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

STATE OF ALASKA,  
Plaintiff,  
vs  
JOSEPH HAZELWOOD,  
Defendant.

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

OMNIBUS HEARING  
DECEMBER 12, 1989  
PAGES 1362 THROUGH 1477

VOLUME IX

*Original*

H & M Court Reporting  
510 "L" Street, Suite 650  
Anchorage, Alaska 99501  
(907) 274-5661

**ARLIS**  
Alaska Resources  
Library & Information Services  
Anchorage Alaska

BEFORE THE HONORABLE KARL JOHNSTONE  
Superior Court Judge

Anchorage, Alaska  
December 12, 1989  
9:02 a.m.

APPEARANCES:

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1 PROCEEDINGS

2 DECEMBER 12, 1989

3 (Tape: C-3525)

4 (1414)

5 THE CLERK: ...Karl S. Johnstone presiding is  
6 now in session.

7 THE COURT: You may be seated. Well, I've  
8 reached a decision which I'll give to counsel.  
9 Needless to say, this is a case of first impression and  
10 there is really no authority on all fours to have  
11 assisted me. Probably nothing like this has ever  
12 occurred and nothing resembles the facts of this case  
13 and hopefully won't again.

14 I appreciate the opportunity to have heard the  
15 argument and briefing -- excellent briefing. I think  
16 it reflects the seriousness of the case, the way it was  
17 presented. My oral remarks and decision will be in a  
18 narrative summary, the facts which I have found.

19 I've concluded that the requisite burden of  
20 proof is by a preponderance of the evidence. However,  
21 most oft cases, the facts which I read, cite, were  
22 undisputed, and this court is clearly convinced that  
23 the events and consequences that I recite did in fact  
24 occur or would have occurred.

25 The findings are based on the testimony of the

1 witnesses and the exhibits, and reasonable inferences  
2 and assumptions can be drawn from that evidence. I've  
3 prepared a written decision, an order which we've made  
4 part of the record. In some cases the narrative I'm  
5 going to relate now will not quote all parts of the  
6 written decision, by leaving out some citations, some  
7 footnotes, maybe some context. In some cases where my  
8 oral remarks differ from the written decision, they  
9 will be supplementing the written decision. Where the  
10 written decision may differ from my oral remarks, they  
11 will be supplementing the oral remarks and both will  
12 constitute the decision in the order of this court.

13 After making the decision, we'll take a brief  
14 recess and come back and determine what the next steps  
15 are.

16 (1566)

17 On the night of March 23rd, 1989 the oil  
18 tanker Exxon Valdez left the Port of Valdez, Alaska.  
19 The vessel had been fully loaded with crude oil at the  
20 Alyeska Pipeline Terminal in Valdez and was en route to  
21 California. Until the vessel passed through Valdez  
22 Narrows and reached Rocky Point, it was under the  
23 control of Pilot William Murphy. Murphy disembarked at  
24 the Rocky Point pilot station approximately 11:20 p.m.,  
25 and control of the vessel was turned over to Captain

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Hazelwood.

From the time the ship left Valdez, it was required to report its progress through Prince William Sound to the Coast Guard Vessel Traffic Service, VTS, in Valdez. The VTS were responsible for monitoring the vessel traffic through the major shipping lanes at Prince William Sound.

At approximately 11:45 p.m., Bruce Blandford, a civilian employee of the Coast Guard, began his shift as watch-stander at the VTS. The previous watch stander, Gordon Taylor, briefed Blandford on the current situation regarding vessel traffic in the sound. Taylor told Blandford that the Exxon Valdez had radioed to report dropping a pilot off at Rocky Point. Blandford was also informed that the vessel had estimated that it would be abeam Naked Island, a required reporting point at approximately 1:00 o'clock a.m. on the 24th. The vessel had also reported, however, that it had encountered some ice, and would, therefore, be slowing down and deviating from its scheduled course. Once clear of the ice it would give a new estimate for when it would be at abeam Naked Island.

At approximately 12:04 a.m. on the 24th the Exxon Valdez ran aground on Bligh Reef in Prince

1 William Sound. The impact of the grounding damaged the  
2 hull of the vessel, eventually causing approximately 11  
3 million gallons of crude oil to spill into the sound.  
4 Shortly thereafter, at approximately 12:28 a.m.,  
5 Hazelwood radioed the VTS and reported the following:

6 "Yeah, this is the Valdez back. We should be  
7 on your radar there. We've fetched up hard aground  
8 north of Goose Island off Bligh Reef and evidently  
9 we're leaking some oil and we're going to be here for a  
10 while."

11 When Blandford received this communication he  
12 immediately located the Exxon Valdez on the VTS radar.  
13 The vessel was visible as a "good-sized blip" on the  
14 radar screen. The signal was steady, approximately  
15 one-half inch long, and was immediately adjacent to a  
16 smaller, intermittent signal that Blandford recognized  
17 as a radar-reflective buoy marking Bligh Reef. The  
18 signal indicated the ship was facing perpendicular to  
19 the shoreline, facing towards Bligh Island. As soon as  
20 he located the vessel on radar, Blandford telephoned  
21 Commander Steven McCall, the Coast Guard officer in  
22 charge of the VTS, and the investigation began.

23 According to Blandford, at about 12:15 a.m. he  
24 was already wondering why he hadn't heard from the  
25 Exxon/ Valdez. Based on what he had been told by

1 Taylor, and on over two years experience on the job,  
2 Blandford felt that the vessel should have radioed by  
3 then to report it's new estimate for reaching Naked  
4 Island. Had he not heard from the vessel by 12:30  
5 a.m., Blandford testified he would have attempted to  
6 make contact on his own initiative.

7 Blandford would have first attempted to reach  
8 the vessel by radio. Had that been unsuccessful, he  
9 would have attempted to locate the vessel on radar.  
10 Blandford would have seen the vessel, clearly visible  
11 on Bligh Reef, as he in fact did after receiving the  
12 radio transmission at 12:28 a.m. Blandford would have  
13 located the Exxon Valdez on radar and not later than  
14 12:45 a.m. on the 24th, even had the grounding not been  
15 reported.

16 The court reaches this conclusion by allowing  
17 Blandford approximately 15 minutes to attempt radio  
18 contact with other vessels and to use alternate radio  
19 bands and frequencies.

20 On the radar map you could not tell if the  
21 vessel was leaking oil. However, based on his  
22 knowledge of Bligh Reef, Blandford would have concluded  
23 that the vessel was in serious trouble simply due to  
24 its location. According to Blandford there was no  
25 water in the area where the vessel appeared on radar.



1 The radar also indicated that the vessel was  
2 perpendicular to the shore, which, together with this  
3 location, it was clearly an indication of a grounding.  
4 Based solely on his location of the ship on Bligh Reef,  
5 Blandford immediately would have called Commander  
6 McCall to report the incident. Blandford would have  
7 telephoned McCall approximately 12:45 a.m. on the 24th.

8 Blandford did, in fact, telephone McCall  
9 within two or three minutes of receiving Hazelwood's  
10 report. McCall received a call at home at approximately  
11 12:30 a.m., and instructed Blandford to contact the  
12 other Coast Guard officers and inform them of the  
13 situation. At approximately 12:50 a.m., McCall met  
14 with Lt. Commander Thomas Falkenstein and Chief Warrant  
15 Officer Mark Delozier at the VTS office. The location  
16 of the Exxon Valdez was still clearly visible on radar.

17 After a brief discussion an assessment of the  
18 situation, McCall decided to send Falkenstein and  
19 Delozier to the site of the casualty. Falkenstein was  
20 put in charge of salvage and pollution control, and  
21 Delozier was assigned to investigate the cause of the  
22 accident. Meanwhile, Daniel Lawn, an environmental  
23 engineer with the Alaska Department of Environmental  
24 Conservation had been informed of the spill by Alyeska  
25 officials. Lawn telephoned the VTS and McCall invited

1 him to join the team headed for Bligh Reef.

2 The Coast Guard boat carrying Falkenstein,  
3 Delozier and Lawn arrived at the Exxon Valdez at  
4 approximately 3:15 a.m. Conditions, including the  
5 visible gushing of crude oil from the tanker, made  
6 boarding difficult. The group did not arrive on the  
7 bridge until approximately 3:45 a.m.

8 Once on the bridge, Delozier then began  
9 investigating the cause of the spill, while Falkenstein  
10 and Lawn attempted to gauge the magnitude of the spill  
11 and make preparation for the cleanup operation.

12 Based on the knowledge of Prince William  
13 Sound, McCall, Falkenstein, Delozier and Lawn all  
14 testified that had they known only that the Exxon  
15 Valdez had run aground on Bligh Reef, they still would  
16 have made immediate plans to travel to the vessel.  
17 According to Lawn, the rough water and rocky bottom of  
18 the sound made conditions extremely dangerous. He felt  
19 it would be almost a miracle for a tanker to run  
20 aground there and not leak oil. Commander McCall  
21 testified that grounding of an oil tanker in the sound  
22 would have been considered extremely serious, even if  
23 no oil spill had been reported. In response to a  
24 grounding report, and as required by law, McCall would  
25 have acted quickly to investigate any possible safety

1 or pollution dangers.

2 In addition to the information available to  
3 the Coast Guard when it first located the Exxon Valdez,  
4 the position of the vessel would have been discovered  
5 by the Chevron California, reported to the Coast Guard  
6 no later than 3:00 o'clock a.m. The Chevron California  
7 was proceeding northward to Valdez and was expecting to  
8 encounter the Exxon Valdez to obtain an ice report.  
9 The Chevron California would have passed within two or  
10 three miles of Bligh Reef, and the lights on the Exxon  
11 Valdez would have been clearly visible. This  
12 observation would have resulted an immediate response  
13 from the Coast Guard.

14 As a result of the investigation, evidence was  
15 gathered on-board the Exxon Valdez. The investigators  
16 made observations that the defendant smelled of  
17 alcohol, and heard the defendant make several  
18 statements. The defendant and other crew members were  
19 interviewed, and tested for alcohol by taking blood and  
20 urine samples. A number of documents were also seized  
21 from the vessel.

22 The defendant moved to dismiss, claiming that  
23 he is entitled to full transactional immunity or,  
24 alternatively, to use/derivative use immunity based on  
25 his report of the oil spill. The defendant asserts

1 that none of the evidence gathered can be used against  
2 him because it was derived from the report or was an  
3 exploitation of that report. The state asserts that,  
4 at most, the defendant is entitled to use/derivative  
5 use immunity. The state further contends that all of  
6 the evidence, (a) was discovered independently of the  
7 report of the oil spill because of the defendant's  
8 report of a marine casualty, and (b) inevitably would  
9 have been discovered in the absence of any report by  
10 the defendant.

11 Under federal law the defendant is provided  
12 immunity as follows:

13 Any person in charge of a vessel shall, as  
14 soon as he has knowledge of any discharge of oil from  
15 such vessel, immediately notify the appropriate agency  
16 of the United States Government of the discharge.  
17 Notification shall not be used against any such person  
18 in any criminal case, except as a prosecution for  
19 perjury or for giving a false statement.

20 In Kastigar vs. United States, a case cited by  
21 both parties, the court ruled that use/derivative use  
22 immunity was sufficient to protect a declarant's  
23 privilege against self-incrimination under the Fifth  
24 Amendment. The court rejected full transactional  
25 immunity because it would afford a witness considerably

1 broader protection than his Firth Amendment privilege.

2 Immunity under state law is similar to that  
3 provided under federal law. Alaska Statute provides  
4 that a person in charge of a vessel must report any oil  
5 spill as soon as the person has knowledge of the spill.  
6 Administrative Code Regulation provides immunity as  
7 follows:

8 Information given under 80-110 of this Chapter  
9 or information directly obtained by the exploitation of  
10 a notification or report will not be used against any  
11 natural person providing a notification or report in  
12 any criminal action for the discharge itself.

13 Defendant argues that under State vs.  
14 Serdahely, an Alaska Supreme Court decision, and the  
15 reasoning contained in Ollanik (ph) article entitled,  
16 Compelling Testimony in Alaska, The Coming Rejection of  
17 Use and Derivative Use Immunity, the defendant should  
18 be entitled to full transactional immunity.

19 In Serdahely, which was a one-page, three  
20 paragraph, per curiam decision, the court used its  
21 supervisory powers and adopted a grant of transactional  
22 immunity in that case.

23 However, subsequent to Serdahely, Alaska  
24 Statute 12.50.101 was enacted, which provides  
25 use/derivative use immunity to witnesses compelled by

1 court order to testify in spite of a Fifth Amendment  
2 assertion.

3 Any ambiguity between Serdahely and the  
4 statute seems to have been explained in Resek vs.  
5 State, where the court in its reasoning indicated that  
6 a use and derivative use immunity may serve to protect  
7 the claimant's privilege against self-incrimination."

8 The court concludes that under federal and  
9 state law, the defendant is only entitled to  
10 use/derivative use immunity and not transactional  
11 immunity.

12 The state argues that even if defendant is  
13 entitled to use/derivative use immunity due to his  
14 report of the oil spill, evidence derived from an  
15 independent source, can be used against him.

16 Under Kastigar, once the defendant becomes  
17 entitled to immunity, the prosecution bears a heavy  
18 burden proving that all of its evidence is derived from  
19 a legitimate source, wholly independent of the  
20 information compelled from the defendant. The state  
21 has the burden of proving by a preponderance of the  
22 evidence that the information came from a wholly  
23 independent source. I think our Alaska Rules of  
24 Evidence 104, in Hawley v. State, give an example of  
25 the state requirements in that area.

1           The defendant initially reported that "we've  
2 fetched up hard aground" off Bligh Reef and "evidently  
3 we're leaking some oil." The state argues that the  
4 report of the grounding required by the Code of Federal  
5 Regulations constitutes a wholly independent source for  
6 the investigation and for obtaining the evidence  
7 acquired after the report.

8           As of March 24, 1989, there was in effect a  
9 Coast Guard regulation which is provided as follows:

10           The owner, agent, master, or person in charge  
11 of a vessel involved in a marine casualty shall give  
12 notice as soon as possible to the nearest Coast Guard  
13 Marine Safety or Marine Inspection Office whenever the  
14 casualty involves any of the following:

15           All accidental groundings and any intentional  
16 grounding which also meets any of the other reporting  
17 criteria or creates a hazard to navigation, the  
18 environment, or the safety of the vessel, or an  
19 occurrence not meeting the above criteria but resulting  
20 in damage of property in excess of \$25,000.00.

21           Federal statutes provide civil penalties for  
22 failure to report. It is clear that authorities would  
23 have responded similarly to a grounding as they did to  
24 the spill. Coast Guard regulations in effect also  
25 prescribed a Coast Guard investigation of a marine

1 casualty. They provide as follows:

2 The Commandant or District Commander, upon  
3 receipt of information of a marine casualty or  
4 accident, will immediately cause such an investigation  
5 as may be necessary in accordance with the regulations  
6 in this part.

7 The investigation of marine casualties and  
8 accidents and determinations are made for the purpose  
9 of taking appropriate measures for protecting safety of  
10 life and property at sea and are not intended to fix  
11 civil or criminal responsibility.

12 An investigating officer investigates each  
13 marine casualty or accident reported; Code of Federal  
14 Regulations provides as follows:

15 Such investigating officer shall have the  
16 power to administer oath, subpoena witnesses, require  
17 persons having knowledge of the subject matter of the  
18 investigation to answer questionnaires and require the  
19 production of relevant books, papers, documents and  
20 other records.

21 Authority would have responded similarly to a  
22 grounding as they did the spill, that's clear.  
23 Defendant argues that the report of the grounding wa  
24 necessarily included in the report of the spill and  
25 that the sate cannot separate the two. An analysis of



1 the purposes behind reporting marine casualties and oil  
2 spills may be in order.

3           Polluting is generally always a crime.  
4 However, legislative bodies have balanced the need to  
5 abate and lessen pollution against the need to present  
6 all probative evidence in a criminal proceeding, and  
7 the balance has resulted in providing immunity to a  
8 polluter, in order to achieve the regulatory goals.

9           A marine casualty, which includes grounding of  
10 a vessel, is generally not a crime. There is a high  
11 social goal in preventing the loss of life and  
12 protection of property that often results from a marine  
13 casualty which mandates self-reporting. Since marine  
14 casualties are not generally crimes, immunity is not  
15 provided. The regulatory goal is unrelated to  
16 deterrence of anti-social behavior through criminal  
17 sanctions.

18           Clearly, there are two separate goals to be  
19 achieved by the required reports made by the defendant.  
20 The report of a marine casualty does not necessarily  
21 include an oil spill, nor does the report of an oil  
22 spill necessarily include a marine casualty. In this  
23 case, response to both appears to be the same,  
24 involving essentially the same investigative processes.  
25 There is no evidence that required reporting of marine

1 casualties is merely a guise to penetrate the  
2 protective screen of the Fifth Amendment in order to  
3 give the government information in a criminal  
4 proceeding. There appears to be no exploitation in  
5 this case of the required reporting of marine casualty  
6 in order to prosecute the defendant in this case. To  
7 the contrary, there is sufficient evidence to show that  
8 the casualty and oil spill would have been discovered  
9 in any event, very shortly after the defendant's  
10 report.

11 The policy behind self-reporting of oil spills  
12 was to ensure, so far as possible, that small  
13 discharges would not go undetected, and that the  
14 possibility of effective abatement would not be lost.  
15 Common sense says that many spills are so small that,  
16 but for self-reporting, they would go undetected and no  
17 evidence could be gathered except as a result of the  
18 polluter's compelled protective report.

19 Had the defendant reported just the grounding,  
20 and then five minutes later reported the vessel was  
21 "evidently leaking some oil," the wheels of the  
22 investigatory process would have been started in motion  
23 because of the grounding report. Would they be started  
24 in motion any quicker because the defendant in the same  
25 sentence reported the grounding, and then added that

1 there was an oil spill? I think not.

2           The requirement that evidence be derived from  
3 a source wholly independent from information compelled  
4 from the defendant does not necessarily refer to the  
5 time elapsing between the independent source and the  
6 compelled protected disclosure. The fact that only a  
7 few seconds separated the two sources is not  
8 dispositive. Whether a source is independent of a  
9 compelled disclosure would be determined by reference  
10 to the purposes and legal requirements for making the  
11 disclosure. As noted above, the reporting of a  
12 grounding and the report of an oil spill are each based  
13 on distinct social policies and goals, and required by  
14 independent provisions of law.

15           Based on the policies behind the self-  
16 reporting schemes adhered to in this case and this  
17 court's finding that discovery, investigation and  
18 information-gathering resulting from a grounding would  
19 have been the same as from an oil spill report, this  
20 court concludes that the defendant's initial report of  
21 a grounding constitutes an independent source for the  
22 information-gathering process and that all information  
23 gathered, except for the defendant's report of the  
24 spill itself, is otherwise from a source wholly  
25 independent from his protected report.

1           Closely related to the independent source  
2 doctrine is the so-called inevitable discovery  
3 doctrine, adopted in Nix vs. Williams. Under the  
4 inevitable discovery doctrine, information otherwise  
5 inadmissible due to an impermissible or  
6 unconstitutional source, may be used only if the stat  
7 can demonstrate that the information ultimately or  
8 inevitably would have been discovered by lawful means.  
9 In Williams, the court noted that the rationale of the  
10 independent source doctrine is wholly consistent with  
11 and justifies our adoption of the ultimate or  
12 inevitable discovery exception to the exclusionary  
13 rule. The court stated that inevitable discovery  
14 doctrine provides that where the prosecution can prove  
15 by a preponderance of the evidence, yet the information  
16 ultimately or inevitably would have been discovered by  
17 lawful means, the evidence should be received.

18           In this case, if the state can establish that  
19 the evidence it desires to use would have been obtained  
20 independently or inevitably, regardless of its actual  
21 source, there is no rational basis to keep the evidence  
22 from the jury in order to assure the fairness of the  
23 trial proceedings. Neither Kastigar nor Williams  
24 requires that law enforcement authorities be placed in  
25 a worse position than they would have been absent an

1 error or violation of a defendant's Fifth or Sixth  
2 Amendment rights. Use/derivative use immunity leaves  
3 the witness and the prosecution authorities in  
4 substantially the same position as if the witness had  
5 claimed the Fifth Amendment privilege. In Williams the  
6 court believed that fairness in such situations can be  
7 assured by placing the state and the accused in the  
8 same position that they would have been in had the  
9 impermissible conduct not taken place.

10 The inevitable discovery doctrine need not be  
11 applied exclusively to Sixth Amendment cases. The same  
12 policies and reasoning support application of both the  
13 independent source and inevitable discovery doctrines  
14 to Fifth Amendment cases.

15 In this case, the policy behind granting  
16 immunity to persons reporting oil spills is to provide  
17 an incentive for the person responsible for the  
18 discharge to make an immediate report. The intent of  
19 Congress in enacting the statute was to prevent harmful  
20 spills and to minimize the damage caused by such  
21 spills. In the absence of required reporting and  
22 provisions for immunity, some small oil spills might go  
23 undetected or the possibility of clean-up would be  
24 diminished.

25 Application of the inevitable discovery

1 doctrine to cases involving oil spills would not defeat  
2 these policies. A party required to report would not  
3 be less likely to report an oil spill simply because  
4 evidence inevitably may be discovered and used in a  
5 criminal prosecution. If anything, the likelihood of  
6 inevitable discovery would contribute to the obligation  
7 to report due to the substantial federal criminal  
8 penalties for not reporting. In addition to having  
9 concluded that the defendant's report of the grounding  
10 constitutes an independent source, this court also  
11 concludes that inevitable discovery doctrine applies to  
12 this case.

13 The defendant's report of the grounding,  
14 notwithstanding, the state inevitably would have  
15 discovered the grounding of Exxon Valdez and initiated  
16 the investigatory process by not later than 12:45 a.m.  
17 on March 24, 1989. The court further concludes, based  
18 on these facts, that the investigating team of  
19 Falkenstein, Delozier, Lawn and Fox, ultimately would  
20 have arrived at approximately the same time as they, in  
21 fact, did. Any observations made or investigation  
22 actually commenced would have been made or commenced at  
23 approximately the same time.

24 As a result of the inevitable discovery and  
25 the substantially identical investigation which would

1 have occurred, the court finds that all evidence  
2 gathered was derived from a wholly independent source  
3 other than the defendant's report. Defendant's report  
4 that "evidently we're leaking some oil" will be  
5 excluded. All other evidence will be admitted, subject  
6 to other proper objections.

7 It is therefore ordered that defendant's  
8 motion to dismiss on immunity grounds is denied.

9 (2488)

10 That concludes the oral remarks. Mr. Purden  
11 will distribute the written copies of the decision to  
12 counsel, and we'll take a recess, until quarter to  
13 10:00, at this time.

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

16 (Off record - 9:23 a.m.)

17 (On record - 9:50 a.m.)

18 THE COURT: I have the proposed schedule for  
19 argument on the remaining motion, Mr. Madson. Is that  
20 going to be your responsibility?

21 MR. MADSON: It will, Your Honor. However,  
22 Mr. Linton and I have just discussed the proposed  
23 schedule during the recess and because he's only  
24 involved in two more matters, he requested that we go  
25 forward on the two motions that are pending that

1 directly involve him, and I certainly have no objection  
2 to that.

3 I believe the first one would be the motion to  
4 suppress the statement of Captain Hazelwood and,  
5 secondly, the motion to suppress the blood alcohol  
6 results.

7 Is that correct, Bob?

8 MR. LINTON: Yes. There's one other one that  
9 I'm partially involved in, the motion to dismiss on  
10 several grounds, grand jury matters, two of which I  
11 responded to. One being the claim that we failed to  
12 present exculpatory evidence in the form first of  
13 Greg Cousins' testimony before the grand jury and,  
14 second, the ALAMAR teletype regarding pilotage  
15 requirements in Prince William Sound.

16 So, it's actually three motions in four  
17 subject matter areas.

18 MR. MADSON: Does the court have any objection  
19 to take them in that order then?

20 THE COURT: No. That's not the order I  
21 prepared myself in. I prepared myself somewhat in the  
22 order that you proposed the schedule for argument, so I  
23 may not be able to give you as quick a ruling on these  
24 as I might otherwise had, but we can go ahead and hear  
25 argument on them and I'll just take it under



1 advisement.

2 MR. MADSON: Okay, fine. Thank you. Well,  
3 Your Honor, I think I know somewhat how Joe Montana  
4 must have felt last night about the beginning of the  
5 fourth quarter, but I can only tell the court that it's  
6 a new ball game, and we would certainly -- I know the  
7 court has very patiently heard and listened to a great  
8 deal of testimony on the immunity issue. The court has  
9 ruled on that, and now, in effect, I'm asking the court  
10 to basically forget everything you've heard and we  
11 start over.

12 The first one I'd like to address, and that's  
13 the easiest one, perhaps, and that's the motion to  
14 suppress the statement of Captain Hazelwood. As  
15 matters stand right now, the evidence is  
16 uncontroverted. There's an affidavit from Captain  
17 Hazelwood that said, "I made this statement in response  
18 to my legal requirement and duty under the law, and  
19 because I was aware of the statute, require me to  
20 report oil spills." So, he did that. There's no  
21 evidence to the contrary. The question, I think, now  
22 is based on the court's earlier ruling, can this  
23 statement be used even though it, perhaps, was part of  
24 an independent source? And the only way, of course,  
25 that could be done, I would submit, is to take his

1 statement and split it in half. And I certainly don't  
2 think that would be the situation that would be  
3 appropriate in this case.

4 In other words, the court has to, apparently,  
5 rule on this, and I don't know what exactly  
6 Mr. Linton's position would be with regard to this, but  
7 I just want to reiterate, and I don't think it takes a  
8 great deal of argument because the court has heard all  
9 the facts of the case, and we certainly don't want to  
10 go through that once again. But as matters stand right  
11 now, we know why he made the statement, we know what  
12 the statement was, we know it was required to be made  
13 by law, and we know that he receives immunity from the  
14 Congress and from the state of Alaska as a result of  
15 making that statement.

16 So, therefore, can that statement in its  
17 entirety be used or, on the other hand, should it be  
18 used in part? And I don't know how independently one  
19 can say, "I reported the oil spill," but at the same  
20 time because there is independent grounds to require  
21 Captain Hazelwood to report a grounding, that part of  
22 the statement can be used and part can't.

23 I think we have to look at the evidence as it  
24 is and not speculate as to what he might have done had  
25 he not reported the oil spill, but said, well, if there

1 was no spill, would you have reported the grounding  
2 anyway? And that calls for sheer speculation because,  
3 as Mr. Friedman mentioned, there's a lot of different  
4 ways of reporting a grounding. And I don't think this  
5 case calls for speculation or conjecture; it calls for  
6 an application of the facts under the law. And the law  
7 seems to be quite clear that the statement itself, if  
8 nothing else -- if nothing else, the statement should  
9 not be used in evidence in any way.

10 So with that, I'll just leave it to Mr.  
11 Linton, perhaps, to respond to this one.

12 MR. LINTON: Judge, I have a -- at no point  
13 has the statement been introduced into court. I don't  
14 think it was one of the exhibits that we marked in the  
15 earlier stages of the proceedings. I'd ask that a copy  
16 of the transcript be marked and admitted as an exhibit  
17 in this proceedings, and then I'd argue from that, in  
18 part.

19 THE COURT: Do you have a copy of it?

20 MR. LINTON: Yes, sir, I do. Here's a copy  
21 for counsel.

22 (Pause)

23 MR. MADSON: No objection to the transcript,  
24 Your Honor.

25 THE COURT: I think we'll just continue the

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numbering sequence, if that's okay with counsel.

MR. LINTON: Yes, it is, Your Honor.

THE COURT: We'll just continue the number sequence.

MR. MADSON: Pardon me, Your Honor?

THE COURT: We're just going to continue the numbering sequence. So, it will be Exhibit 69.

MR. MADSON: Yes.

THE COURT: And 69, without objection, will be admitted.

EXHIBIT 69 ADMITTED

THE COURT: Now, just to make sure we understand, the contents of 69, it's your...

MR. MADSON: Your Honor, the contents of that particular statement flowed from the initial report. Now, my initial response to the motion is that certainly the tape recording cannot be used. That's already, I believe, in evidence. I don't have the number, but the initial report can't be because this flows from that as a direct result.

My argument remains the same, Exhibit 61 cannot be used either.

THE COURT: Okay, I've already ruled that the transmission, "and evidently we're leaking some oil," is protected. That's not what you're concerned with,

1 you're concerned with this statement now. Is that  
2 correct?

3 MR. MADSON: That's correct.

4 THE COURT: Okay. Mr. Linton, are we  
5 focussing on the right statement?

6 MR. LINTON: I think so, yes, Your Honor.

7 THE COURT: All right.

8 MR. LINTON: Actually, probably to be more  
9 careful, there were the initial transmission, there  
10 would have been some subsequent transmissions about  
11 "shortly after 1:00 o'clock." Those were the ones  
12 which were the top line on the defendant's chart, some  
13 trouble with the third mate, where Commander McCall  
14 says, "I shouldn't have to tell you -- I don't feel  
15 right telling you, but be careful about trying to go  
16 forward or trying to get off the rock."

17 They would be statements to Mr. Fox, when Mr.  
18 Fox was on-board the vessel, and the -- he was  
19 introducing himself and asked what the problem was, and  
20 the Captain said words to the effect that, "You're  
21 looking at them."

22 A similar statement to almost exactly the  
23 identical import was made to Mr. LeBeau, after  
24 Mr. LeBeau went on-board at 11:30 a.m. And then there  
25 is the statement, which was just marked, which was the

1 interview by Mr. Delozier with the Captain, which was  
2 recorded by Mr. Fox on his tape recorder. And so that  
3 what you have as this next exhibit is the tape  
4 recording of the statement made at, roughly,  
5 1:00 o'clock, 1:30 in the afternoon of the 24th.

6 (Pause)

7 I would agree that the radio transmissions are  
8 sufficiently connected that we wouldn't ask to admit  
9 the radio transmissions, but we think the other three  
10 are independent of an oil spill report and would be  
11 part of the independent investigation of the grounding  
12 alone, such that these may not be said to have been  
13 approved of the oil spill report.

14 First, in each instance they were made at a  
15 time period long after the report when the situation  
16 was one where an investigation was going on, was  
17 ongoing, it was clear that Mr. Delozier was conducting  
18 an investigation, that he was doing that in response to  
19 a report of a grounding, that Commander Falkenstein was  
20 handling the oil spill aspect of the report and,  
21 therefore, the statements are really independent of his  
22 report. They are volunteered by Captain Hazelwood. He  
23 was not in custody, he was not -- there was no  
24 requirement that Miranda warnings be given to him.

25 And with respect to the two of the statements,

1 those to Fox and LeBeau, they don't deal with the  
2 subject matter of the oil spill at all, just the fact  
3 that the situation in which they find themselves was a  
4 result of his conduct.

5 With respect to the last statement, there is a  
6 line in it about the oil spill. That is, Mr. Delozier  
7 asks, "What happened from the time you left the pier?"  
8 And then the Captain recites what happens from the time  
9 he left the pier.

10 There is a reference on one of the pages --  
11 thank you, I...

12 THE COURT: Referring to 69?

13 MR. LINTON: Yes, sir, Exhibit 69, and it's on  
14 page 5 of the statement, about the fourth entry. "You  
15 were stopped, the engines were still running but there  
16 was making no way, okay, put some deck lights on and we  
17 saw the oil around the vessel and we called traffic and  
18 informed them." I would agree that that's another  
19 reference to the report and would properly not be  
20 admissible, but that's just the report in another form  
21 and would properly be not admissible.

22 In all other respects on there having been no  
23 illegal conduct on the part of the investigators, there  
24 was no -- this is not the fruit of any such physical  
25 conduct, if you take the independent source theory

1 under the inevitable discovery theory. The result  
2 would be the same under Your Honors findings, whether  
3 you would take Your Honor's findings or even the  
4 state's finding that this was an independent  
5 investigation of a grounding that would have been  
6 commenced at one time or the other, that they were not  
7 questions directed to the oil spill, and to the extent  
8 oil spill subject matter came out, it would properly  
9 not be admitted.

10 MR. MADSON: Your Honor, I think we're making  
11 this situation unduly complex. If the court is  
12 inclined to follow Mr. Linton's line of reasoning and  
13 apply the independent source/inevitable discovery  
14 doctrine to the statement and excise certain portions  
15 out that apply to the oil spill but not to the  
16 grounding, the court has to make findings of fact. The  
17 court has to find beyond a preponderance of the  
18 evidence, as you've indicated that would be the  
19 appropriate standard, to show that Captain Hazelwood  
20 would have, in fact, made the identical or same or  
21 similar statements had there just been a grounding and  
22 had there been no oil spill. Or that, on the other  
23 hand, it would be inevitable that Captain Hazelwood  
24 would have made the same statement even though the  
25 response team was out there because of another report



1 or would have inevitably come out there anyway.

2 Well, the problem with that is, there is  
3 simply no facts to show that. The evidence at this  
4 point, uncontroverted evidence, is that  
5 Captain Hazelwood made the report because he was  
6 required to as a matter of law and that he expected  
7 some immunity as a result. What has been shown to the  
8 contrary, and that is absolutely nothing.

9 So, I don't know how the court can go down  
10 this road and find beyond a preponderance of the  
11 evidence that this would have happened, because there's  
12 nothing to show it would have happened. We don't know  
13 what Captain Hazelwood would have done had there only  
14 been a grounding. We don't know if he had not made the  
15 report. And I would submit that if he hadn't made the  
16 report when he knew it was required by law, it kind of  
17 naturally follows that he -- if he didn't want to  
18 report it because he was trying to protect himself,  
19 that he wouldn't make the statement either.

20 So, if you want to speculate, we get in this  
21 area of what would have been done, what could have been  
22 done, what might have been done, and that simply isn't  
23 the way this matter should be resolved.

24 Now, with the court's earlier ruling there was  
25 certainly -- well, we may disagree, that's what makes

1 lawsuits, but there was evidence that the court found,  
2 from listening to the testimony that went on for days,  
3 to show either independent source or inevitable  
4 discovery.

5 This matter arose the other day with regard to  
6 the affidavit when the court questioned that as to  
7 whether there should be testimony to support that  
8 affidavit, and there was none. And as it stands right  
9 now, we believe consistent with court decisions and the  
10 rules of court, that that is the facts. The facts are  
11 the report was made and how it was made, and to go  
12 further now and say, well, all these things that  
13 occurred later in time would have happened anyway,  
14 needs some support in the record, and I would submit it  
15 simply is not there.

16 Thank you.

17 (3376)

18 THE COURT: Mr. Madson, we have  
19 Captain Hazelwood's affidavit, and are you relying on  
20 that affidavit in support of this motion?

21 MR. MADSON: Yes, Your Honor.

22 THE COURT: Okay. We have the same problem we  
23 had before then. Mr. Linton, your stipulation before  
24 was that the Captain had standing to assert his  
25 immunity and he has perhaps standing to assert this

1 motion, but do you accept, as a fact, his factual  
2 assertions contained in that affidavit?

3 MR. LINTON: Your Honor, the position is the  
4 same. I don't accept the factual allegations, and I  
5 would ask an opportunity to cross examine him if there  
6 is some assertion beyond the fact that he had standing  
7 to object to the statements being admitted.

8 THE COURT: Okay. We're back to where we were  
9 before, and I take it you're not going to put the...

10 MR. MADSON: We will not call him. No, we  
11 think under the present way the rules are applied and  
12 the court decision is in this area with civil cases and  
13 criminal cases, the affidavit is uncontroverted. The  
14 state had plenty of opportunity to show, by affidavit  
15 or otherwise, that it wasn't, but they didn't choose to  
16 do that.

17 THE COURT: Well, the factual assertions by  
18 Captain Hazelwood state his intent and the reasons for  
19 his actions, and I don't see how they could have a way  
20 of determining that without an opportunity to cross  
21 examine. And the common way would be -- the test of  
22 all that would be cross examination, Mr. Madson.

23 MR. MADSON: That may be correct, Your Honor,  
24 but we choose not to do that.

25 THE COURT: Okay. Then I will not accept the

1 affidavit as part of the factual basis for your motion.  
2 If you are submitting it now without that, I mean you  
3 are not voluntarily submitting it, I'm going to accept  
4 it without that affidavit.

5 If you have nothing further, I'll take it  
6 under advisement. If there's any evidence you wish to  
7 present, now would be the time to do so.

8 MR. MADSON: We presented it, Your Honor.

9 THE COURT: Okay.

10 MR. MADSON: The state had ample opportunity  
11 to do so also and did not.

12 THE COURT: Okay. I'll take that motion under  
13 advice. Thank you, Mr. Madson.

14 (3533)

15 MR. MADSON: The next matter, perhaps, is the  
16 one that I think is also a great deal of importance and  
17 involves Mr. Linton. That's the motion to suppress  
18 blood alcohol.

19 Going through these motions, Your Honor, we've  
20 had a great deal of time on the immunity one. Perhaps  
21 it may seem like it over-shadows the other motions,  
22 just because of the length of time it took to decide  
23 that and hear it. However, there are so many, we  
24 think, motions with great merit in this case, it's such  
25 a unique case that perhaps if you put all the law

1 professors together in one room and told them to come  
2 up with a fact situation that had a number of legal  
3 attorneys and legal problems with it, they couldn't  
4 have come up with one that even approached this.

5 THE COURT: I agree.

6 MR. MADSON: It's nice, from a lawyer's point  
7 of view, but it may be pretty difficult from a  
8 defendant's, but that's beside the point.

9 On this one, this again is totally separate  
10 and apart from immunity as such. The state has said  
11 that, in essence, in their reply -- well, maybe I  
12 better backup and say that we initially asserted that  
13 the blood alcohol test and results cannot be admitted  
14 in a state court in this case because they do not  
15 comply with state law.

16 I don't intend to really argue the method of  
17 taking the test and the way the sample was preserved  
18 and how it was tested. I don't think that's at all  
19 relevant nor necessary to decide this motion. To  
20 decide this motion, the court is going to be again on  
21 very new ground and extremely thin ice, I would say, to  
22 take a phrase from my esteemed co-counsel, because the  
23 state is going to have to -- the court, rather, is  
24 going to have to say that it is permissible for the  
25 state of Alaska to utilize a blood test that is

1       admissible under a Coast Guard regulation and, perhaps,  
2       under federal law, when the state of Alaska seems to  
3       paint a clearly contrary position.

4               We have to go back, I think, to the case of  
5       Shmerber (ph) vs. United States. That's an appropriate  
6       starting point, I think, for the analysis that the  
7       court has to make in this case. Under Shmerber (ph),  
8       of course, there's a case in California where the  
9       federal courts -- it was a state case, the federal  
10      court said that the Fourth Amendment, the prohibition  
11      against unlawful search and seizure, was not offended  
12      by forcibly taking a blood sample from a defendant who  
13      did not otherwise consent to taking that test. They  
14      found that the method of taking the sample was not  
15      unduly harsh or it didn't involve a great deal of  
16      physical pain or punishment to the defendant.

17              Consequently, under federal law, at the  
18      present time it is permissible, I would submit, to take  
19      a defendant -- not a defendant, but a suspect operating  
20      under the influence case, forcibly put him on the  
21      floor, hold him down and extract a sample of blood. A  
22      case just came across my desk the other day, and  
23      unfortunately there isn't a citation for it yet, but  
24      that's in fact what was just done in a case, I think,  
25      out of the circuit, and under the federal law, the

1 federal authorities, they seem to have no trouble with  
2 this.

3 Well, it would certainly seem that the state  
4 of Alaska and the legislature in this state did have  
5 trouble with it. They curtly took up the position that  
6 our citizens are not going to be subject to this type  
7 of search and seizure. In other words, we're going to  
8 put restraints on the police in an operating under the  
9 influence case. And they did that quite clearly by  
10 passing the implied consent law.

11 And the cases we cited in our brief kind of  
12 follow along the history of what happened and why they  
13 did it, and they said, if you're going to charge  
14 somebody on a DWI or case like that, a case involving  
15 alcohol in a motor vehicle, here is the way your going  
16 to do it and this is the only way that your going to do  
17 it, and that way is the use of a breath test, not a  
18 blood test without express consent.

19 In this case, of course, there was also it  
20 requires an arrest, a lawful arrest before this can be  
21 done without consent. And in this case we certainly  
22 didn't have an arrest.

23 I think Trooper Fox correctly testified that  
24 no, he couldn't arrest Captain Hazelwood, there was no  
25 probable cause when he was on-board. All he had was

1 the Coast Guard personnel saying they smelled alcohol  
2 on his breath. He saw no signs of impairment, nor did  
3 the Coast Guard see any signs of impairment. There  
4 were no grounds to arrest, even though Coast Guard was  
5 on the scene earlier than Trooper Fox. He couldn't go  
6 to anybody and say, gosh, there's probably cause to  
7 arrest because here's what I have, A, B, C and D, it  
8 just wasn't there. And by his own admission, it wasn't  
9 there.

10 The other reason -- well, other problems, if  
11 he was going to try to show probable cause, was that he  
12 also said he went and got some of this Moussy beer and  
13 passed it around and asked Delozier, "Is this what you  
14 could be smelling?" And he said, "Yes." So the smell  
15 of alcohol is further weakened by the fact that it was  
16 a Moussy, theoretically non-alcohol or very little  
17 alcohol beer that caused the smell that was on Captain  
18 Hazelwood's breath.

19 So, we didn't have that. And this got to be  
20 an interesting situation, if the court will think back  
21 to the testimony. There clearly appeared to be two  
22 systems at work here and going in opposite directions.  
23 Trooper Fox said, "Well, here's what I would have done.  
24 I came on there thinking there was a raging, drunk  
25 maniac on-board. There wasn't. I didn't have any



1 means of testing his blood. I didn't have a breath  
2 test. The only thing we could do was take him back to  
3 Valdez to the trooper station there." Which,  
4 incidently, certainly could have been done, had he been  
5 placed under arrest, but he wasn't. And the reason he  
6 did that is because they felt his presence on-board  
7 certainly was more important, because of the nature of  
8 the spill, and Captain Hazelwood's knowledge of the  
9 situation and what could be done to insure the safety  
10 of the ship and to prevent further damage to the  
11 environment. And this, of course, is totally  
12 inconsistent with the person in Captain Hazelwood's  
13 situation, being under the influence. No law  
14 enforcement officer in their right mind would leave a  
15 drunk in charge of an operation like that.

16 But getting back to my point, there was no  
17 arrest, there was nothing else. Trooper Fox said, "I  
18 was going to go back and get a search warrant, that's  
19 how I was going to do it, 'cause they didn't want the  
20 personnel I was going to bring out here, the Coast  
21 Guard didn't want them." You know, they said he was no  
22 help. Trooper Fox, he told an opposite story and said,  
23 "I had people that could come out and take that blood  
24 real quick." But we know what was done, the Coast  
25 Guard went their own independent way and wanted the

1 Coast Guard corpsman, and it turned out to be Conner,  
2 by a stroke of luck on their part, that was able to  
3 come out and extract the blood.

4 So, Trooper Fox, under state law -- now if you  
5 look at the state law here, what could he have done? I  
6 would submit very little without any consent on  
7 Captain Hazelwood's part. He couldn't have gone and  
8 did what he said he was going to do, and that's get a  
9 search warrant for the blood. First of all, there was  
10 no probable cause, by his own admission.

11 THE COURT: Mr. Madson, doesn't the Code of  
12 Federal Regulations cover this? Doesn't...

13 MR. MADSON: I'm going to get to that in a  
14 minute. It does, Your Honor. But I think it's  
15 necessary to go through this the way I was approaching  
16 it to get to the Code of Federal Regulations.

17 But, okay, so a search warrant would not have  
18 been sufficient under state law. Pina (ph) vs. State,  
19 Reichert vs. State, which are cases which are not  
20 discussed in the brief, but they are a joint case,  
21 they're found in 684 P2d 864. That case, or those  
22 cases...

23 THE COURT: Are they Alaska cases or...

24 MR. MADSON: They are state of Alaska cases,  
25 yes, Your Honor.

1           Those cases arose before the statute was  
2 changed, that allowed a blood test to be taken without  
3 consent if it involved a death or injury in a motor  
4 vehicle accident and there's a suspicion of alcohol on  
5 the part of one of the drivers.

6           So, we didn't have that statute in effect at  
7 the time Pina (ph) and Reichert were decided. But I  
8 don't think it matters. It doesn't matter here because  
9 of the obvious reason: This case did not involve any  
10 death injury nor was Captain Hazelwood placed under  
11 arrest, which the statute also requires. But there,  
12 the -- both Pina (ph) and Reichert were involved in  
13 automobile accidents involving injury to other people  
14 and he refused to take the state required breath test.  
15 That's what the state says is a method of determining  
16 blood alcohol. They did not choose to do that and the  
17 police officer went and got search warrants.

18           In a very short opinion the Alaska Supreme  
19 Court said, "You can't do that. Search warrants don't  
20 apply. There is only one method of alcohol blood  
21 determination in this state, by statute, and that is  
22 the breath test, without consent."

23 (Tape: C-3527)

24 (0027)

25           MR. MADSON: If that's the case, then I want

1 to get into the area that the court has already  
2 mentioned. If that's the state law, then can the state  
3 utilize a Coast Guard regulation, Code of Federal  
4 Regulations, which in effect -- I think your position  
5 would be that Captain Hazelwood had no right to consent  
6 -- he had no right to object, rather, since under the  
7 Coast Guard regulation if there's a marine casualty or  
8 there is a suspicion of alcohol, he is required to give  
9 a sample of his blood. That's for Coast Guard  
10 purposes.

11 So, theoretically, we are not conceding that  
12 it was done properly under state law. What we are  
13 saying is that for the purpose of this motion it is  
14 really irrelevant, because assuming that it was done  
15 legally improperly, under state law, it is completely  
16 inadmissible in the state court. It has never been  
17 done before and, I would submit, for very good reason,  
18 because the state law is so specific on the point that  
19 we say, here is the way you're going to do it.

20 That seems to puzzle Your Honor.

21 THE COURT: I'm sorry, I think I  
22 misunderstood. You say assuming it was done properly  
23 under state law?

24 MR. MADSON: No.

25 THE COURT: You mean assuming it was done

1 properly under federal law?

2 MR. MADSON: Correct.

3 THE COURT: Okay.

4 MR. MADSON: Yeah, that's just for the sake of  
5 argument. Everything the Coast Guard required or the  
6 federal law required be done was done. All I said was  
7 we're not conceding that, but certainly for this motion  
8 we are, in fact.

9 So, if we could take that approach and say it  
10 was perfectly lawful, they could have taken this and  
11 gone to a -- let's say a Coast Guard review  
12 administrative proceeding with regard to Captain  
13 Hazelwood's license, they could have referred this to a  
14 United States attorney for prosecution in state courts.  
15 They could have done, let's say, all these things. The  
16 question is not whether it's admissible in one of those  
17 two forums; the question is can they then turn around  
18 and admit it in state court? And I would challenge  
19 Mr. Linton, or anyone for the state, to show any  
20 authority that this can be done, 'cause it can't.

21 I think the analysis of the DWI case law in  
22 Alaska clearly shows that the court of appeals and the  
23 supreme court has over and over again said, we are  
24 affording our citizens greater protection than that  
25 afforded under the Fourth Amendment. We do not follow

1 Shmerber (ph), which is a Fourth Amendment case. The  
2 legislature has done this, not the courts. Courts  
3 simply are to follow the law, and the legislature says,  
4 here's the procedure we're going to use.

5 You know, by way of analogy, I suppose, look  
6 at the situation you could have, if the state troopers  
7 stop somebody and they have a questionable case, but  
8 the federal law is far more in their favor of  
9 admissibility of blood alcohol tests, let's say, than  
10 the state law, if they happen to be close by some  
11 federal facility where they can just use the federal  
12 people to come in and take the test and say, "Gee,  
13 judge, it's perfectly okay over there in federal court,  
14 let's bring it over here and use it here." This is  
15 what I discussed in my brief earlier. This is exactly  
16 reverse situation of the silver platter doctrine, which  
17 has been long outlawed. You just can't do it because  
18 it's admissible in one. We both know, we all know,  
19 that there are different rules of procedure, there are  
20 different substantive laws in federal court than there  
21 are in state court.

22 The easiest way of looking at this, and the  
23 most persuasive way of looking at this is in the Fourth  
24 Amendment context. Alaska has gone a totally different  
25 route than the federal court system has in protecting

1 its citizens under the Alaska constitution, as opposed  
2 to the Fourth Amendment in the federal constitution.  
3 Glass vs. State is a perfect example. Federal court,  
4 they don't need warrants to listen in on a  
5 conversation, they do it all the time. In the state  
6 court you do not. That was by court interpretation of  
7 what they believed -- the court believed to be proper  
8 protection of Alaska citizens.

9 In this case we have something even stronger.  
10 We have the legislature saying, "This is the way it  
11 will be done and the only way it will be done." The  
12 legislature did not carve out an exception, saying this  
13 is the way it will be done unless you can show that it  
14 is admissible in a Coast Guard administrative  
15 proceeding, and it's lawful there under Coast Guard  
16 regulations, or it's lawful under federal law, not at  
17 all.

18 I don't know the situation where it could be  
19 clearer than this one here. In fact, when I read the  
20 state's response, I was somewhat puzzled and thought  
21 maybe I'm missing something. I've been doing a lot of  
22 DWI cases in 20 years, but I have never seen this one  
23 come up before. And I think for good reason it never  
24 came up because they couldn't bring it up. It just  
25 can't be done. Otherwise what it does, it simply

1 destroys the entire statute that we've lived under and  
2 have abided by for a number of years.

3           Maybe I'm misreading the court, but I don't  
4 know if the court is puzzled by this argument or not,  
5 but I certainly hope not. I mean, I was puzzled  
6 initially, too, when I looked at it closely, and I  
7 thought, well, that's what they're saying. But I'm  
8 looking for some authority that says they can do this,  
9 and I can't find it. I cannot find any authority that  
10 says they can do what they are asking this court to do.

11           THE COURT: Mr. Madson, what socially or  
12 legally unacceptable conduct would we be deterring by  
13 application of the exclusionary rule in this case?

14           MR. MADSON: What we're deterring, Your Honor,  
15 is the -- certainly this wasn't done by force. I mean,  
16 I'm not saying it was forcibly done, but what it was  
17 doing was submitting Captain Hazelwood to a test, which  
18 state law prohibits without express consent,...

19           THE COURT: Do you think we deter the Coast  
20 Guard officials from doing this if we applied the  
21 exclusionary rule?

22           MR. MADSON: Oh, of course not.

23           THE COURT: Well, what conduct are we -- the  
24 whole idea of the exclusionary rule in a case like this  
25 is to deter conduct by law enforcement authorities, and



1 I'm wondering what policy would we affect by applying  
2 it here?

3 MR. MADSON: The Alaska constitution/Alaska  
4 state law has absolutely no effect on the Coast Guard.  
5 I mean, no matter what we do or say here isn't going to  
6 affect what they do in the future. We can't deter them  
7 by state law. What we are deterring is the state  
8 officials, not the law enforcement officer on the  
9 scene. I don't think deterrence is the proper way of  
10 approaching this case. Perhaps it is, but if you want  
11 to use deterrents as a factor, you're deterring the  
12 prosecution from using it.

13 But it's similar to the case that the state  
14 cited where -- I don't remember the name of it  
15 off-hand, 'cause I don't have my brief in front of me  
16 -- Poolie (ph), that's it. The case in California  
17 where there was arguably an unlawful search and seizure  
18 in California under Alaska law, and the Alaska court  
19 said we're not deterring anybody in California by what  
20 we're doing here. We can't deter those people. What  
21 we have to do is say there is not application of the  
22 Alaska constitution that goes beyond our territorial  
23 boundaries, that goes beyond Alaska. Well, the same  
24 argument is made here: There is not application of the  
25 Alaska constitution or state law that goes beyond --

1 not the territorial boundaries, but the jurisdictional  
2 boundaries, if you will. In other words, we can't  
3 deter the federal government from doing anything they  
4 want to do, which is perfectly valid under their law,  
5 but what we can do is say you can't use it here because  
6 we afford greater protection to our citizens. And I  
7 think that is really what it comes down to.

8 And I don't know how much more I can add, Your  
9 Honor. It isn't really a deterrent thing because no  
10 one is claiming that -- you know, it isn't like a  
11 Fourth Amendment situation where -- it's just usually  
12 the reverse, where the police do something unlawfully  
13 in a search and seizure context, and usually the  
14 situation arises is when it's in federal court and it's  
15 inadmissible in state court, and the federal court  
16 says, "We have our own protection under our Fourth  
17 Amendment and we don't apply state law, even though  
18 there is a greater restriction placed on the police in  
19 the state system." We do not do this. We give them  
20 broader authority to do things.

21 Now we've got the reverse situation where the  
22 state is saying we restrict the way evidence is  
23 presented in court, what evidence is admissible, how  
24 blood tests are conducted, what the citizens of this  
25 state -- not only citizens, but visitors, anybody who

1 is operating a motor vehicle, and that includes ships  
2 in state waters, are all included in this protection.  
3 They say if the state wants to bring this man into  
4 court and charge him with operating under the influence  
5 or any other statute that involves blood alcohol, here  
6 is the only way you're going to do it. And Gerber has  
7 made that extremely clear. State vs. Gerber said,  
8 "This is the way it will be done."

9 The only exception, Your Honor, to this is the  
10 alcohol which is taken. A blood sample which is taken  
11 and measured pursuant to medical -- for medical  
12 purposes and treatment of a defendant, that is pretty  
13 clear that if that's done in that context, that blood  
14 sample can be tested and used. There is no other  
15 exception; I know of none. Certainly I've never seen a  
16 case where our court has said that in spite of the  
17 legislative prohibition against blood samples per se,  
18 without consent you can use it as long as there's a  
19 Coast Guard regulation which, in effect, takes away  
20 consent. The state, I'm sure, will argue that under  
21 this regulation, consent isn't an issue, he has to do  
22 it. Under Alaska law he has that right.

23 That raises another question, but I don't want  
24 to get into that right now, as to what effect a refusal  
25 would have, and it says administrative proceeding in

1 the Coast Guard regulation, it can be used for that and  
2 can be used for anything else. But, the fact of the  
3 matter was, there was no refusal. Captain Hazelwood,  
4 and for the purpose of this argument, had no right to  
5 refuse, I think the state would say, because that  
6 statute requires him to do it.

7           Clearly under state law when you are asked to  
8 submit to a Breathalyzer test, which is the only  
9 exclusive, sole means of determining blood alcohol, if  
10 you refuse, you are penalized for that refusal  
11 separately. There is a number of factors like this  
12 that apply to give either protection, or on the other  
13 hand, a greater right on the part of the state to  
14 prosecute -- greater authority to prosecute on DWI  
15 cases.

16           But I don't know how much more I can add, Your  
17 Honor, except to say that it appears to be certainly a  
18 case of first impression. I have not seen this raised  
19 before. This is, again, asking the court to do  
20 something that is totally unique, and that is to go  
21 far, far out on a limb and say, whatever is admissible  
22 in a Coast Guard administrative proceeding, as far as  
23 blood alcohol methods, taking blood samples are  
24 concerned or in a federal court, is admissible per se  
25 in the Alaska State Court System. And I would submit

1 there is not authority for that, and for very good  
2 reason.

3 Thank you.

4 THE COURT: And are we in agreement that the  
5 state has the burden here of persuasion, being a  
6 warrantless seizure of blood...

7 MR. LINTON: Yes.

8 THE COURT: All right.

9 MR. LINTON: Judge, there is an express  
10 federal regulation that authorizes the Coast Guard to  
11 do what they did. That federal regulation, or one  
12 appropriately like it, applied to railway workers  
13 rather than applied to masters of vessels involved in  
14 casualties, has been expressly upheld as constitutional  
15 by the U.S. Supreme Court.

16 The question then is what does Alaska law say  
17 about what happens when a different sovereign does an  
18 act, ceases some evidence, which is permissible under  
19 their law. The only Alaska case I was able to find,  
20 and the defense has cited no other ones, is Poolie (ph)  
21 vs. State, where the court reasoned this way: Because  
22 we don't have any control over the officers of those  
23 other jurisdictions, suppressing evidence in Alaska  
24 would not serve to deter them. It was not the  
25 interests of that other state which were being served

1 by the prosecution in Alaska, so when we don't permit  
2 the use of evidence in Alaska because of the conduct of  
3 some police officer, in that case in the state of  
4 California, we are not serving the interests of this  
5 whole exclusionary rule, we're not deterring any police  
6 conduct. That principle applies here.

7 In fact, if you recall the testimony in the  
8 course of the other proceeding, Michael Fox expressly  
9 asked Mr. Delozier, "Do you have the authority to do  
10 this? I would not have the authority to do this."  
11 Michael Fox expressly said, "I did not feel I could  
12 interfere with Coast Guard investigations." You  
13 couldn't have two investigators stumbling over one  
14 another in deciding how to go about that investigation.

15 Were there some evidence of collusion or were  
16 there some evidence this was all a pretext by state  
17 officers to get around a requirement that might be  
18 imposed by state law, then there might be some case.  
19 But there's absolutely no indication of that here. In  
20 fact, the contrary is the case.

21 THE COURT: What about Mr. Madson's comment  
22 that if federal authorities allow a wire tap; could  
23 that be used without a Glass warrant being obtained in  
24 state court, the information obtained through a federal  
25 wire tap and a state action against the defendant?

1 Isn't that a similar type thing we're looking at?

2 MR. LINTON: And I don't know the answer to  
3 that. I don't know other than Poolie (ph), I don't  
4 know of law which clearly tells us that.

5 THE COURT: Poolie (ph) didn't involve a  
6 statute though, it involved a constitutional  
7 interpretation. Right?

8 MR. LINTON: That's right. That's right,  
9 Poolie (ph) was a constitutional case. And I don't  
10 know how that would be received. I don't know of an  
11 instance where it's been applied in a large measure  
12 because of political controls. That is, political  
13 controls might say whatever the constitution of Alaska  
14 might permit, if there's a statute that suggests that  
15 it's improper for the state to do that, then the state  
16 would not go out and seek such evidence and bring a  
17 prosecution based on it. But I think that's a  
18 political control rather than a constitutional control.

19 THE COURT: Mr. Madson. The state does have  
20 the burden, but I'll let you have the last word. And I  
21 assume, for purposes of this proceeding, that all the  
22 evidence we took that was germane to this in the  
23 earlier proceeding can be considered by the court.

24 MR. MADSON: Yes, Your Honor, I would  
25 certainly agree with that.

1 THE COURT: Is that agreeable, Mr. Linton?  
2 MR. LINTON: It is.  
3 THE COURT: Okay.  
4 (0700)  
5 MR. MADSON: Your Honor, first of all,  
6 Mr. Linton made comments about Trooper Fox. I think  
7 it's important to remember one thing about what  
8 happened on the bridge that time, and this has to do  
9 with thinking about possible deterrents, state  
10 officers. Fox said that they discussed the matter and  
11 agreed to proceed under the Coast Guard authority. For  
12 one thing, it was easier, probably it was easier to do.  
13 Fox would have problems. He knew what he wanted to do,  
14 the Coast Guard knew what they wanted to do. As I  
15 recall the testimony of Trooper Fox, it wasn't snatched  
16 out of his hands; he agreed that the Coast Guard would  
17 proceed with their investigation and their means of  
18 taking the blood sample. In addition, he was concerned  
19 and asked questions to make sure that the sample would  
20 be preserved properly. In other words, there was state  
21 involvement in the Coast Guard proceeding. There  
22 wasn't just a hands-off, gee, you guys do it your way,  
23 you know, I'm just not going to have anything to say  
24 about it. He was directly involved in this. So, in  
25 that respect, certainly we could and should deter state



1 officers from using federal law enforcement officials  
2 doing the state officer's job for him, because this is  
3 where it ends up. And as long as there is state  
4 investigation with the possible -- almost immediate  
5 charge later of DWI here, the state involvement,  
6 clearly you're deterring, I think, both the prosecution  
7 and even law enforcement officials in this case by  
8 being directly involved and either agreeing to or  
9 making suggestions with the federal authorities as to  
10 how it's best to proceed.

11 So, the other thing, I guess, the court  
12 indicated about Glass and whether a wire tap, if you  
13 will, without a Glass warrant, done by federal  
14 officers, would be admissible in state court. I would  
15 say what Alaska courts would do with this is say it  
16 makes no difference. The federal officers must step  
17 into the shoes of the state officials. That's the way  
18 all the search and seizure questions are done. They  
19 were done for years that way and still are.

20 You look at the state substantive law and the  
21 procedural law and say it doesn't matter what uniform  
22 the person was wearing here, if you're in this court,  
23 here's the rules that apply. And consequently, if you  
24 want to use a blood sample, if you want to use an  
25 unlawful seizure under Alaska law or just say a seizure

1 of evidence or a wire tap, I think it's abundantly  
2 clear the Alaska Appellate Courts would say we're not  
3 going to look at the color of your uniform and say,  
4 well, you're wearing brown, therefore, it's  
5 inadmissible because what you're doing is perfectly all  
6 right under your authority. We're talking about our  
7 authority. We're talking about the controls we have  
8 over our law enforcement officials. And certainly they  
9 are not deterring federal authorities per se; they're  
10 deterring the state officials from utilizing those  
11 people.

12 And getting back to that point, if you put the  
13 Coast Guard then in the shoes of the state officers,  
14 which I think is an appropriate analysis for doing  
15 this, when you look at them as if they were state  
16 officers, even though we know they're not, in that  
17 context did they do what was correct under state law?  
18 I think that pretty well ends the argument, because  
19 they did not.

20 Thank you.

21 THE COURT: Thank you. For purposes of this  
22 motion, it's my understanding now that counsel has  
23 agreed that the sample was not voluntarily provided by  
24 Captain Hazelwood and that under our state law it would  
25 have been improperly obtained under state law. Is that

1 right?

2 MR. LINTON: Yes, sir.

3 MR. MADSON: Yes, Your Honor.

4 THE COURT: Okay. I'll take this under  
5 advice. Very interesting questions. I'll ask counsel.  
6 I know you've done a lot of work on this, but you'll be  
7 more of assistance to me if you maybe scratch around  
8 and see if you can find an answer to my question  
9 concerning wire tap information under federal law  
10 authorized being admitted in like our state with a  
11 Glass warrant required. I need that as a reasonable  
12 basis in this case. I will take it under advice.

13 MR. MADSON: Your Honor, I believe we could go  
14 on to the third and, I believe, last one that  
15 Mr. Linton is directly involved in.

16 THE COURT: Exculpatory evidence?

17 MR. MADSON: Yes. It wasn't exactly the order  
18 I was all primed and ready to go on either, but, you  
19 know, we all have to improvise, so I'll try to do the  
20 same.

21 THE COURT: If you'll just give me a minute,  
22 I'll see if I can find it. (Pause) All right, sir.

23 (0878)

24 MR. MADSON: Your Honor, this motion is a  
25 little bit difficult due to -- in view of the fact that

1 there were two prosecutors involved in responding to  
2 it, and I'll try to keep it in the context involving  
3 Mr. Linton.

4 I guess, to go back to my initial comments,  
5 when we have to start with a clean slate, we have to  
6 throw everything else and look at the two volumes of  
7 the grand jury testimony. But, at the same time, there  
8 are certain things that occurred in the context of the  
9 evidentiary hearing which have a bearing on this. So,  
10 occasionally, I think we have to, perhaps, refer to  
11 matters which weren't directly involved or directly  
12 disclosed by the grand jury testimony.

13 But basically, the gist of this particular  
14 motion is that the state was aware of and failed to  
15 present to the grand jury certain exculpatory evidence  
16 that would tend to negate guilt on the part of  
17 Captain Hazelwood. And that had to do with two issues:  
18 One was this so-called pilotage, and the second was  
19 that of the testimony of Gregory Cousins.

20 If the court looks back and reviews the grand  
21 jury testimony, it appeared that -- well, first of all,  
22 it's quite clear he had to show Captain Hazelwood was  
23 reckless. In order to show that he was reckless they  
24 had to show his state of mind, in essence, what his  
25 state of mind was. What did he know at the time, what

1 did he do at the time based on the knowledge he had?  
2 In other words, under the definition of recklessness,  
3 they had to show that he was consciously aware and --  
4 or aware of and consciously disregarded a substantial  
5 risk that this result would occur.

6 So, that directs the inquiry into what Captain  
7 Hazelwood knew at the time this occurred. What  
8 information did he have at his disposal which would  
9 bear on any decision he made and then would further  
10 support the state's theory that he was reckless.

11 On the other hand, if there was evidence that  
12 he was aware of something which would show he was not  
13 reckless, the law is clear that the prosecutor has an  
14 obligation to have the grand jury be aware of this  
15 information also.

16 The pilotage issue, the first one we raised,  
17 because all the evidence wasn't really before us, all  
18 the discovery wasn't there, but the first one was, of  
19 course, the so-called ALAMAR letter. This is a letter  
20 from the Alaska Maritime agency that supports the Exxon  
21 tanker fleet and gives them information concerning  
22 pertinent information that they feel is necessary for  
23 captains of the ships to know. That had to do with so-  
24 called pilotage in Prince William Sound.

25 It's easy to get side-tracked, and we can get

1 into a long dissertation, an argument on pilotage and  
2 whether it applies or whether it doesn't and what  
3 context, but primarily what it does is it muddies the  
4 waters as to when a federally licensed pilot is  
5 necessary to be either in direction or control of the  
6 vessel or direction and control as shown by being  
7 on-board the vessel in the area between the state pilot  
8 station, Rocky Point and Hinchinbrook. It muddies the  
9 waters, but at the same time it bears on what a person  
10 knew.

11 Now, the court has before it, in the motion, a  
12 copy of this particular letter which is not the Captain  
13 of the Port order. This is the person, Mr. Arts, who  
14 is saying, "I get this information from  
15 Commander McCall and I'm letting you people know about  
16 this." And if you look at it in the context of a  
17 reasonable captain of a ship and you go further and you  
18 find out what this means, in effect what it means is  
19 that if you're even a foreign ship and a tanker comes  
20 into Prince William Sound, you don't need a federal  
21 pilot on-board, there's no federal requirement for  
22 pilotage because it isn't under the federal system. It  
23 isn't registered in the United States, the Coast Guard  
24 has limited authority over it. But as long as there is  
25 somebody on-board that speaks English and you do

1 certain things, you don't need this federal  
2 requirement. So, the captain would know this because  
3 presumably he's experienced, he's been in and out of  
4 this place for a long time, and a foreign vessel  
5 doesn't need this. It does not necessarily waive the  
6 requirement that he has to be personally on-board and  
7 personally on the bridge, directing the operation in  
8 this area. I'm not saying, for the purpose of this  
9 motion, it does or doesn't. I think we can easily get  
10 side-tracked on that. All I'm saying is that did not  
11 the grand jury have the right to see this letter and  
12 reach conclusions themselves? At least to see it,  
13 because it bears directly on what he knew or didn't  
14 know. That's the whole question. And the grand jury  
15 is trying to determine this; was this man being  
16 reckless, what did he know? I mean, did he just -- if  
17 you look at the grand jury transcript, it leaves one  
18 with the cold impression that Captain Hazelwood didn't  
19 care, he just left the bridge, didn't give any  
20 directions, didn't do anything, just left, and the next  
21 thing we know, there's a crash.

22 The memo barely -- I mean it really relates to  
23 the knowledge he had as to whether or not it was  
24 appropriate for him to be on the bridge or not. And  
25 that gets into the next area because the grand jury was

1 obviously confused about this because they wanted to  
2 know what direction and control meant. Does this mean  
3 he had to be on the bridge? If you look at what the  
4 state then submitted in response, and that's the  
5 Captain of the Port order, I believe, I-80, which they  
6 say they had, but they didn't have the follow-up one,  
7 which was 81. I won't go into the issue of whether or  
8 not they should or should not have had that. It seems  
9 if they had one, they had access to the other.

10 But the point is, in that particular Captain  
11 of the Port order, it talks about having a pilot  
12 on-board. It doesn't say on the bridge, it says  
13 on-board. That's what Commander McCall said and that's  
14 what Commander Woodell, I believe, the one that was  
15 before him said. They used these terms, "on-board."  
16 The grand jury was confused about this. They say,  
17 well, what does this mean, and the state's response to  
18 that was to call Captain Beevers, their expert, to say,  
19 "In my opinion, Coast Guard regulations require that he  
20 be on the bridge, in my opinion." They did not give  
21 the grand jury the actual documents that are in  
22 question.

23 Our point is quite simple. Did it tend to  
24 negate guilt; number one, and number two; if so, why  
25 wasn't it presented? We can't answer the question of



1 why, except perhaps Mr. Linton believes that it isn't  
2 exculpatory. As long as they have a hired expert to  
3 say, in his opinion, his legal opinion is that it  
4 requires the captain to be on the bridge, even though  
5 the exact words are on-board. Now, that's a rather  
6 unique situation.

7           Secondly, there's another area that bears on  
8 this pilotage, which in fairness to a grand jury who is  
9 trying to determine the facts here, in fairness to  
10 them, they should have known about it. And that's the  
11 state's pilots' statute under Title 8. Why is that  
12 important? Because under the state law, when they talk  
13 about when a pilot is to be in control of a vessel,  
14 they say he's to be in actual control of the vessel  
15 when docking. There's a natural inference, I would  
16 submit, that if you have to be in control only when  
17 docking, you don't have to be in actual control when  
18 you're not. The grand jury didn't know about this  
19 either. They were presented very little information on  
20 this issue. All they were presented was the opinion of  
21 Beevers that said, "In my opinion, all the Coast Guard  
22 regulations require, in this case, is that he be  
23 actually on the bridge to be in direction of control."  
24 I suppose you can get into a lot of strange analogies  
25 about what this means, but I would submit, as long as a

1 captain of a vessel is awake and not sleeping, he is in  
2 direction and control, even though he may be 20 seconds  
3 away in his quarters in contact by radio by simply  
4 picking up the radio, in immediate contact he can give  
5 directions and control from there as well as being on  
6 the bridge.

7 In other words, do you actually have to be  
8 there visually looking at everything and visually  
9 giving signals or verbal signals in the presence of  
10 another officer or the helmsman? I think the  
11 Coast Guard probably -- or the commander probably has  
12 the right idea in saying this is impossible, you're in  
13 direction and control even though your not there 100%  
14 of the time. But again, it's easy to get sidetracked  
15 on this, 'cause that's not the question the court has  
16 to answer, not at all. It may come about at a  
17 different time, but certainly not now.

18 Right now the question is simply did the grand  
19 jury have the right to see this? Did they have the  
20 right to have these documents there? 'Cause they asked  
21 the question. They were very concerned about this.  
22 And that gets us in the position of what the other  
23 prosecutor did in response to this motion. Mr. Linton  
24 essentially takes the position that it wasn't  
25 exculpatory at all.

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THE COURT: What wasn't; the failure to...

MR. MADSON: The failure to...

THE COURT: ...give the...

MR. MADSON: ...present to the pilotage ALAMAR letter.

THE COURT: Okay. We're dealing with that now, not 862 185?

MR. MADSON: Well, basically he takes the same position there, that wasn't required to be presented to the grand jury. But as far as Mr. Cole and Ms. Henry are concerned, they seem to take the position, which is somewhat contrary to Mr. Linton's, which is if the only issue of recklessness on the part of Captain Hazelwood was that of his giving the control of the vessel over to Cousins, who was not qualified, then the pilotage letter would have some bearing on it. It's kind of a -- I'd say an admission on their part, that it has bearing as long as this was the only issue. And then they go on to say -- well, there's so many other issues.

Probably this was done, and I guess -- and I am only guessing here because of the limited knowledge they profess to have with regard to the facts of this case, because of that they had to take the approach that, well, yeah, it's -- it really bears on this

1 question, and it very well may have been presented to  
2 the grand jury, or should have been. But the other  
3 issue is recklessness, so it doesn't matter.

4 I find it difficult to argue both of these  
5 when they're coming at you from two different  
6 directions, and one of them seems to somewhat agree  
7 with our position. But I would submit, the only way  
8 this question can be answered is to really review the  
9 grand jury testimony again. I would guess it's been  
10 sometime since the court has seen it and reviewed it  
11 with this in mind. And if that's done, and I'm looking  
12 at the state's response where they say, well, the  
13 ALAMAR letter is and it isn't exculpatory, then it's  
14 difficult to answer. It's very difficult, but it  
15 certainly would appear, without even somewhat of an  
16 admission on the part of the state, that the answer  
17 becomes clear.

18 The grand jury is sitting there, and it  
19 shouldn't sit there in a vacuum, you know, they should  
20 have the facts at their disposal. And when it's a  
21 complicated area like it is, as to what was required,  
22 what it means, what Captain Hazelwood's duties were,  
23 and then does it rise to the level of recklessness.

24 The next item I want to go into is the  
25 testimony of Greg Cousins. Again, if the court looks

1 at the grand jury testimony, there's a real gap in the  
2 evidence presented. There's evidence, what Murphy  
3 says, right up to the time he gets off the ship, the  
4 pilot, he said, "Everything is fine." So he gets off,  
5 turns the command over to Captain Hazelwood, the ship  
6 then alters course.

7 But there's a gap as to what happened on the  
8 bridge of the Exxon Valdez in this critical time  
9 period. That gap and the answers to these questions  
10 are readily supplied by Greg Cousins. They were  
11 supplied, to a somewhat limited extent, by his  
12 statement that he gave the Coast Guard, which at least  
13 says he was given directions as to what to do. That  
14 wasn't supplied to the grand jury.

15 In addition, and far more important, right  
16 across the street at the Captain Cook Hotel,  
17 Greg Cousins testified under oath, with a number of  
18 state representatives present. The state was aware of  
19 that. The court has heard testimony, in fact, that Bob  
20 Mainard (ph), I believe, was supposed to have the job  
21 of editing and excising material from the NTSB  
22 transcripts and the testimony.

23 We had a uniformed officer here, I don't  
24 remember his name, who said, "I was there but I didn't  
25 take any notes, I didn't pay any attention to what was

1 said." I imagine all this is presented in context to  
2 show that while the state was there, he didn't care  
3 what Greg Cousins had to say. Or if he did care, he  
4 didn't use it because it was material that the  
5 clean-team couldn't have. But, Greg Cousins did  
6 testify, at length. Representatives of the state were  
7 present. Well, not the prosecutor's office, by their  
8 own choice they weren't present. They certainly could  
9 have, had they wanted to. And Mr. Linton certainly had  
10 access to the transcripts, to the testimony, to any  
11 part of that that he wanted, because he was one of the  
12 tainted members. And Greg Cousins testified, and he  
13 said, "I was told that this position, to set course at  
14 this position." He marks it on the chart, "And then  
15 when I reached -- when I was abeam of this particular  
16 point, 90 degrees out there, I was to alter my course  
17 to go around the ice." He was asked, and he said, "I  
18 was asked by Captain Hazelwood, was I comfortable with  
19 these instructions, if you have any questions, was  
20 there anything in his mind that he was concerned about  
21 that he felt bothered him." He said, "No."

22 And when you look at it, it's a very simple  
23 maneuver. You're on a bearing of 180 degrees due  
24 south, when you reach a position 90 degrees off a  
25 light, that's pretty easy to figure out. And

1 Greg Cousins, contrary to what has been presented in  
2 the press at great length, was not inexperienced. His  
3 testimony at the NTSB shows that he had made 12 to 14  
4 trips, a number of them on the Exxon Valdez. He had  
5 done the same maneuver before. He was a second mate,  
6 not a third mate, even though he was working as a third  
7 mate on this particular voyage, he had a second mate's  
8 license. That is in evidence before the court also.  
9 He wasn't a novice at this, and it was a simple  
10 maneuver. We're not pointing the finger at whether  
11 Greg Cousins made this horrendous mistake or someone  
12 else did.

13 The question is, should this have been  
14 presented to the grand jury so that they were able to  
15 ascertain what was in Captain Hazelwood's mind at the  
16 time he did this, and was he reckless in giving a  
17 perfectly clear, understandable order that was routine,  
18 as Captain Murphy, the pilot, -- Mr. Murphy, rather,  
19 the pilot, said was routine in this area to skirt the  
20 ice coming off Columbia Glacier. And that being the  
21 case, it seems pretty obvious that this was  
22 exculpatory, clearly exculpatory, because it showed  
23 what the captain did at the time was perfectly  
24 legitimate, routine.

25 And what happened afterwards may have some

1 bearing on other matters, but they certainly don't bear  
2 on the question of the obvious ones: Why didn't the  
3 grand jury have the right to hear this? Why couldn't  
4 they hear this? They wanted to know what happened on  
5 the bridge, who wouldn't? They're sitting there and  
6 listening to the greatest economic boom, you might say,  
7 to the state of Alaska, but not in the sense of the  
8 damage to the ecology, is what I meant to say. They're  
9 sitting in the midst of this, wondering what happened  
10 and they didn't have a chance to find out.

11 The grand jury system, if it's going to work  
12 at all, has to work fairly, and it has to work fairly  
13 on the part of the defendant. They have a right to  
14 know certain things. Those certain things are only if  
15 it helps the defendant to show that he was not guilty,  
16 and in this rather nebulous area of state of mind, a  
17 lot of things are relevant to that, as long as they can  
18 legitimately and honestly show that the person in  
19 question, Captain Hazelwood, was aware of this, should  
20 have been aware of it and what he did as a result.

21 So, without prolonging that, I think, getting  
22 back to my point here, again, I guess the only answer  
23 one can come up with as to why they didn't do this is  
24 we get back to the immunity question. The clean team  
25 versus the tainted team. That's why, because obviously



1 Cole and Henry will argue, we weren't aware of the NTSB  
2 material, we couldn't be aware of it. They went into  
3 the grand jury, not with one foot in the bucket, they  
4 unfortunately went into the grand jury with the bucket  
5 over their head, and they were not allowed to see or  
6 hear certain things. Now, I can sympathize with them,  
7 and I'm not blaming them for not presenting material  
8 they didn't know about, but on the other hand, we have  
9 prosecutors over here that are telling them what  
10 witnesses to call and all these other things, but  
11 they're saying, don't use Greg Cousins' statement, we  
12 believe this is tainted material. You can't do it.

13 This is another unique area that the court is  
14 now faced with that I have never seen before. And that  
15 is where the state of Alaska is put in the position at  
16 the grand jury proceedings of trying to protect, and I  
17 will give Mr. Linton credit for this, I don't dispute  
18 what he said at all, that he went very, very far in  
19 trying to protect what he believed to be  
20 Captain Hazelwood's rights under the immunity statute  
21 when we did not have a ruling. They had no ruling and  
22 no case law to go by, this was just kind of winging it.  
23 But he said, "I'm going to take the safe, cautious  
24 approach on this, and whatever I believe to be -- is  
25 covered by the immunity statute, I'm not going to use."

1           On the other hand, he's also faced with the  
2 duty to present exculpatory evidence. How does one  
3 resolve this conflict? And why should the state be in  
4 the position to make this choice? I would submit that  
5 they shouldn't be. It's a choice the defendant can't  
6 win in this situation. He can't possibly win because  
7 the evidence they want to keep out, because it's  
8 tainted, really helps him rather than hurts him. So,  
9 again, I don't know the answer, except to say that it  
10 appears in the context of this case that one right  
11 should certainly outweigh -- outweigh the other one,  
12 and that the testimony of Gregory Cousins, which  
13 clearly showed what happened on the bridge that night,  
14 showed that Captain Hazelwood gave an order which was  
15 understandable, clear, done all the time. It wasn't  
16 like this was just right out of the blue. I mean,  
17 let's turn this ship 180 degrees and see what happens.  
18 There was an obvious purpose to it, it was a routine  
19 purpose and what happened as a result is not the  
20 question right now. The question is why didn't the  
21 grand jury have the opportunity to evaluate this and  
22 look at it in the term -- then determine whether or not  
23 this was a reckless act or not.

24           That's about all I have at this time, Your  
25 Honor. Thank you.

1 MR. LINTON: That is a packet of statutes that  
2 I may refer to in the course of my argument.

3 THE COURT: All right.

4 MR. LINTON: Those are the regulations,  
5 Captain of the Port orders.

6 THE COURT: I wonder if we can take a break  
7 now. You're probably going to take a few minutes.  
8 Let's take a little break before we get into this.

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

11 (Off record - 11:00 a.m.)

12 (On record - 11:25 a.m.)

13 (1808)

14 THE COURT: Thank you. You may be seated.  
15 Okay, Mr. Linton, you can commence.

16 MR. LINTON: Let me give you a brief summary  
17 of what I'm going to say about the pilotage things, and  
18 then I'll go through the things in a little more  
19 detail.

20 Judge, there are some Captain of the Port  
21 orders which may create an ambiguity, in that Arts,  
22 Bob Arts, teletyped to captains, because it speaks of a  
23 pilot station without defining what pilot station it's  
24 talking to about. But when you look at all the Coast  
25 Guard Captain of the Port orders, you see that the

1 pilot station it's talking about is not the Rocky Point  
2 pilot station, but a Bligh Reef pilot station, which  
3 has been defined for what they call non-pilotage  
4 vessels. In fact, the Exxon Valdez was what they call  
5 a pilotage vessel, and the regulation or Captain of the  
6 Port order that Mr. Arts is talking about has no  
7 application to the Exxon Valdez or to what's going on  
8 here. At most, it would have an application if they're  
9 going to say that Captain Hazelwood had the -- that  
10 this was a pilotage vessel, Captain Hazelwood should  
11 have been on-board but that when he went below he  
12 rendered the vessel a non-pilotage vessel, and  
13 therefore under this non-pilotage memo, Captain of the  
14 Port order and memorandum from Arts, it was okay for  
15 Greg Cousins to have command of the ship. But when you  
16 read the words of those Captain of the Port orders, it  
17 wasn't.

18 Let me just show you, first there are defined  
19 in rules two in the orders, they are about two pilot  
20 stations. We've been talking about the Rocky Point  
21 pilot station, located up in this vicinity, right  
22 around in here. But there's something else referred to  
23 as the Bligh Reef pilot station further down and  
24 defined as a position somewhere west of the buoy at  
25 Bligh Reef.

1           Just to briefly summarize what these Captain  
2 of the Port orders said was, if you were going to have  
3 a master like Captain Hazelwood, who has taken the  
4 tests and received pilotage for the waters of Prince  
5 William Sound, he will be permitted to bring a tanker  
6 all the way up to this Rocky Point pilot station, at  
7 which point a state master, like Mr. Murphy, gets  
8 on-board, takes it on in. Similarly, on an out-bound  
9 voyage, Captain Murphy could be on-board to the Rocky  
10 Point station, get off, and then Captain Hazelwood,  
11 because of his endorsement, would continue the vessel  
12 all the way out to the entrance at Cape Hinchinbrook.  
13 Thereafter, you are outside pilotage waters, as are  
14 defined by the Coast Guard, you are on the high seas,  
15 and it's a question of do you have a license as a  
16 master or second mate. You don't need any special  
17 endorsements once you get out there until you get to  
18 the pilotage waters of whatever point you may be  
19 destined to.

20           But, in 1986 there was -- actually, beginning  
21 in 1980 there was an attempt to modify this because  
22 there was recognition that it was dangerous -- as  
23 initially set up, the pilot point -- the pilot station  
24 was out here at Cape Hinchinbrook, and you had to have  
25 pilots all the way in. That was what was required.

1 But they found that this was dangerous for the pilots,  
2 the waters out here are just so rough, the protections  
3 are so few, they actually lost a pilot boat. This is  
4 actually referred to in the documents. I'll be talking  
5 about loss of pilot boat, no people, luckily. They  
6 lost a pilot boat out here.

7 So, they decided they'd try to modify these  
8 regulations, consistent with what they thought was  
9 safe. And in a series of Captain of the Port orders,  
10 what they said was, if your pilotaged, then this Rocky  
11 Point rule applies; pilotage, master with the pilotage,  
12 come on in to Rocky Point, we'll pick up the local  
13 state pilot, go into the port, come back out with a  
14 state pilot to Rocky Point, and from then on the  
15 captain would -- the captain having a Prince William  
16 Sound endorsement would carry the vessel the rest of  
17 the way.

18 If one was what they called, loosely speaking,  
19 a non-pilotaged vessel, that is one which there was no  
20 federally licensed pilot who had an endorsement for  
21 Prince William Sound, that vessel could come to Bligh  
22 Reef, pick up the state pilot, go all the way in, come  
23 back out to Bligh Reef, let the state pilot off and  
24 then proceed with a captain who did not have any Prince  
25 William Sound endorsement for the rest of the way.

1 There were restrictions on this. There were visibility  
2 restrictions that says when you get here you have to  
3 have such and such visibility, not just any captain,  
4 but any captain's knowledge under condition --  
5 generally good conditions of visibility to go the rest  
6 of the way.

7 And what this Arts -- when this Arts teletype  
8 goes out, what it's talking about, about the pilot  
9 station, is the Bligh Reef pilot station. You can only  
10 tell that by looking at all the history of the Captain  
11 of the Port orders.

12 Let me start with -- does your Honor have a  
13 copy of the Alaska Maritime Agency's teletype that's  
14 in...

15 THE COURT: Yes.

16 MR. LINTON: Okay. Just to go through it  
17 quickly. It says, effective September 1, '86, the USCG  
18 requirement for daylight passage in Prince William  
19 Sound for vessels without pilotage has been waived.  
20 See that, vessels without pilotage, so it's all  
21 non-pilotaged vessels will be able to transit  
22 Cape Hinchinbrook to the pilot station. It doesn't say  
23 what pilot station -- at hours as long as visibility  
24 remains two miles or greater. The same remains true  
25 for the outbound leg from the pilot station, without

1 designating it, to Cape Hinchinbrook. U.S. Coast Guard  
2 will require each vessel to advise them of the  
3 visibility prior to arrival at Cape Hinchinbrook on the  
4 in-bound leg and just prior to dropping the pilot on  
5 the out-bound leg, again, not defining where you drop  
6 the pilot on the out-bound leg. Please note that the  
7 Coast Guard is treating such -- is treating each  
8 instance on a case-by-case basis, events such as oil  
9 spills, severe weather, traffic within the VTS and the  
10 vessel's past operating record may dissuade the U.S.  
11 Coast Guard from granting permission to transit in  
12 Prince William Sound without pilotage. All other  
13 requirements of vessels in the TAPS trade remain the  
14 same, and on down. Again, without defining what the  
15 pilot station is and...

16 THE COURT: I'm sorry, I thought I had that,  
17 but I guess I don't have that, I have something else.

18 MR. LINTON: Fine. Let me just show you. The  
19 only copy I have right here is one -- the only one I  
20 can put my hand on is one that...

21 THE COURT: Oh, no, I have it on Exhibit A, I  
22 believe.

23 MR. LINTON: Okay.

24 THE COURT: Yeah, I have a copy of it.

25 MR. LINTON: Right, and it just says pilot



1 station, it doesn't say what pilot station. Okay.  
2 Now, let's go back to the packet of papers that I gave  
3 the court and counsel.

4 This is taken from Title 46 of the U.S. Code,  
5 Section 85.01. And in Section 85.01 it says that there  
6 are -- in some circumstances the states may regulate  
7 pilots, but the operative provision that I want to  
8 point to is 85.02. And it says this: Except as  
9 provided in Subsection G, which is important to --  
10 we'll get to it in a second -- a coast-wise seagoing  
11 vessel shall be under the direction and control of a  
12 pilot licensed under such and such section if the  
13 vessel is not on register, underway, not on the high  
14 seas, and propelled by certain kinds of machinery or  
15 subject to inspection.

16 If you go to the next page, Subsection G says  
17 this: The Secretary of the Department of  
18 Transportation shall designate by regulation the areas  
19 of the approaches to waters of Prince William Sound,  
20 Alaska, on which a vessel, subject to this section, is  
21 not required to be under the direction and control of a  
22 pilot licensed under Section 71.01 of this title.

23 So, in this Title 46 the 85.02 in coast-wise  
24 seagoing vessels, and this vessel was on a trip from  
25 Valdez to Long Beach, so it was coastwise. It had to

1 be under the direction and control of a pilot licensed  
2 under 71.01, we'll get to that in a second, not sailing  
3 on register. Register, as I understand it, is for  
4 foreign vessels which are owned by Americans and can be  
5 registered in the U.S. Registry. But the Exxon Valdez  
6 is not one underway, and this was underway. It was not  
7 on the high seas, it was in the waters and it was  
8 propelled by machinery or subject to inspection under  
9 37.

10 Chapter 37 applies to tank vessels, and I  
11 think that either A or B applies to the Exxon Valdez.  
12 That meant that the Secretary under Subsection G could  
13 designate by regulation how to get in and out of Prince  
14 William Sound.

15 Next in the packet is 71.01. That just says  
16 that the U.S. Secretary can license people as masters,  
17 but as pilots as well, and makes it clear in  
18 Section 71.12, the master or mate licensed under this  
19 part, who also qualifies as a pilot, is not required to  
20 hold two licenses. Instead the qualification of the  
21 master or mate as pilot shall be endorsed on the  
22 master's or mate's license. That's Section 71.12.

23 Next in the packet of papers is an entry from  
24 the Federal Register, dated Monday, June 6, 1988, where  
25 there were proposed rules promulgated by the Department

1 of Transportation regarding the licensing of pilots and  
2 the manning of vessels and pilots, and includes on the  
3 four pages of that exhibit proposed regulations under  
4 46 USC 85.02(G) for Prince William Sound pilotage.

5 However, if you continue through the packet to  
6 the next page, that's Friday, August 11, 1989, in the  
7 upper right-hand corner it's marked clearly 33045 as  
8 the page of the Federal Register, you see that the...

9 THE COURT: Which date?

10 MR. LINTON: August 11, 1989. It's about two  
11 or three pages further on from the place where the  
12 Prince William Sound was. There the Department of  
13 Transportation had said...

14 THE COURT: I haven't found it yet. Is it  
15 still in the Federal Register?

16 (2425)

17 MR LINTON: Yes, still in the Federal  
18 Register. It's the last page of the Federal Register.  
19 (Pause) On the upper right-hand corner it says 33045  
20 is the page of the Federal Register. I wonder if your  
21 copy missed a page.

22 This is after the grounding of the vessel.  
23 The Secretary of Transportation withdraws the notice of  
24 the proposed rule-making entered by on June 6, 1988.  
25 The gist of this is that the Secretary of

1 Transportation has not exercised any authority under  
2 Subsection G to create an exception to create  
3 regulations in accordance with the congressional  
4 statute. Instead, what has happened is the Captain of  
5 the Port of Valdez has issued orders over the years,  
6 which have been the practice for pilotage in Prince  
7 William Sound, and there are then attached a series of  
8 documents. The first is the Captain of the Port order  
9 of 1-80, the next is the Captain of the Port order of  
10 designated 2-81, the next is a memorandum to the  
11 commanding officer of the Marine Safety Office, dated  
12 29 November, and then it's 1980 something, you can't  
13 make it out. Then there's a November '85 --  
14 November 5, '85 memo to the Commanding Officer of the  
15 Marine Safety Office, Valdez -- excuse me, to the  
16 Marine -- to the Commandant of the Coast Guard District  
17 from the Marine Safety Office at Valdez. Then there is  
18 a memorandum to all OODs and DTFs operators by  
19 Commander McCall, dated September 3, 1986, with an  
20 attached non-pilotage vessel check-in sheet attached.  
21 And then finally in November 2, 1988, the promulgation  
22 of a Prince William Sound Vessel Traffic Center manual  
23 by Commander McCall.

24           And those are the series of things that I'm  
25 going to be referring to that make it -- these things

1 are going to make it clear, Judge, that there are two  
2 pilot stations that people have been -- are talking  
3 about. One is the Rocky Point. In some places it's  
4 called the Busby Light pilot station, and another it's  
5 referring to the Bligh Reef pilot station.

6 Let me start with the Captain of the Port  
7 order, the first one of these, 1-80. In 1-80 there is  
8 -- this is the first of them in the sequence. There's  
9 thing called discussion at the beginning of it. It  
10 says, since the establishment of the TransAlaska  
11 Pipeline System, TAPS, all tankers operating in this  
12 trade have been required to have federally licensed  
13 pilots on-board between Cape Hinchinbrook and Valdez,  
14 Alaska. This requirement has been under considerable  
15 re-evaluation, and proposed rule-making is pending to  
16 revise or rescind the requirement.

17 Further, on January 7, 1980, the M/V Blue  
18 Moon, which had been employed as a pilot vessel for  
19 boarding at Hinchinbrook entrance foundered and sank.  
20 Attempts by the Alaska Pilots Association and vessel  
21 agents to temporarily employ a suitable replacement  
22 vessel had been unsuccessful. Long-term commitments  
23 are also hampered by the pending rule-making change.  
24 Use of a helicopter is deemed unsafe, due to unstable  
25 weather conditions, and further limited by reliable

1 availability. Therefore, to facilitate orderly TAPS  
2 tanker traffic and to continue to preserve the safe and  
3 incident-free transit of Hinchinbrook entrance to the  
4 Valdez pilot station, the following order has been  
5 established:

6 "Order: Each TAPS tanker, when conducting the  
7 required three-hour preliminary report, 33 CFR 161.334,  
8 prior to entering Hinchinbrook entrance or 30-minute  
9 initial report, 33 CFR 161.336, from Alyeska Terminal,  
10 prior to departure, will be queried if an officer is  
11 on-board holding applicable federal pilotage for Prince  
12 William Sound. If a pilot will not be aboard for the  
13 transit between Hinchinbrook and the pilot station in-  
14 bound or out-bound, the following will apply:"

15 There then sets forth a series of  
16 requirements, and sub-paragraph four is the one that's  
17 germane here. "Further, the Valdez Port pilot will  
18 board or depart the vessel at the entrance to Valdez  
19 on/off Bligh Reef in lieu of the established station at  
20 Busby Island."

21 (2660)

22 So, what this memorandum is creating is the  
23 class of vessels where there will be a pilot on-board,  
24 will loosely be referred to as pilotage vessels later  
25 on, and non-pilotage vessels, those that don't have

1 such a pilot on-board. Now, when Mr. Blandford was  
2 here, he identified for Your Honor, a vessel data  
3 sheet, which contained the entries in the upper  
4 right-hand corner for both the in-bound and out-bound  
5 legs of the Exxon Valdez on this March 23rd and  
6 March 24th trip.

7 THE COURT: Exhibit 60?

8 MR. LINTON: Exhibit 60, yes, sir. And when  
9 the question was put to the vessel, are you pilotage or  
10 non-pilotage, the answer was yes, we are a pilotage  
11 vessel. We have Captain Hazelwood on-board who has the  
12 requisite endorsement, which he, in fact, had, is the  
13 gist of that communication.

14 If you go then to the next Captain of the Port  
15 order, 2-81, essentially the same thing as  
16 re-promulgated, the same paragraph, sub-paragraph four  
17 says:

18 "Further, the Valdez port pilot will board or  
19 depart the vessel at the entrance to Valdez arm off  
20 Bligh Reef in lieu of the established pilot station at  
21 Busby Island." So, again, they're talking about Bligh  
22 Reef, a position off Bligh Reef, not the pilot station  
23 at Rocky Point.

24 The next document just serves to show that the  
25 next commander, Michael Cavit (ph), regarded the

1 Captain of the Port order, S-80-2 -- 2-81, as being in  
2 place and in effect. And in sub-paragraph 1 he says:

3 "This is the only COTP order in effect for  
4 this marine inspection zone." So, he's saying that  
5 it's only 2-81 in effect and that implicitly 1-80 is no  
6 longer in effect anymore.

7 The next communication is actually one that is  
8 not particularly germane. It's a communication by  
9 Commander McCall to the commandant, making suggestions  
10 in accordance with the law for the federal statute for  
11 promulgation of regulations to define the pilotage of  
12 waters, but doesn't really help analyze this case that  
13 much.

14 Then we come to November 3, 1986. This is a  
15 memorandum to all OODs and DTS operators, and it's by  
16 McCall. And this is coming three days after the Arts  
17 communication. So, presumably when Mr. Arts is  
18 referring to a promulgation by the Coast Guard, this is  
19 what he's talking about. In it Commander McCall says:

20 "First, I have decided to cancel COTP, Captain  
21 of the Port order 1-80, which dealt with requirements  
22 for non-pilotage vessels entering and departing Prince  
23 William Sound."

24 Well, technically 1-80 wasn't in effect,  
25 according to Commander Cavit (ph) when he -- he said



1 only 2-81 was in effect, but 2-81 has the same language  
2 as 1-80, which is a technical kind of thing, but  
3 probably of not significant import. But, instead of  
4 issuing a new Captain of the Port order, "I want each  
5 request to transit Prince William Sound without  
6 pilotage, to be handled on a case-by-case basis. The  
7 primary determining factor for approval will be  
8 visibility. If a tanker entering the system at Cape  
9 Hinchinbrook has less than two miles of visibility,  
10 they will not normally be allowed to enter Prince  
11 William Sound until the visibility improves to two  
12 miles or greater. Of course, claims of adverse weather  
13 or sea conditions affecting the safety of his vessel  
14 would cause reassessment of the two-mile criteria. In  
15 regard to tankers departing Prince William Sound,  
16 visibility requirements will apply when they reach  
17 Bligh Reef. If visibility is less than two miles at  
18 Bligh Reef, the pilot would be required to remain  
19 on-board until visibility improves to two miles or  
20 greater." And it says, "The non-pilotage vessel  
21 check-in sheet will continue to be utilized for tankers  
22 entering Prince William Sound."

23 Item 9, which deals with transits during  
24 daylight hours, "And good visibility will be changed to  
25 eliminate the daylight restriction and require

1 visibility of two miles or greater. When a  
2 non-pilotage vessel makes the 30-minute call prior to  
3 departing the terminal they will be advised at that  
4 time that because they are non-pilotage, they will not  
5 be allowed to transit from Bligh Reef to  
6 Cape Hinchinbrook without a pilot if the visibility is  
7 two miles or greater." Excuse me, "...they will only  
8 be allowed to transit from Bligh Reef to Cape  
9 Hinchinbrook without a pilot if the visibility is two  
10 miles or greater."

11 Well, here Commander McCall is talking about  
12 non-pilotage vessels, vessels that don't have on them  
13 the proper -- an officer with the proper endorsement.  
14 There's been, later in 1988, a promulgation of the  
15 Vessel Traffic Center manual, and we don't have all the  
16 pages of that attached, but with respect to paragraph  
17 7.6 Pilotage, the 7.6.1 says:

18 "All U.S. seagoing vessels under license and  
19 enrollment are required to have a federal pilot in  
20 control of the vessel while in inland waters. The U.S.  
21 vessel sailing under registry must comply with the  
22 state of Alaska pilotage regulations. 7.6.2, tankers  
23 bound for Alyeska Marine Terminal should have a master  
24 who is qualified to pilot the vessel from Cape  
25 Hinchinbrook to Rocky Point. State pilots will board

1 the tankers in the vicinity of Rocky Point. 7.6.3,  
2 non-pilotage, some of the tank vessels in the TAPS  
3 trade do not have a master or mate with a necessary  
4 pilotage endorsement for Prince William Sound, there's  
5 been much discussion on the subject. Until the  
6 question is resolved, MSO Valdez will continue to  
7 enforce Captain of the Port order 2-81, dealing with  
8 non-pilotage vessels. Under the authority of 33 CFR  
9 160, each tank vessel will be queried if an officer is  
10 on-board holding the applicable federal pilotage for  
11 Prince William Sound. If a pilot will not be aboard  
12 for the transit between Hinchinbrook and the pilot  
13 station, in-bound or out-bound, the following will  
14 apply:"

15 And then in sub-paragraph four again:

16 "Further, the Valdez pilot will board or depart the  
17 vessel at the entrance to Valdez Arm off Bligh Reef in  
18 lieu of the established pilot station at Rock Point."

19 So, at one point in the earlier Captain of the  
20 Port order they called it in lieu of the Busby Light  
21 station, now they're saying in lieu of the Rocky Point  
22 station. But in both instances, if it's a  
23 non-pilotaged vessel, the vessels which do not have  
24 appropriate pilots must have his state pilot, must have  
25 another pilot who can take them to Bligh Reef, not just

1 to Rocky Point.

2 Judge, I submit that in light of those  
3 regulations, when you look at what Mr. Arts is writing  
4 in the Alaska Maritime Agency's teletype, is to say  
5 after Bligh Reef you -- and if the visibility is okay,  
6 then you don't need a pilot anymore because you would  
7 be a non-pilotaged vessel at that point.

8 But then, let's look at this trip. This trip,  
9 the Exxon Valdez defines itself as a pilotage vessel  
10 because they have a master on-board who has the  
11 appropriate endorsement. He's the only one from the  
12 licenses that are before the court who had such  
13 endorsement. Now, while it is true that Mr. Beevers  
14 was in the opinion that the captain had to be under the  
15 direction -- that the vessel had to be under the  
16 direction and control -- and that meant physically on  
17 the bridge, that was not the only testimony before the  
18 grand jury to that effect. Mr. LeCain and Mr. Kunkel,  
19 officers of the Exxon Valdez, themselves said the same  
20 thing.

21 Judge, with respect to Mr. Beevers, the  
22 testimony on that appears at pages 139 to 141, and then  
23 page 492 of Mr. Beevers testimony before the grand  
24 jury. I had to correspond the copies in your version  
25 to the pages in my version, and I think it appears in

1 yours of the testimony of Mr. Beevers at 139-141 and at  
2 492.

3 At page 331, which should be open there,  
4 Your Honor, Mr. LeCain's testimony, Mr. LeCain was  
5 asked -- at your page 331, "Are you aware of a  
6 requirement that the person who has the con in that  
7 area...," in talking about actually -- let me backup so  
8 that the area is clear. "Now, going from Rocky Point,  
9 and the pilot would get off to Hinchinbrook, how many  
10 times have you been on watch when a vessel has been in  
11 that area?"

12 "Well, possibly 25 times in the total of my  
13 career."

14 "Okay. Do you -- are you aware of the  
15 requirement that the person who has the con in that  
16 area must have a special pilotage endorsement?"

17 Answer: "Yes, I am."

18 "And that is a special pilotage endorsement  
19 for that area in Prince William Sound. Is that  
20 correct?"

21 Answer: "That's correct."

22 "And the pilotage endorsement is ordinarily  
23 found on that person's license?"

24 Answer: "On the back of the license."

25 That was Mr. LeCain's testimony. Mr. Kunkel's

1 was in the same effect, appears at page 400 of  
2 Your Honor's copy of the grand jury's, and this was the  
3 questioning of him:

4 "Before we get out of Prince William Sound for  
5 a moment, there's one other question that I want to  
6 ask. How often have you been the mate in charge when  
7 the tanker has been in Prince William Sound, from Rocky  
8 Point to Hinchinbrook?"

9 Answer: "On the bridge, actually in charge of  
10 the bridge watch, maybe one or two round trips."

11 "Okay. Are you aware of any particular  
12 requirements that the person who actually has the con  
13 in that area must have a pilotage endorsement?"

14 His answer: "Well, I'm aware that according  
15 to the regulations there must be a person on-board with  
16 pilotage. That would -- and prudent action would be  
17 that that man would be on the bridge at the con," is  
18 the testimony of Mr. Kunkel. He does not actually say  
19 the regulations require -- it says prudent action  
20 requires it.

21 Judge, the defense says that the points in the  
22 regulations where the Captain of the Port says that the  
23 pilot must be on-board is somehow misleading in that it  
24 takes away from the general requirement of the law that  
25 the vessel be under the direction and control of the

1 pilot. That's simply reading into it more than a  
2 reasonable person would, and the testimony of  
3 Mr. Kunkel and Mr. LeCain make it clear that that's  
4 reading more into it than need be read into it.

5           There was no failure to present exculpatory  
6 evidence here. That memorandum by Mr. Arts should  
7 reasonably be read to require that there be a pilot on  
8 vessel -- on-board the vessel from the transit from  
9 Rocky Point on out to Hinchinbrook.

10           Now, so they were legal so long as the  
11 direction and control was being exercised by Captain  
12 Hazelwood, they could legally do that. The only time  
13 that the non-pilotage rules would even apply to  
14 Mr. Arts' memo would be if they're trying to say, well,  
15 when Captain Hazelwood went below and was not actually  
16 in control -- well, not actually on the bridge, let's  
17 put it that way, at the time that he -- of the  
18 grounding of the vessel, then this rendered a  
19 non-pilotage vessel, and they were complying with the  
20 regulations because Mr. Arts says they only needed a  
21 pilot at the pilot station when they were past the  
22 pilot station. Answer is no, they were not past the  
23 pilot station for non-pilotage type rules. For  
24 non-pilotage type rules, that is if Captain Hazelwood  
25 hadn't been on-board at all, then Mr. Cousins would

1 have been required to keep on-board that pilot,  
2 Mr. Murphy, until they got out to Bligh Reef.

3 (3537)

4 So, the memorandum by Mr. Arts is not -- is  
5 ambiguous on its face, but when read in light of all  
6 the other Captain of the Port orders, it becomes clear  
7 what they were talking about. And Mr. LeCain and Mr.  
8 Kunkel, as well as Captain Beevers, indicate that there  
9 was no confusion about how it was actually being  
10 applied on the Exxon Valdez. They listed themselves as  
11 the pilotage vessel when they came in and out, not a  
12 non-pilotage vessel, so that the failure to present  
13 that was not a failure to present anything which is  
14 genuinely exculpatory. In fact, it would have just  
15 added confusion and been misleading to present it in  
16 and of itself without that full explanation, but that  
17 was just given.

18 Let me talk about the second point, the  
19 calling of Mr. Cousins. (Pause) The law is that in  
20 order to be regarded as exculpatory in such a way that  
21 an indictment should be dismissed, the material must be  
22 substantially favored -- favorable to the defendant in  
23 a way that it would likely produce a different result.  
24 And that's not the case here.

25 Mr. Cousins' testimony would, at most, have



1 been a two-edged sword. Mr. Madson says to you, before  
2 the National Transportation Safety Board, Mr. Cousins  
3 said that he had received -- talked to the captain,  
4 that he had received instructions as to how to maneuver  
5 the ship and that the captain had then left the bridge  
6 and he, Mr. Cousins, was in charge. Before the grand  
7 jury there was testimony first that Mr. Cousins and the  
8 Captain talked, there was testimony that the Captain  
9 went below, that he was not on the bridge at the time  
10 of the grounding, that he came up after that and that  
11 he and Mr. Cousins talked before they went below --  
12 before he, Captain Hazelwood, went below. That came  
13 from other crewmen who were on the bridge at the time.  
14 So that the only thing missing from what Mr. Cousins  
15 could have said was what the communication was between  
16 the two of them.

17           There was testimony as to a protocol, which is  
18 followed when one officer relieves another, what kinds  
19 of information are transmitted from one to the other  
20 and of a practice to do that. That came out through  
21 the testimony of Captain Beevers and Mr. LeCain and Mr.  
22 Kunkel, so that the grand jury was aware that that was  
23 customary to transmit that.

24           So the only question then is was that  
25 substantially helpful to the defendant to have them say

1 that the con was turned over and what those directions  
2 were. On the one hand you can say, like Mr. Madson,  
3 yes, it would have been, but on the other hand you can  
4 say, under circumstances when he knew that Mr. Cousins  
5 did not have the proper endorsement. At that point  
6 what that served to -- what that evidence would serve  
7 to highlight is that here he was directly turning over  
8 the con to someone who he knew did not have the proper  
9 license at the time. So, on the one-hand you can say,  
10 well, it showed that he turned it over to Cousins and  
11 he wanted Cousins to do it. On the other hand, you say  
12 if you had that, that shows directly what you otherwise  
13 have only circumstantially from the testimony of the  
14 other witnesses, that by golly, he turned this vessel  
15 over to someone who did not have the proper endorsement  
16 for that period.

17 So, under those circumstances, that piece of  
18 evidence cuts both ways, and it's neither more  
19 exculpatory -- I mean if anything, it seems to me, more  
20 incriminatory in that it showed a violation of duty and  
21 regulations which would ordinarily be a criterion for  
22 determining whether one was acting negligently or  
23 recklessly in his conduct. So, if anything, it's  
24 really more inculpatory than exculpatory.

25 Now, it's certainly true that at that time we

1 were not aware of what Your Honor's ruling might be  
2 about what constituted evidence which was properly  
3 admitted, and so, therefore, Ms. Henry and Mr. Cole did  
4 not have what I had, and that was the summary of the  
5 statement from Mr. Delozier's interview, which was in  
6 the matters that are before the court, among the packet  
7 of things that Mr. Burke (ph) got from the Coast Guard  
8 on April 6, 1989.

9 Under circumstances where it's not something  
10 that one can say is anymore incriminatory than  
11 exculpatory, that statement would not be one that would  
12 rise to one's attention and say, hey, this is something  
13 that ought to be presented. But we tried to have  
14 Mr. Cousins testify, over and above that. Mr. Cousins  
15 chose to exercise a right against self-incrimination.  
16 What they're saying is then that we were obliged to go  
17 further than that and present to -- even in the absence  
18 of the man himself wanting to testify, we were obliged  
19 to present on a hearsay basis statements which there  
20 were certainly mixed motives for one to make. That is  
21 on the one-hand Mr. Cousins might be -- before grand  
22 jury, which was considering his own case, his  
23 statements, or even before a Coast Guard officer who  
24 was looking into the situation, might cast  
25 responsibility on someone else rather than himself in a

1 way that was unfair. Maybe it was a true version,  
2 maybe it was not a true version. In fact, it was  
3 pretty much the same version that Mr. Hazelwood,  
4 however, had given to Mr. Delozier as well, in which  
5 the state had as well. So that they were -- if you  
6 look at Captain Hazelwood's statement and compare it to  
7 Mr. Delozier's, there's no -- nothing jumps out at you  
8 as being inconsistent between the two.

9 In short, because this is susceptible to an  
10 interpretation which is equally, if not more indicative  
11 of guilt than innocence, it is not something which  
12 meets the standard for Alaska law, that it be  
13 substantially favorable to the defendant and likely to  
14 produce a different result.

15 THE COURT: Mr. Madson.

16 MR. MADSON: Does the court want to continue  
17 or take a break now, Your Honor? I certainly...

18 THE COURT: Do you have a response to that...

19 MR. MADSON: Oh, yeah, I certainly do. I  
20 think Mr. Linton couldn't have made a better argument  
21 for our case than I could myself. What he has shown  
22 is, number one, the ambiguous nature of the different  
23 Captain of the Port orders, regulations by the Coast  
24 Guard and other material that the grand jury didn't  
25 have a opportunity to review, analyze, discuss or even

1 consider. I think if we were to take a little test of  
2 everyone in this courtroom now, everyone who is not  
3 familiar with the facts, as a grand jury would be when  
4 they're initially presented with this, I'll bet nobody  
5 has the foggiest idea what we're talking about here,  
6 except the court, of course, and ourselves -- I mean,  
7 just spectators.

8 (Tape: C-3528)

9 (0020)

10 MR. MADSON: I sit here and it sounds  
11 confusing, and I've been living with this thing for  
12 months. There's a number of things, we want to get  
13 into the analysis of regulations, Captain of the Port  
14 orders and things of this nature.

15 First of all, there are some factual matters  
16 which I believe are not correct. First of all,  
17 Mr. Linton discussed Title 46, 85.01 and 85.02. He  
18 made certain assumptions or statements which are  
19 probably incorrect. Under 85.01 the vessel,  
20 Exxon Valdez, comes within paragraph D, and as such the  
21 state could not require state pilots, except, we would  
22 submit, to a rock from Rocky Point and nowhere else.  
23 More importantly, for what it's worth, nobody knows,  
24 because what we're talking about here is an area, for  
25 our discussion, but the point is should the grand jury

1 have had more information on this to establish, in  
2 their minds, that Captain Hazelwood was reckless.

3 Now, we get to 85.02, under A it says:

4 "Coastwise seagoing vessels shall be under the  
5 direction and control of a pilot, under 71.01, if the  
6 vessel is, one, not sailing unregistered."

7 Unfortunately, there's not a document, I don't believe,  
8 in evidence at this point, but we can supplement the  
9 record, we could show that the Exxon Valdez was  
10 unregistered. That muddies the waters even further. I  
11 mean, we could argue these points forever and ever.

12 The point is, what did Captain Hazelwood know?  
13 What information was given to him that he either  
14 consciously disregarded and created a substantial risk  
15 that this result was going to occur or otherwise acted  
16 in a reckless manner? That's the issue that we seem to  
17 be avoiding here. What he knew was the letter from  
18 Mr. Arts, and that letter, Mr. Linton says, well, the  
19 pilot station is different, it's at Bligh Reef, it's  
20 not at Rocky Point. Well, the letter doesn't say that.  
21 We have to presume that Captain Hazelwood knew this.  
22 We have to make a lot of presumptions or assumptions.

23 What the letter shows is that daylight passage  
24 for non-pilotage vessels is wait, okay? That's what it  
25 says, that we had talked about the pilot station. If

1 the captain is not, according to the state's definition  
2 then, on the bridge and in direction of control of the  
3 vessel, it becomes a non-pilotage vessel. These other  
4 things have to apply.

5 One other correction that needs to be made.  
6 Mr. Blandford did not testify that the form that is  
7 used by the Coast Guard, as to whether there was a  
8 federal pilot on-board, that is incorrect. He never  
9 testified, and for a very good reason. When he came on  
10 duty, he relieved Mr. Taylor. Mr. Taylor did not  
11 testify here. The form was filled out, but Taylor  
12 never testified that he inquired on the out-going leg  
13 of the vessel, whether or not there was a federal pilot  
14 on-board. It would, presumably, be either that or an  
15 assumption was made because the query was made on the  
16 in-bound leg.

17 THE COURT: Isn't there a separate column for  
18 the answer to that question? The first column under  
19 pilotage says yes, and then there's another column on  
20 the right-hand side, wouldn't that be the out-going,  
21 where it says OB?

22 MR. MADSON: Your Honor, unfortunately, this  
23 didn't come out in the testimony. We would disagree  
24 that a call was made and that anyone on-board the  
25 Exxon Valdez said -- answered yes to the question,

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because no such call was made. Or if it was,  
Captain Hazelwood did not respond to that call.

THE COURT: The only evidence we have is that  
it was made...

MR. MADSON: Is that, yes.

THE COURT: ...is this document, okay.

MR. MADSON: The point I was making is  
Mr. Blandford never said he made the call, and that was  
a response. It just wasn't in evidence. I didn't  
think -- well, obviously, he didn't think it was that  
important. I still don't. If it was important, it was  
testimony that the grand jury should have heard,  
because they were left in the dark on this. They were  
left with the sole belief that this -- that there were  
no -- I mean the regulations, which they never saw,  
said he has to be there. That's what they had and  
that's all they had. They never had one document, one  
evening, that Captain Beevers is saying yes. Then they  
had Mr. Kunkel, of course, saying yes, prudent action  
would seem that he be on the bridge, or that yes, I'm  
aware of the other. LeCain also said that yes, federal  
regulations require this. Neither one was queried as  
to -- well, first of all, they didn't have the  
necessary endorsement. I think there's a logical  
presumption that they may not be totally aware of all



1 this. They weren't aware, first of all, of the Arts  
2 letter. If they weren't aware of that, then I think in  
3 addition, there's no showing that even Beevers was  
4 aware of it. But, certainly I think it's relevant, the  
5 question should have been asked to these gentlemen,  
6 well, would your opinion be different in view of this  
7 letter from the Alaska Maritime Agency, would you still  
8 feel that he has to be on the bridge? We don't know  
9 that. That's the point I'm trying to make is, this  
10 grand jury, in a way, all had buckets over their heads,  
11 too. There was material that they simply didn't have,  
12 and nobody can fault them for doing what they felt was  
13 necessarily required, based on the information they  
14 had.

15 Now, I disagree with Mr. Linton in some  
16 respects. I think the law of Alaska doesn't require  
17 that we have to show that Captain Hazelwood would  
18 certainly be not indicted had this information been  
19 presented. But if it tends to negate guilt, if it  
20 certainly is not harmless error, it goes much farther  
21 than that, certainly, but tends to show that he wasn't  
22 reckless. That's the key issue here. That's a state  
23 of mind question, and a lot of facts bear on the state  
24 of mind. And, how many times have courts used the  
25 instruction to juries about using, you know, the

1 defendant's knowledge, what he knew and what he  
2 shouldn't have known, is circumstantial evidence to  
3 show state of mind or intention? These are all things  
4 that they didn't have.

5 To go on a little bit, we come back to the  
6 same question about direction and control on-board.  
7 Even looking at it, assuming Mr. Linton's argument is  
8 absolutely correct, can't argue with it, it's the  
9 Captain of the Port order that really counts and not  
10 the interpretation of that by Mr. Arts that, in turn,  
11 communicated to Captain Hazelwood. It says on-board.  
12 Nobody knows what that means. There's no case law on  
13 it, there's no interpretation by anyone except Beevers  
14 that says that. Maybe prudent action under most  
15 situations would mean on the bridge. But the Captain  
16 of the Port order says it doesn't say that, it says  
17 on-board. Certainly he was on-board.

18 Furthermore, we can confuse things even  
19 further because any state pilot will say, in effect, I  
20 never really have direction and control of a vessel  
21 because I am in a position of advisor to the captain  
22 only. Therefore, as only advisor, I don't have  
23 direction and control. So, we don't even know what  
24 that means, direction and control. It probably means  
25 just common sense interpretation. It means you can

1 have direction and control even though you are not  
2 physically present, right there at that wheel. I  
3 suppose you could be in the back seat of a car, easy  
4 enough, telling the driver where to go and how to do it  
5 and you are in direction and control, but you are not  
6 sitting next to him. You can go on and on, on this,  
7 but the point is, why should the grand jury have had  
8 only one person's legal interpretation or legal opinion  
9 as to what this means, when all these materials are  
10 relevant to the question of Captain Hazelwood's state  
11 of mind? They should have had the opportunity to do  
12 that and listen to it.

13 THE COURT: Mr. Madson, I'm having a difficult  
14 time finding the affidavit of Captain Hazelwood on  
15 this. Can you let me look at yours for a minute?

16 MR. MADSON: Captain Hazelwood's, Your Honor?

17 THE COURT: Would it reflect that he had  
18 knowledge of the Arts document? I might assume that he  
19 would have had knowledge of this document as well as  
20 all the rest of the documents that Mr. Linton has  
21 submitted?

22 MR. MADSON: No, Your Honor. I think there is  
23 no affidavit that says that, and that is, perhaps,  
24 unfortunate, but on the other hand, the state is not  
25 contending that he did not. If an affidavit is

1 necessary to supplement the record, we could certainly  
2 prepare one. I guess we made it an assumption, which  
3 was not controverted. If Mr. Linton requires it, we  
4 can certainly have an affidavit from Captain Hazelwood  
5 that said on a particular or approximate time he  
6 received the Arts communication.

7 MR. LINTON: I was under the assumption that  
8 there was no evidence that he was aware of it.

9 THE COURT: I found no evidence in the record  
10 that he was aware of that document.

11 MR. LINTON: I didn't know of any evidence nor  
12 of any affidavit.

13 THE COURT: But I thought maybe I might have  
14 missed the affidavit, that's what I was...

15 MR. MADSON: I'm afraid we overlooked that,  
16 Your Honor. We just made an assumption without backing  
17 it up. If the court would have no objection, I would  
18 certainly ask to supplement the record with an  
19 affidavit to this effect.

20 MR. LINTON: Judge, I certainly agree to  
21 supplementing the record, not by way of affidavit, but  
22 by way of testimony and cross examination, because one  
23 might say, I got this memo, but I knew it was mistaken,  
24 and I knew the pilot point it was referring to was  
25 Bligh Reef and not Rocky Point, and so that the

1 defendant's choice of what he puts in his affidavit  
2 should not be the only evidence before the court.

3 (0410)

4 THE COURT: And I think that's standard, Mr.  
5 Madson. I think that an affidavit, without giving an  
6 opportunity to cross examine an affidavit, isn't going  
7 to be adequate. You just can't put an affidavit up and  
8 have that serve for your purposes without having the  
9 state give an opportunity to at least test the veracity  
10 of the affidavit.

11 I would infer normally that Captain Hazelwood,  
12 a person in Captain Hazelwood's shoes, operating that  
13 kind of a tanker would probably be knowledgeable, or  
14 should be knowledgeable of all of the documentation  
15 that's been presented here, not only the Arts document  
16 but the Code of Federal Regulations, the U.S. Code and  
17 the Order of the Port. I would imagine -- I mean I  
18 would think that is something that a reasonably able  
19 captain who is responsible would be aware of. But,  
20 there's nothing in the record to say that he's aware of  
21 either of these documents at this time.

22 MR. MADSON: Well, we've certainly gotten that  
23 impression that the court and the state has never  
24 contended otherwise, Your Honor, until this point.  
25 We've all made that assumption, and I think correctly

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so. We'll decide over the lunch hour.

Is the court going to start again at 1:00 o'clock?

THE COURT: We're going to finish this argument and recess for the day. I've got afternoon matters and we'll resume tomorrow morning because, as I understand it, Mr. Linton will not be doing the other motions. We'll finish it up today.

MR. MADSON: In other words, as soon as we conclude with this argument, or are we going to finish all of them today?

THE COURT: No, no. We're just going to conclude the argument on the...

MR. MADSON: Okay.

THE COURT: ...failure to present exculpatory evidence and then recess for the day. I've got matters this afternoon to...

MR. MADSON: Okay. Well, we'll decide over the noon hour, Your Honor, but I think our position will be the same as we stated otherwise, that I think the law does not require that he have to testify. An affidavit is sufficient, but we'll decide that later.

THE COURT: Okay. I will tell you now that my decision will be, I would not consider an affidavit. If Mr. Linton wishes to cross examine the defendant and

1 the defendant refuses to submit to cross examination, I  
2 would then not consider the contents of the affidavit.  
3 But, if Mr. Linton chooses not to cross examine and  
4 accept the affidavit, I would accept that as fact.

5 MR. MADSON: The only query I'd make,  
6 Your Honor, with that is since this is a pre-trial  
7 hearing that any statements Captain Hazelwood makes in  
8 response to this motion, testimony with regard to it,  
9 would normally not be admissible against him at trial.

10 THE COURT: Well, I hesitate to teach a law  
11 course here, Mr. Madson, but I would imagine they would  
12 not be admissible except if he took the stand there  
13 maybe for impeachment purposes in trial. I don't know  
14 the answer to that though and I wouldn't want you to be  
15 bound by my statement at this time. That would be a  
16 decision you would have to make.

17 But I think, Mr. Linton, isn't that generally  
18 what the rule is?

19 MR. LINTON: It is.

20 THE COURT: Okay.

21 MR. MADSON: That's my understanding also,  
22 Your Honor.

23 Going on to something, I think, more  
24 important, we can get off the whole track of pilotage  
25 here, and I think it isn't necessary to determine this

1 motion, and that's going back to Cousins' testimony.  
2 Mr. Linton said that when Cousins testified before the  
3 NTSB, basically what he said was, "I don't have the  
4 necessary endorsement." Therefore, it shows even more  
5 evidence that Captain Hazelwood knew "I did not have  
6 this," and therefore it goes to show guilt rather than  
7 -- so it comes down to this: That to show  
8 recklessness, Cousins would have aided the state and  
9 not have helped Captain Hazelwood by showing that he  
10 didn't have the necessary endorsement, and that, by  
11 itself. Okay.

12 If the court would read pages 60 and 61 of the  
13 state's brief.

14 THE COURT: 61 of the state's brief?

15 MR. MADSON: Page 60 and, I believe -- rather  
16 61. There's one statement on page 61 that I think is  
17 very significant that the state seems to acknowledge,  
18 and that says: "However, the mere fact that a pilot is  
19 unlicensed without more does not establish  
20 recklessness." Greg Cousins would have said just that,  
21 I don't have a license. He wouldn't have said, I am  
22 incompetent, I don't know what I'm doing, I've never  
23 done this before, I was scared to death. He would have  
24 said none of that. He would have merely said, I don't  
25 have this license endorsement. And the state agrees



1 this doesn't show recklessness.

2 So, I would submit, that shoots that argument  
3 down literally in flames because it goes to show again  
4 the confidence, the reasons why Captain Hazelwood would  
5 not be even negligent in doing what he did, but acting  
6 in a reasonably prudent manner. The only question is  
7 this man didn't have this piece of paper. He didn't  
8 have, in effect, a driver's license for this little  
9 section of water. That's what he didn't have. And I  
10 think the state reasonably and correctly agrees that  
11 this isn't enough; you have to show more than that, you  
12 have to show that this guy -- that Cousins simply  
13 wasn't capable of handling this maneuver.

14 Mr. Linton also said that, well, we couldn't  
15 present Mr. Cousins, we invited him and we offered him  
16 immunity and that didn't work, so we didn't present  
17 him. Ms. Henry, in the statement she makes to the  
18 grand jury, refers to a number of things that Cousins  
19 did or said. Marks on the chart, clearly hearsay  
20 information. She refers to the exception, why Cousins'  
21 -- some of Cousins' statements, if you will, and there  
22 was also statements of what he did or what he said, the  
23 discussion on the bridge, to a limited extent that was  
24 made available to the grand jury. She used the  
25 analysis of Galuska (ph) vs. State, which is the one

1 where the Alaska Supreme Court years ago said if you  
2 have co-defendants or people in a co-defendant  
3 situation, co-conspirators, if you will, there is an  
4 exception to the hearsay rule. And certainly that  
5 material can be brought to the grand jury's attention.  
6 In other words, what one supposed co-defendant said is  
7 not hearsay in that situation. And she probably  
8 correctly said at that time -- it's also important to  
9 remember she was trying to indict Cousins. And it  
10 wasn't until later when the decision was made not to.  
11 But when she initially presented this case to the grand  
12 jury she said, "I want you people to listen to evidence  
13 and consider indictments to both these individuals."  
14 And in that context, what she said, as far as hearsay  
15 is concerned, would be certainly all right. In fact,  
16 if they changed their minds in mid-stream doesn't take  
17 back the effect of what her statement was to the grand  
18 jury and why there was an exception.

19 But that's all I have on this, Your Honor. We  
20 will certainly let the court know tomorrow what we  
21 decide, but I think that's probably a foregone  
22 conclusion.

23 If I could go back to the court's earlier  
24 comments on the alcohol suppression issue, a case just  
25 came to mind, and I don't have the cite for it, but I

1 can certainly supply it to the court and counsel this  
2 afternoon. And that is State vs. Jones. That's where  
3 the Alaska Supreme Court did not follow the Gates and  
4 Leon analysis by the United States Supreme Court in  
5 testing the sufficiency of an affidavit for a search  
6 warrant, or in the -- the second one, of course, is  
7 whether the officers acted in a reasonable manner, even  
8 though the war in itself is insufficient under state  
9 law. The point of Jones is they clearly did not apply  
10 federal law; they applied only state law. I could get  
11 that cite and copy that case, if necessary.

12 THE COURT: I'll give counsel until close of  
13 business tomorrow to come up with the additional  
14 authority on that motion, the motion to suppress the  
15 blood alcohol test.

16 Okay. We'll take these motions under advice.  
17 I'll probably have a decision for you on a couple of  
18 them tomorrow, after we complete the motion to dismiss  
19 because of failure to present exculpatory grounds. If  
20 Captain Hazelwood does not take the stand, then I might  
21 have an answer for you tomorrow by close of business.  
22 If he does, it may take longer.

23 And would you let Mr. Linton know -- would you  
24 be here otherwise tomorrow, Mr. Linton?

25 MR. LINTON: Otherwise I would not be here;

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no, sir.

THE COURT: Would you let him know as soon as you can if you're going to present additional evidence in support of that motion?

MR. MADSON: For permitting him to be cross examined, yes, Your Honor.

THE COURT: So he can be present?

MR. MADSON: Yeah. If there's any testimony, I'll certainly let him know.

THE COURT: We stand in recess.

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

(0757)

(Off record - 12:26 p.m.)

\*\*\*CONTINUED\*\*\*