 And when they start off in that direction I kinda  
13 watch where they are going. At that time there  
14 was a little snow and ice on the ground, and I  
15 kinda watched them to make sure that none of them  
16 slipped and fell, and I did not observe any  
17 irregularities in their walk. And at that time I  
18 proceeded with the inspection of the cab.

19 Q And where do the individuals go after they go  
20 inside and come back out. What do they do next?

21 A Well, once they've gone through the main --  
22 they go outside the security, go right from there  
23 directly to the cab. The cab is there inside of  
24 the terminal.

25 Q Inside the gate?



1 A Yes, sir.

2 Q And then the cab then goes to the ship or the  
3 berth?

4 A Yes, sir. Goes right to the berth.

5 Q So I take it, after they got back in the cab  
6 you did not see Captain Hazelwood after that?

7 A No, sir.

8 Q Thank you, sir. I have no other questions.

9 CROSS EXAMINATION OF MR. DUDLEY

10 BY MR. COLE:

11 Q Mr. Dudley, how long did you work for American  
12 Guard and Alert?

13 A Approximately two years, sir.

14 Q And was all of that time in Alyeska?

15 A Yes, sir.

16 Q Now, as I understand it, American Guard and  
17 Alert, they contract with Alyeska to provide  
18 security, is that correct?

19 A Yes.

20 Q And so your job is essentially to provide  
21 security for Alyeska?

22 A At that time, yes, sir.

23 Q You essentially worked for Alyeska?

24 A Then, yes, sir.

25 Q Did any of Alyeska's attorneys contact you

1 over this matter?

2 A No, sir.

3 Q You never had any contact with anyone from  
4 Alyeska over this matter?

5 A Not Alyeska, no, sir.

6 Q I think it would be helpful -- would you mind  
7 drawing a picture of the guard shack and the  
8 entrance gate for the jury?

9 (600)

10 A You got the ingress gate, inbound gate, a  
11 little island, and then we got the outbound gate,  
12 and the security building itself, and they got  
13 the main door here. And then we have a door  
14 here.

15 When a cab pulls up it would pull up in this  
16 area and the passenger would disembark. I was  
17 standing about right here behind the cab. The  
18 individuals came over to here. I took their Z  
19 cards from them and checked them off my list and  
20 I gave them right back to them. And then they  
21 proceeded from this area to this door. And when  
22 they got past or started on the sidewalk, that's  
23 when I no longer concerned myself with them, and  
24 I went ahead and inspected the cab.

25 After I was satisfied the cab was clean, then

1 I opened the gate and let the cab through. Then  
2 when the individuals were finished being  
3 processed through security, they then came out  
4 this door and walked directly over to the cab and  
5 got in and proceeded down through the...

6 Q Would you mind drawing a picture of where the  
7 cab first started and maybe a little arrow in  
8 which direction it was going?

9 A The cab, when he first pulled up...

10 Q Just put a box there.

11 A Okay. They pulled up right here (indicating).  
12 And after I had done my inspection with them, and  
13 the cab was going to pull up inside the gate, and  
14 it was about in this area, and waited for the  
15 pedestrian, or the passengers, and then they  
16 would proceed on down to the berth.

17 Q Okay. Thank you. You could resume your seat.

18 I assume that as a security guard, one of your  
19 jobs is to make sure that unauthorized people  
20 don't go into the Alyeska Terminal area?

21 A That's right.

22 Q And the reason is, there is a lot of sensitive  
23 equipment, and there's oil, and you wouldn't want  
24 anybody who is not authorized to get in there and  
25 have any problems, is that right?

1 A That's right, sir.

2 Q So your primary concern is to make sure that  
3 only authorized people are allowed to go beyond  
4 the gates there, correct?

5 A Yes, sir.

6 Q And that's why you check people's ID's. And  
7 when they show you that they have an ID card, or  
8 some type of identification, then you know that  
9 they are authorized to go in, correct?

10 A Yes, sir.

11 Q And if they are not authorized, you turn them  
12 back?

13 A Yes, sir.

14 Q Now, do you get to know the cab drivers that  
15 end up driving back and forth?

16 A Yes, sir.

17 Q You know them all pretty well? In fact, you  
18 knew the cab driver in this case? His name was -  
19 - a man named Frenchie, right?

20 A Yes, sir.

21 Q Do you talk with the cab drivers when they  
22 drive up?

23 A Occasionally, yes, sir.

24 Q Did you become friends with some of them, and  
25 laugh and maybe tell jokes every so often when

1           they drove up?

2           A           Occasionally, yes, sir.

3           Q           But you still checked every one of their cars  
4           when they came up, right?

5           A           Yes, sir.

6           Q           Just because they were a friend of yours, you  
7           would make sure that you checked their individual  
8           cars?

9           A           Yes, sir.

10          Q           And you did that for every vehicle that went  
11          through there, correct?

12          A           Yes, sir.

13          Q           Now, after people hand you your card, then you  
14          said you walked -- you watch them after they had  
15          you the card, and while they're walking back to  
16          the gate, is that correct?

17          A           Yes, sir.

18          Q           And you said that you were watching -- if I  
19          have your words here correctly -- you said that  
20          they were -- you are looking for people that are  
21          excessively intoxicated, correct?

22          A           We look to see -- basically what it is, yes,  
23          sir.

24          Q           And when you say that, you mean people that  
25          are stumbling, or falling down, or can't take

1 care of themselves?

2 A Yes, sir.

3 Q Because those people -- you are also

4 protecting Alyeska in case those people later on

5 say that they slipped and hurt themselves because

6 there were bad conditions and not because they

7 were intoxicated?

8 A Right. Yes, sir.

9 Q But you didn't make any notations that people

10 had had alcohol on their breath at that time, did

11 you? Did you write that down when people came

12 through?

13 A No, sir.

14 Q And you took some alcohol training courses to

15 work at your job?

16 A That was after the so-called incident, yes,

17 sir.

18 Q You didn't have any experience in identifying

19 people that had been drinking before that?

20 A No, sir. Based on your own experience from

21 your previous...

22 Q How many people -- you worked there for two

23 years. How many people that were off these ships

24 -- how many sailors can you say -- just give us a

25 ballpark figure. How many sailors came in and

1 out of the terminal while you were at work?

2 A Several thousand.

3 Q Do you have any idea how many of those people  
4 were drinking while they were in town and came  
5 past you?

6 A Do you want a figure?

7 Q To the best of your recol -- you know.

8 A All I can tell you, there's quite a few.

9 Q In fact, that's one of the reasons people go  
10 into town, is to have alcohol, is that right?  
11 Get a couple drinks?

12 A I really can't give you a straight answer on  
13 that, sir. They do drink.

14 Q Well, it sounds like it was almost an every  
15 day occasion for some of the people that were  
16 members off these tankers to go in and come back  
17 after having been drinking, and you noticed?

18 A Yes.

19 Q You said that there were three people in this  
20 car with the taxicab driver?

21 A To the best of my recollection, yes, sir.

22 Q And you are pretty sure that there were three  
23 people in the car?

24 A To the best of my memory, yes, sir. There may  
25 have been another one, I don't -- at the time I

1           wasn't sure.

2           Q           Did you smell any smoke when you check any of

3           the people that were in the car, when they came

4           up to you?

5           A           No, sir.

6           Q           Did you smell any pizza?

7           A           Yes, sir.

8           Q           Why did you smell pizza?

9           A           Because they had pizza with them. And the one

10          guy that was in the front seat, he was eating

11          pizza.

12          Q           Do you remember who that was?

13          A           No, sir.

14          Q           Well, you picked out Captain Hazelwood in the

15          courtroom here today. Was Captain Hazelwood the

16          one that was eating the pizza?

17          A           No, sir, I don't think so.

18          Q           He was someplace else?

19          A           I think he was in the back seat of the cab.

20          Q           It was a pretty strong smell of pizza in the

21          car, though, I assume?

22          A           Yes, sir.

23          Q           And after they got to the corner of the door,

24          you didn't watch these people any further?

25          A           Once they stepped foot on the concrete, no,



1 sir.

2 Q And did you watch them when they came back?

3 A When they exited that building, yes, sir. I  
4 watched them when they walked to the vehicle  
5 again, because of the snow and ice that was on  
6 the ground. It was for their own safety.

7 Q You checked that car and you are sure there  
8 was no alcohol in that car?

9 A Yes, sir.

10 Q You didn't see any signs of anybody carrying  
11 any alcohol when they went in?

12 A No, sir.

13 Q I have nothing further. Thank you.

14 REDIRECT EXAMINATION OF MR. DUDLEY

15 BY MR. MADSON:

16 Q Mr. Dudley, you indicated, in response to Mr.  
17 Cole's question that Alyeska's attorneys had not  
18 contacted you about your testimony, or...

19 A With the exception of yourself.

20 Q What about police officers?

21  
22 (946)

23 A One -- well, a state representative talked to  
24 me -- one was Mr. Mike Fox, and I don't recall  
25 the other gentleman's name. They questioned me

1                   about the incident.

2       Q           Was that just one time or two separate times?

3       A           That was one time.

4       Q           Do you recall about when that was?

5       A           A day or two after the incident.

6       Q           Did you tell them essentially what you told

7                   the jury here today?

8       A           Yes, sir.

9                   MR. COLE: Objection. Relevance. Hearsay.

10                  THE COURT: Objection overruled under 801,

11                  based on your inquiry...

12       Q           Mr. Dudley, from your personal experiences,

13                   you've seen people that are under the influence

14                   of alcohol, is that correct?

15       A           Yes, sir.

16       Q           And I think you told the jury in response to

17                   Mr. Cole's question, that on other occasions, and

18                   as part of your job, you have seen people that

19                   were under the influence or intoxicated, going

20                   through the gate?

21       A           Yes, sir.

22       Q           Now, did you see any signs at all, let alone

23                   excessive signs of intoxication on the individual

24                   that you saw this night?

25       A           No, sir.

1 Q Captain Hazelwood in particular?  
2 A No, sir.  
3 Q Thank you. I have no other questions.  
4 THE COURT: Thank you. You're excused.  
5 (Witness excused)  
6 MR. MADSON: Call Michael Craig, Your Honor.  
7 (Oath administered)  
8 A Yes, I do.  
9 MICHAEL EDWARD CRAIG  
10 called as a witness in behalf of the defendant, being  
11 first duly sworn upon oath, testified as follows:  
12 THE CLERK: Sir, would you state your full  
13 name and spell your last name?  
14 A Michael Edward Craig, C-r-a-i-g.  
15 THE CLERK: Your current mailing address?  
16 A Box 1825, Valdez, Alaska.  
17 THE CLERK: Your occupation?  
18 A Security supervisor.  
19 DIRECT EXAMINATION OF MR. CRAIG  
20 BY MR. MADSON:  
21 Q Mr. Craig, who do you work for as security  
22 supervisor?  
23 A American Guard and Alert, Incorporated.  
24 Q And how long have you worked for them?  
25 A Approximately seven years.

1 Q And would you explain the job that you have  
2 with them? In other words, what the job entails  
3 and your responsibilities in doing so?

4 A I'm one of the duty sergeants, security  
5 supervisor. We work in shifts, so I have -- we  
6 work two weeks on and two weeks off, and I happen  
7 to be in charge, at this point, of about six or  
8 seven guys in any given day or night.

9 Q This was at the terminal in Valdez?

10 A Yes, sir.

11 Q What is your function? What is your primary  
12 purpose in being there?

13 A Currently or at that time?

14 A Well, let's put it at that time. When you say  
15 "that time", you are referring to March 23, I  
16 take it?

17 A Yes, sir.

18 Q Let's take March 23.

19 A At that time we had somewhat less amount of  
20 security people than there is now. And I was  
21 also in a patrol supervisory role where I take  
22 care of all the paperwork and that sort of thing.  
23 And then when that slowed down, then I would go  
24 out in the field and I perform patrol duties.  
25 Somewhere within the year before they had

1 eliminated the night patrol slot, and put me  
2 there. Generally, other than that, I just take  
3 care of the paperwork and make sure everything  
4 was squared away. Decision making, that sort of  
5 thing, when something would come up, I would be  
6 the point of contact.

7 Q Let me ask you, sir, as part of your duties,  
8 did you watch for or look for intoxicated  
9 individuals?

10 A Yes.

11 Q I mean, through the terminal?

12 A Yes. The seamen that were going back to the  
13 ship had to exit the cabs, or whatever mode of  
14 transportation that they arrived in, and come  
15 through the security office, where we have a  
16 magnetometer, which is similar to what you have  
17 to go through at an airport for metal screening.  
18 We have an ex-ray machine and that sort of thing.  
19 They have to get out of the cab, or, again,  
20 whatever mode of transportation that they have at  
21 the gate where they are identified and verified  
22 on a crew list or ship's manifest that's supplied  
23 to us by whatever ship happens to be in.

24 If they can be identified by the guard at the  
25 gate and they are on that crew list, then they

1 proceed into the office where, hopefully, someone  
2 was there, and I was on that night.

3 Q Calling your attention to that night, were you  
4 inside the guard office?

5 A Yes, I was. I was on -- there's an island  
6 that separates two different areas in the office,  
7 one being my desk area and the other one being  
8 the secretary's desk area. But on that side is  
9 where the magnetometer is, and that's where  
10 things control -- I was at my desk doing  
11 paperwork at the time when the guy at the gate  
12 would radio in and just let you know that a cab  
13 was on the way. I looked down the road, and sure  
14 enough there was a cab. So I made my way over to  
15 the other side of the counter where I could  
16 screen the people that were going to be entering.

17 Q Calling your attention to Exhibit 32. Do you  
18 recognize that document, sir?

19 A Yes. It's one of our standard Gate Logs.

20 Q And calling your further attention to the time  
21 involved here, 2024 I believe it is?

22 A Yes.

23 Q What time is that in regular time?

24 A That's 8:24 p.m.

25 Q Did you write this document yourself?

1 A No. That would have been written by a couple  
2 of different people. The 2024 people would have  
3 been by a guy, Dudley. That would have been at  
4 the gate at the time. I have a log that I have  
5 to fill out, also. And at 2023 I show that I  
6 screened four seamen on that date.

7 Q Is that the only ones you screened at  
8 approximately that time?

9 A Yes.

10 Q Could you identify any of those seamen today?

11 A Today.

12 Q Who could you identify?

13 A Captain Hazelwood.

14 Q And do you see him in court today?

15 A Yes.

16 Q Where is he?

17 A He's sitting right here.

18 Q Would you tell the jury, please, what you saw  
19 at that time when you said the four seamen came  
20 in. What did you do and what did you see?

21 A Okay. When I was told that there was a cab  
22 coming I was to look down the road; there was  
23 one. I walked over to the other side. We have  
24 to flip a switch on to get the things activated.  
25 I looked out there...

1 Q What things are you...

2 A The magnetometer. That has to -- if we leave  
3 it on all day, you know -- we carry weapons and  
4 what not, so every time you walk by it would go  
5 off. So you only turn it on when you need to use  
6 it.

7 I looked out there and there was four people  
8 in the cab. And I just kinda observed what was  
9 going on out there. You know, it's March, and  
10 what not. People slip and fall and that sort of  
11 thing, so you just want to make sure that  
12 everything goes all right.

13 One person got out of the back of the cab and  
14 gave his identification to...

15 Q When you say "back of the cab", you mean  
16 the...

17 A It's actually a stationwagon type of affair  
18 and there's three separate seats. The rear seat  
19 faces out, so he has to climb out the back as  
20 opposed to, you know, getting out in what we  
21 would term a normal fashion. He got out rather  
22 quickly and gave his identification to the guard  
23 at the gate, who identified them and gave his  
24 identification back. He then came through, and  
25 they had been through it many times, so they set



1 all the metal things that they have on the  
2 counter and they go through -- you know, you talk  
3 with them -- just, really, not talk, just ask  
4 them, "Sir, what ship are you off?", and that  
5 sort of thing, just so you can get some kind of -  
6 - you know, how they're talkin' and what's goin'  
7 on with them.

8 Gave him back -- I believe all he had was some  
9 kind of a pocket knife, and he went immediately  
10 out. I didn't see anybody else come in. And I  
11 thought, well, gee, I remember there being four  
12 people. So I looked out there and there was  
13 still a group of three standing out there. And  
14 they looked to be together, that being why they  
15 were taking a little bit longer. They were  
16 waiting for each other to come through.

17 So I watched them walk from there over to the  
18 front door, or until they got out of my vision.  
19 Came in the front door. Once person went back to  
20 the restroom area.

21 Q Do you know who that person was?

22 A No, I don't. I don't recall which one it was.  
23 One person went back to the restroom area; two  
24 people came over to be screened.

25 If you have any -- one of them had like a

1           backpack sort of thing. There was a couple  
2           pizzas. There might have been another backpack  
3           or bag, or some such thing, maybe from a store.  
4           I don't remember exactly what all there was. And  
5           all that has to be gone through individually.  
6           You take the things out and you make sure there's  
7           no alcohol, weapons, whatever it happens to be.

8           Q           Did you look under the pizza, for instance?

9           A           You actually have to open the pizza and look  
10           under it. They had been known to bring whatever  
11           it is that they like to bring in through that  
12           venue.

13                    So those two people went through and I  
14           searched those things and gave them back all the  
15           metal objections, set the other stuff on the side  
16           where they were, through the magnetometer. And  
17           then they stood there, you know, for a brief  
18           period of time, a minute or two, waiting for the  
19           other person who came out, and he went through  
20           the screening procedure just like they did. It  
21           just was a normal kind of a thing.

22           Q           Let me ask you, sir, what are the things that  
23           you do? Do you look for signs of intoxication of  
24           individuals, crew members, for instance?

25           (1340)



1 know, whichever one was in the restroom. So, a  
2 couple minutes, three minutes.

3 Q Have you had experience in observing  
4 intoxicated individuals before, sir?

5 A Yes.

6 Q If someone came through there and you believed  
7 them to be under the influence or intoxicated, is  
8 there a certain procedure you would go through at  
9 that point? I'm talking about back in March.

10 Q They would have to be pretty far gone. You  
11 know, if they were stumbling and vomiting and  
12 that sort of thing. Then we would notify the  
13 ship, who would provide some people, generally  
14 supervisory level, to come down and personally  
15 tell us, "Yes, we want these people on." At that  
16 time they're denied access until the ship comes  
17 down and says, "Well, we understand the condition  
18 that they're in, but we accept responsibility for  
19 that."

20 So, what we do is we either follow them down  
21 or provide transportation down to the ship. They  
22 have to supply a couple of people from the ship  
23 to actually get them over this gangway, which is  
24 quite an affair to get over.

25 Q Let me ask you about that, sir. On March 23

1           were you familiar with the gangway or the access  
2           to the Exxon Valdez when it floated?

3           A           Yes. Yes.

4           Q           Would you explain what was involved in getting  
5           from the ground on to the vessel -- shore of the  
6           vessel?

7           A           Just to get on to the ship is approximately a  
8           quarter mile walk. You got to walk out on this  
9           causeway. You get to the end of the causeway and  
10          there's a gangway that goes up. It's kinda like  
11          a ladder step kind of affair. It goes up about  
12          two stories or two flights. And they are pretty  
13          much straight up, and you...

14          Q           Is that like a ladder with -- how would you  
15          describe it?

16          A           Well, pretty much -- a ladder with handrails,  
17          basically, is what it is. And then you get to  
18          the top of that and that's where it pivots so you  
19          can -- you know, you put this gangway on the ship  
20          so people can get on and off. When the ship goes  
21          to leave, then it's on some kind of hydraulic  
22          system where it lifts back off and comes back on  
23          the berth, or it remains stationary until another  
24          ship comes on.

25                    So when the ship is loaded they are very low

1 in the water. So, when you get up to the top,  
2 then you have to go, you know, about straight  
3 down to the ship, because this is up two flights.  
4 And then you're going to be even lower than that  
5 two flights.

6 Those steps to go from that top to the bottom  
7 are even more narrow than the ones going up to  
8 the top.

9 Q Well, you have to go up this walkway, almost  
10 vertical, and then you cross over and go down  
11 again?

12 A Yes.

13 Q Have you done it yourself?

14 A Many times.

15 Q How would you describe it as far as degree of  
16 difficulty to do in a sober condition?

17 A Well, you have to concentrate on what you are  
18 doing, because you slip and there you go quite a  
19 long ways. You just can't nonchalantly go up the  
20 thing. We have people that go up and down it  
21 every single day, and almost invariably you'll  
22 have some comment about, "Well, gee, I almost  
23 slipped. I had to used two hands to hold on.",  
24 whatever it happens to be. So you have to make  
25 sure that you got it all together every time you

1 go up and down it.

2 I mean, it's not scary or anything like that,  
3 but you have to think about it.

4 Q Last week, sir, I think you said that the  
5 procedure is different now than it was then?

6 A Sure.

7 Q In what respect?

8 A Well, now we have Breathalyzer instruments  
9 that we use to...

10 MR. COLE: Objection. Relevance.

11 MR. MADSON: I'll withdraw it, Your Honor. No  
12 other questions.

13 (1545)

14 CROSS EXAMINATION OF MR. CRAIG

15 BY MR. COLE:

16 Q Mr. Craig, who do you work for right now?

17 A American Guard and Alert.

18 Q Essentially, you work for Alyeska?

19 A Yeah. I work contract security for Alyeska.

20 Q Have you had any conversation with any Alyeska  
21 attorneys about this matter?

22 A No.

23 Q Have you reviewed any statements before coming  
24 in here?

25 A Other than the ones I've gotten, I haven't

1            looked at any of them.

2            Q            Well, which ones have you got?

3            A            Well, shortly after this incident -- of

4            course, being the security supervisor, I've got a

5            statement form -- a standard Alyeska statement

6            from Allen McGregor, who was in the cab with the

7            three individuals, and another one from a cab

8            driver who drove them out.

9            Q            But you, yourself. Have you reviewed any of

10           your own statements?

11           A            Sure.

12           Q            Who provided you with those?

13           A            Those are, you know, standard forms that I've

14           had, you know, since -- once you make them -- or,

15           once they've been made, then, you know, I

16           obviously keep a copy of everything that I make.

17           You know, statements that I make and things that

18           I receive. And when I was supposed to come down

19           here, and part of the subpoena was that I bring -

20           - or, that I have all the paperwork involved for

21           that night, so I did that.

22           Q            Now, you went to work at what time in the

23           evening?

24           A            Approximately -- 1830 is when we go on duty,

25           which is 6:30 at night. So I was there, you



1 know, 10, 15 minutes before that.

2 Q Would you mind, right underneath that diagram,  
3 drawing us a diagram of what the inside of the  
4 guard shack looks like? Just underneath it.

5 A Oh, you want me to draw just what the guard  
6 shack looks like?

7 Q Yes.

8 A It's just a standard little box. There's  
9 nothing really inside of it. Just sliding doors  
10 that -- you know, it's just, like, maybe four or  
11 five by six feet. It's real small.

12 Q Well, maybe you could draw where you were  
13 sitting then. Let's assume that that box that's  
14 up there is the guard shack.

15 A Well, see, there's a difference between the  
16 guard shack and the security office. The guard  
17 shack is where the gate guard is; where the  
18 vehicles come for their ingress-egress. And then  
19 there is a security office, exactly where I was.

20 Q Do you see that box that's up there?

21 A This box, sure. I could see that.

22 Q Would you assume that that's the security  
23 office. And draw where you were sitting?

24 A This being the main door, there is a  
25 countertop here, and another countertop here.

1 This is my desk in here. And that's where I was  
2 sitting initially. Then I came around where the  
3 magnetometer and ex-ray machine is, right here  
4 before you exit the door. So I was actually  
5 right at that counter.

6 Q There is a counter, then, between you and the  
7 individual to come in?

8 A Yes, there is.

9 Q How wide is that counter?

10 A Something very similar to that desk; couple  
11 feet.

12 Q Now, you indicated that there were four people  
13 that got out of the cab?

14 A Yes, there was four.

15 Q And you are sure there were four?

16 A Positive.

17 Q And which one was Captain Hazelwood?

18 A I don't know. I just know he wasn't the first  
19 one.

20 Q Do you know which one he was as far as the  
21 other three?

22 A No.

23 Q Well, how do you know Captain Hazelwood was  
24 the one that went through there?

25 A The identification process that's conducted at

1 the gate.

2 Q So you don't remember which one of the three  
3 he was; whether he was one of the first two or  
4 the other person?

5 A True.

6 Q Now, when people come into the guard shack,  
7 the purpose is to check to make sure that they  
8 don't have any contraband, correct?

9 A True.

10 Q Contraband includes weapons, drugs and  
11 alcohol, correct?

12 A Yes.

13 Q And that's your primary function in there,  
14 isn't that true?

15 A Primarily, yes.

16 Q And back in March of 1989, if someone had a  
17 few drinks and you noticed that they had alcohol  
18 on their breath, you didn't make any notations  
19 about that, did you?

20 A No.

21 Q And if they were a little bit unsteady on  
22 their feet, but seemed to be handling themselves  
23 okay, and were quiet, you didn't make any  
24 notations about that, did you?

25 A Well, not exactly. If it started to -- if

1           there is some physical indicators, but there  
2           wasn't -- the guy still could walk and he was in  
3           control of himself, and that sort of thing, then  
4           what we would do is, the camera monitor room  
5           would actually video or monitor this person's  
6           progress all the way to the vessel.

7           If it looked like he was having difficulties,  
8           when we send a patrol out there to give him a  
9           ride, help him get over the gangway, and that  
10          sort of thing. If not that, then we call a  
11          patrolman and have him meet this cab, or whatever  
12          it is, at the head of the berth and then he would  
13          walk down with him and just make sure that, you  
14          know, he didn't fall in, or whatever it happened  
15          to be.

16        Q           And the purpose of that was to protect that  
17                    person and Alyeska?

18        A           Sure.

19        Q           Right?

20        A           Sure.

21        Q           And the only reason you did that is if a  
22                    person was so intoxicated that he couldn't help  
23                    himself, right?

24        A           Like I say, there is different things that we  
25                    did. If he was intoxicated to the point where he

1           couldn't help himself, then we actually denied  
2           him access then when they sent some  
3           representatives from the ship, and marine  
4           supervisor level person came from Alyeska. They  
5           make that determination, whether or not he could  
6           come in. If he could, then we monitor and had  
7           somebody with him all the time until he got on  
8           the ship. Yes, he would still make the ship, but  
9           there is different things that we did.

10           Like I said, if he was -- if we thought he was  
11           intoxicated, but he was still in control of  
12           himself, then we would monitor that with cameras  
13           and with an individual down there.

14       Q           That day when these three individuals came in,  
15           did you smell whether any of them had been  
16           smoking?

17       A           No, I don't recall.

18       Q           How about whether or not there was the smell  
19           of pizza in the office?

20       A           There was. Well, not in the office until I  
21           opened it up, obviously.

22       Q           There was no smell at all until you opened it  
23           up?

24       A           True.

25       Q           Now, you were asked at one point that you --

1 and I understand it to be, you worked here for a  
2 while; you probably checked 1,000 people that go  
3 through that gate, is that correct?

4 A Yes. Well, I don't know, about 1,000, but  
5 quite a few.

6 (1880)

7 Q Well, you were asked -- that would be a modest  
8 count at one point?

9 A That's what I say, I don't know -- 1,000 -- I  
10 mean, there's been many. They used to average,  
11 you know, somewhere around 20 or 30 a day or a  
12 night shift at that time. And so given many,  
13 many days, I think 1,000 would be rather modest.

14 Q And you were asked, also, how many of them you  
15 thought had been drinking, and you estimated...

16 MR. MADSON: Excuse me. You said "asked".  
17 Asked by whom? I mean, are we referring to questions I  
18 asked?

19 MR. COLE: I'll rephrase the question.

20 Q Out of the number of people, let's say, 1,000;  
21 about 900 of them had been drinking when they  
22 come back, is that correct?

23 A Well, I would assume so. I don't know that  
24 for a fact, but I would assume so. And, of  
25 course, this was before then. That wouldn't be

1 related to now.

2 Q When you say you assume so, did you always see  
3 signs of drinking after people came back?

4 A Always most of the time. That's why there's  
5 not 1,000 out of 1,000. It was most of the time,  
6 yes. And that being on night shift. Of course,  
7 on day shift it's a different story. But on  
8 night shift it was almost all of the people that  
9 came through, there was some indication.

10 Q Now, after these three individuals left, they  
11 went down to Berth 5, is that correct?

12 A Well, and to Berth 4 and Berth 5, because they  
13 had to drop off the individual from the Arco ship  
14 first.

15 Q And you stayed in your security shack?

16 A Security building.

17 Q Is that correct?

18 A Yes.

19 Q You didn't watch them board that evening?

20 A No. Again, there was -- you know, I performed  
21 a dual role there, where, during the day they had  
22 extra patrol. If it had been at night, and they  
23 had the extra patrol like they had, you know,  
24 several months back, we would have notified that  
25 person that a cab had ingressed the terminal; it

1 was on its way to such and such a point. There  
2 would be a guard, and in this case it would have  
3 been me, however, I'm the supervisor also, so I  
4 had other things to do in the office. That  
5 person would meet them at whatever berth it  
6 happens to be.

7 They would follow the cab to that berth. They  
8 monitor the exiting of the cab. They'd watch the  
9 people walk down the berths, and that sort of  
10 thing. That was something that we did very  
11 regularly.

12 Q On March 23, about 8:30, you didn't watch  
13 these three people get on the Exxon Valdez?

14 A No.

15 Q And there is handrails going up?

16 A Yes. And handrails going down.

17 Q And handrails going down.

18 A Sure.

19 Q So if a person wanted to be careful going up  
20 things, he could just put both hands on the  
21 handrails, right, and walk up the stairs?

22 A I don't know anybody who doesn't.

23 Q But you don't know what these individuals did  
24 that night, because you didn't see them?

25 A Certainly didn't.



1 Q Now, when the three individuals from the Exxon  
2 Valdez walked in, you searched all their baggage,  
3 correct?

4 A Yes.

5 Q And you were sure that there was absolutely no  
6 alcohol in those bags when you let them in?

7 A Yes.

8 Q And you searched every one of the three  
9 individuals to make sure that they didn't have  
10 any alcohol on their person, correct?

11 A No. The individuals are not searched. They  
12 proceed through a magnetometer, and if there is  
13 some indication that they may have some more  
14 metal objects and that sort of thing. You know,  
15 like, the machine activates an alarm signal.  
16 Then you have them step back through. They have  
17 to clear all their pockets. If you still can't  
18 determine that, we have a hand held pocket  
19 scanner which we would then go over the  
20 individual with from head to toe, and be  
21 satisfied that whatever is setting it off is, you  
22 know, something that's not...

23 Q You just take their word that they don't have  
24 any alcohol under their jacket or something like  
25 that, correct?

1 A True.

2 Q And that would mean that you didn't -- so you  
3 didn't actually have to physically check any of  
4 these three individuals, correct?

5 A That's correct.

6 Q And you always stayed behind the counter when  
7 they were in the room?

8 A That's correct.

9 Q I have nothing further.

10 (2083)

11 REDIRECT EXAMINATION OF MR. CRAIG

12 BY MR. MADSON:

13 Q Mr. Craig, were you asked any questions by  
14 representatives of the state prior to today?

15 A Yes.

16 Q Who was that, sir, do you recall?

17 A Well, there's actually a couple different  
18 guys. One's name was, I think, McGhee -- John  
19 McGhee, and then there was a Rawley Port. I was  
20 interviewed by both.

21 Q Separate times or at the same time?

22 A Separate times.

23 Q And do you recall when that was?

24 A I don't recall the specific dates.

25 Q You indicated that there is a camera

1 monitoring system available and it could be  
2 turned on to monitor or record an individual.

3 A Yeah, there's a guard that sits at that  
4 location 24 hours a day. If he, on his own,  
5 while he is viewing this, decides that there is,  
6 you know, some indicator there that something  
7 might be amiss, or whatever, then he  
8 automatically will begin to record that. We also  
9 have a little code that we use if I want him to  
10 record it, then we make some kind of arrangement  
11 for that to be done.

12 There was nothing recorded that night. There  
13 was nothing specific.

14 Q Assume there was a guard on duty at the  
15 monitor.

16 A Yes, there was.

17 Q If I understand correctly, the cameras are  
18 monitoring. That is, he's got cameras -- or, not  
19 cameras, but screens he could look at?

20 A Yes.

21 Q But it isn't being recorded unless he pushes a  
22 button?

23 A Unless he actually activates it, yes.

24 Q And nothing was done this evening with regard  
25 to recording anything?

1 A No, no.

2 Q You indicated, also that you were familiar  
3 with the signs of intoxication from the number of  
4 people that were going through there about that  
5 time that had been drinking, right?

6 A Yes.

7 Q And it's your testimony that you did not see  
8 any familiar signs on Captain Hazelwood?

9 A Nothing whatsoever.

10 Q Thank you, sir. No other questions.

11 (2173)

12 RE CROSS EXAMINATION OF MR. CRAIG

13 BY MR. COLE:

14 Q Well, how could you tell whether or not you  
15 saw signs of intoxication if you don't know which  
16 one of the three was Captain Hazelwood?

17 A Because it really doesn't matter who the  
18 person's name is, you have individuals that you  
19 look at. They don't mean anything to me, as far  
20 as what their names are. I just look at them as  
21 individuals.

22 Q Well, you don't even remember which one was  
23 Captain Hazelwood, right?

24 A True.

25 Q So how could you say whether or not he

1 actually exhibited signs of intoxication if you  
2 don't know which one of the three it was?

3 A Because if I pick up any initial sign or  
4 indicator, then it keys me to that specific  
5 person, I spend a little more time. I might  
6 elicit some conversation with him and that sort  
7 of thing so that I am comfortable with letting  
8 him in, because that's part of what I do.

9 Q Are you sure that you didn't -- did you smell  
10 any alcohol at all on any of these individuals?

11 A None.

12 Q None whatsoever. You got right up next to  
13 him?

14 A No, I didn't get right up next to him.

15 Q Well, did you check to see whether they had  
16 alcohol on their breath when you walked in?

17 A Depending on what you mean by "did you check".

18 Q Well, were you looking for signs...

19 A We're not -- when they come into the security  
20 office we don't go up to each individual, you  
21 know, and get within, you know, how many inches  
22 that you might.

23 I mean, it's a normal kind of a thing where  
24 these people walk in. All they're trying to do  
25 is go to their ship. And in that normal

1 progression, from the time they walk in to the  
2 time they walk out, if you haven't noticed  
3 anything -- if there's no indicators, then there  
4 isn't.

5 Now the story is different these days. If you  
6 want to use that, it's a different thing. You  
7 have to get in much closer to them to determine  
8 that.

9 Q This was nothing more than a routine check  
10 that evening?

11 A True.

12 Q And you didn't handle it any differently than  
13 a routine check?

14 A No.

15 Q Thank you. I have nothing further.

16 MR. MADSON: No other questions.

17 THE COURT: You're excused.

18 (Witness excused)

19 MR. MADSON: May we approach the bench, Your  
20 Honor.

21 THE COURT: Yes, sir.

22 (2270)

23 (Whispered bench conference as follows:)

24 MR. MADSON: That was the last witness we  
25 intended to call today that we had arrangements for.

1 THE COURT: Is more witnesses available?

2 MR. MADSON: No, not right now.

3 (Indiscernible - whispering).

4 THE COURT: You have no witnesses available  
5 that are here.

6 MR. MADSON: Well, I mean, can we take a few  
7 minutes. I could converse with my counsel to see.

8 THE COURT: I've got not problem with  
9 (indiscernible - whispering).

10 MR. MADSON: (Indiscernible - whispering).

11 (End of whispered bench conference)

12 (2290)

13 THE COURT: We're going to recess now. We  
14 will have a witness immediately available, and there is  
15 no sense in waiting for 15 or 20 minutes and not have  
16 him here anyway. So we will resume tomorrow morning at  
17 8:30.

18 Don't discuss the case among yourselves or  
19 with any other person. Remember my instructions  
20 regarding media sources. You are probably getting  
21 tired of hearing this, but it is required by law. I am  
22 sure you remember. But in the event that you might  
23 forget it, I'm going to constantly remind you. Don't  
24 form or express any opinion. I'll see you back  
25 tomorrow morning. Be safe.

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(Jury not present)

May I get an estimate from you of the time of the defense case?

MR. MADSON: Yes, Your Honor. Certainly we are going to go through all this week and I would anticipate all of next week. We would be very lucky if we could finish a week from this Friday.

THE COURT: Okay. So at least through next week and probably longer than that?

MR. MADSON: We are going to try our best to finish next week.

THE COURT: I'm not, by any means, pushing you, I'm just trying to get an estimate for my own calendar.

Is there anything we can do now before we recess?

MR. COLE: I don't believe so.

THE COURT: Okay. If you have something to take up tomorrow morning, come in at 8:15 and notify opposing counsel.

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

(Off record - 12:50 p.m.)

(2385)

\*\*\*CONTINUED\*\*\*