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VOLUME 31

STATE OF ALASKA

IN THE SUPERIOR COURT AT ANCHORAGE

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	:
In The Matter of:	:
	:
STATE OF ALASKA	:
	:
versus	:
	:
JOSEPH J. HAZELWOOD	:
	:
----- x	:

Case No. 3ANS89-7217
Case No. 3ANS89-7218

Anchorage, Alaska
March 16, 1980

The above-entitled matter came on for trial by jury before the Honorable Karl J. Johnstone, commencing at 8:47 o'clock a.m., on March 16, 1990. This transcript was prepared from tapes recorded by the Court.

APPEARANCES:

On behalf of the State:

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On behalf of the Defendant:

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DEFENDANT'S

FOR IDENTIFICATION

IN EVIDENCE

AF

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STATE'S

117

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P R O C E E D I N G S

1
2 (Start Tape C-3680)

3 THE COURT: You may be seated, please.

4 Counsel, I have got copies of some instructions
5 here. Why don't you come on up and get them.

6 So we'll be talking about the same things, I have
7 copied the Defendant's proposed jury instructions and the
8 State's proposed jury instructions, and I have numbered them
9 so we'll have a reference point to discuss from. And I took
10 the originals as you filed them and I numbered the originals
11 as you filed them, and then I made copies of the original
12 package after being numbered. So that is part of the
13 official record, what you have right now, by numbers. So
14 when you refer to a number, you'll be referring to a number
15 that is in the official record.

16 MR. MADSON: Okay.

17 MR. ADAMS: Your Honor, I would like to file
18 another jury instruction -- I have given Mr. Madson a copy -
19 - with three supplemental memoranda.

20 THE COURT: If you'll just give me a moment to
21 review your response here.

22 Would you log these in? These have not been
23 filed. These are the originals?

24 MR. ADAMS: Those are the originals.

25 THE COURT: File the originals downstairs, Mr.

1 Adams, and then bring copies up.

2 Pat, the originals are being maintained
3 downstairs. I'll have to use the originals.

4 Do you have a copy of the originals?

5 MR. ADAMS: Yeah, I have a copy.

6 THE COURT: Okay.

7 Pat, would you make sure they get downstairs?

8 THE CLERK: Yes.

9 THE COURT: Thank you.

10 (Pause.)

11 THE COURT: All right, let's take care of the
12 pending motion which is the motion to reconsider. Do you
13 wish to be heard any further on it, Mr. Madson?

14 MR. MADSON: I don't believe so, certainly not at
15 any great length, your Honor. I think what I outlined there
16 in the written motion pretty well sets it out.

17 I think -- first of all, I think it was error to
18 allow a late witness to testify as to a matter of law. But
19 secondly, as I explained in the memorandum that I discovered
20 afterwards, that Coast Guard policy doesn't even permit it.
21 And at the very least, I think the jury should be entitled
22 to have the regulations as some kind of a guide to them to
23 allow them to consider the opinion as to -- and whether or
24 not it was made to show some kind of bias motive or anything
25 on the part of the Coast Guard. That's essentially it.

1 MR. ADAMS: Your Honor, I reviewed the tape of
2 Lieutenant Commander Falkenstein, and he never mentioned the
3 word bridge from what I can hear. He just said, and I
4 quote, being under the direction and control means that the
5 individual directing a vessel's movement through the water,
6 the individual who has the conn must have the pilotage
7 endorsement. The word bridge is not there, and whether
8 having the conn means the person is on the bridge is a whole
9 other story. And that would be an opinion.

10 I think the other witnesses have testified to that
11 fact. Conn means control. I mean, he just said the person
12 having direction has the conn, which is just what the
13 statute says. And he expressed no opinion.

14 MR. MADSON: Well, your Honor, I don't know how in
15 the world from all the other testimony that's been heard
16 here one can say, you've got the conn and you're not on the
17 bridge. That's obviously what he meant. The conn was the
18 person who was actually up there on the bridge, not
19 somewhere else.

20 THE COURT: All right.

21 Your application is denied, Mr. Madson. The
22 witness did not decline to answer the question. He answered
23 the question. Frankly, had he declined I would have ordered
24 him to answer it anyway, and the statute would permit me to
25 do that.

1 Are there any motions now that the defendant or
2 the State wishes to make?

3 MR. MADSON: Yes, there's a couple of evidentiary
4 matters we could probably clear up.

5 THE COURT: Okay.

6 MR. MADSON: One thing is the -- I don't have the
7 number of the exhibit -- it's not been moved in evidence --
8 it was Captain Knowlton's license. We discussed it -- and I
9 don't have the exhibit list in front of me -- but he was the
10 master of the Arco Juneau and Captain Beevers testified
11 about the course he took and he also testified from the
12 license that Captain Knowlton had a pilotage endorsement
13 that only extended up to Busby Island, did not go to the
14 pilot station.

15 THE COURT: Was this a defense exhibit?

16 MR. MADSON: I believe it was, your Honor.

17 MR. CHALOS: We can find it, your Honor.

18 THE COURT: Okay. I don't remember the number and
19 it would be of some help if you could dig it up.

20 MR. CHALOS: Right. It was Exhibit AF. Would you
21 like to see it?

22 THE COURT: Okay. You're offering it at this
23 time?

24 MR. MADSON: I would, your Honor, because there
25 was testimony about it and because it was examined by

1 Captain Beevers, and I think it comes in -- it would
2 certainly come in under 803.23 which is the catchall hearsay
3 exception where it has the indicia of reliability and
4 truthfulness. Certainly his license is required by law. It
5 is required by law to be kept on the vessel. There is
6 absolutely no showing. I think -- or any serious argument
7 can be made that it was not authentic, that it wasn't
8 Captain Knowlton's license, and that it did not contain the
9 proper endorsement. So I think with that indicia of
10 reliability, it should be admitted, even though it
11 technically is -- it's not a business record offering as
12 such.

13 THE COURT: Is there going to be an objection to
14 that exhibit?

15 MR. COLE: No objection.

16 THE COURT: Okay, without objection it is
17 admitted.

18 (Defendant's Exhibit Number AF
19 was admitted in evidence.)

20 MR. MADSON: The other thing we were talking
21 about, your Honor, and we know what the Court said as far as
22 the jury was concerned yesterday, but we were discussing
23 this and it seem that it would be appropriate to sequester
24 the jury for deliberations. We are coming up on the
25 anniversary of the oil spill, and I think it is highly

1 likely that there is going to be demonstrations and they may
2 be in front of the Courthouse where people know what's going
3 on. The press is, of course, going to pick this up. It is
4 little by little gaining momentum right now. And I think it
5 is going to be virtually impossible to insulate the jury
6 from outside influences.

7 And I don't know what effect, if any, this would
8 have, but it certainly raises a fear of a potential mistrial
9 if the jury was exposed to, let's say, demonstrations
10 outside the Courthouse or other activity that would perhaps
11 interfere with their ability to be fair and totally
12 impartial in this case. And it just seems that in the
13 interest of trying to be completely -- avoid the chance of a
14 mistrial, that the additional inconvenience of the jury
15 probably isn't really going to be that significant.

16 And secondly, I think it would enhance the jury's
17 ability to come to a verdict if they are sequestered,
18 because then they are going to be put in a place where I
19 think they are going to be working harder, than knowing they
20 can go home any time they want to.

21 THE COURT: You mean they'll reach a verdict so
22 they can go home is what you're suggesting?

23 MR. MADSON: Yes, so we can all go home.

24 But I -- we're really more concerned about the --
25 I think if it wasn't coming up on yet another week we're

1 looking at anniversary date here, and I just know as sure as
2 I am standing here there's going to be all kinds of new
3 activity coming up.

4 THE COURT: Is there some reason why you waited
5 until this late date to ask it? Is there some change of
6 circumstances that have occurred, or is it just in general -

7 -
8 MR. MADSON: No, we're not aware of any change in
9 circumstance, your Honor. We never requested the jury to be
10 sequestered for all those eight weeks. I think that would
11 have been -- that was just too much. But we start looking
12 at jury deliberations and the fact that all of a sudden it's
13 dawning on us that, good grief, here we are coming up on the
14 23rd here shortly, and we just started thinking about it and
15 thought well, there should be maybe a difference between
16 sequestering for the whole period of the trial and then just
17 for a much shorter period of time for just the jury
18 deliberations as such, because then we're talking just a few
19 days at the most, hopefully.

20 THE COURT: All right.

21 The rule covers this, Rule 27 of the Alaska
22 Criminal Rule says that a request for overnight
23 sequestration shall be made by the parties before the jury
24 is sworn unless good cause is shown for a later request, and
25 you haven't made any showing of good cause here except as a

1 general cautionary feeling on your part.

2 I am going to deny your request at this time.

3 Anything else we can take up as far as
4 applications now?

5 MR. MADSON: I don't think there is anything else
6 pending. Wait a minute, there is, too. There's one other
7 thing. And that is Exhibit 117, that's the inbound tape.

8 I think, your Honor, it's already been ruled on to
9 a certain extent, but we reviewed the transcript of the
10 testimony and of the conference that we had with regard to
11 the objection and it may not have been picked up on the
12 record. We had a conference right up there at the bench,
13 and I wanted to make sure that the record reflects that the
14 tape was objected to on the grounds of relevancy plus the
15 other additional items that we mentioned such as the purpose
16 for which it was offered, you know, as to just compare the
17 voices. And now that we have had testimony which is
18 uncontroverted that it is not really a true and accurate
19 reproduction of the original. I still am not entirely sure
20 what the State is going to use it for. But if it is just to
21 compare the way he sounds -- Captain Hazelwood sounds on
22 that tape versus the other tape, I think this would probably
23 be in the nature of a motion to reconsider. The Court was
24 kind of hesitant about admitting it to the jury, but then I
25 think you said the witness should be required to testify to

1 the jury and show whether or not we had any reason to
2 believe it wasn't a true and accurate reproduction. And we
3 did that.

4 The State has not countered that, so I think at
5 this point we have made a sufficient showing that it is not
6 a reliable reproduction, as far as comparing the nature of
7 the way a person speaks. Not the words. Just how fast or
8 how slow.

9 So I would ask the Court to reconsider.

10 And then even if it is admitted and does go to the
11 jury, there's some other voices on there which are pure
12 hearsay. There's another person talking, this three hour
13 report. Don't know who that is. The Coast Guard person is
14 on there.

15 THE COURT: Are the words being offered for the
16 truth of the matter contained in them? The other person?

17 MR. MADSON: Don't know why they're offered.
18 You'll have to ask the State.

19 THE COURT: Okay.

20 Mr. Cole?

21 MR. COLE: Your Honor, I think it all goes to the
22 issue of -- goes to weight and not admissibility. That has
23 been our position from the beginning. As to -- well, our
24 position is it goes to the weight and not to the
25 admissibility.

1 THE COURT: He has objected to other voices, Mr.
2 Cole. Do you want to address the entire objection. Other
3 voices are on the tape, apparently, not just Captain
4 Hazelwood.

5 As I understand your offer, you are trying to show
6 Captain Hazelwood's voice at the time coming in contrasted
7 with the time when he reported the spill and thereafter in
8 order to prove that he was under the influence at the time
9 of the spill. Is that a correct summary of your reason?

10 MR. COLE: Yes.

11 And it also is being offered to show that they
12 declared themselves a pilotage vessel on the three hour
13 inbound tape.

14 MR. MADSON: On that point, your Honor, it is not,
15 in our opinion, Captain Hazelwood's voice that is saying
16 that they are a pilotage vessel. It is some other person
17 whose voice has never been identified. So that is pure
18 hearsay. And it is certainly offered for the truth of the
19 matter, sir.

20 MR. COLE: It is offered to show why the watch
21 stander or the VTS person did what he did, which is write
22 that down on an exhibit.

23 THE COURT: How long is the tape? When I turn it
24 on and listen to it, how long will it take me to listen to
25 it?

1 MR. COLE: About a minute.

2 THE COURT: The entire tape?

3 MR. COLE: It's about a minute.

4 MR. MADSON: It's not very long.

5 MS. HENRY: Yes, your Honor, Mr. McCain says one
6 thing, Mr. _____ says something in response, and then
7 Captain Hazelwood says something. It is about four minutes.

8 THE COURT: Let's hear it.

9 (A tape recording is played.)

10 THE COURT: Any further argument by --

11 MR. MADSON: Well, I think it is important to
12 note, your Honor, this conversation is not recorded as it
13 really happened. In other words --

14 THE COURT: Just a minute. Mr. Cole, what are you
15 doing?

16 MR. COLE: I was going to hand you this, because
17 it shows you -- that's --

18 THE COURT: This is the outbound? This is what he
19 filled out?

20 MR. COLE: Yes. On the inbound.

21 THE COURT: Okay, you take this back. I
22 understand.

23 MR. COLE: Okay.

24 THE COURT: That's the inbound and outbound, isn't
25 it?

1 MR. COLE: Inbound and outbound.

2 MR. MADSON: In other words, your Honor, this
3 recording was not made in -- like Mr. Seidik testified, in
4 real time. You take a portion here, you take a portion here
5 some hours later and you put them together on one tape. And
6 that's what happened here. In other words, what was
7 necessarily said at the three hour reporting time was not
8 necessarily at the same speed or pitch as what happened
9 later when you refer to what has been referred to as Captain
10 Hazelwood's voice. That's where he said the difficulties
11 were in this tape.

12 So we have a composite of different times and
13 places -- not -- and places, too, because the ship was
14 obviously moving along.

15 I may have missed it also, but I don't think Mr.
16 LeCain identified his voice. Miss Henry said that's who it
17 was, but I don't recall Mr. LeCain being shown or listened
18 to this tape and said, yeah, that's me saying this. So we
19 have a pure hearsay statement offered for the truth of the
20 matter asserted which is, did the vessel have pilotage, by
21 an unknown person, and all this is hearsay. So if it is
22 admissible at all, it should have only Captain Hazelwood's
23 voice and nothing else on it.

24 THE COURT: Okay.

25 The objection is overruled. I find that it is a

1 duplicate under Evidence Rule 1001, that the original is
2 either lost or destroyed under Evidence Rule 1004. And
3 there is not a genuine question raised as to the
4 authenticity of the original, and there is no circumstance
5 in which it would be unfair to admit the duplicate in lieu
6 of the original in this case. That your argument goes to
7 the weight to be given this document. The witness testified
8 that it accurately reflected what he heard from the original
9 when he played it back. Of course, you can argue the weight
10 to be given this document.

11 117 is admitted without the provision at this
12 time.

13 (State's Exhibit Number 117
14 was admitted in evidence.)

15 THE COURT: What else can we take up now from the
16 Defendant's point of view?

17 MR. MADSON: Well, your Honor, the Court ruled
18 under 101, but I assume then that the hearsay objection is
19 also overruled.

20 THE COURT: That's correct, it's overruled. 1001,
21 yes.

22 MR. MADSON: I can't think of anything else at the
23 moment. I pondered this this morning, and I think the time
24 would probably be better spent on the instructions. The
25 only thing I could think of, your Honor, might be somewhat

1 useful, is to maybe go over some instructions that we don't
2 have a disagreement about. We could at least clear that up
3 and might save some time later on. In other words, the
4 boilerplate type stuff.

5 THE COURT: Okay.

6 What I am doing is preparing a Court's set of
7 instructions which will put them in the chronology that they
8 would normally be given, and I haven't completed them yet.
9 There are a few hand written instructions. And until I get
10 them completed, which will probably take another hour or
11 two, I don't think it would do any good to go with that
12 package. And they're in the order which I'd be giving them.
13 I am going to go back to the office and massage them some
14 more and then give you each a copy of the best I have got in
15 about an hour and a half or two hours.

16 And then we can start talking in terms of the
17 Court's instructions and you'll see that they overlap both
18 State and Defense instructions quite a bit. And we'll be
19 talking in at least some meaningful fashion.

20 I anticipated there would be post-trial motions
21 that would normally be made, and I take it there are no
22 post-trial motions at this time?

23 Okay. You're shaking your head negative but --

24 MR. MADSON: That's right.

25 THE COURT: Are there any applications by the

1 State?

2 MR. COLE: No, we have none.

3 THE COURT: Okay.

4 I received the supplemental memorandum regarding
5 impossibility and the definition of operating a motor craft.
6 Once again I want to reiterate, and I expected this, and
7 there's nothing new on here, and I take it you could find no
8 cases that would be contrary to your position or in support
9 of your position, Mr. Adams, that creating a risk must be a
10 real risk and not a potential risk.

11 MR. ADAMS: No, your Honor, we found no
12 authorities.

13 THE COURT: Do you want to be heard further on
14 your requested instruction on impossibility? I have told
15 you what the Court's inclination is. It's not in granite,
16 but it is getting harder and harder in view of the absence
17 of any authority to the contrary.

18 MR. ADAMS: Well, your Honor, it would be our
19 position that because it was impossible for the vessel to be
20 refloated under its own power, that doesn't create a risk --
21 it doesn't create a risk consistent with refloating that
22 vessel. However, it was a risk that the actions of trying
23 to remove the vessel created, and that would be to bend the
24 longitudinals more, which Professor Vorus testified to, that
25 he observed damage down in San Diego that was consistent

1 with a grinding motion of the longitudinals which decreased
2 the strength of the vessel, increasing the risk that it
3 would knuckle as the tide went down.

4 As it turned out, the vessel simply crushed and
5 created a cathedral effect at bulkhead 23. However, the
6 actions of grinding it for over an hour increased the risk.
7 And so we should be allowed to have -- to argue to that
8 effect. That is something wholly separate from a risk of
9 replicating the vessel.

10 THE COURT: What was the risk that was created by
11 doing this?

12 MR. ADAMS: Your Honor, the risk that was created
13 was that as the vessel was ground into the rocks, it
14 decreased the strength at bulkhead 23, and -- causing a
15 greater risk that the vessel, as the tide came down, would
16 knuckle. That's I believe what it is called. And then
17 instead of crushing the vessel, which is what happened, the
18 vessel breaks in half and releases even more oil.

19 THE COURT: So the risk is that the actions
20 created risk to the vessel?

21 MR. ADAMS: That's correct.

22 THE COURT: That would be the property of another
23 you're referring to?

24 MR. ADAMS: No.

25 And then -- okay. At bulkhead 23, the starboard

1 tank and the center cargo tank were ruptured. The port tank
2 was not ruptured. If that vessel had knuckled as opposed to
3 crushed, the port -- the port tanks would have ruptured
4 releasing a tremendous amount more of oil. Instead of
5 having a vessel that released 250,000 barrels, we would have
6 had a vessel that released 400,000 or 500,000 barrels of
7 oil. And that would have increased the damage.

8 That was a risk that was created by grinding that
9 vessel into the rocks. Those longitudinals run the length
10 of the vessel. They are I beams and their strength is
11 created solely by their -- or 99% by their longitudinal,
12 their straightness. As soon as those I beams are twisted,
13 they lose a tremendous amount of strength. The amount of
14 damage at bulkhead 23 was substantial. And Professor Vorus
15 testified that he saw damage that was consistent with the
16 twisting of those longitudinals, which was different than
17 running straight into a -- straight into a reef. There's no
18 reason that those longitudinals would be as twisted as they
19 were, because they would have just been crushed up. They
20 looked like rocks had been ground into them. The testimony
21 is that the vessel was impaled on rocks. There is a picture
22 of a rock that is almost the size of a Volkswagen jammed up
23 in there. And as that vessel twisted back and forth and
24 back and forth, it decreased the strength, increasing the
25 risk that the vessel would knuckle as the tide fell.

1 THE COURT: Do you have citation's to the record
2 that supports your assertions of these facts? My
3 recollection is a little different than your's, and I am
4 wondering what evidence you're drawing on here to support
5 that this was all done by Captain Hazelwood, that there was
6 longitudinals that were going to be damaged by Captain
7 Hazelwood doing this, and that there would be extra millions
8 of gallons of oil spilled. I don't remember any testimony
9 along these lines, and I would like to hear you specifically
10 recite the record that you are talking about.

11 MR. ADAMS: When Professor Vorus testified, he was
12 asked, did you see any evidence down in San Diego that was
13 consistent with twisting the vessel. He testified that he
14 saw scratch marks that were perpendicular to an axis -- to a
15 radial from the point of rotation, perpendicular lines --

16 THE COURT: I recall that part of the testimony.

17 MR. ADAMS: He also testified that he saw evidence
18 in the longitudinals that -- evidence that the longitudinals
19 were damaged consistent with twisting. He also testified,
20 if I am not mistaken, that that increased -- or decreased
21 the strength of the vessel, increasing the risk of more
22 damage as the tide went down, creating more of a risk.

23 And we're talking about a risk here. And it would
24 be a reasonable inference that if holing tanks -- holing the
25 tanks, the nine or ten tanks that were holed caused this

1 amount of damage, that holing the rest of the tanks or
2 however many tanks would have been damaged if it would have
3 knuckled, is consistent with more damage. And we don't have
4 to prove damage, just the risk of damage.

5 THE COURT: I understand that, Mr. Adams. Okay.

6 MR. COLE: Judge, we have one other point there
7 that Mr. Adams hasn't talked about, and that's the argument
8 that I told you about when we talked about this the other
9 time. Captain Hazelwood's actions on moving this vessel
10 back and forth created also a risk of holing the port side
11 tanks. By moving the vessel back and forth the way he did
12 created a risk of that. It created a risk that he would hit
13 one of the port side tanks and cause it to be punctured.
14 And Professor Vorus testified about that and so did Mr.
15 Milwee.

16 I believe that there is a reasonable inference
17 based on this activity, because you heard testimony that he
18 was swinging it around a hundred feet at the bow, and it had
19 to be almost twice that much in the aft section. In other
20 words, it was a distance of over a hundred feet.

21 And we believe that with the fact that there are
22 rocks in the area that can puncture that, that that --

23 THE COURT: Are there rocks? Was their evidence
24 that there are rocks in the area that he could have
25 punctured?

1 MR. COLE: I think so.

2 THE COURT: You can --

3 MR. COLE: You have to look at the fathom marks.

4 THE COURT: Well, maybe you can point to the
5 record for me to show where the rocks were that he could
6 have punctured. First of all, was there any testimony that
7 there were soundings made of rocks in the area that he could
8 have hit?

9 MR. COLE: There's testimony of soundings made all
10 around the ship.

11 THE COURT: Okay.

12 MR. COLE: And their expert himself said that if
13 he had turned -- if he had just turned it one way, he would
14 have gone around in a circle.

15 THE COURT: David, would you go get those two
16 cases for me, please? The two cases you were researching I
17 gave you from the Bench yesterday?

18 (Pause.)

19 MR. COLE: I can't tell what that one is, but that
20 looks like a six to me, your Honor. That marker right
21 there. And it's difficult to see. There's the fathom mark.

22 THE COURT: You're showing me exhibit what
23 numbers?

24 MR. COLE: AK.

25 THE COURT: Okay.

1 (Pause.)

2 THE COURT: Is there any other evidence you wish
3 to call the Court's attention to that would establish that
4 there was a real risk involved?

5 MR. COLE: No.

6 THE COURT: Okay.

7 MR. MADSON: Your Honor, I think the Court has
8 really keyed into it. What the State is talking about here
9 is a theoretical risk and not a real or -- and more
10 particularly what the statute requires is a substantial
11 risk. Their argument has totally left that word out of the
12 -- as if it didn't exist. Well, it is a very substantial
13 part of the statute, if I could use that phrase, because
14 that is what it really means. You can risk a lot of things,
15 but unless it's other than just in theory, a possibility, it
16 has to be not only just a potential one but it has to exist
17 and it has to be whatever substantial means, whether it's
18 50% or more than 50% or whatever, but it has to be a real
19 risk as the Court has already pointed out.

20 You know, we can sit here all day and look at a
21 fathom chart and say well, if the vessel could have moved
22 this far, this could have happened. Or if -- a lot of
23 things could have happened. But I think the testimony was
24 clear by a part of everybody that there was no damage at all
25 that was attributable to any twisting action on the part of

1 the -- of Captain Hazelwood. There was crushing damage from
2 tides. There was damage that may have been caused by the
3 tugs moving it back and forth. Damage that was caused
4 afterwards. There was absolutely no testimony to show that
5 specifically this could have happened as a result of Captain
6 Hazelwood's minimal actions with the rudder and power. In
7 fact, most of the witnesses agreed that the amount of power
8 -- in fact they all did, they all agreed the amount of power
9 used was insufficient -- just so insignificant that it
10 couldn't really move the vessel forward one inch and
11 sideways very little. So in fact it couldn't move at all.
12 Was virtually impossible.

13 THE COURT: Were you about to say something?

14 MR. ADAMS: Well, your Honor, there's one other
15 issue as far as the use of the evidence of the refloating,
16 and that's to establish that he was impaired. You've
17 tentatively ruled that we could argue that to the jury, that
18 that was evidence of his impairment, irregardless of whether
19 it was impossible. And the case of Como versus State, i
20 cited in my supplemental memo there, refers that impairment
21 and recklessness are pretty much synonymous when the State
22 proves that a person is actually driving a motor vehicle
23 while he's impaired.

24 And we would request that we be able to argue that
25 not only is it evidence of his level of impairment, it is

1 also evidence of his state of mind, that he was acting
2 recklessly and negligently.

3 THE COURT: All right.

4 Well, I have given it a lot of thought and we
5 can't find much more on the subject than counsel has been
6 able to -- to give us. But what I can find leads me to
7 believe that criminal mischief requires an actual risk and
8 not a speculative risk, and in determining whether the crime
9 of criminal mischief in the second degree is committed, an
10 objective assessment of the degree of risk presented by the
11 alleged reckless conduct has to be made.

12 Reckless endangerment, criminal mischief is
13 defined in terms of the risk produced by Defendant's conduct
14 and not intent. And factual impossibility eliminates the
15 risk essential to the commission of the crime. Based on the
16 evidence, reasonable minds can't differ in my opinion, that
17 it was factually impossible for their to be any additional
18 oil lost or to be any additional damage to property of
19 another as the term is being used in this case.

20 And on November 17, 1989, in response to the
21 Court's order, the State stated that the phrase, quote,
22 "property of another," end quote, as used for the purpose of
23 the indictment includes the fisheries, wildlife, vegetation,
24 shoreline and other aspects of Prince William Sound. It
25 does not include the Exxon Valdez itself.

1 So the very diminimus testimony is there may have
2 been additional damage to the Exxon Valdez itself does not
3 constitute creating a risk of damage to property of another
4 as the term is used in the indictment. There is no evidence
5 in the record that would support an argument that additional
6 oil was lost or could have been lost by the defendant's
7 alleged maneuvering on Bligh Reef. There is no evidence in
8 the record to support argument that any additional damage to
9 property of another could have occurred as a result of his
10 actions. It being factually impossible for that to have
11 occurred based on the record the Court has before it.

12 There was a substantial amount of evidence
13 admitted on the question. In my way of thinking the
14 evidence of what the Defendant did in trying to move the
15 vessel off could be considered and the State could argue
16 that that is evidence of his impairment based on the record
17 before the Court. So what he did and the knowledge that
18 other people say that he should have had or captains should
19 have that not knowing what the circumstances were could
20 result in additional damage or loss, is evidence of
21 impairment. We'll leave it up to the jury to determine what
22 weight to give that evidence. So the evidence came in for
23 that purpose.

24 It's come in so much and so often, however, this
25 Court I believe needs to give an instruction to limit the

1 jury's consideration into that charge. So it is the Court's
2 intention to give an instruction that will provide the jury
3 information that they are to consider the actions by Captain
4 Hazelwood in running the engines and making any maneuvers if
5 they find any were made, as evidence of count -- and I
6 forget the count of the information --

7 MR. COLE: One.

8 THE COURT: Count one of the information and not
9 as evidence of count one of the indictment, counts two and
10 three of the -- of the information.

11 I don't know exactly how I'm going to word that,
12 but I'll get it together and we'll discuss the wording of
13 it. But the jury will be so instructed and limited -- their
14 consideration of that evidence will be limited to the DWI
15 only.

16 The next issue I think we need to discuss is the
17 issue of operating a water craft. There has been a second
18 supplemental memorandum regarding the definition of
19 operating a water craft. I am aware of the statutory
20 definition. I am aware of the case law that's been cited.
21 I have already come to the conclusion earlier that a captain
22 on the bridge issuing helm orders, navigating or anybody who
23 is using the vessel in that fashion is operating a water
24 craft, as the term is used.

25 However, I thought it was the State's intention to

1 show that after the engines were turned off finally at
2 approximately 1:41, that the captain could still be found
3 guilty for operating a water craft, for using a vessel that
4 is used for transportation or can be used for transportation
5 -- is that the State's intention, to go on that theory?

6 MR. COLE: If we could just have a minute, your
7 Honor.

8 (Pause.)

9 MR. ADAMS: Your Honor, the State is only going to
10 argue that the operation continued until 1:41 a.m.

11 THE COURT: Until the engines were finally turned
12 off?

13 MR. ADAMS: That's correct.

14 THE COURT: I take it the Defendant's position is
15 that you cannot be found guilty of operating a water craft
16 after it went aground?

17 MR. MADSON: That's absolutely correct, your
18 Honor. And the Rickendahler case, I think, supports that.
19 That's Rickendahler versus Diamond Drilling Company, 19
20 Federal 2nd 124. It's cited in the case the State attached
21 in their motion -- it was cited in there. But I think it is
22 important to note that in the State's definition, and now
23 they're trying to define water craft, the cases that they
24 have cited all have to do with such things as workman's
25 compensation and things -- matters like this, where there is

1 a very, very liberal construction given to what is a
2 watercraft in order for injured seamen to be covered. And I
3 think that is pointed out in all the cases.

4 But the Rickendahler case, in deciding that very
5 issue, said that a vessel which is not on navigable waters,
6 that is, not on the water, and is incapable of being used at
7 that time -- had holes in the hull -- in fact, it was not
8 completed yet, it was still being built -- was not in fact a
9 vessel under the terms that can be used by means of as
10 capable of being used as a means of transportation.

11 So our argument is that when the Exxon Valdez is
12 on a reef and impossible to move it by its own power -- in
13 other words, it took a lot of time and a lot of effort to
14 get it off of there -- it certainly isn't capable of being
15 used as a means of transportation at that point. Whether
16 the engine is able to run or not, it simply can't transport
17 anything from point A to point B. It couldn't go one inch.

18 And so I think under the definition you have both
19 things. It wasn't on water at the time. It was in fact on
20 land. It was impaled. And secondly, because of the holes
21 in the hull, just like in Rickendahler, it was incapable of
22 being used as a means of transportation.

23 So whether the engines or running -- the engine
24 ran or not is not the question, because the engine could be
25 used for a number of things. And as the Court has heard,

1 there was testimony that it was used to maneuver the vessel
2 ever so slightly -- it could just turn a little bit, but it
3 certainly couldn't be used under the terms as defined in the
4 statute.

5 Now the difference and where we're having
6 difficulty here is because I think there is no definition by
7 the legislature on operation of a motor vehicle. And we had
8 a lot of cases that show under State law that a motor
9 vehicle, a car or bus or a truck, you don't need those
10 qualities of movement. In other words, you can be stuck in
11 the snow and the mud or have a lot of problems with the car,
12 but it still has to be at least, number one, operable, and
13 it has to be -- you have to operate something on it.

14 Now in that context I suppose it could be said
15 that the Exxon Valdez was operable because the engine
16 worked. But that's all.

17 THE COURT: The rudder worked also.

18 MR. MADSON: Pardon me?

19 THE COURT: The rudder worked.

20 MR. MADSON: The rudder and the engine worked. So
21 in that sense you could say it's operable. But then the
22 other part is, and here's the basic distinction, is that
23 under motor vehicle definition there isn't any, so the Court
24 had to interpret one and say it doesn't matter. But here,
25 for whatever reason, the legislature did this -- I certainly

1 can't say one reason or the other -- but they did say --
2 they apparently took the standard definition of a water
3 craft and put that in a statute, to operate a water craft.
4 And it's a broad definition, but it still requires some
5 movement, some way of transporting something. Now, it could
6 be a barge with no engine at all. That could be a water
7 craft probably under that definition. A means of
8 transportation.

9 I don't know. We don't have to reason -- reach
10 that issue. But that's one of the things that comes up
11 quite often. In fact, the case that the State cited in
12 support of the theory was just that. It was a vessel that
13 didn't have an engine. But it was capable of being moved
14 from one place to another.

15 Now under maritime law, for purposes of recovery
16 under workman's compensation acts, it was a vessel. Under
17 our law, it didn't have an engine, I don't know, it
18 apparently would not be a water craft because -- or maybe it
19 is. Maybe sailboats come under that. I don't know.
20 Engine, I don't think, is the criteria. I think the basic
21 criteria is what it says there is capable of being used as a
22 means of transportation. And I don't think there is any
23 argument that after the Exxon Valdez crunched into that rock
24 and stayed there, there was no way it could transport
25 anything.

1 MR. ADAMS: Nothing further, your Honor.

2 THE COURT: I am going to look at this a little
3 more before I make a final decision. But I am looking at it
4 from the point of view of the defendant's theory of the case
5 and the States theory of the case. The defendant's theory
6 of the case is that Captain Hazelwood was maneuvering this
7 vessel to keep it on the rocks. He was using the rudder and
8 the engine control to keep it on the rocks. He was
9 intentionally -- your theory is he was intentionally
10 swinging the bow around to keep it on the rocks, doing what
11 was necessary. And I think under that theory it might be
12 considered that he was using that water craft for either
13 transporting people to keep them on the rocks, or to
14 navigate to keep it on the rocks. Now, I am not sure about
15 that but that is my inclination so far.

16 MR. MADSON: Well, I just point out once again,
17 your Honor, I think the Court is zeroing in on only part of
18 that definition. I just encourage the Court to kind of look
19 again at capable of being used as a means of transportation
20 and look at the transporting aspect of it.

21 THE COURT: Well, as I said, it's not final. Just
22 giving you a little idea which way I am heading so far. And
23 if I do go that direction, I might -- I might be giving an
24 instruction that states something to the effect that the
25 Exxon Valdez, after the engines were turned off at

1 approximately 1:41 and the Exxon Valdez was hard aground,
2 the Exxon Valdez was no longer capable of being used for
3 navigation or transportation, something along those lines.
4 So the jury can't consider anything past that.

5 (Pause.)

6 THE COURT: I'd like to go to the instruction
7 number 9 of the State's proposed instructions. I have --
8 that's the indictment in this case charges. The State's
9 proposed number 9. I have changed that to eliminate all of
10 after -- this is on the indictment -- all of it after
11 dangerous means, starting with the words, to wit, down to
12 the word oil. I propose to eliminate that language.

13 Mr. Cole, do you wish to be heard on that, or Mr.
14 Adams?

15 MR. MADSON: I would agree with that, your Honor.
16 It should just state the terms of the statute and _____.

17 (Pause.)

18 THE COURT: The State's instruction number 17, the
19 middle paragraph, I propose to eliminate. Does the State
20 wish to be heard on that?

21 MR. COLE: No.

22 MR. MADSON: I agree, your Honor. It was on my
23 list of things to bring up in instructions. I think that
24 instruction has been held to be impermissible.

25 THE COURT: Not yet, but it's close.

1 MR. MADSON: It's certainly been criticized ,
2 let's put it that way.

3 THE COURT: The word, presumption, was held
4 impermissible, I know.

5 Okay.

6 (Pause.)

7 THE COURT: State's instruction number 23, the
8 definition of widely dangerous means, has a sentence that is
9 added to it. An oil spill may be considered a widely
10 dangerous means. The Court's ruled already that that's
11 within the definition that the jury may consider an oil
12 spill. Is there objection to that language?

13 MR. MADSON: Oh, certainly, your Honor. I think
14 that's an issue that the jury is entitled to find. Widely
15 dangerous means is one of the elements of the offense, and
16 by giving this instruction, the Court is virtually giving a
17 directed verdict on that element. I think it is something
18 the jury can agree or disagree with.

19 MR. ADAMS: Well, your Honor, if the sentence said
20 an oil spill must be considered widely dangerous means, that
21 would be a directed verdict. A directed verdict on this
22 particular issue. It doesn't state must, it says, may. And
23 the Court's already ruled as a matter of law and there are a
24 lot of times that sentences such as this are included where
25 there's permissive language in there.

1 THE COURT: I've ruled as -- I denied the
2 application to dismiss. I didn't rule as a matter of law
3 that the oil spill was widely dangerous means. I said it
4 could be within the definition as given by widely dangerous
5 means.

6 Does that language track the statute exactly?

7 MR. ADAMS: Of widely dangerous means?

8 THE COURT: Except for the last sentence?

9 MR. ADAMS: Yes, I believe so, your Honor. Except
10 for the last sentence.

11 THE COURT: Well, let's see.

12 (Pause.)

13 THE COURT: What's the statutory definition
14 number, Mr. Adams?

15 MR. ADAMS: Your Honor, I believe the definition
16 of widely dangerous means comes at the very end of 11.46.04.

17 THE COURT: Okay. I see it now.

18 (Pause.)

19 THE COURT: Mr. Madson, do you intend on arguing
20 that the oiled beaches and the oil that was spilled was not
21 widely dangerous means?

22 MR. MADSON: I was going to argue that's something
23 the jury certainly can consider in determining whether or
24 not that element has been proven beyond a reasonable doubt
25 by the State, your Honor.

1 The problem with that last sentence is whether or
2 not it tells the jury directly. It certainly gives a strong
3 inference that that's what the Court was saying. And I
4 think it simply is -- is inappropriate to do that in a
5 situation where there's different elements, and this is one
6 of them. I mean, they have to prove it was by widely
7 dangerous means. And by telling the jury, well, the Court
8 says you can consider this, that's true, but I think it just
9 gives too much emphasis to this one particular element. I
10 think they are all subject to jury interpretation and --
11 who's to say. It's up to the jury to decide that as well as
12 any of the other elements, recklessness or anything else.

13 THE COURT: Well, something has to be done to
14 prevent you from arguing that since the word, oil spill, is
15 not contained in that statutory definition, that therefore
16 the State hasn't proved its case. That's what I want to
17 avoid having happen.

18 MR. MADSON: I was -- I wasn't going to argue oil
19 spill in those terms, your Honor. I was just going to refer
20 that the statute and say what is required for the State to
21 prove in that element as well, within, you know, those
22 definitions, what evidence have they heard whether or not it
23 comes within this or not, beyond a reasonable doubt.

24 THE COURT: Okay. At this time provisionally I'm
25 going to give the instruction as suggested by the State,

1 unless you can come up with some other instruction that will
2 cover my concerns, Mr. Madson.

3 Okay, instruction number 24, State's instruction.
4 Given the State's bill of particulars that the property of
5 another does not include the Exxon Valdez itself, and given
6 that there has been evidence of damage to the vessel, and
7 given that there has been evidence that some 10 millions,
8 approximately, gallons of oil was lost, which I assume the
9 jury would infer had some value in excess of \$100,000, I
10 think we need to define this with some degree of
11 specificity.

12 Would counsel object to using the bill of
13 particulars as set forth by Mr. Cole, and add to it, nor the
14 cargo or the contents. Would the Defendant have any
15 objection to that?

16 MR. MADSON: Maybe the Court can read that bill of
17 particulars again, your Honor, I'm not sure I remember it
18 exactly.

19 THE COURT: I would propose the instruction to
20 read as follows. Property of another means property in
21 which a person has an interest which the Defendant is not
22 privileged to infringe whether or not the Defendant also has
23 an interest in the property and whether or not the person
24 from whom the property is obtained or withheld also obtained
25 the property unlawfully, period. The phrase, property of

1 another as used for the purposes of the indictment includes
2 the fisheries, wildlife, vegetation, shoreline, and other
3 aspects of Prince William Sound. It does not include the
4 Exxon Valdez or its cargo or contents itself, period.

5 MR. MADSON: I think that's appropriate. I would
6 not have any objection to that.

7 MR. COLE: We don't have any objection to that.

8 (Pause.)

9 THE COURT: Okay.

10 State's instruction number 30. That doesn't seem
11 to track the statute, counsel. But perhaps there was reason
12 for you deviating from that. Is there a pattern instruction
13 that this is derived from or --

14 MR. ADAMS: Yes, your Honor. This instruction
15 came by way of jury instructions that come from DWI trials
16 in the District Court that are used in the misdemeanor
17 section of our office. What I did is I found this
18 instruction in the DWI packet that we have and changed it to
19 not refer to .05 by breath alcohol but by blood alcohol.
20 That's the only changes I've made to it. If it's not what's
21 tracking the statute, then something is wrong in the
22 District Court, because that's the one they have been using
23 as far as I know.

24 THE COURT: Did you look at the statute?

25 MR. ADAMS: Yes, I did.

1 THE COURT: The statute doesn't talk in terms of
2 inferences. It talks in terms of presumptions, number one.
3 28.55.033 talks about presumptions and chemical analysis of
4 breath and it doesn't deal with chemical analysis of blood.
5 Now, would that make any difference in your proposal, that
6 we're talking about presumptions? Subsection 1 says if
7 there was 0.05 percent or less by weight of alcohol in the
8 person's blood, it shall be presumed that the person was not
9 under the influence of intoxicating liquor. And then it
10 goes, if there was in excess of 0.05 percent but less than
11 0.10 percent by weight of alcohol of the person's blood,
12 that fact does not give rise to any presumption the person
13 was or was not under the influence of intoxicating liquor,
14 but that fact may be considered with other competent in
15 determining whether the person was under the influence of
16 intoxicating liquor. Now, you use the word inference rather
17 than presumption. I am wondering if it --

18 MR. ADAMS: Your Honor, the reason I used the word
19 inference is that is what I got out of the District Court,
20 and what I'll do is I propose to take a closer look at this
21 instruction and compare it to the statute and see if the
22 District Court has one that they used for blood alcohol as
23 opposed to breath alcohol. And I can --

24 THE COURT: Okay.

25 You might look at what the Alaska pattern jury

1 instructions are if there are any on this.

2 MR. ADAMS: There aren't any on DWI.

3 THE COURT: They're just on Title 11, are they?

4 MR. ADAMS: What I did is I went and received a
5 DWI packet from the District Court. It did not have this
6 instruction in it. I looked at the files in our office
7 where this instruction has been given. I found this
8 instruction and changed it to blood alcohol. I'll go check
9 with the District Court and see if they have one for blood
10 alcohol. But this is the one they -- they use the word
11 influence -- infer for breath alcohol in the instruction I
12 received. So I'll change it if I can find another one.

13 THE COURT: Okay.

14 That's not the only thing I am finding difficult
15 with this, but I just wanted to find out if there was a
16 pattern instruction.

17 Does it make any difference that the statute deals
18 in terms of the amount of alcohol in a person's blood at the
19 time alleged? Does that make any difference? Because this
20 was a test taken approximately 10 hours after the time
21 alleged, or about maybe not ten, but maybe nine hours, eight
22 and a half, nine hours after the time alleged that he was
23 operating a water craft while under the influence.

24 MR. ADAMS: Well, your Honor, we would -- it would
25 be our position that using retrograde extrapolation back to

1 midnight, between midnight -- or whenever the pilot left the
2 vessel, 11:30 or so, until 1:41, that is the time alleged,
3 and using retrograde extrapolation, if the jury finds that
4 retrograde extrapolation proves that Captain Hazelwood's
5 blood was in excess of .1, it may be inferred or however the
6 language of the statute, that he was intoxicated. That is a
7 permissive presumption.

8 THE COURT: Are there any cases to support your
9 theory that we can use retrograde extrapolation to apply
10 this statute?

11 MR. ADAMS: No, I am aware of none.

12 THE COURT: Do you know of any cases to the
13 contrary that would suggest that we cannot apply retrograde
14 extrapolation or evidence of a blood test taken hours
15 afterwards to apply this statute?

16 MR. ADAMS. I am aware of none.

17 MR. MADSON: Your Honor, I am aware of one. What
18 the State has done here is they say under Alaska law. Well,
19 they eliminated one very important phrase here, and that is
20 the chemical analysis of the person's blood or breath. I
21 don't think that's really the criteria they should consider.
22 But right after that it says by a test taken within four
23 hours. They just eliminated that from the law all together,
24 like it is meaningless. Williams versus State --
25 unfortunately I don't have the cite --

1 THE COURT: What statute are you referring to?

2 MR. MADSON: That's the one that talks about -- I
3 don't have the number here -- I'm just looking at
4 instruction 30. But that's the theory of DWI by a breath
5 test or blood test, the .10 theory. That's what they're
6 talking about here. In other words, a person can be found
7 guilty of DWI by being under the influence, number one,
8 regardless of his blood alcohol content or breath content.
9 Or number two, the .10 theory. And that is what this refers
10 to. And that statute -- I don't have it -- it's 11 --

11 THE COURT: Okay. It's 28.35.030 is the one about
12 four hours.

13 MR. MADSON: Yeah.

14 THE COURT: And the one you're tracking your
15 instruction from is 28.35.033.

16 MR. ADAMS: That's correct, your Honor. And I
17 don't think that .033 requires that it be within four hours.
18 My reading of it didn't require within four hours.

19 MR. MADSON: Well, I think Williams in the
20 footnote there talks about this and says that certainly a
21 test taken outside of the four hour limit can be used to
22 infer intoxication but not under that theory. There's no
23 other purpose of having that test requirement there for
24 blood alcohol. And certainly there's no law that says that
25 retrograde extrapolation can be used to go back under the

1 .10 theory to show that. There has to be a time -- a
2 limiting time here and that is what the legislature did.
3 They put the four hours in to get around this and say, if
4 it's within a four hours, the test is presumed to be valid
5 and can be used to establish that at the time alleged his
6 blood alcohol was at a certain level. But that is the only
7 purpose of this. And it can be used to allege it in the
8 sense that he was operating while impaired or while
9 intoxicated, but not to show what his blood alcohol content
10 really was, because let's look at it. If the blood
11 examination actually established to be .10 percent or
12 greater at the time...

13 (Start Tape C-3882)

14 ...well, we've certainly heard plenty of testimony that it's
15 -- even their own experts said you can't accurately do this.
16 It's at best an extrapolation based on a lot of assumptions.
17 I would ask the Court to maybe withhold any -- I'm sorry I
18 didn't bring Williams with me, but I --

19 THE COURT: I'm going to. I'm going to hold off
20 on it. It sounds like you're not geared. You haven't got
21 the statutes and you're not geared to argue that.

22 (Pause.)

23 THE COURT: There was no instruction in the
24 State's package that I could find that indicated that the
25 jury was under the obligation to consider each of the

1 charges separately, and I included them in the rules. I
2 included one of those and it will be in your package.

3 Since counsel is -- let me ask you this, Mr.
4 Madson, are you prepared at this time to argue these
5 instructions? There were several instructions that the
6 State proposed with some citations. Would you like some
7 time to get geared up for that?

8 MR. MADSON: Well, your Honor, I was probably
9 prepared to argue some, but since the Court said they wanted
10 something in writing, we were kind of gearing up to do that.

11 THE COURT: Okay.

12 The ones I am referring to were the ones that were
13 attached to the Defendant's trial memorandum re jury
14 instructions. Would you need some time to prepare for
15 those?

16 MR. MADSON: The ones attached to what?

17 THE COURT: The trial memorandum re jury
18 instructions. There was several instructions. I don't mind
19 holding off on this and coming back on Monday. By then I'll
20 have this package in your hands.

21 MR. MADSON: I think just as a starting point, I
22 could certainly say one thing, your Honor, and that's with
23 regard to the pilotage instructions that they have attached.
24 I have read their case that they cited -- I think it is
25 Michael versus State, and I don't know whether the Court has

1 seen that one yet or not. There seems to be a South Dakota
2 case based on an earlier case which allowed the jury to
3 hears rules of the road, so to speak. Statutes that involve
4 how a motor vehicle should be operated. And then the jury
5 was told, well, you can consider these, and consider them in
6 the context of whether or not the Defendant was acting
7 recklessly if he violated these statutes. That seems to be,
8 from what I can find -- and I was researching this yesterday
9 -- was that these cases seem to stand alone. That South
10 Dakota seems to be pretty far removed from the trend here.

11 I know of no case in Alaska that I was ever
12 involved with that in a manslaughter case where you are
13 talking about a result, a death, where the jury is allowed
14 to consider speeding violations or things -- separate
15 statutory or regulatory violations of the operation of a
16 motor vehicle to consider whether he is acting recklessly,
17 the term recklessly has been defined by a statute in that
18 context.

19 However, more importantly, the problem I have with
20 those instructions is that the State is trying to use the
21 regulations from a totally different jurisdiction, that is
22 the Federal government and Federal Coast Guard regulations or
23 statutes, and impose them here to enforce a State law. I --
24 it's a little bit off the track but I mean I do have a case
25 that says the State simply can't do this. You can't force

1 or try to enforce other jurisdiction's statutes by way of
2 your own.

3 Now, the State of course is arguing -- would argue
4 that they are not trying to do that. They are just trying
5 to say a violation of this Federal statute or Coast Guard
6 reg, you can consider that as far as recklessness is
7 concerned. Well, I just object to that entire theory all
8 together. I just have never, ever seen that done. It just
9 seems to me that it is so bizarre to me that I just think it
10 is -- it's beyond argument.

11 But even if that were the case, there's been so
12 much controversy about this pilotage thing that I think it
13 certainly could be argued to the jury at this point as to
14 what it means and whether or not it is reckless or not. But
15 to take it in terms of an actual citing the statute or
16 regulation and saying well, you have to find -- I guess
17 you'd have to find that he is beyond a reasonable doubt he
18 violated that and then consider that as whether or not he
19 beyond a reasonable doubt was guilty of recklessness. And
20 the two just don't go hand in hand. I mean, these
21 regulations were -- I mean, the penalty involved, for
22 instance, in this pilotage thing, is a \$500 civil fine.
23 That is the importance the government places on it, the
24 Federal government. The State wants to argue that if you
25 violate that, you're guilty of a sentence up to five years.

1 And it just makes no sense.

2 THE COURT: Mr. Madson, State's instruction 39
3 through 45, do I infer from your comments that you object to
4 those instructions?

5 MR. MADSON: Yes.

6 THE COURT: Okay.

7 Is there anything else you wish to add to your
8 trial memorandum in support of the request for those jury
9 instructions?

10 MR. ADAMS: 39 through 45, your Honor?

11 THE COURT: That's correct.

12 MR. ADAMS: No, your Honor.

13 I would like to respond to Mr. Madson's argument
14 about the _____, but that's separate.

15 THE COURT: Okay. I will not be giving
16 instructions 39 through 45. I find them to be a comment on
17 the evidence. It would be akin to almost directing a
18 verdict in some cases. They are argument, and I don't find
19 Michael versus State to be authority for those instructions,
20 nor Westinghouse or any of the Captain of the Port Orders,
21 or any treatises on point -- the authority to give these
22 instructions.

23 (Pause.)

24 THE COURT: Let's start with State's instruction
25 number 1, Mr. Madson.

1 MR. MADSON: One second, your Honor. I am going
2 back to what the Court said. What about instruction 38,
3 number 38?

4 THE COURT: We haven't got to that. I just asked
5 you about 39 through 45. That's all I was concerned with at
6 the time. We didn't discuss that one, so there's been no
7 ruling on that.

8 Let's go back to number 1. Any objection to
9 number 1?

10 MR. MADSON: No.

11 THE COURT: Number 2?

12 MR. MADSON: No.

13 THE COURT: Number 3?

14 MR. MADSON: No. There's a typo there obviously,
15 emphasis was is all one word. Second line.

16 THE COURT: I'm sure that we can get that squared
17 around.

18 Number 4?

19 MR. MADSON: This appears to be the regular
20 commonly used pattern instruction, your Honor. I have no
21 objection to that.

22 THE COURT: Okay. I think that's the one that I
23 gave at the beginning of the case and it is the pattern.

24 Now, the order in which the State presented these
25 instructions will not be the order in which the Court gives

1 them by any means. But the word unlawfully as proposed in
2 instruction number 5 will be given by the Court in another
3 place. Is there any objection to that one?

4 MR. MADSON: No.

5 THE COURT: Number 6?

6 MR. MADSON: No objection.

7 THE COURT: Number 7?

8 MR. MADSON: Probably it should include the
9 information, your Honor, just to --

10 THE COURT: The indictment and the information are
11 the charging documents?

12 MR. MADSON: Right.

13 THE COURT: Is that agreeable to the State?

14 MR. COLE: Yes.

15 THE COURT: Number 9, we've gone through that.
16 Number 10?

17 MR. MADSON: No objection to that.

18 THE COURT: Number 11?

19 MR. MADSON: No objection.

20 THE COURT: Number 12?

21 MR. MADSON: No objection.

22 THE COURT: Number 13?

23 MR. MADSON: Yeah, I object to that one.

24 THE COURT: Your grounds?

25 MR. MADSON: That there were no -- there was no

1 evidence of an admission or a confession, your Honor. And I
2 think it simply goes to a statement by Captain Hazelwood
3 which the state would argue was an admission, but I think
4 under the statutory definition or the definition here, it
5 doesn't even come within this to say that -- to warrant an
6 inference of guilt, or tend to prove guilt, because it
7 wasn't given in the context of the total situation.

8 In other words, the only evidence of an admission
9 would be the statement by Captain Hazelwood to Mr. Meyers,
10 an Exxon official, and it just was totally out of context of
11 the whole picture. So I would object to it.

12 THE COURT: Argument is not necessary. All of
13 Captain Hazelwood's statements, the recordings, the
14 statement by Fox, came in as an admission. Otherwise they
15 wouldn't have come in because of hearsay.

16 Number 13 will be given. Your objection is noted,
17 however.

18 Number 14?

19 MR. MADSON: No objection.

20 THE COURT: Number 15?

21 MR. MADSON: No objection. I think that is
22 required, sir.

23 THE COURT: Number 16?

24 MR. MADSON: This seems -- I think this is a
25 pattern jury instruction. I am not sure, but I think.

1 THE COURT: It's real close to it. They vary a
2 little bit. The last paragraph varies in some cases. But
3 this is one of the ones I give.

4 MR. MADSON: I guess that last sentence is the
5 only thing that I was -- it didn't ring a bell as I had seen
6 before, but the rest of it is certainly consistent with
7 other jury instructions.

8 THE COURT: Okay.

9 17 we've amended.

10 MR. MADSON: Uh-huh.

11 THE COURT: Number 18?

12 MR. MADSON: That's no objection.

13 THE COURT: Number 19?

14 MR. MADSON: Well, it's a definition negligently,
15 but I would object its being used in this case, because I
16 think we need the definition of criminal negligence, which
17 this one is not. The State has eliminated substantial as
18 far as the risk is concerned and it should be a gross
19 deviation, not just a deviation.

20 THE COURT: The State filed a trial memorandum on
21 this point. That's what you're referring to?

22 MR. MADSON: Yes.

23 THE COURT: Okay.

24 Mr. Adams, are you handling this argument?

25 MR. ADAMS: Yes.

1 THE COURT: Okay.

2 I read your trial memorandum. You would concede
3 that negligent driving would be an ordinary civil standard
4 of negligence, would you not?

5 MR. ADAMS: Your Honor, I haven't thought that
6 issue through. I can refer to the statute and read it real
7 closely to see what the legislature stated and what the case
8 law is.

9 THE COURT: I am just referring to the Comc
10 citation from the State here, page 115, 758 Pacific 2nd 108
11 at 115 and 116. In context, the reason for inclusion of an
12 actual endangerment requirement in the negligent driving
13 provision is obvious, because the statutory definition of
14 negligence incorporates the same standard of ordinary care
15 used in cases of civil negligence. The added requirement of
16 actual endangerment is necessary to protect against the
17 possibility -- and it goes on. I just assumed that they
18 were referring to the same civil standard of negligence.

19 MR. ADAMS: I am not familiar with that case, your
20 Honor.

21 THE COURT: Why then should we deviate from the
22 statutory definition of criminal negligence for a negligent
23 discharge of oil?

24 MR. ADAMS: Well, your Honor, in Reynolds the case
25 -- the Reynolds Court says, we conclude in the absence of

1 legislative direction something greater than proof of simple
2 negligence should be required for conviction for driving
3 while license is suspended.

4 Here we have the legislature saying negligence.
5 They don't say with criminal negligence. The legislature --
6 not all the time, but in some cases when they require
7 criminal negligence, they say criminal negligence. Here
8 they are not saying criminal negligence, they are saying
9 negligence. There is absolutely no reason to infer that
10 when the legislature says negligence, they mean criminal
11 negligence in these circumstances.

12 THE COURT: Well, does Gregory mean then? It
13 said, we conclude that in the absence of legislative
14 directions something greater than proof of simple negligence
15 should be required for conviction for driving while driver's
16 license is suspended.

17 MR. ADAMS: Well, in that -- in the DWI statute,
18 there is no specification of the required mens rea. And so
19 they had to infer what the legislature wanted because of the
20 severe penalties, the ten day mandatory minimum, and the one
21 year loss of license under the -- the driving while license
22 suspended statute, the Court said simple negligence is not
23 enough. We're going to have to infer criminal negligence.
24 And they gave the clear impression that if the Court had --
25 or if the legislature had said that the mens rea for DWLS

1 was negligence as opposed to criminal negligence that the
2 Court would have had absolutely no discretion to do anything
3 other than uphold that statute. I am aware of no authority
4 which says that a person cannot be held criminally liable
5 under a negligence standard. And in fact LeFave in
6 Substantive Criminal Law specifically says that people can
7 be held criminally liable for a negligent standard. It's
8 rare -- I mean granted it's rare, usually under the common
9 law they call culpable negligence, which was
10 essentially _____ standard. But they do recognize that
11 in some circumstances a person can be held criminally
12 liable --

13 THE COURT: In Reynolds, was there anything in the
14 definition of the commercial fishing violation that he was
15 charged with that had the term negligent in it?

16 MR. ADAMS: No, it was silent.

17 THE COURT: Okay. And so in that case they said
18 we determine that at least simple negligence has to be
19 proved?

20 MR. ADAMS: Right; exactly.

21 THE COURT: And was the issue in that case whether
22 it should be criminally negligent or just negligent?

23 MR. ADAMS: The issue whether they should -- I
24 think -- that case came before the provision of the criminal
25 code where we had a criminal standard. So the issue there

1 was whether it was negligence or recklessness.

2 THE COURT: That case came in 1982 after we had a
3 criminal negligence.

4 MR. COLE: The case on point is State versus
5 Septi. That's the one I wrote the brief for. It
6 specifically addresses that issue that was addressed in
7 dicta.

8 THE COURT: I am referring to Mr. Adams trial
9 memorandum where he is arguing this very issue, whether we
10 should use simple negligence or criminal negligence.

11 MR. ADAMS: Well, your Honor, in light of the
12 language that says that legislative direction -- and we have
13 legislative direction here that says negligence. And it
14 doesn't seem reasonable to infer that when the legislature
15 says negligence they actually mean criminal negligence.

16 This Court -- the rules of statutory construction
17 require the Court to give -- or to accept the meaning of the
18 statute unless it is ambiguous. There is nothing ambiguous
19 about the word negligence.

20 THE COURT: How about in Gregory. What does the
21 DWLS statute say in terms of negligence?

22 MR. ADAMS: It's silent. See, that's why the
23 Court had to infer. The various District Courts around the
24 State were either using a criminal negligence standard or
25 recklessness standard under the DWLS, and in the Gregory

1 case they used the criminal negligence standard and
2 defendant appealed, saying no, it's silent and the mens rea
3 should be recklessness, and the Court of Appeals said no,
4 criminal negligence is enough to convict this person. But
5 they specifically said negligence is not enough because of
6 severe penalties. And they went on to say without
7 legislative direction, negligence is not enough, so we infer
8 criminal negligence.

9 Here we have legislative direction. So it must be
10 negligence standard. And there is --

11 THE COURT: Since the standard talks in terms of
12 just the word negligence and not criminal negligence, you
13 are saying that is legislative direction.

14 MR. ADAMS: That's correct, yes. And there are
15 statutes which state that a person can be convicted with
16 criminal negligence. I believe that -- well, I can't cite a
17 statute off the top of my head which contains the word,
18 criminal negligence, but there are plenty of them in Title
19 11 which state that the mens rea is criminal negligence.
20 And the legislature could have said criminal negligence.
21 Could have called it criminal negligent discharge of oil,
22 but they called it negligent discharge of oil.

23 MR. MADSON: Your Honor, on that point it is
24 unclear whether the legislature actually meant civil or
25 criminal negligence. But I don't think we can just take

1 that one word out the context of the entire statute we're
2 dealing with here. If the Court looks at the criminal
3 penalties involved, they also use the term knowingly. That
4 is the term that is certainly also addressed by our criminal
5 code in this definition. They say if it is knowingly done,
6 discharged, knowingly discharged, it is a class a
7 misdemeanor. If it is done negligently, it is a class b.

8 It would seem to me the legislature was looking at
9 the different mens rea requirements. And it wouldn't make
10 any sense to go from knowingly all the way down to civil
11 negligence and still have a penalty that is up to six months
12 in jail. I mean, there's quite a gap there between a
13 knowingly requirement, which is a pretty severe standard to
14 prove, that somebody knowingly discharged a quantity of oil,
15 and all the way down to a civil standard of just being
16 negligent. And yet the penalty involved is still a very
17 great one. It is still up to six months as opposed to one
18 year.

19 So looking at it in context of what the
20 legislature was attempting to do, it seems to me that they
21 were inferring if not using the word, they were trying to
22 make it clear that criminal negligence must be the standard.

23 And this is -- I just learned yesterday that the --
24 -- and I was aware of the statute that is being introduced
25 down there, it's in Committee right now in Juneau, to up the

1 penalties for negligent discharge of oil, or negligent
2 operation of a tanker. It's been modified now to try to
3 create a law which didn't exist before. We've argued
4 already. The legislature is now arguing with this trying to
5 come up with a law that covers this for the future,
6 negligent operation of a tanker.

7 It was the government's position there, the
8 State's position that the negligent requirement -- it just
9 said negligent as far as the statute is concerned, required
10 criminal negligence. Now, I know that's in a different
11 context, but it's still in the same subject matter and the
12 State seems to be once again taking a position elsewhere
13 contrary to what they are saying here.

14 THE COURT: Okay.

15 I don't have a lot of authority to go by on this
16 but it seems that the Title 11 deals in terms of criminally
17 negligent offenses. They use the term criminal negligence,
18 and then there's a definition of criminal negligence. This
19 is found in another title all together. And it deals in
20 terms of negligence. The legislature had intended it to be
21 criminal negligence, I think they would have used it. They
22 exhibited the ability to use it in Title 11, so why didn't
23 they in the statute at question here. I think that is --
24 the term negligent as used should be given its civil
25 meaning. And the Courts have given civil meanings to the

1 term negligent in a criminal context as set forth in
2 Reynolds, and have discussed the difference between them in
3 Gregory.

4 In Gregory the law was silent on the terms, and
5 the Court held that because of the severe minimum penalties
6 for violation of the DWLS statute, the State had to prove
7 more than simple negligence. In this case, there's
8 direction and there are no severe minimum penalties that
9 exist in the statute that I can see.

10 So we're going to give instruction number 19 as
11 has been submitted.

12 (Pause.)

13 THE COURT: Number 20, Mr. Madson, is there
14 objection to it?

15 MR. MADSON: Yes, there is, your Honor.

16 The State is totally wrong on this one. What they
17 have done is combine recklessness and negligence and say it
18 applies equally. The term reckless should not be in there
19 at all. This is a negligence standard. In other words,
20 determine recklessness on the part of somebody, the State
21 has to prove that he actually knew of and consciously
22 disregarded a risk. And that requires then that he -- that
23 knowing his intelligence, his knowledge of the situation,
24 his background, all -- his education, all these things that
25 he knew of and disregarded, that's -- fortunately I was

1 proposing a construction that I was going to have in
2 hopefully today and certainly Monday to cover the same thing
3 as far as recklessness is concerned.

4 Because there is a State decision on that, and
5 unfortunately I don't have it with me and I can't for the
6 life of me remember the name of it. But it's one I have
7 cited earlier in fact on this topic.

8 Secondly, if you're going to use this to
9 determine negligence it should judge his actions according
10 to standards and care that a reasonably prudent person would
11 employ, not necessarily a tanker captain. That could be
12 argued under the same or similar circumstances. But I don't
13 think the term, tanker captain, is necessary. That's up to
14 argument whether or not it was negligence or not in the same
15 or similar circumstances. But certainly recklessness
16 doesn't belong in there.

17 MR. ADAMS: Your Honor, in drafting this
18 instruction I didn't mean to intend or we didn't intend that
19 this be used as a standard of conduct for what the
20 definition of recklessly negligent is. All this is designed
21 is to show what a reasonable person is. And in these
22 circumstances the reasonable person is the reasonably
23 prudent tanker captain. You can apply this instruction back
24 to the previous two in determining what a reasonable person
25 is.

1 That's -- this is -- an instruction like this has
2 been used for ages as far as what a reasonable person is,
3 and what a reasonable doctor is is what a reasonable doctor
4 is, and what a reasonable driver is is what a reasonable
5 driver is. And it wasn't designed to change the standard of
6 care. This is the definition of what a reasonable person
7 is.

8 THE COURT: Okay.

9 This might fit into a civil context, but I don't
10 believe it has any place in this case. Instruction number
11 20 as proposed by the State is, I believe, argumentative,
12 and an improper comment on the evidence. I am going to -- I
13 will not be giving instruction number 20.

14 Anything with number 21, Mr. Madson?

15 MR. MADSON: No, your Honor, no problem.

16 THE COURT: Number 22, Mr. Madson?

17 MR. MADSON: I am just checking to make sure they
18 are all covered, your Honor. It looks like it just tracks
19 the statutory language. No problem.

20 THE COURT: Number 25?

21 MR. MADSON: No problem. That's correct.

22 Your Honor, could we take a short break? I've got
23 to run across the hall for a second.

24 THE COURT: We'll come back in about ten or
25 fifteen minutes.

1 THE CLERK: Please rise. This Court stands in
2 recess.

3 (A recess was taken from 10:22 o'clock a.m. until
4 10:45 o'clock a.m.)

5 THE COURT: We'll go through a few more here and
6 then we'll call it a day and come back on Monday when I can
7 give you a copy of the Court's proposed instructions.

8 We're on State's number 26.

9 MR. MADSON: That's all right, your Honor. I have
10 no objection.

11 THE COURT: All right, now we're going to contrast
12 State's number 27 and Defendant's number 4.

13 First, where did you get number 27, Mr. Adams?

14 MR. ADAMS: That is out of the standard District
15 Court DWI packet.

16 THE COURT: Okay.

17 That's verbatim?

18 MR. ADAMS: That's verbatim, yes, sir.

19 THE COURT: Okay.

20 Where did you get number 4?

21 MR. MADSON: Same place, your Honor. This is the
22 one that is given in every case in Fairbanks since I've been
23 here for 20 years. It's standard operating procedure to
24 give this instruction. I think it just does a better job
25 than 27 does.

1 (Pause.)

2 THE COURT: But does the State have any objection
3 to number 4, Defendant's number 4?

4 MR. ADAMS: I think they both say essentially the
5 same thing.

6 THE COURT: Okay.

7 I'll give instruction number 4 in place of number
8 27.

9 (Pause.)

10 THE COURT: State's number 31?

11 MR. MADSON: No, objection, your Honor. Sorry; I
12 was daydreaming here a second.

13 THE COURT: State's 32?

14 MR. MADSON: The only question I had on that, that
15 modifies the definition, and I wasn't sure when that took
16 effect. I wanted to check that out. Because otherwise I
17 wouldn't have any objection if it was in effect at the time.

18 MR. ADAMS: Your Honor, the only thing that was
19 taken out of this definition from the statute is about the
20 wrongful abortion.

21 MR. MADSON: Let me say, it's okay for now, your
22 Honor, unless I find out for some reason that it simply
23 wasn't in effect at the time of the Valdez incident. I have
24 no reason to believe it wasn't. I just know it was modified
25 by A. Before the definition was just under B.

1 THE COURT: Okay.

2 Unless I hear differently from you, I'll leave the
3 burden on you to let me know, it'll be given.

4 MR. MADSON: That's fine.

5 THE COURT: It looks to me, Mr. Madson, it's the
6 same as it's been for several years.

7 Number 33?

8 MR. MADSON: Okay. That's no problem.

9 THE COURT: Number 34? Other than the term
10 criminally negligent, any objection to it?

11 MR. MADSON: No, your Honor. I wouldn't have any
12 objection anyway. I think my concern would be that
13 negligent would be defined elsewhere anyway.

14 THE COURT: All right. So 34 is okay?

15 MR. MADSON: Yeah, it's okay.

16 THE COURT: 35?

17 MR. MADSON: That's all right.

18 THE COURT: 37?

19 MR. MADSON: That's all right. That's a pattern
20 instruction.

21 THE COURT: All right.

22 Some of the boilerplate instructions in the back I
23 have changed a little bit. I have put in a different order.
24 There were a few that were not given that should be given by
25 the Court. When I give you the package I'll be asking you

1 what specific instructions you object to in the package and
2 if there are some of those in the back you have problems
3 with we can deal with them. But for the most part, they're
4 okay. They're just out of order and I have consolidated a
5 couple and some of them are duplicitous. So I have improved
6 on them somewhat.

7 Let's do number 38.

8 Mr. Adams, do you have any statutory or any case
9 law to support such an instruction?

10 MR. ADAMS: Your Honor, I had this South Dakota
11 case, and the way I found it was I used West Law, printed
12 some instructions about violation of a regulation as
13 evidence of recklessness and I came up with that case. And
14 _____ it. And if Mr. Madson described it accurately
15 it's a case where a person parked a motor vehicle on a road
16 and just left it there and violated a number of rules of the
17 road, at his trial for manslaughter the jury was instructed
18 regarding those violations of rules of the road. And they
19 were described.

20 My instruction here, what I propose to do, is
21 draft instructions different than that. Upon further
22 discussion between Miss Henry and I, we decided that we
23 would give an instruction of what the offenses, the
24 _____ was, because the one we're talking about, the
25 particular and the .04, and there's the pilotage regulation,

1 those are evidence of -- can be used as evidence.

2 THE COURT: The Court did not take judicial notice
3 of the 0-4 as you recall.

4 MR. ADAMS: Then if the Court is going to refuse
5 to take judicial notice of the 0-4, then I suppose you are
6 not going to allow us to instruct the jury on that statute.
7 However, the _____ would support our and Coast
8 Guard regulation 33 CFR 495. The jury has been informed of
9 that. And if they find that there was a violation, and
10 that's a simple statute on a civil regulation, the person
11 consumes alcohol within four hours of assuming duties on
12 board the vessel, he's in violation of it.

13 And every single tanker captain that came in here
14 testified that they were aware of that regulation.
15 Something that --

16 THE COURT: That's part of the evidence on
17 recklessness is what you're asserting?

18 MR. ADAMS: That's correct.

19 THE COURT: And that's in evidence all ready,
20 isn't it?

21 MR. ADAMS: That's correct, yes.

22 THE COURT: Is there anything that would prevent
23 you from arguing that without this instruction?

24 MR. ADAMS: No. However, just based on that South
25 Dakota case, it's a new case, they found no error in

1 instructing the jury in that manner. And we can argue
2 that, but based on that case, I proposed the jury
3 instruction.

4 THE COURT: Okay. Why don't you go ahead and
5 propose the one Monday morning. Let me have it by no later
6 than Monday morning. It would be helpful to get it this
7 afternoon, but I understand it may be difficult.

8 MR. ADAMS: Well --

9 THE COURT: I thought you were going to redraft an
10 instruction?

11 MR. ADAMS: Yes, I am. But my question is may I
12 redraft an instruction for the pilotage violation also under
13 46 USC 8502, or are you limiting solely to the bottle to
14 throttle regulation?

15 THE COURT: I said you could redraft an
16 instruction. I didn't say I would give it.

17 MR. ADAMS: I understand; I understand. But are
18 you contemplating both the pilotage violation and the bottle
19 to throttle, or just solely the bottle to throttle?

20 THE COURT: Mr. Adams, this is your instructions.
21 I am not contemplating anything. We can argue that, but my
22 inclination is whenever you start commenting on an item of
23 evidence, you unfairly highlight that item and it may, in
24 the eyes of the jury, take on greater meaning than it
25 should. And I consider that as evidence, the four hour rule

1 as evidence, and that's been admitted. And you are
2 certainly entitled to argue that that goes to a person's
3 recklessness if he's going to violate a regulation. If the
4 jury finds that he drank, that's a regulation, you can argue
5 that, maybe effectively. I don't know. But to highlight
6 that one particular item of evidence in an instruction may
7 give undue influence to it, and that is what my concern is.
8 And I generally don't do that.

9 MR. ADAMS: I'll draft an additional instruction
10 on that, and I'll look for additional authority.

11 THE COURT: Okay.

12 Now, is there going to be any objection to the
13 Court giving lesser included offenses to the DWI?

14 MR. ADAMS: Your Honor, our concern deals with the
15 word, driving, and it's reckless driving and negligent
16 driving, and it's unclear whether that applies to a water
17 craft. I think that in the definition of operating -- under
18 28.35.030 it is called operate a water craft. And operate
19 is different than drive. Someone drives a car, a car has
20 tires. Or someone drives a snow machine.

21 THE COURT: Does the definition of reckless
22 driving or negligent driving contain the definition of a
23 motor vehicle or a water craft?

24 MR. MADSON: Well, there's two ways you can
25 approach this, your Honor, that say yes, it does.

1 THE COURT: What's the statute?

2 MR. MADSON: Well, I don't have it right in front
3 of me. That's one of the problems, I don't have it right
4 here.

5 THE COURT: No problem.

6 MR. MADSON: But in addition to that, under title
7 5, it certainly does. There reckless operation of a water
8 craft is covered, and it's a penalty. And it's a criminal
9 crime. And it's addressed in there under operation while
10 under the influence or while intoxicated. So there are
11 really two statutes saying the same thing. But if there is
12 any question whether or not you can recklessly or
13 negligently operate a water craft, the answer is in title 5.
14 It says -- we already went through this on the preemption
15 thing, but the Court ruled that the State was not preempted
16 from enforcing its state laws and regulations concerning
17 commercial watercraft, which this was. And under title 5,
18 then, it says for recreation or any other purpose, it is
19 illegal to operate either negligently or recklessly. And
20 then the next one is, while under the influence. So --

21 THE COURT: Well, let me ask Mr. Adams again. Is
22 there any objection to --

23 MR. ADAMS: Well, your Honor, this morning I
24 reviewed the reckless driving, negligent driving. I have an
25 objection based on the word driving. Driving has a meaning

1 of driving a car, driving a snow machine.

2 THE COURT: So you are suggesting that it should
3 be operating a water craft? To the term operate a water
4 craft while -- recklessly or negligently, is that what
5 you're saying?

6 MR. ADAMS: Right. If my memory serves me
7 correctly, title 5, the definition of water craft,
8 specifically says for recreational purposes. It does not
9 say for other purposes. It says recreational purposes. It
10 has the language, used or capable of being used as a means
11 of transportation for recreational purposes. Title 5 does
12 not apply to a commercial vessel. Therefore, we are looking
13 solely at Title 28 --

14 THE COURT: Are you saying that there is no such
15 crime as operating a commercial water craft negligently or
16 recklessly?

17 MR. ADAMS: I am not aware of, unless the crime of
18 reckless driving in Title 28 applies. Now, I have not
19 looked real closely at Title 5 to see if that would apply.
20 I am just giving my memory of the definition of water craft.
21 I'll go back and look at Title 5 and see if it doesn't
22 apply. And if Mr. Madson is correct, then we're not going
23 to have an argument. Because if there is a statute against
24 reckless operating a water craft in Title 5, then that
25 applies. I'll take a look at it.

1 But as far as my position now is that -- is that
2 driving means to drive a land vehicle. Drive a snow machine
3 or drive an air boat on land.

4 MR. MADSON: Air boat?

5 THE COURT: You would concede an air boat would be

6 --

7 MR. ADAMS: Well, see, Mr. Madson is familiar with
8 that case where someone was driving an airboat on land and
9 he was convicted of driving while intoxicated for driving
10 his air boat. He tried to go from the Cheena River up to a
11 bar in his airboat.

12 MR. MADSON: And he darn near made it, I might
13 add.

14 MR. ADAMS: And he was convicted to driving
15 because he was on the road in his airboat. So this issue
16 has been approached before.

17 THE COURT: Okay.

18 Well, why don't we leave it until Monday morning.

19 Locking at defendant's number 2. The defendant
20 has already agreed on an elements instruction for operating
21 a water craft while intoxicated --

22 (Pause.)

23 -- under number 26 of the State's instructions. I
24 am not sure I understand what number 2 is all about now.

25 MR. MADSON: That's not necessary any more, your

1 Honor.

2 THE COURT: Okay. Number two is withdrawn, then.
3 Defendant's instruction number 16. Mr. Adams?

4 MR. ADAMS: No objection, your Honor.

5 THE COURT: Okay.

6 That's about all we can go over right now. What
7 I'll do is I'll put together a package of ones the Court's
8 going to be proposing based on this hearing today and what
9 the Court would expect might occur. But I'll leave open
10 room for argument on the ones we haven't discussed. We can
11 meet back on Monday morning, at say, 9:00 o'clock. How's
12 that?

13 Is there anything else we can do?

14 MR. MADSON: The only thing I can think of, your
15 Honor, if the Court wants to set some time limits on
16 argument. That'll be the next thing comes up. Give us some
17 idea of what to shoot for in terms of preparation.

18 THE COURT: How much time are you going to need,
19 Mr. Cole? Are you going to be breaking it up in any way, or
20 are you going to handle both sides of this?

21 MR. COLE: I'm going to handle both sides.

22 THE COURT: How much time do you think you'll
23 need?

24 MR. COLE: Three, three and a half hours.

25 THE COURT: I'd like to do it in a day.

1 MR. COLE: Oh, yes, my part's going to be done.

2 THE COURT: Is that going to be enough for you,
3 two or three hours?

4 MR. MADSON: Well, if we say two or three hours.
5 If we say three hours each, I think we can do it in a day.
6 If we start looking at three and a half hours or longer,
7 then I don't know if any jury is going to sit there. I
8 wouldn't wish that on anybody, to listen to two lawyers for
9 eight hours.

10 THE COURT: How much time do you need?

11 MR. MADSON: I would say that three hours would be
12 the minimum, and I would like to keep it at that.

13 THE COURT: That would be the maximum, too?

14 MR. MADSON: Maximum and minimum. It's going to
15 take that long, and if I'm exceeding that, then I am
16 probably going too far. Three hours would be my guess.

17 THE COURT: Well, if we get started at 8:30, which
18 we won't -- probably won't get started until 9:00 if we're
19 lucky. 9:00 until 12:00 will be three, an hour for lunch,
20 1:00, 1:00 until 4:00 is three more. Instructions is going
21 to last about an hour, they're so lengthy, it's 5:00
22 o'clock. That's stretching it. I don't mind doing it, but
23 three hours seems a little long to me for both of you. But
24 I think that is an outside estimate, I imagine?

25 MR. COLE: That's an outside estimate.

1 THE COURT: I generally don't restrict argument,
2 but we'll restrict it this time to not more than three hours
3 in total for the State or the Defendant, and I'll let you
4 know if you're getting close to it.

5 Anything else we can do?

6 MR. MADSON: I don't think so.

7 MR. COLE: All we would ask is if maybe you could
8 keep the Courtroom open for a couple of minutes so we could
9 look at the exhibits.

10 THE COURT: We require -- the _____ will have
11 to stay here then.

12 MR. COLE: Well, at least sometime between now and
13 closing we would like to spend half an hour.

14 THE COURT: Why don't we do that when Scott gets
15 back here. He's much more familiar with the exhibits, and
16 then on Monday you all can make sure all the exhibits are in
17 and we can take that up on Monday some time.

18 Last chance.

19 Okay, we're in recess.

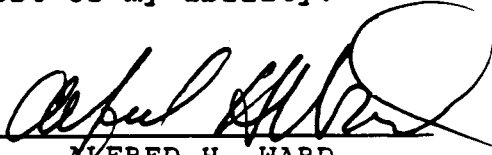
20 (Thereupon, at 11:06 o'clock a.m., the Court stood
21 in recess.)

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SUPERIOR COURT)
) Case No. 3ANS89-7217
STATE OF ALASKA) Case No. 3ANS89-7218

I do hereby certify that the foregoing transcript was typed by me and that said transcript is a true record of the recorded proceedings to the best of my ability.



ALFRED H. WARD

STATE OF ALASKA

IN THE SUPERIOR COURT AT ANCHORAGE

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 In the Matter of: :
 :
 STATE OF ALASKA : Case No. 3ANS89-7217
 :
 versus : Case No. 3ANS89-7218
 :
 JOSEPH J. HAZELWOOD :
 :
 ----- :

Anchorage, Alaska
March 19, 1990

The above-entitled matter came on for omnibus hearing before the Honorable Karl S. Johnstone, commencing at 9:11 a.m. on March 19, 1990. This transcript was prepared from tapes recorded by the Court.

APPEARANCES:

On behalf of the State:
BRENT COLE, Esq.
MARY ANN HENRY, Esq.
SAMUEL ADAMS, Esq.

On behalf of the Defendant:
DICK L. MADSON, Esq.
MIKE CHALOS, Esq.
TOM RUSSO, Esq.

P R O C E E D I N G S

1
2 (Tape No. C-3684)

3 THE CLERK: _____ Johnstone presiding is now in
4 session.

5 THE COURT: You may be seated. Thank you. I just
6 received a couple additional instructions. Why don't you
7 log these in, Scott, looks like they're originals from the
8 State.

9 MR. MADSON: Your Honor, I have something in
10 addition. It was filed this morning but I think it's --
11 what I did is, after the Court requested it have a
12 memorandum on proposed instructions and we've had a radical
13 change here. I think it certainly would require the Court
14 to consider our latest request.

15 THE COURT: Why don't you tell me what your latest
16 request is? Is it the request as of today now?

17 MR. MADSON: Yes. Yes. Your Honor, the Court
18 already has in its proposed instructions a lesser included
19 offense as a reckless driving and negligent driving under
20 DWI. In thinking about this, pondering it a little bit
21 more and looking at the cases involving lesser included
22 offenses in Alaska, it appeared to me that it was more
23 appropriate to put the lesser included offenses of reckless
24 driving and negligent driving as lesser included of
25 criminal mischief in the second degree.

1 Now, on the surface that obviously sounds strange
2 because the elements are totally different. But on the
3 Alaska approach that's taken they don't take the elements
4 approach. And the Alaska cases all indicate you must look
5 to the facts and whether or not the facts and the evidence
6 justify the lesser included -- whether they fall within the
7 technical elements or not, so what we have here, and I
8 think I've pointed out in my memorandum, is essentially
9 that the jury, in finding -- in looking at the criminal
10 mischief case, has to find recklessness, obviously, and
11 they have to find then that there was the risk of damage to
12 property over \$100,000.00 by widely dangerous means.

13 Now, the jury could easily -- and it was certainly
14 contested throughout this trial -- they could easily find
15 that there was no -- that the risk involved was not a
16 substantial one. But at the same time, in order to find
17 that the defendant acted recklessly, they have to find he
18 did so by the operation of a vessel.

19 Now, there's two statutes that come into play
20 here, and I've raised them both. One is under Title 5,
21 which is the -- that's watercraft, under that section, and
22 also then under Title 28. Either one applies but certainly
23 under Title 28, since under any definition or at least the
24 definition that's in our Title 28, motor vehicle statutes,
25 a vessel which is self-propelled is a motor vehicle; even

1 though there is a second definition of watercraft it is
2 still a motor vehicle, and under the section called
3 "Driver," it means you either drive or that you have actual
4 physical control over that motor vehicle. The Court's
5 already found that Captain Hazelwood had actual physical
6 control, so what we have is a driver of a motor vehicle.
7 And that simply fits all the necessary requirements of a
8 lesser-included offense, so in summary, Your Honor, what
9 we're saying is that we're withdrawing our request that
10 reckless driving and negligent driving be lesser included
11 of DWI but that they be made lesser included offenses of
12 the felony charge.

13 THE COURT: Mr. Adams?

14 MR. ADAMS: Well, Your Honor, I haven't had time
15 to read Defendant's request in detail. I skimmed through
16 it. The State has no opposition to a lesser included
17 reckless driving or negligent driving to the DWI charge. I
18 think under Title 5, that's appropriate. However, as far
19 as the criminal mischief, again, I haven't had time to
20 really review the request but it seems like they're
21 completely different charges. One, we have criminal
22 mischief which involves recklessly creating a risk of
23 damage to property of another in excess of \$100,000.00 and
24 a person who negligently drives or recklessly drives. If
25 the jury finds that the Defendant did anything reckless,

1 then it's inconceivable that they could find him not guilty
2 of criminal mischief in the second degree. This Court can
3 rule as a matter of law for the purpose of these motions
4 that oil is a widely dangerous means, that property of
5 another was risked in excess of \$100,000.00, so reckless
6 driving can't be a lesser included offense of the criminal
7 mischief. As far as negligent driving, again they're
8 comparing apples and oranges, and the elements are
9 different.

10 What the State would request is an opportunity to
11 review the Defendant's proposed instruction, review their
12 authority, and file something in writing later on this
13 afternoon. Right now, I'm not prepared to go forward on an
14 argument.

15 THE COURT: All right. Mr. Madson, will be
16 anything further on this issue?

17 MR. MADSON: Your Honor --

18 THE COURT: Just on this issue.

19 MR. MADSON: Yes, just on this issue, Your Honor.
20 I think there's only one case that needs to be reviewed and
21 it's already been quoted by the State and it's been quoted
22 by myself --

23 THE COURT: Komo.

24 MR. MADSON: -- and that's Komo, that's right.
25 And I think one needs to look very closely at the language

1 in there of what the Court says is the test for a lesser
2 included offense. That's what caused me to rethink this
3 after rereading that case. It appeared to me quite clear
4 that -- and Mr. Adams is correct, it isn't -- but it's not
5 an elements approach. They very clearly take the approach
6 that you must look at the facts of a given case, and in the
7 interest of fairness and justice as to whether or not a
8 lesser included should be available to the Defendant, not
9 because the elements fit but because the facts fit. So I
10 would just urge the Court to look at that case once again
11 with our request in mind.

12 THE COURT: All right. I gave some thought to
13 this already. It was something I was wondering about over
14 the weekend and I saw counsel down here and you can infer
15 that I was doing about the same thing you were over the
16 weekend. I don't think I'll be doing this, Mr. Madson, and
17 the reason is I think that there's -- the criminal mischief
18 statute focuses on the risk that is created whereas the
19 other statute you're asking to be in lesser included focus
20 on the conduct, and I think even under the Coggin theory of
21 lesser included they would not be included offenses.

22 So my inclination is, and I'm going to -- as I
23 say, once again, it's not final but it's real close to
24 final; I'm going to do a little more research on it since
25 you have requested this, but my inclination is that you

1 will not be getting lesser includeds of reckless and
2 negligent driving to the criminal mischief charge. They
3 will remain if you're asking for them to the DWI. I don't
4 know if you're -- assuming you don't get the lesser
5 includeds to the criminal mischief, did you want to
6 continue having them for the DWI?

7 MR. MADSON: No, Your Honor. We're putting it in
8 all or nothing here.

9 THE COURT: Okay.

10 MR. MADSON: We've discussed this at great length,
11 and I might add that -- sorry, Your Honor -- might add that
12 we have certainly conferred with the Defendant because it's
13 ultimately his choice as to whether to ask for lesser
14 includeds or not, and it's our position that they really
15 belong under the criminal mischief and not the other.

16 THE COURT: Okay. Mr. Adams, since the State is
17 not requesting lesser includeds, I assume that they have no
18 objection to withdrawal of them to DWI.

19 MR. ADAMS: No, Your Honor.

20 THE COURT: Am I correct in that assumption?

21 MR. ADAMS: No objections, Your Honor, to withdraw
22 them.

23 THE COURT: Okay. Well, let's go on to matters we
24 can handle right now. The State has -- and let's go on the
25 State's newly proposed instructions. And for purposes of

1 the record, I'll number one. The first one we'll talk
2 about is the instruction that starts out, "If you find that
3 the Defendant operated a watercraft while intoxicated,"
4 we'll number that State's Supp. Number 1.

5 MR. MADSON: What was that number, Your Honor?

6 THE COURT: Supplemental Number 1.

7 MR. MADSON: Oh, Supplemental 1, okay.

8 THE COURT: Okay, have you found the one I'm
9 talking about?

10 MR. MADSON: Yes.

11 THE COURT: Okay. Is there objection to that?

12 MR. MADSON: Yes, there is, Your Honor.

13 THE COURT: Okay, before you state your grounds I
14 want to make sure there was or was not objection. Mr.
15 Adams?

16 MR. ADAMS: Your Honor --

17 THE COURT: I read both cases, incidentally.

18 MR. ADAMS: The Komo and St. John case?

19 THE COURT: Uh-huh.

20 MR. ADAMS: All right. The only thing I'd like to
21 point out, Your Honor, is on page 113 of Komo, and that
22 case relied on St. John and quoted some language of the St.
23 John case, which talked about permissive inferences. When
24 the State is proving a DWI charge by use of reckless
25 conduct -- in essence, instead of relying on the .10 or

1 above theory, the State is saying, "Defendant drove
2 recklessly." And under those circumstances the Court in
3 St. John was real clear that the State is entitled to an
4 instruction that the jury may infer that a person who is
5 driving while intoxicated is reckless.

6 THE COURT: Where does it say that?

7 MR. ADAMS: It says that on page 113.

8 THE COURT: Would you -- where it says the State's
9 entitled to the instruction? Whereabouts on that page?

10 MR. ADAMS: I'll read it, it's on the first full
11 paragraph of the right-hand --

12 THE COURT: Okay.

13 MR. ADAMS: -- till the very last paragraph, which
14 starts about two-thirds of the way down. "Second, relying
15 on case law prohibiting the use of mandatory presumptions
16 in criminal cases" -- and it has a long string citation --
17 "we held that the legal relationship between drunken
18 driving and recklessness should have been communicated to
19 the jury in the form of a permissive inference rather than
20 a mandatory presumption," and that is the instruction that
21 you've called State's Supplemental Number 1, that if the
22 Defendant -- if the jury finds that the Defendant operated
23 a watercraft while intoxicated, you may but are not
24 required to infer that the Defendant acted recklessly or
25 negligently.

1 I believe in the St. John case the trial judge --
2 now looking on the left-hand column of page 113, last
3 partial paragraph, first sentence -- "in St. John, another
4 drunken driving manslaughter case, the trial judge
5 instructed the jury that it was required to find that the
6 Defendant acted recklessly if it found that he drove while
7 intoxicated." The Court said that as a matter of law the
8 St. John Court recognized that it was recklessness per se
9 to drive while intoxicated; however, relying in a number of
10 U.S. Supreme Court cases -- two, to be precise -- they said
11 that you can't instruct the jury about a mandatory
12 presumption. You take away their job, essentially.

13 THE COURT: I didn't read the cases you cited as
14 mandating the Court to -- giving the Court a mandate to
15 give a State's proposed instruction. I read the cases as a
16 conclusion by an Appellate Court that the Trial Court was
17 in error in giving a presumption instruction, and reversed
18 the Court for that. That was a defense issue, it wasn't a
19 State's request for instruction, it was Defendant's
20 objection to the State's request, and as I --

21 MR. ADAMS: Your Honor, excuse me, I don't mean to
22 imply that you have to do this. It's just a proposed
23 instruction and there is authority that if you gave that
24 proposed instruction, that would not be an error. And by
25 no means am I arguing that you have to give it; otherwise,

1 it is error. This is a proposed instruction that would be
2 appropriate as matter of law pursuant to St. John. So it's
3 your discretion. However, we argue that it is appropriate.

4 THE COURT: Okay, I'm not ready to give it, Mr.
5 Adams. If we had lesser includeds of reckless operation of
6 a watercraft or a negligent operation of a watercraft, that
7 might be something I'd consider. However, they've been
8 withdrawn and for purpose of determining whether or not the
9 Defendant recklessly created a risk I think the issue is
10 different than the reckless conduct of the element on the
11 reckless operating of a watercraft, and I believe it is
12 permissive and I don't think it's error not to, and I think
13 it'd be argumentative, it might be improperly commenting on
14 the evidence or highlighting the evidence unnecessarily.
15 State's Supplemental _____ will not be given.

16 State's Supplemental Number 2 starts out, "A Coast
17 Guard regulation prohibits ..." And I think we can deal
18 with that instruction together with the other two. The
19 other one starts out, "Coast Guard regulations prohibit an
20 individual," and the third one, "At the time of the
21 grounding of the Exxon Valdez," so they'll be State's
22 Supplemental 2, 3, and 4.

23 As I understand the regulations you're referring
24 to in the instructions are in evidence, is that correct,
25 Mr. Adams?

1 MR. ADAMS: My notes are unclear about the one
2 about the .04 percent, the Coast Guard regulation. The
3 first one is clearly in evidence. You took judicial notice
4 of the four-hour requirement and that's in. That four-hour
5 requirement is in 33 CFR, Title 95.

6 THE COURT: And that was taken --

7 MR. ADAMS: That was taken judicial notice of. My
8 notes are unclear whether the .04 percent -- I don't think
9 it was, but I included that in the event that it was. I'm
10 not making representations one way or the other. That
11 instruction accurately outlines the law, again, in Title 95
12 of --

13 THE COURT: Why should I give State's Supplemental
14 Number 2, to start off with? What legal authority do you
15 have to give an instruction on a particular item of
16 evidence that's admitted? Why would I want to highlight
17 this item of evidence more than the testimony -- opinion
18 testimony given by experts that the Defendant operated
19 recklessly?

20 MR. ADAMS: Well, again, Your Honor, relying on
21 the Martin case from South Dakota, which I believe is a
22 December 1989 South Dakota Supreme Court case where the
23 Court gave an instruction where the last sentence was
24 identical to this sentence about violating a regulation and
25 it must emphasize that the regulation in South Dakota was

1 not a criminal regulation, it was an infraction, a traffic
2 infraction, "If you park your vehicle on the side of the
3 road you have to have lights on it, you must park it off
4 the side of the road, if you don't" -- it was those type of
5 things where a person gets a ticket, two or three points on
6 his license, and the Court gave an instruction which said,
7 "This is what the infraction is," and in the last sentence,
8 "If you find beyond a reasonable doubt that the Defendant
9 violated this regulation you may consider such violation
10 along with all other evidence, facts and circumstances to
11 determine whether or not the conduct and acts of the
12 Defendant were reckless or negligent."

13 Now, relying on the Martin case, this instruction
14 would be appropriate. And it doesn't highlight any other
15 evidence -- no, it does highlight this evidence because it
16 rises to the level of a violation of a regulation. The
17 putting of the vessel on auto pilot in Prince William Sound
18 is not being highlighted in the instruction because that
19 does not violate a regulation. It violates the Exxon
20 operation manual but it doesn't violate a regulation;
21 therefore, we're not proposing instruction. This rises to
22 a different level. This is more -- this is better evidence
23 of negligence, of recklessness.

24 Now, based on the Martin case, we propose this
25 jury instruction. It's, of course, left to your

1 discretion. But there is authority for this instruction.

2 THE COURT: All right.

3 MR. ADAMS: Do you want me to continue with the --

4 THE COURT: Sure, let's do Supplemental Number 3.

5 MR. ADAMS: Well, my same arguments apply to that
6 one, that Coast Guard regulation -- if you do taken
7 judicial notice of that -- provides that a person cannot
8 operate a vessel other than a recreational vessel when the
9 individual has a blood alcohol concentration of .0 percent
10 by weight or greater. Now, again, evidence of that
11 violation is greater and it's entitled to more weight. The
12 jury is entitled to consider that as greater weight of
13 negligence or recklessness than some other violation or
14 some other piece of evidence of negligence or recklessness.

15 THE COURT: The statute that I -- the regulation I
16 recall that I did not take judicial notice of was a statute
17 that was couched in terms of .04 percent blood alcohol
18 being considered intoxication.

19 MR. ADAMS: That's correct, yes.

20 THE COURT: Now, is that the one you're referring
21 to?

22 MR. ADAMS: Yes, that's 33 CFR, Part 95, again.

23 THE COURT: Okay. And I don't have that right in
24 front of me but I think that it was couched in such terms
25 that in reading it if a person came to the conclusion that

1 Captain Hazelwood had a .04 they would have to conclude he
2 was intoxicated.

3 MR. ADAMS: That's correct, yes.

4 THE COURT: Okay. Well, I'm standing by my
5 original ruling that that will not come in. It won't come
6 in either in the form of instructions or in taking judicial
7 notice of it.

8 MR. ADAMS: Going on to Supplement Number 4, which
9 raises some other issues, here about a month ago or three
10 weeks ago I found a motion for the Court to take judicial
11 notice of Prince William Sound pilotage law. On Friday,
12 the Court stated that you were not going to use the State's
13 jury instructions numbers 39 through 45, which were a
14 recitation of that law, on the ground that they were
15 argumentative. However, you still haven't ruled on whether
16 you're going to take judicial notice of the law, and the
17 law is represented by 46 U.S.C. 8502, which requires any
18 coastwide seagoing vessel in pilotage waters to be under
19 the direction and control of a licensed officer with
20 pilotage. That's clear as -- and that is the law.

21 THE COURT: That's in evidence, isn't it?

22 MR. ADAMS: I'm not sure if it is or not. Have
23 you taken judicial notice of that?

24 THE COURT: Is the statute or regulation requiring
25 pilotage in evidence? I thought it was. I mean, listen, I

1 don't know if it is or not; there's been so much evidence.
2 I would expect that in arguing this motion you know the
3 answer to that.

4 MR. ADAMS: That's what I requested the judicial
5 notice for if it's not. I'm not sure if it is. And the
6 purpose of my argument now is to delineate what Mr. Cole
7 can argue tomorrow as far as what are the Prince William
8 Sound pilotage laws and whether he can get up and say,
9 "This law -- the Court has taken judicial notice of this
10 law. This is what was required," and use
11 Lieutenant-Commander Falkenstein's chart that shows
12 pilotage, not-pilotage and go right down the line and see
13 that there was a violation.

14 THE COURT: Mr. Adams, did the Court take judicial
15 notice? Mr. Purden just shook his head. Is that to say we
16 have not taken judicial notice? Were we even asked to take
17 judicial notice of the pilotage and regulations?

18 MR. ADAMS: By my motion, yes. I mean, my motion
19 was --

20 THE COURT: The 21st of February.

21 MR. ADAMS: February 21.

22 THE COURT: And we haven't had a chance to rule on
23 this motion is what you're saying?

24 MR. ADAMS: That's correct, yes.

25 THE COURT: Let me take a look at this. Okay,

1 specifically which statute or regulation do you wish the
2 Court to take judicial notice of?

3 MR. ADAMS: Well, Your Honor, the State would
4 request the Court to take judicial notice first of 46
5 U.S.C. 8502.

6 THE COURT: And what else?

7 MR. ADAMS: In addition to that, the State
8 requests that you take judicial notice of Captain of Port
9 Order 1-80.

10 THE COURT: If I can find it here. Okay, next?

11 MR. ADAMS: And Commander McCall's September 1986
12 memorandum.

13 THE COURT: That's in evidence, isn't it?

14 MR. ADAMS: I believe so, but --

15 THE COURT: Okay.

16 MR. ADAMS: -- what it is Prince William Sound
17 pilotage law is an aggregate of those three things and they
18 all three have to be read together.

19 THE COURT: Well, my question is, it is in
20 evidence?

21 MR. ADAMS: Yes, it is in evidence.

22 THE COURT: And how about the Captain of the Port
23 Order 1-80, is that in evidence?

24 MR. ADAMS: No, it's not.

25 THE COURT: Was it offered in evidence at any

1 time? What's the exhibit number, if it was?

2 MR. ADAMS: It wasn't offered, Your Honor. It was
3 marked but not offered.

4 Your Honor, the State's request --

5 THE COURT: Just a second. Do you have it in --
6 as marked?

7 MR. : I can probably get it.

8 (Inaudible.)

9 THE COURT: Do you have the number down of the --

10 MS. HENRY: No, I don't. My list doesn't go that
11 far.

12 THE COURT: We'll (inaudible). It would be
13 helpful if Mr. Cole were here to assist us on this. Is he
14 around someplace? It might be nice if he were here so he
15 would know what the Court's orders are if he's going to be
16 doing the arguing. Or --

17 MR. ADAMS: He is in his office.

18 THE COURT: Let's get him over here. He's going
19 to be arguing these instruction to the jury, isn't he?

20 MR. ADAMS: Yes.

21 THE COURT: Okay. All right, so we have a
22 September 1986 letter in evidence, we don't have the
23 Captain of the Port Order in evidence, and we don't have
24 46-8502 in evidence, is that correct?

25 MS. HENRY: That's correct. That's my

1 understanding.

2 THE COURT: All right. So your request, as I
3 understand, you want the Court to take judicial notice of
4 those three items?

5 MR. ADAMS: That's correct, yes.

6 THE COURT: Okay. Mr. Madson? This is timely
7 made, by the way, Mr. Madson. It has not been ruled on by
8 the Court on the February 21st request.

9 MR. MADSON: I wasn't going to argue that, Your
10 Honor. Essentially what I'm going to say -- let's start
11 back at the beginning, and ask the question why this
12 particular instruction, or this Supplemental Number 4 and
13 Number 2, should be given at all. Or Number 3, for that
14 matter, and, of course, I think that one's pretty well been
15 covered because the Court did not take judicial notice of
16 that .04, but let's go back to the only authority the State
17 has cited for this proposition which again is a single
18 jurisdiction in South Dakota, and there at least, at the
19 very least, the bottom line there was the Court said that
20 these instructions that give particular emphasis to certain
21 operating rules of the road --

22 THE COURT: Let's get back on track. The question
23 is should we take judicial notice under Evidence Rule 201
24 and 202 and 203 of 46-8502 and Captain of the Port Order
25 1-80.

1 MR. MADSON: Well, I don't think the Court can
2 stop there. That's the problem. This opens up a door --
3 you know --

4 THE COURT: Okay, let me --

5 MR. MADSON: -- we could take judicial notice of
6 it --

7 THE COURT: Okay, let's start over again. Ms.
8 Henry, we do have admitted 46 U.S.C. 8502. It's Exhibit
9 107. Exhibit 108, contrary to your statement, the Captain
10 of the Port Order, was not admitted nor offered. So, we
11 have two out of the three offered, the 1986 letter admitted
12 and the 46 U.S.C. 8502. We're now talking about the
13 Captain of the Port Order 1-80 only at this time.

14 MR. MADSON: I thought that one was -- it was
15 offered before or not offered?

16 THE COURT: Not admitted nor offered.

17 THE CLERK: That I know of, yes.

18 THE COURT: This is according to Mr. Purden, our
19 in-court deputy here.

20 MR. MADSON: Well, the problem --

21 THE COURT: He says that the U.S.C. section
22 exhibit is 107 and it was admitted.

23 MR. MADSON: Okay. The problem with the 1-80,
24 Captain of the Port Order, is you can't stop there, Your
25 Honor. You can take judicial notice -- I think the Court

1 has to take judicial notice of 33 C.F.R. Captain of the
2 Port Orders and Waivers. In other words, the Secretary of
3 Department of Transportation did not set up Prince William
4 Sound for special pilot endorsements or anything. The
5 Coast Guard did that. They also allowed Captain of the
6 Port to do this and also issue waivers. That goes to --
7 that simply at one time, if I'm thinking correctly, the
8 1-80 is the one for daylight passage. And then the problem
9 is after that, McCall did an internal memo -- that's the
10 one that hasn't been offered in evidence -- in September of
11 1986. That one broadened the daylight passage to include
12 night. Then we have the Ellamar letter. See, all these
13 things kind of fit in there and I think the Court --

14 THE COURT: The Ellamar letter is in evidence.

15 MR. MADSON: Yes, that's all in evidence, so the
16 Court has taken judicial notice of the statute. I don't
17 have any problem with that. That's in there. And it can
18 be argued. I think everyone can argue. You've heard, you
19 know, a week of testimony if not more about what does this
20 mean, you know, what does pilotage mean and whether or not
21 it was violated or not, but to emphasize this as evidence
22 of recklessness when we have all these contrasting views of
23 pilotage and contrasting letters, memorandums, and
24 everything else, it simply plays a much greater role than
25 necessary in this whole case.

1 I don't have any argument with the State being
2 able to use that statute, because the key words there were
3 direction and control, and what does that mean. And we've
4 heard all kinds of varying testimony about when it's
5 necessary and when it isn't. And secondly, the importance
6 of this is just way, way over-extended here. It's a
7 \$500.00 civil fine for the statute. I mean, that's like
8 the administrative regulations for the Coast Guard, you
9 know, that's all they can do is say, "Well, we may take
10 action on your license," under Supplemental 2 or 3, but to
11 give these things the importance, to say you violate these,
12 you make this quantum leap and say, "This is recklessness
13 under our state statute," is just -- it's beyond me.

14 So, in other words, I don't have any problem --
15 the Court has already had that in evidence, 46-8502, and I
16 think we are free to argue the meaning of that in the
17 context of this case.

18 THE COURT: My specific question was do you have
19 any objection to the Court taking judicial notice of the
20 Captain of the Port Order 1-80?

21 MR. MADSON: Yes.

22 THE COURT: Okay, that's what we're talking about.

23 MR. MADSON: Yes, okay. I do, because you can't
24 limit it to just that.

25 THE COURT: But we have in evidence 46-8502 and we

1 have the September 1986 letter in evidence, and in order to
2 get this in evidence, the Court's being requested to take
3 judicial notice of it so it can be argued. That's what the
4 purpose of this is.

5 MR. MADSON: Your Honor --

6 THE COURT: I'm not dealing with the instruction.

7 MR. MADSON: Right. But let me just ask the
8 Court, you said the internal -- that September '86, is that
9 in evidence? I don't believe it is. That's why I'm
10 wondering.

11 THE COURT: I think he said it was.

12 THE CLERK: Which one? Was that that 85 --

13 MR. MADSON: Not 180, dash-80, but memorandum from
14 McCall dated September '86.

15 THE COURT: What is the Ellamar letter dated?

16 MR. : Your Honor, if I may, the Ellamar
17 letter is September 19, 1986. The internal memo that we're
18 talking about is September 3rd, 1986.

19 MR. MADSON: They're two different things.

20 MR. : I think that was offered but
21 wasn't admitted.

22 THE COURT: Have a seat, Mr. Cole. You can
23 participate in this. Okay, Mr. Adams, you've asked the
24 memorandum, the last page, it says, "This Court should
25 therefore take judicial notice of the Prince William Sound

1 pilotage law applicable to Coast Guard officials which was
2 in effect when the Exxon Valdez grounded. That law is
3 represented at 46 U.S.C. 8502." That's in evidence.
4 "Together with the procedures set forth in Captain of the
5 Port Order 1-80." That's going to be taken judicial notice
6 of in a moment. "And Commander McCall's September 1986
7 memorandum of procedures which were in place with only
8 minor changes for over nine years prior to the grounding."

9 Now, if that's what you want, this Court will take
10 judicial notice of that and that'll come in evidence as
11 having been taken judicial notice of.

12 MR. ADAMS: Thank you.

13 THE COURT: And that's what you want, isn't it,
14 the 1986 letter from -- 1986 memorandum --

15 MR. MADSON: Oh. No.

16 THE COURT: -- Commander McCall?

17 MR. MADSON: Your Honor, that was an internal
18 memo. Nobody ever saw that except the Coast Guard. You
19 know.

20 THE COURT: Okay, it's not one that was
21 disseminated to the --

22 MR. MADSON: No, the Ellamar letter is a different
23 one. That's already in evidence.

24 THE COURT: Oh, yes.

25 MR. MADSON: That's Exhibit B, Defendant's

1 Exhibit B is the Ellamar letter.

2 THE COURT: Was there an offer of the 1986
3 memorandum in evidence? I thought it was offered and
4 rejected.

5 MR. MADSON: I think that's correct.

6 MR. ADAMS: I think it was -- it was never
7 offered, Your Honor. It was marked. Again, the letter
8 itself --

9 THE CLERK: I'm not sure of the number of that one
10 (inaudible).

11 THE COURT: What's the number of it, Mr. Adams?

12 MS. HENRY: It should be the one right after the
13 1-80.

14 THE COURT: My recollection is that the Ellamar
15 letter came in, _____ letter came in. The memorandum,
16 there was an objection to and the Court ruled against
17 admissibility on hearsay grounds. That's my recollection,
18 and I don't remember what exhibit it was. It may be, since
19 you're asking for it, you can give us some clues on what
20 exhibit you're talking about. Did you find an exhibit for
21 it?

22 MS. HENRY: Your Honor, if I recall when those
23 were marked, we thought we were going to mark the third one
24 too. Apparently, we did not. It would have been the next
25 in order, so since it apparently was not marked we did not

1 have it marked nor did we offer it. But as to the third
2 one, the 1-80 was marked. We did not offer it.

3 THE COURT: I clearly recall talking about this in
4 this case, the 1986 internal memorandum. Mr. Cole, don't
5 you remember that?

6 MR. COLE: Yes, I remember that, Judge.

7 THE COURT: And do you remember the Court
8 rejecting the the submission?

9 MR. COLE: Yes, I remember that.

10 THE COURT: Okay. The Court will not be taking
11 judicial notice of that internal memorandum. That is not a
12 proclamation of law, as the Rule 200 series refers to.
13 I've already ruled on its admissibility and there's no
14 reason to take it under advisement any further, so your
15 request to take judicial notice of that document is
16 denied. I am going to take judicial notice of Captain of
17 the Port Order 1-80. It will come into evidence, if you
18 will get us an exhibit that's properly marked, it will be
19 admitted, if we don't have one already.

20 MS. HENRY: It's been marked as 118.

21 THE COURT: I'll leave that up to you, Mr. --
22 before you can argue, it has to come in evidence. Pardon?

23 MS. HENRY: It's been marked as 118. Plaintiff's
24 118.

25 THE CLERK: I think it's 108.

1 THE COURT: 118, that doesn't sound right to me.

2 THE CLERK: No, the Captain of the Port Order 1-80
3 is Exhibit -- State's 108.

4 THE COURT: 108.

5 MS. HENRY: 108, I'm sorry.

6 THE COURT: Okay, 108 is admitted.

7 (State's Exhibit 108,
8 previously marked, was
9 received in evidence.)

10 THE COURT: Okay, now let's talk about the
11 instructions based on these regulations. Do you wish to be
12 heard any further, Mr. Adams, on the instructions? That
13 would be State Supplemental Number 2, which I've denied.
14 We don't need to discuss it any more. State's Number 3 and
15 Number 4.

16 MR. ADAMS: You have denied Number 2, Your Honor?

17 THE COURT: That's correct. I've already ruled --

18 MR. ADAMS: Nothing further.

19 THE COURT: -- that that was not admissible in
20 evidence, that regulation was not admissible in evidence.

21 MR. ADAMS: Oh, that was Number 3, the one that
22 was not admissible in evidence.

23 THE COURT: Oh, let me see. Let me see Number 2.
24 I'm sorry. That's the one with four hours -- this is the
25 one with four hours? Okay, Number 3 is not going to be

1 given.

2 MR. ADAMS: Number 4, Your Honor, just that
3 instruction, again summarizes what the law was in effect at
4 the time to coastwise tankers, pilotage tankers and, again,
5 it is law that that was what the pilotage tankers were
6 required to follow. They are certainly going to argue that
7 the Ellamar letter somehow waived it even though the first
8 two sentences of Ellamar clearly discuss non-pilotage
9 tankers and Captain Martineau specifically admitted that it
10 applied only to non-pilotage tankers. They're entitled to
11 argue that. However, this again rises to the level of a
12 regulation or it is a law that the Captain of the Port has
13 authority to issue.

14 THE COURT: Is there a regulation in evidence that
15 relates to this four-hour limitation?

16 MR. COLE: The four-hour limitation, yes. You
17 took judicial notice of the four-hour limitation. And now,
18 that's Number 2, and Number 4 goes to the pilotage law.

19 MR. : Your Honor, I'm not so sure that
20 judicial notice was taken on that four-hour -- I'd have to
21 look back and think about that, but I don't believe so.

22 THE COURT: Why don't you see what it was,
23 (inaudible) four hours. Mr. Cole, did you --

24 MR. : Yes, you took judicial notice of
25 it. That's my understanding. I'm trying to remember who

1 it was through.

2 THE COURT: What's the statutory citation for
3 that?

4 MR. ADAMS: It's 33 CFR 95, I can give you the
5 exact cite. 33 CFR, Section 95.045.

6 THE COURT: Seems to me we did take judicial
7 notice of that. Was there an exhibit marked?

8 MR. ADAMS: Yes. There is an exhibit marked.

9 THE COURT: Why don't you come up here and see if
10 you can help Mr. Purden find it.

11 MR. : It might be Number 33 (inaudible)
12 Coast Guard regulation --

13 MR. : Is that (inaudible)?

14 THE COURT: Exhibit Number 33.

15 MR. : Yes, that's it.

16 THE COURT: Exhibit Number 33? Why don't you see
17 if you can find it over there?

18 MR. : I did not, it's not (inaudible)
19 right now.

20 THE COURT: It's not admitted --

21 MR. : (Inaudible.)

22 THE COURT: Did the Court take judicial notice of
23 it?

24 MR. MADSON: It wasn't admitted. I don't believe
25 the Court did.

1 MR. ADAMS: Well, there's two sections that were
2 in that. One of them dealt with --

3 THE COURT: Let's get the exhibit so we can look
4 at the exhibits. Exhibit 33 is the document that the Court
5 did not take judicial notice of, Mr. Cole, Mr. Adams.

6 That's the one that I did not take judicial notice of.
7 It's the one that talks about an individual is intoxicated
8 when he has the blood alcohol at 10 percent or .04. This
9 was offered and it was rejected by the Court, Exhibit 33.

10 MR. ADAMS: Do you mind if I look at this?

11 THE COURT: No, go ahead.

12 MR. ADAMS: Judge, this also contains the 905-045
13 four-hour, and that's the part that I think that you took
14 judicial notice of. There's a second -- a third page,
15 95 045. I know you're right on the first part as far as
16 the .04 because I remember that discussion with Mr. Proudie
17 and Mr. Madson, but my recollection is that when we talked
18 about the four-hour limit, that that was admitted and it
19 was in one of the witnesses that -- it may have been -- I
20 believe it was one of the crew members when we were talking
21 about the alcohol policies for drinking.

22 THE COURT: So you're requesting the Court to take
23 notice of 3395 045?

24 MR. ADAMS: Yes.

25 THE COURT: Mr. Madson? That's -- you know the

1 regulation, I take it. You don't need --

2 MR. MADSON: Yes, I do, Your Honor. Well, there
3 was testimony about it. My recollection was, while there
4 was testimony, the Court did not take judicial notice of
5 that. That's how I remember what happened. And, of
6 course, just because there's testimony doesn't mean that
7 the Court can take judicial notice of a particular Coast
8 Guard regulation.

9 THE COURT: There's a request now. There was not
10 a request and there is a request now and there was
11 testimony, I remember the testimony, at least.

12 MR. MADSON: Well, I would object to that, Your
13 Honor. I don't believe the Court should take judicial
14 notice of that. You know, one thing is that it kind of
15 lulls us into a sense of false security when the Court
16 makes a certain ruling and then we go on and don't maybe
17 cross-examine witnesses and do certain things, and then
18 after the case is all over then they come and say, "Well,
19 now we want you to take judicial notice."

20 THE COURT: All right, the Court will take
21 judicial notice of 3395.045(a), (b), (c), and (d). And
22 we'll have to have this -- Exhibit Number 33 consists of
23 three pages. The portion of 33 which the Court rejected,
24 which was a standard of intoxication -- 3395.020 -- is on a
25 separate page from the Section 3395.045. Would counsel

1 have any objection to separating those two and making a
2 separate exhibit of the latter?

3 MR. MADSON: Well, I would have to look at it,
4 Your Honor, but I would just say that the section the Court
5 is over our objection taking judicial notice of should be
6 the only one that goes in. Nothing else.

7 MR. ADAMS: We have no objection to that, Your
8 Honor.

9 THE COURT: Okay. Then why don't you go ahead and
10 get a copy made of just that section, pass it by Mr.
11 Madson, just of 95.045. You can blank out the rest of the
12 -- and that will be Exhibit -- what number should we make
13 that now?

14 THE CLERK: 180.

15 THE COURT: Sure? 180. Okay, 180. It'll be
16 Exhibit 180, it's admitted.

17 (State's Exhibit 180 was
18 marked for identification and
19 received in evidence.)

20 THE COURT: All right, the Court will not be
21 giving State's proposal -- Supplemental Number 2 nor
22 State's Supplemental Number 4, for reasons similar to the
23 reason -- not given the package requested earlier by the
24 State, that they're argumentative, that they're unduly
25 commenting on a particular item of the evidence,

1 highlighting unnecessarily.

2 Okay, I gave counsel a numbered copy of the
3 Court's proposed instructions. They're not in final form
4 yet, but they're getting closer. I numbered them so we'll
5 have a reference point to discuss them. I have an
6 unnumbered copy which we'll be using eventually here for
7 final numbering. Let's start with the Defendant. Any
8 objection to the Court's proposed instructions?

9 MR. MADSON: Which one, Your Honor?

10 THE COURT: Any objection to the Court's proposed
11 instructions? That's the package of instructions --

12 MR. MADSON: Oh, yes, yes, I do.

13 THE COURT: -- I gave you on Friday. You can
14 start out with the number that you're referring to and
15 we'll discuss the ...

16 MR. MADSON: Right. Perhaps the Court could refer
17 to my written memorandum that is filed today, but start
18 with the --

19 THE COURT: Yes, I have that.

20 MR. MADSON: -- Instruction Number 30. That's the
21 negligence discharge one.

22 THE COURT: Okay. So up to Number 30, there is no
23 objection?

24 MR. MADSON: I believe the only thing I did is
25 talk about lesser includeds in that.

1 THE COURT: Okay.

2 MR. MADSON: Yes.

3 THE COURT: I'll be pulling out the lesser
4 includeds so we don't need to discuss the lesser includeds
5 and there'll be no verdict formed for the lesser includeds
6 and there'll be no transition instructions to the lesser
7 includeds. Any definitional instructions that pertain just
8 to the lesser includeds will be eliminated as well. So
9 Number 30.

10 MR. MADSON: Okay, Number 30, as the Court can see
11 by my memorandum, what I propose doing is changing that one
12 to insert a third -- you've got a first paragraph, second
13 paragraph, and third, and that should read that, "Third,
14 that the negligence of Captain Hazelwood was the legal
15 cause of the discharge of oil," and then I have two
16 proposed instructions, Number 22 and Number 23, and they
17 define legal cause and superceding cause, and the reason I
18 requested those, Your Honor, was after the Court indicated
19 last Friday it was going to give the civil standard of
20 negligence it seemed only fair and only proper that if the
21 civil standard is going to be applied to Captain Hazelwood,
22 that he should be entitled to the defenses of a civil
23 standard and that includes superceding cause and proximate
24 or legal cause, and so those two instructions I think would
25 be appropriate.

1 THE COURT: Let's go over the instruction --
2 proposed Instruction number 24 by the Defendant in lieu of
3 Instruction number 30. And we would add the final two
4 paragraphs to any instruction, those bottom two paragraphs
5 in Instruction number 30.

6 So do you object to Number 24 in lieu of Number
7 30?

8 MR. ADAMS: Yes, Your Honor. This is not a civil
9 case. And the standard of negligence that we're using is
10 not a civil standard of negligence. We're using the
11 criminal standard of simple negligence. It's not used
12 often. However, it is used in negligent driving, it's used
13 in fishery cases, and it's going to be used in this case.
14 Therefore, the only causation questions are criminal
15 causation questions. And what Mr. Madson is trying to do
16 here is argue that because we're using a definition of
17 negligence that is used in civil cases, that automatically
18 this is a civil case. But that's not the case. And I
19 believe that the Wren case -- Wren versus State,
20 establishes the proximate cause and that is Number 34,
21 which you're using, and that is not necessary for the
22 Defendant's actions or inactions in this case to be the
23 sole proximate cause for the risks that were created in
24 this case, so on.

25 The other case that talks about intervening causes

1 -- Krusmider, you're familiar with that one. That's
2 equally applicable to a case where the State -- where the
3 Court's going to be using a negligence standard, a mental
4 state, and that essentially goes along with that
5 instruction right there. And we don't need to get into the
6 issues of proximate cause, superceding cause, and
7 intervening -- (inaudible) have restatement of tort section
8 404 and 402(b) in here for the rest of the week, we could
9 be arguing about that. This is not a civil case. This is
10 a criminal case.

11 THE COURT: Do you think that there should be some
12 language regarding substantial factor? Causation is
13 generally defined in terms of being a substantial factor
14 and bringing about the outcome, and that was not proposed
15 by the State. Do you think that would be appropriate?

16 MR. ADAMS: No, Your Honor.

17 THE COURT: You do not think --

18 MR. ADAMS: If the instruction that we use for
19 causation comes from a criminal case and talks about
20 criminal causation, then we're not going to have an
21 objection to it. If we start talking about restatement of
22 torts and the Alaska Supreme Court definitions of
23 intervening, superceding cause, we're going to be getting
24 into a quagmire.

25 THE COURT: Well, did you track the pattern

1 instruction with this proposed Number 34?

2 MR. ADAMS: This proposed Number 34 came out of
3 Wren versus State, and that's how we got that instruction.
4 That's W-r-e-n.

5 THE COURT: David, would you go get the Pattern of
6 Jury Instructions for Criminal Cases, please. Let's go on
7 to the next objection. We'll come back to this one.

8 MR. MADSON: Yes. Your Honor, there's -- let me
9 look and see here. My requested Number 21, which has to do
10 -- I'm trying to find it in the Court's numbered ones.

11 THE COURT: We are now going on the Court's
12 proposed instructions, so when you come to one that you
13 object to, let me know.

14 MR. MADSON: That's what I'm looking for right
15 now, Your Honor. And for the life of me I can't seem to
16 find it.

17 THE COURT: You may not have it.

18 MR. MADSON: It very well might not be in there.
19 That's the problem, I think.

20 THE COURT: Okay, Number 38 may be.

21 MR. MADSON: Yes, I would either have a separate
22 one or add my requested Number 21 right after the first
23 paragraph of the Court's Number 38, where operate a
24 watercraft means to navigate or use.

25 THE COURT: Where did you get this proposed

1 Instruction Number 21, Mr. Madson?

2 MR. MADSON: This came from actual physical
3 control and the definition, Your Honor, under Department of
4 Public Safety versus Connelly and the _____ are Jacobson
5 and --

6 THE COURT: What are the citations to that?

7 MR. MADSON: It's in my memorandum where that came
8 from. It's 754 P2, 234, Lathen versus State; 707 P2, 941,
9 and Jacobson versus State, 551 P2, 935.

10 THE COURT: Are these the last of the cases?

11 MR. MADSON: Yes. And what they did in Connelly,
12 and this is exactly where it came from, in a footnote -- I
13 believe it's -- yes, footnote 4 on page 235, in Connelly --
14 the State Supreme Court quoted the Montana Supreme Court
15 case, the definition of actual physical control, and that's
16 the precise wording that I took from there. They
17 apparently cite it with approval. They indicated that
18 that's what Montana meant, and I think it's necessary to
19 put this in the proper focus.

20 THE COURT: Mr. Adams. I understand that operate
21 a watercraft is defined by our statute, and the cases that
22 are cited by the State go to driving motor vehicles, cars,
23 and they're not exactly the same. However, I want to find
24 out for sure that if you really object to that statute
25 being given -- that instruction. The term "operating a

1 watercraft means exercise of actual physical control over
2 watercraft," actual physical control means "existing or
3 present bodily restraint, directing influence, domination,
4 or regulation."

5 MR. ADAMS: Your Honor, I believe Mr. Cole is
6 going to argue this.

7 MR. COLE: Judge, I just think the term "actual
8 physical control" in the sense of operating a watercraft is
9 misleading. That's not what happens on the bridge of a
10 tanker. The captain doesn't have actual physical control.
11 The other part of the sentence, if you take away "actual
12 physical control," I don't have any problem with, you know,
13 "present bodily restraint, directing influence, domination
14 or regulation," but "actual physical control" is -- it
15 doesn't take into consideration the difference between
16 operating a motor vehicle and the operations behind the
17 navigation of a tanker. A captain doesn't go up and take
18 actual physical control of the throttle except in very rare
19 circumstances, and very rarely does he ever take the helm.
20 And so if you put the words, "actual physical control" in
21 there, the problem that you have is that you confuse the
22 jury. And it's not in accordance with what they've heard
23 six weeks of testimony, that here's the captain, he's
24 responsible, he's the person at the con, they are the one
25 that guide and direct this vessel. Then it's got to
confuse

1 them. And under -- the term, "actual physical control,"
2 unless we prove some time in the course of this trial that
3 Captain Hazelwood had actually touched the wheel during the
4 time that we're alleging he was intoxicated, that's a
5 directed verdict.

6 THE COURT: No, Mr. Cole, that's why the
7 definition says, "actual physical control means." That's
8 the whole purpose of this instruction, to define what
9 "actual physical control" means. It means existing or
10 present bodily restraint, directing influence, domination
11 or regulation. It would seem to me that would be your
12 theory of the case, that when the captain is below, if he
13 is still directing influence, domination or regulating the
14 navigation or the use of that vessel, he would be in actual
15 physical control.

16 MR. COLE: The only thing that I have a problem
17 with in this instruction is the words "actual physical" --
18 it if's changed to "the term term 'operating a watercraft'
19 means exercise of control over the watercraft. Control
20 means existing present bodily restraint, directing
21 influence, domination or regulation." I think that more
22 accurately reflects what goes on on the bridge of a vessel.

23 THE COURT: So they would have two definitions of
24 operating a watercraft, the statutory definition and this
25 definition. That's going to be difficult, Mr. Madson. I'm

1 going to give the statutory definition, that's a given, so
2 how do we cure both of your problems here?

3 MR. MADSON: Well, Your Honor, you know, I didn't
4 make these statutes. I mean, I can only go by what they
5 say drive or operate --

6 THE COURT: Well, I'm going to give the statute --

7 MR. MADSON: -- drive or operate definition under
8 Title 28 says "actual physical control or drive."

9 THE COURT: Well, Mr. Madson, operate a watercraft
10 is a statutory definition.

11 MR. MADSON: I agree.

12 THE COURT: And that's defining operation of a
13 watercraft, which is what we're dealing with here and not a
14 motor vehicle, so I'm going to give the statutory
15 definition and if we can somehow combine both of your areas
16 of concern here into a continuing definition, I'll do
17 that. Otherwise, it's going to be just like it's given. I
18 think Mr. Cole has a legitimate concern, that perhaps the
19 jury is not going to know what operate a watercraft means
20 here. You might be able to argue that he was down below,
21 he wasn't using or navigating the vessel, he was down
22 below, but with yours it might give them the way to find
23 that he was.

24 MR. MADSON: There should be no distinction
25 between a boat and a car or a bus as far as the danger to

1 the public is concerned. It is the person that is
2 directing the controlled influence of that vehicle that is
3 the cause for the legislature to come around and say, "This
4 is a crime." Now, if the Court just reads this definition
5 of a watercraft, "to navigate or use a vessel capable of
6 being used as a means of transportation on water," that
7 covers everybody. I mean, if I want to hire someone to
8 take me from place to place, I'm using one. The jury's
9 going to be totally confused about that. Or navigate.
10 Does that mean the guy that's sitting there on the chart,
11 just taking fixes? There has to be something else here to
12 show that the person that has dominating or influencing and
13 controlling and the actual physical control is what the
14 state law seems to require. And I don't think they made a
15 distinction between the two, so I think it should be given
16 as I've proposed and I don't know what more I can say about
17 it.

18 MR. COLE: Judge, I have another solution to help
19 you. What if you used the following. You say the term "to
20 navigate or use a watercraft means to exercise control over
21 the watercraft. Control means to present bodily restraint,
22 directing influence, domination or regulation on the
23 vessel."

24 THE COURT: Okay, I propose this, a middle
25 paragraph between the two, the phrase, quote, "'navigate or

1 use a vessel,' end quote, means existing or present bodily
2 restraint, directing influence, domination or regulation of
3 the vessel."

4 MR. COLE: We have no objection.

5 MR. MADSON: Would you read that again, Your
6 Honor? I may not have got it all.

7 THE COURT: It'd be a middle paragraph.

8 MR. MADSON: This is Instruction 38 now?

9 THE COURT: Yes, it would be in the middle,
10 between the two paragraphs in Instruction 38. The new
11 paragraph would read as follows, "The phrase, quote,
12 'navigate or use a vessel,' end quote, means existing or
13 present bodily restraint, directing influence, domination
14 or regulation of the vessel."

15 MR. MADSON: That sounds pretty much like what I
16 was requesting if I'm hearing you correctly, so ... If I'm
17 correct in the way I perceive it, I guess I wouldn't have
18 any objection, Your Honor.

19 THE COURT: Okay. I'll be giving you that middle
20 paragraph. So that takes care of the definitional problem.

21 Let's go to the next objection that you have to
22 the Court's instructions, and anything you would like to
23 have in place.

24 MR. MADSON: I think that might cover it, Your
25 Honor. I believe that's pretty much it.

1 THE COURT: Okay. Let me get into the Alaska
2 Pattern Jury Instructions for causation.

3 MR. MADSON: Oh, there's one other one that Mr.
4 Adams gave me and then I was going to request to be given
5 too, so there's no problem on it. The Court, I think, has
6 it up there. That's the one on separate crimes, counts.

7 THE COURT: That should be in there already.
8 Isn't it in the proposed jury instructions?

9 MR. MADSON: I didn't see it. Maybe --

10 THE COURT: It should be right before the
11 indictment instruction. Number 19.

12 MR. MADSON: Yes, you're right.

13 THE COURT: Let me just see if I can find
14 causation here. Well, I can't find the causation section
15 right now.

16 MR. COLE: Judge, my understanding is that there's
17 not a causation in the thing. I would refer you -- maybe
18 there's a couple sources in the last trial that you and I
19 did. We had the David Williams murder trial, and we gave
20 an instruction to the jury on this same thing. I would
21 agree that, as I remember, in criminal law the defendant
22 has to be -- doesn't have to be the sole proximate cause,
23 he has to be a cause, and I believe you're correct that in
24 some fashion I've seen language, because he not only has to
25 be a cause, but he has to be a substantial cause. And I

1 can't remember where I've seen that, but you're right.

2 THE COURT: David, why don't you see if we can
3 scratch that up from the David Williams instruction. We'll
4 come back to that in a moment.

5 Okay, now we'll go to the State's objections to
6 the Court's proposed instructions.

7 MR. MADSON: Your Honor, just to make sure, I know
8 this happened the other day, last Friday, but on 35 I just
9 want to make sure that there was an objection to that
10 instruction. I'm quite sure that happened before.

11 THE COURT: You were going to come up with
12 something on that.

13 MR. MADSON: No, not that one. That one's not the
14 -- there was another one that I found -- that was a
15 physical injury one?

16 THE COURT: Okay, no that's --

17 MR. MADSON: Yes, and I did not. That's correct.
18 So I have no objection, the physical injury -- or serious
19 physical injury definition, rather. But I did last Friday
20 object to this, the last sentence.

21 THE COURT: Frankly, I don't like this
22 instruction, counsel. Number 35. I told you that I was
23 waiting for Mr. Madson to come with a different approach to
24 it, and I was concerned that he might, if we didn't include
25 that, he might argue that since oil spill is not included

1 is the definition it is therefore not a widely dangerous
2 means. And I have a little concern about that. I'd like
3 to find some way that would address that concern. Maybe
4 you can give me a suggestion here. I don't like the
5 statement, "An oil spill may be considered a widely
6 dangerous means." It's certainly permissive, but it seemed
7 to me to be a comment on the evidence.

8 MR. COLE: Judge, Mr. Madson agreed not to argue
9 that because it's not in there it can't be won. I don't
10 have any problem with that. But if he's going to argue
11 that, I think that under Evidence Rule 303 and in -- you're
12 not putting in a presumption at all. All that you're
13 saying, indicating, is that they can consider that by using
14 the word "may." It's not creating an inference, it's not
15 creating a presumption. All it is indicating is that this
16 is not limited by what is actually in the instruction.

17 THE COURT: And that was my conclusion in an
18 earlier pretrial hearing, that the language did not
19 prohibit the jury from considering an oil spill being a
20 widely dangerous means. I'm wondering if there's some
21 other way we can handle this language, though.

22 MR. MADSON: Your Honor --

23 THE COURT: It seems to be pretty directive. Even
24 though it says "may," it seems to point something out. All
25 they have to do is find an oil spill, and that's not

1 enough.

2 MR. MADSON: Your Honor, I didn't mean to
3 interrupt, but if I just want to comment on some of the
4 evidence -- remember, I objected to some of the evidence
5 coming in, especially the Fish and Wildlife officer that
6 testified about dead birds and things like that, and I said
7 it was totally irrelevant to this and I recall Ms. Henry
8 said the relevance was it goes to show that an oil spill
9 was a poison within this definition. And I think it's
10 arguable and I think that's one of the elements the jury
11 has to find, and I think the State can argue it and I think
12 I can argue it, as to whether or not it fits this
13 definition.

14 MR. COLE: The only other suggestion I can have
15 for the Court is to put in a last sentence that says, "This
16 is not" -- words to the effect that "This is not an
17 inclusive list."

18 THE COURT: Okay, Mr. Madson, I'm going to give it
19 as is on the basis that the "maybe" makes it permissive,
20 that it would -- I think that would be the best way to
21 handle this, given my earlier court ruling.

22 All right, now we'll go to the State's objections.

23 MR. ADAMS: Your Honor, before we get to the
24 objections, we need to address the presumption instruction
25 regarding BA levels, blood alcohol levels, and I have filed

1 a jury instruction last week and I've since changed that.
2 I filed that memo on this issue today. It's entitled
3 "Trial Memorandum Regarding Applicability of AS28-35033
4 presumptions And attached to that memorandum is a new
5 instruction which tracks for the most part the prior
6 instruction, except for the last paragraph is changed. And
7 the State would request that that instruction be given in
8 lieu of the previous one, and the authority for that can be
9 found in Dresnick versus State, 697 P2 1059. And the Court
10 specifically discussed AS28-033 and stated, "We are
11 satisfied that the presumptions established in
12 AS28-35033(a) reflect a legislative judgment regarding the
13 interrelationship between blood alcohol levels and
14 competence to drive. We believe that a jury considering
15 drunk driving, assault involving motor vehicles,
16 manslaughter, and negligent homicide cases should be made
17 aware of this legislative judgment."

18 Now, that is applicable to this case. We have a
19 case where Defendant is accused of operating a motorcraft
20 while intoxicated. The jury is entitled to find out what
21 the legislature feels about levels of intoxication and
22 impairment with regard to the blood alcohol level. We have
23 evidence before the jury that Defendant was at a .061 some
24 ten and a half hours after the grounding. There's been
25 evidence regarding retrograde extrapolation, and the jury

1 should be entitled to hear what the legislature feels about
2 that. There is nothing in that statute, nor is there
3 anything in Dresnick which states that that only applies to
4 blood alcohol tests or breath tests within four hours of
5 the incident. That requirement is contained in
6 28-35030(a)(2), and there are cases that -- I believe Mr.
7 Madson has cited the Wilson case, but that doesn't say that
8 it's only applicable to cases that come in within .040 -- I
9 mean, within, excuse me, within four hours. I tried to
10 read all the cases that are cited in 033 last night and I
11 couldn't find one that used the words, "these presumptions
12 are only applicable to cases or tests within four hours."

13 And I have an instruction here which I did not
14 make a copy of -- I apologize -- it's a standard DWI
15 instruction which we're not proposing to give because this
16 -- we feel that this instruction applies only to the test
17 within four hours, and the second paragraph of that
18 instruction says, "If you find that Defendant took a breath
19 test within four hours of the offense alleged and that an
20 accurate result was obtained, you may infer from such
21 result that the Defendant's breath alcohol content at the
22 time of the test was equal to or less than the Defendant's
23 breath alcohol content at the time he operated a motor
24 vehicle."

25 Now, that is the instruction that applies to when

1 a test is taken within four hours, and it says the
2 presumption applies. That there's an -- well, that an
3 inference you can infer. And we don't have that here,
4 we're not asking for this instruction. We're simply asking
5 for the instruction which gives an idea of what the
6 legislature feels about BA levels.

7 THE COURT: Would it make any difference that it
8 was not conducted -- the chemical analysis of the person's
9 breath was not conducted or performed according to methods
10 approved by the Department of Public Safety?

11 MR. ADAMS: In 033, I believe, in one of the
12 latter paragraphs it does state that, and I don't have
13 specific recollection that this test was taken, if it
14 followed those directions, if that mandates that this
15 presumption does not apply. If I could review the
16 statute ... I believe it just requires substantial
17 compliance.

18 For instance, Your Honor, there is a case out
19 there which -- I believe that the intoximeters are required
20 to be calibrated every 60 days, and there's a case out
21 there where an intoximeter was calibrated on the 61st day
22 and defendant raised the objection that the intoximeter was
23 not calibrated within the Department of Public Safety
24 regulations and therefore the test was not taken in
25 compliance with those regulations. The Court of Appeals

1 said substantial compliance is all that's required, that
2 one day is not going to make a difference. We have
3 substantial compliance in this case.

4 THE COURT: Was full information concerning the
5 testing made available to the Defendant?

6 MR. ADAMS: Was full information regarding the
7 tests --

8 THE COURT: Full information concerning the test
9 made available to the Defendant?

10 MR. ADAMS: In what kind of information? About
11 how --

12 THE COURT: Well, how about the samples
13 themselves, all three samples, results of all three samples
14 made available to the Defendant.

15 MR. ADAMS: The litigation packet was provided. I
16 mean --

17 THE COURT: Well, what was provided in the
18 litigation packet?

19 MR. ADAMS: The litigation packet that Dr. Peat
20 brought to trial pursuant to his subpoena contained the
21 full laboratory analysis, all the steps that were taken,
22 copies of the chemist's notes, protocol of the laboratory.
23 He had it up there on the stand for --

24 THE COURT: All three tests?

25 MR. ADAMS: All three tests, yes. He had the

1 whole entire packet.

2 In addition, Your Honor, Dr. Peat related to me
3 that he was contacted by someone representing the Defendant
4 to retest these -- to get the tests and they could be
5 retested. No one ever followed up on that. So they had
6 access to all of the tests to retest them if they wanted.

7 THE COURT: Do you know of any DWI case, Mr.
8 Adams, where this type of an instruction was given where
9 the test was taken more than four hours after the time
10 alleged?

11 MR. ADAMS: No, I do not.

12 And, Your Honor, we're not asking for for any kind
13 of a presumption or inference that the jury is allowed to
14 infer that the results taken at 10:30 are what the results
15 were at midnight. That is what -- we're not asking for
16 that presumption or that inference. We're asking for an
17 inference that a person, if the jury finds that Captain
18 Hazelwood had a blood alcohol level of over .10 at 12:00
19 o'clock or shortly thereafter, then they can use the
20 legislative judgment about interrelationship between blood
21 alcohol level and ability to drive. We're not asking for
22 an inference that

23 (Tape changed to C-3685.)

24 Your Honor, in addition, Mr. Madson brought this
25 up in his opening about the BA levels and that they're not

1 allowed to presume or that .06 is not in and of itself
2 evidence establishing negligence. I mean, excuse me,
3 establishing that the Defendant was intoxicated.

4 MR. MADSON: Well, that part is certainly true,
5 Your Honor, when the State gives their opening and starts
6 talking about a .04 I felt I had to say something on that
7 point, so that was simply in proper rebuttal to the State's
8 opening. But, you know, we're really getting into a
9 situation where the State is asking this Court to step on
10 some extremely thin ice. I think they've totally missed
11 the point, and I would urge the Court to read the footnote
12 in Williams, when they really set out what this presumption
13 means and why the four-hour requirement is there. And
14 there's other cases.

15 Let's see, I think in -- Komo is one, too. I
16 think that's an excellent example. If you look at Komo,
17 remember the evidence of intoxication there was his driving
18 and the fact that an accident happened. This happened
19 again -- the accident occurred some time prior to, some
20 hours before the actual taking of the blood test. Now, the
21 State was not allowed to -- or did not, I don't know if
22 they just recognized it or the Judge did it, the case
23 doesn't set that out, doesn't make it clear -- but it was
24 very clear there was no presumption given to the jury.

25 The only evidence was, like we had in this case --

1 it's identical to this case -- where you have a test taken
2 some hours later, well beyond the four-hour limitation, and
3 then the evidence is confined to whether or not he was
4 under the influence at the time -- in other words, visibly
5 and noticeably impaired, not the presumption. And in
6 Williams they set out the reason for that. The
7 legislature, as in Bresnick, has created this inference or
8 presumption that if a test is taken within four hours this
9 presumption arises.

10 Now, the fact that you can take the test and
11 extrapolate, like they did here, does not give rise to the
12 inference. All that does is create a way or a means of
13 saying, "Well, this is what the blood alcohol was at that
14 time," but that doesn't give rise to the use of the
15 presumption or the inference here. And I think Williams
16 really sets that out in -- you look at that and Komo and it
17 makes sense, because there it wasn't done. And I don't
18 know of any case where it's been done, where the test was
19 taken outside the four hours. I've had numerous
20 manslaughter cases where the test is taken, you know, an
21 accident, somebody's brought to the hospital, blood test is
22 within an hour and two, and this is done, but I've never
23 had one where it's been a situation like this.

24 Because this is designed for the .10 theory of
25 intoxication, but that's why then the legislature says, "It

1 only applies because it only makes sense if this test is
2 done within this period of time." Because beyond that it's
3 anybody's guess. That's not to say like, in Williams, the
4 Court said, "Well, it's certainly relevant evidence of what
5 a blood alcohol content could be at an earlier time, but it
6 does not give rise to the presumption," and that's exactly
7 what we've said in there.

8 THE COURT: All right. Mr. Adams, I won't be
9 giving that instruction either. I've concluded that the
10 inferences that are permitted under 28-35033 are inferences
11 on evidence that was gained as a result of tests by the
12 Department of Public Safety, either through the intoximeter
13 or approved blood tests, that the tests that were
14 administered were not administered in accord with the
15 methods approved by the Department of Public Safety, and
16 that to give that instruction would be error. Your request
17 is, however, noted.

18 Any other suggestions to the Court's proposed
19 instructions, Mr. Adams?

20 MR. ADAMS: Your Honor, reviewing Instruction
21 Number 37, I believe that we agreed to that instruction on
22 Friday. However, it was something that was just put forth
23 to us without a memo outlining that instruction, and upon
24 closer review we believe that it has certain words in it
25 that are not appropriate under the law. To be specific,

1 the word "noticeable" and "noticeable." In the sixth line
2 down it says, "great or small that if adversely affected
3 and noticeably impaired his actions, reactions, or mental
4 processes."

5 We don't believe that the law requires that a
6 person be noticeably impaired, that that's going to give
7 the jury the wrong idea that instead of a driving while
8 intoxicated we have a drunk driving charge, and in District
9 Court that's an argument and something that the District
10 Courts always rely on and it's something -- it's the
11 difference between -- in a driving while impaired case, all
12 you have to do is prove the person was impaired, and
13 impaired means not only his physical abilities but his
14 mental ability. And when you put something in here it
15 changes it from a driving while impaired to someone who
16 stumbled on drunk. And that puts an unfair burden on the
17 State. All we have to do is prove that he was impaired,
18 not that he was stumble-down drunk.

19 THE COURT: So you would argue that at this time
20 you'd eliminate the word "noticeably" on the sixth line and
21 you would eliminate the phrase "to a noticeable degree" on
22 the next to last line, is that correct?

23 MR. ADAMS: Yes, Your Honor. In fact, I believe
24 that those are the only two instances where those words are
25 used.

1 THE COURT: This is your last shot at this
2 instruction --

3 MR. ADAMS: Your Honor --

4 THE COURT: -- is there anything else you wanted
5 to argue about it?

6 MR. ADAMS: -- in our office and in the Anchorage
7 District Courts, the instruction that we proposed is the
8 one that's used. It's always used. And if this is the one
9 that's used up in the Fourth Judicial District, as Mr.
10 Madson states, then we feel that that's wrong, that it puts
11 an improper burden on the State.

12 THE COURT: You have no objection to the
13 instruction in Number 37 if we eliminate the term
14 "noticeably" in the sixth line and "to a noticeable degree"
15 in the second to the last line, is that correct?

16 MR. ADAMS: That's correct, yes.

17 THE COURT: Okay. Mr. Madson?

18 MR. MADSON: Your Honor, I got this instruction
19 from Judge Zimmerman's chambers, and it's consistently and
20 routinely given by all the District Courts in Fairbanks.
21 Now, maybe there's a distinction between drunk drivers in
22 Fairbanks and Anchorage. Maybe in Fairbanks they have to
23 be noticeable while here they can drive around without
24 being noticed. But there has to be some way of knowing
25 when a person is impaired. I mean, we just have to look at

1 this in a common-sense way. Certainly, the test is whether
2 you're impaired. I mean, that's what driving while
3 intoxicated is all about. But how do you translate that to
4 a jury and what do they look for when they do that? You
5 can either have a blood test, number one, or else there's
6 evidence of impairment. What's the evidence of impairment
7 that his physical or mental abilities -- that you could
8 notice it? The routine one is a police officer saying,
9 "Yes, I gave him these tests. He couldn't perform the
10 tests right. His mental abilities were a little bit
11 screwed up. He couldn't count, he couldn't do this, he
12 couldn't walk the line." These are noticeable impairments.

13 If you take away that language and those words --
14 and also, I might add, the State of Anchorage was certainly
15 represented and has been represented in prosecuting cases
16 in Fairbanks routinely and I don't know if they've ever
17 objected to this or if they have, if it ever was taken up
18 on appeal. I'm certainly not aware of a case that
19 construed this, but my gosh, it's been around for a long
20 time. This is the first time I've heard an objection to
21 it.

22 THE COURT: All right, I'll eliminate the word
23 "noticeably" and "to a noticeable degree." I think that's
24 the way it should be. There's lots of people who can mask
25 their impairment so as not to appear noticeably impaired

1 but certainly can be considered impaired based on their
2 actions and their judgment calls.

3 Mr. Adams, next?

4 MR. ADAMS: If I could just have one moment, Your
5 Honor?

6 THE COURT: Yes, sir.

7 MR. ADAMS: That's it, Your Honor.

8 THE COURT: Okay. There is an instruction I think
9 we need to -- Number 28, Court's proposed Number 28. Mr.
10 Madson, Court's proposed Number 28.

11 MR. MADSON: Which one?

12 THE COURT: Number 28.

13 MR. MADSON: That's out, yes.

14 THE COURT: Pardon?

15 MR. MADSON: What about it, Your Honor?

16 THE COURT: That's out, is that correct?

17 MR. MADSON: Yes.

18 THE COURT: Okay, I wanted to make sure. Okay, so
19 we'll take all the lesser includeds out.

20 Now, I'm going to formulate a new causation
21 instruction, Mr. Madson, that will talk in terms of the
22 Defendant's conduct must be a cause, a legal cause, which
23 will be defined as a proximate cause of the harm. It need
24 not be the only cause, but it must be a cause and a cause
25 will be defined as being a substantial factor in bringing

1 about the outcome of the events -- something along those
2 lines, that's what --

3 MR. MADSON: That probably would cover it.

4 THE COURT: Something like that okay with you,
5 Mr. --

6 MR. ADAMS: That's fine, Your Honor.

7 THE COURT: Okay. David, you can get cracking on
8 that.

9 And Mr. Madson, you've requested Instruction
10 Number 24, which has a third element, "that the negligence
11 of Captain Hazelwood, if any, was the legal cause of the
12 discharge of oil," I'm not going to be giving that, Mr.
13 Madson. That's included in the second element and I'll be
14 giving an instruction on causation, what that means. I
15 will not be giving it as a third element.

16 MR. MADSON: Okay, that's fine. That'll cover it.

17 THE COURT: Okay., are there any other
18 instructions that we need to discuss at this time from the
19 State's point of view that haven't been covered? Maybe you
20 want to talk it over with all three of you there before we
21 ...

22 MR. ADAMS: Your Honor, is ruling that you are not
23 going to be giving lesser includeds to the criminal
24 mischief?

25 THE COURT: That's correct. Unless there's

1 something dramatic happens between now and late this
2 afternoon. I can't foresee that, but if there's some case
3 law that says, "Yes, that is," and it would be error to
4 refuse to give it, I will not be giving it.

5 MR. ADAMS: Nothing further, then, Your Honor.

6 THE COURT: Okay., from the Defendant's point of
7 view?

8 MR. MADSON: No, nothing.

9 THE COURT: Okay. I think the numbers will have
10 to be changed since we're withdrawing some of them. We
11 will withdraw the ones that won't be necessary any more,
12 we'll renumber them, I'll make the changes that we've
13 talked about today, I'll pull out the lesser included
14 verdict forms.

15 Now, counsel, to avoid a problem, I'd request that
16 you hang around here and you go through the exhibits so we
17 don't have any problem exhibits on the morning of the
18 argument tomorrow morning. We've got all morning and this
19 is as good a time as any to go through them. There is
20 going to be an exhibit you're going to submit, Number 180,
21 I believe, and if there is a problem develops you can
22 notify me this morning or this afternoon and we can take
23 that up then.

24 Anything else we can do? How about -- Mr. Madson,
25 I don't know how they do it in Fairbanks or how they do it

1 in New York, Mr. Chalos, but if both parties agree to waive
2 their presence during playbacks they may do so. My
3 standard procedure is to call the attorneys for each
4 questions asked unless it's a question like, "May we have
5 pencils?" in which case I'd call you and say is it okay,
6 but normally I'd call you and say, "Come on down, let's
7 resolve the question," and if they wanted a playback we
8 could find out from them what they wanted and if you didn't
9 want to be present I would instruct the jury that nobody
10 would be present except the in-court deputy, the bailiff,
11 and the jury, and that they would be required to listen and
12 not talk in the jury box; if they need to take a restroom
13 break, notify Mr. Purden, and then they listen to the
14 completion of it and they go back to the jury room. If
15 there was any discussion took place, Mr. Purden would be
16 instructed to stop the recording, notify me, and I'd notify
17 counsel. Does counsel wish to be present during playbacks?

18 MR. MADSON: No, Your Honor. We would waive
19 presence during any playback.

20 THE COURT: On behalf of Defendant. Does the
21 State wish to be present during playbacks?

22 MR. ADAMS: No. We waive.

23 THE COURT: Okay. Any objection to them having a
24 sufficient supply of paper pads and pencils in the jury
25 room?

1 MR. MADSON: Certainly not.

2 THE COURT: Okay. Any objection to them having
3 their notes that they've been taking for the last seven
4 weeks in the jury room?

5 MR. MADSON: Oh, I'd request it, Your Honor.
6 Otherwise, we're going to have playbacks for the next six
7 months.

8 THE COURT: Any objection?

9 MR. ADAMS: No.

10 THE COURT: Okay. How about a video -- was there
11 a video? There was a video, wasn't there? How about a
12 video machine in the jury room in case they need to use it?

13 MR. MADSON: I would object to that, Your Honor.
14 The tape is in evidence, but to put special emphasis on
15 that video, which is of oiled beaches and stuff like that
16 so that they can play it any time they want... If they
17 request that that video be played, then that's something we
18 can take up, but to have the actual machine in there and
19 who knows what else they can get, I mean it's possible to
20 watch As The World Turns on that thing.

21 THE COURT: Okay., any objection to if they
22 request it we'll take it up at that time?

23 MR. ADAMS: We can take it up then.

24 THE COURT: Okay, how about a tape -- how about a
25 cassette tape recorder so they can play --

1 MR. MADSON: I have the same objection with that,
2 Your Honor. The tape is evidence but the recorder never
3 came in. If they want to play it, they can request the
4 Court, we can be heard on that, they could in and hear it,
5 but to have it available and to take that one piece of
6 evidence and play it as many times as they want really
7 gives them a lot of undue emphasis on one item.

8 THE COURT: All right. Mr. Cole?

9 MR. COLE: Well, I think that they should have the
10 tape.

11 THE COURT: Recorder? The player?

12 MR. COLE: The recorder, yes. There's a number of
13 tapes in evidence and otherwise if today -- they're
14 entitled to listen to the tapes, they're admitted, they
15 should be entitled to have that back there and listen to
16 those tapes.

17 THE COURT: All right. Is that tape player -- can
18 you get us one that doesn't have a radio function on it?

19 MR. COLE: Yes, I can bring one of those over.

20 THE COURT: And have the tapes themselves been
21 protected against erasure?

22 MR. COLE: I believe yes, they have. We'll
23 check.

24 THE COURT: Okay, over objection the jury will be
25 permitted to have a tape player to play the cassettes.

1 Make sure that you get the right cassettes to the jury and
2 that there aren't any that --

3 MR. COLE: There's one that's not supposed to go
4 in and we'll make sure that we (inaudible) --

5 THE COURT: -- would inadvertently get to the
6 jury. Okay.

7 Anything else you can think of before we ...

8 MR. MADSON: No.

9 THE COURT: Okay, I'll start working on these
10 instructions and if you have anything you come up with here
11 that's important enough to call me, let me know, and in the
12 meantime I'll get you a copy of the instructions later this
13 morning or early afternoon.

14 We stand recessed.

15 (Whereupon, proceedings were concluded at 10:50
16 a.m.)

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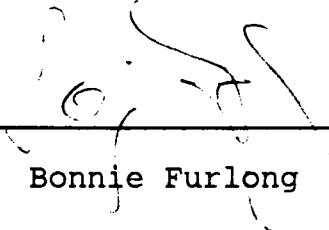
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SUPERIOR COURT)
) Case No. 3ANS89-7217
STATE OF ALASKA) Case No. 3ANS89-7218

I do hereby certify that the foregoing transcript was typed by me and that said transcript is a true record of the recorded proceedings to the best of my ability.



Bonnie Furlong

STATE OF ALASKA

IN THE SUPERIOR COURT AT ANCHORAGE

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In the Matter of:	:	
STATE OF ALASKA	:	Case No. 3ANS89-7217
versus	:	Case No. 3ANS89-7218
JOSEPH J. HAZELWOOD	:	
-----	:	

Anchorage, Alaska
March 20, 1990

The above-entitled matter came on for trial by jury before the Honorable Karl S. Johnstone, commencing at 8:35 a.m. on March 20, 1990. This transcript was prepared from tapes recorded by the Court.

APPEARANCES:

On behalf of the State:

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 MARY ANN HENRY, Esq.

On behalf of the Defendant:

 DICK L. MADSON, Esq.

 MIKE CHALOS, Esq.

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DEFENDANT'S

IDENTIFICATION

IN EVIDENCE

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211

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212

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P R O C E E D I N G S

(Tape C-3685)

THE CLERK: -- the Honorable Karl S. Johnstone presiding is now in session.

JUDGE JOHNSTONE: You may be seated. Mr. Madson, did you need to take up a matter before bringing the jury in?

MR. MADSON: Yes, very, very briefly, Your Honor. What I was concerned about is that since the State has ruled that -- the Court has ruled that the State cannot use the .10 theory to support its case for intoxication, I want to make sure that Mr. Cole is precluded from arguing that .10 or above, as far as the blood test is concerned, is evidence -- is intoxicated under state law. In other words, I think since the Court has ruled on this, the State shouldn't go around the bend, so to speak, and be able to argue this to the jury, even though there's no instructions on it and that and that whole theory has been effectively discarded. So I think anything saying, any statements saying .10 or greater is in violation of state law I think would be prohibited under the Court's ruling.

MR. COLE: Judge, that's what the law is in the State of Alaska. If you're above a .10, you're intoxicated. We should be able to put that in. We talked about it. It was testified to by Dr. Prouty. It's

1 evidence of what other people have found to be a level of
2 impairment that we're talking about.

3 JUDGE JOHNSTONE: Was that part of the evidence in
4 this case, that under state law, that a .10 --

5 MR. COLE: Mr. Prouty testified to that, yes.

6 JUDGE JOHNSTONE: I thought he did, too.

7 MR. MADSON: Well, Your Honor, he did. Where
8 we're making a mistake here -- and I really urge the Court
9 to think about this very carefully because, again, there
10 are two theories here. The Court has ruled that the .10
11 theory is out and the only way that can come into play is
12 when a test is given within the four hours or, in other
13 words, it's a valid test. Then you have the .10 theory.
14 That's out of the picture. It's impairment and impairment,
15 only.

16 Now the State is free to argue those numbers. I'm
17 not saying that. The .10 or greater or a .07 or a .2, it's
18 all evidence of impairment. But to say that that, by
19 itself, now -- and state law says .10 or greater is in
20 violation of state law, to be able to argue that now is
21 simply doing what the Court said we couldn't do.

22 JUDGE JOHNSTONE: Okay, Mr. Cole, you can argue
23 the evidence, whatever Mr. Prouty said, you can argue that
24 as the evidence. My recollection is that Dr. Prouty said
25 that many states have a threshold of 10. Some have lower.

1 He doesn't know any that have less than I think a little
2 higher number, maybe it was 10, and he included that Alaska
3 state law was 10. You can argue the evidence.

4 Mr. Madson, he can do that and I'm going to remind
5 the jury that arguments of Counsel are not evidence and
6 they're bound to follow the Court's instructions on the
7 interpretation of evidence.

8 We're ready now with the jury?

9 I would like to be able to see what you're doing
10 during the argument. You can twist it around enough for me
11 to see.

12 MR. COLE: Yes, I will.

13 JUDGE JOHNSTONE: And, Mr. Madson, if you want to
14 sit over next to Ms. Henry to look at the board, you may do
15 so, while the argument is going on or you may remain there.

16 MR. MADSON: Another thing, Your Honor. The jury
17 has note pads there, but I would -- argument is not
18 evidence. I would urge the Court to remind them that
19 perhaps they should not be taking notes because I think
20 that might -- I'd like to have them take notes for me, but
21 I don't want them to take notes for Mr. Cole. So I just
22 think that note taking -- I don't know, I've never seen it
23 done. I don't know what this Court's preference is and
24 it's obviously your call, but I kind of worry about taking
25 notes in final arguments.

1 JUDGE JOHNSTONE: All right, I'll tell the jury
2 that they should just listen and not take notes at this
3 time.

4 Counsel, I'm going to have 12 copies of the jury
5 instructions prepared. Any objection to giving those
6 copies to the jury, Mr. Cole?

7 MR. COLE: No.

8 JUDGE JOHNSTONE: Mr. Madson?

9 MR. MADSON: I'm sorry, I didn't hear you.

10 JUDGE JOHNSTONE: I'm having 12 copies of the jury
11 instructions made for each individual juror. Any problem
12 with that?

13 MR. MADSON: Oh, no, not at all.

14 (Whereupon, the jury enters the courtroom.)

15 JUDGE JOHNSTONE: Good morning, ladies and
16 gentlemen. We're about to hear final arguments in this
17 case. During the course of the evidence, I've allowed you
18 to take notes. That's to facilitate your recollection in
19 deliberations, to assist you in your recollection and
20 assist you in deliberations, if it need be. However, as I
21 instructed you earlier, statements and now final arguments
22 of Counsel are not evidence, so I would ask you not to take
23 notes, just put the note pads down on the floor. You may
24 take your notes with you into deliberations.

25 Now Mr. Cole will be making an opening statement

1 and closing argument in just a minute. I remind you that
2 his closing argument, as Mr. Madson's closing argument, is
3 not evidence. Sometimes the arguments differ from the
4 evidence, that's generally inadvertent. You'll have 12
5 times of collective memory of any one of us and use that
6 collective memory if the arguments differ from it.

7 I'll be giving you jury instructions some time
8 later on, probably this afternoon. They're fairly
9 lengthy. It's not a memory contest. You'll be each
10 getting a copy of the jury instructions for your
11 deliberations. We'll take a break probably in about an
12 hour and a half. I don't know how long Mr. Cole's first
13 part of the argument will take, but in around an hour and a
14 half, we'll take a break and we'll take breaks
15 periodically. We will have a lunch break today and we'll
16 try to coincide it with a break in the arguments, but we
17 will have lunch. Mr. Cole.

18 MR. COLE: Thank you, Your Honor. Mr. Madson, Mr.
19 Chalos, Judge Johnstone, ladies and gentlemen of the jury,
20 on March 23d, 1989, Captain Joseph Hazelwood, the man who
21 sits to my right, chose to be a gambler. He chose to be a
22 risk taker that day. He chose to sit in a bar, the
23 Pipeline Club, most of the afternoon and drink prior to
24 going to work that evening. And when he made that choice,
25 he risked the safety of his vessel right here. He risked

1 not only the safety of that vessel; he risked the safety of
2 the crew and he risked the cargo that she carried.

3 He gambled that day that his drinking would not
4 adversely affect his judgment or decision making that
5 night. He was wrong, ladies and gentlemen, because alcohol
6 never improves judgment, never.

7 Captain Joseph Hazelwood gambled and lost. He
8 took too many risks and it resulted in a captain's worst
9 nightmare, finding your vessel grounded on a rock and
10 helplessly watching the oil that you had once known was
11 stored safely within the vessel bubbling out and being
12 carried into the rest of Prince William Sound.

13 And if there is any question in your mind about
14 that risk that faces every tanker captain that enters and
15 leaves Prince William Sound every day, then I urge you to
16 watch the videotape that was done by Dan Lawn. That
17 videotape shows better than anyone or any person can
18 testify or describe in words the helpless feeling that a
19 tanker captain must feel, the fear that every tanker
20 captain is aware of when that film showed you the oil
21 bubbling out of that vessel and being carried away.

22 Essentially, ladies and gentlemen, what that video
23 shows is just exactly what you would expect out of tanker
24 captains. It shows that they know of the risk that's
25 involved and that, above all else, safety should be first.

1 On March 23d, 1989, Captain Hazelwood did not have
2 safety first in his mind when he was drinking at the
3 Pipeline Club that day. If he had, he wouldn't have been
4 there. He didn't have safety first on his mind when he
5 left the bridge for the Narrows because if he had had
6 safety first on his mind, he wouldn't have left the
7 bridge. He didn't have safety on his mind when he left --
8 when he placed the vessel on auto pilot after heading
9 toward Bligh Reef and accelerated to sea speed. If he had
10 had safety first, he wouldn't have left the lanes in the
11 first place. And if he had to leave the lanes, he wouldn't
12 have accelerated to sea speed and he would have checked the
13 helm and kept the steering on helm. And he didn't have
14 safety first when he left the bridge that evening in the
15 hands of Greg Cousins and Mr. Kagan because if he had had
16 safety first, he wouldn't have left.

17 And these errors in judgment are not merely the
18 product of a person who's careless. They were much more
19 than that, ladies and gentlemen, as all the captains came
20 in and testified to. They were actions and judgments of a
21 person whose mind was clouded with alcohol from that
22 drinking that day. And as Mr. Prouty so accurately stated,
23 alcohol has the effect of unraveling the knitted sleeve of
24 care. And there could be no better example of that than
25 the facts of this case.

1 On March 23d, 1989, Captain Joseph Hazelwood chose
2 to be a gambler. He chose to be a risk taker. And because
3 of his choices that day, you have been called to sit in
4 this case.

5 Now Judge Johnstone indicated to you that this is
6 closing and this is the second part, second to the last
7 part of the case before you will be asked to deliberate.
8 The last part, obviously, is Judge Johnstone will read the
9 instructions.

10 The purposes of closing are for the attorneys to
11 summarize the facts, to go through some of the instructions
12 and show you how the facts apply or don't apply to the
13 instructions, the law that you've been given.

14 I remind you, as Judge Johnstone did, that our
15 arguments are not evidence. If I misstate the facts, I
16 apologize. If my recitation of the facts is different than
17 what you remember, you should follow your own belief, how
18 you remember it, because your collective memory is much
19 better than mine.

20 But remember this. You've taken an oath to follow
21 the law in this case. You'll receive that in this package
22 of instructions and it looks a lot like this. In addition
23 to the law in this case, you will get very helpful
24 instructions on how to view the evidence, how to evaluate
25 the credibility of witnesses and experts. In addition to

1 that, there is also information on how to deliberate, some
2 interesting tidbits to help during your deliberations. And
3 we're going to be discussing some of them, but by not means
4 all of them. That's not because they aren't all important;
5 it's just that we're limited in time.

6 In this case, ladies and gentlemen, there have
7 been four crimes that have been charged, as you can see,
8 criminal mischief in the second degree, reckless
9 endangerment, operating a water craft under the influence,
10 and negligent discharge of the oil. You will be instructed
11 that it's the burden of the State of Alaska, which it is,
12 to prove beyond a reasonable doubt these elements of the
13 crimes and that is what the State of Alaska's burden is.
14 It's not any more than that.

15 An example of that. Oftentimes, you hear the
16 language, "drunk driving." Ladies and gentlemen, you're
17 not going to see in any of these instructions anywhere
18 where a person has to be drunk. That's not what the law is
19 and we don't have to prove that a person is drunk. We have
20 to prove that they were impaired, under the influence, and
21 operating. Those are the things.

22 And, additionally, there will be times there will
23 be disputes over, for instance, what type of coat somebody
24 was wearing, something like that, or what time the vessel
25 left or what time it actually hit the reef. You'll see

1 that there's no requirement that the State prove that
2 beyond a reasonable doubt. The burden of the State of
3 Alaska in this case is to prove the elements beyond a
4 reasonable doubt.

5 Now there are several things that jurors often
6 become confused upon in criminal trials and I'd like to
7 talk about a couple of them. You're going to get an
8 instruction that says that there is a requirement that
9 there be a joint action of the culpable mental state in a
10 criminal act and you're going to say, "Gosh, what do they
11 mean by that?" Well, in criminal law, the law that we have
12 in Alaska, it requires that there be -- for a person to
13 commit a crime, that they both do a criminal act and that
14 they have a culpable mental state.

15 I want to give you an example of what happens when
16 you don't have one and you have the other. I hate my
17 neighbor. I can't stand my neighbor. I plot every day to
18 kill my neighbor. But I never do anything about it. Now I
19 may have a culpable mental state in that I intend to kill
20 my neighbor, but if I never do any criminal act, I'm not
21 guilty of any crime because you're not guilty of crimes in
22 Alaska for just having bad thoughts.

23 Now another example. You're driving down the
24 highway. It's night out. You're in a desert. There is
25 nobody, no houses, no establishments, no nothing. And

1 you're driving down the road and you're observing the speed
2 limit. You've got your lights in working condition. And
3 out of the blue, somewhere where you have no expectation of
4 somebody being, a small child jumps out and you strike that
5 child with your car and you hurt her, him. Now there is
6 what would be called a criminal act. Someone's been hurt
7 or even maybe killed. But if you were exercising all care,
8 caution, you would not be guilty of a crime because you
9 didn't have the reckless mental intent.

10 Now in the State of Alaska, there are five mental
11 intents and you can -- culpable mental intents, and you can
12 see them here and you'll also see them in the criminal
13 charges. But, essentially, they go in an order of
14 priority. They are for criminal matters, a person acts
15 intentionally, knowingly, recklessly, with criminal
16 negligence and negligent. And we assume that a person who
17 commits crimes intentionally is more culpable, is a worse
18 person than someone who does it negligently. That just
19 makes sense, nothing confusing about that.

20 A person acts intentionally when they're conscious
21 objective is to cause a result. A person acts knowingly
22 when they have a -- the language is aware of the
23 substantial probability that their actions will cause a
24 result. A person acts recklessly when they are aware of
25 and consciously disregard a substantial and unjustifiable

1 risks. And a person acts with criminal negligence when
2 they fail to perceive a substantial and unjustifiable
3 risk. And, finally, a person acts negligently when they
4 fail to perceive an unjustifiable risk that a result will
5 occur. And that's what I'm sure you're saying right now,
6 "Well, what does all that mean, Mr. Cole? That's all nice
7 and good. Give us some examples."

8 Now the easiest way to do that is to start with a
9 criminal act that we can all understand and let's call it a
10 homicide, a death. Let's say we have a homicide and let's
11 apply to these particular culpable mental states. If I
12 take my car and I see my neighbor there, the person I hated
13 so bad, and I say, "I'm going to kill you," and I run that
14 person over, my conscious objective is to cause that
15 result. I act intentionally. That's an example of when a
16 person acts intentionally.

17 Now the second culpable mental state is
18 knowingly. That is when, for instance, I may be driving
19 down the road and I see people on the sidewalk. I don't
20 intend to kill them, but I intend to drive on the
21 sidewalk. Well, I'm aware of the substantial probability
22 of causing their death if I know that there are people on
23 the sidewalk.

24 The next level down, when a person acts recklessly
25 in my scenario, the most easy way to understand that is

1 manslaughter. In the State of Alaska, it's when a person
2 gets behind the wheel of a vehicle when they've been
3 drinking too much and they kill someone because people are
4 aware of the risks of drinking and driving. We hear it
5 every day. But if you drink and you drive, you consciously
6 disregard that risk of somebody being injured, of your
7 judgment being bad. And that is a substantial and
8 unjustifiable risk in our society. That is the best
9 example of when a person acts recklessly, when they're
10 under the influence and they get behind the wheel and
11 drive.

12 A person acts with criminal negligence. Well, how
13 would that happen? Well, that's a tough one. The law is
14 that you don't necessarily have to be aware of the risk.
15 You just have to fail to perceive a substantial and
16 unjustifiable risk. And an example of that would be
17 someone who has never seen a car. Maybe he comes from some
18 place where they never had them and he is given a car and
19 he has no idea of the danger involved in driving a motor
20 vehicle. And he gets in it and he drives and he hurts
21 somebody, kills somebody. That person might not have been
22 aware of the risk, but he failed to perceive it and it's a
23 substantial and unjustifiable risk. Let's say he was
24 speeding.

25 Finally, negligence under the circumstances, and

1 that's very simple. You're driving along the road and as
2 you're approaching an intersection, your pen falls over on
3 your passenger's side and you reach down to get it and you
4 take your eyes away from the road. You don't see that the
5 light turned red and you go through the light. That's an
6 example of when somebody acts negligently. He should have
7 known better.

8 Those are the standards that we have in Alaska,
9 but in particular, ladies and gentlemen, these -- this one,
10 recklessly and negligence, are the ones that will be
11 applicable in this case. I only did this to give you an
12 idea of where these particular mental states sit. You'll
13 notice that nowhere will you read that a person has to
14 intend to violate the law. That's not what the law is.
15 And that's exactly why we have manslaughter laws. Most
16 people that get behind the wheel of a car and drive when
17 they've been drinking don't intend to commit any crimes.
18 They're aware of the risk of danger and they consciously
19 disregard it, but they're not intending to commit any
20 crimes.

21 Next, you say, "Well, how do you ever determine
22 what's going on in a person's mind to be able to make this
23 determination of what a person is," because obviously I
24 can't look into any one of your minds and see what you're
25 thinking. That's a difficult concept. But it's not

1 impossible, it's not impossible at all. I'll give you an
2 example.

3 You go to a store or a restaurant and you take
4 your jacket and you hang it up on the wall and you walk
5 over to the corner and you're sitting there looking and you
6 watch. And all of a sudden, someone gets up, goes over and
7 starts to take your jacket. Now at that time, right there,
8 if you freeze that instant, it might be difficult to
9 determine whether that person was just making a mistake or
10 whether that person was intentionally stealing your
11 jacket. So what would you do? You would look at what he
12 did before and what he did after. Was he cautious? Did he
13 try and avoid you? Did he run when he did it? Did he
14 appear to nonchalantly do it? Those are common sense
15 factors, things that we think about every day. We make
16 these decisions about what's going through a person's mind
17 every day whenever we meet people. That's exactly what
18 you're going to be asked to do here and that's exactly what
19 the law will say.

20 Circumstantial evidence is a good indication,
21 absent someone saying, "I'm thinking right now this."
22 Circumstantial evidence is a good indication of what a
23 person's state of mind is.

24 I'd like to start by eliminating some things that
25 are not at issue so that when you go back, you will have

1 certain things that are not at issue and you'll know it.
2 First of all, that this happened on or about March 24th is
3 not really in issue in this case. Everything happened on
4 or about -- you'll read the on or about instruction and it
5 says it doesn't have to be exactly on that date, it could
6 be a little bit before or a little bit after.

7 Negligent discharge of oil, that Captain Hazelwood
8 negligently discharged or caused to be discharged or
9 permitted the discharge of oil into and upon the waters and
10 the land. Well, there's no doubt that oil got discharged
11 in this case. There's no doubt that it happened on
12 March 24th. And, ladies and gentlemen, there's no doubt
13 that Captain Hazelwood was, at a minimum, negligent.

14 Remember -- I forgot to mention this -- if a
15 person is reckless, they also act with criminal negligence
16 and they also act with negligence. I mean just a person
17 who acts -- kills, intentionally kills somebody acts
18 knowingly, recklessly, with criminal negligence or with
19 negligence. So this encompasses that; the reckless
20 standard encompasses negligence.

21 Captain Hazelwood said it was his fault in his
22 statement, "I've got to accept responsibility for
23 overestimating the abilities of the third mate." That's an
24 admission. He told Mr. Myers, "It's my fault for not being
25 on the bridge." He was asked by Trooper Fox what the

1 problem was and he said, "You're looking at him." And his
2 attorneys, in essence, said that in their opening when they
3 talked about fault and how it was evenly distributed among
4 the people.

5 This count is not at issue, ladies and gentlemen.
6 It happened on the 24th. There's no doubt that oil was
7 discharged. And if you follow the law and the testimony,
8 there's only one verdict that applies to that count.

9 Now I'm going to skip the operating under the
10 influence, but just talk briefly about this part. You'll
11 see that the common thread running through both criminal
12 mischief and reckless endangerment is that the Defendant
13 had to act recklessly in both cases. There is no doubt
14 that this happened on the 24th, 1989. There's no doubt
15 that Captain Hazelwood had no right or any reasonable
16 ground to believe that he could create this risk. He
17 didn't have that. And there's no doubt that the risk of
18 damage in this case exceeded \$100,000.00. You saw, you've
19 seen that the damage that actually occurred went well over
20 millions of dollars. And you've seen that the risk was
21 created by the use of widely dangerous means.

22 Now the definition of widely dangerous means,
23 you'll find that in here, and it basically says any
24 difficult to confine substance, force or other means
25 capable of causing widespread damage. Oil falls right - an

1 oil spill falls right in that definition. It's a difficult
2 to confine substance, as we saw, and it is capable of
3 causing widespread damage, which you heard testimony about,
4 the clean-up, the killing. In addition, you saw how many
5 animals it killed. It could be considered a poison.

6 Don't be misled by the fact that in the first part
7 of the definition of widely dangerous means it doesn't have
8 the word "oil spill" in it. The last word is -- and it
9 gives a bunch of examples of what constitutes widely
10 dangerous means and you don't find the word "oil spill" in
11 that. But that's because legislators can't anticipate
12 every possible widely dangerous means that could be
13 introduced into our community. And so what they did is
14 they said -- they defined it as meaning any difficult to
15 confine substance, force or other means capable of causing
16 widespread damage and then they gave some examples, fire,
17 explosion, avalanche, poison, radioactive material,
18 bacteria, collapse of buildings or flood, but it's not an
19 inclusive group.

20 And all that means -- the instruction reads, "An
21 oil spill may be considered a widely dangerous means."
22 There's no doubt that oil is a widely dangerous means.

23 So, really, the risk here, the element at issue,
24 is whether or not Captain Hazelwood recklessly created a
25 risk of damage to the property of another. Second, on

1 reckless endangerment, there's no doubt that it occurred on
2 March 24th. And, third, there really isn't much of a doubt
3 that by grounding, you create -- the risk of a grounding
4 creates a substantial risk of serious physical injury.
5 People -- if you ground -- tankers capsize, they break up.
6 That causes people to be placed at serious risk, there's no
7 doubt about that. The only real issue on that count is
8 whether he, Captain Hazelwood, recklessly engaged in
9 conduct that created a substantial risk.

10 Now, I'm halfway through with my argument, so bear
11 with me. There's only a couple of more areas that I want
12 to talk about.

13 The first part we're going to talk about is what
14 operating under the influence, operating a water craft
15 under the influence means. And then we're going to talk
16 about what constitutes recklessness.

17 So let's focus on the third thing for just a
18 minute. No doubt, Captain Hazelwood -- this occurred on or
19 about March 24th, 1989. Captain Hazelwood operated a water
20 craft. Well, you say, "What does operate a water
21 craft . . .," that will be defined in the instructions that
22 you receive. It basically says it means to navigate or
23 use; that's what operate means. In addition, there's
24 another instruction that talks about what navigate or use
25 means. And that means -- and it's further defined to mean

1 directing influence, domination or regulation of the
2 vessel. That's the instruction that you will receive on
3 what the definition of operating is. There's no doubt that
4 this is a water craft. I mean it's used for commercial
5 purposes.

6 Now on a tanker, you've learned a little bit about
7 how they are actually operated. It's not like a motor
8 vehicle. You've seen, through the testimony, that it
9 requires at least two people, generally, and in certain
10 circumstances, three. But the helmsman stays at the helm
11 and he doesn't -- all he does is direct the steering. He
12 takes orders and he just keeps whatever -- he just does
13 what they tell him. He's an extension of the wheel, as
14 Captain Walker said. The watchman officer, if there's
15 three people on the bridge, is just required, generally, to
16 oversee the helm, work the throttle, the teletype, and make
17 plots if it's necessary to put them in their position.

18 But the person who actually navigates the vessel,
19 who exercises control over the vessel, that is the one who
20 has the conn. You've heard that expression a number of
21 times. That person has the control of the vessel. He is
22 the one, he or she is the one that directs what heading it
23 will take, what turns it will make. He is the one that is
24 responsible for the safety of the vessel at that time, the
25 person on the conn. And on this evening, ladies and

1 gentlemen, Captain Hazelwood had the conn from 11:24, when
2 the pilot got off, until 11:53, when he left the bridge,
3 and then again at 11:18, when he ordered it turned off, and
4 then again at 11:36, I believe, :38, when he ordered the
5 vessel started up again, until 1:41 that morning. Captain
6 Hazelwood gave the orders. He gave the turning
7 instructions. He had control of the vessel. He operated a
8 water craft.

9 Finally, the State has to prove that while he was
10 operating that water craft, he was under the influence of
11 intoxicating liquor. Now I touched on it briefly at the
12 beginning, but I want to emphasize again, because it's a
13 notion that a lot of people have. This is not drunk
14 driving. There is going to be -- you're not going to read
15 one thing in there that says a person has to be drunk,
16 because the image that we have when a person is drunk is
17 that he's stumbling and that he's falling down and he needs
18 support. We don't let people get to that point before we
19 say that they've committed a crime in our state because by
20 the time they've gotten to that point, they're well beyond
21 being a danger. They're a hazard.

22 What we make a crime is that when you operate a
23 motor vehicle and your physical and mental impaired -- and
24 that's what the definition is. You're going to find that
25 definition in Instruction 33 and I'd like to read just a

1 portion of it to emphasize how important it is. "A person
2 is under the influence of intoxicating liquor when he has
3 consumed alcohol to such an extent as to impair his ability
4 to operate a water craft. 'Under the influence of
5 intoxicating liquor' means that the Defendant consumed some
6 alcohol, whether mild or _____, in such a quantity,
7 whether great or small, that it adversely affected and
8 impaired his actions, reactions or mental processes under
9 the circumstances then existing and deprived him of that
10 clearness of intellect and control of himself which he
11 would otherwise have possessed.

12 "The question is not how much alcohol would affect
13 an ordinary person. The question is what effect did the
14 alcohol consumed by the Defendant have on him at the time
15 and place involved. If the consumption of alcohol so
16 affected the nervous system, brain or muscles of the
17 Defendant as to impair his ability to operate the water
18 craft, then the Defendant was under the influence."

19 Well, you say, "That's nice, Mr. Cole, but I mean
20 how do we apply that to these facts?" Well, you've got a
21 number of ways. You could focus on several of the
22 witnesses in evaluating it. You need to think about what
23 Mr. Prouty had to say. You need to think about what Mr.
24 Burr had to say. And you need to think about what Mr.
25 Hlastala had to say because they all say pretty much the
same thing. They

1 may not want to admit it, but they do.

2 We know that, in Alaska, as Mr. Prouty -- and in
3 many states in the country, the legal level for
4 intoxication is .10. We also have heard that many people
5 believe -- many other states have an even lower blood
6 alcohol content level at a .08. You heard Mr. Prouty talk
7 about when alcohol starts to impair people's judgment.
8 And, remember, we're talking about judgment; we're talking
9 about decision making and whether or not alcohol has an
10 effect on your judgment and your decision making. And you
11 remember Mr. Prouty saying that in his experiments, he
12 found that a person's judgment is affected well before
13 clinical manifestations of impairment are seen. He told
14 you and you learned, both from him and Mr. Burr, that
15 physical and visual observations are a crude means of
16 predicting intoxication and that the best means is the
17 blood test. And why is that? It only makes sense, ladies
18 and gentlemen. Because physical evidence doesn't lie.

19 You can do whatever you want. You can argue
20 whatever you want in this case. But you've got to remember
21 that at 10:30 a.m., on March 24th, Captain Hazelwood had a
22 .061 and you can't take that away, a .061. You can't get
23 around that. Their experts testified that they assumed
24 that it was valid. They have nothing to believe that that
25 was an invalid test. You can't get around a .061 at 10:30

1 in the morning.

2 Now the next thing you can't get around is that
3 there's no evidence that he was drinking after 8:00 o'clock
4 that evening, the night before. You can't do it.

5 And Mr. Madson, in his opening, he told you,
6 "You're going to conclude that that's meaningless, has no
7 value." Ladies and gentlemen, you can't do that because
8 you can't get around a .061. You can try, but you can't,
9 and he can try, but he can't. He can do anything he
10 wants. He can bring people in here to say, "Oh, you know,
11 some people absorb -- eliminate at very high levels and
12 they're all differentiated. Some people, it takes longer
13 for alcohol to get through their system." But the bottom
14 line is, at 10:30, he's got an .061. And we all know from
15 our own experiences, nothing new -- what Mr. Prouty came up
16 here and said, "Look, after awhile, alcohol starts
17 eliminating and the studies show that 96 percent of the
18 people, the large majority, everything they've had to
19 drink, when they stop, it takes them about an hour to an
20 hour and a half before they stop going up." Remember,
21 that's a very important thing about back calculating or
22 retrograde extrapolation. You have to be able -- you can
23 only do it when you're in the elimination phase.

24 Back calculation is not a difficult concept. It
25 just makes sense. If you haven't had a drink in a long

1 time and you go and you have a blood alcohol test and
2 you're not going up at the time you have the test, if you
3 go back, you would be at a higher level. It's not a
4 difficult concept.

5 Now the accuracy of it may be difficult to
6 pinpoint because people have different individual
7 elimination rates. But the concept, itself, is sound.
8 Every graph that you saw them draw, bring up here and put
9 up here went down because, at a certain point, we all go
10 down. And the evidence in this case is that Captain
11 Hazelwood stopped drinking essential at -- he says in a
12 statement -- he makes one statement that he stopped
13 drinking at about 8:30, when he had a couple of Mooseys,
14 but before they sailed. But you know that that has no
15 significance because the level of alcohol in a Moosey is
16 very small. Essentially, he stopped drinking at 8:00. And
17 under everybody's theory, he's in the elimination phase at
18 12:00 o'clock.

19 Now you say, "Well, what significance does that
20 have?" Well, it has a large significance. We know that if
21 he's a .061 at 10:30 and he's in the elimination phase back
22 to midnight, if he has a rate of elimination of about .08,
23 which is what most people have, he's at about a .25 at
24 12:00 o'clock. If he has an elimination rate of .10 -- or
25 .01, he is at .17 at 12:00 o'clock. If he happens to have

1 an elimination rate even as low as .004, he still, at 12:00
2 o'clock, is a .14. Under every scenario that you have, he
3 is above a .10 at 12:00 o'clock that night.

4 And the law in Alaska is that way. You've heard
5 Mr. Prouty tell you that all people are impaired at that
6 level. You have no reason to disbelieve that. There's no
7 evidence of drinking afterward. And without any evidence
8 of drinking, you have to conclude that his alcohol level
9 was going down. And though Dr. Hlastala may not like the
10 theory, he's got -- he even had wrote about it. What did
11 his article say? He comes in here and tells you that you
12 can't do it, you can't back calculate. But in his own
13 article, he says, "In addition, it is always worth
14 considering retrograde extrapolation from the time of the
15 blood or breath test to the time of the driving or the
16 other incident. However, this procedure has some
17 uncertainty. Widmark's formula does not provide an easy
18 answer because that formula assumes all the alcohol is
19 completely absorbed from the stomach into the blood stream.

20 "If the Defendant was well into the
21 post-absorbative phase, the calculated BAC will be
22 accurate." Their own expert.

23 However, remember that it sometimes takes four
24 hours after drinking to reach the post-absorbative phase.
25 Had Captain Hazelwood stopped at 8:00 o'clock, there's your

1 four hours. That's an extreme; most people are an hour and
2 a half.

3 We know, in this case, that he was in a bar in the
4 afternoon, 2:00 o'clock at least. Jamie Delozier was in
5 there until some time after she left, which was 2:45. He
6 had at least two drinks there and she saw him. A, she saw
7 the outfit that he had on, the hat, the jacket. He came
8 within two feet of her. He ordered a vodka on the rocks
9 and it was a special vodka and he had two of them then, at
10 least, that she remembers.

11 We heard the testimony of Jerzy Glowacki who said
12 that he got there some time before 4:00 o'clock. Captain
13 Hazelwood joined him about 15 minutes later. And the two
14 of them drank in that bar until at least 7:00 o'clock that
15 evening. And that's all they did. They didn't say they
16 ate. They weren't playing games. They weren't
17 socializing. They weren't doing anything. All they were
18 doing is sitting in the bar, knowing they were leaving that
19 night, Captain Hazelwood knowing that he was going to be
20 the one responsible for the safe passage of that vessel
21 outside Prince William Sound sound that evening and they
22 sat in the bar and did nothing but drink, had nothing else
23 to do but drink and talk.

24 You know, ladies and gentlemen, it doesn't take
25 someone like Mr. Prouty or Mr. Burr, who both said that we

1 don't accurately remember how many drinks we have when
2 we're sitting around, unless we have a reason to do or
3 unless somebody's keeping track of who's paying. People
4 don't do it. And they didn't do it accurately in this case
5 because it boggles the imagination that these three
6 gentlemen who are doing nothing but drinking had two to
7 three drinks over a three-hour period in the Pipeline
8 Club. It doesn't happen.

9 Then from there, what do they do? They don't go
10 home. They don't get anything to eat. They go over and
11 pick up a pizza. They can't stay in the pizza parlor and
12 wait for their pizza. They can't shop around, no. They've
13 got to go to another bar and have another drink and Captain
14 Hazelwood has another vodka. Now, remember, when they had
15 left, they knew they were leaving at 9:00 o'clock that
16 evening and they had to be back at 8:00. Now they're going
17 to say, well, they learned they were supposed to leave at
18 10:00 o'clock. Well, they could have checked, number one,
19 and, number two, so what? If they're leaving at 10:00
20 o'clock, what are these guys doing drinking at 7:30? And
21 it's because they just didn't care.

22 He didn't care. He was willing to take the risk
23 that by drinking, it would not affect his judgment that
24 evening. He was willing to take the risk and he took it.
25 And you saw there was other evidence.

1 Patricia Caples testified that Captain Hazelwood
2 wasn't his normal, businesslike personality. He seemed
3 much more personal, "I suspected he had been drinking." He
4 seemed to stumble at one point when he was leaving. He had
5 red eyes. Mr. Murphy, Captain Murphy, said, "I smelled
6 alcohol on his breath at 8:30." What else did he say? "He
7 left the bridge. When he came back up, when I was getting
8 ready to get dropped off . . .," what did Captain Murphy
9 said -- ". . . I smelled alcohol on his breath again."
10 This is right before this guy is getting ready to take over
11 command of this vessel.

12 And who is the next person, the next person,
13 objective person on this vessel, Falkenstein, Lieutenant
14 Commander Falkenstein. When he comes aboard this vessel at
15 3:45 that morning, what does he say? "I smelled alcohol.
16 It was obvious." What did Investigator Delozier say? "It
17 was obvious," the first thing. It wasn't 15 minutes
18 later. It wasn't a half an hour later that somebody went,
19 "Gee whiz, something's wrong here." They had a
20 conversation with this man from two to three feet away and
21 what's the first thing they do? They walk outside and say,
22 "We've got to do something," and they attempt to order
23 someone to get out there and get a blood test. That's the
24 first thing they do. It's not 20 minutes later, it's not a
25 half-hour later. They come in there and it's obvious.

1 So you've got to say to yourself, "Well, wait
2 minute. Murphy, Patricia Caples, these two guys, what was
3 going on with the crew?" I mean, you know, Greg Cousins
4 never smelled anything, no sign whatsoever. Maureen Jones,
5 nothing. Bob Kagan, no signs of impairment.

6 Ladies and gentlemen, all I can say is I direct
7 you to Instruction Number 6. This talks about how you
8 should interpret or perceive a witness' testimony. And
9 there are a lot of things that you should look at in
10 evaluating someone's credibility, among those, the witness'
11 attitude, behavior and appearance on the stand and the way
12 the witness testifies. You got a good chance to watch how
13 these witnesses, one after one, stepped down, gave their
14 respects to Captain Hazelwood and walked away, like it was
15 a very difficult thing for them to be doing in this
16 courtroom. You got an opportunity to see the accuracy of
17 their memory and how they were so sure about all the events
18 that happened up to the grounding, but, gosh, when it came
19 time to tell you about what he was trying to do after the
20 grounding, Greg Cousins goes, "Geez, I don't know what he
21 was doing." Maureen Jones goes, "Oh, I don't know what he
22 was doing." Though they're sitting on the bridge for an
23 hour and a half or an hour, while he's giving commands,
24 they don't know what he's doing. And Bob Kagan says,
25 "Well, I don't know what he was doing, either."

1 And you know what the best example of the loyalty
2 of this crew was? It's this point exactly. Every one of
3 those witnesses, when I asked them, I said, "Look, what was
4 was he trying to do?" "I don't know, I don't know."
5 "Well, isn't it true that you told this person, this person
6 and this person that he was trying to get it off the reef
7 and now you're saying you don't know?" And they said
8 yes. Every one of those crew members came in and changed
9 their mind and said, in front of you, "Well, I don't know
10 what he was doing. I think he was trying to get it off the
11 reef." And the reason is because they all knew that was a
12 dumb decision by Captain Hazelwood to try and take that
13 vessel off the reef.

14 Bob Kagan expressed that more than anybody. He
15 realized in talking, remember, I said, "Mr. Kagan, the
16 reason that you come to this conclusion that he was trying
17 to get it off the reef is because you've talked with people
18 and they said nobody would have tried to get it off the
19 reef, so he couldn't have been trying it, isn't that
20 right?" "Yes." But at the time when he gave his
21 statements and before the time when anybody knew the
22 importance of it, they were all saying what everybody knew
23 and what they heard and we've seen, he was trying to get it
24 off the reef.

25 Motive not to tell the truth? About having to go

1 back into the maritime industry, knowing that you have been
2 a witness against a captain. How far do you think that
3 will get you in the maritime industry? Pressures.
4 Pressures put on by Exxon. Notice all these people had
5 turns, they're all talking with Exxon in turn. You see the
6 presence of Exxon throughout this trial. And you heard
7 from Captain Stalzer that Exxon had an interest in it and
8 it doesn't take a brain surgeon to figure out what Exxon
9 Corporation's interest is in this matter. It's seeing
10 Captain Hazelwood get acquitted.

11 And it doesn't take anybody to figure out that
12 when Exxon experts are coming in and testifying for the
13 Defense where Exxon stands in this an the pressure that
14 they had to be putting on these people.

15 Ladies and gentlemen, each one of these witnesses
16 said there was nothing different with Captain Hazelwood
17 that evening. What I would ask you to do is when you go
18 back in that jury room, you take that tape, that inbound
19 tape, and you put it in and you listen to it. Then you
20 take the next tape, the outbound tape, on the 23d, before,
21 at 11:24 and listen to that tape. There is a different
22 person on that. It's the same Captain Hazelwood, but he's
23 a different person and you can tell it just from
24 listening. Then you take and you get the one at 9:00
25 o'clock and you put it in there. And then you take and you

1 put the one that says Captain Hazelwood's Interview at 1:00
2 o'clock with Trooper Fox and put it in there. Every one of
3 those, ladies and gentlemen, you'll see, is different from
4 the person who was operating that vessel at 11:24, when he
5 called the VTC Center. And it's obvious. Do it and you'll
6 see. It's a person who's not as precise, who makes
7 mistakes, whose voice is slow, makes one after another.

8 But the best evidence, ladies and gentlemen, of
9 Captain Hazelwood's intoxication is his judgment during the
10 course of this, leaving the bridge through the Narrows,
11 evidence of bad judgment; putting the vessel on auto pilot
12 in Prince William Sound when confronting this, bad
13 judgment; accelerating to sea speed, bad judgment; leaving
14 the TSS zone without contacting the VTC, bad judgment;
15 leaving the bridge with Bob Kagan at the helm, bad
16 judgment; leaving the bridge with Greg Cousins the only one
17 up there, bad judgment; attempting -- not coming to the
18 bridge when Greg Cousins called and said, "We may be
19 running into the reef -- to the leading edge of the ice,
20 bad judgment; leaving -- attempting to get the vessel off
21 the reef, bad judgment.

22 Now one of the things you've got to remember is,
23 you say, "Well, what about the physical signs no crew
24 members saw?" You've got to remember two thing. First of
25 all, Captain Hazelwood -- this is a three-hour trip we're

1 talking about. They left at 9:00 o'clock. They're
2 grounded at right around 12:00. And he's down below where
3 no one can see him for an hour, an hour and a half, closer
4 to an hour and a half. That's one of the reasons why
5 people don't see him and that's one of the reasons why you
6 don't have more signs because Captain Hazelwood knew that
7 he was not in a condition to run that vessel. And he did
8 what Mr. Burr said, in an attempt to mask, in an attempt to
9 prevent people from seeing the signs, the clinical
10 manifestations of intoxication, he chose to be absent and
11 he chose to be absent in the two places that it's the most
12 critical.

13 Sure, there's a couple of more critical places,
14 but I can't think of too many. One of them might be
15 Hinchinbrook and they didn't make it there. The other
16 might be in the Gulf of Alaska under certain circumstances,
17 if the weather comes up. But the Narrows, you're within a
18 quarter mile of the beach and he is not there, poor
19 judgment, ladies and gentlemen, all of it a sign that
20 Captain Hazelwood, on March 23d, was impaired by the use of
21 alcohol that day.

22 In addition to that, you have the evidence of back
23 calculation, going from an .061 back to midnight. You
24 can't get around that .061 and you can't get around the
25 fact that he exercised bad judgment throughout this vessel

1 and you can't get around the fact that he was drinking a
2 bar before.

3 Now the last part of my argument, I'd like to
4 focus on the risk and what constitutes recklessness in this
5 matter. But I'd like to talk for just a minute about what
6 we've learned about this industry. Obviously, there was a
7 lot of information that you received during the course of
8 this trial that was not really relevant to these particular
9 counts. But in order for you to understand what was the
10 industry practice, you have to understand the tanker
11 industry itself and that requires learning about what the
12 crew members did, the qualifications and their licenses and
13 things like that.

14 But there are some areas that are particularly
15 important and I'd like to talk about them now. The first
16 thing that we learned is that every tanker captain that
17 came in here came in and told you that the most important
18 thing on his mind was safety, the safety of his crew, the
19 safety of his vessel, the safety of his cargo. And when we
20 talk about safety and we talk about risk and we talk about
21 recklessness, sometimes people get a little bit confused
22 about it.

23 But the concept of recklessness is really no
24 different, though it's maybe termed in legal words, it's no
25 different than what your ordinary understanding of the word

1 reckless is.

2 What's the best example that comes to mind when
3 you think about a person being reckless? You think about
4 the young kid who's driving down the street in kind of a
5 souped up car and he's going too fast through traffic and
6 you reach out and you say, "You know, that's just
7 reckless. That guy is going through the lanes and he's
8 going to cause an accident." And that's no different than
9 the concept of reckless that we're talking about here.

10 Another example. Some of you may drive back from
11 Alyeska and I'm sure that you've seen, after skiing, those
12 people that have got to pass 15 cars that are all going
13 home, not knowing who's coming the other way, another
14 example. You know, you say, when that person goes by, you
15 say, "God, that's just reckless. How can that person do
16 that when he doesn't know who's coming around the corner?"
17 You're aware of the risk when you get out in the passing
18 lane and try and pass somebody and you consciously
19 disregard it because you go out there and it's a
20 substantial and unjustifiable risk.

21 It's the same thing in this case. A reckless
22 person is generally a risk taker. He's a person who's not
23 safe. And it's important to realize that safety and risk
24 taking are kind of inversely related. In other words, the
25 more safe you are, the less risk is involved in what you

1 do. However, the more risky you are, the less safe you
2 become. That's a very simple concept. But it's something
3 that you should remember during your deliberations.

4 And in determining in this case what constitutes a
5 gross deviation from the standard of care as a reasonable
6 person, you need to think about the situation that these
7 people have placed themselves in, these tanker captains.
8 You're dealing with more than just a ship captain, okay?
9 The person that we're talking about here, we're dealing
10 with a tanker captain, and that's different than just a
11 ship captain. A tanker captain has a responsibility, in
12 this case, for at least 19 people, crew members on board.
13 And his decisions have a significant effect on their well
14 being.

15 The second thing is he differs, though, from like
16 a grain ship tanker captain because if a -- let's say a
17 tanker captain who's carrying grain grounds his vessel. He
18 feeds the ocean. But a tanker captain, he grounds his
19 vessel, he spills oil wherever he goes. The risks are much
20 greater. The risk to our environment, the risk to
21 wildlife, everything is much greater. It's an elevated
22 plain.

23 In this case, Captain Hazelwood's vessel was
24 carrying 1.2 million barrels of oil. There's no doubt that
25 the risk that's involved is that if you damage or ground

1 your vessel, you risk causing an environmental
2 catastrophe. Every tanker captain who came in here told
3 you that.

4 (Change to Tape C-3686)

5 So what that means is when the risks go up, ladies
6 and gentlemen, your duty to exercise care and to be safe
7 also goes up and that just makes sense. And as you go up,
8 the potential consequences of your actions of not being
9 safe also go up.

10 And that's what we want, isn't it. I mean think
11 about it. Think about it in these terms. We demand high
12 standards out of these tanker captains for a reason,
13 because they carry an ecological time bomb on board. We
14 demand the same thing of the people that carry hazardous
15 waste on our highways. We demand the same high standard
16 and level of care out of the people that fly our airplanes
17 armed with nuclear bombs. We demand the high standard of
18 care for even the commercial pilots that get on our
19 airplanes and fly us to places because dealing with those
20 people, the consequences of them making mistakes, of their
21 judgment being affected by alcohol are significantly
22 greater than a person driving down the highway and we
23 demand a higher standard of care.

24 And you saw -- these tanker captains accept that
25 responsibility. You saw what type of conscientious, good

1 tanker captains came here, Captain Stalzer, Captain
2 Beevers, Captain Mackintire, salts of the sea, understood
3 their responsibility and went by the line, Captain Deppe.
4 Even Captain Walker was always on the bridge and put safety
5 first. But it's important to remember that this is a very
6 high standard that we expect out of them.

7 So I guess the next thing is, well -- before I
8 even go into that, I think you should also remember that
9 the system that we have designed is devoted to creating and
10 fostering safety in this industry. We've got a VTC Center
11 to help them. We've got one-way traffic in the Narrows.
12 We've got radar tracking them all the time in the Narrows.
13 We've got a speed limit in the Narrows. We've got lanes
14 out in Prince William Sound. We provide them with a pilot
15 who has special knowledge of the area to help guide these
16 tankers in and out. We provide them with radio
17 communications. All of that designed for one reason, to
18 promote safety. It is done to avoid the risk that is
19 inherent in every trip that goes in and out of Prince
20 William Sound, the promotion of safety.

21 Now in addition to that, the vessels, themselves,
22 are designed to promote safety. I mean the Exxon Valdez,
23 you saw that it was, navigationally, it was a very good
24 ship. It had rudder indicators, rate of turn, gyro
25 repeaters, fathometers, NAVSAT systems, Lorans. They had

1 capability for selectional navigation, dopplers, speed
2 indicators. Everything was designed to make the navigation
3 of this vessel as safe as possible. You had
4 communication. You had an advance steering mechanism.

5 And what about the people that actually were on
6 the vessel? You heard about the qualifications that were
7 necessary. Even to be an AB, you had to be in the industry
8 to a long time or you had to go -- for a third mate, you
9 had to be in the industry for a long time or you had to go
10 to a maritime school and then you had to get in so much sea
11 time and then you could qualify for a second mate. And
12 then, after a license, you get your second mate's license,
13 you have to qualify and go through other courses and learn
14 more things. And you saw how long it took for a lot of
15 these people to get to the level of master. And even once
16 they made the level of master, they're still sending them
17 to steering school, fire fighting, things like that. And
18 what is the whole purpose? The whole purpose is to be
19 safe. And why is that? Because the consequences are so
20 great if you're not. If you're a risk taker, the
21 consequences are just too great.

22 The best insurance policy of the whole thing,
23 though, ladies and gentlemen, is a competent and sober
24 tanker captain and that's the best insurance policy any
25 ship could have because that man takes them in and out.

1 He's the one that directs them. He's the one on the
2 bridge. And it's through his experience that the safe
3 passage can occur. And that didn't happen in this case.

4 The second concept of risk that I would like you
5 to think about is that -- and which is important in this
6 case because your initial reaction is, I'm sure, "Well, Mr.
7 Cole, that's nice, but if there's a risk with every one of
8 these guys, isn't that a problem? Every one of these
9 tankers, there's a risk of going aground, perhaps spilling
10 oil." And that's true. But that's why we create the
11 system that we did. This whole maritime industry is
12 nothing more than risk minimization. Every step is
13 designed to minimize the risk involved in this industry.

14 But there's another concept that you need to think
15 about and that there are certain circumstances where it's
16 even more important that you be safe and that's what the
17 circumstance was on March 23d, 1989. It was approaching
18 ice. It was laid out like this. You'll see it says, Note
19 E, "During the calving season, Columbia Glacier deposits
20 ice which may drift into the northern part of Prince
21 William Sound. Mariners are advised to exercise extreme
22 caution . . .," extreme caution, ". . . and report all ice
23 sightings."

24 Pick up the bridge manual when you're in there.
25 Read about the bridge manual. And one of them, it says,

1 "When you shall be on the bridge." 2.1.5, "The master must
2 be on the bridge whenever conditions present a potential
3 threat to the vessel, such as passing in the vicinity of
4 shoals, rocks or other hazards which represent any threat
5 to the safe navigation." How about less than a mile or a
6 mile off Busby, shoals, threat? How about the red sector,
7 being in the red sector, being minutes away from the red
8 sector? These are the kinds of situations, ladies and
9 gentlemen, when you're around ice, when you're around land,
10 that you have to exercise extreme caution and that was not
11 done in this case.

12 Now we've talked about the risk that's involved
13 when you drink before you do anything and a number of you
14 were asked those questions, "Before you go to work, do you
15 drink?" You don't drink because it impairs your judgment,
16 it impairs your ability to do work. And that's exactly
17 what happened here. And by drinking in the bar that
18 afternoon, Captain Hazelwood risked -- was aware of the
19 risk and chose to disregard the risk that alcohol would
20 affect his judgment that evening. And by doing that, there
21 was more risk involved in his case than his vessel was
22 going to be left safe.

23 Now I'm not going to go over and talk about all
24 the things that we talked about about drinking. But you
25 have to remember that in this particular scenario, we've

1 got a person who's going to work and prior to that, he's
2 drinking for at least three and a half hours. What did the
3 masters say about that? They all said that he was not --
4 they would not drink.

5 Now the second thing, leaving the bridge in the
6 Narrows. Like I said, ladies and gentlemen, there's only a
7 couple of places that are important in this whole thing,
8 but one of them is Prince William Sound. But even more
9 importantly, there's the undocking process, there's going
10 through the Narrows, there's going through Hinchinbrook.
11 He didn't make it to Hinchinbrook and missed one of the --
12 the going through the Narrows. He risked the safety of his
13 vessel. He risked the fact that something might go wrong,
14 that the other people -- and that he would not be able to
15 be there and respond. "Who would be on the bridge," the
16 tanker captains. Captain Stalzer, Bob Beevers, Captain
17 Mackintire. Captain Walker said he was always on the
18 bridge through the Narrows. And Mr. Mihajlovic, Captain
19 Hazelwood's friend for 14 years, said he was on the bridge
20 all the time, except for once. And why? It's very simple,
21 because it's a dangerous area and danger means you exercise
22 more caution. And that's all that they're telling us, that
23 Captain Hazelwood chose to disregard that risk on this
24 particular occasion. He chose to put the safety of his
25 vessel down below, not place it as his first priority. And

1 by doing so, he showed you why he was not functioning
2 properly, his functions were not proper that evening.

3 The next thing, somewhere after 12:45, this vessel
4 was placed on auto pilot. Now you'll remember the
5 testimony that Mr. Claar steadied up on 180 and you can see
6 it from the course recorder. 12:45, 12:48, somewhere in
7 there, this vessel was placed on automatic pilot and it did
8 not vary the whole time until it turned. There isn't one
9 piece of variance. You can see somebody right here making
10 changes back and forth. But this one, there's no variance,
11 none whatsoever.

12 Now what did Captain Hazelwood risk by placing
13 that vessel on auto pilot? He risked that someone would
14 forget that it's on if he left and that they would attempt
15 to make maneuvers and that it wouldn't occur, they wouldn't
16 be able to, because you heard that you can't turn the
17 vessel, it doesn't turn when it's on auto pilot. What
18 tanker captains told you that they used auto pilot in
19 Prince William Sound? Captain Stalzer said he didn't.
20 Captain Beevers said he didn't. Captain Walker said he
21 didn't. Captain Mihajlovic said he did it once when he was
22 stowing a ladder. Captain Mackintire said he didn't.
23 There's a reason why all these people, these captains, come
24 in here and say, "I don't use it," because it's not safe
25 and you don't want it in gyro or automatic pilot when

1 you're confronting these types of situations. It's like
2 putting your car on cruise control when you're approaching
3 an accident. You don't do it.

4 Accelerating to sea speed. Well, before we get
5 there. He left the traffic lane about 11:51 and that's
6 when he left it entirely. Ladies and gentlemen, those
7 traffic lanes don't contain any rocks. You look at the
8 fathom markers; they're safe. You stay in those traffic
9 lanes, just like you stay on a road, in the lanes, and
10 you're safe. Now you may have to slow down because of ice
11 and you may have to maneuver around, but you don't run into
12 land there when you're in the traffic lanes. You don't run
13 into the reefs. And if you're going to go out of them, if
14 you're going to leave the traffic lane, then you've got to
15 be sure of what you're doing because it's more risky, once
16 you get out of those traffic lanes. You can see that
17 they're a mile wide, but once you get out of them, you
18 start running into land everywhere you go, so you've got to
19 be even more safe.

20 What's the risk? I guess the risk -- as it was so
21 eloquently put, the reason to do this is an attempt not to
22 lollygag around, as Captain Walker said. The risk is that
23 you will not have enough time to recognize a problem ahead
24 of you and take sufficient -- and be able to take
25 sufficient action. Think about it.

1 A vessel traveling at 12 knots, which is
2 approximately what the Exxon Valdez was traveling at the
3 time, travels at about .2 nautical miles per minute, .2
4 nautical miles per minute. In five minutes, it will go a
5 mile. If it travels at six knots, or one half, it will
6 take ten minutes to do a mile and, in a minute, it will
7 only go .1 mile. If Captain Hazelwood had been traveling
8 from the 1155 mark, which is abeam of Busby, if that vessel
9 had been traveling at six knots, rather than 12, at 12:02
10 or 12:01-1/2, when this vessel started to turn, it would
11 only have gone half the distance. That would have been a
12 margin of safety that Greg Cousins could have used to get
13 out of this thing. In addition, if it had gone 12 minutes,
14 then they would have been at the place down here. But
15 either way, going at a slower rate of speed gives you more
16 time to take action and that just makes sense. You're more
17 risky when you're going faster and you're less safe. And
18 think about it in this situation.

19 You're driving down the highway and up ahead you
20 see a trooper. He's got his lights out and there's an
21 accident in one of the lanes and let's say it's a four-lane
22 highway and you've got two lanes on your side and two on
23 the other. You don't accelerate coming to that accident
24 because you know that that's risky. As you go around, you
25 slow down and then when you get through it, you accelerate.

1 But you don't increase speed going into that accident. And
2 that's exactly what Captain Hazelwood was doing and that's
3 what he risked. And by doing it, he was more risky and
4 less safe.

5 Leaving the bridge with Bob Kagan at the helm.
6 What do we know about Mr. Kagan? You saw him testify. You
7 know that Captain Stalzer was told, "Watch him carefully."
8 Captain Stalzer had a conversation with Joseph Hazelwood,
9 Captain Joseph Hazelwood, and he said, "He needs close
10 supervision," those were his words. Captain Hazelwood was
11 told that by Lloyd LeCain, Bob Kagan's own mate. He was
12 told by James Kunkel. He was told it by all these people,
13 ladies and gentlemen, and by leaving the bridge, he risked
14 by Bob Kagan not being able to handle the circumstances
15 that he was put in. By not carefully making sure were the
16 people that should be there, he risked the safety of this
17 vessel. And you know, the sad thing is that Bob Kagan, Bob
18 Kagan, himself, told people that.

19 Bob Kagan told Captain Stalzer, "Look, I don't
20 feel comfortable," that's what Captain Stalzer said, "So I
21 gave him practice." Bob Kagan told Mr. LeCain he didn't
22 feel comfortable. He told everybody. But Captain
23 Hazelwood didn't listen. And now Captain Hazelwood comes
24 in here, through his attorneys, and blames Bob Kagan for
25 this accident, after telling him he did, ". . . a hell of a

1 job, Bob," but now we find that was sarcasm.

2 Leaving the bridge with Mr. Cousins as a watch
3 officer. Ladies and gentlemen, this is a chart of what Mr.
4 Cousins did from 11:39, when he came back up on the bridge,
5 to the time Captain Hazelwood left the bridge, and it's
6 just like the one that he did before. But these are the
7 things he did from 11:39 to 11:53, when the captain left.
8 He went and took a fix, so at 11:39, he was out on the
9 bridge. Then he went back to the starboard radar to get a
10 range. He went to the chart room to plot the fix, returned
11 to the starboard radar. That's when the captain tells him
12 they were going to divert the first time. He goes to the
13 windows to look for ice. He then goes to the bridge wing,
14 returns to the bridge, returns the binoculars, goes to the
15 starboard radar to determine the range, estimates it, tells
16 the captain about the ice, goes back to the starboard radar
17 to get a range, goes to the chart room, back to the radar
18 and about that time, Captain Hazelwood puts the vessel on
19 to accelerate to sea speed. Soon after that, there's the
20 crew change and the starboard radar, he goes back to the
21 starboard radar, and Captain Hazelwood leaves the bridge
22 and it's a number of things. He's going back and forth,
23 every one of these, and that's within about 13 minutes.

24 But it's even greater between 11:53 and 12:11. I
25 mean he leaves the bridge and he leaves Greg Cousins there,

1 himself. It's almost as if this is a test, "Look, you've
2 got all these things to do. Now I'm giving you ten minutes
3 to get out of it," because that's essentially what he left
4 Greg Cousins. He said, "Mr. Cousins, you're here. When
5 you get to here, turn there, and you've got ten minutes to
6 do it. I'll be back in a couple of minutes." He didn't
7 tell him a track. He didn't tell him a rate of turn. He
8 didn't go to a chart. He didn't do any of that, Captain
9 Hazelwood didn't. He pointed to something on a radar and
10 said, "When you get to about that point, turn and wind your
11 way back into the TSS lanes."

12 That's not an exercise of extreme caution, ladies
13 and gentlemen. That's an exercise of no caution. That is
14 someone who is not willing to accept the responsibility.
15 And all we're talking about is a couple of minutes he's got
16 to stay up on the bridge, 30 minutes to get through this
17 problem that he's taken steps to avoid, in the first place,
18 two minutes to make sure that the turn is executed. But he
19 can't even do that. He can't wait around for two more
20 minutes. He's got to go below to do what, paper work?
21 Paper work for Captain Hazelwood was more important than
22 the safety of his vessel and that's why when he left Mr.
23 Kagan, a person with limited experience, as a watch officer
24 -- and it was in violation of the Exxon policy regs -- when
25 he did that, he was more risky, less safe, no doubt about

1 it.

2 Now there's been some talk during this trial that
3 these regs, these guidelines, the brig organizational
4 manual, they're just guidelines and they don't have any
5 effect. Well, ladies and gentlemen, I guarantee you that
6 if Captain Hazelwood had followed those regs, he'd be in
7 here and his attorneys would be putting them in front of
8 our desk every day, saying, "He followed this, this, this,
9 this and this," but he didn't. It was clear that he was
10 violating those regs when he left the bridge that day after
11 placing -- after he was the one that placed his ship in the
12 position of peril.

13 Placing the Exxon Valdez in peril and leaving the
14 bridge. Don't forget, ladies and gentlemen, that it was
15 Captain Hazelwood who decided to avoid the ice and take a
16 heading of 180 degrees, placing this vessel directly in
17 line with Bligh. It was Captain Hazelwood who put it on
18 auto pilot. It was Captain Hazelwood who accelerated, who
19 chose to accelerate to sea speed. It was Captain Hazelwood
20 who chose to leave Bob Kagan on the bridge at the helm. It
21 was Captain Hazelwood who chose to leave Greg Cousins by
22 himself. And Greg Cousins wasn't qualified to be up there
23 and he didn't have the pilotage endorsement.

24 And I'm not going to spend any time on that,
25 ladies and gentlemen, because it's a moot issue. We've

1 heard a lot of evidence here about nonpilotage and
2 pilotage. But the bottom line was and is the Exxon Valdez
3 was a pilotage vessel. Captain Hazelwood was required to
4 be on the bridge at the conn throughout Prince William
5 Sound as a pilotage vessel, and not one tanker captain,
6 except for Captain Walker, said differently. And he said
7 it was based on a letter that he couldn't even explain why
8 that letter changed the regs for pilotage vessels.

9 The bottom line is Greg Cousins didn't have
10 pilotage. Captain Hazelwood did. They didn't have a pilot
11 on board, so Captain Hazelwood was required to be there
12 and, by law, could not leave the bridge until they were out
13 of Prince William Sound.

14 But, finally, it's Captain Hazelwood who places
15 the vessel on auto pilot. It's Captain Hazelwood who
16 leaves the bridge, who leaves the TSS zone. It's Captain
17 Hazelwood who orders it to accelerate and it's Captain
18 Hazelwood who leaves. And when he left, ladies and
19 gentlemen, there was more risk and he was less safe.

20 The concept of recklessness is not an absolute
21 thing. You just can't say one thing is reckless. When a
22 person drinks and drives and hurts somebody with a motor
23 vehicle, you look at the totality of their actions. You
24 look at whether they were speeding at the time. You look
25 at whether they went through red lights. You look at

1 whether they went through stop signs. You look at whether
2 it was light out and it wasn't easy to see. And then you
3 look at all those things and you say are these indications
4 of impairment if a person is disregarding these safety
5 rules and that is how you determine whether a person is
6 reckless. It's not one thing and it's not another. But in
7 this case, ladies and gentlemen, it's a number of things.

8 It's his drinking before departure. He knew what
9 the risk was, but he consciously disregarded it by going
10 ahead and drinking anyway. And the risk was that it would
11 affect his judgment. And by doing so, he was less safe.

12 When he left the bridge in the Narrows, he knew
13 what his risk was, but he was willing to take that risk.
14 He was willing to walk away from the bridge and leave his
15 vessel in the safety of hands of other people.

16 When he left the traffic lanes, he knew that was
17 more risky than being in the traffic lanes. He knew that
18 and he consciously disregarded it and left. And by doing
19 so, he was less safe, particularly when you put it in light
20 of placing the vessel on auto pilot, accelerating to sea
21 speed and placing the vessel in a position where it's going
22 to have Bligh -- Busby within a mile on your left, ice to
23 an even shorter distance on your right, a red zone with
24 Blight straight in front of you. He knew what the risks
25 were and he consciously disregarded those risks and they

1 were substantial, ladies and gentlemen, because as you'll
2 remember, there wasn't one tanker captain that came in here
3 and said that they would not be on the bridge during the
4 hypothetical that we gave to them. One person said he
5 probably would be on the bridge, but everyone else said,
6 "I'm on the bridge."

7 And that goes to show that this was a gross
8 deviation in this particular case, ladies and gentlemen.
9 It was a gross deviation from the standard of care that an
10 ordinary prudent tanker captain would exercise under the
11 circumstances. And for that reason, these acts constituted
12 recklessness.

13 JUDGE JOHNSTONE: Have you finished your first
14 portion?

15 MR. COLE: Yes.

16 JUDGE JOHNSTONE: We'll take our break, ladies and
17 gentlemen. Don't discuss this case in any way with any
18 other person, including among yourselves, and don't form or
19 express any opinions. We'll take about a 15-minute break.

20 THE CLERK: Please rise. This Court stands at
21 recess.

22 (Whereupon, the jury leaves the courtroom.)

23 (Whereupon, at 10:15 a.m., a recess was taken.)

24 (Whereupon, the jury enters the courtroom.)

25 JUDGE JOHNSTONE: You may be seated, thank you.

1 Are you ready, Mr. Madson?

2 MR. MADSON: Thank you, Your Honor.

3 JUDGE JOHNSTONE: You're welcome.

4 MR. MADSON: Well, at long last, ladies and
5 gentlemen, we're getting close. Bear with me, please. You
6 know, this is the time, for a trial attorney, it's either
7 the time you dread the most or the time you kind of like
8 the most, I guess it just depends on your makeup, because
9 it's a time when you've got a captive audience and you
10 really hope, if not dream at least, that there's something
11 that you're going to say that's going to make a difference
12 in the case. It's also the time that you wish you looked
13 like Paul Newman, you had a voice like Walter Cronkite, and
14 you could argue like Billy Graham or Martin Luther King.
15 But like Captain Hazelwood when he is on the ship, on the
16 Exxon Valdez, you kind of -- what you see is what you get
17 and that's the situation you're in here today.

18 But, first of all, I want to certainly on my
19 behalf and that of Captain Hazelwood and that of my
20 co-counsel, thank you for your attention during this
21 trial. It's been a very long trial. It's been a very
22 detailed trial, sometimes a very confusing trial. You've
23 seen papers floating around up here and you've seen people
24 talk about things that you haven't seen, documents,
25 pictures that you just got a glimpse of and you're soon

1 going to have in there to take your time. You've learned a
2 lot about tanker operations. You've learned a lot about
3 Prince William Sound. Maybe you're ready to take the
4 pilotage endorsement exam.

5 But the purpose of a final argument like this --
6 and it is argument and there's a reason for that -- is
7 because we, either Mr. Cole or myself, can take the
8 evidence and argue it in the light most favorable to our
9 position. But I think it's important to go back to the
10 beginning here. Let's start over again. It will just take
11 a few minutes.

12 At the very beginning, there were opening
13 statements. Now that's not evidence, either. But that's a
14 time when you don't argue your case. You just say, "Ladies
15 and gentlemen, you don't know anything about this case,
16 except what you've read in the papers, of course, and you
17 all said it isn't going to make any difference." Okay, so
18 put that aside and we'll start fresh and we're going to
19 prove things. The State says, "Here's what we're going to
20 prove beyond a reasonable doubt." Now the Defense made an
21 opening statement, too. Now let's go back to that, just so
22 we can start fresh and get the proper perspective in this
23 case.

24 The State's opening said they were going to prove
25 that Captain Hazelwood was reckless, drinking in town, he

1 was off the bridge in the Narrows, that he left the bridge
2 to unqualified people, that the auto pilot was on and the
3 load program up was on. He also said, "We're going to
4 prove intoxication by experts." These are important
5 things. It also said, "We're going to prove reckless
6 endangerment, that someone was actually at substantial risk
7 of serious injury or death" And, lastly, that he was going
8 to prove that Captain Hazelwood was negligent and caused
9 the discharge of oil.

10 On the other hand, we came to you and said, in
11 effect, there's a lot of things that went wrong down there,
12 a lot of things, in hindsight, that could have been done
13 differently. But Captain Hazelwood isn't perfect and he
14 made mistakes. The key question is do those mistakes,
15 errors or whatever you want to call them, on the part of
16 him and others, but only him because he's the only one on
17 trial here, were the kind of mistakes, the kind of error,
18 in hindsight, again, I remind you in hindsight, that rises
19 to the level of a criminal offense.

20 As I said, there were two things that were going
21 to be important, the difference between criminal
22 responsibility, civil fault of the state, accident -- we
23 said it was a maritime accident and accidents do not
24 happen, except in very rare cases, by an act of God, a tree
25 limb falling on your car or something, lightning striking,

1 they don't happen without human error. We are not perfect,
2 none of us. And that's the difference and it's an
3 important difference, we have to stress that over and over,
4 the difference between accidents that are going to happen,
5 no matter how we try, no matter what kind of technology we
6 have, no matter how many instruments are on the bridge of
7 the ship, it still comes down to people and people aren't
8 perfect. And Captain Hazelwood isn't perfect.

9 We also said that alcohol did not play any role in
10 this. Now let's look at the evidence here. First of all,
11 before we do that, though, I think I should take a minute
12 or two and perhaps just talk about some of the legal
13 aspects again. Mr. Cole did this and I'm not going to
14 elaborate on it because we've asked you to become maritime
15 experts and that's difficult enough. And now we're going
16 to ask you to become legal experts. That is a very, very
17 difficult task for any jury, to know all this, to acquire
18 all that knowledge and apply it in a short period of time
19 when we've spent days arguing about things that we're not
20 sure of, when the Court had questions. And now we expect
21 you to resolve those.

22 The jury system is just the greatest thing in the
23 world if it works and it almost always does. And when it
24 does, there's nothing better, because it puts 12 people
25 that have never seen each other before, who come from

1 different walks of life, different ages, different
2 everything, put you together and you come up as one mind.
3 You put all this together and, yet, you become one in a
4 unanimous verdict.

5 Now, first of all, I think it's appropriate to
6 mention that Mr. Cole's opening remarks -- and I say
7 opening remarks because he's going to talk to you again
8 here -- the way the rules work here -- some of you have
9 been on criminal cases before and probably remember this.
10 For those of you who have not, I think it's important to
11 note that the prosecution gets to argue, I get to argue,
12 and if they choose, they can save part of their argument
13 until later and I feel very confident Mr. Cole is going to
14 do that. The reason for that -- it may sound a little
15 unfair. Why should the State get two bites of this apple
16 and I only get one? The reason is because under the laws
17 of fair debate, the State has to prove their case beyond a
18 reasonable doubt. So, generally, the rules say, "Well,
19 since you have this high burden of proof, we'll let you
20 make these two arguments. So I say that now just so you
21 can understand perhaps what's going to happen later.

22 But Mr. Cole said Captain Hazelwood took a risk.
23 We all take risks. Every day you get up, you start taking
24 risks. You take a shower and step into the bathtub, you
25 take a risk. You drive to work. You do everything, every

1 day, taking a risk. Now none of these are minor risks.
2 Mr. Cole says that's a major risk when you talk about
3 Prince William Sound and operating a ship and drinking, a
4 major, major risk. Well, the word he left out was
5 "substantial." We're going to talk a lot about that, but
6 let me just continue for a minute and talk a minute or two
7 about the same thing Mr. Cole did, but perhaps in a little
8 different way, maybe not much, but at the very least, maybe
9 a few minutes of our time will help you understand what
10 these different mental states are that are required before
11 a person can be convicted of a crime.

12 And we have to think about this for one second.
13 What is the difference between making a mistake, civil
14 fault if you will, an error, and a criminal offense? The
15 difference is really a pretty simple one when you come down
16 to it, when you think about it. The legislature determined
17 that the person's acts, conduct, mental state, together,
18 are so bad that they deserve punishment. That's the
19 difference between the civil standard of just pure
20 negligence and a crime, punishment.

21 Somebody made that determination and it isn't one
22 of just whether you made a mistake. No, it's a gross,
23 serious mistake, so serious, the law says, that you can go
24 to jail and pay heavy fines for it. There is a basic
25 distinction and I think you have to keep that in mind at

1 all times because you're going to hear, over and over, and
2 you already have, safety of the ship, safety of the ship,
3 "He didn't do this," "He didn't do that."

4 Well, let's keep our eyes focused on the issue
5 here because, oftentimes, in a case where you don't have
6 the case, you talk emotion, you talk around it. In this
7 case, we're going to talk facts.

8 The criminal law is also divided into different
9 categories because of the seriousness of that mental state
10 and acts or conduct. Now that makes sense. Obviously,
11 murder is a far more serious offense than something like
12 shoplifting. You know, they're both crimes, and rightly
13 so, but one's far more serious than the other. So the
14 legislature then is divided up into what they call the
15 mental state, what you do and why you did it. And Mr. Cole
16 talked about the most serious, homicide. Of course, it
17 is. An attempt to kill, can you think of anything worse
18 than that? Intending to kill someone and doing it, that's
19 the ultimate.

20 So it goes downward from there. Intent to steal
21 is the same thing. Now that's showing what the person
22 truly wanted to do. He wanted to accomplish that result
23 which the law prohibits. Then we get into -- "knowingly"
24 doesn't apply here and Mr. Cole touched on that. Let's
25 just get right down to recklessly and criminal negligence,

1 negligence, these sorts of things. Recklessly is the most
2 important definition you're going to hear in this case and
3 you've heard it over and over again. And I can only tell
4 you, ladies and gentlemen, that it's the one that you
5 definitely have to look at the closest. You've heard it
6 defined. You'll have it defined in the jury instructions.
7 But it really means that being aware of, okay, aware of and
8 consciously disregarding a substantial and unjustifiable
9 risk that the result will occur.

10 Now there are some words in there. I want to talk
11 about that later, after we discuss the evidence here. But
12 that requires perhaps some kind of maybe an analogy.
13 Analogies don't always work. Sometimes they do; sometimes
14 they don't. But sometimes they're also helpful. An
15 analogy for recklessness. Mr. Cole gave you one. I can
16 give you one, too. I don't know if one's any better than
17 the other. But let's think about this for a minute. You
18 leave work and you drive home the same way every day. You
19 know that road very, very well. You know, as you come over
20 the top of the hill, there's a long grade and at the bottom
21 of that hill, there is a traffic light. And you leave work
22 and you want to get home fast, you're in a hurry and the
23 streets are a little bit slippery. And you know that
24 light. You come over the hill and the light is green and
25 you think to yourself, "If I step on it, I can make it, I

1 think." But there's a yellow school bus sitting there,
2 taking these kids home from school. It's parked there.
3 And if the light does change, that bus is more than likely
4 going to go out into the intersection and I may hit it with
5 disastrous results.

6 Knowing this, putting all this in your mind, you
7 make a conscious decision. You say, "I'm going to risk
8 it. I'm going to take that chance." And you do. Now,
9 granted, the result doesn't have to happen. The school bus
10 may not pull out because the driver may look around and see
11 you and say, "My gosh . . .," and stop and you whiz right
12 through, no problem. That's the risk.

13 Now you might contrast that one with a little
14 different one by being in the back seat and telling
15 somebody, "When you go over this hill, be very careful down
16 here," okay? You instruct someone to be careful and then
17 tell the driver to be careful and all these assurances and,
18 in spite of that, something happens. The person you told
19 didn't follow what you said.

20 Anyway, that's one example, for instance, of what
21 could be deemed reckless behavior. And it's a serious
22 thing. You think about it for awhile. That's asking an
23 awful lot, it's requiring an awful lot, on the part of a
24 person's mental state that is, what he's doing, which the
25 law prohibits. It's right up there when you can't say you

1 intended the result because, in my analogy, obviously, the
2 driver did not want to hurt anybody or kill anybody, but he
3 sure took one heck of a risk. That's what we're talking
4 about here, except for one charge. And oddly enough, the
5 only charge that involves the discharge of oil, the
6 criminal mischief charge, which has this high degree of
7 mental state requirement, doesn't say anything about
8 spilling oil, not one word. The only one that does is this
9 negligent discharge of oil statute. That's the only charge
10 Captain Hazelwood faces here, in this courtroom, that has
11 anything to do with spilling oil. That may sound strange,
12 but we don't make up these laws, folks. We've just got to
13 deal with them. But for whatever reason, that one simply
14 says that he had to act negligently. That's the lower
15 standard. That's the should have known. That's the
16 failure to perceive what could occur.

17 Now you think about that and the basic difference
18 between that and recklessness is a very substantial, very
19 important one. For recklessness, the State has to prove
20 what Captain Hazelwood actually knew and disregarded. For
21 negligence, they have to prove what he should have known
22 and failed to perceive.

23 Now that may sound confusing and I'll go into it
24 with you, it is. But if you just take a few minutes and
25 think about it, keep that distinction in your mind at all

1 times -- and it will be written out in the instructions.
2 But in all honestly, in all fairness, these are confusing
3 and you'll probably find them to be so. But maybe that
4 helps a little bit if you keep those two things in mind at
5 all times. Reckless requires the State to prove what he
6 knew and what he consciously disregarded, what he knew,
7 when he knew it, what he did. Negligence, what he should
8 have known, what he should have done, failure to perceive
9 and one other factor. That failure to exercise that due
10 caution or care must have been a proximate cause or
11 substantial cause of the result. We'll talk about that a
12 little later. But, anyway, those are the basic
13 distinctions that we have here.

14 Now with regard to each crime that he's charged
15 with, let's take a minute or two and see how these just
16 fit. Okay, criminal mischief in the second degree. You've
17 already heard about that and I'm not going to dwell on it.
18 But that has the recklessness, that's the reckless
19 element. They have to prove what he knew and there was a
20 substantial and unjustifiable risk and that he disregarded,
21 consciously disregarded it. And this, again, throughout
22 everything I say here and everything Mr. Cole says, when we
23 talk about proving it, it's beyond a reasonable doubt, and
24 we'll talk about that a little bit later. But that's
25 number one. That's a tough hurdle to get over right there.

1 And rightly so because this is a serious crime. This is a
2 serious crime we're talking about right here because of
3 that high mental state.

4 It may sound, you know, when you talk about it --
5 criminal mischief, what does that sound like? Something,
6 your kid went and threw a baseball through a neighbor's
7 window or something, you know. Well, that's mischief, just
8 something we associate with some kid's prank or something,
9 letting the air out of your tires. But what makes it go up
10 to that very high level of criminal culpability, serious
11 crime? Think about the rest of it. You're not only
12 reckless, which is high enough, but you have to show that
13 you risked damage to the property of another in the amount
14 of \$100,000.00 or more. Now that's a lot of money. That's
15 not throwing a baseball through a window. You're talking
16 serious stuff here, \$100,000.00 or more, plus widely
17 dangerous means. That's the means you have to employ,
18 you're required. That's an element of this, too. All
19 these are separate elements and the Court's going to
20 instruct you that you have to find reasonable doubt on each
21 and every -- you have to find beyond a reasonable doubt to
22 find him guilty, that it's proven on each and every one of
23 these elements. And they're all spelled out for you and
24 that, of course, is one of them, this widely dangerous
25 means. We'll get into that after awhile. But that's how

1 the mental state relates to a specific charge here.

2 The next one is reckless endangerment. You've
3 heard a little bit about this, but not much. First of all,
4 it requires the same mental state, recklessness, nothing
5 changes. When you go to that charge and consider it, not
6 one thing changes. He has to be just as reckless in one as
7 he does in the other. The difference there, and it's a big
8 difference, is that reckless endangerment requires a
9 substantial risk of death or serious physical injury to a
10 person. We're not talking property. There's the
11 distinction. Forget the property; go to person.
12 Everything else stays the same, but you have to have this
13 serious risk, substantial risk of death or serious physical
14 injury.

15 The next one we talked about, the mental state
16 isn't important here, but driving while intoxicated. It's
17 something you can all understand. That's just something
18 you know you're not supposed to do, right? You don't have
19 to do it recklessly, intentionally or anything like that.
20 But I think it's important to put it in the proper
21 perspective in this case. And Mr. Cole touched on this and
22 we're going to talk about it a little later when I get to
23 it, hopefully in a few minutes. We have to talk about one
24 key word here and that's impairment, that's the key word,
25 impairment of one's physical or mental abilities that has

1 to adversely affect what he does.

2 Now Mr. Cole didn't mention those terms in very
3 loud terms, adversely affect. We'll talk about that later,
4 but keep that in mind because, in this case, that's the
5 only way they're going to be able to prove Captain
6 Hazelwood guilty of that charge is by actual physical and
7 mental impairment. The State says, "We're going to show it
8 by experts." That's what they told you and we'll get to
9 that and see if they did.

10 Negligent discharge of oil. Again, I told you
11 that's a lower mental state, but they still have to prove
12 it beyond a reasonable doubt and it still must be a
13 substantial factor. Negligence still has to be a
14 substantial factor in causing that result.

15 Well, that's the legal lecture. I hope it
16 helped. I'm not so sure I understand it myself sometimes,
17 but all we can do in the short period of time is use what
18 the Courts have used for years. The legislatures
19 determined to give you this material and we feel with every
20 degree of confidence that you will understand it. It takes
21 some time. Perhaps some things are a little more confusing
22 than others. But it's still designed for people to use in
23 deciding these very important questions.

24 And these instructions, law that you hear, have
25 been kind of time tested. They've stood the test of time.

1 It's like the Rules of Evidence. You have these rules for
2 a very good reason. You eliminate some things from your
3 consideration because it just, over the centuries, it's
4 just decided that it's best because things that you can
5 hear in Court are the things that really meet the test of
6 good reliable evidence. And the same thing on
7 instructions, they meet that test.

8 Now let's look to the evidence, itself. To do
9 that, I think we have to kind of recap. Now Mr. Cole has
10 graphs and charts. I've got a few, too, not as many, not
11 as good, but hopefully they'll help a little bit. I don't
12 have the bells and whistles and the smoke screen, though,
13 and that's what you use when you don't have the facts.
14 This is the facts.

15 Let's look at everything that happened, briefly
16 now, because we obviously don't have time, nor the desire
17 to go through everybody's testimony again. But let's start
18 with basically what happened when Captain Hazelwood left
19 the ship, when he came into Valdez. He left about 11:00
20 o'clock, went to the Alamar office and made some phone
21 calls and they went to lunch. There was no alcohol
22 consumed there at all, we know that. We know there was no
23 impairment at that time. That's a starting point.

24 Next, we have lunch that finishes somewhere around
25 1:30, maybe later. Now we get into one of the real factual

1 disputes in this case. Mr. Cole said Captain Hazelwood
2 went into the Pipeline Club and began drinking at 1:30,
3 1:40, something like that, and stayed there until about
4 7:00 o'clock, drinking. And what is that based on? The
5 testimony of one single witness, Jamie Delozier. Do you
6 remember?

7 This is some time back now, but this is a critical
8 area because it may put into context why certain things
9 were done in this case, coming in kind of a jumbled up
10 manner, but hopefully you'll understand it, that she said,
11 "He was there and I recognized him because of a picture in
12 the paper." That was a couple of days later. "And I know
13 he was there that afternoon," although she was also there
14 that evening. But she said she described him as a man of
15 his 50s, in his 50s, about five foot, nine, weighed so
16 much. And then she said, "Yes, I am absolutely 100 percent
17 sure that he was there from around 1:30 or a little after
18 1:30," when she got there, until when she left much later,
19 2:45 or something like that. She was absolutely 100
20 percent sure. Now how many people do you know to be 100
21 percent sure of anything? And the more you question Ms.
22 Delozier, the more sure she was until it was 100 percent,
23 no question about it.

24 Well, how did she identify Captain Hazelwood
25 here? Mr. Cole hands her a picture and says, "This is a

1 picture of Captain Hazelwood. Is this the picture you
2 saw?" "Yes." "Now do you see Captain Hazelwood?" Well,
3 lo and behold, she did, can you imagine that? And just
4 everyone fell over in a state of absolute shock that she
5 could identify him after looking at his newspaper picture.

6 The important thing there is even if the
7 identification was okay, even if we prove the testimony of
8 Emily Kaiser, that Captain Hazelwood was absolutely,
9 positively in her shop at two minutes after 2:00 that same
10 day, two minutes after 2:00 -- now how do we do that? She
11 said, "I thought he was there between 2:00 and 3:00
12 o'clock. He bought flowers to send back to Long Island."
13 She wasn't absolutely sure until she looked and got her
14 phone records and there is the transaction that's in
15 evidence at that time of the call she made to the florist
16 in Long Island because, obviously, when you send flowers by
17 wire, there's a call that's made and you order them that
18 way, you order by telephone. And there it was, docketed,
19 logged in. What does that show? Absolutely, positively
20 that Jamie Delozier did not tell it the way it was.

21 But giving her the benefit of the doubt, she may
22 and very likely had him confused either with someone else
23 or the time. When she was there later that night, maybe
24 she saw him then. She got it twisted in her mind somehow.
25 But, wait, you just know, I mean there is absolutely no

1 question about it. And this is the nice thing about things
2 like telephone records. Otherwise, you have two people
3 saying two contradictory things, but that record just does
4 it all. It makes it abundantly clear.

5 So what does this do; what's the effect of that?
6 The effect is to eliminate two of these mysterious drinks
7 that the State said Captain Hazelwood had. Everyone else
8 -- we'll get to the other people here -- Jerzy Glowacki,
9 for instance, said, "After, we just walked around for
10 awhile," and he was the first one to get into the Pipeline
11 Club at around 4:00 o'clock. Jerzy Glowacki says, "I came
12 in then. Captain Hazelwood arrived next, somewhere between
13 that time and 4:30." That's uncontroverted evidence,
14 ladies and gentlemen, no question about that. It has not
15 -- I might remind you, the State of Alaska called these
16 people to prove their case, their case. They called them
17 to say, "We're going to prove it in our opening statement,
18 here's how we're going to do it." Except for the last
19 three people, they called every one of them as their
20 witness to prove their case. And now they turn around and
21 say, in essence, "Don't believe them. Don't believe them.

22 So going on, the next thing that happens is that
23 Mr. Robertson, the radio operator, shows up and, yes, they
24 admit and there's no question about it and there's no
25 dispute that they drank in that club and they made --

1 Captain Hazelwood may have had as many as three drinks in
2 that time. The State says, "What are they doing there?
3 They're sitting there drinking." Is there a scrap of
4 evidence that said anything about how much somebody has to
5 drink because you're there socializing, talking with your
6 friends? Are you going to drink more in that situation?
7 Or is it just as consistent with three drinks or even two
8 drinks? Of course, it is.

9 Lo and behold, they went to the Pizza Palace and
10 he said, "What did they do there? They went and had
11 something else to drink. Why did they?" Well, they went
12 in there and the place was crowded. All they wanted was a
13 pizza. They went next door. It was the only place to wait
14 for the pizza, so they had maybe another drink, maybe, but
15 that's one more, four at the most.

16 So we head back to the ship now. Now that takes a
17 little time, somewhere around 8:00 o'clock, near 7:30. It
18 took awhile; they had to pick up somebody else, get to the
19 ship. We know that at about 24 minutes after 8:00 o'clock
20 is when they arrived. We know that through the testimony
21 of Mr. Dudley. He logged them in. Hew as the Alyeska, one
22 of the Alyeska guards, along with Michael Craig.

23 Now think back to their testimony, ladies and
24 gentlemen. What did they say? Not impaired, that's what
25 they said here, not impaired in the slightest. And they

1 certainly were used to seeing people that were impaired,
2 but not at all, no signs.

3 Now there's something else that's important
4 there. You haven't had a chance to really examine these,
5 yet, but you will shortly. It's an exhibit here. This
6 happens to be numbered B2 or BZ, excuse me. It's a gangway
7 that goes onto the ship, on the Exxon Valdez. It's the way
8 you get there from the shore. Now it's obviously too far
9 away from you to see, but when you do get a chance to look
10 at these, look at them closely and you conclude, if you
11 will, that is probably the toughest sobriety test you're
12 ever going to see. And that's going to tie in with, later,
13 the testimony you heard from the experts that Mr. Cole is
14 relying on that state Captain Hazelwood must have been
15 impaired.

16 Well, at the time he was going on this gangway, at
17 that time, under the State's scenario, under their belief
18 of how the evidence should be viewed here, Captain
19 Hazelwood would have to have been dragged up there by his
20 collar. He would have been so high up that blood alcohol
21 level that he virtually would be incapable of doing
22 anything, let alone walk up this thing and down again.

23 And one other thing -- and, again, I agree with
24 Mr. Cole on this -- is that recollection of testimony is --
25 we can be mistaken. I mean it comes right down to that. I

1 recall Maureen Jones testifying that she saw Captain
2 Hazelwood arrive, carrying an attaché case. The testimony
3 supports that and your recollection of that is correct.
4 Then we have one other factor in there, that he does real
5 well with one hand going up this ladder.

6 In any event, he's back on the ship and we have
7 Pilot Murphy, Captain William Murphy. What does he say?
8 Every one of these witnesses, the State's witnesses, were
9 asked these questions. Mr. Murphy doesn't work for Exxon
10 and certainly the gentlemen down here don't and a number of
11 other people don't. But what did they say? In one solid,
12 uniform voice, they said not impaired. The State's going
13 to have you disregard 21 people and say he was guilty of
14 being intoxicated. Now that is absurd. Pilot Murphy said,
15 "I smelled alcohol," and that's all. Pat Caples, Mr. Cole
16 said, the only person on this list, by the way, and she
17 doesn't work for Exxon either, the only person on this list
18 that, she says, Captain Hazelwood showed signs of
19 impairment. Well, what did she really say? She was asked,
20 "Was there any slipping, stumbling?" She said, "Well, I
21 saw him hesitate slightly going through the door," or
22 something. The question was, "did you attribute that at
23 all to the consumption of alcohol?" The answer was, "No, I
24 did not." She attributed nothing to the consumption of
25 alcohol. "He had watery eyes." "Could that be just as

1 likely from being outside in the weather, coming up
2 there?" "Of course," she acknowledged that. Not one
3 person said he did anything that they saw, noticed or
4 anything else that was impairment. The State says,, "Well,
5 disregard that. We'll get to judgment, talk about
6 judgment. Even though nobody can see this, nobody saw
7 anything at all, it's got to judgment that's important
8 here."

9 Well, going on, after Captain Murphy is there,,
10 Captain Hazelwood assists in the undocking process. You
11 heard about that. Captain Murphy said it went routine, no
12 problem, everything was fine. "Did Captain Hazelwood act
13 like he was in command?" "Yes, he did."

14 Now Maureen Jones sees him at that time, too.
15 Again, not impaired. Then he's seen by the chief mate, Mr.
16 Kunkel, James Kunkel, not impaired. Now it isn't like
17 Captain Hazelwood was hiding behind something. He's there
18 talking to people. They're undocking the ship. He's
19 giving orders. He's doing all these things, not impaired.

20 Everything went routine. The ship left the dock
21 about 9:51, 9:50, something like that. The captain went
22 below during part of the transit through the Narrows.
23 We'll talk about that later. He returned to the bridge.
24 But what's important in this time chronology that we're
25 doing here is to show you this, that when he returned to

1 the bridge, was there any change in him at all. Captain
2 Murphy, once again, said he saw absolutely no signs of
3 impairment. He discussed the maneuvers of getting off the
4 ship with Captain Hazelwood, discussed the course, did all
5 this stuff, talked to him, could hear him, he's standing
6 right there, not impaired. Greg Cousins said the same
7 thing.

8 I know I sound like a broken record here, but it's
9 so important to stress how 21 people can come into this
10 Court and say he wasn't impaired and the State can raise
11 this absurd notion that he was.

12 Then after Captain Murphy is off the ship, then
13 certain other things happen, so the times get somewhat
14 important here. Some are critical, some are not. Captain
15 Hazelwood calls the Vessel Control Center and tells them
16 what his intentions were. What did they really say, the
17 Coast Guard people say about that system? What did they
18 really want to know? To find out what your intentions
19 were, not write down there, "Are you doing this exactly
20 right." They want to know what your intentions were.
21 We'll talk about the Coast Guard a little later, too, but
22 that's what he did. He said, "Here's my intention. I'm
23 going to go around the ice and deviate. I will end up back
24 in the other lane." That kind of shows that you have to go
25 out of the lane if you're going to end up back in it. But,

1 anyway, that's not too important. He decides, Captain
2 Hazelwood decides to not go through the ice, but to go
3 around it. You're going to hear a lot about this in
4 awhile, too.

5 At between 11:45 and 11:50, Captain Hazelwood and
6 Greg Cousins discuss the situation and discuss what's going
7 to be done. They go over the ice conditions report, look
8 at the radar together and the radar is like a chart, ladies
9 and gentlemen. You look at it and it shows just what a
10 chart will show, only in a different context. You see land
11 forms; you see exactly where you are. You see ice. Maybe
12 not the full extent of it because, as you heard, it's
13 somewhat difficult to pick up. But as is also in evidence,
14 there's a law, there's a law that the Congress of the
15 United States passed some time ago that said when a ship
16 captain encounters ice on a U.S. vessel, he must either
17 slow down or go around it. Imagine that, Congress thought
18 that was important enough to pass a law. It makes sense,
19 doesn't it? You've got to do one or the other. But the
20 important fact is you don't have to do one, as opposed to
21 the other. The captain is given the discretion of doing
22 either one, whatever in his judgment is best. One isn't
23 necessarily better than the other. He chose the course in
24 his mind that was he safest, to go around.

25 He talked to Cousins about it. They discussed it.

1 Gregory Cousins said something really important and I want
2 to bring that up right now because sometimes we forget
3 these things. And Gregory Cousins said, "Hey, I just don't
4 blindly follow orders, you know. I'm part of this
5 operation and I discuss it. If I don't feel right about
6 it, if I think something's wrong about it," he said, "I
7 certainly will tell the captain." Of course, he would.
8 He's just not there taking orders like maybe just a private
9 in the Army when the general is ordering him to clean the
10 latrine or something. He has a part to play in running
11 this ship. And he says, "Yes, I understand what you want
12 to do, Captain. Yes, it sounds good to me and, yes, I am
13 comfortable with doing this." He assured Captain Hazelwood
14 he was comfortable doing this. What did Captain Hazelwood
15 know? He knew Gregory Cousins was comfortable doing this.

16 The State also made the thing about, at 11:50,
17 putting this thing on the gyro or automatic pilot. We'll
18 talk about that a little later. At 11:53 or so, it was
19 off. Mr. Cole, in his opening statement, told you it was
20 off. He said, "Yes, the pilot was on and then the
21 testimony will be that it was off." So it's on for just
22 three or four minutes.

23 The captain does leave the bridge. You've heard
24 that there's only one place in the entire world where
25 there's any law or regulation that requires the captain to

1 be on a bridge and it wasn't a state law, ladies and
2 gentlemen, it wasn't any state regulation. It was a
3 federal Coast Guard regulation that says the only time a
4 captain is required to be on the bridge is in the Panama
5 Canal, nowhere else. They would have you say that this is
6 some horrendous thing he did by leaving the bridge when the
7 people that are really in control of the situation, the
8 ones who seem to know or are supposed to know the best of
9 how a tanker should be operated make no such requirement.
10 Cousins is comfortable doing what he's doing up there and
11 why shouldn't he be?

12 He then takes, gets his fix, real simple to do.
13 We'll talk about that later. But he takes the fix and then
14 he tells Kagan to turn ten degrees right rudder. We know
15 that order wasn't carried out. That's a given. But just
16 going through this time sequence, the captain then comes
17 back on board as soon as the vessel hits the reef. In
18 fact, Cousins was on the phone to him at the time,
19 "Captain, I think we've got a serious problem here. I
20 think we're in serious trouble," crunch.

21 We're going back a little bit, in case I forget
22 again, we're going back a little bit. In between these
23 intervening times, Cousins calls the captain and says,
24 "We're starting our maneuver." What does Captain Hazelwood
25 know? The ship is starting to turn, that's what he knows.

1 "How's the ice condition? How do you view the ice up
2 there?" He says, "Well, I think we're going to get back to
3 the leading edge." And here's what Mr. Cole did not tell
4 you. What's the next part of that statement? Captain
5 Hazelwood asked him, "Do you think that will be a
6 problem?" Greg Cousins said, "No, it won't be a problem."
7 What did Captain Hazelwood know? Ice won't be a problem,
8 the ship is turning.

9 After Captain Hazelwood came up on the bridge at
10 approximately 12:09, nine minutes after -- there's a little
11 variance in the testimony of when it actually happened, but
12 assume for the sake of argument that it's about that time.
13 Again, no impairment. What did he do? He was calm, cool
14 and collected under the circumstances. Jim Kunkel, the
15 first mate who actually has a master's license, was
16 absolutely qualified to operate that vessel just as much as
17 Captain Hazelwood, he was shook, he was really shook. But
18 what did he say? "Captain calmed the situation down."

19 And he did certain things after that. He phoned
20 the engine room. He told Glowacki to do certain things,
21 sound the engine room, void spaces report, "How about the
22 engine, will that run?" We'll talk about this later. But,
23 basically, he tells Kunkel, "Give me some options." "What
24 are we going to do?" "Can we get off?" "Are we stable?"
25 "What's the situation?" And he's doing this in a very

1 dramatic time in his life.

2 Now the question -- and this is going to be
3 important. I guess everything's important, but one thing
4 -- it's going to be a little bit confusing to discuss it
5 right now, but I'm going to say it and probably come back
6 to it. But the Court is going to instruct you on certain
7 things about the grounding and what occurred after the
8 grounding and what you can consider. It's a little bit
9 confusing because there's two different times involved
10 here. The Court will give you a specific instruction that
11 says, "After the ship is aground on Bligh Reef, you may not
12 consider Captain Hazelwood's actions as bearing on the
13 question of recklessness or negligence for a simple
14 reason. The reason is there was no risk involved after
15 that point. That's a matter of law. There is no dispute.
16 When there's no dispute on something, the jury shouldn't be
17 -- you shouldn't have to consider it. And there's no
18 dispute that there was no risk because the ship could not
19 move. You heard that over and over and over again.

20 Now the State's going to say, "Captain Hazelwood
21 didn't know that. He shows that he was intoxicated because
22 he was trying to do these things. Okay, that's the
23 recklessness. You cannot consider -- once that vessel hit
24 at 12:09, 12:07, whatever time you want to place on it,
25 that ends the question of recklessness right there because

1 a risk cannot be a hypothetical one. It can't be something
2 you speculate about. It has to be real, not imaginary and
3 it has to be substantial.

4 What in the word is substantial? Maybe that's a
5 good time to talk about this right now. Nobody knows. You
6 can't really define it, except what does the word mean to
7 people like yourselves that have used English probably all
8 your lives. Substantial means a lot in any way you look at
9 it; it means a lot, large, great, considerable. I suppose
10 it depends on the situation, also, what is a substantial
11 risk.

12 If there were ten revolvers on the table in front
13 of me, only one of which was loaded, and I get angry and I
14 go over there and I grab one of them, not knowing which is
15 loaded and which isn't, grab it and point it at the judge
16 there. Maybe I'd better use another example, maybe Mr.
17 Cole.

18 (General laughter.)

19 MR. MADSON: -- and pull the trigger, that's a
20 substantial risk, ladies and gentlemen, because of the
21 dangerous consequences of what could happen. Probably if
22 there were a hundred revolvers there, it's still a
23 substantial risk because the risk of the result is so great
24 that society will simply not say that that's appropriate.
25 So that's substantial.

1 What's in between? You don't know and you can't
2 define it. It would be virtually impossible to put a
3 definition on that word that could possibly cover every
4 single event that you want to think about.

5 You could go from that extreme down to others
6 where perhaps just property is at risk. Is that a
7 substantial risk because it's property, not a life? Well,
8 you could look at all kinds of examples. In the final
9 analysis, you decide what's substantial and that's very
10 risky. It's probably the most important decision you'd
11 ever make in your life, is to judge the actions of a
12 captain of a tanker by your version of what's substantial.

13 I'm not saying you can't do it and you're going to
14 be called upon to do it. All I'm saying is it's a heavy,
15 heavy responsibility and you must decide whether or not the
16 vessel was a mile away from Busby Island, two miles from
17 Bligh Reef that can turn in a very short period of time
18 with five degrees rudder, four degrees rudder, that would
19 have easily missed that reef if a simple command is carried
20 out, whether that risk, when the decision was made, was a
21 substantial one. That's really what it's going to come
22 down to.

23 Anyway, going on a little, there's a gap in time
24 here. There's a gap because Captain Hazelwood then also
25 calls the Coast Guard and he says, "Yes, we're aground."

1 And that tape does not sound like a happy camper when you
2 hear that. Can you imagine the absolute feeling that must
3 go through someone's mind in that event, the total
4 helplessness of what has occurred and you can't do anything
5 about it? You do the best you can and you try to make sure
6 that things are done, people are safe, but it's a totally
7 helpless feeling. But he did the right things.

8 The Coast Guard eventually arrives. You heard a
9 lot of testimony about what happened. And this might be of
10 some interest. Mark Delozier was the Coast Guard
11 investigator. He came out to the -- he got the call
12 shortly after the grounding. Commander McCall or someone,
13 the Coast Guard called him when he was home. Earlier, he
14 had been at the Pipeline Club and, lo and behold, he had
15 been drinking there. Now he said two beers. He's not on
16 trial here, so that isn't an issue, whether he had two or
17 six. The fact is he was drinking when he went on duty a
18 short time later, just a very short time later. He left
19 about 11:00 o'clock, two hours, less than two hours later,
20 he's on his way to the ship after he had been drinking.
21 Now argue all you want that he didn't know this was going
22 to happen. Of course he didn't, but he also told you, "I'm
23 on duty all the time. I'm the investigator. If anything
24 happens, bingo, I'm the one who goes out there." So he was
25 aware of the risk and he disregarded that risk that alcohol

1 might affect his judgment. Whether it's the same degree or
2 not, that's up to you. Whether that has any bearing on
3 this case is up to you.

4 I point it out just to show you that sometimes we
5 can get into some really ridiculous situations here and how
6 we can zero in on one person's actions, but we ignore
7 what's commonly acceptable human behavior on the part of
8 somebody else.

9 Now there was a lot of talk and a lot of things
10 about what happened on the ship afterwards. But remember
11 these things, these people, starting here, Conner,
12 Falkenstein, Fox and Delozier, all said he wasn't
13 impaired. The Coast Guard people said, "We had the power
14 and the authority at that time," when they came on the
15 ship, even smelling what they thought was alcohol, they had
16 the power and authority to remove the captain and they
17 wanted to get a blood test. It took a long time to do
18 that. What value that has as evidence in this case is open
19 to speculation and conjecture. I think the testimony was
20 Trooper Fox showed up, thinking he had a raving maniac and
21 a drunk on board. That wasn't the case. He said, "I saw
22 nothing." But he said, "The captain was in his quarters.
23 He was there for some time by himself." He thought he was
24 sleeping. But he wasn't impaired.

25 The Coast Guard said they didn't take him in for a

1 breath test, they didn't remove him. They didn't even tell
2 him what they were going to do. They didn't do any of
3 these things because, as Falkenstein said, "That man knows
4 his ship better than anybody else. We want him here to be
5 in charge and in command, to make sure that the stability
6 of this vessel remains the same and no one else is in
7 danger. We want him here."

8 Now does that sound like anybody who's impaired?
9 Do you think anybody would allow anyone whose faculties are
10 so adversely affected by alcohol that they'd want to have
11 him remain in charge? Absolute nonsense.

12 Now we get to something else at this point. We
13 have a blood test which I agree with Mr. Cole, that number
14 is there. We are not saying, however, that that number
15 means anything except what it stands for, that at that time
16 there was that result. We'll talk about that later, too,
17 but just to make sure we set some things at rest, yes, the
18 number is there, some hours and hours and hours later.

19 Now something else you should keep in mind perhaps
20 at this time, because we're going to talk about expert
21 testimony in a minute, Lieutenant Commander Falkenstein
22 gave an opinion to you, based on a federal statute that
23 says something about pilotage. You're going to get that,
24 too. And it talks about direction and control.
25 Falkenstein said that, in his opinion, the person who has

1 the pilotage should have the conn, in his opinion. He's a
2 Coast Guard officer, but he was not a legal expert. So he
3 was giving an opinion as what we call lay people, as
4 anybody else, because it's an interpretation of what the
5 law means, is what he did. He was no legal scholar. He
6 didn't write that statute. His opinion is worth nothing
7 more than mine, Mr. Cole's or any of yours. And I think
8 it's important to understand that. Because somebody has a
9 uniform does not make them a legal expert on the
10 interpretation of a given statute by the Congress of the
11 United States. You can interpret it one way. If Congress
12 wanted to make it clearer, they had every opportunity to
13 say the person must be on the bridge, the person must have
14 the conn. They did not do that and that's why we got into
15 all this testimony about what that really means. What's
16 direction and control? What's this pilotage stuff?

17 That leads us into what we call the war of the
18 experts. Now getting back, these people, of course, are
19 not experts. That's what we call the fact witnesses, the
20 ones who simply were there, they saw, they heard, they
21 observed and that's what they said, not impaired.

22 The experts lead us into another field altogether
23 and there's a difference between the people who can testify
24 about what they see and what they heard and what they did
25 and experts. The difference is an expert is allowed to

1 give you opinions that a lay person or a fact witness
2 cannot.

3 And if you think about it, it's very helpful in
4 many situations and this is a classic example because we're
5 talking about technical operations of a large ocean going
6 tanker, how things are done, what does this mean, how does
7 that work. These people have to be able to tell you,
8 "Here's what's commonly accepted," "Here's how I do
9 things," "Here's how the industry does things," "Here's
10 what this machine or this instrument does," and give you
11 opinions because it helps you, as a fact finder, to
12 understand exactly what's at stake here.

13 Now the first witness you heard, for the State
14 again -- I'm going to try and take them in chronology if I
15 can -- Mr. Greiner. He testified a long time. And at the
16 risk of oversimplification -- and here I am, creating a
17 risk, but at that risk, I'll take that risk. Mr. Greiner
18 said really nothing more than there was a two hit theory.
19 He said he viewed the ship when it was down in San Diego
20 and in his opinion, there was a first striking and a second
21 striking. There's no dispute about that; that occurred.
22 That's Mr. Greiner's testimony, it hit twice.

23 Where he was perhaps mistaken and where the
24 evidence is in conflict is when and how that striking
25 occurred, how far apart they were. Now Mr. Greiner said

1 they were some two minutes or so apart and he had the ship
2 farther back because he assumed the grounding took place at
3 an earlier time. So by doing that, he starts with that
4 conclusion and goes backwards and then says the ship must
5 have been here, which oddly enough places it on what could
6 have been the reef that caused the first striking, okay?
7 Then he says, well, for whatever purpose that had,
8 apparently it was to show that Captain Hazelwood must have
9 known there was an earlier striking and couldn't back up
10 and explained why he never put the engines in reverse
11 because there was this first striking and a second one.
12 And so he says, "I can't go backwards because I know I hit
13 here."

14 (Tape changed to C-3687)

15 However, the fact witnesses don't support that.
16 They say, "We heard this initial kind of vibration, the
17 scraping sound. It continued for a while and it stopped,"
18 not one and then another. And, in fact, the State's own
19 experts agree that, in all probability, the crew would
20 never have noticed that first striking that kind of
21 tunneled along the midship section of the vessel. And that
22 may sound strange when you look at the pictures of the
23 damage to this ship. But think about the cargo load it
24 had, the size of the vessel, things like this, and it
25 starts to make sense that, in actuality, they could not

1 feel something like that. So all it proves from Mr.
2 Greiner's testimony is that there were two hits.

3 Then we have Mr. Beevers. Captain Beevers said he
4 really never testified in Court before. He had done some
5 small consulting on the side. He had done an hour here, a
6 day here, and a day there, but primarily what he does, he's
7 a contractor and he makes cement sidewalks and things of
8 this nature. And he got \$30,000.00 to come in here and do
9 a critique, a critique of Captain Hazelwood. And according
10 to Captain Beevers, Captain Hazelwood didn't do anything
11 right; he didn't do a darned thing right. He risked
12 everything from the time he left the vessel until the time
13 after striking the reef, every single thing.

14 He apparently -- well, let's put it this way.
15 From his testimony, if there's any question about how a
16 tanker should be run, I guess you leave it to Beevers.

17 (General laughter.)

18 MR. MADSON: I couldn't resist that. Anyway, if
19 you don't leave it to Captain Beevers, you leave it to Mr.
20 Cole. They'll tell you how a vessel should be run. "I
21 will bring in captains. We'll bring in some captains to
22 say, well, that's what they would have done. 'Here's what
23 I would have done. This is wrong. That's wrong.'" Where
24 do you draw the line here, folks. You bring in every
25 single captain, you know, everyone who's ever been in

1 Prince William Sound and, "Let's take a majority vote,
2 shall we? Raise your hands if you would have ever left the
3 bridge. Raise your hands if the pilot ever left the
4 bridge. Raise your hands . . .," this. That's the problem
5 with a case like this. And, again, that's the problem with
6 experts because they can have different opinions. And the
7 reason is it's all based on the luxury that Captain
8 Hazelwood did not have. He did not enjoy the luxury of
9 hindsight.

10 Captain Milwee also testified. He is a salvage
11 expert. Again, at the risk of oversimplifying, maybe
12 leaving some things out because he testified at great
13 length, but one thing he did say was that a captain of a
14 ship can't be expected to have the same amount of knowledge
15 and expertise as someone in his position because he
16 salvages ships, he knows what to do as an expert, once a
17 ship is aground. Captains of vessels don't have that
18 experience because many of the times, they don't go
19 aground, they're not supposed to. So they don't have a
20 chance to use that or develop an expertise in what to do
21 after.

22 So Captain Hazelwood is put in a position of being
23 judged by Captain Milwee, who's an expert in what to do
24 afterwards. And what Milwee is he gave Captain Hazelwood
25 an exam. He said, "I'm going to test you, even though you

1 were never required to take the course and even though you
2 had a number of different materials at your disposal, I
3 would require you to take only the stuff that I printed and
4 ignore what other people print, as to whether soundings
5 should be taken first, last or in between."

6 So he gives him a test that he never was required
7 to take or a course he was never required to take with
8 books that he never knew he had to use and he could not use
9 some other ones, in Mr. Milwee's opinion, because he
10 doesn't rely on those, only his. And then what does he
11 do? He passes some 13 to 15 examples, test questions of
12 what to do after a grounding. He has no disagreement with
13 the vast majority of them, but he does with two, soundings,
14 you take soundings right away. And you've heard person
15 after person here say it wouldn't have done any good. It
16 wouldn't have done any good to take soundings. And they
17 were done at the first available opportunity.

18 "He also made a horrendous error of judgment,
19 unbelievable error of judgment in not ringing the general
20 alarm bell," again, something a captain has the discretion
21 to do. Some people can differ and say, "I would have rang
22 that alarm. I would have risked the crew getting out from
23 a dead sleep, getting outside." Who knows what would
24 happen? There's oil fumes -- getting their stuff on,
25 panicking, who knows? Is that better than telling someone,

1 "Go there and wake everybody up. Wake them up. Make sure
2 they know what's happening and have them stand by and I'll
3 tell them what needs to be done from here." The luxury of
4 hindsight, it's a wonderful thing.

5 Now Mr. Voras testified. Mr. Voras went through a
6 long, detailed \$40,000.00 explanation of a computer
7 generated scenario that said the ship would sink if it got
8 off the reef. That \$40,000.00 was wasted, ladies and
9 gentlemen, because the ship couldn't get off the reef. And
10 it was based on that assumption, plus another one, the
11 assumption that the crew would stand there and do nothing.
12 They'd say, "By golly, we're listing and it's going down by
13 the head. Well, son of a gun, I guess we're going to
14 sink," and do nothing. That scenario just didn't make any
15 sense.

16 The fact is you can disregard it altogether
17 because for what Mr. Voras said, it couldn't possibly
18 occur. But since you heard all this and for whatever value
19 it has on Captain Hazelwood's actions, reaction, mental
20 state or something in trying to get off the reef or not
21 trying to get off the reef, consider that testimony for
22 whatever value you give it. And I submit it doesn't have
23 any because it's based on a hypothetical that did not
24 exist, could not happen, and an assumption that just has no
25 relationship to common sense.

1 Now after they testified, the Defense put on
2 certain experts. That's what we call the war of the
3 experts. We had Ed Hoffman testify. Remember the tall
4 guy, mustache? He said, first of all, he did the same
5 thing, he was called upon to render a judgment or opinion
6 about the ship, itself, and view it, what did he think. He
7 said, sure, it was all fore and aft damage. It wasn't
8 damaged any more after the initial grounding and that the
9 use of the engine and the rudder caused no additional
10 damage whatsoever. And he also said something that was
11 extremely important that you hadn't heard up until this
12 time and it could have made a very, very big difference in
13 this case, but because of what Mr. Hoffman and some of the
14 other people said here, it takes that theory away from the
15 State of getting of the reef, drunken behavior or
16 intoxicated behavior.

17 Mr. Hoffman told you about power curves of an
18 engine such as that contained on the Exxon Valdez. He said
19 it has a maximum output of 31,800 horsepower and Captain
20 Hazelwood, running it the way he did, never exceeded 8,600,
21 less than one-third of what was available. He also said
22 that no ship crew is going to get off a reef, see that
23 they're listing, in danger of sinking, and stand by and do
24 nothing. He said with minimal -- the key word, "minimal"
25 -- intervention by that crew, the ship would not have sunk.

1 The oil spill would be spilled. Everything else would be
2 the same. But this additional factor the State was trying
3 to show early on simply could not have happened and would
4 not have happened.

5 Next, we get to probably what would be the most
6 important expert of all. You heard from a person called
7 Peter Shizume. From what you saw of him, he certainly was
8 not an expert witness in the sense that he has testified a
9 lot. He doesn't make it his business; he does not have a
10 business of going around and testifying. He's a physicist
11 that is very, very good at what he does. I submit the
12 evidence showed that he is excellent at computers and
13 simulating the courses that ships take by using certain
14 data and programming that so you can tell what a ship did
15 or what a ship would do. Maybe that sounds a little far
16 out to some of us who aren't scientifically oriented, but
17 it's well accepted, it's done all the time. You know,
18 maybe computers are here to stay, I guess they are, and he
19 certainly proves it.

20 And how reliable that simulation he did -- and,
21 you know, "simulation" sounds like, "Gee, that's something
22 you're kind of making up." But he was asked, "How do you
23 know this was really reliable?" Because he could plot it
24 right on the course recorder of that vessel and it came out
25 almost perfectly. His was by computer. The vessel had a

1 recorder that recorded every move it made. And he said it
2 came out right on it, very, very close.

3 But he did something a little bit different. He
4 didn't do what Mr. Greiner did. Mr. Greiner had a
5 conclusion and worked backwards from the conclusion to
6 support the theory that the State had. Mr. Shizume did
7 what I would certainly submit to you, ladies and gentlemen,
8 was a more scientific approach, reasonable, rational
9 approach. What he did is say, "I will take certain known
10 things from what the vessel had available there," the
11 course recorder, the bell logger, things like this, where
12 things were logged that we know are right and known
13 positions of the vessel. From those, he could calculate
14 then the speed, course and everything else of that vessel
15 and it came out just right. His simulation would show
16 exactly what the course recorder did or very, very close to
17 it.

18 So what was the purpose of that? Well, we know
19 what happened. We know the ship hit the reef. We could
20 spend all day talking about that and we won't accomplish
21 one more thing. His value of being here, as you saw and as
22 you heard, has to do with these _____ because he said
23 that had the turn been made as late as one and a half
24 minutes after midnight, six minutes later, it still would
25 have easily cleared the reef. The net effect of the

1 rudder, he said -- another important thing he said was at
2 one minute after midnight as when the course recorder
3 showed the turn started, one and a half minutes after
4 midnight. Now this is some five minutes, at least, after
5 the turn supposedly was started. That's from the
6 testimony. That's what Cousins said to Captain Hazelwood,
7 that's about the time he said, "We're starting our turn."
8 But we know that didn't happen and we know that because the
9 course recorder on this ship showed it did not happen until
10 12:01-1/2. So there's a gap in time there that the
11 evidence shows Captain Hazelwood did not know that this was
12 happening.

13 We go back again to what he knew is important.
14 When he knew it is important. And what he did and whether
15 he could rely on that is important.

16 So Mr. Shizume said the net effect of the rudder
17 when the turn was finally made was only four degrees.
18 Gregory Cousins said, "I said ten degrees right rudder."
19 We know that didn't happen because it was only four
20 degrees. There was no indication that the 20-degree or
21 hard right was made until far, far later.

22 But there's something else. There's a little
23 wiggle in that course recorder that Mr. Shizume examined, a
24 little jog there. The State would probably argue that that
25 little jog happened because the vessel hit the first reef

1 and then changed its heading somewhat because of that first
2 striking. Again, these are disputes based on the testimony
3 of experts who have a different way of looking at it. You
4 have to decide which one makes more sense. You have to
5 decide if any of them have any bearing on this. You're
6 free to disregard one or all.

7 But it's important that Mr. Shizume said what that
8 indicated, that little wiggle, in that time was that about
9 a six-degree left counterrudder was put on this vessel.
10 Why? Nobody knows. But counterrudder, as you've heard,
11 means when you turn let's say to the right, you turn it
12 back again. And that little wiggle, that thing right
13 there, that little wiggle, that little deviation, that
14 counterrudder put the Exxon Valdez on Bligh Reef because
15 just the slightest more net -- five degrees of net rudder
16 angle would have cleared, close, but it would have
17 cleared. Hindsight, again, is a wonderful thing, but the
18 importance of this is to show you and try to show you what
19 really did happen.

20 Now, again, Captain Hazelwood isn't charged with
21 causing that oil spill, except for one of these counts, the
22 negligent discharge of oil. Obviously, the discharge of
23 this oil occurred only in one way and that way was very
24 simple, because it hit the reef, tore the bottom out of
25 some holds and the oil went out.

1 But as far as the risk is concerned under the
2 criminal mischief statute -- again, go back to that. We're
3 talking only about risk here. But it's still important to
4 know and understand that there was plenty of what was
5 called sea room. You heard that testimony fro ship
6 captains, a term called sea room, and it means just what
7 the words imply. It means there's room to maneuver. He
8 had all kinds of room to maneuver and, in fact, that was a
9 routine, ordinary maneuver done frequently by many
10 captains, nothing wrong with it.

11 Now we had Joe Weiner testify -- anyway, getting
12 back to Mr. Shizume, the main point I'd like to leave with
13 you with regard to his testimony is that if, as Captain
14 Hazelwood believed, right rudder was put onto that vessel,
15 ten degrees right rudder, or any right rudder command was
16 given at the time the vessel was off Busby Island 90
17 degrees, right here, it would have missed Bligh Reef by one
18 and one half miles, a mile from Busby, a mile and a half
19 from Bligh Reef.

20 The State could argue, "Well, if it took that
21 long, why didn't he know it? Why didn't Captain Hazelwood
22 do anything about it?" Well, the very simple reason is
23 they have not shown that he did know it. And I remind you
24 once again that, for this major charge, they have to show
25 that he, in fact, knew and disregarded the risk. The risk

1 he knew of at that time was nonexistent. The risk he
2 thought had occurred right there at that time was a minimal
3 risk, extremely minimal, because Gregory Cousins said,
4 "We're starting our turn. We're going to do exactly what
5 we discussed." So where's the risk that was run?

6 Mr. Weiner testified next. Mr. Weiner basically
7 confirmed Mr. Shizume's computer simulations by his own
8 expertise and his knowledge. He compared the course
9 recorder, data logger, bell book and the crew's testimony
10 to see if it fit and, in fact, it did. We have no dispute
11 whatsoever with that.

12 He also disagreed with Mr. Greiner's analysis that
13 at 12:05-1/2, the vessel hit the reef. He said, at that
14 time, from his analysis, working the other way mind you,
15 not concluding that the time occurred here and then going
16 backwards, but taking all the data available and running it
17 along and seeing what would happen if things went along,
18 the course recorder, data logger, the rest of it, that at
19 five and a half minutes after midnight, the Exxon Valdez
20 was in 200 feet of water, not striking the reef, 200 feet
21 of water.

22 He also then told you that the time between the
23 striking of the two times -- he agreed with Mr. Greiner in
24 that respect, that there were two strikings, one followed
25 shortly by another one, and said that it was only about a

1 minute. He also confirmed that the power available to Mr.
2 Hazelwood, Captain Hazelwood, at the time he was on the
3 reef was substantially greater than any power he decided to
4 use, a confirmation of that.

5 He also confirmed that the Exxon Valdez would have
6 missed Bligh Reef, even as late as 12:01-1/2, much later
7 than this point here, much farther down. It still would
8 have missed.

9 Now we get into probably what gets to be more
10 important in this case because the experts I've just
11 discussed testified a lot about getting off the reef, which
12 we know was impossible. All that stuff as far as
13 recklessness is now out the window. The only thing you can
14 use anything that happened from the time the vessel
15 grounded on the reef until 1:41 a.m., the only value that
16 Captain Hazelwood's had in your deliberations deals solely
17 with the question of intoxication. The Judge will also
18 instruct you on this, that after 1:41, 1:41 a.m., when the
19 engine was shut down a second time, you can no longer
20 consider anything he did as evidence of intoxication or
21 impairment.

22 If you stop and think about it for a minute, it
23 makes sense. First of all, there's the definition about
24 the vessel being capable of being used for transportation
25 on water. And to operate a water craft means to navigate

1 or use a vessel for something, capable of being used as a
2 means of transportation on water. Capable is a very key
3 word, capable of being used. We know it was stuck firmly
4 on the reef, couldn't go anywhere.

5 The Court has ruled that from 1:41, you definitely
6 cannot consider anything past that time because the engine
7 was shut off and the Exxon Valdez, at that time, was
8 nothing more than an oil storage tank with some of the
9 tanks leaking, but it was an oil storage tank, sitting
10 there, incapable of any transportation or movement or
11 operation under the term as defined by law.

12 But we had all this testimony, then, about getting
13 off the reef, so that comes within this time period of
14 about nine minutes after 12:00 and 1:41. And that deals
15 solely, and I emphasize the word "solely," with the issue
16 of whether or not his actions and his judgment at that time
17 as a result of impairment due to alcohol.

18 Your Honor, I wonder if this would be an
19 appropriate time to go on or -- I'm getting a little
20 hoarse.

21 JUDGE JOHNSTONE: No, it's up to you. Would you
22 like to recess for lunch now?

23 MR. MADSON: I think it would be a good time to
24 stop, right now.

25 JUDGE JOHNSTONE: Okay, I had planned on having a

1 recess for lunch. Would that be okay with you?

2 MR. MADSON: Sure, that would be fine.

3 JUDGE JOHNSTONE: Okay. When we return from
4 lunch, ladies and gentlemen, Mr. Madson will complete his
5 final argument. Let's try coming back at 1:15. That will
6 give us enough time to get in and out of a restaurant or
7 otherwise take a break.

8 Don't discuss this case with any person, including
9 among yourselves. Don't form or express any opinions.
10 Avoid the media information concerning it. Avoid media
11 personnel. Avoid everything connected with this case.
12 It's particularly important at this time. We'll see you
13 back at 1:15.

14 Is there anything we need to take up, Counsel?

15 MR. MADSON: No, Your Honor.

16 THE CLERK: Please rise. This Court stands at
17 recess.

18 (Whereupon, the jury leaves the courtroom.)

19 (Whereupon, at 12:00 p.m., a luncheon recess is
20 taken.)

21 (Whereupon, at 1:20 p.m., proceedings resumed and
22 the jury enters the courtroom.)

23 THE CLERK: -- now in session.

24 JUDGE JOHNSTONE: Thank you, ladies and
25 gentlemen. Mr. Madson, are you ready to resume?

1 MR. MADSON: Thank you, Your Honor.

2 JUDGE JOHNSTONE: You're welcome.

3 MR. MADSON: Ladies and gentlemen, I've got some
4 good news and some bad news. The good news is that I don't
5 have my keys to rattle and jingle around and distract
6 anybody any more. Somebody reminded me I sound like
7 Captain Quigg in the Caine Mutiny. The bad news is I'm
8 going to talk anyway.

9 And I'm going to take off where we left off and
10 briefly go again on the summarizing of some of what we
11 think are the important factors to consider in a witness'
12 testimony.

13 If I forget something or something else you think
14 was important wasn't covered, we all have differences of
15 opinion, you're the final judge.

16 Captain Walker, that's where we left off. Captain
17 Walker essentially said just the opposite of Captain
18 Beevers. The difference maybe between the two, one
19 essential difference, is that Captain Walker is a guy who's
20 doing this every day. He's a pilot in a congested, heavily
21 trafficked area down in Florida where ships are coming and
22 going far more frequently than they do in Prince William
23 Sound. And he does this for a living every single day.
24 He's been there. He's doing it now and he did it before.

25 And he looked at Captain Hazelwood's actions and

1 what he did, his decisions and his judgment and he found no
2 fault with them. He said, first of all, the Narrows,
3 there's no risk, that's what he said, there's no risk in
4 the Narrows to speak of. The risk, certainly, we can argue
5 that for the next three months. But it's such a minimal
6 risk. He basically said there is no risk because you've
7 got a competent pilot, Murphy, who he sees, in his
8 knowledge, was competent. It's customary and routine, and
9 it was. You heard not the slightest evidence that there
10 was anything that even remotely went wrong this night. And
11 then you've got a vessel traveling at only six knots.
12 Think about that for a minute. Six knots, that's a little
13 faster than six miles an hour. That ain't moving very
14 fast.

15 You've got the Coast Guard, at the very least now
16 -- they get a little funny about where they're monitoring
17 vessel, but at least they said, in the Narrows, they were.
18 You've got the _____ right there in case the vessel
19 gets disabled or something like that. You've got the
20 pilot, watch stander, helmsman, lookout. What more could a
21 captain do at that point? One more pair of eyes. Is that
22 the difference between tragedy and a routine transit?
23 Hardly. Captain Walker also said the captain is only ten
24 to 15 seconds away, if necessary.

25 The ice conditions, the same thing. He said it's

1 better to go around -- and, again, it's a discretionary
2 call -- go around, as he was planning to do. And he said
3 what Captain Hazelwood did, he said, he set up
4 beautifully. That was the word he used, beautifully.
5 You're on a course of 180. That's one of these nice,
6 straight lines going directly south. You come to this
7 point right here, abeam of -- you heard that term a lot and
8 it means it's 90 degrees. When the ship is here, 90
9 degrees, you start making the turn, the simplest
10 instruction anybody could possibly be given. No one could
11 possibly get that confused and no one did. He was set up
12 beautifully, routinely, it's done all the time and here's
13 where they would have gone. We know that didn't happen.

14 Captain Walker continued and he said that the auto
15 pilot played no role in this and there is certainly no
16 reason not to use it. Once again, I have to emphasize to
17 you, ladies and gentlemen, there's going to be talk about a
18 lot of rules and regulations and things. The State's going
19 to come back; Mr. Cole is going to come back. Sure as
20 heck, he's going to talk about some regulations, Coast
21 Guard regulations. He's going to talk about this four-hour
22 no drinking rule the Coast Guard has. He'll talk about
23 this sort of stuff. All immaterial, all irrelevant, has
24 nothing to do with this case, just like this red herring of
25 this auto pilot, the biggest red herring of all.

1 Captain Walker said there's nothing wrong with
2 using it. Of course, you can leave it on and not know it,
3 but what do you think the chance is of that? You heard all
4 kinds of testimony, lights, this, that. You know it's on.
5 You'd have to be a total bimbo not to know it. It played
6 no part in this grounding whatsoever, had nothing to do
7 with it. It's another one of these red herrings they've
8 thrown at you and there isn't even the slightest regulation
9 involving it.

10 Even the precious Exxon manual that Mr. Cole keeps
11 referring to all the time, their own guidelines, say
12 nothing about the use of an auto pilot, no guidelines
13 whatsoever. It's perfectly acceptable to use whether you
14 want to or not. And in hindsight, probably a lot of ship
15 captains aren't going to come in here and say, "Well, I
16 wouldn't do this," because they know what happened.

17 The load program up, how much did we hear about
18 that? We heard all kinds about that, lots of stuff. We
19 know it takes 40 to 45 minutes to do it because it's
20 computer generated. You just don't shove the throttle
21 forward and you immediately go. It takes time to build up
22 your speed. So when it was put on, it was not going to be
23 anywhere near to sea speed until they had basically cleared
24 the ice and they're on their way.

25 Captain Walker said he puts his on sooner than

1 that, there's no problem with that. If you're going to go
2 through the ice, you slow down, that makes sense. If
3 you're going to go around the ice, it makes no sense to
4 slow down. It accomplishes nothing. There's no safety
5 feature whatsoever that can be utilized by going around at
6 a slower speed. Just think about that. That, again, is
7 common sense, common sense. If you're going to go around
8 something, you can go at the regular speed. If you're
9 going to go through it and have to maneuver, you can slow
10 down.

11 The order to Cousins, absolutely prudent, nothing
12 wrong with it, simple. Cousins is a licensed second mate,
13 second mate, a competent crew. If not, at least Captain
14 Hazelwood thought he was because he had sailed with him
15 before and he knew his qualifications. No reason has been
16 shown here by the State of Alaska whatsoever that Gregory
17 Cousins was not a competent person. Did he make a mistake?
18 Of course, he did, one of the simplest mistakes, the
19 mistakes we all make, the mistakes that result in maritime
20 accidents.

21 He also said something very important and that was
22 the sea room. He said there was plenty of room to make the
23 maneuver, plenty of room.

24 He also said that only in hindsight would he say
25 leaving the bridge could play any part in the grounding.

1 Mr. Cole brought it up and he said, "Well, Captain Walker
2 admitted that if Hazelwood had been there, this probably
3 wouldn't have happened." That's exactly right, probably.
4 Now, in hindsight, looking back, yes, probably not. Is it
5 still possible it would have happened? Of course. Maybe
6 Captain Hazelwood went in the bathroom. Maybe he's in the
7 chart room. He could be doing anything. He could be just
8 not looking at the rudder indicator, angle indicator, the
9 same as anyone else. These things happen and that's why we
10 call them accidents.

11 Captain Walker also said Captain Hazelwood did
12 something important; he left the check, "Call me. Mr.
13 Cousins, call me when you start doing this. Otherwise, I
14 don't know if it's going okay or not, but once you call me,
15 bingo, I'm put at ease." What does he know? He knew it
16 was safe. Did he know there was a risk? No.

17 Then he also talked about, as did Captain Beevers,
18 the course of the ARCO Juneau and the Brooklyn. The ARCO
19 Juneau was a ship commanded by a Captain Knowlton that did
20 a much more dangerous maneuver. Everybody agreed with
21 that. His risk was substantially greater than Captain
22 Hazelwood's. Maybe he was on the bridge. We don't know,
23 Captain Knowlton never testified here. The State didn't
24 call him. It did Captain Mackintire, who was the master of
25 the Brooklyn, but not Captain Knowlton, but he was called

1 reckless, more reckless than Captain Hazelwood was, because
2 he did the maneuver with his ship faster, closer to Bligh
3 Reef going around the ice. And it should be pointed out,
4 in evidence before you, you'll see his master's license and
5 it has a pilotage endorsement on there from Hinchinbrook to
6 Busby Island. Now isn't that odd? It says something about
7 pilotage and the way it's done.

8 This chart doesn't show a whole lot, but his
9 pilotage only comes up to here. The pilot station is well
10 north; it's up at Rocky Point. Technically and legally,
11 under the State's scenario and their theory, even Captain
12 Knowlton was required to have a pilot on the conn after his
13 pilotage endorsement stopped. Nobody knows why it only
14 went to Busby Island, but it did. We also know he dropped
15 the pilot off well north of Bligh Reef.

16 All these things important because they are
17 critical in the sense of looking at judgment and in looking
18 at whether Captain Hazelwood was exercising good judgment,
19 proper judgment, whether he was reckless. And we're going
20 to talk about the standard toward the end of this. But
21 beyond a reasonable doubt is something you can never put
22 out of your minds. It's the most important two words in
23 this case, reasonable doubt.

24 Continuing on, Captain Martineau testified and he
25 basically testified about something you haven't had a

1 chance to really see, yet, and that's Exhibit B. That's
2 this document that's called a -- it's a letter that was
3 sent out to the Exxon Shipping Company by Mr. Bob Arts, who
4 testified here, and it said New Pilotage Requirements.
5 There's been all kinds of talk about this and the State is
6 going to say, "By golly, the first words up there still
7 says 'Nonpilotage Vessels.'" But you've got to read it in
8 its context.

9 All the people that testified, including Captain
10 Martineau -- and this is interesting because, remember, he
11 was asked about this letter and what it meant, what it
12 meant. Captain Martineau was only called here to show one
13 thing, that he sent this letter to the Exxon Valdez so the
14 captain would have this and have this knowledge about
15 pilotage requirements. The State, however, wanted to go a
16 little further. They had this Exxon guy that is obviously
17 out to get -- you know, acquit Captain Hazelwood -- all
18 these Exxon people, according to him, are out to just help
19 him and this one did. Mr. Cole didn't know it. He thought
20 he was going to get a different explanation from Captain
21 Martineau on this when he asked him about it. And what did
22 he say? "This does away with the pilotage. I know all
23 about the pilotage. I was working on shore. The Coast
24 Guard sent me something." "Fill this out." "Is it
25 necessary?" "No, I know what they were doing, I know what

1 they were trying to do. I know the whole history." This
2 was the final nail in that coffin.

3 You will have it to look at. I would submit,
4 ladies and gentlemen, it does not clearly say, one way or
5 the other. But put it in the context of everything
6 concerning this pilotage stuff you've heard about and, at
7 the very least, it becomes extremely ambiguous. But the
8 very last part, the only time you need this extra watch
9 stander on the bridge is every ten minutes, when navigating
10 from Cape Hinchinbrook to Montague Point. Now without
11 taking the time, that's toward the outer end of the Prince
12 William Sound, a short distance.

13 Now whether this is right or not, whether the
14 Coast Guard would approve this or not is not the point.
15 How much talk was spent, "Well, you didn't go to the Coast
16 Guard. You didn't see what they said about this." What
17 utter nonsense.

18 Once again, what did Captain Hazelwood know and
19 what did he do or what did he rely on? He relied on things
20 like this. He had no obligation to call the Coast Guard
21 and say, "Hey, is this letter correct?" Every one of them
22 that was going up there knew what was happening with
23 pilotage. It was meaningless. This was the final thing.

24 Under the State's theory, they would have you --
25 so-called pilotage vessels have a higher standard than

1 nonpilotage ones, but we'll get to that, again, I promise,
2 in a minute.

3 The last witness that was a captain was Ivan
4 Mihajlovic. He had no pilotage at all, no pilotage. His
5 pilot stays down below. He made 20, 25 trips, always
6 dropped the pilot off around Busby Island. In other words,
7 without this endorsement on his license, this piece of
8 paper, this typing on his license, he went around Busby
9 Island and went around Bligh Reef and the pilot was picked
10 up there and vice versa, always there.

11 He also said he's been left alone as a mate in
12 Prince William Sound. There's nothing wrong with that,
13 he's qualified. He deviated around ice in a similar
14 maneuver as Captain Hazelwood. It was routine. It was
15 customary.

16 He also said the Prince William Sound waters were
17 not dangerous or hazardous, compared to many other areas.
18 They were wide open with all kinds of sea room, maneuvering
19 room. He also said he got this Alamar letter, as it's
20 called, in 1988 and he agreed that it waived pilotage,
21 too. All these people that are qualified and competent to
22 be captains of tanker vessels read something and they say,
23 "This is what it means to me." And the State will say,
24 "But that's not what it says in the first line." Again,
25 you have to look at the whole thing in the proper

1 perspective and the context in which this letter was
2 written. And it was to those persons with that knowledge
3 and background, it said exactly that, because they knew
4 what this pilotage thing was. They knew the waters. They
5 knew it was something the Coast Guard wasn't really doing
6 anyway.

7 It started off that way and, gradually, through
8 the Captain of the Port Orders, he said, "Well, this isn't
9 necessary." The pilots didn't like it. They had to go way
10 out in open water where it was dangerous. They said, "We
11 don't want to do that. Let's pull back here. That's the
12 only place, the Narrows is really the only place it's
13 necessary and docking." The Coast Guard agreed. They
14 finally said visibility was the criteria, visibility was
15 the thing that made the difference and that only.

16 And the only difference was -- what Ivan
17 Mihajlovic, Captain Mihajlovic would do was between Cape
18 Hinchinbrook, as they entered the sound, and Montague
19 Point, in that sort distance. They would have two people
20 on the bridge and report their position every ten minutes.
21 And after that, according to the information they had, you
22 didn't have to do anything else until you picked up the
23 pilot.

24 Mr. Leitz testified very briefly. He testified
25 that he was the salvage master that Exxon hired or

1 contracted with, if you will -- he was not an employee of
2 Exxon -- to refloat the vessel and he did. He was the guy
3 that was there. He was the expert who was there and he
4 knew everything about that ship, inside and out, knew all
5 about it, lived on it for weeks. And he said the ship
6 wouldn't have sunk if it was off the reef, agreed with the
7 other experts in that regard, as long as the crew did
8 anything, they could easily do that. And he said Captain
9 Hazelwood's actions were that of a prudent captain and
10 showed extremely good seamanship.

11 Again, remember the time this occurred. You're
12 called upon to come suddenly onto a situation that you've
13 never faced before in your life, ever. And there's
14 everything happening at once. And whether he did it
15 instinctively or sat down and mentally calculated each and
16 every move, he did it right, he did it right.

17 He also explained -- the big bugaboo here is what
18 Captain Hazelwood said, as opposed to what he did. And
19 both Captain Walker and Mr. Leitz explained why they
20 thought that happened. There can be any explanation for
21 it. The facts are whatever he said is not what he did and
22 it's just that simple because the people that knew best
23 said everything he did was designed to do it safely and
24 make sure it stayed where it was.

25 Now is that the actions of somebody who is

1 impaired, somebody who didn't know what they were doing and
2 acting rashly, just going off because they were drunk or
3 under the influence, didn't know what they were doing?

4 Absolutely not. He did it right.

5 Mr. Hudson, Don Hudson, testified that -- in
6 essence, he helped Mr. Leitz and the ship wouldn't sink is
7 basically what he said. He was the guy that had to go on
8 there to make sure the stresses were such that when they
9 refloated the vessel, it would be done safely. But the
10 ship wouldn't sink, that's what he said.

11 All these people, for every expert the State put
12 on, we put on at least one, if not two. Which ones do you
13 want to believe? Just the mere fact that you have this
14 overbalance -- there wasn't a balance -- isn't that
15 reasonable doubt? It's more than that. The Defense proved
16 to you in this case that the actions of Captain Hazelwood
17 were prudent and good seamanship and they were not those of
18 an impaired captain.

19 Something very important came up and at the time
20 you heard the testimony of Ed Siedlick, you probably
21 wondered, "What's this guy testifying about? What this all
22 of a sudden talking, this guy talking about tape," when you
23 hadn't even heard the tape, knew nothing about it? Well,
24 here's why. It's because the State -- a little while ago,
25 Mr. Cole said, "Take this tape in there and you play this

1 tape and you listen to this other tape and you're going to
2 hear two different people." You're absolutely right and
3 Mr. Siedlick explained why.

4 Anticipating that this was going to happen, Mr.
5 Siedlick came here and had a chance to really go over these
6 tapes. You heard him. He was 21 years with New York law
7 enforcement, the Police Department. He became a
8 surveillance tape expert. He knew tapes inside and out
9 because that's what he did a lot of. And then he said the
10 biggest problem on one tape, the so-called inbound tape --
11 that's when they were coming into Prince William Sound.
12 There's other voices on there that you'll hear. You don't
13 know who they are, have no idea. You don't know if they
14 talk that way normally or not. The only thing you heard
15 was the Coast Guard or ex-Coast Guard person who came in
16 here and said, "Yes, I heard this tape and it sounds that
17 way to me." He says nothing about Captain Hazelwood's
18 voice, did not identify it. He simply said that, "Yes, I
19 heard myself on that tape." What does it all mean?

20 Well, Ed Siedlick went down to Valdez, first of
21 all, and he found out that the original tape was destroyed,
22 it did not exist any more, found out the tape that you're
23 going to hear was made by holding up a little microcassette
24 to the speaker, batteries going, maybe the batteries are a
25 little weak, maybe they're good, but they probably were

1 weak and so it recorded in a slower mode. And then it's
2 recopied onto something else at least once, we don't know
3 how many times. And he said, "In conclusion, since I don't
4 have that original tape, I can't say for sure, but I can
5 say that from listening to this tape and listening to
6 another tape and listening to Captain Hazelwood, guess
7 what, it doesn't sound like him." Now based on that,
8 evidence that is totally unrefuted -- the State had every
9 opportunity to do what we did with that tape and they did
10 not. They're going to say, "Take that back in there,
11 listen to it and you compare it with this one and you'll
12 see that he's a different person. He's sober here and he's
13 drunk here."

14 That tape sounds like he's talking too fast, just
15 as Ed Siedlick said he was and just as Jim Kunkel said. He
16 said, "I was up here. The State had me over there to
17 listen to this tape. I couldn't even make it out. I went
18 over and listened to one Mr. Siedlick had copied when he
19 was down there and went to Washington, D.C., to check all
20 this out, the NTSB, and listened to that. Yes, I could
21 hear the voices, but it didn't sound right, didn't sound
22 right. It sounded like he's talking too fast." That's the
23 comparison they want you to make.

24 Can you imagine convicting anybody for driving
25 while intoxicated based on that kind of evidence. It's

1 shameful. That's all you can, it's utterly shameful.

2 Lastly, I'm going to quit talking about experts
3 and talking about witnesses, to a certain extent. Captain
4 Mackintire was brought back here by the State as what's
5 called a rebuttal witness. As I told you earlier, Captain
6 Knowlton didn't testify, but Captain Mackintire did. He
7 was basically brought back here to show what he did that
8 night and how that was safely done and routinely and all
9 this and, you know, because of the pilotage thing and all
10 that. And he has no pilotage. He doesn't have this
11 endorsement.

12 And he drops the pilot off somewhere north of
13 Bligh Reef, which means coming back, when he left Valdez and
14 went out, when he left, he actually did something worse
15 than they're saying Captain Hazelwood did. Think about
16 this for just a minute. He talks to the pilot and says,
17 "Well, okay, you get off here because of the weather
18 conditions," or whatever, "We'll let you off here north of
19 Bligh Reef." That's supposed to be this big dangerous
20 area, right? That's the critical maneuver around Bligh
21 Reef. He drops him off, so the pilot isn't even on the
22 ship. He's going away.

23 So here we have Mackintire on the bridge with no
24 pilotage and he has to go around Bligh Reef. But they
25 said, "We discussed it and it was a safe maneuver under the

1 circumstances, there was nothing wrong with it." And
2 they're absolutely right. That's exactly what Captain
3 Hazelwood did, except he was on there 15 seconds away with
4 the pilotage.

5 Now you tell me where is the distinction. Where
6 is one reckless and one not? It makes no sense.

7 Secondly, Captain Mackintire said, "I don't know
8 anything about any visibility requirement in Prince William
9 Sound with this pilotage stuff." That's supposed to be one
10 of the things they ask you when you call in, do you have
11 pilotage, "Do you have pilotage coming in?" "Yes," or,
12 "No, I don't." "Okay, what's the visibility," because the
13 Coast Guard said it's a two-mile limit. They're not going
14 to let anybody in there, according to their so-called
15 Captain of the Port Order, if the visibility is less than
16 two miles. If it's more than two miles, the guy that
17 doesn't have this endorsement can take it on in and report
18 their position. Captain Mackintire, says, "We have fog."
19 So what? Nobody cared. How does all this make any sense?
20 It doesn't. And that's what they're relying on, that's
21 what the State of Alaska is relying on to say this man is
22 guilty, he's a criminal.

23 Now I'm going on to something else
24 (unintelligible) key to things, but I want to put this up
25 here. This is basically like Mr. Cole's. Funny how great

1 minds think alike. That's the key to a number, at least
2 two of these charges right here. Notice the words in
3 here. Notice the words, consciously disregard and
4 substantial and unjustifiable risk. There must be risk,
5 not a theoretical risk, not a maybe, not a possibility, a
6 real risk, a substantial one.

7 So what do we have that proves beyond a reasonable
8 doubt this critical element of recklessness? Well, not
9 much. In fact, not anything. The experts -- they had
10 Captain Beevers. Captain Beevers comes in the category of
11 something I'd like to think of as a Captain Not, a captain
12 that says he should not do this and he should not do that.
13 The Captain Nots in this world can sit in their cozy little
14 easy chairs by the fire. A year later, 11 months later,
15 six months later -- they're never there -- they'll look at
16 different papers and they'll examine things and they'll get
17 up and maybe go and have a cup of coffee and maybe throw
18 another log on the fire and they'll take all the time they
19 want. Then they'll say, "Gee, I don't think he should have
20 done this. I think he should not have done this. He
21 should not have done that." A lot of Captain Nots in this
22 world. They weren't there.

23 Hindsight, what a wonderful thing. How many times
24 -- ask yourself how many times have you had an accident,
25 misfortune, fell, sprained a leg, broke a leg, whatever,

1 and said, "Geez, that was dumb. Why did I do that? I
2 shouldn't have done that." In hindsight, "I would have
3 walked around here. I would have done it differently."
4 That's what makes us human beings. We learn from mistakes
5 and, yet, we continue to make them because we are not
6 perfect.

7 Leaving the bridge in the Narrows. Well, before I
8 do that, I want to go on and just make one more comment.
9 It was somewhat disturbing when Mr. Cole said all these
10 people here that he called as his witnesses, "Well, Exxon
11 has this interest. They want to see Captain Hazelwood
12 acquitted." He had experts. He had Captain Stalzer from
13 Exxon. He had Captain Deppe. And did they help Captain
14 Hazelwood? They said, "No, under the watch conditions, as
15 I view that guideline, I would have done it differently."

16 Ladies and gentlemen, does it not appear that
17 Exxon was doing just the opposite? They may have had
18 attorneys and maybe they had attorneys because they're
19 afraid the State might charge them with something. Based
20 on what happened here and what they saw, you bet, they
21 might have been scared. But trying to help him? No.
22 Changing their testimony? No. You know what they showed?
23 Even Bob Kagan, when he got off that stand, do you know
24 what he showed? That humanity was involved here, just
25 plain humanity. Do you know what they showed? Respect. A

1 good man, he was a good man, and they saw what he was going
2 through. Did they lie? No, they told the truth, every one
3 of them. And it wasn't because they were pressured.

4 Captain Hazelwood also is accused of being
5 reckless in going through the Narrows. We've already
6 talked about that. There was no risk, no risk. Put that
7 to bed. There's no evidence there.

8 We told you early on in that opening statement
9 that the key to this case, the key to this case, lies in
10 that ten to 15 minutes from Busby Island until they hit the
11 reef, 11:55, let's put it that way, five minutes before
12 midnight, until about nine minutes after. There's the
13 case. Look nowhere else. The rest is red herrings,
14 leading you on false trails.

15 At that time, after all is said about what
16 witnesses testified to, what did Captain Hazelwood know?
17 Not what he should have known, ladies and gentlemen. At
18 that point, we're talking about what he knew. He had a
19 competent person up there. He was just seconds away. The
20 maneuver was simple, routine and ordinary. And he left the
21 check, "Call me when you do it." What substantial risk did
22 he run at that point by saying, "Cousins, do this," and
23 it's understood. "Are you comfortable with it?" "Yes, I
24 am." "Any problems?" "No." He said, "How about the ice,
25 what do you see, any problem?" "No." All these things

1 were checks and all Greg Cousins had to do was say,
2 "Captain, I'm not sure."

3 The second mate was perfectly qualified to do what
4 he did. He didn't have that magic piece of paper, that
5 so-called endorsement which, as you've heard over and over
6 again, is not a test of anything but your knowledge of
7 navigational aids. And we asked that question of Mr.
8 Cousins. "Did you know those aides? Did you know where
9 Bligh Reef was?" Of course, he did. Of course, he knew
10 them all. Do you think it made one bit of difference
11 whether he would have had that endorsement or not. What if
12 they had still hit the reef? Do you think we wouldn't be
13 here? Of course, we would.

14 This is another one of those great red herrings,
15 ladies and gentlemen, that looks good on the surface
16 because you hear so much about it. But it's kind of like
17 being able to drive a car, but not having the piece of
18 paper that says you can, the difference between let's say
19 having the ability to do it, the qualifications to do it,
20 the knowledge to it, but maybe not the authorization to do
21 it. There's a big difference there and that's what you
22 should look at because that endorsement played absolutely
23 no part, as the lack of any endorsement, another big red
24 herring.

25 Rely only, if you will, on the critical facts here

1 and that has to do with the fact that this turn was made,
2 it had plenty of room, the ship had more than enough room
3 to make it, and there was no reason it shouldn't have. Why
4 didn't it? Two reasons.

5 And this isn't casting blame in the criminal
6 sense, ladies and gentlemen, only for the purpose of trying
7 to show to you what really happened here, to give you an
8 idea of the actual sequence of events and that was really
9 simple.

10 Greg Cousins probably gave the order to Kagan,
11 maybe he didn't, but the chances are he did because it's
12 logical he would have done that. Mr. Cole had you going up
13 and down and saying, "Look at all these things he had to
14 do." He listed every little thing on there. What he
15 didn't say was that Greg Cousins was asked, "Is there any
16 problem on this?" "No, it takes seconds. Here's how you
17 do it. You look on there, you get a bearing, boom, that's
18 it." You've done it all from the radar. You don't have to
19 go anywhere. He could sit there at the radar. You don't
20 have to go and look at a chart. He knew exactly where he
21 was. He could plot everything from one position. And he
22 said it was simple, it was easy, no problem with that. The
23 State would have you believe he was running around there
24 like a one-armed paper hanger with no time to do anything.
25 He had ten minutes, all the time in the world.

1 And, again, if I seem to be blaming somebody, it's
2 only in the sense that a man is here on trial and we're
3 trying to show you what happened and we're trying to show
4 you what he knew and what he could rely on. And he could
5 rely on Greg Cousins. You have heard nothing else, except
6 that he was qualified and capable and that's what Captain
7 Hazelwood knew.

8 So what went wrong? He probably gave the order
9 and, for whatever reason, he did not look up at the
10 fail-safe system, the rudder angle indicators. We know
11 that the turn never started until a minute and a half
12 after. Kagan said he did. Cousins said, "I gave him the
13 order and I looked later and saw the ship wasn't turning.
14 I gave him another 20-degree order, right rudder order. I
15 gave him a hard right." By then, it was too late. Gregory
16 Cousins, for some reason, was distracted or whatever.
17 That's what makes accidents. We don't know, but he didn't
18 look up and see something as simple as that.

19 So much has been said about Bob Kagan, all his
20 problems. What did Captain Hazelwood know? He knew that
21 the other masters said, "Hey, Kagan has problems
22 steering." Steering, how many times did we go over that,
23 steering versus rudder orders, over and over until there
24 was just virtually no end to it?

25 Remember when Kunkel testified that he said that

1 he told Captain Hazelwood, "Yes, Kagan had some trouble
2 steering and watch for some." What did Captain Hazelwood
3 say? He said, "Gee, I used him before and he did okay, no
4 problem." Okay, so what's wrong with Gregory Cousins
5 looking at him and watching? I mean no matter who was on
6 the helm, it's a simple matter to say, "Ten degrees right
7 rudder." You've heard it over and over again, steering
8 versus rudder orders. Which is easier? A rudder order is
9 so simple, any one of us here could do it. You go like
10 this. You've got to know your right hand from your left
11 hand and you've got to be able to read a ten. And you hold
12 it there until somebody says to do something else, the
13 simplest thing in the world.

14 Now they would have you believe that Captain
15 Hazelwood knew that Bob Kagan couldn't carry that out,
16 couldn't carry that out. He may have trouble chasing a
17 compass and going around and trying to get it back with
18 counterrudder, but when it comes to simple orders,
19 everybody agreed, every single one of those witnesses
20 agreed, "Of course, he could do it. Anybody could. No
21 reason to think otherwise."

22 Probably the most surprised person in the world
23 was Captain Hazelwood when Greg Cousins said, "We've got
24 trouble here," crunch. The farthest thing from his mind at
25 that point was that that was occurring. It's like how in

1 the world could this have happened? It did. It did.

2 Now we heard a lot about the bridge manual on this
3 question of recklessness, the infamous Exxon bridge manual,
4 the guidelines, just the guidelines. The State would have
5 you believe that if Captain Hazelwood, in his discretion,
6 looks at a certain watch condition and disagrees with
7 Captain Stalzer or Captain Deppe, well, "By golly, then he
8 must have committed a crime. Look at the outrageous
9 judgment that exhibits, how terrible that is." That bridge
10 manual is nothing more than a guideline and it depends on
11 where you are, on what you see, congested areas,
12 visibility, other ships, all these things. But what it
13 really is is a way of Exxon protecting themselves. That's
14 their check because, then, if something happens, they can
15 say, "Hey, look, he wasn't following our bridge manual.
16 Look at that, it's his fault, not ours." And the State
17 would have you believe that Exxon is on Captain Hazelwood's
18 side. But they come up with this thing and say, "My
19 goodness, look, he didn't obey our rules." Anyway, so
20 there's a disagreement. Does that make him a criminal?

21 What does near shoals mean? Shoals are reefs.
22 What in the world does that mean to anybody? It means
23 whatever interpretation you want to give it. Is a mile
24 away from Busby Island near? Is two miles from Bligh Reef
25 so near that you have to have someone else up there on the

1 bridge?

2 Then we go on to something else. What did he
3 know? What did Captain Hazelwood know? He knew there was
4 a Coast Guard VTS system. This was probably the most
5 amazing thing in this whole trial. Dragging that out of
6 the Coast Guard, that their policy manual, the first words
7 in there says, "Our purpose and function in Valdez, Alaska,
8 is to prevent groundings and maritime accidents." And you
9 would think you were pulling teeth to get them to admit
10 that.

11 They have a system where the lanes are in the
12 middle, right? That's where the ships are supposed to be.
13 You know what they say when you leave the lanes? So what?
14 How many times were those guys asked, "What would you do if
15 they leave the lanes?" "Nothing. We might call and ask
16 him his intentions." Of all the ridiculous things. For
17 safety reasons, they want the vessels in the middle, in the
18 lanes. But the minute you go out of the lanes where
19 there's danger, they do nothing. They sit back and say,
20 "Not our job."

21 But what did Captain Hazelwood know? He knew that
22 he told them he was leaving, he was probably going to end
23 up back, going around the ice in the northbound lane. They
24 knew that, no question about it. He knew he told them. He
25 also had every reason to believe that the radar was

1 effective down to Bligh Reef. Why not? That's supposed to
2 be the danger place. Why wouldn't the radar -- why
3 wouldn't it be reasonable that the Coast Guard is going to
4 be concerned about that.

5 So the Coast Guard knew he was leaving the lanes,
6 knew he was out of the lanes, knew he was going to weave
7 around the ice. And Mr. Blandford went down to make a
8 sandwich. That's the concern -- now the point of all this
9 is if it was that dangerous and those waters were so
10 hazardous, does it make any sense that Blandford would have
11 done that? No, of course not. And the reason is it was so
12 routine and so normal and so ordinary, there wasn't the
13 slightest concern raised on the part of anybody, least of
14 all the Coast Guard. For a half-hour, he never even tried
15 to see if the vessel was on radar or not. The previous
16 watch stander said, "I lost him on radar. No one else is
17 coming in for quite awhile, he's virtually alone," no
18 concern, outside these magic lanes where it's supposed to
19 be safe. So they're going somewhere else, heading south.
20 The Coast Guard knew that.

21 The point is, once again, it wasn't a danger and
22 it wasn't a hazard and there was no reason for anybody to
23 be excited about it. It was done routinely all the time.
24 Captain Hazelwood, for what it's worth, had that extra
25 little bit of information there that if you're on radar, if

1 something is going wrong, maybe they'll tell you, maybe
2 they might let you know. And one of the Coast Guard
3 persons, I think Mr. Taylor, said, "Well, what would you
4 have done if the ship . . .," ". . . and you're looking at
5 radar . . ." -- it's Mr. Blandford, I'm sorry -- "What
6 would you have done if it was heading for the reef and you
7 could see it was too close, something looked out of the
8 ordinary, it wasn't changing course?" "I might have
9 called, radioed, and said, 'What are your intentions?'" At
10 least he could rely on that, somebody would say, "What are
11 your intentions? You're getting awful close."

12 Again, this isn't to place blame and criminal
13 fault on anyone else. It goes to the element of
14 recklessness and what Captain Hazelwood knew. It involves
15 the knowledge of the Coast Guard and the system that they
16 set up and maintained at the cost of \$70 million. It
17 involves his knowledge of Gregory Cousins and his capacity
18 as a mate and his knowledge of how he carries out his
19 duties. And as Captain Mihajlovic said, sometimes you can
20 do this right away. It isn't a question of time. You get
21 to know these people and you know how good they are and he
22 knew he was good, he knew he was fine. So that's what he
23 knew.

24 You've heard the expert testimony to say that what
25 he did was normal, routine and okay, everything about it.

1 Now how does that square with intoxication? It doesn't.
2 He wasn't impaired.

3 Now the pilotage thing, again, we've covered and I
4 don't know how much more you can say about that. But once
5 again, look at it from the point of view of what in the
6 world does this really mean and look at it from the history
7 of what's happened and what you heard about pilotage and
8 why it's necessary to advise people of certain conditions
9 in a local area, to advise them of things.

10 You never take over the ship. How ridiculous it
11 would be -- direction and control has to be with the person
12 or the pilot. Maybe it's a third mate. What if Greg
13 Cousins had the pilotage and he has to be up there, taking
14 over from the captain, saying, "Captain, I'm sorry, I've
15 got to tell you what to do because I've got the
16 endorsement." Nothing says a third mate can't have it.
17 Anybody can get it. Even an AB can get it. The only
18 requirement is a certain number of trips and a knowledge of
19 the area. Bob Kagan could have had it. He could have had
20 the endorsement and can you imagine him telling Captain
21 Hazelwood how to run the ship? I mean that's how
22 ridiculous you can get if you want to get into this
23 pilotage thing.

24 Auto pilot, a red herring, end of story. It had
25 nothing to do with anything, no rules, no regulations.

1 Load program up, the same thing. It meant
2 nothing, no rule or no regulation, no anything.

3 Bad judgment, that's the best they can say, "Well,
4 that's bad judgment," when you've heard just the opposite.
5 It's excellent, it's good judgment because you're trying to
6 go around, not through.

7 Now when it comes to -- one thing should probably
8 be mentioned right now very quickly. You did not hear one
9 scrap of evidence about dangerous substantial risk of
10 injury or death, serious physical injury or death. That is
11 one, ladies and gentlemen, you can deliberate that charge
12 of reckless endangerment for all of two seconds because
13 what danger was there when some of the people slept right
14 through the whole thing? There wasn't a scrape. There
15 wasn't a bump. There wasn't physical injury. There was no
16 pain. There was no anything. The State can argue all they
17 want about what could have happened, but that's precisely
18 what the Judge says in his instructions to you that you
19 cannot do is speculate about what could have happened. It
20 has to be a real risk, not a maybe.

21 So what do we have here? Well, we've got the --
22 one, put to rest the reckless endangerment. Now on the
23 criminal mischief, the same element of recklessness that
24 I've already covered. We could talk about it for ever and
25 ever and ever. But just look at that definition and

1 always, always keep in mind the real risk involved, miles
2 from anything, plenty of sea room, competent crew. You go
3 on and on.

4 But let's talk about something else for just a
5 second on the other elements that are involved there. Mr.
6 Cole touched on those briefly. But I'm going to talk for
7 just a minute or two more about them.

8 The two things, damage to property of another over
9 \$100,000.00. Now Captain Hazelwood could always risk
10 damage to his ship because that's a justifiable risk. He,
11 as captain, can take certain risks with the property that
12 he's in charge of. The damage has to be to the property of
13 another, in this case the State, I suppose, fish, animals,
14 whatever. But you have to find that over \$100,000.00 was
15 placed at risk from what he knew at the time and what he
16 did.

17 The other thing is widely dangerous means. Mr.
18 Cole gave you a definition of that, widely dangerous
19 means. The last sentence that he gave you said an oil
20 spill may be considered as evidence of widely dangerous
21 means. The key word is "may." That sentence isn't in the
22 definition as the legislature defined it. The Judge has
23 added that sentence and said because of the facts of this
24 case, you can consider, from what was proven -- you are not
25 required to in any sense of the word, you may consider it.

1 Now that still leads you to find beyond a
2 reasonable doubt that an oil spill was widely dangerous
3 means. Does that sound silly? Maybe it does at first.
4 Captain Hazelwood did not make up that definition. Mr.
5 Cole said the legislature -- you know, that all these
6 things are important, the safety of vessels, safety of
7 tankers, how important they are, that we have all this
8 stuff to make sure they're safe. Oddly enough, the
9 legislature never passed a law that put oil tankers in this
10 little category.

11 If an oil spill is so obvious as widely dangerous
12 means, maybe they should have put it in there. But now
13 it's up to you to decide whether it is or not. But I
14 submit to you, ladies and gentlemen, it isn't all that
15 obvious, not at all, not in the slightest.

16 The State's theory of how it fits in there -- why
17 does an oil spill fit? They used the word "poison." It
18 was a poison. The only thing you heard was the Fish and
19 Wildlife officer that gave -- had a list of what he thought
20 were dead birds and you don't know how many of those the
21 death was due to poison, if any, or any other reason. They
22 could be connected with an oil spill, but not poisoned.
23 That's what they're saying this shows, poisoned.

24 And where's the evidence of \$100,000.00 worth of
25 dead birds? If that's where widely dangerous means fits

1 into this and that's where oil comes into it, it seems
2 like, I submit to you, somebody could have come up with a
3 better way of determining it, which once again proves one
4 thing and it shows one thing, that in this whole case,
5 you're not hearing anything about the State of Alaska
6 rules, regulations or laws about tanker captains, except
7 one, negligent discharge of oil. The rest is general
8 criminal law that they're trying to wiggle, shape, squeeze
9 and change the facts to try to fit in there and that's
10 exactly what's occurring here.

11 If it's that all important, why do you have to
12 wrestle with things like this? The fact is you really
13 don't because no matter how you cut it, no matter what law
14 you're talking about, there's no recklessness, there's no
15 substantial risk. The risk is always there, no matter
16 what.

17 Mr. Cole said there's no argument on the
18 negligence aspect, negligent discharge. There certainly
19 is. There certainly is. You have to still show negligence
20 on the part of Captain Hazelwood beyond a reasonable
21 doubt. Now that's just not something we can take too
22 lightly here, folks. That's very important. Secondly,
23 that has to be a substantial factor in what happened. In
24 other words, a lot of people can be negligent, but the
25 negligence might be a small part of what happened. It has

1 to be -- again, this word keeps cropping up -- a
2 substantial factor. He said, "He admitted it. Captain
3 Hazelwood admitted it." He talked to Mr. Myers and said,
4 "Yes, I should have been up there." You know what that
5 shows, ladies and gentlemen? Sure, he admitted that. Does
6 that admit negligence? It admits that, "Hey, if I had been
7 there, it probably wouldn't have happened." Do you know
8 what it shows? Something called leadership, leadership.
9 How easy it would have been to say, "Hey, it wasn't my
10 fault. The nuts up there on the bridge, they're the ones
11 that did it, not me. I told him to turn, the simplest
12 thing in the world. He didn't do it. That goofy Kagan, we
13 don't know what in the world he was doing. But it's not my
14 fault." No. What he did was say, "Hey, the buck stops
15 here." Courage and leadership. No wonder his men came off
16 that stand and said -- shook his hand or whatever, no
17 wonder, because he took the brunt, he took the
18 responsibility.

19 So is there a dispute on negligent discharge?
20 You're darned right there is. Was there a substantial
21 factor if there was any negligence on Captain Hazelwood's
22 part? Yes, there's some doubt about that.

23 In addition, there's something else I think
24 involved in that. The State said he also talked to Trooper
25 Fox or Mark Delozier when they interviewed him and he said,

1 yes, basically the same thing, again showing -- taking the
2 responsibility. He also said, when they came on, they
3 said, "What's the problem?" "You're looking at it."
4 There's two ways of looking at that, ladies and gentlemen.

5 Can you imagine you're up there and your whole
6 life is just about -- your career has ended. As I think
7 Mr. Lawn said when he saw Captain Hazelwood, he looked
8 dejected like a man who saw his career go down the tubes
9 and it certainly did. With that state of mind, you're
10 sitting there, looking at all this oil and this disaster
11 and somebody comes on board and says, "What seems to be the
12 problem here?" "You're looking at it." The dumbest
13 question in the world. "You're looking at it." Does that
14 mean "me"? Nobody knows. It's just as likely to be one as
15 the other.

16 Driving while intoxicated. I'm nearing the end
17 here, but it's a lot to cover. The State is saying he was
18 impaired because he used bad judgment and that would be
19 shown by experts. The reason they did that is because they
20 don't have anybody else. They want to ignore some of their
21 own witnesses because some of them might work for Exxon,
22 ignore them all. 21 people, ignore them. But we will look
23 at the hindsight from a captain who sits in his easy chair
24 and says it was bad judgment, "And we'll take an expert,
25 Mr. Prouty, and show you that he must have been impaired."

1 That's the way they're going to prove their case, the most
2 bizarre way of ever proving a DWI in the history of the
3 world. And if his name wasn't Joseph Hazelwood, they
4 wouldn't even make the effort.

5 This, as you know, you've seen plenty of, plenty
6 of times, was used and prepared by Dr. Hlastala. Mr.
7 Prouty said there's such a thing called retrograde
8 extrapolation. Boy, what a mouthful that is, retrograde
9 extrapolation. He also said it's never, ever, to his
10 knowledge, ever been used going back 11 to 14 hours,
11 never. Four hours was about it, maybe a little bit
12 longer. But there's a first time for everything and he
13 said this was the first time, never even attempted before.
14 Why do you think that? Because it was so ridiculous, most
15 people couldn't look at it with a straight face. You can't
16 do it.

17 There's another one I want to show, if I can find
18 it. Here it is. This is the critical diagram right here.
19 I'll get to that in just a second. But, anyway, let's
20 start with this, retrograde extrapolation. Mr. Prouty
21 said, "Well, I'm an expert, but the other person that the
22 State, you wanted to use or called as an expert isn't. I'm
23 it." "Well, what about these other guys?" "Well, they're
24 experts, but I don't use their stuff. I use mine." That
25 makes it limited to talking about one person and his

1 theory, no one else. Of all the experts available, he's
2 the only one because he said no one else either is or, if
3 they are, "I don't believe in what they have to say."

4 So he comes up with this theory and the one thing
5 he said is that, "Yes, it's a subject of much debate among
6 experts." He managed to say that. Well, ladies and
7 gentlemen, if the experts can't even agree on the concept
8 to begin with, how in the world can that be proof beyond a
9 reasonable doubt? It can't.

10 Mr. Cole spent a lot of time trying to show that
11 Dr. Hlastala is not an expert. Now he turns around and
12 uses a writing, a paper he wrote, to try to convince you
13 that it proves the State's case. But what did he say at
14 the very end of that paper? There was a time period
15 there. Four hours was kind of the outside. That's exactly
16 what Dr. Hlastala said when he was shown that. He said, "I
17 didn't say it was valueless. I'm just saying that it has
18 limitations, even within a short period of time." Even
19 within this period of time concerning here, look at the
20 range you still have. But when you go back like this, he
21 said it's nonsense.

22 What if the drinking had stopped at 1:30 in the
23 afternoon, instead of later, 7:30? What if it stopped at
24 3:30? These lines would continue to go on forever and ever
25 and ever until no matter what the burn-off rate was, the

1 person would be dead. You take one point and it magically,
2 by some magic, becomes proof beyond a reasonable doubt of
3 DWI.

4 Mr. Cole said that .10 was the legal limit in
5 Alaska. True. But what he didn't tell you is that -- and
6 this is very important -- Captain Hazelwood is not being
7 charged with having a blood alcohol of .10 or greater. You
8 can prove a DWI that way. It's one way the legislature you
9 said you could do it. The other way is by being impaired.
10 But the legislature also said if you're going to do it with
11 a blood alcohol reading, that test must be done within four
12 hours. The legislature agreed with Dr. Hlastala. Four
13 hours is basically the outside limit because within that
14 period of time, it is presumed that the level of alcohol in
15 your blood is the same as or at least the same as the
16 amount at the time of the occurrence or the incident. Four
17 hours. If you don't have the four-hour test, there can
18 never, never be a conviction of .10 or greater as proof of
19 DWI. And, yet, that's exactly what they're trying to do
20 here, exactly. And that's something you cannot do.

21 And you can't do it for another good reason. Even
22 if that were acceptable practice, what we have here is Mr.
23 Prouty took the lowest example, he took the lowest -- and,
24 by the way, on this point here, .061, now there's no
25 argument that that's correct. Nobody ever disputed that

1 number. But does it fall on this line. Remember Mr. Burr
2 testified? He said -- he was shown something by Mr. Cole
3 and he said, "Yes, but these are just ideal curves, you
4 know. They don't plot out that way. A person's blood
5 alcohol doesn't just go nice that way. It goes up and
6 down." He was shown one. He said, "Look at here. It
7 points up here. It doesn't fall on that curve. It's way
8 up here." What does that do? It skews everything upward.
9 It makes it worse than it is. So this point is correct,
10 not what the point is, but the value is correct, but where
11 it is is anybody's guess. It could be here; it could be
12 there.

13 And under the State's own scenario, if you take
14 the average, take the average, .17 per hour, 21 drinks, 21
15 drinks when he was drinking. That's how much he would have
16 had to have. He would have been crawling, if he could move
17 at all, at 8:30 when he arrived at the ship. Absolutely
18 inconsistent with all the evidence.

19 The State says, "Well, there's no evidence to show
20 he drank any other time." Let me remind you, ladies and
21 gentlemen, one of the most important things in any criminal
22 trial. The State has to prove it. The Defense does not.
23 The Defense has to prove absolutely nothing. So what
24 happened in the intervening time on that ship after the
25 engines were shut down? There was nowhere to go. You're

1 just sitting there and you're just waiting and you know the
2 end has come. Your career is over. The State says there's
3 no evidence of drinking. That's true, no direct evidence.
4 But you can infer because of this ridiculous extrapolation
5 and the expert's testimony that one way of explaining it is
6 having something to drink in between times because then the
7 whole thing becomes worthless and that's the only way you
8 could explain this.

9 Also, Mr. Burr testified that at levels of .15,
10 .20, things like this, everyone shows signs of impairment.
11 It's visible and noticeable. You see it. You can't hide
12 it. You can't mask it. That's what the State will argue
13 here. That's what they're saying, "He's masking it."
14 These people say, 21 people see him and say he's not
15 impaired because he's hiding it.

16 Mr. Burr said if you take their best scenario,
17 even their lowest one, he's going to show it. Everybody's
18 going to see it, but not a lot of people because -- and the
19 more higher up you go, the higher burn-off rate you have,
20 the more you have to drink and the whole State's theory
21 just goes the opposite of what they want because you have
22 to have the higher burn-off rate. Instead of here, you get
23 up to here, you get up to here. You're up to 30 drinks.

24 (Tape changed to C-3688)

25 The State says, "We're going to prove it by tapes.

1 It's in the tape." A ten-second segment of Captain
2 Hazelwood's voice, have you listen to it, compare it with
3 another voice and say, "Here it is. Here's your proof."
4 We're going to explain that tape. The State has not. They
5 have not refuted that testimony in the slightest.

6 They had a chance to cross examine an expert.
7 They had a chance to get their own. They had a chance to
8 do everything. And perhaps some of that may or may not be
9 their fault because, unfortunately, the original tape
10 doesn't exist. So we're comparing a tape of a tape of a
11 tape or something along that line to an original that we
12 can't even look at.

13 And as Mr. Siedlick told you, when you record
14 something on a recorder that's battery powered and you play
15 it back not on the machine that it's recorded on, it's
16 going to play at a faster speed because if you're going too
17 slow and suddenly you're going at the right speed, you're
18 going too fast. Now was it also cut off so you won't hear
19 any part of it? We don't know how it was done. It was
20 very difficult to try and put this back together. You saw
21 them chasing all over the country, trying to do this. And
22 he could not conclude anything, except something is wrong.
23 Something doesn't gibe here.

24 Mr. Delozier and Mr. Falkenstein never told
25 Captain Hazelwood and said, "Hey, we think you've been

1 drinking. Stay here, we want to watch you. Sit down."
2 Never did it. They said, "Well, go about your business and
3 we'll get this blood test some how." They didn't want
4 Fox's help, obviously. He came to them and said, "Look,
5 here's a number of things we can do." It was a Coast Guard
6 investigation and I submit to you they didn't want the
7 State of Alaska anywhere around and they just ignored Fox.

8 And, oddly enough, if it wasn't for Fox saying the
9 tape recorder -- he said Delozier didn't want it. He said
10 I offered the tape, but he said, "I don't want it." But he
11 said, "Well, I'll finish and it will help the
12 investigation." "Ah, sure." They started without him. He
13 talked to Kagan first and didn't even wait for Fox. So if
14 it wasn't for Fox, the Fish and Game game warden down in
15 Valdez, the State wouldn't even have that tape because it
16 was a Coast Guard investigation and I think it was pretty
17 apparent that if Fox couldn't help doing what they wanted
18 to do, they didn't care if he was around. It was their
19 show. But days later, a search was made.

20 They also said, when they smelled alcohol when
21 they came on board, "We've got something here, some
22 evidence of a 119, probably Moosey beer." If I recall the
23 testimony correctly, Fox got some of that and asked them if
24 that was what they could smell and they said yes, both
25 Delozier and Falkenstein, "Yes, that could be it." "Well,

1 open it up and smell it, see if it smells like _____
2 beer."

3 What does it all mean? It means there certainly
4 isn't any proof that Captain Hazelwood was impaired by the
5 consumption of alcohol. The State's argument here says if
6 you drink anything, you're impaired. That's not the way
7 the law is designed to work, folks, because that means
8 anyone who drinks anything will be impaired because they
9 say, "Well, you drink? Your judgment's impaired." There
10 has to be some reasonable relationship between drinking and
11 the crime. That has to be -- when you're talking
12 impairment, there's proof of impairment by some means other
13 than some kind of ridiculous theory that the experts can't
14 agree on. And what does that leave? What people saw.
15 Like the officer who stops somebody for drunk driving,
16 driving under the influence and says, "Yes, they did things
17 very well. They could count. They do this. But they made
18 this mistake and they made that mistake and they couldn't
19 walk this way and they couldn't do that so well," good, not
20 that good, "Under the influence." "I could see it. It was
21 obvious." 21 witnesses who said he was not impaired, 21
22 witnesses.

23 The State says, "Don't believe them. Believe Mr.
24 Prouty and believe his theory," that apparently only he
25 relies on and even he has never used to go back as early as

1 early as 8:30 or at midnight, go back ten, 12, 14 hours.
2 It's never been done.

3 Ladies and gentlemen, if Captain Hazelwood is
4 convicted of that charge, this would be an all-time first
5 for anywhere, any time on a theory that no one even agreed
6 on.

7 Now I want to put up something else and I'm just
8 about done, fortunately. Before I do that, I just want to
9 say I'm sure I've forgotten a lot of things. But, again,
10 there are times when I must agree with Mr. Cole and one of
11 them is your collective memories are certainly better than
12 ours because there are 12 of you. And we've sat here now,
13 we've talked to you kind of individually because you have
14 not discussed anything about this case. In a little while,
15 you'll be able to do that for the very first time to know
16 what each one of you is thinking. Until then, you've been
17 totally independent in your own thoughts and, suddenly,
18 you're going to become a body in deciding as one.

19 In deciding as one -- and here's another item I
20 just want to mention, Exhibit A. It's the pilot -- when
21 the pilots disembark, it has to be filled out and signed.
22 It is signed by Captain Hazelwood. This was when Pilot
23 Murphy got off at 2320 hours that evening, 11:20. The
24 signature on here, you look at it and see if that isn't
25 just as good as a tape recording as to whether somebody's

1 impaired. An excellent signature, right on the line. For
2 whatever it's worth, it's certainly worth as much as a tape
3 recording, maybe more in this case.

4 Lastly, I want to sum up by saying reasonable
5 doubt, reasonable doubt, those two famous words that
6 distinguish a criminal case from any other time. The
7 distinguishing feature of this case or any criminal case,
8 not a civil case, is that of reasonable doubt. What does
9 it mean? It's one of those things that's been kicked
10 around for years and years. And I guess in doing that --
11 now this is part of the definition. There's going to be a
12 long one, but this is actually what reasonable doubt says
13 in the instruction and other stuff, too.

14 And by taking this out, I don't mean to imply that
15 there's nothing else there. I'm merely saying that this is
16 what reasonable doubt is, a doubt founded upon reason and
17 common sense, the kind of doubt that makes a reasonable
18 person do what? Hesitate to act, hesitate to act
19 (inaudible). It isn't beyond all doubt whatsoever because
20 very few things in human life you can resolve beyond all
21 doubt. I guess you could say _____ is wrong. We know
22 that, there's no doubt about it. Other things are very
23 questionable.

24 But this is the standard you must apply. Can you
25 sit here and say to yourselves in that jury room, "I am

1 convinced beyond this doubt, beyond this reasonable doubt,
2 that there was reckless actions here, that there was
3 negligent actions here, based on what Captain Hazelwood
4 knew and what he did"? Can you say beyond a reasonable
5 doubt, based on a chart, a graph, a possibility, a theory,
6 that he was under the influence? 21 witnesses say no.

7 No doubt, ladies and gentlemen. This is one of
8 the rare cases where the Defense has actually shown the
9 opposite. Going back to what we said in our opening
10 statement, I submit to you and proved exactly as we said we
11 would, even though there's no requirement -- we didn't have
12 to do it -- we told you, "We're going to show you what
13 happened, show you why it happened and, yes, there's going
14 to be a gap in there. We don't know why some things
15 weren't done in a period of time, but we do know . . .,"
16 and you know now, ". . . that Captain Hazelwood had every
17 reason to believe that they were being done, they were
18 being carried out and what happened was the remotest thing
19 from substantial risk that he had to face and make a
20 conscious decision about."

21 Which kind of leads us to the ultimate here, the
22 ending of this. And I hope I haven't bored you. I hope I
23 haven't talked about things that you thought were
24 unimportant. We only can do what we can because lawyers
25 speak for clients, whether that be the State of Alaska,

1 Captain Hazelwood or anybody else. And we try to cover the
2 things we think are important.

3 But this case, when you look at the whole thing,
4 can't help but remind somebody of a story that goes back as
5 far as the bible. It was a time when I don't know who it
6 was -- I don't remember offhand -- but they put the sailors
7 of the Israelites on a scapegoat and they set the scapegoat
8 in the desert to take the sins away. That word has come
9 down through the centuries to kind of mean a little bit
10 something else now, but it's a way of focusing blame and
11 fault and responsibility on only one and it makes us feel
12 better, "It's all his fault." It still exists today. It
13 worked then and it works today.

14 Exxon pressure, how much have we heard about
15 that? It worked to Exxon's advantage, as well as
16 disadvantage. If they had any interest in this at all,
17 "Blame it on him. Blame it on him." Captain Hazelwood is
18 caught in the middle, the State of Alaska, Exxon,
19 everybody, coming at him from all directions, "Make it go
20 away and we'll feel better." I submit to you, ladies and
21 gentlemen, there may be something else involved here.
22 Maybe it makes the State hope that people will look the
23 other way when it comes to their responsibilities, focus
24 the attention elsewhere (inaudible).

25 This was a maritime accident, ladies and

1 gentlemen. It was a tragic one. No one disputes that.
2 But it was not a crime. At least, for the very first time,
3 somebody is attempting to make it one and that's now.

4 This case really revolves around not how a tanker
5 is operated by the law, by the regulations, by the Coast
6 Guard, what a captain should or should not do. It comes
7 down to how a state prosecutor says a tanker should be
8 operated. There's no rules, no regulations, no anything.
9 Maybe the next prosecutor might think differently. But
10 every tanker captain is suddenly subject to the whim of a
11 representative of the criminal justice system for the State
12 of Alaska. (Unintelligible.) "You can spend all this
13 money and all this time because we don't like what you
14 did."

15 As we said earlier, there are so few regulations
16 here, none of which are the State's. And Mr. Cole is going
17 to come back and start talking about Coast Guard
18 regulations, administrative regulations and say, "If he
19 violated them, oh, he must be a bad person," "If he drank
20 this many drinks in a four-hour period before coming on
21 duty, he must be a bad person because that's the
22 regulation." You know what's missing there? They never
23 proved he knew anything about it. They never proved
24 Captain Hazelwood knew of any such regulation, not once.
25 They have to prove what he knew and he did not. So they'll

1 talk about it all they want.

2 Secondly, think of it in these terms. A master of
3 a vessel when he's at sea, when he's on there, he doesn't
4 have any duty hours, as such. He's the one in control.
5 He's got ultimate responsibility. It's also his home. He
6 can't do what we do. We go home, take our shoes off and
7 kick back and maybe relax and have a beer or two. The
8 State says he's not allowed to do that, even though someone
9 else is perfectly qualified to run that ship and is there,
10 doing it. They say, at all times, he has to be the sole
11 one responsible for everything that happens and that,
12 again, is nonsense. He is not. He is not required to.
13 He's a human being like the rest of us. And he has to
14 sleep and eat and he's even entitled to make mistakes, just
15 like everyone else. But they want you to brand him a
16 criminal.

17 I submit, ladies and gentlemen, once you get past
18 the smoke and the mirrors and the bells and the whistles
19 and look at the facts of this case and you look at this,
20 there's no (unintelligible), there's no dispute. But I
21 would submit, ladies and gentlemen, that there's a reason
22 we're here today. Maybe it's politics, politics, nothing
23 but politics, a higher agenda on the part of somebody. You
24 take one person out and zero in on this and spend all this
25 time and all this effort, fortunately Captain Hazelwood

1 could meet that and defend against it. (Unintelligible)
2 and why? Something else here.

3 If the State really thought tankers should be
4 controlled and regulated, it seems like they should have
5 had some proper rules, proper statutes and everything.
6 (Unintelligible), whatever it takes to try to find him
7 guilty of something. It's crazy.

8 You know, Alaska is known as the last frontier.
9 In this frontier, we've learned the mistakes of the prior
10 ones. We don't have vigilantes and we don't have lynch
11 mobs. What we do, what this frontier does is grant a fair
12 trial to everybody. And we believe in the fairness, in the
13 concept of fairness, equality, fair trials. And we believe
14 it in this state, juries, people, we believe that, even for
15 people who transport what they call black gold. Well,
16 Captain Hazelwood's entitled to that same fairness and
17 quality as everyone else.

18 Get past the emotions, ladies and gentlemen. And
19 that's what the State is trying to do, "Look at the video.
20 Look at that terrible stuff that happened on there." Get
21 your emotions to the point where you're going to lose sight
22 of what this is all about, "Look at the video." You'll be
23 asked that again, I'm sure. Why was it there? For that
24 reason, get the emotions up in everybody. Every one of you
25 said, "We've heard about this case. We read about it. But

1 you agreed, "I can put that out of my mind and I don't care
2 what I read or what I saw. I'm going to be fair and I'm
3 going to be impartial and I'm going to ignore all that.
4 I'll base my decision solely on what I've heard here today
5 and what I've heard in the last seven weeks."

6 When you were being selected, Mr. Cole asked you,
7 "Do you realize the importance of this case, Captain
8 Hazelwood and the State of Alaska?" And you all said yes.
9 Well, it's certainly important to Captain Hazelwood,
10 there's no doubt about that. And it must be very important
11 to the State of Alaska.

12 But your verdict, no matter what it is, you cannot
13 change, cannot alter, cannot improve one thing that
14 happened a year ago in Prince William Sound. It's
15 happened. It's over. It's done. Your verdict isn't
16 designed to change that because it cannot. Your verdict
17 will never address blame, will never address fault in the
18 entire industry, Exxon, the Coast Guard, the State, the
19 federal government, Alyeska, or anybody else, except it can
20 do one thing. You're being asked to assess criminal,
21 serious criminal responsibility and nothing else.

22 Does that seem fair? Maybe it is and maybe it
23 isn't, but that's your responsibility. And your verdict
24 will not change anything else in that regard.

25 However, based on the evidence in this case, even

1 though it won't ever prevent another maritime disaster,
2 I'll tell you what a not guilty verdict will do, because
3 it's based on the evidence and the facts. It will send out
4 a nice loud, clear message to the world and it says you,
5 the consciousness of this state, representatives of this
6 state, you came here, not because you volunteered, because
7 it was your duty. You came, you heard the evidence, you
8 listened and you followed the law. After you did that, you
9 simply said those two simple words, "Not guilty," meaning
10 only that the State has failed to prove their case and by
11 doing so, Captain Hazelwood did not commit a crime. And
12 that message is justice was done here today. Thank you.

13 JUDGE JOHNSTONE: We're taking a break, ladies and
14 gentlemen. It will be about ten minutes this time. Don't
15 discuss this case among yourselves or with any other
16 person. Don't form or express any opinions.

17 THE CLERK: Please rise. This Court stands at
18 recess.

19 (Whereupon, at 2:40 p.m., a recess is taken and
20 the jury leaves the courtroom.)

21 (Whereupon, at 2:56 p.m., proceedings resumed and
22 the jury returned to the courtroom.)

23 JUDGE JOHNSTONE: You may be seated. We'll resume
24 with Mr. Cole's closing. And at the completion of Mr.
25 Cole's argument, I'll read the instructions to you and give

1 you further instructions after that. Mr. Cole.

2 MR. COLE: When I came to Alaska, I had the
3 opportunity, ladies and gentlemen, to work with a very
4 famous judge in Alaska. His name was Judge Robert
5 Buckrew. He had a courtroom across the way and I had the
6 opportunity to work with him for a couple of years, one
7 year. And he was a very well known defense attorney in the
8 City of Anchorage and he was also a prosecutor
9 (unintelligible).

10 And I remember asking him, I said, "Well, Judge,
11 you know, I lost some of these cases." And I said,
12 "Sometimes, I don't understand how these defense attorneys
13 can do what they do. How do you do it?" He gave me advice
14 that you see written in almost every defense book on how to
15 defend a case. And that is if you have the facts in your
16 favor, argue the facts. But if you don't have the facts in
17 your favor, argue the law. But if you don't have the law
18 in your favor, then blame everybody else. But don't focus
19 any blame on your client.

20 And if you think about it, ladies and gentlemen,
21 Mr. Madson has followed that to a T. He says don't use
22 emotion, but then he tries to make you feel as guilty as
23 possible about what you are going to be doing in this case,
24 in complete contradiction to what the Judge will instruct
25 you. He uses the words like -- what does he say, a

1 criminal conviction, go to jail, brand him a criminal, acts
2 and conduct so bad they deserve punishment, make him a
3 criminal, brand him a criminal, make him into a scapegoat.

4 Ladies and gentlemen, that is not your purpose.
5 You're going to get an instruction that says you're not to
6 consider punishment, you're not to consider the effects of
7 this. That's up to the Judge. What you have been called
8 upon to do is to look at the facts and determine those
9 facts and determine what the law is and whether it applies
10 to the facts that we have. But you are not here to brand
11 Captain Hazelwood a criminal or make him into a scapegoat.
12 And don't feel like the pressure is that.

13 It's normal in any of these cases, ladies and
14 gentlemen, to feel pity for someone and at some times, I'm
15 sure you've felt that. They've made it very apparent and
16 clear, they brought out that he got fired and I'm sure you
17 felt bad about that. And at times, I'm sure your emotions
18 -- you felt sorry. And then at other times, I'm sure you
19 felt like, "God, this was a terrible thing." When you
20 watched that oil come out, I'm sure you were going, "God,
21 how could this happen?" And maybe you felt very angry
22 toward Captain Hazelwood at that time. Those are all
23 natural emotions that you can't help but have.

24 But all we ask, ladies and gentlemen, is that you
25 not make your decision based upon those. I didn't ask you

1 to do that. Mr. Madson apparently wants you to feel guilty
2 about your role. This is one of the greatest opportunities
3 you've ever had. Don't feel compromised because of what
4 Mr. Madson characterizes as you branding someone a criminal
5 because you're not.

6 Mr. Madson says, "Oh, the State wants to influence
7 you and make you emotional by showing you videos." Ladies
8 and gentlemen, if we wanted to show you videos, you heard
9 Mr. LeBeau say, "We made hundreds and hundreds of hours of
10 video." We could have played them day in and day out and
11 they would have been a lot more graphic.

12 But that's not why we're here. We are here to
13 present our case, to show you that Captain Hazelwood fit --
14 the acts that he took fit within the definition of the law.

15 Now Captain Hazelwood, Mr. Madson says, is a
16 scapegoat. He's a scapegoat? The State of Alaska didn't
17 put vodka into Captain Hazelwood's hand at 2:00 o'clock and
18 force him to drink it. Neither did the Anchorage District
19 Attorneys Office or the State prosecutor or the VTC or
20 Robert Kagan. The only person that put those drinks in his
21 hand is that person that sits at that table right there.
22 He's the one who took the risk. He's the one that went
23 into a bar and drank for four hours, at least, at least
24 four hours prior to taking command of that vessel.

25 It wasn't Bob Kagan that put this vessel in the

1 position of peril that it ended up and it wasn't Greg
2 Cousins who did that. Putting the ship right there,
3 knowing it's going to pass within a mile, less than a mile
4 of Busby, you've got two miles to Bligh, you've got a .9
5 mile gap right there and you've got ice all the way around
6 you. It wasn't the State of Alaska that did that and told
7 him to walk away. It wasn't Bob Kagan who put the vessel
8 in that position and walked away. It wasn't Greg Cousins
9 who put the ship in that position and walked away. It
10 wasn't the VTC who put the ship in that position and walked
11 away. It was Captain Hazelwood.

12 Oh, but Mr. Madson says the VTC, they should have
13 warned him, they should have told him. Told him what?
14 What, "Your vessel is approaching some place in the area"?
15 He'd have to be on the bridge for it to make any difference
16 and he wasn't. He left the bridge. What are they going to
17 tell Greg Cousins that he didn't already know? He said he
18 knew he was already there. But that is another example of
19 how to cast blame on somebody else to try and ease your own
20 responsibility.

21 Reasonable doubt. Mr. Madson told you about
22 reasonable doubt and he put up a nice sign on that. But
23 what he didn't read, what he didn't place up on the board,
24 he just commented on it in passing, is that, "It is not
25 required that the prosecution prove guilty on all possible

1 doubt, for it is rarely possible to prove anything to an
2 absolute certainty." There's no way you could prove
3 anything to an absolute certainty, ladies and gentlemen.
4 But what you have to remember is that we don't have to
5 prove everything in this case.

6 We have to prove the elements of the crime charged
7 beyond a reasonable doubt that this occurred on March 24th,
8 that he had no right or any reasonable ground, that he
9 recklessly created a risk of damage, that the risk of
10 damage is in the amount exceeding \$100,000.00, and that the
11 risk was created by the use of a widely dangerous means.
12 Those are the things we have to prove beyond a reasonable
13 doubt, operating under the influence, on or about -- he
14 operated a water craft and while under the influence of
15 intoxicating liquor, he operated it.

16 So let's talk about the facts that Mr. Madson says
17 don't support the State's case. Mr. Madson says, "Well,
18 look at the State's witnesses. They brought in all these
19 witnesses and none of them support his case." Well, that's
20 not true, ladies and gentlemen. Those witnesses that came
21 up, number one, talked about a lot of other things besides
22 impairment.

23 Number one, the State of Alaska, at the beginning
24 of this case, asked you if you could be fair and impartial.
25 We didn't ask you to say you find this person guilty if we

1 prove the case. You were asked, "Can you be fair? Can you
2 be impartial?" And in presenting our case, we didn't hide
3 anything from you. We called all those people, not only
4 for what they had to say about intoxication, but what they
5 had to say about Captain Hazelwood's conduct on that night.

6 They talked about -- Jerzy Glowacki. We had to
7 call him to show that Captain Hazelwood was drinking in a
8 bar. Mr. Roberson, we had to call him to show he was
9 drinking in a bar. Captain Murphy, he saw signs that he
10 had been drinking that evening on two different occasions.
11 All the rest of the people were put on for a purpose, not
12 because we were hiding a ball, the ball, not because we
13 were trying to deceive you, but to show you the whole
14 picture of what went on.

15 Now you can say whatever you like about whether
16 they thought he was impaired and the reasons why they said
17 or didn't say he was impaired. But you can't change a
18 couple of things. You cannot change physical evidence.
19 The physical evidence in this case does not lie and
20 remember that. It does not lie.

21 And they made a big thing about this one tape with
22 Mr. Siedlick, remember, the New York investigator that
23 tells you about how accurate or inaccurate tapes are?
24 Well, if you remember Mr. Siedlick's actual testimony, he
25 talked about one tape and that was the inbound tape. He

1 said, "If you listen to the inbound tape, that's too fast,"
2 and that's all he said. But if you remember, he was asked,
3 "Well, what about the tape of Trooper Fox with Captain
4 Hazelwood that was done 13 hours after the grounding?" He
5 said, "Oh, that's an accurate one. Sure, that's fine.
6 I've listened to it, that's accurate." What he didn't know
7 is the same type of microcassette recorder that they used
8 on the inbound tape was used to tape his conversation.
9 Well, if you don't like the inbound tape, listen to Captain
10 Hazelwood in the tape with Trooper Fox and compare that to
11 what he said at 11:24 to the Coast Guard. And then compare
12 it to what he said at 9:00 o'clock the next morning.

13 Mr. Siedlick talked about one tape. You don't
14 like that tape? Use another one. But, ladies and
15 gentlemen, you'll hear the difference. And the physical
16 evidence doesn't lie. And all those people were asked,
17 "Was there any difference between when you saw him the
18 night before, on the 22d, and how he was acting on the
19 23d," and they said absolutely not, he was absolutely the
20 same person. And I submit to you, listen to these tapes
21 and see if that is the same person. I submit it's not. I
22 submit that you will hear, before the grounding, a person
23 who is making mistakes, who's slowing down his words, his
24 selection of words is wrong and he shows evidence of
25 impairment. And the physical evidence doesn't lie.

1 Mr. Madson says no signs of impairment, no signs
2 of intoxication. We know he was in a bar for at least four
3 hours, drinking vodkas all afternoon, not doing anything,
4 but talking. We know that he was drinking within a half
5 hour of going through the checkpoint at Alyeska, yet they
6 didn't smell one bit of liquor? It couldn't be because
7 Alyeska has some liability in all of this, could it? Yet,
8 within a half an hour of leaving the bar, after drinking
9 four hours, these two Alyeska guards don't smell alcohol.
10 Yet, Captain Murphy, who sees him ten minutes later, does.
11 Now you figure that out.

12 When he gets to the bridge, Captain Murphy smells
13 alcohol on him. Patricia Caples observes that he appears
14 to be of changed personality, notes that she thinks he's
15 been drinking. When he leaves the bridge that morning --
16 that evening, why does he leave the bridge? Well, their
17 own expert gave you a pretty good indication of why,
18 because people that mask take steps to avoid being seen in
19 an intoxicated stage. And how better to -- what better
20 steps could you take to mask than to leave the bridge? And
21 in addition to that, if you knew you were intoxicated and
22 you knew you shouldn't be making responsible decisions for
23 the safety of your crew and the safety of your vessel, what
24 would you do? You'd walk away so that other people had to
25 make those decisions. And that's exactly what he did that

1 night. He didn't want to have to make a decision, so he
2 walked away and that covered up his alcohol.

3 His initial conversation with the Coast Guard,
4 listen to the tape. He calls it the Exxon Bat and he
5 starts to say the Baton Rouge. He says, "We've departed
6 the pilot -- I mean we've disembarked the pilot." He says,
7 "We're hooking up to sea speed." He was not at a sea speed
8 at that time, nor was he even close to it. Listen to how
9 his voice sounds.

10 He then has a second conversation at 11:35. He
11 says, "We're going to reduce speed to 12 knots." They
12 haven't been over 12 knots in speed. He should have known
13 that. That's a mistake. He talks about the Columbia
14 Glacier, instead of the ice coming out of Columbia Bay.
15 Listen to how his voice sounded in that one. These are
16 24, 30 minutes before the accident happened.

17 He placed the vessel on auto pilot. He
18 accelerated to sea speed. He apparently didn't even
19 recognize the danger that this vessel was in. Every person
20 that we brought in here recognized the danger of this
21 scenario. For lack of a better word or hypo., just call it
22 the Deppe Hypo. "Captain Deppe, your ship is traveling at
23 night. You've made a course change of 180 degrees. It's
24 going to take you one mile off Busby and somewhere in
25 between the ice. You're headed straight for Bligh Reef.

1 You've got drafts of about 56 feet. Your vessel's worth
2 \$115 million. Your helmsman has a problem. At 11:53,
3 where are you?" And he says, "I'm on the bridge." And why
4 is he on the bridge? Because they all recognize the
5 problem here.

6 And for Mr. Madson to come in here and say that
7 tanker captains, particularly Captain Hazelwood, doesn't
8 recognize the problem is ridiculous. Think about it.
9 That's what they're responsible for. They're trained to
10 recognize problems. And if he's not recognizing this
11 problem and taking steps to effectively avoid it, to use
12 extreme caution, to use the words of this, then something's
13 wrong. Something is wrong with his judgment. And it's no
14 different than the drunk driver that's driving down the
15 street and he doesn't recognize that the light is red and
16 continues to accelerate toward it and, in fact, goes
17 through it and hurts somebody. There's absolutely no
18 difference.

19 He left the bridge. And, you know, there's a lot
20 of talk about how -- remember the questions, ten-degree
21 turn is a correct turn, it's an easy turn. That would put
22 the captain at ease. You listen to Greg Cousins'
23 testimony. He was asked, point blank, by Mr. Madson, "Did
24 you tell him that she was turning ten degrees?" "No, I
25 just pulled the wheel and turned it." And what did Captain

1 Mackintire tell you about that and what did some of the
2 other people tell you? That you develop a sense when the
3 ship is turning after being on it awhile. A captain has
4 feelings, that they can feel the vessel turning, even if
5 they're not on the bridge. That would have given Captain
6 Hazelwood an indication that this vessel wasn't turning.
7 He should have been expecting it. He knew it was going to
8 be turning in less than two minutes when he left the
9 bridge.

10 But I'll tell you the other thing that, really,
11 you've got to sit down and wonder. This is Captain
12 Hazelwood's office, right here. You can see it in this
13 picture right here, as was shown to you. It's right there,
14 that window and that window and that window. Now if he's
15 actually doing paper work, like he says he is, and he's
16 sitting at this table right here, and there's a window
17 right behind him, all he had to do was look out. It's a
18 dark night. Maureen Jones could see a red light off the
19 bow. Why can't Captain Hazelwood? All he had to do was
20 look out the window. It was there. He was aware and if he
21 wasn't aware, ladies and gentlemen, it's only because he
22 was intoxicated that night.

23 And you'll remember that the definition of
24 recklessness -- when Mr. Madson put it up there, he didn't
25 talk about it a whole lot, but at the end, it says if you

1 are not aware of risk because you're intoxicated, that's
2 not a defense if a reasonable person would have been aware
3 of those circumstances, a reasonable person who was not
4 intoxicated.

5 So because someone is impaired and they don't
6 appreciate or understand the risk doesn't mean that they
7 have been absolved. In fact, it's not a defense in
8 reckless cases.

9 Not returning to the bridge upon grounding. Well,
10 they say, "He was there." Is that really the evidence?
11 He's 15 seconds from the bridge, right? Even under their
12 scenario -- and it really makes no difference how this
13 vessel hit, whether it finally grounded at 12:08 or 12:07
14 or 12:09. When you look at this course recorder, we know
15 that it wasn't until 12:11, at least, that this vessel
16 stopped turning. And what did Greg Cousins say? He said,
17 "The vessel was turning hard and so I ordered a hard left
18 and it didn't get responded to, the order didn't get
19 followed. So I grabbed the wheel and ordered a hard left."

20 Now you remember the Sperry people told you it
21 would have taken about 27 seconds for the rudder to go from
22 a hard right to a hard left. Greg Cousins didn't leave
23 that bridge until the vessel had stopped turning. And,
24 yet, when he left the bridge, Captain Hazelwood wasn't
25 there. He didn't see him. And what would be the first

1 thing Captain Hazelwood would do? Is it to come up and be
2 quiet as Greg Cousins is sitting there, turning the wheel,
3 trying to stop this? Of course not. Captain Hazelwood
4 didn't return to the bridge in time for who knows why. But
5 all we know is that no one saw him until Greg Cousins and
6 Maureen Jones came back from the port wing. And what he
7 was doing down there, what paper work was so important, we
8 just don't know.

9 But it's clear, ladies and gentlemen, that Captain
10 Hazelwood put his paper work below the safety of his vessel
11 and he was not responding appropriately because he should
12 have been up there within seconds. He should have been up
13 there well within the time Greg Cousins was trying to get
14 that vessel steady.

15 Not turning off the engines, another indication of
16 impairment. He doesn't realize the engines are going?
17 It's on for nearly eight minutes, nine minutes after the
18 grounding, even according to their theory.

19 Not calling the Coast Guard for at least 16
20 minutes after grounding. And listen to that conversation.
21 He says, "I'm north of Goose Island." And remember what
22 Mr. Blandford said, "I couldn't figure out what he was
23 talking about." North of Goose Island. That puts him--
24 and here's Goose Island. That puts him somewhere over
25 here. Captain Hazelwood's all the way over here. How does

1 he get north of Goose Island by Bligh? How about west,
2 just like Mr. Blandford said? Listen to the tape. Mr.
3 Blandford was obviously very confused and that's because it
4 was a completely erroneous place that he gave the location
5 of the ship.

6 "Evidently leaking some oil," that's kind of an
7 understatement. They lost 100 to 115,000 barrels at that
8 time. Listen to his voice there.

9 Several people testified that Captain Hazelwood
10 did not treat this as the emergency it should have been
11 treated as. You know, there's talk about what you would
12 and would not do after that and, to a certain extent, that
13 is hindsight. But at the same time, your first obligation
14 is to protect your crew members and it's a very simple
15 procedure. Whether you choose to do it by using a general
16 alarm or choose to do it by sending someone down, the
17 ultimate thing is to make sure that they get all awakened
18 and prepared and that wasn't done in this case. They
19 didn't take the right steps.

20 Trying to get the vessel off the reef. You know,
21 ladies and gentlemen, I'm sure that when you heard Mr.
22 Madson say, in his opening, "We're going to bring witnesses
23 in here to say "off" means "on," you had to be as confused
24 as everyone else. I mean when you think about it, why not
25 just get up here and say, "It was the wrong thing to do.

1 We admit it. But it wasn't reckless"? And that would have
2 made a heck of a lot more sense. But you know why they
3 didn't do that? Because everybody knows what a dumb
4 decision had been made.

5 So they, instead, bring in two people to say,
6 "Well, he didn't know what he was saying." One person says
7 he was telling the Coast Guard what they wanted to hear.
8 Is that really true? Listen to what his statement is.
9 "This is Captain of the Port, Commander McCall. Good
10 evening. Do you have any more of an estimate as to your
11 situation at this time? Over." Answer, this is at 1:07,
12 "Not at the present. Steve, Joe Hazelwood here. A little
13 problem here with the third mate, but we're working our way
14 off the reef. The vessel's at hold and we're ascertaining
15 right now, we're just trying to get her off the reef and
16 we'll get back to you as soon as we can. Over." _____
17 that. And he goes on to say -- and, you know, "I'm not
18 telling you the obvious, but take it slow and easy and
19 we're getting help out as fast as we can. And I'd
20 appreciate it, when you get around to it, if you could give
21 me an update as to the general location of where you
22 suspect it might be and the stability info." And Captain
23 Hazelwood says, "We're in pretty good shape right now,
24 stabilitywise. We're just trying to extract her off the
25 shoal here. And you can probably see me on your radar.

1 And once we get underway, I'll let you know." Underway.
2 Do another damage assessment. And then, this is the person
3 who -- Captain Hazelwood is supposed to be trying to
4 please? He says, "Let me know again before you make any
5 drastic attempt to get underway. Make sure you don't start
6 doing any ripping." He's not telling him, "Look, I want
7 you to get off the reef." "You've got a rising tide.
8 You've got another -- you've got about a half an hour -- an
9 hour and a half worth of tide in your favor. Once you get
10 that mapped, I wouldn't recommend doing much wiggling."
11 He's not encouraging him to do this.

12 And then, Captain Hazelwood's statement 13 hours
13 later to Trooper Fox, "Okay, when you arrived on the
14 bridge, did you do anything at that time?" "I tried the
15 rudder and the engines for a few minutes to see if we could
16 extract it from the situation," extract it. "But then I
17 got my faculties about me. I was a little upset, but then
18 I thought about it and driving her off the reef might not
19 be the best way to go because it just exacerbates the
20 damage, so I just stopped the engines." Even Captain
21 Hazelwood realized, when he was giving this interview, that
22 it was bad judgment to try and drive that vessel off the
23 reef.

24 But you've got to question the people that would
25 come in here and try and tell you, an Alaska jury, that off

1 means on and on means off. It just isn't there. And, yet,
2 these are the same people that want to say, "Captain
3 Hazelwood wasn't reckless. Captain Hazelwood didn't do
4 anything." They want to come in here and they want to
5 bring their New York investigators. They want to bring
6 their people from Florida to tell you that off really means
7 on. Well, think about it, ladies and gentlemen, and use
8 your common sense.

9 Now they talked a little bit about Janice Delozier
10 and from the way it sounds, apparently they believe there
11 was another person walking around Valdez dressed up in the
12 same jacket as Captain Hazelwood had, the same type of hat,
13 the same type of beard, who was walking into the Pipeline
14 Club and drinking a different vodka. That's what you have
15 to believe. Either that or Janet Delozier saw him later
16 on? Janice Delozier told you exactly who she saw that
17 evening later on and where she was and it wasn't sitting in
18 the corner where she saw Captain Hazelwood on her lunch
19 break.

20 Now she might have been off on the time and if you
21 remember her, she was very clear and that she identified
22 him. And how would she have known that he was drinking a
23 special vodka. She didn't know Jerzy Glowacki. She didn't
24 know Roberson. How would she have known that? She
25 wouldn't. She knew it because she was sitting right there

1 when it happened.

2 And I can tell you another reason why they have
3 problems with this. And that's because you've got this
4 small town of Valdez and people are walking around. And
5 what did Jerzy Glowacki and Mr. Roberson say? They said,
6 "When we dropped him off, we never saw him again until
7 later," and, "Yes, we were walking around." Well, think
8 about it. You're walking around the town of Valdez. It's
9 not that big. And you're surely going to see Captain
10 Haze'wood because he's walking around. But nobody saw
11 him. And that's because they didn't go into the Pipeline
12 Club before 4:00 o'clock and he was in there until some
13 time after 2:45 and then maybe he left and did some more
14 shopping. But it's clear that she saw him there during her
15 lunch break and that she saw him have two drinks. And
16 that's consistent with the fact that Roberson and Glowacki
17 didn't see him anywhere else.

18 And you look at his statement. When you have that
19 tape in there, you can listen to his statement. He said,
20 "I bought some flowers and shopped for some post cards and
21 then we went to the Pipeline Club." Well, what else?
22 There was nothing else; he was in the Pipeline Club. Now
23 how long he was in it or when he left after Janice
24 Delozier, we don't know, but we know he was there and we
25 know he came back. We know he came back the second time,

1 from 4:15 to nearly 7:00 o'clock. And we know that when he
2 left there, they went to another bar. Just imagine. They
3 don't like to talk about those facts, but they're facts
4 that he can't get around. His client couldn't just wait in
5 the Pizza Palace to pick up their pizza. They had to go
6 back and have another beer and another vodka.

7 And finally on the drinking aspect, two more
8 things. Mr. Madson said there's some type of inference
9 that you can draw that he drank afterwards. Now, really,
10 is that true? We have -- we put Jerzy Glowacki, Joe
11 Roberson, Paul Radtke, Harry Claar, Robert Kagan, Greg
12 Cousins, Maureen Jones, Lloyd LeCain, James Kunkel, we put
13 almost the whole crew on there. We asked them, "Do you
14 know of any alcohol on board?" "No." "Did you have any
15 alcohol on board?" "No." The policy was you couldn't
16 drink. Everybody knew that, you got fired.

17 Captain Hazelwood, at 1:50, knew that the Coast
18 Guard was coming out there. What's he going to do, drink
19 on their way out there? That's not a reasonable
20 inference. There's no inference whatsoever. There is
21 absolutely no evidence in this trial that he had anything
22 to drink after the incident in the bar. The only evidence
23 that you have is that he didn't drink and that, at 10:00
24 o'clock, he had a .06. Those are facts that Mr. Madson
25 doesn't want to have to deal with, but he has to. And if

1 you look at it in that light, you'll understand why the
2 retrograde extrapolation is completely logical.

3 If he's not drinking, he's eliminating. And if
4 he's eliminating, even according to Dr. Hlastala, their
5 expert, it's an accurate way of predicting blood alcohol
6 levels.

7 Now it may not be accurate in the sense that you
8 can pin it down to a certain thing, a certain number. But
9 if you remember, that's exactly what Mr. Prouty said.
10 People eliminate in different ranges between a .08 -- .01
11 and a .25. But if this is the elimination phase, this
12 whole period of time, which he had no reason to believe
13 that it was not, that even Dr. Hlastala had to agree that
14 it would only be a very, very rare situation when a person
15 would be in the elimination phase at 12:00 o'clock. Under
16 any scenario, from a .04 to .025 or an 030, this gentleman
17 is over a .10.

18 Mr. Madson seems to think that we've engaged in
19 selective prosecution in this case. Selective
20 prosecution? Ladies and gentlemen, this man had the
21 responsibility of 19 other crew members and 1.2 million
22 barrels of crude oil. He doesn't get treated any different
23 than a person that drives down the road and gets hit with a
24 DWI. In fact, I think there would be a lot of people out
25 there that have gotten DWIs that would be pretty offended

1 if he wasn't charged because the bottom line is he sits in
2 a bar for four or five hours and drinks and then goes to
3 work.

4 Now the last part goes to the recklessness. And I
5 would agree with Mr. Madson on one thing and that is that
6 the more dangerous something is, the more danger that it
7 represents, the more substantial the risk is. In this
8 case, Mr. Madson admitted that in certain instances, the
9 greater amount of danger will constitute a substantial
10 risk. And he gave you the example of the guns. You know,
11 one out of ten might be loaded, but it's the risk and you
12 can't pick them up.

13 That's the same thing we've got going on here.
14 There's always a risk that a tanker, that the hold will be
15 damaged and that further pollution will go on. But in this
16 case, it's a very different risk. It was a different risk
17 because of the facts and the situation that existed that
18 night. It was a different risk because of the ice. They
19 made the decision to go around it and if they did, it was
20 imperative for them to proceed with caution. And this is
21 not the actions that were taken by a prudent person.
22 Captain Hazelwood was willing to risk the safety of his
23 vessel through the Narrows and when he came out here and
24 faced this second hazardous condition, he was willing to
25 risk the safety of his vessel in that case.

1 Mr. Madson says, "Well, experts, you know, they
2 don't really account for a whole lot." But the bottom
3 line, ladies and gentlemen, is they all recognize the risk
4 that was involved in this maneuver because they all told
5 that they'd be on the bridge. And by doing that, you can
6 infer that Captain Hazelwood either knew it and should have
7 done something different, or if he didn't recognize the
8 risk, it was only because he was impaired.

9 What did those masters say, drinking before
10 departure? Murphy said absolutely not. Stalzer said they
11 don't go to town; drinking would violate Exxon policy.
12 Walker, their expert, "Not my practice." Mihajlovic, "I
13 probably wouldn't." Mackintire, "I normally do not go into
14 town." The only time is the one time he was in there.

15 Leaving the bridge in the Narrows. Murphy, "Not
16 difficult for a captain to go out through the Narrows."
17 Stalzer, "I would be on the bridge." Beevers, "I was
18 always on the bridge." Mihajlovic, "I left only once."
19 Walker, "I was always on the bridge." Mackintire, "I was
20 always on the bridge."

21 There's a reason why all these tanker captains are
22 taking all these steps. It's because they're aware of the
23 risks and they're out to protect the safety of their
24 vessel.

25 Leaving the VTS zone, call it the vessel traffic

1 system. Beevers, "Must advise." Walker, "Required to
2 advise." Mackintire, "Required to advise." And it didn't
3 happen in this case.

4 Auto pilot. Murphy, "Around the Narrows, not
5 required. Not for maneuvering through ice." Stalzer, "Nct
6 in Prince William Sound." Beevers, "Not in Prince William
7 Sound." Walker, "Not my practice to use it." Mihajlovic,
8 "Maybe once." Mackintire, "Not in Prince William Sound."

9 Sea speed. Murphy, "I would slow down when
10 maneuvering through ice." Beevers, "I would slow down near
11 ice." Mackintire, "I would slow down when maneuvering
12 through ice."

13 Mr. Madson says there's no reason to slow down.
14 What do you mean, there's no reason to slow down? How
15 about Busby Island, isn't that a good enough reason for
16 you? How about Bligh Reef, isn't that a good enough reason
17 for you? All for the purpose of speed, saving a few
18 minutes and, at the same time, putting your vessel in
19 jeopardy. Captain Hazelwood was aware of that. He
20 disregarded that risk.

21 Leaving the bridge with one officer during this
22 maneuver. Murphy, "Wouldn't leave the bridge while
23 maneuvering." Deppe, "I'd be on the bridge." Stalzer, "I
24 would never leave during a course change." Beevers, "I
25 would be on the bridge." Walker, "I would be on the

1 bridge." Mihajlovic, "I would probably be on the bridge
2 during the maneuver." Mackintire, "I'm always on the
3 bridge in this area." There's a reason for that, ladies
4 and gentlemen.

5 Captain Hazelwood's conduct fell well below the
6 conduct of a reasonable person and in that way, he is no
7 different than if we had a case of drunk driving and the
8 police officer or somebody else came in and said, "I
9 watched this car. I sat right behind it. And it weaved in
10 the lane and it missed the stop light and it didn't signal
11 going to the righthand lane and then it got into the
12 accident." And you could use those same factors, just like
13 in this case, to determine that that person's judgment was
14 impaired and this is no different.

15 Ladies and gentlemen, I, like Mr. Madson, have a
16 number of things to say. But, really, what it comes down
17 to -- you can talk all you want, but it comes down to a
18 simple thing, was Captain Hazelwood reckless or was he not
19 reckless. When you go back in there, that's going to be
20 the decision you have to make. In making that decision,
21 look at the risks, look at the circumstances that he was
22 presented, look at how he risked his vessel before that.
23 Think about the standard of care that a reasonable person
24 should exercise under those conditions. And ask yourself
25 does what he did constitute a gross deviation from the

1 standard of care that a reasonable person would observe in
2 that circumstance. Ask yourself is it correct, as Mr.
3 Prouty testified, that in this case, this is a good example
4 of how there has been an unraveling -- let me rephrase that
5 -- how the care that is normally seen in a prudent captain
6 has not been taken in this matter.

7 I submit to you, ladies and gentlemen, that in
8 this case, Captain Hazelwood has not been selected out.
9 Captain Hazelwood has been given a fair trial. Captain
10 Hazelwood is not being judged by any different standards.
11 No one is asking you to do that. All that we're asking is
12 that you reach a fair and just verdict in this matter for
13 both parties. That has been what the State has asked from
14 the beginning and that's what we ask from you at this
15 time. Thank you.

16 JUDGE JOHNSTONE: I'm going to read the
17 instructions to you, ladies and gentlemen, and then I'll
18 give you 12 copies so you'll each have a copy to review
19 during your deliberations. And in the middle of the
20 reading, we'll take a little break and stand up and stretch
21 a little bit, but we won't leave the courtroom.

22 The evidence has now been presented to you and
23 you've heard the arguments of Counsel. I will give you the
24 instructions concerning the law to be applied to this case.

25 As used in these instructions, masculine gender

1 includes the feminine; the singular number includes the
2 first one.

3 Distinguishing features of a criminal trial are
4 where known, in the language of the law, is a presumption
5 of innocence and the burden of proof beyond a reasonable
6 doubt. The law presumes the Defendant to be innocent of
7 the crime. Thus, the Defendant, although accused, begins
8 the trial with a clean slate with no evidence favoring
9 conviction. The presumption of innocence alone is
10 sufficient to acquit a Defendant unless and until you're
11 satisfied beyond a reasonable doubt of the Defendant's
12 guilt after careful and impartial consideration of all the
13 evidence in the case.

14 This last mentioned requirement that you be
15 satisfied beyond a reasonable doubt of the Defendant's
16 guilt is what is called the burden of proof. It is not
17 required that the prosecution prove guilt beyond all
18 possible doubt, for it is rarely possible to prove anything
19 to an absolute certainty. Rather, the test is one of
20 reasonable doubt.

21 Reasonable doubt is a doubt based upon reason and
22 common sense, the kind of doubt that would make a
23 reasonable person hesitate to act in his or her important
24 affairs.

25 Proof beyond a reasonable doubt must, therefore,

1 be proof of such a convincing character that you'd be
2 willing to rely and act upon it in your important affairs.
3 The Defendant is never to be convicted on mere suspicion or
4 conjecture.

5 The burden of proving the Defendant guilty beyond
6 a reasonable doubt always rests upon the prosecution. This
7 burden never shifts throughout the trial, for the law never
8 imposes upon a Defendant in a criminal case the burden or
9 duty of calling any witnesses or producing any evidence.

10 A Defendant has the absolute right not to testify
11 and you must not draw any inference against a Defendant for
12 not testifying. Thus, a reasonable doubt may arise not
13 only from the evidence produced, but also from the lack of
14 evidence.

15 Since the burden is upon the prosecution to prove
16 every essential element of the crime charged beyond a
17 reasonable doubt, a Defendant has the right to rely upon
18 failure of the prosecution to establish such proof. A
19 Defendant may also rely upon evidence brought out in cross
20 examination of witnesses for the prosecution.

21 If the Court has repeated any rule, direction or
22 idea or stated the same in varying ways, no emphasis was
23 intended and you must not draw any inference. You're not
24 to single out any certain sentence or any individual point
25 or instruction and ignore the others. You are to consider

1 all the instructions as a whole and to regard each in the
2 light of all the others. The order in which the
3 instructions are given has no significance as to their
4 relative importance.

5 A fact may be proved by direct evidence, by
6 circumstantial evidence or both. Direct evidence is given
7 when a witness testifies of actual and personal knowledge
8 of the facts in issue to be proved. Circumstantial
9 evidence is given when a witness testifies to facts from
10 which the jury may infer other and connected facts which
11 usually and reasonably follow from the facts testified to,
12 according to the common experience of mankind. Neither is
13 automatically entitled to any greater weight than the
14 other.

15 Every person who testifies under oath is a
16 witness. You, as jurors, are the sole judges of the
17 credibility of the witnesses and the weight their testimony
18 deserves. In deciding whether to believe a witness or how
19 much weight to give a witness' testimony, you should
20 consider anything that reasonably helps you to judge the
21 testimony.

22 Among the things you should consider are the
23 following: The witness' attitude, behavior and appearance
24 on the stand, the way the witness testifies; the witness'
25 intelligence; the witness' opportunity and ability to see

1 or hear the things about which the witness testifies; the
2 accuracy of the witness' memory; any motive of the witness
3 not to tell the truth; any interest that the witness has in
4 the outcome of the case; any bias of the witness; any
5 opinion or reputation or evidence of the witness'
6 truthfulness; the consistency of the witness' testimony and
7 whether it is supported or contradicted by other evidence.

8 And if you believe that a witness testified
9 falsely as to part of his or her testimony, you may choose
10 to distrust other parts, also, but you're not required to
11 do so. You should bear in mind that inconsistencies and
12 contradictions in a witness' testimony or between the
13 testimony and that of others do not necessarily mean that
14 you should disbelieve the witness. It is not unusual for
15 persons to forget or be mistaken about what they remember
16 and this may explain some inconsistencies and
17 contradictions. And it is not uncommon for two honest
18 people to witness the same event and see or hear things
19 differently.

20 It may be helpful when you evaluate
21 inconsistencies and contradictions to consider whether they
22 relate to important or unimportant facts.

23 You may believe all, part or none of the testimony
24 of any witness. You need not believe a witness, even
25 though his or her testimony is uncontradicted. But you

1 should act reasonably in deciding whether or not you
2 believe a witness and how much weight to give to the
3 testimony.

4 A witness may be impeached or discredited in a
5 number of ways. He may be impeached by evidence affecting
6 his character for truth, honesty or integrity or by
7 contradictory evidence. He may also be impeached by
8 evidence that, at other times, he has made statements
9 inconsistent with his present testimony as to any matter
10 material in this case or by proof that he has been
11 convicted of a crime involving dishonesty or false
12 statements.

13 The impeachment of a witness does not necessarily
14 mean that his testimony is completely deprived of value or
15 that its value is destroyed in any degree. The effect, if
16 any, of the impeachment upon the credibility of a witness
17 is for you to determine.

18 You're not bound to decide in conformity with the
19 testimony of a greater number of witnesses which does not
20 convince you as against the testimony of a lesser number of
21 witnesses which appeals to your mind as a more convincing
22 force. Thus, you're not to decide an issue by the simple
23 process of counting the number of witnesses who have
24 testified on opposing sides. The final test is not the
25 number of witnesses, but the convincing part of the

1 evidence.

2 Expert witnesses may testify in this case. They
3 did. These experts may have special training, education,
4 skills or knowledge. Their testimony may be of help to
5 you. In deciding whether to believe them and how much
6 weight to give their testimony, you should consider the
7 same things that you would when any other testifies. In
8 addition, you should consider the following things: The
9 special qualifications of the expert; the expert's
10 knowledge of the subject matter involved in this case; how
11 the expert got the information that he or she testified
12 about; the nature of the facts upon which the expert's
13 opinion is based; the clarity of the expert's testimony.

14 As with other witnesses, you must decide whether
15 or not to believe an expert and how much weight to give to
16 expert testimony. You may believe all, part or none of the
17 testimony of an expert witness. You need not believe an
18 expert witness, even though the testimony is
19 uncontradicted, but you should act reasonably in deciding
20 whether or not you believe such a witness and how much
21 weight to give to his testimony.

22 A nonexpert witness may testify to his opinion if
23 it is rationally based on his perceptions and helpful to a
24 clear understanding of his testimony or the determination
25 of a fact in issue. In determining the weight to be given

1 to an opinion expressed by a nonexpert witness, you should
2 consider his credibility, the extent of his opportunity to
3 perceive the matters upon which his opinion is based and
4 the reasons, if any, given for it. You are not required to
5 accept such an opinion, but you should give it the weight,
6 if any, to which you find it entitled.

7 A statement made by a Defendant, other than at the
8 Defendant's trial, may be either an admission or a
9 confession. An admission is a statement by a Defendant
10 which, by itself, is not sufficient to warrant an inference
11 of guilt, but which tends to prove guilt when considered
12 with other evidence. A confession is a statement by a
13 Defendant which discloses intentional participation in the
14 criminal act for which the Defendant is on trial and which
15 you believe proves the Defendant's guilt of that crime.

16 You are the exclusive judges as to whether an
17 admission or confession was made the Defendant and if the
18 statement is true in whole or in part. If you should find
19 that such statement is entirely untrue, you must reject
20 it. If you find it is true in part, you may consider that
21 part which you find to be true.

22 Evidence of an oral admission of the Defendant
23 ought to be viewed with caution.

24 It is the constitutional right of the Defendant in
25 a criminal trial that he may not be compelled to take the

1 witness stand to testify. No presumption of guilt may be
2 raised and you must not draw any inference of any kind from
3 the fact that a Defendant does not testify, nor should that
4 be discussed by you or enter into your deliberations in any
5 way.

6 It is the duty of the attorney on each side of a
7 case to object when the other side offers testimony or
8 other evidence which the attorney believes is not properly
9 admissible. Upon allowing testimony or other evidence to
10 be introduced over the objection of an attorney, the Court
11 does not, unless expressly stated, indicate an opinion as
12 to the weight or effect of such evidence.

13 As stated before, you are the exclusive judges of
14 the credibility of all witnesses and the weight and effect
15 of all evidence.

16 When the Court sustains an objection addressed to
17 a witness, you must disregard the question entirely and may
18 not draw any inference from the wording of it, nor
19 speculate as to what the witness would have said if
20 permitted to answer the question. You must never speculate
21 to be true any insinuations suggested by a question to a
22 witness. A question is not evidence and may be considered
23 only as it supplies a mean to the answer.

24 Do no consider as evidence any statements,
25 arguments, questions or remarks of Counsel made during the

1 trial. While not evidence, they generally are meant to
2 help you understand the evidence and apply the law.
3 Consider them in that light. Disregard any arguments,
4 statement, question or remark of Counsel which has no basis
5 in the evidence produced in open Court. Questions by
6 Counsel may only be considered as they supply meaning to
7 the answers. Never speculate to be true any insinuations
8 suggested by questions of Counsel.

9 A stipulation is an agreed statement of fact
10 between the attorneys for the prosecution and Defendant and
11 you shall regard such stipulated facts as having been
12 proven. The word "unlawfully" as used in these
13 instructions means wrongfully or contrary to law.

14 When, as in this case, it is alleged that the
15 crime charged was committed on or about a certain date, if
16 the jury finds that the crime was committed, it is not
17 necessary that the proof show that it was committed on that
18 precise date. It is sufficient that the proof show that
19 the crime was committed on or about the date.

20 The indictment and the information in the charging
21 documents in this case are mere accusations against the
22 Defendant. They are not evidence of the guilt of the
23 Defendant and you should not permit yourself to be
24 influenced to any extent, however slight, against the
25 Defendant because of the filing of the indictment or the

1 information.

2 The Defendant is charged with a separate crime in
3 each count of the indictment and information. Each crime
4 and the evidence pertaining to it should be considered
5 separately by you and a separate verdict should be returned
6 as to each count. A Defendant's guilt or innocence of the
7 crime charged as to one count should not affect your
8 verdict on any other count.

9 The indictment in this case charges that on or
10 about the 23d or 24th days of March 1989, at or near
11 Valdez, in the Third Judicial District, State of Alaska,
12 Joseph Hazelwood, having no right to do so or any
13 reasonable ground to believe he had such a right,
14 recklessly created a risk of damage to the property of
15 others in the amount exceeding \$100,000.00 by widely
16 dangerous means.

17 The information in this case charges: Count 1,
18 that on or about the 24th day of March 1989, at or near
19 Valdez in the Third Judicial District, State of Alaska,
20 Joseph Hazelwood did unlawfully operate a water craft, the
21 Exxon Valdez, while under the influence of intoxicating
22 liquor; Count 2, that on or about the 24th day of March
23 1989, at or near Valdez in the Third Judicial District,
24 State of Alaska, Joseph Hazelwood did recklessly engage in
25 conduct that resulted in the Exxon Valdez being run aground

1 on Bligh Reef and created a substantial risk of serious
2 physical injury to another person; Count 3, that on or
3 about the 24th day of March 1989, at or near Valdez in the
4 Third Judicial District, State of Alaska, Joseph Hazelwood
5 did unlawfully and negligently discharge, cause to be
6 discharged or permit the discharge of petroleum in or upon
7 the waters of the State of Alaska.

8 A person commits a crime of criminal mischief in
9 the second degree if, having no right to do so or having
10 any reasonable grounds to believe he has such a right, the
11 person recklessly creates a risk of damage in an amount
12 exceeding \$100,000.00 to the property of another by the use
13 of widely dangerous means.

14 In order to establish a crime of criminal mischief
15 in the second degree, it is necessary for the State to
16 prove beyond a reasonable doubt the following: First, that
17 the event in question occurred at or near Valdez, Alaska,
18 and on or about March 24th, 1989; second, that Captain
19 Joseph Hazelwood had no right or any reasonable ground to
20 believe he had such a right to commit the act or acts
21 charged; third, that Captain Hazelwood recklessly created a
22 risk of damage to the property of another; fourth, that the
23 risk of damage was in an amount exceeding \$100,000.00; and,
24 fifth, that the risk was created by the use of widely
25 dangerous means.

1 If you find, from your consideration of all the
2 evidence, that each of these propositions has been proven
3 beyond a reasonable doubt, then you shall find the
4 Defendant guilty. If, on the other hand, you find in your
5 consideration of all the evidence that any of these
6 propositions has not been proved beyond a reasonable doubt,
7 then you shall find the Defendant not guilty.

8 In order for the State to establish the offense of
9 operating a water craft while under the influence of
10 intoxicating liquor, the State must prove beyond a
11 reasonable doubt the following: First, the Defendant
12 operated a water craft near Valdez, in the Third Judicial
13 District, on or about March 24th, 1989; two, at the time
14 Defendant operated said water craft, he was under the
15 influence of intoxicating liquor. If you find, from your
16 consideration of all the evidence, that each of these
17 propositions has been proved beyond a reasonable doubt,
18 then you shall find the Defendant guilty. If, on the other
19 hand, you find from your consideration of all the evidence
20 that any of these propositions has not been proved beyond a
21 reasonable doubt, then you shall find the Defendant not
22 guilty.

23 A person commits a crime of reckless endangerment
24 if the person recklessly engages in conduct which creates a
25 substantial risk of serious physical injury to another

1 person. In order to establish the crime of reckless
2 endangerment, it is necessary for the State to prove beyond
3 a reasonable doubt the following: First, that the event in
4 question occurred at or near Valdez, Alaska, in the Third
5 Judicial District, on or about March 24, 1989; second, that
6 Captain Joseph Hazelwood recklessly engaged in conduct;
7 and, third, that Captain Hazelwood's conduct created a
8 substantial risk of serious physical injury to another
9 person.

10 If you find from your consideration of all the
11 evidence that each of these propositions has been proved
12 beyond a reasonable doubt, then you shall find the
13 Defendant guilty. If, on the other hand, you find from
14 your consideration of all the evidence that any of these
15 propositions has not been proved beyond a reasonable doubt,
16 then you shall find the Defendant not guilty.

17 A person commits a crime of negligent discharge of
18 oil if, having no right to do so or any reasonable ground
19 to believe in such right, the person negligently
20 discharges, causes to be discharged or permits the
21 discharge of oil.

22 In order to establish the crime of negligent
23 discharge of oil, it is necessary for the State to prove
24 beyond a reasonable doubt the following: First, that the
25 event in question occurred at or near Valdez, Alaska, in

1 the Third Judicial District, on or about March 24, 1989;
2 second, that the Captain Hazelwood negligently discharged,
3 caused to be discharged or permitted the discharge of oil
4 into or upon the waters or land of the state.

5 If you find, from your consideration of all the
6 evidence, that each of these propositions has been proved
7 beyond a reasonable doubt, then you shall find the
8 Defendant guilty. If, on the other hand, you find, from
9 your consideration of all the evidence, that any of these
10 propositions has not been proved beyond a reasonable doubt,
11 then you shall find the Defendant not guilty.

12 Want to take a stretch? We'll take two minutes.
13 We're on the record, though.

14 Thank you. For the jury to find whether the
15 Defendant caused or permitted the discharge of oil, as the
16 phrase is used in Instruction Number 24, which is the
17 preceding instruction of these instructions, the jury must
18 find beyond a reasonable doubt that the Defendant's conduct
19 was a substantial factor in causing or permitting the
20 discharge of oil. Defendant's conduct need not be the sole
21 cause.

22 A person acts recklessly with respect to the
23 result described by the law when a person is aware of and
24 consciously disregards a substantial and unjustifiable risk
25 that the result will occur. The risk must be of such a

1 nature and degree that disregard of it constitutes a gross
2 deviation from the standard of conduct that a reasonable
3 person would observe in the situation. A person who is
4 unaware of a risk of which the person would have been
5 aware, had he not been intoxicated, acts recklessly with
6 respect to that risk.

7 A person acts negligently with respect to a result
8 described by a provision of law defining an offense when a
9 person fails to perceive an unjustifiable risk that the
10 result will occur. The risk must be of such a nature and
11 degree that the failure to perceive it constitutes a
12 deviation from the standard of care that a reasonable
13 person would observe in the situation.

14 Property of another means property in which a
15 person has an interest which the Defendant is not
16 privileged to infringe. Whether or not the Defendant also
17 has an interest in the property and whether or not the
18 person from whom the property was obtained or withheld also
19 obtained that property unlawfully.

20 As used in the indictment, property of another
21 refers to the fisheries, wildlife, vegetation, shoreline
22 and other natural aspects of Prince William Sound. The
23 phrase does not refer to the Exxon Valdez, itself, or its
24 contents.

25 It is not necessary for the Defendant's actions or

1 inactions in this case to be the sole proximate cause of
2 the risk created in this case. If the Defendant recklessly
3 creates a risk, the fact that other persons acts also
4 contribute to the creation of the risk does not serve to
5 exculpate the Defendant. It is only necessary that the
6 Defendant's actions be a cause of the risk.

7 Widely dangerous means means any difficult to
8 confine substance, force or other means capable of causing
9 widespread damage, including fire, explosion, avalanche,
10 poison, radioactive material, bacterial, collapse of
11 building or flood and an oil spill may be considered a
12 widely dangerous means.

13 "Person" means a natural person and, when
14 appropriate, an organization, government or a governmental
15 instrumentality.

16 Operate a water craft means to navigate or use a
17 vessel used or capable of being used as a means of
18 transportation on water for recreational or commercial
19 purposes on all waters, fresh or salt, inland or coastal,
20 inside the territorial limits or under the jurisdiction of
21 the State. The phrase "navigate or use a vessel" means to
22 have existing or present bodily restraint, directing
23 influence, domination or regulation of the vessel.

24 Actions, if any, taken by the Defendant after 1:41
25 a.m. on March 24, 1989, may not be considered by the jury

1 in determining whether the Defendant was operating a water
2 craft, as the phrased is used in these instructions.

3 A person is under the influence of intoxicating
4 liquor when he has consumed alcohol to such an extent as to
5 impair his ability to operate a water craft. Under the
6 influence of intoxicating liquor means that the Defendant
7 consumed some alcohol, whether mild or potent, in such a
8 quantity, whether great or small, that it adversely
9 affected and impaired his actions, reactions or mental
10 processes under the circumstances then existing and
11 deprived him of that clearness of the intellect and control
12 of himself which he would otherwise have possessed.

13 The question is not how much alcohol would affect
14 an ordinary person. The question is what effect did any
15 alcohol consumed by the Defendant have on him at the time
16 and place involved. If the consumption of alcohol so
17 affected the nervous system, brain or muscles of the
18 Defendant as to impair his ability to operate the water
19 craft, then the Defendant was under the influence.

20 Serious physical injury means physical injury
21 caused by an act performed under circumstances that create
22 a substantial risk of death or physical injury that causes
23 serious and protracted disfigurement, protracted impairment
24 of health or protracted loss or impairment of the function
25 of a body member or organ.

1 A person creates a risk of damage to property of
2 another when the person engaged in conduct constituting an
3 actual and realistic possibility of harm to the property.
4 The risk of damage must be real, not merely hypothetical or
5 speculative. You are further instructed that any evidence
6 of the Defendant's actions in operating the Exxon Valdez
7 after the time of the initial grounding and any evidence
8 that what might have occurred to the vessel and its
9 contents or crew had the vessel refloated, for any reason,
10 may not be considered in determining whether the Defendant
11 created a risk to the property of another, as the phrase is
12 used in Count 1 of the indictment, nor may such evidence be
13 considered in determining whether a Defendant created a
14 substantial risk of serious physical injury to another
15 person, as the phrase is used in Count 2 of the
16 information, nor may it be considered in determining
17 whether the Defendant discharged or caused to be discharged
18 or permitted the discharge of petroleum, as the phrase is
19 used in Count 3 of the information. Such evidence may be
20 considered along with all other facts and circumstances in
21 determining the remaining issues presented to you.

22 (Tape changed to C-3689)

23 Physical injury means a physical pain or
24 impairment of physical condition.

25 "Oil" means a derivative of liquid hydrocarbon and

1 includes crude oil, lubricating oil, sludge, oil refuse or
2 other petroleum related by-products or products.

3 For the crimes I've instructed you on, there must
4 exist a joint operation of an act or conduct and a culpable
5 mental state. To constitute a culpable mental state, it is
6 not necessary that there exist an intent to violate the
7 law. Depending on a specific crime, when a person
8 intentionally, knowingly, recklessly or negligently does
9 that which the law declares to be a crime, he is acting
10 with a culpable mental state, even though he may not know
11 that his actions or conduct are unlawful.

12 State of mind may be proved by circumstantial
13 evidence. It rarely can be established by any other
14 means. While witnesses may see and hear and, thus, be able
15 to give direct evidence of what a Defendant does or fails
16 to do, there can be no eyewitness to the state of mind in
17 which the acts were done or omitted. But what a Defendant
18 does or fails to do may indicate the Defendant's state of
19 mind. In determining issues of state of mind, the jury is
20 entitled to consider any statements made and acts done or
21 omitted by the accused and all facts and circumstances in
22 evidence which may aid determination of state of mind.

23 At the close of the trial, Counsel argued the case
24 to you. The arguments of Counsel, based upon study and
25 thought, may be, and usually are, distinctly helpful.

1 However, it should be remembered that arguments of Counsel
2 are not evidence and cannot be considered as such. It is
3 your duty to give careful attention to the arguments of
4 Counsel, if they are based upon the evidence and upon the
5 law as given to you by me in these instructions. But
6 arguments of Counsel, if they depart from the facts or from
7 the law, should be disregarded.

8 Counsel, although acting in good faith, may be
9 mistaken in their recollection of evidence given during the
10 trial. You are the ones to determine what evidence was
11 given in this case, as well as what conclusions of law
12 should be drawn therefrom.

13 In performing your duty as jurors, you must not be
14 influenced by pity for the Defendant or by passion or
15 prejudice against him, nor may you be influenced by public
16 opinion or media reports. You must not be biased against
17 the Defendant because he has been arrested for this offense
18 or because the charge has been filed against him or because
19 he has been brought to trial. None of these facts are
20 evidence of his guilt and you must not infer or speculate
21 from any or all of them that he is more likely to be guilty
22 than innocent.

23 The authority thus vested in you is not an
24 arbitrary power, but must be exercised with sincere
25 judgment and sound discretion and in accordance with rules

1 of the law as stated to you.

2 In arriving at a verdict in this case, the subject
3 of penalty or punishment is not to be discussed or
4 considered by you. That matter is one that lies solely
5 with the Court and must not in any way affect your decision
6 as to the innocence or guilt of the Defendant.

7 The attitude and conduct of jurors at the
8 beginning of their deliberations are matters of
9 considerable importance. It is rarely productive or good
10 for a juror, at the outset, to make an emphatic expression
11 of his or her opinion on the case or state how he or she
12 intends to vote. When this is done at the beginning, that
13 juror's sense of pride may be aroused and the juror may
14 hesitate to change his or her opinion, even if shown that
15 it is wrong. Remember that you are not partisans or
16 advocates in this matter, but you are judges.

17 The verdict must represent the considered judgment
18 of each juror. In order to return a verdict, it is
19 necessary that each juror agree thereto. Your verdict must
20 be unanimous. It is your duty as jurors to consult with
21 one another and to deliberate with a view to reaching an
22 agreement, if you can do so without violence to individual
23 judgment. Each of you must decide the case for yourselves,
24 but do so only after an impartial consideration of the
25 evidence with your fellow jurors. In the course of your

1 deliberations, do not hesitate to reexamine your own views
2 and change your opinion if convinced it is erroneous. But
3 do not surrender your honest conviction as to the weight or
4 effect of evidence solely because of the opinion of your
5 fellow jurors or for the mere purpose of returning a
6 verdict.

7 During your deliberations, a bailiff will be
8 appointed to keep you together and prevent conversations
9 between you and any other persons. The bailiff will
10 provide with such requirements as meals and will make phone
11 calls to your families, when necessary, to let them know of
12 your schedule. The bailiff cannot answer any questions
13 about this case or provide you with any information, books
14 or materials, as I have strictly forbidden this. The
15 bailiff, as well as all other persons, are forbidden to
16 communicate in any way or manner with any member of the
17 jury on any subject touching the merits of this case.

18 Bear in mind, also, that you are never to reveal
19 to any person, not even to the bailiff or to me, how the
20 jury stands, numerically or otherwise, on the question of
21 guilt or innocence of the accused until authorized by the
22 Court. Any violation or perceived violation by a fellow
23 juror of any item about which I have cautioned you is to be
24 reported by you as a body or individually to me.

25 If it becomes necessary during your deliberations

1 to communicate with me, you may send a note by the bailiff,
2 signed by your foreperson or by one or more members of the
3 jury. No member of the jury should ever communicate with
4 me by any means, other than a signed writing. The writing
5 should contain the date and time of the communication. I
6 will never communicate with any member of the jury, other
7 than in writing or orally, here in open Court.

8 You were accepted as jurors in this case in
9 reliance upon your answers to the questions asked to you
10 concerning your qualifications. You are just as much bound
11 by those answers now and until you are finally discharged
12 from further consideration of this case as you were then.
13 The oath taken by you obligates you to try this case well
14 and truly and to render a true verdict according to the law
15 and the evidence. Both the State and the Defendant have a
16 right to expect that you will conscientiously consider and
17 weigh the evidence and apply the law of the case and that
18 you will reach a just verdict.

19 Verdict forms have been prepared for your use.
20 These forms are for your use in recording the jury's
21 unanimous verdict as to the guilt or innocence of the
22 accused with respect to the charged crime. You will take
23 the forms to the jury room and if you reach unanimous
24 agreement as to the guilty or innocence of the accused with
25 respect to the crimes charged, you will have your

1 foreperson fill in the date and sign the forms designed to
2 record the verdict upon which you unanimously agree as to
3 the crime charged.

4 After your unanimous verdict is that the accused
5 is guilty or not guilty of the crimes, you will return with
6 that verdict to the courtroom.

7 Upon your return to the jury room, select one of
8 your number, man or woman, to act as foreperson. The
9 foreperson is to preside over your deliberations. You will
10 take to the jury room exhibits and these instructions,
11 together with the verdict forms, which are
12 self-explanatory. Each of your verdicts must be unanimous;
13 that is all of you must agree on each verdict.

14 If you unanimously agree upon the verdict during
15 Court hours, that is between 8:30 a.m. and 4:30 p.m.,
16 return it, together with the exhibits and these
17 instructions, immediately into open Court. If, however,
18 you do not unanimously agree upon the verdict during Court
19 hours, you may continue to deliberate after 4:30 p.m. If
20 you have any questions for the Court which arise after 4:30
21 p.m., they will be answered the next day, when you return
22 to resume deliberations.

23 If you unanimously agree on a verdict after 4:30
24 p.m., the verdict, after being properly dated and signed by
25 the foreperson, must be sealed in an envelope accompanying

1 these instructions. The foreperson will keep it in his or
2 her possession in a sealed envelope and you may separate
3 and go to your homes. But all of you must be in the jury
4 box when the Court next convenes at 8:30 a.m., when the
5 verdict will be received from you in the usual way.

6 In the event that you use this method of sealed
7 verdict, you are admonished not to make any disclosure
8 concerning the verdict to anyone and not to speak with
9 anyone concerning the case until the verdict has been
10 returned in open Court.

11 The instructions are dated this 20th day of March
12 1990 and signed by myself. That completes the reading of
13 the jury instructions. There are a few administrative
14 matters we'll need to take up at this time before you go to
15 the jury room.

16 My question now is for the first 12 members and
17 does not include Ms. Turner or Ms. Roselle. Are the first
18 12 members feeling okay? Are there any medical
19 emergencies, any other emergencies in the family, anything
20 that would prevent you from commencing deliberations and
21 continuing with them?

22 All right, Ms. Turner, you are an alternate; Ms.
23 Roselle, you are an alternate -- do I have -- Gause, Ms.
24 Gause, correction. The two alternates are excused at this
25 time with my thanks for your participation. I regret you

1 cannot participate in deliberations. I've talked to
2 alternates who were not able to and they were
3 disappointed. That's the way the system works. But if you
4 are interested in the outcome, as soon as there is an
5 outcome, you can contact me. If you've made plans with
6 other jurors after the outcome, you can talk to them. If
7 you have any questions or suggestions for me, I'll be in my
8 office in about ten minutes and I'll be happy to talk with
9 you then.

10 You can go to the jury room with Mr. Purden's keys
11 and retrieve your personal belongings. After you leave the
12 Court building, you're released from my instructions about
13 discussing the case. You're free to form or express
14 opinions as soon as you leave the Court building. Media
15 people may want to talk with you. Whether you talk with
16 them or not is up to you, but you're under no
17 restrictions. You may talk with anybody you want. On the
18 other hand, if somebody pushes you and tries to get you to
19 talk about something you don't want, let me know. I'll
20 probably be able to take care of that.

21 Once again, my thanks for your attendance and your
22 participation. You have my thanks and the system's
23 thanks. Thanks very much.

24 I'm going to place you in the charge of a bailiff
25 momentarily. Under the Alaska Rules of Court, the jury

1 shall be under the charge of a bailiff until the jury
2 agrees upon its verdict or is discharged by the Court.
3 Unless otherwise ordered by the Court, the bailiff who has
4 the jury under his charge must keep the jury together and
5 keep it separate from other persons. He must not allow any
6 communication made to the jury, nor make any himself,
7 except to ask the jury if it has agreed upon its verdict.

8 You must not, before the verdict is rendered,
9 communicate to any person the state of the jury's
10 deliberations or the verdict agreed upon.

11 If Mr. Van Huss would stand forward, please.
12 Would you raise your right hand, please? Do you, as
13 bailiff of this jury, solemnly swear or affirm that you
14 will conduct yourself according to the instructions just
15 read to you?

16 MR. VAN HUSS: I do.

17 JUDGE JOHNSTONE: Okay, thank you. You can step
18 over here, Mr. Van Huss, for a minute. Ladies and
19 gentlemen, I'm going to read from our Alaska Rules of
20 Criminal Procedure, from Rule 27, verbatim, to emphasize
21 the importance of this.

22 "If any juror is permitted to separate from the
23 jury after the case is submitted to the jury, the Court
24 shall admonish him that it is his duty to discuss the case
25 only with other jurors in the jury room and not to converse

1 with any other person on any subject connected with the
2 trial."

3 That means that you do your discussion of the case
4 in the jury room with all of you present and I suppose that
5 means that if one of you is using the bathroom, you might
6 want to wait. It does mean, for sure, that when you go to
7 dinner, go to lunch or you separate and go home later on
8 this evening, that you cannot talk about this case to
9 anybody. And you've heard me admonish you. You're
10 probably getting tired of hearing me, but avoid the media.
11 Now you can appreciate how important it is right now to
12 avoid media information about this case. So keep that in
13 mind.

14 If you have a question concerning the case, for
15 example, if you wanted a play back of testimony, we do have
16 the electronic means of recording and playing back
17 testimony. You've taken notes and one of the reasons you
18 were allowed to take notes was to minimize the need for
19 this as much as possible, but it might become necessary.
20 And if it does, I will consider a legitimate request and I
21 will take it up with Counsel. You can make our job a
22 little easier if you are specific as you can be about your
23 request. Regardless of what your request is, I'm required
24 to take this up with Counsel. It'll take us awhile. We'll
25 come up with a result, hopefully satisfactory to your

1 request. But please be patient because it takes some time
2 to get this together and answer your questions.

3 You will be given pads, clear pads, and pencils.
4 You will each be given a copy of the jury instructions.
5 You'll be given a tape recorder for playing exhibits.

6 I'll leave it up to the sound discretion of the
7 jury of how long they wish to deliberate for the remainder
8 of the day. It's getting to be 4:30. You may want to just
9 pick a jury foreperson and then retire for the day and
10 resume tomorrow. If that's the case and if you do need to
11 come back tomorrow or any other day, I'm going to require
12 you, during Court days, to come back and resume your
13 deliberations at 8:30 a.m. and deliberate, if it's
14 necessary, at least until 4:30.

15 If you need meals, you just notify the bailiff and
16 the bailiff will make reservations and we'll either take
17 you to lunch or we'll bring lunch in for you. That goes
18 for any meals that are required. If you deliberate in the
19 evenings and you want dinner, the bailiff will accommodate
20 dinner for you, as well.

21 When you start your deliberations, Counsel will be
22 working with the in Court deputy, Mr. Purden, to get all
23 the exhibits together and we'll get them in to you as
24 quickly as we can, together with the envelope that will
25 accompany the instructions, the sealed verdict envelope.

1 The evidence admitted is all the evidence that you
2 will receive. There is no other evidence, other than the
3 evidence that has been admitted in the trial. So if you
4 ask for something that has not been admitted, the question
5 is going to be answered with something like, "You've
6 received all the evidence in this trial."

7 Is there anything else you can think of, Counsel?

8 MR. MADSON: No, Your Honor.

9 JUDGE JOHNSTONE: All right, I'm going to commit
10 you to the charge of the bailiff at this time, ladies and
11 gentlemen, to embark on your deliberations.

12 (Whereupon, the jury leaves the courtroom.)

13 JUDGE JOHNSTONE: Please leave your telephone
14 numbers where you can be reached during Court hours, 8:30
15 to 4:30 with Mr. Purden when we recess.

16 MR. MADSON: Your Honor, two matters, very
17 quickly. Exhibit AC, the Court took judicial notice of the
18 ice statute. That was not technically offered into
19 evidence. The Court took judicial notice of it, but it's
20 not an exhibit at this time and it has to be admitted.

21 JUDGE JOHNSTONE: Any objection?

22 MR. COLE: No.

23 JUDGE JOHNSTONE: AC is admitted.

24 (Defendant's Exhibit AC was
25 received in evidence.)

1 MR. MADSON: And Exhibit AJ, which is the document
2 Captain Beevers testified about, essentially just his
3 position report as to where the vessel is located on Bligh
4 Reef, I'd ask that that be admitted.

5 JUDGE JOHNSTONE: It's AJ. Any objection?

6 MR. COLE: No.

7 JUDGE JOHNSTONE: It's admitted, also.

8 (Defendant's Exhibit AJ was
9 received in evidence.)

10 MR. COLE: I assume that Counsel's going to work
11 with us to make sure that the exhibits that dealt with law
12 we have a little bit of editing to do, I think, on those.

13 JUDGE JOHNSTONE: I'm sorry?

14 MR. COLE: When we talked about the statutes that
15 dealt with what the law was and that you took judicial
16 notice, there was some other --

17 JUDGE JOHNSTONE: Okay, Exhibit 180 we have in
18 evidence now, I believe. That's just a copy of the one
19 section. Is there another exhibit you're referring to?

20 MR. COLE: Well, I think that there is. I'd like
21 to --

22 JUDGE JOHNSTONE: Okay, well, go through those
23 exhibits and if they need to be edited out, you just
24 reflect what was admitted. We can do that.

25 So, Counsel, you'll probably want to stick around

1 here with Mr. Purden for awhile. I'll get the additional
2 copies of the instructions to the bailiff so he can hand
3 them to the jurors. And we have a sealed verdict envelope,
4 which Mr. Purdent will get for me in a minute and we'll --
5 do you have one here?

6 THE CLERK: I've got one.

7 JUDGE JOHNSTONE: Okay, anything else, Counsel?

8 MR. COLE: No.

9 MR. MADSON: No.

10 JUDGE JOHNSTONE: Okay, we stand at recess.

11 THE CLERK: Please rise. This Court stands at
12 recess.

13 (Whereupon, at 4:20 p.m., proceedings adjourned.)

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1 SUPERIOR COURT)
2) Case No. 3ANS89-7217
3 STATE OF ALASKA) Case No. 3ANS89-7218
4
5

6 I do hereby certify that the foregoing transcript
7 was typed by me and that said transcript is a true record
8 of the recorded proceedings to the best of my ability.
9
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11


A handwritten signature in cursive script, reading "Doris A. Cutler", is written over a horizontal line.

12
13 DORIS A. CUTLER
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VOLUME 34

STATE OF ALASKA

IN THE SUPERIOR COURT AT ANCHORAGE

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In the Matter of:	:	
STATE OF ALASKA	:	Case No. 3ANS89-7217
versus	:	Case No. 3ANS89-7218
JOSEPH J. HAZELWOOD	:	
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Anchorage, Alaska

March 22, 1990

The above-entitled matter came on for trial by jury before the Honorable Karl S. Johnstone, commencing at 12:38 p.m. on March 22, 1990. This transcript was prepared from tapes recorded by the Court.

APPEARANCES:

On behalf of the State:

BRENT COLE, Esq.
MARY ANN HENRY,
Assistant District Attorneys

On behalf of the Defendant:

DICK L. MADSON, Esq.
MIKE CHALOS, Esq.
THOMAS RUSSO, Esq.

P R O C E E D I N G S

1
2 THE CLERK: -- the Honorable Karl S. Johnstone
3 presiding is now in session.

4 THE COURT: You may be seated.

5 I have a note from the jury. They indicate
6 they've reached a verdict and are ready to return it to the
7 courtroom. Is there anything counsel needs to do before we
8 bring the jury in?

9 MR. MADSON: No, Your Honor.

10 MS. HENRY: No, Your Honor.

11 THE COURT: All right.

12 We have a large number of media representatives
13 here who have asked to be able to talk with some of the
14 jurors afterwards. I'm going to advise them that the media
15 would like to talk to them afterwards, and if they want to
16 talk to the media, they can come back into the courtroom,
17 so we won't have chaos in the hallways or in the elevators
18 or downstairs, and the media has agreed to conduct their
19 interviews in the courtroom afterwards.

20 Those who do not want to talk to the media I'm
21 sure will not be hounded by the media personnel on their
22 way out. I'll be talking to the jurors personally after I
23 excuse them in the jury room, and then it will be up to
24 them what they want to do.

25 Let's bring the jury in.

1 And we will be polling the jury.

2 (Whereupon, the jury enters the courtroom.)

3 THE COURT: All twelve of you are present. I've
4 got your note, ladies and gentlemen. We're ready to
5 receive your verdict. If you will pass it to the Bailiff,
6 he will pass it to me.

7 (Pause)

8 The verdicts are in proper form. I'll publish
9 the caption on the first one, and then just read the
10 verdict for each of them after that.

11 In the Superior Court of the state of Alaska, 3rd
12 Judicial District, state of Alaska, Plaintiff, versus
13 Joseph Hazelwood, Defendant. Verdict number one. We, the
14 jury, find the Defendant, Joseph Hazelwood, not guilty of
15 criminal mischief in the second degree as charged in the
16 indictment, dated Anchorage, Alaska this 22nd day of March,
17 1990.

18 Verdict two. We, the jury, find the Defendant,
19 Joseph Hazelwood, not guilty of operating a watercraft
20 while under the influence of intoxicating liquor, as
21 charged in count one of the information.

22 Verdict three. We, the jury, find the Defendant,
23 Joseph Hazelwood, not guilty of reckless endangerment as
24 charged in count two of the information.

25 Verdict four. We, the jury, find the Defendant,

1 Joseph Hazelwood, guilty of negligent discharge of oil as
2 charged in count three of the information.

3 All four verdicts are dated the 22nd day of
4 March, 1990, signed by the Jury Foreperson.

5 (Pause)

6 Ladies and gentlemen, that completes your jury
7 service in this case. On behalf of the court system and on
8 behalf of myself personally, I want to thank you for your
9 efforts and your participation.

10 This was a thoughtless -- a thankless job.
11 Everybody gets in here gets paid for their role on this
12 case, and you folks don't, and yet you probably have the
13 most important role. You were on time every day. I
14 noticed that, and that's very unusual. You were very
15 attentive. You have my thanks.

16 I told you in the beginning it would probably be
17 an experience you would never forget and I'm sure that's
18 going to be the case. I hope it was a positive experience
19 for you. You've been part of a very significant case. I
20 think you'll remember that.

21 I'm going to release you from the instructions
22 not to discuss this case with anybody else. However, I'm
23 going to ask that you wait in your jury room, just for a
24 couple of minutes. I will come in and talk with you. I
25 want to exchange some information with you.

1 The media personnel will probably want to talk to
2 you about the case.

3 Before I excuse you, however, I want to verify
4 that the verdicts read were your verdicts. You're going to
5 be asked by Mr. Purden if the verdicts just read are your
6 verdicts. That means that if all four of the verdicts I
7 just read are your verdicts, the answer is yes. If less
8 than all four is your individual verdict, the answer is
9 no. So when you hear your name called, just answer the
10 question yes or no.

11 Mr. Purden?

12 THE CLERK: Yes, Your Honor.

13 Juror number one, Margaret _____, are the
14 verdicts just read true and correct verdicts?

15 JUROR: Yes.

16 THE CLERK: Juror number two, _____, were
17 the verdicts just read your true and correct verdicts?

18 JUROR: Yes.

19 THE CLERK: Juror number three, _____, were
20 the verdicts just read your true and correct verdicts?

21 JUROR: Yes.

22 THE CLERK: Juror number four, _____ Smith,
23 were the verdicts just read your true and correct verdicts?

24 JUROR: Yes.

25 THE CLERK: Juror number five, _____, were

1 the verdicts just read your true and correct verdicts?

2 JUROR: Yes.

3 THE CLERK: Juror number six, James _____,
4 were the verdicts just read your true and correct verdicts?

5 JUROR: Yes.

6 THE CLERK: Juror number seven, Terence
7 _____, were the verdicts just read your true and
8 correct verdicts?

9 JUROR: Yes.

10 THE CLERK: Juror number eight, Kathleen
11 _____, were the verdicts just read your true and
12 correct verdicts?

13 JUROR: Yes.

14 THE CLERK: Juror number ten, _____, were
15 the verdicts just read your true and correct verdicts?

16 JUROR: Yes.

17 THE CLERK: Juror number eleven, Yvonne _____
18 , were the verdicts just read your true and correct
19 verdicts?

20 JUROR: (Inaudible).

21 THE CLERK: Juror number eleven, _____, were
22 the verdicts just read your true and correct verdicts?

23 JUROR: Yes.

24 THE CLERK: Juror number twelve, Bobby Lewis,
25 were the verdicts just read your true and correct verdicts?

1 JUROR: Yes.

2 THE COURT: I'm going to excuse you now. I'll be
3 back and talk with you momentarily. Press people, media
4 people, will probably want to talk to you. I'm not going
5 to encourage you or discourage you. That's your right, if
6 you want to speak to anybody about this case afterwards.

7 It's not wise to -- to go into the mental
8 processes that go on in jury deliberations with anybody.
9 Counsel will not be able to ask you those questions.
10 Sometimes they like to ask questions that might improve
11 their performance.

12 It's an interesting case for a lot of people, so
13 I'm sure there's going to be a lot of interest in your
14 participation.

15 If you want to talk to media personnel, or want
16 to talk to the attorneys, I'm going to let you come back in
17 through the same door you've been coming in every day, and
18 you can conduct your conversations here in the courtroom.
19 I won't be here, but I'm not going to allow media to
20 descend, or anybody to descend upon you out there in the
21 hallway, or in the elevators, or downstairs. They've
22 agreed to conduct their interviews in the courtroom here,
23 which is probably the best idea of all, and if you don't
24 want to, you do not have to, and you're free to leave after
25 I've finished talking with you, and you just tell people

1 it's private; you'd rather not talk about it. They won't
2 press the issue.

3 So I'm going to let you go to your jury room.
4 I'll be there in just about two minutes myself.

5 (Whereupon, the jury leaves the courtroom.)

6 THE COURT: I want to thank counsel for what I
7 consider to be a highly professional trial that was
8 conducted by them. We'll put this on the calendar for
9 this afternoon for further proceedings. We'll have to
10 determine our sentencing date on the misdemeanor.

11 We'll come on at 3:00 o'clock p.m. in this
12 courtroom. While everybody's still in town, I want to
13 resolve this, or set it for a future date as agreeable to
14 everybody. I'd like counsel to be prepared with sentencing
15 information concerning this particular count to assist the
16 Court.

17 We'll stand in recess.

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

20 (A recess was taken from 12:50 p.m. to 3:01 p.m.)

21 THE CLERK: The court now resumes its session.

22 THE COURT: You may be seated.

23 This is further proceedings in the Joseph
24 Hazelwood matter.

25 Counsel, this is a Class B misdemeanor

1 sentencing, and normally I wouldn't order a presentence
2 report for it. Normally, Class B misdemeanors are
3 sentenced at the time a verdict is returned, but there are
4 some -- possibly some extenuating circumstances in this
5 case that may justify a delay, and maybe counsel will need
6 some additional time.

7 I didn't want to take this matter up right after
8 the jury returned its verdict, when we're in the middle of
9 some potential chaos, which ultimately did develop, as I
10 expected. I wanted to wait and give you all time to think
11 about it.

12 I'll accept input from counsel now. From the
13 State, first.

14 MR. COLE: Whatever you want to do, Judge, is
15 fine with us.

16 MR. MADSON: Your Honor, I don't believe a formal
17 presentence report is necessary. We would certainly not
18 request one. I think that poses an undue burden on the
19 Probation Office. We don't believe it's necessary in a
20 case involving only a maximum of 90 days, even though we --
21 I think we can present extenuating circumstances without
22 the necessity of a formal presentence report.

23 THE COURT: All right. Does the State need some
24 time to gear up for sentencing in this case?

25 MR. COLE: We are prepared today.

1 THE COURT: Does the Defendant want some time?
2 I'm willing to give you some time to --

3 MR. MADSON: Yes. We thought, Your Honor, when
4 you spoke earlier that, you know, you were asking for time,
5 or requesting, or at least considering time, we'd ask for
6 it, and that's what we anticipated.

7 Our problem is probably one of scheduling. We
8 talked about it, and it looks like we've got some real
9 problems in April and part of May to get counsel back here
10 again, but if possible, we'd like to have the sentencing
11 around the first part of June. I don't know if the Court
12 feels that's too late, or how counsel feels about that, but
13 we feel that, also that would let things kind of simmer
14 down a little bit, and get time to look at it in a proper
15 perspective, and not have the emotion of the moment
16 involved in the decision or in the sentencing.

17 THE COURT: That seems a little long, but I'm
18 willing to consider a reasonable delay. I recognize that,
19 in the case of Mr. Chalos, Mr. Russo and the Defendant, it
20 would require travel to New York and back. I don't know if
21 you'll need everybody here for sentencing.

22 MR. MADSON: I've got some problems, too, in
23 April, sometime, too, Your Honor.

24 THE COURT: I am thinking in terms of not quite
25 such a long delay, like in terms of tomorrow or next

1 Tuesday or Wednesday. I don't need any more time than
2 that. I don't know what more information I'm going to have
3 then, or you're going to have then, that we don't already
4 have now.

5 MR. MADSON: Can we just confer a second, Your
6 Honor?

7 (Pause)

8 Your Honor, if that's the case, you know, rather
9 than wait, how about tomorrow? Can we do it tomorrow
10 morning?

11 THE COURT: That's fine with me. How about
12 counsel for the State?

13 MS. HENRY: Your Honor, that would be fine. I
14 would request -- I have a sentencing that's going to take
15 the better part of the morning, but we'd be available in
16 the afternoon, if the Court has some time.

17 THE COURT: How does 1:30 in the afternoon sound?

18 MR. MADSON: That should be okay, Your Honor.
19 We're going to be here, obviously, and we don't have any
20 other matters.

21 THE COURT: All right. We'll set it on for
22 sentencing at 1:30, and if you have any documentation you
23 want to submit in aid of disposition, I would be willing to
24 look at that. I don't know anything about the computer
25 printouts on the Defendant, if you have anything on that,

1 pass them by to opposing counsel and then let me look at
2 them.

3 MR. COLE: Yes, Your Honor. I've given a copy to
4 the defense, and we'll deliver a copy to your office by
5 close of business today. I'm sorry. I didn't make a copy
6 of them for you.

7 THE COURT: All right. Is there anything
8 further, then?

9 MR. COLE: No, I have nothing further, Your
10 Honor.

11 MR. MADSON: That would be 1:30 tomorrow, is that
12 right, Your Honor?

13 THE COURT: Yes, sir.

14 MR. MADSON: Okay. Thank you. That will be
15 fine.

16 THE COURT: All right. We'll stand in recess.

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

19 (Whereupon, at 3:08 p.m., the hearing recessed.)
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SUPERIOR COURT)
STATE OF ALASKA) Case No. 3ANS89-7217
Case No. 3ANS89-7218

I do hereby certify that the foregoing transcript was typed by me and that said transcript is a true record of the recorded proceedings to the best of my ability.

Alexandra Tomalonis
ALEXANDRA TOMALONIS

VOLUME 35

STATE OF ALASKA

IN THE SUPERIOR COURT AT ANCHORAGE

4	----- X	:	
5	In the Matter of:	:	
6	STATE OF ALASKA	:	Case No. 3ANS89-7217
7	versus	:	Case No. 3ANS89-7218
8	JOSEPH J. HAZELWOOD	:	
9	----- X	:	

Anchorage, Alaska

March 23, 1990

The above-entitled matter came on for trial by jury before the Honorable Karl S. Johnstone, commencing at 1:30 o'clock p.m., on March 23, 1990. This transcript was prepared from tapes recorded by the Court.

APPEARANCES:

On behalf of the State:

BRENT COLE, Assistant District Attorney

On behalf of the Defendant:

RICHARD MADSON, Esq.
MICHAEL CHALOS, Esq.
THOMAS RUSSO, Esq.

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P R O C E E D I N G S

(State Tape C-3691)

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

THE COURT: You may be seated.

It's time for sentencing in the Joseph Hazelwood matter. Normally class B sentencing doesn't involve sentencing arguments. The sentence is imposed promptly after an allocution. However, this is not a run of the mill class B misdemeanor. So I am going to allow brief sentencing arguments after which Captain Hazelwood can make an allocution.

Mr. Cole?

MR. COLE: Well, thank you, your Honor. I think that I should first state that these comments that I am about to make acknowledge the jury's verdict, and I don't mean to imply otherwise. The Court heard the facts in this case. It is clear that there was an oil spill, the largest oil spill in the United States's history, a spill of over 260,000 barrels of crude oil into Prince William Sound. The damages were catastrophic.

I think that the Court should look at AS 12.55.005, that's the declaration of purposes for sentencing. It sets out the six things the Court should

1 take into consideration in pronouncing an appropriate
2 sentence. The first one is seriousness of the present
3 offense. I don't think that there could be any doubt that
4 the circumstances surrounding this incident were among the
5 most serious ever contemplated by the statute itself. I
6 think the spill speaks for itself on that.

7 As to the defendant's prior criminal history, he
8 has a 1984 DWI accident. Actually it was a refusal. In
9 that case he refused to take the breath test, was
10 belligerent and upon being contacted, he stated that he had
11 been hit -- the son of a bitch hit me, and he was noted to
12 be -- his speech was slurred, breath smelled of alcohol.

13 In 1985 the defendant checked into an alcohol
14 rehabilitation program, a 28 day program. And in 1988, on
15 September 13th, about six months prior to the Exxon Valdez
16 going aground, he had another DWI in New Hampshire, where he
17 had a .19 blood alcohol content. A .19 is nearly two times
18 what the legal limit in Alaska.

19 The third factor -- well, in summing up on that
20 point, I think Captain Hazelwood's had the opportunity to be
21 aware of the effects of alcohol and what they have had on
22 his life. He has apparently disregarded that through the
23 testimony in this case, those consequences. And it would --
24 we would submit that he is probably, on a scale of 1 to 10,
25 a 3 to 4 as far as to the likelihood of his rehabilitation.

1 The third one is need to confine, that he doesn't
2 present a danger to the community like some of the other
3 people. I wouldn't think that that is one of the things
4 that needs to be taken into consideration.

5 The fourth one is circumstances of the offense and
6 specifically the offense harmed the victim or endangered
7 public safety. I don't think there is any doubt that the
8 offense in this case did a substantial -- there was
9 substantial endangerment to the public safety. I think that
10 in this case the Court can deter other people and I think
11 that that is a significant factor that should be taken into
12 consideration. Tanker captains should be put on notice that
13 for their conduct, they will be held responsible.

14 And finally, your Honor, there is the community
15 condemnation and reaffirmation of societal norms. And I
16 think that is something that you in your position are better
17 able to take into account, given the controversial nature of
18 this case. We are not going to make any recommendations.
19 We submit that to your -- I think that you're in the best
20 position, given the light of this case, to make that
21 determination.

22 THE COURT: Thank you, Mr. Cole.

23 Mr. Madson?

24 MR. MADSON: Thank you, your Honor.

25 Well, this certainly is a class B misdemeanor that

1 has gathered a great deal of attention, more than any other
2 in history. I'm sure. The comments I am going to make are
3 also brief, your Honor, and I think the Court is correct.
4 Normally in a situation like this it doesn't call for a
5 great deal of argument, and I fully agree.

6 One thing I should mention, the 1988, the
7 conviction that Mr. Cole mentioned, that went down in New
8 Hampshire as a violation only. It was not a misdemeanor.
9 It was a violation. Apparently they have some means of
10 reducing the charge there that I don't understand, but
11 that's what it was. It was not a conviction of a
12 misdemeanor for a DWI.

13 The important thing is whether or not -- the
14 conviction, I think, is totally irrelevant. The jury's
15 verdict in this case clearly set out what we said in the
16 very beginning, that alcohol was not a factor in this. They
17 made that as clear as anyone possibly could. The negligence
18 that was involved here was civil negligence. The Court gave
19 the civil standard definition of negligence to the jury, and
20 that's what they found. I think that factor is extremely
21 important. Any by doing this and not finding anything else,
22 they obviously rejected any factor of alcoholism, any cause
23 or result or relationship between the two. So I think the
24 prior record means nothing as far as this is concerned.

25 The other thing I think we have to stress here and

1 I think it is very important is that while the jury had this
2 as a civil negligence definition, if it had been a civil
3 case, they also would have had to determine one other thing,
4 and that is the appropriate percentage of negligence of all
5 the parties. They of course did not have a chance to do
6 that. And I think it is very important, because in a civil
7 case, obviously, more than one defendant can be present and
8 the jury has the duty and the right and the power to
9 apportion the percent of negligence attributable to each of
10 the parties. We don't know what a jury would have done in
11 this case. We do know from the result and I think the
12 comments that were made afterwards and the whole thrust of
13 this case, the evidence the Court has heard, that when it
14 came to the end result, there were a number of parties that
15 were appropriately at fault.

16 We don't know how much the Coast Guard played in
17 this. We don't know how much the other individuals on the
18 bridge would have been assigned a certain percentage of
19 negligence. Exxon, Alyeska, we could on and on. And
20 certainly as the result, as Mr. Cole said, the disaster of
21 the spill -- and the Court saw the video, saw the pictures,
22 and we know that for two days the ship sat there in still
23 calm waters and nothing was done. If we want to look just
24 at the result, I think we have to look at the overall
25 picture.

1 So in summary, your Honor, I think the negligence
2 of Captain Hazelwood as found by the jury was a percentage
3 of the total. How much is anybody's guess. But I think the
4 end result should be that Captain Hazelwood either get a
5 suspended imposition of sentence, and to do that of course
6 because normally a probationary period can only be as long
7 as the period of incarceration, in this case 90 days --
8 without his consent, that is. But with his consent -- and I
9 have discussed this with him -- he would agree to any amount
10 of probation up to the maximum the Court would see fit to
11 apply here. In addition to that we feel if that isn't
12 appropriate, certainly a suspended sentence is.

13 We would also ask that -- that the bond in this
14 case be refunded except for a thousand dollars. I think the
15 thousand dollars is the maximum fine, and as the Court may
16 or may not be aware, if an appeal is taken and the end
17 result is such that the conviction stands, the thousand
18 dollars would cover the maximum fine. But we feel the
19 balance should be returned to help defray some of the costs
20 and expenses in this case, and that he be either given a
21 suspended sentence or a suspended imposition of sentence,
22 with whatever condition the Court seems fit to -- or sees
23 fit to apply here.

24 And we would also ask lastly for the return of his
25 passport. That was one of the conditions of his release on

1 a felony that we feel is no longer appropriate. But I would
2 agree with Mr. Cole that sentencing is obviously at the
3 discretion of the Court, and I think the Court has certainly
4 heard the evidence and is in a position to impose a sentence
5 that we believe that we would be fair.

6 Thank you, very much.

7 THE COURT: Captain Hazelwood, you have a right to
8 make a statement on your own behalf. If you choose to you
9 may do so while seated or you may stand. You do have a
10 right, though.

11 THE DEFENDANT: Standing at the podium, your
12 Honor?

13 THE COURT: Yes, sir.

14 THE DEFENDANT: I would just like to thank the
15 jury for the verdict they reached. I know they were hard
16 pressed to find that, but given the facts, I thank them for
17 their efforts.

18 Thank you.

19 THE COURT: Well, you're right, Mr. Madson, this
20 is a very costly and complicated misdemeanor offense. The
21 defendant has two prior convictions, one for a misdemeanor,
22 one for a violation, both involving DWI. And he is no
23 stranger to the criminal justice system in that regard. He
24 certainly knows that alcohol and equipment don't work very
25 well together.

1 I was hoping that I was going to hear something
2 that would sound like an apology. I have been waiting to
3 hear that. I watch television and I saw where the Captain
4 is going to try to get his job back with back pay. I was
5 waiting to hear something that would sound like, I'm sorry
6 for whatever role the Captain was willing to accept in this
7 case. And it sound like there is no acceptance of any role
8 so far.

9 But I believe and I think that Captain Hazelwood
10 believes and knows, as just about everybody else does who
11 has reliable information about this case, that no reasonably
12 prudent person operating a tanker like the Exxon Valdez,
13 would have had those drinks before getting on board, or
14 would have left the bridge when Captain Hazelwood did. In
15 my opinion he violated at least a couple of Coast Guard
16 regulations. And that at the very least constitutes
17 negligence.

18 And I think Captain Hazelwood knows that the buck
19 stops with him as the captain of that vessel and he has to
20 take responsibility.

21 I agree with Mr. Cole, when the legislature
22 enacted this class B misdemeanor offense for negligently
23 discharging oil, they probably didn't envision the Exxon
24 Valdez going aground and discharging the millions of gallons
25 of oil that it did. And given that the defendant's record

1 of criminal convictions, given his conduct in this case, and
2 the impact of his actions, there is no question that this is
3 worst case scenario for the class B misdemeanor offense of
4 negligent discharge of oil.

5 I think Captain Hazelwood has no doubt been
6 deterred. it is very unlikely in my opinion he would ever
7 be given the opportunity to be a master of a tanker and he
8 has suffered enormous shame through all of this.

9 I am giving him the benefit of the doubt by him
10 not taking responsibility, he's following the advice of
11 counsel and trying to remain as silent as possible because
12 of the pending civil litigations. I would imagine deep down
13 he probably is very shameful and very contrite, but he is
14 having a difficult time saying that at this time.

15 I don't believe that imprisonment needs to be
16 imposed to deter Captain Hazelwood. He's been deterred.
17 And he is certainly not a danger to society. But there is a
18 community outrage at what has happened. He has been found
19 guilty of the offense of negligently discharging oil, and
20 something has to be done about that to satisfy the
21 community's need for condemnation and reaffirmation and to
22 hopefully deter the captains in similar situations.

23 Imprisonment is not going to restore the
24 environment and he can't respond fully financially for the
25 damage that's been caused. But I think there is an

1 alternative to imprisonment. And there is an alternative
2 for restitution that I think would serve in part to satisfy
3 the community's need for condemnation and reaffirmation.

4 It is therefore the order of this Court that
5 Captain Hazelwood be committed to the Department of
6 Corrections for a period of 90 days to be spent in a penal
7 facility. That he be fined \$1,000. And that Captain
8 Hazelwood pay restitution to the State of Alaska in the sum
9 of \$50,000, which I recognize is a token restitution, but I
10 think it reflects somewhat of what Captain Hazelwood might
11 be able to do, by applying 25% of his gross income from all
12 sources as he receives it towards this financial obligation.

13 It is further ordered that the term of
14 imprisonment and the fine be suspended on the condition that
15 Captain Hazelwood perform 1,000 hours of community work
16 service in the State of Alaska.

17 The Court has utilized the formula contained in AS
18 12.55.055 in determining the amount of community work
19 service hours.

20 It is further ordered that pursuant to that
21 statute, that Captain Hazelwood perform community in
22 projects that are designed to eliminate the environmental
23 damage that was caused by the oil spill in Prince William
24 Sound. It is strongly recommended by this Court to the
25 Department of Corrections that said work be performed on the

1 beaches in Prince William Sound as far as is feasible.

2 It is the intention of this Court that the
3 community work be performed during summer months of 1990 or
4 such other time as is clean up efforts are being conducted.
5 I recognize that there may be actions which might delay the
6 performance of the defendant's community work such as his
7 appeal rights being exercised. As a result, should clean up
8 operations have ceased in Prince William Sound -- and I
9 doubt that that will occur in the foreseeable near future --
10 but in the event they do cease, the defendant shall perform
11 his community work service on other projects within the
12 State of Alaska designed to reduce or eliminate
13 environmental damage or improve the public lands.

14 That completes my sentence in this case.

15 Are there any questions concerning the sentence,
16 Mr. Cole?

17 MR. COLE: The length of probation, your Honor? I
18 didn't understand.

19 THE COURT: The maximum probationary period that
20 can be imposed for a misdemeanor offense, as I understand
21 it, under these circumstances, is one year. I am going to
22 make that a condition of probation. One year.

23 In the event that an appeal is filed and the
24 sentence is stayed and bail, that will at that time will
25 toll the one year. The one year won't commence while

1 defendant has filed his appeal until it is resolved.

2 Any questions concerning the sentence, Mr. Madson?

3 MR. MADSON: Not concerning the sentence, no, your
4 Honor.

5 THE COURT: Okay.

6 Captain Hazelwood, you have a right to appeal this
7 sentence if you believe it to be excessive or contrary to
8 law. The Court will appoint counsel if you cannot afford
9 your own counsel. You must make your appeal within 30 days
10 of the effective date of the judgment.

11 Is there anything further in this case?

12 MR. MADSON: The only thing further, your Honor,
13 would be as I understand it, we have 30 days to appeal and
14 if appeal is timely filed, we would ask that the sentence be
15 stayed pending the appeal.

16 THE COURT: Yes. Do that in writing, and at your
17 request, I see no reason to continue the bond. Is it a
18 \$50,000 bond, is that what it is?

19 MR. MADSON: Yes.

20 THE COURT: I am going to exonerate that bond at
21 this time.

22 And did this Court order him to turn his passport
23 over? Was it --

24 MR. COLE: Judge Stewart did that when he was
25 first arraigned.

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THE COURT: Okay.

Any objection to returning the passport?

MR. COLE: No.

THE COURT: Okay. The passport shall be returned.

Anything further?

MR. MADSON: I don't believe so, your Honor.

Thank you.

THE COURT: We stand in recess.

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

(Whereupon, at 1:55 o'clock p.m., the Court was
recessed.)

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SUPERIOR COURT

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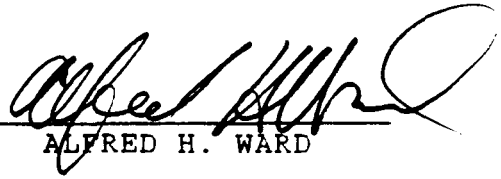
Case No. 3ANS89-7217

STATE OF ALASKA

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Case No. 3ANS89-7218

I do hereby certify that the foregoing transcript was typed by me and that said transcript is a true record of the recorded proceedings to the best of my ability.


ALFRED H. WARD
