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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.

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

TRIAL BY JURY
MARCH 14, 1990
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BEFORE THE HONORABLE KARL JOHNSTONE
Superior Court Judge

Anchorage, Alaska
March 14, 1990

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1 PROCEEDINGS

2 MARCH 14, 1990

3 (Tape: C-3673)

4 (1342)

5 THE CLERK: The Superior Court for the State
6 of Alaska, with the Honorable Karl S. Johnstone
7 presiding, is now in session.

8 THE COURT: Thank you. You may be seated.
9 Sir, you're still under oath.

10 MICHAEL P. HLASTALA

11 recalled as a witness, having previously been sworn,
12 upon oath, testified as follows:

13 CROSS EXAMINATION OF DR. HLASTALA, CONTINUED

14 BY MR. COLE:

15 Q Very quickly, I'd like to cover one thing that
16 we talked about yesterday. Would it be fair to
17 say that in the 400 criminal trials where you
18 have testified on behalf of the defendant, the
19 majority of those dealt with the validity of a
20 breath test?

21 A Yes, I think that's fair to say.

22 Q Would that be 80 percent, that dealt with the
23 validity of a breath test, or 90 percent?

24 A I don't know, but it could be on that order, I
25 -- I really don't know.

1 Q Okay. Now, do you get referrals for
2 consulting in matters from defense attorneys
3 you've worked for in the past?
4 A Yes.
5 Q I assume that you speak in seminars, correct?
6 A Yes, I have.
7 Q Do you get referrals from speaking in
8 seminars?
9 A I -- I don't know. I suppose it's possible.
10 No one -- no one has ever -- well, I don't know.
11 If I have been contacted only because of them
12 hearing me speak at a seminar.
13 Q Now, you've spoken at several seminars in the
14 past, correct?
15 A Yes.
16 Q One of them would have been what is known as
17 the Third Annual DWI Defense Seminar, correct?
18 A That would be the one in Reno? Is it that
19 national seminar, or was it a local Washington
20 one?
21 Q Excuse me. See if this refreshes your
22 recollection.
23 A Oh, this was in Washington. Thank you.
24 Q You've also spoken at the Fourth Annual
25 Criminal Law Seminar, correct?

1 A I don't remember the title. But I've spoken
2 at a number of them.

3 Q See if this refreshes your recollection.

4 A Right, I remember the chairman asking me to do
5 that. That was -- that was also in the State of
6 Washington.

7 Q And you've also spoken at the Annual Drunk
8 Driving Seminar, correct?

9 A I presume, I -- I don't remember the titles of
10 all those seminars, but that's possible.

11 Q Now, at the Third Annual DWI -- well, before I
12 get into that, these seminars are put on by
13 defense attorneys, correct?

14 A Many of them are, some of them are not, but
15 many of them are.

16 Q These three were. Correct?

17 A Those three were put on by defense attorneys.
18 That's a local, state -- no wait a minute, the
19 one actually -- I think that one you showed me
20 was put on by the State Bar Association, which is
21 not a defense, necessarily, oriented group.

22 Q At the Third Annual DWI Defense Seminar, you
23 spoke with a person by the name of Steven Haines
24 (ph.), correct?

25 A Yes. Uh-huh (affirmative).

1 Q And your topic was how and when to use a
2 defense expert, correct?
3 A That was the topic he chose, yes.
4 Q Other topics that were addressed in that
5 particular seminar were, for instance, laying the
6 minefield cross-exam of an arresting officer,
7 correct?
8 A I have no idea. Was that one of the other
9 speakers?
10 Q One of the topics that was discussed was
11 laying the minefield cross-exam of arresting
12 officers, right?
13 MR. MADSON: Excuse me, Your Honor, I don't
14 know what the relevance is of some other topic, if this
15 witness didn't speak on the topic, what possible
16 relevance does what somebody else believes or says
17 have?
18 THE COURT: Mr. Cole, you're getting a little
19 far afield, why don't you get back on track, please?
20 Q At the Fourth Annual Criminal Law Seminar,
21 your topic was breath testing deficiencies,
22 correct?
23 A It could have been.
24 Q Does this refresh your recollection, Dr.
25 Hlastala?

1 A This is -- let's see ...

2 Q Does this refresh your recollection, yes or
3 no?

4 A It does, this was about two years ago ...

5 Q Yes or no, does this refresh your
6 recollection?

7 A Let me read it first.

8 Q Well, then, read it, and no comments, just yes
9 or no, please.

10 MR. MADSON: Your Honor, he's arguing with the
11 witness.

12 MR. COLE: Judge, my questions ask for a
13 simple yes or no, and Dr. Hlastala, every time he gets
14 a chance, goes on to a narrative. I just want a simple
15 yes or no.

16 THE COURT: I wish we could avoid this kind of
17 colloquy. Sir, if you can answer the question just yes
18 or no, go ahead. If you can't, just tell Mr. Cole you
19 can't answer yes or no, and that you need to explain
20 your answer, can you do it that way?

21 A All right, I'll ...

22 THE COURT: Whether a document refreshes your
23 recollection or not just calls for yes or no.

24 A All right, I'll have to read it to see if --
25 first.

1 THE COURT: Sure.

2 A Yes, the fourth speaker down is me, so this
3 does refresh my recollection.

4 Q And your topic was breath testing
5 deficiencies, correct?

6 A That's correct.

7 Q And at the DWI seminar that we talked about,
8 the Annual Drunk Driving Seminar, your topic was
9 "Battling the New BAC Verifier." Correct?

10 A It could have been.

11 Q Now, when we left yesterday, left off
12 yesterday, we talked about absorption, correct?
13 Remember talking about that?

14 A Yes.

15 Q On direct exam yesterday, from Mr. Madson, you
16 indicated that the absorption rates were between
17 half an hour and three and a half hours.
18 Correct?

19 A I did, but I also considered the possibility
20 that it might be longer, but from the Austi (ph.)
21 article ...

22 Q Excuse me.

23 A ... and from others, it was between a half an
24 hour and three and a half hours.

25 Q You said a half an hour and three and a half

1 hours, correct?

2 A That was not the complete range I said, but I
3 did say that at one time, yes.

4 Q In most of the articles that you have read on
5 this subject, people fall within that half an
6 hour to three and a half hour period, correct?

7 A Yes, in most of the articles they do.

8 Q And the average is about one to two hours,
9 correct?

10 A That's correct.

11 Q And your studies showed that the maximum was
12 one to two hours, correct?

13 A Well, the maximum was about two. The range
14 was about one to two hours.

15 Q So if we were to put up here one half, one
16 -- you would agree that most people, most people,
17 fall within this category from one half hour to
18 three and a half hours. Correct?

19 A I would agree that that would be the range for
20 most people.

21 Q And it would be rare to have someone fall
22 within a period zero to one and a half.

23 A Yes, rare but possible.

24 Q Rare but possible.

25 A Yes.

1 Q And it would be possible, but rare, to fall
2 outside of three and a half hours, correct?
3 A Yes.
4 Q Now, I'd like to ask you a question about
5 elimination rates. Dr. Prouty and Mr. Burr have
6 testified that people fall within a bell-shaped
7 curve, as far as elimination rates. Would you
8 agree with that?
9 A I think that would be fair to say, yeah.
10 Q Your studies showed that people fell within
11 .10 to 25 -- .25 -- .025, correct? .010, I'm
12 sorry. And .025. Correct?
13 A Well, not exactly, but my -- if you'll recall,
14 my studies indicated that there was an average
15 plus a standard deviation, and ...
16 Q You said the standard deviation was .010 to
17 .025 ...
18 (1800)
19 MR. MADSON: Your Honor, I think the witness
20 needs to finish his answer, he was cut off in
21 midsentence.
22 THE COURT: Do you need to finish your answer?
23 A No. I'd like to respond to the second -- the
24 next question. No, I didn't say that, I said
25 that in my studies, I had an average value of a

1 .018 plus or minus .004, which is a standard
2 deviation.

3 Q Four, so the standard deviation would actually
4 be less than that. It would be 014 or 022.

5 A No, that would be one standard deviation, but
6 as I mentioned in direct, if you want to consider
7 95 percent of the population, you consider plus
8 or minus two standard deviations, and that would
9 be plus or minus .008. So ...

10 Q So 95 percent of the people are ...

11 A No, 95 percent of the individuals in my
12 particular study, if you use normal parametric
13 statistics, would fall between a .010 and a .026.

14 Q Well, let's put a 26 here.

15 A But that ...

16 Q 95 percent, with the average being 018.

17 Correct?

18 A That's correct.

19 Q So -- I mean, that's not to scale, obviously,
20 but is that at all what it looks like?

21 A Well, it looks something like that, but the
22 only thing is for -- this would be the general
23 population, for my particular studies we only had
24 15 to 18 or so subjects, so it wouldn't be bell-
25 shaped like that, but if you considered the

1 entire population, that would be a fair
2 representation.

3 Q And that's pretty consistent with what the
4 other people in the field have found, correct?

5 A Yes.

6 Q So this would be about two and a half percent,
7 statistically, and this end would be about two
8 and a half percent, statistically.

9 A That's right.

10 Q And this part would be 95 percent.

11 A That's correct.

12 Q With the mean about 18.

13 A That's right. Let me add one thing, that was
14 the -- the data for the males in the study. The
15 females were different.

16 Q Well, we're talking about a male here, so
17 that's fine. Now, you say retrograde
18 extrapolation or back calculation is not an
19 accurate means of measuring a person's blood
20 alcohol content at an earlier time, correct?

21 A Yes.

22 Q Now, when you wrote up your questions for
23 attorneys, you took care to make sure that you
24 did that accurately, right? And that the things
25 that you told them were accurate, right?

1 A I took care, I suppose there could have been
2 some things that were inaccurate in some of those
3 earlier questions, I really don't recall.

4 Q Well, you -- obviously, if you were going to
5 send some questions to somebody of what you
6 expected to answer and what they should ask, you
7 wouldn't want to mislead them, right?

8 A Well, as you see, they can ask any questions
9 they want. The questions -- I'm not sure I
10 really understand your question, but I suppose I
11 would have tried to be reasonably accurate in
12 those questions.

13 Q You would have tried to be as accurate as
14 possible, because you wouldn't want to embarrass
15 them by giving them the wrong information, right?

16 A It's -- they're the ones that might embarrass
17 themselves, I would not embarrass them by giving
18 them questions, they have the choice of asking
19 the questions they wish to ask.

20 Q But you admitted yesterday that one of the
21 reasons for doing this, writing up these
22 questions, is because you deal with attorneys
23 that aren't quite as knowledgeable, and sometimes
24 you have to give them the knowledge and the
25 information that they need to effectively cross-

1 question you, right?

2 A Well, attorneys are pretty knowledgeable, it's
3 just that they're not knowledgeable regarding
4 blood alcohol as much, usually.

5 Q But you would try and give them as accurate an
6 information about the issues of blood alcohol and
7 breath testing as you could, correct?

8 A I would do that, yeah.

9 Q Now. Isn't it true that in one of your
10 questions, you said the following ...

11 MR. MADSON: Excuse me, I want to object, he
12 said "one of his questions," we don't know where, when,
13 what ...

14 Q Do you recall drawing up questions, suggested
15 questions directed to Dr. Hlastala, on December
16 5, 1988?

17 A Well, I don't recall, but I could certainly
18 look at it and see. Yes.

19 Q Are those the questions that you did?

20 A I believe so.

21 Q Well, I want to make sure, do you -- are those
22 the questions that you did or not?

23 A They appear to be, I don't recall sending them
24 to you, but they appear to be ones that I have
25 sent to other people.

1 Q Other defense attorneys.

2 A I've also sent them to prosecuting attorneys,
3 so I may have sent them to other prosecuting
4 attorneys.

5 Q Is that when they were prosecutors, or when
6 they were defense attorneys?

7 A They've asked me as prosecutors, and I've sent
8 them to them.

9 Q And one of the sections that you discussed in
10 your questions concerns retrograde extrapolation,
11 correct?

12 A I believe so, yes.

13 Q Well, I'm not trying to trick you ...

14 A I believe -- I believe that it's in here, yes.
15 Towards the end.

16 Q Now, and you said, "Ask the following if you
17 suspect there may have been some absorption of
18 alcohol from the stomach between the time of the
19 stop and the time of the alcohol test."

20 A Yes.

21 Q "This argument is strongest if there was
22 drinking close to the time of the stop."

23 A That's correct.

24 Q "This argument is weakened if there was
25 drinking over a long period of time, or if the

1 subject stopped drinking several hours before the
2 driving incident." Correct?

3 A Yes ...

4 Q You said that.

5 A That I would -- that would agree with what I
6 just said here. Right.

7 (2119)

8 Q Now, isn't it true that that calculation,
9 retrograde extrapolation, whatever you want to
10 call it, can be accurate under certain
11 circumstances?

12 A It can be -- it can be if you have
13 corroborating information and if you're really
14 going over a short range. Then I think it can be
15 reasonably accurate within a range. You have to
16 consider a range of error. And that range of
17 error just gets bigger the farther back you go.

18 Q Okay. You have stated that if the defendant
19 is well into the post-absorption phase, that
20 calculating of blood alcohol content will be
21 accurate. Correct? Correct or incorrect?

22 A I may have stated that. It would be accurate
23 within a certain range, I mean, I would agree
24 with the accuracy, but acknowledging error all
25 the time.

1 Q Do you recall writing an article called "The
2 Physiology of Alcohol in the Body"?

3 A Yes.

4 Q And when you write articles to be published,
5 you take a certain -- you make sure that
6 everything that you say is as accurate as
7 possible, correct?

8 A I do indeed, but let's ...

9 Q Excuse me. Is that correct or not?

10 A Sure it is.

11 Q And when you write these articles, you don't
12 write misleading information in 'em, do you?

13 A I usually try not to, right.

14 Q You try and put in as accurate of information
15 as you can, right?

16 A That's correct.

17 Q And in this article, "Physiology of Alcohol in
18 the Body," you wrote, "If the defendant was well
19 into the post-absorptive phase, calculated BAC
20 will be accurate." Correct?

21 A Well, that's what I wrote ...

22 Q Excuse me. Did you write that or not?

23 A That's what I just said. I said I wrote it.

24 Q And next you said, "However, remember that it
25 sometimes takes four hours after drinking to

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reach the post-absorptive phase."

A Yes.

Q "If an individual has been drinking and then goes out and is caught driving shortly thereafter, it is entirely possible that the BAC is actually increasing from the time of the incident to the time of the breath or blood test." Correct?

A That's right.

Q "The drinking pattern is of critical importance when estimating the BAC at the time of the incident from the BAC at the time of the test." Correct?

A That's a summary of the problems with retrograde extrapolation, that's correct.

Q And the period that you mentioned was four hours in this. Correct?

A For -- for a normal range of individuals, yes.

Q For this?

A Uh-huh (affirmative).

Q Under your normal range of individuals, if a person has been eating, had eaten lunch at noon, around noon, 1:30, and drank during the afternoon and stopped at between 7:30 and 7:45, that person would be in the post-absorptive phase or

1 elimination phase at midnight. Wouldn't he?

2 A Everything being average, that would be the
3 case.

4 Q I'm showing you what's been referred to as
5 Plaintiff's Exhibit CF. You made up this
6 exhibit, right? I mean, you didn't make it up,
7 but you made a smaller version of it, and it ...

8 A That's correct.

9 Q ... was made into a poster, right?

10 A Right.

11 Q And you've testified that -- what did you say,
12 95 percent of the people fall within this range,
13 .101 -- .010 and .025.

14 A That's correct.

15 Q Correct? And I suppose maybe one or two
16 percent or less are in this range 004. Correct?

17 A It would be less than one percent, probably.

18 Q And under each one of these scenarios, from
19 .004 to .0025, this individual at 12:00 is above
20 a .10. Correct?

21 A That's correct.

22 Q And a .004 would be giving a person -- would
23 be a very conservative estimate, because very
24 very few people fall in that range. Correct?

25 A Well, I wouldn't call it conservative, I'd

1 call it extreme, because if you take a 004,
2 you're assuming -- I mean, in order to do that,
3 you're assuming that we have a really unusual
4 person here. We're taking the extremes if we go
5 to that low range.

6 Q Finally, I notice on your resume that you have
7 a -- you're a pilot?

8 A Yes, I am.

9 Q What kind of rating do you have?

10 A Are you interested ...

11 MR. MADSON: Your Honor, I'm going to object,
12 I don't know what relevance his rating ...

13 MR. COLE: I'll tie it up.

14 MR. MADSON: Tie it up with what?

15 THE COURT: I'll give you a couple of
16 questions.

17 Q (Dr. Hlastala by Mr. Cole:) It's only going
18 to be a couple of questions. What kind of rating
19 do you have?

20 A I have a commercial pilot's license.

21 Q What does that allow you to do?

22 A It would -- a commercial pilot's license would
23 allow you to -- to fly for hire, but you'd need
24 further licensing in order to fly commercially
25 -- to fly passengers.

1 Q To fly for hire, but you can fly ...
2 A That's right.
3 Q ... with other people in the ...
4 A Oh, sure. A private license will allow you to
5 do that as well.
6 Q Do you drink before you fly?
7 MR. MADSON: Your Honor, I'm going to object,
8 what possible relevance does it have what this
9 individual does or does not do? Whether he drinks or
10 not isn't relevant.
11 MR. COLE: This person has been called as an
12 expert in the field of alcohol, Your Honor. He has
13 done tests on the effects of people, he has testified
14 on that in the past. I think that this is something
15 that tests his direct testimony in this case, on the
16 effects of alcohol on an individual.
17 THE COURT: Objection sustained.
18 MR. COLE: Nothing further.
19 (2462)
20 REDIRECT EXAMINATION OF DR. HLASTALA
21 BY MR. MADSON:
22 Q Dr. Hlastala, let me kind of recap, and I'll
23 try to be as brief as possible, go over some of
24 the things Mr. Cole has brought up. For example,
25 yesterday he indicated that your particular field

1 of study didn't really relate to blood alcohol.
2 Can you explain exactly what physiology is and
3 how it relates to a subtopic such as alcohol in
4 the blood and its effects on a human being?

5 A Well, my field is related certainly very
6 strongly to blood alcohol. The dynamics of
7 alcohol absorption, distribution around the body,
8 is physiology. That's a physiological problem.
9 Whenever we're dealing with something reasonably
10 complex like the issue of alcohol, there are
11 several fields that kind of overlap. Toxicology,
12 biochemistry, physiology, medicine, all of these
13 fields are overlapping, and you'll find people
14 that have expertise in this area that come from
15 these different -- different disciplines.

16 Blood alcohol measurement with a gas
17 chromatograph is in my field really not a big
18 deal, because ...

19 Q What do you mean, it's not a big deal?

20 A Well, it's pretty easy to do if you use the
21 right technique. In fact, for the past 20 years,
22 that's what I do. I use a gas chromatograph to
23 make measurements of substances in blood, and
24 also in breath, in order to test the way that the
25 lungs work, we make measurements of substances

1 both in the blood and in the breath.

2 Q Well, let me ask, why would you use a breath
3 test rather than a blood test, or vice versa? Is
4 there any reason for that?

5 A A breath test might be used out of convenience
6 because it's non-invasive, and it gives a
7 representation of the amount of alcohol in the
8 blood at a given time, but not a very precise
9 representation of it. It's just easier because
10 it's non-invasive, you don't have to put a needle
11 into the arm.

12 Q Mr. Cole said you testified like 400 times in
13 criminal cases, and the majority if not all of
14 them dealt with breath tests. Why would that be
15 so, sir?

16 A Well, in the -- the situation in most states
17 in the United States is that they -- well, in
18 fact, all states, is they use primarily breath
19 alcohol tests, because they prefer to be non-
20 invasive. That's not the case in some of the
21 other countries. So ...

22 Q You mean non-invasive, you mean that's not ...

23 A Not taking ...

24 Q ... traumatic to the individual?

25 A Yeah, not penetrating the skin. So that's the

1 kind of information we have, and most criminal
2 offenses related to alcohol are prosecuted based
3 on information from a -- from a breath test.
4 There's often other information, as the
5 prosecutor pointed out, I've also written a great
6 deal on absorption and burnoff, and those are
7 issues that are also important in any case.

8 Q Sir, Mr. Cole asked you about one case in
9 particular, Frank Stagnal (ph.), a case that he's
10 indicated that I was involved in.

11 A Yes.

12 Q Did that case, to your recollection, involve
13 burnoff and absorption?

14 A I believe it may have, yes.

15 Q But in other words, since the states such as
16 Alaska use breath-testing devices, your testimony
17 would be more than likely involved in the testing
18 procedure and the methods and possible
19 deficiencies or errors.

20 A Yes, that would be one of the aspects of the
21 testimony.

22 Q Well, let me ask you, sir, are there such
23 things as deficiencies and errors in breath
24 testing?

25 A Yes.

1 MR. COLE: Objection, relevance.

2 THE COURT: Overruled.

3 Q Not going into detail, but are there, sir?

4 A Yes, there are.

5 Q Dr. Hlastala, have you in fact studied the
6 equipment -- is this one of your subspecialties
7 in a way, is breath-testing procedures and
8 methods?

9 A Yes, it is.

10 Q Do you hold any patents in this area?

11 A Yes, I do.

12 Q What is that, sir?

13 A In that particular area, I have a patent, and
14 it relates to obtaining a sample of air -- thank
15 you very much -- relates to sampling of air from
16 the lungs without undergoing a change. We had a
17 -- a grant from the National Institutes of
18 Alcoholism and Alcohol Abuse to work on the
19 development of an improved means for breath
20 testing, so the patent was just part of this
21 process of the developing of an improved means
22 for getting a better breath sample, so that we
23 can get a better estimation of blood.

24 Q Mr. Cole also asked you about the number of
25 times you've testified for the defense in, like,

1 DWI cases. Why is this so, sir, why do you
2 testify for defendants in DWI prosecutions, for
3 example?

4 A Well, there's a couple reasons. One reason is
5 that I'm aware of a number of problems associated
6 with breath testing, variables that can affect
7 breath testing, and it's usually not in the best
8 interests of the prosecution to bring out those
9 errors, so I'm not often called by -- I'm not
10 called by the prosecution.

11 In addition, there are individuals who serve
12 as expert witnesses that are salaried by most of
13 the states, that have individuals that can serve
14 as expert witnesses for the prosecution.

15 Q Is that true in Alaska to your knowledge, sir?

16 A Yes, it is.

17 Q We have a crime laboratory here paid for and
18 supported by the State?

19 A Yes, that's correct.

20 Q Mr. Cole said you also spoke at seminars for
21 attorneys. Is that correct?

22 A Yes.

23 Q Have you spoken at seminars that -- for
24 instance, other seminars involving other people
25 in either law enforcement or other part of the

1 judicial system?

2 A Yes, I've spoken at seminars where there have
3 been prosecutors and defense attorneys and judges
4 there, and in fact I've also spoken to a judges'
5 conference in the State of Washington.

6 Q What was the purpose of that conference?

7 A The purpose there was to talk about the pros
8 and cons of breath testing, and I was asked to
9 talk, and also our ex-state toxicologist in the
10 State of Washington, and we had a sort of a
11 point-counterpoint discussion of problems with
12 breath testing.

13 Q Now, Mr. Cole asked you also about absorption
14 rates on most people, I think you just went over
15 that, but if I'm correct, most people fall within
16 a range, and there are extremes, but we don't
17 know where -- is it fair to say we don't know
18 where any given individual may or may not fall
19 within this range?

20 A That's correct.

21 (2842)

22 Q The article he asked you to examine, the one
23 on the physiology of alcohol ...

24 A Yes.

25 Q When was this written, sir?

1 A A couple of years ago. I don't remember
2 exactly.

3 Q And would you explain the article as you --
4 what you wrote and what you were intending to
5 convey by the passage that Mr. Cole just asked
6 you to read?

7 A Well, in fact, the whole article was
8 discussing some of the things that we talked
9 about already here yesterday, we talked about
10 variations in absorption and burnoff, and
11 discussed about the problems associated with
12 retrograde extrapolation. In -- usually -- well,
13 in fact, it's never been a concern in my previous
14 experience thinking beyond about four hours, and
15 so the four hours is within this normal range,
16 this three and a half hour absorption, that's why
17 we consider four hours as kind of a limit under
18 most normal circumstances.

19 There are some other very unusual
20 circumstances, which were not outlined in that
21 particular article, where absorption can be even
22 longer than that under pathological situations.

23 Q When you say "four hours," you're talking
24 about going backwards and extrapolating up to
25 four hours as kind of a maximum.

1 A Yeah, that's right.

2 Q Was that article consistent or inconsistent

3 with your testimony here today?

4 A That was completely consistent with it.

5 Q You haven't changed your ...

6 A That's right.

7 Q ... feeling or your mind on this subject ...

8 A Yeah.

9 Q ... in the last two years?

10 A I haven't, I need to make sure that it's

11 understood, though, that the word "accurate" to a

12 scientist always brings with it a qualifier of

13 error and variation. Nothing is precisely

14 accurate, and I think that's important to

15 recognize, and when a scientist uses the word

16 "accurate," you're speaking in a relative sense,

17 and the amount of error is something that we

18 consider when we're using the word "accurate."

19 We mean that it's within a certain range of

20 error.

21 Now, the implication of something being

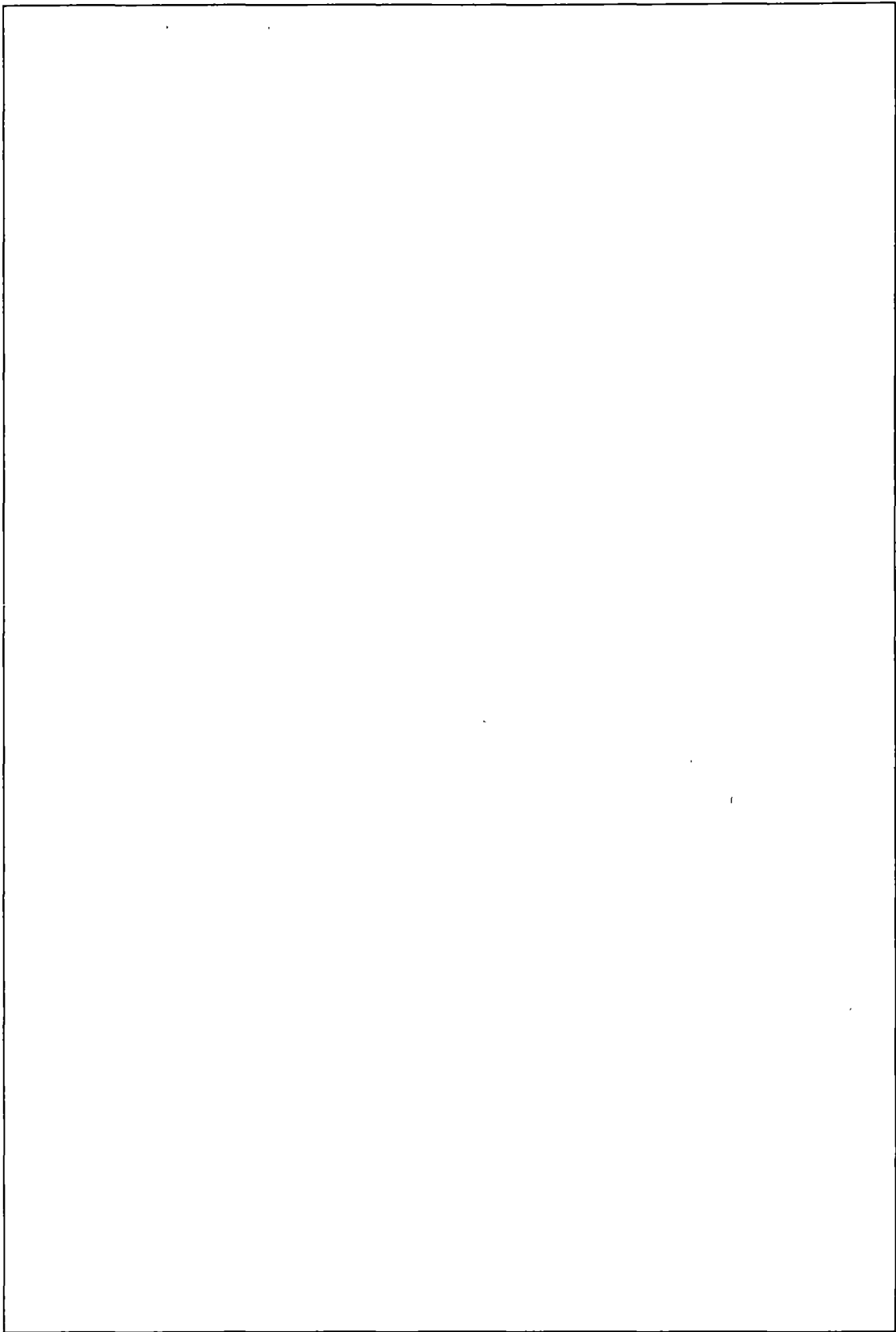
22 accurate just means, is that it would be within a

23 range of error. If in fact we had something that

24 was farther back and the error was so large

25 compared to -- to the value, then accuracy is

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1 really not a word that applies.

2 Q Well, is it fair to say something like, with
3 regard to retrograde extrapolation, the farther
4 back you go, the greater your chances for
5 inaccuracy?

6 A Oh, sure. Definitely.

7 Q And in a case where you're going back, let's
8 say, 10, 12, 14 hours, would you have an opinion
9 on the chances of inaccuracy in that situation,
10 of retrograde extrapolation?

11 A Extremely large, as we've pointed out here
12 already. I can't imagine any -- well, I can't
13 imagine an extrapolation like that.

14 Q Have you ever, in all your survey of the
15 literature or your own personal studies, ever
16 seen an attempt made to go back this far as we
17 have in this case?

18 A No, I haven't.

19 Q Now, Mr. Cole also asked you about some
20 questions that you had prepared for some
21 attorneys in other cases.

22 A Yes.

23 Q Is that correct?

24 A Yes.

25 Q Would you explain briefly, what was your

1 purpose in doing that? I think you may have
2 touched on this already, but if it needs further
3 elaboration, please just tell the jury why you
4 would do that.

5 A It's a -- it's a pretty common -- common
6 approach for expert witnesses to provide
7 information via questions like that. Attorneys
8 are individuals who are involved in a variety of
9 things. In some cases they need to know about
10 things such as alcohol, and mechanics of boats,
11 and all of these kinds of things in the same
12 case, and the next case is different, and it's
13 very difficult for an attorney to have scientific
14 and -- scientific and factual information related
15 to various different kinds of sciences.

16 So a set of questions allows a way of
17 conveying the key information to an attorney so
18 that he can use that information in developing a
19 case, and in fact, that's part of being an expert
20 witness, is to assist an attorney in developing a
21 case, and in fact helping them identify areas
22 that are important to consider. And that in fact
23 is the purpose of questions I ...

24 MR. COLE: Let me just add that some attorneys
25 are more knowledgeable than others in that area, and

1 many attorneys that are involved in alcohol-related
2 offenses are fairly new to the legal business, and are
3 learning the legal business alone, let alone having to
4 understand some of the scientific things as well.

5 Q So it's an assistance to inexperienced or
6 younger attorneys, is that fair to say?

7 A Yes.

8 Q And possibly even for old duffers like me?

9 A Possibly.

10 Q Were they designed at all to embarrass
11 prosecutors like Mr. Cole?

12 A No, I -- I mean, questions can't embarrass
13 prosecutors.

14 Q He didn't need your help in embarrassing
15 himself.

16 (3155)

17 MR. COLE: Objection.

18 MR. MADSON: I'll withdraw that.

19 MR. COLE: Judge, I object to that.

20 MR. MADSON: I withdraw it, I'll apologize to
21 Mr. Cole.

22 THE COURT: He withdrew the question.

23 Q (Dr. Hlastala by Mr. Madson:) Now, Mr.
24 Hlastala, you indicated it would be rare or
25 unusual for someone in a situation involving the

1 absorption rates, okay, to be outside the norm,
2 in other words, the bell-shaped curve, and so on
3 and so forth.

4 A Yes.

5 Q People can do that, it's just -- there is a
6 norm or a general population in the middle,
7 right?

8 A That's right.

9 Q Would the same thing be true for -- let's say
10 instead of absorption, but for burnoff rates, as
11 you explained yesterday?

12 A Yes.

13 Q For instance, would it be very rare, or not
14 rare, but how would you phrase it if a person had
15 a burnoff rate of .008, for instance?

16 A That would also be rare. That would be
17 unusual.

18 Q I take it, though, there's just simply no way
19 of knowing unless you had more information.

20 A That's correct, actually, you know -- I wonder
21 if I can use this chart, this one chart, could I
22 ...

23 Q If you need to explain it, certainly.

24 A I was going to answer your question just by
25 reminding you that -- that, you know, the

1 possibilities, if we consider all the
2 possibilities, it's possible that we have a low
3 absorption rate, it's possible that we have -- or
4 burnoff rate, it's also possible that we have a
5 high burnoff rate. It's possible that we were
6 absorbed rapidly. It's also possible that
7 there's a delayed absorption.

8 There's a range of possibilities at this
9 midnight time frame, all the way from near zero
10 up to a .5. There's absolutely no way of knowing
11 where we stand in this particular case, unless we
12 look at other information that's available.

13 Q What other information could there be in this
14 -- situation like this?

15 A Well, the only other information that we could
16 possibly imagine would be to look at other
17 testimony and observations of other individuals,
18 and if in fact there was a great deal of apparent
19 intoxication, then in fact he may very well have
20 been an average individual. Up here, an average
21 absorption of ...

22 Q You're looking at the burnoff of .017.

23 A Yeah. .017, an average absorption, about a
24 .25. If he was extremely intoxicated, in fact,
25 passed out, he might have been up here at the

1 high range. If there was no apparent
2 intoxication, he may have been way down here. He
3 may have been even in here, because of the range,
4 I mean it's -- you just can't know.

5 Q Then, sir, do you have an opinion, based on
6 any degree of scientific reliability, as to
7 whether or not a particular blood alcohol level
8 can be given or attributed to Captain Hazelwood
9 at any given time, let's say at midnight or
10 before?

11 A I have an opinion.

12 Q What's that, sir?

13 A The opinion is, is that it's nonsense to try
14 to pin down a specific alcohol content at that
15 time, 12:00.

16 Q Thank you. I have no other questions.

17 (3335)

18 RE-CROSS EXAMINATION OF DR. HLASTALA

19 BY MR. COLE:

20 Q Now, you say it's nonsense to pin down any
21 specific time, but you read Dr. Prouty's
22 testimony, right?

23 A Specific alcohol concentration at a specific
24 time, and I did read his testimony.

25 Q And you already testified that 95 percent of

1 our population falls between a .010 and a .025
2 elimination rate, right?

3 A Yes.

4 Q So 95 percent of our population falls within
5 this portion right here and this portion right
6 here, if we assume that there has been no
7 drinking from this point to that point, correct?

8 A Yes.

9 Q 95 percent ...

10 A That's right.

11 Q ... falls within that amount.

12 A That's right.

13 Q And probably another one or two percent falls
14 within this amount right here ...

15 A That's right.

16 Q ... correct?

17 A Uh-huh (affirmative).

18 Q So maybe 96 percent of our population, if
19 there is a blood alcohol content of .061 at
20 10:30, and there is no evidence of drinking, and
21 there is no drinking between that time and
22 midnight, would fall over a .10. Correct, at
23 midnight?

24 A 95 -- no. 95 percent, I'm sorry, would fall
25 between -- at midnight, 95 percent would fall

1 between a .17 and a .32 blood alcohol. And would
2 be intoxicated, pure intoxicated at that level.

3 Q And if you included down to .004, that would
4 be maybe 96 percent, correct?

5 A No. It would -- it would be really rare,
6 there would be a very very small fraction, only
7 maybe even one or two people have been reported
8 with that low -- low a value.

9 Q And it would be even rarer than for anybody to
10 be in one of these, correct?

11 A No. Not -- no, not necessarily, 'cause as I
12 pointed out on that other chart, you can have a
13 burnoff rate like this, you can have a delayed
14 absorption, and you can still come up and
15 intercept one of these curves. So you could have
16 a normal burnoff rate, and if you have this
17 delayed absorption phenomenon going on because of
18 the pre-prandial alcohol, then you can still be
19 down here.

20 Q Well, let me ask you, under one of these
21 theories right here, if I had a drink, is it --
22 let me see if I understand. If I had a drink at
23 about 8:00 last night, the theory is that you're
24 saying that it's a possibility that I could have
25 alcohol in my stomach this morning. It's a

1 possibility, huh?

2 A It's a possibility if you have that clamping-
3 down phenomenon. You probably need more than one
4 drink, but it would be possible.

5 Q Now, that situation that you talked about is
6 when a person drinks a lot and then has some food
7 after that, right? Drinks on an empty stomach
8 and then has some food, correct?

9 A You don't necessarily need the food. The
10 alcohol itself can do that.

11 Q Okay. Well, the facts in our case are that
12 the defendant ate lunch, so he wasn't having an
13 empty stomach, so we can exclude these, then,
14 can't we?

15 A I don't think you can exclude it. I think you
16 have to consider it as a possibility.

17 Q A possibility, but not a probability, correct?

18 A It's certainly not a probability, but it's a
19 possibility.

20 Q You said that it's pretty easy to do blood
21 alcohol concentrations on a gas chromatograph,
22 correct?

23 A Relatively easy, I don't think every person
24 can do it, but if you spend a lot of time at it,
25 it's a relatively easy thing.

1 Q But in your test, you didn't even do it for
2 your blood samples, did you?
3 A That's because our particular ...
4 Q Excuse me. Did you or didn't you?
5 A I mentioned that we sent it down because their
6 chromatograph was more specifically set up, down
7 at the toxicology lab.
8 Q You didn't do it in your lab.
9 A That's right, we sent it -- sent 'em away.
10 Q Sir, the whole country uses breath tests,
11 correct?
12 A I believe so.
13 Q And you go around testifying about the
14 inaccuracy of breath testing, correct?
15 A That's because the inaccuracies exist in all
16 the places, yes.
17 Q So it would be fair to say that your opinions
18 on the accuracy of breath tests is in the
19 minority, correct?
20 A Not in the field of respiratory physiology,
21 but in the forensic community it is, because --
22 because there's sort of a vested interest and a
23 historical momentum really built up because of
24 the breath test developed in the early '50's, but
25 that's true.

1 Q You're in the minority, correct?

2 A But I'm not in the forensic community. In the
3 respiratory community, I'm not in the minority.

4 Q I guess from what you're saying about your
5 article, when you used the word "accurate," you
6 didn't mean accurate, basically?

7 A I meant accurate, but accuracy with a
8 scientist always holds the -- you have to
9 recognize there's variation and error always with
10 the word "accuracy."

11 Q One percent, two percent -- never can be
12 completely accurate, but maybe one or two
13 percent.

14 A It's never that tight. If you look at blood
15 tests, blood tests in and of themselves are
16 accurate to within about ten percent or so,
17 approximately. It would depend on the
18 chromatograph conditions. But if you consider
19 other variations, the farther back you go, the
20 greater the error becomes.

21 Q Basically, when you said accurate, you didn't
22 mean accurate.

23 A I meant accurate. In the scientific sense, I
24 meant accurate.

25 Q Dr. Hlastala, if you were the only expert to

1 come into this courtroom and testify that you had
2 given questions to -- in the past, and that that
3 was common, you would be -- that would be common
4 to you? You would consider that a common
5 practice among experts?

6 A I'm sorry, could you rephrase the question, I
7 ...

8 Q If you were the only person that testified
9 about giving questions to defense attorneys, and
10 that being a common practice, would you consider
11 that to be a common practice?

12 A The -- you mean the process of giving ...

13 Q Yes.

14 A Not necessarily, if I'm the only one that
15 testifies, I may have been the only one that was
16 asked that question. Other people may not have
17 been asked that question.

18 Q You said that a person should look at other
19 evidence to corroborate certain -- to see whether
20 or not their ranges are corroborated by the other
21 evidence, correct?

22 A No, not the range, but to find out where
23 within the range you are, likely you'd need other
24 information.

25 Q One of those would be listening to somebody's

1 voice, to determine whether or not it sounds
2 impaired. Correct?

3 A I wouldn't think that would be a very good
4 way.

5 Q That wouldn't be a good way. Okay. So when
6 police officers testify in court that one of the
7 things they do is they listen to a person's voice
8 to try and determine whether it's slurred or
9 whether they make mistakes, you don't think that
10 that's good testimony.

11 A Not necessarily. They in that case will
12 listen for slurred speech. Slurred speech is
13 different than what you asked me before, you
14 asked me about listening to a voice, that's
15 different. Certainly slurred speech can be an
16 indicator, but not necessarily -- can be an
17 indicator of intoxication.

18 Q And another indicator of intoxication is poor
19 judgement, correct?

20 A That can be, although I know people that
21 exhibit poor judgement even without alcohol.

22 Q Decision-making, poor decision-making,
23 correct?

24 A Again, the same thing holds.

25 Q It's correct that alcohol affects the brain

1 primarily, correct?

2 A Yes, it does.

3 Q It's a central nervous system depressant,
4 correct?

5 A Yes. It is.

6 Q And a good indication of whether -- one
7 indication of whether an individual is impaired
8 is to look at his judgement. Correct?

9 A That's one, but not strong indicator, but that
10 is an indicator of intoxication.

11 Q Poor judgement by an individual who's been
12 drinking is not a good indicator of intoxication.

13 A No, not in and of itself, because other people
14 that are not intoxicated also can exhibit poor
15 judgement.

16 Q But if you assume that generally that person
17 does exhibit good judgement, if on this occasion
18 he does not exhibit good judgement, that might be
19 a good indicator. Correct?

20 A No, I don't think it is. You know, it is an
21 indicator, but I don't think it's a good
22 indicator.

23 Q Thank you, Doctor.

24 (3880)

25 *

1 REDIRECT EXAMINATION OF DR. HLASTALA

2 BY MR. MADSON:

3 Q This time I promise that we'll be brief. With
4 regard to the whole subject there, sir, of what
5 you testified to about retrograde extrapolation,
6 that is based on one assumption, one of many
7 assumptions, is it not, and that would be, for
8 instance, that there was absolutely no alcohol
9 consumed past the time that you made your
10 assumption that says 7:30-8:00.

11 A Yeah, that's correct. If there was -- were
12 alcohol consumed, then yeah, the curve could look
13 very differently.

14 Q Would it have any value at all as far as your
15 chart is concerned there?

16 A I'm not sure ...

17 Q If there was drinking after 7:30, let's say,
18 in this situation ...

19 A Well, it would completely change these curves.
20 If there were drinking after this time, it would
21 change the shape of many of these curves, and
22 increase the chance that it could be lower at the
23 time of 12:00.

24 Q Now, let me get under a chart here. Would you
25 put up Exhibit CC, just the generalized curve,

1 for a second? Okay. Now, the chart you just
2 looked at before, this -- you start out with one
3 point, the .061 blood alcohol reading that was
4 taken at 10:40 or 10:58, correct?

5 A Yes.

6 Q Now, let me ask you, sir, if -- you testified
7 yesterday that this generalized curve is just
8 that. Now, for instance, can you explain ...

9 MR. COLE: I object. It's outside the scope
10 of recross.

11 MR. MADSON: Your Honor, it is certainly not,
12 because ...

13 THE COURT: Mr. Cole, I'm going to let Mr.
14 Madson ask his questions. You used a similar chart a
15 while ago.

16 Q (Dr. Hlastala by Mr. Madson:) My question to
17 you, sir, is then what if the .61 percent alcohol
18 reading was taken, and it is not on your general
19 curve. In other words, it fell either below or
20 above the general curve. What effect, if any,
21 would this have on the prior chart that you just
22 explained?

23 A Well, if I understand, if there's error or
24 -- you know, normally these curves are stylized,
25 there's actual variation that occurs around

1 these, and if -- that would add additional error
2 to your retrograde extrapolation, but you already
3 got enough as it is, that there's so much error
4 that if you have a little variation in this point
5 here, that would still ...

6 Q When you say "this point here," you're
7 referring to the ...

8 A Right.

9 Q ... blood alcohol reading test.

10 A Yeah. That's right.

11 Q And assuming it was a little higher, let's say
12 it's off the curve just a bit, what effect would
13 that have?

14 A Well, it would -- it would add to your error,
15 it would shift all of these curves, in effect.
16 See, if you'd be extrapolating from a point that
17 was up here someplace, that would shift
18 everything upwards, and if it was actually down
19 here, it would shift everything downwards.

20 Q So was this one of the factors that you
21 considered in saying that retrograde
22 extrapolation in a case like this simply is
23 nonsense?

24 A That's one of the factors, but the issue is
25 nonsense even without that error, actually.

1 Q Also, do you know, sir, if there's been any
2 studies on the effect of stress on alcohol
3 absorption at all?

4 MR. COLE: Objection, beyond the scope.

5 MR. MADSON: Your Honor, I think he went into
6 the same thing before, this will be very brief, I just
7 -- a yes or no answer or short explanation.

8 THE COURT: You brought up a question
9 concerning judgement and decision-making, I think this
10 is appropriate.

11 A There haven't been a lot of studies, however,
12 stress would be expected to have a slight effect,
13 and one of the reasons ...

14 MR. COLE: I object to his testifying to
15 hearsay.

16 Q (Dr. Hlastala by Mr. Madson:) Well, can you
17 testify to your own personal knowledge, sir ...

18 A Yes.

19 Q ... in your field.

20 A Right. Because of the physiology of the
21 human, when you're in a time of stress, you get
22 what's sometimes called the flight or -- fight or
23 flight syndrome, where you get -- you -- the
24 blood flow will shift away from the
25 gastrointestinal tract and more towards other

1 muscles, for example, to use in running and
2 fighting, and that might be expected to decrease
3 the absorption rate of alcohol under those
4 circumstances, although I'm not aware of studies
5 that have been done that would be ...

6 (Tape: C-3674)

7 Q You have not done the studies.

8 A I have not done any, that's correct.

9 Q Lastly, sir, a couple other things. The .061
10 blood alcohol reading. For the purposes of your
11 testimony, or your conclusions or opinions, would
12 it have made any difference whether that was a
13 blood test or a breath test?

14 A It wouldn't have made any difference, that
15 would have just provided information here, all of
16 what goes on back here in that extrapolation
17 process would be independent of whether this
18 information was obtained either with breath or
19 blood.

20 Q You're starting with the basic assumption that
21 that number was correct, regardless of how it was
22 derived, is that correct?

23 A That's correct.

24 Q And lastly, do you know if Mr. Prouty gave Mr.
25 Cole any questions that he phrased in such a way

1 he'd like to get answered, or perhaps suggested
2 questions? Do you know if that was done?

3 A I don't know.

4 Q If that was done, would you have any objection
5 as an expert witness to that?

6 A No, I wouldn't.

7 Q Thank you. I don't have any further
8 questions.

9 MR. COLE: I don't have anything.

10 THE COURT: Counsel approach the bench,
11 please.

12 (51)

13 (Whispered bench conference)

14 (77)

15 (Oath administered)

16 A I do.

17 EDWARD SIEDLICK,
18 called as a witness in behalf of the Defendant, being
19 first duly sworn upon oath, testified as follows:

20 THE CLERK: Would you please attach that
21 microphone -- would you please state your full name,
22 and then spell your last name?

23 A Yes, my name is Edward Siedlick, S-i-e-d-l-i-
24 c-k.

25 THE CLERK: And your current mailing address?

1 A Greene County, New York.

2 THE CLERK: Your current occupation?

3 A I'm a consultant.

4 DIRECT EXAMINATION OF MR. SIEDLICK

5 BY MR. MADSON:

6 Q Mr. Siedlick, what's your present employment,
7 sir?

8 A I am ...

9 Q Educational background, employment, we can do
10 it that way, sorry.

11 A Yes. I am the president of a firm in New York
12 called Investigative Research Associates,
13 Limited. The company does -- it's a small firm,
14 five or six people, the company does primarily
15 three things. We do analysis of audiotapes, we
16 do work that would be normally considered to be
17 under the sphere of private investigative work,
18 litigation-type support, I'm a licensed and
19 bonded private investigator in the State of New
20 York, and we also do such things as corporate
21 security, security threats, anti-terrorism, and
22 things like that.

23 Q Where'd you go to school, then, sir?

24 A I graduated from Syracuse University, I have a
25 degree in business economics.

1 Q What did you do as far as employment is
2 concerned after you finished your formal
3 training?

4 A Well, after a stint in the United States Air
5 Force, I spent 21 years in law enforcement in the
6 City of New York, primarily with the New York
7 City Police Department. I served as a police
8 officer, a detective, a detective second grade, a
9 sergeant, a supervisor of detectives, and a
10 lieutenant commander of detectives.

11 I also served parallel with that in another
12 law enforcement agency in the City of New York
13 called the Department of Investigation, which is
14 the agency that is responsible for the
15 investigation of economic crime against the
16 government, specifically corruption, large-scale
17 frauds, embezzlements against the government. In
18 that particular agency, I served as the executive
19 officer of the department. I was the director of
20 electronic surveillance for ...

21 Q Would you explain that, what electronic
22 surveillance is, sir?

23 A Yes. As the director of electronic
24 surveillance, I was in charge of the purchasing,
25 the usage, and the issuance of all devices,

1 audiotape devices, microphones, radio devices, in
2 which audiotape evidence is gathered. We used to
3 log in at that particular agency about two to
4 3,000 audiotapes per year.

5 I was the chief evidentiary custodian of the
6 department, which specifically meant that I was
7 responsible for the issuance of an audiotape that
8 may be potentially used in any type of a criminal
9 or legal proceeding, controlling its usage from
10 an evidentiary standpoint until its final
11 presentation in a court of competent
12 jurisdiction.

13 Getting back to my background, I also served
14 as the director of investigative training with
15 the department in the City of New York, in the
16 inspector general's training program. This is
17 New York City, every department is mandated by
18 statute to have an inspector general, which
19 performs that function which investigates matters
20 that pertain to a particular agency, I was a
21 director of investigative training for the City
22 of New York.

23 And the last four years of my career, I was
24 the chief investigator of that agency. I retired
25 in 1984.

1 Q And then you got into your present employment.

2 A Yes, I have.

3 Q With regard to audiotapes, sir, I wonder if
4 you can just tell the jury what your particular
5 experience has been with audiotapes and their
6 associated equipment, recorders and things?

7 A Yes, well, of course I handled 'em throughout
8 my entire police career, the -- being a director
9 of electronic surveillance, I participated in
10 well over 3,000 criminal cases in which
11 audiotapes were used. I've examined and analyzed
12 for transcript purposes, or for the purposes of
13 alterations, tampering, changes, additions,
14 editing, deletions, well over 10,000 tapes, the
15 number's probably closer to 15,000 tapes. I'm
16 also a qualified expert in audiotapes, in various
17 courts ...

18 Q What courts have you testified in, sir?

19 A I'm an expert, I'm a qualified expert or I've
20 given expert testimony in the Federal Court
21 System, specifically in the Southern District of
22 New York, the Eastern District of New York, the
23 District of New Jersey. I've given life
24 testimony in the state system, which is similar
25 to this system, in New York they call it the

1 Supreme Court System, also in the New Jersey
2 system which they call the Superior Court System,
3 and in the State of Vermont, which they call the
4 Superior Court System also.

5 Q Sir, I'm going to hand you what's been
6 admitted as Plaintiff's Exhibit Number 117. What
7 is that, sir?

8 A (No audible response)

9 Q I mean just in general, if you can just tell
10 the jury ...

11 A Well, it's an audio -- it's an audiocassette,
12 and I -- I believe that this is a -- a copy of
13 the so-called inbound tape that was made on April
14 22 -- excuse me, March 22.

15 Q Now, sir, I wondered if you could just briefly
16 tell the jury how an audiotape like this is made,
17 I mean, how is sound produced ...

18 A Yes.

19 Q ... and recorded on this?

20 A First of all, an audiotape -- it consists of a
21 -- excuse me, I've had a cold, may I have some
22 water?

23 Q Sure.

24 A I've had it for a week, I'm sorry, with
25 respect to the court. An audiotape is really

1 plastic backing, and it has an RN (ph.) oxide, or
2 a metallic compound that's coated on it. Once
3 sound is captured by a microphone in radio waves,
4 this is basically what you're hearing, are the
5 radio frequency waves now, it's transported into
6 an electrical signal, and it -- it passes, that
7 particular signal passes across the magnetic
8 poles of a -- what we call a record head.

9 The tape itself is transported across this
10 particular record head by means of a tape drive
11 system at a constant speed. And of course, the
12 particles on this particular tape that's passing
13 the record head are being rearranged. So
14 therefore when you play it back, there's a
15 playback and it plays back the sound of the
16 rearranged particles on there. Now ...

17 Q You said, sir, it travels at a speed over the
18 heads, correct?

19 A That's correct.

20 Q Is there a variation in -- machine to machine,
21 or ...

22 A Well, you are -- yes, there is. That's called
23 IPS, or inches per second, and what that means
24 is, is that tapes -- it's absolutely essential
25 for a tape to pass a record head, and a playback

1 head, for that matter, at a constant speed, so
2 you get a uniform sound that comes back.

3 The speed of audio recorders vary from, shall
4 we say, your commercial type recorders, which is
5 30 inches per second, and what that means is, is
6 that the tape is passing the record head at a
7 rate of 30 inches per second. So if you had one
8 second of conversation, it would be on 30 inches
9 of tape.

10 And they -- they start to -- they can also
11 send -- they can begin to descend on the inches
12 per second where you get down to one of the low
13 speeds, which is 15/16 of an inch per second, and
14 what that means is now that one second of
15 conversation is on 15/16 of an inch of tape.

16 Q What difference if any would this make on the
17 audio quality?

18 A Well, when you get into 30 inches per second,
19 or anything above 15 inches per second, you're
20 getting into what's called studio level quality,
21 I mean, this is your recording industry. Usually
22 when you get down to the lowest systems, those
23 systems are designed, 15/16 inch per second, are
24 designed to capture audio, merely to preserve it,
25 but it sacrifices audio quality at that

1 particular speed, and of course, the idea there
2 is to save tape, to have long, long-running
3 tapes.

4 Q Is it fair to say if you're only interested in
5 maybe transcribing the words, in other words, a
6 person dictating into a machine which would be
7 given to a secretary to transcribe it, that's
8 when the tape saving could be ...

9 A Yeah, like a -- like a standard microcassette
10 or dictating machine, or a cassette that you
11 would buy would normally be at a 15/16 inch,
12 although microcassettes are ...

13 Q But that ...

14 Q ... because they're manufactured overseas, are
15 in centimeters, but if you transpose it back to
16 inches, it would come out to roughly 15/16 inches
17 per second. And the reason for that is, is that
18 you have a small machine, and you want to get as
19 much conversation as you possibly can on that.
20 It's not for audio quality, it's just to preserve
21 the audio record.

22 Now also, I might add that in large machines,
23 okay, you do have large machines that run at a
24 very very slow speed, and of course the purpose
25 there is, is -- there's several purposes, but one

1 of the primary purposes is, is that -- so they
2 can have a long-running machine over a long
3 period of time on, say, a 15-inch reel, or a 12-
4 inch reel, whatever the particular machine is
5 rated for.

6 Q And sir, calling your attention again to
7 Exhibit 117 there in front of you, what -- were
8 you asked to do something with regard to that
9 inbound, so-called inbound tape recording?

10 A Yes.

11 Q Who asked you to do this and what were you
12 asked to do?

13 A You asked me. What you'd asked me to do is,
14 is to make an analysis of a tape that had been
15 turned over by the State, to see whether or not
16 there was any evidence of alteration, additions,
17 editing, tampering, splicing, those kinds of
18 analysis. When ...

19 (0499)

20 Q What did you do in that regard then ...

21 A Well, I originally listened to the copy that
22 was provided, and I did find evidence of
23 electronic start-stop signatures on it, some of
24 the conversations weren't in sequence, it didn't
25 appear to be in chronological order. So I then

1 said to you to do a proper analysis, that I must
2 examine the original tape.

3 Q Where was the original tape located as far as
4 you knew?

5 A It was located in Valdez.

6 Q Did you go there, sir?

7 A Yes, I did.

8 Q When was that?

9 A I believe I went there the first week in
10 February.

11 Q And what did you do when you arrived there?

12 A Well, I -- through a prearrangement with the
13 U.S. Coast Guard, I went to the Coast Guard's
14 base, the station there, and ...

15 Q Was anyone with you, by the way, at the time?

16 A Well, I ...

17 Q When you were at the Coast Guard station.

18 A Yes, there was two -- I believe there was one,
19 probably two Coast Guard officers, there were
20 several people, one, two enlisted personnel, they
21 were all in uniform, and there was a -- a state
22 police officer, who was there, who identified
23 himself as Trooper Fox.

24 Q And what did you do at the station then, sir?

25 A Well, in regards to the inbound tape, I asked

1 to see the original tape, to make a -- what's
2 called a real-time copy of the tape.

3 Q Two things here, but let me ask, first of all,
4 what is a real-time copy of the original?

5 A Yes. When you do an analysis of a tape, it is
6 absolutely essential to examine the original
7 tape. And the reason for this is, when you have
8 a copy of the tape, you don't -- you do not know
9 what processes have been done in the interim
10 between the original tape and the copy of the
11 tape.

12 So if you hear electronic start-stop
13 signatures on the tape, or there's possible
14 evidence of -- evidence of editing on the tape,
15 or indications probably would be a better word,
16 you don't know if those have been made by the
17 copier, or how many generations of a copy it is,
18 because as you get into generations of copies,
19 they tend to deteriorate, unless made properly.

20 So what you want to do is, you want to examine
21 the original tape itself, and you do a physical
22 examination, 'cause you want to see if there's
23 any evidences of splicing on it, and the second
24 thing you want to do is, you may want to make a
25 real-time copy of the tape, and what that simply

1 means is, you want to make an actual running time
2 of the tape.

3 If the tape -- the recorded portion is ten
4 minutes, then you would do it on a tape recording
5 simultaneously off that machine, you would plug a
6 line jack from your recorder into -- directly
7 into the playback machine, and as that tape is
8 playing, you would be making a real-time copy of
9 this particular tape.

10 Q Were you able to do that in this situation,
11 sir?

12 A No, I -- when I asked for the tape, I was
13 informed by the Coast Guard officer there that
14 the tape had been destroyed.

15 Q Okay, what then did you do after that?

16 A Well, in regards to this tape, there wasn't
17 much I could do, I basically went back to Greene
18 County, and I had a conversation with counsel and
19 yourself, and told them that this particular
20 tape, I couldn't do a proper analysis, that --
21 that I had to at least, at the very minimum
22 examine the first-generation copy of this tape,
23 the circumstances under which this copy was made.

24 Q Were you later informed, then, as how that
25 copy was made, in other words, the procedure used

1 to make the copy that you did examine?

2 A Yes, I was.

3 Q And what was that, sir?

4 A Well, apparently a -- an employee of the U.S.
5 Coast Guard had gone and had -- and had in fact
6 examined the original inbound tape, up -- I
7 assume in Valdez, and had a microcassette
8 recorder, a dictating type of recorder ...

9 Q Excuse me one second, let me hand you this,
10 and I don't need it to be marked, but you can use
11 it to ...

12 A Yes.

13 Q ... illustrate your testimony. What is that,
14 sir?

15 A This is a -- this is a linear microcassette
16 dictation-type recorder.

17 Q Maybe you can just take that out, just so
18 everybody can see -- out of the case. What
19 relevance, if any, did this type of recorder have
20 to your ultimate conclusions and everything, what
21 did you -- how do you use this, or ...

22 A Well, since I was working from a copy of the
23 tape, okay, I had to know the circumstances under
24 which the first-generation copy is made, because
25 we now cannot examine the original. And so the

1 next -- it's not a complete analysis, but the
2 next step would be to examine the first-
3 generation copy that was made, and apparently the
4 first-generation copy was made on a microcassette
5 ...

6 Q Was it similar to that type ...

7 A With this similar type machine, yes. And ...

8 Q How was it done, sir, do you know?

9 A Well, of course, this particular machine has a
10 -- has a -- an internal microphone, here, which
11 is located on the top of the machine, which when
12 you put this in the recorder mode, a red light
13 comes on, and it is recording what is in range of
14 this particular microphone, here, just -- another
15 way to possibly do it, it also has a microphone
16 outlet, and the microphone could be plugged in,
17 and you could have a microphone ...

18 Q Something like this ...

19 A Something like we're talking now. And of
20 course, the third way, which is the common way in
21 which you make a tape, is to exclude additional
22 noise, meaning environmental sounds, from one
23 recorder to another, you would plug in what's
24 called a line jack, and you take the output of a
25 play machine, the one you're playing it back on,

1 and you would plug it into -- use a line, a cord,
2 an electronic cord, plug it into this and have a
3 direct line recording.

4 And what that does is, after you make proper
5 adjustments on the machine, to the record level,
6 what that basically does is it excludes the
7 environmental sounds that might come on. For
8 example, somebody might talk during -- and that
9 would be on the tape, and you wouldn't know if
10 that was -- that conversation was part of the
11 original recording, the original conversation
12 that took place, or whether or not it actually
13 took place subsequently at the time of the
14 recording. That's generally why you use a line
15 jack.

16 Q Is there a line jack on a -- tape like this
17 ...

18 A Yes, there is, so you can hook a microphone.

19 Q Okay. Did you subsequently learn how this
20 particular inbound first-generation copy was
21 made, or derived?

22 A Yes ...

23 Q How did you do that?

24 A Well, I was -- I believe it was in my report
25 of the National Transportation Safety Board,

1 telling me that the machine, that the record
2 method used was used with the internal
3 microphone, and it was put into the record mode.
4 The playback machine of the original tape was
5 played, and they made a recording of it by
6 holding it up at some proximity to the -- to the
7 machine.

8 Q Now, was the cassette in that mini -- small
9 recorder there the same size as the one you have
10 in Exhibit 117?

11 A No, this is a cassette.

12 Q Uh-huh (affirmative).

13 A This is a cassette copy, on a machine. This
14 is -- this takes a microcassette, which is a much
15 smaller piece of a -- of tape.

16 Q What speed does it run at, do you know?

17 A This particular machine runs at 2.4
18 centimeters, which is roughly 15/16 of an inch.

19 Q Okay, were you able then to examine the
20 original copy, if you will, or the so-called
21 original, since the original's gone, the next-
22 generation ...

23 A Yes.

24 Q ... copy, where was that, sir?

25 A I made that examination, I made a real-time

1 copy of that at the audio laboratory of the
2 National Transportation Safety Board in
3 Washington. Some time in the last two weeks.

4 Q Just to make sure, you said this has a line
5 jack in it, but that was not used.

6 A There's a microphone jack, which can be used
7 as a line jack, yes.

8 Q The method used was to -- not the line jack,
9 but just to hold it up to a speaker and record
10 from the internal speaker ...

11 A That's ...

12 Q ... internal microphone, rather ...

13 A That's my information, yes..

14 Q Did you speak with the person in Washington
15 that actually made the copy, or did any of the
16 work in this ...

17 A No, no, I did not. No. I had -- I had
18 originally asked you, counsel, to be able to talk
19 to this particular individual, but I was
20 subsequently informed that he was -- would not be
21 available for interview.

22 (0830)

23 Q What did you do after making this real-time
24 copy, sir, what did you do then?

25 A Well, I -- I examined it for a variety of

1 purposes, and I did an analysis to see whether or
2 not this particular tape, this first-generation
3 copy, was an accurate representation of the
4 conversation that originally took place.

5 If I might -- if I might just elaborate on
6 that a little bit, there's really two processes
7 that are involved, when -- in an audiotape
8 process. The first process, of course, is the
9 process of the actual conversation taking place,
10 and it's similar to this particular -- this is
11 not a conversation, it's testimony, but what's
12 happening is we're having this conversation.

13 Somehow a microphone is injected into a
14 particular conversation and a record is made of
15 that particular conversation, and then -- now you
16 have what is the original tape. Which is the
17 -- usually the best record of a particular
18 conversation that took place.

19 So you asked me to perform an analysis, well,
20 first you asked me to -- any additions,
21 tampering, editing, what have you, because there
22 were start-stop signatures on this tape. Since I
23 -- I cannot examine the original tape, I cannot
24 tell you whether or not this particular
25 conversation was excerpted out of a larger

1 conversation, okay, or a series of larger
2 conversations, I cannot make that determination
3 because I cannot listen to the original.

4 Q That's the one that's been destroyed, right?

5 A That's correct. So in -- my examination in
6 this particular case led me to the conclusion
7 that this copy, this first-generation copy, this
8 microcassette copy, okay, was not an accurate
9 reproduction of the conversation that took place.
10 And what I mean by that is, is that in my
11 opinion, the pitch of the tape -- now, the pitch
12 is the speed of the tape at which it -- goes past
13 the record heads or the playback heads. In this
14 case the pitch of the tape seemed to exceed that
15 of the normal talking voice of Captain Hazelwood.

16 Now, I base this on I've had several
17 conversations over the last month with Captain
18 Hazelwood, in his conversations, and -- and
19 listening to his voice and then comparing against
20 the recorded audio portion of this tape ...

21 Q Did you hear other recordings of Captain
22 Hazelwood in addition to personal conversation?

23 A Yes, I did.

24 Q Okay, did you use that in your ...

25 A Yes, I did, I -- I listened to a tape of an

1 interview of Captain Hazelwood that I believe
2 occurred on March 24 by a U.S. Coast Guard
3 representative, and I think Trooper Fox was also
4 present at that.

5 So taking those two comparisons and comparing
6 against this copy of the original tape, the pitch
7 of the tape sounded -- sounded fast. In other
8 words, he was speaking very very rapidly, or I
9 shouldn't say he was speaking rapidly. What's
10 happening is, is that the conversation that is
11 being reproduced on this tape appears to be
12 greater than Captain Hazelwood's normal voice.

13 Q What could cause this change in pitch, sir, as
14 you described it?

15 A Well ...

16 Q What possible explanations are there?

17 A There are several. I think we have to back to
18 the original tape, where probably the answer, you
19 know, may lie. It certainly lies there more
20 accurately. The Coast Guard tape, the original
21 Coast Guard tape of March 22, and my information
22 is, is that they used the same recording system
23 from each 24-hour period.

24 The original Coast Guard system was recorded
25 at a low audio speed. It's a 24-hour tape, it's

1 a -- what's called a multi-track, there's various
2 other conversations on it that -- what a multi-
3 track means is that you can have a phone line
4 hooked up, is what you can have different radios
5 hooked up to it -- that people are transmitting
6 on different frequencies, and the purpose is of
7 -- it's called a logging tape, 'cause it gives
8 the time on it.

9 The purpose of this multi-track low-speed
10 audiotape is to, is basically to save tape and to
11 preserve an audio record, okay, a transcript of
12 the conversation. Now, at the low speed, there's
13 certain phenomena that does occur because it is
14 not studio-level quality, okay, you do sacrifice
15 a certain amount of quality, there are certain
16 characteristics that occur at low speed.
17 Especially if you play back a tape on a machine
18 other than what it was recorded at.

19 Q Why is that important?

20 A Okay, at the -- well, because what happens is,
21 you -- since you only have one second of
22 conversation on 15/16 inches of a piece of tape,
23 okay, there's less margin for error. Now,
24 usually what happens is, is that when you -- when
25 you play back a -- an original tape that's been

1 recorded at a low speed on other than the machine
2 that it was played on, there's usually a slight
3 calibration problem, so you get a variation in
4 the speed of the tape, the pitch of the tape, so
5 it could be higher or it could be lower, okay.

6 That is why professional machines --
7 professional people who use low-speed audiotapes
8 have variable speed devices on their machines so
9 that they can correct this change in pitch.

10 Second thing that happens is, low -- low-speed
11 IPS audiotapes usually do not have a very good
12 recording range in recording high frequencies.
13 There's also ...

14 Q What do you mean by "high frequencies"?

15 A Well, when we speak, we're speaking at a
16 various frequency range. Our voice -- our voice,
17 speech, or sounds can go from a very low
18 megahertz range up to a very high range. And a
19 lot of times on slow-playing machines like normal
20 cassettes that you buy in a store, you'll see
21 they have high-frequency tape, low-noise roll,
22 trying to compensate because the slow speed -- it
23 has a lot of trouble getting high -- high-
24 frequency tape -- high-frequency conversations on
25 the tape. That part of the signal spectrum.

1 The other thing is, there's a phenomena in
2 recording, in audio recording, and it's called
3 wow and flutter, and in fact it's used when you
4 purchase speakers or you purchase cassettes in a
5 store, you'll see this term used, wow and
6 flutter, and what wow is, it's a musical term.
7 And wow is the momentary variation in a -- in the
8 sustained pitch of a musical note.

9 So it has a momentary variation in the pitch
10 of the note. And flutter is a phenomena which
11 doesn't amount to wow, but causes overall audio
12 distortion. So when you have slow-speed tapes,
13 you tend to get a higher content of wow and
14 flutter in it. And this of course is the reason
15 that studios ...

16 Q This is different than pitch, right?

17 A That's right. That's right. Although,
18 although what it is, it's a momentary variation.
19 When I talk pitch, I'm talking about the tape
20 passing at a constant speed. Okay, the thing is
21 a momentary variation in a -- in a musical note,
22 so you'd get a slight variation in the tape.

23 So this is what happens when you rerecord from
24 an original tape. So that's the first problem.
25 But of course ...

1 Q Well, let me ask you this, what about the tape
2 itself that's used to make the recording? Would
3 it make any difference if it was an original
4 unused tape or a used tape?

5 A Well, quite frankly, a used tape, it really
6 doesn't have that great an effect on pitch, I
7 mean, unless it's been used over and over again
8 that the tape is stretched. But quite frankly
9 under normal circumstances no, it really -- it
10 really shouldn't be a factor in pitch and speed.

11 Okay, getting back to this, so that's part
12 one, the original tape, the original machine. On
13 this particular type of a machine, this has an AC
14 outlet, meaning you can plug in to a -- no, let
15 me just back up a minute. One of the things
16 that's absolutely essential to constant speed
17 passing across a recorder or playback head is
18 power. Okay, you have to have a constant uniform
19 power supply, so that the machinery doesn't speed
20 up or -- or slow down.

21 When you plug into an AC outlet, assuming that
22 you don't have power fluctuations, you do get
23 this constant speed of the tape going across the
24 heads. This particular machine has an AC outlet,
25 okay, which ...

1 Q When you say that particular machine, you're
2 referring to the mini ...

3 A Well, this -- this model Lanier, here, which
4 you could plug into an outlet, and assuming that
5 there were no power variations, it should give
6 you a uniform tape drive across the heads.

7 If you use the batteries in this, okay, now
8 you're subject to the limitations of the power
9 state of the batteries at the time the recording
10 was made. And what I mean by that is, if the
11 batteries were in a less than -- if they weren't
12 brand new, fresh batteries, okay, and they were
13 in some sort of a depleted state, in other words
14 they had been used several times, over and over
15 again, they were in a low state, they would
16 record at a certain level.

17 When you played the tape back at a subsequent
18 date, okay, even if you played it on this machine
19 or another machine, since the battery power, the
20 power was low, what would be happening would be,
21 it would be playing back faster than it was
22 originally recorded. So the pitch would be off.
23 People would tend to be speaking faster than what
24 they normally spoke.

25 Q You're saying it's recorded at one speed but

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playing back at a faster speed?

A That's right. This is common, batteries -- in using batteries, this is very common, and again, that's why a lot of machines have variable speed devices on 'em, so -- to compensate for this.

Q How is that done, how do you ...

A Well, what you can do is, it's just sort of a control lever that -- that takes the motor and can slightly increase or slightly decrease the speed of the tape drive passing across the head, so if you had a low-power recording, that was recording at -- obviously if this was a 2.4 centimeter per second machine, and the batteries were a little run down in this machine, what would be happening is, we would be recording this.

But then, later on, if we subse -- when we played this tape back with fresh batteries or in another machine or in an AC outlet, it would -- the tape would -- the conversation would sound a lot faster than -- well, the conversation isn't taking place faster, but the audiotape itself is flawed in representing that it's an accurate reproduction of that tape.

There's also one other thing that's a

1 possibility, and that is, is that you don't know
2 if there's any malfunctions in the machine, and
3 if there's a problem with the tape drive, or the
4 machine has been malfunctioning, or something has
5 been hanging up the tape drive, or -- you know,
6 you're subject to whatever the mechanical
7 limitations of the machine are, in other words,
8 was the car running at the time, properly.

9 And so you don't -- you don't really know
10 that, and it becomes very very difficult to -- to
11 reconstruct that at a later date. That -- again,
12 I know I've testified to this several times, but
13 that is why machines have variable-speed devices
14 on 'em.

15 Q Okay, then when you say "accurate reproduction
16 of a conversation," sir, are you -- you're really
17 saying, if I understand you correctly, two
18 things. You can reproduce it accurately, so that
19 you can transcribe the words on there, in other
20 words you can hear the words.

21 A That's correct.

22 Q But this doesn't necessarily mean that the
23 rate, the speed or rate at which the speaker is
24 speaking, is an accurate reproduction of the
25 original conversation.

1 A That's correct.

2 Q Thank you, I don't have any other questions at
3 this time.

4 THE COURT: Let's take a break. Don't discuss
5 this matter among yourselves or with any other person,
6 don't form or express any opinions. We'll stand in
7 recess.

8 (1309)

9 (Off record - 10:00 a.m.)

10 (On record - 10:25 a.m.)

11 THE COURT: Mr. Cole?

12 CROSS EXAMINATION OF MR. SIEDLICK

13 BY MS. HENRY:

14 Q Good morning, Mr. Siedlick.

15 A Morning.

16 Q Sir, the tape that you were provided by a
17 counsel that you've identified as the inbound
18 tape, that tape had three or four series of
19 conversations on it, right?

20 A That's correct.

21 Q And I think you testified on direct that they
22 appeared not to be in sequence.

23 A Well, let me say this. The -- not this
24 particular tape, the first tape that was given to
25 me did not appear to be in sequence.

1 Q All right, now, this particular tape, and I
2 want to make sure that it's been made clear to
3 you that the only thing on Exhibit 117 is the
4 three-hour recording, it doesn't have the other
5 sets of conversations, well, you knew that,
6 didn't you?

7 A The -- when you say the three-car report ...

8 Q Oh, I'm sorry. The inbound tape consisted of
9 a conversation which was called the three-hour
10 report, that is, they had to report three hours
11 before they came into Hinchinbrook.

12 A Okay, that's the first time I'm hearing that.

13 Q Okay, and then there was a one-hour report,
14 they have to report an hour before they're at
15 Hinchinbrook, and then there was another report
16 at the radio. And the tape that you originally
17 received from counsel included all three of those
18 conversations, is that right?

19 A Yes.

20 Q Okay. And I want to make sure that you
21 understand that Exhibit 117 does not contain all
22 of those conversations, only the three-hour
23 report, and then a conversation at the end of the
24 three-hour report about berthing.

25 A Well, you have me at a disadvantage in that

1 I'm not familiar with what the three-hour report
2 is, and I can't place it in my mind without
3 possibly seeing it, you know, written down, okay.
4 What I can -- what I can testify to is the fact
5 that the exhibit, okay, that I'm talking about is
6 a copy of a tape that was made on March 22, and
7 has been designated to me, and I've seen it on
8 reports, called the inbound tape.

9 And on that tape, and I assume we're talking
10 about the first tape that was turned over to me
11 ...

12 Q Yes.

13 A ... that there was a series of conversations
14 on that, that had -- that appeared to be a series
15 of conversations on it, that had some electronic
16 start-stop signatures on it. Okay.

17 Q Right. Okay. I ...

18 A The tape that I'm testifying to here, okay ...

19 Q Uh-huh (affirmative).

20 A ... is the -- the inbound tape, I'm -- I'm
21 testifying, is the tape, is the second copy, the
22 first-generation copy, that's what I'm testifying
23 to.

24 Q Okay, and I understand that. The problem is
25 that the tape that's in evidence, Exhibit 117 ...

1 A Uh-huh (affirmative).

2 Q ... in front of you ...

3 A Uh-huh (affirmative).

4 Q ... is only a portion of that tape.

5 A Okay.

6 Q And I just wanted to make sure you understood
7 that, for purposes of your questions.

8 A Okay, if that's -- if that's the
9 representation, okay.

10 Q Okay. And perhaps, if I can give you some of
11 the information that -- that conversation, as I
12 said, it's a three-hour report conversation,
13 essentially one of the mates was reporting where
14 they were, what time they thought they'd get to
15 Hinchinbrook, reported that they had pilotage,
16 and then inquired as to what berth they were
17 going to report to. So do you remember a
18 conversation like that?

19 A Well, in general terms, I don't remember the
20 specific parts of the transcript.

21 Q Okay. All right. So the tape that's before
22 you now, Plaintiff's Exhibit 117, only contains
23 that one set of conversations, that one topic, do
24 you understand that now?

25 A Quite frankly, I don't, counsel.

1 Q Okay.

2 A The -- I think what your statement is, is that

3 of the inbound tape that was made on the

4 microcassette, this only contains a portion of

5 that.

6 Q That's correct.

7 A Okay.

8 Q Okay. You understand.

9 A That I understand. Okay.

10 Q Do you also understand that as a result of

11 that, the only conversation -- or that tape in

12 front of you, 117, only contains one start and

13 stop.

14 A Okay.

15 Q Okay. Now, you said on direct examination

16 that the tape that you received and listened to,

17 and then of course part of which is Exhibit 117,

18 does not appear to have been reproduced on real

19 time.

20 A I don't know if I said that.

21 Q All right. You said that ...

22 A At real time? You're talking -- now, which

23 conversation are we talking about?

24 Q We're talking about the conversation that's on

25 Exhibit 117.

1 A Okay. The first copy of the tape that was
2 provided to me did not appear to be in real time
3 in that it did not appear to be in a
4 chronological sequence.

5 Q Okay.

6 A As opposed to the real time that I testified
7 making the one-to-one copy. Okay.

8 Q But it wasn't -- or you don't think it was
9 recorded on fast recording speed?

10 A Well, which tape are we talking to now?

11 Q They're the same, sir, the only difference ...

12 A No, no, no ...

13 Q ... is this doesn't have all the conversations
14 on it, okay?

15 A But which tape are you referring to that was
16 recorded at a fast speed?

17 Q You said that the tape you listened to was not
18 recorded real-time.

19 A Okay.

20 Q But in each conversation, that conversation
21 was recorded in real time, but then it was
22 stopped.

23 A Okay, yes. That's correct, yes.

24 Q Okay. So the conversation -- there's real
25 time and there's fast time, when you're

1 recording, right?

2 A Okay.

3 Q Okay. In this particular case, it wasn't

4 recorded at fast speed, as far as you can tell,

5 was it? It wasn't reproduced at fast speed.

6 A Well, no, you see, when we're talking about

7 being reproduced at fast speed, I think we have a

8 little confusion of terms. Because when you

9 produce something at real time, as we produced

10 it, as I have previously testified -- are you

11 talking about high-speed copying?

12 Q High-speed copying.

13 A Okay.

14 Q Sorry, I'm trying to get these terms down ...

15 A Yeah.

16 Q ... but it wasn't high-speed copying, as far

17 as you know?

18 A Well, I have no way of knowing how the copy

19 was produced.

20 Q All right. You did talk to someone at NTSB to

21 discover how the copy was produced, didn't you?

22 A What's that, the -- no, not the copy. How the

23 original was produced.

24 Q All right, so ...

25 A The -- excuse me. Not the original, but the

1 microcassette, the first -- let's -- just for
2 clarity of terms, the first-generation copy
3 microcassette, okay ...

4 Q All right.

5 A ... how that was produced.

6 Q And that is my question. As far as you know,
7 the microcassette first-generation was not
8 reproduced at high speed.

9 A That's correct.

10 (1610)

11 Q All right. Now, it was not reproduced at real
12 time, either, in the sense that there were starts
13 and stops.

14 A Well, I don't know that. I mean, you know,
15 when I say there's starts and stops, I mean,
16 we're talking about the total inbound tape?

17 Q Yes.

18 A Okay, you see, I don't have any way of knowing
19 where the starts begin and where the stops end,
20 for the simple reason I cannot examine the
21 original tape.

22 Q All right, but my question is, the
23 microcassette first-generation ...

24 A Yes.

25 Q ... as far as you know was made on real time,

1 except that there are starts and stops.
2 A That's correct.
3 Q And you in fact listened to the first-
4 generation ...
5 A Yes.
6 Q ... microcassette and ...
7 A Yes.
8 Q ... you could hear that, couldn't you?
9 A Yes.
10 Q All right. Now, you said that you went down
11 to the U.S. Coast Guard base in Valdez for
12 purposes of listening to the original inbound
13 tape, is that right?
14 A And to conduct an analysis also.
15 Q Okay. You already knew before you went down
16 to Valdez that that tape no longer -- the
17 original no longer exists, didn't you?
18 A Well, let me say this, okay? I didn't know
19 that of my own direct knowledge. I was informed
20 that the tape could not be located, okay.
21 Q And you ...
22 A So my procedure is, okay, whenever I examine,
23 I go through a certain -- various steps of
24 procedures, okay. As a person who is going to
25 perhaps be called upon at some court of competent

1 jurisdiction to give an opinion, okay, I have
2 certain procedures that I go through. I, rather
3 than relying on other people, ask the people
4 directly, okay, "Do you have the original tape?"

5 Q Okay.

6 A Okay.

7 Q Back to my original question. You were not
8 surprised when you got down to Valdez and were
9 informed that they did not have the original
10 tape.

11 A Well, I don't know if it was -- care to say if
12 I was surprised or not, it's a procedure that I
13 go through. I mean, whether I was surprised or
14 not, or whether I was forewarned that they may
15 not have it, that's true, but as far as ...

16 Q All right, you were forewarned ...

17 A ... being surprised ...

18 Q You were forewarned that it probably wasn't
19 going to be there, right?

20 A That's correct.

21 Q Okay. And you also know that in fact it was
22 not preserved, because routinely they rerecord
23 over those tapes, is that correct?

24 A Well, I didn't know that of my own direct
25 knowledge.

1 Q All right, but you were informed of that.
2 A Well, actually, what I was informed of, and I
3 can exactly -- when I asked for that tape, they
4 told me that nobody had seen that tape since last
5 April.
6 Q And "they" being ...
7 A So -- meaning the Coast Guard officer that I
8 asked at the time, and ...
9 Q Okay. So whatever problem there was with
10 preserving the original inbound tape, that was
11 with the Coast Guard. As far as you can tell.
12 A Well, I would assume that, as far as I know, I
13 mean ...
14 Q It's not with the prosecutors or the State
15 Troopers.
16 A Well, you see ...
17 Q As far as you know ...
18 A My knowledge is, is yes. It ...
19 Q Sir, let's just answer my question, okay?
20 A I'm trying to.
21 Q As far as you know, the tape and the failure
22 to preserve it lies with the Coast Guard, is that
23 correct?
24 A That would be a reasonable assumption, yes.
25 Q Okay. Now, you testified as to how the first-

1 generation microcassette copy was made, and you
2 got that information from whom?

3 A I believe I got that from somebody in the
4 NTSB, that made that representation to me.

5 Q Do you remember who it was?

6 A No, I don't, not at this -- not as I sit here.

7 Q Was it at the headquarters of NTSB that you
8 talked to this person?

9 A I don't -- I don't believe so, I spoke to a
10 Mr. Cash (ph.) there, and he was the audio
11 engineer there, and I don't believe that he
12 discussed it, now, it is possible that -- that I
13 read a report somewhere, or that somebody else
14 informed me, but -- you know, it -- it was -- I
15 came to that conclusion, okay, that it was made,
16 and the manner in which it was made, really to
17 two things, based upon that information, but also
18 in listening to the tape, I felt there were
19 environmental sounds on the tape.

20 Q All right, so at any rate, from either
21 listening to the tape or talking to some ...

22 A Yeah.

23 Q ... person at NTSB, you discovered that
24 Investigator Johnson, the NTSB investigator, used
25 his Lanier microcassette and put it up to the

1 speaker of the original system in Valdez.

2 A Okay.

3 Q And the original tape was played through that

4 speaker, and he recorded it on his microcassette,

5 was that -- is that your understanding of what

6 happened?

7 A That's right, it was played through a

8 particular playback machine, I have no idea what

9 the playback machine was. I know what it was

10 recorded on, but I don't know the playback

11 machine.

12 Q But you were informed that in fact it was

13 played back on the original machine that recorded

14 it in Valdez.

15 A Actually, quite frankly, counsel, my

16 information is, is that it was not played back on

17 the original machine that it was recorded on.

18 Q And where did you get that information?

19 A When I was up in Valdez during my discussions

20 with Coast Guard and the Trooper people, they

21 brought out these original tapes to play, and

22 they played 'em on a machine that was other than

23 the machine that it was recorded on. In fact,

24 there came a point where ...

25 Q All right, so the time ...

1 A ... I'm not -- I'm not ...

2 Q Well, no, sir ...

3 (1840)

4 MR. MADSON: Your Honor, I think the witness
5 can finish his answer. If it calls for an explanation,
6 he's entitled to that.

7 THE COURT: She asked where he got the
8 information, and I think that ...

9 MS. HENRY: Well, he's not answering that
10 question, Your Honor, I'm trying to ...

11 THE COURT: I think he is. You may finish
12 your answer.

13 Q (Mr. Siedlick by Ms. Henry:) Again, where did
14 you get the information that Investigator
15 Johnson's creation of the first-generation tape
16 was not the -- did not use the original recorder?
17 Where did you get that information?

18 A Yeah. Yes, yes, this is -- as I was
19 explaining my answer, okay? The -- there came a
20 point in time when the Coast Guard took me on a
21 tour of the Vehicle Traffic Center ...

22 Q Uh-huh (affirmative).

23 A ... and told me that, "This is the machine
24 that is used to record the tapes on," and it was
25 a large tape-logging machine that had two reels

1 on. I was informed that when a 24-hour period,
2 specifically 2400 hours, 12 midnight, the tape is
3 subsequently then removed, and it's secured in
4 some manner or fashion. Okay. The tape that I
5 observed them playing back subsequent dates,
6 okay, outbound tapes, was played on a machine
7 that was not up in the Vehicle Traffic Center
8 that was in use.

9 So my information is, is that it was played on
10 a machine other than what it was recorded on, and
11 I was also informed that this is the machine that
12 they play back and make the copies off of. In
13 fact, I observed Trooper Fox make copies off
14 them.

15 Q At the same time you did, basically, wasn't
16 it?

17 A That's right.

18 Q Okay. So you're basing your opinion that
19 Investigator Johnson did not use the original
20 recorder because you didn't use it and Trooper
21 Fox didn't use it.

22 A That's right. That's an assumption on my
23 part, yes.

24 Q Now, were you also informed that when regular-
25 size cassettes as opposed to microcassettes were

1 made, I guess that would be then second-
2 generation.

3 A Okay.

4 Q From the microcassette ...

5 A Uh-huh (affirmative).

6 Q ... first-generation, that the NTSB people
7 used Investigator Johnson's original
8 microcassette recorder that he had used. They
9 put the microcassette into his microcassette
10 recorder in order to create the second-generation
11 tape. Were you aware of that?

12 A Nobody told me that.

13 Q You weren't aware of that either?

14 A No, I mean, obviously I was aware that a
15 subsequent copy was made from the microcassette,
16 because I was given a copy ...

17 Q I just ...

18 A ... the method in which it was made, I'm not
19 familiar with.

20 Q All right. Were you also advised of the type
21 of equipment that the NTSB used in order to make
22 the second-generation regular-size cassette?

23 A No, I wasn't.

24 Q Did you see the equipment that they used at
25 headquarters there?

1 A Not to reproduce this tape.

2 Q You didn't see that equipment?

3 A Well, there was -- there was audio equipment
4 in this particular lab, that one sees commonly in
5 any audio lab. Whether or not those subsequent
6 copies were made from that, I have no knowledge
7 of that.

8 Q But you did see the equipment at the lab
9 there.

10 A They have audio equipment at the lab.

11 Q All right, and are you aware that that
12 equipment that they have at the lab there is
13 equipment that they use for other purposes, for
14 instance, listening to cockpit recordings in
15 airline crashes, and that sort of thing?

16 A I have no way of knowing that.

17 Q Now, you said, in answer to my question a
18 couple of minutes ago, that you in fact made a
19 tape yourself from the first-generation
20 microcassette.

21 A Yes.

22 Q Is that right?

23 A A real-time copy, yes.

24 Q A real-time copy. And do you have that with
25 you?

1 A I don't, no.

2 Q You did not bring it with you?

3 A No.

4 Q Okay. Now, you also stated that you weren't
5 sure, because of the start and stop on the tape,
6 what conversations may have occurred in between
7 the conversations that were actually recorded, is
8 that right?

9 A That's correct.

10 Q Okay. Are you aware of the system that is
11 used by the Coast Guard when they're recording
12 real-time dispatches?

13 A Yes. It's a logging system.

14 Q It's a logging system, there's a time that's
15 recorded ...

16 A It's a time-date generator on it.

17 Q ... and if, say, there's dead space, because
18 nobody's talking on the radio, the tape's still
19 going.

20 A That's correct, it's a 24-hour tape.

21 Q So there will be dead space on the tape.

22 A Yes.

23 Q Would it be fair to assume that some of the
24 stuff that was not recorded on the inbound tape
25 was dead time?

1 A Well, I think it's a fair assumption.

2 Q Now, you stated that you listened to a

3 cassette recording of an interview with Captain

4 Hazelwood and Trooper Fox and Mr. Delozier?

5 A Yes, I believe that was his name.

6 Q Anyway, it was the interview with the Trooper.

7 A Well, I believe the conversation occurred on

8 March 24 of 1989.

9 Q Did that appear to be a fairly accurate tape?

10 In your opinion?

11 A Well, from the standpoint of -- of what, now?

12 Q Of Captain Hazelwood's voice.

13 A Yes.

14 Q Are you aware that Trooper Fox, in recording

15 that conversation, also used a microcassette

16 recorder?

17 A I have no way of knowing how that was

18 recorded.

19 Q All right. So you aren't aware of that.

20 A No.

21 Q Now, the inbound tape that you've been

22 referring to and that you listened to, obviously

23 there are other voices on that tape besides

24 Captain Hazelwood's, is that correct?

25 A That's correct, yes.

1 Q All right, and if I were to inform you that
2 some of the other voices on that tape included a
3 Mr. LeCain and two watch standers, watch standers
4 from the Valdez Traffic Center, a Mr. Taylor and
5 a Mr. Shepherd...

6 A Uh-huh (affirmative).

7 Q Did you compare their voices on the inbound
8 tape with their voices when they testified in
9 this trial?

10 A No.

11 Q Thank you, sir. That's all the questions I
12 have.

13 (2126)

14 REDIRECT EXAMINATION OF MR. SIEDLICK

15 BY MR. MADSON:

16 Q Mr. Siedlick, first of all, you testified that
17 when you heard the -- I want to say the first-
18 generation copy of the nonexistent original,
19 okay, the microcassette.

20 A Yes.

21 Q You said that it contained something that you
22 believed to be environmental sounds. Would you
23 explain that, please?

24 A Well, yes. As I've previously testified, if
25 you use a recording system other than the line

1 jack system, meaning you use an external
2 microphone or the internal -- the internal
3 microphone that's on this particular machine, it
4 would not only pick up the sounds that are coming
5 over the speaker, it would also pick up any other
6 sounds within range of this microphone that were
7 going on at the time that the copy was being
8 made.

9 Q Buzzing sounds, or doors opening and closing,
10 anything like that?

11 A Things like that. Well, I also think I
12 indicated that there was a lot of noise on the
13 tape, also, at this time. Which was -- which
14 could have been -- which could have been -- see,
15 I did not know how the generation copies were
16 made, and of course I didn't have access to the
17 original. When one makes a recording, in using
18 an internal microphone, okay, all -- the internal
19 microphones put noise and distortion on the tape
20 other than what's on the original recording. And
21 what they do is, they record the circuitry noise
22 of the motors turning in here, 'cause the
23 microphone's close to the circuitry. So it puts
24 additional noise on it.

25 Now, the question then becomes, not knowing

1 how the copies are being made, how much is
2 original noise, and how much is distortion, how
3 much is environmental that's been put on? And
4 that's why you go back to the original tape to
5 determine, you know, what sounds shouldn't be on
6 this tape. And this is of course why I made the
7 copy of this other tape.

8 Q Just so everyone clearly understands, a
9 machine like this little microcassette was used
10 to make the copy from the so-called original.

11 A That's correct.

12 Q Then this in turn was copied in some manner,
13 some fashion, onto a larger cassette.

14 A That's -- that's correct.

15 Q And that's Exhibit 117.

16 A That's correct.

17 Q Do you know how many subsequent generations of
18 copies were made to end up with number 117?

19 A No, I don't know.

20 Q Now, if the original contained errors or --
21 let's say flaws, or what do you want to call it,
22 such as pitch, in other words, assuming, sir, the
23 batteries in the little microcassette were down,
24 it was recorded at a slower speed and then played
25 back, what effect if any would there be on the

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subsequent generations of copies?

A Okay ...

Q Would it clear that up, change it, or what would happen?

A If that's -- if that was one of the scenarios, okay, among the others that I testified to, the -- excuse me. The subsequent copies would also show an increase in pitch on the tape.

Q Is there a means of correcting for that, if the problem was noted, say, early on?

A Oh, sure, you have -- there's a variable speed device.

Q It could have been -- assuming, of course, it was -- my scenario or my assumption is correct, it could have been modified or changed back to the correct speed by a variable speed control.

A Yeah, that's what most professional people do, yes.

Q Thank you, that's all I have.

MS. HENRY: No questions.

THE COURT: You're excused. You may call your next witness.

(2303)

MR. MADSON: Yes, we have one more.

THE COURT: Mr. Madson, counsel, would you

1 approach ...

2 MR. MADSON: Excuse me, would there be any
3 objection if Mr. Siedlick remains in the courtroom?

4 THE COURT: Any objection?

5 MR. MADSON: I don't intend to recall him.

6 THE COURT: Sure, free to stay.

7 (2305)

8 (Whispered bench conference)

9 (2312)

10 JAMES KUNKEL,
11 recalled as a witness, having previously been sworn
12 upon oath, testified as follows:

13 THE COURT: State your name.

14 A James Kunkel.

15 THE COURT: Mr. Kunkel, you're still under
16 oath, sir.

17 DIRECT EXAMINATION OF MR. KUNKEL

18 BY MR. MADSON:

19 Q Mr. Kunkel, you're the same Mr. Kunkel that
20 testified here on behalf of the State at an
21 earlier time, is that correct?

22 A That's correct.

23 Q Do you recall when you testified, the
24 approximate dates when you were here?

25 A I think it was February 15 or 16, something

1 like that.

2 Q During the time you were here, did you have an
3 occasion to go to the District Attorney's office
4 for the purpose of listening to a tape recording?

5 A Yes, I did.

6 Q Do you recall when that -- approximately when
7 that occurred?

8 A I think it was the day, maybe two days before
9 I came here to testify.

10 Q And who was present at that time, sir?

11 A One of the attorneys that works with my
12 attorney, and a State Trooper.

13 Q And what were you asked to do at that time?

14 A I was asked to listen to two tapes.

15 Q Do you recall what tapes they were, sir? What
16 they were purported to represent?

17 A One tape was an outbound tape, which I heard
18 here in court. Another tape, I was told, was the
19 inbound tape.

20 Q How was that inbound -- or how were these
21 tapes played to you? Do you recall the type of
22 equipment?

23 A They were played on a small tape recorder.

24 Q When you say "small," were they ...

25 A They were bigger than that, but ...

1 Q It appeared to be a normal cassette ...
2 A Yes, a cassette player.
3 Q Did you hear both those tapes, then, sir? Did
4 you hear the tapes and listen to them?
5 A Yes, I did.
6 Q With regard to -- what were you asked?
7 A I was asked to identify the voices on the
8 tapes.
9 Q With regard to the outbound tape, for
10 instance, were you able to do that, sir?
11 A Yes, I was.
12 Q What about the so-called inbound tape? When
13 you say "inbound," that's -- did you realize what
14 that was, what period of time?
15 A Yes.
16 Q When was that, sir?
17 A They told me that was the inbound tape of the
18 Exxon Valdez coming into port ...
19 Q You were told that, right?
20 A I was told that, yes.
21 Q Okay. With regard to that particular tape,
22 what, if anything, did you tell the prosecutor
23 about your identification of voices?
24 A I wasn't -- you know, at that time I was not
25 able to recognize any of the voices and confirm

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the voices.

Q Why was that?

A I just couldn't. From hearing the tape, I could not recognize the voices.

Q You mean the overall quality of the tape was such that you couldn't distinguish one voice from another, or ...

A Well, the quality could have had something to do with it ...

THE COURT: Just a minute. Objection came up, leading -- maybe you could rephrase your question.

Q If you can, sir, just -- I mean, you say you couldn't identify voices, I'm just trying to narrow that down as to why you could not do that.

A Because I wasn't able to recognize the voices on the tape, after hearing it.

Q Now, yesterday, sir, did you have an opportunity to hear what was purported to be a copy of that same inbound tape?

A Yes, I did.

Q Where was that?

A This was at the Captain Cook Hotel, on the 19th floor, at your office.

Q And were you asked by myself or someone to listen to this tape?

1 A Yes, one of your attorneys asked me to listen
2 to it.

3 Q Okay. And do you know who prepared that tape,
4 sir?

5 A You told me -- I was told it was your expert,
6 sound expert.

7 Q Mr. Siedlick?

8 A Yes.

9 Q Okay. After hearing that copy of what was
10 purported to be the inbound tape, could you
11 identify voices on that, sir?

12 A Yes, I was able to.

13 Q And could you conclude, or do you have any
14 opinions as to the manner in which the people
15 were speaking? Did it sound familiar to you, or
16 different in any way?

17 A I was able to recognize the people, but their
18 voices sounded as if they were talking faster
19 than I'm normally used to hearing.

20 Q Did you hear Captain Hazelwood's voice on that
21 tape at any time?

22 A Yes, I did.

23 Q What conclusions did you reach about his
24 voice, if anything?

25 A To me it sounded as if he was talking awful

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fast.

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

(2566)

CROSS EXAMINATION OF MR. KUNKEL

BY MR. COLE:

Q The one you recognized as Captain Hazelwood's voice, that was when he was talking about the berthing problems, correct?

A That's correct, he was talking about berthing.

Q Nothing further, Your Honor.

THE COURT: May the witness be excused? Thank you. You may call your next witness.

MR. MADSON: Oh, excuse me, I do have something else. If Mr. Chalos doesn't mind me -- if this witness can help with the -- if the Clerk would assist me ...

REDIRECT EXAMINATION OF MR. KUNKEL

BY MR. MADSON:

Q Mr. Kunkel, what I'm going to ask you right now, I'll hand you what's been marked as Defendant's Exhibits CA, CB, and BZ, and ask you if you can recognize what that purports to be, sir.

A The first picture?

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Q Yeah, all three of them, okay?

A It appears to be the gangway set up at the
Valdez terminal.

Q Have you in the past had occasion to see that
gangway, sir, and use it?

A Yes.

Q And does this appear to be a true and accurate
reproduction of that gangway, which is a means, I
understand, of getting from shore to the vessel?

A That's correct.

Q Thank you, sir, then I don't have any other
questions. And I would ask that these
photographs be admitted in evidence at this time,
Your Honor.

MR. COLE: No objections.

THE COURT: They're admitted. Cross-
examination? All right, now you're excused.

A Thank you.

THE COURT: You're welcome.

(2706)

(Whispered bench conference)

(2740)

THE COURT: Call the name of your next
witness, please.

MR. CHALOS: The next witness, Your Honor, is

1 Captain Ivan Mihajlovic.

2 THE CLERK: Sir, there's a microphone on top
3 of the counter right there, if you'll remain standing
4 and attach that and raise your right hand, please.

5 (Oath administered)

6 A I do.

7 IVAN MIHAJLOVIC,
8 called as a witness in behalf of the Defendant, being
9 first duly sworn upon oath, testified as follows:

10 THE CLERK: Please be seated. Sir, would you
11 please state your full name, and then spell your last
12 name?

13 A Ivan S. Mihajlovic. M-i-h-a-j-l-o-v-i-c.

14 THE CLERK: M-i-h-a-j ...

15 A M-i-h-a-j-l-o-v-i-c.

16 THE CLERK: And your mailing address, sir?

17 A It's 31 Seaspray Drive.

18 THE CLERK: And your current occupation?

19 A Master.

20 THE COURT: Seaspray Drive where? What city?

21 A That's in Centerport. Centerport, New York.

22 DIRECT EXAMINATION OF CAPTAIN MIHAJLOVIC

23 BY MR. CHALOS:

24 Q Good morning, Captain Mihajlovic. By whom are
25 you presently employed?

1 A Exxon Shipping Company.
2 Q In what capacity?
3 A As master.
4 Q How long have you been master?
5 A Since 1984.
6 Q Do you have a permanent ship that you sail on?
7 A I do now, yes.
8 Q What's that ship?
9 A That's the Exxon San Francisco.
10 Q She's a tanker?
11 A Yes, she is.
12 Q Does she call in the Valdez trade?
13 A Yes, she does.
14 Q Now, could you give us a brief description of
15 your educational employment background?
16 A Yes, I graduated from Kings Point ...
17 Q Is that the U.S. Merchant Marine Academy?
18 A The U.S. Merchant Marine Academy, in 1974,
19 about June, and then I started working with Exxon
20 in July, 1974.
21 Q In what capacity?
22 A As third mate.
23 Q Did you work your way up?
24 A Yes, I did.
25 Q To master?

1 A Yes, I did.

2 Q You sailed for a period of time as third mate?

3 A That's correct, I ...

4 Q How long?

5 A I sailed until about 1976, then I got my
6 second mate's license, and 1978 or thereabouts I
7 got my chief mate's license, and then in 1982 I
8 got my master's license.

9 Q And have you been sailing as master, you said,
10 since 1984?

11 A No, there was a brief period there in 1985
12 where I had gone into the -- into the office
13 there for six months.

14 Q When was that?

15 A That was in 1985.

16 Q What was the purpose of your going into the
17 office?

18 A The purpose of my going into the office was I
19 was supposed to be Assistant Marine Adviser.

20 Q What did you do in that job?

21 A In that job I worked with what they call port
22 approvals, where they take a tanker, and they
23 decide whether it could fit at certain berths
24 safely, and I also did work on the bridge
25 organization manual, at that time it was still

1 being -- it wasn't completed yet, and anything
2 else that came about that needed any advice.

3 Q And in the capacity that you've just
4 described, did you have occasion to review any
5 pilotage regulations?

6 A Yes, I did.

7 Q Could you tell us what you reviewed at that
8 time?

9 A Well, basically, there's a -- there's three
10 different areas there, we're looking at pilotage
11 ...

12 MR. COLE: Objection, if he's going to read,
13 state what he read, I object on the grounds of hearsay.

14 THE COURT: Are you talking about regulations
15 that are in evidence?

16 MR. CHALOS: They may be, Your Honor, I'm not
17 sure what he read at that particular time. I'm just
18 asking him generally what type of regulations he read
19 then.

20 THE COURT: Without going into the substance
21 of them?

22 MR. CHALOS: Right.

23 THE COURT: All right, objection overruled.

24 Q (Captain Mihajlovic by Mr. Chalos:) Go ahead.

25 A Okay, and -- in the bridge organization

1 manual, there's a short section on pilotage. And
2 where it comes from is there's a U.S. code,
3 there's federal registers, CFR's, as we know it,
4 there's also what they call navigational
5 inspectional circulars. That comes all out of
6 the Coast Guard, and the law of course comes up
7 from the law. But then you have interpretations
8 of those. So ...

9 Q Company interpretations?

10 A Not company interpretations, no, you have the
11 interpretations there as -- like Arts (ph.) has a
12 law manual, they interpret the law in different
13 ways. I had to look up some of that stuff to go
14 over with the lawyers on that. And then I just
15 basically told my -- my boss was Captain Duncan
16 -- exactly what I had found, and that's how that
17 thing came out in the bridge organization manual.

18 Q Well, just answering yes or no, when you were
19 in the office, did you have -- in 1985, did you
20 have occasion to review any proposed changes to
21 the pilotage regulations?

22 A Oh, yes.

23 MR. COLE: Judge, I object to that question as
24 -- we've gone into this time and time again, and it's
25 just the same, and I object on the grounds of

1 relevance.

2 MR. CHALOS: Judge, I've been asking what
3 those proposed changes were, because whether he read
4 anything regarding ...

5 THE COURT: I don't see how that is going to
6 assist the finder of fact if he read anything ...

7 MR. CHALOS: Well, I'll tie it up with
8 testimony a little bit later on in this examination.

9 THE COURT: Objection sustained. Disregard
10 the answer, question overthrown.

11 Q (Captain Mihajlovic by Mr. Chalos:) When was
12 the first time that you traveled to Valdez on a
13 tanker?

14 A That was in 1977 as a third mate.

15 Q How many trips had you made to Valdez as a
16 mate, as opposed to a captain?

17 A How many trips -- I went from 1977, basically,
18 to present, with a two-year layoff period, so the
19 amount of trips could be -- it could be 60, 70, I
20 don't -- I have no idea.

21 Q Do you have your pilotage endorsement for
22 Prince William Sound?

23 A No, I do not.

24 Q Do you know the navigational hazards in Prince
25 William Sound?

1 A I'm familiar with Prince William Sound, yes.
2 Q Do you know the navigational aids?
3 A Yes.
4 Q Do you think that ...
5 MR. COLE: Objection.
6 (3090)
7 Q Let me start again. Do you feel qualified to
8 take the pilotage exam for Prince William Sound?
9 A Yeah, I think I could take the pilotage exam,
10 yes.
11 Q And pass it?
12 A I think so.
13 MR. COLE: Objection.
14 Q In addition to your mate's licenses, did you
15 hold any able-bodied seaman certificates?
16 A That's correct, when you graduate from the
17 United States Merchant Marine Academy, or any
18 academy at that time, that's part of your
19 training, and you receive what they call a United
20 States Mariner's Document. And that's called
21 your seaman's papers, Z card. And on the back of
22 it, it'll state that you can sail any unlicensed
23 rating in the deck department up to a -- able
24 seaman.
25 Q And you've never sailed as an A.B., I take it.

1 A No, I have never sailed as an A.B.

2 Q Excuse me one second, let me get an exhibit.

3 I want to show you Exhibit B in evidence and ask

4 you, have you seen that letter in form or

5 substance before?

6 A Yes, this is the Alaska Maritime Agency, Bob

7 Arts' letter, yes.

8 Q Yes.

9 A Uh-huh (affirmative).

10 Q When was the first time that you saw that

11 particular letter?

12 A I saw this letter when I was coming back from

13 Singapore, and I was going to -- to Valdez. The

14 last time I had been there, it was daylight only,

15 you could only -- with non -- no pilotage, you

16 could only go in in daylight and leave in

17 daylight.

18 Q Well, let's put it in a time frame.

19 A Okay.

20 Q When did you see this letter for the first

21 time? What year?

22 A 1988.

23 Q All right, when was the last time you had been

24 up to Valdez?

25 A 1986.

1 Q And what were the pilotage regulations as you
2 knew them in 1986?
3 A In 1986 the pilot ...
4 THE COURT: Mr. Cole, if you have an
5 objection, you have to stand, make your objection so I
6 can hear it.
7 MR. COLE: Objection, relevance.
8 THE COURT: Objection's overruled.
9 Q Go ahead.
10 A Could you repeat that, please?
11 Q Yes, what was the pilotage regulations as you
12 knew them in 1986?
13 A In 1986, for non-pilotage vessels, which I
14 would be under, would be daylight only transit.
15 That means daylight, you'd have it be -- the
16 whole transit would have to be in daylight
17 northbound to the dock, and the whole transit
18 southbound had to be in daylight hours.
19 Q In 1986, where did you pick up and drop off
20 the pilot?
21 A I picked up and dropped off the pilot at --
22 just below Busby Island or just above Busby
23 Island. End of Bus ...
24 Q Let me get a chart, and you can show the jury.
25 I'll show you what's been marked as Exhibit

1 Number 26, and ask you, can you point, if you
2 will, to the jury -- come on up. Where, in 1986,
3 you dropped off and picked up the pilot.

4 A Okay, I dropped off the pilot usually in this
5 area right here, or this area right here.

6 Q Now, those areas are well north of Bligh Reef,
7 are they not?

8 A That's correct.

9 Q And you didn't have pilotage at the time.

10 A No, I did not.

11 Q You didn't drop or pick up the pilot, let's
12 say, abeam of Bligh Reef like ...

13 MR. COLE: Objection, leading.

14 THE COURT: Counsel approach the bench,
15 please.

16 (3326)

17 (Whispered bench conference)

18 THE COURT: Okay, Mr. Chalos, let's refrain
19 from leading questions. Objection sustained.

20 MR. CHALOS: Yes, Your Honor. Was the
21 objection sustained?

22 THE COURT: Yes, sir.

23 Q (Captain Mihajlovic by Mr. Chalos:) Captain
24 Mihajlovic ...

25 A Yes.

1 Q Prior to 1986, did there ever come a time when
2 you picked up or dropped off the pilot abeam of
3 Bligh Reef?
4 A I really can't remember. Prior to 1986 I
5 really can't remember, I don't think so. It was
6 always up in this area ...
7 Q You mean Busby?
8 A ... in the Sound. Yeah. Uh-huh
9 (affirmative).
10 Q Okay. How far north is the general area that
11 you just pointed to of Bligh Reef light? In
12 terms of distance?
13 A I could just take a look right there, north
14 would be right here -- roughly three and a half
15 miles.
16 Q And if you took them up further north where
17 you pointed, that would be more, wouldn't it?
18 A That would be more, yes.
19 Q Okay. You may return to your seat.
20 A Thank you.
21 Q Now. You say in 1988 on the way back from
22 Singapore, you did what, you contacted Alaska
23 Maritime?
24 A I first contacted my office, and I asked had
25 any of the pilot -- had any of the pilotage

1 regulations changed, so I could adjust my -- so I
2 could adjust my speed to arrive at daylight, for
3 instance, that's what at last I had thought it
4 would be. And they had basically said that they
5 were gonna send me a telex of a recent letter
6 that they had gotten, and that they had gotten it
7 after I had left the West Coast.

8 Q A letter gotten from whom?

9 A Well, it ended up being this letter right
10 here, that you're looking at.

11 Q The -- Exhibit B.

12 A Bob Arts -- yeah, Bob Arts' letter. Alaska
13 Maritime.

14 Q And the telex that you got had the text of
15 that particular letter?

16 A Yes.

17 Q All right. After you received that letter,
18 what did you do?

19 MR. COLE: Your Honor, I'm going to object at
20 this point as to relevance.

21 THE COURT: Overruled.

22 (3479)

23 Q Go ahead.

24 A Okay, after I received this letter, well, I
25 just kept the ship going at its normal speed, so

1 I could take arrival at any time. It wasn't a
2 question anymore of daylight, it was a question
3 that -- really, that the whole pilotage thing was
4 waived, I would imagine.

5 Q When you received that letter, did you believe
6 that pilotage had been waived?

7 A Yes, I did.

8 Q And have you been -- did you operate under
9 that assumption right on through the grounding of
10 this vessel?

11 A Yes, I did.

12 Q Now, what was your interpretation of that
13 letter when you received it?

14 A Well, the only thing on this letter that --
15 you know, you have to write -- well, you have to
16 inform the Coast Guard of anything, is if the
17 visibility. Visibility was the key factor. Two
18 miles or greater. Anything below that, then you
19 would not be permitted to go into Prince William
20 Sound, or you'd have to inform the Coast Guard,
21 and they would make the final decision. They had
22 also a two-man watch, a two-man watch there from
23 Cape Hinchinbrook to Montague Point, or vice
24 versa, outbound.

25 Q Let me get another chart. Can you show the

1 jury where Cape Hinchinbrook is and where
2 Montague Point is?

3 A Yes. Cape Hinchinbrook is this light right
4 here, and you would keep going, let's say you're
5 northbound, you would keep going until you get
6 abeam of this tip right here. As soon as that
7 -- that is your area that they want -- ten-minute
8 position reports, and a two-man watch.

9 Q What's the distance in that area?

10 A Well -- roughly about 12, 13 miles.

11 Q All right. And is that the only area you
12 understood that a two-man watch was required?

13 A Yes.

14 Q Now, for the rest of Prince William Sound,
15 whether you were inbound or outbound, did you
16 understand that -- how many people did you
17 understand were required to be on the bridge?

18 A Only one person.

19 Q One watch stander.

20 A One watch -- one watch stander.

21 Q Whether you were coming out or going in.

22 A That's correct.

23 Q And that was true up to the pilot's station?

24 A That's correct.

25 Q Sir, do you presently have someone on your

1 vessel with pilotage?
2 A Yes, I do, I have the chief mate.
3 Q Okay, he has a pilotage endorsement.
4 A He has a pilotage endorsement.
5 Q When you transit through Prince William Sound,
6 is he on the bridge?
7 A No.
8 Q Why is that?
9 A Well, the pilotage -- the pilot is an adviser,
10 and the chief mate I usually use to send down to
11 go across and check the deck out before you get
12 in, especially this time of year. And I use him
13 more for preparing for the in-port operation,
14 which is the real dangerous part.
15 Q So the man on your ship with the pilotage is
16 not on the bridge of the ship while you're
17 transitting Prince William Sound, is that your
18 testimony?
19 A That's correct.
20 Q And who's on the bridge, just the watch
21 stander at that point?
22 A Just the watch stander or myself, or both of
23 us. It depends. It would depend.
24 Q Have you in your experience had occasion to
25 leave the bridge in Prince William Sound leaving

1 just one man on the bridge?

2 A Yes. In Prince William Sound, that's all the
3 way up to the Narrows?

4 Q All the way to the Port of Valdez.

5 A Okay, yes. I left in -- I left the bridge
6 there in the Narrows, and if I'm gonna leave the
7 bridge, I might leave the bridge for a short
8 period of time in this area right here.

9 Q In the area of Bligh Reef?

10 A Yeah, just -- just south of it.

11 Q And sir, in a situation where the man with the
12 pilotage endorsement on your ship, the chief
13 mate, is below, do you consider yourself to be in
14 violation of the pilotage regulations prior to
15 the grounding?

16 A No, I don't.

17 Q Why is that?

18 A Well, because a master -- the pilot is only
19 there as an adviser. And the federal pilotage,
20 the way it is right here in Prince William Sound,
21 advisory -- I could always call him at any time.
22 He could be up there at any time I might need
23 him. I actually have more trips than he does, he
24 just has the piece of paper, and I don't.

25 Q You've sailed to other parts of the world,

1 have you not?

2 A Yes, I have.

3 Q How do you compare sailing in Prince William
4 Sound, with respect to navigational hazards, to
5 other areas that you've sailed in?

6 A Well, I'll be honest with you there, Prince
7 William Sound is -- cannot compete, cannot
8 compete with anything on the East Coast. You
9 have ...

10 Q What do you mean by that?

11 A You have the approaches -- in the Gulf of
12 Mexico, you have the approaches to Galveston, for
13 example, or Corpus Christi, for example, and you
14 have -- on each side, you have a mile fail way,
15 so basically what that would be, it's just about
16 from here to the separation zone. And that's the
17 two-way track. Now, also on ...

18 Q What does that mean, two-way track?

19 A Well, in other words, you have it right here,
20 you have inbound, separation zone, and an
21 outbound lane.

22 Q How much distance is between the three?

23 A Between the three right here? I think it's
24 1,000, you can almost see. Separation zone I
25 believe is 1,000, 1,000 yards.

1 Q Okay, so in the other areas that you've
2 sailed, then, it's a narrower area?

3 A Yes. Also it is dotted by rigs, in other
4 words, rigs would be on each side. So as you
5 came in, as you were heading into, let's say,
6 Galveston, for example, you were coming into
7 Galveston, you would have a rig on the edge of
8 the fail way, another rig on the other edge of
9 the fail way, which would leave you, to stay in
10 the middle, a half a -- a half a mile on each
11 side. Plus, coupled with outbound traffic and
12 -- any fishing boats, or rig boats, boat for
13 transit back and forth to the rigs -- so that
14 area over there, and that extends about 18 hours
15 out from Galveston.

16 Q You would consider that area to be much more
17 hazardous than Prince William Sound?

18 A Oh, yes. Oh, yes, without a doubt.

19 Q In your opinion, is pilotage required for
20 Prince William Sound?

21 A In my opinion now?

22 Q Yes.

23 A I -- I don't believe that pilotage is required
24 at this point, I think it was still waived. It
25 stopped, and they were having more correspondence

1 and getting more and more confusing.

2 Q Now. I'd like to speak a little bit about
3 your experience with ice in Prince William Sound.
4 Have you encountered ice in the past?

5 A Yes, I have.

6 Q Did you encounter ice in the area of Bligh
7 Reef?

8 A Yes.

9 Q In the situations that you encountered ice,
10 what did you do?

11 A In the situations where I encountered ice --
12 could I use this chart?

13 Q Yes.

14 A Okay. Usually I would look -- like I said,
15 the pilot would be around here -- I would insist
16 that the pilot, depending on the ice, I would
17 insist that the pilot bring the ship around the
18 ice.

19 Q You'd have him take you out of the lanes?

20 A Exactly, yes. And he would get off around
21 this area here.

22 Q Still up in the back of Busby light area?

23 A Yes.

24 Q In the Busby Island area?

25 A Yes.

1 Q And then, after the pilot left, you would be
2 out of the lanes?
3 A I would be either in the northbound lane, or
4 slightly out of the lanes, yes.
5 Q Okay. I take it you're diverting around ice
6 at this point.
7 A That's correct.
8 Q Is that your normal practice to divert around
9 ice?
10 A That is my normal practice, yes.
11 Q Okay. What type of course did you steer in
12 those situations, to get out of the ice?
13 A That's -- that's hard to say, I mean, you're
14 going back anywhere between 200 and 180, 175, you
15 know, depending.
16 Q Have you had occasion to look at the course
17 that Captain Hazelwood was using, the courses he
18 was using in this case?
19 A Yes.
20 Q Were the courses that you used similar to
21 those?
22 A Yes, they were.
23 Q Did you, in your cases, come abeam of Busby
24 and then make your turn back?
25 A Yes, been cases of that.

1 (4073)

2 MR. COLE: I'm going to object to the leading
3 nature again of Mr. Chalos' question.

4 THE COURT: Your questions are suggested in
5 the answer, Mr. Chalos, refrain from ...

6 Q I'll rephrase it. At what point, when you
7 were diverting around ice, did you use as your
8 turning point?

9 A We used Busby Island. Almost any area there
10 that you have, Busby is the most predominant,
11 because it's obviously before Bligh Reef, so you
12 use Busby, you could use Reef Island, you could
13 use ranges on anything that you wanted there,
14 basically.

15 Q What's the controlling factor as to what point
16 you use it, where you could get a good fix?

17 A Well, the controlling factor would be where it
18 would be easiest fix, that would be the easiest
19 fix at -- let's say at Busby Island, because it's
20 right there, you know, it's a very simple course
21 change, come down and turn right, basically, is
22 what you're talking about. You're coming to an
23 intersection, basically.

24 Q Just going back to your experience with the
25 Galveston area ...

1 A Uh-huh (affirmative).

2 Q ... you say that it normally takes about 18
3 hours to transit the area?

4 A That's correct.

5 Q Are you on the bridge the entire 18 hours?

6 A No. As a matter of fact, in 1974, when I came
7 to work with the company, after I graduated from
8 Kings Point, there was one ship that I had where
9 I was a trainee with another trainee, as third
10 mate, and we ran the Florida Keys, which at that
11 time we were running right off the Florida Keys,
12 we were running about a mile, mile and a half off
13 the lights and the reefs, and at full speed, and
14 -- well, just the training was just there, I
15 mean, you just -- you know, that is what the
16 third mate is supposed to be able to do.

17 (Tape: C-3675)

18 (0010)

19 Q Now, sir, is it in the Captain's discretion as
20 to when to stay on the bridge and when to leave
21 the bridge?

22 A Oh yes.

23 Q Are you aware of any regulations that require
24 the Captain to be on the bridge at any time?

25 A Yes, the only regulation I am aware of is the

1 Panama Canal. The Panama Canal has a set -- they
2 have in that case over there, that would be
3 pilotage waters, but they have a set -- how would
4 you say it? -- routine. The master is assigned
5 to do this, the chief mate on watch is assigned
6 to do this, the helmsman is assigned to do this.
7 But that's the only area that I know of.

8 Q Are you aware of any regulations that require
9 the Captain to be on the bridge in Prince William
10 Sound?

11 A No.

12 Q You're not aware of any.

13 A Not aware of any, no.

14 Q Now, when you sailed in Prince William Sound
15 as a mate, did your captains ever leave you alone
16 on the bridge?

17 A Oh yes. Oh yes.

18 Q Was that done routinely then?

19 A That was done, depending on the ship you went
20 on. Some captains would stay up there, and
21 they'd point out the different areas, like -- you
22 know, they'd tell you stories that they heard
23 about Bear Cape, for example, Cape Hinchinbrook,
24 and they'd go up that way, and other captains
25 would just leave the bridge. One captain told me

1 it was like getting pilotage for the Pacific
2 Ocean. And I'd call him at the pilot's station.

3 Q What is that?

4 A Call him up there right before we got to Rocky
5 Point.

6 Q No, no, I mean it was like the Pacific Ocean.
7 What did that mean?

8 A Well, basically, I just took it as a, you
9 know, he was joking around, and basically, it's
10 that it was so open compared to running the East
11 Coast that it was -- that it was nothing.

12 Q In your opinion, do you have an opinion as to
13 the waters between, let's say, Rocky Point and
14 Bligh Reef as to their hazardous quality or
15 characteristics?

16 A Rocky Point and Bligh Reef is -- it's -- I'm
17 used to the East Coast, where you have -- where
18 you're constantly maneuvering for traffic and
19 you're constantly -- you know, maneuvering for
20 rigs and stuff, this area is not to me hazardous.

21 Q Now, you spoke about the bridge organization
22 manual, you have some experience with that from a
23 management standpoint?

24 A That's correct.

25 Q And I take it you also have experience from a

1 captain's standpoint?

2 A Yes, I do.

3 Q How would you characterize the bridge
4 organization manual?

5 A The bridge organization manual is nothing more
6 than a guide. It -- it gathers information, it
7 takes it out of -- what we had are Exxon marine
8 regs, and puts it all into one manual, so it's
9 easier to locate. But it's nothing more than a
10 guide.

11 Q Is the interpretation left to the person
12 reading the guide, as to what should be done
13 under particular situations?

14 A Oh yes.

15 Q And is that specifically true with respect to
16 a master interpreting that?

17 A Oh, yes, definitely.

18 Q The organization manual.

19 A Yes.

20 Q Are watch conditions, or the setting of watch
21 conditions, in the discretion of the master?

22 MR. COLE: Your Honor, again. I hate to keep
23 interrupting Mr. Chalos, but he continues his line of
24 leading questions, and I object to the leading nature
25 of his questions.

1 MR. CHALOS: Judge, I didn't think that was
2 leading, I'm asking him for a yes or no answer, without
3 suggesting an answer.

4 THE COURT: You did lead him, Mr. Chalos.

5 Q (Captain Mihajlovic by Mr. Chalos:) All
6 right, let me rephrase it. At whose discretion
7 aboard these Exxon vessels are watch conditions
8 set?

9 A Set by the master.

10 Q Would you agree or disagree with the
11 proposition that two masters looking at the same
12 situation may differ in what watch condition they
13 would set?

14 A Oh, definitely, there's no question about it.
15 As I said there, in 1974, the watch condition A,
16 B, C, D were in effect, and you go on one ship,
17 you might have to log it, the master would want
18 you to log, you're in watch condition A. You go
19 on other ships there, they really didn't care
20 whether you logged it, they wanted you to just
21 put down that you checked the compasses and
22 everything else, and that was it.

23 Q Now, have you read any testimony with respect
24 to this trial?

25 A Yes, I read Captain Beevers', Captain Greiner,

1 and I glanced over Mr. Kunkel's, Mr. Cousins',
2 and Harry Paul (ph.) -- Maureen Jones, a little
3 bit.

4 Q Now. You're familiar, are you not, with the
5 facts relating to the type of maneuvers that were
6 supposed to be made in this case?

7 A Yes, I am.

8 Q Okay. Do you have an opinion as to the
9 maneuvers that were made by Captain Hazelwood to
10 avoid the ice?

11 A Yes, the -- my opinion is that that was a --
12 it was done right after Rocky Point, basically,
13 he saw the ice, he came back to 200, and then to
14 180. That's a typical maneuver to avoid the ice.
15 You come down and you change course at Busby, to
16 go back -- either parallel or into the lanes, to
17 get around the ice, and then you make your way
18 back by the time you're down to Naked Island
19 there.

20 Q Do you have an opinion as to whether there was
21 sufficient room to make the turn back into the
22 lanes, if the turn was started abeam of Busby?

23 A Oh, yes, that was -- there was plenty of time
24 to bring the ship back into the lanes. You have
25 to understand that -- and this was explained to

1 me by pilots, the pilots that we talked to there,
2 about going around the ice, 'cause everyone has
3 ...

4 MR. COLE: Your Honor, I object if he's going
5 to bring out hearsay.

6 MR. CHALOS: I don't know what he's going to
7 say, Judge.

8 THE COURT: Well, that's the problem with the
9 narration form of testimony, so why don't you ...

10 Q (Captain Mihajlovic by Mr. Chalos:) All
11 right, let me ask you some specific questions.

12 A Okay.

13 Q You read the testimony about Captain Hazelwood
14 leaving the bridge and leaving Mr. Cousins in
15 charge of the watch, did you not?

16 A Yes, I did.

17 Q Do you have an opinion as to that maneuver?

18 A I have no problem with that.

19 Q Why is that?

20 A Just it's a very simple maneuver.

21 Q What simple maneuver are you talking about?

22 A I'm talking about coming down, the
23 instructions were to come down at Busby Island
24 and bring the ship back, change course and bring
25 the ship back into the lanes.

1 Q In your opinion, is that a maneuver that a
2 third mate is qualified to make?

3 A Yes. Oh, definitely.

4 MR. CHALOS: Your Honor, I have no further
5 questions of this witness at this time.

6 THE COURT: Shall we break? All right. Take
7 another break, ladies and gentlemen, don't discuss the
8 case among yourselves or with any other person, don't
9 form or express any opinions.

10 (0261)

11 (Off record - 11:25 a.m.)

12 (On record - 11:50 a.m.)

13 THE COURT: Mr. Cole?

14 CROSS EXAMINATION OF CAPTAIN MIHAJLOVIC

15 BY MR. COLE:

16 Q Good morning. I guess it's pretty close to
17 good afternoon, Captain Mihajlovic, correct?

18 A Yes, Captain Mihajlovic.

19 Q You have worked for Exxon for the past 15
20 years, correct?

21 A That is correct.

22 Q And you presently work for Exxon Corporation,
23 right?

24 A That -- that is correct.

25 Q Shipping Corporation, correct?

1 A Yes.

2 Q You became a permanent captain in 1986.

3 A That's correct.

4 Q And you began the Valdez run as a permanent
5 captain, after becoming a permanent captain in
6 1988, correct?

7 A No, I was -- I was -- I was a captain there
8 since 1984.

9 Q You first entered Valdez as a permanent
10 captain in 1988.

11 A I don't understand what you mean by "permanent
12 captain," a captain is a captain.

13 Q Well, in 1984, you made about nine different
14 trips, correct, in and out of Valdez?

15 A That's correct.

16 Q And that was as a relieving captain.

17 A Yes. Still captain, though.

18 Q That was as a relieving captain.

19 A Yes, yes, correct.

20 Q You were filling in for another captain.

21 A That's correct.

22 Q So it wasn't until 1988, when you were a
23 permanent captain, that you started coming into
24 Valdez.

25 A That's correct.

1 Q Now, you've known Captain Hazelwood for
2 approximately 14 years.
3 A That is right.
4 Q And did you work with Captain Hazelwood when
5 he was a captain?
6 A Yes, I did.
7 Q How many times did you work for Captain
8 Hazelwood?
9 A When he was captain -- once, I believe.
10 Q And did you work with him when he was a chief
11 mate?
12 A Yes, years ago, way -- 1974 or '5.
13 Q How long did you work for him then?
14 A About two months.
15 Q Did you work with him any other times?
16 A Not that I can recall.
17 Q And when you worked with him when he was a
18 captain, how long did you work with him?
19 A It was roughly two months.
20 Q That was on the East Coast?
21 A No, that was on the West Coast.
22 Q On this -- in the trade up here.
23 A Yes.
24 Q You would consider Captain Hazelwood a friend
25 of yours.

1 A Yes, I would consider him a friend of mine,
2 yes.

3 Q Have you ever been called upon to critique or
4 evaluate the -- and testify to the performance of
5 a captain aboard?

6 A No, I haven't.

7 Q I assume that you would find it difficult to
8 critique someone who was a friend of yours.

9 A You're not critiquing a friend, you're
10 critiquing an individual's actions, so I -- I
11 don't see any problem with that.

12 Q You wouldn't have any problem critiquing
13 Captain Hazelwood, even though he's a friend of
14 yours.

15 A No, I don't believe so.

16 Q You don't think that would have any impact on
17 your being objective.

18 A No.

19 Q And it wouldn't make any difference that you
20 work for Exxon Shipping Corporation right now,
21 that wouldn't play into your -- whether or not
22 you're objective in critiquing Captain Hazelwood.

23 A No, no, I don't believe so, no. I don't
24 understand the question.

25 Q Okay. Now, prior to the Exxon Valdez, and now

1 I understand according to your testimony, you had
2 never had pilotage for Prince William Sound.
3 A That is correct.
4 Q And as a master, none of your mates ever had
5 pilotage for Prince William Sound, correct?
6 A Except recently, the chief mate did. But
7 after the accident.
8 Q Yeah, but before the -- prior to the
9 grounding, none of your mates ever had ...
10 A No.
11 (0430)
12 Q Now, every -- you have to report, at a -- how
13 many -- you said you took about -- how many trips
14 did you make as a master in and out of Prince
15 William Sound, prior to the 1989 grounding?
16 A As a master. I would say -- it's hard to say,
17 I would say 25, 30. I really don't know, be
18 honest with you.
19 Q That's a rough estimation.
20 A It's rough, yes.
21 Q And every time you came in, would it be fair
22 to say -- and about eight or nine of those
23 happened in 1984, correct?
24 A That's correct.
25 Q So the rest of them would have happened in

1 1988.

2 A That's correct.

3 Q And every time you came into Prince William
4 Sound in 1988, at the three-hour mark, you
5 declared that you were a non-pilotage vessel.

6 A That's correct, yes.

7 Q And you were asked at that time, "Are you a
8 pilotage or a non-pilotage vessel?"

9 A That is correct.

10 Q And it never entered your mind that there
11 might be something strange about the fact that
12 the Coast Guard was asking whether you were a
13 pilotage or non-pilotage vessel, at that point.

14 A No, not at all. They'd done that since '77,
15 actually.

16 Q And a non-pilotage vessel is a vessel that
17 does not have a mate on board, or the captain,
18 with pilotage for that particular area.

19 A That's -- that would be considered a non-
20 pilotage vessel, yes.

21 Q And every time you left the Port of Valdez, in
22 these trips since 1988, you declared yourself a
23 non-pilotage vessel.

24 A No, actually the pilot would call up, and he
25 would declare the ship to be a non-pilotage

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vessel.

Q Yeah, but he did it after questioning whether anybody on the bridge, any of the mates, have pilotage, correct?

A Most likely, I would assume.

Q And you always, then, were required to abide by non-pilotage vessel rules, correct?

A Well, non-pilotage vessel rules as far as this letter, that's basically what we -- required to do that, yes.

Q Now, my understanding is that you never dropped the pilot off, or picked him up at Rocky Point. It was always north -- right around north or south of Busby light, is that correct?

A That is correct, yes.

Q And only vessels that had an officer with pilotage could drop or pick up the pilot at Rocky Point, correct?

A That would be correct, yes.

Q Now, did you tell the pilot where to get on and get off, or did he tell you where to get on and off?

A Well, he usually picked -- he usually told us, you know, "Keep coming, Captain, we'll proceed up, and we'll meet you up in this area," or it

1 might be the other way around, depending on the
2 weather.

3 Q Now, you were gone from the Prince William
4 Sound trade between some time in 1984 and 1988.
5 Would that be correct?

6 A Some time between the -- yes, some time
7 between the two, yes.

8 Q And the Bob Arts letter was written in 1986,
9 correct?

10 A That is correct, yes.

11 Q And when you read that letter, you understood
12 it to mean -- to refer to only changes in the
13 non-pilotage laws, correct?

14 A No, when I read this letter, over here, and
15 the way it had been proceeding, being in the
16 office, I assumed that it was waived, that there
17 was really no pilotage.

18 Q Would you please read the first sentence of
19 that letter?

20 A Sure.

21 Q Right there.

22 A "Effective September 1, 1986, the U.S. Coast
23 Guard requirement for daylight passage in Prince
24 William Sound for vessels without pilotage has
25 been waived."

1 Q Okay. Now, how does that letter, that
2 sentence right there affect pilotage vessels?

3 A Well -- are you saying that you're gonna -- to
4 me it's saying that it's pilotage or non-pilotage
5 vessels, for the simple reason you're not gonna
6 have pilotage vessels held to any higher
7 standards than a person who doesn't have
8 pilotage.

9 Q Okay.

10 A So you'd assume that.

11 Q You assume that this refers to pilotage and
12 non-pilotage vessels, even though it very clearly
13 says, "For vessels without pilotage"?

14 A That's correct, that doesn't make sense then.

15 Q Okay. Well, if it didn't make sense, did you
16 take the time to call the Coast Guard?

17 A I wouldn't have to call the Coast Guard, for
18 the simple reason that the Alaska Maritime Agency
19 is our agent, is our agent in there. And I
20 wasn't really concerned with pilotage or non-
21 pilotage as far as that I knew I didn't have
22 pilotage, so this letter I would look at from
23 that point of view.

24 Q So are you saying that it's clear as to
25 vessels without pilotage?

1 A It's clear for my vessel.

2 Q Your vessel.

3 A Yeah.

4 Q Okay. But you didn't check with the Coast
5 Guard.

6 A No. That's our -- Alaska Maritime Agencies,
7 that's their job. That's -- that would be like
8 me checking into stores, or anything else that
9 comes on the -- on the vessel. You don't do
10 that. They take care of that.

11 Q Okay, would you read the second sentence here
12 that says "All ... "

13 A "All non-pilotage vessels will be able to
14 transit from Cape Hinchinbrook to the pilot
15 station at all hours, as long as visibility
16 remains two miles or greater."

17 (0645)

18 Q Now, that sentence doesn't refer to pilotage
19 vessels, does it?

20 A No, it says non-pilotage vessels.

21 Q Is there any place in that letter that refers
22 to the regulations applying to a pilotage vessel
23 have changed?

24 A No. No, it just talks about -- about the non-
25 pilotage.

1 THE COURT: Mr. Cole, would you move that
2 exhibit back out of the way, please? Push it back?
3 Q Now, of course, you said that you interpreted
4 it to mean pilotage vessels.
5 A That is correct, yes.
6 Q And that's because you found this to be
7 inconsistent, is that correct?
8 A Yes, a little confusing.
9 Q And of course the easiest way to clear that up
10 would have been to call the Coast Guard
11 authorities in Valdez and ask them, "What is the
12 policy?" Correct?
13 A No, the easiest way would be to call my agent,
14 which I had done, and that's what he said was
15 -- was there. For me that is perfectly clear.
16 Q You talk to the Coast Guard every time you
17 come in and out of Prince William Sound, correct?
18 A I talk on Channel 13 to the traffic center.
19 Q Okay. You're in town, when you're in Valdez,
20 for approximately 13 to 14 hours while your
21 vessel's loading and unloading, correct?
22 A That is correct, yeah.
23 Q And you went into town, even, a couple times
24 when you were in Valdez, correct?
25 A That is correct, yes.

1 Q And when you went into town, you could have
2 easily gone right over to the Coast Guard and
3 asked them about whether pilotage or non-pilotage
4 had been waived. Correct?

5 A You could, but why would you? Why would I go
6 to town for -- you know, to go see the Coast
7 Guard? When I have a letter stating my
8 requirements, when I've talked to the Coast Guard
9 inbound?

10 Q Well, every time you talked to them, you told
11 them that you were a non-pilotage vessel.

12 A That is correct.

13 Q And they asked you, "Are you pilotage or non-
14 pilotage?"

15 A That's correct.

16 Q So there must have been some difference
17 between how they were treating pilotage and non-
18 pilotage vessels.

19 A Well, for my vessel right there, that was --
20 that was what I did.

21 Q Now, Alaska Maritime Agencies, as far as you
22 know, doesn't change the law or the regulations,
23 it just gives an interpretation of the
24 regulations, correct?

25 A It passes on information to the vessels.

1 Q It doesn't change the regulations, it only
2 interprets what they think are the regulations,
3 correct?

4 A I don't know whether they interpret, I think
5 they pass on the information that they receive
6 from, let's say, the Coast Guard. But they don't
7 make the law, no.

8 Q They don't make the law, all they do is
9 interpret what they believe it to be.

10 A Okay.

11 Q And of course this letter, when you saw it,
12 had been made in 1986, correct?

13 A That is correct.

14 Q And when you were coming into the Prince
15 William Sound for the first time, it was nearly
16 two years later.

17 A That's correct.

18 Q Now, the role of pilots in a particular area,
19 I'd like to talk about that for just a minute.
20 Pilots are there to provide their knowledge of
21 the area, correct?

22 A Yes, local knowledge.

23 Q Okay. They're an aid to the safe navigation
24 of your vessel. Would you agree with me on that?

25 A In some ways, yes.

1 Q And they know things like tides and currents
2 and particular hazards that exist in the area,
3 correct?
4 A That's correct.
5 Q And their job is to pass that along, that
6 information along to you, correct?
7 A That's correct.
8 Q And the purpose is to assure the safety of the
9 vessel, correct?
10 A That is correct.
11 Q Now, the Narrows up there. It's a one-way
12 zone, correct?
13 A That is correct.
14 Q And one of the -- what I mean when I say a
15 one-way zone, the purpose of what that means is
16 that only one tanker can be in that area at one
17 time, correct?
18 A Correct.
19 Q And the purpose is so that in that particular
20 area, you avoid collisions. Correct?
21 A Yes.
22 Q That would be fairly ...
23 A That would be fairly.
24 Q Now, the TSS system out in Prince William
25 Sound. It's divided into three lanes, correct?

1 A That's correct.

2 Q And they're about a mile wide.

3 A That's right.

4 Q And one of them is a northbound lane, and then
5 you have a separation lane, and then you have a
6 southbound lane, correct?

7 A Correct.

8 Q And those are designed to separate the traffic
9 that's coming in and out of Prince William Sound,
10 correct?

11 A Yes, the one and two ships a day, yes.

12 Q And the separation zone is in case you have to
13 move in and out, you can do it and still leave a
14 margin of safety.

15 A That would be -- that would be correct.

16 Q Would you agree with me, Captain Mihajlovic,
17 that all of these, the pilotage, the one-way
18 traffic in the Narrows, the TSS, is designed so
19 that -- to enhance the safety of tanker traffic
20 in Prince William Sound?

21 A Well, it -- it's designed to enhance the
22 safety and to keep the tankers out of the fishing
23 areas, too.

24 Q But primarily it's safety concerns, correct?

25 A Yeah. Okay.

1 Q Would you agree with me? I'm not trying to
2 put one over on you, now.

3 A Well, when I was running in here originally,
4 there was some talk about changing these lanes
5 over here, and moving the lanes because of the
6 local fishing areas. And that would not be
7 safety, that would be just a monetary thing.

8 Q But for the most part ...

9 A But for the most part, okay, yes.

10 Q It's safety.

11 A Yes.

12 Q Now, a pilot, when he comes on board your
13 vessel, he doesn't relieve you in your
14 responsibilities as a master, does he?

15 A No, he does not.

16 Q In fact, that's very well set out in the
17 operations manual, that's on the Exxon tankers.
18 The captain still has responsibilities, right?

19 A The bridge organization manual, yes.

20 Q That's your understanding of the way it should
21 be, correct?

22 A The captain -- the captain is never relieved
23 of any of his responsibility, but he can
24 designate it to other officers.

25 Q And there are certain times when you

1 designate, and I suppose there are certain times
2 when you don't designate authority to other
3 officers.

4 A True.

5 Q Would you agree with me on that?

6 A Yes.

7 (0920)

8 Q Now, when the pilot comes on board to navigate
9 your vessel, say, from Busby into the dock, you
10 don't expect him to do that from down in the mess
11 hall, do you?

12 A No.

13 Q You don't expect him to do that from in your
14 quarters, do you?

15 A No.

16 Q You expect him to be right on the bridge,
17 helping to safely navigate your vessel into the
18 dock, correct?

19 A Yeah. In this case over here, if he wanted to
20 go down below, I would take it over for him, for
21 a while.

22 Q How many time shave you seen in all your trips
23 ...

24 A Right.

25 Q ... a pilot leave the bridge while he was --

1 while you were navigating to and from the dock?

2 A Oh, quite -- quite a few times.

3 Q A lot of times?

4 A Our -- our head would be outside the bridge
5 area, which is outside, off the navigational
6 bridge.

7 Q All right.

8 A And I've seen pilots there gone for as much as
9 four, five minutes.

10 Q Four or five minutes, that's a long time.

11 A Well, I mean, you know, you asked the
12 question, that's what I mean.

13 Q Is that the longest time you saw them leave,
14 four or five minutes?

15 A Yeah, that's about it. And clips.

16 Q And that's to go to the restroom.

17 A That's correct. Uh-huh (affirmative).

18 Q But the rest of the time they're on the
19 bridge, correct?

20 A That's correct.

21 Q And how many times of those times was it
22 during the transit through the Narrows that the
23 pilots left?

24 A I couldn't recall.

25 Q Do you remember any of the pilots ever leaving

1 the bridge through the Narrows?

2 A I really couldn't recall, to be honest with
3 you.

4 Q And how many times during the docking process
5 did they leave the bridge?

6 A The docking process -- I don't ...

7 MR. CHALOS: Your Honor, I object. What would
8 be the relevancy of that question?

9 THE COURT: Objection overruled.

10 Q How many times during the docking process do
11 you ever remember a pilot leaving the bridge?

12 A I don't remember.

13 Q Do you ever remember him leaving during the
14 undocking process?

15 A No. No, not really.

16 Q How many times -- is the docking and the
17 undocking a fairly important time for the safety
18 of the tanker?

19 A I would say the docking more than the
20 undocking. Undocking's pretty cut and dried.

21 Q How many times have you not been on the bridge
22 during the docking process of one of your
23 tankers?

24 MR. CHALOS: Your Honor, I object again for
25 the relevancy. The evidence here is that Captain

1 Hazelwood was on the bridge during the undocking
2 process, and for quite a bit of time thereafter, so I
3 don't know what relevancy that ...

4 THE COURT: Objection overruled.

5 Q How many times have you not been on the bridge
6 during a docking process of your vessel, when you
7 were captain?

8 A I can't recall that I ever was not on the
9 bridge at the dock.

10 Q So you would agree with me that there are
11 certain circumstances where you're always on the
12 bridge.

13 A That's correct.

14 Q Now, I believe you said that you had left the
15 bridge on certain occasions while transitting in
16 and out of Prince William Sound.

17 A That is correct.

18 Q And did you say that you had left the bridge
19 during your transit of the Narrows?

20 A Yes, I have.

21 Q How long would -- how many times did you leave
22 the bridge during that?

23 A Well, it's hard to say. I know I left once,
24 once for sure, maybe a couple other times.

25 Q Once for sure, out of 25 round trips?

1 A Well, okay, yeah.

2 Q Okay, and how long were you gone?

3 A Just about the whole -- the whole transit.

4 Q The whole transit?

5 A Yeah.

6 Q And you understood at that time, obviously,
7 that you were not relieved of your
8 responsibilities for the safety of this vessel.

9 A That's right.

10 Q When the pilot was there, correct?

11 A That's correct.

12 Q And that was the only time you ever did that?

13 A What's that?

14 Q Left the bridge for the entire time of the
15 transit through the Narrows?

16 A I'm not -- for the entire time, yes.

17 Q Now, my understanding is that you have used
18 the autopilot in Prince William Sound once, maybe
19 twice. Is that correct?

20 A That's correct.

21 Q And that would be in all the 25 times that you
22 were -- navigated in and out of Prince William
23 Sound.

24 A That is correct.

25 Q And that was during a time when -- maybe once

1 when stowing the pilot ladder.

2 A That's correct.

3 Q You've navigated through ice, is that correct?

4 A Yes.

5 Q You didn't use the autopilot when you were
6 navigating through ice, did you?

7 A No, I didn't.

8 Q And when you were navigating through the
9 Narrows, did you use it through the Narrows?

10 A No.

11 (1130)

12 Q Now, my understanding is that -- well, let me
13 just ask you this. Is the safety of your crew
14 and your vessel the most important responsibility
15 a master has toward a vessel?

16 A Yes.

17 Q You would agree with me?

18 A Yes.

19 Q And I assume that you would take all
20 reasonable precautions to assure that your -- the
21 vessel that you captain proceeds in a safe
22 manner.

23 A That's correct.

24 Q Do you take -- I assume that -- you've been a
25 captain for going on six years, off and on.

1 A Right.

2 Q Two -- four full-time. Correct?

3 A That's correct.

4 Q The vessel that you captain right now,
5 presently, is called the Exxon San Francisco.

6 A That is correct.

7 Q And it's about 75,000 gross tons?

8 A No, 75,000 tons, dead weight.

9 Q Oh, I'm sorry.

10 A Gross would be about 200,000, 300,000, what
11 you're talking.

12 Q So the vessel that you do is about the third
13 size of the Exxon Valdez.

14 A That is correct.

15 Q But that doesn't diminish your responsibility
16 at all, as to assure its safety, just because
17 it's smaller, right?

18 A No.

19 Q And I assume that as a tanker captain who has
20 only been a permanent person for -- oh, four
21 years, you might even take a little bit more --
22 you might be even a little bit more cautious.

23 A I don't understand what you meant by
24 "permanent person."

25 Q Well, you were assigned as a ...

1 A 13 years I've been working with the company.
2 Q But you were a tanker captain on a permanent
3 basis since 1986, correct?
4 A Yeah, that's correct, okay.
5 Q I would assume that -- how many tanker
6 captains are you -- in priority-wise, are you on
7 the low end as far as the number of years you've
8 been on the permanent basis, or are you on the
9 high end?
10 A I guess just on the low end. On the low end.
11 Q And I assume that there are tanker captains in
12 the industry that have 15 or 20 years of
13 experience.
14 A Not that much with -- with Exxon. But in the
15 industry, yes.
16 Q Would it be fair to say that you might even be
17 a little bit more cautious because of your
18 inexperience as a tanker captain?
19 A That's possible.
20 Q And I assume that you don't take any
21 unreasonable or unnecessary risks when navigating
22 your vessel in a hazardous area. Would that be
23 fair to say?
24 A That would be fair to say.
25 Q Well, when I say hazardous area, I mean things

1 like you don't get in closer to navigating -- any
2 closer to shore when navigating close to shore
3 than you have to, correct?

4 A Hazardous area, as you're talking it, is very
5 hard to explain. You know, what's hazardous?
6 It's all relative. It's relative to maybe the
7 East Coast, maybe the West Coast, it's all
8 relative to where you've been. So I don't really
9 understand what you mean by hazardous, could you
10 ...

11 Q Okay, well, let me give you a couple examples.

12 A Okay.

13 Q When you are navigating your vessel, you don't
14 get any closer to shore than you have to.
15 Correct?

16 A That's correct.

17 Q And when you're navigating around ice, you
18 don't get any closer to the ice than you have to.
19 Correct?

20 A Correct.

21 Q When navigating in areas of high-density
22 traffic, where a lot of ships are coming and
23 going, I suppose you don't go any faster than
24 reasonably necessary. Correct?

25 A That's correct.

1 (Pause)

2 Q Now, as I understand it, you have encountered
3 ice how many times as a captain?

4 A Oh, three or four, somewhere around that area.

5 Q And in at least one of them, you insisted that
6 the pilot take you around the ice.

7 A I never insisted the pilot take me around the
8 ice, I told the pilot I'd like him to change
9 course to go around it.

10 Q But did you drop him off prior to getting to
11 it?

12 A Yes, I did.

13 Q Now, you have always diverted from up around
14 the ice, correct?

15 A That is correct.

16 Q And that's because you consider ice to be a
17 hazardous condition to your ship, correct?

18 A I consider that that area -- to divert, that
19 the thinnest ice, the smallest pieces of ice,
20 would be on the eastern side, with the most
21 drift. The other side would be the biggest
22 pieces. That's why I would divert.

23 Q You would consider it a hazardous condition.

24 A Yeah, okay.

25 Q Now, you indicated that the Exxon bridge

1 manual doesn't have -- can be interpreted in a
2 number of different ways, it's just kind of up to
3 the master, correct?
4 A That's correct.
5 Q When it says, "Within the limitations outlined
6 in paragraph 2.1.5H below, the master must be on
7 the bridge whenever conditions present a
8 potential threat to the vessel, such as passing
9 in the vicinity of shoals, rocks, or other
10 hazards which represent any threat to safe
11 navigation." Do you find that to be a provision
12 that the master can interpret however he wants?
13 A Could I see that?
14 Q Sure.
15 A It's very hard to read something without ...
16 Q I'm sorry.
17 A Go ahead. Okay, right here.
18 Q Uh-huh (affirmative).
19 A This part, "Within the limitations outlined"?
20 Q Uh-huh (affirmative).
21 A Okay, now what is your question?
22 Q Is that a provision that the master has a lot
23 of discretion in interpreting?
24 A Oh yes. Oh yes.
25 Q Lot of discretion.

1 A There's nothing in this manual, nothing in
2 this manual that will take anything away from the
3 master's judgement.

4 (1426)

5 Q So even if he's passing close to -- let me
6 read it exactly. Even if he's passing in areas
7 which present a potential threat to his vessel,
8 he has the discretion of whether or not he has to
9 be on the bridge.

10 A That's correct. He has to look at a hazard.
11 A hazard could be anything. Could be a huge sea
12 coming at you. Do you have to be called every
13 time a huge sea comes at you? No. So there is
14 discretion there.

15 Q But I assume you exercise that discretion with
16 the safety of your vessel in mind.

17 A That is correct.

18 Q And you don't take any unreasonable chances as
19 a tanker captain, correct?

20 A No, you wouldn't take any unreasonable
21 chances, no.

22 Q Now, you indicated you had no problem with
23 Captain Hazelwood leaving the bridge.

24 A That's correct.

25 Q Is that correct?

1 A That's correct.

2 Q I want to give you a hypothetical.

3 A Okay.

4 Q I want you to assume that you have pilotage.

5 Okay?

6 A Okay.

7 Q For Prince William Sound up to Rocky Point. I

8 want you to assume it's March 23, 1989, at about

9 11:40. You're captaining the Exxon Valdez, which

10 is a 209,000 -- is it ton vessel?

11 A Yeah, okay.

12 Q It's valued at \$150 million. You have

13 approximately a crew of about 20 that you're

14 responsible for their safety.

15 A Right.

16 Q You have a cargo of approximately 1.2 million

17 barrels, and you have drafts of 56 feet and a

18 quarter. And at that time, you're at full

19 maneuvering speed, because you've just dropped

20 off the pilot about 15 minutes before. It's

21 dark, and the weather's calm, but you bring your

22 lookout into the bridge, to the bridge wing,

23 because it's that dark.

24 This is the ice that you initially see in

25 front of you, and you make the choice to go

1 through the ice under that scenario.

2 A To go through the ice.

3 Q Go through the ice. Uh-huh (affirmative).

4 Where are you on your vessel when you're in the

5 middle of this ice?

6 A You're pointing to the wrong lane.

7 Q Okay.

8 A That lane? When I go through the ice I would

9 probably be on the bridge.

10 Q Probably, or you would be?

11 A Probably, depending on your -- you know, how

12 much concentration of ice there is.

13 Q The worst ice you've seen in Prince William

14 Sound.

15 A Well, then, yeah, then I would say I'd be up

16 on the bridge at that time.

17 Q And if you were just about to enter that ice,

18 where would you be?

19 A I might be on the bridge there ...

20 Q Might, or ...

21 A ... probably be on the bridge. I'd probably

22 be on the bridge.

23 Q Probably?

24 A Yes.

25 Q Okay. What is more important than the safety

1 of your ...

2 A There's nothing ...

3 Q ... vessel that would keep you off that

4 bridge?

5 A There's nothing more important than the safety

6 of my vessel. Take -- take -- I'm looking at it

7 from my ship. I have people on my ship that have

8 more experience than I do. They have 20 years as

9 second mate. Those people are quite capable to

10 take care of that, if I had to go down. They're

11 quite capable. I have no doubt at all about

12 that. So I'm looking at your hypothetical, and

13 thinking about how it applies to me, if you

14 understand.

15 Q Uh-huh (affirmative).

16 A So the experience level of a crew member is

17 excellent. I mean, my chief mate is sailing

18 captain while I'm here. So ...

19 Q What is more important than the safety of your

20 vessel?

21 A There is nothing more important than the

22 safety of the vessel.

23 Q And this is a hazardous situation, the worst

24 ice you've seen ...

25 A Correct.

1 Q ... and you might be on the bridge.

2 A That's correct.

3 Q Okay. And after you -- you were at this end,
4 you might be on the bridge, is that right?

5 A That's correct.

6 Q I want you to assume that you've decided to go
7 around the reef, or around the ice ...

8 A Uh-huh (affirmative).

9 Q ... and you've left the bridge. Or let's say
10 you're not. If this is Bligh, would you consider
11 this to be a hazardous situation at eight and a
12 half minutes?

13 A Yes.

14 Q How about at seven and a half?

15 A Yes.

16 Q And would you be on the bridge in a hazardous
17 condition like that?

18 A Yes.

19 Q How about at six and a half, is that a
20 hazardous condition?

21 A Yes. My -- I'm just looking at that, is the
22 vessel turning or anything?

23 Q I just asked you about those positions.

24 A Okay, yes. Yes, no question about it.

25 Q Now, I'd like to ask you another hypothetical.

1 A Okay.

2 Q You decide to turn, and take a heading of
3 approximately 200 degrees, and then take a
4 heading of 180 degrees.

5 A Yes.

6 Q Now, this 180 degrees will take you within .9
7 and 1.1 miles of Busby Island.

8 A That's correct.

9 Q It will take you within an even shorter
10 distance or the equivalent of the ice that you
11 see outlined in this. You have been informed
12 that in some circumstances, your helmsman, by
13 several authorities, by several people, that your
14 helmsman has trouble steering your vessel in
15 certain circumstances. Okay?

16 A Yes.

17 Q You proceed along the course of 180 degrees,
18 until about 11:52, when you place this vessel on
19 load program up. The vessel is also on automatic
20 pilot at this time, when you leave -- at 11:52.
21 At 11:53, your vessel is about two tenths of a
22 mile above Busby.

23 A Uh-huh (affirmative).

24 Q You've left the TSS zone completely.

25 A Uh-huh (affirmative).

1 Q And you're headed in a direction that would
2 cause you to run into Bligh. Correct?
3 A Yes. Okay.
4 Q You're headed toward a red sector. Correct?
5 A Right.
6 Q And you know a red sector is dangerous --
7 constitutes a dangerous area.
8 A Could be dangerous. Constitutes dangerous,
9 yes.
10 Q At 11:53, you would be on the bridge of your
11 vessel, wouldn't you?
12 A How is the person that is up there now? Is he
13 good or bad?
14 Q What person?
15 A Well, am I the only one up on the bridge now?
16 I don't ...
17 Q You have a third mate up there. And a
18 helmsman that you're aware of has problems.
19 A Well, for that ...
20 Q In some circumstances.
21 A For that hypothetical question, I'd have to
22 pretty much find out how well that third mate ...
23 Q What other information do you need?
24 A I will need how good the third mate is.
25 Q Let's say he has a second mate's license that

1 he's had for approximately two months, he has
2 worked as a third mate for about a year, sea
3 time.

4 A Time is no matter. You have people that are
5 good the first day they come out. You have
6 people that are bad after 30 years. You know,
7 forget about time. Is the guy good or is he bad,
8 that's what I want to know to make this decision,
9 not the time that he's up there.

10 Q So you're willing to risk the safety of your
11 vessel on one person.

12 A No, not at all.

13 Q Other than yourself.

14 A Not at all. I mean, I am saying there that
15 for your hyp -- to answer your hypothetical
16 question, I don't need how long the third mate's
17 been around, I need how good he is. Is he good
18 or bad?

19 Q Well, let's assume that he's good.

20 A Is he good?

21 Q Yes.

22 A Well, then, there's no risk.

23 Q Then you'd leave.

24 A Yes. I could leave, very well leave.

25 Q Okay. And if at 12:0 -- and you would leave

1 the instruction -- let's assume that you left the
2 instruction that Captain Hazelwood left. You're
3 aware of what that was, right?

4 A Somewhat, yes.

5 Q And you would leave for the entire transit
6 through that ice, through that maneuver, correct?
7 Is that what you're saying?

8 A I'm saying in a hypothetical case, yes. Yeah,
9 with no problem.

10 Q You would? Or you could? I want to know what
11 you would do.

12 A I would -- I'd have to see the ice, I'd have
13 to go around the ice, but yes, I'd prob -- I
14 probably would.

15 Q You would leave the bridge.

16 A I -- I would probably leave the bridge, yes.
17 If I had a -- good people.

18 Q And you work for Exxon.

19 A Yes, I do.

20 Q Thank you.

21 A You're welcome.

22 THE COURT: Mr. Chalos?

23 REDIRECT EXAMINATION OF CAPTAIN MIHAJLOVIC

24 BY MR. CHALOS:

25 Q Now, Captain Mihajlovic, do you believe Exxon

1 would agree or disagree with the testimony that
2 you just gave about leaving the bridge?

3 MR. COLE: Objection.

4 A I really don't know.

5 THE COURT: Just a minute, don't answer that
6 question.

7 Q All right, I'll withdraw the question. Let's
8 go back to the beginning of the cross-
9 examination. Mr. Cole -- let me start again.
10 Mr. Cole asked you about sailing as a relief
11 captain, do you recall that?

12 A Yes.

13 Q Is there any difference between a relief
14 captain and a captain?

15 A No, a captain is a captain.

16 Q Well, what's a relief captain?

17 A A relief captain is basically you go from ship
18 to ship to ship. You fill in -- there are two
19 regular captains assigned to a ship. So you
20 would go on that ship and you would fill in for a
21 while.

22 Q In other words, you don't have a permanent
23 ship assigned.

24 A That's correct.

25 Q But you're still a captain.

1 A That is correct.

2 Q And you're sailing on your master's license.

3 A That is right.

4 Q Now, I didn't ask you this on direct, but let
5 me ask you now. When you were sailing as a mate,
6 have you had occasion to observe masters on the
7 bridge?

8 A Oh yes.

9 Q Can you tell us about the general practice of
10 a master standing at the windows, the front
11 windows of the wheelhouse?

12 A Okay, well, when I was there, I was on the
13 Exxon North Slope. And the windows generally had
14 -- there's a sill, like -- basically like this,
15 with the window maybe here. Okay? So some of
16 these, they even made little pads or something
17 like that, you would stand over there like this.

18 Q Is it your habit to lean on the windowsill?

19 A Oh yes, either lean or sit down, have a chair
20 up there.

21 Q Have you observed captains leaning on the
22 windowsill?

23 A Oh yes.

24 Q On how many occasions?

25 A On occasions on the North Slope when I was

1 chief mate, and I do it myself.

2 Q Are you impaired, normally, when you're
3 leaning on the windowsill?

4 A No. I don't think so, no.

5 Q I'd like to speak a little bit about Exhibit
6 B, the letter from Mr. Arts. Let me put it in
7 front of you.

8 A All right.

9 Q Let me go back to my podium here. You
10 mentioned that when you got this letter, you
11 interpreted it as being the pilotage rules, did
12 you not?

13 A Yes.

14 Q Okay, what did you mean by the pilotage rules,
15 what did you understand the pilotage rules to be?

16 A Well, I had -- after receiving this letter, I
17 felt that the pilotage was just waived. And
18 there's been talk about that before in 1985, so
19 ...

20 Q What did you understand the rules were as they
21 applied to non-pilotage vessels?

22 A According to this letter?

23 Q Yes.

24 A Just the two mates on the bridge from Cape
25 Hinchinbrook up to Montague Point, and -- as long

1 as the visibility was two miles or greater.

2 Q Did you also understand that to mean that
3 someone with pilotage could travel Prince William
4 Sound with visibility less than two miles?

5 MR. COLE: Objection, leading. Objection,
6 leading.

7 Q Let me withdraw, let me rephrase it. Did you
8 have any understanding as to the difference in
9 the two-mile rule between pilotage and non-
10 pilotage vessels?

11 A No, I really didn't. I didn't know whether
12 the pilot -- I wasn't a pilotage vessel, so I
13 don't know what the pilotage vessels would do.

14 Q Now, let me ask you this, when you sailed as a
15 mate, a chief mate, second mate, third mate ...

16 A Right.

17 Q ... in Prince William Sound, were there ships
18 that had people with pilotage endorsements on
19 board?

20 A That's correct.

21 Q That was prior to 1984, right?

22 A That's correct, yes.

23 Q On those occasions, do you remember where the
24 pilot was picked up or dropped off?

25 A The pilot was picked up or dropped -- I think

1 two or three miles above -- two miles above Busby
2 Island, usually in this area right here, if I may
3 -- this area right here.

4 Q And that's basically the same area where you
5 picked up and dropped off a pilot, is it not?

6 A Basically, yes.

7 Q It really depended on the circumstances at
8 that time?

9 A That's correct.

10 Q Weather being a factor?

11 A Weather is a major factor, yes.

12 Q Now, I'd like to speak again a little bit
13 about the pilotage letter. You said that you
14 interpreted that letter as applying to both
15 pilotage and non-pilotage vessels we've been
16 describing.

17 A That's correct.

18 Q And what's the basis for that?

19 A Well, if -- let's say I had pilotage. And I'm
20 coming into Prince William Sound. And I have to
21 go by the pilotage regulations. It'd be easier
22 to say that my vessel was -- did not have
23 pilotage.

24 Q Why?

25 A Well, because then I'd have to go by this,

1 right here. I could go by from two mates up from
2 Cape Hinchinbrook to Montague Point, there would
3 have to be only one mate up on the bridge, until
4 the point where you pick up the pilot.

5 Q Well, did you believe that the regulations
6 -- if you read it and interpreted it as Mr. Cole
7 suggests, did you then believe that the
8 regulations for non-pilotage vessels were more
9 lax than those for pilotage vessels?

10 A Yes.

11 Q So you would just declare yourself a non-
12 pilotage vessel, is that what you're saying?

13 A That's correct.

14 Q In other words, in your interpretation, it
15 makes no sense, does it, or -- you're saying it
16 makes no sense to ask someone with no pilotage to
17 go all the way up here with one mate.

18 (2120)

19 MR. COLE: Your Honor, I object, to leading.

20 A That's correct.

21 Q And is that the basis ...

22 THE COURT: Mr. Chalos, objection sustained.

23 Rephrase your question.

24 Q I'm sorry, okay. Now, in that letter, it
25 talks about the pilots' station?

1 A Yes.

2 Q Is that correct? What is the pilots' station
3 as you know it?

4 A The pilots' station as I know it according to
5 the Coast Pilot is two -- two and a half miles
6 above Busby Island, somewhere around that area.

7 Q What is the Coast Pilot?

8 A Coast Pilot is a publication put out, that all
9 the ships have for all the ports of the United
10 States.

11 Q Did you have a Coast Pilot on board your ship?

12 A Yes, all ships have the Coast Pilot.

13 Q Okay, and where is the pilots' station
14 according to that publication?

15 MR. COLE: Objection, hearsay.

16 A It ...

17 THE COURT: Just a minute, just a minute. I
18 haven't heard him ask a question that might call for
19 hearsay yet.

20 MR. COLE: I assume that he's testifying
21 according to the book.

22 Q Well, I'll rephrase the question. Where is
23 the pilots' station as you know it?

24 A Just above Busby Island. Two -- I think it's
25 two miles.

1 Q And that's the general area where you drop off
2 and pick up the pilot?
3 A That's correct.
4 Q Now, when you received this letter, did you
5 rely on it?
6 A Yes, I did.
7 Q In 1988 when you received the text of this
8 letter, did you understand the regulations that
9 are set forth in there, or the situation that is
10 set forth in there with the existing pilotage
11 requirements?
12 A Yes, when I received this -- received the
13 context of this letter, it was pretty -- to me it
14 was obvious.
15 Q For 1988. In other words, it was written in
16 1986, but you understood ...
17 A Oh, yes, definitely.
18 Q ... to apply to 1988.
19 A Yes. Yes.
20 Q Now, you were asked about pilots knowing tides
21 and currents. Are there any significant tides
22 and currents in Prince William Sound?
23 A No, there's not.
24 Q Based on your knowledge of Prince William
25 Sound, would you say the navigational hazards are

1 well known and well marked?

2 A Oh yes.

3 Q I'd like to ask you a little bit about the
4 one-way zone. Mr. Cole indicated that in the
5 one-way zone, there's always one vessel, now, is
6 that correct?

7 A No, there's not one vessel, there's just one
8 tanker, but you could have small vessels in
9 there.

10 Q You could even have two tankers in there,
11 going the same way, couldn't you?

12 A Yes, as long as you stay further apart.
13 There's a restriction on the amount of space you
14 keep between the ships.

15 Q Now, you started to mention that in Prince
16 William Sound, there's only one or two ships a
17 day that come in, right?

18 A Yeah, one or two, maybe three.

19 Q Would you say the traffic ...

20 A That's -- that's high.

21 Q Would you say the traffic is light or heavy?

22 A Oh, it's light. Traffic is light.

23 Q Now, Captain Mihajlovic, when you sailed as
24 master in this area in 1987, '88, '89, did you
25 believe that you were being monitored by the

1 Coast Guard on radar?

2 MR. COLE: I'm going to object, it's outside
3 the scope.

4 A Oh yes.

5 MR. CHALOS: I think it goes to ...

6 THE COURT: I'll let him reopen the evidence,
7 you can have cross-examination of him.

8 Q (Captain Mihajlovic by Mr. Chalos:) Did you
9 believe you were being monitored?

10 A Yes.

11 Q Did you believe you were being monitored down
12 to Bligh Reef?

13 A Oh yes.

14 Q Did you believe -- what did you believe would
15 happen if your ship was standing into danger?

16 A I believed that they would let -- they would
17 inform me. Actually it happened almost -- once.

18 Q To you?

19 A Yes.

20 Q What happened?

21 A Well, we had come out from ice, and we had
22 come out past Bligh Reef, and the Coast Guard
23 informed me there that -- I think it was the
24 Overseas Juneau and the Exxon Valdez, were behind
25 inbound, and I told 'em what I was doing, coming

1 around, and he had the Overseas Juneau asked if
2 he would haul over into the -- this area
3 basically right here, and let me get back into my
4 traffic position.

5 Q At that time did you believe they were looking
6 at you on the radar?

7 A Oh yes. Yes.

8 Q Now, you spoke about at least one situation
9 where you left the bridge in the Narrows?

10 A That's correct.

11 Q At that time, did you leave the pilot up
12 there?

13 A Yes, I did.

14 Q With the mate?

15 A Yes.

16 Q And you also mentioned that pilots, in your
17 experience, on your ships, have left the bridge
18 area for -- I think you said four to five
19 minutes?

20 A That's -- that's correct.

21 (2370)

22 MR. COLE: Your Honor, I'm going to again
23 object to the leading nature of Mr. Chalos' question.

24 MR. CHALOS: Your Honor, this is just
25 foundation ...

1 THE COURT: I think you just recapped a
2 question and answer before, it's preliminary in
3 developing the next question, objection overruled.

4 Q (Captain Mihajlovic by Mr. Chalos:) Sir, do
5 you have an opinion as to whether something could
6 happen in a four- to five-minute period that the
7 pilot is off the bridge?

8 A If the pilot's off the bridge, anything could
9 happen, I mean, you know -- it could happen.
10 It's not likely, but it could ...

11 Q In any event, in those situations, how far was
12 the pilot away from the bridge area?

13 A My ship, over there, he was about 20 feet,
14 chart room back.

15 Q How long would it take him to get back to the
16 bridge if you had to get him?

17 A Probably about -- maybe five seconds or less.

18 Q What would you have to do to get him back to
19 the bridge, just basically go knock on the door
20 and say, "Come back"?

21 A Yeah, you'd have to -- in that case, you'd
22 have to, there's -- there's no telephone in the
23 bathroom, so you'd have to have somebody go back
24 and knock on the door.

25 Q And he'd have to do whatever he had to do in

1 there and come out, right?

2 A Right. Come back, yes.

3 Q Okay. Now, when you left the bridge in the

4 situations that we've described, where did you

5 go?

6 A I went down to my -- in that one case that I

7 was talking about, leaving the bridge in the

8 Narrows, I had to go down to the radio room, to

9 make a call -- I was going out to lighter the

10 Exxon Valdez, we were the second ship, and I had

11 to make a call to the office, because they wanted

12 us to go around Glacier Island and drift for 12

13 hours. I didn't think that was appropriate, to

14 have the pilot for 12 hours and then dock the

15 next morning.

16 Q Who wanted you to go around?

17 A The Coast Guard.

18 Q Now, is the radio room at the next level on

19 your ship?

20 A No, the Exxon San Francisco is designed -- it

21 might be kind of hard to explain to you ...

22 Q You want to draw it or something?

23 A If I may.

24 Q Well, let me ask you this. How far away were

25 you from the bridge in that instance?

1 A Well, let's see, there's about three levels
2 missing on the San Francisco, so one level above
3 the -- one level above the main deck.
4 Q So if you were needed, you could get back
5 there in a minute?
6 A Yes.
7 Q Were you close to a telephone if you were
8 needed?
9 A Oh yes. Yes.
10 Q And if something was happening on the bridge
11 and you were needed, what would you expect the
12 mate or the pilot to do?
13 A Oh, to call me.
14 Q Is that your standard instructions?
15 A Oh yes.
16 Q Is that standard instructions as you know it
17 from every master?
18 A Oh yes.
19 Q Now, there's been testimony in this case, I'll
20 put it to you in a hypothetical form, that the
21 autopilot was put on at 2350, 11:50, and taken
22 off at 2353, when the vessel was north of Bligh
23 Reef. Do you have an opinion as to whether that
24 was a hazardous maneuver?
25 A North of Busby Island, you mean?

1 Q Yes. Busby Island, right. Sorry.

2 A No, it's not hazardous at all.

3 Q Do you have an opinion as to the use of the
4 autopilot for three to five minutes, let's say,
5 at the most?

6 A No. No, I've used it myself.

7 Q You've studied the testimony in this case?

8 A Some of it, yes.

9 Q You said you read Mr. Kunkel and Mr. Cousins,
10 Mr. Beevers.

11 A That's correct.

12 Q Okay. Do you have an opinion as to whether
13 the autopilot being on for three to five minutes
14 had any role in this grounding?

15 A No.

16 Q You don't have an opinion?

17 A Well, I have an opinion on it.

18 Q What is that opinion?

19 A The answer is no.

20 Q The answer is no?

21 A I don't believe that the autopilot had
22 anything to do with this collision, no. This
23 grounding.

24 Q Now, you also know from the testimony that you
25 read that the vessel was approximately one mile

1 off Busby Island?

2 A Yes.

3 Q When she was abeam? Do you consider the one-
4 mile distance to be hazardous?

5 A No.

6 Q You also, I take it, read that she was on
7 course 180 at that time. Do you have an opinion
8 as to whether that particular course is a
9 hazardous course?

10 A No. No, not at all.

11 Q Normal course for avoiding the ice?

12 A Normal course for avoiding the ice, normal
13 procedures.

14 Q You also undoubtedly read that the speed of
15 this vessel at that time was about -- coming up
16 to 11.5 knots. Do you have an opinion as to that
17 speed in terms of hazard?

18 A No, there's no -- I have no problem with that
19 at all, no.

20 Q When you avoided the ice, how fast was your
21 vessel traveling?

22 A When I avoided the ice, it was up to around
23 12.

24 Q Normal speed for going around ice?

25 A Yes, actually a little slower.

1 (2625)
2 Q Now, do you have any opinion as to whether any
3 of the maneuvers that were made by Captain
4 Hazelwood were prudent or imprudent?
5 A Do I have any opinion of it?
6 Q Yes.
7 A No. I have an opinion on it, but I don't -- I
8 don't think there was anything wrong with it.
9 Q Now, your ship, the Exxon San Francisco, is, I
10 think you said, 75,000 tons?
11 A That is correct.
12 Q What's her length, though?
13 A 864 feet.
14 Q Which is about 100 feet shorter than the
15 Valdez.
16 A Than the Valdez, yes.
17 Q She's just not as wide.
18 A That's right, I'm only 125 feet wide.
19 Q I'd like to speak a little bit about your
20 testimony with respect to the ice. You said that
21 in your experience, the eastern or leading edge
22 of the ice here is generally thinner than what
23 you would find in the southbound lane?
24 A That is correct.
25 Q Does that put any role at all in why one would

1 divert around ice?

2 A That is correct.

3 Q Now, at the times that you saw ice, you didn't
4 -- did you see ice as a sheet, or did you see it
5 as pieces of ice?

6 A It's pieces of ice, you know.

7 Q And how would you describe the pieces that you
8 saw in the eastern edge, or the leading edge of
9 it?

10 A Well, the leading edge of it usually is very
11 -- they're smaller pieces, it's the easier ones
12 should you have to turn into the ice, then you
13 could go through it with the least amount of
14 danger.

15 Q Or just maneuver a little bit around?

16 A Just maneuver a little around it, yes. It's
17 -- that is the normal procedure.

18 Q Now, Mr. Cole gave you -- strike that. Let me
19 show you this exhibit again, that Mr. Cole showed
20 you, Exhibit BU?

21 A Uh-huh (affirmative).

22 Q Mr. Cole asked you if, whether at eight and a
23 half minutes, or seven and a half minutes, or six
24 and a half minutes after midnight, in the
25 situation outlined on this exhibit, whether you

1 would be on the bridge, and your answer was yes.

2 A That's correct.

3 Q Would your answer be different if you didn't

4 know that the vessel was in this area at this

5 particular time? In other words, you had

6 assumed, or were told that the vessel started its

7 turn back at Busby Island, like ...

8 A Oh, yes, my answer would be different. If I

9 didn't know it was there, yes, it would be

10 different.

11 Q Now, you read testimony that Captain Hazelwood

12 asked the mate to call him and let him know when

13 he started his maneuver. Do you remember that?

14 A Yes.

15 Q Okay. And you remember that the third mate

16 Cousins in fact called at 2357 and said,

17 "Captain, I've started my maneuver."

18 A Uh-huh (affirmative).

19 Q Now, is that the type of call you would expect

20 to get from a mate with whom you left

21 instructions?

22 A Yes.

23 Q If you'd gotten that call, what would that

24 tell you?

25 A It would tell me that he was doing the

1 maneuver.

2 Q And would your mind be put at ease?

3 A Yes.

4 Q Now, there was some testimony -- or Mr. Cole
5 outlined a situation to you involving a helmsman
6 who had problems steering, okay? In your mind is
7 there a difference between steering and following
8 a helm order ...

9 A Yes.

10 Q ... like a 10-degree right rudder?

11 A Yes.

12 Q What's the difference in them?

13 A Well, the difference on a -- on a helm order
14 is, a helm order is just -- you give a right 10
15 rudder command, for example, or a right five.
16 That's a rudder command. You just turn the
17 wheel, you line up the rudder angle indicator on
18 10, which is the rudder, and that's -- that's the
19 extent of it.

20 Now, the steering is actually different,
21 because as the vessel swings, you have to apply
22 counter-rudder to it, which is rudder put the
23 opposite way, to slow the swing down, and you
24 have to bring her in and then you have to steady
25 her up there. That -- that's different.

1 Q All right, which would you say is more
2 difficult?
3 A Oh, if you had to steer a course, that's --
4 that would be -- that would be a lot more
5 difficult than a rudder angle.
6 Q How difficult is following a 10-degree right
7 rudder command?
8 A I'm sure anybody here could do that. Put 'em
9 on the ship there -- not difficult at all.
10 Q And how difficult is it carrying out that
11 task?
12 A Not difficult at all.
13 Q Lastly, Mr. Cole asked you about the course
14 that this vessel was steering, 180 at the time
15 they got abeam of Busby, and he indicated that
16 that course would be taking you down towards
17 Bligh Reef. Do you recall that?
18 A That is correct.
19 Q Now, when you were in the Port of Valdez, and
20 you were on course 270, you're doing about full
21 sea speed in that area?
22 A In that area to bring her up, yes. About 12
23 knots.
24 Q Okay. If you don't make the course change to
25 get into Entrance Island, you're going to wind up

1 on the shore here, are you not?

2 A That's correct.

3 Q And when you're down in this arm steering --
4 219? Is that right?

5 A That's 218, 219, yes.

6 Q If you don't change course, what happens?

7 A You'll hit Naked Island.

8 Q In other words, every course that you may be
9 steering in Prince William Sound at one time or
10 another is taking you towards land, right?

11 A That is correct.

12 Q And you're going to wind up hitting land
13 unless there's a course change.

14 A That is correct.

15 Q I have no further questions.

16 (2961)

17 RECROSS EXAMINATION OF CAPTAIN MIHAJLOVIC

18 BY MR. COLE:

19 Q There's nothing in that letter that you have
20 in front of you that changes the requirements for
21 pilotage regs, is there? For pilotage vessels,
22 is there?

23 A No.

24 Q That letter was written in 1986, correct?

25 A That is correct.

1 Q And you relied on it in 1988, correct?

2 A That is correct.

3 Q And you didn't ask, or call a Coast Guard

4 person to determine whether or not that was still

5 the policy, correct?

6 A That is correct.

7 Q Pilotage laws, one of the purposes of pilotage

8 laws is to aid in the safe navigation of tankers.

9 Do you agree with me on that?

10 A Yes.

11 Q And TSS zones are designed to aid in the

12 safety of the vessel, correct?

13 A Correct.

14 Q And it seems to me that you believe that

15 there's no reason to have pilotage in Prince

16 William Sound, is that correct?

17 A That's my opinion, yes.

18 Q So anybody who has pilotage or TSS or VTC is

19 being overly safe, is that correct?

20 A Anybody that has ...

21 Q If that's what we have in Prince William

22 Sound, those people who have instilled that

23 system are being overly cautious.

24 MR. CHALOS: Objection, Your Honor. No

25 foundation for whether they're cautious, overly

1 cautious, not cautious.

2 THE COURT: Rephrase your question, and I
3 still don't understand what you're trying to get at.

4 Q Policies designed to have pilots aboard
5 vessels, one-way zones, speed limits, separation
6 zones, are designed to promote safe navigation of
7 tanker vessels in Prince William Sound. Do you
8 agree with that?

9 A Yes.

10 Q And to do away with that would make this less
11 safe.

12 A No.

13 Q Would you agree with that?

14 A No, I don't agree with that.

15 Q Where do you live?

16 A I live in New York. Centerport, Long Island.

17 Q How long have you been here in Anchorage?

18 A Since February 28.

19 Q And you've talked with the defense attorneys
20 in this case?

21 A Yes, I have.

22 Q In fact, I'm sure you have even talked about
23 this hypothetical that I talked with you about.

24 A I might have, yes.

25 Q You might have, or you did?

1 A I don't remember. There's been so many -- so
2 many things that I've talked to 'em about that I
3 really wouldn't remember this hypothetical that
4 you just gave me.

5 Q The way I understand your testimony on
6 redirect is that you evaluated Captain
7 Hazelwood's conduct throughout the passage of
8 this -- from the passage out to where it
9 grounded, and you find nothing wrong with
10 anything that he did. Is that correct?

11 A That's correct.

12 Q What about if the testimony in this case was
13 that Captain Hazelwood was in a bar from 4:15 and
14 drank, and stopped drinking -- he drank until
15 approximately quarter to eight, when he stopped.
16 Do you have an opinion on whether that's good or
17 proper or improper?

18 THE COURT: Don't answer the question.

19 MR. CHALOS: Yes, I object, Your Honor, unless
20 he gives a little more foundation. He could have been
21 in a bar, could have had one drink, could have had soda
22 ...

23 THE COURT: Why don't you track the evidence
24 on that?

25 Q (Captain Mihajlovic by Mr. Cole:) The

1 evidence is that Captain Hazelwood was in a bar
2 from, say, 1:45 to 2:45, and, say, then arrived
3 back at about 4:15, he had two drinks the first
4 time he was in there, he came back, had several
5 drinks until approximately seven, 7:15, went to
6 another bar from there and had another drink
7 there, and left at about quarter to eight, and
8 arrived back at the ship and took the helm. Do
9 you have an opinion about that?

10 A I'm totally confused.

11 (3217)

12 MR. CHALOS: I object, Your Honor.

13 THE COURT: Objection overruled, I haven't
14 heard any grounds of its relevancy or foundation, it's
15 overruled for those grounds.

16 MR. CHALOS: The reason I'm objecting is, I
17 take it Mr. Cole has given him a hypothetical, because
18 there's certainly a lot of dispute as to the evidence
19 of when Captain Hazelwood was in the bar.

20 THE COURT: He's asking a question based on
21 his view of the evidence, and I think it's within the
22 realm of the evidence, so I'm going to let it stand.

23 Q (Captain Mihajlovic by Mr. Cole:) Do you have
24 an opinion about that?

25 A Could you please go over that again, you said

1 that he had a couple of drinks from 1:45 to 2:45,
2 is that correct?

3 Q That's correct.

4 A And then I -- you talked about other places
5 ...

6 Q And then he had -- came back into the bar at
7 4:15 ...

8 A Okay.

9 Q ... had a couple more drinks, until 7:00, and
10 then he went to another bar and had another drink
11 there, and left that bar at about quarter to
12 eight, and made it back to the ship around 8:25.

13 A Okay. Now what's your question?

14 Q My question is is that a violation of Coast
15 Guard regs?

16 MR. CHALOS: Your Honor, that wasn't his first
17 question.

18 THE COURT: That wasn't your question, Mr.
19 Cole, you asked him about an opinion he might have.

20 Q Okay, do you have an opinion on whether that's
21 proper conduct by a tanker captain master for the
22 Exxon Shipping Company?

23 A It's something I probably wouldn't do, no.

24 Q If you would be willing to go -- in my
25 hypothetical, if you would be willing to go below

1 the bridge, you must have believed, then, that
2 that would be what Exxon Shipping Company would
3 call an A watch stander type watch, correct?

4 A Watch condition A. Yes.

5 Q Is that right? In other words, you would
6 consider that a watch condition A.

7 A That's correct.

8 Q And do you know who Captain Deppe is?

9 A Yes, yes, Captain Deppe, I know who Captain
10 Deppe is.

11 Q And you've sailed with him before?

12 A I relieved him once on the Dayton (ph.).

13 Q Do you consider him a good tanker captain?

14 A I don't know, I've never sailed with him. I
15 relieved him.

16 Q Do you have any reason to believe that he's
17 not a good tanker captain?

18 A No.

19 Q And if he said that he would be on the bridge
20 during that time, you would disagree with him.

21 A Oh, it's up to the master, if he -- if he
22 thinks that in that hypothetical that he should
23 be up on the bridge, yes.

24 Q If he said he would be up there, you would
25 disagree with him, correct?

1 A No. No, that's his opinion. His opinion is
2 ...
3 Q And if his opinion is different than yours,
4 you would disagree with him, correct?
5 A I wouldn't disagree with him, that's his
6 opinion. My opinion would be, maybe I wouldn't
7 be up there. His opinion would be that he would
8 be up there.
9 Q You said ...
10 A But as far as our opinions would disagree,
11 yes.
12 Q You would disagree.
13 A But I wouldn't disagree with -- yeah.
14 Q You would disagree with him.
15 A Okay.
16 Q If he said he would be up there and you said
17 you wouldn't, you would be disagreeing.
18 A Okay. Okay, we would be disagreeing, yes.
19 Q Do you know who Captain Stalzer is?
20 A Yes.
21 Q And you've sailed with him before?
22 A No.
23 Q Have any reason to believe he's not a good
24 tanker captain?
25 A I have no reason at all.

1 Q And if he testified that it was his
2 understanding that the entire Prince William
3 Sound passage, that would be a watch type C at
4 least, you would disagree with him on that.

5 A Yes.

6 Q And if he said that he would be on the bridge
7 under a certain situation like that, you would
8 disagree with him on that, correct?

9 A Correct.

10 Q And if another tanker captain who had been
11 coming in and out by the name of Captain Beevers
12 testified that a tanker captain should be on the
13 bridge during this entire time, you would
14 disagree with him. Correct?

15 A Correct.

16 Q And if Captain Walker had come in here and
17 said that his personal philosophy would have been
18 to be on the bridge in this situation, you would
19 disagree with him.

20 A That's correct.

21 Q I have nothing further.

22 MR. CHALOS: Just a few questions, Your Honor.

23 REDIRECT EXAMINATION OF CAPTAIN MIHAJLOVIC

24 BY MR. CHALOS:

25 Q Captain Mihajlovic, Mr. Cole asked you about

1 the VTS system being a way to ensure safety, he
2 asked you about the pilotage regulations being a
3 way to ensure safety, was the Coast Guard
4 monitoring system, that is, the Coast Guard
5 monitoring vessels on their radar also part of
6 the safety system?

7 A That is correct.

8 Q And that was installed for the purpose of
9 ensuring that vessels don't run aground or run
10 into each other?

11 A That is correct.

12 Q Now, Captain Mihajlovic, are the navigational
13 risks south of Rocky Point after you drop off the
14 pilot any different for a pilotage vessel as
15 opposed to a non-pilotage vessel?

16 A No, there's no difference.

17 Q No difference at all.

18 A No difference.

19 Q So whether you have pilotage or not, the risks
20 are the same.

21 A That is correct.

22 Q And the way you interpret the pilotage
23 regulations, all you need is one man on the
24 bridge south of Rocky Point.

25 A That is correct.

1 Q Now, Mr. Cole asked you about being here since
2 the 28th of February.
3 A That is also correct.
4 Q Was it your understanding that you would
5 testify sooner than you have testified?
6 A That's why I came up here, I left my vessel to
7 come up here the 28th to testify the 1st and the
8 2nd.
9 Q And it wasn't your fault that you didn't come
10 in until today, was it?
11 A No.
12 Q Now, you said that you as a matter of
13 preference wouldn't drink ashore.
14 A That's correct.
15 Q Does the fact that someone might, make it
16 improper?
17 A No.
18 Q Speaking about the bridge organizational
19 manual, I think you've testified already to this.
20 Different captains can interpret it different
21 ways?
22 A That is correct.
23 Q And if Captain Deppe interpreted it one way,
24 and Captain Stalzer interpreted it either the
25 same way or a little bit different, that would be

1 their prerogative.

2 A That is correct.

3 Q And that was ...

4 MR. COLE: Your Honor, again, I'm going to

5 object to the leading nature of Mr. Chalos' questions.

6 Q Sir, do you have an opinion as to the

7 interpretation given by Captains Deppe, Stalzer,

8 and Beevers as to what they would have done under

9 the circumstances that we've described, in

10 hindsight?

11 A Could you repeat that, please?

12 Q Yeah, do you have an opinion as to the things

13 that Captains Deppe, Stalzer, and Beevers said

14 they would have done, in hindsight? I mean, does

15 the fact that it's hindsight play any role?

16 A Yes, I -- I feel it does.

17 MR. COLE: Objection, leading.

18 THE COURT: Objection overruled. Go ahead.

19 Q Go ahead.

20 A I feel that definitely that is the case, I

21 mean ...

22 Q What is the case?

23 A Well, that knowing what happened, knowing the

24 grounding, yes, you -- you're going to, you know

25 -- you're not gonna say what exactly -- well,

1 maybe you wouldn't do it, but now definitely
2 you're gonna do it, it basically the idea now,
3 you know? I know that the Valdez ran aground, I
4 was alongside it taking the cargo off, it -- you
5 know, it -- it would affect my decisions there
6 that I'd made earlier, I'm sure.

7 Q Well, even knowing that the Valdez ran
8 aground, you still hold the opinion that what
9 Captain Hazelwood did on that particular night
10 was not reckless.

11 A No. That's -- that's correct.

12 Q No further questions.

13 THE COURT: Sir, I've got just a couple
14 questions for you.

15 A Sure.

16 THE COURT: From Bligh Reef into the port
17 where you would berth a vessel, are there any
18 visibility restrictions for pilotage vessels that
19 you're aware of?

20 A From Bligh Reef in?

21 THE COURT: Yes.

22 A Just the ones there for the two-mile, for me.

23 THE COURT: For pilotage vessels.

24 A Oh, for pilotage vessels. No, I'm really not,
25 sir.

1 THE COURT: Are you -- "I'm not" what?
2 A I'm not -- I'm not familiar with the pilotage,
3 for the pilotage vessels, whether there's a
4 restriction there for that or not. I don't
5 believe there is, though.
6 THE COURT: Okay, so with the Arts letter, the
7 Exhibit B, are there visibility restrictions for non-
8 pilotage vessels?
9 A Well, you would have the two-mile -- two-mile
10 visibility restriction.
11 THE COURT: Okay, is that a difference between
12 pilotage and non-pilotage vessels, even under the Arts
13 letter?
14 A I'm really not familiar with the pilotage --
15 if you have pilotage, sir.
16 THE COURT: And you mentioned your vessel was
17 75,000 tons?
18 A That's correct.
19 THE COURT: The Exxon San -- tell me, what is
20 the difference between dead weight tons and gross tons?
21 I don't understand the different terms.
22 A Well, gross tons is -- you really don't go by
23 gross tons. Dead weight tons is the weight of
24 the cargo on the ship. Then there's displacement
25 tons, which is the weight of the cargo, the ship,

1 everything. Gross tons is something that you
2 -- you put on the pilot receipt there and they
3 -- they take away certain spaces. It really
4 doesn't have anything to do with how much the
5 vessel weighs.

6 THE COURT: Okay, when we've been hearing that
7 the Exxon Valdez is in excess of 200,000 tons, are we
8 talking about gross tons or dead weight tons?

9 A What we're talking about is -- if you want the
10 weight of the vessel, you're talking about
11 209,000 dead weight tons, sir. Like mine's
12 75,000 dead weight tons.

13 THE COURT: And that's with the cargo weight,
14 is that what you're saying?

15 A That's the weight of the cargo, right. Then
16 you add the weight of the ship.

17 THE COURT: Okay. Thank you. That's all the
18 questions I have. You're excused.

19 A Okay, thank you.

20 THE COURT: Counsel approach the bench.

21 (Whispered bench conference)

22 THE COURT: We'll recess a tad bit early
23 today. I've been informed from reliable sources that
24 the volcano has erupted again, coming this direction,
25 and so we'll give you a little jump start on the

1 volcano. We'll see you tomorrow at 8:15. Don't
2 discuss this case among yourselves or with any other
3 person, do not form or express any opinions concerning
4 the facts. Remember my instructions regarding media
5 sources and not being exposed to them. We'll see you
6 tomorrow, be safe.

7 Anything you need to take up, counsel? We'll
8 stand in recess.

9 (3993)

10 (Off record - 1:06 p.m.)

11 ***CONTINUED***

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