RealTime Transcriptions

TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

THE HONOURABLE MR JUSTICE FARLAM (RETIRED) - CHAIRPERSON MR TOKOTA SC MS HEMRAJ SC

HELD ON

DAY 286 5 SEPTEMBER 2014 PAGES 37027 TO 37183



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5th September 2014

1	Page 37027	1	Page 37028 MS LE ROUX: Thank you very much, we'll
1	[PROCEEDINGS ON 5 SEPTEMBER 2014]		, , , , , , , , , , , , , , , , , , ,
2	[08:28] CHAIRPERSON: The Commission resumes.	2	follow up with the SAPS legal team for those. Mr De Rover,
3	You're still bound by your affirmation, Mr De Rover. Ms Le	3	you testified yesterday that you had consulted with
4	Roux – you took, of course, I beginning your pardon, you	4	officers Annandale –
5	took the oath. It's the other man from the lowlands who	5	CHAIRPERSON: Who is doing that? There's
6	affirmed. You are still bound by your oath.	6	something making a noise there. Please turn it off. If it
7	CEES DE ROVER: (s.u.o.)	7	goes off again I'll ask you to leave the room. I'm sorry,
8	CROSS-EXAMINATION BY MS LE ROUX (CONTD.):	8	Ms Le Roux.
9	Thank you, Chair, and let me express on the record my	9	MS LE ROUX: Mr De Rover - thank you,
10	appreciation for the early start. Good morning, Mr De	10	Chair – you testified that you had consulted with officers
11	Rover.	11	Annandale, Merafi, Mpembe, Scott and Calitz, correct, and
12	MR DE ROVER: Good morning.	12	then we've seen the call-up list. Chair, for the record
13	CHAIRPERSON: It was the least we could	13	it's UUUU11, for the members that you did your walk through
14	do, Ms Le Roux.	14	at scene 2. Other than those – and you testified that you
15	MS LE ROUX: Mr De Rover, to start with	15	had not spoken to Colonel Vermaak – other than those
16	some housekeeping, have you been able to locate your terms	16	commanders, have you spoken to any other, and those on the
17	of reference overnight?	17	call-up list, have you engaged with any other members?
18	MR DE ROVER: I have. I have indicated	18	CHAIRPERSON: Ms Le Roux, this call-up
19	them to our legal team. I've actually just mailed them	19	list – [microphone off, inaudible.]
20	across so there is a letter of the 22nd of February of this	20	MS LE ROUX: It's pre-marked as UUUU11.
21	year and, sorry, of last year, that is the letter of my	21	CHAIRPERSON: I say what exhibits are
22	appointment and it holds a tasking and there are guidelines	22	going in, you don't just give me a list of the exhibits
23	that were established March this year for continued work	23	that are before me, I've got to accept each one. I'm not
24	and that document will be made available to you via the	24	saying I'll refuse it but I'm just, let's get the rules
25	legal team.	25	right. UUUU11 is Mr De Rover's call list.
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	Page 37029		Page 37030
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	Page 37031 that in the aftermath while they were standing there waiting for medical personnel to arrive to render assistance, he said that a person came walking out from between the rocks in front of him, that would be a person coming from the east walking westwards, a police sergeant, and that he later realised was Myburgh who asked him whether the person lying at Warrant Officer Swart's feet was deceased and Swart said no, he is alive and we are waiting for medical personnel. According to Swart, Myburgh then said, when the medics come can you send them in there and he points behind himself to a narrow corridor between rocks on the southern side, because I believe I may have just shot someone and I think he's dead. That is the story that Swart came with on that day. Now obviously that is, at that stage to me that's upsetting news because there was a new element there that I had not heard before. Of course at that time I think in the Commission the evidence of Myburgh had seen the light of day, his allegation that he made I think for the first time in October to, coincidence of coincidences I think, but to Lieutenant-Colonel Vermaak. I leave that as it stands but my concern now is that here is someone who makes an equally serious allegation against another police officer to what at least constitutes then an	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 22	Page 37032 steps within SAPS to alert and the legal team were there during that meeting, so steps were initiated to engage SAPS on this revelation and to request that in accordance with the procedures that apply in your national context, this situation now gets taken over because I'm an expert in your country, I have no right to question people that potentially are either witnesses of crime or suspects of crime. So if you want to know the reason why I did not speak to Myburgh, that would be another one because I can't advise him of his rights. I could talk to him if he would agree to talk to me but I still think that it would pose a precarious proposition. MS LE ROUX: Do you know whether any steps were taken as you had recommended? MR DE ROVER: Again I've, at a few corners, stated to you that I am retained as an adviser. My competence and influence or reach, if you want, does simply not extend to checking whether they do something with that information or not. MS LE ROUX: Do you know if anything has been done? MR DE ROVER: I've left this information, with the healn of the load to am at a bird load in SADS and
23	another police officer to what at least constitutes then an	23	with the help of the legal team at a high level in SAPS and
24	admission of potential use of lethal force that I think	24	I was assured that it would be given the follow-up
25	needs to be investigated. So I had on that date initiated	25	required. I have never received feedback on it.
3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	Page 37033 MS LE ROUX: When you say a high level, what are you referring to? MR DE ROVER: On the day I had a long telephone conversation with General Masemola and with General Mbombo. MS LE ROUX: One further question on this. Did you, when you had your, when you took notes of scene 2 - we understand you don't have them with you, they're in Australia but did you record anything relating to this Myburgh/Swart chain of events in those notes? MR DE ROVER: Ja, of course. MS LE ROUX: Okay. MR DE ROVER: Because that – but I've made the information contained therein obviously available and I know that affidavits were subsequently taken at least of Warrant Officer Swart that I am aware of, and of another TRT member who was able to corroborate the story because Swart's information with regards to Myburgh does not limit itself to the incidents on the 16th of August. He also made statements with regard to an encounter that he had with Myburgh subsequently when people were called to give – MS LE ROUX: Yes, we've seen that – MR DE ROVER: Ja, so you are aware of that. MR DE ROVER: Ja, so you are aware of that. MS LE ROUX: If I could then, if I could	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	Page 37034 then ask you to focus on the decision to move to the tactical phase on the 16th of August. Are you aware of Lieutenant-Colonel Scott's evidence that he had two pre- conditions for moving to the tactical phase, the first being an escalation of the threat of violence and destruction by mobilising as a group to move to a pre- determined target or if all other options to resolve the situation without force were exhausted and there was no other means to restore order, are you aware that those were Lieutenant-Colonel Scott's two preconditions to initiate phase 3? You're aware of that? MR DE ROVER: Yes. MS LE ROUX: Yesterday we addressed the risk assessments that you described in your interrogatory responses, specifically those to the evidence leaders. Chair, UUUU2.5 paragraph 1.7, we don't need to go there though, and you described the risk assessment exercise as essentially looking at what you intend to do and then trying to put probabilities to outcomes and you describe in that interrogatory response how something gets ranked from likely to not likely and the like. Two questions on that. First of all, you accept that before the 1:30 JOCCOM there was no plan for stage 3 that had yet been presented and agreed. MR DE ROVER: I would politely disagree

	Page 37035		Page 37036
1	because, for two reasons. One, that effectively if you	1	JOCCOM was his Google Earth image that you've seen
2	look at what happened on the Monday, even for a short	2	with the icons on it showing the deployment of resources
3	period of time SAPS went to a stage 3. So if not, and	3	that he intended, but other than that image there was no
4	again now we come back to auditable trail but if not in	4	written plan. There was no document that spelt out in any
5	writing, at least in intention and implementation on Monday	5	detail how all the different units in the Marikana
6	temporarily I would describe what occurred, whatever the	6	operation would co-ordinate themselves, what their roles
7	trigger, but what occurred there is, in its confined	7	would be and the like. Do you accept that that is the
8	reality is a stage 3 situation. They go back –	8	evidence before this Commission?
	MS LE ROUX: Mr De Rover, I think you may	9	
9			MR DE ROVER: Chair, respectfully, no.
10	have misunderstood my question.	10	My understanding is different and I think part of it was
11	MR DE ROVER: Sorry?	11	covered by Mr Budlender yesterday when specifically asking
12	MS LE ROUX: I think you may have	12	about the detailing of disperse, disarm, arrest with
13	misunderstood my question. I just want to check –	13	regards to stage 3 and how much detail you would expect to
14	MR DE ROVER: No, I think –	14	see in writing for such a phase.
15	MS LE ROUX: - we're not missing each	15	CHAIRPERSON: No, no, no. I think that,
16	other.	16	with respect, is a different point.
17	MS LE ROUX: I think I did but please go	17	MR DE ROVER: Mm.
18	ahead.	18	CHAIRPERSON: What Ms Le Roux is putting
19	MS LE ROUX: So on the 16th of August	19	to you is, all that was put before the Commission, before
20	before the 1:30 JOCCOM the evidence before the Commission	20	the committee, the JOCCOM committee, was the concept and
21	has been that there was no written plan that detailed what	21	the Google Earth image.
22	stage 3 would look like. In concept there was a tactical	22	MR DE ROVER: Mm.
23	phase but what that would actually entail, there was	23	CHAIRPERSON: That was all. What you've
24	nothing in existence before the 1:30 JOCCOM. The only	24	said and what other evidence has been to the effect is that
25	thing Lieutenant-Colonel Scott had that he presented at the	25	when you talk about disarm, disperse and disarm, you don't
	Page 37037		Page 37038
1	Page 37037 have to spell it out because the people concerned have been	1	Page 37038 MR DE ROVER: Ja, I think - you must, I
1 2	8	1 2	
_	have to spell it out because the people concerned have been		MR DE ROVER: Ja, I think - you must, I
2	have to spell it out because the people concerned have been trained, they know exactly what those procedures involve	2	MR DE ROVER: Ja, I think - you must, I think, remember that my two statements are now one and a
2 3	have to spell it out because the people concerned have been trained, they know exactly what those procedures involve but that's not what Ms Le Roux is asking you about. Put	2 3	MR DE ROVER: Ja, I think - you must, I think, remember that my two statements are now one and a half years old. You've learned a lot in that time. I had
2 3 4	have to spell it out because the people concerned have been trained, they know exactly what those procedures involve but that's not what Ms Le Roux is asking you about. Put the question again so that the witness can understand the	2 3 4	MR DE ROVER: Ja, I think - you must, I think, remember that my two statements are now one and a half years old. You've learned a lot in that time. I had a limited time frame and of course I realise that some of
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		Ι	
1	Page 37039 explained on the basis that t was just help us to	1	Page 37040 co-ordinated, there was no contemporaneous document that
2	understand. We don't have to discuss that further, but Ms	2	set that out. If you accept that and assume that, will you
3	Le Roux is right, she has correctly summarised Lieutenant-	3	agree with me –
4	Colonel Scott's evidence on that point.	4	CHAIRPERSON: I think he said quite
5	MS BALOYI: Mr De Rover, just one further	5	fairly that what you've put to him, if it's in accordance
6	point of clarification on that, are you aware that the	6	with the evidence that's what he accepted –
7	Google Earth image that Lieutenant-Colonel Scott used for	7	MS LE ROUX: Yes.
8	the 1:30 JOCCOM and the subsequent briefing, represented	, 8	CHAIRPERSON: And my job, in a way, is to
9	what's been called the second stage configuration. So	9	make sure that what you've put is in fact in accordance
10	there was an initial encirclement plan of the koppie,	10	with the evidence.
11	secondly there was a plan that had half of an arc dealt	11	MS LE ROUX: Yes.
12	with by barbed wire and the remainder of that arc dealt	12	CHAIRPERSON: And I've ticked that block
13	with the deployment of NIU, STF and other units. And then	13	so you can carry on from there.
14	of course we have the actual stage 3 configuration which	14	MS LE ROUX: Thank you, Chair. So Mr De
15	was only barbed wire, no officers completing the arc. Are	15	Rover, accepting that, would you agree with me that there's
16	you aware that the image that he utilised was the second	16	not much value in doing a risk assessment where there isn't
17	version, the one that had half an arc of barbed wire, half	17	a proper plan that, in detail, sets out what the different
18	an arc of personnel. Were you aware of that?	18	units should be doing, how this tactical phase should be
19	MR DE ROVER: I have seen, I think, all	19	implemented because absent that detail, it's very difficult
20	those images and asked questions to it when I was shown	20	to do a meaningful risk assessment because you don't
21	them.	21	actually understand what you're assessing the risk of?
22	MS LE ROUX: Okay, so if you accept my	22	MR DE ROVER: This is where I think the
23	summarisation of the plan that he had at the time, you will	23	rubber meets the road because now if you only take
24	accept that that plan did not set out in any detail what	24	contemporaneous documentation as a basis to qualify that, I
25	role the different units would perform, how they are to be	25	would be inclined to agree with you but you are dealing
1	Page 37041 with professional police officials. That's why yesterday I	1	Page 37042 respect, it's quite as simple as that. What Colonel Scott
1 2	Page 37041 with professional police officials. That's why yesterday I did refer to Stockwell for the simple reason that here	1 2	
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1	Page 37043	1	Page 37044
1	that there was a discussion of risk and Brigadier Calitz	1	about 9 o'clock in the morning. It was a conversation
2	gave a very interesting answer when he was questioned about	2	between General Annandale, General Mpembe and General
3	that. He was asked well why didn't you hey but you know	3	Mbombo. General Mbombo was told about the risk and she
4	this is risk you're doing. We should wait until tomorrow	4	said well just do your best to make sure it doesn't happen.
5	morning, I'm summarising loosely, but that was the	5	That's as far as it went. There was no discussion at the
6	question. And he said well I couldn't have done that	6	JOCCOM at 1:30 and remember at that stage no plan actually
7	because if there'd been trouble that night then I would	7	was on the table, so there was nothing to consider in
8	have been held responsible for stalling the operation and	8	relation to the risks attached to it. And then at 2:30 –
9	therefore I said nothing. Now that was very, to use the	9	so nothing happened in the JOCCOM and as far as I can
10	word insiggewend in Dutch, maybe you do, a very	10	recall from the evidence there was no suggestion that
11	insiggewende answer and I think that's really at the root	11	anyone said hang on a second, Colonel Scott, I think he was
12	of the questions you're being asked. Am I right, Ms Le	12	Lieutenant-Colonel Scott, Lieutenant-Colonel, let's
13	Roux? Mr Semenya.	13	consider the risk first before we go ahead. That didn't
14	MR SEMENYA SC: Chair, I think that ought	14	happen either.
15	to be qualified by saying in the JOCCOM, you'd recall when	15	MS LE ROUX: Now, Mr De Rover, in your
16	this cross-examination started Ms Le Roux herself says	16	response to the interrogatories to the evidence leaders
17	there was a – General Mbombo was cautioned that there would	17	which, Chair, is UUUU2.5, paragraph 1.7 of that, this is
18	be risk associated with going tactical and if that does not	18	where you set out this risk assessment exercise for the
19	constitute some form of risk assessment that is why the	19	first time. And you conclude that answer by saying based
20	witnesses say it is not documented, but you can accept that	20	on its previous experiences in public order management SAPS
21	that would have ordinarily been a risk assessment	21	gave that scenario, the scenario being that one of the
22	discussion around going tactical.	22	possible outcomes of forcible disarmament would be injury
23 24	CHAIRPERSON: You are right. I didn't have to put that to the witness because it was mentioned	23 24	or death. So they gave that scenario a probability of not
24 25	yesterday, but that so-called risk assessment took place	24 25	likely because of its experiences of the outcomes of many operations to date they'd been different. Now I'd like to
23	yesteruay, but that so-called fisk assessment took place	20	operations to date they a been different. Now 14 like to
	Page 37045		Page 37046
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1 2	ask you the basis of that answer. When you say that the SAPS gave the scenario a probability of not likely, who at	1 2	SAPS because obviously my interest is and Mr White has canvassed that, that you countenance the possibility that
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		I	
1	Page 37047	1	Page 37048
1	CHAIRPERSON: All right, I'm not	1	there to protect the POP people, to ensure that there was
2	interested in whether it could really be said that there	2 3	no loss of life on the police side. And the only way they could do it, you can't blame the TRT for doing what they
3	was a probability of not likely, never mind what they now	4	
4	say or said to you. I don't remember them saying that to	4 5	did because that's what they had to do and the only equipment they had to do it with was TRT rifles. So they
5	us by the way, but we won't go there now, they may have		
6	done. This is conceded by Colonel Scott in the passage	6	must have foreseen, this is obviously a prima facie issue I'm putting to you, but they must have foreseen the POP
7	that I think was put to you yesterday being a first time	8	
8	situation, a very unusual situation that they never had	8 9	people mightn't be affected regard been had to these
9	before. Now there are a number of factors that are		special circumstances. The muti, the conduct of the 13th,
10	relevant. They knew that these people had taken muti,	10	the information and that was really a first time situation,
11	their understanding was, it's disputed actually from the	11 12	they never dealt with this kind of situation before. I can
12	other side, but the understanding was that gave the	12	understand they dispersed and disarmed people in the past, but this let who behaved as they had behaved, who had shown
13	strikers a belief in their invulnerability or		but this lot who behaved as they had behaved, who had shown
14	invincibility. They knew how the strikers had reacted on the Monday. The intelligence that they received was that	14	themselves to be the kind of people they were, well not all
15	they were not going to lay down their arms, they were not	15 16	of them obviously, but some of them. Based on the information and so forth, I would have thought that, again
16 17	going to abandon their position on the koppie, the were	17	prima facie that to way that it was not likely that the POP
18	going to fight to retain their arms and retain their	17	people wouldn't have to do what they had to do. It was not
10	position. That was all the information, that's the	10	likely that the TRT people would have to take over, fire
20	information they had. They also foresaw as a possibility	20	shots which would have a probability of causing death or
20	that the POP with their non-lethal methods would not be	21	serious injury. That's a difficult one to accept and
22	able to deal with the situation which is why they put in	22	there's something I must tell you, I don't think you know.
23	place the TRT people. The TRT people were there for two	23	The decision to proceed then was not taken by the JOCCOM,
24	reasons. Firstly to do mopping up if the POP people were	24	it was something imposed from above, in fact from the night
25	successful, but secondly and more importantly they were	25	before. And the evidence is that at the end of the meeting
			5
	Page 37049		Page 37050
1	Page 37049 Major-General Annandale went to Brigadier Pretorius who was	1	Page 37050 they would be approached and arrested and disarmed. Now if
1 2		1 2	5
	Major-General Annandale went to Brigadier Pretorius who was		they would be approached and arrested and disarmed. Now if
2	Major-General Annandale went to Brigadier Pretorius who was keeping the minutes and said please make t his note in the	2	they would be approached and arrested and disarmed. Now if that was not feasible to be done by POP TRT members would
2 3	Major-General Annandale went to Brigadier Pretorius who was keeping the minutes and said please make t his note in the minutes, this decision was made by the Provincial	2 3	they would be approached and arrested and disarmed. Now if that was not feasible to be done by POP TRT members would be on hand to assist them with accomplishing that task and I will frankly say I don't think that SAPS anticipated that as a not likely event. I think that that was actually what
2 3 4	Major-General Annandale went to Brigadier Pretorius who was keeping the minutes and said please make t his note in the minutes, this decision was made by the Provincial Commissioner. And he stood over her while she wrote that	2 3 4	they would be approached and arrested and disarmed. Now if that was not feasible to be done by POP TRT members would be on hand to assist them with accomplishing that task and I will frankly say I don't think that SAPS anticipated that
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1	Page 37051	1	Page 37052
1	end. So you're faced with people who've shown what they're	1	that now the operation was actually going to something that
2	capable of on the Monday and indeed in certain other	2	they knew and understood and that from experience they knew
3	incidents, obviously not all of them, but some of them,	3	they can do, they can handle. Whatever you would label it
4	people who believe they're invincible, bullets will turn	4	in terms of quality, but it seemed to be familiar
5	into water. People who the police believe or not believe,	5	territory. Disperse, disarm, arrest, now we're talking
6	police are told people who will fight to protect their	6	issues that we know, recognise that we're comfortable with
7	position and their arms. Then you look at the likelihood	7	and in terms of lessons learnt I don't think that the 14th
8	and make an assessment.	8	and the 15th were sufficiently utilised to critically look
9	MR DE ROVER: Well I think that if you	9	at how was that possible. And to maybe draw something from
10	take that you would qualify then a confrontation as very	10	that for what you planned to do on the 16th.
11	likely to happen the risk that that confrontation then	11	CHAIRPERSON: Yes there are two other
12	produces death or serious injury and I just point to the	12	points that I must put to you and that is on the 13th, of
13	Monday where whatever the trigger that caused the	13	course, the police and the strikers were in close proximity
14	confrontation, once the proximity occurred, death and	14	to each other. So that's why the police sustained – that's
15	injury occur on both sides. And that lamentable loss of	15	why the two policemen were killed and injuries were
16	mind, of life would obviously also have played on the	16	sustained. On this occasion, of course, the TRT line was
17	Monday when the incident eventually unfolded as it did.	17	further back and TRT line, members of that were able to
18	But I think that if - I still believe on what I have been	18	fire without receiving any injuries themselves which is a
19	told that there was never the anticipation that they would	19	distinguishing factor for the 13th. But there's another
20	have to deal with the group as one at the time that they	20	factor that I must put to you, I should have mentioned to
21	were confronted by that reality. I think their	21	you earlier and that was the police evidence is, again it's
22	anticipation was that if that happened it would be in	22	disputed by the other side, but we are looking at the
23	smaller numbers and in a situation that they could control.	23	police evidence this time. The police evidence is they
24	And if I can just share a personal feeling I got talking to	24	received threats during the day from the strikers, from the
25	SAPS members. In a strange way there was almost a relief	25	leader of the strikers. There was a threat that the Hippos
	5 5		
	Page 37053		Page 37054
1	Page 37053 as they recall, that's the Nyalas would be burnt. There	1	Page 37054 CHAIRPERSON: Right, can you tell us –
1 2	5	1 2	0
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	Page 37055		Page 37056
1	front was "Rules of Engagement."	1	numbers to these things, you can carry on with that
2	CHAIRPERSON: Okay, "Rules of	2	function as far as these things are concerned as well.
3	Engagement."	3	Okay, can we carry on? Now we've got the slide, yes, what
4	COMMISSIONER HEMRAJ: 12 Rules.	4	do you want to show us about the slide?
5	CHAIRPERSON: No – oh, you've changed it	5	MR DE ROVER: Now on the left-hand side
6	now. Oh, I see. So it is 12, I beg your pardon. So we	6	in the yellow square I've just attributed some qualifiers
7	can leave 13. It's UUUU12, "Rules of Engagement" and we're	7	to the behaviour as I observed it, particularly on the
8	looking, I take it we're looking at the whole thing. The	8	Monday and let me stray away from that, let's separate it
9	whole exhibit is before us now but we must look at slide 7,	9	from the 16th although that, there are other, there might be
10	you say. Alright, thank you.	10	that you say that equally applies on that day still to that
11	COMMISSIONER HEMRAJ: Is there anything	11	group –
12	else, Mr De Rover, that you've handed over that we haven't	12	CHAIRPERSON: I suggested a distinction –
13	had an opportunity to look at as yet?	13	differences.
14	MR DE ROVER: I gave an entire memory	14	MR DE ROVER: Okay. So what I saw is the
15	stick and there is a report of the previous special	15	group on the Monday was willing to be confrontational.
16	rapporteur on summary executions. There is another article	16	They appeared to be organised, they were mobile, they were
17	on crowd control of one of the authors of the Stott article	17	armed, they were violent and they showed themselves
18	but I made that available, I just don't know where these	18	volatile and whatever triggered the volatility, I know that
19	documents are.	19	that is a point of discussion but they showed that they can
20	CHAIRPERSON: May I suggest that during	20	be. Now if – I put in the middle there with a question
21	the first short break, comfort break, there can be	21	mark and I think it is important to consider that because
22	discussions between the Human Rights Commission counsel and	22	yesterday I said that SAPS has more than 100 cases open
23	the police counsel and the evidence leaders in regards to	23	between February and the 1st of August that relate, in my
24	what can go in on mere production and in fact seeing you've	24	experience at least, to extreme forms of violence that all
25	very kindly taken it upon yourselves to give exhibit	25	seem to be strike related or mining problem related in the
	Page 37057		Page 37058
1	Rustenburg area. So I put in red there, "Society	1	video, well documented, and you can trace it back to the
2	Rustenburg area. So I put in red there, "Society acceptance of contemporary forms of protest and violence"	2	video, well documented, and you can trace it back to the way POP is organised and I think that this form of protest
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5th September 2014

	Page 37059	1	Page 37060
-	in the London riots they didn't shoot 34	1	aggressive mood towards the police.
	n live ammunition.	2	MR DE ROVER: Mm.
3 MR DE R		3	CHAIRPERSON: What I've, the evidence
4 MS LE RO	, , , ,	4	I've put to you indicates that Thursday was different,
	this. That's a yes or no question, you're	5	there were threats of aggression towards the police. On
6 only looking at F		6	Monday they weren't standing in a position to defend where
7 MR DE R	3 0	7	they were. They weren't defending their position, they
8 MS LE RO	•	8	were actually on their way to the koppie which they were,
9 MR DE R	•	9	according to the information that the police got, the
10 eases the discus	5	10	intelligence they got, what they were going to defend on
11 MS LE RO	1 3	11	the Thursday and they weren't actually being disarmed or an
-	ss-examination but I'd like to –	12	attempt wasn't being made to disarm them on the Thursday.
13 CHAIRPE	j, et je j	13	They may have thought that that was going to happen – I
	o put two things, put one thing actually	14	mean on the Monday but on the Thursday, according to the
-	and Adv Hemraj wants to get clarification on	15	information received, they were going to defend their
	ou carry on. Looking at the left-hand side	16	position and they were going to defend their arms and they
3	ling with the situation as you saw it in	17	were aggressive towards the police and there's evidence
	ikers, in comparison with, comparing	18	that somebody said you can't have two bulls in the same
	irsday, on Monday they were, they said they	19	place and there was talk about - there's other evidence as
	ve towards the police, there were no	20	well which indicated it was they or the police who were
21 threats to attack		21	going to be there, there wasn't room for both of them. So
22 MR DE R		22	the situation on Thursday was significantly more serious
23 CHAIRPE	, , ,	23	than it had been on Monday and in the light of what you say
	ng you. They were on their way to the	24	about Monday then a fortiori the points you make apply to
25 koppie being eso	orted by the police, they weren't in an	25	Thursday. You would agree with that, I think.
	Page 37061		Page 37062
1 MR DE R		1	with those characteristics in Pretoria and they decide they
2 CHAIRPE	RSON: Yes. Adv Hemraj wants a	2	will walk into the Union Building, I don't think that at
3 clarification, the	n we'll stop using up Ms Le Roux's time	3	this stage the South African Police has the ability to stop
4 and give her a c	hance to carry on with the cross-	4	them doing that.
5 examination.		5	COMMISSIONER HEMRAJ: None of the units
6 MS LE RO	DUX: I'd appreciate that, Chair.	6	in the South African Police?
7 COMMIS	SIONER HEMRAJ: Mr De Rover, what	7	MR DE ROVER: That comes with a price tag
8 does set piece r	nean?	8	because then you will go into your risk assessment and
9 MR DE R	OVER: Well, POP works with	9	there is plenty recent example of how such confrontations
10 standard respor	ses, like you deny access by forming a line	10	in Greece, in Turkey, in Egypt, how such confrontations end
11 or you create a	cordon or you channel or you block, those	11	when the state decides that nevertheless it will try and
12 type of response	s that are essential set piece, that I must	12	put a stop to that type of protest and, you know, then you
13 add work proba	oly better in an urban environment than in a	13	get state controlled use of lethal force, sanctions beyond
14 mund and in the	nt because structures can then be used to	14	judicial control. And I know in Egypt I think 180 people
14 rural environme			
	at you are trying to do and people can't	15	have been condemned to death -
15 complement wh			have been condemned to death – COMMISSIONER HEMRAJ: Thank you.
15 complement wh16 simply walk arous	at you are trying to do and people can't	15	
 complement wh simply walk around COMMIS 	at you are trying to do and people can't and a line that you put up.	15 16	COMMISSIONER HEMRAJ: Thank you.
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1	Page 37063	1	Page 37064
1	mean what they do is certain drills, as it were, a routine	1	passes can totally change the requirements of the situation
2	they can follow but if the strikers behave in an	2	on the ground again and a solution for which you get
3	unpredictable fashion, then they're not very good at – it's	3	permission is no longer appropriate.
4	not a criticism, it's just, they're not very good at	4	MS LE ROUX: But Mr De Rover, you'll
5	improvising.	5	accept then that those commanders on the ground also need
6	MR DE ROVER: That I would hold true	6	to be fully briefed and aware of what their role and what
7	because it would, you'd have to have a high degree of	7	every other unit's role is in order to ensure that they can
8	training to be able to improvise but you'd also need the	8	make decision making without endangering or jeopardising or
9	commanders to facilitate such improvisation and typical the	9	undermining the roles of the other unit.
10	structures that SAPS has in place, you create an	10	MR DE ROVER: Ja, but you know that the
11	organisational contradiction. You have so many different	11	problem is that you're now looking at possibilities of
12	units in place that there is a need for centralised control	12	interactions that go well beyond what is planned and that
13	of those units so that they don't run rogue or riot on you,	13	the situation may dictate. I think one element that you
14	but the complexity of the situation would require that you	14	will find when you look at it is that although commanders
15	decentralise command decisions and that is where, when I	15	were responsibilised for different parts of the action,
16	talked yesterday about unravelling systems, you build it	16	they weren't authorised to make decisions. They would
17	into your operation almost that it happened this time, it	17	still be expected to ask permission before going ahead. So
18	can happen another time and maybe the next time not all	18	there is an attempt from the JOC to still, with remote
19	elements will conspire to thwart you but it will become a	19	control or central steer, control the operation and direct
20	problem. So because of the different elements there is a	20	the different entities and although commanders were briefed
21	desire to exert central command and control on the	21	on their role on the ground, i.e. my assessment is that
22	operation but an operation of this type also needs	22	they were insufficiently put in a position that they could
23	reponsibilising and authorising commanders on the ground to	23	also make their own decisions and then report back on hose
24	make decision that are necessary and not obliging them to	24	rather than reporting on a situation and asking permission
25	first ask permission from a superior because the time that	25	to do something.
	Page 37065		Page 37066
1	Page 37065 CHAIRPERSON: Can I just go back? I'm	1	Page 37066 reading and I think in the end his voice did not prevail in
1 2		1 2	5
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	Page 37067		Page 37068
1	August where police members used force against strikers, it	1	eighth piece of evidence is that we've had no evidence from
2	resulted in retaliation, five people died. The second is	2	anyone in the JOCOM that they seriously thought that the
3	Lieutenant-Colonel Scott's view that there was going to be	3	so-called militant group would voluntarily just disperse
4	conflict and that the protesters being armed, emotions	4	and disarm when they were asked to do so. The ninth piece
5	running high, there was likely to be a confrontation. The	5	of evidence is Lieutenant-General Mbombo's oral evidence
6	third piece of evidence is the use of muti by the strikers	6	that she'd been warned of the risk of the TRT using live
7	and their belief that it made them somehow invincible	7	ammunition when they went tactical to try to disarm the
8	potentially to the use of force by police, which may make	8	strikers.
9	them disregard that risk in their conduct. The fourth is	9	[09:28] The tenth piece of evidence is the threats that
10	that this mindset of invincibility was in fact reflected in	10	were made from the strikers towards the police in the days
11	some of the planning. The fifth piece of evidence is that	11	before the 16th and on that day as well. So in light of
12	the police had information to suggest that there were	12	those 10 pieces of evidence –
13	firearms within the possession of the strikers who were	13	CHAIRPERSON: May I add two more before
14	present on the koppie, so there was a firearms threat. The	14	he answers?
15	sixth piece of evidence is that the intelligence available	15	MS LE ROUX: Certainly, Chair.
16	to the police by the 16th of August noted that many of the	16	CHAIRPERSON: In relation to what senior
17	mineworkers were in possession of dangerous weapons which	17	people in the police force saw as possible there is
18	they were likely to decline to surrender and they would be	18	evidence which was put to you before, I think yesterday,
19	prepared to fight if their demands were not met, including	19	that somebody ordered four funeral hearses to be, early on
20	by resisting the police. The seventh piece of evidence is	20	the morning of the Thursday to be there. They didn't come
21	Lieutenant-Colonel Scott's oral evidence that he was	21	actually, but that's not the point. There's also evidence
22	mindful that the tactical option could elicit a violent	22	that, and there's a dispute as to who was responsible for
23	response from the strikers and it was important not to send	23	it but the evidence of, I think it was Colonel Merafi – if
24	the SAPS members into what he called a blatant death trap.	24	I'm wrong with that I'll be corrected – he ordered, he
25	So he proposed a line of TRT to back up the pops. The	25	arranged for 4 000 extra rounds of ammunition to be
20	so he proposed a line of the to back up the pops. The	25	analiged for 4 000 extra rounds of animalition to be
	Page 37069		Page 37070
1	delivered to the JOC before the tactical operation started.	1	Page 37070 should have been able to foresee the risk of injury or
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2 3	delivered to the JOC before the tactical operation started. He says, I think it was Colonel Merafi, he said that Brigadier Calitz ordered it. Brigadier Calitz denies it.	2 3	should have been able to foresee the risk of injury or death in the operation when they went tactical on the 16th of August?
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1	statements but one thing I do know is that in no democratic	1	pity that he wasn't drawn to qualify that because I think
2	country an incident that doesn't only have national	2	that part of the answer that you need, one, to unearth the
3	security ramifications but definitely serious economical	3	structures behind what happened and how that happened is to
4	dimensions, does a police force decide that it is time for	4	get clarity why, in the face of such overwhelming evidence
5	whoever is there to go. That decision comes and originates	5	as you now present and that you hold the police were aware
6	from somewhere else and it may well be that that then	6	of when they were making that decision and trying to
7	becomes the subject for a discussion in a management forum	7	operationalise it, why didn't they refuse to do it, because
8	of the police but it's an order that comes from the	8	if it originated from within the police itself it would
9	executive and the police must implement that order and then	9	have been simple to stop that. And I hope that the police
10	 because how else, like in the face of what you say, how 	10	are not an entity on itself, they are agents of the state.
11	can anyone decide that you are going to do that if what, if	11	They are accountable to the executive, at first to the
12	I just accept at face value that each of those 12 points is	12	Minister for the Police, Minister for Justice and maybe
13	true, you can't implement an operation on that. Now you	13	even the President and I would hope that an incident like
14	have been given an order, international law says if an	14	Marikana in the way it escalated in that week, posed
15	order is manifestly unlawful and if you have a reasonable	15	ramifications for safety and security that well over-
16	opportunity to refuse it, you should do so. That for me	16	stepped something that you leave your police force to deal
17	now is a \$64 000 question. Is the order that was given to	17	with if you are in government and it had ramifications at
18	the police that I will take came from the executive, from	18	industrial level with the involvement of Lonmin and the
19	government, is that order an unlawful order? Can you now,	19	unions that have economic ramifications. I read in
20	on the basis of what you know because you're now asking the	20	Lonmin's annual report that that week alone cost them \$326
20	police to resolve a situation of which they could have	20	million and that one year on after Marikana, they were
22	demonstrated to the executive that it would likely produce	22	still only at 85% of pre-production capacity, of pre-
23	this result, then you have that problem and I recall your	23	Marikana production levels. So it was still costing them
23	Deputy President in answer to a question of Mr Mpofu,	24	money. So there have been all these references made. I
25	qualifying Marikana as a collective failure. It's really a	25	think it's time to then unearth who gave that order.
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	Page 37073		Page 37074
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	Page 37075		Page 37076
1	o'clock already, even though that is the time that they	1	as a one-off way of dealing with it, then the least I want
2	had, most of the people would be back from the koppie – so	2	to say about that, that is unacceptable. You cannot have a
3	why Thursday? Why Thursday when you know that you can only	3	police force essentially deciding on issues that have such
4	do it after 9 o'clock? That's the question I've been	4	ramifications attached to it and consequences as Marikana,
5	asking. I haven't yet got a definitive answer. If, of	5	on its own, and place that beyond the political and
6	course, it was some order from on high not based on peace	6	judicial control that you would want to exercise before you
7	consideration, not based on knowledge of what was happening	7	go ahead. And what I then inversely, if I take that that
8	on the ground, that's a different matter. That's one of	8	is what is normal in a democratic society and therefore
9	the things we're trying to investigate. Have you got any	9	normal here, I would find it very hard to believe that
10	information you can give to us that'll help us?	10	there weapons no political or judicial guidance on that
11	MR DE ROVER: Chair, like I said, one, it	11	decision and because a higher authority made it and gave it
12	was an extraordinary session and it held people back that,	12	as an order, then you have your answer to your question as
13	in the normal structures that exist within SAPS for	13	to why it was implemented and why the haste and why the day
14	managing incidents of this kind in their initial phases,	14	and why those 12 points in the end, although raised, did
15	that that forum doesn't have a place. Now if you call that	15	not weigh heavily enough to counter the order. And hence
16	meeting, and with what I've said about police forces in a	16	my question is the order, because were the ones that issued
17	democratic society, I would be very surprised that SAPS	17	it made sufficiently aware of those 12 points and the risk
18	would have been permitted to make that decision on its own	18	that in going ahead – because then it entails a
19	alone and not guided or would not have actively sought the	19	responsibility and the line of command responsibility in
20	guidance of the executive on this prior to doing it,	20	law enforcement doesn't stop at the National Commissioner,
21	definitely when faced with the 12 elements that you have	21	it goes right through to the top because the police is not
22	just presented, that's my problem, that I would fine it –	22	an independent organisation. They are under government
23	one, if that is held because of the way people talk about	23	control.
24	it, that it's held that that was a decision that was made	24	CHAIRPERSON: Yes, there are provisions,
25	by SAPS and that forum was used to discuss it and decide it	25	though, in the Constitution and the Act which do give
1	Page 37077	1	Page 37078
1	freedom and independence to the Police Commissioner –	1	proposal because of this and this and this or we want to
2	freedom and independence to the Police Commissioner – MR DE ROVER: Ja, but under direction of	2	proposal because of this and this and this or we want to know more information, would you have backed off? And she
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	Page 37079		Page 37080
1	MR DE ROVER: No, no.	1	society's acceptance of contemporary forms of protest and
2	CHAIRPERSON: Do you use that expression	2	violence but if it's an incident that puts at risk the
3	in Holland as well?	3	interests of a big international enterprise, that obviously
4	MR DE ROVER: Ja.	4	is of economic importance to South African Police, if it
5	CHAIRPERSON: A wrong track. It's called	5	puts at risk lives and communities and if it occasions now
6	an extraordinary session simply because some of the people	6	with regularity death and injury, I can't imagine that just
7	had gone. They were there at the meeting, the meeting	7	to be policing questions and that directions and choices
8	ended apparently, the people, some people left and then the	8	that are made are not subject to political scrutiny or
9	National Commissioner said let's now discuss this	9	political advice, at least to a National Provincial
10	information, they'd just got the information that it was	10	Commissioner, and I remember at least from the early days
11	said that the strikers might voluntarily hand down their	11	of the Commission that a lot of discussion was held about
12	arms the next morning and so she said, let's discuss it.	12	who called whom, what phone calls were made, what e-mails
13	And they then discussed it, as I said, for apparently	13	were sent, who engaged themselves on this issue. Did, I
14	something like an hour, it was minuted but it was called an	14	think the problem for me is that it is less than
15	extraordinary session because not everybody was there. So	15	transparent who involved and engaged themselves because -
16	it isn't as if they specially convened an extraordinary	16	and it's simply on my expectation of having been in many
17	session because of some order that they received from	17	countries around the world, that operations of this kind
18	elsewhere to discuss it. The extraordinary is explained in	18	are not left to the police to run there because the policy
19	the way I've given you, so let's not go on a dwaalspoor	19	that would underpin the action needs the sanctioning from
20	there. Sorry, I interrupted you but I think that's	20	the executive and the judiciary. It can't be the police
21	important information to have.	21	alone.
22	MR DE ROVER: Ja, but what I maintain as	22	CHAIRPERSON: I understand, you've made
23	my opinion is that I would expect a political direction to	23	that point. The question, I don't think in South Africa
24	a situation of this kind and I, obviously I don't live	24	the judiciary plays a role but let's not, we don't have
25	here, I don't know how you deal with that red square,	25	examining justices and so on as you have but let's not get
			00050
1	Page 37081 involved in that for the moment.	1	Page 37082 why that decision was taken, what the motivation of the NMF
2	MR DE ROVER: No, no.	2	was?
3	CHAIRPERSON: I asked you a question	3	MR DE ROVER: Ja, no, the way – I think
4	earlier, you told us how you understood, you heard about	4	it was General Mbombo who, when I asked her how that came
5	this National Management Forum decision not as part of the	5	about, that it was almost like, oh, you know, there
6	official briefing you received. It was, you used the word	6	happened to be that meeting and a few of the members
7	it was divulged to you by somebody.	7	remained behind and then we had that discussion. So, but
8	MR DE ROVER: Ja.	8	I'm already armed with at least my personal experience and
9	CHAIRPERSON: A third party, I think you	9	exposure of 22 years in 70 countries where I see this done
10	said, over a cup of coffee or tea or whatever the beverage	10	differently and I hear what she says.
11	was that you were drinking and then you went back to	11	[09:47] I have a problem accepting it as an utterance of
		1	
12	Annandale and I think you said Mbombo and put it to them.	12	how modern democracies work because the ramifications of
12 13		12 13	how modern democracies work because the ramifications of such an action would invariably come back on the
	Annandale and I think you said Mbombo and put it to them.		
13	Annandale and I think you said Mbombo and put it to them. As part of the information you received was there any	13	such an action would invariably come back on the
13 14	Annandale and I think you said Mbombo and put it to them. As part of the information you received was there any suggestion that there was an executive order which was the	13 14	such an action would invariably come back on the government, as they did after Marikana. So to imagine a
13 14 15	Annandale and I think you said Mbombo and put it to them. As part of the information you received was there any suggestion that there was an executive order which was the reason why the National Management Forum made this	13 14 15	such an action would invariably come back on the government, as they did after Marikana. So to imagine a reality that that was given a go-ahead or left to go ahead
13 14 15 16	Annandale and I think you said Mbombo and put it to them. As part of the information you received was there any suggestion that there was an executive order which was the reason why the National Management Forum made this decision?	13 14 15 16	such an action would invariably come back on the government, as they did after Marikana. So to imagine a reality that that was given a go-ahead or left to go ahead without the government having its say on it but still being
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13 14 15 16 17 18	Annandale and I think you said Mbombo and put it to them. As part of the information you received was there any suggestion that there was an executive order which was the reason why the National Management Forum made this decision? MR DE ROVER: No, I think my questions have been straightforward on the point, the answers have	 13 14 15 16 17 18 	such an action would invariably come back on the government, as they did after Marikana. So to imagine a reality that that was given a go-ahead or left to go ahead without the government having its say on it but still being confronted now with the consequences of it, the least of which is that they pay for this Commission to now happen, I
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1	MR DE ROVER:	Page 37083 Ja, especially with the	1	Page 37 CHAIRPERSON: How diplomatic? What wer	
2	legal team.	Sa, especially with the	2	the ipsissima verba of the diplomatic answer?	IC I
3	CHAIRPERSON:	Yes, well never mind the	3	MR DE ROVER: I, it's, that's a long time	
4		have more information anyway.	4	ago, this discussion, Chair, and –	
5	MR DE ROVER:	Ja.	5	CHAIRPERSON: Is it recorded in your	
6	CHAIRPERSON:	Did you raise it with those	6	notes?	
7	instructing them?	Dia you ruise it with those	7	MR DE ROVER: No, there were many	
8	MR DE ROVER:	Well, I've had lengthy	, 8	informal meetings that I had, or several I should say, wit	th
9	discussions on it with Gene	0,3	9	her and I've tried to raise this but you must accept that	
10	Annandale –		10	at the time those took place I'd only been in the country	а
11	CHAIRPERSON:	And did they give you any	11	few weeks –	u
12	answers which you could u		12	CHAIRPERSON: Yes, yes. No, leave the	
13	MR DE ROVER:	Ja, that they share my	13	note point. It was just a -	
14		are not privy as eyewitnesses or	14	MR DE ROVER: Yes, I don't know, but it's	
15		formation that helps other than	15	more that my relationship with her was very much still of	fa
16	say they share that view.		16	stranger, of two strangers meeting and I asked that	
17	CHAIRPERSON:	Did you put the view to	17	question that that's a hot one if, you know, to even enter	r
18	General Phiyega?	3	18	into, to divulge to me what you're working relationships	
19	MR DE ROVER:	I did –	19	are with the executive. So I got a diplomatic answer –	
20	CHAIRPERSON:	Sorry, National	20	CHAIRPERSON: By diplomatic do you mean	n
21	Commissioner Phiyega.		21	evasive?	
22	MR DE ROVER:	Yes.	22	MR DE ROVER: Ja.	
23	CHAIRPERSON:	And what was her answer?	23	MS LE ROUX: Mr De Rover, in any of your	
24	MR DE ROVER:	A diplomatic answer and you	24	discussions with the National Commissioner did she expre	ess
25	know in fact I –		25	any reluctance to you that you participate in this	
		Page 37085		Page 37	
1	Commission process, partice	ularly the expert process?	1	not operational police people, you're trying to understand	I
2	MR DE ROVER:	ularly the expert process? No, I, and I attach value	2	not operational police people, you're trying to understand concepts, so I've used methods and I've used clarification	I
2 3	MR DE ROVER: to expressing this here beca	ularly the expert process? No, I, and I attach value ause it took me a while	2 3	not operational police people, you're trying to understand concepts, so I've used methods and I've used clarification and I've used comparisons that are not meant to justify	I
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2 3 4 5	MR DE ROVER: to expressing this here beca yesterday to realise that I w and I regret that because I	ularly the expert process? No, I, and I attach value ause it took me a while vas seen as a SAPS gun for hire would face unemployment forever	2 3 4 5	not operational police people, you're trying to understand concepts, so I've used methods and I've used clarification and I've used comparisons that are not meant to justify anything, but to explain, to give you a possibility to comprehend how certain actions on the ground can happe	l ns en,
2 3 4 5 6	MR DE ROVER: to expressing this here beca yesterday to realise that I w and I regret that because I if I put my professionalism a	ularly the expert process? No, I, and I attach value ause it took me a while vas seen as a SAPS gun for hire would face unemployment forever and integrity on the line here,	2 3 4 5 6	not operational police people, you're trying to understand concepts, so I've used methods and I've used clarification and I've used comparisons that are not meant to justify anything, but to explain, to give you a possibility to comprehend how certain actions on the ground can happe and other than that there has been no point that I was to	l ns en,
2 3 4 5 6 7	MR DE ROVER: to expressing this here beca yesterday to realise that I w and I regret that because I if I put my professionalism a and I made that clear even	ularly the expert process? No, I, and I attach value ause it took me a while vas seen as a SAPS gun for hire would face unemployment forever and integrity on the line here, before coming, when I received	2 3 4 5 6 7	not operational police people, you're trying to understand concepts, so I've used methods and I've used clarification and I've used comparisons that are not meant to justify anything, but to explain, to give you a possibility to comprehend how certain actions on the ground can happe and other than that there has been no point that I was to oh, you can't say this or you can't say that. And frankly,	l ns en,
2 3 4 5 6 7 8	MR DE ROVER: to expressing this here beca yesterday to realise that I w and I regret that because I if I put my professionalism a and I made that clear even the phone call from SAPS I	ularly the expert process? No, I, and I attach value ause it took me a while vas seen as a SAPS gun for hire would face unemployment forever and integrity on the line here, before coming, when I received made that abundantly clear to	2 3 4 5 6 7 8	not operational police people, you're trying to understand concepts, so I've used methods and I've used clarification and I've used comparisons that are not meant to justify anything, but to explain, to give you a possibility to comprehend how certain actions on the ground can happe and other than that there has been no point that I was to oh, you can't say this or you can't say that. And frankly, I would hear that and that wouldn't wash with me.	l ns en,
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2 3 4 5 6 7 8 9 10	MR DE ROVER: to expressing this here beca yesterday to realise that I w and I regret that because I if I put my professionalism and I made that clear even the phone call from SAPS I them that I am not your gu standards and integrity that	Ularly the expert process? No, I, and I attach value ause it took me a while vas seen as a SAPS gun for hire would face unemployment forever and integrity on the line here, before coming, when I received made that abundantly clear to y, I have my own professional come first, I will not lie for	2 3 4 5 6 7 8 9 10	not operational police people, you're trying to understand concepts, so I've used methods and I've used clarification and I've used comparisons that are not meant to justify anything, but to explain, to give you a possibility to comprehend how certain actions on the ground can happe and other than that there has been no point that I was to oh, you can't say this or you can't say that. And frankly, I would hear that and that wouldn't wash with me. MS LE ROUX: Because you see, Mr De Rover, I'm trying to understand why you didn't engage with	i en, old
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1	Page 37087 have done nothing rather than sit down, have a beer and get	1	Page 37088 made the suggestion on a number, a couple of occasions at
2	to work on this, but because that, because of the fact that	2	least, and I understood it was taken further, the
3	parties before this Commission also have their particular	3	suggestion I made was communicated to the parties and
4	interest at heart because of the representations that they	4	nothing happened. So that really what Ms Le Roux is about.
5	make, those discussions are prejudiced from the word go.	5	MS LE ROUX: Mr De Rover –
6	They're not objective expert discussions anymore, and	6	CHAIRPERSON: We don't expect people,
	that's why I was reluctant, because I don't feel a need to	7	experts to come like some international arbitrators do –
7 8	5	8	•
9	enter into yes, no, and arguing and actually not honestly arguing but trying to find something that derails a	8 9	MR DE ROVER: No. CHAIRPERSON: - and argue for the side
10	completely valid proposition. So that's my answer to that.	10	that's appointed them. We expect the experts to get
11	CHAIRPERSON: Sorry, what we do in the	11	together and say we genuinely can agree on the following
12	courts where there's conflict of expert testimony, what we	12	points; we genuinely disagree on these points. It narrows
13	very often do is – when we, I mean as judges – we say to	13	the debate, you see. That's what I had hoped would happen.
14	the parties look here, we accept the experts are impartial	14 15	I'm sorry it didn't, but what Ms Le Roux is probing is why
15	because they are supposed to be giving their expertise	15	it didn't happen.
16	irrespective of who's called them. We invite the experts,	16	MS LE ROUX: Mr De Rover, your answer was
17	we say can't you get the experts together to have a	17 10	that it was a bit of both and I've understood your last
18 19	discussion to see whether they can't reach agreement and what very often happens then, experts go away for a couple	18 19	answer to be describing in a sense your feeling that since
			you largely were in agreement with Mr White and Mr
20	of days, they come back with a report saying we discussed	20	Hendrickx, that it would somehow be redundant for you to
21	the matter, we agree on the following, and then set out	21	add to that. Is that a correct summary of in part your
22	what they agree on, we disagree on the following points and this expect says that and the other expect says semathing	22	explanation as to your attitude to it? But I'm interested
23 24	this expert says that and the other expert says something	23	in the other part of the both, which was, were you ever
24 25	else. That's what I had hoped could be achieved here. I thought it would save a lot of time if we did that and I	24 25	instructed not to engage, or if not instructed, were you ever, was it made clear to you that it was discouraged, or
25		25	ever, was it made clear to you that it was discouraged, or
	Page 37089		Page 37090
1	Page 37089 anything like that?	1	Page 37090 MS LE ROUX: Chair, I just have one
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1	Page 37091	1	Page 37092 problem my tactic has always been to make it bigger because
1 2	and I think you all were here, you, some of you even have a mandate that empowers you to act and I'm thinking that	2	if you make it bigger there is a bigger chance that you'll
2	there were people that engaged themselves with that	3	actually find some common ground, something that you can
	situation because they were aware of it, and the Bishop is	4	agree on, and not that you whittle it down to that
4			
5	one utterance of someone who obviously took it to heart and	5	essential key point that you forever will differ of opinion
6	decided to physically go there, and I think that more of	6	on. I look at, that's again society acceptance of forms of
7	that might, could have created other opportunities that	7	violence.
8	simply then don't eventuate, and I'm particularly looking	8	I've been in your country now one and a half
9	at the 14th and the 15th because it seemed to be days of	9	years and the last time I went home after four months it
10	relative calm there, where attempts at getting some form of	10	takes me a week to get back to normality, that I don't have
11	constructive dialogue going maybe from different	11	to lock my doors, that it's alright to leave the keys in my
12	perspectives and different actors and stakeholders who	12	car, and I don't have an electrified fence around my house
13	again in democratic societies are expected and entitled to	13	and armed response on standby. You have 1.2 million
14	engage themselves on those issues, that's a missed chance	14	registered private security providers in this country.
15	too.	15	That's to me a demonstration of how safe your country is
16	If you are, in answer to that question on 262 I	16	and an indication of how well you law enforcement is doing
17	would consider that part of trying your damndest, is that	17	because they charge you for a service that the police
18	word is permitted in this setting, to avoid that you need	18	should give you for free, and that is, there are just some
19	to deploy and put a stop to it because inevitably when you	19	factors there that I put in alignment and I think well,
20	stop talking, things become confrontational, and I've	20	people were watching the news and definitely on the 11th and
21	worked long with the United Nations; the core principle in	21	the 12th and then on the 13th you get that flashpoint that
22	any relationship is that we try and maintain constructive	22	would have made headlines. People would have seen that,
23	dialogue, however futile, because for as long as we're	23	people in government, individuals in the street. Aren't
24	talking, we're not fighting, and even if we agree to	24	people outraged? And South African Human Rights
25	disagree, and rather than focussing on the essence of a	25	Commission, you have a constitutional mandate when it comes
1	Page 37093 to protecting human rights. Is there no platform then for	1	Page 37094 alternatives to you would you comment on them and tell me
1	to protecting human rights. Is there no platform then for	1	alternatives to you would you comment on them and tell me
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2 3 4	to protecting human rights. Is there no platform then for you to engage in this situation and say we can project on the basis of past experience that this may well lead to catastrophe? So if we talk missed opportunities, I see	2 3 4	alternatives to you would you comment on them and tell me if you'll accept them; the first would be to have waited until at least the following morning and implemented the encirclement plan which had a lower risk and therefore less
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Page 37095 1 to put in line was to bring representatives from NUM and 1 Pakistani and two weeks later eight Ame	
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2 AMOL and actually act as facilitations, as a conduit 1	•
2 AMCU and actually act as facilitators, as a conduit. I 2 out, the UN pulled out of Somalia and w	
3 think that in the process the police lost their neutrality 3 So the proposition of being misundersto	ood in your role is a
4 by doing that, that from a mediator, especially when they 4 risk there.	
5 were the bearers of the bad news that there would be no one 5 [10:07] So you want the police to main	
6 else coming, that Lonmin would not be coming and that now 6 to try and maintain dialogue. I would a	t least venture you
7 it was time to go home, that there may have been a 7 need a bargaining chip, you can't just tr	ry and talk because
8 confusion on the part of the strikers because now the 8 I think the talks that were there were st	trained enough
9 police act as the speaking tube for corporate enterprise 9 whilst the police had a bargaining chip t	those talks were
10 and for that other group that obviously were not friends 10 not easy. And those talks were not safe	e, they were
11 with the people on the hill, and that some of the 11 conducted from within a Nyala. So the	conditions of the
12 aggression that then develops in fact gets directed at the 12 talks were already not very happy. So the	that is why I'm
13 police and that, I actually think that the police failed to 13 saying that if the bishop had arrived on	the 14th or the
14 recognise that as a risk, that by putting yourself as a 14 15th I'm sure he would have been welc	omed with open arms as
15 neutral intermediary and doing something on behalf of one 15 you would have been as anybody else v	who would have wanted
16 of the parties, that you may be perceived you're then doing 16 to engage probably would have been w	
17 something against another party, and that might not be your 17 a means of relieving pressure. If I was	
18 intention but that may well be the reading. That's why I 18 ground I'd be desperately looking for we	
19 refer to Operation Restore Hope in Somalia where with the 19 pressure even if I have to bring a portal	5
20 best of intentions the UN distributed food to 300 000 20 to play music or to distribute food to pe	
21 people starving, but that was a weapon of war in the hands 21 get a sense or an atmosphere that wou	
22 of General Aidid and he did take offence. He didn't care 22 have a conversation rather than adversa	
	'd like to take
24 wanted them to do, and when the UN gave them food he turned 24 the adjournment now.	F understand
25 on them and he killed UN peacekeepers. He killed 24 25 CHAIRPERSON: I would, 1	5 minutes.
Page 37097	Page 37098
1 [COMMISSION ADJOURNS COMMISSION RESUMES] 1 that the plan starts to diverge from what	
2 [10:37] CHAIRPERSON: I'm sorry, Ms Le Roux, we 2 because that Nyala was supposed to go	·
3 had a bit of housekeeping to deal with in relation to the 3 supposed to make the curve.	5
I 4 INSPECTION ON WIONDAY. IT ALE UD SOME OF VOULTIME, TOP I 4 INSTERIOUX: NOW IN THE	_
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5 which I apologise but I'm sure you'll have fine-tuned your 5 CHAIRPERSON: I must sa	y I thought the
5which I apologise but I'm sure you'll have fine-tuned your5CHAIRPERSON:I must sa6cross-examination and won't be prejudiced.6disruption point was slightly different.	y I thought the They intended to
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1	Page 37099 themselves. That, I think in a nutshell, is their case.	1	Page 37100 really the first disruption and it's said in quotation
2	Am I right, Mr Semenya?	2	marks. The second one is the one you've mentioned and the
3	MR SEMENYA SC: It is so, Chair.	3	third one is the one which I think the National
4	CHAIRPERSON: [Microphone off, inaudible]	4	Commissioner meant, but you want to ask a question. Do you
5	MR DE ROVER: Chair, looking at that	5	want to ask me or – you've got more chance of getting an
6	because that has come to light after the fact but I'd put	6	answer out of Ms Le Roux.
7	that in fact the first disruption already happens when the	7	MR DE ROVER: No, no. Well, Chair, I
8	deployment of the barbed wire is done consecutively and not	, 8	know I need to address you but I know that the owners of
9	simultaneously as Lieutenant-Colonel Scott foresaw at the	9	the exhibit are the Human Rights Commission. Now I think
10	time. So if you want an earliest indication of when the	10	that that exhibit would benefit from an effort and I've
11	plan already did not, the action on the ground did not	11	checked, I'm sure SAPS is willing to come to party, if I
12	reflect what the plan said, that that would for me be the	12	can call it that, on that because I know that it will cost
13	earliest manifestation. When I asked specifically with the	13	money to do it but you can identify the command vehicles in
14	exhibits available at the time where they figured that	14	those presentations and specially the animations. Now what
15	tangibly things went different, that is at the moment Nyala	15	we saw yesterday shows camera views but those camera views
16	4 starts to arc. Is it permitted, Chair, to ask a question	16	do not equate lines of sight commanders had. If you would
17	about this exhibit because that would be a useful addition	17	use that same principle of the yellow line arcs, it would
18		18	at least permit in the animation to show what commanders at
19	CHAIRPERSON: I'm sure you can ask a	19	that time were looking at because you get a camera on
20	question. I must say I would have thought the first	20	someone's right there, I remember one sequence where
21	disruption was actually when they moved Nyala 6. I seem to	21	there's a camera here and a Nyala drives through the screen
22	remember the evidence was that Colonel Scott wasn't aware	22	left to right and we see things behind that Nyala that the
23	of it, I may be wrong on that but the original plan has	23	camera keeps focusing on, that could have been Brigadier
24	Nyala 6 in a position where it was and it was then moved at	24	Calitz's Nyala but obviously his line of sight is different
25	about 11 o'clock or 11:20 or thereabouts, so that was	25	from the line of sight that we are being presented with and
	Page 37101		Page 37102
1	I think the exhibit would benefit, for your understanding	1	may be budgetary difficulties, it's something that the
2	I think the exhibit would benefit, for your understanding but for everybody's, if for the command vehicles, those	2	may be budgetary difficulties, it's something that the parties should come to the evidence leaders to discuss
2 3	I think the exhibit would benefit, for your understanding but for everybody's, if for the command vehicles, those lines could be included and secondly I think that the	2 3	may be budgetary difficulties, it's something that the parties should come to the evidence leaders to discuss because we might be able to assist.
2 3 4	I think the exhibit would benefit, for your understanding but for everybody's, if for the command vehicles, those lines could be included and secondly I think that the exhibit would probably give rise to a number of pointed	2 3 4	may be budgetary difficulties, it's something that the parties should come to the evidence leaders to discuss because we might be able to assist. CHAIRPERSON: It sounds as if something
2 3 4 5	I think the exhibit would benefit, for your understanding but for everybody's, if for the command vehicles, those lines could be included and secondly I think that the exhibit would probably give rise to a number of pointed interrogatories for those operational commanders pursuant	2 3 4 5	may be budgetary difficulties, it's something that the parties should come to the evidence leaders to discuss because we might be able to assist. CHAIRPERSON: It sounds as if something may happen along those lines but certainly I'm sure – do
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		I	
1	Page 37103 planning to do, it is also important to note that from that	1	Page 37104 this point but I know that Brigadier Calitz was in the
2	moment till the shooting starts there is two minutes in	2	centre of his Nyala, sitting sidewards, focused on radio
	real time available to them. Now at that time you see	3	communication and occasionally looking out of the windows.
3	5		
4	vehicles moving. They're obviously on their way to their	4	Now, I know you are going to Marikana on Monday. I've
5	jump off point where that dispersal action needs to start	5	already contacted General Annandale and recommended that a
6	so their attention and direction are to get towards that	6	Nyala is there. I know you have been inside Nyalas before,
7	end of the line where they will then come around and start	7	that you had a chance but it might be good to refresh that
8	the dispersal proper. Are they actually able to observe	8	opportunity, but to play that role then and be told where
9	what the camera is showing us? And I don't want to qualify	9	he was sitting and for you to have a chance, even plot some
10	that unless we can actually draw in on the exhibit the	10	of these routes and see what can you actually see when you
11	lines of sight so that you can say, not only say look, this	11	are there because I think they are factors that, in the end
12	happens because the camera caught it, but that you can	12	when judging decisions, can be critical. And we are
13	superimpose on it a line of sight and say look, just on the	13	talking about a serious matter so if you want to invoke a
14	basis of the line of sight that commander was in a position	14	commander's responsibility you must get to a point that you
15	to observe that same fact and then you'd have a point to	15	can prove that that commander saw, or if you want I can use
16	question them and get them to speak to that because all,	16	the word "knowledge," that that commander had knowledge and
17	you've managed to identify every single vehicle there and	17	failed to act on it. And the exhibit I think supremely
18	the occupants of every single vehicle are known. So I	18	enables that possibility, so I would think that with that
19	would think that to be a very useful and worthwhile	19	in mind the exercise of Monday might even gain some
20	exercise to conduct.	20	significance on that point as well.
21	COMMISSIONER HEMRAJ: Bearing in mind	21	MS LE ROUX: And Mr De Rover, if we're
22	that some of those commanders would have been inside the	22	engaged in an exercise of suggestions for Monday, we should
23	Nyalas at the time.	23	then probably also have 328 rounds fired next to that Nyala
24	MR DE ROVER: Ja, but that's – like I	24	and see if it's possible to hear them.
25	know and that's why I don't, my opinion is second-hand on	25	MR DE ROVER: Ja, but the same applies to
		1	
	Page 37105		Page 37106
1	Page 37105 calls of cease fire, you know, that is true. I think in	1	Page 37106 MR DE ROVER: Well, it's not quite at a
1 2		1 2	-
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2	calls of cease fire, you know, that is true. I think in all fairness, rounds going off, you can, you don't have to	2	MR DE ROVER: Well, it's not quite at a damaging level but I can tell you that it's annoying if you
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	Page 37107		Dogo 27109
1	at 500 metres distance plus. These systems exist. Now my	1	Page 37108 at those?
2	contention, I said that yesterday, it's not in arming up,	2	MS LE ROUX: If we could now return to my
3	it's in smarting up but you can expect your police to	3	cross-examination, you've observed annexure V2 which is
4	differentiate the approaches but the means that are	4	around the movement of strikers and you've seen the
5	available on the market are generally marketed under	5	animation that is V2A. In your statement – Chair, just for
6	euphemisms of less lethal technologies. All of them, every	6	the record it's FFF11A page 18, paragraph 33, there you
7	single one of them has multiple attested cases that they do	7	refer to the strikers repeatedly approaching the barbed
8	produce injury and death. So there is –	8	wire line and trying to breach or skirt it. Having seen
9	MS LE ROUX: Mr De Rover –	9	annexure V2, the video, and V2A the animation which
10	CHAIRPERSON: What you're suggesting –	10	indicates the position of the lead group at all times, do
11	MS LE ROUX: Mr De Rover –	11	those presentations accord with what you were told by the
12	CHAIRPERSON: Sorry, what you're	12	SAPS about the movement of strikers?
13	suggesting, we get a decibel counter and then we do	13	MR DE ROVER: Again what I was told by
14	something to simulate sound at –	14	SAPS and at the time I wrote that, that's before the 8th of
15	MR DE ROVER: Well, if –	15	March 2013, I had been shown exhibit L, that does contain
16	CHAIRPERSON: - at the relevant decibel	16	SAPS version of photographs that purport to show that they
17	reading.	17	were approaching the line. If we can hold, and I've heard
18	MR DE ROVER: I know that the contentions	18	the reservations yesterday to the videos, I have no beef
19	about the cease fire shouts, I think they are important	19	with that. What I see does not support that. So if it can
20	because you'd expect that one command of cease fire would	20	be held that your presentation is correct, then my
21	be enough for that fire to cease. Now –	21	statement on that point is incorrect.
22	MS LE ROUX: Mr De Rover, you accept that	22	MS LE ROUX: Mr De Rover, turning then to
23	there are several cease fire calls which are indicated by	23	the question of water cannons, you'll accept of course that
24	gesture, though, so –	24	water cannons are an important part of the less than lethal
25	MR DE ROVER: Ja, but are people looking	25	equipment that's available to police in crowd situations.
1	Page 37109	1	Page 37110
1	You will agree with that.	1	problem then because I referred in that response to a
2	You will agree with that. MR DE ROVER: Given that they are one of	2	problem then because I referred in that response to a number of statements. Again, I don't make these things up.
2 3	You will agree with that. MR DE ROVER: Given that they are one of two means that I would qualify as mostly non-lethal, yes.		problem then because I referred in that response to a number of statements. Again, I don't make these things up. I base myself on at least an auditable information that
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		I	
	Page 37111		Page 37112
1	people that made that claim in that reply, that you get	1	MS LE ROUX: It's a statement by Warrant
2	them to verify now.	2	Officer Fourie –
3	[10:57] MS LE ROUX: Mr De Rover, we'll obviously	3	MR DE ROVER: No, I haven't seen that –
4	contend that those statements are false in light of the	4	MS LE ROUX: - who describes the two-hour
5	objective evidence that shows how the water cannon was not	5	crash course he gave Kruger and Dicks and that's all the
6	used on the lead group of strikers. You also in your	6	training they've had.
7	interrogatory response to CALS indicated that you had been	7	MR DE ROVER: Well, they in their
8	informed that the water cannon operators were properly	8	statements only refer to the fact that their training was a
9	trained. Have you been aware of the statement of Warrant	9	year ago and I think in another statement someone qualifies
10	Officer Fourie – Chair, it's HHH37 – where he sets out what	10	that they did receive the operator training but not the
11	he calls a two-hour crash course that Officers –	11	training on how to operate the video system.
12	CHAIRPERSON: Perhaps we could have it on	12	MS LE ROUX: Warrant Officer Kruger and
13	the screen.	13	Dicks also acknowledge their training was what they call
14	MS LE ROUX: We can, Chair. I'm just	14 15	"very limited." MR DE ROVER: Ja.
15	conscious of time. The phrase they used was "two-hour	15	
16 17	crash course that Warrant Officers Kruger and Dicks went through. It was not an official course and they would need	16 17	MS LE ROUX: Ja. Are you aware of the evidence that Warrant Officers Kruger and Dicks were not
17	to get proper training but that never took place." If you	17	expecting to have to operate the water cannot and they did
19	accept that that evidence is true, all that Kruger and	19	not receive any briefing in advance of the commencement of
20	Dicks have had is a two-hour crash course, not an official	20	the operation? Are you aware of that evidence?
21	programme, would you revise your opinion that the water	20	MR DE ROVER: It's part of their
22	cannon operators were properly trained?	22	statements, I think, where they say that it was actually
23	MR DE ROVER: The statements I saw from	23	the crew of the other cannon that told them what would be
24	Kruger and Dicks do not contain that qualification, so I've	24	expected of them.
25	obviously seen earlier versions of that. You –	25	MS LE ROUX: Yes, and you have no
	, ,		
	Page 37113		Page 37114
1	evidence to the contrary as to their preparedness to	1	then surely you can't say that teargas and stun grenades
2	evidence to the contrary as to their preparedness to participate in the operation?	2	then surely you can't say that teargas and stun grenades were ineffective against that group of strikers because
	evidence to the contrary as to their preparedness to participate in the operation? MR DE ROVER: No.	2 3	then surely you can't say that teargas and stun grenades were ineffective against that group of strikers because they had the intended effect, the strikers moved away from
2 3 4	evidence to the contrary as to their preparedness to participate in the operation? MR DE ROVER: No. MS LE ROUX: So if the evidence is	2 3 4	then surely you can't say that teargas and stun grenades were ineffective against that group of strikers because they had the intended effect, the strikers moved away from the teargas and the stun grenades that were used against
2 3 4 5	evidence to the contrary as to their preparedness to participate in the operation? MR DE ROVER: No. MS LE ROUX: So if the evidence is accepted by the Commission that the Johannesburg water	2 3 4 5	then surely you can't say that teargas and stun grenades were ineffective against that group of strikers because they had the intended effect, the strikers moved away from the teargas and the stun grenades that were used against them. Would you accept that?
2 3 4 5 6	evidence to the contrary as to their preparedness to participate in the operation? MR DE ROVER: No. MS LE ROUX: So if the evidence is accepted by the Commission that the Johannesburg water cannon operators were not properly trained, first, second	2 3 4 5 6	then surely you can't say that teargas and stun grenades were ineffective against that group of strikers because they had the intended effect, the strikers moved away from the teargas and the stun grenades that were used against them. Would you accept that? MR DE ROVER: I think it's important to
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		1	
	Page 37115		Page 37116
1	If, there was one brief aerial shot where that group is	1	or stun grenade is for a protester to move away from the
2	still I think seconds before they made the second turn that	2	teargas and the stun grenade, correct? That's the expected
3	puts them on an inverse course on the one that they	3	response of someone when they have teargas or stun grenades
4	actually were walking on, so in that shot you see many	4	used near them, it's to move away from those.
5	people actually walking away to the north and that's the	5	MR DE ROVER: Well, it depends on two
6	part that looking at it I see the two differences and I	6	factors. It depends on a possibility to move away and it
7	don't understand it. So, and I just have to leave that for	7	depends on the intention of the use. Specifically with
8	what it is.	8	teargas you're obviously dependent on wind direction
9	But I do see that the exercise of trying to	9	because if on that day a stiff breeze had been blowing
10	isolate the commanders, because I'd like to know, because	10	towards the north it would have been quite difficult to
11	the use of the teargas and the stun grenades is still	11	effectively use teargas unless you deploy it on the other
12	supposed to be subject to someone giving that order. So	12	side.
13	someone gave that order. It would be important now with	13	Now I think, and that's why I put that slide up
14	this material to try and isolate who did, especially if you	14	before; I think that SAPS' use of teargas and stun grenades
15	put, your contention is that it causes them to move towards	15	is more aimed at maintaining that separation between police
16	the police line in fact, or it forces them in that	16	and protesters, and I see much more, like knowing that and
17	direction. I would still ask why they didn't simply turn	17	knowing that preference from speaking to them, that I see
18	around and do what the rest of the crowd did and walk in	18	the use of that teargas and those stun grenades there as
19	the opposite direction. So there is a manifest difference	19	POP members trying to have that safety barrier between them
20	in the intended direction of that group and what a lot of	20	and the demonstrators. I don't think, because physically
21	other people are doing. But that's what I'm seeing	21	it would have been impossible for the strikers to move
22	yesterday, and what I'm saying now I'm saying off the cuff	22	further away because that would have only been possible if
23	on just watching that.	23	the kraal hadn't been there, they could have moved towards
24	MS LE ROUX: But let me break this down	24	a westerly direction.
25	then. The expected response to the deployment of teargas	25	So I think that I read the action, and again I'm
	Page 37117		Page 37118
1	Page 37117 saying this with respect that I've only seen that footage	1	Page 37118 MS LE ROUX: Hence my question. Are you
1 2	6	1 2	5
	saying this with respect that I've only seen that footage		MS LE ROUX: Hence my question. Are you
2	saying this with respect that I've only seen that footage yesterday, I'm looking and considering that now. I haven't	2	MS LE ROUX: Hence my question. Are you aware of any other handguns, any other guns being used by
2 3	saying this with respect that I've only seen that footage yesterday, I'm looking and considering that now. I haven't spoken to anyone about it. I can only read it as an intent	2 3	MS LE ROUX: Hence my question. Are you aware of any other handguns, any other guns being used by that group?
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7 So my contention would still remain that the 7 think of General Naidoo's use of the firearm at scene 2, 8 possibility that there were other firearms there 1 think is 6 10 of that scene and the polic's contention, the way they 9 11 prostend it to me is that none of those firearms had a 10 11 12 that scene and the polic's contention, the way they 10 CHAIRPERSON: I think it for correct to say 13 twe said that to them, that the fact that rounds are 13 were sold, or whether they were used or whether someone 14 missing descrit necessarily say anything about when they 14 is evidence which has some value, but it's rather limited 15 wind that no more than five rounds for a cight-round 16 is regrad to what I've put to you, limit I? 17 MR SEROVX: Mr De Rover, have you been 16 in regrad to what I've put to you, limit I? 18 the only cariting that was solf rearms steized at scene 1 and 16 is evidence which has some value, but it's rather limited 19 there was only one shoft fired and there was only one 17 MR SEROVX: So Mr De Rover, you said 21 is the rous cariting that was solf rearms steized, only ono 25 MS I'rearms the rearm	5	auditable evidence, but not necessarily on and of its own.	5	the evidence collection at the scene because of the size
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1	Page 37127 silence and provides some statement and if you accept my	1	Page 37128 are then subjected to an interview by our equivalent of
2	description of a lot of the warning statements that we have	2	IPID who quiz you on what happened. And what I'm actually
3	before the Commission where they admit to killing, they	3	trying to stress is and I've seen that in may other
4	admit to shooting. But they don't give any of the details	4	countries, there's a close time correlation and requirement
5	of the circumstances that would justify that shooting.	5	between being confronted with the fact that they will treat
6	That officer is then in a very difficult position because	6	you as a suspect and the requirement to then follow up.
7	prima facie they've admitted to potentially killing	7	And here I understand that IPID's backlog runs into years.
8	somebody yet have not taken the opportunity to set out all	8	Now as a matter of international principles I think that is
9	of the detail and the circumstances that justify each and	9	unacceptable because if it's about a theft I can sort of
10	every one of the shots that they fire. You'll agree with	10	understand that your priorities are elsewhere. But if it
11	that proposition.	11	is about the intentional or accidental taking of life or
12	MR DE ROVER: Well I think it underscores	12	occasioning grievous bodily harm those are not cases that
13	the problem that we face because to – it would be up to	13	you can put on the back burner because you have a big
14	IPID then to solicit that detailed statement and I would	14	workload. And I would think that given that this incident
15	expect that to be part of what IPID does. So they've taken	15	triggered a commission of inquiry a logical consequence of
16	it on record, so they've got a start now, they've got a	16	that would be that an instruction would be given to IPID to
17	basic admission of yes I fired my weapon and an answer to	17	give those investigations priority so that it assists the
18	the question did that occasion injury and or death. And	18	Commission in it's findings.
19	that's a start. Initially you would not require more. In	19	COMMISSIONER HEMRAJ: Doesn't your
20	Holland I know that you get that stage then you have 48	20	warning, before taking a warning statement include a
20	hours because there's obviously let's say your moment	20	warning to disclose everything that might be pertinent?
22	induced confusion and stress and trauma of the incident as	22	MR DE ROVER: Well the thing is that and
22	such, so you get your initial encounter with central	22	this is where it differs in Holland. If I've been involved
23	detectives and your warning statement and then you have	23	in a shooting incident I don't get treated like a suspect
24	your 48 hours to compile your statement. But actually you	25	off the bat. Of course there's a judicial process that
20	your 40 hours to complic your statement. Dut actually you	20	on the bat. Of course there is a judicial process that
	Page 37129		Page 37130
1	Page 37129 follows, but you're a police officer, you've sworn an oath	1	Page 37130 recorded that you had not read all of the statements of the
1 2		1 2	5
	follows, but you're a police officer, you've sworn an oath		recorded that you had not read all of the statements of the
2	follows, but you're a police officer, you've sworn an oath and I take that seriously. So I come with everything I can	2	recorded that you had not read all of the statements of the shottists of the 16th of August. Is that still the case?
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		I	
	Page 37131	1	Page 37132
1	give you a footing for a quick scan of any shooting	1	jump, lift, carry and you make them tired and you give them
2	incident and the reason why this morning I said I have the	2	then, still it's a static target and now they're tired and
3	special repertoire's report where Professor Philip Alston	3	they have to shoot. Their results drop dramatically. If
4	was special repertoire and he did a country study on	4	you take 100% of the first score then in the second similar
5	Brazil. I've worked for him in the sense that I advised	5	test they only score about 30%. Now make it more
6	him, but roles without acknowledgement or glory, but you	6	difficult, now it's a moving target and the target is
7	try and assist a special repertoire if you can. Had he's	7	shooting back at you or at least you think the target is
8	used those approaches to make quick analysis, am I looking	8	moving back at you the chances that you actually hit it
9	at something dirty or not. And the second thing that I	9	diminish dramatically because those scenarios are currently
10	think is an important lesson to take is there is, I think,	10	in SAPS not trained. Or actually not many police forces
11	an overestimation of what you think the police can do. And	11	train it. When I worked in Holland we did train it because
12	especially when it comes to use of firearms there is, I	12	we realised and were aware of the figures that when police
13	think, the biggest lesson to draw from those figures and	13	officers get confronted by an armed criminal most of them
14	from the narrative that runs around it is that if an	14	die, 75% in the US die at a distance from zero to seven
15	officer is on his own and he's supposed to fire shots under	15	yards. And that's where they score the worst results when
16	threat on average it's about 50% of those rounds that will	16	they are forced to shoot. And that doesn't make sense
17	find their target. Now that's not meant to explain	17	because that offers you a problem that you could solve
18	shootings, what it's actually meant for is to improve	18	through training. So all I've tried to do with offsetting
19	training. And SAPS trains police officials on a range with	19	the results is to say I know that the number of shots fired
20	a static target, at a set distance where your breathing is	20	is horribly high, but I can show you and there's more
21	normal and where you get, in your own time, the chance to	21	recent examples, that have come out of US from Philadelphia
22	fire at that target. And surely if you can hit it at 15	22	where four police officers fired 138 rounds into a car.
23	metres you can hit it at three. That is the base	23	The mind boggles how that happens and why that happens and
24	contention and it's erroneous because if you put officers	24	how that can ever by justifiable, but I just tried to offer
25	under stress even just by simply asking them to sprint,	25	it as a base to say please don't be distracted by the
	Page 37133		Page 37134
1	Page 37133 number at the onset. Let that not cloud your focus on you	1	Page 37134 realistic circumstances that would match possible threats
1 2		1 2	•
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2	number at the onset. Let that not cloud your focus on you actually need to focus on which is the justification.	2	realistic circumstances that would match possible threats they face. And I totally – look I know the rules that you
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	Page 37135		Dogo 27124
1	to it.	1	Page 37136 concerns because I don't think that SAPS training in
2	MS LE ROUX: But whatever the	2	elements is an adequate reflection of the threats and the
3	explanation, whether it was inadvertent or not you would	3	real circumstances policing every day here puts on police
4	accept that that is reckless.	4	officials. So I think they're poorly prepared. I think
5	MR DE ROVER: I've said yesterday that I	5	that my preference would be that judgment is part of active
6	think that R5 rifles do not belong in public order	6	shooting training so that you create shoot, don't shoot
7	management and if you take away the possibility for them to	7	scenarios and there's very sophisticated ones that have a
8	be used you can't have the reality that you need to deal	8	video wall that even interacts with your voice command.
9	with the consequences. And in a blanket answer automatic	9	[11:37] So you have a suspect with a knife and yo draw
10	rifle fire doesn't have a place in law enforcement, I'm	10	your weapon and you shout at the suspect will drop the
11	sorry.	11	knife and those moments allow an instructor to judge
12	MS LE ROUX: Mr De Rover, you described a	12	student response to more realistic scenarios, and I think
13	moment ago the SAPS firearm training as static target at a	13	if you separate shooting from class room that connection
14	distance, standing still and stressed. Are you aware of	14	isn't necessarily made. Like I can put 20 people in a room
15	whether the SAPS firearm training, in addition to testing	15	here that will recite for you the definition on
16	accuracy, ability to hit the target whether it also tests	16	proportionality in the use of force, but if I put them in a
17	judgment, distinguishing between a threat and a non-threat?	17	scenario where they have to use it I'm not so sure that I
18	Does it have any judgment component to it that you're aware	18	could say with as much confidence that they all will behave
19 20	of? MR DE ROVER: I think that there is	19	in proportion to what confronts them because that is a
20	theory component that police officers go through where	20 21	function of what they are capable of physically and how strong they are mentally and how they judge the requirement
22	obviously that aspect of judgment is taught to them or told	22	of that particular situation and it becomes very much
23	them you know acting in proportionality means nothing if	22	individual.
24	you can't act proportionately when the situation occasions.	24	COMMISSIONER HEMRAJ: Mr De Rover, the
25	So the problem is with operationalisation. What I see	25	removing of one finger from the trigger when you're firing,
	· ·		5 5 55 7 5.
	Page 37137		Page 37138
1	especially an automatic, is a conscious decision. There's	1	safe, single shot, three-round burst, to full automatic.
2	especially an automatic, is a conscious decision. There's some writing about that, isn't there?	2	safe, single shot, three-round burst, to full automatic. So it's virtually impossible, unless you do it
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1	Page 37139 call associative threat perception in scene 2 based on the	1	Page 37140 shooting at and why, and two of them talk about an
2	interactions you've had with members of scene 2? Do you	2	individual darting in and out with a handgun, and we found
3	limit it to scene 1?	3	on the day, but it's useless because on the day where one
4	MR DE ROVER: I see it particularly at	4	of those officers was lying and there was no cover where he
5	scene 1 and I think if you take some of the stills, or if	5	had to go down because he said shots were fired at me, I
6	you would freeze frame on some of the images of yesterday,	6	had to fall down in the grass, and there's a rock in front
7	it's worth to have a look at that and you can see that,	7	of him and it has a strike mark on it that was confirmed is
8	that some people are responding because others are, but I	8	a bullet strike mark, but that's in March 2013. I can't
9	don't necessarily think because they saw a threat	9	say when that strike mark happened, but it sort of then, on
10	themselves, and it's probably also why you get that cascade	10	face value it supports his contention and the ballistic
11	that mounds like a bell curve and then comes back down.	11	experts that were there admitted they missed that one.
12	It's a serious worry because it also, this has to do with	12	They didn't see it because they, their efforts were very
13	experience and exposure to this type of incident and	13	much focussed on recording the shots that had gone in, but
14	scenario and the problem is that now we're talking very	14	not necessarily on identifying the shots that had gone out,
15	dangerous scenarios, how can you train them, and actually	15	and the same happened on the western side where Captain
16	I'd like a reality where you don't need to train those.	16	Kidd is. There's a rock that shows at least six strike
17	MS LE ROUX: Mr De Rover, my question was	17	marks of bullets that were never recorded. Problem is now
18	do you see, do you have a view that there is associative	18	I can't say they happened, they were made on the 16th of
19	threat perception operating at scene 2 as well?	19	August. So it's, but –
20	MR DE ROVER: There is, I think there is,	20	CHAIRPERSON: Can you say which direction
21	especially –	21	they came from?
22	MS LE ROUX: And why do you say that?	22	MR DE ROVER: Sorry?
23	MR DE ROVER: Well, speaking to people on	23	CHAIRPERSON: Can you say which direction
24	the southern side that were brought there by General	24	those strike marks came from?
25	Naidoo, some of the K9 members, I asked them what were you	25	MR DE ROVER: They would have come from
	Page 37141		Page 37142
	0		
1	within the koppie because for where they are placed they	1	MR DE ROVER: Yes.
2	can't have been placed by shots from the police.	2	MR DE ROVER:Yes.CHAIRPERSON:Can we take the adjournment
2 3	can't have been placed by shots from the police. CHAIRPERSON: Ms Le Roux, I'm proposing	2 3	MR DE ROVER: Yes. CHAIRPERSON: Can we take the adjournment now, or do you want to round off the point –
2 3 4	can't have been placed by shots from the police. CHAIRPERSON: Ms Le Roux, I'm proposing to take the tea adjournment in a minute when it's	2 3 4	MR DE ROVER: Yes. CHAIRPERSON: Can we take the adjournment now, or do you want to round off the point – MS LE ROUX: Chair, if I could just round
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	Page 37143		Page 37144
1	injury. It doesn't say that if you feel that your	1	actually ascertain what it is they are shooting at, and I
2	colleague is firing at something that poses a threat you	2	see that replicated in law enforcement in instances.
3	just take fire in that same general direction and you take	3	CHAIRPERSON: Yes, I see. Ms Le Roux, is
4	by proxy the threat to life to also –	4	it convenient –
5	CHAIRPERSON: Is it a voluntary act?	5	MS LE ROUX: Yes, Chair.
6	MR DE ROVER: Sorry?	6	CHAIRPERSON: - for us to take the tea
7	CHAIRPERSON: Is it a voluntary act? I	7	adjournment – 15 minutes.
	can understand if my colleague is firing and if the fact	8	[COMMISSION ADJOURNS COMMISSION RESUMES]
8			
9	he's firing makes me involuntarily fire then you wouldn't	9	[12:07] CHAIRPERSON: The Commission resumes.
10	have a conscious act.	10	You're still bound by your oath, Mr De Rover. Ms Le Roux?
11	MR DE ROVER: Well, it's, ja it's more	11	CEES DE ROVER: (s.u.o.)
12	like panic spreads in a crowd. If someone starts to yell	12	CROSS-EXAMINATION BY MS LE ROUX (CONTD.):
13	fire here now others might, you know, when we see smoke	13	Thank you, Chair. Mr De Rover, I do want to just take us
14	might take that up and all of us start to scramble for the	14	back to your suggestion that the V2 video be further
15	door, and it's been compared to that, you know, that there	15	annotated with what we call sort of the commander fields of
16	is a panic reaction, if you will, that all of a sudden now	16	view so that we can see what the commanders could have
17	a police officer is firing, there must be a reason for	17	seen. I just want to confirm that the reason you think
18	that, a rationale, and others, without having properly	18	that will assist us is that it could potentially explain
19	appreciated what that is, do the same thing.	19	why those commanders were mistaken in terms of what they
20	I think it's much more readily visible in armed	20	perceived to be the intentions of the strikers or the
21	combat. There is much more footage available of it too	21	movement of the strikers. Is that what you're trying to
22	where you can see a patrol, one soldier perceives a threat,	22	explain?
23	he's not going to say guys, there's a threat on that side,	23	CHAIRPERSON: Sorry to interrupt you. It
24	he opens up fire and the immediate response of the others	24	could work the other way too, of course. It could indicate
25	is to do in the general direction the same thing until they	25	the opposite. I understand a Nyala will be available, I
		_	· · · · · · · · · · · · · · · · · · ·
	Page 37145		Page 37146
1	Page 37145 think we were told that, weren't we? There will be a Nyala	1	Page 37146 be done. You and I don't have to supervise it, Ms Le Roux.
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	Page 37147		Page 37148
1	perceived that that was something that shouldn't be allowed	1	to attack the police. I want you to assume that the
2	to happen at Marikana. Did she mention that to you at all?	2	intention of the individuals within that crowd changed
3	MR DE ROVER: Not at all.	3	after they saw the first few of their colleagues begin to
4	CHAIRPERSON: Not at all?	4	fall. Mr X says that's because they realised the muti
5	MR DE ROVER: Not at all.	5	wasn't working and they started to turn to run away but
6	CHAIRPERSON: Didn't mention Mr Malema's	6	just assume the fact that the intention of some of the
7	name at all?	7	individuals in the crowd changes and they turn to run away.
8	MR DE ROVER: No, not at all, Chair.	8	Would you agree with me that if that change of intention
9	This is the first time that I hear that.	9	and the effort to run away is happening where there is a
10	MS LE ROUX: Mr De Rover, I'm not sure if	10	dust cloud and therefore the police are obscured in being
11	you're familiar with the cross-examination by my learned	11	able to see that crowd or what they're doing then it would
12	friend Mr Semenya of Mr White where they dealt with this	12	not be justified to shoot at that moment in time into the
13	question of the dust cloud obscuring the strikers at the	13	dust cloud.
14	kraal.	14	MR DE ROVER: I think you need to make
15	MR DE ROVER: Mm.	15	that part of the investigation because again I can only, I
16	MS LE ROUX: Are you familiar with that?	16	know that you have your national law applying first so
17	MR DE ROVER: Not in detail but I –	17	section 49, I think, of the Criminal Procedure Act –
18	MS LE ROUX: But broadly that that –	18	CHAIRPERSON: [Microphone off, inaudible]
19	MR DE ROVER: I can see where your	19	– applies to arrests, they weren't arrested –
20	question would go, so -	20	MR DE ROVER: But –
21	MS LE ROUX: Right. So I'd like you to	21	CHAIRPERSON: Common law applies here.
22	assume that there are approximately 30 people coming around	22	MR DE ROVER: Okay. So, but –
23	the kraal. I'd like you to assume that according to the	23	CHAIRPERSON: Which is essentially the
24	evidence of Mr X but just assume, regardless of its source,	24	same as international law.
25	that at the time these 30 come around the kraal they intend	25	MR DE ROVER: Okay, but if I take that
	Deg. 27140		
	Page 37149		Page 37150
1	and if I put international legal requirements – there would	1	Page 37150 attack you and you fire a couple of shots and the first few
1 2		1 2	
	and if I put international legal requirements – there would		attack you and you fire a couple of shots and the first few
2	and if I put international legal requirements – there would obviously be an issue with a difficulty to be able to	2	attack you and you fire a couple of shots and the first few people fall, are you now – I mustn't ask you a legal
2 3	and if I put international legal requirements – there would obviously be an issue with a difficulty to be able to identify that threat. So I hear what you are saying and	2 3	attack you and you fire a couple of shots and the first few people fall, are you now – I mustn't ask you a legal question but would it not be appropriate for a reasonable
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		I	
1	Page 37151 won't have another chance, that would be one thing but if	1	Page 37152 CHAIRPERSON: The visible falling of the
2	they're sufficiently far away for you to stop to see	2	front line or some of the people in the front line and the
3	whether the first, the falling of the first lot has had any	3	end of the firing.
	influence on the rest, then I take it you'd be obliged to	4	MR DE ROVER: Ja.
4		4 5	CHAIRPERSON: And it obviously –
5	hold fire for a moment at least to see what impact that has	6	MS LE ROUX: Chair, my recollection is
6	had on those following. Would that be right? MR DE ROVER: The problem is, Chair, that	7	that the dust cloud is obscuring strikers about four
7	if I take the worst possible to be true, that it in fact	8	seconds into the volley. That's my recollection.
8		9	
9 10	lasted for 12 seconds, then there was only those 12	9 10	CHAIRPERSON: Anyway, we can look at it but the point is, my recollection, which may be faulty, was
10	seconds. The contention I, at least until yesterday	10	you can see people in the front line falling and –
12	afternoon, is that it was actually only eight and that whilst I agree with that principle it is again, can you	12	MS LE ROUX: That's in the first four
12		12	seconds, because it's by four seconds -
	make it practicable? Can you actually then apply it in	13	CHAIRPERSON: That's right, then comes
14	that time frame that was available because it was done and	14	the dust cloud. The dust cloud wouldn't be an excuse if
15 16	finished then essentially, barring that additional shot		the falling of the first line was already visible and not
	that we see fired and that I had no knowledge of until	16 17	obscured by the dust cloud. It's then a question of,
17 18	yesterday. CHAIRPERSON: We might have to see from	18	you've got to take things like reaction time and so on into
19	CHAIRPERSON: We might have to see from the video, the timing of it and so on –	19	account and you can then measure with a stopwatch the time
20	MR DE ROVER: Ja.	20	lag between the visible falling of the first line, the
20	CHAIRPERSON: - what the time lag is	20	front line, and the end of the firing. That's the point.
22	between the falling, the visible falling of the first	22	Mr Semenya?
22	group. I understand the dust cloud came later actually,	22	MR SEMENYA SC: Chair, one of the
23 24	that was my impression.	23	difficulties we had with this video tape and the narrative
24	MR DE ROVER: Ja.	24	is that there are things in the video which are not
20		25	is that there are things in the video which are not
	Page 37153		Page 37154
1	Page 37153 consistent with a theme the narrator wants and it's not	1	Page 37154 shoot if it's a dust cloud? My question is a different
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2	consistent with a theme the narrator wants and it's not mentioned as part of the narrative. Now I'm making this	2	shoot if it's a dust cloud? My question is a different one, should you shoot if before the dust cloud you see the
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	Page 37155		Page 37156
1	that is the question, so the standard is there. I think	1	MR CHASKALSON SC: But I do foresee
2	the standard of necessity is embodied in that. Now the	2	difficulties.
3	question is, can you make it operational in the context	3	CHAIRPERSON: We'll cross that bridge
4	there? Was it, like are they aware of that standard? I'd	4	when we have to.
5	hope so. And are they able to act on that standard? Is	5	COMMISSIONER HEMRAJ: Didn't you give us
6	there time to act and is it reasonable to hold them to that	6	a measurement of 12 metres? I think it was for –
7	standard in those circumstances?	7	MR CHASKALSON SC: It was 12 to Warrant
8	CHAIRPERSON: The close quarters problem	8	Officer Kuhn and –
9	we can work out the answer to on Monday, we can measure the	9	COMMISSIONER HEMRAJ: That's right.
10	distance actually between the TRT line and the place where	10	MR CHASKALSON SC: 18 to the –
11		11	COMMISSIONER HEMRAJ: To the TRT line.
12	COMMISSIONER HEMRAJ: Mr Chaskalson's	12	MR CHASKALSON SC: To the TRT line.
13	measured it -	13	COMMISSIONER HEMRAJ: Yes.
14	MR CHASKALSON SC: Chair –	14	MS LE ROUX: Mr De Rover, if I can then
15	CHAIRPERSON: He can measure it on his	15	move on to scene 2 and I don't intend to spend any
16	Google Earth, I'd like to measure it on the ground.	16	significant amount of time on it but on e aspect of scene
17	MR CHASKALSON SC: No, no, no.	17	that I wanted to canvass with you is, do you accept that as
18	Chairperson, we will have grave difficulty, that landscape	18	a point of principle that a law enforcement officials
19	has changed dramatically. So there are no markers that one	19	should consider retreat before using lethal force?
20	can see from the original time period that are still in	20	MR DE ROVER: If that is practicable,
21	existence other than the kraal itself and I can foresee a	21	yes.
22	great deal of debate between parties if we try to pin down	22	MS LE ROUX: And are you aware of the
23	the exact position. We will do our, we'll make our best	23	evidence of Lieutenant-Colonel Scott – Chair, the reference
24	attempt.	24	is say 141, page 15293 lines 17 to 25 – there Lieutenant-
25	CHAIRPERSON: Ja.	25	Colonel Scott was asked to comment about what had happened
			Dama 27150
1	Page 37157 at scene 2 and he said that he agreed with the approach	1	Page 37158 Colonel Scott's view that one it was clear the strikers had
1	at scene 2 and he said that he agreed with the approach	1	Colonel Scott's view that one it was clear the strikers had
2	at scene 2 and he said that he agreed with the approach that, "the whole operation should have been slowed down,	2	Colonel Scott's view that one it was clear the strikers had holed themselves up in koppie 3, that the police had legal
2 3	at scene 2 and he said that he agreed with the approach that, "the whole operation should have been slowed down, police officials should have backed away to a safe distance	2 3	Colonel Scott's view that one it was clear the strikers had holed themselves up in koppie 3, that the police had legal obligation or had a –
2 3 4	at scene 2 and he said that he agreed with the approach that, "the whole operation should have been slowed down, police officials should have backed away to a safe distance and negotiations should have been reignited or reinitiated,	2 3 4	Colonel Scott's view that one it was clear the strikers had holed themselves up in koppie 3, that the police had legal obligation or had a – CHAIRPERSON: No, no, no, he can't say
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		I	
1	Page 37159 spot was not just to have the police there but to actually	1	Page 37160 150. Now put 300 people there, because that would have
2	realise and I think that factor has not been emphasised	2	been the most likely spot where they would have thought
3	here a lot but there were, when that police action happened	3	themselves safe; you have sight cover and fire cover, but
4	there were 300 people there. Now you go there on Monday,	4	you do not have fire cover for fire from all directions.
4 5	you just walk around there and tell me where those 300	5	You'd have it at best for two, but not for four, and that's
6	people are going to be and where they can find cover. So	6	why I'm saying that tragic as that is, I'm mindful of the
7	whilst listening and just listening and hearing policemen	7	fact that the number because then of what you have there,
8	say that there was something of a threat and they shot at	8	at least 150 rounds flying through and there are nine
9	that threat and missed, I now picture these rounds	9	deaths there that can't be linked to an individual shooter,
9 10	travelling through that area and you, on Monday, the	9 10	that could have been much higher, and I think that the
10	foliage there is distinctly different although the	10	position in which people were found and the injuries they
12	ballistics report will give you an idea but the ballistics	12	suffered, my reading is that that – and I'm not an expert
12	report also shows you the evidence of how far and	12	
13		13	on that, so please discount if you disagree, but there
14	penetrating those rounds were. Now, there is a very		would have been normal interactions going on. So we are facing each other. I'm bending to pick something up and at
	unfortunate term in humanitarian law that calls situations	15	
16	like that collateral damage and I'm loathe to employ that, but from the stories and the reality and the geography on	16	that moment a round strikes the top of my head, and I
17	the ground, the fact is that shots were fired allegedly in	17 18	realised that standing there and that took my breath away. It's terrible.
18		10	MS LE ROUX: Mr De Rover, in your
19	self-defence. That remains to be seen and tested, whether		-
20 21	that is true. Those shots missed and then continue on their path.	20 21	statement where you determine that nine of the deaths were incidental and not intentional, we haven't seen which nine
21	[12:27] And the worst part of it is that in that centre	21	individuals you ascribe that judgment to. Would you be
22		22	able to provide us with that information?
23 24	area of koppie eventually you have shots from four directions travelling through, and I can't remember the	23 24	CHAIRPERSON: Forgive me for a moment. I
24 25	exact number I said, but that might have been in excess of	24 25	know you're running out of time. Mr De Rover, would you
25	exact number 1 said, but that might have been in excess of	23	Know you're running out of time. Wir De Kover, would you
	Page 37161		Page 37162
1	like an adjournment for five minutes? I can see you're	1	SAPS on points of disagreement in June. I just wanted to
2	very moved by what you've just said. Five-minute	2	clarify from yesterday's evidence, did you have input into
3	adjournment? Can we sit till 5 past 1, Mr Semenya?	3	that document?
4	[COMMISSION ADJOURNS COMMISSION RESUMES]	4	MR DE ROVER: Can you give me the
5	[12:34] CHAIRPERSON: The Commission resumes.	5	reference again?
6			
0	Are you able to continue now, Mr De Rover?	6	MS LE ROUX: It's JJJ178.10. It's
7	Are you able to continue now, Mr De Rover? MR DE ROVER: Sure.	6 7	MS LE ROUX: It's JJJ178.10. It's attached to Mr White's statement. It's up on the screen,
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7	MR DE ROVER: Sure.	7	attached to Mr White's statement. It's up on the screen,
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1	Page 37163 facilitate it through the SAPS legal team. Mr De Rover, in	1	Page 37164 statement you say my own review of these incidents, you
2	your second statement FFF11A and specifically page 12 of	2	didn't actually review any incident.
3	that statement, paragraph 21 here you're dealing with a	3	MR DE ROVER: Well I did look into a few
4	section entitled The SAPS Doctrine of Maximum Force. And	4	of them. The Tatane case comes back to mind from that time
5	paragraph 21 at page 12 states "I'm aware of incidents in	5	and without qualifying that further I did not see a reason
6	recent SAPS history that have given rise to the belief that	6	to equate that to an organisational or a systemic breakdown
7	a doctrine of maximum force does exist within the	7	within SAPS.
8	organisation. My own review of these incidents leaves me	8	MS LE ROUX: But beyond that research you
9	to contend that they were indeed isolated incidents and do	9	didn't – those are the incidents in recent SAPS history
10	not provide evidence or even strong indication of an	10	that you're referring to and only those.
11	organisational breakdown within SAPS with regard to the use	11	MR DE ROVER: Yes but I think what you
12	of force and firearms culminating in the systemic and	12	read out there in my statement should probably be preceded
13	deliberate use of lethal force against civilians."	13	by the study that I did that seeks to establish how often
14	So we were interested, given that you said my own	14	does the police use lethal force. How many police
15	review of the incidents, we were interested in the review	15	officials get killed in the line of duty every year and
16	that we thought you had conducted. So in GW4A, the	16	what percentage does that represent of the total number of
17	annexure to Mr White's statement we asked you to please	17	homicides in the country. And because I'd be loathe to use
18	identify which incidents you had reviewed and then in GW4B	18	one or two incidents to elevate that to a norm or a
19	we got the response that "Mr De Rover did not examine – the	19	standard which seemed to have happened before the
20	incidents referred to are those raised in cross-examination	20	Commission. Now again that particular methodology is used
21	by various parties to claim a doctrine of maximum force	21	or was used by a previous special repertoire on arbitrary
22	within SAPS. Mr De Rover did not further examine those.	22	and summary execution, Mr Philip Olson and I can refer you
23	He rather went down the path to explain basic law	23	to the exact document and paragraph where it's set out that
24	enforcement structures and practises with regards to use of	24	he's using that. So it's not just something that I
25	force and firearms." So I just want to be clear, in your	25	developed and kept to myself but others are actually
	Page 37165		Page 37166
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		1	
	Page 37167		Page 37168
1	commissioners who made statements to similar effect, I'm	1	help your argument and that obviously you're keen on
2	just glad to see that my conclusion still is that obviously	2	getting specifics that assist you. And then I just have to
3	the individual officer is aware of his duties and	3	admit that's not why I'm here. I'm not here to help you,
4	responsibilities that have to be in accordance with the law	4	I'm here to help the Commission.
5	and that there hasn't been an organisational following of	5	MS LE ROUX: Mr De Rover, my question was
6	what was indicated almost as a blank cheque to run wild.	6	whether despite disagreements between experts, as a matter
7	And it is important to note that South Africa loses, you	7	of principle, that disagreement doesn't mean either one
8	know, I think it's between 2008 and 2013 close to 800	8	lacks objectivity or impartiality does it?
9	police officials in the line of duty and that is a serious	9	MR DE ROVER: No.
10	count because I think Holland maybe loses one every 10	10	MS LE ROUX: Reasonable experts can
11	years.	11	disagree without becoming in any way partial.
12	MS LE ROUX: Mr De Rover, I'm sure you'll	12	MR DE ROVER: I had a business teacher
13	pleased to know I'm onto my final topic which is to ask you	13	who once pointed out to class in one of the first sessions
14	whether you agree with me that reasonable expert witnesses	14	that the moon in Turkey looks different from the moon in
15	can disagree on substantial matters, but that disagreement	15	Holland because in Turkey you see a lying banana and in
16	doesn't indicate that one or other of the experts is	16	Holland a standing one. He said you better not forget that
17	lacking objectivity or impartiality. Do you agree with	17	you're both looking at the moon. So at times I think it's
18	that?	18	perspectives that differ. If you come from a certain angle
19	MR DE ROVER: The term expert is not a	19	you look at an issue, you come with findings and you base
20	protected one, nor is it linked to a training that you can	20	them on your honest, expert opinion. An expert comes from
21	do. So you know I think show me an argument and I'll show	21	another angle and picks up something different. That
22	you 20 that go the other way. I think that that's a given.	22	doesn't have to bite each other, totally not, there can be
23	I've tried to offer this Commission not more of the same,	23	expert disagreement. The unenviable tasks rests with this
24	but something different and I hope it assists the	24	Commission to say where their preference lies.
25	Commission. I'm fully conscious that at times it may not	25	MS LE ROUX: And my assumingly unenviable
	Page 37169		Page 37170
1	Page 37169 task is to get you to agree with me that you can disagree	1	Page 37170 White, an attack by police?
1 2		1 2	
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Pretoria

		1	
	Page 37171		Page 37172
1	apparently we now know, we're now told and we must accept	1	suffers from pejorative and highly emotional language?
2	it.	2	MR DE ROVER: If the base contention is
3	MR DE ROVER: I accept that, so that	3	that you can compare apples and oranges then I would have
4	obviously I was mistaken in the identity of the author so	4	to agree with you, but To Serve and To Protect seeks to
5	then humbly I apologise and I think there is then sense no	5	explain concepts in an international setting and then it
6	need to continue because I was reading something that was	6	is, of course, necessary and required that you explain what
7	written by Mr White.	7	excessive force is without a quality judgment. Now my base
8	MS LE ROUX: Okay so if you accept that	8	attitude is that it may hamper the Commission that you
9	it was an error made by the legal team that that should not	9	attach that qualification to it although I can see why he
10	in any way be a basis to accuse Mr White of being un-	10	made it. And it was more along those lines that to me and
11	objective or impartial or partial.	11	I'll say that on a personal level, that those few
12	MR DE ROVER: No absolutely. So I	12	qualifiers, shambolic is the other one, just took away from
13	totally –	13	the quality of his analysis. And I found it a shame,
14	MS LE ROUX: Now the second example that	14	that's just what I thought, that I thought if those had not
15	you put up as a basis for attacking Mr White's impartiality	15	been there I'd regard that I held for his analysis and I
16	and objectivity in what you call his regular use of the	16	tried to make amends here, publicly, by acknowledging that
17	words and first one is reckless and then excessive and	17	I agree with that analysis. And that my not addressing
18	shambolic. Now with respect to excessive we have managed	18	them didn't meant that I didn't see a need to, I just
19	to find that he used it twice as a qualifier for the use of	19	didn't want to do more of the same. So his work is solid,
20	force. I did a similar exercise in the second edition of	20	I just think that those few moments that have that what
21	your book To Serve And Protect and excessive appears there	21	can't be anything else but a subjective qualifier to it
22	17 times and excessive use of force appears five times. So	22	make it, ja difficult. At least I thought that was worth
23	if Mr White can be accused of highly emotional and	23	mentioning.
24	pejorative language because he uses the word excessive	24	CHAIRPERSON: Mr De Rover, is the point
25	twice would you accept that To Serve And Protect similarly	25	that you're making now a valid one? Let me put my problem
20		20	
	Page 37173		Page 37174
1	to you about that. I understand that's the way you thought	1	in South Africa. It means foresight of possibility and not
2	and I'm not criticising you for that, but I just need to		
_	and this hot criticising you for that, but I just need to	2	caring as to whether that possibility will eventuate.
3	know whether the point you make is a sound one. If you	2 3	caring as to whether that possibility will eventuate. That's our legal term for recklessness. Now if he thought
3	know whether the point you make is a sound one. If you	3	That's our legal term for recklessness. Now if he thought
3 4	know whether the point you make is a sound one. If you want to say someone used too much force, excessive is a perfectly permissible adjective. It expresses precisely	3 4	That's our legal term for recklessness. Now if he thought the conduct of the police, again I don't know the specific context, the context of the police indicate that – he
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Marikana Commission of Inquiry

1	Page 37175 CHAIRPERSON: Alright, okay.	1	Page 37176 thought. So I take it you - are happy to withdraw that?
2	MS LE ROUX: - that we had evidence of	2	MR DE ROVER: Chair, I'm more than happy
3	the members involved who didn't understand what it needed	3	to withdraw that and to add to it that we've actually
4	to be used for and that Brigadier Calitz was unaware of all	4	exchanged business cards and are fully intending to be in
5	of these issues relating to barbed wire. He uses it in	5	touch, so I do not see that problem occurring.
6	that context once.	6	CHAIRPERSON: You wouldn't have done that
7	CHAIRPERSON: Shambolic is the adjective	7	if you'd not regarded him as someone who is, now regard him
8	for shambles. A shambles is, things go awry rather badly.	8	as someone who is impartial and objective, is that fair?
9	Would that be not an appropriate word to use? Possibly one	9	MR DE ROVER: Sure.
10	you wouldn't use but can one criticise somebody who uses	10	MS LE ROUX: And Chair, you just stole my
11	that English word, the adjective of shambles, to describe a	11	last question, so I have no more questions for Mr De Rover.
12	shambles in the sense I've endeavoured to define?	12	CHAIRPERSON: I'm sorry to have done that
13	MR DE ROVER: Chair, with the	13	but I'm pleased – one question I want to ask. It won't
14	qualifications you give I'm happy to accept that and to	14	require a very long answer but you gave us a document in
15	apologise if that causes distress because I think it	15	Dutch, a report prepared in respect of some action by some
16	distracts from what we are trying to do. The other thing	16	people who were described by "hooligans" which I take it
17	is, I do need to point out I'm not a native English	17	means the same in Dutch as it does in English. I think
18	speaker, I'm still learning.	18	it's actually an Irish word but we haven't got Mr White to
19	CHAIRPERSON: But you do very well, if I	19	tell us whether that's correct. An incident at the Hoek
20	may say so. No, the reason I raise this with you is it	20	van Holland.
21	seems to me that \ensuremath{Mr} White who is also in the field now as a	21	MR DE ROVER: Ja.
22	retired police officer giving professional advice all over	22	CHAIRPERSON: Where some hooligans
23	the world and a suggestion that he's not an impartial and	23	behaved very badly.
24	objective expert witness is something which, if it stands	24	MR DE ROVER: Yes.
25	un-withdrawn, could cause him some harm I would have	25	CHAIRPERSON: And where the police
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	Page 37177		Page 37178
1	Page 37177 appeared to have had inadequate equipment to deal with the	1	Page 37178 conscience, the next day this triggered a response from the
1 2	5	1 2	5
	appeared to have had inadequate equipment to deal with the		conscience, the next day this triggered a response from the
2	appeared to have had inadequate equipment to deal with the situation. Now can you tell us precisely what that, in a	2	conscience, the next day this triggered a response from the Queen in Holland on TV and it triggered a response from
2 3	appeared to have had inadequate equipment to deal with the situation. Now can you tell us precisely what that, in a sentence or two what that document shows and I'm going to	2 3	conscience, the next day this triggered a response from the Queen in Holland on TV and it triggered a response from politics where the actions of that group, whatever their
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1	Page 37179	1	Page 37180
1	CHAIRPERSON: I have a suggestion to	1	MR BIZOS SC: I just thought that
2 3	solve your problem. MR BIZOS SC: Yes.	2 3	although he seems to be quite versed with legal principles, that he may not have known of the rules of our profession
	CHAIRPERSON: I take it that Mr De Rover	4	and what is expected of a witness.
4 5	will be happy to provide written answers to any	4 5	CHAIRPERSON: Yes, no, as I've said I am
6	interrogatories that you may wish to address to him in	6	not going to ask him to do that. I think I'd be insulting
7	relation to matters which you regard as of great importance	7	him if I did, I don't think it is necessary. I am sure he
8	where you think his answers may well be of assistance to	8	will behave in the way you have suggested he should, okay.
9	the Commission. I take it I'm correctly expressing what	9	MR BIZOS SC: Thank you, Mr Chairman.
10	your attitude would be -	10	CHAIRPERSON: Thank you, Mr De Rover,
11	MR BIZOS SC: Well –	11	you're excused. Oh sorry, Mr Semenya, I beg your pardon,
12	CHAIRPERSON: - Mr Bizos?	12	your light is on.
13	MR BIZOS SC: I am glad but I did want to	13	MR SEMENYA SC: Chair, directly arising
14	indicate that I do not wish to lay blame on anyone but I	14	out of the cross-examination by my learned colleague Ms Le
15	would ask you, Mr Chairman, to indicate to the witness that	15	Roux in relation to justification of each and every bullet
16	the interrogatories are to be answered by him and not after	16	fired, I think my request for a ruling is now imminent and
17	consultation with our colleagues or members of the police.	17	I must place it on record because we will fail to discharge
18	We are entitled to the right –	18	that legal hurdle in the time available.
19	CHAIRPERSON: If you'd asked him the	19	CHAIRPERSON: [Microphone off, inaudible]
20	questions here when he's sitting at the witness table he	20	the ruling you want me to give?
21	would have given his answers without that. Now you're	21	MR SEMENYA SC: The ruling couched as we
22	asking for the same thing, in effect, and I'm quite sure –	22	possibly agreed with –
23	I'm not going to tell him to do that because I think I'd be	23	CHAIRPERSON: Oh, I remember what it is
24	insulting him if I told him to do that because I'm sure he	24	now. I did indicate to you in chambers, as I indicated to
25	is going to do that anyway.	25	some of the other parties, I think, that we do not consider
1	Page 37181	1	Page 37182 obviously you're free to do so. If you have 50 people who
1	it necessary and we communicated that to you and it's on the strength of that that you adopted a particular attitude	1	fire and you've got, representative come and say why they
2	to the leading of evidence here, that we didn't consider it	2	fired, the likelihood that any one of the others would have
4	necessary for every single shottist to come and explain why	4	some particular factor operating in his mind is something
5	he shot. The view we took and it's the view we hold is	5	that one will have to consider as and when it arises as a
6	that it was sufficient to have representative people from	6	possibility or as a non-possibility but anyway –
7	different groups, different situations, explaining the	7	MS LE ROUX: Chair, we would certainly –
8	situation as they saw it and explaining why in particular	8	CHAIRPERSON: If you want to address
9	cases they fired. After all, the test would be on e of	9	submissions to us at the end on the matter, obviously you
10	reasonableness and if it was reasonable for witness A to	10	can do so.
11	shoot then it would be reasonable for someone in the same	11	MS LE ROUX: When was the ruling given?
12	group as he was, witness C, to do the same. If it was	12	CHAIRPERSON: [Microphone off, inaudible]
13	unreasonable for witness A, the same would apply to witness	13	the ruling now. I communicated to Mr Semenya that was my
14	C and that was the ruling that I indicated to you in	14	attitude. If I hadn't said that, we would be here until
15	chambers. It was on the strength of that that you made the	15	the – well, if we had enough time – till sometime towards
16	decision not to call every shottist.	16	the end of next year with every single shottist coming to
17	MS LE ROUX: Chair -	17	give evidence, which would have been, in my view shared by
18	MR SEMENYA SC: I am indebted to you,	18	my colleagues, would have been unnecessary in the
19	Chair.	19	circumstances. You have obviously never had experience of
20	CHAIRPERSON: Alright. Yes, Ms Le Roux?	20	faction fighting cases. If you call every member of each
21	MS LE ROUX: And Chair, of course that	21	faction, those cases would go on forever. The procedure
22	approach will still be the subject of submissions by other	22	followed is the one that I've indicated. Anyway, if you
23	parties in connection with as to whether that -	23	want to make submissions to us on the point you may do so.
24	CHAIRPERSON: Well, you can make – ja,	24	MS LE ROUX: We will, Chair.
25	that's the ruling I gave. If you want to attack it then	25	CHAIRPERSON: Thank you, Mr De Rover. I
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1	take it you're leaving our country soon. Thank you for the	
2	evidence you've given us and we wish you bon voyage on your	
3	return home. We will now adjourn. We resume at 10 o'clock	
4	on Monday morning at forward holding area A –	
5	COMMISSIONER HEMRAJ: One.	
6	CHAIRPERSON: I'm sorry.	
7	COMMISSIONER HEMRAJ: Forward holding	
, 8	area 1.	
9	CHAIRPERSON: Ja, Adv Pingla says it's	
10	because we started at half past eight. We will resume at	
11	forward holding area 1 at 10 o'clock on Monday at Marikana.	
12	[COMMISSION ADJOURNED]	
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A	RCHIVE FOR JUSTICE	

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A	accountability 37124:3	37144:8 37161:4	37167:14,17 37169:1	annexure 37108:3,9
abandon 37047:17	accountable 37072:11	administer 37129:11	37169:4 37172:4,17	37163:17
ability 37062:3	accuracy 37133:19	admission 37031:24	37173:15	annotated 37144:15
37113:12 37135:16	37135:16	37127:17	agreed 37034:24	annoying 37106:2
abject 37057:25	accuse 37123:2	admit 37127:3,4	37157:1 37180:22	annual 37072:20
able 37027:16	37171:10	37168:3	agreement 37087:18	answer 37043:2,11
37030:17 37033:17	accused 37171:23	admitted 37127:7	37088:19	37044:19 37045:1,25
37047:22 37052:17	achieve 37150:14	37134:20,25	ah 37129:7	37046:23 37049:13
37057:21 37063:8	achieved 37087:24	37140:11	ahead 37035:18	37058:16 37069:17
37066:15 37070:1	acknowledge 37094:19	adopted 37181:2	37044:13 37064:17	37070:10,17
37098:22 37102:3	37112:13 37133:17	Adv 37059:15 37061:2	37076:7,18 37082:15	37071:24 37072:2
37103:8 37126:9	acknowledgement	37101:15 37149:19	ahs 37058:18	37074:10 37075:5
37133:15 37145:15	37131:6	37153:24 37183:9	Aidid 37095:22	37076:12 37077:18
37148:11 37149:2	acknowledging	advance 37106:13	aimed 37057:16	37083:23,24 37084:2
37155:5 37160:23	37165:18 37172:16	37112:19	37116:15 37158:21	37084:19 37087:10
37161:6,15	acoustical 37106:10,11	advanced 37059:12	alert 37032:1	37088:16,18
absence 37109:14	act 37074:14 37076:25	advancing 37153:16	align 37126:7	37091:16 37100:6
absent 37040:19	37077:15,16,17	adversarial 37096:22	alignment 37092:19	37123:14 37127:17
absolute 37057:21	37091:2 37095:2,9	advice 37080:9	alive 37031:8	37134:25 37135:9
	37102:23 37104:17	37175:22	allegation 37031:18,22	37137:4 37150:8
absolutely 37154:24 37158:11 37171:12	37130:23 37135:24	advise 37032:10	37073:10 37169:7	37153:22 37154:4,5
	37143:5,7,10	37085:15 37123:25	allegations 37030:4	37155:9 37162:24
abundantly 37085:8	37146:18 37148:17	advised 37123:4,5	allege 37169:5,8	37176:14
abuse 37165:2,17,19	37150:25 37155:5,6	37131:5	alleged 37038:21	answered 37129:24,25
abused 37165:5	acting 37135:23	adviser 37032:16	37118:7	37179:16
acceleration 37114:24	action 37041:16	Advocate 37161:12	allegedly 37159:18	answering 37045:18
accept 37028:23	37046:3,19 37064:15	aerial 37115:1	allow 37030:19	37070:14 37101:9
37034:22 37036:7	37065:6 37080:19	affidavits 37033:15	37097:20 37136:11	answers 37068:14
37037:11 37039:22	37082:13 37099:11	affiliated 37089:18	37150:15	37081:18,20
37039:24 37040:2	37103:5 37106:12	affirmation 37027:3	allowed 37125:16	37083:12 37179:5,8
37041:10 37043:20	37116:25 37159:3	affirmed 37027:6	37147:1	37179:21
37048:21 37058:25	37176:15	afraid 37101:16	allude 37153:3	anticipated 37050:4
37064:5 37071:12	actions 37030:12,24	Africa 37080:23	allusion 37049:21	37098:1 37146:12
37084:9 37087:14	37086:5 37123:23	37102:10 37165:14	aloud 37177:6	37170:19
37094:2,9 37107:22	37178:3	37167:7 37174:1	alright 37055:10	anticipation 37051:19
37108:23 37110:17	active 37136:5	African 37061:18,20	37092:11 37175:1	37051:22 37169:17
37110:20 37111:19	actively 37075:19	37062:3,6 37080:4	37181:20	37169:22
37113:25 37114:5	37165:1	37092:24 37106:5	Alston 37131:3	anybody 37042:13
37119:3 37127:1	actors 37091:12	Afrikaans 37049:6	alternative 37094:10	37096:15
37130:17 37135:4	actual 37039:14	37177:6,7	alternatively 37145:17	anymore 37087:6
37156:17 37170:24	37106:15 37130:19	Afrikaners 37177:9	alternatives 37093:19	anyway 37049:6
37171:1,3,8,25	acute 37066:8	aftermath 37031:1	37094:1	37050:21 37077:5
37175:14	add 37061:13 37068:13	afternoon 37074:22	AMCU 37095:2	37083:4 37101:21
acceptable 37170:22	37088:21 37154:9	37094:11 37151:11	amends 37172:16	37121:13 37150:7
acceptance 37057:2	37176:3	37161:19	American 37106:12	37152:9 37154:3
37080:1 37092:6	added 37078:11	agent 37123:18	Americans 37096:1	37179:25 37182:6,22
accepted 37040:6	addition 37099:17	agents 37072:10	amidst 37125:18	Apologies 37121:6
37042:9 37078:7	37135:15 37154:7	aggression 37060:5	ammunition 37059:2	apologise 37097:5
37109:22 37113:5	additional 37151:15	37095:12	37068:7,25 37069:8	37171:5 37175:15
37157:23 37166:19	address 37100:8	aggressive 37059:20	37069:14	apparent 37114:20
accepting 37040:15	37179:6 37182:8	37060:1,17	amount 37065:10	apparently 37079:8,13
37082:11 37166:20	addressed 37034:13	ago 37084:4 37109:14	37105:4,5 37156:16	37171:1
accepts 37098:16	addressing 37172:17	37109:18 37112:9	amplify 37154:4	appear 37057:7
access 37061:10	adequate 37029:7	37135:13	analysis 37058:25	37165:16 37166:7
37090:22	37136:2	agree 37032:11	37113:19 37130:12	37170:8
accidental 37128:11	adequately 37129:7	37040:3,15,25	37130:17 37131:8	appearance 37050:10
accommodate 37121:7	adjective 37173:5	37053:8 37060:25	37172:13,15,17	appeared 37056:16
37121:10	37175:7,11	37069:25 37078:17	angle 37168:18,21	37177:1
accompli 37042:2	adjourn 37183:3	37087:21,22	animation 37100:18	appears 37130:15
accomplishing 37050:3	ADJOURNED	37087:21,22 37088:11 37091:24	37108:5,9	37165:23 37171:21
accord 37037:24	37183:12	37088:11 37091:24 37092:4 37093:7	animations 37097:21	37105:23 37171:21 37171:22
37108:11	adjournment 37089:25	37109:1,23 37119:18	37100:14	apples 37172:3
1 27000 02	autum mich p/069:20	5/107.1,25 5/119:18		
account 37090:23		27126.24 27127.10	Annondalo 27020.4.11	application 27165.02
37101:11 37124:2	37096:24 37141:4	37126:24 37127:10	Annandale 37028:4,11 37044:2 37045:6	application 37165:23
37101:11 3 71 24:2 37134:22 37149:5	3709 6 :24 37141:4 3714 2 :2 37144:7	37134:3 37142:8	37044:2 37045:6	applies 37049:17
37101:11 37124:2	37096:24 37141:4		-	

RealTime Transcriptions

				Page
37148:21 37166:22	37037:12 37052:5	assume 37040:2	37134:20,21 37135:9	37174:22 37175:5
apply 37032:4	arrested 37050:1	37113:19,20	37137:1,20,21	bargain 37094:24
37045:17 37049:16	37148:19	37147:22,23,24	37138:1,3	bargaining 37094:25
37060:24 37151:13	arresting 37098:11	37148:1,6	automatically 37134:4	37096:7,9
37178:20,23	arrests 37148:19	assuming 37041:7	avail 37123:4	barrier 37098:7
37181:13	arrive 37031:2	37149:25	available 37027:24	37116:19 37117:4,11
applying 37148:16	arrived 37074:21	assumingly 37168:25	37033:14 37053:12	barring 37151:15
appointed 37088:10	37096:13 37146:22	assured 37032:24	37055:18 37067:15	base 37110:3,5 37125:9
appointment 37027:22	arriving 37058:7	ate 37097:4	37085:14 37099:14	37131:23 37132:25
appreciate 37061:6	article 37054:18	atmosphere 37089:21	37103:3 37107:5	37133:18 37137:16
appreciated 37102:22	37055:16,17	37096:21	37108:25 37109:15	37137:17 37157:18
37143:19	37141:12	attach 37085:2 37172:9	37129:15 37143:21	37168:19 37172:2,7
appreciating 37085:25	articles 37141:8,21,23	attached 37044:8	37144:25 37145:2	based 37044:19
appreciation 37027:10	37142:19	37076:4 37162:7	37151:14 37180:18	37048:15 37075:6,7
37066:8 37118:17	ascertain 37144:1	attack 37058:11	average 37131:16 37133:5	37139:1 37145:14
approach 37050:8	ascribe 37160:22	37059:21 37098:16		37149:18 37173:12
37062:23 37065:17 37157:1,15 37181:22	asked 37031:6	37098:25 37148:1	averages 37130:18	basic 37127:17 37137:6 37163:23
,	37039:20 37043:3,12	37150:1,24 37169:17	37133:4,17	
approached 37050:1	37046:12 37068:4 37070:16 37074:5,9	37169:22 37170:1,19	averaging 37130:20 avoid 37090:16,18	basically 37123:2
37050:19,20		37170:19,21,22	37091:18 37093:8	basing 37073:12
approaches 37107:4	37077:10,18 37081:3	37181:25	37091:18 37093:8	basis 37039:1 37040:24
37131:8	37082:4 37084:16	attacked 37030:25		37045:1 37071:20
approaching 37108:7 37108:17	37099:13 37126:20	attacker 37154:11	avoiding 37093:20	37073:14 37093:3
	37139:25 37150:7	attacking 37059:24	aware 37033:16,23	37103:14 37142:9
appropriate 37064:3 37090:8 37150:3	37156:25 37162:22 37163:17 37170:16	37171:15 attempt 27028:20	37034:2,9,11 37039:6 37039:16,18 37064:6	37150:17 37154:21 37169:7,9 37171:10
37153:18 37174:9	37179:19	attempt 37038:20 37060:12 37061:24	-	37171:15
37175:9		37064:18 37155:24	37065:5,15 37070:25 37072:5 37076:17	
	asking 37036:11 37037:3 37064:24	37157:11		basket 37166:22 bat 37128:25
appropriateness 37066:9	37071:20 37075:5	attempting 37109:20	37090:19 37091:4 37099:22 37111:9	bat 37128:23 beach 37177:13
	37118:12 37119:1			bear 37073:11 37094:8
approve 37134:13	37131:25 37161:13	attempts 37086:12 37091:10	37112:16,20 37118:2 37132:12 37135:14	bearers 37095:5
approximately 37147:22	37179:22	attend 37089:3	37135:18 37155:4	Bearing 37103:21
arbitrary 37164:21	aspect 37058:17	attending 37053:19	37156:22 37157:9,12	becoming 37168:11
arbitrators 37088:7	37124:2 37135:22	attention 37103:6	37157:13 37163:5	37169:2
arc 37039:11,12,15,17	37124.2 37135.22	37138:7	37167:3	beef 37108:18
37039:18 37099:16	aspects 37066:18	attested 37107:7	awry 37175:8	beer 37087:1
37101:12	assess 37153:13	attitude 37088:22	axe 37065:11	beg 37055:6 37178:22
arcs 37097:24	assessing 37040:21	37172:8 37179:10	axe 57005.11	37180:11
37100:17	assessment 37034:17	37181:2 37182:14	B	beginning 37027:4
area 37046:21 37057:1	37040:16,20	attributed 37056:6	back 37035:4,8	37074:9 37097:22
37106:17,17,19	37043:19,21,25	37169:25	37052:17 37058:1	37157:19
37159:10,23 37183:4	37044:18 37045:9,20	audible 37105:11	37064:23 37065:1,3	behalf 37095:15
37183:8,11	37045:21 37049:11	auditable 37035:4	37067:25 37069:10	behave 37057:11
Aren't 37092:23	37051:8 37062:8	37110:3 37118:24	37069:14 37075:2,12	37063:2 37136:18
argue 37070:20	37064:21 37065:4,12	37119:5	37081:11 37082:13	37180:8
37088:9	37090:12	August 37033:19	37087:20 37090:10	behaved 37048:13,13
argued 37065:14	assessments 37034:14	37034:2 37035:19	37092:10 37096:2	37176:23
37153:17	37041:21 37065:25	37056:23 37067:1,16	37092:10 37090:2	behaviour 37056:7
arguing 37087:8,9	assigned 37045:3	37069:22 37070:3	37132:7,8 37139:11	belief 37047:13
argument 37098:18	37125:18	37090:14 37094:11	37144:14 37164:4	37067:7 37163:6
37167:21 37168:1	assigning 37045:8,19	37109:6 37113:14	backed 37078:2	believe 37031:12
arguments 37153:11	assist 37050:3,13	37129:25 37130:2	37157:3	37051:4,5,5,18
arises 37182:5	37102:3 37122:25,25	37140:19	background 37077:19	37076:9 37097:16
arising 37180:13	37125:6 37131:7	Australia 37033:9	backlog 37128:7	37158:16 37178:18
armed 37056:17	37133:11 37144:18	author 37171:4	bad 37095:5	believed 37050:21,22
37067:4 37082:8	37168:2	37173:22	badly 37175:8	37050:24 37069:23
37092:13 37117:17	assistance 37031:3	authored 37170:9	37176:23	bell 37139:11
37132:13 37143:20	37179:8	authorised 37064:16	ballgame 37124:5	belong 37135:6
	assisted 37125:3	authorising 37063:23	ballistic 37140:10	37177:17
arming 37107:2			ballistics 37121:2	belonged 37118:8
arming 37107:2 arms 37047:16.18	assists 37128:17	authorities 37123:16		
arms 37047:16,18	assists 37128:17 37167:24	authorities 37123:16 authority 37054:11		0
arms 37047:16,18 37050:17 37051:7	37167:24	authority 37054:11	37159:12,12	bend 37114:25
arms 37047:16,18 37050:17 37051:7 37060:16 37079:12	37167:24 associated 37043:18	authority 37054:11 37076:11	37159:12,12 BALOYI 37039:5	bend 37114:25 bending 37102:24
arms 37047:16,18 37050:17 37051:7 37060:16 37079:12 37096:14	37167:24 associated 37043:18 associative 37138:19	authority 37054:11 37076:11 authors 37055:17	37159:12,12 BALOYI 37039:5 banana 37168:15	bend 37114:25 bending 37102:24 37160:15
arms 37047:16,18 37050:17 37051:7 37060:16 37079:12	37167:24 associated 37043:18	authority 37054:11 37076:11	37159:12,12 BALOYI 37039:5	bend 37114:25 bending 37102:24

RealTime Transcriptions

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Marikana Commission of Inquiry

Pretoria

				Page 3
37101:1	37042:20 37081:6	37029:1,6,22	37175:25 37177:16	chips 37094:25
best 37044:4 37095:20	37112:19	calm 37091:10	37177:19	choice 37137:21
37109:15 37126:17	Brigadier 37042:23	CALS 37111:7	caused 37051:13	choices 37080:7
37155:23 37160:5	37043:1 37049:1	37129:24	causes 37114:12	choreographed
better 37045:15	37069:3,3,9 37098:9	camera 37100:15,15,19	37115:15 37175:15	37062:23,25
37061:13 37085:18	37100:23 37104:1	37100:21,23	causing 37048:20	circumstances 37048:9
37129:12 37150:25	37175:4	37102:17 37103:9,12	cautioned 37043:17	37049:11 37077:20
37165:15 37168:16	bring 37094:7 37095:1	37145:4,10,25	caveat 37153:8	37124:13 37127:5,9
beverage 37081:10	37096:19 37137:19	cannon 37110:4	cease 37105:1,14	37129:3 37133:25
beyond 37062:13	bringing 37124:19,20	37111:5,8,22	37107:19,20,21,23	37134:1 37136:3
37064:12 37076:5	37129:5	37112:23 37113:6,8	37150:14 37154:19	37150:4 37154:24
37097:8 37164:8	broadly 37147:18	37113:10,12	CEES 37027:7	37155:7 37166:10
big 37065:23 37080:3	broken 37049:25	cannons 37108:23,24	37097:11 37144:11	37182:19
37093:5 37128:13	brought 37046:14	37146:7	central 37063:21	circumstantial 37166:4
bigger 37092:1,2,2	37057:10 37073:11	canon 37046:20	37064:19 37127:23	cited 37130:14
biggest 37131:13	37139:24 37146:25	37109:6,7,9,19,24	centralised 37063:12	civilians 37163:13
binders 37141:17	budgetary 37102:1	37110:19	centre 37058:11	37165:7,9 37166:9
bishop 37090:21	Budlender 37036:11	canvass 37156:17	37104:2 37159:22	claim 37111:1
37091:4 37093:24	37161:13	canvassed 37046:2	certain 37051:2	37142:22 37163:21
37096:13	build 37046:5 37053:5	can't 37046:7 37048:3	37063:1 37066:18	claimed 37110:25
bit 37045:23 37085:13	37063:16	37082:19 37086:7,7	37086:5 37168:18	claims 37030:25
37086:19 37088:17	Building 37062:2	37087:17,18 37096:7	37174:15	37120:8
37097:3	built 37074:16	37114:1 37118:19	certainly 37068:15	clam 37124:7
bite 37168:22	bulk 37129:22	37119:18 37123:7	37077:6 37101:17	clarification 37030:22
bits 37070:16 37177:4	bullet 37140:8	37125:16 37134:25	37102:5,11 37182:7	37039:6 37059:15
Bizos 37178:15,16,22	37180:15	37135:8,24 37140:8	certainty 37041:5	37061:3
37178:25 37179:3,11	bullets 37046:20	37140:18 37141:2	37165:2	clarifications 37086:2
37179:12,13 37180:1	37050:23 37051:4	37142:16 37159:24	chain 37033:10	clarify 37130:17
37180:9	37077:8 37140:17	37160:9 37170:16	Chairman 37178:16	37162:2
blame 37048:3	bulls 37060:18	37172:21	37179:15 37180:9	clarity 37072:4
37179:14	bunch 37130:7	capabilities 37057:13	challenged 37058:13	class 37136:13
blank 37167:6	burner 37128:13	37058:21	chambers 37180:24	37168:13
blanket 37135:9	burnt 37053:1	capable 37051:2	37181:15	clear 37041:20 37085:7
blatant 37067:24	burst 37134:21	37136:20	chance 37061:4	37085:8,11 37088:25
block 37040:12	37138:1	capacity 37072:22	37070:18 37090:24	37093:6 37158:1,8
37061:11,19	business 37168:12	Captain 37140:15	37091:14 37092:2	37163:25
bloodshed 37065:12	37176:4	capture 37038:20	37100:5 37102:19	Clearly 37110:5
blowing 37116:9	busy 37053:18 37073:2	37117:25	37104:7,9 37131:21	clinical 37133:25
board 37125:18	37124:23	captured 37145:10	37133:24 37151:1	close 37052:13 37128:4
bodily 37128:12	~~~~	car 37092:12 37132:22	chances 37132:8	37150:25 37154:12
boekdele 37049:5	C	cards 37176:4	change 37064:1	37154:16 37155:8
boggles 37132:23	C 37181:12,14	care 37095:22	37109:6 37123:24	37167:8
bon 37183:2	Calitz 37028:11	careful 37049:14	37124:19 37148:8	closer 37154:11
book 37038:10,12	37043:1 37069:3,3	caring 37174:2	changed 37055:5	closes 37114:12
37124:15 37171:21	37098:9 37104:1	carried 37066:17	37148:2 37155:19	closing 37058:20
books 37038:9 37141:8	37175:4	carry 37040:13	changes 37124:5	cloud 37133:1
bottle 37137:12	Calitz's 37100:24	37056:1,3 37059:13	37148:7	37147:13 37148:10
bound 37027:3,6	call 37028:25 37041:15	37059:16 37061:4	changing 37046:8	37148:13 37149:7,21
37101:6 37144:10	37075:15 37085:8	37132:1 37146:13	channel 37061:11	37151:23 37152:7,15
Brazil 37131:5	37093:21 37098:23	cartridge 37119:23	37125:7	37152:15,17
breach 37108:8	37100:12 37112:13	37120:1,4,12,14	characteristics	37153:25 37154:1,2
break 37050:7	37123:24 37130:12	cartridges 37120:3,8	37053:11 37058:4	clouds 37133:5
37055:21,21	37139:1 37144:15	cascade 37139:10	37062:1	37149:15
37115:24	37166:7 37169:15	case 37098:21 37099:1	charge 37092:17	club 37177:18
1 11 07140.44	37171:16 37181:16	37120:14 37125:17	Chaskalson 37101:22	clue 37130:5,5
breakdown 37163:11		37130:2,3 37157:8	37101:24 37155:14	clued 37125:19
37164:6 37166:8	37182:20	-		
37164:6 37166:8 breaking 37065:2	called 37033:21	37164:4 37165:2	37155:17 37156:1,7	coffee 37081:10
37164:6 37166:8 breaking 37065:2 breath 37160:17	called 37033:21 37039:9 37054:18,23	37164:4 37165:2 cases 37056:22 37107:7	37156:10,12	coincidence 37031:19
37164:6 37166:8 breaking 37065:2 breath 37160:17 breathing 37131:20	called 37033:21 37039:9 37054:18,23 37067:24 37079:5,14	37164:4 37165:2 cases 37056:22 37107:7 37120:12 37128:12	37156:10,12 Chaskalson's 37155:12	<pre>coincidence 37031:19 coincidences 37031:20</pre>
37164:6 37166:8 breaking 37065:2 breath 37160:17 breathing 37131:20 breeze 37116:9	called 37033:21 37039:9 37054:18,23 37067:24 37079:5,14 37080:12 37087:16	37164:4 37165:2 cases 37056:22 37107:7 37120:12 37128:12 37173:10 37181:9	37156:10,12 Chaskalson's 37155:12 check 37035:13	coincidence 37031:19 coincidences 37031:20 coincides 37118:18
37164:6 37166:8 breaking 37065:2 breath 37160:17 breathing 37131:20 breeze 37116:9 bridge 37156:3	called 37033:21 37039:9 37054:18,23 37067:24 37079:5,14 37080:12 37087:16 37097:15 37134:16	37164:4 37165:2 cases 37056:22 37107:7 37120:12 37128:12 37173:10 37181:9 37182:20,21	37156:10,12 Chaskalson's 37155:12 check 37035:13 37134:19	coincidence 37031:19 coincidences 37031:20 coincides 37118:18 collateral 37159:16
37164:6 37166:8 breaking 37065:2 breath 37160:17 breathing 37131:20 breeze 37116:9 bridge 37156:3 brief 37115:1	called 37033:21 37039:9 37054:18,23 37067:24 37079:5,14 37080:12 37087:16 37097:15 37134:16 37138:19	37164:4 37165:2 cases 37056:22 37107:7 37120:12 37128:12 37173:10 37181:9 37182:20,21 catastrophe 37093:4	37156:10,12 Chaskalson's 37155:12 check 37035:13 37134:19 checked 37100:11	coincidence 37031:19 coincidences 37031:20 coincides 37118:18 collateral 37159:16 colleague 37078:14
37164:6 37166:8 breaking 37065:2 breath 37160:17 breathing 37131:20 breeze 37116:9 bridge 37156:3 brief 37115:1 briefed 37064:6,20	called 37033:21 37039:9 37054:18,23 37067:24 37079:5,14 37080:12 37087:16 37097:15 37134:16 37138:19 calls 37080:12 37105:1	37164:4 37165:2 cases 37056:22 37107:7 37120:12 37128:12 37173:10 37181:9 37182:20,21 catastrophe 37093:4 catch 37134:17	37156:10,12 Chaskalson's 37155:12 check 37035:13 37134:19 checked 37100:11 checking 37032:18	coincidence 37031:19 coincidences 37031:20 coincides 37118:18 collateral 37159:16 colleague 37078:14 37121:10 37143:2,8
37164:6 37166:8 breaking 37065:2 breath 37160:17 breathing 37131:20 breeze 37116:9 bridge 37156:3 brief 37115:1 briefed 37064:6,20 37113:7	called 37033:21 37039:9 37054:18,23 37067:24 37079:5,14 37080:12 37087:16 37097:15 37134:16 37138:19 calls 37080:12 37105:1 37107:23 37111:11	37164:4 37165:2 cases 37056:22 37107:7 37120:12 37128:12 37173:10 37181:9 37182:20,21 catastrophe 37093:4 catch 37134:17 caught 37103:12	37156:10,12 Chaskalson's 37155:12 check 37035:13 37134:19 checked 37100:11 checking 37032:18 cheque 37167:6	coincidence 37031:19 coincidences 37031:20 coincides 37118:18 collateral 37159:16 colleague 37078:14 37121:10 37143:2,8 37180:14
37164:6 37166:8 breaking 37065:2 breath 37160:17 breathing 37131:20 breeze 37116:9 bridge 37156:3 brief 37115:1 briefed 37064:6,20 37113:7 briefing 37037:17	called 37033:21 37039:9 37054:18,23 37067:24 37079:5,14 37080:12 37087:16 37097:15 37134:16 37138:19 calls 37080:12 37105:1 37107:23 37111:11 37159:15	37164:4 37165:2 cases 37056:22 37107:7 37120:12 37128:12 37173:10 37181:9 37182:20,21 catastrophe 37093:4 catch 37134:17 caught 37103:12 cause 37045:22	37156:10,12 Chaskalson's 37155:12 check 37035:13 37134:19 checked 37100:11 checking 37032:18 cheque 37167:6 chief 37053:10,22	coincidence 37031:19 coincidences 37031:20 coincides 37118:18 collateral 37159:16 colleague 37078:14 37121:10 37143:2,8 37180:14 colleagues 37057:23
37164:6 37166:8 breaking 37065:2 breath 37160:17 breathing 37131:20 breeze 37116:9 bridge 37156:3 brief 37115:1 briefed 37064:6,20 37113:7	called 37033:21 37039:9 37054:18,23 37067:24 37079:5,14 37080:12 37087:16 37097:15 37134:16 37138:19 calls 37080:12 37105:1 37107:23 37111:11	37164:4 37165:2 cases 37056:22 37107:7 37120:12 37128:12 37173:10 37181:9 37182:20,21 catastrophe 37093:4 catch 37134:17 caught 37103:12	37156:10,12 Chaskalson's 37155:12 check 37035:13 37134:19 checked 37100:11 checking 37032:18 cheque 37167:6	coincidence 37031:19 coincidences 37031:20 coincides 37118:18 collateral 37159:16 colleague 37078:14 37121:10 37143:2,8 37180:14

Tel: 011 021 6457 Fax: 011 440 9119

RealTime Transcriptions

				Page
37179:17 37182:18	37037:7 37038:14	compiled 37110:5	confrontational	contained 37030:1
collection 37120:5	37049:22 37055:22	37118:9,10	37056:15 37091:20	37033:14 37038:12
collective 37071:25	37061:25 37066:13	complement 37061:15	confrontations 37062:9	37141:19
Colonel 37028:15	37066:22 37070:6	complements 37041:5	37062:10	containment 37057:16
37038:15 37039:4	37080:11 37082:18	complete 37153:22	confronted 37051:21	CONTD 37027:8
37042:1 37044:11	37085:1,16,19	completely 37086:20	37082:17 37117:7,17	37097:12 37144:12
37047:6 37068:23	37086:12 37087:3	37087:10	37118:15 37128:5	contemporaneous
37069:2 37099:22	37090:13 37092:25	completing 37039:15	37132:13	37037:22 37040:1,24
37156:25 37158:1 combat 37143:21	37097:1,1 37100:9 37101:19 37109:22	complex 37037:16 complexity 37063:14	confronts 37136:19 confused 37110:8	contemporary 37057:2 37080:1
combined 37119:1	37101.19 37109.22	complimentarity	37125:13	contend 37111:4
come 37031:10 37035:4	37125:24 37127:3	37130:23	confusion 37095:8	37133:4 37134:24
37046:7 37053:3	37128:15,18	component 37135:18	37127:22	37149:7 37154:20
37058:13 37068:20	37130:18 37133:6,11	37135:21	connection 37136:13	37163:9
37070:25 37082:13	37144:8,8,9 37161:4	compounded 37057:17	37181:23	content 37165:16
37085:10 37087:20	37161:4,5 37164:20	comprehend 37086:5	conscience 37057:8	contention 37066:20
37088:7 37094:15	37167:23,25 37168:4	comprehensive	37178:1,6	37107:2 37115:15
37099:6 37100:11	37168:24 37169:24	37097:19	conscious 37111:15	37119:7,10 37121:25
37102:2 37103:7	37172:8 37179:9	computer 37106:14	37137:1 37143:10	37131:24 37140:10
37110:20 37114:24	37183:12	conceded 37047:6	37167:25	37150:10 37151:10
37117:22 37123:13	Commissioner 37042:3	concept 37035:22	consecutively 37099:8	37172:2
37123:25 37124:15	37049:4 37055:4,11	37036:20	consequence 37128:15	contentions 37107:18
37129:2 37132:21	37061:7,17 37062:5	concepts 37086:2	consequences 37076:4	contested 37049:19
37140:25 37146:24	37062:16,19 37073:6	37172:5	37082:17 37093:17	context 37032:4
37147:25 37150:24	37073:25 37074:4	concern 37031:21	37123:7 37124:7	37102:20 37155:3
37168:18,19	37076:20 37077:1,14	37061:25 37130:24	37135:9 37174:6	37174:5,5,20 37175:6
37177:14 37181:4	37079:9 37080:10	concerned 37037:1	consider 37044:7,13	contextualise 37070:18
37182:2	37081:25 37083:21	37038:10 37041:7	37045:19 37049:10	contingency 37161:13
comes 37030:15 37058:16 37062:7	37084:24 37085:12 37089:17 37097:13	37056:2 37113:12 37118:20 37125:22	37056:21 37070:17 37090:13 37091:17	continue 37093:24 37094:21 37159:20
37071:5,8 37092:25	37100:4 37102:11	37118.20 37123.22	37094:14 37124:2	37161:6 37171:6
37131:12 37139:11	37103:21 37121:8	concerns 37136:1	37125:20 37156:19	continued 37027:23
37149:21 37152:14	37128:19 37136:24	concert 37177:13	37157:24 37178:17	continuing 37150:17
37164:4 37168:20	37146:18 37154:8,15	conclude 37044:19	37180:25 37181:3	contradict 37126:5
37170:20	37155:12 37156:5,9	concludes 37158:16	37182:5	contradiction 37063:11
comfort 37055:21	37156:11,13 37183:5	conclusion 37158:15	consideration 37075:7	contrary 37059:23
comfortable 37052:6	37183:7	37167:2	considered 37125:17	37113:1
coming 37031:5	commissioners 37073:6	condemned 37062:15	37126:6	contribute 37113:13
37085:7 37095:6,6	37073:8,24 37077:22	37178:4	considering 37117:2	control 37051:23
37117:8,8 37147:22	37078:4,21 37167:1	conditioned 37046:17	consistent 37090:15	37055:17 37062:14
37149:25 37153:5	committee 37036:20,20	conditions 37034:4	37153:1	37063:12,21
37169:19 37182:16	common 37092:3	37096:11	consistently 37113:23	37064:19,19 37076:6
command 37063:15,21	37148:21 37149:17	conduct 37048:9	consists 37073:4,5	37076:23 37124:21
37076:19 37100:13	communicated 37088:3	37066:25 37067:9	conspire 37063:19	37137:15 37165:24
37101:2 37107:20	37181:1 37182:13	37103:20 37174:4	Constable 37133:9,10	controlled 37062:13
37136:8	communicating	conducted 37096:11	37133:10	convened 37079:16
commander 37103:14	37058:7	37163:16	constables 37124:5	convenient 37141:5
37104:15,16	communication	conducting 37125:14	constitute 37043:19	37144:4
37144:15 37145:11	37041:17 37104:3	conduit 37095:2	37123:23	conversation 37033:4
37145:14 37146:3 commanders 37028:16	communications 37177:20	confess 37105:25 confidence 37136:18	constitutes 37031:23 Constitution 37076:25	37044:1 37096:22 37121:7
37042:23 37063:9,23	communities 37080:5	configuration 37039:9	constitution 37076.23	convey 37122:14,16
37042.23 37063.9,23 37064:5,14,20	community 37057:6	37039:14 37057:18	37092:25	37174:9
37100:16,18 37101:5	community 37037.0 community 's 37146:5	confine 37090:6	constructive 37091:11	convince 37046:20
37102:16 37103:22	compare 37172:3	confined 37035:7	37091:22	37122:8
37114:10 37115:10	compared 37143:15	confirm 37105:15	consult 37029:10,11,13	cordon 37061:11
37144:16,19	37165:7	37144:17	37029:16	37094:6
commander's	comparing 37059:18	confirmed 37140:7	consultation 37179:17	core 37091:21
37104:14	37089:5	conflict 37067:4	consultations 37029:24	corner 37097:24
commencement	comparison 37059:18	37087:12 37170:20	consulted 37028:3,10	37114:12
37112:19 37113:10	37105:11	confront 37058:20	37029:9	corners 37032:16
comment 37094:1	comparisons 37086:3	37138:14	contact 37117:4	corporate 37095:9
37101:11 37156:25	competence 37032:17	confrontation	contacted 37104:5	correct 37028:11
commission 37027:2	competing 37123:16	37049:20 37051:10	contain 37058:18	37059:6 37062:23
37030:2,16 37031:17	37126:2	37051:11,14 37067:5	37108:15 37111:24	37088:21 37108:20
The second secon				
37035:20 37036:8,19	compile 37127:25	37154:18	37141:18 37157:11	37109:22 37113:20

Marikana Commission of Inquiry

				Page
37116:2 37120:10	37112:5	37140:3,3 37178:1	decisions 37063:15	37120:18 37127:2
37142:12 37146:8,10	create 37061:11	days 37068:10	37064:16,23	deserve 37166:17
37158:20 37176:19	37063:10 37129:8	37077:14 37080:10	37104:12	design 37157:18
37178:25	37136:6	37087:20 37091:9	decline 37067:18	designed 37137:24
corrected 37068:24	created 37038:6,20	DDA 37098:23	defend 37060:6,10,15	37138:4
correctly 37039:3	37091:7	dead 37031:13 37059:2	37060:16 37098:25	desire 37063:21
37125:16 37179:9	crew 37110:4 37112:23	deal 37047:22	defending 37050:14	desperately 37096:18
correlation 37128:4	37113:8	37051:20 37057:19	37060:7	despite 37168:6
correspondence	crime 37032:7,8	37057:21 37058:22	define 37175:12	destruction 37034:6
37053:19	criminal 37123:23	37061:18,21	defined 37170:21	detail 37036:5,13
corridor 37031:11	37132:13 37148:17	37072:16 37079:25	definitely 37059:10	37039:24 37040:17
corroborate 37033:17	37165:3	37097:3 37098:24	37071:3 37075:21	37040:19 37058:15
cost 37072:20 37100:12	critical 37104:12	37135:8 37141:8	37092:20 37162:18	37114:18,20
costing 37072:23	37114:11	37149:15 37155:22	definition 37136:15	37121:21,23 37122:5
costs 37090:16 37093:9	critically 37052:8	37177:1	37142:6	37123:1 37127:9
couched 37180:21	criticise 37175:10	dealing 37040:25	definitions 37037:12	37130:6,6 37133:15
couldn't 37043:6	criticising 37173:2	37059:17 37065:13	definitive 37075:5	37147:17
37089:7 37090:22	criticism 37063:4	37076:1 37138:18	degree 37063:7	detailed 37035:21
37170:18	37078:13	37146:15 37153:25	delay 37094:13	37127:14
counsel 37055:22,23	cross 37061:4 37156:3	37163:3	37124:13	detailing 37036:12
count 37165:15	cross-examination	deals 37109:5 37146:15	deliberate 37163:13	details 37127:4
37167:10	37027:8 37043:16	dealt 37039:11,12	37166:9	detectives 37127:24
countenance 37046:2	37059:12 37097:6,12	37048:11 37146:16	deliberately 37138:3	determine 37066:15
37065:20 counter 37058:18,19	37108:3 37121:15 37144:12 37147:11	37147:12 death 37044:23	delivered 37069:1,9 demands 37067:19	37160:20 determined 37034:7
37076:15 37107:13	37163:20 37180:14	37045:4,22 37048:20	democracies 37082:12	develop 37114:7
countries 37080:17	cross-examine	37049:17 37051:12	democratic 37071:1	developed 37164:25
37082:9 37128:4	37178:21,24	37051:14 37062:15	37075:17 37076:8	developed 37104.23 develops 37095:12
country 37032:6	crowd 37054:18	37066:24 37067:24	37091:13	device 37106:10,11
37071:2 37084:10	37055:17 37057:17	37070:2 37080:6	demonstrate 37041:9	dialogue 37091:11,23
37092:8,14,15	37108:25 37115:18	37107:8 37127:18	37041:24	37094:22 37096:6
37131:4 37164:17	37143:12 37148:2,7	deaths 37158:15,17	demonstrated	Dicks 37111:16,20,24
37165:10 37178:8	37148:11	37160:9,20	37057:25 37071:22	37112:5,13,17
37183:1	crucially 37057:16	debate 37077:5	37119:9	dictate 37064:13
couple 37087:19	cuff 37115:22	37088:13 37090:11	demonstration	didn't 37042:3,12
37088:1 37150:1	culminating 37163:12	37098:20 37101:22	37092:15	37043:3,23 37044:13
course 37027:4	37166:8	37114:23 37155:22	demonstrators	37086:10 37088:14
37029:22 37031:16	cup 37081:10	deceased 37031:8	37116:20	37088:15 37095:22
37033:11 37038:4	current 37057:13,18	decentralise 37063:15	denial 37106:17,20	37115:17 37119:16
37039:14 37052:13	37058:21	decibel 37105:13	denied 37050:24	37121:9,14 37140:12
37052:16 37053:5	currently 37132:9	37107:13,16	denies 37069:3	37164:2,9 37172:18
37058:25 37069:21	curve 37098:3	decibels 37105:4,6,23	deny 37061:10	37172:18,19
37073:22 37074:8	37139:11	37106:16	dependent 37116:8	die 37132:14,14
37075:6 37077:9	customary 37145:21,23	decide 37046:9	depends 37116:5,6,7	died 37067:2
37078:12 37081:19	cuts 37097:24	37050:25 37062:1	37150:18	dies 37177:23
37082:20 37086:21	D	37069:4 37071:4,11	deploy 37037:20	differ 37092:5
37098:14 37108:23		37075:25 37093:16	37091:19 37116:11	37168:18
37110:16 37111:11	daadwerklike 37102:6	37102:22 37177:15	deployment 37036:2	difference 37102:13
37111:16,17,20	37102:8 domogo 27105:24	decided 37042:4,5	37039:13 37099:8	37115:19
37112:5 37113:15	damage 37105:24	37066:2 37074:14	37115:25 37177:21 doputy 27071:24	differences 37056:13
37115:3 37120:13 37121:1 37126:16	37159:16 domoging 37106:2	37091:6 37098:15,15 decides 37062:11	deputy 37071:24 37073:6 37166:5,6	37115:6 different 37030:6
37128:25 37133:8	damaging 37106:2 damndest 37091:17	deciding 37053:6,6	derails 37087:9	37036:5,10,16
37128:23 37135:8	damadest 37091:17 danger 37122:7,11	37076:3	describe 37029:25	37037:9 37039:25
37153:24 37170:21	dangerous 37065:19	decision 37034:1	37030:6 37034:19	37040:17 37044:25
37172:6 37181:21	37067:17 37139:15	37048:23 37049:3	37035:6 37054:23	37060:4 37063:11,20
court 37122:15	darting 37140:2	37063:24 37064:8	37089:6 37121:20	37064:15,20 37075:8
courts 37087:12	37142:22	37070:7 37071:5	37175:11	37091:11,12 37098:6
Courts 57007.12		37072:6 37075:18,24	described 37030:24	37099:15 37100:24
cover 37140:4 37159:6	data 37130:19	57072.0 57075.10.24		
		37076:11 37078:14	37034:14,17	37129:4 37130:22
cover 37140:4 37159:6	data 37130:19 date 37031:25 37044:25		37034:14,17 37135:12 37176:16	37129:4 37130:22 37154:1 37159:11
cover 37140:4 37159:6 37160:3,3,4	date 37031:25	37076:11 37078:14		
cover 37140:4 37159:6 37160:3,3,4 covered 37036:11	date 37031:25 37044:25	37076:11 37078:14 37078:20 37081:5,16	37135:12 37176:16	37154:1 37159:11
cover 37140:4 37159:6 37160:3,3,4 covered 37036:11 37120:24 co-ordinate 37036:6 37037:13	date 37031:25 37044:25 day 37031:14,18	37076:11 37078:14 37078:20 37081:5,16 37081:23,24 37082:1 37090:10,14 37094:13 37137:1	37135:12 37176:16 describes 37112:4 37141:12 describing 37088:18	37154:1 37159:11 37166:13 37167:24 37168:14,21 37177:5 37181:7,7
cover 37140:4 37159:6 37160:3,3,4 covered 37036:11 37120:24 co-ordinate 37036:6 37037:13 co-ordinated 37040:1	date 37031:25 37044:25 day 37031:14,18 37033:3 37052:24 37056:10 37068:11 37076:13 37078:16	37076:11 37078:14 37078:20 37081:5,16 37081:23,24 37082:1 37090:10,14 37094:13 37137:1 37146:18 37173:8	37135:12 37176:16 describes 37112:4 37141:12 describing 37088:18 37122:16	37154:1 37159:11 37166:13 37167:24 37168:14,21 37177:5 37181:7,7 differentiate 37107:4
cover 37140:4 37159:6 37160:3,3,4 covered 37036:11 37120:24 co-ordinate 37036:6 37037:13	date 37031:25 37044:25 day 37031:14,18 37033:3 37052:24 37056:10 37068:11 37076:13 37078:16 37116:9 37136:3	37076:11 37078:14 37078:20 37081:5,16 37081:23,24 37082:1 37090:10,14 37094:13 37137:1	37135:12 37176:16 describes 37112:4 37141:12 describing 37088:18	37154:1 37159:11 37166:13 37167:24 37168:14,21 37177:5 37181:7,7

Tel: 011 021 6457 Fax: 011 440 9119

				Page
differs 37128:23	37065:8 37071:7	37137:19 37142:8,16	eardrums 37105:24	emotions 37067:4
difficult 37040:19	37074:6 37080:11	37143:1 37165:1,24	earlier 37052:21	emphasis 37061:23
37048:21 37116:10	37082:7 37084:4	37167:16 37168:7,22	37081:4 37111:25	emphasised 37159:2
37127:6 37129:8	37087:18 37089:8,12	37173:18	37146:14,16	employ 37159:16
37132:6 37172:22	37093:15	doing 37028:5	earliest 37099:10,13	37165:13
difficulties 37102:1	discussions 37055:22	37040:16,18 37043:4	early 37027:10	empowers 37091:2
37152:24 37156:2	37082:23 37083:9	37048:3 37050:9	37068:19 37074:13	enables 37065:10
difficulty 37101:25	37084:24 37087:5,6	37062:4 37075:20	37074:23 37077:10	37104:18
37146:3 37149:2	dispersal 37041:16	37092:16 37094:20	37080:10 37122:3	encirclement 37039:10
37155:18 37177:7	37046:19 37049:24	37092:10 57094:20	Earth 37036:1,21	37094:4
dimensions 37071:4	37103:5,8 37114:17	37115:21 37124:22	37037:19 37039:7	encounter 37033:20
diminish 37132:9	37117:6	37126:11 37148:11	37155:16	37046:8 37127:23
diplomatic 37083:24	disperse 37036:12,25	37165:15	eases 37059:10	endangering 37064:8
	37052:5 37068:3	dolus 37173:25		endeavoured 37090:20
37084:1,2,19,20			easier 37177:7	
direct 37064:19	dispersed 37048:12	don't 37041:25	east 37031:5 37157:16	37175:12
directed 37095:12	dispersing 37098:10	37045:15 37047:4	easy 37096:10	ended 37073:21
37170:14	dispute 37068:22	37048:22 37050:4	economic 37072:19	37079:8
direction 37077:2	37069:22	37052:7 37084:14	37080:4	endorse 37077:25
37079:23 37085:24	disputed 37047:11	37086:20 37087:7	economical 37071:3	37081:24
37101:12 37103:6	37052:22	37088:6 37089:2	edition 37171:20	endorsed 37074:8
37114:19 37115:17	disregard 37067:9	37090:6 37091:8	educated 37057:11	enforcement 37076:20
37115:19,20 37116:8	disrupted 37097:15,16	37092:10,12 37114:9	37085:18	37092:16 37122:12
37116:24 37140:20	disruption 37098:6,17	37114:23 37115:7	education 37124:6	37123:18 37135:10
37140:23 37143:3,25	37098:20,22 37099:7	37116:20 37118:19	effect 37036:24	37137:25 37144:2
directions 37080:7	37099:21 37100:1	37120:12 37124:8	37114:3 37124:25	37156:18 37157:23
37159:24 37160:4	dissimilar 37120:19	37125:4 37127:4	37150:6,16 37153:14	37163:24 37170:23
directly 37180:13	distance 37057:16	37128:24 37129:14	37167:1 37179:22	engage 37032:2
dirty 37131:9	37107:1 37131:20	37130:4 37132:25	effectively 37035:1	37086:10,13
disagree 37034:25	37132:14 37135:14	37134:13,19,19	37057:21 37078:8	37088:24 37091:14
37087:22 37088:12	37150:19 37154:13	37136:1,6 37137:4	37106:20 37113:13	37093:2 37096:16
37091:25 37160:13	37155:10 37157:3	37139:9,16 37141:7	37116:11 37124:21	37123:10
37167:15 37168:11	distinct 37053:4	37142:7 37162:8	37149:8	engaged 37028:17
37169:1	37126:4	37165:16 37173:24	effort 37100:10	37065:7 37080:13,15
disagreement 37162:1	distinction 37056:12	37174:4	37125:22 37148:9	37091:3 37104:22
37167:15 37168:7,23		door 37143:15	efforts 37140:12	37130:13
disagreements 37168:6	distinctly 37159:11			
8	distinguishing 37052:19 37135:17	doors 37092:11 double-handed	Egypt 37062:10,14	engagement 37055:1,3
disappear 37058:11			eight 37096:1 37150:11	37055:7 37086:14,25
disappointed 37166:13	distracted 37132:25	37137:9	37151:11 37154:18	engine 37105:9
disarm 37036:12,25,25	distracts 37175:16	drafted 37170:15	37183:10	English 37173:14
37050:9,19,20	distress 37175:15	dramatically 37132:3,9	eighth 37068:1	37175:11,17
37052:5 37060:12	distribute 37096:20	37155:19	eight-round 37119:16	37176:17 37177:8,8
37065:9,11 37068:4,7	distributed 37095:20	draw 37052:9 37103:10	either 37029:9,18	enjoy 37177:14
disarmament 37044:22	diverge 37098:1	37131:13 37136:9	37032:7 37042:12	ensure 37048:1
disarmed 37048:12	diverting 37102:25	drawn 37072:1	37044:14 37086:13	37064:7
37050:1 37060:11	divulge 37084:18	drills 37063:1	37098:15 37118:20	entail 37035:23
disarming 37098:11	divulged 37081:7	drinking 37081:11	37124:10 37137:20	entails 37076:18
discharge 37180:17	dockets 37125:8	drives 37100:21	37137:22 37146:20	enter 37084:17 37087:8
discharged 37113:22	doctrine 37066:8	drop 37132:3 37136:10	37154:18 37168:7	37109:20 37177:16
37117:20	37137:16,17 37163:4	due 37126:16	elaborate 37057:14	entered 37153:8
discharging 37121:23	37163:7,21	dust 37147:13	37122:15	enterprise 37080:3
disclose 37128:21	document 37027:24	37148:10,13	elected 37123:9	37095:9
discount 37160:13	37036:4 37040:1	37149:15,20	electrified 37092:12	entire 37055:14
discouraged 37088:25	37161:15 37162:3,10	37151:23 37152:7,15	element 37031:16	37153:20
37089:3	37162:14 37164:23	37152:15,17	37064:13 37142:18	entirely 37066:22
discuss 37030:4	37176:14 37177:3,9	37153:25 37154:1,2	elements 37063:19,20	entirety 37038:12
37039:2 37042:10	documentation	Dutch 37043:10	37075:21 37136:2	entities 37064:20
37049:8 37075:25	37037:8,22 37040:24	37102:6,9 37176:15	elevate 37164:18	entitled 37091:13
37079:9,12,18	documented 37041:4	37176:17 37177:5,8	elicit 37067:22	37121:12 37163:4
37089:14 37102:2	37043:20 37058:1	duties 37167:3	Embassy 37106:5	37179:18 antity 27072:10
discussed 37038:18	documents 37038:5,7	duty 37164:15 37167:9	embodied 37154:22	entity 37072:10
37079:13 37087:20	37055:19	dwaalspoor 37078:25	37155:2	entrusting 37041:11
37094:17 37146:19	doesn't 37042:18	37079:19	emotion 37122:17	37042:11,11
discussing 37065:7	37044:4 37094:16	dying 37095:23	emotional 37065:25	environment 37061:13
a man I have a state	Prof. Ward and det and the second			
		e 37156:16 37181:9	37172:1	equally 37031:22
discussing 37065:7 discussion 37042:19 37043:1,22 37044:5 37056:19 37059:10	37044:4 37094:16 37119:14 37128:19 37130:19 37132:16 37134:4 37135:10	$\frac{491037095:23}{E}$ e 37156:16 37181:9	37122:10 37158:25 37169:14 37171:23	environment 37061 37061:14 37105:9 envisaged 37157:14 equally 37031:22

equate 37100:1637171:17,18,21,22,2437167:19 37168:2037160:1537134:1937164:637172:7 37173:4,1437168:20,23 37169:537040:9 37041:937151:2equipment 37048:5exchanged 37176:437169:8,16 37175:2437041:23 37046:6fashion 37a7108:25 37177:1excuse 37152:15expertise 37087:1537048:24 37055:24faster 3702equipped 37058:22excused 37180:11experts 37078:1437057:18 37066:15fatalistic 3equivalent 37128:1executed 37030:337085:19,2337067:10 37069:25faulty 371erring 37170:12execution 37164:2237086:11,13,2537077:15 37083:15fear 37122error 37171:9executive 37071:9,1837088:7,10 37101:737095:12 37099:6,7feasible 37erupt 37177:1837071:22 37072:1137130:22 37140:1137102:16 37103:15Februaryscalated 37072:1437073:12 37075:2037167:16 37168:6,1037114:11 37115:16feedback 37	58:8 37094:13 52:10 2:17,18 7050:2,11 37027:20 3 37032:25 2:7 37106:23
37164:637172:7 37173:4,1437168:20,23 37169:5fact 37040:9 37041:937151:2equipment 37048:5exchanged 37176:437169:8,16 37175:2437041:23 37046:6fashion 3737108:25 37177:1excuse 37152:15expertise 37087:1537048:24 37055:24faster 370equipped 37058:22excuted 37030:337085:19,2337067:10 37069:25faulty 371erring 37170:12executed 37030:337085:19,2337067:10 37069:25faulty 371erroneous 37131:24execution 37164:2237086:11,13,2537077:15 37083:15fear 37122error 37171:9executive 37071:9,1837088:7,10 37101:737095:12 3709:6,7feasible 37escalated 37072:1437073:12 37075:2037167:16 37168:6,1037110:18,24 37112:837056:2escorted 37059:2537081:14 3708:20explain 37086:437114:11 37115:16feedback 37especially 37083:1exercise 37034:1737131:17 37144:1837123:5 37125:11feeling 37037131:12 37137:137076:6 37101:1637169:25 37172:5,637128:5 37133:537088:1437139:2137103:20 37104:1937181:437148:6 37149:11felt 37070essence 37091:2537104:22 37115:9explained 37039:137148:6 37149:11felt 37070	2 37159:13 7063:3 558:8 37094:13 52:10 2:17,18 7050:2,11 37027:20 23 37032:25 2:7 37106:23
equipment 37048:5 37108:25 37177:1 equipped 37058:22 equivalent 37128:1 erring 37170:12 erroneous 37131:24 erron 37171:9 escalated 37072:14 escalation 37034:5 escalation 37034:5 srone 37071:22 srone 37071:22 srone 37071:22 srone 37071:22 srone 37071:22 srone 37171:9 erroneous 37131:24 erroneous 37131:24 erroneous 37131:24 erroneous 37131:24 erroneous 37131:24 erroneous 37131:24 erroneous 37131:24 erroneous 37055:16 erroneous 37071:9,18 srone 37071:22 sroneous 37071:9,18 sroneous 37071:22 sroneous 37071:9,18 sroneous 37071:22 sroneous 37071:22 sroneous 37055:16 erroneous 37071:22 sroneous 37071:22 sroneous 37055:16 sroneous 37071:22 sroneous 37071:22 sroneous 37055:16 erroneous 37071:22 sroneous 37071:22 sroneous 37055:16 sroneous 37071:22 sroneous 37071:22 sroneous 3705:20 sroneous 37071:22 sroneous 37071:22 sroneous 3705:20 sroneous 37071:22 sroneous 37071:22 sroneous 3705:20 sroneous 37071:22 sroneous 3705:20 sroneous 37071:22 sroneous 37071:22 sroneous 3708:20 sroneous 37086:4 sroneous 37059:25 sroneous 37081:14 sroneous 37084:17 sroneous 37094:16 sroneous 3712:22 sroneous 3712:23 sroneous 37131:12 sroneous 37034:17 sroneous 37094:16 sroneous 3712:22 sroneous 37131:12 sroneous 37034:17 sroneous 37094:16 sroneous 3712:22 sroneous 37131:12 sroneous 37034:17 sroneous 37094:16 sroneous 3712:23 sroneous 37131:12 sroneous 37034:17 sroneous 37094:16 sroneous 3712:23 sroneous 37131:12 sroneous 37034:17 sroneous 37094:16 sroneous 3712:23 sroneous 37131:12 sroneous 37034:17 sroneous 37094:16 sroneous 37131:17 sroneous 37133:12 sroneous 37034:17 sroneous 37094:16 sroneous 37133:12 sroneous 37034:17 sroneous 37094:16 sroneous 37133:12 sroneous 37034:	7063:3 58:8 37094:13 52:10 2:17,18 7050:2,11 37027:20 3 37032:25 2:7 37106:23
37108:25 37177:1 equipped 37058:22 equivalent 37128:1 erring 37170:12 erroneous 37131:24 erron 37171:9excuse 37152:15 excution 37164:22 excution 37164:22 excution 37055:16experts 37087:15 37085:19,23 37086:11,13,25 37087:14,16,17,19 37083:25 37087:2 37095:12 37099:6,7faster 3702 faulty 3712 fear 37122 37138:8 fear 37122 feasible 37 arron 37171:9 erron 37171:9 erron 37171:9 escalated 37072:14 escution 37034:5 escorted 37059:25 s7081:14 37082:0 37080:20 s7081:14 37084:19 s7095:4 37115:14 	58:8 37094:13 52:10 2:17,18 7050:2,11 37027:20 3 37032:25 2:7 37106:23
equipped 37058:22 equivalent 37128:1 erring 37170:12 erroneous 37131:24excused 37180:11 execution 37164:22 execution 37164:22 executions 37055:16experts 37078:14 37085:19,2337057:18 37066:15 37067:10 37069:25 37067:10 37069:25 37077:15 37083:15fatalistic 3 faulty 371 fear 37122erroneous 37131:24 error 37171:9 escalated 37072:14executions 37055:16 37077:12 37072:1137086:11,13,25 37088:7,10 37101:7 37095:12 37099:6,737083:25 37087:2 feasible 37 37095:12 37099:6,7feasible 37 feasible 37 feasible 37escalated 37072:14 escalation 37034:5 escorted 37059:2537078:20 37080:20 37081:14 37082:0explain 37086:4 	37094:13 52:10 2:17,18 7050:2,11 37027:20 23 37032:25 7:7 37106:23
equivalent 37128:1 erring 37170:12 erroneous 37131:24executed 37030:3 execution 37164:22 executions 37055:1637085:19,23 37086:11,13,2537067:10 37069:25 37087:14,16,17,19faulty 371 fear 37122 37083:25 37087:2error 37171:9 erupt 37177:18executive 37071:9,18 37077:12 37072:1137088:7,10 37101:7 37088:7,10 37101:737095:12 37099:6,7 37095:12 37099:6,7feasible 37 feasible 37 feasible 37escalated 37072:14 escalated 37059:2537077:12 37075:20 37081:14 37084:1937167:16 37168:6,10 37094:16 37121:2237110:18,24 37112:8 37094:16 37121:2237056:22 37118:7,16 37119:9especially 37083:1 37095:4 37115:14 37131:12 37137:1arcise 37034:17 	52:10 2:17,18 7050:2,11 37027:20 33 37032:25 2:7 37106:23
erring 37170:12 erroneous 37131:24 error 37171:9execution 37164:22 executions 37055:16 executive 37071:9,1837086:11,13,25 37087:14,16,17,19 37083:25 37087:237073122 37083:25 37087:2 37138:8error 37171:9 erupt 37177:18executive 37071:9,18 37071:22 37072:1137088:7,10 37101:7 37032:2 37140:1137095:12 37099:6,7 37102:16 37103:15fear 37122 37099:6,7escalated 37072:14 escalated 37059:2537071:22 37072:11 37081:14 37084:1937073:12 37075:20 37081:14 37084:1937167:16 37168:6,10 37094:16 37121:2237110:18,24 37112:8 37114:11 37115:1637056:22 	2:17,18 7050:2,11 37027:20 33 37032:25 7:7 37106:23
erroneous37131:24executions37055:1637087:14,16,17,1937083:2537087:237138:8error37171:9executive37071:2237071:9,1837088:7,1037101:737095:1237099:6,7feasible37081:15erupt37177:1837071:2237071:2237072:1137130:2237140:1137102:1637103:15Februaryescalated37072:1237073:1237075:2037167:1637168:6,1037110:18,2437112:837056:2escalation37034:537078:2037081:1437082:0arosexplain37086:437114:1137115:16feedbackescorted37059:2537081:1437084:1937094:1637121:2237118:7,1637119:19feel37087especially37083:1exercise37034:1737131:1737144:1837119:1337120:1437143:137095:437115:1437076:637101:1637169:2537123:537123:537088:1437139:2137103:2037104:1937181:437143:837143:837143:837143:8essence37091:2537104:2237115:9explained37039:137148:637149:11	7050:2,11 37027:20 33 37032:25 27 37106:23
error 37171:9 erupt 37177:18executive 37071:9,18 37071:22 37072:1137088:7,10 37101:7 37130:22 37140:1137095:12 37099:6,7 37102:16 37103:15feasible 37 February 37056:22escalated 37072:14 escalation 37034:537073:12 37075:20 37078:20 37080:2037167:16 37168:6,10 37094:16 37121:2237110:18,24 37112:8 37114:11 37115:1637056:22 February 37056:22escorted 37059:25 especially 37083:1 37095:4 37115:14 37095:4 37115:14arous 27034:17 37044:18 37045:837094:16 37121:22 37144:12 37163:2337119:13 37120:14 37123:5 37125:11feeling 370 feeling 370 37144:22 37163:23arous 27139:21 essence 37091:2537102:20 37104:19 37104:22 37115:937181:4 37181:437143:8 37146:24 37039:1feet 370070 37148:6 37149:11	7050:2,11 37027:20 33 37032:25 7:7 37106:23
erupt 37177:1837071:22 37072:1137130:22 37140:1137102:16 37103:15Februaryescalated 37072:1437073:12 37075:2037167:16 37168:6,1037110:18,24 37112:837056:2escalation 37034:537078:20 37080:20explain 37086:437114:11 37115:16feedback 3escorted 37059:2537081:14 37084:1937094:16 37121:2237118:7,16 37119:9feedback 3especially 37083:1exercise 37034:1737131:17 37144:1837119:13 37120:1437143:137095:4 37115:1437044:18 37045:837144:22 37163:2337123:5 37125:11feeling 37037131:12 37137:137076:6 37101:1637169:25 37172:5,637128:5 37133:537088:1437139:2137103:20 37104:1937181:437143:8 37146:24feet 37031essence 37091:2537104:22 37115:9explained 37039:137148:6 37149:11felt 37070	37027:20 23 37032:25 27 37106:23
escalated 37072:1437073:12 37075:2037167:16 37168:6,1037110:18,24 37112:837056:2escalation 37034:537078:20 37080:2037081:14 37084:19explain 37086:437114:11 37115:16feedback 3especially 37083:1exercise 37034:1737094:16 37121:2237118:7,16 37119:9feel 3708737095:4 37115:1437044:18 37045:837144:22 37163:2337123:5 37125:11feeling 37037131:12 37137:137076:6 37101:1637169:25 37172:5,637128:5 37133:537088:1337139:2137103:20 37104:1937181:437143:8 37146:24feet 37031essence 37091:2537104:22 37115:9explained 37039:137148:6 37149:11felt 37070	23 37032:25 7:7 37106:23
escalation 37034:5 escorted 37059:2537078:20 37080:20 37081:14 37084:19explain 37086:4 37094:16 37121:2237114:11 37115:16 3718:7,16 37119:9feedback 3708especially 37083:1 37095:4 37115:14 37131:12 37137:1exercise 37034:17 37044:18 37045:837131:17 37144:18 37144:22 37163:2337119:13 37120:14 37123:5 37125:11feel 37087 feel 3708737131:12 37137:1 37139:2137076:6 37101:16 37103:20 37104:1937169:25 37172:5,6 37181:437128:5 37133:5 37143:8 37146:2437088:14 feet 37031essence 37091:2537104:22 37115:9explained 37039:137148:6 37149:11felt 37070	37032:25 7:7 37106:23
escorted 37059:2537081:14 37084:1937094:16 37121:2237118:7,16 37119:9feel 37087especially 37083:1exercise 37034:1737131:17 37144:1837119:13 37120:1437143:137095:4 37115:1437044:18 37045:837144:22 37163:2337123:5 37125:11feeling 37037131:12 37137:137076:6 37101:1637169:25 37172:5,637128:5 37133:537088:1337139:2137103:20 37104:1937181:437143:8 37146:24feet 37031essence 37091:2537104:22 37115:9explained 37039:137148:6 37149:11felt 37070:	2:7 37106:23
especially 37083:1exercise 37034:1737131:17 37144:1837119:13 37120:1437143:137095:4 37115:1437044:18 37045:837144:22 37163:2337123:5 37125:11feeling 37037131:12 37137:137076:6 37101:1637169:25 37172:5,637128:5 37133:537088:1337139:2137103:20 37104:1937181:437143:8 37146:24feet 37031essence 37091:2537104:22 37115:9explained 37039:137148:6 37149:11felt 37070	
37095:4 37115:1437044:18 37045:837144:22 37163:2337123:5 37125:11feeling 37037131:12 37137:137076:6 37101:1637169:25 37172:5,637128:5 37133:537088:1337139:2137103:20 37104:1937181:437143:8 37146:24feet 37031essence 37091:2537104:22 37115:9explained 37039:137148:6 37149:11felt 37070:	
37131:12 37137:1 37076:6 37101:16 37169:25 37172:5,6 37128:5 37133:5 37088:12 37139:21 37103:20 37104:19 37181:4 37143:8 37146:24 feet 37031 essence 37091:25 37104:22 37115:9 explained 37039:1 37148:6 37149:11 felt 37070:	
37139:2137103:20 37104:1937181:437143:8 37146:24feet 37031essence 37091:2537104:22 37115:9explained 37039:137148:6 37149:11feet 37070	
essence 37091:25 37104:22 37115:9 explained 37039:1 37148:6 37149:11 felt 37070:	
1000000000000000000000000000000000000	
37092:5 exert 37063:21 explaining 37181:7,8 37153:7 37159:18 FFF11 371	
i ë i	0 37138:17
37034:18 37076:3 exhibit 37054:9,9,14,24 37122:22 37135:3 37178:5 FFF11A 3	37108:6
37142:6,14 37148:23 37055:9,25 37099:17 exploring 37106:9 faction 37182:20,21 37158:11	3 37163:2
37151:15 37100:9,10 37101:1,4 exposure 37082:9 factor 37050:15 field 37042	
	8 37145:10
37133:12 37142:17 37103:10 37104:17 express 37027:9 37093:16 37102:12 37175:2	
37162:13,20 37108:15 37121:2,3 37057:7 37084:24 37102:20 37105:9 fields 3714	
37164:13 37161:19 expressed 37157:10 37121:12 37122:19 fifth 37067	
established 37027:23 exhibits 37028:21,22 expresses 37173:5 37146:20 37153:14 fifthly 370	
37030:15 37125:24 37099:14 expressing 37085:3 37153:15 37159:2 fight 3704	
	8,20 37051:6
euphemisms 37107:6 37123:16 37142:16 37173:16 37179:9 factors 37047:9 37067:19 arranging 27084:21 27162:7 arranging 27070:2 27060:16:19:27077:6 fighting 270	
evasive 37084:21 37163:7 expression 37079:2 37069:16,18 37077:6 fighting 37 evening 37073:18 existed 37122:18 37102:6 37173:25 37092:19 37104:11 37182:20	
event 37050:5 37149:6 37174:9 37102:0 57175:25 57092:19 57104:11 57182:21 fights 3717	
event 37030.5 57174.9 57174.9 57170.0 57155.12 fights 571 events 37033:10 existence 37035:24 extend 37032:18 facts 37049:7 37069:23 figured 37	
average average <t< td=""><td></td></t<>	
eventualis 37173:25 exists 37106:19 extent 37078:21 37119:25 37132.11	
eventually 37051:17 37142:14 37165:20 factual 37169:6 final 3713	
37159:23 expand 37154:4 extra 37068:25 37069:8 fail 37180:17 37167:12	
eventuate 37091:8 expect 37036:13 37069:13,17 failed 37041:21 finalise 37	
37174:2 37046:9 37079:23 extracts 37038:9,11 37095:13 37104:17 financial 3	
everybody 37079:15 37085:13 37088:6,10 extraordinary failure 37057:25 find 37064	4:14 37073:2
	37087:9
exact 37155:23 37127:15 37141:7 37075:12 37078:19 fair 37078:25 37165:4 37092:3	37122:13
	6 37131:17
	37157:19
1 0	5 37169:23
37095:23 37170:16 37085:13 37091:13 eyewitnesses 37083:14 37078:9 37105:2 37171:19	
37177:9 37112:24 37115:25 e-mails 37080:12 fait 37042:2 finding 37	
examination 37061:5 37116:2 37180:4 fall 37122:21 37140:6 findings 37126:4 examine 37163:19 22 expecting 37112:18 F 37148:4 37150:2 37126:4	
examine 57105.17,22 expecting 57112.10 57110.157150.2 57120.1	,5 37128:18
examining 37080:25 experience 37046:13 face 37061:23 37071:10 fallen 37150:6,23 37168:19	
example 37030:1637052:2 37056:2437071:12 37072:437154:10fine 3707537038:8 37058:6,1437082:8 37093:337085:5 37126:18falling 37149:22fine-tuned	
37038:8 37058:6,14 37082:8 37093:3 37085:5 37126:18 falling 37149:22 fine-tuned 37062:9 37077:8 37122:11 37139:13 37127:13 37134:2 37151:3,22,22 finger 371	
	5,10,12,16,17
37120.0 37133.4,9 37138.23 37182.19 37140.10 37132.1,11,10,20 37137.0 37141:19 37142:21 experienced 37077:21 faced 37051:1 37153:13 37154:3 finish 3704	
37165:6 37171:14 37078:4 37169:19 37075:21 falls 37153:14 37161:12	
examples 37132:21 experiences 37044:20 facie 37048:6,17 false 37111:4 finished 3'	
37169:16 37044:24 37050:10 37127:7 familiar 37052:4 37161:12	
	3:19 37052:18
	,14 37107:19
excess 37105:23 37087:6,12,23,23 37163:1 far 37044:5,9 37056:2 37107:2	
	0 37131:15
ARCHIVE FOR JUSTICE	

RealTime Transcriptions

37131:22 37134:3 37135:10 37137:19 faws 37178:11 ftow 37121:14 ftow 37121:12 37135:10 37					Page
37135:10 37132:10 now 3712:1:4 37106:24 37157.7 37385.11 37085.11	37131:22 37134:3	flaws 37178:11	37065:3 37105:17	37137:22 37138:1,3,5	
ary 143:39,13,24 funds 37106:24 form 37038:22 fully 37064-6 37134:3 37071:13,13 371561:37151:5 forga 37160:37182:2 370851:57091:10 37072:371762:371765:2 37071:14,17 37172:237182:2 forga 37160:37182:2 forga 37160:37182:2 37162:37172:237136:20 37096:1373709:2 37099:1373709:7 37102:237136:20 37099:1373709:7 37102:223712:14:7 37109:23709:12 37112:237136:20 37108:23718:1 3718:35718:20 37108:23718:1 3718:35718:20 3708:23709:12 37142:53718:20 37104:53718:20 37104:53718:20 37104:53718:20 37104:53718:20 37104:53718:20 37104:52 37114:13718:20 37104:23718:44 3716:52 3716:35 37104:53718:20 37104:53718:20 37104:53718:20 37104:53718:20 37104:53718:20 37104:53718:20 3716:35716:20 3716:35716:20 3716:35716:20 3716:35716:3710:52 37105:20 37104:3716:20 3716:35716:20 3716:35716:20 3716:35716:20 3716:35716:20 3716:35716:20 3716:35716:20 3716:35716:20 3716:35716:20 3716:35716:20 3716:35716:20 3716:35716:20 3716:35716:20 3716:35716:20 3716:					0
3715(1) Tytes <					-
37154:19 57006:10 Function 370662 370762 370762 370762 370762 37006:17 37006:10					
37177:22.37182.2 37133.2 formal 37124:20 37126:20 37126:20 37126:20 37126:21 37126:23 37126:24 3716:45 3716:45 3716:45 3716:45 3716:45 3716:45 3716:32 3718:20<					
firearms 37119/20 focused 3710/2 3712/2/3 formally 37125/24 formally 37126/24 formally 37126/24 formally 37126/24 formally 37126/24 formally 37149/21 formally 37141/21 formally 37149/21 forma					
371207 37134:8 formally 37125:24 37069:13 3707:9 37122:23 37123:14 firearms 37067:13,14 forms 37053:3 former 37033:3 37122:23 37123:14 firearms 37067:13,14 forms 37066:6 37088:23 7089:12 37138:63 37119:13,118:68,6 folders 3714:12 37106:03 7138:64 37098:23 7098:12 37138:63 37110:23 37121:12 follow 7028:23 706:12 37092:6 37114:12 37138:6 37142:5 37158:6 37136:3311:12 37128:63 7116:12 37088:1 37092:6 37144:14 37163:22 3716:12 37178:4 37141:13 37131:12 37128:63 7116:12 fortun 3708:12 3716:12 37169:23 37179:21 3718:6 3714:13 37121:12 followed 37009:12 37179:21 3718:6 37164:13 3718:13 37114:13 3712:12 followed 37094:5:4 fortun 3706:24 37073:34.17 gap 37088:10 3718:13 37114:12 37179:10 3718:16:3716:7:1 fortun 3706:56 gap 3708:12 3718:15 3716:12 37114:13 3713:1:6 3706:12:3 3706:12 3708:12 3708:12 3714:12 3719:17 37112:1:2 fo					
3713513.15 focussed 37140:13 former 37053.3 further 37033.6 37126.23 37128.12 37111715 571186.6 570392.5 570392.5 570392.5 570392.5 37128.23 57128.5 37128.23 57128.5 37128.23 37128.23 37128.23 37128.23 37128.23 37128.23 37128.23 37128.23 37128.23 37128.23 37128.23 37128.23 37128.23 37128.23 37128.23 37128.23 37162.13 37138.22 37162.13 37162.23 37168.23 37164.23 37164.23 37164.23 37164.23 37164.23 37164.23 37164.23 37164.23 37164.23 37164.23 37164.23 37172.53 37162.23 37172.53 37162.23 37162.23 37172.23 3718.22 37183.23 3708.22 37178.23 37162.23 3718.23 37162.23 37162.23 3708.22 3718.23 3708.22 3708.23 3708.22 3718.23 3708.22 3718.23 3708.23 3708.23 3708.23 3708.23 3708.23 3708.22 3718.23 3708.23					,
firearms 37067:13,14 focussing 37091:25 37166:6 370392:25 37082:17 37128:16 37129-9 371175153118:68 foliage 37159:11 forming 37061:10 370882 370890:12 37108:63 37138-6 371128:13 371312:12 foliage 37159:11 forming 37063:12 37092:6 370142:63 37164:2 370142:53 37164:2 370142:53 37164:2 370142:53 37164:2 370142:53 37164:2 370142:53 37164:2 370142:53 37164:2 370142:53 37164:2 370142:53 37164:2 370142:53 37164:2 370142:53 37164:2 370142:53 37164:2 37014:2 37164:53 37164:2 37014:2 37164:53 37164:2 37014:2 37014:15 37177:3 37164:53 37162:15 37102:15 37					
37117:15 57118:6.8 folders 37141:20 forming 37061:10 37088:237090:12 37108:837135:20 371120:23 37121:12 37108:837165:12 3709:46 3709:46 3709:46 3709:46 3716:22 3715:23 3716:22 3715:23 3709:46 3709:46 3716:22 3716:23 3716:23 3716:23 3716:23 3716:22 37175:3 3716:23 3716:22 3718:22 3716:23 3716:22 3718:22 3718:22 3718:22 3718:22 3718:12 3706:22 3707:15 3716:1					
3711928.9.11.22.53 foliage 37195:12 forms 37056:24 37094:6 37101:22 37142:5 37135:20 37110:23.37121:12 follow 37028.2 37065:2 3707:5 37080:1 37114:14 37163:22 37114:14 37163:22 37110:23.37121:12 follow 37028.2 37065:2 forto 3708:19 37164:14 37163:22 37167:22 3778:84:1 37110:21.37176 follow 37028.2 forto 3706:0:2 forto 3706:0:2 37114:14 37163:22 37111:21 3710:51.6 forto 3706:0:2 forto 3706:0:2 gain 37104:19 give 3704:15 37111:21 3708:10.1 37078:10.15.2 forto 3706:2 gain 37104:19 give 3708:10.1 37112:21 3710:21.5 follow and 3703:2:4 37078:10.15.2 grows 3708:10.1 gain 37104:19 give 3708:10.1 37112:22 3713:20.1 follow and 3708:20.2 3708:10.15.2 grows 3708:10.2 grows 3708:10.2 grows 3708:10.2 grows 3708:10.2 grows 37102:15 grows 37102:12 grows 3702:12 grows 37102:12					
37120:23 37121:13 3716:23 37178:22 37178:22 3716:23 3716:23 3716:23 37178:23 3716:23 37178:22 3716:23 3716:23 3716:23 3716:23 3716:23 37179:21 3718:22 3716:23 3716:33 3716:33					
37121:13 37131:12 37128:6 37161:21 3702:6 37144:14 37163:22 37163:20 37137:6 37142:20 57162:13 37155:20 5707 37038:19 37164:23 37164:23 37164:23 37164:23 37164:23 37164:23 37164:23 37164:23 37164:23 37174:41 37104:19 37162:13 37162:12 37167:23 37184:14 37104:19 37164:14 37104:19 37167:23 37184:13 37167:23 37184:13 37167:23 37184:13 37167:23 37184:13 37167:23 37184:13 37167:14 37167:13 37167:13 37067:14 37067:14 37067:14 37067:14 37067:14 37067:14 37067:13 37067:14 37067:14 37067:14 37067:14 37067:14 37067:14 37067:14 <td< td=""><td></td><td>0</td><td></td><td></td><td></td></td<>		0			
37167:4220 37162:12 37163:12.25 600 kmowd 37003:12 37163:12 37163:12.37 37163:12.25 600 kmowd 37003:12 37083:16 600 kmowd 37003:12 37182:12 37182:12 37117:12 37119:19 37087:12.12 37177:5 37100:22 3707:12 37182:12 37151:12 37151:12 37151:12 37151:12 37151:12 37151:12 37151:12 37151:12 37151:12 37151:12 37058:12 37071:13:12 37151:12					
37163:12,25 followed 37030:13 37048:16 full 3706:12,37 371479:137182:11 37179:137182:12 37163:17,19 37182:22 fortion 37060:24 fortion 37060:24 gain 3710419:13 gain 371					
3718:5:17.19 3718:2:22 fortiori 37080:24 fortiori 37080:24 3718:3:2 fired 37069:83 7104:25 37087:21.22 37117:5 37107:5 gap 3708:20 37087:15 37102:15 37117:21 37119:19 37088:11 37094:3 37070:22 37071:7 gap 3708:20 37183:22 37183:22 37112:12 37132:10 follow-up 3708:22 37073:3.4,17 gather 37094:55 gather 37094:55 gather 37094:55 gather 37094:55 gather 37094:55 gather 37094:55 gather 3708:90 gather 3708:91 gather 3708:91 gather 3708:93 gather 3708:93 gather 3708:93 gather 3708:92 gather 37094:23 37042:19:22 37042:19:22 37042:19:22 37042:19:22 37042:19:22 37042:13:3704:23:3704:23:3704:23:3704:23:3704:23:3704:23:3704:23:3704:23:3704:23:3704:23:3704:23:3704:23:3706:16 3718:14:37117:24 3706:24:3708:19 3706:24:3708:19 3706:24:3708:19 3706:24:3708:19 3706:24:3708:19 3706:23:3706:12:3706:13:3706:16:13716:62:4 37004:23:3707:12:3708:19 3706:23:3706:12:33706:12:3706:13:3716:16:13716:16:24 3709:23:3712:12:13:3713:22:13:3713:22:13:3713:22:3712:12:13:3713:22:13:3713:22:3712:13:3713:22:3712:13:3713:22:3712:13:3713:22:3712:13:3713:22:3712:13:3713:37					
General System Genera System General System General				Tutile 37091:23	
37114:18 37117:18 37087:21.22 37177:5 37087:13 37087:15 37177:5 37087:15 37107:15 37087:15 37107:15 3707:13 3707:13 3707:13 3707:13 3707:13 3707:13 3707:13 3707:13 3707:13 3707:13 3707:13 3704:13 3704:13 3704:13 3704:13 3704:13 3704:13 3707:13 3707:13 370					
37117:21 37119:23 37088:11 37094:3 37070:22					
37119:24 37115:16 37167:5 37070:22 37011:7 sps 37041:6 37115:12 37115:12 37120:19 37112:11 7010:22 37073:3,4,17 3715:19 3715:22 37173:32 3715:19 3715:12 37073:13716:22 37175:12 37175:12 37074:10,15 3715:19 37145:12 37034:16 37179:13 37145:12 3704:15 3704:15 3704:15 3704:16 3704:15 3704:16 3704:16 3704:16 3706:12 3704:16 3706:12 3704:13 3706:12 3706:13 3706:13 3706:13					
37120:19 37122:17 follow:ng 37129:11 5003:22:4 37073:34,417 gather 37094:5: 37175:22 gatharing 3703:13:16 gatharing 3703:13:17:17 gatharing 3703:13:17:17 3715:10:9 gatharing 3703:13:17:17 gatharing 3704:13:17:17					
37122:1,7 follow-up 3703:2:24 37075:15.25 37077:7 37150:9 gatherings 37029:23 gatherings 3703:4.5 gatherings 37029:23 gatherings 3703:4.5 gatherings 3703:4.5 gatherings 3703:4.5 gatherings 3703:4.5 gatherings 3703:4.5 gatherings 3704:3.5 gathering 3703:4.5 gathering 3703:4.5 gathering 3703:4.5 gathering 3703:4.5 gathering 3704:3.5 gathering 3704:3.5 gathering 3704:3.5 gathering 3704:3.5 gathering 3704:3.5 gathering 3704:3.5 gathering 3706:3.2 gathering 3704:3.5 gathering 3706:3.2 gathering 3704:4.5 gathering 3706:3.2 gathering 3704:4.5 gathering 3706:3.2 gathering 3704:4.5 gathering 3706:3.2 gathering 3704:4.5 gathering 3706:3.2					
37130:19 37132:19 food 37095:20.24 37078:10.15 37081:5 gatherings 37095:23 gatherings 37095:25 gatherings 37044:3 gatherings 37044:3 gatherings 37045:24 37045:13 37065:14 37065:14 37065:14 37065:14 37065:14 37065:13					
37132:22 37133:9.10 37065:20 37081:15.23 gear 3708:9.9 glory 37131:6 37133:10 37134:21 foota 37089:19 37146:21 groward 37101:23 37043:17 37044:2,2,2 37042:19,22 37180:16 37181:9 37118:14 37119:24 37183:16 37081:15,23 37042:19,22 37042:19,22 37180:16 37082:12 37014:13 37042:19,22 37052:13,37063:17 37063:13,37063:16 37172:13 37139:22 37063:14,37063:16 37172:13 37123:13,37129:24 37085:11,37063:17 37082:15,37076:12 37092:12,37079:19 37057:13,37083:19,3708:11,37124:13,37129:24 37092:12,37099:10 37123:13,37129:12 37093:14,37093:19 37057:13,37124:13,37129:44 37085:12,37066:12 37076:12,37076:12 371313:13,37164:12 37014:13,37					
37133:10 3713:10 37143:10 37146:21 general 37043:17 37043:17 37043:17 37043:17 37043:12 37043:17 37043:12 37043:17 37043:12 37043:17 37043:12 37065:24 37055:24 37055:24 37074:20 37076:7: 37043:12 37065:24 37065:24 37065:24 37076:7: 37074:20 37076:7: 37074:20 37076:7: 37074:20 37076:7: 37074:25 37076:25 37076:25 37076:25 37076:20 37143:3:32 37093:12 37093:12 37093:12 37093:12 37093:12 37093:12 37093:13 37193:13 37143:3:32 37105:13 37193:13 37143:3:32 37105:13 37193:12 37093:10:3706:13 37105:13 37105:13 37105:13<	37130:19 37132:19	food 37095:20,24	37078:10,15 37081:5	gatherings 37029:23	37179:13
37140:5 37151:16 foreage 371171.19.24 forward 37101:23 37044:13 77044:2,2,2 37042:19.22 37154:19 37159:18 37118:14 37119:24 37183:4,7,11 37044:3 37045:6 37044:13 37047:6 37182:3 foreig 37085:25 37090:21 37119:23 37062:8 37065:12,9 37062:8 37065:12,9 37183:20 37142:6,7 37062:13 37066:16 37172:13 37095:22 37104:5 37074:20 37076:7 37133:20 37142:6,7 37062:13 37066:16 37172:13 371303:19.24 37082:15 37078:25 37044:19 3707:14 37072:16 37092:9 37110:11 37183:13 37139:24 37081:15 37098:16 37044:19 37047:7 37094:5 37136:16 37120:13 37159:23 37091:6 37136:22 37044:19 37072:11 37193:13 37145:12 37114:13 37135:21 37095:5,5 37114:13 37135:21 37063:25 37066:25 37150:13 3716:19 37112:2 37140:5 37147:20 37140:5 37147:20 37072:11 37165:17,19 37165:1 37106:13 37062:8 3706:12 37140:5 37147:20 3700:3713:6 37165:17,19 37165:1 37116:12 37140:5 37147:20 37140:5 37147:20 3700:37114:3709:10 37165:17,19 37165				gear 37058:9	
37154:19 37148:14 37119:24 37183:4,7,11 37044:13 37044:13 37045:13 37045:25 37054:23 37054:23 37054:23 37054:23 37055:25 37054:23 37055:24 37052:83 37055:25 37055:24 37055:24 37055:23 37054:23 37057:24 37055:23 37057:23 37057:23 37057:23 37057:23 37057:23 37057:23 37057:23 37057:23 37057:23 37057:23 37057:23 37057:23 37057:23 37057:23 37057:23 37057:23 37075:23 37075:23 37077:13 37075:23 37077:216 37075:23 37077:216 37097:23 37097:23 37075:33 37096:13 37122:13 37137:23 37095:73 37098:23 37096:33 37096:33 37096:33 37096:33 37096:33 37095:23 37105:13	37133:10 37134:21	foot 37089:19	37146:21	general 37033:4,5	go 37034:16 37035:8,17
37180:16 37181:9 37182:3 fires 37137:24 firing 37136:25 fires 37137:24 firing 37136:25 fires 37137:24 firing 37136:25 fires 37137:24 firing 37136:25 fires 37037142:07 37138:20 37142:67 37138:20 37142:67 37032:12 37067:18 37068:17 37032:21 37138:10 37071:4 37072:16 37092:9 37110:11 37034:4;23 3704:13 37034:4;13 37093:9,12,20 37132:22 37152:13 37034:4;13 37035;12 37034:4;13 37093:9,12,20 37132:13 37159:23 37044:10 37055;25 371061:3 37156:16 37102:2 37106:25 37103137156:19 37102:2 37072:11 37038:13 37142:12 37038:13 37142:12 37038:13 37142:12 37038:13 37142:12 37038:13 37142:12 371061:3 37156:19 37112:2 371061:3 37156:19 37112:2 371061:3 37156:19 37112:2 371061:3 37156:19 37112:2 371061:3 37156:19 37112:2 371061:3 37156:19 37112:2 371061:3 37156:19 37112:2 37107:2 371061:3 37156:19 37112:2 371072:2 371072:2 371072:2 371072:2 371072:2 371072:2 371072:2 3710	37140:5 37151:16	footage 37117:1,19,24	forward 37101:23	37043:17 37044:2,2,2	37042:19,22
37182:3 fires 37137:24 footing 37085:25 37137:24 37090:21 37119:23 37130:13,14 37140:2 37165:13,20 3704:1 37065:24 37082:4 37065:1,3,20 37071 37065:1,3,20 37071 37138:20 37142:6,7 37138:20 37142:6,7 37138:20 37142:6,7 37062:13 37066:16 37067:1,8 37068:17 37112:13 37067:1,8 37068:17 370712:25 37078:4 37072:25 37078:25 37079:12 37072:25 37078:25 37079:12 37072:25 37082:25 37079:12 37076:37097.57 37082:25 37092:29 37110:11 37042:13 37199:24 37082:55 37108:13 37109:12 37076:37098:12 37072:13 37199:24 37107:55 371075:13 37109:12 37076:37098:12,30 37106:13 37106:11 37042:19 37072:11 37042:19 37072:11 371075:13 37136:16 37105:17 37094:5 37136:16 37105:17 37094:5 37136:16 37106:13 37106:19 37112:2 37106:13 37106:13 37106:13 37105:12 371074:18 37137106:19 37112:2 37104:13 37137147:00 371137:14 37113714 37142:5 371374.8 37144:5 371374.2 37004:5 37099:7,20 37094:5 37099:7,20 37094:5 37099:7,20 37064:17 37094:5 37106:14 37067:9 37114:13 37142:12 generate 37105:25 37144:13 37147:0 37144:5 37147:00 37142:23 37147:0 37142:12 37137:24 37144:13 37135:12 37164:13 37124:12 37137:24 37124:13 37124:12 37142:12 37173:24 37144:13 37142:12 37144:13 37142:12 37142:12 37142:23 37142:12 37142:12 37064:13 37066:12 37077:12 37083:11 37041:12 37042:4,6 37077:12 37083:11 37041:12 37042:4,6 37042:14;17372.5 370041:12 37042:4,6 37042:16;17142 37041:1	37154:19 37159:18	37118:14 37119:24	37183:4,7,11	37044:3 37045:6	37044:13 37047:5
fires 37137:24 37137:1 37120:13,14 37140:2 37083:9,9,18 37065:1,3,20 37071 firing 37136:25 force 37031:24 37034:8 37160:11 37166:24 37093:22 37104:5 37072:23 57079:19 37138:20 37142:67, 73703:17 37067:1,8 37066:16 37172:13 37122:5 37072:23 57079:19 37143:2,8,9,17 37067:1,8 37068:17 57071:4 37072:16 37092:9 37110:11 37143:3,25 37098:2,15 37098:2,15 37034:4,22 37044:13 37093:9,12,20 37152:13 37159:23 generalied 37046:13 371095:7, 37098:2,15 37044:19 37047:7 37094:5 37136:16 37160:5 generate 37105:5,5 37114:13 37135:21 37063:25 37066:25 37150:13 37156:19 37112:2 generate 37105:23 37164:4 37165:5,13 37004:2 37097:7,20 37164:14 37165:5,13 fourth 37067:9 genuinely 3708:11,12 generate 37107:24 37114:8,20 37113:6 3712:2 frame 37102:18,13 37147:20 37162:13 37062:1 37123:11 3712:41 3713:42 37137:48 37137:23 37147:20 37102:12 3714:13 37169:12 fourth 37067:9 genuinely 3708:11,12 generate 37107:24<	37180:16 37181:9	37143:21	found 37058:12	37049:16 37065:8,9	37054:2 37055:24
fires 37137:24 37131:1 37120:13,14 37140:2 37083:9,9,18 37065:1,3,20 37076:7 37138:20 37142:67 37062:13 37066:16 37173:21 37083:9,9,18 37074:20 37076:7 37138:20 37142:67 37067:1,8 37068:17 37067:1,8 37068:17 3702:9 37110:11 37122:5 37079:29 37078:4 37123:13 37139:24 37092:9 37110:11 37133:3,25 37093:9,14 37092:9 37110:11 37134:3,3,25 37093:14 37093:9,14 37092:9 37110:11 37134:3,3,25 37093:14 37093:9,14 37092:9 37110:11 37134:3,3,25 37093:14 37093:14 37093:14 37093:9,14 37093:14 37093:14 37093:14 37092:9 37110:11 37134:3,3,25 37093:14 37017:14 <td>37182:3</td> <td>footing 37085:25</td> <td>37090:21 37119:23</td> <td>37065:24 37082:4</td> <td>37062:8 37064:12</td>	37182:3	footing 37085:25	37090:21 37119:23	37065:24 37082:4	37062:8 37064:12
firing 37136:25 force 37031:24 37034:8 37160:11 37166:24 37095:22 37104:5 37074:20 37076:7 37138:20 37142:6,7 37062:13 37066:16 37172:13 37120:7 37122:5 37078:22 37078:2 37078:22 37078:19 37152:3,21 37158:10 37071:4 37072:16 37092:9 37110:11 37143:3,25 37091:6 37093:14 37034:22 37044:19 37047:7 37094:5 37136:16 37160:5 generalised 37046:13 37095:7 37088:2,15 37042:10 37055:21 37138:13 37142:12 3706:1 37165:5 371161:13 37155:12 371137:4,8 37138:6 37002:3 37072:11 37157:12,24 37163:4 37163:7,12,13,21,25 37167:19 generate 37105:5,5 37114:13 37135:21 370091:5 37069:25 37165:17,19 37166:9 37151:14 37135:42 37167:12 37147:10 37175:8 37175:22 37172:3 37175:23 37175:8 37103:10 37132:4 37132:16 37055:16 37086:7 37105:13 37159:17 37132:16 37052:13 37159:12 370371:0,11 37132:16 37132:16 37055:16 37086:7 37052:13 37152:12 37052:13 37152:12 37052:13 37152:12 37052:13 3705:25 37043:18,22 37133:137169:12 37069:12,12 37099:12	fires 37137:24	-	37120:13,14 37140:2		37065:1,3,20 37071:5
37138:20 37142:6,7 37062:13 37062:13 37067:1,8 37067:1,8 37078:25 37078:25 37078:25 37078:25 37078:25 37078:25 37082:15 37087:51 37082:15 37087:51 37082:15 37087:51 37082:15 37087:51 37082:15 37087:51 37082:15 37087:52 37082:15 37065:13 37160:13 37160:13 37160:13 37160:15 371161:13 37142:15 37147:20 37147:20 37147:20 37147:20 37147:22 37147:22 37147:22 37147:22 37147:22 37147:22 37147:22 37147:22 37147:22 37147:22 37147:22 37147:22 37147:22 37147:22 37147:22 37147:22 37147:22		force 37031:24 37034:8			
37143:2,8,9,17 37067:1,8 37068:17 four 37068:19 37078:4 37123:13 37139:24 37082:15 37087:5,1 37152:3,21 37158:10 37071:4 37072:16 37092:9 37110:11 37143:3,25 37091:6 37093:14 37044:19 37047:7 37094:5 37136:16 37152:13 37159:23 generalised 37046:13 37095:7 37098:2,15 37044:19 37047:7 37094:5 37136:16 37152:13 37159:23 generalised 37046:13 371095:7 37098:2,15 37044:19 37047:7 37094:5 37136:16 37160:5 generalised 37046:13 37105:22 37062:2 37066:25 37150:13 37156:19 37112:2 generalised 37045:22 37137:4,8 37147:20 37094:2 37099:7,20 37163:7,12,13,21,25 fourth 37089:15 gengraph 37159:17 37167:22 37173:23 37102:1 37113:6 37165:17,19 37166:9 37151:14 37154:20 grame 37038:4 37139:6 gengraph 37159:17 37167:22 37173:23 37114:18,20 37115:16 37132:10 frame 3703760:4 37100:5 37124:18,23 gitu 37082:25 37066:25 37041:12 37042:24 37135:12,313 37149:5 37114:12 37099:9 37165:16 37086:7 37105:13 37106:2 3703716:2 37037176:2 37114:13,322 </td <td></td> <td></td> <td></td> <td></td> <td></td>					
37152:3.21 37071:4 37072:16 37092:9 37110:11 37143:3.25 37091:6 37093:14 37037:4 37037:4 37072:20 37152:22 37152:21 37152:23 37094:6 37098:2.15 371098:2.15 371098:2.15 371098:2.15 371098:2.15 371098:2.15 371098:2.15 371098:2.15 37106:13 37113:13 37114:13 37137:24 37105:13 37137:24 37137:24 37137:24 37137:23 37147:12 37174:10 37147:12 37174:10 37137:23 37148:21 37137:24 37167:12 37137:24 37032:1774:10 37124:23 37					
first 37030:7 37031:1937076:3 37090:1637132:22 37152:7,12generalised 37046:1337095:7 37098:2,1537034:4,22 37044:1337093:9,12,2037132:13 37159:23generalised 37046:1337105:13 37106:13704:19 3704:7:37094:5 37136:1637160:5generalised 37045:7.537114:13 37135:2137063:25 37066:2537150:13 37156:1937112:237112:2generate 37105:5.237114:13 37135:2137094:2 37092:7.2037163:7,12,13,21,25fourth 37067:9generate 37105:1937167:22 37159:437004:2 37092:7.2037164:14 37165:5,13frame 37038:4 37139:637137:2337174:10 37175:837101:13713:637165:17,19 37166:237151:14 37154:2037137:2337174:10 37175:837124:17,17forced 37106:3framkly 37050:437100:5 37124:18,2337108:2137138:17,23 37147:9forces 37075:16free 37092:18 37182:1give 37028:22 37033:2137037101.1137151:13,3,22forcibic 37044:22freed 37106:137053:12 37055:2537043:18,2237151:2,3,23foreibic 37044:22freed 37106:2137075:10 37075:02 3705:10 37075:2537043:18,2237151:3,3,22foreibic 37044:22freeg 37102:1837055:21 3705:25 3706:4,1737066:1237169:21 37151:937174:6freegen 37077:137055:21 3705:25 3708:4,1737066:1337169:21 3717:1937164:12 37092:9freegen 37047:2037077:12 3708:1137055:25 37086:4,1737165:1937165:137174:6freegen 37077:1337077:12 3708:2237069:737071:1137169:21		,			,
37034:4,22 37044:13 37093:9,12,20 37152:13 37159:23 generally 37107:5 37105:13 37106:11 37044:19 37047:7 37094:5 37136:16 37160:15 37114:13 37135:21 37160:15 37044:19 37047:7 37094:5 37136:16 37160:15 37114:13 37135:21 37114:13 37135:21 37070:23 37072:11 37157:12,24 37163:4 fourth 37067:9 generic 37030:18 37142:25 37159:4 37094:12 37097:20 37164:14 37165:5 fourth 37094:5 generic 37030:18 37142:23 37139:4 37100:1 37113:6 37165:17,19 37166:9 37151:14 37154:20 37137:23 37142:12 371318:17,23 37147:15 37132:16 37105:13 37105:14 37137:25 gensta 370917:24 geos 37028:7 37076:2 371318:17,23 37147:9 forced 37106:3 frankly 37050:4 37100:5 37124:18,23 grog 37028:22 37043:18,22 37151:1,3,22 forcibl 37044:22 freez 3702:18 37182:1 give 37028:22 37033:21 37041:12 37042:4, 37152:1,2,16,20 forcibl 37044:22 freez 37102:18 37065:14 37066:20 37047:16,17,18 37152:1,2,16,20 foresaw 37047:20 foresea 37075:16					
37044:19 37047:7 37094:5 37136:16 37160:5 generate 37105:5,5 37114:13 37135:21 37048:10 37055:21 37156:13 37165:19 37112:2 generate 37105:5,5 371137:4,8 37138:6 37063:25 37066:25 37150:13 37165:19 37112:2 generate 37105:2,2 37137:4,8 37138:6 37095:10 37089:25 37163:7,12,13,21,25 fourth 37067:9 generate 37105:2,1 37164:2,5 37157:12,24 37163:7 37094:2 37099:7,20 37164:14 37165:9,17 fourth 37067:9 genuinely 37088:11,12 3714:2,2 37173:2,3 37100:1 37113:6 37165:17,19 37166:9 37151:14 37154:20 37137:2,3 37182:21 37123:11 37124:15 37173:4,11,12 frame 37002:18,18 gesture 37107:24 goes 37028:7 37076:2 37130:10 37132:4 37132:16 free 37092:18 37182:1 free 37002:12,2 37033:21 37033:21 37032:22 37033:21 37041:12 37042:4,6 37151:4 3714:0 free 37002:18 37052:1 37052:5 3704:12 37042:4,6 37106:37106:23 3706:43706:23 3706:43706:23 3704:12 3704:12 3704:12 3706:31,1 37053:21,2705:25 3704:12 3706:6:31,1 37053:21,3705:25 3704:1			,		· · · · · · · · · · · · · · · · · · ·
37048:10 37035:21 37138:13 37142:12 Fourie 57111:10 generates 37105:22 37137:4,8 37138:6 37063:25 37063:25 37163:7,12,13,21,25 37163:7,12,13,21,25 37163:7,12,13,21,25 37163:7,12,13,21,25 37164:14 37165:5,13 Frame 37038:4 37139:6 37167:22 37173:23 37001:137113:6 37164:14 37165:5,13 Frame 37038:4 37139:6 37167:22 37173:23 37114:8,20 37117:20,22 37177:4,8 37163:12 37167:22 37173:23 37114:8,20 37117:20,22 37177:4,10 37165:17,19 37165:17 Frames 37051:14 37162:18,18 gesture 37107:24 goes 37028:7 37137:25 37123:11 37132:16 Tramework 37085:24 free 37092:18 37100:5 37041:12 37042:46 37005:25 37041:12 37042:46 37151:1,3,3,22 forcible 37044:22 free 37107:12 gross:21 37041:12 37042:46 37055:25 37044:12 37042:46 37055:25 37041:12 37042:45 37055:21 37041:12	-				
37063:25 37066:25 37150:13 37156:19 37112:2 generic 37030:18 37140:5 37147:20 37070:23 37072:11 37157:12,24 37163:4 fourth 37067:9 generic 37030:18 37140:5 37147:20 37085:10 37089:25 37164:14 37165:5,13 fourth 37067:9 geography 37159:17 37167:22 37173:23 37100:1 37113:6 37165:17,19 37166:9 37151:14 37154:20 frame 37038:4 37139:6 German-made 37174:10 37175:8 371124:17,17 57162:23 37173:2,3 57151:14 37154:20 frames 37102:18,18 gesture 37107:24 goes 37028:7 37076:2 37132:11 37124:15 37132:16 frankly 37050:4 37100:5 37124:18,23 going 37028:22 3703710,11 37138:17,23 37147:9 forced 37106:3 freez 37092:18 37182:1 give 37028:22 37033:21 37041:12 37042:4,6 37151:13,3,22 foresis 37124:22 freez 37102:18 3706:14 37066:20 37047:16,17,18 37151:14:37165:1 37174:6 frequent 37138:12 37061:4 37066:20 37047:16,17,18 37151:13:37169:12 forese 37070:1 frequent 37138:12 37061:4 37066:20 37047:16,17,18 37151:13:13 37169:12 fo					
37070:2337172:1137157:12,2437163:4fourth37067:9genuinely37088:11,1237154:2537159:437085:1037085:2537164:1437165:5,13fourthly37094:237099:7,2037164:1437165:5,13frame37038:437139:637101:37113:637165:17,1937165:5,13frame37038:437139:637137:2337174:1037177:2837123:1137124:1537171:20,2237176:3framevork37085:24getting37091:1037137:2537124:17,17forced37106:3frankly37050:437102:18,18grag 37028:2237037:10,1137138:17,2337147:9forces37075:16freedom37077:1freedom37053:2137042:2537043:18,2237150:12,3,22foresics37142:20freez37102:1837065:2537047:16,17,1837057:1037075:2537047:16,17,1837152:12,16,20foresaw37047:20frequenty37106:2137077:1237085:2537045:1137050:5237047:16,17,1837169:2137169:2137069:12,1237099:9frequenty37133:2337092:1837098:937064:1737066:76:337169:2137074:24foresee 37070:137074:1237125:537124:437064:1737067:6337169:2137047:24foresee 3706:23friend37095:1137098:9237064:1737064:1737067:6337169:2137047:25foresee 3706:233714:1637125:5 <t< td=""><td></td><td></td><td></td><td>0</td><td>,</td></t<>				0	,
37085:10 37089:25 37094:2 37094:2 37094:237163:7,12,13,21,25 37164:14 37165:5,13 37165:17,19 37166:9 37165:17,19 37166:9 37165:17,19 37166:9 37113:113 37112:15fourthly 37094:5 frame 37038:4 37139:6geography 37159:17 German-made 37137:23 37171:10 3717:23 37171:20,22 37172:7 37123:11 37124:15 37132:1637167:22 37173:23 37167:27 37172:7 37167:22 37173:4,11,12 frames 37102:18,18 framework 37085:24 free 37092:18 37085:7geography 37159:17 German-made 37137:23 gesture 37107:24 getting 37091:1037167:22 37173:23 37174:10 37175:237124:17,17 37124:17,17 37132:16forced 37106:3 s7132:16framky 37050:4 37053:16 37050:437100:5 37124:18,23 37100:5 37124:23 37168:2going 37028:22 37037:10,1137138:17,23 37147:9 37151:13,3,22forcible 37044:22 foresaw 37047:20 foresaw 37047:20free a7092:18 37182:1 freequenty 37106:21 frequenty 37106:21 frequenty 37106:21 froget 37056:2537053:21,2105:25 37053:21,21052:5237043:18,22 37053:21,21052:5237151:3,3,22 37152:12,16,6,20foresaw 37047:20 frequenty 37138:12 frequenty 37138:12frequenty 37138:12 37054:13 37056:2037047:16,17,18 37053:21,211 37053:21,211 37053:21,21137169:21 37174:16 37169:21 37169:12foresee 37070:1 freguenty 37133:2337092:18 37098:9 37064:17 37067:13 37101:4,8 37106:23 37069:7 37071:11 37162:4 37164:43716:22 37138:4 37146:13 37164:4foreseen 37048:6,7 foreseble 37066:13 37113:22 37114:25friend 37147:12 37141:8 37140:6 37150:5,1937162:4 37162:3 37162:4 37165:137093:19 37094:10 37162:4 37165:137161:1 37165:4 3704:25foresef 3			*		
37094:2 37099:7,20 37100:1 37113:637164:14 37165:5,13 37165:17,19 37166:9frame 37038:4 37139:6 37151:14 37154:20German-made 37137:2337174:10 37175:8 37182:2137100:1 37113:637165:17,19 37166:9 37114:8,20 37119:237173:4,11,12 37173:4,11,1237173:4,11,12 forced 37106:337151:14 37154:20 s7105:1437137:23 going 37091:1037182:21 going 37028:2237124:17,17 37138:17,23 37147:9forced 37106:3 s7138:17,23 37147:937132:16 forces 37075:16free 37092:18 37182:1 free 37092:18 37182:137100:5 37124:18,23 going 37028:22 37033:2137041:12 37042:4,6 37041:12 37042:2,637150:1,23,23 37150:1,23,22foresics 37124:22 foresics 37124:22 foresics 37124:22 foresa 37047:20freedom 37077:1 frequenty 37138:12 frequenty 37138:12 frequenty 37138:12 37169:21 37171:1737069:12,12 37099:9 37069:12,12 37099:937164:13 3706:20 37047:2037047:16,17,18 37076:2537168:13 37169:12 37169:21 37171:1737155:21 37156:1 s7067:2 37119:1637077:12 37074:1237085:25 37086:4,17 37076:1237060:10,13,15,16,2 37098:937164:13 37169:12 37047:24foresee 37070:1 foresee 37066:23friend 37147:12 friend 37147:123712:13 37124:4 37074:1337099:19 37094:10 37132:1 37131:137134:22 37138:4 37141:6 5716524foreseen 37048:6,7 foresight 37066:13 37113:22 37114:25friend 37045:51 37142:23 37131:137098:90 37098:9137141:137165:4 37144:1537066:13 37144:1537140:6 371505:10 37143:23 37144:2537141:8 37145:8 37098:91 37132:1 37131:13 37124:437098:910,11,13 37098:92		-			
37100:1 37113:637165:17,19 37166:937151:14 37154:2037137:2337182:2137114:8,20 37119:237171:20,22 37172:7frames 37102:18,18gesture 37107:24goes 37028:7 37076:237123:11 37124:1537173:4,11,12frankly 3705:4gesture 37107:24going 37028:2237130:10 37132:437132:16frankly 3705:637100:5 37124:18,23going 37028:2237130:10 37132:437132:16freed 37092:18 37182:1give 37028:22 37033:2137041:12 37042:4,637150:1,23,23forcible 37044:22freed 37077:137053:21 37055:2537043:18,2237151:3,3,22forensics 37124:22freeze 37102:1837061:4 37066:2037047:16,17,1837152:1,16,20foresaw 37074:20frequency 37106:2137077:10 37076:2537050:6 37052:137168:13 37169:1237069:12,12 37099:9frequency 37106:2137077:10 37076:2537060:10,13,15,16,137168:13 37169:12forese 37070:1frequent 37138:1237092:18 37089:937064:17 37067:337168:13 37169:1237074:25fried 37074:1337101:4,8 37106:2337099:7 37071:113713:22 37138:4foreseen 37048:6,7foreseen 37048:6,7foreseen 37048:6,7foreseen 37048:6,737132:23 3714:2537141:8 37145:83714:123713:22 37114:2537141:8 37145:837098:91.9111337089:22 37091:113714:22 37138:4foreseen 37048:6,7foreseen 37048:6,7foreseen 37048:6,7foreseen 37048:6,7five 37067:2 37119:1637074:2537141:2537141:8 37125:13 3713:1337102:2 37113:13 <t< td=""><td></td><td></td><td></td><td></td><td></td></t<>					
37114:8,20 37119:2 37123:11 37124:15 37173:4,11,12 37132:437171:20,22 37172:7 37173:4,11,12 forced 37106:3 37132:16frames 37102:18,18 framework 37085:24 frankly 37050:4gesture 37107:24 getting 37091:10 3710:05 37124:18,23 3710:05 37124:18,23 3710:05 37124:18,23 37037:00,1137138:17,23 37147:9 37138:17,23 37147:9forced 37106:3 forced 37075:16frankly 37050:4 free 37092:18 37086:7 free 37092:18 37053:12 37053:22 37033:21 37053:16 37132:10gesture 37107:24:18,23 37037:10,11 37053:21 37055:25going 37028:22 37043:18,22 37043:18,2237150:1,23,23 37150:1,23,22forcible 37044:22 foresics 37124:22freed om 37077:11 frequency 37106:21 frequenty 37106:21 frequenty 37106:21 s7057:10 37076:2537043:18,22 37050:6 37052:1 37053:21,21 37053:21,2137153:4 37154:19 37157:19 37158:16 37174:637174:6 frequenty 37106:21 frequenty 37106:21 frequenty 37106:21 s7007:12 37088:11 37069:12,12 37099:937069:12,12 37099:9 frequenty 37106:21 s7069:12,12 37099:937064:17 37067:3 37064:17 37067:4 37074:18,1937134:22 37138:4 37146:3 370747:25foresee 37066:23 friend 37147:12 37142:2 37133:18 37140:6 37155:19 37140:6 37155:19 37140:6 37155:19 37140:6 37155:19 37142:2 37133:18 37140:6 37155:19 37162:3 37133:18 37098:9,10,11,13 37140:6 37155:19 37162:3 37133:14 37162:4 37165:1 37162:4 37163:14 37102:2 37174:4 37101:24 37104:4 37101:24 37104:4 37101:24 37104:					
37123:11 37124:15 37124:17,1737173:4,11,12 forced 37106:3 37132:16framework 37085:24 fankly 37050:4getting 37091:10 37100:5 37124:18,23 37100:5 37124:18,23 37100:5 37124:18,23 37100:5 37124:18,23 37103:16 37132:1037137:25 going 37028:22 37037:10,1137138:17,23 37147:9 37148:3,16 37149:5forces 37075:16 forcible 37044:22 foresis 37124:22free 37092:18 37182:11 free 37092:18 37182:137053:21 37051:25 37053:21 37055:2537043:18,22 37043:18,2237150:1,23,23 37155:12,37152:12,16,20foresaw 37047:20 foresaw 37047:20freequency 37106:21 frequenty 37138:12 frequenty 37138:1237057:10 37076:25 37057:10 37076:2537060:10,13,15,16,2 37050:6 37052:137157:19 37158:16 37169:21 37171:1737169:21 37174:6 foresee 37070:1 37169:21 37171:17foresee 37070:1 foresee 37066:23 37074:25freduent 37133:23 friend 37147:1237069:7 37071:11 37122:5 37127:437134:22 37138:4 37146:11 37165:4 37161:1 37165:4foresee 37048:6.7 foresight 37066:13 37174:1front 37031:4 37055:11 37140:6 371055:1937098:9 37141:8 37145:83717:22 37177:23 fix 37145:5foreseen 37048:6.7 foresight 37066:13 37174:1front 37031:4 37055:1 37142:237132:1 37133:18 37142:3 37098:937093:19 37094:10 37132:2 37114:2537140:6 37105:2,37174:12 foreseen 37048:6.7 foresight 37066:13 37174:12friend 37147:12 37143:2 37114:2537141:8 37145:8 37098:9,10,11,13 37140:6 37155:1937032:1 37133:18 37106:6:1337140:6 37155:5 fix 37145:5foresee 37048:6.7 foresight 37066:13 37174:12friend 37147:12 37143:13 37142:2 <t< td=""><td></td><td>,</td><td></td><td></td><td></td></t<>		,			
37124:17,17 37130:10 37132:4 37130:10 37132:4forced 37106:3 37132:16frankly 37050:4 37053:16 37086:7 free 37092:18 37182:137100:5 37124:18,23 37124:23 37168:2 give 37028:22 37033:21going 37028:22 37037:10,1137138:17,23 37147:9 37148:3,16 37149:5forces 37075:16 37150:1,23,23 37150:1,23,22 37150:1,23,22forces 37075:16 foresibe 37044:22 foresics 37124:22freedom 37077:1 freedom 37077:137053:21 37055:25 37043:18,2237041:12 37042:4,6 37043:18,2237150:1,23,23 37152:12,16,20 37155:14,37154:19 37157:19 37158:16 37168:13 37169:12 37169:12 37169:12foresaw 37047:0 frequenty 37099:9freequenty 37106:21 frequenty 37133:2337075:10 37076:25 37095:10 37075:10 37076:25 37086:4,1737060:10,13,15,16,2 37060:10,13,15,16,237168:13 37169:12 37169:12 37169:12 37169:21 37171:17foresee 37070:1 foresee 37070:1Friday 37074:13 37078:637101:4,8 37106:23 37123:13 37124:437069:7 37071:11 37069:7 37071:11 37089:22 37091:1137134:22 37138:4 3714:1foreseen 37048:6,7 foresight 37066:13 37113:22 37114:25friend 37147:12 37113:22 37114:2537101:4,8 37106:23 37121:1 37133:18 37093:19 37094:10 37113:22 37114:2537101:4,37133:18 37093:19 37094:10 37113:22 37114:2537141:37145:5 fixation 37137:6foreget 37168:16frustrating 37130:7 37153:13 37154:337162:4 37165:1 37175:14 37178:1237143:23 37145:3	2		,		
37130:1037132:437132:1637053:1637053:1637124:2337168:237037:10,1137138:17,2337148:3,1637147:9forces37075:16freedom37077:11give37028:2237033:2137041:1237042:4,637150:1,23,2337150:1,23,23forcible37044:22freedom37077:137053:2137053:2137043:18,2237152:12,16,20foresaw37047120frequency37106:2137077:1237085:2537050:637053:21,2137153:437153:437069:12,1237099:9frequent37138:1237085:2537086:4,1737060:10,13,15,16,237168:1337169:1237069:12,1237099:9frequent37133:2337092:1837092:1837069:737061:1,316,5,16,237169:2137174:6foresee 37070:1Friday37074:1337101:4,83706:2337069:737074:16,1737169:2137171:1737155:1337156:137074:2537123:1337124:437074:18,1937134:2237138:4foreseen37048:6,7friend37147:1237123:1337124:43707618:5,237091:1137134:2237138:4foresegnt37048:6,7friend3714:2537141:837098:9,10,1,1337174:1foresegnt37085:537150:5,1937152:137131:137089:2237091:1137161:137165:437074:25friend3713:237114:2537141:837098:9,10,1,1337177:2337174:1foresef 37085:537152:2,2,11,					
37138:17,23 37147:9 37148:3,16 37149:5 37115:16 37132:10 37150:1,23,23 37151:3,3,22forces 37075:16 37151:3,3,22 foresics 37124:22 foresaw 37047:20free 37092:18 37182:1 freedom 37077:1 frequency 37106:21 frequency 37106:21 s7075:10 37076:2537041:12 37042:4,6 37053:21 37055:2537152:12,16,20 37153:4 37154:19 37157:19 37158:16 37169:12 37169:12 37169:21 37171:17forese 37070:1 s7155:21 37156:1 foresee 37070:1 37169:21 37171:17forese 37070:1 s7155:21 37156:1 foresee 37070:1 37161:1 37165:4free 37092:18 37182:1 frequenty 37133:23 s7092:18 37098:937047:16,17,18 37063:21,21 37092:18 37086:4,17 37060:10,13,15,16,2 37006:10,13,15,16,2 37069:7 37071:11 37076:2537134:22 37138:4 3714:2foreseen 37048:6,7 foreseen 37048:6,7 foreseen 37048:6,7 s7161:1 37165:4 37171:22 37177:23 37174:1foreseen 37048:6,7 foreseen 37048:6,7 foreseen 37048:6,7 foreseen 37048:6,7 foreseen 37048:6,7 foreseen 37048:6,7 s7161:1 37165:4 37161:1 37165:4 37171:22 37177:23 37174:1foreseen 37048:6,7 foreseen 370			•		
37148:3,16 37149:537115:16 37132:10freedom 37077:137053:21 37055:2537043:18,2237150:1,23,23forcible 37044:22freeze 37102:1837061:4 37066:2037047:16,17,1837151:3,3,22forensics 37124:2237139:637075:10 37076:2537050:6 37052:137152:12,16,20foresaw 37047:20frequency 37106:2137077:12 37083:1137053:21,2137157:19 37158:1637174:6frequenty 37138:1237085:25 37086:4,1737060:10,13,15,16,237168:13 37169:12foresee 37070:1frequently 37133:2337092:18 37098:937064:17 37067:337169:21 37171:1737155:21 37156:137078:637123:13 37124:437074:18,19Firstly 37047:24foreseeable 37066:23friend 37147:1237125:5 37127:437076:18 37078:5,23714:22 37138:4foreseen 37048:6,7front 37031:4 37055:137132:1 37133:1837093:19 37094:1037171:22 37177:2337174:157143:23 3714:2537141:8 37145:837098:9,10,11,1337147:12foresight 37066:1337113:22 37114:2537141:8 37145:837098:9,10,11,1337142:2 37177:2337174:137140:6 37150:5,1937150:8 37153:437101:24 37104:4fix 37145:5foreyer 37085:537152:2,2,11,2137165:5 37159:1237105:2,3 37113:19fix 37145:5foreget 37168:16frustrating 37130:737175:14 37178:1237143:23 37145:3					
37150:1,23,23 37151:3,3,22forcible 37044:22 forensics 37124:22freeze 37102:18 37139:637061:4 37066:20 37075:10 37076:2537047:16,17,18 37050:6 37052:137152:12,16,20 37153:4 37154:19foresaw 37047:20 37069:12,12 37099:9frequency 37106:21 frequent 37138:1237077:12 37083:11 37085:25 37086:4,1737050:6 37052:1 37060:10,13,15,16,237157:19 37158:16 37168:13 37169:12 37169:21 37171:1737174:6 foresee 37070:1frequently 37133:23 Friday 37074:1337092:18 37098:9 37064:17 37067:2337169:21 37171:17 37155:21 37156:1 foreseeable 37066:23foresee 37070:1 friend 37147:1237101:4,8 37106:23 37078:637069:7 37071:11 37125:5 37127:437134:22 37138:4 37161:1 37165:4 37161:1 37165:4foreseen 37048:6,7 foresight 37066:13 37174:1friend 37147:12 s7113:22 37114:2537141:8 37145:8 37140:6 37150:5,1937093:19 37094:10 37150:8 37153:437141:2 fix 37145:5 fix 37145:5forever 37085:5 37092:5 37182:2137152:2,2,11,21 37153:13 37154:337162:4 37165:1 37132:137113:19 37162:4 37165:1fix af145:5 fix af145:5foreget 37168:16frustrating 37130:7 37153:13 37154:337143:23 37145:3	<i>,</i>			0	
37151:3,3,22 37152:12,16,20 37153:4 37154:19forensics 37124:22 foresaw 37047:20 37069:12,12 37099:937139:6 frequency 37106:21 frequenty 37138:12 frequenty 37133:2337075:10 37076:25 37077:12 37083:11 37085:25 37086:4,17 37060:10,13,15,16,23 37074:18,19 37074:18,19 37074:18,19 37076:18 37078:5,2 37174:12 37113:22 37114:25 37141:8 37142:5 					
37152:12,16,20 37153:4 37154:19 37157:19 37158:16 37168:13 37169:12foresaw 37047:20 37069:12,12 37099:9frequency 37106:21 frequent 37138:12 frequent 37138:12 frequent 37133:2337077:12 37083:11 37085:25 37086:4,17 37085:25 37086:4,1737053:21,21 37060:10,13,15,16,2 37071:11 37074:18,19 37074:18,19 37125:13,37124:4 37125:13,37124:4 37076:18,37078:5,2 37128:17,37131:1 37089:22,37091:11 37089:22,37091:11 37132:13,37133:18 37093:19,37094:10 37131:22,37114:25 37141:8,37145:8 37098:9,10,11,13 37174:1 57152:2,2,11,21 37152:2,2,11,21 37152:2,2,11,21 37152:2,2,11,21 37162:4,37165:1 37118:18,37126:3,11 37113:22,37114:23 37143:23,37145:337077:12,37074:13 37175:14,37178:1237145:5 fixation 37137:6foresea 37048:6,7 forget 37168:16frequenty 37130:7 fix313,37154:337162:4,37165:1 37113:1237101:24,37104:					
37153:4 37154:19 37157:19 37158:16 37168:13 37169:12 37169:21 37171:1737069:12,12 37099:9 37174:6 foresee 37070:1 37155:21 37156:1 37155:21 37156:1 foreseeable 37066:23 37074:25frequent 37138:12 friend 37147:12 friend 37147:12 friend 37147:1237085:25 37086:4,17 37092:18 37098:9 37092:18 37098:9 37064:17 37067:3 37069:7 37071:11 37074:18,19Firstly 37047:24 five 37067:2 37119:16foresee 37070:1 37074:25Friday 37074:13 37076:637123:13 37124:4 37125:5 37127:437069:7 37071:11 37076:18 37078:5,2 37076:18 37078:5,2 37076:18 37078:5,237134:22 37138:4 37161:1 37165:4 37161:1 37165:4foreseen 37048:6,7 foresight 37066:13 37174:1front 37031:4 37055:1 37113:22 37114:2537132:1 37133:18 37141:8 37145:837093:19 37094:10 37150:8 37153:4Five-minute 37161:2 fix 37145:5 fixation 37137:6foreyer 37085:5 37092:5 37182:21 37168:1637152:2,2,11,21 37153:13 37154:3 37130:737162:4 37165:1 37175:14 37178:1237143:23 37145:3				37075:10 37076:25	
37157:19 37158:16 37168:13 37169:12 37169:21 37171:1737174:6 foresee 37070:1 37155:21 37156:1 foreseeble 37066:23 37074:25frequently 37133:23 Friday 37074:13 37078:637092:18 37098:9 37101:4,8 37106:23 37101:4,8 37106:23 37123:13 37124:437064:17 37067:3 37069:7 37071:11 37074:18,19Firstly 37047:24 five 37067:2 37119:16foreseeble 37066:23 37074:25friend 37147:12 friends 37095:1037125:5 37127:4 37125:5 37127:437076:18 37078:5,2 37076:18 37078:5,237134:22 37138:4 37161:1 37165:4 37161:1 37165:4foreseen 37048:6,7 foresight 37066:13 37174:1front 37031:4 37055:1 37113:22 37114:2537132:1 37133:18 37140:6 37150:5,19 37150:8 37153:437093:19 37094:10 37150:8 37153:4Five-minute 37161:2 fix 37145:5 fixation 37137:6foreset 37085:5 37092:5 37182:21 forget 37168:1637152:2,2,11,21 37153:13 37154:3 37130:737162:4 37165:1 37175:14 37178:1237143:23 37145:3	37152:12,16,20	foresaw 37047:20		37077:12 37083:11	37053:21,21
37157:19 37158:16 37168:13 37169:12 37169:21 37171:1737174:6 foresee 37070:1 37155:21 37156:1 foreseable 37066:23 s7067:2 37119:16frequently 37133:23 s7074:2537092:18 37098:9 37164:17 37067:3 37101:4,8 37106:23 37101:4,8 37106:23 37123:13 37124:437064:17 37067:3 37069:7 37071:11 37105:21 37156:1 s7074:25Firstly 37047:24 five 37067:2 37119:16foreseable 37066:23 37074:25friend 37147:12 friend 37147:1237125:5 37127:4 37125:5 37127:437076:18 37078:5,2 37076:18 37078:5,2five 37067:2 37119:1637074:25 37074:25friend 37147:12 friend 37147:1237125:5 37127:4 37125:5 37127:437089:22 37091:11 37089:22 37091:1137134:22 37138:4 37161:1 37165:4 37161:1 37165:4 37171:22 37177:23foresight 37066:13 37174:137113:22 37114:25 37140:6 37150:5,19 37140:6 37150:5,1937132:1 37133:18 37150:8 37153:437098:9,10,11,13 37101:24 37104:4Five-minute 37161:2 fix 37145:5 fixation 37137:6foreget 37085:5 37092:5 37182:21 forget 37168:1637153:13 37154:3 frustrating 37130:737162:4 37165:1 37175:14 37178:1237143:23 37145:3	37153:4 37154:19	37069:12,12 37099:9	frequent 37138:12	37085:25 37086:4,17	37060:10,13,15,16,21
37168:13 37169:12 37169:21 37171:17foresee 37070:1 37155:21 37156:1 foreseeable 37066:23 37074:25Friday 37074:13 37078:637101:4,8 37106:23 37078:637069:7 37071:11 37123:13 37124:4Firstly 37047:24 five 37067:2 37119:16foreseeable 37066:23 37074:25Friend 37147:12 friend 37147:1237125:5 37127:4 37125:5 37127:437076:18 37078:5,2 37076:18 37078:5,2five 37067:2 37119:1637074:25 37074:25friend 37147:12 friend 37031:4 37055:137128:17 37131:1 37132:1 37133:1837099:22 37091:11 37093:19 37094:1037161:1 37165:4 37161:1 37165:4 37171:22 37177:23foresight 37066:13 37174:137113:22 37114:25 37140:6 37150:5,1937141:8 37145:8 37150:8 37153:437098:9,10,11,13 37101:24 37104:4Five-minute 37161:2 fix 37145:5 fixation 37137:6foreget 37168:1637153:13 37154:3 frustrating 37130:737162:4 37165:1 37175:14 37178:1237143:23 37145:3		-			
37169:21 37171:1737155:21 37156:137078:637123:13 37124:437074:18,19Firstly 37047:24foreseeable 37066:23friend 37147:1237125:5 37127:437076:18 37078:5,2five 37067:2 37119:1637074:25friend 37147:1237125:5 37127:437076:18 37078:5,237134:22 37138:4foreseen 37048:6,7friend 37031:4 37055:137132:1 37131:137093:19 37094:1037161:1 37165:4foresight 37066:1337113:22 37114:2537141:8 37145:837098:9,10,11,1337171:22 37177:2337174:137140:6 37150:5,1937150:8 37153:437101:24 37104:4Five-minute 37161:2forever 37085:537152:2,2,11,2137156:5 37159:1237105:2,3 37113:19fix 37145:537092:5 37182:2137153:13 37154:337162:4 37165:137118:18 37126:3,11fixation 37137:6forget 37168:16frustrating 37130:737175:14 37178:1237143:23 37145:3	37168:13 37169:12	foresee 37070:1		37101:4,8 37106:23	37069:7 37071:11
Firstly 37047:24foreseeable 37066:23friend 37147:1237125:5 37127:437076:18 37078:5,2five 37067:2 37119:1637074:25friends 37095:1037128:17 37131:137089:22 37091:1137134:22 37138:4foreseen 37048:6,7front 37031:4 37055:137132:1 37133:1837093:19 37094:1037161:1 37165:4foresight 37066:1337113:22 37114:2537141:8 37145:837098:9,10,11,1337171:22 37177:2337174:137140:6 37150:5,1937150:8 37153:437101:24 37104:4Five-minute 37161:2forever 37085:537152:2,2,11,2137156:5 37159:1237105:2,3 37113:19fix 37145:537092:5 37182:2137153:13 37154:337162:4 37165:137118:18 37126:3,11fixation 37137:6forget 37168:16frustrating 37130:737175:14 37178:1237143:23 37145:3	37169:21 37171:17	37155:21 37156:1		-	37074:18,19
five 37067:2 37119:1637074:25friends 37095:1037128:17 37131:137089:22 37091:1137134:22 37138:4forescen 37048:6,7front 37031:4 37055:137132:1 37133:1837093:19 37094:1037161:1 37165:4foresight 37066:1337113:22 37114:2537141:8 37145:837098:9,10,11,1337171:22 37177:2337174:137140:6 37150:5,1937150:8 37153:437101:24 37104:4Five-minute 37161:2forever 37085:537152:2,2,11,2137156:5 37159:1237105:2,3 37113:19fix 37145:537092:5 37182:2137153:13 37154:337162:4 37165:137118:18 37126:3,11fixation 37137:6forget 37168:16frustrating 37130:737175:14 37178:1237143:23 37145:3			friend 37147:12		37076:18 37078:5,23
37134:22 37138:4 37161:1 37165:4 37171:22 37177:23forescen 37048:6,7 foresight 37066:13 37171:22 37177:23front 37031:4 37055:1 37141:2 37114:2537132:1 37133:18 37141:8 37145:837093:19 37094:10 37141:8 37145:8Five-minute 37161:2 fix 37145:5 fixation 37137:6forescen 37048:6,7 foresight 37066:13 37174:1front 37031:4 37055:1 37140:6 37150:5,19 37152:2,2,11,2137132:1 37133:18 37141:8 37145:837093:19 37094:10 37141:8 37145:8fix 37145:5 fixation 37137:6forescen 37048:6,7 foresight 37066:13 37085:5front 37031:4 37055:1 37140:6 37150:5,19 37152:2,2,11,2137130:7 37156:5 37159:1237093:19 37094:10 37156:5 37159:1237101:24 37104:4 37145:5forever 37085:5 37092:5 37182:21 forget 37168:16front 37031:4 37055:1 37153:13 37154:3 37130:737162:4 37165:1 37175:14 37178:1237143:23 37145:3					
37161:1 37165:4 37171:22 37177:23foresight 37066:13 37174:137113:22 37114:25 37140:6 37150:5,1937141:8 37145:8 37150:8 37153:437098:9,10,11,13 37101:24 37104:4Five-minute 37161:2 fix 37145:5forever 37085:5 37092:5 37182:2137152:2,2,11,21 37153:13 37154:337156:5 37159:12 37162:4 37165:137101:24 37104:4 37105:2,3 37113:19fix ation 37137:6forget 37168:16frustrating 37130:737175:14 37178:1237143:23 37145:3					
37171:22 37177:2337174:137140:6 37150:5,1937150:8 37153:437101:24 37104:4Five-minute 37161:2forever 37085:537152:2,2,11,2137156:5 37159:1237105:2,3 37113:19fix 37145:537092:5 37182:2137153:13 37154:337162:4 37165:137118:18 37126:3,11fixation 37137:6forget 37168:16frustrating 37130:737175:14 37178:1237143:23 37145:3	/ 31 1 1.52				
Five-minute 37161:2 fix 37145:5forever 37085:537152:2,2,11,2137156:5 37159:1237105:2,3 37113:19fix 37145:537092:5 37182:2137153:13 37154:337162:4 37165:137118:18 37126:3,1fixation 37137:6forget 37168:16frustrating 37130:737175:14 37178:1237143:23 37145:3					
fix 37145:537092:5 37182:2137153:13 37154:337162:4 37165:137118:18 37126:3,1fixation 37137:6forget 37168:16frustrating 37130:737175:14 37178:1237143:23 37145:3	In It I Prese	2			
fixation 37137:6 forget 37168:16 frustrating 37130:7 37175:14 37178:12 37143:23 37145:3					
[1003100110-57072.21] [101give 57070.25] [10137117.12-57157.17] 57100.20-57102.17] [-57159.0-57100.14]			0		
ARCHIVE FOR LUSTICE			1011 <i>J</i> / 117.12 <i>J</i> / 134.1/	5/100.20 5/182.17	57157.0 57100.14

good 37065:24 370765:29 hasn't 37125:18 37076:63 37126:63 37167:5 37085:9 GW4A 37106:13 haste 3707613 higher 370611 37085:9 GW4A 37106:13 higher 37126:63 higher 37166:14 37036:12 3706:13 371172:37160:21 higher 37126:13 371172:37160:21 37033737106:11 H hadn't 3708:3709:12:1 37160:16 371172:37160:21 37071:19 J J hadn't 37093:17.17 37106:16 371172:37160:21 37070:22 37116:23 37106:14 37070:23 37108:16 37132:23 37082:14,16 37106:14,22 37147:937149:3 37132:83 37132:83 37132:83 37092:23 37178:5 37109:13 37112:12 37132:83 37132:82 37092:23 37178:15 37109:13 37113:12 37132:83 37132:83 37092:13 hamger 3712:12 37143:43 37132:83 37132:83 37132:82	37101:18
good 37027:10.12 guy 37085:9 hasn't 37125:18 37075:6 37162:1 higher 37076:11 1 37082:24 37063:14 GWAA 37163:16 maxen't 37125:18 37160:10 37160:10 1 37086:6 37104:7 GWAA 37163:16 maxen't 37125:18 37160:10 37160:10 1 37036:1 21 37037:19 T H hade 37074:1 37077:23 1 1 1 1 1 37161:10 37161:10 37161:10 37161:10 37161:10 37161:10 37161:10 37161:10 37172:11 37161:10 37161:10 37161:10 37161:10 1 1 1 3706:12 37161:10 37161:10 1 1 1 1 1 1 3706:12 37161:10 3	
37062:24 37063:3.4 gnys 37143:23 37126:6 37167:5 higher 37076:11 37089:6 37104:7 GW4A 37163:16 haven*1 37112:3 higher 37076:13 37160:10 37165:8 37089:6 37030:11 G20 37106:13 371161:20 371738.9 37161:20 371738.9 37161:20 371738.9 37051:21 37037:19 J7161:20 371738.9 37161:20 371738.9 37171:23 37172:1 37051:31 37071:10 37023:17 half *1 37093:22 head 37074:1 37077:23 hill 37095:11 37071:10 37072:17 37039:17,17 37094:17 37104:24 37164:29 history 37163:6 37082:14,16 37106:14,22 37161:03 7104:24 37163:63 37163:10 history 37163:6 37082:37178:5 37109:13 37141:16 37070:22 37073:13 hited 37135:16 37132:83 37135:16 37092:23 37178:5 37183:10 37092:12 3718:17 hold 37063:037079:11 heard 37081:17 hold 37063:072:5 graes 37140:6 handed 37055:12 hearig 37159:13 37169:14 hold 37063:072:5 graes 37140:7 handed 37055:12 hard 3709:13 37077:10 37149:437135:16 37155:23718:5 37114:12 371414:11 <td< td=""><td>humanitarian</td></td<>	humanitarian
37089:6 37104:7 ČW4B 37163:16 haste 37076:13 37161:01 3716:8 highes 37178:9 37097:13 7030:11 37097:13 706:11 37161:02 37173:8,9 37161:02 37173:8,9 3717172:37160:21 3717172:37160:21 3717172:37160:21 3717172:37160:21 3717172:37160:21 3717172:37160:21 3717172:37160:21 3717172:37160:21 3717172:37160:21 37161:01 37093:22 37161:01 37093:22 37161:01 37093:22 37161:01 37093:22 37161:01 37093:22 37161:01 37093:22 37161:01 37093:22 37161:01 37093:22 37161:01 37093:22 37161:01 37093:22 37161:01 37093:22 37161:01 37093:22 37161:01 3708:74 37094:22 37161:03 37097:13 371091:037161:3 37161:03 3716:12 37161:03 3716:12 37161:03 3716:12 37161:03 3713:10 grabbing 37137:14 hander 37157:20 37094:13 37077:10 37119:13 37119:13 37109:13 37119:13 37119:18 37077:10 37119:13 3713:10 graes 37165:18 37137:14 hander 37055:12 37119:13 3714:14 hander 37055:12 37119:13 3714:14 handg 37057:13 Hold 37053:03 3707:10 37115:63 3713:15 graes 37155:18 37137:17.21 hande 37052:33 hande 37052:33	37159:15
37141:14 GW4B 37163:18 37036:1.21 37037:19 haven't 37112:3 37117:2 37160:21 highes 37178:9 37117:2 37160:21 37036:1.21 37037:19 H G20 37106:13 37117:2 37160:21 highes 37178:9 highes 37178:9 37155:16 hadn't 37093:22 37160:10 37171:23 37172:13 highes 37085:11 highes 37085:12 governnet 37165:22 37116:23 37106:14 37071:19 37072:17 37039:17,17 37094:17 37104:24 37082:14,16 37106:14,22 37117:20 atlet 37082:10 37149:3 37132:8 37135:16 37082:14,16 37106:14,22 37109:13 37141:16 heard 37081:16 37132:8 37135:16 grab 37137:8,12 halted 37157:20 37081:4 37108:17 Holes 37175:19 Hit 371315:16 grab 37137:8,13 37137:8,13 37137:8,13 37109:13 3716:10 37123:22,37137:5 graes 37140:6 37137:8,13 37137:8,13 37137:8,13 37137:8,13 37132:32 37137:5 graes 3716:10:3 371412:4 371412:4 371417:3 37123:22 37133:31 graes 37140:6 37137:8,13 37092:3 37137:83 37023:37077:1	humbleness 37133:14
Google 37030:11 37036:1,21 37037:19 G20 37106:13 37117:2 37160:21 37161:20 37173:8,9 high 37137169:14 37171:23 37172:1 ingh 37137169:14 37171:23 37172:1 37036:1,21 37037:19 Jandr 13009:22 37116:22 hadr 13009:22 37161:20 37173:8,9 Jandr 13009:22 Jandr 137092:8 Jandr 137092:8 Jandr 137092:8 Jandr 137092:8 Jandr 137092:8 Jandr 137092:8 Jandr 137092:8 Jandr 137092:8 Jandr 137092:8 Jandr 14:0 Jan	humbly 37171:5
37036:1.21 37173:8.9 37171:8.9 37171:12 371711:12 37171:12 37171:12	hurdle 37180:18
37039:7 37106:11 H hadn't 37093:22 hadn't 37093:22 hill 37074:1 37077:23 hill 37095:11 govermed 37165:22 s7116:23 hadn't 37093:22 s7160:16 hill 37092:25 hill 37095:11 govermed 37057:7 s7071:19 s7039:17,17 s7094:17 s7094:17 s7094:17 s7094:17 s7094:17 s7094:17 s7094:17 s7104:24 s7144:19 s7145:16 s7135:16 s7155:22 s7175:10 s7166:24 hold 37063:63 s7075:10 hold 37063:63 s7075:10 s7149:43 s7165:10 s7149:43 s7155:22 s7175:15 s7165:10 s7164:14 s7076:15 s7149:43 s7164:14 s7076:15 s7149:43 s7164:14 s7076:15 s7149:43 s7164:14 s7076:15 s7149:43 s7164:12 s7064:12 s70764:	hybrid 37124:22
and n't 37093:22 and n't 37093:22 and n't 37093:22 and n't 37093:22 hig 37032:25 hig 37032:23 hig 37032:23 hig 37032:23 hig 37032:23 hig 37032:23 hig 37032:23 hig 37032:22 hig 37032:23 <	т
governed 37165:22 37116:23 headlines 37092:22 hire 37085:4 37085:5 37115:5 37145:4 37145:4 37075:10 37114:10 37085:4 37095:5 37115:5 37118:10 37075:22 37075:23	I
government 37037:7 half 37038:3 hare 3708:10 history 3716:10 37071:19 37070:21 37039:17,17 3709:17,37104:24 37104:9 37103:23 37132:8 37132:8 37132:8 37132:8 37132:8 37132:8 37132:8 37132:8 37132:8 37132:8 37132:8 37132:8 37132:8 37132:8 37132:8 37132:8 37132:8 37132:8 37132:8 37133:10 3709:22 370712:1 Hongy and	icons 37036:2 37037:19 idea 37065:20
37071:19 37039:17,17 37094:17 37094:17 37094:17 37094:17 37104:24 hit	37074:22 37133:18
37076:22 37070:24 37092:8 37105:16 37125:13 hit 37131:22,23 i 37082:14,16 37106:14,22 37147:9 37149:3 37132:8 37135:16 37138:12 heard 37081:4 37108:17 3708:6:6 37108:17 3708:6:6 37108:17 37078:6 37108:17 37078:6 37108:17 37132:8 37135:12 37135:13 37135:13 37135:16 37135:22 37137:5 37135:22 37137:5 37135:22 37137:5 37149:2 37149:2 37149:2 37149:2 37149:2 37149:2 37149:2 37137:50 37155:6 3718:12 37165:16 3708:3718:12 3704:12 3704:12 3704:12 3704:12 3704:12 3704:12 3704:12 3704:12 3704:12 3704:12 37165:13 37166:16 37166:13 37166:16<	37159:12
37082:14,16 37106:14,22 37147:9 37149:3 37132:8 37135:16 37132:8 37135:16 37092:23 37178:5 37109:13 37141:16 37070:22 37073:13 Hongware 37133:10 grab 37137:8,12 halted 37157:20 37081:4 37108:17 Hoek 37176:19 grab 37137:8,12 halted 37152:20 37081:4 37108:17 Hoek 37176:19 grab 37137:8,12 halted 37152:20 37081:4 37108:17 Hoek 37176:19 gras 37140:6 hand 37050:3 37077:10 37086:6 37108:17 i gras 37140:6 hand 37055:12 hearses 37068:19 37142:3 37145:5 i great 3707:05 37126:6 handgun 37117:20 37177:17 holdis 37027:22 holdis 37027:22 grenade 37116:1,2 37042:21 37073:06 37038:9 37079:3 37127:20 37167:10 37168:15 37116:3,24 37114:1,4 hands 37042:3 halde 3702:23 halde 3705:23 holdi 37075:12 37167:10 37168:15 37116:3,24 37114:1,8 happen 37041:20 37167:10 37168:15 37167:10 37168:15 37167:10 37168:15 37116:3,24 37195:11 3702:41 3705:12 37075:10 37106:25 3716:10 37168:15 37168:10 370	identification 37162:23
37092:23 37178:5 37109:13 37141:16 heard 37031:16 37158:22,22 i go-ahead 37082:15 37183:10 37070:22 37073:13 Hlongwane 37133:10 grab 37137:81,2 halted 37157:20 37081:4 37108:17 Hock 37176:19 grabs 37137:81,2 hamper 37172:8 37119:18 37166:24 hold 37063:6 37072:5 i grateful 37097:18 37107:10 37126:12 handed 37055:12 hearing 37159:7 37078:6 37108:17 i greav 37165:22 37179:7 37074:18 handed 37055:12 heard 37087:10 37149:4 37151:5 i ferece 37062:10 handgun 37117:20 37117:17 holds 37027:22 hold 37037:5 i grenade 37116:1,2 37140:2 heavity 37076:15 holding 37057:5 i grenade 37116:1,2 37140:2 handgun 37042:8 37044:13 37037:3723 Holda 37057:5 i grenade 37116:1,2 37140:2 handgun 37042:8 37044:12 37037:37373 i hold 37057:5 i grenade 37118:14 handgun 37042:8 37044:14 37075:23,24 37168:15 i	identified 37161:14
grab 37137:8,12 halted 37157:20 37081:4 37108:17 Hoek 37176:19 grab 37137:14 hamper 37172:8 37119:18 37166:24 hold 37063:63 7072:5 indl 37063:63 7072:5 grass 37140:6 hand 37050:3 37079:11 arring 37159:7 37078:6 37108:17 37078:6 37108:17 graes 37140:6 arring 37157:10 37137:8,13 37066:13 37077:10 37149:4 37151:5 37149:4 37151:5 great 37070:5 37126:6 arring 37157:20 handed 37055:12 heart 37087:4 37091:5 hold 370637:22 grenade 37116:1,2 37140:2 heary 37058:9 hold 37057:55 i grenades 37113:17,21 hande 37052:3 held 37030:6 37038:9 3709:3 37127:20 37118:18 hands 37042:21 37041:12 37043:8 37182:3 37127:20 37116:3,14,18 hang 37042:21 37045:12 371075:12 37167:10 37168:15 37106:37085:5 37044:11 37082:13 37075:10 371065:5 37178:12 37090:13 7705:8 37042:4,12 37044:4 37075:10 371065:5 37178:2 37090:13 37065:8 37042:4,12 37044:4 37177:13 37183:3 37092:3 37096:18	identify 37100:13
grabbing 37137:14 grass 37140:6 hand 37050:3 37079:11 systemhamper 37172:8 hand 37050:3 37079:11 hearing 37159:7systemgrass 37140:6 grave 37155:18 37155:22 37179:7a7011:0 37126:12 37075:5 37155:22 37179:7a7078:6 37108:17 37123:22 37137:5great 37070:5 37126:6 37155:22 37179:7handed 37055:12 anded 37055:12hearing 37077:10 heares 37068:19 37149:4 37151:537149:4 37151:5greade 37062:10 grenade 37116:1,2 37113:24 37114:1,2 37114:19 37115:11handg ar 37172:0 37042:21heart 37087:4 37091:5 heavily 37076:15hold 37063:6 37072:2 heavily 37076:15grenade 37116:1,2 37114:19 37115:11 37065:21handg 37052:3 hands 37042:8held 37030:6 37038:9 37073:17 37075:12hold 37057:5 37075:12 37168:16 37172:20 37075:33 3709:11 37114:19 37115:11hang 37042:21 37044:1137075:12 37168:16 37173:24 37167:10 37168:15ground 37063:23 37099:11 37114:10 37082:18 37062:13 37099:11 37114:10happen 37041:20 37082:18 37063:18 37023:13 37095:213712:22 37039:1 37168:16 37173:24 37177:13home 37092:9 37095:7 37168:16 37165:9group 37034:6 37024:41 37051:22 37057:43712:24 37155:16 37088:13,15 37089:9 37068:15 37061:27 37088:13,15 37089:937168:10 37163:23 37095:10 37106:5group 37034:6 37095:10 37106:10 37068:10 37063:23 37095:10 37106:10 37068:10 37063:33 37095:10 37106:10 37063:13 37095:12hoped 37065:37072:9 37075:12 37166:18 	37103:17 37149:3
grass 37140:6 hand 37050:3 37079:11 hearing 37159:7 37078:6 37108:17 i grate dil 37097:18 37101:10 37126:12 37069:13 37077:10 37149:4 37151:5 i grate 37155:12 s7137:8,13 37069:13 37077:10 37149:4 37151:5 i great 37070:5 37126:6 handed 37055:12 heart 37087:4 37091:5 holding 37183:4,7,11 i Greece 37062:10 handgun 37117:20 37149:4 37155:6 3718:5 i holding 37183:4,7,11 i grenade 37116:1,2 37140:2 heavily 37076:15 holding 37183:4,7,11 i holds 37057:5 i grenade 37113:1,21 handguns 37118:2 heckler 37137:23 Holland 37057:5 i i 37114:19 37115:11 37095:21 37073:17 37075:12 3716:16:137168:15 i i 37092:3 37096:18 37042:21 37078:16 3708:20 37178:22 37137:23 i	37163:18 37177:17
grateful 37097:18 37101:10 37126:12 hearses 37068:19 37123:22 37137:5 i grave 37155:18 37137:8,13 37069:13 37077:10 37149:4 37151:5 i	identifying 37140:14
grave 37155:18 37137:8,13 37069:13 37077:10 37149:4 37151:5 i great 37070:5 37126:6 handed 37055:12 heart 37087:4 37091:5 37155:6 37181:5 i 37155:22 37179:7 37074:18 heart 37087:4 37091:5 holding 37183:4,7,11 i Greece 37062:10 handgun 37117:20 37117:17 holds 37027:22 hold 37158:2,8 grenade 37116:1,2 37140:2 heavy 37058:9 holed 37158:2,8 Holland 37057:5 grenades 37113:17,21 37095:21 s7041:12 37043:8 37128:23 37122:0 37167:10 37168:15 37116:3,14,18 hang 37042:21 37073:17 37075:12 37167:10 37168:15 371620 37177:13 greievous 37128:12 groun 37063:23 happen 37041:20 37123:12 37172:15 37178:2 i 37092:13 37096:18 37062:13 37063:18 37075:10 37106:5 home 37092:9 37095:7 i 37092:3 37096:18 37068:13 37166:18 37077:10 37168:15 homelads 37053:3,3 i 37099:11 37114:10 37088:13,15 37089:9 37168:1,3,4 37177:11 homelads 37053:3,3 i 37099:13 37016:18 37	identity 37171:4
great 37070:5 37126:6 handed 37055:12 heart 37087:4 37091:5 37155:6 37181:5 i Greece 37062:10 arrade 3714:12 3714:12 3714:12 holdig 37183:4,7,11 i Greece 37162:10 arrade 37116:12 3714:2 heavy 37058:9 holde 37188:2,8 grenade 37113:24 37114:1,4 handguns 37118:2 Heckler 37030:6 37038:9 37079:3 37127:20 37116:3,14,18 handg 37042:21 37075:12 37167:10 37168:16 3717:22 grevous 37128:12 37044:11 37080:11 37082:12 37167:10 37176:20 37176:20 37177:13 i 37064:2,5,21 37075:13 37042:4,12 37044:4 37177:13 homeal 37053:3 i 37183:3 i 37092:9 37183:3 i 37175:10 37183:3 i i i i i i i i i	ignorance 37105:17
37155:22 37179:7 37074:18 heavily 37076:15 holding 37183:4,7,11 i Greece 37062:10 handgun 37117:20 37117:17 holds 37027:22 grenade 37116:1,2 37140:2 heavy 37058:9 hold 37158:2,8 grenades 37113:17,21 hande 37052:3 heckler 37137:23 hold 37057:5 i 37114:19 37115:11 37095:21 37042:12 37067:12 37167:10 37168:15 37163:14,18 hang 37042:21 37075:12 37167:10 37168:15 37167:10 37168:15 greivous 37128:12 37044:11 37080:11 37108:20 37176:20 37177:13 i 37092:3 37096:18 37061:13 37063:18 37072:12 37172:15 3718:3 home 37092:9 37095:71 i 37099:11 37114:10 37082:18 37086:5 37124:14 37051:11 help 37032:23 37039:1 homeiads 37053:3,3 i 37099:13 3714:2 37157:15 37166:18 helpful 37097:21 homeice 37165:9 i 37051:2 37005:8 37051:2 37057:4 37063:17 37072:3,3 37168:12,4 37177:15 homeids 37165:2 37095:10 37108:10 37063:17 37072:3,3	illustrate 37141:16
Greece 37062:10 grenade 37116:1,2 37113:24 handgun 37117:20 37140:2 37117:17 heavy 37058:9 holds 37027:22 holed 37158:2,8 grenade 37113:12 37113:24 handguns 37118:2 handguns 37118:2 heavy 37058:9 holds 37057:5 grenades 37113:17,21 37113:24 handguns 37042:8 37041:12 37043:8 37073:17 37113:24 37114:19 37115:11 37095:21 37075:23,24 37167:10 37168:15 37106:3,14,18 hang 37042:21 37075:23,24 37168:16 37173:22 37176:20 grewous 37063:23 happen 37041:20 37177:13 help 37032:23 37178:2 i 37099:13 37060:13 37063:18 37075:10 37106:5 37178:2 i 37099:13 37095:16 37088:13,15 37089:9 37168:16 37173:24 37099:11 37124:14 3708:13 37075:10 37106:5 i 37099:11 37043:46 37124:11,12 37124:10 37124:10 37144:19 37099:11 stripp 37034:6 37124:11,12 37124:10 37144:19 i	illustrated 37097:23
grenade 37116:1,237140:2heavy 37058:9holed 37158:2,837118:18handguns 37118:2heavy 37058:9holed 37057:5igrenades 37113:17,21handie 37052:3held 37030:6 37038:937079:3 37127:2037113:24 37114:1,4handie 37042:837041:12 37043:837128:23 37132:1137114:19 37115:1137095:2137075:12 37075:1237167:10 37168:1537116:3,14,18hang 37042:2137075:23,2437168:16 37173:24grievous 37128:1237044:1437080:11 37108:2037176:20 37177:13ground 37063:23happen 37041:2037123:12 37172:1537178:237092:3 37096:1837060:13 37063:1837075:10 37106:5home 37092:9 37095:737092:3 37096:1837088:13,15 37089:937165:10 37106:5homicide 37165:93712:4:24 37155:1637088:13,15 37089:937168:13,4 37177:11helpful 37097:21momicide 37164:17group 37034:637124:11,12 37147:237124:10 37141:937058:19 37068:337051:22 37057:437095:10 37108:1037063:17 37072:3,337059:15 37061:2,737073:13 37095:1937095:10 37108:1037063:17 37072:3,337059:15 37061:2,737072:13 37095:1937109:21,2437124:11 37125:2,3337095:15 37167:2437124:11 37125:2,3337109:21,2437088:43 7005:2437109:21,2437088:43 7005:2437109:21,2437088:43 7005:2437095:10 37108:1037063:17 37072:3,337059:15 37061:2,737072:13 37095:1937109:21,2437	image 37036:1,3,21
37118:18 grenades 37113:17,21 37113:24 37114:1,4 37114:19 37115:11handguns 37118:2 handle 37052:3 handle 37052:3 handle 37042:8Heckler 37137:23 held 37030:6 37038:9 37041:12 37043:8 37041:12 37043:8 37041:12 37043:8 37041:12 37043:8 37075:12 37167:10 37168:15 37063:23,24Holland 37057:5 37168:16 37173:24 37168:16 37173:24 37168:16 37173:24 37168:16 37173:24 37064:2,5,21 37075:8 37044:11 37044:11 37064:2,5,21 37075:8 37044:14 37051:11 37064:2,5,21 37075:8 37044:14 37051:11 37064:2,5,21 37075:8 	37037:19,20 37039:7
grenades 37113:17,21 37113:24 37114:1,4 37113:24 37114:1,4handle 37052:3 hands 37042:8held 37030:6 37038:9 37043:837079:3 37127:20 3703:17 37043:837113:24 37114:1,4 37116:3,14,18 grievous 37128:12 ground 37063:23hang 37042:21 happen 37041:1237073:17 37075:12 37042:4,1137075:23,24 3708:11 37108:2037168:16 37173:24 37168:16 37173:2437064:2,5,21 37075:8 37042:4,12 37044:437080:11 37108:20 37108:16 37086:537042:4,12 37044:4 37177:1337177:21 home 37092:9 37095:737092:3 37096:18 37099:11 37114:10 37082:18 37066:13 37063:18 37124:24 37155:1637080:13 37063:18 37022:3 37109:637075:10 37106:5 homeidas 37053:3,337099:11 37114:10 37082:18 37066:537084:1,3 57089:9 37168:1,3,4 37177:11homeidas 37053:3,3 homicide 37165:9group 37034:6 37059:1837102:5 37110:6 37025:3 37056:14,11 37058:19 37068:337051:22 37057:4 37051:22 37057:4helping 37081:21 honestly 37087:837095:10 37108:10 37058:19 37068:3 37051:22 37057:437061:17 37022:5,16 37056:14,1537082:6 37088:4 37059:15 37061:2,737072:13 37095:19 37072:13 37095:19 37056:3 37072:937109:21,24 37109:21,243703:23 37077:8 37056:17 37022:3,337051:22,7057:4 37056:12,7hope 37065:3 37072:9 37056:13 37057:24 37105:12 37057:437110:20 37111:6 37082:6 37088:4 37051:22 37057:437061:17 37022:5,16 37102:11 37103:21 37052:1437105:25 371072:2337111:20 37111:6 37112:2137124:11 37125:2,23 37140:18 37106:2437163:24 37084:17 37106:2437111:23 37114:12 37114:12 37114:1237124:	37039:16 images 37039:20
37113:24 37114:1,4 37114:19 37115:11hands 37042:8 37095:2137041:12 37043:8 37075:12 37075:1237128:23 37132:11 	37046:14 37139:6
37114:1937095:2137073:1737075:1237167:1037168:1537116:3,14,18hang37042:2137075:23,2437168:1637173:24grevous37128:1237044:1137080:1137108:2037176:2037177:13ground37064:2,5,2137042:4,1237044:437123:1237178:237178:237064:2,5,2137075:837042:4,1237044:437177:1337183:337092:337096:1837066:1337063:1837075:1037106:537099:1137114:1037082:1837065:537122:2437165:1337124:2437155:1637088:13,1537089:937168:1,3,437177:1137159:1837102:537102:537168:1happened37035:237049:18,20,2437157:1537053:237059:11homest 37161:1737055:1037068:337051:2037083:837059:1537061:2737095:1037068:337057:23,337059:1537061:2737072:1337095:1037063:1737072:3,337059:1537061:2737072:1337095:1037081:1037082:637088:437062:1937101:1937109:21,2437028:637088:437062:1937101:193715:5537110:2037114:237088:437062:1937101:1537155:537110:2037114:237128:1937128:1937168:2437088:1337109:21,2437082:637088:437062:1937105:1237165:5,9,11,13	imagine 37049:6
37116:3,14,18 grievous 37128:12hang 37042:2137075:23,2437168:16 37173:24ground 37063:23 37064:2,5,21 37075:837044:1137080:11 37108:2037176:20 37177:1337064:2,5,21 37075:837042:4,12 37044:437177.13home 37092:9 37095:737078:16 37086:537044:14 37051:11help 37032:23 37099:137183:337092:3 37096:1837060:13 37063:1837075:10 37106:5homelands 37053:3,337099:11 37114:1037088:13,15 37089:937168:1,3,4 37177:11homeide 37165:937124:24 37155:1637088:13,15 37089:937168:1,3,4 37177:11homest 37161:1737159:1837102:5 37110:6s1214:11,12 37147:237124:10 37141:9s7168:2037049:18,20,2437157:15 37166:18helpfully 37059:11homesty 37087:8inonesty 37087:837055:8 37051:20happened 37035:2s7058:19 37068:337051:22 37057:4Hemraj 37055:4,1137095:10 37108:1037063:17 37072:3,337059:15 37061:2,737075:13 37065:3 37072:937095:10 37108:1037082:6 37088:437062:19 37101:1537155:5 37167:2437111:20 37111:637082:6 37088:437062:19 37101:1537155:5 37167:2437114:12 37115:1,2037124:11 37123:137124:11 37123:137124:13 37123:137118:3,7 37121:2137124:21 37140:9,1537155:5,9,11,13horibly 37132:2037118:3,7 37121:2137124:11 37125:2,5337140:18 37156:2537183:5,737150:19 37151:2337140:18 37156:2537183:5,7hot 37084:17 37106:24	37065:14 37080:6
grievous37128:1237044:1137080:11 37108:2037176:20 37177:13iground37063:23happen37041:2037123:12 37172:1537178:2i37064:2,5,2137075:837042:4,12 37044:437177:13home 37092:9 37095:7i37078:1637086:537044:14 37051:11help37032:23 37039:137183:337092:337096:1837060:13 37063:1837075:10 37106:5homelands 37053:3,3i37099:1137114:1037082:18 37086:537122:24 37165:13homicide 37165:9i37124:24 37155:1637088:13,15 37089:937164:17homest 37161:17j37159:1837102:5 37110:6helpful 37097:21s7168:20i37050:8 37051:2037083:8 37044:9helpfully 37059:11homest 37161:1737095:10 37108:1037063:17 37072:3,337059:15 37061:2,737072:13 37095:1937095:10 37108:1037063:17 37072:3,337059:15 37061:2,737072:13 37095:1937110:20 37111:637082:6 37088:437062:19 37101:1537155:5 37167:2437114:12 37115:1,2037121:17 37123:137128:19 37136:2437088:1337114:12 37115:1,2037121:17 37123:137156:5,911,13horribly 37132:20i37150:19 37151:2337140:18 37156:2537183:5,7hot 37084:17 37106:24i37150:19 37178:337159:3 37164:19Hendrickx 37046:1137106:24i	37082:14,19
37064:2,5,21 37075:837042:4,12 37044:437177:13home 37092:9 37095:7i37078:16 37086:537044:14 37051:11help 37032:23 37039:137183:337092:3 37096:1837060:13 37063:1837075:10 37106:5homelands 37053:3,337099:11 37114:1037082:18 37086:537122:24 37165:13homicide 37165:937124:24 37155:1637088:13,15 37089:937168:1,3,4 37177:11homest 37164:1737159:1837102:5 37110:6helpful 37097:21homest 37164:1737049:18,20,2437157:15 37166:18helpful 37097:21homest 37161:1737050:8 37051:20happened 37035:2helpful 37059:11homesty 37087:837055:10 37108:1037063:17 37072:3,337059:15 37061:2,737177:1537095:10 37108:1037063:17 37072:3,337062:19 37101:1537105:4,1137109:21,2437073:3,23 37077:837062:19 37101:1537155:5 37167:24371113:23,23 37114:237124:11 37125:2,2337159:15 37061:2,737088:1337114:12 37115:1,2037124:11 37125:2,2337154:8,15 37155:12horeby 37087:2437114:12 37115:1,2037124:11 37125:2,2337154:8,15 37155:12horeby 37087:2437118:3,7 37121:2137128:2 37140:9,1537156:5,9,11,13hose 37064:2337150:19 37151:2337140:18 37156:2537183:5,7hor 37084:17 37106:24	imagined 37065:22
37078:16 37086:537044:14 37051:11help 37032:23 37039:137183:337092:3 37096:1837060:13 37063:1837075:10 37106:5homelands 37053:3,337099:11 37114:1037082:18 37086:537122:24 37165:13homicide 37165:937124:24 37155:1637088:13,15 37089:937168:1,3,4 37177:11homicide 37164:1737159:1837102:5 37110:6helpful 37097:21homest 37161:17group 37034:637124:11,12 37147:237124:10 37141:937168:2037049:18,20,2437157:15 37166:18helpfully 37059:11honestly 37087:837050:8 37051:20happened 37035:2helpfully 37059:11honegans 37176:16,2237056:11,1537068:337051:22 37057:4Hemraj 37055:4,11hope 37065:3 37072:937095:10 37108:1037063:17 37072:3,337059:15 37061:2,737072:13 37095:193710:20 37111:637082:6 37088:437062:19 37101:1537155:5 37167:243711:23,23 37114:237098:14 37110:737128:19 37136:2437088:1337111:17,17,18,2137124:11 37125:2,2337154:8,15 37155:12horibly 37132:2037118:3,7 37121:2137128:2 37140:9,1537156:5,9,11,13hose 37064:2337150:19 37151:2337140:18 37156:2537183:5,7hot 37084:17 37106:24	immediate 37143:24
37092:3 37096:1837060:13 37063:1837075:10 37106:5homelands 37053:3,337099:11 37114:1037082:18 37086:537122:24 37165:13homicide 37165:937124:24 37155:1637088:13,15 37089:937168:1,3,4 37177:11homicide 37164:1737159:1837102:5 37110:6helpful 37097:21homest 37161:17group 37034:637124:11,12 37147:237124:10 37141:937168:2037049:18,20,2437157:15 37166:18helpfully 37059:11honestly 37087:837050:8 37051:20happened 37035:2helping 37081:21hooligans 37176:16,2237056:11,1537088:8 37044:9helps 37083:1537177:1537058:19 37068:337051:22 37057:4Hemraj 37055:4,11hope 37065:3 37072:937095:10 37108:1037063:17 37072:3,337059:15 37061:2,737072:13 37095:1937109:21,2437073:3,23 37077:837061:17 37062:5,1637110:19 37105:2537110:20 37111:637082:6 37088:437062:19 37101:1537155:5 37167:2437114:12 37115:1,2037121:17 37123:137128:19 37136:2437088:1337117:17,18,2137124:11 37125:2,2337154:8,15 37155:12horeiby 37132:2037118:3,7 37121:2137128:2 37140:9,1537183:5,7hot 37084:17 37106:2437177:19 37178:337159:3 37164:19Hendrickx 37046:1137106:24	immediately 37077:15
37099:11 37114:1037082:18 37086:537122:24 37165:13homicide 37165:937124:24 37155:1637088:13,15 37089:937168:1,3,4 37177:11homicides 37164:1737159:1837102:5 37110:637124:11,12 37147:237124:10 37141:9honest 37161:1737049:18,20,2437157:15 37166:18helpfully 37059:11honestly 37087:8i37050:8 37051:20happened 37035:2helps 37083:15holoigans 37176:16,2237056:11,1537038:8 37044:9helps 37083:1537177:1537058:19 37068:337051:22 37057:4Hemraj 37055:4,11hope 37065:3 37072:937095:10 37108:1037063:17 37072:3,337059:15 37061:2,737072:13 37095:1937109:21,2437073:3,23 37077:837061:17 37062:5,1637101:19 37105:2537110:20 37111:637082:6 37088:437062:19 37101:1537155:5 37167:2437114:12 37115:1,2037121:17 37123:137128:19 37136:2437088:1337117:17,18,2137124:11 37125:2,2337154:8,15 37155:12horeibly 37132:2037118:3,7 37121:2137128:2 37140:9,1537156:5,9,11,13hoze 37064:2337150:19 37151:2337140:18 37156:2537183:5,7hot 37084:17 37106:24	37150:25
37124:24 37155:16 37159:1837088:13,15 37089:9 37102:5 37110:637168:1,3,4 37177:11 helpful 37097:21homicides 37164:17 honest 37161:17group 37034:6 37049:18,20,2437124:11,12 37147:2 37157:15 37166:18 happened 37035:237124:10 37141:9 helpfully 37059:11 helpfully 37059:11 helping 37081:21 holoigans 37176:16,22 37056:11,15homestly 37087:8 37058:19 37068:337055:19 37068:3 37095:10 37108:10 37109:21,2437063:17 37072:3,3 37073:3,23 37077:837059:15 37061:2,7 37062:5,1637065:3 37072:9 37062:5,1637110:20 37111:6 37113:23,23 37114:237088:4 37098:14 37110:7 37121:17 37123:137128:19 37136:24 37156:5,9,11,13 37156:5,9,11,13 37155:1237168:10 37084:17 37106:2437111:23,7 37121:21 37128:2 37140:9,15 37150:19 37151:2337128:2 37140:9,15 37169:3 37164:1937165:5,9,11,13 37183:5,7horeidy 37084:17 37106:24	imminence 37122:19
37159:1837102:5 37110:6helpful 37097:21honest 37161:17group 37034:637124:11,12 37147:237124:10 37141:9honest 37161:1737049:18,20,2437157:15 37166:18helpfully 37059:11honestly 37087:837050:8 37051:2037038:8 37044:9helpfully 37059:11holigans 37176:16,2237056:11,1537038:8 37044:9helps 37083:15hooligans 37176:16,2237058:19 37068:337051:22 37057:4Hemraj 37055:4,11hope 37065:3 37072:937095:10 37108:1037063:17 37072:3,337059:15 37061:2,737072:13 37095:1937109:21,2437073:3,23 37077:837061:17 37062:5,1637101:19 37105:2537110:20 37111:637082:6 37088:437062:19 37101:1537102:11 37103:2137114:12 37115:1,2037124:11 37125:2,2337154:8,15 37155:12horeibly 37132:2037118:3,7 37121:2137128:2 37140:9,1537156:5,9,11,13horeibly 37132:2037150:19 37151:2337140:18 37156:2537183:5,7hot 37084:17 37106:2437177:19 37178:337159:3 37164:19Hendrickx 37046:1137106:24	imminent 37122:9
group37034:637124:11,12 37147:237124:10 37141:937168:2037049:18,20,2437157:15 37166:18happened37035:237050:8 37051:20happened37035:237056:11,1537038:8 37044:937058:19 37068:337051:22 37057:437095:10 37108:1037063:17 37072:3,337095:10 37108:1037063:17 37072:3,337095:12,2437073:3,23 37077:837092:1,2437073:3,23 37077:837110:20 37111:637082:6 37088:437111:23,23 37114:237098:14 37110:737114:12 37115:1,2037121:17 37123:137114:12 37115:1,2037124:11 37125:2,2337118:3,7 37121:2137128:2 37140:9,1537150:19 37151:2337140:18 37156:2537177:19 37178:337159:3 37164:19Hendrickx 37046:1137106:24	37134:6 37142:25
37049:18,20,2437157:15 37166:18helpfully 37059:11honestly 37087:837050:8 37051:20happened 37035:2appened 37035:2helping 37081:2137056:11,1537038:8 37044:9helps 37083:15hooligans 37176:16,2237058:19 37068:337051:22 37057:4helps 37083:15hope 37065:3 37072:937095:10 37108:1037063:17 37072:3,337059:15 37061:2,737072:13 37095:1937109:21,2437073:3,23 37077:837061:17 37062:5,1637101:19 37105:2537110:20 37111:637082:6 37088:437062:19 37101:1537155:5 37167:2437113:23,23 37114:237098:14 37110:737102:11 37103:21hoped 37087:2437114:12 37115:1,2037121:17 37123:137128:19 37136:2437088:1337117:17,18,2137124:11 37125:2,2337154:8,15 37155:12horribly 37132:2037118:3,7 37121:2137128:2 37140:9,1537183:5,7hot 37084:17 37106:2437177:19 37178:337159:3 37164:19Hendrickx 37046:1137106:24	37149:16 37180:16
37050:8 37051:20happened 37035:2helping 37081:21hooligans 37176:16,2237056:11,1537038:8 37044:9helps 37083:1537177:1537058:19 37068:337051:22 37057:4helps 37055:4,11hope 37065:3 37072:937095:10 37108:1037063:17 37072:3,337059:15 37061:2,737072:13 37095:1937109:21,2437073:3,23 37077:837061:17 37062:5,1637101:19 37105:2537110:20 37111:637082:6 37088:437062:19 37101:1537155:5 37167:2437113:23,23 37114:237098:14 37110:737102:11 37103:21hoped 37087:2437114:12 37115:1,2037121:17 37123:137128:19 37136:2437088:1337117:17,18,2137124:11 37125:2,2337156:5,9,11,13hose 37064:2337150:19 37151:2337140:18 37156:2537183:5,7hot 37084:17 37106:2437177:19 37178:337159:3 37164:19Hendrickx 37046:1137106:24	impact 37151:5 impartial 37087:14
37056:11,1537038:8 37044:9helps 37083:1537177:1537058:19 37068:337051:22 37057:4Hemraj 37055:4,11hope 37065:3 37072:937095:10 37108:1037063:17 37072:3,337059:15 37061:2,737072:13 37095:1937109:21,2437073:3,23 37077:837061:17 37062:5,1637101:19 37105:2537110:20 37111:637082:6 37088:437062:19 37101:1537155:5 37167:2437113:23,23 37114:237098:14 37110:737102:11 37103:2137155:5 37167:2437114:12 37115:1,2037121:17 37123:137128:19 37136:2437088:1337117:17,18,2137124:11 37125:2,2337154:8,15 37155:12horribly 37132:2037118:3,7 37121:2137128:2 37140:9,1537183:5,7hot 37084:17 37106:2437177:19 37178:337159:3 37164:19Hendrickx 37046:1137106:24	37169:16 37171:11
37058:1937068:337051:2237057:4Hemraj37055:4,11hope37065:337072:937095:1037108:1037063:1737072:3,337059:1537061:2,737072:1337095:1937109:21,2437073:3,2337077:837061:1737062:5,1637101:1937105:2537110:2037111:637082:637088:437062:1937101:1537155:537167:2437113:23,2337114:237098:143710737102:1137102:1137103:2137114:1237115:1,2037121:1737123:137128:1937136:2437088:1337117:17,18,2137124:1137125:2,2337154:8,1537155:1237088:1337150:1937151:2337140:1837156:2537183:5,7hot37084:1737106:2437177:1937178:337159:337164:19Hendrickx37046:1137106:24	37173:19 37175:23
37095:10 37108:1037063:17 37072:3,337059:15 37061:2,7 $\bar{3}7072:13 37095:19$ 37109:21,2437073:3,23 37077:837061:17 37062:5,1637110:20 37111:637082:6 37088:437062:19 37101:1537113:23,23 37114:237098:14 37110:737102:11 37103:2137114:12 37115:1,2037121:17 37123:137128:19 37136:2437117:17,18,2137124:11 37125:2,2337154:8,15 37155:1237118:3,7 37121:2137128:2 37140:9,1537156:5,9,11,1337150:19 37151:2337140:18 37156:2537183:5,737177:19 37178:337159:3 37164:19Hendrickx 37046:11	37176:8
37109:21,2437073:3,23 37077:837061:17 37062:5,1637101:19 37105:2537110:20 37111:637082:6 37088:437062:19 37101:1537155:5 37167:2437113:23,23 37114:237098:14 37110:737102:11 37103:21hoped 37087:2437114:12 37115:1,2037121:17 37123:137128:19 37136:2437088:1337117:17,18,2137124:11 37125:2,2337154:8,15 37155:12horribly 37132:2037118:3,7 37121:2137128:2 37140:9,1537156:5,9,11,13hose 37064:2337150:19 37151:2337140:18 37156:2537183:5,7hot 37084:17 37106:2437177:19 37178:337159:3 37164:19Hendrickx 37046:1137106:24	impartiality 37167:17
37113:23,2337114:237098:1437110:737102:1137103:21hoped37087:24i37114:1237115:1,2037121:1737123:137128:1937136:2437088:1337088:1337117:17,18,2137124:1137125:2,2337154:8,1537155:1237088:13horribly37132:20i37118:3,737121:2137128:237140:9,1537156:5,9,11,13horse37064:23hot37084:1737106:24i37177:1937178:337159:337164:19Hendrickx37046:1137106:24i	37168:8 37169:6,8
37114:12 37115:1,2037121:17 37123:137128:19 37136:24 $\bar{3}7088:13$ 37117:17,18,2137124:11 37125:2,2337154:8,15 37155:12horribly 37132:2037118:3,7 37121:2137128:2 37140:9,1537156:5,9,11,13hose 37064:2337150:19 37151:2337140:18 37156:2537183:5,7hot 37084:17 37106:2437177:19 37178:337159:3 37164:19Hendrickx 37046:1137106:24	37171:15
37117:17,18,2137124:11 37125:2,2337154:8,15 37155:12horribly 37132:2037118:3,7 37121:2137128:2 37140:9,1537156:5,9,11,1337150:19 37151:2337140:18 37156:2537183:5,737177:19 37178:337159:3 37164:19	implement 37071:9,13
37118:3,7 37121:2137128:2 37140:9,1537156:5,9,11,13hose 37064:2337150:19 37151:2337140:18 37156:2537183:5,7hot 37084:17 37106:2437177:19 37178:337159:3 37164:19Hendrickx 37046:1137106:24	37074:15
37150:19 37151:23 37140:18 37156:25 37183:5,7 hot 37084:17 37106:24 1 37177:19 37178:3 37159:3 37164:19 Hendrickx 37046:11 37106:24 1	implementation
37177:19 37178:3 37159:3 37164:19 Hendrickx 37046:11 37106:24	37035:5
	implemented 37040:19
3/151/1 = 1.5/1070.5/11/170 = 1.5/0887/0 = 1.60000.5/01/06.5/01/001/01	37074:13,24
	37076:13 37094:3 implementing
groups 37049:25 37181:7happening 37075:7 37090:19 37148:9here's 37141:19 hey 37043:3hours 37127:21,25 	37042:14
•	implications 37178:7
	implying 37041:18
	importance 37080:4
guidance 37075:20 37132:23,23 37131:7,15 37143:9 HRC 37141:11	37179:7
	important 37056:21
guided 37075:19 happy 37057:13 37173:13 37175:23 huge 37057:6 37102:12	37067:23 37079:21
guidelines 37027:22 37093:13 37096:12 37179:20 human 37055:22	37081:20 37102:20
gun 37085:4 37117:21 37175:14 37176:1,2 HHH37 37111:10 37066:5,12,21	37103:1 37106:8
37119:24 37179:5 hide 37133:17 37090:13 37092:24	37107:19 37108:24
gunfire 37105:13 hard 37076:9 37142:15 high 37032:23 37033:1 37093:1 37100:9	37114:6 37115:13

				Page 10
37126:1 37131:10	37167:6 37180:24	inquiry 37074:9	37170:21 37172:5	issue 37048:6 37058:14
37146:22 37167:7	37181:14 37182:22	37125:11 37128:15	interpret 37109:21	37080:13 37081:19
37178:17	indicates 37049:6	37133:6	interrogation 37105:21	37081:20,20 37149:2
importantly 37047:25	37060:4 37108:10	inside 37103:22	interrogatories	37154:17 37165:17
imposed 37048:24	37166:5	37104:6	37044:16 37045:18	37168:19
impossible 37116:21	indication 37092:16	insiggewend 37043:10	37101:5 37129:24	issued 37076:16
37138:2	37099:10 37102:25	insiggewende 37043:11	37141:11 37169:12	issues 37052:6 37069:4
impression 37149:19	37163:10 37165:4,11	insight 37178:12	37179:6,16	37076:3 37091:14
37149:20 37151:24	37170:18	inspection 37097:4	interrogatory 37034:14	37126:5 37175:5
improve 37131:18	indistinct 37177:14	37145:2	37034:20 37045:14	issuing 37124:23
improvisation 37063:9	individual 37030:17	instances 37144:2	37057:3 37110:13	items 37118:5
improvise 37063:8	37050:8 37136:23	institutional 37166:8	37111:7 37145:12	I'd 37044:25 37045:13
improvise 37063:37 improvising 37062:25	37140:2 37149:7	instructed 37088:24,24	interrupt 37070:14	37045:16 37046:22
37063:5	37160:9 37167:3	37119:22	37073:20 37078:24	37053:16 37054:6
inaccuracy 37038:25	individuals 37049:25	instructing 37082:22	37121:14 37144:23	37084:10 37096:18
inadequate 37129:11	37092:23 37130:20	37083:7	interrupted 37046:23	37101:10 37115:10
37177:1	37134:25 37148:2,7	instruction 37086:16	37079:20	37101.10 37113.10
		37089:17 37128:16	interview 37128:1	
inadvertent 37135:3	37160:22			37130:5 37139:16
inadvertently 37134:21	induced 37127:22	instructions 37114:10	interviews 37121:20	37164:17 37165:11
37137:13	industrial 37072:18	instructor 37136:11	invariably 37082:13	37166:13 37169:21
inaudible 37028:19	ineffective 37114:2	insufficiently 37064:22	inverse 37115:3	37172:15
37062:21 37099:4	ineptitude 37134:24	insulting 37179:24	37138:4	I'll 37028:7,24
37106:4 37148:18	inevitably 37091:19	37180:6	inversely 37076:7	37068:24 37134:10
37180:19 37182:12	inflict 37154:23	integrity 37085:6,10	investigate 37075:9	37150:11 37167:21
incident 37051:17	influence 37032:17	37124:16	investigated 37031:25	37172:11
37057:4,8 37071:2	37073:11 37151:4	intelligence 37047:15	investigation 37125:5	I'm 37041:18 37043:5
37072:13 37080:2	informal 37084:8	37050:15 37060:10	37125:15 37148:15	37047:1 37048:7
37127:22 37128:14	information 37032:19	37067:15 37094:6	37165:20 37178:10	37053:18 37086:10
37128:24 37129:3,7	37032:22 37033:14	intend 37034:18	investigations	37086:15,17
37129:11 37131:2	37033:18 37047:19	37046:3,4 37121:9,14	37128:17	37088:14,22
37139:13 37145:9	37047:20 37048:10	37147:25 37156:15	invincibility 37047:14	37089:24 37090:19
37164:2 37176:19	37048:16 37060:9,15	intended 37036:3	37067:10	37091:2,8 37093:13
37177:13,22 37178:5	37067:12 37075:10	37037:20 37098:6	invincible 37050:22	37094:12 37096:12
incidental 37158:19,20	37078:2 37079:10,10	37114:3 37115:20	37051:4 37067:7	37096:14 37111:14
37160:21	37079:21 37081:13	37158:22 37170:19	invite 37087:16	37113:18 37115:21
incidents 37033:19	37083:4,15 37085:14	intending 37176:4	invoke 37104:13	37115:22,22
37051:3 37075:14	37109:15 37110:3	intends 37066:13	involuntarily 37143:9	37116:25 37117:2
37137:11 37163:5,8,9	37118:11 37120:22	intent 37117:3	involve 37037:2	37121:6 37125:13,19
37163:15,18,20	37125:8,9 37129:18	intention 37035:5	involved 37037:9	37128:2 37130:25
37164:1,9,18	37129:21 37133:15	37095:18 37116:7	37065:21 37080:15	37135:10 37136:17
37165:18	37133:22 37160:23	37148:2,6,8	37081:1 37128:23	37137:14,15 37141:3
inclined 37040:25	informed 37057:10	intentional 37128:11	37175:3	37160:6,6,12,15
37078:17	37085:22 37111:8	37158:19,20	involvement 37049:23	37161:12 37163:5
include 37030:24	inherent 37093:10	37160:21	37072:18 37122:23	37165:18 37167:1,12
37128:20 37169:16	initial 37039:10	intentions 37038:6	37124:1	37167:13,25 37168:3
included 37066:19	37075:14 37127:23	37095:20 37144:20	involving 37124:13	37168:3,4 37170:12
37101:3	initially 37127:19	interactions 37064:12	invulnerability	37173:2,16
includes 37162:16	37129:10 37138:5	37139:2 37160:14	37047:13	I've 37028:23 37032:15
including 37067:19	initiate 37034:10	interacts 37136:8	IPID 37122:4 37124:1	37032:22 37042:4
37161:18	37086:12	interest 37046:1	37124:14,19,20,23	37083:8 37084:9
incorrect 37108:21	initiated 37031:25	37087:4 37126:7	37125:4,15,17	37085:11 37086:2,2,3
37109:23	37032:2	interested 37030:7,8	37126:5,6,10,13	37088:17 37089:17
incredible 37122:10	injured 37177:24	37047:2 37088:22	37127:14,15 37128:2	37090:17 37091:20
incredibly 37106:24	injuries 37052:15,18	37163:14,15	37128:16 37129:5,6	37092:8 37108:17
indebted 37181:18	37160:11 37177:24	interesting 37043:2	37129:15	37111:24 37114:17
independence 37077:1	injury 37044:22	37069:15	IPID's 37122:23	37117:1 37119:13,18
independent 37076:22	37045:4,22 37048:21	interests 37080:3	37128:7	37120:16 37121:18
independently	37049:13,16	interference 37125:17	ipsissima 37084:2	37122:5,21 37126:18
37045:17	37051:12,15	intermediary 37095:15	Irish 37176:18	37126:18,20 37128:3
indicate 37037:20	37066:23 37070:1	internal 37125:14	irrespective 37087:16	37128:23 37131:5
37144:24 37167:16	37080:6 37106:16	international 37071:14	isn't 37120:16	37132:18 37135:5
37174:5,13 37179:14	37107:8 37122:9	37080:3 37085:19,24	37136:14 37137:2	37150:7 37165:11
37179:15 37180:24	37127:18 37134:6	37080:3 37083:19,24 37088:7 37123:17	37173:6,14	37166:24 37167:23
	present and a second seco			37166:24 37167:23 37173:20
indicated 37027:18	37143:1 37149:16	37126:24 37128:8	isolate 37115:10,14 37118:20	37173:20 i.e 37064:21 37138:20
37060:20 37107:23	input 37162:2,14	37142:24 37148:24		1.C 57004:21 57158:20
37111:7 37165:6	inquire 37133:7	37149:1,14 37154:21	isolated 37163:9	
ARCHIVE FO	R JUSTICE	1	1	1

			4	
				Page 1
	27166.10	1 1 07145 00	27000 10 27002 15	Ĭ
J	37166:10	lack 37145:23	37080:18 37082:15	37069:24 37070:25
ja 37033:11,23	justify 37086:3 37127:5	37174:13,14	37100:22 37129:17	37099:6 37109:9
37037:14 37038:1,14	37127:9 37130:24	lacking 37167:17	37170:17	37111:4 37180:12
37038:17,23	37133:8,13 37134:4	37173:19	left-hand 37056:5	liked 37089:20
37064:10 37066:10	37150:17	lacks 37168:8 37169:6	37059:16 37061:19	likelihood 37049:16
37073:22 37074:3		37169:8	legal 37027:19,25	37051:7 37053:7
37077:2 37079:4,22	K	lag 37151:21 37152:20	37028:2 37032:1,23	37090:12 37094:5
	kamikaze 37150:24	lamentable 37051:15	37083:2,4 37089:13	37182:3
37081:8 37082:3	keen 37168:1	landscape 37155:18	37089:18 37123:4	limit 37033:18 37105:4
37083:1,5,13	keep 37098:7 37117:4	language 37081:24	37126:23,24 37149:1	37138:24 37139:3
37084:22 37103:24	keeping 37049:2	37169:14,18	37150:2 37158:2,5	limitation 37117:24
37104:25 37107:25		· · · · · · · · · · · · · · · · · · ·		
37112:15,16	keeps 37100:23	37171:24 37172:1	37161:22 37162:13	limited 37038:4
37113:15 37121:5	kept 37164:25	languages 37098:13	37162:17,21 37163:1	37057:18 37058:25
37142:13 37143:11	key 37092:5	laptop 37042:25	37170:5,8 37171:9	37086:14 37112:14
37145:16,19	keys 37092:11	large 37106:20	37174:3 37180:2,18	37113:8 37120:15
37149:12,23	kicked 37120:4	largely 37057:15	lengthy 37083:8	37124:6 37130:14
37150:20 37151:20	Kidd 37140:16	37088:19	37106:3	37154:20
37151:25 37152:4	killed 37052:15	larger 37129:22	lesson 37131:10,13	line 37030:15 37052:16
37155:25 37152:4	37053:4 37095:25,25	lasted 37150:11	lessons 37052:7	37052:17 37061:10
37176:21 37181:24	37164:15 37165:7,8	37151:9	lethal 37031:24	37061:16 37067:25
	killing 37127:3,7	lately 37089:18	37062:13 37107:6	37076:19 37085:6
37183:9	killings 37165:9	Latin 37173:25	37108:24 37113:13	37090:21 37095:1
Jamaica 37165:6,12	kind 37042:19	law 37071:14 37076:20	37156:19 37157:12	37100:17,24,25
jargon 37134:16	37048:11,14	37092:16 37122:12	37157:24 37163:13	37103:7,13,14
jeans 37058:8				
jeopardising 37064:8	37075:14 37079:24	37123:17,18	37164:14 37166:9	37108:8,17 37109:20
JJJ178.10 37161:25	37080:17 37150:24	37135:10 37137:25	letter 37027:20,21	37110:24 37114:25
37162:6	kindly 37055:25	37142:24 37144:2	let's 37028:24	37115:16 37124:17
job 37040:8	KKK23 37120:18	37148:16,21,24	37042:10,14,21	37125:11 37150:5,23
JOC 37064:18 37069:1	knew 37047:10,14	37149:14,17	37044:12 37049:8,9	37152:2,2,11,16,20
37089:19	37052:2 37066:14	37156:18 37157:23	37054:4 37056:8	37152:21 37153:13
JOCCOM 37034:22	37113:11 37121:11	37159:15 37163:23	37077:5 37078:25	37154:3 37155:10
37035:20,24 37036:1	knife 37136:9,11	37167:4 37170:21,23	37079:9,12,19	37156:11,12
	knowing 37066:14	lawful 37142:9	37080:24,25	37164:15 37167:9
37036:20 37037:7,17	37078:15 37116:16	lawyer 37149:12	37127:21 37173:23	37178:12
37039:8 37043:15	37116:17	lay 37047:16 37179:14	37174:10	lines 37100:16 37101:3
37044:6,9 37045:12	knowledge 37075:7	lead 37049:24 37093:3	level 37032:23 37033:1	37101:20 37102:5
37048:23	37104:16,16	37108:10 37109:21		37101:20 37102:3
JOCOM 37068:2	· · · · · · · · · · · · · · · · · · ·		37041:19 37072:18	
Johannesburg 37113:5	37109:14 37124:6	37109:24 37110:19	37105:13 37106:2	37172:10
judge 37085:22	37151:16	37111:6 37113:22	37150:12 37165:23	linked 37160:9
37118:20 37122:18	known 37066:2,3	leader 37052:25	37172:11	37167:20
37129:14 37136:11	37069:23 37077:7	leaders 37034:15	levels 37072:23	list 37028:12,17,19,22
37136:21 37149:13	37103:18 37180:3	37044:16 37045:18	lie 37085:10	37028:25 37029:1,6
37149:13 37154:6	Koch 37137:23	37053:12 37055:23	lies 37168:24	37029:22 37054:17
judges 37087:13	koppie 37039:10	37102:2 37109:18	Lieutenant 37039:3	37066:19,21
judging 37104:12	37047:17 37050:17	37141:17,24	37156:24 37157:25	37094:15 37141:8
	37059:25 37060:8	37146:12	Lieutenant-Colonel	listen 37106:3,15
judgment 37030:21	37067:14 37074:22	leading 37181:3	37031:20 37034:3,10	listening 37159:7,7
37135:17,18,22	37075:2 37094:22	leaning 37101:23	37035:25 37037:18	literature 37141:6
37136:5 37160:22	37098:7,8 37141:1	learned 37038:3	37039:7 37044:12,12	little 37045:23
37172:7	37157:17 37158:2,9	37147:11 37180:14	37045:6 37067:3,21	37086:19
judicial 37062:14	-			
37076:6,10 37128:25	37158:10,15,17	learning 37175:18	37099:9 37156:23	live 37059:2 37068:6
judiciary 37080:20,24	37159:23	learnt 37052:7	37157:9 37158:7	37079:24 37142:11
jump 37041:15	kraal 37097:24	leave 37028:7 37029:11	Lieutenant-General	37158:10
37103:5 37132:1	37110:20 37114:12	37031:21 37046:21	37068:5 37073:7	lives 37080:5
jump-off 37114:16	37116:23 37117:22	37055:7 37072:16	Lieutenant-Generals	loathe 37159:16
June 37162:1 37169:11	37147:14,23,25	37084:12 37092:11	37077:24	37164:17
justice 37057:10	37155:21	37115:7 37150:11	life 37048:2 37049:13	locate 37027:16
37072:12 37086:22	Kruger 37111:16,19,24	37157:16 37178:20	37051:16 37122:7,9	37161:15
justices 37080:25	37112:5,12,17	37178:23	37122:11 37128:11	lock 37092:11
	Kuhn 37156:8	leaves 37110:11	37134:6 37138:9	logical 37128:15
justifiable 37132:24	Kumar 37133:9	37124:25 37163:8	37142:25 37143:4	London 37058:6
1			37142:25 57145.4	37059:1
justification 37133:2		leaving 37183+1		
37142:9 37180:15	K9 37139:25 37142:21	leaving 37183:1		
37142:9 37180:15 justifications 37124:12	K9 37139:25 37142:21	led 37166:7	lift 37132:1	long 37033:3 37070:15
37142:9 37180:15 justifications 37124:12 justified 37148:12	K9 37139:25 37142:21	led 37166:7 left 37030:10,14	lift 37132:1 light 37030:6 37031:18	long 37033:3 37070:15 37084:3 37091:21,23
37142:9 37180:15 justifications 37124:12	K9 37139:25 37142:21 L L 37108:15	led 37166:7 left 37030:10,14 37032:22 37057:23	lift 37132:1 light 37030:6 37031:18 37049:7 37060:23	long 37033:3 37070:15 37084:3 37091:21,23 37097:19 37101:20
37142:9 37180:15 justifications 37124:12 justified 37148:12	K9 37139:25 37142:21 L 37108:15 label 37049:17 37052:3	led 37166:7 left 37030:10,14	lift 37132:1 light 37030:6 37031:18	long 37033:3 37070:15 37084:3 37091:21,23

Tel: 011 021 6457 Fax: 011 440 9119

RealTime Transcriptions

37176:14	Major-General	maximum 37163:4,7	method 37174:14
longer 37064:3	37049:1	37163:21	methodology 37130:25
37122:23	making 37028:6	Mbombo 37033:5	37164:20
Lonmin 37072:18	37064:8 37072:6	37043:17 37044:3,3	methods 37047:21
37094:8 37095:6	37153:2 37169:7	37074:5 37081:12	37086:2 37105:21
Lonmin's 37072:20	37172:25	37082:4	37165:13
look 37035:2,22	Malema 37146:22,24	Mbombo's 37068:5	metres 37105:14
37042:14,21 37051:7	Malema's 37147:6	mean 37060:14	37107:1 37131:23
37052:8 37054:4	man 37027:5	37061:8 37063:1	37156:6
		37077:7 37078:4	microphone 37028:19
37055:9,13 37057:20 37064:14 37077:18	manage 37050:7	37084:20 37087:13	37062:21 37099:4
	37129:7 37146:5,9		
37078:5 37085:13	managed 37094:25	37105:19 37109:21	37101:23 37106:4
37087:14 37089:2	37103:17 37165:23	37158:20,23 37168:7	37148:18 37180:19
37090:23,24,25	37171:18	meaningful 37040:20	37182:12
37092:6 37102:14	management 37044:20	means 37034:9	microwave 37106:20
37103:11,13	37065:6 37070:22	37074:14 37096:17	middle 37056:20
37133:14 37134:2	37071:7 37073:3,4,17	37107:4 37109:3	mightn't 37048:8
37139:7 37141:18,24	37077:7 37078:10	37135:23 37174:1	mildly 37130:9
37149:19 37152:9	37081:5,15,23	37176:17	militant 37068:3
37153:10 37164:3	37135:7 37146:21	meant 37086:3 37100:4	military 37170:20
37165:3,14,21	managing 37075:14	37131:17,18	millimetre 37106:22
37168:19 37177:10	mandate 37091:2	37146:14 37157:15	37118:9 37119:23
looked 37038:5	37092:25	37172:18	37137:5,24 37177:23
37161:18,19	manifest 37115:19	measure 37152:19	million 37072:21
37173:10	manifestation	37155:9,15,16	37092:13
looking 37034:18	37099:13	measured 37105:6	mind 37041:20
37052:22 37055:8,8	manifestly 37071:15	37155:13	37042:11 37045:17
37059:4,6,7,16	manner 37089:22	measurement 37156:6	37046:13 37047:3
37061:24 37064:11	maps 37030:11	measures 37113:14	37051:16 37083:3
37091:8 37096:18	March 37027:23	media 37058:7 37145:4	37103:21 37104:19
37099:5 37100:19	37029:19 37108:15	mediator 37095:4	37132:23 37164:4
37102:19 37104:3	37120:4 37140:8	medical 37031:2,9	37182:4
37107:25 37115:6	marginally 37165:15	medics 37031:10	mindful 37067:22
37117:2 37131:8	Marikana 37036:5	meeting 37030:7	37160:6
37153:7 37168:17	37037:10 37046:15	37032:2 37048:25	minds 37046:5
looks 37168:14	37058:3 37065:17	37070:22 37073:21	mindset 37067:10
loosely 37043:5	37071:25 37072:14	37075:16 37079:7,7	mine 37110:14
loot 37058:10	37072:21,23 37076:4	37082:6 37084:16	mines 37146:24
loses 37167:7,10	37082:14 37090:18	meetings 37084:8	mineworkers 37067:17
loss 37048:2 37049:12	37104:4 37109:8	meets 37040:23	mining 37056:25
37051:15	37130:12 37147:2	member 37030:3	minister 37072:12,12
lost 37095:3	37183:11	37033:17 37089:15	37166:6,6
lot 37038:3 37048:13	mark 37054:16	37182:20	minute 37141:4
37069:8 37070:24	37056:21 37140:7,8,9	members 37028:13,17	minuted 37079:14
37074:25 37078:10	markers 37155:19	37050:2 37051:25	minutes 37049:2,3
37080:11 37087:25	market 37107:5	37052:17 37067:1,24	37074:6 37096:25
37115:20 37124:9	marketed 37107:5	37073:4 37082:6	37103:2 37144:7
37127:2 37142:19	marks 37100:2	37116:19 37120:25	37161:1
37150:23 37151:3	37140:17,24	37121:20 37122:3	missed 37091:14
37159:3	Masemola 37033:4	37123:9 37139:2,25	37093:4,5 37140:11
lower 37094:4	match 37119:24	37175:3 37179:17	37159:9,20
lowlands 37027:5	37134:1	memory 37055:14	missing 37035:15
lucky 37089:5	matched 37058:14	mentally 37136:21	37119:12,14
lurch 37057:23	material 37115:14	mention 37146:20	mistake 37118:16
lying 37031:7 37140:4	Mathunjwa 37074:21	37147:2,6	37134:16,18
37168:15	matter 37049:19	mentioned 37043:24	37138:15
	37075:8 37078:22	37050:14 37052:20	mistaken 37110:23
M	37087:21 37101:21	37093:19,23 37100:2	37144:19 37171:4
magazine 37119:12,17	37104:13 37123:17	37121:4 37153:2	37173:22
· · · · · · · · · · · · · · · · · · ·	37128:8 37138:10	37161:14	mistakes 37138:9
mailed 37027:19			
mailed 37027:19 maintain 37079:22		mentioning 37172:23	misunaerstood
maintain 37079:22	37146:16 37168:6	mentioning 37172:23 Merafi 37028:11	misunderstood 37035:10.13 37096:3
maintain 37079:22 37091:22 37094:22	37146:16 37168:6 37173:14 37178:9	Merafi 37028:11	37035:10,13 37096:3
maintain 37079:22 37091:22 37094:22 37096:5,6	37146:16 37168:6 37173:14 37178:9 37182:9	Merafi 37028:11 37068:23 37069:2	37035:10,13 37096:3 Mm 37036:17,22
maintain 37079:22 37091:22 37094:22 37096:5,6 maintaining 37093:21	37146:16 37168:6 37173:14 37178:9 37182:9 matters 37065:7	Merafi 37028:11 37068:23 37069:2 mere 37055:24	37035:10,13 37096:3 Mm 37036:17,22 37059:22 37060:2
maintain 37079:22 37091:22 37094:22 37096:5,6	37146:16 37168:6 37173:14 37178:9 37182:9	Merafi 37028:11 37068:23 37069:2	37035:10,13 37096:3 Mm 37036:17,22

mobile 37056:16 37058:19 37106:19 mobilising 37034:6 mobility 37058:14,17 mode 37137:19 37138:7 modern 37082:12 Molotologai 37133:10 moment 37041:13 37074:16 37081:1 37097:23,25 37099:15 37101:17 37103:2 37127:21 37135:13 37148:12 37150:15 37151:5 37154:9 37160:16,24 moments 37136:11 37172:20 Monday 37035:2,5 37047:15 37051:2,13 37051:17 37056:8,15 37057:4,22,24 4 37177:23 37059:19,19 37060:6 37060:14,23,24 37093:23 37097:4 37104:4,19,22 37118:8 37145:2,24 37146:5 37155:9 37159:4,10 37183:4 37183:11 money 37072:24 37100:13 months 37092:9 mood 37060:1 moon 37168:14,14,17 mopping 37047:24 morning 37027:10,12 37043:5 37044:1 37068:20 37074:13 37074:23 37077:9,10 37078:7 37079:12 37090:5,11 37094:3 37130:21 37131:2 37183:4 motivation 37082:1 motive 37178:4 mounds 37139:11 move 37034:1,6 37041:14,15 37046:16 37090:10 37090:14 37093:8,11 37106:25 37114:22 37115:15 37116:1,4,6 37116:21 37117:6,14 37154:5 37156:15 37158:12 moved 37099:21,24 37113:23,24 37114:3 37116:23 37161:2 movement 37101:12 37108:4,12 37114:13 13 37096:3 37114:24 37144:21 movements 37101:13 moves 37062:23,25 **moving** 37034:4 37041:14 37103:4

Tel: 011 021 6457 Fax: 011 440 9119

RealTime Transcriptions

Pretoria

				Page
37132:6,8	37069:8,10 37070:6	non-written 37038:21	observing 37154:19	official 37081:6
Mpembe 37028:11	37072:2 37087:7	norm 37164:18	obtained 37121:13	37111:17,20
37044:2 37065:8,9,24	37091:18 37093:15	normal 37075:13	obviously 37030:7	37123:18 37124:15
37083:9	37096:7 37100:8	37076:8,9 37124:13	37031:14 37033:14	37157:24 37169:19
Mpofu 37071:24	37110:14 37111:17	37129:4 37131:21	37041:16 37042:16	officials 37041:1
multiple 37037:15	37122:18 37124:2,18	37160:14	37046:1 37048:6,15	37125:21 37131:19
37102:17,18 37105:3	37125:8,9,9 37133:2	normality 37092:10	37051:3,16 37059:1	37136:4 37156:18
37107:7 37118:6,16	37134:5 37135:8	north 37115:5	37074:18 37078:3,7	37157:3 37164:15
37119:9 37142:20	37137:18 37139:16	37116:10 37157:16	37078:11 37079:24	37166:14,14,16
multi-camera 37097:20	37148:14 37165:19	note 37049:2 37084:13	37080:3 37089:3,6	37167:9
murder 37123:3	37165:21 37166:23	37103:1 37167:7	37091:5 37093:15	offset 37057:12
music 37096:20	37169:9 37171:6	noted 37067:16	37095:10 37100:24	37085:23 37102:16
mustn't 37057:9	37172:18 37173:2	notes 37033:7,10	37103:4 37111:3,25	offsetting 37132:18
37150:2	37175:17	37084:6 37089:5	37113:18 37114:7	oh 37046:8 37055:5,6
muti 37047:10 37048:9	needed 37124:21	NUM 37095:1	37116:8 37118:6	37082:5 37086:7
37067:6 37148:4	37175:3	number 37047:9	37125:23 37127:21	37174:23 37180:11
Myburgh 37029:9,11	needs 37031:25	37054:21 37077:5,21	37135:22 37137:14	37180:23
37030:2 37031:6,9,18	37063:22 37080:19	37088:1 37090:19	37149:2 37150:18	okay 37033:12
37032:9 37033:18,21	37103:5 37109:10	37101:4,9 37110:2	37152:5 37165:19	37037:23 37039:22
Myburgh/Swart	37123:16 37133:6,7	37117:7 37120:11	37167:2 37168:1	37045:7 37055:2
37033:10	37149:15	37132:19 37133:1	37171:4 37173:22	37056:3,14 37089:14
	negotiate 37093:24	37159:25 37160:7	37178:10 37182:1,9	37090:9 37118:14
N	37094:24	37164:16 37165:7	37182:19	37148:22,25
Naidoo 37139:25	negotiation 37157:6	numbers 37050:8	occasion 37052:16	37161:23 37162:12
Naidoo's 37120:7	negotiations 37157:4	37051:23 37054:9,14	37127:18 37146:23	37162:20 37169:4
name 37054:22	net 37124:25	37056:1 37134:4	occasionally 37104:3	37171:8 37175:1
37147:7	neutral 37095:15	nutshell 37099:1	occasioning 37128:12	37180:8
names 37110:25	neutralise 37153:16	Nyala 37041:13	occasions 37080:5	old 37038:3 37070:24
narrative 37086:24	neutrality 37095:3	37096:11 37097:24	37088:1 37135:24	Olson 37164:22
37122:14 37131:14	never 37032:25	37098:2 37099:15,21	occupants 37103:18	once 37030:19
37145:8 37152:24	37038:9 37042:11	37099:24 37100:21	occur 37051:15	37051:14 37053:13
37153:2,20	37047:3,8 37048:11	37100:22,24	37101:13 37114:9	37093:15 37105:6
narrator 37153:1	37051:19 37065:17	37102:24 37104:2,6	occurred 37035:6,7	37114:24 37137:5
narrow 37031:11	37083:3 37089:21	37104:23 37105:8	37051:14 37161:11	37158:7 37168:13
narrows 37088:12	37096:2 37098:14	37114:11 37144:25	occurrence 37038:9,10	37174:19 37175:6
nation 37057:8 37178:6	37109:24 37111:18	37145:1,24	occurring 37176:5	ones 37058:3 37076:16
national 37032:4	37114:17 37126:20	Nyalas 37053:1	occurs 37138:11	37110:24 37133:16
37065:6 37070:22	37133:15 37138:14	37103:23 37104:6	October 37031:19	37136:7
37071:2 37073:3,4,5	37140:17 37150:14	37146:6	offence 37095:22	one-off 37076:1
37073:7,25 37076:20	37157:14 37182:19		37102:9 37123:23	onset 37133:1
37077:7 37078:9	nevertheless 37062:11	0	37165:3	open 37056:22
37079:9 37080:9	37174:7	oath 37027:5,6 37041:8	offer 37130:4,5	37096:14 37114:23
37081:5,15,23	new 37031:16	37123:19 37129:1	37132:24 37167:23	37119:17 37157:17
37083:20 37084:24	news 37031:15	37144:10 37166:15	offers 37132:17	opens 37143:24
37085:11 37089:17	37092:20 37095:5	objective 37087:6	office 37073:7 37074:1	operate 37112:11,18
37097:13 37100:3	nice 37177:16	37089:22 37111:5	37077:23 37089:19	operating 37113:9
37146:21 37148:16	night 37042:5 37043:7	37150:14 37169:16	37122:24	37139:19 37182:4
Nations 37091:21	37048:24 37058:12	37171:11 37175:24	officer 37029:9,14,15	operation 37036:6
native 37175:17	37065:5,5 37078:15	37176:8	37029:17,25 37030:2	37037:16 37043:8
nature 37154:25	37161:18	objectivity 37041:5	37031:7,23 37033:16	37045:9,20,22,24,25
near 37116:4	nine 37158:17 37160:8	37167:17 37168:8	37111:10 37112:2,12	37052:1 37063:17,22
necessarily 37038:7	37160:20,21	37169:6,8 37171:16	37126:25 37127:6	37063:22 37064:19
37119:5,14 37136:14	37162:23 37177:22	37173:19	37129:1 37131:15	37066:25 37069:1
37138:21 37139:9	ninth 37068:4	obligation 37158:3	37133:5,7,13	37070:2 37071:13
37140:14	NIU 37039:13	obligations 37158:5	37143:17 37156:8	37094:7 37095:19
necessary 37063:24	Nkaneng 37098:15	obliged 37129:20	37167:3 37175:22	37112:20 37113:2,7
37101:21 37157:9	NMF 37082:1	37151:4	officers 37028:4,10	37113:10,11 37157:2
37172:6 37180:7	noise 37028:6 37105:5	obliging 37063:24	37039:15 37041:6,7	37157:20 37169:19
37181:1,4	37105:7,9,10,12,19	obscured 37148:10	37053:2 37111:11,16	37178:11
necessitated 37122:20	37105:20,22	37152:17	37112:17 37118:15	operational 37077:21
37123:12	noises 37105:10	obscures 37149:11	37118:20 37126:19	37086:1 37101:5
necessity 37154:22	non-lethal 37047:21	obscuring 37147:13	37131:24 37132:13	37114:10 37155:3
37155:2	37109:3	37149:8 37152:7	37132:22 37133:16	operationalisation
need 37034:16	non-likelihood 37053:7	observe 37103:8,15	37133:22 37135:21	37135:25
37037:12 37046:11	non-possibility 37182:6	observed 37056:7	37138:20 37140:4	operationalise 37072:7
27062 0 10 27064 5	non-threat 37135:17	37108:3	37142:20	operations 37044:25
37063:8,12 37064:5	non-uncat 5/155.17	5/100.5	57172.20	operations 57011125

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RealTime Transcriptions

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			1 5	
				Page
37080:17	overestimation	party 37081:9	37037:10 37040:18	plans 37038:19
operator 37112:10	37131:11	37095:17 37100:11	37045:4 37090:10,14	platform 37093:1
				-
operators 37111:8,22	overlaps 37118:19	pass 37030:21	phases 37075:14	platinum 37146:24
37113:6	overnight 37027:17	passage 37047:6	phenomenon 37141:12	play 37096:20 37104:8
opinion 37066:2	oversee 37123:7	passes 37064:1	Philadelphia 37132:21	played 37051:16
37079:23 37092:5	overwhelming 37072:4	passionate 37065:25	Philip 37131:3	37105:13
37103:25 37110:14	owners 37100:8	path 37123:10	37164:22	plays 37080:24
37111:21 37168:20	o'clock 37044:1	37124:17 37129:4	Phiyega 37083:18,21	please 37028:6
37173:9,11,17	o'clock 37074:17	37159:21 37163:23	phone 37080:12	37035:17 37046:25
opinions 37078:21	37075:1,4 37097:9	37170:12	37085:8	37049:2 37054:3
-				
37085:15	37099:25 37183:3,11	pathway 37157:17	photographs 37108:16	37070:12 37132:25
opportunities 37091:7	Р	patrol 37143:22	phrase 37111:15	37160:13 37163:17
37093:4		pause 37042:10	37169:22,23,25	pleased 37167:13
opportunity 37055:13	page 37108:6 37117:16	pay 37082:18 37138:7	37170:8	37176:13
37071:16 37093:5	37130:10 37156:24	peace 37075:6	physical 37117:4	plenty 37062:9
37104:8 37127:8	37158:13 37163:2,5	peacekeepers 37095:25	physically 37038:9	plot 37030:10 37104:9
37145:9 37157:5	Pakistani 37096:1	peaks 37133:17	37091:6 37116:20	plotted 37030:20
37177:16	panic 37143:12,16	peers 37085:22	37136:20	plural 37117:18
opposing 37169:5		pejorative 37169:14	pick 37160:15	plus 37069:15 37107:1
	paper 37041:11		-	
opposite 37115:19	37042:11,18	37171:24 37172:1	picks 37168:21	poging 37102:8
37144:25	par 37082:19	penetrates 37106:22	picture 37153:22	pogings 37102:6
option 37030:19	paragraph 37034:16	penetrating 37159:14	37159:9	point 37036:16 37039
37067:22 37074:8	37044:17 37108:6	people's 37046:5	piece 37057:15 37061:8	37039:6 37041:11,1
37093:8,11 37094:14	37117:16 37118:12	perceive 37046:7	37061:12 37062:22	37042:15,16
options 37034:7	37118:23 37130:11	37142:7	37067:6,11,15,20	37045:14 37051:12
37057:19 37119:17	37138:16 37158:14	perceived 37095:16	37068:1,4,9 37077:11	37053:10,22,23
		-		
oral 37067:21 37068:5	37163:3,5 37164:23	37098:24 37138:21	37122:25 37125:10	37056:19 37057:11
oranges 37172:3	37169:13	37144:20 37147:1	37125:23	37059:16 37068:21
order 37034:9	paragraphs 37166:1	perceives 37143:22	pieces 37066:21	37070:7 37073:2
37044:20 37054:19	pardon 37027:4	percentage 37093:13	37068:12 37069:20	37077:5 37080:23
37057:25 37064:7	37055:6 37178:22	37164:16 37165:8	37069:24 37090:11	37081:18 37083:12
37071:8,9,14,15,17	37180:11	perception 37138:20	PILLAY 37054:13,20	37084:13 37085:21
37071:19,19	part 37036:10	37138:24 37139:1,19	pin 37155:22	37086:6 37092:5
	-	-	-	
37072:25 37073:12	37065:22 37072:2	37141:6 37142:5	Pingla 37183:9	37098:6 37101:14
37075:6 37076:12,15	37081:5,13 37088:21	37146:5	pinpoint 37030:17	37102:24 37103:5,1
37076:16 37077:8	37088:23 37091:17	perceptions 37046:4	pistol 37118:9 37137:8	37104:1,14,20
37079:17 37081:14	37094:6,23 37095:8	perfectly 37173:5,14	37137:11,15,19	37108:21 37110:13
37090:15 37115:12	37108:24 37112:21	perform 37039:25	pity 37072:1	37114:16 37117:5
37115:13 37123:13	37114:14 37115:6	37041:10	place 37043:25	37120:18 37121:22
37135:6 37178:8	37125:12 37127:15	performing 37125:19	37047:23 37060:19	37125:1 37142:3
ordered 37068:19,24	37136:5 37148:15	period 37035:3	37063:10,12	37145:11 37152:10
37069:3,13,14	37149:4 37153:2	37106:3 37155:20	37075:15 37076:5	37152:21 37153:17
ordinarily 37043:21	37159:22 37178:9	37165:3	37084:10 37111:18	37156:18 37157:23
ordinary 37073:20	partial 37168:11	permissible 37173:5,14	37124:14 37125:25	37172:24 37173:3,7
organisation 37076:22	37169:2 37171:11	permission 37063:25	37135:10 37155:10	37175:17 37182:23
37124:17 37129:10	partially 37050:12	37064:3,17,24	37178:17 37180:17	pointed 37045:14
37163:8 37174:13	participate 37084:25	permit 37100:18	placed 37037:19	37101:4 37168:13
		-	37061:21 37069:20	
organisational	37086:17 37113:2	permitted 37075:18		points 37031:11
37063:11 37129:17	particular 37046:3,21	37091:18 37099:16	37117:11 37141:1,2	37052:12 37060:24
37163:11 37164:6	37053:7,23 37087:3	perpetrators 37057:9	plain 37098:8	37071:12 37076:14
37167:5	37106:21 37109:14	person 37030:25	plan 37034:23	37076:17 37087:22
organised 37053:14	37118:11 37136:22	37031:3,4,7 37105:18	37035:21 37036:4	37088:12,12
37056:16 37058:2	37142:7 37164:20	37122:9 37134:7	37037:8,17,21	37118:17 37161:11
original 37099:23	37181:2,8 37182:4	37142:22 37153:4	37039:10,11,23,24	37162:1 37174:15
37155:20		37158:22	37040:17 37042:15	policeman 37058:9
	particularly 37046:12			-
originally 37077:15	37056:7 37058:19	personal 37051:24	37044:6 37066:16,24	37150:4
originated 37072:8	37085:1 37091:8	37082:8 37172:11	37074:11,15 37078:5	policemen 37052:15
originates 37071:5	37097:21 37125:21	37173:17	37094:4 37097:14,16	37159:7
ought 37043:14	37139:4 37141:9	personally 37123:6	37098:1,19 37099:11	police's 37094:23
outcomes 37034:19	37174:16	personnel 37031:2,9	37099:12,23 37106:7	37119:10
/ 31 196	parties 37087:3,14	37039:18	37157:13 37161:14	policing 37054:19
370/1.22 24				
37044:22,24		perspectives 37091:12	37174:17	37057:25 37080:7
outcry 37057:6	37088:3 37095:16			
outcry 37057:6 outline 37153:3	37102:2 37155:22	37102:12 37168:18	planned 37052:10	37136:3 37178:11
outcry 37057:6 outline 37153:3			planned 37052:10 37064:12 37098:23	
outcry 37057:6 outline 37153:3 outpaces 37058:5	37102:2 37155:22 37163:21 37180:25	37102:12 37168:18 pertinent 37128:21	37064:12 37098:23	policy 37070:7 37077:
outcry 37057:6 outline 37153:3	37102:2 37155:22	37102:12 37168:18		

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RealTime Transcriptions

				Page
politely 37034:25	practise 37133:24	previously 37094:17	37027:1	prove 37104:15
political 37073:10	practises 37163:24	pre-empted 37054:10	process 37085:1,1,18	37118:22 37123:22
37076:5,10 37079:23	pre 37034:3,6 37072:22	pre-marked 37028:20	37086:11,20 37095:3	37134:5 37142:16,18
37080:8,9	precarious 37032:12	pre-production	37106:9 37125:12	proven 37119:3
politics 37178:3	preceded 37164:12	37072:22	37128:25 37166:18	provide 37129:17
poorly 37136:4	precedence 37126:3	price 37062:7	processes 37126:2,7	37133:21 37141:13
POP 37042:20,23	precise 37146:3	prima 37048:6,17	produce 37071:22	37142:8 37160:23
37047:21,24 37048:1	precisely 37086:11	37050:10 37127:7	37107:8 37125:25	37163:10 37179:5
37048:7,17 37050:2,9	37173:5 37177:2	37165:10	37129:13	provided 37029:2
37050:14,18	precision 37145:21,23	principle 37091:21	produced 37125:8	37141:11 37145:5,24
37057:13,16,18	preconditions	37100:17 37151:12	produces 37051:12	providers 37092:14
37058:2,21 37059:1,5	37034:10	37154:22 37156:18	37106:15	provides 37127:1
37059:6,7 37061:9	prefer 37129:16	37157:23 37168:7	production 37055:24	providing 37125:20
37062:23 37116:19	preferable 37158:9	principles 37123:17	37072:23	Provincial 37042:3
37157:15	preference 37116:17	37128:8 37154:21	Prof 37054:18	37049:3 37073:8,24
pops 37061:18	37119:2 37136:5	37180:2	profession 37041:4	37074:4 37077:13,22
37067:25	37145:7 37157:10	prior 37075:20	37180:3	37078:4,21 37080:9
portable 37096:19	37168:24	priorities 37128:10	professional 37041:1	37081:25 37146:18
pose 37032:11	preferred 37086:24	priority 37125:5,18	37041:19 37085:9	provisions 37076:24
posed 37072:14	prefers 37057:16	37128:17 37178:9	37122:2 37175:22	provisions 37070.24 proximity 37051:14
poses 37143:2	prejudiced 37087:5	prisoners 37105:22	professionalism	37052:13
position 37047:17,19	37097:6	private 37092:14	37085:6 37124:16	proxy 37143:4
37050:17 37051:7			Professor 37131:3	
	prepare 37065:22	privy 37083:14		Psychology 37054:18
37054:15 37060:6,7	prepared 37053:9,22	probabilities 37034:19	programme 37111:21	public 37041:7
37060:16 37064:22	37058:22 37067:19	probability 37044:23	prohibits 37126:20	37044:20 37054:18
37098:9 37099:24	37123:14 37136:4	37045:2 37047:3	project 37093:2	37057:25 37062:17
37102:22 37103:14	37162:21 37176:15	37048:20 37049:12	projected 37106:25	37122:24 37124:2,3,3
37108:10 37127:6	preparedness 37065:24	probably 37061:13	promise 37065:2	37124:15 37135:6
37129:14 37155:23	37113:1	37089:9 37094:14,15	37070:17	37166:14 37177:25
37160:11	presence 37029:12	37096:16 37101:4	prompt 37129:5	publicly 37172:16
positions 37030:11	37049:21 37093:21	37104:23 37105:18	proof 37134:11	pull 37134:5,23
37146:3	37096:5	37125:3 37139:10	proper 37040:17	37137:13
possession 37067:13,17	present 37038:21	37145:4 37164:12	37041:16 37103:8	pulled 37096:1,2
possibilities 37064:11	37042:20 37067:14	probing 37088:14	37111:18	pulling 37134:7
possibility 37042:22	37072:5 37077:22	problem 37056:25	properly 37111:8,22	punishable 37102:9
37046:2 37047:20	37122:8 37130:19	37058:6 37063:20	37113:6 37143:18	purchase 37106:10
37086:4 37093:16	presentation 37053:22	37064:11 37071:23	proportion 37136:19	purport 37108:16
37104:18 37106:10	37053:23 37054:22	37075:22 37080:14	proportionality	purpose 37130:14
37110:21 37116:6	37108:20 37109:5,6	37082:11,21	37135:23 37136:16	pursuant 37101:5
37119:8 37126:4	37109:11,22	37086:24 37092:1	proportionately	pursue 37178:8
37135:7 37138:10	37113:20,21	37094:18,23 37110:1	37135:24	pursuit 37178:9
37150:22 37174:1,2	presentations 37086:23	37120:2 37122:3	proposal 37074:7	push 37134:19
37182:6	37100:14 37108:11	37123:15 37125:12	37077:13 37078:1	37165:25
possible 37044:22	presented 37034:23	37127:13 37132:17	37081:25	pushes 37134:17
37045:4 37052:9	37035:25 37042:2	37133:18,19	proposed 37054:14	put 37034:19 37036:19
37053:15 37068:17	37075:22 37077:13	37135:25 37139:14	37067:25	37037:3 37038:13
37086:25 37089:22	37100:25 37114:21	37140:17 37141:21	proposing 37089:24	37040:5,9 37041:22
37093:17,19	37119:11 37130:18	37142:14,23	37141:3	37041:22,23 37042:7
37096:21 37104:24	37170:13	37142:14,23	proposition 37032:12	37041.22,23 37042.7 37042:17 37043:24
37116:22 37122:16	President 37071:24	37155:8 37172:25	37087:10 37096:3	37042.17 37043.24
37134:1 37151:8	37072:13	37176:5 37179:2	37127:11 37150:13	37052:20 37054:7,25
37169:18 37174:7	pressure 37094:7,16	problematic 37119:6	protect 37048:1	37052.20 37054.7,25
possibly 37053:12	37096:17,19	37120:6	37050:18 37051:6	37059:14,14 37060:4
37066:24 37175:9	presumably 37145:25	problems 37065:17	37171:21,25 37172:4	37061:16,25
37180:22	Pretoria 37062:1	37077:25 37133:19	protected 37167:20	37061:16,25 37062:12 37064:22
	Pretorius 37062:1 Pretorius 37042:23	37177:16,19,20,21	protecting 37093:1	37062:12 37064:22 37066:18 37068:18
posterity 37153:21				
potential 37031:24	37049:1 37069:9	procedure 37148:17	protest 37053:11	37069:12,13,16
37093:25 37138:15	prevail 37066:1,4	37182:21	37057:2 37058:2	37077:6 37078:11
37154:11	prevent 37058:18	procedures 37032:4	37062:12 37080:1	37081:12 37082:21
potentially 37032:7	37126:13	37037:2	37106:13	37083:17 37085:6
37067:8 37127:7	preventing 37126:15	proceed 37048:23	protester 37116:1	37091:19 37092:19
37144:18	prevents 37126:10	37074:7 37098:23	37177:23	37093:25 37095:1
power 37053:10,22,23	previous 37044:20	proceeded 37174:7	protesters 37067:4	37099:6 37105:21
D D 1 4 07054 00	37055:15 37146:23	proceeding 37074:23	37116:16 37158:17	37106:13,14
PowerPoint 37054:23				
practicable 37151:13	37161:9 37164:21	37174:16	protests 37058:4	37110:25 37115:15
	37161:9 37164:21 37166:25 37 173:21		protests 37058:4 37062:18	37110:25 37115:15 37116:13 37120:16

Pretoria

				Page 1
37122:10,11,15	37147:20 37149:18	37058:21 37066:1	37133:20	reinitiated 37157:4
37124:14,16	37149:24 37150:3,7	37095:18 37107:17	recommended	reiterate 37130:24
37128:13 37131:24	37152:17 37153:21	37160:12 37171:6	37032:14 37104:5	relate 37056:23
37136:14,16	37153:25 37154:1,25	37177:4	record 37027:9	37146:15
37141:21 37149:1	37155:1,3 37165:24	real 37103:3 37136:3	37028:12 37033:9	related 37056:25,25
37160:1 37166:2	37168:5 37169:15	realise 37038:4	37097:8 37108:6	relating 37033:9
37170:3,4,7,10	37170:3,4,7,10,11,11	37085:4 37129:13	37117:16 37120:18	37175:5
37171:15 37172:25	37170:13 37173:21	37159:2	37127:16 37178:17	relation 37044:8
37178:18	37176:11,13	realised 37031:6	37180:17	37068:16 37069:15
puts 37059:9 37065:23	questioned 37043:2	37132:12 37148:4	recorded 37084:5	37097:3 37141:5
37080:2,5 37115:3	questions 37030:10,22	37160:17	37109:19 37130:1	37179:7 37180:15
37136:3	37034:21 37039:20	realistic 37134:1	37137:11 37140:17	relationship 37084:15
putting 37036:18	37043:12 37065:23	37136:12	37169:13	37091:22
37048:7 37095:14	37074:8 37080:7	realities 37165:14	recording 37140:13	relationships 37084:18
37130:9 37157:25	37081:17 37101:9	reality 37035:8	recovered 37120:9	relative 37091:10
puzzling 37125:14	37170:14,16	37051:21 37065:18	recurring 37142:19	relevance 37069:6
P	37176:11 37178:18	37082:15,19	red 37057:1 37079:25	relevant 37047:10
Q	37179:20	37094:21 37129:8,16	redundant 37088:20	37053:6,24 37107:16
qualification 37111:24	quick 37131:1,8	37134:23 37135:8	refer 37041:2 37095:19	relied 37118:11
37172:9	quickly 37058:7,9,10	37139:16 37159:17	37108:7 37112:8	relief 37051:25
qualifications 37126:24	37146:17	37166:21	37118:6 37126:9	37094:20
37175:14	quite 37040:4 37042:1	really 37042:15	37149:14 37164:22	relieve 37096:18
qualified 37043:15	37069:14 37106:1	37043:11 37047:2	37169:18	relieving 37096:17
37058:22	37116:10 37122:13	37048:10 37049:9	reference 37027:17	reluctance 37084:25
qualifier 37171:19	37179:22 37180:2	37071:25 37088:4	37126:16 37156:23	37086:16
37172:21	quiz 37128:2	37100:1 37123:7	37157:19 37162:5	reluctant 37087:7
qualifiers 37056:6	quotation 37100:1	37129:7,8 37146:9	37169:17	rely 37038:10 37066:22
37057:20 37172:12	quote 37134:3	reason 37032:8	referenced 37126:10	remain 37119:7
qualifies 37112:9	37166:24	37041:2 37050:10	references 37072:24	remainder 37039:12
qualify 37040:24	quoted 37110:25	37078:19 37081:15	referred 37110:1	remained 37082:7
37051:10 37072:1	quoteu 57110.25	37101:10 37131:2	37126:19 37158:17	remains 37159:19
37086:23 37103:9		37143:17 37144:17	37163:20	remarks 37166:5
37109:3 37126:20	radio 37096:19	37164:5 37175:20	referring 37033:2	remedy 37166:21
qualifying 37071:25	37104:2 37106:21	reasonable 37045:20	37109:13 37110:7,8	remember 37038:2
37164:5	raft 37141:20	37071:15 37150:3,13	37110:18 37161:16	37042:20 37044:6
quality 37052:4	raise 37082:25 37083:6	37155:6 37167:14	37164:10	37042.20 37044.0
37172:7,13	37084:9 37175:20	37168:10 37181:10	refers 37162:15	37099:22 37100:20
quantitative 37045:25	raised 37073:1	37181:11	reflect 37099:12	37146:19 37153:9
quarrel 37173:13	37076:14 37081:19	reasonableness	37109:10	37159:24 37170:17
quarters 37154:12,16	37081:19 37101:15	37049:10 37181:10	reflected 37067:10	37180:23
37155:8	37163:20	reasons 37035:1	reflecting 37038:7	reminder 37057:12
Queen 37178:2	ramifications 37071:3	37047:24 37074:20	reflection 37136:2	remote 37064:18
quest 37086:21	37072:15,17,19	37077:17 37142:20	reflex 37137:9	removing 37136:25
37125:1		recall 37043:15	refresh 37104:7	render 37031:2
37125:1 question 37030:13	37076:4 37082:12 37124:7	37044:10 37053:1	refuse 37028:24	reorganisation 37157:7
question 37030:13 37032:6 37033:6	37124:7 ran 37057:23	37071:23	37071:16 37072:7	reorganisation 3/15/:/ repeat 37046:12
37035:10,13 37037:4	range 37106:10,11	receive 37112:10,19	regard 37033:20	37098:12 37162:15
	37131:19	received 37032:25	37048:8 37120:11,16	repeated 37086:12
37037:5 37042:6			-	-
37043:6 37046:23	rank 37073:6	37047:15 37052:24 37060:15 37079:17	37163:11 37172:15	repeatedly 37108:7
37049:7 37056:20	ranked 37034:20		37176:7 37179:7	repertoire 37131:4,7 37164:21
37059:5 37069:17	rapporteur 37055:16	37081:6,13 37085:7	regarded 37176:7	
37070:11,14,16,17	rationale 37143:18	receiving 37052:18 recite 37136:15	regardless 37147:24 37174:8	repertoire's 37131:3
37071:17,24	reach 37032:17			rephrase 37158:6
37074:13 37075:4	37087:18	reckless 37135:4	regards 37033:18	replays 37102:18
37076:12,16	reacted 37047:14	37169:20 37171:17	37036:13 37055:23	replicated 37144:2
37077:18 37078:12	reaction 37046:6	37173:23,24 37174:8	37089:4 37163:24	reply 37111:1
37080:23 37081:3	37143:16 37152:18	recklessness 37174:3	37173:21	reponsibilising
37084:17 37089:7	37153:12	reckon 37177:17	registered 37092:14	37063:23
37090:2,7,12	reactive 37057:14	recognise 37052:6	37117:24	report 37055:15
37091:16 37099:16	read 37072:19	37094:18 37095:14	registration 37118:14	37064:23 37072:20
37099:20 37100:4	37090:22 37116:25	37126:1 37162:9,10	regret 37085:5	37074:5 37087:20
37103:16 37108:23	37117:3 37122:6	recognised 37030:2	regular 37169:20	37131:3 37159:12,13
37118:1,21 37123:14	37130:1 37164:12	37085:23	37171:16	37176:15 37178:12
37127:18 37137:4	37177:4,6,10	recollection 37152:6,8	regularity 37080:6	reporting 37064:24
	343 0 - 4 10 6 -	07150 10		
37138:23 37139:17	readily 37143:20	37152:10	37174:14	represent 37164:16
	readily 37143:20 reading 37049:15	37152:10 recommendation	37174:14 reignited 37157:4	represent 37164:16 representation 37089:6

Tel: 011 021 6457 Fax: 011 440 9119

RealTime Transcriptions

Marikana Commission of Inquiry

				Page 17
				Ű Ő
representations	restore 37034:9	37066:23 37067:9	running 37067:5	37166:3,11 37173:13
37086:23 37087:4	37095:19	37068:6 37070:1	37160:25	says 37043:16
representative 37094:8	rests 37168:23	37076:17 37080:2,5	runs 37128:7 37131:14	37053:20 37069:2
37181:6 37182:2	result 37071:23	37090:12 37093:10	rural 37061:14	37071:14 37074:7,11
representatives	37074:20 37158:21	37094:4 37095:14	Rustenburg 37057:1	37082:10 37087:23
37095:1	resulted 37067:2	37096:4 37138:9	R5 37118:8 37134:17	37087:23 37138:18
represented 37039:8	results 37129:5	37154:10	37135:6	37148:4 37153:21
represents 37038:11	37132:3,15,19	risks 37042:10,14,14	37133.0	37173:12 37183:9
	resume 37183:3,10	37044:8 37053:6	<u> </u>	SC 37043:14 37097:7
request 37032:3	,			
37180:16	resumes 37027:2	37065:12 37078:6	safe 37092:15 37096:10	37099:3 37101:24
require 37063:14	37097:1 37144:8,9	risky 37074:12	37134:17 37137:18	37120:17 37152:23
37066:16 37127:19	37161:4,5	rival 37177:18	37137:20 37138:1,5	37153:19 37155:14
37176:14	retain 37047:18,18	road 37040:23	37157:3 37160:3	37155:17 37156:1,7
required 37032:25	retained 37032:16	37089:20	safety 37072:15	37156:10,12
37133:20 37154:24	retaliation 37067:2	rock 37140:6,16	37116:19 37137:7	37178:16,22,25
37172:6	reticence 37122:5	rocking 37146:6	37178:7	37179:3,11,13
requirement 37090:15	retired 37175:22	rocks 37031:4,12	sanctioning 37080:19	37180:1,9,13,21
37124:20 37128:4,6	retreat 37156:19	rogue 37063:13	sanctions 37062:13	37181:18
37129:6 37136:21	37157:10,24 37158:9	role 37039:25 37050:14	sand 37120:4 37149:11	scan 37131:1
37142:25	retrospectively	37064:6,7,21	SAPS 37028:2 37030:2	scared 37050:22
requirements 37064:1	37038:20	37080:24 37096:3	37032:1,2,23 37035:3	scenario 37044:21,21
37149:1	return 37108:2	37104:8 37124:15	37044:20 37045:2,3	37044:23 37045:2,3
research 37164:8	37183:3	roles 37036:6 37064:9	37045:21,24 37046:1	37050:6 37053:8
reservations 37108:18	revelation 37032:3	37131:6	37046:12,19 37050:4	37136:17 37139:14
resisting 37067:20	review 37163:8,15,15	rollout 37174:22	37051:25 37056:22	scenarios 37094:10
resolution 37081:24	37164:1,2	room 37028:7	37063:10 37066:2	37132:9 37136:7,12
	,			
resolve 37034:7	reviewed 37163:18	37060:21 37089:8	37067:24 37075:13	37138:12 37139:15
37071:21	revise 37109:8	37105:18 37136:13	37075:17,25 37085:4	scene 37028:14
resources 37036:2	37110:13,14	37136:14	37085:8 37086:13	37029:5 37030:3,20
37037:20 37124:21	37111:21	root 37043:11	37089:15,18	37030:24 37033:8
37129:6,15	re-enacting 37146:6	rotten 37166:22	37097:15 37100:11	37074:21 37098:19
respect 37036:16	rid 37166:23	round 37090:4	37101:18 37102:25	37113:17 37118:13
37042:1 37059:18	ride 37118:21	37093:18 37133:8,13	37106:9 37108:12,14	37118:25 37119:10
37101:25 37117:1	rifle 37065:11	37142:3,4 37160:16	37108:16 37116:14	37119:22 37120:5,7
37171:18 37174:21	37135:10 37137:21			
		rounds 37068:25	37120:23 37121:20	37120:12,14
37176:15	rifles 37048:5 37135:6	37069:9,13 37104:23	37122:3 37123:9	37123:12 37124:22
respectfully 37036:9	right 37028:25	37105:2,3,3 37119:12	37124:22 37125:14	37129:5 37138:18,19
responding 37139:8	37030:14 37032:6	37119:13,16	37126:13,14,19,23	37138:24 37139:1,2,3
response 37034:20	37039:3 37043:12,23	37131:16 37132:22	37129:14,16	37139:5,19 37146:23
37044:16 37046:17	37047:1 37054:1,4	37133:5,9 37134:22	37131:19 37132:10	37156:15,16 37157:1
37049:15 37057:3,5	37059:8 37076:21	37137:24 37158:10	37133:21 37135:13	37157:11,14,21
37059:5 37067:23	37097:22 37099:2	37159:9,14 37160:8	37135:15 37136:1	37162:23 37174:16
		· · · · · · · · · · · · · · · · · · ·		
37085:12 37092:13	37100:20,22	37177:22	37161:22 37162:1,13	scientist 37142:15
37109:17 37110:1	37102:19 37122:13	routes 37104:10	37162:16,21 37163:1	score 37132:4,5,15
37111:7 37115:25	37124:3 37126:25	routine 37063:1	37163:4,6,11,22	Scott 37028:11
37116:3 37121:13	37147:21 37151:6	Roux's 37042:15	37164:7,9 37165:22	37035:25 37039:7
37122:20 37136:12	37152:14 37153:18	37061:3 37154:25	37166:8,21	37042:1 37044:11,12
37141:10 37143:24	37156:9 37173:15	Rover's 37028:25	satisfied 37124:18	37045:6 37047:6
37161:8,25 37162:15	37179:18	37029:6	save 37087:25	37099:9,22 37156:23
37163:19 37169:11	rights 37032:10	rubber 37040:23	saw 37038:19 37056:14	37156:25 37157:9
37169:13 37170:2	37055:22 37066:6,13	37046:20	37059:17 37068:17	Scott's 37034:3,10
37178:1,2	37066:21 37090:13	rule 37126:10,12,19,21	37074:6 37085:19,20	37037:19 37038:15
responses 37034:15	37092:24 37093:1	37149:5	37097:18 37100:15	37039:4 37067:3,21
37058:13 37061:10	37100:9 37101:18	rules 37028:24 37055:1	37104:15 37111:23	37158:1,7
37061:12	37123:25	37055:2,4,7 37125:15	37121:22 37139:9	scramble 37143:14
responsibilised	riot 37058:8 37063:13	37134:2 37142:24	37148:3 37150:10	screen 37053:13,24,25
37064:15	riots 37058:6 37059:1	37180:3	37153:15 37181:8	37100:21 37111:13
responsibilities	rise 37101:4,9 37163:6	ruling 37180:16,20,21	saying 37028:24	37162:7
37167:4	risk 37034:14,17	37181:14,25	37043:15 37044:19	scroll 37162:8
responsibility 37076:19		37181.14,23		
	37040:16,20,21	2	37047:4 37057:24	scrutiny 37080:8
37076:19 37104:14	37043:1,4,18,19,21	rumour 37070:23	37062:22 37073:14	search 37094:6
37129:17	37043:25 37044:3,13	37073:13	37074:12 37087:20	second 37039:9,16
responsible 37043:8	37044:18 37045:9,20	run 37058:8 37063:13	37094:18 37096:13	37042:21 37044:11
37068:22	37045:20 37046:18	37080:18 37148:5,7,9	37115:22,22 37117:1	37067:2 37093:23
rest 37115:18 37151:4	37051:11 37062:8	37154:10 37167:6	37137:3 37149:3	37094:15 37100:2
restoration 37086:22	37065:3,21 37066:17	37178:15	37158:16 37160:6	37101:9 37106:19
	37003.3,21 37000.17		2,120.10 2,100.0	0,101,0,100,17
			•	·

			i cin y	110101
				Page 1
				i age i
37113:6 37115:2	37119:9,22,25	37087:21 37127:8	shouts 37107:19	single 37089:3
37131:9 37132:4	37120:24	37130:11 37131:20	37142:23	37103:17,18 37107:7
	select 37137:21			
37149:6,10 37158:13		37158:18 37164:23	show 37038:6 37046:15	37134:18 37137:20
37158:15 37163:2	37138:3,8 37141:22	sets 37040:17 37111:10	37056:4 37097:19	37137:22 37138:1,6
37171:14,20	selection 37166:18	setting 37091:18	37100:18 37108:16	37181:4 37182:16
secondly 37039:11	selector 37137:25	37158:14 37172:5	37132:20 37167:21	single-shot 37137:19
37047:25 37101:3	self-defence 37159:19	seven 37132:14	37167:21	sit 37087:1 37089:8
seconds 37115:2	Semenya 37043:13,14	seventh 37067:20	showed 37041:13	37094:15 37105:7
37149:10 37150:11	37097:7 37098:21	shambles 37174:12	37056:17,19	37161:3
37151:9,10 37152:8	37099:2,3 37120:17	37175:8,8,11,12	37161:19	site 37129:11
· · · · · · · · · · · · · · · · · · ·				
37152:13,13	37121:4 37147:12	shambolic 37169:21	showing 37036:2	sitting 37104:2,9
37154:18	37152:22,23	37171:18 37172:12	37103:9	37179:20
second-hand 37103:25	37153:19 37161:3	37174:10,10,11,15,19	shown 37039:20	situation 37032:5
section 37148:17	37180:11,13,21	37175:7	37048:13 37051:1	37034:8 37035:8
37163:4	37181:18 37182:13	shame 37172:13	37108:15 37113:20	37047:8,8,22
securing 37124:22	send 37031:10 37046:3	share 37045:21	37113:25 37114:20	37048:10,11
security 37071:3	37067:23 37094:8	37051:24 37083:13	37118:4	37051:23 37057:19
37072:15 37092:14	sends 37106:21	37083:16	shows 37042:24	37059:17 37060:22
37178:7	37129:10	shared 37066:3	37100:15 37111:5	37063:14 37064:1,13
see 37036:14 37041:12	senior 37053:2	37182:17	37134:16 37138:4	37064:24 37065:13
37041:14 37053:17	37068:16 37069:12	she'd 37068:6	37140:16 37159:13	37065:19 37071:21
37055:6 37057:22,24	37126:19		37177:3	
		shocked 37178:6		37074:16 37078:16
37078:19 37082:9	sensation 37106:23	shocks 37057:8	shy 37058:20	37079:24 37091:4
37086:9 37087:18	sense 37088:18	37177:25	sick 37029:11	37093:2,12 37122:3
37088:13 37093:4	37096:21 37130:7	shoot 37059:1 37132:3	side 37031:12 37047:12	37123:20 37135:24
37100:22 37101:8	37131:5 37132:16	37132:16 37133:22	37048:2 37052:22	37136:22 37157:11
37102:21 37103:3	37171:5 37175:12	37136:6,6 37148:12	37053:5 37056:5	37174:14 37177:2
37104:10,10,24	sensible 37074:19	37154:1,2 37181:11	37059:16 37061:19	37181:8
37106:12,14	37078:3	shooter 37160:9	37088:9 37098:7	situational 37066:8
-				
37108:19 37114:14	sent 37069:10,14,14	shooter's 37149:8	37116:12 37139:24	situations 37108:25
37114:17,22,24,25	37080:13	shooting 37103:2	37140:15 37142:22	37159:15 37170:20
37115:4,6,9 37116:16	sentence 37138:17	37127:4,5 37128:24	37143:23 37157:16	37181:7
37116:17 37119:24	37158:15,16 37177:3	37130:12 37131:1	sides 37051:15	six 37134:22 37140:16
	,			
37120:19 37135:25	Seoka 37090:21	37132:7 37133:20	37157:16	sixth 37067:15
37138:18,24 37139:4	37093:24	37136:6,13 37140:1	sidewards 37104:2	size 37120:5
37139:7,18 37140:12	separate 37056:8	37141:12 37144:1	sight 37100:16,24,25	skill 37133:24
	-		0	
37143:13,22 37144:2	37136:13	37149:9	37101:12 37103:11	skin 37106:22
37144:3,16 37145:9	separation 37116:15	shootings 37130:16,25	37103:13,14 37160:3	skirt 37108:8
37145:15,18	SEPTEMBER 37027:1	37131:18	significance 37104:20	slang 37174:11
37147:19 37148:11	sequence 37100:20	shoots 37149:7	significant 37093:22	slide 37053:13,23
37149:14,21 37150:4	sergeant 37031:5	shop 37058:10	37156:16	37054:2,5,23 37055:9
37150:15 37151:2,5	serious 37031:22	short 37035:2 37055:21	significantly 37060:22	37056:3,4 37059:17
37151:16,18	37048:21 37049:13	37122:21 37177:12	silence 37127:1	37116:13
37152:11 37154:2,9		shot 37030:25	silly 37069:10	
	37051:12 37058:17			slightly 37098:6
37155:20 37161:1	37060:22 37071:3	37031:13 37050:23	similar 37132:4	slowed 37157:2
37164:5 37167:2	37078:6 37104:13	37115:1,4 37118:15	37167:1 37171:20	smaller 37049:25
37168:15 37172:9,18	37117:24 37122:9	37118:18 37119:19	similarly 37171:25	37050:8 37051:23
37174:23 37176:5	37134:6 37139:12	37120:19 37134:3,18	simple 37030:13	smarting 37107:3
			-	
seeing 37055:24	37142:25 37149:16	37137:21,22 37138:1	37041:2 37042:1	smoke 37143:13
37115:21 37118:13	37165:11,12 37167:9	37138:6 37150:5	37072:9	sneakers 37058:8
37118:24 37121:17	37169:5 37178:7,11	37151:15 37154:19	simply 37030:24	snippet 37118:13
seeking 37130:24	seriously 37068:2	37159:8 37181:5	37032:18 37057:24	soccer 37177:15,18
seeks 37164:13 37172:4	37129:2 37177:23	shots 37048:20 37120:8	37058:4 37061:16	social 37058:7
seen 37028:12 37030:9	serve 37045:14	37120:11 37121:21	37079:6 37080:16	societies 37091:13
37031:18 37033:22	37171:21,25 37172:4	37121:25 37127:10	37091:8 37115:17	society 37057:1
37036:1 37038:8	service 37073:5	37130:19 37131:15	37119:16 37131:25	37075:17 37076:8
37039:19 37085:4	37092:17	37132:19 37140:5,13	37142:24 37149:15	37092:6
37092:22 37108:4,8	session 37073:16	37140:14 37141:2	37177:16	society's 37080:1
37109:4,9,11	37075:12 37078:20	37150:1 37158:21	simulate 37107:14	soldier 37143:22
37111:25 37112:3	37079:6,15,17	37159:18,20,23	37138:13	solicit 37127:14
37117:1,10 37119:18	37089:4 37123:12	shottist 37150:19	simulation 37142:17	solid 37172:19
07100 01 07100 0	074 (0.40)	37181:4,16 37182:16	simultaneous 37174:25	solution 37064:2
3/122:21 3/128:3	sessions 3/168:13			
37122:21 37128:3	sessions 37168:13	-	simultaneously	solve 37122.17 27170.2
37144:17 37159:19	set 37037:8 37039:24	shottists 37130:2	simultaneously	solve 37132:17 37179:2
37144:17 37159:19 37160:21	set 37037:8 37039:24 37040:2 37044:18	<pre>shottists 37130:2 shouldn't 37078:14</pre>	37099:9 37157:6	Somalia 37095:19
37144:17 37159:19	set 37037:8 37039:24	shottists 37130:2		
37144:17 37159:19 37160:21 sees 37117:25	set 37037:8 37039:24 37040:2 37044:18 37053:10 37057:15	<pre>shottists 37130:2 shouldn't 37078:14 37101:20 37147:1</pre>	37099:9 37157:6 sincerity 37090:25	Somalia 37095:19 37096:2
37144:17 37159:19 37160:21	set 37037:8 37039:24 37040:2 37044:18	<pre>shottists 37130:2 shouldn't 37078:14</pre>	37099:9 37157:6	Somalia 37095:19

Tel: 011 021 6457 Fax: 011 440 9119

Pretoria

Still September 2014	Wid		an y	11010
				Page
	051511			<u> </u>
37068:19 37069:7	37174:4	statement 37030:1	stray 37056:8	subsequently 37033:15
37081:7 37127:8	specifically 37034:15	37090:23 37108:5,21	street 37092:23	37033:21
37175:10	37036:11 37099:13	37109:7,13 37111:9	strength 37118:21	substantial 37167:15
someone's 37100:20	37116:7 37163:2	37112:1,9 37117:15	37181:2,15	substitute 37105:6,7
37119:4 37145:3	specifics 37168:2	37120:18 37124:4	stress 37078:19	successful 37047:25
soon 37077:15	speculating 37110:23	37127:1,14,24,25	37105:22 37114:7	sudden 37106:23
37089:25 37183:1	speculation 37045:15	37128:20 37130:10	37127:22 37128:3	37143:16
sophisticated 37136:7	speed 37125:5	37130:11 37138:17	37131:25 37134:24	suffered 37160:12
sorry 37027:21	spell 37037:1	37153:3 37157:20	37138:8,13	suffers 37172:1
37028:7 37035:11	spelt 37036:4	37158:13,14	stressed 37134:18	sufficient 37124:14
37046:22 37053:18	spend 37156:15	37160:20 37162:7	37135:14	37133:12 37181:6
37059:13 37065:2	sphere 37177:17	37163:2,3,17 37164:1	strike 37056:25	sufficiently 37052:8
37066:7,7,11,11	spoke 37029:23	37164:12 37169:15	37058:10 37140:7,8,9	37076:17 37151:2
37070:21 37073:19	37120:25 37146:17	statements 37030:8,9	37140:16,24	suggest 37042:18
	spoken 37028:15,16	37033:20 37038:2	37146:25	
37078:24 37079:20				37055:20 37067:12
37083:20 37087:11	37042:12 37046:10	37071:1 37110:2,4,12	striker 37030:3	37110:24
37088:14 37097:2	37117:3 37146:24	37110:18 37111:4,23	37117:20 37121:22	suggested 37042:9
37107:12 37126:13	spot 37159:1 37160:2	37112:8,22 37122:4,6	strikers 37047:13,14	37056:12 37101:16
37126:15 37135:11	spray 37109:19	37122:21 37123:2	37050:16,25	37145:25 37180:8
37140:22 37143:6	spreads 37143:12	37124:24 37127:2	37052:13,24,25	suggesting 37107:10,13
37144:23 37154:8	spreek 37049:5	37129:19 37130:1,7	37053:5 37059:18	suggestion 37042:8,13
37158:16 37170:6	sprint 37131:25	37130:15 37167:1	37063:2 37066:17,24	37042:25 37044:10
37176:12 37178:15	square 37056:6	37169:24	37067:1,6,13,23	37049:8 37053:2
37180:11 37183:6	37079:25 37089:19	states 37149:15	37068:8,10 37079:11	37081:14 37088:1,3
sort 37098:8 37128:9	stage 37031:15	37163:5	37093:25 37094:9,22	37101:17 37144:14
37140:9 37144:15	37034:23 37035:3,8	static 37057:15	37095:8 37098:15,25	37175:23 37179:1
37146:4,6 37150:24	37035:22 37036:13	37131:20 37132:2	37108:4,7,12	suggestions 37042:8
sought 37075:19	37039:9,14 37044:6	37131.20 37132.2	37109:20,21,24	37104:22
0				
37130:23 37150:15	37046:16 37062:3	statistic 37165:10	37110:19 37111:6	suitable 37098:8
sound 37062:24	37089:7 37093:21	statistical 37130:12,15	37113:23 37114:2,3	sum 37069:19
37106:15,16	37126:2 37127:20	statistics 37166:4	37116:21 37117:12	summarisation
37107:14 37118:19	stake 37126:2	status 37123:25	37117:22 37120:23	37039:23
37169:6 37173:3	stakeholders 37091:12	37169:15	37121:11 37144:20	summarise 37089:23
sounds 37102:4	stalling 37043:8	stay 37046:19 37119:17	37144:21 37146:25	summarised 37039:3
source 37105:14,15	stand 37057:9	stayed 37073:25	37147:13 37152:7	summarising 37043:5
37147:24	37096:22 37105:13	37101:17	37158:1,8	summary 37055:16
sources 37120:22	standard 37061:10	steer 37064:19	strikes 37160:16	37088:21 37097:19
south 37061:18,20	37155:1,2,4,5,7	step 37124:4	strong 37136:21	37164:22 37166:11
37062:3,6 37080:4,23	37164:19	stepped 37072:16	37163:10	summoned 37042:24
37092:24 37102:10	standards 37085:10	steps 37032:1,2,14	structured 37165:22	superimpose 37103:13
	standby 37092:13			
37106:5 37157:16	e	sterile 37105:8	structures 37061:14	superior 37063:25
37165:14 37167:7	standing 37031:1	STF 37039:13	37063:10 37072:3	supervise 37146:1
37174:1	37060:6 37090:15	stick 37055:15	37075:13 37163:24	support 37094:6
southern 37031:12	37135:14 37138:11	37093:13	struggle 37122:13	37108:19 37123:4
37139:24	37160:17 37168:16	stiff 37116:9	struggling 37166:21	supports 37066:19
so-called 37043:25	stands 37031:21	stills 37139:5	student 37136:12	37140:10
37068:3 37098:17	37175:24	Stockwell 37041:2,5	study 37131:4	supposed 37041:18,20
space 37089:19	start 37027:10,15	stole 37176:10	37164:13	37087:15 37098:2,3
speak 37032:9	37041:16 37103:5,7	stood 37049:4	stun 37113:17,21,24	37115:12 37129:9
37093:25 37094:8	37114:16 37117:6	stop 37061:3 37062:3	37114:1,4,19	37131:15
37103:16 37123:13	37127:16,19	37062:12 37072:9	37115:11 37116:1,2,3	supremely 37104:17
37123:20,20	37143:14 37169:21	37076:20 37091:19	37116:14,18	sure 37040:9 37044:4
37129:20 37157:5	started 37043:16	37091:20 37151:2	37118:18	37057:6 37096:14
speaker 37175:18	37069:1 37114:7	stopwatch 37152:19	subject 37069:21	37097:5 37099:19
speakers 37175.18	37148:5 37183:10	stories 37159:17	37071:7 37080:8	37100:11 37102:5,7
speaking 37095:9	starting 37041:14	story 37031:13	37115:12 37181:22	37106:5 37136:17
37116:17 37123:7	37050:9 37125:1	37033:17 37042:25	subjected 37128:1	37146:11 37147:10
37139:23	starts 37041:13	Stott 37054:18	37133:23	37161:7 37167:12
	37049:24 37098:1	37055:17	subjective 37172:21	37169:3 37174:11
special 37048:9			submissions 37145:14	37176:9 37179:22,24
37055:15 37131:3,4,7	37099:16 37103:2	straight 37098:2		
		straight 37098:2 straightforward	37169:24 37181:22	37180:7
37055:15 37131:3,4,7	37099:16 37103:2			-
37055:15 37131:3,4,7 37164:21	3709 9:16 3710 3:2 3714 3:1 2	straightforward	37169:24 37181:22	37180:7
37055:15 37131:3,4,7 37164:21 speciality 37077:20 specially 37079:16	37099:16 37103:2 37143:12 starving 37095:21 state 37062:11,13	straightforward 37081:18 strained 37096:8	37169:24 37181:22 37182:9,23 submit 37066:13	37180:7 surely 37114:1 37131:22
37055:15 37131:3,4,7 37164:21 speciality 37077:20 specially 37079:16 37100:14	37099:16 37103:2 37143:12 starving 37095:21 state 37062:11,13 37072:10 37097:8	straightforward 37081:18 strained 37096:8 strange 37051:25	37169:24 37181:22 37182:9,23 submit 37066:13 submitted 37057:3	37180:7 surely 37114:1 37131:22 surprised 37075:17
37055:15 37131:3,4,7 37164:21 speciality 37077:20 specially 37079:16	37099:16 37103:2 37143:12 starving 37095:21 state 37062:11,13	straightforward 37081:18 strained 37096:8	37169:24 37181:22 37182:9,23 submit 37066:13	37180:7 surely 37114:1 37131:22

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RealTime Transcriptions

Still September 2014	- Mai		qui y	1101011
				Page 2
surround 37050:9	37143:3,3,14 37144:6	37089:25 37090:3,7	37177:20,21	threats 37052:24
suspect 37050:11	37144:13 37145:5	37094:1 37098:21	they'd 37044:25	37053:4 37059:21
37123:3,24 37128:6	37148:25 37150:12	37106:2 37121:11	37074:12 37079:10	37060:5 37068:9
37128:24 37136:9,10	37151:4,8 37152:18	37122:12 37123:3,11	they'll 37105:25	37134:1 37136:2
37137:15	37173:10 37176:1,16	37124:10 37125:4	they're 37033:9	three 37078:4 37086:13
suspects 37032:7	37179:4,9 37183:1	37134:7 37141:7	37051:1,4 37057:14	37093:25 37094:9
	-			
37123:1	taken 37032:5,14	37159:5 37176:19	37057:15,15,21	37113:11 37119:22
sustain 37177:24	37033:15 37047:10	37177:2 37179:23	37058:22 37062:24	37119:25 37126:1
sustained 37052:14,16	37048:23 37055:25	temporarily 37035:6	37062:25 37063:3,4	37131:23 37141:17
Swart 37029:9,10,15	37078:15 37082:1	tenth 37068:9	37074:19 37087:6	37149:10
37029:16,17,25	37088:2 37118:7	term 37105:21	37103:4 37110:8	three-round 37138:1
37031:8,9,14	37125:17 37126:18	37159:15 37167:19	37125:16 37130:6	thumbing 37134:16
37033:16	37127:8,15 37149:4	37170:20,22 37174:3	37132:2 37136:4	Thursday 37059:19
Swart's 37030:23	takes 37092:10	terms 37027:16	37148:11 37151:2	37060:4,11,12,14,22
37031:7 37033:18	talk 37030:12 37032:10	37052:4,7 37057:21	they've 37112:6	37060:25 37065:14
sweep 37157:8	37032:11 37036:25	37065:23 37118:24	37127:7,15,16,16	37068:20 37074:10
switch 37137:25	37060:19 37075:23	37129:21 37144:19	thing 37030:10	37074:15,15 37075:3
swore 37041:8	37093:4 37096:7	37166:3	37035:25 37046:18	37075:3 37146:19
37123:19,19	37101:19 37140:1	terrible 37160:18	37055:8 37059:14	thwart 37063:19
37166:14	37142:19,24	territory 37052:5	37065:21 37071:1	ticked 37040:12
sworn 37129:1	37165:11,12	test 37105:3,8 37132:5	37078:3 37105:12	till 37074:17 37078:6
symptomatic 37094:20	talked 37063:16	37181:9	37119:12 37125:2	37103:2 37161:3
synonym 37173:15	talking 37037:13	tested 37058:12	37119.12 37123.2	37182:15
system 37106:20	37051:24 37052:5	37065:18 37159:19	37137:7,7 37138:11	time 37031:17,19
37112:11 37165:21	37069:11 37073:16	testified 37028:3,10,14	37142:15 37143:19	37035:3 37038:3,4
systematically 37165:5	37077:14 37091:20	37097:14	37143:25 37151:1	37039:23 37042:17
systemic 37163:12	37091:24 37094:19	testimony 37041:6	37175:16 37177:21	37044:19 37047:7
37164:6 37165:17,25	37104:13 37118:12	37070:24 37087:12	37179:22	37048:10 37051:20
systems 37063:16	37118:25 37126:19	37119:4 37161:14	things 37038:8	37052:23 37061:3
37106:18 37107:1	37139:14	testing 37135:15	37042:17 37049:6	37063:17,18,18,25
s.u.o 37027:7 37097:11	talks 37096:8,9,10,12	tests 37135:16	37056:1,2 37059:14	37066:14 37070:19
37144:11	tangibly 37099:15	text 37093:5	37073:15 37075:9	37070:20 37071:4
	tape 37152:24	thank 37027:9 37028:1	37091:20 37099:15	37072:25 37073:13
T	target 37034:7	37028:9 37029:7	37100:22 37110:2	37074:22 37075:1
t 37039:1 37049:2	37131:17,20,22	37040:14 37055:10	37113:11 37152:18	37084:3,10 37087:25
table 37044:7 37179:20	37132:2,6,6,7	37062:16,19	37152:25 37161:18	37089:16 37092:9
tack 37123:24	37135:13,16	37121:16 37144:13	37174:16 37175:8	37095:7 37097:4
tact 37124:19 37130:22	task 37050:3 37169:1	37161:10 37178:14	thinking 37091:2	37099:10,14
tactic 37092:1	tasking 37027:22	37180:9,10 37182:25	37153:7	37100:19 37101:6,13
		37180.9,10 37182.23	third 37067:6 37081:9	
tactical 37034:2,4	tasks 37125:19			37103:3,3,23 37105:4
37035:22 37037:9	37168:23	that'll 37075:10	37100:3 37122:8	37106:3 37108:14
37040:18 37043:18	Tatane 37164:4	theft 37128:9	37125:11	37109:16 37110:7,24
37043:22 37045:4	taught 37133:22	theme 37142:19	thirdly 37113:9	37111:15 37114:9
37058:13 37067:22	37135:22	37153:1	thought 37048:16	37123:9 37128:4
37068:7 37069:1	tea 37081:10 37141:4	theory 37135:21	37049:9 37050:6,21	37131:21 37137:14
37070:2 37074:7	37144:6	thereabouts 37099:25	37050:23 37053:21	37138:11 37147:9,25
37090:10,14 37093:8	teach 37177:11	there'd 37043:7	37060:13 37068:2	37148:12 37149:6
37093:11,20	teacher 37168:12	there'll 37049:12	37069:7 37085:20	37151:14,21
· ·				
37094:10	team 37027:19,25	there's 37028:5	37087:25 37090:18	37152:18,19
tactics 37058:10	37028:2 37032:1,23	37037:12 37040:15	37098:5,17 37099:20	37153:12,18
tag 37062:7	37083:2,4 37089:13	37042:13,25	37110:8 37122:7	37154:20 37155:6,20
take 37040:23	37089:18 37126:23	37048:22 37052:19	37160:2 37163:16	37156:16 37160:25
37041:19 37048:19	37161:22 37162:13	37053:23 37060:17	37172:14,14,22	37164:4 37177:15
37051:10 37053:8	37162:17,21 37163:1	37060:19 37065:10	37173:1 37174:3,6,7	37178:15 37180:18
37054:19 37055:8	37170:5,8 37171:9	37068:21,22 37069:7	37174:15 37176:1	37182:15
37071:18 37076:7	teargas 37046:20	37073:9 37077:11	37180:1	times 37086:22
37089:25 37094:18	37113:17,21,25	37078:13 37087:12	threat 37034:5	37106:24 37108:10
37095:22 37096:23	37114:1,4,19	37100:21 37101:25	37052:25 37067:14	37122:12,13 37165:8
37097:25 37101:18	37115:11,25 37116:2	37117:19 37127:21	37122:9 37131:16	37167:25 37168:17
37101:20 37102:24	37116:3,8,11,14,18	37128:4,25 37132:20	37134:6 37135:17	37171:22,22
37110:14 37124:21		37136:7 37137:1,9,10	37138:19,21,23	timing 37094:17
1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1	technical 37150:12	5/150./ 5/15/.1,2,10		5
37126:3.22 37129.2			37139:1.9.19 37141.6	37110:9 37151.19
37126:3,22 37129:2 37131:10 37132:4	technologies 37107:6	37140:6,16 37141:20	37139:1,9,19 37141:6	37110:9 37151:19 tired 37132:1 2
37131:10 37132:4	technologies 37107:6 telephone 37033:4	37140:6,16 37141:20 37143:23 37146:14	37142:5,8,25 37143:2	tired 37132:1,2
37131:10 37132:4 37134:13 37135:7	technologies 37107:6 telephone 37033:4 tell 37030:11,13	37140:6,16 37141:20 37143:23 37146:14 37150:21,22 37153:8	37142:5,8,25 37143:2 37143:4,22,23	tired 37132:1,2 title 37054:25
37131:10 37132:4 37134:13 37135:7 37137:23 37139:5	technologies 37107:6 telephone 37033:4 tell 37030:11,13 37038:24 37041:8	37140:6,16 37141:20 37143:23 37146:14 37150:21,22 37153:8 37153:12 37154:20	37142:5,8,25 37143:2 37143:4,22,23 37149:3,6,11,16	tired 37132:1,2 title 37054:25 told 37037:25 37038:25
37131:10 37132:4 37134:13 37135:7	technologies 37107:6 telephone 37033:4 tell 37030:11,13	37140:6,16 37141:20 37143:23 37146:14 37150:21,22 37153:8	37142:5,8,25 37143:2 37143:4,22,23	tired 37132:1,2 title 37054:25

·				
				Page 2 [°]
	25152.20			07171.01
37051:6,19 37073:13	37153:20	37073:15 37078:11	unfold 37050:7	uses 37171:24
37081:4 37086:6	TRT 37030:15	37084:16 37085:19	unfolded 37051:17	37174:13,18 37175:5
37097:10,15,25	37033:17 37047:23	37085:22 37093:19	37157:14	37175:10
37104:8 37108:11,13	37047:23 37048:3,5	37096:1 37103:2	unfortuitous 37125:2	utilisation 37113:17
37112:23 37114:15	37048:19 37049:21	37109:3,12 37115:6	unfortunate 37159:15	utilised 37039:16
37119:25 37121:18	37049:23 37050:2,11	37116:5 37118:10	37166:5	37052:8
37135:22 37145:1	37050:13,19	37119:1,25 37120:8	unfurling 37046:5	utter 37134:23
	-			
37165:18 37171:1	37052:16,17	37120:22 37129:10	uniform 37030:18	utterance 37082:11
37179:24	37067:25 37068:6	37140:1 37149:10	unimaginable	37091:5
tomorrow 37043:4	37117:12 37155:10	37157:25 37160:5	37065:23	UUUU1.3 37169:12
tone 37046:8	37156:11,12	37161:11 37164:18	Union 37062:2	UUUU11 37028:13,20
tool 37101:7	37157:15	37177:3	unions 37072:19	37028:25
top 37076:21 37106:21	true 37063:6 37069:24	two-hour 37111:11,15	unit 37030:20,21	UUUU12 37054:16,17
37160:16	37071:13 37105:1	37111:20 37112:4	37061:20 37064:9	37055:7
topic 37167:13	37111:19 37142:18	two-minute 37114:8	United 37091:21	UUUU13 37054:22
total 37164:16	37151:8 37159:20	type 37061:12	units 37036:5 37037:9	UUUU2.5 37034:16
totally 37058:22	37166:12	37062:12 37063:22	37037:15 37039:13	37044:17
37064:1 37134:2	trust 37110:6,15	37139:13	37039:25 37040:18	UUUU2.6 37129:24
37168:22 37171:13	truth 37041:8 37086:21	typical 37063:9	37062:5 37063:12,13	
touch 37176:5	37122:24 37123:21	v	37117:5	V
trace 37058:1	37123:21,22	U	unit's 37064:7	valid 37042:17
track 37079:5	37129:19,20	UK 37058:6,12,17	unlawful 37071:15,19	37087:10 37172:25
37098:19	try 37030:10 37046:7	un 37095:20,24,25	unnecessary 37182:18	value 37040:16
tragic 37160:6	37062:11 37068:7	37096:2 37171:10	unprecedented	37071:12 37085:2
trail 37035:4	37090:20 37091:22	unable 37061:18	37037:16	37120:15 37126:18
train 37065:20	37093:24 37094:21	37097:8 37169:23	unpredictable 37063:3	37140:10
37132:11,11	37096:6,7,20	unacceptable 37076:2	unravelling 37063:16	van 37176:20
37139:15,16	37115:14 37122:8,10	37128:9 37129:12	unreasonable 37181:13	various 37073:6
trained 37037:2	37122:14,16 37126:7	unaware 37175:4	unresponsive 37086:14	37163:21
37111:9,22 37113:6	37131:7 37138:13	undermining 37064:9	unusual 37047:8	vehicle 37042:24
37132:10	37155:22 37166:23	underpin 37080:19	37169:18	37103:17,18
training 37063:8	trying 37034:19	underpinned 37119:4	un-withdrawn	vehicles 37041:14
37065:10 37111:18	37061:15 37072:6	underscore 37070:5	37175:25	37100:13 37101:2
37112:6,8,10,11,13	37075:9 37086:1,10	underscores 37127:12	uphold 37123:19	37103:4 37114:14
37131:19 37132:18	37086:15,17 37087:9	understand 37033:8	upsetting 37031:15	venture 37058:15
37133:23 37135:13	37091:17 37093:8	37037:4,21 37039:2	urban 37061:13	37096:6
37135:15 37136:1,6	37094:5,7 37098:25	37040:21 37041:3,17	37105:10	ventured 37122:8
37137:6,16 37138:12	37102:19 37108:8	37048:12 37062:22	USA 37165:16	veracity 37110:15
37167:20	37115:9 37116:19	37077:20 37080:22	usage 37120:23	verba 37084:2
trains 37131:19	37117:5 37121:7	37083:12 37086:1,10	use 37030:16 37031:24	verify 37111:2
translated 37098:12	37125:10,22 37128:3	37086:15,18,20	37043:9 37046:19	Vermaak 37028:15
transparent 37080:15	37133:12 37144:21	37102:13 37114:15	37054:21 37062:13	37031:20
trap 37067:24	37157:5 37175:16	37115:7 37125:15	37066:16 37067:6,8	vernacular 37098:12
trauma 37127:22	tube 37095:9	37126:8,11 37128:7	37079:2 37081:23	versed 37180:2
travelling 37159:10,24	Tuesday 37077:16	37128:10 37130:13	37090:16 37093:9,12	version 37039:17
treat 37123:21 37128:5	tune 37123:24 37130:4	37130:14 37143:8	37093:20 37094:5	37098:16 37108:16
treated 37128:24	Turkey 37062:10	37144:25 37150:22	37100:17 37102:6	versions 37111:25
tremendous 37177:19	37168:14,15	37151:23 37153:6,11	37104:15 37109:5,7	video 37058:1
tried 37030:21	turn 37028:6 37030:23	37154:25 37161:8	37110:19 37113:13	37097:23 37108:9
37050:19,20 37073:2	37050:23 37051:4	37166:3 37170:25	37115:11 37116:7,11	37109:5,9 37112:11
37084:9 37085:25	37113:16 37115:2,17	37173:1 37175:3	37116:14,18	37113:18,25
37086:12 37123:10	37148:5,7 37166:18	understanding	37117:15 37120:7	37117:19,24
37132:18,24	turned 37095:24	37036:10 37045:5,8	37131:12 37136:16	37118:14 37120:20
37165:12 37167:23	37166:20	37047:11,12	37136:17 37137:6,25	37136:8 37144:14
37172:16 37177:4	turning 37049:18	37089:21,21 37101:1	37142:11 37163:11	37145:3,25 37151:19
trigger 37035:7	37108:22	37102:15 37124:6	37163:13,24	37152:24,25 37153:7
37046:6 37051:13	TV 37057:7 37096:19	understood 37046:4	37164:14,17 37166:9	37166:24
37134:5,7,23	37178:2	37049:23 37052:2	37169:20 37171:16	videographer 37118:17
37136:25 37137:7,10	twice 37171:19,25	37081:4 37088:2,17	37171:19,22	videos 37041:13
37137:12,13,16,17	two 37034:3,10,21	37097:22 37098:21	37173:24,25 37175:9	37097:18 37108:18
37165:25	37035:1 37038:2	unearth 37070:6	37175:10 37177:8,25	37149:20 37153:9
triggered 37056:18	37047:23 37052:11	37072:2,25	useful 37053:13	view 37045:21 37067:3
37128:15 37178:1,2	37052:15 37057:10	unemployment	37099:17 37102:15	37083:14,16,17
triggers 37165:24	37057:20 37059:14	37085:5	37103:19 37124:10	37085:23 37097:20
trouble 37043:7	37059:15 37060:18	unenviable 37168:23	usefully 37133:21	37139:18 37144:16
37046:9,10 37074:21	37068:13 37069:17	37168:25	useless 37140:3	37145:11 37149:8
ARCHIVE FO	R JUSTICE			L

RealTime Transcriptions

				Page 2
37158:1,7 37169:18	37181:25 37182:8,23	weapons 37067:17	white 37046:1,10	37093:22 37148:5
37181:5,5 37182:17	wanted 37085:14	37074:17 37076:10	37058:16 37074:11	workload 37128:14
views 37100:15,15	37090:22 37095:24	wearing 37121:22	37088:19 37105:7,12	works 37061:9
37102:17	37096:15 37156:17	Wednesday 37065:5	37105:19,20	37130:18
violence 37034:5	37162:1	37077:16,17	37147:12 37169:22	world 37080:17
37053:4 37056:24	wants 37059:15	week 37070:23	37170:1,9,11,14	37175:23
37057:2 37080:2	37061:2 37153:1	37072:14,20	37171:7,10,23	worry 37098:18
37092:7 37093:23	war 37095:21	37092:10 37118:10	37174:18 37175:21	37139:12
violent 37056:17	warfare 37138:5	weeks 37084:11	37176:18	worse 37137:14
37067:22	warn 37106:13	37096:1 37109:18	White's 37162:7	37166:19
virtually 37138:2	warned 37068:6	weigh 37076:15	37163:17 37169:14	worst 37132:15
37165:9	warning 37098:10	weighed 37146:20	37169:24 37171:15	37151:8 37159:22
visibility 37102:12	37122:4 37123:2,8	welcome 37096:16	whittle 37092:4	worth 37139:7
visible 37143:20	37122:4 37123:2,8	welcome 37090.10 welcomed 37096:14	who'd 37053:3	37172:22
37149:11 37151:22	37124.4,24 37127.2	went 37035:3 37044:5	who's 37087:16	worthwhile 37103:19
		37049:1 37068:7	who've 37051:1	wouldn't 37048:18
37152:1,16,20 vital 37178:18	37128:20,21 37129:18	37070:2 37081:11		
			wild 37167:6	37083:4 37086:8,25
voice 37066:1,4	warrant 37029:14,15	37085:24 37092:9	willing 37056:15	37093:14 37129:18
37136:8	37029:17,25 37031:7	37096:2 37099:15	37058:19 37100:11	37143:9
volatile 37056:18	37033:16 37110:12	37111:16 37118:23	willingness 37101:21	wouldn't 37074:17
volatility 37056:18	37111:9,16 37112:1	37120:3 37134:22	wind 37116:8	37145:14 37152:15
volley 37152:8	37112:12,17 37156:7	37158:24 37163:23	window 37114:8	37175:10 37176:6
volume 37106:14	warranted 37122:19	weren't 37050:22	windows 37104:3	wounded 37030:25
voluntarily 37068:3	wash 37086:8	weren't 37059:20,25	wire 37039:12,15,17	write 37094:15
37074:18,19	wasn't 37042:17	37060:6,7,11	37046:6 37099:8	37118:11 37162:18
37079:11	37130:24 37165:2	37064:16 37074:23	37108:8 37174:22	37170:13
voluntary 37143:5,7	37166:10	37077:7 37078:12	37175:5	writing 37035:5
voyage 37183:2	wasn't 37060:12,21	37145:1 37148:19	wish 37109:8 37123:6	37036:14 37038:20
V2 37108:3,9 37144:14	37065:22 37070:25	37174:16	37178:16 37179:6,14	37041:22,22,23
V2A 37108:5,9	37072:1 37099:22	Wesley 37053:16,18	37183:2	37137:2
V3 37109:5	37148:5 37153:7	westerly 37116:24	wishes 37154:4	written 37035:21
V4 37113:18	watched 37113:18	western 37140:15	withdraw 37176:1,3	37036:4 37037:8,16
V5 37117:18	37117:19	37157:16	witness 37037:4	37070:5 37171:7
	watching 37092:20	westwards 37031:5	37043:24 37053:16	37177:5,6 37179:5
W	37115:23	we'd 37093:21	37053:20 37123:21	wrong 37062:22
wait 37043:4 37098:11	water 37046:19	we'll 37028:1 37050:25	37146:14 37154:3	37068:24 37079:5
37150:4	37050:24 37051:5	37061:3 37111:3	37169:16 37175:24	37098:22 37099:23
waited 37042:6	37108:23,24 37109:5	37123:23,24	37178:17 37179:15	wrong-footed 37085:17
			5/1/011/5/1/215	
37094.2		· · · · · · · · · · · · · · · · · · ·	37179.20 37180.4	
37094:2 waiting 37031:2.9	37109:7,8,19,23	37126:22 37141:24	37179:20 37180:4 37181:10 12 13 13	wrote 37049:4
waiting 37031:2,9	37109:7,8,19,23 37110:4,19 37111:5,8	37126:22 37141:24 37145:20 37156:3	37181:10,12,13,13	wrote 37049:4 37070:25 37108:14
waiting 37031:2,9 waives 37126:25	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12	37181:10,12,13,13 witnesses 37032:7	wrote 37049:4
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15	wrote 37049:4 37070:25 37108:14 37118:23
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23	wrote 37049:4 37070:25 37108:14 37118:23 <u>X</u>
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14	wrote 37049:4 37070:25 37108:14 37118:23
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20	wrote 37049:4 37070:25 37108:14 37118:23 <u>X</u> X 37147:24 37148:4
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9	wrote 37049:4 37070:25 37108:14 37118:23 X X 37147:24 37148:4 Y
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12	wrote 37049:4 37070:25 37108:14 37118:23 X X 37147:24 37148:4 Y yards 37132:15
<pre>waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8</pre>	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6	wrote 37049:4 37070:25 37108:14 37118:23 X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18	wrote 37049:4 37070:25 37108:14 37118:23 X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23 37029:19,20
<pre>waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17 37035:13 37041:4</pre>	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13 37072:14 37074:19	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14 37146:6 37171:1	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18 37104:16 37171:24	wrote 37049:4 37070:25 37108:14 37118:23 X X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23 37029:19,20 37072:21 37112:9
<pre>waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17 37035:13 37041:4 37056:4 37065:3</pre>	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13 37072:14 37074:19 37075:23 37076:1	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14 37146:6 37171:1 we've 37028:12	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18 37104:16 37171:24 37173:24,25 37174:8	wrote 37049:4 37070:25 37108:14 37118:23 X X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23 37029:19,20 37072:21 37112:9 37129:25 37164:15
<pre>waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17 37035:13 37041:4 37056:4 37065:3 37074:20 37076:1,6</pre>	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13 37072:14 37074:19 37075:23 37076:1 37077:12 37079:19	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14 37146:6 37171:1 we've 37028:12 37033:22 37056:3	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18 37104:16 37171:24 37173:24,25 37174:8 37174:12,13,19	wrote 37049:4 37070:25 37108:14 37118:23 X X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23 37029:19,20 37072:21 37112:9 37129:25 37164:15 37165:4 37182:16
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17 37035:13 37041:4 37056:4 37065:3 37074:20 37076:1,6 37078:1 37093:14	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13 37072:14 37074:19 37075:23 37076:1 37077:12 37079:19 37082:3 37089:5,6	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14 37146:6 37171:1 we've 37028:12 37033:22 37056:3 37068:1 37069:20	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18 37104:16 37171:24 37173:24,25 37174:8 37174:12,13,19 37175:9,11 37176:18	wrote 37049:4 37070:25 37108:14 37118:23 X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23 37029:19,20 37072:21 37112:9 37129:25 37164:15 37165:4 37182:16 years 37038:3
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17 37035:13 37041:4 37056:4 37065:3 37074:20 37076:1,6 37078:1 37093:14 37096:5 37099:10	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13 37072:14 37074:19 37075:23 37076:1 37077:12 37079:19 37082:3 37089:5,6 37103:4 37113:8	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14 37146:6 37171:1 we've 37028:12 37033:22 37056:3 37068:1 37069:20 37082:23 37090:5	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18 37104:16 37171:24 37173:24,25 37174:8 37174:12,13,19 37175:9,11 37176:18 words 37050:18	wrote 37049:4 37070:25 37108:14 37118:23 X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23 37029:19,20 37072:21 37112:9 37129:25 37164:15 37165:4 37182:16 years 37038:3 37070:24 37082:9
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17 37035:13 37041:4 37056:4 37065:3 37074:20 37076:1,6 37078:1 37093:14 37096:5 37099:10 37100:4,5 37103:9	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13 37072:14 37074:19 37075:23 37076:1 37077:12 37079:19 37082:3 37089:5,6 37103:4 37113:8 37114:15 37119:10	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14 37146:6 37171:1 we've 37028:12 37033:22 37056:3 37068:1 37069:20 37082:23 37090:5 37120:24 37130:13	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18 37104:16 37171:24 37173:24,25 37174:8 37174:12,13,19 37175:9,11 37176:18 words 37050:18 37122:10,13	wrote 37049:4 37070:25 37108:14 37118:23 X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23 37029:19,20 37072:21 37112:9 37129:25 37164:15 37165:4 37182:16 years 37038:3 37070:24 37082:9 37092:9 37109:12,13
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17 37035:13 37041:4 37056:4 37065:3 37074:20 37076:1,6 37078:1 37093:14 37096:5 37099:10 37100:4,5 37103:9 37104:13,15	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13 37072:14 37074:19 37075:23 37076:1 37077:12 37079:19 37082:3 37089:5,6 37103:4 37113:8 37114:15 37119:10 37121:23 37124:12	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14 37146:6 37171:1 we've 37028:12 37033:22 37056:3 37068:1 37069:20 37082:23 37090:5 37120:24 37130:13 37169:23 37176:3	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18 37104:16 37171:24 37173:24,25 37174:8 37174:12,13,19 37175:9,11 37176:18 words 37050:18 37122:10,13 37169:20 37171:17	wrote 37049:4 37070:25 37108:14 37118:23 X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23 37029:19,20 37072:21 37112:9 37129:25 37164:15 37165:4 37182:16 years 37038:3 37070:24 37082:9 37092:9 37109:12,13 37118:10 37128:7
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17 37035:13 37041:4 37056:4 37065:3 37074:20 37076:1,6 37078:1 37093:14 37096:5 37099:10 37100:4,5 37103:9 37104:13,15 37106:17,25	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13 37072:14 37074:19 37075:23 37076:1 37077:12 37079:19 37082:3 37089:5,6 37103:4 37113:8 37114:15 37119:10	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14 37146:6 37171:1 we've 37028:12 37033:22 37056:3 37068:1 37069:20 37082:23 37090:5 37120:24 37130:13 37169:23 37176:3 37178:15	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18 37104:16 37171:24 37173:24,25 37174:8 37174:12,13,19 37175:9,11 37176:18 words 37050:18 37122:10,13 37169:20 37171:17 37177:8	wrote 37049:4 37070:25 37108:14 37118:23 X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23 37029:19,20 37072:21 37112:9 37129:25 37164:15 37165:4 37182:16 years 37038:3 37070:24 37082:9 37092:9 37109:12,13
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17 37035:13 37041:4 37056:4 37065:3 37074:20 37076:1,6 37078:1 37093:14 37096:5 37099:10 37100:4,5 37103:9 37104:13,15	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13 37072:14 37074:19 37075:23 37076:1 37077:12 37079:19 37082:3 37089:5,6 37103:4 37113:8 37114:15 37119:10 37121:23 37124:12	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14 37146:6 37171:1 we've 37028:12 37033:22 37056:3 37068:1 37069:20 37082:23 37090:5 37120:24 37130:13 37169:23 37176:3 37178:15 we'll 37155:23	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18 37104:16 37171:24 37173:24,25 37174:8 37174:12,13,19 37175:9,11 37176:18 words 37050:18 37122:10,13 37169:20 37171:17 37177:8 work 37027:23	wrote 37049:4 37070:25 37108:14 37118:23 X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23 37029:19,20 37072:21 37112:9 37129:25 37164:15 37165:4 37182:16 years 37038:3 37070:24 37082:9 37092:9 37109:12,13 37118:10 37128:7
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17 37035:13 37041:4 37056:4 37065:3 37074:20 37076:1,6 37078:1 37093:14 37096:5 37099:10 37100:4,5 37103:9 37104:13,15 37106:17,25	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13 37072:14 37074:19 37075:23 37076:1 37077:12 37079:19 37082:3 37089:5,6 37103:4 37113:8 37114:15 37119:10 37121:23 37124:12 37142:17 37144:24	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14 37146:6 37171:1 we've 37028:12 37033:22 37056:3 37068:1 37069:20 37082:23 37090:5 37120:24 37130:13 37169:23 37176:3 37178:15	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18 37104:16 37171:24 37173:24,25 37174:8 37174:12,13,19 37175:9,11 37176:18 words 37050:18 37122:10,13 37169:20 37171:17 37177:8	wrote 37049:4 37070:25 37108:14 37118:23 X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23 37029:19,20 37072:21 37112:9 37129:25 37164:15 37165:4 37182:16 years 37038:3 37070:24 37082:9 37092:9 37109:12,13 37118:10 37128:7 37141:16 37165:4
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17 37035:13 37041:4 37056:4 37065:3 37074:20 37076:1,6 37078:1 37093:14 37096:5 37099:10 37100:4,5 37103:9 37104:13,15 37106:17,25 37110:13 37119:3	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13 37072:14 37074:19 37075:23 37076:1 37077:12 37079:19 37082:3 37089:5,6 37103:4 37113:8 37114:15 37119:10 37121:23 37124:12 37142:17 37144:24 37157:14 37165:22	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14 37146:6 37171:1 we've 37028:12 37033:22 37056:3 37068:1 37069:20 37082:23 37090:5 37120:24 37130:13 37169:23 37176:3 37178:15 we'll 37155:23	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18 37104:16 37171:24 37173:24,25 37174:8 37174:12,13,19 37175:9,11 37176:18 words 37050:18 37122:10,13 37169:20 37171:17 37177:8 work 37027:23	wrote 37049:4 37070:25 37108:14 37118:23 X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23 37029:19,20 37072:21 37112:9 37129:25 37164:15 37165:4 37182:16 years 37038:3 37070:24 37082:9 37092:9 37109:12,13 37118:10 37128:7 37141:16 37165:4 37167:11
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17 37035:13 37041:4 37056:4 37065:3 37074:20 37076:1,6 37078:1 37093:14 37096:5 37099:10 37100:4,5 37103:9 37104:13,15 37106:17,25 37110:13 37119:3 37130:6,6 37137:15	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13 37072:14 37074:19 37075:23 37076:1 37077:12 37079:19 37082:3 37089:5,6 37103:4 37113:8 37114:15 37119:10 37121:23 37124:12 37142:17 37144:24 37157:14 37165:22 37165:22 37167:22	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14 37146:6 37171:1 we've 37028:12 37033:22 37056:3 37068:1 37069:20 37082:23 37090:5 37120:24 37130:13 37169:23 37176:3 37178:15 we'll 37155:23 what's 37039:9	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18 37104:16 37171:24 37173:24,25 37174:8 37174:12,13,19 37175:9,11 37176:18 words 37050:18 37122:10,13 37169:20 37171:17 37177:8 work 37027:23 37061:13 37078:5	wrote 37049:4 37070:25 37108:14 37118:23 X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23 37029:19,20 37072:21 37112:9 37129:25 37164:15 37165:4 37182:16 years 37038:3 37070:24 37082:9 37092:9 37109:12,13 37118:10 37128:7 37141:16 37165:4 37167:11 yell 37105:14 37143:12
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17 37035:13 37041:4 37056:4 37065:3 37074:20 37076:1,6 37074:20 37076:1,6 37078:1 37093:14 37096:5 37099:10 37100:4,5 37103:9 37104:13,15 37106:17,25 37110:13 37119:3 37130:6,6 37137:15 37142:3 37144:13,17	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13 37072:14 37074:19 37075:23 37076:1 37077:12 37079:19 37082:3 37089:5,6 37103:4 37113:8 37114:15 37119:10 37121:23 37124:12 37142:17 37144:24 37157:14 37165:22 37165:22 37167:22 37168:11 37170:13	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14 37146:6 37171:1 we've 37028:12 37033:22 37056:3 37068:1 37069:20 37082:23 37090:5 37120:24 37130:13 37169:23 37176:3 37178:15 we'll 37155:23 what's 37039:9 37049:13 37054:11	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18 37104:16 37171:24 37173:24,25 37174:8 37174:12,13,19 37175:9,11 37176:18 words 37050:18 37122:10,13 37169:20 37171:17 37177:8 work 37027:23 37061:13 37078:5 37082:12 37087:2	wrote 37049:4 37070:25 37108:14 37118:23 X X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23 37029:19,20 37072:21 37112:9 37129:25 37164:15 37165:4 37182:16 years 37038:3 37070:24 37082:9 37092:9 37109:12,13 37118:10 37128:7 37141:16 37165:4 37167:11 yell 37105:14 37143:12 yellow 37056:6 37100:17
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17 37035:13 37041:4 37056:4 37065:3 37074:20 37076:1,6 37078:1 37093:14 37096:5 37099:10 37100:4,5 37103:9 37104:13,15 37106:17,25 37110:13 37119:3 37130:6,6 37137:15 37142:3 37144:13,17 37148:1 37149:24 37162:23 37163:25	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13 37072:14 37074:19 37075:23 37076:1 37077:12 37079:19 37082:3 37089:5,6 37103:4 37113:8 37114:15 37119:10 37121:23 37124:12 37142:17 37144:24 37157:14 37165:22 37165:22 37167:22 37168:11 37170:13 37171:10 37173:1 37180:8	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14 37146:6 37171:1 we've 37028:12 37033:22 37056:3 37068:1 37069:20 37082:23 37090:5 37120:24 37130:13 37169:23 37176:3 37178:15 we'll 37155:23 what's 37039:9 37049:13 37054:11 37054:22,23 37097:23 37141:19	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18 37104:16 37171:24 37173:24,25 37174:8 37174:12,13,19 37175:9,11 37176:18 words 37050:18 37122:10,13 37169:20 37171:17 37177:8 work 37027:23 37061:13 37078:5 37082:12 37087:2 37144:24 37155:9 37172:19 37174:11	wrote 37049:4 37070:25 37108:14 37118:23 X X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23 37029:19,20 37072:21 37112:9 37129:25 37164:15 37165:4 37182:16 years 37038:3 37070:24 37082:9 37092:9 37109:12,13 37118:10 37128:7 37141:16 37165:4 37167:11 yell 37105:14 37143:12 yellow 37056:6 37100:17 yesterday 37028:3
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17 37035:13 37041:4 37056:4 37065:3 37074:20 37076:1,6 37078:1 37093:14 37096:5 37099:10 37100:4,5 37103:9 37100:4,5 37103:9 37100:4,5 37103:9 37100:4,5 37103:9 37100:4,5 37103:9 37100:4,5 37119:3 37130:6,6 37137:15 37142:3 37144:13,17 37148:1 37149:24 37162:23 37163:25 37165:11 37166:15	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13 37072:14 37074:19 37075:23 37076:1 37077:12 37079:19 37082:3 37089:5,6 37103:4 37113:8 37114:15 37119:10 37121:23 37124:12 37142:17 37144:24 37157:14 37165:22 37165:22 37167:22 37168:11 37170:13 37171:10 37173:1 37180:8 ways 37096:18 37177:7	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14 37146:6 37171:1 we've 37028:12 37033:22 37056:3 37068:1 37069:20 37082:23 37090:5 37120:24 37130:13 37169:23 37176:3 37178:15 we'll 37155:23 what's 37039:9 37049:13 37054:11 37054:22,23 37097:23 37141:19 whichever 37098:16	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18 37104:16 37171:24 37173:24,25 37174:8 37174:12,13,19 37175:9,11 37176:18 words 37050:18 37122:10,13 37169:20 37171:17 37177:8 work 37027:23 37061:13 37078:5 37082:12 37087:2 37144:24 37155:9 37172:19 37174:11 worked 37054:14	wrote 37049:4 37070:25 37108:14 37118:23 X X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23 37029:19,20 37072:21 37112:9 37129:25 37164:15 37165:4 37182:16 years 37038:3 37070:24 37082:9 37092:9 37109:12,13 37118:10 37128:7 37141:16 37165:4 37167:11 yell 37105:14 37143:12 yellow 37056:6 37100:17 yesterday 37028:3 37034:13 37036:11
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17 37035:13 37041:4 37056:4 37065:3 37074:20 37076:1,6 37078:1 37093:14 37096:5 37099:10 37100:4,5 37103:9 37104:13,15 37106:17,25 37110:13 37119:3 37130:6,6 37137:15 37142:3 37144:13,17 37148:1 37149:24 37162:23 37163:25 37165:11 37166:15 37166:16 37172:19	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13 37072:14 37074:19 37075:23 37076:1 37077:12 37079:19 37082:3 37089:5,6 37103:4 37113:8 37114:15 37119:10 37121:23 37124:12 37142:17 37144:24 37165:22 37167:22 37168:11 37170:13 37171:10 37173:1 37180:8 ways 37096:18 37177:7 weapon 37095:21	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14 37146:6 37171:1 we've 37028:12 37033:22 37056:3 37068:1 37069:20 37082:23 37090:5 37120:24 37130:13 37169:23 37176:3 37178:15 we'll 37155:23 what's 37039:9 37049:13 37054:11 37054:22,23 37097:23 37141:19 whichever 37098:16 whilst 37041:10	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18 37104:16 37171:24 37173:24,25 37174:8 37174:12,13,19 37175:9,11 37176:18 words 37050:18 37122:10,13 37169:20 37171:17 37177:8 work 37027:23 37061:13 37078:5 37082:12 37087:2 37144:24 37155:9 37172:19 37174:11 worked 37054:14 37091:21 37131:5	wrote 37049:4 37070:25 37108:14 37118:23 X X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23 37029:19,20 37072:21 37112:9 37129:25 37164:15 37165:4 37182:16 years 37038:3 37070:24 37082:9 37092:9 37109:12,13 37118:10 37128:7 37141:16 37165:4 37167:11 yell 37105:14 37143:12 yellow 37056:6 37100:17 yesterday 37028:3 37034:13 37036:11 37038:18 37041:1,13
waiting 37031:2,9 waives 37126:25 walk 37028:13 37029:4 37061:16 37062:2 37115:18 37124:17 37159:5 walking 37031:3,5 37115:4,5 wall 37136:8 want 37032:8,17 37035:13 37041:4 37056:4 37065:3 37074:20 37076:1,6 37078:1 37093:14 37096:5 37099:10 37100:4,5 37103:9 37100:4,5 37103:9 37100:4,5 37103:9 37100:4,5 37103:9 37100:4,5 37103:9 37100:4,5 37119:3 37130:6,6 37137:15 37142:3 37144:13,17 37148:1 37149:24 37162:23 37163:25 37165:11 37166:15	37109:7,8,19,23 37110:4,19 37111:5,8 37111:21 37112:18 37113:5,8,9,12 37146:7 wave 37106:21 way 37030:5 37040:8 37046:4 37047:5 37048:2,17 37051:25 37058:2,8 37059:24 37060:8 37065:13 37072:14 37074:19 37075:23 37076:1 37077:12 37079:19 37082:3 37089:5,6 37103:4 37113:8 37114:15 37119:10 37121:23 37124:12 37142:17 37144:24 37157:14 37165:22 37165:22 37167:22 37168:11 37170:13 37171:10 37173:1 37180:8 ways 37096:18 37177:7	37126:22 37141:24 37145:20 37156:3 37161:21 37162:12 37162:20 we're 37035:15 37037:13 37052:5,6 37055:7,8 37059:24 37069:11 37073:2 37075:9 37091:23,24 37094:20 37098:10 37104:21 37139:14 37146:6 37171:1 we've 37028:12 37033:22 37056:3 37068:1 37069:20 37082:23 37090:5 37120:24 37130:13 37169:23 37176:3 37178:15 we'll 37155:23 what's 37039:9 37049:13 37054:11 37054:22,23 37097:23 37141:19 whichever 37098:16	37181:10,12,13,13 witnesses 37032:7 37043:20 37083:15 37089:5 37122:23 37129:19 37167:14 wonder 37057:20 won't 37047:5 37126:9 word 37042:12 37043:10 37081:6 37087:5 37091:18 37104:16 37171:24 37173:24,25 37174:8 37174:12,13,19 37175:9,11 37176:18 words 37050:18 37122:10,13 37169:20 37171:17 37177:8 work 37027:23 37061:13 37078:5 37082:12 37087:2 37144:24 37155:9 37172:19 37174:11 worked 37054:14	wrote 37049:4 37070:25 37108:14 37118:23 X X 37147:24 37148:4 Y yards 37132:15 year 37027:21,21,23 37029:19,20 37072:21 37112:9 37129:25 37164:15 37165:4 37182:16 years 37038:3 37070:24 37082:9 37092:9 37109:12,13 37118:10 37128:7 37141:16 37165:4 37167:11 yell 37105:14 37143:12 yellow 37056:6 37100:17 yesterday 37028:3 37034:13 37036:11

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RealTime Transcriptions

				Page
37063:16 37068:18	\$	15th 37052:8 37073:17	34 37059:1	
37085:4 37097:18	\$326 37072:20	37090:24 37091:9		
37100:15 37107:2	\$64 37071:17	37096:14	4	
37108:18 37113:18	·	150 37160:1,8	4 37041:13 37068:25	
37114:20 37115:22	0	15293 37156:24	37069:8 37077:8	
37117:2,19 37135:5 37137:4 37139:6	000 37068:25 37069:8	16 37134:4 16th 37033:19 37034:2	37097:24 37099:16 37102:24 37114:11	
37150:10 37151:10	37071:17 37077:8	37035:19 37045:10	48 37127:20,25	
37151:17 37153:9	37095:20 37177:14 08:28 37027:2	37045:12 37052:10	49 37148:17	
37161:13,19	08:28 37027:2 08:48 37041:10	37056:9 37067:16		
yesterday's 37162:2	09:08 37054:8	37068:11 37069:22	5	
yielded 37129:4	09:28 37068:9	37070:2 37077:9	5 37027:1 37098:2	
yo 37136:9	09:47 37082:11	37090:14 37094:11	37161:3	
YouTube 37106:11		37109:6 37113:14	50 37182:1	
you'd 37043:15 37093:13 37096:23	1	37130:2 37140:18 17 37132:0 37156:24	50% 37131:16	
37107:20 37124:17	1 37097:8 37113:17	17 37133:9 37156:24 37171:22	500 37107:1	
37129:15 37142:16	37119:22 37120:12	18 37108:6 37117:16	6	
37145:11 37160:5	37138:18,24 37139:3 37139:5 37157:21	37130:10 37156:10	6 37099:21,24	
37169:4 37176:7	37161:3 37183:8,11	180 37062:14	6.18 37133:5	
37179:19	1st 37056:23		62 37158:14	
you'll 37058:24	1.2 37092:13	2		
37064:4 37065:3	1.7 37034:16 37044:17	2 37028:14 37029:5	7	
37092:2 37093:7	1:30 37034:22	37030:3,20,24	7 37054:2,5 37055:9	
37094:2 37097:5 37108:23 37110:17	37035:20,24 37037:7	37033:8 37093:21 37098:20 37120:7,14	70 37082:9 75 37165:8	
37126:24 37127:10	37037:17 37039:8	37123:12 37139:1,2	75% 37132:14	
37130:17 37157:19	37044:6 37045:12	37139:19 37156:15	77 37130:11 37138:16	
37167:12	10 37066:21 37068:12 37167:10 37183:3,11	37157:1,11,14		
you're 37034:11	10:07 37096:5	37162:23 37174:16	8	
37040:21 37043:4,12	10:37 37097:2	2:30 37042:22 37044:8	8th 37108:14	
37051:1 37059:4,5	10:57 37111:3	20 37094:16 37105:14	80 37117:16 37177:15	
37061:24 37065:5	100 37056:22 37106:25	37136:14 37167:22	37177:19	
37084:18 37086:1 37095:16 37101:23	100% 37093:14	200 37177:22 2008 37166:7 37167:8	800 37167:8	
37107:10,12 37116:8	37119:18 37132:4	2013 37108:15 37140:8	85% 37072:22	
37123:3,18,21	11 37099:25	37167:8	9	
37124:18,23	11th 37092:20 11:17 37124:9	2014 37027:1	9 37044:1 37074:17,25	
37125:10 37129:1,9	11:20 37099:25	21 37163:3,5	37075:4 37118:9	
37134:18 37135:18	11:20 37039:25 11:37 37136:9	22 37082:9	37119:23 37137:5,24	
37136:25 37138:18	12 37055:4,6 37069:20	22nd 37027:20		
37144:21 37146:15	37069:24 37071:12	24 37095:25 37133:11		
37147:11 37154:9,11	37075:21 37076:14	25 37156:24		
37158:14 37160:25 37161:1 37163:3	37076:17 37090:11	25% 37165:9 26th 37029:18 37120:3		
37164:10 37165:15	37150:11 37151:9,9	37129:25		
37166:11 37168:1,17	37154:18 37156:6,7	262 37090:15 37091:16		
37169:7 37172:25	37163:2,5 12th 37092:21	37093:5,6		
37179:21 37180:11	12:07 37144:9	27th 37029:18		
37182:1 37183:1	12:27 37159:22	29 37158:13		
you've 37036:1,23	12:34 37161:5	295 37158:10		
37038:3 37055:5,24	12:54 37174:11	3		
37074:16 37085:22 37100:2 37105:6	120 37105:23	3 37034:11,23 37035:3		
37108:3,4 37109:4,7	13 37054:21 37055:7	37035:8,22 37036:13		
37118:10 37129:1,9,9	13th 37048:9 37052:12	37039:14 37157:18		
37130:17 37139:2	37052:19 37066:25 37092:21 37121:14	37158:2,9,15,17		
37152:18 37153:9	138 37132:22	3:30 37037:18		
37157:22 37158:18	14th 37052:7 37090:24	30 37147:22,25		
37161:2 37166:22	37091:9 37096:13	37177:14		
37169:25 37182:2	140 37106:16	30% 37132:5		
37183:2	141 37156:24	300 37061:25 37095:20		
Z	15 37096:25 37131:22	37105:3 37159:4,5 37160:1		
zero 37132:14	37133:10 37134:4	328 37104:23		
Zokwana 37065:8,9	37144:7	33 37108:6		
ARCHIVE FO	R JUSTICE			