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

STATE OF ALASKA,

Plaintiff,

vs

JOSEPH HAZELWOOD,

Defendant.

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

OMNIBUS HEARING  
DECEMBER 11, 1989  
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VOLUME VIII

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H. & M. Court Reporting  
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**ARLIS**  
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Anchorage Alaska

BEFORE THE HONORABLE KARL JOHNSTONE  
Superior Court Judge

Anchorage, Alaska  
December 11, 1989

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H & M Court Reporting  
510 "L" Street, Suite 650

STATE OF ALASKA VS. JOSEPH HAZELWOOD  
OMNIBUS HEARING (12/11/89)

1288

1 PROCEEDINGS

2 DECEMBER 11, 1989

3 (Tape: C-3523)

4 (0767)

5 THE CLERK: Now in session.

6 THE COURT: Please be seated. This time set  
7 for argument on defendant's motions. I have received  
8 the proposed findings by both defendant and the state  
9 and am going through them. You can have as much as  
10 time as you reasonably like.

11 It seems to me, in this situation the state  
12 has a certain burden here and I'm not sure how to  
13 allocate the argument, but I'll allow both sides equal  
14 full opportunity to address issues. I would suggest,  
15 unless you two have a better way, that Mr. Linton would  
16 go first.

17 MR. FRIEDMAN: Seems right, Your Honor.

18 THE COURT: Thank you.

19 (0823)

20 ARGUMENT BY PLAINTIFF

21 MR. LINTON: Judge, to this point we've heard  
22 about the theory that all of this flowed from a single  
23 report.

24 The defense theory is this, that all of this  
25 flow investigation branched out from a report of an oil

1 spill.

2 The state has at least two separate theories.

3 Number one, this really stemmed from a report  
4 of a grounding, or at least equally stemmed from a  
5 report of a grounding, so that the dot which they say  
6 is a report of an oil spill, is actually a little  
7 circle that contains both the report of an oil spill  
8 and the report of a grounding. And that the report of  
9 the grounding alone would have been independent to  
10 produce the same line of investigation.

11 There's an alternative here. The alternative  
12 theory is that the Chevron California some time after  
13 the spill would have discovered the Exxon Valdez  
14 aground even if the Captain had not reported it. And  
15 that that would have led to an investigation and that  
16 that investigation reasonably could be said to have  
17 resulted in the same information with a certain bit of  
18 exception; some little time period in here where some  
19 parts of the investigation may be time sensitive.  
20 Things might not have been discovered.

21 And that the role of the court here is, not  
22 only to determine whether, in fact, this would have  
23 been discovered and whether the investigation would  
24 have been as large, but more properly to define what,  
25 if anything, should be excluded by virtue of being time

1 sensitive. That is, things which would not have been  
2 discovered but for the earlier report.

3 Besides the Chevron California reporting,  
4 however, there was another, almost equally likely,  
5 opportunity to discover the same evidence. And that  
6 came from the Coast Guard radar. That is, the  
7 independent source theory that we have that there was a  
8 report of a grounding was based on testimony of Coast  
9 Guard officials and Dan Lawn of the ADEC. But they  
10 would have responded to a report of a grounding.

11 But their evidence is germane to a second  
12 issue, Judge. That is, had the Coast Guard not heard  
13 by 1:00 a.m. that the vessel was not abeam Naked Island  
14 as it said and had Mr. Blandford discovered that on the  
15 radar, then presumably the same testimony bears the  
16 fact that they, the Coast Guard, would have responded  
17 to the grounding even if there had been no call from  
18 the Exxon Valdez as to its status or as to oil in the  
19 water. So that the focus of these proceedings really  
20 should be defining what kind of evidence fits in the  
21 area that would not have been discovered but for the  
22 report of the oil spill.

23 Let me talk about the independent source  
24 theory just a second. Judge, it's interesting to note  
25 that, when Congress enacted 13.21.B(5), they said any

1 person in charge of a vessel or an on-shore facility or  
2 an off-shore facility, shall, as soon as he has  
3 knowledge of any discharge of oil or hazardous  
4 substance from such vessel or facility in violation of  
5 paragraph 3, immediately notify the appropriate agency  
6 of the United States government of such discharge.

7 In defining what constitutes an on-shore  
8 facility in 13.21.10, in the definition section which  
9 preceded all of this, on-shore facility means end  
10 facility, including but not limited to, motor vehicles  
11 and rolling stock of any kind located in, on, or under  
12 any land within the United States or other submerged  
13 land.

14 On-shore facility as opposed to off-shore  
15 facility, includes motor vehicles. What it means is  
16 that, if -- excuse me.

17 (Side conversation)

18 If a tank truck is carrying fuel oil and gets  
19 into an accident and happens to not only spill oil but  
20 cause \$500.00 worth of damage, then the very same  
21 statutes, the reporting statutes, that state motor  
22 vehicles law require, which we had cited in support of  
23 our contention that the master had an independent need  
24 to report the ground of the vessel would come into  
25 play.

1           That is, the vehicle driver would have to  
2 report that he'd been involved in an accident involving  
3 \$500.00 and that would trigger a response which  
4 presumably would uncover the oil, just the way the  
5 vessel reported its grounding prompted a response that  
6 would have discovered the oil even if it had not been  
7 reported.

8           Judge, the independent source theory is  
9 founded upon the testimony of three people from the  
10 Coast Guard, Commander McCall, Commander Falkenstein,  
11 and CWO Delozier that this was the kind of thing that  
12 they would have responded to just on the basis of the  
13 recorded grounding. But what is equally important is  
14 that it bears upon a subsequent or a second type of  
15 inevitable discovery; that is that the Coast Guard  
16 would have discovered it themselves by radar and would  
17 have responded to it.

18           Now, there certainly would be some interplay  
19 between obligation of a vehicle driver or a master of a  
20 vessel who had to report a grounding or an automobile  
21 accident which resulted in an oil spill. And their  
22 requirement to report the oil spill.

23           That is, if Your Honor were to conclude that  
24 this was, in fact, an independent source, you'd be  
25 placing both of those people in a position where they



1 would have to think or might think, here I have been  
2 placed in this position, I am either aground or I've  
3 had an automobile accident. Do I report the accident  
4 or grounding? Because if I do, I take a risk of losing  
5 what immunity I have under the Oil Spill Statute.

6 That certainly places some additional burden  
7 on the master or the driver. But in both instances,  
8 there are certainly going to be many instances in which  
9 both the master and the driver are involved in oil  
10 spills which don't require such a report. That is,  
11 there are going to be, with respect to vessel, oil  
12 spills which occur in the loading or unloading of  
13 vessels which do not come under marine casualties and  
14 require reporting; similarly with vehicles that are  
15 being loaded or unloaded with oil, there will be  
16 spillage which doesn't require a report of a motor  
17 vehicle accident.

18 So, it's the exception being carved out, if  
19 Your Honor chooses to do that, is a relatively narrow  
20 one. And in the marine area, and in some instances in  
21 the motor vehicle area even, you really get to a point  
22 where judgment is not that hard for a master in this  
23 sense.

24 In some instances, the accident in which the  
25 person finds themselves, be it a grounding or be it the

1 accident with respect to a vehicle, endangers life. In  
2 testimony before the Grand Jury, Mr. Kunkel, the chief  
3 mate, said that he grabbed his survival suit. He  
4 entertained notions and suggested to the captain that  
5 perhaps he should sound the general alarm to alert  
6 everybody on the vessel that there was a danger that  
7 the vessel might break up and sink.

8 The master, when one reaches a catastrophe of  
9 that proportion, one's instincts for self-preservation,  
10 as well as the safety of his crew, would come first and  
11 foremost irrespective of any obligation report of  
12 marine casualty or to report an oil spill. This comes  
13 close to that case, at least from the testimony of Mr.  
14 Kunkel. This was that precarious a situation. So that  
15 a report was going to be needed just from the  
16 standpoint of the safety of the crew and the vessel,  
17 putting aside how they got on the reef, aground;  
18 putting aside that there was oil in the water, an oil  
19 spill.

20 So by carving out the exception the state's  
21 suggesting, it's a very narrow carving. It's a very  
22 small carving. And it's under circumstances where  
23 there was a risk of physical harm to people, maybe  
24 death. And one where you're not going to be putting a  
25 master in a position of having to second guess himself

1 between reporting grounding and reporting an oil spill.

2 We talk about inevitable discovery. The U.S.  
3 Supreme Court has recognized inevitable discovery in  
4 Nix vs. William. What it has said is, where police  
5 officers violated the rights of a defendant, violated  
6 his Fifth Amendment Rights, and as a result of that  
7 violation, found the body of a child he had killed,  
8 that evidence was still admissible against him. It was  
9 admissible against him because it inevitably would have  
10 been discovered. There were search teams that were  
11 looking for the child. They had begun at a search  
12 point to the east of the interstate highway along which  
13 her body had been left and were proceeding westbound in  
14 the direction of the location of the body.

15 The U.S. Supreme Court said, because they  
16 would inevitably have come across the body and  
17 discovered and the state had proven that by a  
18 preponderance of the evidence, the state was permitted  
19 to use that evidence at trial.

20 Now, in Nix vs. Williams, the way they  
21 actually got to the body was through a violation of the  
22 defendant's Fifth Amendment Rights. Statements were  
23 taken from him by police misconduct. And, as a result  
24 of that police misconduct, they got to the body.

25 Here the defense says, we got to the evidence

1 by means of the improper use of his immunized  
2 statements. They say this is different. They say this  
3 is not like Nix vs. Williams because there's an  
4 exclusionary rule involved in Nix vs. Williams and  
5 there's a question of whether one relaxes the  
6 exclusionary rule. They say that inevitable discovery  
7 may apply in an exclusionary rule case, but not in an  
8 immunity case. That doesn't make sense to me, Judge.

9 First, in either case, you're talking about a  
10 violation of a person's Fifth Amendment constitutional  
11 right. That is the right to remain silent.

12 In Nix vs. Williams, that was violated by  
13 police misconduct and the U.S. Supreme Court said, even  
14 if you engaged in misconduct, you can still use the  
15 evidence, if it were inevitably discovered.

16 Here there has been no police misconduct.  
17 There's been a Congressional statute which immunizes  
18 the testimony, but there has been no police misconduct.  
19 Why would you not permit the doctrine of inevitable  
20 discovery in cases where there is no police misconduct,  
21 if you permit it in cases where there is police  
22 misconduct? You'd think, if the rule were going to be  
23 applicable, it would be the reverse. That is, you  
24 wouldn't allow inevitable discovery where there was  
25 misconduct, but you would allow it where there is no

1 misconduct.

2 And here we have the U.S. Supreme Court saying  
3 it's allowed even when there is police misconduct. So  
4 that speaks very strongly for the fact in this instance  
5 the doctrine of inevitable discovery should apply.

6 Judge, in the answer to the motion I suggested  
7 that inevitable discovery would have occurred by 8:30  
8 in the morning. I believe the evidence before you has  
9 come out more strongly than anticipated. And I point  
10 specifically to the testimony of Captain Eric Dohm.  
11 Captain Eric Dohm was the captain in charge of the  
12 Chevron California, which was inbound at the time the  
13 Exxon Valdez was outbound.

14 It was abeam Hinchinbrook at 12:15 a.m. It  
15 had a speed which would have caused it to transit  
16 Prince William Sound at 16 knots and would have placed  
17 it abeam Naked Island at 2:00 a.m.

18 Had there been no report, had Captain  
19 Hazelwood remained silent, it would have been at the  
20 closest point to the Exxon Valdez at 2:50 a.m. and by  
21 the closest point. I mean this. That is Naked Island.  
22 Was here at two o'clock. The vessel would have been at  
23 a point abeam the position, the red "x" marked by CWO  
24 Delozier at 2:50.

25 At that point, the vessel having radar set on

1 6 and 12 mile scales would have had an opportunity,  
2 this being a 12 mile, to have seen the Valdez before it  
3 got that far. But even assuming it had not spotted it  
4 on radar and had gotten to this position approximately  
5 three miles away, closer to two miles away, it would  
6 have seen the lighting of the Exxon Valdez. The Exxon  
7 Valdez has, and all ships are required to carry, of  
8 that size, required lighting visible for six miles. It  
9 would have been producing a radar return.

10 Had the Exxon Valdez not reported at that  
11 point, the Chevron may well have been in contact with  
12 the Coast Guard and the Coast Guard confirmed it on  
13 their radar.

14 The Chevron California was expecting to  
15 communicate with the Exxon Valdez in two respects.  
16 First, as it was inbound, it was expecting to meet and  
17 pass the Exxon Valdez on its way outbound. It expected  
18 to do that somewhere south of Naked Island. Had it  
19 gotten to Naked Island and not seen it, it would have  
20 been curious and alerted to the fact that something was  
21 out of the ordinary.

22 Furthermore, the Chevron California expected  
23 to communicate with the Exxon Valdez because of the  
24 ice. That is, the Chevron California knew, as the  
25 Exxon Valdez knew, that there had been reports of ice

1 in the south bound tanker lanes. And the Exxon Valdez  
2 was going to have to divert to get around the ice.

3 The Chevron California, therefore, was alerted  
4 to the fact that, number one, there was ice there; and,  
5 number 2, the Exxon Valdez was going to be coming  
6 through and would have had more recent opportunity to  
7 observe it and to report to the California what  
8 maneuvers might be appropriate for the California to  
9 avoid the ice, if any. So the Chevron California was  
10 expecting to talk to the Exxon Valdez on that score as  
11 well.

12 There was another avenue that was working  
13 simultaneously with that. That is, in the vessel  
14 traffic center, Mr. Bruce Blandford had come on duty at  
15 about 11:45 as a watch stander there. He had been  
16 briefed by the previous watch stander. He'd been told  
17 that the Exxon Valdez was outbound and estimated a time  
18 of arrival at Naked Island at 1:00 a.m. local time. He  
19 had been told that the Exxon Valdez had disappeared  
20 from the radar screen and so he did not look at the  
21 radar screen prior to actually receiving the report.

22 He was speaking with the Chevron California.  
23 He knew that it was inbound. He had spoken to it to  
24 receive it's report that it was abeam Cape Hinchinbrook  
25 and that it estimated that it would be there at 2:00

1 a.m. and he told the Chevron California that it should  
2 be able to get an ice report from the Exxon Valdez once  
3 it had gotten through.

4 He testified that he was about to actually  
5 call the Exxon Valdez himself when he received the  
6 12:26 report from Captain Hazelwood. That is, he said  
7 that, after you'd been working in such a place for a  
8 while, you just have instinctively sense for when it's  
9 time for somebody to report; it's an internal clock  
10 works. And he would have called just about that time  
11 had he not received Captain Hazelwood's call.

12 But in any event, by one o'clock he would have  
13 expected a report or at least a call before hand to  
14 update a report that the vessel would be abeam Naked  
15 Island at some point in the future.

16 In any event, one of the things he would have  
17 done had the vessel failed to call, would ultimately  
18 have been to look on the radar screen and there he  
19 would have seen it. That certainly would have occurred  
20 no later than the Chevron California's approach to  
21 Bligh Reef, if it did not occur sooner than that.

22 Assuming then that those things had occurred,  
23 but for the report, and that the position of the vessel  
24 would inevitably have been discovered, the question is,  
25 what would the response have been?



1           The best evidence is probably what the  
2 response was. That is, the difference in time between  
3 the actual report and these reports would have been a  
4 matter of the difference between 12:26 and 2:50. So,  
5 one could reasonably estimate that the same response  
6 would have occurred. What actually happened is, in  
7 some respects, the best evidence of what would have  
8 happened.

9           In assessing how quickly it would have  
10 happened, there are, once again, it's perhaps easiest  
11 to say what actually happened is one of the best  
12 indications of what would have happened. The Coast  
13 Guard received a call at 12:26 and was out there by  
14 3:43 and on board. Later Mike Fox got a call at 4:30  
15 and was on board at 6:45 and actually on the bridge at  
16 7:05. His response was a little more quick than the  
17 Coast Guards.

18           But if you take the longer of the responses,  
19 giving the defendant the benefit of that, you still  
20 come up with a time roughly 6:00 - 6:07 in the morning  
21 that the Coast Guard would have, not only discovered  
22 it, but been on board the vessel.

23           We say that the things that flowed after that,  
24 the observations that flowed after that, would have  
25 otherwise flowed and so that the real focus here is on

1 what things would not have been discovered in that time  
2 frame? What things would not have been observed?

3 The crew members would have been on board. So  
4 they would have seen, not only what had led up to the  
5 grounding, but they would have seen the captain's  
6 response to it and what happened over the period of  
7 time thereafter. So, their observations are in effect  
8 not, I'll use the term, time sensitive. That is,  
9 presumably they saw the things there and they were  
10 going to know them whether they were interviewed at  
11 seven o'clock in the morning, the next day, three days  
12 later, five days later.

13 It's true of documents on board the vessel.  
14 They were there and they were going to be there whether  
15 they were picked up by the Coast Guard or anybody else  
16 that day or two days later or three days later or four  
17 days later. Those documents would have included a crew  
18 list, so that in the event the crew were not  
19 interviewed the way Sergeant McGhee interviewed them,  
20 by going out to the vessel and talking to them. It  
21 would have been identified and could have been  
22 interviewed at some later point.

23 By the same token, the records of who was it  
24 that was the pilot who took the vessel out was going to  
25 exist. Who was the ship's agent was going to exist?

1 Who was on duty at the Alyeska gate was going to exist?  
2 What was the license plate of the cab in which the  
3 captain come back was going to exist. The people in  
4 town who either had seen or hadn't seen the captain  
5 were going to exist whether the report was at 2:26 by  
6 the captain or at 2:50 by Chevron California.

7 It is possible, however, to define some things  
8 that would have been lost. To define what kinds of  
9 things. And I'd like to define what things fell within  
10 this time of this quadrangle right here. Things which  
11 would not have been discovered if you had to wait until  
12 the Chevron California reported or until the Coast  
13 Guard figured it out on radar.

14 In proposed findings of fact I list with my  
15 proposals, the observation by the Coast Guard officers  
16 of the odor of alcohol on the captain's breath. The  
17 testimony and the observations of alcohol on the breath  
18 of the captain by Dan Lawn, which he placed somewhere  
19 between 5:15 and 7:00 a.m. I do that for these  
20 reasons.

21 While both of them testified that they made  
22 those observations of alcohol on his breath in that  
23 time frame, Michael Fox, the trooper who arrived on  
24 board at 7:05, met the captain at 8:30. There is no  
25 testimony of anyone that they observed alcohol between

1 the 7:05 time and the 8:30 time.

2 At 8:30 Mr. Fox had a conversation with the  
3 captain and in the course of that did not smell any  
4 alcohol or observe any signs of intoxication. For that  
5 reason I submit that the observations by Delozier and  
6 Falkenstein, with respect to the alcohol on the breath,  
7 and Dan Lawn, with respect to alcohol on the breath,  
8 would not have been made had they arrived as late as  
9 they did. There's some overlap there between six and  
10 seven as to Dan Lawn's observations. But I submit that  
11 that's not strong enough for us to ask the court to  
12 find that.

13 That doesn't mean, however, that all evidence  
14 of alcohol thereafter need be excluded. I say that for  
15 this reason. The alcohol testing occurred at roughly  
16 10:00 a.m. to 11:00 a.m.

17 While there had been some prior indication  
18 from observations of the Coast Guard officer we just  
19 talked about there was odor on the breath of Captain  
20 Hazelwood, there was no indication of any alcohol on  
21 Gregory Cousins, Robert Kagan or Maureen Jones, the  
22 other three people who were on the bridge of the Exxon  
23 Valdez at the time of the grounding.

24 Well, if there was no indication of alcohol on  
25 their breath, why are they being tested at 10:00 to

1 11:00 that morning? They are being tested in  
2 accordance with a Coast Guard regulation. They are  
3 being tested in accordance with a Coast Guard  
4 regulation that was discussed briefly by Trooper Fox.  
5 You recall, it came time for the testing, he, Trooper  
6 Fox, testified that he spoke to Mr. Delozier and said,  
7 "Are you sure you have authority to do this? I would  
8 need a search warrant. Do you have authority to do  
9 what you're doing?" And he, Delozier, confirmed that  
10 he did.

11 (2300)

12 There is a Coast Guard regulation pertaining  
13 to intoxication. It's contained in 33 CFR 95.010. It  
14 says that reasonable cause exists for testing whenever  
15 an individual is directly involved in a marine  
16 casualty. It doesn't say, there's no requirement that  
17 there be probable cause to believe that the person had  
18 been drinking. And, indeed, there was no indication  
19 that Kagan, Cousins or Jones had been drinking, and yet  
20 all three were tested.

21 From that one could reasonably infer that what  
22 was occurring at 10:00 to 11:00 was the kind of careful  
23 investigation that one would do with a matter of this  
24 magnitude. Not just Captain Hazelwood, but anyone who  
25 was around the bridge and in the position to control it

1 or know about the control of the vessel was tested.  
2 That would indicate that the testing that occurred at  
3 10:00 to 11:00 was not simply a function of the  
4 observations of alcohol on the breath of the captain,  
5 but was an application of that general careful kind of  
6 investigation that is really called for by that  
7 regulation.

8 With those words on inevitable discovery, let  
9 me address myself to the indictment and the information  
10 and whether there has been evidence before the Grand  
11 Jury or in the probable cause statement which would  
12 require dismissal of the indictment or the information.  
13 And the analysis on the two has to be separate.

14 The analysis on the two is separate because  
15 the Grand Jury presentation was made by prosecuting  
16 attorneys who did not have information which I had when  
17 I filed the information. That is, there was a  
18 screening process under which they got certain kinds of  
19 information. Information as to events, things which  
20 happened on March 24th, 1989 in response to the report  
21 of the grounding.

22 Now, from the affidavits of the three lawyers  
23 in the District Attorneys office and from the testimony  
24 of these hearings, the state set up a system under  
25 which the materials were screened. That is, police

1 reports, exhibits, which went to them were screened so  
2 that they didn't get anything which can be said to have  
3 been in response to the captain's report. In fact, the  
4 more careful standard than is being argued for before  
5 this court would apply. Out of caution, they were  
6 given nothing as to the 24th rather than cutting things  
7 off at the 6:00 o'clock time we suggests now.

8 So far in the course of these hearings, there  
9 has been no evidence that they, in fact, got any  
10 materials, any factual materials, that came within that  
11 6:00 o'clock time frame. There was some suggestion  
12 that the 24 hour time frame was not observed in one  
13 instance with respect to that Rick Wade diagram. The  
14 diagram, on its face, indicated the 25th-26th, but, in  
15 fact, he'd gone out there on the 24th and began diving  
16 late on the 24th.

17 There was one other instance where Mr. Weeks  
18 said that he thought he had talked to or there was a  
19 memorandum that he was questioned about which indicated  
20 that he had spoken to, might have spoken, to Mary Anne  
21 Henry about statements that Captain Hazelwood made to  
22 Mr. Cousins and Trooper Fox around 1:00 a.m. They were  
23 done, however, in the context of a question of  
24 exculpatory evidence.

25 That is, given the fact that the captain had

1 told Mr. Cousins and Mr. Fox that he had one beer in  
2 town and one or two Moussys after he got on board the  
3 vessel, was that exculpatory evidence which the state  
4 was obliged to present to the Grand Jury to protect the  
5 defendant's right to a fair presentation before the  
6 Grand Jury.

7 In light of the fact that there were other  
8 people who had said he had had more to drink than that,  
9 that really wasn't exculpatory evidence. And, in fact,  
10 it wasn't presented to the Grand Jury.

11 So that those are the only instances where  
12 there has been any indication that the wall that was  
13 built and over which was passed only materials fitting  
14 that guideline were breached, that would mean that the  
15 Grand Jury indictment should not be dismissed. It was  
16 produced as a result of evidence which did not contain  
17 any of the evidence which we're suggesting would not  
18 appropriately be presented.

19 And it was not even presented by prosecutors  
20 who knew about that information, with that one  
21 exception on the exculpatory and the Rick Wade  
22 exception. Both of those as falling outside the  
23 guidelines suggested.

24 So, strictly speaking, as to the evidence  
25 which we agree would not have inevitably have been



1 discovered, none of that was presented to the Grand  
2 Jury. It was not presented by prosecutors who had  
3 knowledge of it.

4           There was evidence presented that supervisory  
5 personnel in the district attorneys office in  
6 Anchorage, Mr. McConnell, and in Juneau, Mr. Weeks and  
7 Mr. Guaneli, knew of the probable cause statement in  
8 the complaint. Let's examine that for two purposes.  
9 One, to see what it was that they knew that would be  
10 impermissible, and, number two, assuming impermissible  
11 matters were to be excluded, does enough remain to  
12 support the charges in the complaint -- any  
13 information, excuse me.

14           Judge, if you examine the information and  
15 remove from it the things which are time sensitive,  
16 what it means is you remove the line which refers to  
17 the fact that the two Coast Guard investigators smelled  
18 alcohol on the breath of the defendant. It appears on  
19 the bottom of the third page of the charging document.  
20 The line reads, "The Coast Guards officers, who were  
21 the first persons on the ship after the grounding,  
22 stated they smelled alcohol on the breath of the  
23 defendant." That would be what you would remove from  
24 that probable cause statement. It would remain the  
25 fact that the blood test showed a result of .061 and

1 .09 and that that would violate federal law as to the  
2 standards of intoxication for one acting as a officer  
3 on a vessel like this.

4 So, therefore, even if you were to exclude  
5 from the information the same things which would be  
6 excluded under this finding, there would be probable  
7 cause in the information to support the charges.

8 The same thing is true with respect to what  
9 the prosecutors who talked to the prosecuting team,  
10 that is the supervisor of the prosecutors who talked to  
11 the prosecuting team, knew? The thing which would be  
12 eliminated from their knowledge which they could pass  
13 on and utilize would be the fact that the two Coast  
14 Guard investigators smelled alcohol on the captain's  
15 breath. They could still utilize the results of the  
16 alcohol test. There's no indication that they, in  
17 fact, communicated that information in any fashion to  
18 the prosecuting team, that is, the results of the  
19 alcohol test.

20 Judge, while there is some authority that, if  
21 a prosecutor has even knowledge of such prohibited  
22 materials, he may not participate in charging  
23 decisions. He may not act like, do the work of, a  
24 lawyer.

25 That's not the law in the Ninth Circuit. The

1 law in the Ninth Circuit says, it's improper for the  
2 prosecutors to use the information in an evidentiary  
3 fashion. That is to present it in evidence; to use it  
4 to cross examine a witness; as a lead in an  
5 investigation. But doesn't go as far as that case  
6 which says, if they even know it, they're disqualified.

7 Judge, for those reasons, we think that the  
8 motion to dismiss should be denied, as to both the  
9 complaint and the indictment and that we should be  
10 permitted to prosecute the case with the evidence we've  
11 collected with those exceptions.

12 (2848)

13 THE COURT: Mr. Linton, at the last meeting I  
14 asked that counsel address the burden of proof. You  
15 did barely address it. In the Williams case, I think,  
16 they used a standard of proof of preponderance of the  
17 evidence. And we have an evidence rule in a couple of  
18 cases in this jurisdiction that seems to say the same  
19 thing. But do you have anything else you want to add  
20 on that?

21 MR. LINTON: Judge, there were some points in  
22 the proposed findings of fact and conclusions of law  
23 where I wrote in the court finds these things by a  
24 preponderance of the evidence/beyond a reasonable  
25 doubt.

1 I don't know of any authority that requires  
2 Your Honor to find anything beyond a reasonable doubt  
3 in these proceedings. But, there may be some of the  
4 evidence which came through so clearly and so  
5 convincingly that it, in fact, meets that standard.  
6 And, if it, in fact, met that standard, then we'd ask  
7 Your Honor to put the finding in that form.

8 This is an important matter in a sensitive  
9 area and the length that the state went to to try to  
10 guard its prosecuting team was in part a reflection of  
11 the state's sensitivity to the fact that it is a  
12 sensitive area. And we are breaking new ground. And  
13 in what we're asking Your Honor, we're asking Your  
14 Honor, in some respects, to break new ground.

15 This is authority which leads in this  
16 direction, but there's nothing on point that tells  
17 either the state or tells Your Honor how to proceed in  
18 this kind of instance.

19 If we had made showings that rise to that  
20 level and Your Honor could make the findings to a  
21 higher standard, we'd ask Your Honor to do that. But  
22 the law doesn't require it.

23 THE COURT: Are you saying that, in your  
24 opinion, the law requires proof by a preponderance of  
25 the evidence?

1 MR. LINTON: Exactly.

2 THE COURT: Okay. Now, how about Kastigar,  
3 when Kastigar says that the prosecution has a heavy  
4 burden, what are they referring in that? Are they  
5 referring to a standard of proof or the standard to the  
6 volume of proof?

7 MR. LINTON: I think they're reflecting the  
8 practical common sense notion that you kind of start  
9 with one foot in a bucket when you start from that  
10 position. Not that no one is capable of showing it by  
11 a preponderance of the evidence, but that the normal  
12 inference to be drawn is adverse, and until there has  
13 been a showing by a preponderance to the contrary, the  
14 state's going to have a tough row to hoe.

15 (3044)

16 ARGUMENT BY DEFENDANT

17 MR. FRIEDMAN: Your Honor, Mr. Linton says  
18 that he's asking the court to break new ground. I  
19 would submit that the prosecutors are on thin ice and  
20 he's asking the court to join him out there.

21 My job today, I think, is to point out the  
22 cracks in the ice and obviously the court can do what  
23 it wants. But, what they're asking you to do, is  
24 extraordinary.

25 I'd like to start by noting for the court

1 that, probably a hundred times a day all over the  
2 country, witnesses are given immunity. Criminals are  
3 given immunity. Some times transactional. Some times  
4 use derivative. Contract murderers, drug dealers,  
5 embezzlers are given immunity by the authorities  
6 because the authorities believe that the information  
7 those witnesses have is more important than prosecuting  
8 those witnesses. A cost benefit analysis is performed  
9 and they say, we would rather have your information  
10 because of the good it will do us than put you in jail.

11 In this case, Congress made that cost benefit  
12 analysis. Congress said, we want you to report oil  
13 spills whatever the circumstances. And, in return,  
14 we're willing to give you immunity. We want you to  
15 report so badly, we're going to make it a crime not to  
16 report. And, in return, we're going to give you  
17 immunity.

18 Now, if you just took the statute and Kastigar  
19 and applied them to the facts of this case, that's the  
20 pyramid. And what it shows is, that everything flows  
21 from Mr. Hazelwood's report. And, if you just apply  
22 these general principles, the prosecution couldn't go  
23 forward. That was recognized by the state early on.

24 They had serious problems in wanting to  
25 prosecute Captain Hazelwood. And you had a little bit

1 of a peak, we've all had a little peak, into the  
2 decision making process that the state went through;  
3 why they decided to prosecute Captain Hazelwood and not  
4 Mr. Cousins and not the higher ups in Exxon, and not  
5 Exxon, itself.

6 (3207)

7 They had reasons. And we're not here to  
8 examine their reasons, but they had reasons why they  
9 wanted to go after Mr. Hazelwood and nobody else. But  
10 they have to get around a very serious obstacle, which  
11 was Kastigar. And under the facts in the law of this  
12 case, they had a particularly difficult time.

13 First, there was the law. Kastigar says you  
14 can't use his report to help focus the investigation.  
15 You can't use it to lead to other evidence. You can't  
16 use it in any way, any way, to help obtain a  
17 conviction. It doesn't say you can't use it to lead to  
18 other evidence unless you can you show you could have  
19 found the evidence otherwise. It doesn't say you can  
20 use everything he says, as long as later on down the  
21 line, you can prove that you might have gotten it  
22 anyway.

23 Pretty strong. If you read the Kastigar  
24 language, it's strong, it's emphatic, and it emphasizes  
25 what a heavy burden is being placed on the prosecution,

1 what a strong protection it is attempting to grant to a  
2 witness who is being compelled to speak.

3 So that's the first burden they had to  
4 overcome, was the law.

5 The second one was, that no one else, in fact,  
6 reported, as Lieutenant Commander Falkenstein  
7 testified, in fact, nobody other than Captain Hazelwood  
8 reported the spill. So they don't have, under the law,  
9 what traditionally would be regarded as an independent  
10 source. This is not a situation where someone reports  
11 themselves and they also have a whole other investigation  
12 that had been going on for two months and they can say,  
13 well, we had this independent batch of evidence that  
14 would have led us here anyway. They don't have any of  
15 that, as they've candidly admitted.

16 (3380)

17 They have an investigation that went forward  
18 for three weeks using the information he gave them; no  
19 efforts made to prevent the use of that information;  
20 and only at the end of that three weeks when, as Mr.  
21 Linton acknowledged on the stand, the investigation was  
22 virtually complete, only at that time did they erect  
23 their Chinese wall.

24 Okay, now that our investigation is done, now  
25 that we've used all your information to collect our



1 evidence, now we'll erect our Chinese wall and decide  
2 what we want to put over the wall and what we don't.  
3 That's unprecedented. You won't find another case  
4 anywhere where that procedure was followed.

5           They had a situation where the lawyers and  
6 expert witnesses, who were working on the case for the  
7 first three weeks, were not given any special  
8 instructions. And even the clean team had exposure to  
9 a variety of information; news reports and the like.

10           They had a situation where they went out a  
11 week after the spill and charged Captain Hazelwood  
12 before they'd even determined the extent of the  
13 immunity he was entitled to. And I suggest to the  
14 court that that may be the key to why we're here in the  
15 first place.

16           In essence, by charging Captain Hazelwood  
17 before they even figured out the extent of his  
18 immunity, the state painted itself into a corner. What  
19 are they going to do now? Say, whoops, we made a  
20 mistake, in front of the entire nation and say, it  
21 turns out you've got immunity and we overlooked the  
22 statute and so we're going to withdraw the prosecution?

23           At that point, they'd gotten out on thin ice  
24 and there was no way for them to get back.

25           If they're going to prosecute Captain

1 Hazelwood, they've got to sell the court on some legal  
2 and factual propositions that have never been accepted  
3 before and which require stretching of the facts and  
4 law almost beyond recognition in some cases.

5 They say that, well, the first argument is the  
6 independent source doctrine. And what they're asking  
7 the court to do, in Mr. Linton's words, is carve out a  
8 narrow exception to the statute.

9 (3490)

10 THE COURT: Do you know of any other cases  
11 where there's been a compelled reporting that was  
12 protected in conjunction with a compelled reporting  
13 that was not protected? Or, is Mr. Linton correct that  
14 this is a unique situation from that point of view?

15 MR. FRIEDMAN: I'm not sure I understand.

16 THE COURT: Well, as I understand the  
17 regulations, Captain Hazelwood was required to report a  
18 marine casualty.

19 MR. FRIEDMAN: Uh-huh (affirmative).

20 THE COURT: And there's no immunity provided  
21 for that.

22 MR. FRIEDMAN: Right.

23 THE COURT: Compelled report. And he is  
24 compelled to report a spill for which there is some  
25 sort of immunity provided. Do you know of any other

1 case that provides that type of scenario to compelled  
2 reports, one protected, one not?

3 MR. FRIEDMAN: I know of no case that  
4 explicitly says it in that way. But, if you look at  
5 the other oil spill cases that we cited in our brief,  
6 and I haven't done this, but I would expect that one  
7 could go look at those fact situations and go into the  
8 Code of Federal Regulations and find other duties to  
9 report.

10 For example, one of the cases dealt with a  
11 situation where a factory was leaking or discharging  
12 hazardous waste into a river. Somebody called up and  
13 said, we've got a leak here. We've got a problem here.  
14 And later claimed immunity.

15 Now, clearly he had an obligation to report  
16 under 13.21.B(5). My guess is, and it's just a guess,  
17 that there's a federal regulation somewhere that also  
18 required him to report. Some other federal agency, or  
19 perhaps a state agency.

20 If this occurred in New York, for example, my  
21 guess is that there's a New York regulation that would  
22 have required some sort of self report.

23 Let's put the law aside. There may have been,  
24 if this was ITT or whatever the company was, Exxon,  
25 there's probably internal policies that require

1 reporting to somebody at some point.

2 And, our point, Your Honor, is that, if you  
3 accept that argument, you can almost come up with some  
4 other reason why someone could have been reporting.  
5 But you asked us for some argument on the policy issues  
6 behind this, and I'd like to provide that to you. But  
7 I'd like to start with Mr. Linton's statement that he's  
8 asking you to carve out an exception to the statute,  
9 because I think that's a very important point.

10 Congress passed the statute. Congress  
11 conferred the immunity. It's not in this court's  
12 province to tinker with the statute. To carve out an  
13 exception to the statute. If Congress feels that the  
14 application of this statute to the facts in a  
15 particular way is inappropriate, it's Congress's  
16 prerogative to change that.

17 Going to the policy issues, there's some  
18 important distinctions that the court needs to be aware  
19 of between the spill statute and the grounding  
20 regulations. The spill statute requires immediate  
21 reporting. And, if you look at the Coast Guard  
22 regulations promulgated under that statute, it's clear  
23 what is contemplated is radio reporting or whatever is  
24 the next quickest, if for some reason a radio report  
25 can't be made.

1 (3758)

2 The grounding regulations, if you look at  
3 those, and, I believe it's .05-10(B), says that in  
4 place of the report required by that regulation, a  
5 Coast Guard form report may be filed, if it is filed  
6 without delay.

7 So, in other words, the regulatory scheme  
8 while it says you are to report, also provides that it  
9 can be done in writing, which any common sense reading  
10 of that, would have to indicate that a form being filed  
11 without delay is going to be somewhat longer than a  
12 radio report. Presumably within 24 hours, 36 hours, 72  
13 hours. I don't know what the Coast Guard means by  
14 without delay. But the provision that it can be done  
15 in writing, clearly shows that the intent is not with  
16 the immediate response required by the statute.

17 And that makes some sense for policy reasons.  
18 If there's an oil spill, we want to get on the scene as  
19 quickly as possible to prevent damage to the  
20 environment.

21 If there's a grounding, that can encompass a  
22 wide range of problems from some barge going aground in  
23 a sand bar in the Mississippi River to something like  
24 what we have here. And the purpose of the grounding  
25 regulation is to allow the Coast Guard to get notice of

1 what hazards are in the water; what's causing problems  
2 to mariners; and to initiate an investigation if it  
3 feels one is warranted. But the sense of immediacy is  
4 not there as there is for a spill. And I think that's  
5 reflected in the regulations.

6 It's further reflected in the penalties. It's  
7 a crime not to report yourself if you're involved in a  
8 spill. That's a crime set out by Congress.

9 I am not as familiar with the Coast Guard  
10 regulations as maybe I should be, but I couldn't find  
11 anywhere where it was made a crime, punishable by  
12 imprisonment, to fail to file the grounding form that's  
13 required under the regulations cited by the state.

14 Finally, of course, the spill regulation, or  
15 the spill statute, gives immunity; and the grounding  
16 one does not.

17 If the state's view were correct, when you  
18 think about what's going to cause an oil spill, there  
19 are really two categories in terms of maritime things,  
20 at least that I'm familiar with. One would be, as  
21 you're loading or unloading a tanker and a hose comes  
22 loose or malfunctions and oil is dumped into the  
23 harbor, it's caught immediately. People see it. It's  
24 a problem and it's addressed immediately.

25 The other category of problems are those that

1 result from casualties; collisions, groundings, things  
2 of that type. And, if the state were correct, whenever  
3 there were a grounding, collision, something of that  
4 type, a captain would have no immunity for the report  
5 ever.

6 And then you're in this anomalous situation  
7 where you have Congress saying, in effect, Captain  
8 Hazelwood, when you run aground and start leaking oil,  
9 we want you to report and we're going to grant you  
10 immunity; and you have the Coast Guard saying, well, we  
11 want you to report also...

12 THE COURT: Is that what Congress says, "When  
13 you run aground and you start leaking oil, we want you  
14 to report"? Or does Congress say, "When you lead oil,  
15 we want you to report"?

16 MR. FRIEDMAN: For any reason. Exactly.

17 THE COURT: When you leak oil.

18 MR. FRIEDMAN: Right.

19 And it's clear Congress meant it to cover the  
20 field. They want you to report if it's grounding.  
21 They want you to report if the hose malfunctions. They  
22 want you to report no matter what. And they're giving  
23 you immunity no matter what.

24 (4058)

25 If some other duty, whatever it is -- part of

1 the problem with the state's argument, of course, is  
2 the speculative nature of it. I mean, what Kastigar  
3 requires it is factually a wholly independent source.

4 When someone is granted immunity to testify  
5 before a Grand Jury, he can say, well, -- I forget the  
6 name of the statute. It's cited in all the case. -- he  
7 can say, I'm here testifying pursuant to this grant of  
8 immunity under this statute. The prosecutor, after he  
9 testifies and the prosecutor gets his information, can  
10 say, well, yeah, we granted you immunity under the  
11 statute, but really you would have testified anyway  
12 because your wife wanted you to come and make a clean  
13 breast of it. And that's really the reason you  
14 testified, so we should be allowed to get around your  
15 immunity. Or you really testified because you became a  
16 Born Again Christian.

17 The state, the government, can always come up  
18 with some other idea as to why somebody testified  
19 against themselves. But the law of immunity is, we  
20 don't speculate about those things. If the government  
21 grants you immunity, it's not lightly taken away.

22 THE COURT: Mr. Friedman.

23 MR. FRIEDMAN: Yes, sir.

24 THE COURT: If Captain Hazelwood had reported  
25 just a grounding and then said, out, and then come back



1 in an hour and said, we're evidently leaking some oil  
2 too, would the report of the grounding, would that have  
3 constituted a wholly independent source under the facts  
4 of this case for investigation?

5 MR. FRIEDMAN: I think I can say it might well  
6 have, certainly.

7 THE COURT: How about if it was five minutes  
8 later he said, and evidently we're leaking some oil?

9 MR. FRIEDMAN: I think also in that situation.  
10 Well, under the facts, as they've come out in this  
11 trial, where we have witnesses saying we would have  
12 responded to the grounding anyway, assuming that's  
13 given credence, then I think...

14 THE COURT: Is there any serious dispute that  
15 the Coast Guard would have responded to a grounding of  
16 the Exxon Valdez on Bligh Reef any less quick than if  
17 the Exxon Valdez had just reported evidently leaking  
18 some oil? Do you think there's any serious dispute on  
19 that?

20 (TAPE: C-3524)

21 (0026)

22 MR. FRIEDMAN: Well, I'm not willing to  
23 concede that and this is why, Your Honor. I think,  
24 when you look at one of the transcripts, well, let me  
25 take that back. I don't think that's in evidence. I

1 think, given the state of the evidence, we have to say  
2 that they would have responded had there been a  
3 grounding as well, yes.

4           What the court would have to find though, in  
5 order to find this is an independent source, is that  
6 these fifteen words, or however many words there are in  
7 that sentence, should be divided in half. And, if you  
8 accept the state's argument, then the only thing that's  
9 immunized are the words oil spill or leaking oil. And  
10 everything else around that is not immunized. And  
11 think about that for a minute, because you did want  
12 some argument on policy things.

13           If that were the case, clearly Congress  
14 doesn't want Captain Hazelwood to pick up the radio and  
15 say, I'm not going to tell you who I am, where I am, or  
16 how I got here, but I'm leaking oil, and you now have  
17 your oil spill report. That clearly is not what they  
18 want. They want a report that gives them the  
19 information they need to respond effectively. And that  
20 report has to, as a matter of common sense, contain his  
21 name, the ship, location, if he knows it, and what  
22 happened. Why it's leaking oil.

23           If there was a fire on board and they were  
24 leaking oil because of fire on board, that would be  
25 important for the Coast Guard to know. If they're

1 aground and they're leaking oil, that's important for  
2 the Coast Guard to know. And, as a matter of fact, you  
3 cannot say one sentence or one group of words in a  
4 sentence, is wholly independent from the other group of  
5 words.

6 In this factual setting that we have setting  
7 that we have here, if you adopt the state's view, you  
8 also then have this problem of, well, do you apply an  
9 objective or a subjective standard? If you're going to  
10 apply an objective standard, presumably that would  
11 involve searching around as to whether there's any  
12 other legal, maybe moral, duty to report. I think that  
13 was what Mr. Linton was grappling with in his argument  
14 saying, well, if life is in endangered, then you  
15 probably would have reported anyway, therefore, there's  
16 no immunity.

17 Well a creative prosecutor is always, in ever  
18 case, going to be able to come up with some reason why  
19 someone would have reported anyway. There's no fact  
20 situation you can come up with where you couldn't find  
21 a legal, moral, societal duty to report in that sort of  
22 situation. And, so, the objective standard swallows up  
23 the immunity.

24 On the other hand, you could try to apply a  
25 subjective standard. Was he thinking of something else

1 when he reported. Did he report because his wife  
2 wanted him to or because he thought he was going to die.  
3 And you can speculate as to all of the other reasons he  
4 might have reported anyway.

5           Significantly, there's no evidence that  
6 Captain Hazelwood was aware of this grounding  
7 regulation. That he was reporting pursuant to this  
8 grounding regulation. No evidence that he that he  
9 thought his crew was in danger, as Mr. Linton  
10 suggested, and was reporting for that reason.

11           And, so, what you're really being asked to do,  
12 if you look at this independent source exception, what  
13 you're being asked to do is, first, cut these words, a  
14 sentence in half. Say one part is wholly independent  
15 of the other and then say he was really only doing the  
16 first half. And there are independent reasons as to  
17 why. You're looking into his mind on the basis of no  
18 evidence and saying, well, you must have been reporting  
19 because you were afraid for your crew or you must have  
20 been reporting because you must have known about this  
21 Coast Guard regulation.

22           Again, you will be out there stretching to  
23 make factual findings that simply aren't there in the  
24 record.

25           Again, Your Honor, I think it bears repeating.

1 If you look at Kastigar in the case of sense that do  
2 deal with the independent sources exception. They're  
3 all factually focussed. Not one of them looks at  
4 independent duty or independent motivation. They are  
5 all looking at independent in fact. Was an independent  
6 investigation going on? Is there an independent source  
7 somewhere? And, by independent, they're referring to a  
8 different witness, a different deposition, a different  
9 something.

10 You will not find anywhere a situation where  
11 they try to read into a single statement two different  
12 motivations and two different meetings and then  
13 separate them out.

14 On the issue of inevitable discovery, the  
15 state's asking you to make several leaps. And before I  
16 talk about those, I'd like to... I'm sorry.

17 THE COURT: I was thinking that, before you  
18 got into that, it might be good to take a break here.

19 MR. FRIEDMAN: That would be fine, Your Honor.

20 THE COURT: We've been at it for some time.

21 MR. FRIEDMAN: Sure.

22 THE COURT: You're not near finished...

23 MR. FRIEDMAN: I'm not close.

24 THE COURT: ...I don't think. Okay. Let's  
25 take a break.

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

(Off record - 9:54 a.m.)

(0231)

(On record - 10:14 a.m.)

THE COURT: You may be seated. I have until noon for the arguments. Are you going to be out of it? Okay, because we're going to recess at noon. I have 1:30 and 3:30 omnibus hearings I've got to prepare for too. Okay.

MR. FRIEDMAN: Your Honor, I wanted to start the discussion of inevitable discovery by pointing out that Nix is not a Fifth Amendment case as Mr. Linton suggested.

THE COURT: It's a Sixth Amendment case.

MR. FRIEDMAN: Right.

If you're going to apply the inevitable discovery doctrine in this case, you again have to make some leaps of faith, however you want to characterize, what the state is asking you to do.

The first thing you have to do is decide that the state of Alaska would adopt the inevitable discovery exception. As we pointed out in our brief, it's never been adopted.

If we were here today arguing over an illegal

1 search and whether inevitable discovery should apply, I  
2 would probably be pointing out to the court the  
3 instances in which the Alaska Supreme Court or Court of  
4 Appeals has deviated from the Burger or Rehnquist  
5 courts and the greater protection in our court has said  
6 applies, both in immunity areas and in privacy areas  
7 and a variety of things.

8           And Mr. Linton would be arguing the U.S.  
9 Supreme Court authorities and it would be a close  
10 question as to whether the Supreme Court or the Court  
11 of Appeals of Alaska would adopt inevitable discovery  
12 in a search context, Fourth Amendment context, or Sixth  
13 Amendment context.

14           But you have another hurdle, which is, no  
15 where, at least that we've been able to find, has the  
16 inevitable discovery doctrine been applied in the  
17 context of immunity.

18 (0330)

19           Now, we submitted -- well, first I should say,  
20 the reason for that, I think, is apparent from looking  
21 at the policies involved. Kastigar is such a strong  
22 prohibition against the use of testimony against a  
23 defendant who's been granted immunity that, I think it  
24 may not have occurred to any prosecutor, that they can  
25 sell this argument to a judge. That although we've

1 granted you immunity and we've used what you've given  
2 us, we can now still go after you because we could have  
3 found all of this anyway.

4 I think, again, similar to the argument I made  
5 before, in almost every instance, once you have the  
6 answer to the problem, it's easy to show you would have  
7 gotten there anyway. How arguably it's easy to show.

8 At any event, the only case we were able to  
9 find that explicitly discusses immunity and inevitable  
10 discovery is the case we cited to the court over the  
11 weekend, the Hanley case out of Alabama. And  
12 significantly, if you take -- the Hanley case,  
13 apparently the defendant didn't object to the  
14 inevitable discovery doctrine applying there. He said  
15 simply, if you apply it, it still doesn't fit.

16 The court said the prosecution must  
17 demonstrate that the lawful means, which made discovery  
18 inevitable, were possessed by the police and were being  
19 actively pursued prior to the occurrence of the illegal  
20 conduct.

21 So that even, if you want to, assume Alaska  
22 would adopt inevitable discovery, further assume that  
23 it would apply in an immunity context, you still are  
24 left with a problem of, as it's been applied by the  
25 courts, it doesn't fit here, because what the courts



1 require is prior pursuit. That what was going on at  
2 the time you called, would have ultimately led to the  
3 discovery anyway. And clearly we don't have that here.

4 Nix, as you're undoubtedly aware, the search  
5 party's heading right towards the body. They would  
6 have reached it in a half an hour. Their instructions  
7 were so explicit. Search under culverts. That's where  
8 the body was. Barring some unforeseen cataclysmic  
9 occurrence, they would have inevitably found the body.

10 (0413)

11 Here, what the state is asking you to do is  
12 indulge in a series of speculations and guesses to try  
13 to establish that inevitably everything that they got  
14 would have been found anyway.

15 You asked for some argument on the burden.  
16 And I'm not sure that I can add anything to what we've  
17 provided you in the briefs already. We've got Kastigar  
18 saying it's a heavy burden. We have, I think it's  
19 Wade, yes Wade, interpreting Murphy v. Waterfront  
20 Commission, as requiring a clear and convincing  
21 standard.

22 Clearly there are federal cases that require  
23 only a preponderance of the evidence standard. There's  
24 a split of authority.

25 Again, as I say, I'm not sure I can provide

1 the court with anything more than we've given in the  
2 briefs. I'm not sure it makes a lot of difference,  
3 given the state's factual concessions in this case,  
4 given the actual facts as they've been presented in the  
5 hearing. And I'll explain why in a minute.

6 The first issue, if we enter this land of  
7 speculation, is when would the ship have been  
8 discovered? And just so there's no mistake, we agree  
9 inevitably the ship would have been discovered without  
10 his call. Would have been discovered some time that  
11 night or that early morning. Clearly the oil spill  
12 would have been discovered soon thereafter.

13 But that doesn't answer the question. If  
14 you're going to go down this road with the state, Your  
15 Honor, you're going to have to make specific findings  
16 as to what inevitably would have happened. Not what  
17 might have happened. Not what could have happened.  
18 But what inevitably would have happened. And whatever  
19 standard you apply, the state comes up short.

20 (0538)

21 Really, three different theories you can use  
22 or that the state has presented you with to try to  
23 figure out when the ship would have inevitably have  
24 been discovered: one I'll call the Blandford theory;  
25 one is the Chevron California theory; and the third is

1 that people on the shore would have eventually noticed  
2 the ship. I won't talk about the people on the shore,  
3 just because, really, the Chevron California theory  
4 gets us where we want to be. And the state concedes  
5 that the people on the shore, their discovery, would  
6 have been some time later than the Chevron California.

7 I'd like to talk about the Blandford scenario  
8 first. Basically, that theory is that Mr. Blandford  
9 would have noticed something amiss and would have taken  
10 a series of actions which would have resulted in  
11 discovery of the Exxon Valdez and the predicament it  
12 was in sooner than the Chevron California theory.

13 It requires the court to make findings as to  
14 what Mr. Blandford would have done, would have done,  
15 which Mr. Blandford, himself, was unwilling to commit  
16 to. He told us there was not set procedures for what  
17 to do. He told us that at some point, about the time  
18 he received the call, he was beginning to wonder about  
19 the ship anyway. He said soon thereafter he probably  
20 would have tried to raise the ship on the radio. He  
21 said at some point, if he didn't receive a return call,  
22 he would have made repeated calls.

23 Now, he didn't say, and there's no evidence as  
24 to how long he would have kept trying to make repeated  
25 radio calls before doing something else. So, the court

1 will have to provide this. If you want to go down that  
2 road, you'd have to provide that factual material. You  
3 will have to say, well, I find, after he made seven and  
4 a half calls, he then would have done something else.  
5 Or, after he tried for five minutes or ten minutes, he  
6 then would have done something else.

7 He didn't say that. There's no evidence in  
8 the record to support that sort of a finding. But,  
9 assuming you want to make that kind of finding, after  
10 ten minutes it would have been reasonable for him to do  
11 something else, doesn't mean Mr. Blandford would. But,  
12 if you want to say that, then the next question is, all  
13 right, what would he have done next?

14 (0610)

15 Well, he said there were a variety of things  
16 of he could have done. He could have called other  
17 vessels in the area. He could have called the pilot  
18 boat at, I think it's Potato Point, one of those  
19 points, to go out and take a look. He could have  
20 called the Chevron California. And he could have  
21 looked on the radar. I think those are the four that  
22 he mentioned initially.

23 He never said what order he would have done  
24 those in. Which one he would have tried first. Which  
25 one he would have tried second. How long he would have

1        tried one or the other until he moved on to something  
2        else.

3                As to the radar issue, remember that the radar  
4        was set on a setting that wouldn't have shown the ship.  
5        And remember that Mr. Blandford said that he expected  
6        the ship would have been well passed Bligh Reef by the  
7        time he started wondering what was going on. So, it's  
8        safe to assume, on this land of speculation, that had  
9        he turned on the radar to look for the ship, he would  
10       have been looking well passed Bligh Reef for it. He  
11       never said, he was never asked and he never said that,  
12       had Captain Hazelwood not told him where the ship was,  
13       that he would have found it.

14               Now, we can speculate. We can say, well, it  
15       was a half inch blip on his screen and therefore he  
16       would have found it. But, again, we're speculating in  
17       a way that he was even unwilling to do. And there's no  
18       evidence that he would have found it not knowing where  
19       to look on his own.

20       (0700)

21               But there was this list of things he could  
22       have done. There was no testimony as to which he would  
23       have done, in what order, and so on. Assuming at some  
24       point he discovered something was wrong, he said that  
25       he would have contacted Commander McCall. But, once he

1 was alarmed, once he was worried, seriously worried, he  
2 would have called Commander McCall.

3 I do want to point out, just as an aside, that  
4 the records we showed him showed that, on occasions, as  
5 much as twenty minutes passed, a vessel was as much as  
6 twenty minutes late, without him having responded in  
7 some way, as he admitted to us. And, also, that on  
8 some occasions, vessels didn't even report in when they  
9 were supposed to and he couldn't tell us what action,  
10 if any, he had taken on those occasions.

11 But, again, giving him the benefit of the  
12 doubt that he would have done something and he would  
13 have discovered something was amiss, at some point in  
14 time that evening, he would have contacted Commander  
15 McCall. Well, what have he had said to Commander  
16 McCall? That, of course, depends on what he found.  
17 You're going to have to supply what he would have said  
18 to Commander McCall.

19 There's no testimony -- Commander McCall said,  
20 if somebody told me the ship was aground, they would  
21 have sent people out there. But he provided no  
22 testimony about what he would have done if he'd simply  
23 been told the Exxon Valdez is missing. I can't raise  
24 them on the radio. Or, the Exxon Valdez has not been  
25 spotted by the Chevron California and is not responded,

1 what should we do next? Commander McCall didn't say  
2 what he would do in that situation.

3 And so, again, the court is left to fill in  
4 the blanks for the state, if you want to go down that  
5 road.

6 The Blandford scenario is so speculative, that  
7 ever the state has not suggested that the court adopt  
8 it either in its briefs or in its proposed findings of  
9 fact. If the state is unwilling to go that far out,  
10 the court should be unwilling to do that far out.

11 But assume you do, for a minute. Assume you  
12 do. And you find that, if you take an extreme example,  
13 the investigators would have arrived only a half hour  
14 later than when they did arrive. So, we've got them  
15 there roughly a little after four o'clock. There is  
16 testimony at the hearing that Captain Hazelwood was at  
17 various places on the ship at various times that night.  
18 To make sense, at times he was in his stateroom. At  
19 times he was in the stateroom where they were  
20 conducting interviews. At times he was on the bridge.  
21 At times he was walking around.

22 (0850)

23 There's no showing as to, had they come aboard  
24 at 4:05, let's say, where Captain Hazelwood would have  
25 been. That's significant for this reason. We know

1 that at 3:30 standing next to him on the bridge someone  
2 thought they smelled alcohol on his breath. At 4:05,  
3 if he were in the engine room, if he were out on the  
4 wing, the outside of the vessel, if he were in another  
5 location, could they have smelled alcohol on his  
6 breath? We don't know. But it is safe, and again, we  
7 are in this sort of land of speculation, but, if we're  
8 there, we're there because the state wants us there.  
9 And, if we there, it's the state that has to answer  
10 these sorts of questions.

11 Just like in Nix, inevitably the prosecution  
12 could show, we would have wound up at that culvert  
13 where the body was and we would have looked. The state  
14 has to show you that, inevitably, we would have wound  
15 up in a position with Captain Hazelwood where someone  
16 could have smelled alcohol on his breath. And they  
17 can't do that. And you'll have to supply that, if you  
18 want to adopt the Blandford scenario.

19 If you adopt the Chevron California scenario,  
20 which is the one the state is urging, that is not an  
21 unreasonable assumption. That by the time the ship was  
22 going by, Chevron California, went by Bligh Island  
23 within three miles of the Exxon Valdez, somebody would  
24 have figured something is wrong. The position would  
25 have been located, because the Chevron California could



1 have seen it and would have radioed and they would have  
2 known something.

3 Now, the testimony on this is somewhat fuzzy,  
4 unlike much of the other testimony. The captain of the  
5 Chevron California said, if I had maintained my same  
6 speed, I would have arrived abeam Bligh Island at 2:50.  
7 He said that assumed that he didn't slow down for ice.  
8 But there were ice reports in the area.

9 Lieutenant Commander Falkenstein told us that  
10 he estimated the Chevron California would be abeam  
11 Bligh Island at 3:30. So we've got a forty minute  
12 different there as to discovery time. I think  
13 Lieutenant Commander Falkenstein was basing his  
14 estimate on the ship slowing for ice. No evidence one  
15 way or the other as to whether they actually would have  
16 slowed for ice.

17 At any rate, it would have taken a minimum, as  
18 the state says in its proposed findings, a minimum of  
19 three hours and seventeen minutes once there's a report  
20 to the Coast Guard for the investigators to get out to  
21 the ship.

22 Now, that's a minimum time, in terms of what  
23 you can do, because there's been no evidence that, what  
24 would it be, roughly two, three hours later, the same  
25 response would have been effective. There's no reason

1 to assume it would be different, but there's no reason  
2 to assume it would be the same either. One of these  
3 men may have gone on duty somewhere else, so on.

4 (0974)

5 But I think the court can adopt that. Can  
6 say, all right, three hours and seventeen minutes from  
7 the time the Chevron California was going by; puts  
8 investigators on the ship at either 6:07 or 6:47,  
9 depending upon which side of the spectrum you want to  
10 come down on. It really doesn't matter a whole lot,  
11 because the end result is the same.

12 The state admits that the smell of alcohol on  
13 Hazelwood's breath was not inevitably going to be  
14 discovered. And that's a key concession that really  
15 decides this case for the court even if you have gone  
16 this far down the road with the state.

17 Dan Lawn said he thought he smelled something  
18 like alcohol on Hazelwood's breath between, I think he  
19 said, 5:30 and 7:00 o'clock. If the officers get on  
20 board 6:00 o'clock or 6:47, there's no evidence the  
21 smell would have still been there. We know by 8:30 it  
22 was gone, because Trooper Fox, who was specifically  
23 looking for smell or smelling for a smell of alcohol,  
24 didn't smell it. So the state's concession that the  
25 inevitability of the smell of alcohol isn't there is

1 well taken.

2           What are the implications of that for this  
3 inevitable discovery doctrine? We have to imagine,  
4 recreate, what would have happened had the officers  
5 gone on board and not smelled alcohol. Well, that  
6 leads, based on what we know, to some serious problems  
7 for the state's argument.

8           First, we know that, when Trooper Fox was  
9 first called about the spill/grounding, that all he did  
10 was roll over and go back to bed. This was not  
11 something he was going to investigate. At least not  
12 that night. We know the only time the investigators  
13 called him out there was when they decided they needed  
14 to do a breath test.

15           I need to back up for a second. They didn't  
16 go out there with a breath test or a urinalysis or a  
17 blood test kit. They didn't go out there with the  
18 intent to test for alcohol. What prompted them to test  
19 for alcohol at that time was the smell of alcohol on  
20 Hazelwood's breath. The testimony is uncontracted on  
21 that point. And fairly convincing.

22 (1110)

23           They get out there and this is a surprising  
24 fact. And they respond by trying to get Trooper Fox  
25 out there. When Fox got out there, he was given all

1 the information about the potential of alcohol being  
2 involved. And remember what he said? And this was  
3 quite a while ago. But what he said was, when he got  
4 back to shore, he started pursuing alcohol leads. Gave  
5 some of those leads to the Coast Guard that night,  
6 hoping they would further pursue. And then he got on  
7 the phone with his superiors and he was trying to  
8 convince them that the state should do its own  
9 investigation of the accident.

10 Now, that's not, in hindsight, maybe that's  
11 self evident. But at the time it wasn't. The Coast  
12 Guard had jurisdiction. The Coast Guard had its team  
13 of investigators out there. It was a large vessel  
14 casualty. Not the sort of thing the troopers  
15 ordinarily investigate. And Fox is having a hard time,  
16 as he said, getting people to take him seriously. He's  
17 saying, look, this is bigger than anyone of you really  
18 understands. And he's trying to tell them that  
19 alcohol's been involved.

20 Now, that's what actually happened. And it  
21 took him several days to convince his superiors to send  
22 other troopers down there.

23 Now, assume Delozier is out there and he  
24 doesn't smell alcohol and he starts his Coast Guard  
25 investigation. Who was on the bridge? Who wasn't on

1 the bridge? Does that violate Coast Guard regulations  
2 and Coast Guard orders? Does it not violate those  
3 orders?

4 It's a Coast Guard investigation. There are  
5 no state trooper issues floating around. Fox hasn't  
6 even gone out there. There's no showing at all in the  
7 evidence that the troopers would have even investigated  
8 this case had Fox not been out there that morning and  
9 been aware of the alcohol issues.

10 Now, if there's no trooper investigation,  
11 everything falls. And there's been no showing there  
12 would have been a trooper investigation in the absence  
13 of the smell of alcohol. The indictment is dismissed  
14 because use was made of trooper gained materials. Use  
15 was made of alcohol related information.

16 Now, I need to address two general statements;  
17 one made by McGhee and one made by Falkenstein. McGhee  
18 says, well, we would have looked into the issue of  
19 alcohol anyway. That would be part of our  
20 investigation. Well, that assumes, and there's no  
21 evidence to support it, that the troopers would have  
22 investigated. Likewise, Falkenstein says, any marine  
23 casualty investigation would have involved an alcohol  
24 investigation.

25 Well, first of all, that's not necessarily

1 supported by the evidence. We know that, when the  
2 Coast Guard people first went out, they brought no  
3 equipment to investigate alcohol. And we know that  
4 when Fox, even knowing it was an alcohol case, when he  
5 went out there, he didn't bring any equipment to  
6 investigate alcohol, in terms of blood tests.

7 (1270)

8 We know that, in the ensuing investigations,  
9 no questions were asked relating to alcohol use by  
10 Cousins, the third mate who was on the bridge at the  
11 time, or Kagan, the helmsman.

12 That's why, by the way, Your Honor, we  
13 submitted Exhibit F.

14 Exhibit F are the interviews conducted by the  
15 troopers. And if you look, they're asking questions  
16 about Hazelwood. They're not asking questions about  
17 Cousins or Kagan.

18 What that does is, that casts doubt on their  
19 assertions that they would have, absent the smell of  
20 alcohol, still investigated the alcohol issue. Because  
21 the fact is, they didn't seriously investigate it as to  
22 Cousins or Kagan. They took blood tests of Cousins and  
23 Kagan only after they thought they smelled it on  
24 Hazelwood's breath and they decided they were going to  
25 test everyone. But the subsequent days, as they're

1 trying to follow up leads and pursue the issue before  
2 the blood test results are back, they're asking only  
3 about Hazelwood because he's the only one they smelled  
4 alcohol on.

5 But, assume that they would have, in some  
6 manner, investigated alcohol. Either the Coast Guard  
7 or the troopers would have, in some manner,  
8 investigated alcohol.

9 That still does answer the crucial questions,  
10 which are: When would they have started investigating  
11 alcohol, if they hadn't smelled it on his breath? Some  
12 time after when then did. What would they have done to  
13 investigate alcohol? We know there's a direct link  
14 from the smell of alcohol to Fox to Caples to Murphy to  
15 bartender people and so on. We know what they did in  
16 response to the smell.

17 What would they have done if they were just  
18 doing a routine, cover all bases sort of investigation?  
19 Who would they have talked to? What would they have  
20 asked? And what answers would they have gotten several  
21 days later?

22 (1394)

23 A case I wanted to cite to the court which I  
24 haven't done before is U.S. vs. Ramirez Sandoval, which  
25 is at 872 F2d 1392, it's a Ninth Circuit 1989 case.

1 And at page 1400, and this is an inevitable discovery  
2 case, Your Honor, under a, basically, search and  
3 seizure issue, but the court is wrestling with the same  
4 issue I'm bringing up now.

5 The court says, it's not disputed the officers  
6 had the right to ask these illegal aliens to come out  
7 of the car. And it's undisputed they had the right to  
8 ask them questions, such as what their immigration  
9 status was. But there's no showing as to what specific  
10 questions would have been, in fact, asked. In other  
11 words, if the right would have been exercised. No  
12 showing as to what the answers would have been. And,  
13 therefore, no showing that discovery was inevitable.

14 And that's the situation we have here. Even  
15 if you want to accept McGhee and Falkenstein's  
16 assertion that some sort of alcohol investigation would  
17 have been done, there's no showing that inevitably that  
18 investigation, the routine, perfunctory, careful  
19 investigation that would just be done by any careful  
20 investigator would have led to the same information,  
21 the same evidence that the specific investigation,  
22 prompted by specific leads, relating to specific  
23 people.

24 In other words, it caused it to focus on  
25 Hazelwood, caused it to focus on alcohol on his breath.



1 Fox was there, therefore, he had access to the local  
2 people and knew what to plug the Coast Guard into in  
3 terms of location knowledge and local people. No  
4 showing that any of that would have happened.

5 And, again, if you want to go down that road,  
6 you're going to have to supply those facts. You're  
7 going to have to say, well, I find that McGhee is a  
8 careful investigator, therefore, he would have asked  
9 questions that would have brought out these same facts.  
10 And there's no evidence in the record to support that.

11 Without the smell of alcohol, Your Honor, the  
12 entire state's case falls, even under their inevitable  
13 discovery theory.

14 (1525)

15 A similar point can be made about the crew  
16 members statements from another angle, assuming you  
17 excise or eliminate the issue of alcohol from the crew  
18 members' statements.

19 What actually happened in this case, was that  
20 the Coast Guard came aboard. Went up to the bridge and  
21 started interviewing the captain. The question is,  
22 what would have happened had he exercised his Fifth  
23 Amendment rights? Not filed his report with the Coast  
24 Guard. Said, we're not going to call the Coast Guard.  
25 We're going to take care of this ourselves. And the

1 Coast Guard comes aboard and he doesn't talk to them.

2 No showing has been made that any crew member  
3 would have, in fact, talked to investigators under that  
4 scenario.

5 Again, contrast this with Nix. Where the  
6 searchers are heading towards the body. They're a half  
7 hour away. They're searching in the precise types of  
8 locations. Discovery is inevitable, short of something  
9 happening.

10 There's been no testimony from any crew  
11 members or any investigators that the crew members  
12 would have talked. They would have spoken to the  
13 investigators had their captain remained silent, not  
14 reporting.

15 In short, Your Honor, not only is the state  
16 asking you to make some leaps of faith with regard to  
17 what the law should be in this area, but they're asking  
18 you to fill in substantial factual gaps to support  
19 their inevitable discovery theory.

20 Unlike Nix, where the prosecutor could show  
21 all the specific facts leading from point A to point B,  
22 all they've provided the court with are some general  
23 conclusory statements, which don't answer the specific  
24 step by step analysis that's required, even under the  
25 Supreme Court's view of it, the U.S. Supreme Court's

1 view.

2 Your Honor, I just briefly want to talk about  
3 the Chinese wall issue. As I noted in the beginning,  
4 the state investigated this case for three weeks before  
5 implementing any kind of prophylactic measures. You  
6 won't find another case in the books where that's been  
7 done.

8 We have a case where the people, who are  
9 supposedly untainted, read newspaper articles about the  
10 case. Heard radio reports about the case. Actually  
11 heard the immunized testimony on the car radio, in the  
12 case of Brent Cole. Knew of the alcohol test. Knew  
13 that it was positive. That's the clean side.

14 You won't find another case upholding, what  
15 shall we call it, upholding the use or exposure of the  
16 clean prosecution to such extensive tainted  
17 information. You won't find another case where, even  
18 if you look at -- obviously, there's a split. Some  
19 cases say you can't make any evidentiary or non-  
20 evidentiary use. Other cases say non-evidentiary use  
21 is okay.

22 (1700)

23 Well, even if you only look at the non-  
24 evidentiary use is okay cases, you won't find another  
25 one where such extensive exposure and such extensive

1 use has been made, where you have the prosecutors who  
2 are drafting the indictment language, who are making  
3 charging decisions, who are giving the names to the  
4 clean team as to who to call at Grand Jury, they're all  
5 exposed to the tainted information and they're calling  
6 the shots. You won't find a case like that.

7 That argument, that problem, doesn't fit  
8 neatly into any of the categories we've been talking  
9 about. We cannot show that, as a result of Larry Weeks  
10 knowing a specific piece of information, that he was  
11 specifically led to another piece of information. But  
12 it doesn't take much imagination to say that the whole  
13 course of the prosecution may have been determined by  
14 what they knew.

15 They knew what was out there. I forget which  
16 witness it was. One of the prosecutors, I think it was  
17 Mr. Guaneli, maybe it was Mr. Cole, said, I think it  
18 was Mr. Cole, he was talking about how the alcohol  
19 case, he thought, was pretty weak, based upon what he  
20 was going to be allowed to use. But he wasn't going to  
21 dismiss it, although, presumably, he had the authority  
22 to dismiss it. He wasn't going to dismiss it. They  
23 were going to wait and see what happens. In other  
24 words, what you're going to allow them to see or use.

25 And so, it's this game that they're playing,

1 where they know the answer and they know what's out  
2 there, but they're saying, well, we really don't know  
3 and it's not affecting our decision. But the evidence  
4 is that it is affecting their decision and it's  
5 affected it every step of the way; from the charging  
6 language to the decision to give immunity to Cousins.  
7 To not indict Cousins. To keep going with the DWI  
8 case, even though Brent Cole thinks it's weak.

9 The knowledge of the tainted information has  
10 permeated all of the decision making process. It's an  
11 incredible record of that. And I have trouble believe  
12 the courts that are most strongly against us on non-  
13 evidentiary use would approve of such use.

14 And, if you look at some of those case, like  
15 Bird, you can see these footnotes where they say, well,  
16 we think the better practice is to make sure they don't  
17 have any exposure to any of this stuff. And then you'd  
18 save us a lot of work and a lot worry, because clearly  
19 all the courts are uncomfortable with any of this kind  
20 of use.

21 Yes. Some of them have said, on the specific  
22 facts presented to them, one prosecutor sees a  
23 transcript of immunized testimony and then doesn't use  
24 it any more; says he's not using it. And they say,  
25 okay, under those circumstances, because we can compare

1 what you would have done, and they're all fact  
2 specific, in other words. No case has there been  
3 approval of such extensive non-evidentiary use as is  
4 presented in this case.

5 But you see they were stuck and they had to  
6 use that information as much as they did, because their  
7 whole solution, their whole concept doesn't make sense.

8 This gets back to the point that I was talking  
9 about in the beginning, Your Honor, where, if you apply  
10 the Kastigar principles, it all goes. And they've got  
11 to come up with a solution. And it's kind of a Ruth  
12 Goldberg Chinese wall. They're not really.

13 Remember what Kastigar's concerned with is  
14 what leads to what. We're not going to allow the  
15 immunized testimony to lead to other information. And  
16 if it leads to other information, we're going to throw  
17 it out. They can't live with that Kastigar concept.  
18 (1927)

19 So, they're going to slap a line across it and  
20 say everything before 6:07 is out; everything after  
21 6:07 is in. It ignores Kastigar. It ignores common  
22 sense. We know that one fact leads to another leads to  
23 another. And there's nothing magical about 6:07 in  
24 terms of causation.

25 And what they're asking the court to approve,

1 and I think they've admitted as much, we can use it  
2 all. We can get it all up to 6:07. And we can get the  
3 fruits of what everything in here led us to. We'll let  
4 our prosecutors have all of this and all the evidence  
5 that supports these things. We just won't tell them  
6 how we got there and, therefore, Kastigar will be okay.

7 But Kastigar says that's not okay. That if  
8 you went right to things by what took place up here,  
9 you're out of luck.

10 (2018)

11 Your Honor, you asked me at one of our  
12 colloquies early in this case, whether, under the facts  
13 of this case, it was impossible to prosecute Mr.  
14 Hazelwood. I've had some time to think about that.  
15 And I guess the best answer I can come up for the court  
16 is this.

17 That, first of all, there's nothing wrong with  
18 that result and that's done all the time all over the  
19 country every day. You wind up with a result where  
20 immunity results in somebody not being able to be  
21 prosecuted. The whole reason we give immunity is to  
22 tell someone, you're going to be protected; therefore,  
23 we want your information.

24 Maybe it wasn't impossible to prosecute Mr.  
25 Hazelwood. The state knew, according to their

1 testimony, by the 27th or 28th that they had an  
2 immunity problem. But maybe, maybe there was a way to  
3 immediately appoint separate investigators, separate  
4 prosecutors, and set them to work. Giving them no  
5 information and maybe that would have satisfied the  
6 Kastigar demands. In any case, it would have come a  
7 lot closer.

8 But, in fact, what happened was, three weeks  
9 of investigation, three weeks of using his immunized  
10 testimony, basically, compiling their entire case and  
11 then constructing the wall. And, under those facts,  
12 yes, it is impossible for them to do. Because, after  
13 three weeks, there's not a person in the state of  
14 Alaska who didn't hear or read about the immunized  
15 testimony, about the blood tests, and so on. After  
16 three weeks it's a charade. It's not an untainted  
17 team.

18 It is, as I mentioned to the court once  
19 before, it's Larry Weeks standing above the Chinese  
20 wall and Mr. Linton standing above the Chinese wall and  
21 pulling the strings on both sides. Deciding who's  
22 going to see what and what moves are going to be made.  
23 And that's not a Chinese wall, as that terms is being  
24 used in all the other cases.

25 And if it's impossible to prosecute Mr.



1 Hazelwood, it's certainly not the court's fault. Your  
2 job is to apply the law as Congress wrote it. And  
3 maybe it's not the state's fault. Although one could  
4 argue that they sure could have moved a lot faster to  
5 try to honor and correct the immunity.

6 Their extraordinary sensitivity, as Mr. Linton  
7 calls it, to these immunity rights is motivated more by  
8 the fact that, it took them so long to discover the  
9 problem and come up with a solution, than it is out of  
10 any sensitivity to those rights.

11 (2138)

12 If they were sensitive to those rights, they  
13 would have looked into them before they charged him  
14 with a crime. There was no rush. There was no need to  
15 charge him immediately, other than whatever public  
16 pressure they were feeling.

17 But, if it's impossible to prosecute him,  
18 that's a policy decision which has been made by  
19 Congress and is simply being implemented by this court.  
20 And that sort of policy decision is enforced by courts  
21 all the time. Your job is not to weigh the wisdom of  
22 that policy. Not to come up and carve out exceptions to  
23 that policy because you think or Mr. Linton thinks  
24 there's a better way to write the statute. You have to  
25 apply the statute as written.

1           And, if you apply the statute, as written, and  
2 immunity, as interpreted by Kastigar, to the facts of  
3 this case, then, as this case was investigated, it is  
4 impossible to prosecute Captain Hazelwood and still  
5 honor his immunity rights.

6           We'd ask that the indictment and the  
7 information be dismissed for that reason. Thank you.

8           THE COURT: Mr. Linton.

9           MR. LINTON: Your Honor, I don't think there's  
10 any specific item would go to in rebuttal. I suggest  
11 we use what time to go on to other motions, if we can  
12 get one done between now and 11:00; now and 12:00.

13           THE COURT: I think I can use the time more  
14 productively to start working on a decision on this  
15 between 11:00 and noon. I'd like to do that. Maybe I  
16 can do something tomorrow morning on this.

17           I have another case which is suppose to start  
18 in trial tomorrow morning, but I'm going to just put  
19 that off until we finish all the hearings on this and I  
20 can give you a decision on this.

21           I'll try to tomorrow morning have something  
22 for you. I make no promises, but I'll do the best I  
23 can.

24           If there's nothing further, we will stand in  
25 recess until 8:30...

1 MR. MADSON: Yes, a question, Your Honor. I  
2 assume from...

3 THE COURT: ...until 8:30 a.m. tomorrow  
4 morning. Excuse me.

5 MR. MADSON: I'm sorry, Your Honor. I didn't  
6 mean to interrupt.

7 From the court's comments, I assume the court  
8 is going to hear all the motions, even though you may  
9 reach a decision on this one prior to the argument on  
10 the others?

11 THE COURT: A lot depends on what I do on this  
12 one, doesn't it?

13 MR. MADSON: Well, it certainly would, Your  
14 Honor. But, I guess, the point I would like to make,  
15 is that it certainly would be nice to have rulings on  
16 everything, because I would think it's inevitable, if I  
17 dare use that word, that this case would be appealed by  
18 one party or the other.

19 It would be nice to have all the issues framed  
20 and argued and decision made on them, so we wouldn't  
21 have to do it piece meal, I guess, is what I'm saying.  
22 But, of course, it's your decision and your call. I'm  
23 only suggesting that it'd save, perhaps, a lot of time  
24 and trouble down the road.

25 THE COURT: Thanks for pointing that out.

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We'll stand in recess.

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

(Off record - 11:01 a.m.)

(2318)

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