

Commission of Inquiry
Into the Wrongful
Conviction of David Milgaard
before
THE HONOURABLE MR. JUSTICE
EDWARD P. MacCALLUM

Transcript of Proceedings
and
Testimony before the Commission
sitting at
TCU Place at
Saskatoon, Saskatchewan

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Volume 163

Inquiry Proceedings



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 The Hon. Vic Toews
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 (Retired)



INDEX OF PROCEEDINGS

DESCRIPTION:

PAGE:

DR. PETER HERMANUS MARKESTEYN, SWORN

| | | |
|----|--------------------------|-------|
| 1 | | |
| 2 | | |
| 3 | | |
| 4 | - BY MR. HARDY | 33538 |
| 5 | - (CLIP JH1 PLAYED) | 33577 |
| 6 | - (CLIP JH1 ENDS) | 33579 |
| 7 | - (CLIP PLAYED) | 33581 |
| 8 | - (CLIP ENDS) | 33581 |
| 9 | - (CLIP PLAYED) | 33581 |
| 10 | - (CLIP ENDS) | 33583 |
| 11 | - (CLIP JH2 PLAYED) | 33691 |
| 12 | - (CLIP JH2 ENDS) | 33691 |
| 13 | - BY MR. GIBSON | 33716 |
| 14 | - BY MR. HOPKINS | 33729 |
| 15 | - COMMISSIONER MACCALLUM | 33745 |
| 16 | - BY MS. KNOX | 33747 |
| 17 | - BY MR. LORAN | 33753 |
| 18 | - BY MR. WOLCH | 33758 |
| 19 | - (CLIP VT3 PLAYED) | 33766 |
| 20 | - (CLIP VT3 PAUSED) | 33771 |
| 21 | - (CLIP VT3 RESTARTED) | 33773 |
| 22 | - (CLIP VT3 ENDS) | 33774 |
| 23 | - (CLIP VT11A PLAYED) | 33774 |
| 24 | - (CLIP VT11A ENDS) | 33781 |
| 25 | - (CLIP VT11B PLAYED) | 33781 |



| | | |
|---|----------------------|-------|
| 1 | - (CLIP VT11B ENDS) | 33789 |
| 2 | - (CLIP VT24 PLAYED) | 33789 |
| 3 | - (CLIP VT24 ENDS) | 33798 |
| 4 | - (CLIP VT25 PLAYED) | 33798 |
| 5 | - (CLIP VT25 ENDS) | 33801 |
| 6 | - (CLIP VT26 PLAYED) | 33801 |
| 7 | - (CLIP VT26 ENDS) | 33811 |
| 8 | - (CLIP VT27 PLAYED) | 33811 |
| 9 | - (CLIP VT27 ENDS) | 33814 |

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25



Transcript of Proceedings

(Reconvened at 9:00 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Good morning.

MR. HARDY: Good morning, Mr. Commissioner.

COMMISSIONER MacCALLUM: Good morning.

MR. HARDY: We're ready to proceed with our
next witness, Dr. Peter Markesteyn, I'll call Dr.
Markesteyn forward to be sworn in.

DR. PETER HERMANUS MARKESTEYN, sworn:

COMMISSIONER MacCALLUM: Morning, sir.

BY MR. HARDY:

Q Good morning, Dr. Markesteyn, thank you for
attending today to give testimony.

I understand that you currently
reside in Winnipeg?

A I do.

Q And how old are you, sir?

A 74.

Q And am I correct that you are now retired?

A I'm retired as the Chief Medical Examiner of
Manitoba, that is correct.

Q And I understand that you worked throughout the
majority of your career as a forensic pathologist?

A That is correct.



1 Q And what does a forensic pathologist do?

2 A A forensic pathologist is a pathologist who does
3 not only determine what diseases do to people, but
4 what people do to people or to themselves. It is,
09:03 5 therefore, specifically dealing with the issues in
6 the administration of justice.

7 Q And all relating, of course, to causes of death
8 and circumstances of death?

9 A The cause of death, the identity, and the time of
09:03 10 death, place of death, and the circumstances,
11 that's correct.

12 Q And you have been kind enough to provide us with a
13 copy of a curriculum vitae, and perhaps we will
14 turn to that now, the document number is 338018.

09:04 15 And do you recognize that, Dr. Markesteyn, as your
16 CV?

17 A Yes, I do.

18 Q And you've reviewed this document prior to today?

19 A Yes, I did.

09:04 20 Q And it contains accurate information?

21 A It does.

22 Q I see, on the first page, I note you received your
23 Doctors in Medicine in 1958?

24 A That's correct.

09:04 25 Q And if we turn to page 4 of the document, it is



1 338021. I note at the top the date range noted,
2 August 1982 to July 1999, Chief Medical Examiner,
3 Manitoba Justice, Province of Manitoba, and
4 Inspector of Anatomy, Manitoba Health, Province of
09:05 5 Manitoba; that would be correct?

6 A Yes, sir.

7 Q And what was your function as chief medical
8 examiner during this time period?

9 A The function of the chief medical examiner is
09:05 10 identical in some aspects to that of a chief
11 coroner, that is to determine the W-5 in any death
12 that falls under our legislation, meaning to
13 determine, as you said before, the identity, the
14 time, the cause and manner of death, manner of
09:05 15 death meaning homicide, suicide, accidents and so
16 on, and to report, and give a report on this
17 matter to the parties interested in these
18 findings.

19 Q So that's above and beyond then, for example, a
09:05 20 position such as a chief coroner or a regular
21 forensic pathologist then?

22 A A regular forensic pathologist may not have the
23 position of a chief medical examiner. A
24 pathologist, including a forensic pathologist, may
09:05 25 determine the cause of death but is not in law, in



1 many instances, allowed to determine the manner of
2 death. And a chief coroner, contrary to a chief
3 medical examiner as we have in Alberta as well,
4 the chief coroner holds his own inquest or her own
09:06 5 inquest, whereas a medical examiner delegates, so
6 to speak, the judicial function of the office to a
7 provincial judge, who holds the inquest.

8 Q Okay. Am I correct that, presently, only certain
9 provinces in the country have chief medical
09:06 10 examiners?

11 A Yes, that is correct, it is Newfoundland, Nova
12 Scotia, Manitoba, and Alberta.

13 Q And I understand that, although you're retired,
14 you continue to work in a consulting capacity?

09:06 15 A Yes, I do.

16 Q And can you tell us what you do in that regard?

17 A Well I assist the, in the administration of
18 justice on occasion by either assisting the Crown
19 or the defence in reviewing autopsies that have
09:07 20 been done by other pathologists. And I also
21 assisted the International Criminal Court in the
22 Hague in the determination of the presence or
23 absence of crimes committed in the Balkans, I did
24 that for a year, and I actually became the Chief
09:07 25 Medical Examiner of Kosovo at that time.



1 Q And am I correct that, most recently, you have
2 been overseeing a public inquiry in Newfoundland?

3 A Yes, I'm actually almost -- well, the function is
4 I'm holding an inquiry, an in-camera inquiry in
09:07 5 the death of a person who killed herself and her
6 child while awaiting extradition to go to the
7 United States, and the purpose of that is to know
8 or to try and find out whether the death of the
9 child was preventable.

09:07 10 Q Okay. And I understand you came to be involved in
11 the David Milgaard matter in approximately 1990;
12 would that sound accurate?

13 A That is correct, yes.

14 Q And how did that come about?

09:08 15 A I was contacted by Mr. Asper on this matter, and
16 he asked if I would be kind enough to review some
17 material that he had from Dr. Ferris, and I said I
18 would do that.

19 Q And it was suggested, although I don't think he
09:08 20 had a clear recollection by Mr. Asper in his
21 testimony, that you may have contacted him or
22 initiated your involvement in this matter; would
23 that be correct?

24 A That's not correct. I do not contact other
09:08 25 lawyers in matters, at all, ever.



1 Q Okay. So the request came from Mr. Asper, then?

2 A It must have.

3 Q And did you have an association with Mr. Asper,
4 then, prior to your involvement in this matter?

09:08 5 A Not really, but I may have dealt with his
6 cross-examination on occasion, but I had no
7 professional relationship with Mr. Asper, no.

8 Q And what did you understand, at the outset, was
9 the purpose of your involvement?

09:08 10 A The purpose of the involvement was to see if the
11 opinion rendered by Dr. Ferris had forensic value.

12 Q Okay. And I'm going to turn you to some
13 correspondence, the document is 155505, and you'll
14 note this is a letter directed to yourself from
09:09 15 Mr. Asper dated May 1st, 1990. And I'm going to
16 review this correspondence with you, it states at
17 the outset:

18 "Please find enclosed the
19 following documentation:

09:09 20 1) Photocopy of an application submitted by
21 David Milgaard to the Federal Department
22 of Justice pursuant to Section 690 of
23 the Criminal Code, including the two
24 reports of Dr. James Ferris; and

09:09 25 2) Excerpts from the transcripts relied



1 upon by Dr. Ferris in the preparation of
2 his report.

3 While I can appreciate that
4 this is a fairly daunting task,
09:09 5 nonetheless we would very much
6 appreciate your reviewing these
7 materials with a view to offering your
8 opinion on the report prepared by Dr.
9 Ferris. We submitted the original
09:10 10 application to the Department of Justice
11 in December of 1988, and to our
12 knowledge nothing has been done to
13 assess the validity of his opinion. As
14 you can imagine, the frustration level
09:10 15 of the Milgaard family rises by the
16 minute, and we hope that Dr. Ferris'
17 conclusions will find support from other
18 noted forensic pathologists, and
19 therefore cause the Department of
09:10 20 Justice to take heed.

21 I am intimately familiar with
22 the facts of this case, and if you have
23 any questions or require further
24 information, please feel free to contact
09:10 25 me.



1 On behalf of the Milgaard
2 family, please let me extend my
3 gratitude for your concern in this
4 matter."

09:10 5 And would this be the formal request, then, that
6 initiated your involvement?

7 A Yes.

8 Q And it is correct, then, that you were initially
9 involved to assess the opinions of Dr. Ferris, to
09:10 10 assess the reports of Dr. Ferris?

11 A Yes, that is correct.

12 Q And the, is the letter accurate in terms of the
13 initial materials that you would have received?

14 A Oh yeah, I daresay, yes.

09:11 15 Q And we'll see a further list of materials that you
16 considered on your review, in your report, in a
17 moment, and we'll look at various details of your
18 findings, but how would you have proceeded with a
19 request of this nature?

09:11 20 A Well, what I would ask for is all the material
21 that is available to review, and if I were to do
22 that I would then write a -- something to myself
23 to the regards about this, you know, make an
24 extract of that, so notes, and then try and see.
09:11 25 If the request is to review the certain opinions



1 of other people, I try to use that opinion as a
2 frame for my own so that it does not become too
3 confusing, one can use one report to read the
4 other, and I think I did that here as well.

09:11 5 Q And did you understand that the Milgaard group,
6 then, was hoping that you would support the
7 findings of Dr. Ferris?

8 A I would imagine that they would come to me with
9 that hope, yes.

09:12 10 Q And I'm going to move through the documents
11 chronologically. We next come to a press article
12 dated May 12th, 1990, and if we could turn to
13 document 220901, please. And you'll note it is an
14 article from the *Winnipeg Free Press* by Dan Lett,
09:12 15 the title *Coroner reviews Milgaard case*. I'll
16 just review a couple portions with you, the first
17 two paragraphs, those state:

18 "Manitoba's chief medical
19 examiner has reviewed forensic evidence
09:12 20 from the David Milgaard case to
21 determine if the Stony Mountain
22 Institution inmate was unjustly
23 convicted of a 1969 murder.

24 Dr. Peter Markesteyn confirmed
09:12 25 yesterday he has finished reviewing



1 scientific evidence from the Milgaard
2 trial and is preparing a report on his
3 findings."

09:12 4 And did you know, at the time, how Mr. Lett had
5 learned of your involvement?

6 A I have no idea.

7 Q And do you recall what scientific evidence, that's
8 referred to in the article, you would have
9 reviewed by this point in time?

09:13 10 A That would be the evidence as presented or as
11 reviewed by Dr. Ferris.

12 Q Okay. And can you be more specific? Again, we'll
13 look at some of these materials, but I assume that
14 included original trial evidence, --

09:13 15 A Actually, more the scientific evidence. I use the
16 trial evidence as a background, I don't -- on --
17 don't always take a great note of it because
18 that's not my station. But I use -- I was -- my
19 task was to review the scientific evidence --

09:13 20 Q Okay.

21 A -- and that's what I did.

22 Q Okay. So the 'scientific evidence' here is
23 referring to Dr. Ferris' report then?

24 A That's correct.

09:13 25 Q Okay. And were you under the impression, at the



1 time, that you would be making a determination as
2 to whether Mr. Milgaard had been unjustly
3 convicted?

4 A Well, I think that was implied, but that was not
09:13 5 the request. My, the request was as stated in the
6 letter, to review the evidence and see if I had an
7 opinion either supporting or perhaps not
8 supporting.

9 Q Okay. And if we go back to the full article,
09:14 10 please, if we move down to this portion. Again,
11 I'll read this to you.

12 "Markesteyn conducted the
13 review at the request of Milgaard's
14 lawyer, David Asper.

09:14 15 Markesteyn, who declined to
16 comment on his findings until his report
17 is complete, said he is intrigued by
18 both the case and Ferris's report.

19 'It is a very interesting case
09:14 20 indeed. I find it fascinating.'"

21 And was this accurate as far as your position and
22 comments at that time?

23 A Yes.

24 Q And why were you declining to comment on your
09:14 25 findings at this point?



1 A It's -- I do not comment on findings to the press
2 ever, umm --

3 Q Okay. So that was a policy, then, of yours?

4 A Oh yes.

09:14 5 Q And had you been expecting to hear from the press
6 about your involvement?

7 A Well the press, at that time when I was in office,
8 was very often in contact with me, there's hardly
9 a day didn't go by that they didn't contact me
09:15 10 about something or another, so that did not
11 surprise me at all. In fact, I recall getting in
12 -- a statement or a question from the Toronto
13 newspaper in which the journalist asked "have you
14 been asked to find Milgaard innocent?", and I
09:15 15 recall saying to him "they have no courts here,
16 you know, in Manitoba, they just phone me and I'll
17 say", he said "I get your point", and I said
18 "that's not what I do."

19 Q Okay. I'm going to continue reading from the
09:15 20 point that we left off:

21 "Key to Ferris's report is the
22 conclusion that semen samples found at
23 the scene were incorrectly interpreted
24 as tying Milgaard to the crime."

09:15 25 Of course I believe there we're talking about the



1 frozen substance that was found at the scene and
2 we'll talk more about that. The article
3 continues quoting Ferris' report:

4 "On the basis of the evidence that I
09:16 5 have examined," the report stated, "I
6 have no reasonable doubt that
7 serological evidence presented at the
8 trial failed to link David Milgaard with
9 the offence and that in fact, could be
09:16 10 reasonably considered to exclude him
11 from being the perpetrator of the
12 murder."

13 And I assume by this point in time, Dr.
14 Markesteyn, that you would have been aware of Dr.
09:16 15 Ferris' conclusions in this respect?

16 A Oh, yes.

17 Q And did you understand that they were twofold in a
18 sense, (a), that the serological evidence failed
19 to link David Milgaard to the murder, and
09:16 20 secondly, that the serological evidence could be
21 reasonably considered as excluding David Milgaard
22 as the perpetrator?

23 A I was aware of that conclusion, yes.

24 Q Okay. Out to the full article again, a short
09:16 25 portion here, the paragraph here states:



1 "Asper said he requested Markesteyn
2 review the evidence because it appears
3 the Justice Department has little
4 interest in challenging Ferris's
09:17 5 findings."

6 And were you aware or do you recall whether you
7 were aware at the time of Mr. Asper's feelings in
8 this regard?

9 A Well, he did not share that to that extent with me
09:17 10 in the sense that I'm sure that Mr. Asper felt
11 that this was the case, but that's not what he
12 asked me to do.

13 Q And was Federal Justice involved at all in the
14 retention of your services?

09:17 15 A No, they were not.

16 Q I turn you to another article, a similar article
17 from the same date, 004726, and this is from the
18 *Toronto Star*, and perhaps it's the one that, or
19 related to what you were referring to earlier,
09:18 20 "Pathologist re-examining evidence from murder
21 trial." The date is actually May 13th, 1990 on
22 this article I believe, and just the first
23 paragraph states:

24 "Manitoba's chief medical examiner has
09:18 25 reviewed forensic evidence and will soon



1 give his opinion on whether David
2 Milgaard is innocent of a 1969 murder
3 for which he was convicted."

4 And were you under the --

09:18 5 COMMISSIONER MacCALLUM: Mr. Hardy, it says
6 January doesn't it?

7 MR. HARDY: Actually, if we go to the full,
8 it is May.

9 COMMISSIONER MacCALLUM: Okay.

09:18 10 MR. HARDY: But you are right, the -- I
11 think it got cut off. If we could just blow up
12 the date there for a moment, please.

13 COMMISSIONER MacCALLUM: Oh, okay, thank
14 you. May 13th, 1990?

09:18 15 MR. HARDY: That's how I read it, yes.

16 COMMISSIONER MacCALLUM: All right. Thank
17 you.

18 BY MR. HARDY:

19 Q Again, the first paragraph states:

09:18 20 "Manitoba's chief medical examiner has
21 reviewed forensic evidence and will soon
22 give his opinion on whether David
23 Milgaard is innocent of a 1969 murder
24 for which he was convicted."

09:18 25 And perhaps you've covered this, but were you



1 under the assumption at any time that you would
2 be reaching a conclusion on Mr. Milgaard's guilt
3 or innocence?

4 A I do not reach that conclusion.

09:19 5 Q One more article that I'll just refer to, I don't
6 think we need to review any portions from it, but
7 it's from the same time period and it's generally
8 of the same approach, it's from the *StarPhoenix*,
9 and the document is 004730, and again I'll just
09:19 10 note that for reference, there are no specific
11 portions that I am going to refer you to, Dr.
12 Markesteyn.

13 We next come to a second letter
14 from Mr. Asper to yourself dated May 15th, 1990,
09:19 15 if we could turn to 155507, please, and again
16 you'll see it's correspondence directed to
17 yourself from Mr. Asper dated May 15th, 1990, and
18 again I'll review this correspondence with you.
19 It states:

09:19 20 "Further to our telephone
21 conversation of May 14, 1990, this will
22 confirm my request that you offer an
23 opinion if possible on whether the
24 evidence tendered at the Milgaard
09:20 25 supports the Crown's theory of the case.



1 I trust that you are familiar
2 with the scene immediately surrounding
3 the body of the deceased. The body was
4 located in a north/south portion of a
09:20 5 T-shaped alley. There was an east/west
6 portion of the alley located at the
7 southern end of the portion in which the
8 deceased's body was located. The most
9 proximate street to the west of the
09:20 10 alley was Avenue 0 South, and to the
11 east was Avenue N South.

12 The Crown's theory is that
13 Milgaard intercepted the deceased as she
14 walked along Avenue N near where it
09:20 15 meets the east/west portion of the
16 alley. Allegedly, a struggle occurred
17 at that point, and then carried on into
18 the lane and then northward into the
19 north/south portion of the T.

09:20 20 I do not know whether you have
21 the evidence of the identification
22 officers, but the evidence at trial was
23 clear that there was no evidence of a
24 struggle having occurred at one point in
09:20 25 the alley, and carrying on up to the



1 point where the body was found. I can
2 appreciate that this area is highly
3 speculative, but nevertheless, one would
4 think that given the number of stab
09:21 5 wounds, as well as the degree of
6 violence used in the attack generally,
7 there would be some evidence -- be it
8 blood stains or a disturbance in the
9 snow -- to show that the attack had
09:21 10 begun at one point and concluded at
11 another."

12 And do you recall this request, Dr. Markesteyn?

13 A Yes, I do.

14 Q And do you recall any discussions with Mr. Asper
09:21 15 at the time relating to this request?

16 A Yes, he did ask me, you know, about the opinion
17 that had been expressed by Dr. Ferris on this
18 matter and I said I would look at it and, as you
19 know, I later declined.

09:21 20 Q Okay. And I think we'll see that in your report
21 as you mention. Now, it would appear that around
22 the same time as the document we just looked at,
23 that you were also in contact with Eugene Williams
24 who was a lawyer from the Federal Department of
09:21 25 Justice working on Mr. Milgaard's Section 690



1 application. Do you recall Mr. Williams?

2 A Yes, I do, yes.

3 Q I'll turn you to 333393. You'll see it's a letter
4 dated May 15th, 1990 directed to yourself from
09:22 5 Eugene Williams, and the body of the letter
6 states:

7 "Further to our discussion of May 14,
8 1990, please find enclosed the
9 transcript of the Judge's charge to the
09:22 10 jury in the above captioned matter. If
11 there are any further materials that you
12 require, please do not hesitate to ask."

13 And do you recall receiving the judge's charge
14 from Mr. Williams?

09:22 15 A I did.

16 Q And do you recall how that came about or what
17 discussions surrounded that matter?

18 A The reason I wanted that is because it's my
19 impression, and that's all it is, that the jury on
09:22 20 occasion place a lot of attention, if not all the
21 attention, to the judge's charge, and I wanted to
22 see if all this work what you were doing had
23 already been dealt with by the judge somehow or
24 the other. That's why I wanted to see what had
09:23 25 been said about the matter.



1 Q And when you say all of this work, do you mean all
2 of the --

3 A All this forensic testing, retesting, non-testing
4 and all that.

09:23 5 Q Okay. And do you recall whether the charge had
6 any impact on your findings?

7 A It had no impact on the findings, but I do state
8 in my report that the judge specifically stated
9 that there was no evidence that the semen had been
09:23 10 contaminated with blood.

11 Q And I think that perhaps that wasn't in the
12 charge, but perhaps in the evidence, or during the
13 evidence of Bruce Paynter, and would that fit with
14 your recollection? In the charge itself for the
09:23 15 most part there is no direction on the forensic
16 evidence.

17 A I may be incorrect.

18 Q That's a matter that sticks out in your mind?

19 A That's correct.

09:23 20 Q As you recall in any event?

21 A Yeah.

22 Q And other than that, though, I take it that the
23 judge's charge, you don't recall it having any
24 impact on your findings?

09:23 25 A That does not have any impact on the scientific



1 evaluation of the findings, no.

2 Q And it could have, and I know I'm speculating at
3 this point, but could have related to some of the
4 theories about how the crime occurred, and I refer
09:24 5 to the request that Mr. Asper had just made of you
6 in terms of commenting on the Crown's theory.

7 A Yeah.

8 Q And I don't know, as I say, what discussions took
9 place with Mr. Williams, but perhaps it could have
09:24 10 related to that as well.

11 I'll turn you to another memo
12 relating to a discussion with Mr. Williams, the
13 document is 002510, and you'll see it's a memo to
14 file by Mr. Williams dated May 29th, 1990
09:24 15 respecting conversations with Dr. Markesteyn and
16 Murray Brown, and starting at the first paragraph
17 I'll read to you:

18 "On May 29, 1990, I spoke with Dr.
19 Markesteyn ... to request a copy of his
09:24 20 completed report. Dr. Markesteyn
21 indicated that he was currently working
22 on the report and expected to have it
23 completed by June 1, 1990. Dr.
24 Markesteyn indicated that a number of
09:25 25 individuals and organizations had



1 expressed an interest in obtaining a
2 copy of his report."

3 And do you recall this request for the report
4 from Mr. Williams?

09:25 5 A Yes.

6 Q And was it accurate that you had received a number
7 of requests then from other parties?

8 A Oh, yes. Everybody was trying to find out what I
9 was going to say.

09:25 10 Q And from whom? What is your recollection in that
11 regard?

12 A Well, it would be the press specifically.

13 Q And reading to the next paragraph:

14 "He had no objections to providing me
09:25 15 with a fax copy of it. He also agreed
16 to address the question - whether the
17 scientific evidence exonerated David
18 Milgaard?"

19 And is that information accurate from your
09:25 20 recollection?

21 A Yes, that's probably correct.

22 Q And do you recall any discussions surrounding this
23 particular request?

24 A Yes, I think I -- well, I know that I would have
09:25 25 told Mr. Williams as well that of course that's



1 not my station to exonerate anybody, that I would
2 review and I would answer any questions that he
3 had on the theory of the Crown if you like.

4 Q Okay. And just moving to the next paragraph:

09:26 5 "Dr. Markesteyn also had access to the
6 psychiatric file of David Milgaard.
7 Further he indicated that a professional
8 source, (non-medical) had advised him
9 that Albert Cadrain had been admitted to
09:26 10 a psychiatric facility after the trial
11 of David Milgaard."

12 And is that information that you would have
13 provided to Mr. Williams at this time?

14 A Yes.

09:26 15 Q And what did you have respecting a psychiatric
16 file as referred to in that paragraph?

17 A Oh, I had the file of the psychiatrist who had
18 attended to Mr. Milgaard during his incarceration.

19 Q It was psychiatric reports and comments then
09:27 20 during, or arising during the time of Mr.
21 Milgaard's imprisonment?

22 A That's correct.

23 Q And do you recall who had provided you with this
24 material?

09:27 25 A No, I don't. I got it all, I would imagine,



1 from -- well, it may have been from Mr. Williams,
2 but I got it, I got it all. It may even have been
3 from Mr. Asper, I'm not sure. I don't remember
4 where it came from.

09:27 5 Q And in terms of the information relating to Albert
6 Cadrain, do you recall providing that information
7 as well to Mr. Williams?

8 A Yes, because I had that information from what I
9 call a professional source non-medical, that's
09:27 10 what -- that can only mean that's probably a legal
11 source of some kind.

12 Q And are you able to tell us or do you recall who
13 that information was received from?

14 A No.

09:27 15 Q And did this type of information, I'm referring to
16 the psychiatric file and the information relating
17 to Albert Cadrain, was that relevant at all for
18 purposes of your review?

19 A No, not really, but it is important to know as
09:28 20 much as possible if one can as a pathologist to
21 address the circumstances of the death, to know as
22 much as possible of the accused and habits of the
23 accused and so on.

24 Q Do you recall specifically why you were mentioning
09:28 25 this information to Mr. Williams?



1 A Well, I think there was a, I had a discussion with
2 another pathologist who gave me the impression
3 that I should have no doubt about the guilt of Mr.
4 Milgaard because he had a psychiatric problem.

09:28 5 Q And who was the pathologist that you are referring
6 to?

7 A Dr. Emson.

8 Q Okay. And I think we're going to touch upon that
9 just shortly. Did you have your own view at the
09:29 10 time, your own personal view at the time on Mr.
11 Milgaard's guilt or innocence?

12 A No, I do not, and may I qualify that. Of course
13 as a person, as a person I have views, but if you
14 are asking me whether I had a professional
09:29 15 opinion, that's a different matter.

16 Q Okay.

17 A Of course I have views.

18 Q And maybe that's a better question. Would this
19 information that I've been referring to, whether
09:29 20 from the psychiatric file or the information
21 relating to Albert Cadrain, have impacted your
22 deliberations or your ultimate conclusions at all?

23 A No.

24 Q And is there anything else you can recall
09:29 25 respecting your conversation with Mr. Williams at



1 this time?

2 A No. I answered the questions he had as best as I
3 could and that was the end of that.

4 Q Okay. Again, moving chronologically, we next come
09:29 5 to a memo to file by David Asper dated May 30th,
6 1990, and the document is 169913. The memo
7 mentions Dr. Colin Merry and Dr. Merry has already
8 testified here at this Inquiry. How did you know
9 Dr. Merry and how had he become involved in this
09:30 10 case?

11 A I, as you know, I was not only the chief medical
12 examiner, I was also the professor of forensic
13 pathology at the University of Manitoba and head
14 of the forensic division, and the forensic
09:30 15 division is more than pathology, that includes
16 anatomy, serology, bacteriology, all sorts of
17 stuff, which is the nice thing about being in a
18 university setting, so I knew Colin Merry, I knew
19 he was a serologist, I knew he does blood
09:31 20 grouping, that was his task, and as he is a
21 colleague, could call him and ask his opinion and
22 that's what I did.

23 Q And I'll review the body of the memo with you. It
24 states, and this is again David Asper writing a
09:31 25 memo to the file:



1 "I was contacted on Sunday,
2 May 27, 1990 by a Dr. Merry, who is a
3 Hematopathologist at the Health Sciences
4 Centre, and connected with the
09:31 5 University of Manitoba Medical School.
6 He was consulted by Dr. Markesteyn as to
7 the blood grouping issues because that
8 is his specialty. He will be conducting
9 a battery of tests which he believes
09:31 10 will establish among other things:
11 a) That human semen is not yellow in the
12 snow, but rather either clear or white,
13 and not visible to the human eye. This
14 likely means that what the police
09:31 15 officer found in the snow was urine, and
16 probably urine from some kind of an
17 animal. He believes that certain
18 enzymes present in urine will give rise
19 to a positive test for human semen, as
09:32 20 well as any testing for the presence of
21 antigens.
22 b) Assuming that the samples were in
23 fact human semen, there is no evidence
24 whatever to establish the presence of
09:32 25 blood, and in the absence of such, the



1 only conclusion was that the antigens
2 were present in the semen by virtue of
3 secretion, and therefore excludes
4 Milgaard as the donor based on the
09:32 5 evidence.

6 He expects that his testing
7 will occur within the next week, and he
8 will provide a report in due course."

9 And do you have any recollection how it had come
09:32 10 about, Dr. Markesteyn, that Dr. Merry was having
11 direct contact with David Asper?

12 A No, I did not know he had done that, nor is that
13 any concern of me, of mine, nor is that anything
14 that -- but I didn't know he was doing this,
09:32 15 that's fine.

16 Q And you had clearly consulted Dr. Merry by this
17 point in time?

18 A Oh, yes.

19 Q But you weren't aware though of this particular
09:33 20 telephone call from Dr. Merry to David Asper, but
21 knowing now about it, that doesn't cause you or
22 concern or wouldn't have caused you concern at the
23 time?

24 A Not in the slightest, no.

09:33 25 Q And I think this is the earliest mention we see of



1 the thought that the frozen lumps that were found
2 at the scene by Lieutenant Penkala on February
3 4th, 1969 may have been dog urine. Can you tell
4 us who first considered this possibility and how
09:33 5 that theory evolved?

6 A I did, and I did that because of the, for two
7 reasons. First of all, in my experience as a
8 person, not as a pathologist, yellow stain or
9 yellowish stains in snowbanks are urine unless or
09:33 10 until proven otherwise, and -- now -- then one
11 says to one's self, okay, if this is urine, could
12 it possibly have sperm in it and could it possibly
13 have A antigen in it, because of course if that
14 was not possible, then it could not be urine, and
09:34 15 I had done research in Newfoundland at the time on
16 kidneys of dogs and I remember talking to the
17 professor involved in that and saying to him sort
18 of during a conversation, you know, it's amazing
19 that -- his research was about urinary tract
09:34 20 infections in dogs, that dogs can pee all the
21 time, you know, and this is one of those
22 conversations that one has during coffee and all
23 that, and he says, "What makes you think that's
24 urine?" I said, "Well, isn't it?" He says, "No.
09:34 25 Dogs, male dogs, they excrete their semen, they



1 don't recycle. Humans do, dogs do not." So I
2 knew that could be, and I checked it out actually
3 with the Department of Veterinary Affairs at the
4 university who agreed that dogs do that.

09:35 5 Now, I had another issue, could
6 there be A antigen. At least we knew it could be
7 semen, they could have semen unless they were
8 neutered, and number 2, could that have A antigen.

9 Well, low and behold, there was
09:35 10 an article in the *Scientific Press* to find a link
11 or to find a model for research to see if blood
12 group A was related to cancer of the stomach,
13 there seemed to be a lot of people who had cancer
14 of the stomach who had blood group A and so we
09:35 15 needed an animal model who had the same antigen,
16 and low and behold, in nature -- there's a
17 the journal, a very highly regarded journal stated
18 dogs have A antigens, we can use dogs and that was
19 the end of that, so I knew that not only that dog
09:35 20 urine could contain semen and could be a positive
21 and therefore I said okay, how do we know this is
22 not urine, dog's urine.

23 And then we had another thought
24 and that is this, I said, you know, to my
09:36 25 experience, not as a pathologist, but as a person,



1 is semen, does that look yellowish in snow, so we
2 decided to do an experiment, and Dr. Merry, as you
3 know, is a very enthusiastic person and let's go
4 for it. I said, "Now where are we going to get
09:36 5 the semen from," and contrary to some suggestions,
6 we decided that we'd get it from the fertility
7 clinic where they had a pitcher full of it and
8 which they do for, to test fertility of males,
9 so -- and he said, "I've got a freezer at minus
09:36 10 40, that's where we keep our specimens," and he
11 said, "There's snow attached or icy snow attached
12 to the side of it, let's test it," so we did, and
13 so we squirted that semen with a syringe against
14 the side of that freezer and we did not find it,
09:37 15 you could not see that, and in fact only with
16 ultraviolet light, which is a well-known test by
17 the police, and I knew of that test, could you see
18 that it was a fluorescent, so we then reached the
19 conclusion, number 1, semen, frozen semen does not
09:37 20 look yellowish; number 2, it is possible, it is
21 possible that dog's urine, being yellowish or
22 yellow, contained A antigen and contains sperm and
23 therefore I raised the issue how do we know in
24 this unpreserved scene that this is not dog urine,
09:37 25 I raised that.



1 Q Okay. And we'll come to some of this further in a
2 moment. You had mentioned the test that was done
3 with the freezer, and before I forget, I wanted to
4 ask, do you recall whether you had let some time
09:37 5 lapse in relation to that test determining whether
6 frozen semen at minus 40 could be yellow, was that
7 something that you looked at at the time or was
8 there a time lapse afterwards?

9 A No, that's -- that's not a very great scientific
09:38 10 test. I'll tell you why not. First of all, the
11 semen we tested was not so-called fresh, right, it
12 had been ejaculated before; number 2, it was at
13 room temperature, not at body temperature because
14 we had it from a pitcher, and we did not wait four
09:38 15 days, of course we should have waited four days,
16 kept that freezer and then look again. We did not
17 do that.

18 Q Again, we'll look at some of that further in just
19 a moment. Otherwise, does this memo, what I've
09:38 20 read to you, sound accurate in terms of the
21 conclusions you were considering at the time?

22 A Yes.

23 Q We'll move next to a memo to file by Eugene
24 Williams dated May 31st, the document is 333433,
09:39 25 you'll see it's a memo dated May 31st, 1990 to



1 file from Eugene Williams respecting telecom with
2 Mr. Peter Markesteyn, and it states:

3 "Dr. Markesteyn called to advise me that
4 his report would be completed today. He
09:39 5 also indicated that he had spoken with
6 David Asper concerning the distribution
7 of the report. Mr. Asper requested Dr.
8 Markesteyn to provide his report only to
9 Asper, who would then distribute the
09:39 10 report to those requesting it."

11 Does that fit with your recollection?

12 A Yes.

13 Q Okay.

14 "I asked Dr. Markesteyn whether the
09:39 15 forensic evidence exculpated David
16 Milgaard. Dr. Markesteyn said: "I
17 can't say the forensic evidence excludes
18 him." He did note, as have the
19 scientists consulted by the department,
09:39 20 that the forensic evidence does not
21 inculcate David Milgaard. Dr.
22 Markesteyn told me however, that his
23 report was silent on the question quoted
24 above.

09:40 25 I also spoke with David Asper



1 who assured me that as soon as he
2 receives Dr. Markesteyn's report, he
3 would provide me with a copy."

4 Do you have a recollection of this conversation?

09:40 5 A Well, to the extent thereof, yes, I would
6 certainly have told Mr. Williams that I have no
7 opinions on whether Mr. Milgaard is guilty or not.

8 Q So no reason to dispute the accuracy then of the
9 contents of this memo?

09:40 10 A No.

11 Q And had you then concluded by this time that Mr.
12 Milgaard could not be excluded on the forensic
13 evidence?

14 A He could not be excluded, no, but he could not be
09:40 15 -- I could not include him, but I could not
16 exclude him.

17 Q Okay. We'll move next --

18 A I'm sorry, I could not include the semen as being,
19 belonging to Mr. Milgaard, nor could I exclude
09:40 20 that the semen was not Mr. Milgaard.

21 Q Okay. We'll move next to a report by Dr. Merry
22 dated June 1st, 1990, 204511, and this report
23 would have just predated I guess your report which
24 we'll see in a moment which was dated June 4th,
09:41 25 1990. I'm going to review the letter with you



1 that went from Dr. Merry to Mr. Asper. Dr. Merry
2 states:

3 "I have examined the forensic
4 evidence presented at the trial.

09:41 5 From this I do not believe that
6 the possibility can be excluded that the
7 frozen yellowish substance found near
8 the body of the deceased was dog urine,
9 from a dog positive for a blood group
09:41 10 antigen cross reacting with the human
11 blood group A.

12 Approximately 50% of dogs are
13 known to have the Tr antigen which cross
14 reacts in this manner."

09:41 15 I think this touches upon something that you've
16 described for us already, but, in effect, and
17 perhaps I'm stating it too simply, it had been
18 determined that the Tr antigen in dogs could
19 mimic the A antigens that might be found in a
09:42 20 human sample.

21 A That's correct, yes.

22 Q It states as well:

23 "Such dog urine might well also contain
24 spermatozoa."

09:42 25 And those would be for the reasons that you've



1 already explained to us?

2 A That's correct.

3 Q It continues:

4 "The use of a test, "used by hospitals
09:42 5 to test for blood in urine", to test for
6 blood in seminal fluid is totally
7 invalid. Normal human seminal fluid
8 specimens will, on standing, test
9 positive as the spermatozoa disintegrate
09:42 10 and liberate cytochromes and enzymes
11 which will catalyze the
12 benzidine/peroxide reaction. This was
13 known but was tested on some seminal
14 fluid specimens submitted to this
09:42 15 laboratory for analysis."

16 And we've covered this aspect with Dr. Merry, but
17 I believe, and correct me if I'm wrong, what he's
18 stating is that if you have uncontaminated semen
19 which sits for a period of time, because of
09:43 20 certain reactions that will take place within the
21 cells of that semen, that if you were to apply
22 the hemostix test later on, you may in fact get a
23 positive reaction?

24 A So I believe, yes.

09:43 25 Q Okay. And the hemostix test, as he explains, was



1 the one, and as we've heard from Staff Sergeant
2 Paynter, was the test that was used to attempt to
3 detect whether there was blood in the original
4 frozen substance that was tested?

09:43 5 A Yes.

6 Q Okay. And then the letter concludes:

7 "From the manner in which the test for
8 secretor status was performed it is not
9 possible to be certain if David Milgaard
09:43 10 is a secretor or non-secretor of blood
11 group A antigen."

12 Again, were you aware of these findings and that
13 Dr. Merry was providing a separate report in this
14 regard?

09:43 15 A No, I was not aware of that.

16 Q Okay. And any concerns about that now that you
17 are aware of it?

18 A No. I think it actually helps the matter. We
19 obviously did not discuss that we would both give
09:44 20 reports and his report is no different from my
21 conclusions.

22 Q You would have agreed with these conclusions?

23 A Yeah, that's correct.

24 Q Based upon your considerations at the time?

09:44 25 A Yes.



1 Q And I think they are threefold, but one of them
2 was that the frozen substance was possibly dog
3 urine --

4 A That's right.

09:44 5 Q -- was one of the conclusions. That the hemostix
6 test was invalid, that, as I said, could have been
7 positive even where the semen was uncontaminated?

8 A He said that, and I have no reason to disagree
9 with that. That's his specialty though, that's
09:44 10 not mine.

11 Q Okay.

12 A Yes.

13 Q And that David Milgaard could be a secretor, that
14 it couldn't be determined one way or the other
09:44 15 from the tests that were done in 1969?

16 A That I was aware of.

17 Q And in relation to this very last point that I've
18 just mentioned, do you recall what your thoughts
19 were on that aspect?

09:44 20 A Yes, I do, and I had grave doubts that -- in fact,
21 I had grave doubt indeed that that test was a
22 valid test and --

23 COMMISSIONER MacCALLUM: That's the
24 hemostix test for the presence of blood?

09:45 25 A No, the test whether he is a secretor or not.



1 COMMISSIONER MacCALLUM: All right.

2 BY MR. HARDY:

3 Q And can you detail that further? You mentioned
4 that you had grave doubt; what were your thoughts
09:45 5 at the time?

6 A Well my thoughts at the time was that he should be
7 re-tested.

8 Q And do you recall any discussions with anyone, at
9 that time, respecting that matter?

09:45 10 A I do have a recollection of that, and it was my
11 understanding, unless I stand corrected I've
12 always acted under the principle that the services
13 of a forensic pathologist is an extension of the
14 client/solicitor privilege, and therefore I do
09:45 15 not, obviously, discuss what counsel discusses
16 with me --

17 Q You do --

18 A -- unless I am allowed to do so.

19 Q And you do recall certain discussions with counsel
09:45 20 for Mr. Milgaard, then, respecting this particular
21 matter?

22 A Yes, I do.

23 Q But you are unwilling, at this point, to share
24 your recollections of that discussion with us?

09:46 25 A Unless I'm allowed to do so, --



1 Q Okay.

2 A -- I believe I cannot.

3 Q Okay. And perhaps we can come back to that, then,
4 and we can cover that at the break, perhaps, but I
09:46 5 can continue on.

6 And we're going to look at the
7 contents of your report in a moment, Dr.
8 Markesteyn; would you have likely provided a
9 summary of your findings to Mr. Asper prior to the
09:46 10 release of your report?

11 A Very likely, that's very common.

12 Q Okay.

13 A Before I give a report I'm always asked, you know,
14 "let's have a chat".

09:46 15 Q Okay.

16 A So I'm sure that happened here.

17 Q And we have a clip, a video clip from
18 approximately the time period just prior to the
19 release of the report, we don't have an exact date
09:46 20 for it. I'm going to play that for you and then I
21 have some questions that follow. I believe the
22 clip is JH1, and it begins at 9 minutes and
23 continues to 10 minutes and 38 seconds, and it
24 will show up on your screen.

09:47 25 (Clip JH1 played)



1 INTERVIEWER: But what about the Ferris
2 report?

3 MR. DAVID ASPER: Well --

4 INTERVIEWER: What does Ferris say that is
09:47 5 so encouraging to David Milgaard?

6 MR. DAVID ASPER: All right. The
7 background is the Crown alleged that there was a
8 sexual assault, and they attempted to link David
9 Milgaard to the scene of the crime because they
09:47 10 said that they had found two spots of semen in
11 the snow, which for a variety of technical
12 reasons they say belonged to David Milgaard. And
13 what Dr. Ferris says is that this doesn't link
14 David Milgaard at all, and for a variety of
09:47 15 technical reasons again, can reasonably
16 interpreted to exclude him as the donor of the
17 semen. And I suspect that, by the time this show
18 goes to air, it will be pretty clear from Dr.
19 Markesteyn that what the doctors and the
09:48 20 courtroom was dealing with was something that
21 could very well have been something other than
22 semen and totally unrelated to the crime.

23 INTERVIEWER: Perhaps even dog urine in the
24 snow, something like that?

09:48 25 MR. DAVID ASPER: Anything.



1 INTERVIEWER: Something like that?

2 MR. DAVID ASPER: Anything. I mean the --
3 Dr. Markesteyn and his support group have so
4 riddled the forensic evidence that it has no
09:48 5 scientific value and yet, you know, it played a
6 fairly -- it must have played a fairly important
7 part in the trial because it's the only
8 independent thing that really establishes David
9 as being at the scene of the crime, or purported
09:48 10 to, and the Court of Appeal, you know, in their
11 decision, relied on it, in part, to support the
12 conviction.

13 (Clip JH1 ends)

14 BY MR. HARDY:

09:48 15 Q And Dr. Markesteyn, the clip seems to confirm --
16 and I think we've confirmed it already -- that you
17 had likely advised Mr. Asper, then, about the dog
18 urine --

19 A Yes.

09:48 20 Q -- theory by this point in time? And we, of
21 course, saw the letter from Dr. Merry as well.

22 COMMISSIONER MacCALLUM: Mr. Hardy, before
23 you go on, do you have a -- is there a doc. ID
24 for that?

09:49 25 MR. HARDY: Yeah, I can give you a doc. ID,



1 Mr. Commissioner, it's 230098.

2 COMMISSIONER MacCALLUM: Is that the
3 transcription?

4 MR. HARDY: It isn't, I think that's
09:49 5 just --

6 COMMISSIONER MacCALLUM: The tape?

7 MR. HARDY: -- the video itself.

8 COMMISSIONER MacCALLUM: Okay.

9 MR. HARDY: The video clip is identified as
09:49 10 JH1.

11 COMMISSIONER MacCALLUM: Yes.

12 MR. HARDY: And do you have the time,
13 running from 9 minutes to 10 minutes and 38
14 seconds?

09:49 15 COMMISSIONER MacCALLUM: Okay.

16 BY MR. HARDY:

17 Q And Dr. Markesteyn, if you would have expressed
18 this theory in relation to the dog urine prior to
19 the point of the release of your report, how would
09:49 20 you have expressed that theory to Mr. Asper or
21 otherwise?

22 A Oh, I probably would have told him exactly what I
23 said in the report, in the sense that, you know,
24 "we can't be certain that this is not dog urine,
09:49 25 all right, it was not tested, therefore it could



1 be, and therefore I don't think it's got any
2 value".

3 Q Okay. And one more very short clip that I'll show
4 to you, it's from the same tape, and it begins at
09:50 5 25 minutes and 11 seconds and, I believe,
6 continues until 25 minutes and 30 seconds. If we
7 could play that, please?

8 **(Clip played)**

9 INTERVIEWER: I guess the Ferris report
09:50 10 just reinforces ...",.

11 **(Clip ends)**

12 MR. HARDY: Sorry, can we start it over
13 again?

14 MS. BOSWELL (Document Manager): We're
09:50 15 trying to find the start.

16 MR. HARDY: Oh, I'm sorry, okay.

17 **(Clip played)**

18 MRS. JOYCE MILGAARD: Don't have Joyce
19 Milgaard at their doorstep every day too.

09:50 20 MR. DAVID ASPER: Well --

21 INTERVIEWER: And the other thing, because
22 we're talking about humanity, we're talking about
23 human beings, there are major careers on the
24 line?

09:51 25 MR. DAVID ASPER: Yes.



1 INTERVIEWER: There are, what, three people
2 from the investigation and the trial, going back
3 to 1969 and 1970, who have responsible positions
4 now in Saskatchewan?

09:51 5 MRS. JOYCE MILGAARD: Oh yes. The
6 investigator is now the chief of police in
7 Saskatoon.

8 MR. DAVID ASPER: And this is the guy, the
9 investigator is the guy who found the samples in
09:51 10 the snow --

11 MRS. JOYCE MILGAARD: Right.

12 MR. DAVID ASPER: -- which, if all goes
13 well, by the time this show airs will be
14 ridiculed.

09:51 15 INTERVIEWER: So you have the investigator
16 who is the police chief?

17 MRS. JOYCE MILGAARD: Yeah. We have --

18 INTERVIEWER: You've got an attorney who is
19 now on the Bench, Justice --

09:51 20 MRS. JOYCE MILGAARD: Now on the Court of
21 Appeal.

22 MR. DAVID ASPER: Court of Appeal of
23 Saskatchewan.

24 INTERVIEWER: Of Saskatchewan, and we have
09:51 25 one other person?



1 MRS. JOYCE MILGAARD: Oh yes, Mr. Caldwell,
2 and he's --

3 (Clip ends)

4 BY MR. HARDY:

5 Q And do you recall, Dr. Markesteyn, had you had
6 discussions with some of the individuals who were
7 originally involved?

8 A None, no.

9 Q And was this a concern that you had at all, given
09:51 10 the theory that you knew was going to be advanced?

11 A That would -- as a person I would have concerns,
12 of course, what this means to other people, but it
13 does not influence me one way or the other.

14 Q Okay. One further pre-report document that I'll
09:52 15 refer you to, there's another discussion that
16 takes place, and we have the transcript of this
17 discussion, and it apparently took place
18 between -- or amongst Joyce Milgaard, David Asper,
19 and an unknown female. And if we could turn,
09:52 20 please, to document 336785, and it's page 12 of
21 that document. It's not particularly easy to
22 follow, Dr. Markesteyn, but I'll direct you to
23 those portions that I want your comment on. And
24 just to give you some context, I believe there's
09:52 25 some discussion here about Dr. Ferris' findings



1 and your findings, and Mr. Asper begins at this
2 paragraph:

3 "MR. DAVID ASPER: Yeah. The problem is
4 ideally, and you know, I talked about
5 this with Hersh, what I would ideally
6 like is for the evidence to be sound,
7 for the integrity to be sound."

8 And I believe he is talking about the integrity
9 of the original forensic evidence at trial.

09:53 10 "UNIDENTIFIED FEMALE SPEAKER: Right.

11 MR. DAVID ASPER: And for it to exclude
12 him.

13 UNIDENTIFIED FEMALE SPEAKER: Right.

14 MR. DAVID ASPER: What we've got now is
15 Markesteyn saying "this evidence is
16 junk, this is not even evidence" --

17 UNIDENTIFIED FEMALE SPEAKER: Shouldn't
18 have even been used (*Inaudible*) --

19 MR. DAVID ASPER: That's right, which I
20 think is as good."

21 "UNIDENTIFIED FEMALE SPEAKER: That's
22 right, yeah.

23 MR. DAVID ASPER: And yet, you know, so now
24 you've got to rethink the whole trial
25 without that evidence, or having that



1 evidence but having it subject to proper
2 cross-examination.

3 UNIDENTIFIED FEMALE SPEAKER: Uh-huh.

4 MR. DAVID ASPER: Does that affect the
5 jury.

6 MRS. JOYCE MILGAARD: Oh, well, it's got
7 to.

8 MR. DAVID ASPER: Well --

9 MRS. JOYCE MILGAARD: I mean you have to.

10 MR. DAVID ASPER: Okay.

11 MRS. JOYCE MILGAARD: So say you were in
12 Kim Campbell's spot and this information
13 comes to you; how are you gonna see it?

14 MR. DAVID ASPER: I'm gonna see it as just
15 another problem with the forensic
16 evidence. One says it excludes, the
17 other says it shouldn't even have been
18 in there, none of them are saying that
19 it -- that it's properly there and, and
20 culpable."

21 And if we can move to the next page, please, I'm
22 going to skip ahead to the top left-hand corner
23 of page 13. And this portion -- yeah, that's
24 fine, beginning here. And it seems apparent that
09:54 25 you haven't yet provided the report. Mr. Asper



1 says:

2 "MR. DAVID ASPER: I mean that's what

3 Markesteyn is doin'.

4 UNIDENTIFIED FEMALE SPEAKER: And I think

5 we should wait and get the report."

6 And then it continues from there:

7 "MR. DAVID ASPER: Markesteyn, you see

8 Markesteyn is a more of a Quincy type,

9 you know.

10 MRS. JOYCE MILGAARD: Yeah.

11 MR. DAVID ASPER: Markesteyn wants to

12 investigate, Markesteyn is like a

13 real -- he's like a cop, almost.

14 MRS. JOYCE MILGAARD: Yeah.

15 MR. DAVID ASPER: And, umm, he'll dig --

16 MRS. JOYCE MILGAARD: So has not -- yeah.

17 What about the, does Markesteyn have

18 access to the prelim?

19 MR. DAVID ASPER: He hasn't asked for it.

20 I said "if you want it", you know, it

21 was, it was --

22 MRS. JOYCE MILGAARD: Yeah, but I think

23 maybe he should have it.

24 MR. DAVID ASPER: No, no, the prelim is not

25 evidence at the trial.



1 UNIDENTIFIED FEMALE SPEAKER: No.

2 MRS. JOYCE MILGAARD: No? Okay.

3 MR. DAVID ASPER: I said to him "if you
4 want it I've got a whole", I mean I got
5 all this, this is the prelim right here,
6 and I'm -- I got a list right here of
7 what stuff from the prelim he could get,
8 and I said "if you want it I'll send
9 it", and he says "nah, nah, I mean I
10 don't need anything more, this is junk,
11 you know, this evidence is junk".

12 UNIDENTIFIED FEMALE SPEAKER: So you might
13 as well wait and get this report from
14 Markesteyn before even putting to Farris
15 about the other --"

16 And in terms of the comments that are attributed
17 to you, or the types of comments that are
18 attributed to you, does this sound like the type
19 of information that you might have been providing
09:56 20 to Mr. Asper prior to the release of your report?

21 A That could very well be, yes.

22 Q And how would you express that in terms of, we see
23 here it is expressed that the evidence was junk,
24 what would you have been saying to Mr. Asper?

09:56 25 A Well, that's not a scientific term, I probably



1 would have said "you know, I don't think this is
2 valid", but I could have said "this is junk", I'm
3 not saying I didn't, but, you know, I could have.

4 Q And we've probably covered this, but why would you
09:56 5 be saying, or expressing the view that you didn't
6 think the original forensic evidence was valid?

7 A That's because of all the reasons we've gone
8 through, which was first of all an unprotected
9 scene, then it was not. The test, the ultimate
09:56 10 test in science, in forensic science, is this: We
11 always have to ask two questions, the first
12 question we ask -- and I teach that to my students
13 and to myself when I need to be reminded -- "what
14 is it", and then the second question, "what else
09:57 15 could it be". And the "what else could it be" was
16 not addressed and, therefore, it has no value.

17 I had no reason to believe, at
18 that time, that that was not dog urine, I still
19 have no reason to believe that it was tested,
09:57 20 therefore -- and it has never been excluded, and
21 to me this entire scenario of the A grouping and
22 the secretor status, and all that, meant this, we
23 were going into no-man's land with it.

24 Q Okay. And it would appear that Mr. Asper was
09:57 25 aware of the apparent fact that you were not



1 necessarily of the same opinion as Dr. Ferris
2 insofar as you weren't ready to offer an opinion
3 that the forensic evidence at trial probably
4 excluded Mr. Milgaard as the perpetrator?

09:58 5 A You see, I could not exclude him. Dr. Ferris
6 could, based on the evidence he had at that time
7 for him, which was Milgaard is a non-secretor,
8 this is secretor stuff, excludes him. I could not
9 do that. I could not exclude him, I could not tie
09:58 10 him in, but I could not exclude him.

11 Q And do you recall whether you appreciated that
12 difference or --

13 A Oh yeah.

14 Q -- you recognized that difference between your
09:58 15 report and Dr. Ferris'?

16 A Oh yes, oh yes.

17 Q Sorry, one other document before we get to the
18 report, it's 025927. This is another press
19 article dated June 4th, 1990 from the *StarPhoenix*,
09:58 20 *Mother confident new review will support*
21 *Milgaard's innocence*. The article states:

22 "David Milgaard's mother is

23 confident a new review of forensic

24 evidence will support a 1988 one

09:59 25 indicating her son is innocent of a 1969



1 murder.

2 'There can only be one answer,
3 and it's got to be that the new review
4 will be supportive ...,' Joyce Milgaard
09:59 5 said Saturday about a study by
6 Manitoba's chief medical examiner, Dr.
7 Peter Markesteyn.

8 Markesteyn's review, a report
9 on which is to be delivered today to
09:59 10 Milgaard family lawyer David Asper,
11 follows the 1988 review of trial
12 evidence by Vancouver forensic
13 pathologist Dr. James Ferris.

14 The Ferris report said evidence
09:59 15 about semen, presented at Milgaard's
16 trial, failed to link Milgaard with the
17 Saskatoon murder of nurse Gail Miller.

18 Joyce Milgaard says the
19 Markesteyn review can do nothing but
09:59 20 confirm the Ferris report.

21 'Dr. Ferris is a world renowned
22 pathologist - he's not going to have
23 made any dumb mistakes or anything,'
24 Milgaard said in a telephone interview
10:00 25 from Winnipeg.



1 Markesteyn was mum about the
2 contents of his review when contacted at
3 his Winnipeg home on Saturday.

4 'If he (Asper) allows people to
5 see it, fine, and if he doesn't that's
6 not my problem,' said Markesteyn.

7 'I'm sure he will share it with
8 others.' "

9 And, again, that would be an accurate account of
10:00 10 the position you would take on this sort of
11 matter at that time?

12 A Yes, sir.

13 Q And other than actually forwarding your report,
14 then, was your work at this point -- and we'll see
10:00 15 the report in a moment is dated June 4th, 1990 --
16 was your work on this matter completed?

17 A Yes, at that time it was, yes.

18 Q We'll next turn to your report, the document is
19 026321. And we've reviewed this together
10:00 20 previously, Dr. Markesteyn, and I understand that
21 you have had a chance to refresh yourself in terms
22 of the contents of this report?

23 A Yes, sir.

24 Q And it's directed to Mr. Asper, and you begin by
10:00 25 listing the various materials that you would have



1 reviewed in the course of your deliberations, and
2 would that be an accurate list of the materials
3 that you had considered?

4 A Yes, sir.

10:00 5 Q And perhaps we will just look briefly at some of
6 them. I note the decision of the Saskatchewan
7 Court of Appeal, the affidavit of Deborah Hall,
8 Ferris' curriculum vitae, two reports of Dr.
9 Ferris, trial transcript re blood, application
10:01 10 pursuant to Section 617 of the *Criminal Code of*
11 *Canada*, and I'll pause there.

12 And if we add item n) below,
13 just for our own reference sake, to those first
14 six that I have mentioned, I believe they are all
10:01 15 contained in document 000002. We don't need to
16 turn to that document.

17 A couple of other items I'll
18 note, I note h) judicial history; do you recall
19 what that might have been, Dr. Markesteyn?

10:01 20 A No, I don't, really.

21 Q Okay. And I missed the affidavit of David Edgar
22 Milgaard, we have excerpted evidence of Staff
23 Sergeant Paynter, and we'll see below in the list
24 of transcripts it would appear that you have the
10:01 25 complete trial evidence of Staff Sergeant Paynter.



1 We then see various letters passing back and forth
2 between counsel for Mr. Milgaard and the ministers
3 of justice, both Joe Clark and Doug Lewis. We
4 then see a list of the various transcripts of
10:02 5 evidence that you apparently reviewed, and you
6 have had a chance to look at that, I'll just
7 briefly go through that. We have the evidence of
8 Thor Kleiv, John Parker, George Reid, Joseph
9 Penkala, Keith Mackie, Helen Gerse, Eddie Karst,
10:02 10 Ray Mackie, John Oleksyn, Shane Kirby, Thomas
11 Edmondson, Gary McLeod, Lloyd McDonald, Bruce
12 Paynter, Victor Molchanko, Dr. Emson,
13 Mr. Molchanko on recall, Lewis Brand, and Thor
14 Kleiv and Giles Beauchamp on recall; and does that
10:02 15 look like an accurate list of the testimony that
16 you would have reviewed from the original trial?

17 A It does.

18 Q And would you have read the complete evidence of
19 each of these witnesses in your preparations?

10:03 20 A I would, yes.

21 Q And, moving down the page, it states:

22 "In addition, I had the
23 opportunity to review:

24 the autopsy report prepared by

10:03 25 Dr. ... Emson;



1 some slide photographs from the
2 scene and autopsy, and, laboratory
3 findings; and,
4 the charge of the Judge to the
10:03 5 members of the jury."

6 Just as far as laboratory findings, do you recall
7 what you may have had in that respect?

8 A Probably what I meant, the drug reports, there
9 usually is alcohol and drugs on the deceased, and
10:03 10 which I believe was negative. And the histology
11 also, which is a laboratory, that's part of the
12 autopsy report is a test done in the pathology
13 department after the autopsy, that's probably what
14 I meant by that.

10:03 15 Q So these, from your best recollection, would have
16 been original lab reports, then, from the lab work
17 that was was being done at the time of the
18 investigation?

19 A Well, it may be copies thereof.

10:04 20 Q Yeah, right.

21 A Yes.

22 Q Okay. But no specific recollection other than
23 that?

24 A No, that's correct.

10:04 25 Q Okay. And we have learned that you did receive



1 the charge to the jury from Mr. Williams; am I
2 correct that you did not have the closing
3 arguments of counsel from the original trial?

4 A No, I didn't ask for that, no.

10:04 5 Q And did you have an opportunity to examine any of
6 the original exhibits during the course of your
7 review?

8 A No, I did not.

9 Q And I think we've confirmed as well, through the
10:04 10 discussion with Mr. Asper, but you did not have
11 the transcripts from the preliminary hearing?

12 A I did not.

13 Q And, in the course of your preparations, did you
14 conduct any interviews with any of the original
10:04 15 witnesses or other parties of interest, and if so
16 can you share your recollection?

17 A No, I did not. I did a discussion with
18 Mrs. Milgaard, but she is not a party of this type
19 of work, yeah.

10:04 20 Q Okay.

21 A No, I did not interview any person, no.

22 Q And we'll see in a moment, and I think maybe you
23 made reference to this earlier on, that there may
24 have been discussion with Dr. Emson?

10:05 25 A Yes, I did, yes.



1 Q Okay. And what do you recall of your discussions
2 with Dr. Emson during your, during your work on
3 this matter?

4 A Well it's very common, of course, for a
10:05 5 pathologist -- and I know Dr. Emson well -- to
6 discuss their findings with the original source,
7 and so I discussed with him. And I also discussed
8 a matter which was of some concern to me, and I
9 think, in fairness, I should relate to that
10:05 10 somewhat.

11 Dr. Ferris -- sorry -- Dr. Emson
12 had come to Winnipeg some years prior to this
13 review and given a talk in which he mentioned that
14 he had been in a case where he took the stand, as
10:05 15 he called it, with -- in fear and trepidation
16 because, in a sperm sample, he had not determined
17 the human origin. And he said -- but, you know,
18 in the context of an after-dinner speech and, you
19 know, we doctors, we do like lawyer jokes you
10:06 20 know -- and he said "these guys, you know, they
21 don't understand, because I escaped", he said,
22 "because they asked me: Did you make sure,
23 doctor, that the sperm was male? And everybody
24 laughed and that was the end of that". And then I
10:06 25 reviewed his testimony years later and there it



1 was.

2 Q And help us follow through, perhaps it's clear,
3 but help us follow through with the connection,
4 then, that you made?

10:06 5 A And then I said "Harry, there are some concerns
6 here about this because, you know, it could be
7 that this is not human at all", and all that. And
8 I also had some other concerns, concerns perhaps,
9 or I needed a clarification, and that was his
10:07 10 conclusion that he had drawn about the motility
11 and mobility of the sperm, and I said "you know,
12 you reached the conclusion in, certainly valid in
13 living persons, that they lose their motility,
14 certainly in the vagina they lose their motility,
10:07 15 not in the uterus", of course not. Otherwise,
16 after four hours, none of us would have been born.
17 Some of them, those that don't make it up the
18 uterus lose their mobility, motility, and he had a
19 time frame there, but I said, "you know, that
10:07 20 doesn't, that doesn't hold in frozen sperm". And
21 he says "well how do you know the sperm was, how
22 do you know the sperm was frozen", I said "well,
23 you know, your report somewhere states that her
24 womb was frozen, and so I assume, if the womb was
10:07 25 frozen, then certainly the vagina would be frozen,



1 and that, so that doesn't hold". And I recall
2 saying that "frozen sperm is sent all over the
3 world, from Manitoba I may add, bull sperms to
4 fertilize cows all over the world, and when they
10:08 5 thaw out, they get happy, and they start moving
6 again". So I said "that doesn't hold, you cannot
7 say that", and I said to him "have you considered,
8 also, the fact that at the time the only sperm
9 found in her", that he examined, and he told, he
10:08 10 told me he had, was in his report as well as in
11 his evidence, "was in the crotch of the panties
12 that contained sperm and the vagina", and as well
13 as the test -- as the snow stuff, and with the --
14 I said "with regards to the crotch and the vagina,
10:08 15 you know", I said, "that's not valid. I mean,
16 ladies who are sexually active have sperm in their
17 panties, that's, we know that, and what about a
18 boyfriend, could this not be sperm from sexual
19 intercourse she had that night before" because, as
10:09 20 I said -- not because I believed that to be the
21 case, but we have to take what are all the
22 possibilities -- well I've been going there. And
23 then so that's fine, and so therefore I think I
24 mentioned in my report "you've got to be very
10:09 25 careful here about this conclusion that it has to



1 be -- I'm not saying it's correct, incorrect --
2 you have to be certain that the evidence that you
3 give is based on, and you have to say what the
4 strength or weakness of that evidence is, and
10:09 5 then" -- and so on.

6 Anyway, so that was, to my
7 recollection, what I discussed with Dr. Emson on
8 this matter, and that's basically it. I did not
9 discuss, I had no reason to discuss the cause of
10:10 10 death with him because we have no, no, no qualms
11 about that, and the manner of death. But I did
12 have a discussion, as I said before, about he
13 volunteered his opinions which, which are fine for
14 what they are, but about guilt and innocence,
10:10 15 which is not a theater in which I play a role.

16 Q I'm sorry, and were you saying Dr. Emson did
17 express a view on that aspect to you?

18 A Yes, he did.

19 Q And what did he say?

10:10 20 A He said there he thought, it was his opinion, a
21 personal opinion, that Mr. Milgaard was guilty.

22 Q Okay. And in terms of the discussion, the points
23 of discussion, I think we'll -- we will be able to
24 get a bit of a clearer picture of it as we go
10:10 25 through your report, but I don't think I heard you



1 recall that portion of the discussion where you
2 were inquiring about the origin of the sperm. Was
3 that something that you spoke to Dr. Emson about,
4 in terms of whether he considered it was of human
10:11 5 origin or not?

6 A Yeah, I probably did, because I would discuss that
7 with him, and I think he said something to the --
8 but I don't really recall this now -- but I think
9 he said well I didn't think, think so, and all
10:11 10 that, that's fine.

11 COMMISSIONER MacCALLUM: Didn't think what?

12 A That it was dog urine or that type of stuff,
13 that -- or that the sperm was of not human origin.
14 But I said to him "you, I do recall that you did
10:11 15 not do that test", and anyway we let it go, go at
16 that.

17 BY MR. HARDY:

18 Q Okay.

19 A I wasn't going to get into an argument.

10:11 20 Q And were you connecting it to the after-dinner
21 speech that you had heard him say earlier?

22 A That made me think. That made me think. And
23 there was another reason why I was concerned about
24 this, and that was that, you know, Dr. Emson does
10:12 25 not normally do that human test, you don't do



1 that, pathologists don't do that, so why have fear
2 and trepidation that it wasn't done? All he had
3 to say is "I don't do that, crime lab does that",
4 that was the end of that.

10:12 5 But as I say, in fairness to
6 him, it was an after-dinner speech and sometimes
7 we do embellish them and make them more
8 interesting, so it's not, it's not, as I say,
9 evidence in the sense that -- under oath that he
10:12 10 would repeat, or he didn't even perhaps mean that,
11 but I became concerned about, in general terms I
12 became concerned of the way this thing had been
13 handled from a forensic point of view.

14 Q And so he did not confirm with you at any point
10:12 15 that what he was speaking about at that
16 after-dinner speech was his work on the Gail
17 Miller investigation?

18 A No, he did not, but I recognized it.

19 Q And again on that other aspect, we'll come back
10:13 20 to, you are referring to sperm on the panties and
21 also the question of the survivability of sperm,
22 and I think probably -- and I know I'm
23 over-simplifying that -- am I correct that what
24 you were getting at in that respect was that Dr.
10:13 25 Emson had perhaps provided an opinion at trial



1 that the sexual attack would have taken place
2 perhaps in a range of 12, or less than 12 hours
3 prior to the time of examination on the afternoon
4 of January --

10:13 5 A Yes.

6 Q -- or, I'm sorry, February 1st, 1970?

7 A Yes.

8 Q Or I'm getting that wrong, January 31st of 1969.

9 Now I'm confusing things more. In any event,

10:13 10 again to simplify it, you were saying that,

11 because of the intervention of the possibility of

12 freezing, that it was not possible to say whether

13 or not the sexual intercourse or the deposit of

14 the semen had perhaps taken place as far back as

10:13 15 the evening prior?

16 A That is correct, could not exclude that.

17 Q And I didn't do a good job of simplifying that,

18 but we'll look at the paragraph where you refer to

19 this in your report in a moment, to cover that in

10:14 20 a little more detail.

21 Just continuing on this page:

22 "This report ...",?

23 you state:

24 "This report is forwarded to

10:14 25 you in response to your request, dated



1 May 1, 1990, to offer an opinion on the
2 report prepared by Dr. Ferris*. This
3 report addresses Dr. Ferris' report but
4 is not limited to his report."

10:14 5 And, just in terms of that last comment, do you
6 recall what you were signaling by that comment?

7 A Actually, it's a term that I learned from lawyers,
8 and I put it in there. I don't recall anything
9 specific. It just means that if anything else,
10:14 10 you know, I probably incorporated that.

11 Q Okay. And I jumped ahead a little too quickly, I
12 think, from my previous chain of inquiry. You've
13 confirmed that you did have a previous discussion
14 with Dr. Emson; do you recall any other
10:15 15 discussions with any other of the original
16 witnesses during the course of your review?

17 A Well I recalled, I certainly asked Sergeant
18 Paynter whether he had done the human test,
19 because obviously that was important, and more
10:15 20 importantly how he had done, done that. And what
21 I, what I heard from him was "I don't recall", and
22 that concerned me somewhat because it was -- it's
23 a routine test, I mean everybody does that, from
24 all sperms you do that, and he said "I don't
10:15 25 recall whether I did that", and that concerned me



1 some -- somewhat. And I think I -- I've addressed
2 that in the report, so I had a discussion about
3 that, yes.

4 Q Okay. And we'll see that in a moment. Any other
10:15 5 interviews with any of the other original
6 witnesses?

7 A No.

8 Q Just before I leave that point, in terms of the
9 materials that were listed that you reviewed,
10:16 10 there are a number of materials that I guess were
11 of a non-forensic nature, affidavits of Deborah
12 Hall, David Milgaard and other materials which we
13 know to be the submissions on behalf of David
14 Milgaard. Did you need this sort of material for
10:16 15 purposes of your review?

16 A I need it, I always ask, whenever I do a case for
17 anybody I ask for all, "all they've got", because
18 I have been in cases where I've only got bits and
19 later there was confusion, that I should have had
10:16 20 all. Now I just ask for everything, and in this
21 particular case I would have asked for a review
22 also of the autopsy slides, which I did not do in
23 this particular case, but I do that normally as
24 well, that's an extra -- I review whatever is
10:17 25 there if I can myself, give me the works, and then



1 I'll see what that means or not means.

2 Q And did you have any concern or would you have had
3 any concern at the time that your review of the
4 non-forensic material might compromise your
10:17 5 objectivity?

6 A It does not compromise my objectivity in that I'm
7 fully aware that opinions given are given in
8 context and for reasons other than of a forensic
9 nature and I'm certainly able to separate those.

10:17 10 Q Okay. Sorry, we'll pick up on the second page
11 where I left off a moment ago, beginning there, it
12 states:

13 "On May 15, 1990, you asked me to
14 comment on the Crown's theory is that
10:17 15 Milgaard intercepted the deceased as she
16 walked along Avenue N where it meets the
17 east/west portion of the alley.

18 Allegedly, a struggle occurred at that
19 point, and then carried on into the lane
10:17 20 and then northward into the north/south
21 portion of the T.

22 Due to a restriction on my
23 time, compounded by the lack of scale
24 drawings, photographs, and, scaled maps
10:18 25 of the scene and surrounding areas, it



1 would lead me into a situation where I
2 would offer an opinion based on
3 insufficient personally reviewed
4 evidence. I, therefore, must decline
10:18 5 your request to respond."

6 And I take it you were obviously uncomfortable
7 commenting on this particular aspect then, Dr.
8 Markesteyn?

9 A That is correct. As a forensic pathologist, as
10:18 10 you know, we do take into consideration the scene
11 as it relates to the body found. As a forensic
12 pathologist and as coroners and medical examiners,
13 we do go to scenes, so we have expertise with
14 regard to the body and the scene, the body in its
10:18 15 surroundings. I'm not an expert on how long it
16 takes to run or walk or stroll or limp in darkness
17 and lightness from A to B, that's not my station,
18 I'm not going there.

19 Q And just the last paragraph in this section
10:19 20 states:

21 "I have read the evidence several times.
22 As it could be helpful for me to prepare
23 this report under similar headings as
24 Dr. Ferris, I will do so."

10:19 25 And then you begin your discussion under the



1 heading "Pathology Evidence - Dr. Emson". The
2 first sentence states:

3 "I concur with Dr. Ferris' opinion that
4 the cause of death and the mechanism of
10:19 5 death, including the suggested
6 survivability of the stab wounds."

7 And perhaps for reference we'll turn to that
8 portion of Dr. Ferris' report, the document is
9 000002, and if we could turn to page 56 of that
10:19 10 document, please, and, I'm sorry, if we could
11 turn to the next page beginning at the bottom,
12 same subheading, Dr. Ferris states:

13 "I think there is absolutely no doubt
14 that Gail Miller died as a direct result
10:20 15 of stab wounds inflicted on January 31,
16 1969 at or around 0700 hours. It may be
17 important, however, to note that none of
18 the stab wounds penetrated any of the
19 major blood vessels or the heart and
10:20 20 that Dr. Emson in his evidence states
21 that the cause of death was the actual
22 loss of blood into the chest cavity, the
23 "shock intendant upon this and the
24 embarrassment of breathing". While
10:20 25 there is no question that these injuries



1 are fatal, the speed with which an
2 individual becomes immobilized as a
3 result of injuries such as this is
4 relatively slow. Since death is as a
5 result of bleeding from the lung tissue
6 into the chest cavities, the speed with
7 which unconsciousness will occur is also
8 relatively slow. It would be my opinion
9 that the stab wounds as described by
10 Dr. Emson were neither immediately fatal
11 nor even immobilizing. In my experience
12 individuals with this type of injury may
13 live for several minutes following the
14 injuries. It is possible that in fact
15 she could have survived for at least 15
16 minutes following the injuries."

17 And back to your report, page 2, so you were
18 stating general agreement with that assessment --

19 A I am.

20 Q -- by Dr. Ferris?

21 A Yeah, complete agreement there, yes.

22 Q And just at the bottom of the page, again I'll
23 continue on, you state:

24 "The time of death is not known. I have
25 assumed that, where the autopsy report



1 was silent on co-existing blunt force
2 injuries to neck organs, forearms,
3 thighs, knees and legs, that these
4 injuries were not present. This also
10:21 5 holds for the lack of documentation of
6 any signs of asphyxia in neck organs,
7 eyes, heart, and lungs.

8 I find if necessary to comment
9 on this in view of the lack of internal
10:21 10 bleeding described around some of the
11 stab wounds (liver) and the, in my
12 opinion, incredible absence of blood on
13 the coat of the deceased as evidenced by
14 the testimony given. Were some (or all)
10:22 15 of the stab wounds postmortem?"

16 And can you explain to us what your thought
17 process here was, Dr. Markesteyn?

18 A Well, my thought -- this certainly looked like a
19 sexual assault and -- now, those can be
10:22 20 co-existing of other attacks, it need not be one.
21 Very often there's blunt force in injury, there's
22 very often strangulation or strangulation attempts
23 or things like that, so I had to be -- I agreed it
24 was only stab wounds because all this other was
10:22 25 absent, there was no evidence of strangulation



1 here. If she had been strangled and was dead or
2 dying, then some of these wounds would not bleed
3 any more or very little and I was somewhat
4 concerned about, or I could not really explain why
10:22 5 some of these wounds did not bleed as much as
6 others which made me think what other
7 possibilities are there, and strangulation signs
8 are visible in the eyes, which was absent, I'm
9 sure he would have mentioned that, and in the
10:23 10 heart and lungs you see signs thereof, so I don't
11 think there was any attempt here to strangle her.

12 I do recall there was one
13 mention of a lip injury on the autopsy report
14 which I thought was, could be significant in that
10:23 15 there may have been an attempt to silence her, but
16 she certainly was not strangled or smothered,
17 there's no evidence of that, and I totally agree
18 with the evidence that, or the opinion, rather,
19 that it would have taken some time for her to die.

10:23 20 Q And you seem to be focusing on your observations
21 in relation to the absence of blood and you tie
22 that to the question of whether it was possible
23 that it was a postmortem stabbing. Why would
24 there be less blood in a postmortem stabbing?

10:24 25 A Well, that's how we diagnose them. The heart does



1 no longer pump and therefore there's no active
2 bleeding, so the wounds are there and there's no
3 blood escaping from them, and that was the case of
4 the liver which made me think was she already dead
10:24 5 and when that wound was inflicted.

6 Q And so in fairness, this was just a matter of
7 speculation, or you were asking the question?

8 A I'm asking the question, right.

9 Q Okay. And I think you are correct that Dr. Emson
10:24 10 noted either in his testimony or in the autopsy
11 report that the liver did bleed very little, as
12 did one of the puncture wounds, I believe to the
13 left lung, the right lung did bleed, and I believe
14 the evidence was that there was approximately a
10:24 15 thousand millilitres of blood from that wound.

16 You mentioned the incredible
17 absence of blood on the coat and we know that
18 there was blood, or know now that there was blood
19 on the coat, and in fairness to you, I reviewed
10:24 20 the evidence of the various people involved and I
21 think what had happened was no one commented on
22 the presence of blood or the quantity of blood,
23 but I don't know if any of those observations I've
24 just mentioned to you would have changed what you
10:25 25 speculated about in this particular paragraph?



1 A No. Well, no, but of course when there's neither
2 any bleeding on the outside, you know, then one
3 starts to wonder if some of these wounds were not
4 bleeding to the outside, or that they need not,
10:25 5 but it doesn't make any difference really with
6 regards to the cause and manner of death and the
7 survivability thereof.

8 Q Okay. I'll continue on to the next subsection
9 then which is titled *Window of Opportunity*, and,
10:25 10 I'm sorry, actually I just noted one further
11 question I had relating to that aspect that we
12 were speaking of, and it relates to this last
13 paragraph, it states:

14 "Dr. Ferris gave an opinion about the
10:25 15 likelihood of the deceased's inner
16 clothing having been removed before the
17 injuries were inflicted. I concur with
18 his opinion."

19 And that would be accurate, Dr. Markesteyn, you
10:26 20 recall sharing that view that Dr. Ferris had in
21 relation to that observation?

22 A Oh, yes, there was no stab wounds through her
23 clothing, inner clothing, only the coat.

24 Q And in terms of Dr. Ferris' comment about the
10:26 25 victim being not necessarily immobilized given the



1 wounds, did you have a view on that in terms of
2 whether she could have moved or otherwise?

3 A Well, there was absolutely no sign of any
4 bruising, there was no sign of any fight of any
10:26 5 kind on her at all, and I don't think she moved
6 much.

7 Q And moving to the next section then, *Window of*
8 *Opportunity*, you state:

9 "Dr. Ferris was of the
10:26 10 opinion that the time frame suggested by
11 the evidence of the trial at which the
12 assault, undressing, alleged rape,
13 partial redressing, (at - 40 F) could
14 not have occurred as suggested by the
10:26 15 evidence at the trial.

16 I wish to limit my comments on
17 this matter to say that there are three
18 elements in the time required to
19 perpetrate this alleged crime:

10:27 20 1) the time it took for the accused to
21 get from the car to the person;

22 2) the time it took to commit the
23 offence at or near the place where the
24 body was found; and,

10:27 25 3) the time, following the commitment of



1 the crime, to return to the car.

2 With regard to 1) and 3, there
3 is no corroborating evidence to indicate
4 the distance between where the car
10:27 5 allegedly was stuck and the place where
6 the body was found. Obviously,
7 therefore, I cannot tell you how much
8 time these took.

9 With regard to 2), it is my
10:27 10 understanding that clothes can be ripped
11 off a person in a matter of seconds -
12 certainly in less than a minute.
13 Infliction of stab wounds, even on both
14 sides of the body, also can be
10:27 15 accomplished within seconds and
16 certainly within less than a minute.
17 Ejaculation in or outside the vagina
18 against consent or without consent can
19 be achieved also within a very short
10:27 20 period of time."

21 And again, am I correct that you were generally
22 unwilling to comment on this particular aspect?

23 A That is correct. In fact, I did discuss this with
24 the -- Dr. Ferris seemed to have the impression,
10:28 25 you know, you cannot do this in this time frame



1 and he really was a bit strong on that. I felt
2 that minus 40 stuff, and, well, we know that this
3 can be, certainly you can do anything at minus 40,
4 that's why I commented on that, that doesn't take
10:28 5 long at all, I do know that. I don't know how
6 long it takes to get to the body, but I do know
7 once you get there how long it takes or can take
8 to kill a person, rape them and stop it.

9 Q And so the temperature caused you no concern in
10:28 10 concluding that the rape may have occurred
11 outside?

12 A No, because I had a short, a very short discussion
13 with the crime lab and with the CID and the crime
14 people all take -- I, in fact, was involved in a
10:29 15 case of a person who was performing a sexual act
16 at minus 40. That's certainly not impossible to
17 do that.

18 Q And --

19 A Minus 30. Sorry, minus 30.

10:29 20 Q And were you referring a moment ago indirectly to
21 a discussion with Dr. Ferris about this aspect?

22 A I don't recall whether I actually did that, but I
23 certainly -- not at that time, but I may have done
24 that later.

10:29 25 Q And in terms of point 2, though, you did seem to



1 be of the view that the attack itself could have
2 happened in a short amount of time?

3 A Certainly, yes.

4 MR. HARDY: This is probably a good place
10:29 5 to break, Mr. Commissioner.

6 (Adjourned at 10:29 a.m.)

7 (Reconvened at 10:51 a.m.)

8 BY MR. HARDY:

9 Q If we could return to page 3 of Dr. Markesteyn's
10:51 10 report, and we left off at the bottom of the page
11 under the subheading *Semen from Vagina*. You are
12 speaking here of the vaginal aspirate that was
13 taken at the autopsy of Gail Miller, and perhaps
14 for context, again we'll refer first to Dr.
10:52 15 Ferris' comments on this point which again is
16 document 000002, and if we could turn to page, I
17 believe, 58 of that document, please, and if we
18 look at -- I'm sorry, I lost my place. If you
19 could go down a little bit, please. I'm sorry,
10:52 20 can you go back one page, this paragraph here, and
21 I'll read that to you, it states:

22 "I note from Dr. Emson's evidence that
23 some issue was made as to the apparent
24 presence of blood mixed with semen in
10:52 25 the vagina. It was suggested by



1 Dr. Emson that the most likely cause of
2 this would have been staining with
3 menstrual blood, however, he failed to
4 find any evidence of menstruation at
10:53 5 postmortem examination. It is not
6 unusual to find discolouration of fluids
7 and secretions within the vaginal tract
8 at postmortem examination simply on the
9 basis of sluffing and decomposition of
10:53 10 the vaginal mucosa following death.
11 Unless there was clear proven evidence
12 of frank blood in the vagina, I would
13 not consider the presence of apparent
14 bloodstain secretions in the vaginal
10:53 15 cavity of any significance."

16 If we can return to your report, the bottom of
17 page 3, you state:

18 "The apparent mixture of blood and semen
19 in the vagina of the deceased is open to
10:53 20 many interpretations. The blood could
21 either have originated from the
22 deceased, the assailant, or, from both.

23 The blood, according to the
24 evidence, was of insufficient quantity
10:53 25 to type as to its blood group."



1 And that was confirmed by Dr. Emson on
2 cross-examination at trial.

3 Moving to the next page, you
4 set out the alternatives, firstly noting blood
10:54 5 from the deceased, and you state:

6 "Bleeding could have been the
7 result of:
8 injury to the genito-urinary tract;
9 inflammation of the genital tract;
10:54 10 menstruation; or,
11 postmortem freezing and thawing of the
12 vagina, cervix, and, endometrium.

13 Dr. Emson stated that chronic
14 cervicitis was present and that this
10:54 15 indeed could have been the origin of the
16 blood."

17 And that relates to the second option that had
18 been noted above, inflammation of the genital
19 tract, and I take it that you thought this was a
10:54 20 viable option?

21 A That could have been, yes.

22 Q Okay. And continuing on, you go on to talk about
23 the third option, menstruation, you state:

24 "Dr. Emson in his testimony stated that
10:54 25 "there was no evidence to menstruation".



1 The autopsy report under the
2 'Microscopic Description', however,
3 refers to changes in the endometrium
4 consistent with imminent or commencing
10:55 5 menstruation. Dr. Emson, in his
6 testimony, stated that the microscopic
7 findings of endometrium although
8 consistent with imminent or commencing
9 menstruation could have been wrongly
10:55 10 interpreted as the microscopic
11 examination was made somewhat difficult
12 as a result of the freezing of these
13 tissues prior to the autopsy."

14 I'm going to skip down to this paragraph:

10:55 15 "Any indirect evidence of menstruation
16 was not evident to my satisfaction. No
17 sanitary pads or tampons were found.
18 The panties were blood-stained. The
19 evidence with regard to the crotch of
10:55 20 the panties is silent as to whether the
21 crotch was blood-stained. The presence
22 of blood-staining of the other articles
23 of clothing around the panties (which
24 were found around the ankle), makes the
10:55 25 blood-staining of the panties, in my



1 opinion, more likely the result of the
2 assault than the result of
3 menstruation."

4 And so with respect to that third option that you
10:55 5 had noted above, menstruation, I take it that
6 your view was that that was not likely --

7 A That's correct.

8 Q -- the source of the blood-staining, if it was
9 blood-staining?

10:56 10 A That is correct.

11 Q And that would be the case even though there were
12 observations of imminent or commencing
13 menstruation?

14 A Yes, imminent, but not actually having started
10:56 15 yet.

16 Q And if we go back to the one sentence that I left
17 out:

18 "There was no evidence of injury to the
19 genito-urinary tract."

10:56 20 That, of course, relates to the first option you
21 had mentioned. And then the last sentence under
22 this heading:

23 "The autopsy report is silent on the
24 presence of blood in the urine."

10:56 25 And do you recall what the significance of this



1 comment was from this perspective?

2 A Well, you can have blood in the urine due to a
3 cystitis and inflammation of the bladder and that
4 could also therefore find its way into the vagina.

10:56 5 Q I see. And did you consider option, I guess (d),
6 or the fourth option you had set out:

7 "Postmortem freezing and thawing of the
8 vagina, cervix, and, endometrium."

9 A That is the only one that I think is indeed quite
10:57 10 probably the case here.

11 Q And that wasn't stated in your report, but that
12 would have been your view at the time, that that
13 was the likely source of the blood?

14 A Yes.

10:57 15 Q And move on, the second alternative you note is
16 *Blood from the Accused* and you state:

17 "The other source of blood,
18 from the accused's genitals, could be
19 the result of injury or inflammation of
10:57 20 the genito-urinary tract. However, no
21 evidence was produced to indicate that
22 Mr. Milgaard at the time of the assault
23 had any injury or inflammation to his
24 internal or external genitalia or
10:57 25 urinary tract.



1 I have addressed this matter
2 with some detail in that it is my
3 impression, for what it is worth, that
4 some inference could well have been
10:57 5 drawn that the blood and semen mixture
6 in the vagina and the so-called blood
7 and semen mixture retrieved from a
8 snowbank several days later were somehow
9 linked together."

10:57 10 And we'll come back to this, Dr. Markesteyn, but
11 what was the concern that you were expressing
12 here?

13 A The concern was that in order to tie Mr. Milgaard
14 in, you had to have blood in the semen,
10:58 15 otherwise -- because he was a non-secretor, right,
16 so therefore if you try to say, ah, we've got
17 blood in the vagina as well, that explains why,
18 that there's A antigen in it, so there was an
19 inference drawn here. We can't go on the semen
10:58 20 alone, we have to have blood with it, and so I
21 thought, well, you know, I don't think this is
22 blood of the accused, it had to be -- in order for
23 it to be B at -- yeah, at a time, or A rather, it
24 had to have blood in it, so I thought there was a
10:58 25 suggestion here that I, you know, you've got two,



1 you've got both blood and semen in the snowbank,
2 you've got blood and semen in the vagina and that
3 explains why this person, although he's A, could
4 be Milgaard.

10:58 5 Q Okay. And so this was just an observation you
6 were making about a potential inference that you
7 were concerned about?

8 A Concerned about, that's right.

9 Q And in fairness, again you would not have been in
10:59 10 possession at this point in time of the closing
11 arguments of counsel for the Crown or for the
12 defence?

13 A No, I did not, no.

14 Q Okay. But you would have reviewed the
10:59 15 cross-examinations, for example, conducted by
16 Mr. Tallis in relation to this issue where he
17 dealt with these possibilities of the blood being
18 there as a result of menstruation and also of the
19 cervicitis and matters of that nature?

10:59 20 A I probably did, yes.

21 Q You state:

22 "In any event, there was insufficient
23 blood there to be typed."

24 And then ultimately you say:

10:59 25 "I concur with Dr. Ferris' opinion that



1 the presence of apparent blood-stained
2 secretions in the vaginal cavity was not
3 of any forensic significance."

4 And this was your conclusion on this particular
10:59 5 aspect then?

6 A Yes, meaning it was a postmortem occurrence,
7 nothing to do with, of any forensic. It was a
8 natural occurrence at death.

9 Q Okay. And then continuing on you say:

11:00 10 "I disagree with Dr. Emson's testimony
11 that shedding blood in semen is a quite
12 "common occurrence" as the result of
13 inflammation to penis, urethra,
14 prostate, and/or bladder. I disagree
11:00 15 with Dr. Emson's thought expressed at
16 that time that it was "accepted medical
17 knowledge that small amounts of blood
18 commonly find their way into seminal
19 fluid of males of any age beyond
11:00 20 puberty". I have been informed that the
21 Forensic Laboratory in Winnipeg has
22 never seen such a case. Other
23 investigators also have failed to
24 confirm this impression of Dr. Emson's."

11:00 25 Would that be an accurate account of your opinion



1 on this point at that time?

2 A Yes, sir.

3 Q And do you recall whether you spoke with Dr. Emson
4 about this particular issue?

11:00 5 A I don't recall, but I probably did. I would have
6 raised that, that I did dis -- I would disagree.
7 I would have told him, I think I would have done
8 that. I don't recall specifically, but I probably
9 did.

11:00 10 Q And do you recall whether you determined whether
11 or not Dr. Emson, based upon the science that was
12 available in 1970, should have known differently
13 on this particular aspect, or differently from
14 what he testified to?

11:01 15 A That's a very difficult question to answer,
16 counsel, what people ought to know and should
17 know.

18 Q And again, you can only speak from your
19 experience. I assume that you were practicing
11:01 20 pathology at that time and perhaps -- you weren't
21 a serologist, so you may not be able to answer the
22 question, but do you know from your own personal
23 experience and knowledge whether this -- would you
24 have known in 1970 that this conclusion was wrong
11:01 25 that Dr. Emson put forward?



1 A I knew it very quickly because I checked it and
2 that it was wrong.

3 Q You checked it with the serology people?

4 A Yeah, correct.

11:01 5 Q And you are talking about in 1990?

6 A That's right.

7 Q Would you have known that from your own personal
8 knowledge and experience in 1970?

9 A Well, I used to do rape investigations myself in
11:01 10 Newfoundland and I never saw red blood cells in
11 there and so -- but that's a limited number, you
12 know, but I certainly knew it was not "common
13 occurrence", no, I knew that was incorrect to my
14 knowledge.

11:02 15 Q And would that have been the case in 1970?

16 A Yes.

17 Q And your experience in rape investigations that
18 you were mentioning, had that experience happened
19 by 1970?

11:02 20 A Yes.

21 Q The next subheading, *Sperm in Vagina of Deceased*,
22 and this is a continued discussion of the vaginal
23 aspirate that was taken at the autopsy, and you
24 state:

11:02 25 "Dr. Emson detected non-motile, intact



1 sperm in a specimen taken from the
2 vagina of the deceased. He testified
3 that sperm would start to lose their
4 motility within the vagina within four
11:02 5 hours and that probably all sperm
6 retrieved from the vagina are non-motile
7 in six hours following intercourse."

8 And was he correct on this point?

9 A Yes, that's fairly commonly the case, yes.

11:02 10 Q Okay.

11 A The vagina is a hostile environment for sperm.

12 Q You go on to say:

13 "Non-motile, intact sperm was found. We
14 do not know for certain, but, it is
11:03 15 medically reasonable to assume that this
16 was human sperm even though no evidence
17 to this effect was given. Evidence was
18 also given that sperm would lose its
19 integrity and, therefore, would no
11:03 20 longer be intact, some twelve hours
21 following the last intercourse. Whereas
22 this, with a certain range of time, may
23 be the case in living females this
24 certainly does not apply when the sperm
11:03 25 is frozen. Evidence was given that the



1 body showed "signs of extreme freezing"
2 and that the lining of the uterus had
3 been frozen. Therefore, no time can be
4 given in this case to estimate the outer
11:03 5 limit that sexual intercourse could have
6 taken place. In any event, the sperm
7 was not typed as to the presence of
8 antigens and was later discarded.

9 Therefore, in my opinion, not only the
11:03 10 blood but also the sperm in the vagina
11 failed to link the accused with vaginal
12 intercourse with the deceased."

13 And we've touched upon this earlier, but I don't
14 know if you can simplify this further, what are
11:04 15 you stating, in effect, in this paragraph, Dr.
16 Markesteyn?

17 A What I'm stating is that whereas certain research
18 has been done on the presence and survivability of
19 sperm in vaginas of living people, that does not
11:04 20 necessarily apply, I know it doesn't apply when
21 the samples are frozen, then you have to be very
22 careful in interpreting something that happens
23 during life with something that happens after
24 death in a frozen sample. We know that sperm that
11:04 25 is frozen remains intact for a long period of



1 time.

2 Q And again, this ties back to Dr. Emson's evidence,
3 I believe, that the sperm would have been
4 deposited within the previous 12 hours from the
11:05 5 point that he was examining the body on the
6 afternoon of January 31st?

7 A That's what he said, yes.

8 Q And some suggestion being made that that might be
9 consistent then with the time of the attack?

11:05 10 A That's an inference drawn, that's right.

11 Q Right. And what you are saying is that at the
12 point that freezing intervened, sort of everything
13 went on hold at that point?

14 A Exactly.

11:05 15 Q In other words, you would count back, your 12 hour
16 window would count back from the point of
17 freezing?

18 A That's right.

19 Q And so that your opinion, if you were reviewing
11:05 20 this, assuming that what you've assumed is
21 correct, is that this evidence would simply
22 indicate that intercourse may have taken place
23 within the previous 12 hours to freezing?

24 A That's right.

11:05 25 Q The freezing of Gail Miller's body on the morning



1 in question?

2 A Yes.

3 Q And I was checking, I was wondering where you
4 might have gotten the indication that there was
11:05 5 freezing of the uterus and vagina, and there is
6 some suggestion -- and do you recall, firstly,
7 where you had received that information from?

8 A Yes, because I said that, I discussed that with
9 Dr. Emson and he said to me "well how do you know
11:06 10 it was frozen", I said "well you told me the
11 uterus, or in this report that the uterus had been
12 frozen, if the uterus is frozen then certainly the
13 vagina would be frozen, and therefore the sperm is
14 frozen in the vagina. That's, I think, a
11:06 15 reasonable conclusion to draw."

16 Q Okay. And it's not mentioned, actually, in the
17 autopsy report; is it possible that you would have
18 gathered that information from somewhere else?

19 A From his testimony, that he could not be certain
11:06 20 whether menstruation was imminent because of
21 freezing and thawing of the uterus.

22 Q Yes, okay. And there is mention of that in Dr.
23 Emson's testimony, and it's in that context, he is
24 being asked about the question of menstruation
11:06 25 being the reason for the presence of blood, and I



1 think he indicates some reservation in being able
2 to determine that because of the freezing and
3 thawing --

4 A That's right.

11:06 5 Q -- of the tissue that was ongoing?

6 A That's right.

7 Q Okay. If we move to the next section, the Knife
8 Wounds, it states:

9 "The individual knife wounds

11:07 10 were not described in the autopsy report
11 as to size, direction, external and
12 internal appearance. They were, to my
13 knowledge, not approximated. I have
14 reviewed some photographs which were
11:07 15 submitted to me by Dr. Emson. They hold
16 no rulers. It is my understanding that
17 photographs taken by the Identification
18 officer at the time of autopsy may show
19 consistency of the knife used in the
11:07 20 attack. As you know, more photographs
21 are taken at autopsy than are used in
22 evidence. If still available, all the
23 photographs taken by the Identification
24 officer should be made available for
11:07 25 review.



1 It is unlikely that all the
2 knife wounds would be the same
3 five-eighths of an inch in width. I am
4 sure the estimated depth of penetration
11:07 5 of the knife blade took into account the
6 thickness of the coat (not stated) as to
7 the possible length of the knife blade.
8 In passing, I find it difficult to
9 explain why the knife blade was broken
11:08 10 in view of the fact no bones were
11 struck."

12 I don't know that I need to spend much time on
13 this section, but that would be an accurate
14 account of your opinion at the time --

11:08 15 A Yes, sir.

16 Q -- on these aspects?

17 A Yes, sir.

18 Q And was there any forensic evidence -- I'm
19 sorry -- was there any forensic significance to
11:08 20 your last observation where you note you found:

21 "... it difficult to explain why the
22 knife blade was broken in view of the
23 fact no bones were struck."?

24 A Yes. You see, one has to explain how come the
11:08 25 knife breaks, all right. And as you know in, or



1 could know, in autopsies where the death is due or
2 the assault is due to a knife we always x-ray the
3 bodies, because we very often find that the tip of
4 the knife breaks when it hits bone, and certainly
11:08 5 when the knife is applied with great strength and
6 pressure. In this case it was broken but there
7 was no mentioning in the autopsy report at all
8 that the bone had been hit, and I couldn't
9 understand why that happened. I just raised that,
11:09 10 I don't understand why that is, did it break after
11 the assault, I don't know that.

12 Q Okay. So it didn't necessarily lead to any
13 forensic significance for you?

14 A No. I still think this is, without a doubt, a
11:09 15 death as a result of knife wounds inflicted.

16 Q And do you recall considering, in terms of the
17 knife wounds -- and it looks like maybe you were
18 under the impression that you didn't have enough
19 information to do so -- do you recall considering
11:09 20 any question about whether there could have been
21 different knives involved in the attack, or
22 matters like that?

23 A Well that is, that's why I mentioned the fact that
24 when you do knife wounds, you do approximate the
11:09 25 wounds. What I mean by that, if you hit skin with



1 a knife it starts to gape, so when you put those
2 edges together, so instead of an oval when you put
3 it together you find that the wound is much longer
4 than it looks like when it's gaping, that's why
11:09 5 you have to approximate.

6 Now what does that mean? A
7 knife does not only cut, it can also cut -- or
8 stab, it can also cut. That means it can be
9 longer, longer than the width of the blade, but
11:10 10 not narrower, right, unless it's a pointed knife
11 and only the tip goes in. So there are certain
12 tests that we do at autopsy to determine the
13 consistency. Of course nowadays there are many
14 more and better tests to do that, but this is what
11:10 15 a pathologist does. He -- and then he estimates
16 or determines, rather, if he can, the length of
17 the blade as it relates to the depth of the
18 wounds, and when you do that you have to take into
19 consideration the clothing, how thick is that,
11:10 20 because obviously -- right, and the
21 compressibility of that clothing, and the
22 compressibility of the tissue. So this is not
23 easy science but we try and see if, at least from
24 a pathology point of view, that particular weapon
11:11 25 could have been used, whether it is -- whether a



1 knife could be used with certain characteristics.

2 Now to determine if that's

3 indeed that particular knife, there are better
4 tests than that, like serology and all that.

11:11 5 Q Okay. Then am I correct then, though, that you
6 didn't feel you had sufficient information to make
7 determinations of that nature?

8 A I could not say that that particular knife was
9 used, that I would not do, I just made the
11:11 10 observation that certain tests could have been
11 done, but the ultimate test would be the serology
12 on the blade.

13 Q Okay.

14 A On an -- in an uncontaminated knife. All right?

11:11 15 Q Okay.

16 A If there was blood on it, in an uncontaminated
17 knife it is reasonable to conclude that that's the
18 knife that entered the body, but if there is blood
19 anywhere -- everywhere, and there is a knife, you
11:11 20 cannot draw that conclusion.

21 Q Okay. Turning to the next page, please. And this
22 is, the sub-heading is Seminal Stains at Scene
23 (Yellowish Stains in the Snowbank), and of course
24 this is the discussion, again, relating to the
11:12 25 frozen substance that is found at the scene by



1 Lieutenant Penkala on February 4th, 1969. And I
2 think probably for context, again, I should -- we
3 should review Dr. Ferris' report in terms of what
4 he says on this aspect, it's a little bit longer,
11:12 5 but if we could turn, please, to 000002. And at
6 page 58 of that document -- got it wrong again, I
7 did, I got it wrong again. Next page, please.
8 Starting here, Dr. Ferris states:

9 "Seminal Stains At Scene"

11:12 10 I have real concerns as to
11 integrity and continuity of the samples
12 of alleged semen that were recovered on
13 February 4th at the scene.

14 It is apparent from reading all
11:13 15 of the statements of the witnesses and
16 the police that by the time the body was
17 examined by police and pathologists, the
18 scene was extensively trampled. There
19 is nothing to indicate whether this
11:13 20 trampling was as a result of movements
21 by the victim during the dying process
22 or whether or not the trampling was as a
23 result of the assailant or perhaps other
24 people who may have found the body
11:13 25 earlier. A very large number of people



1 attended that scene including those
2 examining the body.

3 The descriptions of the scene
4 are in general reasonably precise. It
11:13 5 is clear that there was considerable
6 blood and bloodstaining of the snow
7 around and underneath the body. The
8 police, however, clearly describe a
9 detailed search of the area immediately
11:13 10 around the body both before and after
11 the body was removed. There is evidence
12 that the snow was shovelled to one side
13 while he were searching for other
14 evidence. In view of the porosity of
11:13 15 snow particularly deeply frozen snow,
16 mixing of evidence and soiling with
17 blood from the area around the body
18 would be almost bound to happen. There
19 is also evidence that the area was
11:14 20 melted during the searching process
21 although I have been unable to determine
22 the extent of this melting."

23 Down the page:

24 "In view of the extensive
11:14 25 disturbance of the scene and the obvious



1 potential for contamination of the
2 scene, I find it quite remarkable that
3 two small pools of semen were identified
4 four days after the initial examination.
11:14 5 On the basis of the forensic testing
6 that was done I have no doubt that semen
7 was recovered as described. However, it
8 would be most unusual for this semen not
9 to have been contaminated by all of the
11:14 10 tampering which had gone on with the
11 evidence around the scene. I am
12 surprised that with this clear inability
13 to prove either the continuity or
14 integrity of these seminal samples, they
11:14 15 were considered admissible evidence.

16 The fact that when this frozen
17 semen was melted down in a tube and
18 appeared to be slightly bloodstained is
19 not a surprise. I would find it hard to
11:14 20 believe that any object that had been
21 recovered four days after the murder
22 from the area immediately adjacent to
23 where the body had lain would not have
24 been stained by blood derived from the
11:15 25 area adjacent to the body."



1 And if we return to your report, please. It
2 states at the top, first paragraph:

3 "I share Dr. Ferris' concerns
4 about the integrity and continuity of
11:15 5 the samples of the alleged semen which
6 were recovered on February 4, 1969, at
7 the scene. The scene, according to the
8 evidence, had been extensively searched,
9 trampled, and, the snow had been melted
11:15 10 - in and around the body. There was
11 heavy staining with blood from the
12 deceased. The evidence seems to
13 indicate that two yellowish stains were
14 discovered some four days after the
11:15 15 assault took place."

16 And we read Dr. Ferris' words in terms of
17 concerns about contamination and integrity; you
18 shared all of those same concerns, then, Dr.
19 Markesteyn?

11:15 20 A Very much, yes.

21 Q Okay. And what was your initial conclusion, then,
22 as to the potential value that this evidence
23 should have had at trial?

24 A I think it should have been, if entered at trial
11:16 25 at all, it should have been testified to as to its



1 strength or weaknesses thereof.

2 Q We'll continue on to the next paragraph?

3 "Yellowish stains in

4 snowbanks most commonly find their

11:16 5 origin, not in human ejaculates, but in

6 urine, most commonly of canine origin.

7 I have been informed that male dog urine

8 often contains semen. 'Unused' semen in

9 dogs is not reabsorbed but is secreted

11:16 10 in the urine. Dogs urinate over other

11 dogs' semen and/or urine to establish

12 territory. Dogs have antigens which

13 serologically cross-react with human

14 A-antigen. One of the two yellowish

11:16 15 stains contained semen, perhaps

16 intermingled with urine. The other one

17 did not contain semen and perhaps

18 contained urine only. We will never

19 know."

11:17 20 And am I correct that this, effectively, was the

21 expression of your opinion that this substance

22 may have been dog urine?

23 A Yes, because both looked alike, and one contained

24 semen and the other one didn't, and they had the

11:17 25 same appearance.



1 Q And you've explained to us how that theory
2 evolved. Am I correct, again, that the yellowish
3 coloration was the key indicator for you in terms
4 of proceeding with that consideration?

11:17 5 A Yes, sir.

6 Q Okay. And we'll continue to look at this a little
7 bit further. Just moving down to the next
8 paragraph:

9 "Human semen does not freeze

11:17 10 into a yellowish stain at - 40 degrees
11 Fahrenheit. In fact, it is white and
12 difficult to spot in snow other than
13 through special techniques such as
14 ultraviolet light exposure, etc."

11:17 15 And, again, this is referring to the tests that
16 you conducted at the time of your review?

17 A That's correct.

18 Q Including in the freezer that was at minus 40?

19 A Yes, sir.

11:17 20 Q And I think, just for the sake of completeness,
21 there were a couple of photos taken, and I'll
22 refer those to you, the first one being 338030.
23 And do you recognize that photo as being one that
24 was taken in the course of your testing?

11:18 25 A Yes, I do.



1 Q And, again, the purpose, I take it, of the colour
2 chip chart beside the petri dish was to compare
3 the colour of the frozen substance to --

4 A Yes, sir.

11:18 5 Q -- the colours noted?

6 A Yes, sir.

7 Q Okay. And, again, there was one other document, I
8 think it's much the same, I don't know if we have
9 to turn to it, but 338031. Yes, again same thing,
11:18 10 I see there I think the difference is that the
11 substance is frozen, now, in the petri dish, and
12 again, it was for purposes of doing a colour
13 comparison; is that correct?

14 A Yes, sir, that's correct.

11:18 15 Q And under the circumstances that you previously
16 described for us?

17 A Yes, sir.

18 Q So back to your report. Continuing on from where
19 we were in that paragraph, and you state:

11:19 20 "One of the two yellowish lumps was
21 found to contain semen; the other one,
22 although it looked the same, did not
23 contain semen or any other human
24 material in that it did not contain, we
11:19 25 are informed, blood, sweat, tears or



1 saliva. Dr. Emson examined the material
2 prior to having it sent to the Crime
3 Laboratory in Regina. He has informed
4 me that he was sure it was semen, but,
11:19 5 that he could not say from what species
6 it originated."

7 And is this the conversation that you were
8 referring to earlier?

9 A Yes.

11:19 10 Q And is that an accurate account of what Dr. Emson
11 advised you during that conversation?

12 A Yes.

13 Q And does that refresh your memory any further in
14 terms of the -- that portion of your discussion
11:19 15 with Dr. Emson?

16 A Yes, and I raised, I must have raised and I did
17 raise, you know "are you sure that this wasn't dog
18 urine or dog semen".

19 Q And your recollection --

11:20 20 A Yeah.

21 Q -- is that Dr. Emson responded in the manner
22 noted?

23 A That's right.

24 Q And continuing from there:

11:20 25 "The Serology Section determined it to



1 be not only semen but of human origin."

2 And, again, that, I take it you confirmed that
3 through the evidence of Staff Sergeant Paynter --

4 A That's correct.

11:20 5 Q -- as provided at the trial?

6 A Yes, sir.

7 Q "In order to reach a firm scientific
8 conclusion whether the semen retrieved
9 from the snowbank four days after the
11:20 10 assault was indeed human one needs to
11 review the methodology used by the
12 serologist at that time and thus one
13 needs to review the notes that were made
14 at that time."

11:20 15 And I'll just pause there. Notwithstanding the
16 fact, then, that Staff Sergeant Paynter
17 identified the semen as human at the trial, upon
18 your review of the evidence you still had
19 concerns or questions about that aspect?

11:20 20 A Yes, I did.

21 Q And in what form were your concerns still
22 existing?

23 A Well the concerns were this; did the test to
24 determine its human origin, what was that test?

11:21 25 All right. Not that it was done, it was done, and



1 he told me so. Was there any possibility of any
2 -- in that test, that particular test, if there
3 were contamination with the specimen with human
4 blood, was it possible that he would determine the
11:21 5 human origin by a cross-contamination of other
6 tissue or other fluids in that sample.

7 In other words, I wanted to know
8 is that test that he did at that time very
9 specific for the presence of a human origin fluid,
11:21 10 not only in the sperm, but in the surrounding
11 material. As you know, sperm, or semen contains
12 sperm and fluid, and was it possible, if he did it
13 -- and I don't know what he did -- if he did it on
14 the fluid, and it had contained blood, then it
11:22 15 would be human, it would -- would it? Would it be
16 so specific that it would detect the human origin
17 of the contaminated product rather than the sperm.
18 Now I wanted to know what is the methodology, how
19 did you use it, what did you use, what are the
11:22 20 controls, what are your concerns, what did you do,
21 do you do -- I remember doing this myself when I
22 was a pathologist because this was part of our
23 training -- although I'm not a serologist but we
24 do do this stuff as part of our training -- we
11:22 25 had -- when I did that in Glasgow we had samples



1 of origin of many animals that we were using at
2 the time. In fact, we went to the Glasgow Zoo
3 where we had apes and monkeys and zebras and the
4 whole bit, just to make sure that there was no
11:22 5 chance of cross-contamination of serology which
6 is, as you know it occurs, because in dogs there
7 is cross-contamination with humans; what did you
8 do, how sure are you that this is a pure sample
9 and not a contaminated sample with other human
11:23 10 tissue, which gives you the conclusion it's human,
11 but how sure of it are you thereof? That was my
12 question.

13 Q Okay. And continuing to the next paragraph:

14 "I have been informed that
11:23 15 the original notes on which this
16 evidence by Staff Sgt. Paynter was based
17 are no longer available. Staff Sgt.
18 Paynter informed me that he does not
19 remember (some twenty years after the
11:23 20 event) whether or not he performed
21 specific tests to determine the human
22 origin of these specimens."

23 And in terms of the first portion of that
24 paragraph, do you recall who had informed you
11:23 25 that the original notes were no longer available?



1 A I don't recall who informed me. I don't recall
2 that. I may have discussed that with Mr. Asper,
3 that's quite possible, I may have discussed it
4 with the staff sergeant himself, but I don't
11:24 5 recall doing that. But I did call, I do remember
6 calling him asking him whether he had actually
7 done the human test on this, and what test was
8 performed, specific tests, all right, to determine
9 the human origin. This was my question. I knew,
11:24 10 because it says it in the -- that he had done the
11 human test, but what specific -- how specific is
12 that, meaning if there's any contamination would
13 it detect that. That was my question.

14 Q And in terms of your discussion, or your
11:24 15 recollection of your discussion with Staff
16 Sergeant Paynter, is your recollection as stated
17 here, that he did not remember whether or not he
18 performed specific tests to determine human
19 origin?

11:24 20 A That is correct, yes.

21 Q And as you are aware, we have heard from Staff
22 Sergeant Paynter, and he has testified that he
23 doesn't recall this conversation with you, but you
24 have a clear recollection of speaking with him on
11:25 25 this matter?



1 A Well I wouldn't say that I have a clear
2 recollection, but I probably did talk to him,
3 because I did talk to the crime lab people quite
4 commonly, and I don't -- in fairness to him, I
11:25 5 don't recall, clearly, having that conversation,
6 but my reports says I did, and --

7 Q Okay.

8 A -- I don't doubt my report.

9 Q Okay. And, as you're also aware, that the
11:25 10 Commission has received Staff Sergeant Paynter's
11 original lab notes, or what he has identified as
12 his original lab notes, and we'll review those in
13 a moment. But you were clearly under the
14 impression, at this time, that those original
11:25 15 notes were not available?

16 A That's correct.

17 Q Just to the next paragraph. It states:

18 "The fact that the semen
19 contained an A-antigen does not make it
11:25 20 human nor, I am informed, does the
21 enzyme test for phosphatase used at that
22 time make it human. The human antibody
23 test doesn't make it human if there was
24 any contamination with human blood. The
11:26 25 only way of excluding this semen from



1 being of non-human origin would have
2 been the morphology and/or species
3 specific antigen-antibody reaction
4 tests."

11:26 5 And what were these tests that you are referring
6 to here and how might they have assisted?

7 A Well they -- I just testified to that.

8 Q To the anti-human --

9 A That's right.

11:26 10 Q -- protein test?

11 A Yes, and then you set it up, you -- first of all
12 is it possible if you mixed, if you were to mix,
13 for instance if you were to mix dog sperm with
14 human blood, or a bit thereof, would it then test
11:26 15 human? A very simple test to do. And not only
16 dogs, but they use other animals as well, right,
17 to make sure that the human origin is specific and
18 sensitive and specific. This is what I was after.
19 Are you, have you actually excluded contamination
11:27 20 which allegedly took place here, or we were told
21 there was blood in it; does that interfere with
22 your test? And I -- I don't know the answer.

23 Q And what was the morphological test that you were
24 --

25 A Well that is --



1 Q -- referring to?

2 A -- that is when you look under the microscope, and
3 under the microscope, and if you are a serologist,
4 and if you have looked at dog sperms, you might
11:27 5 recognize them. I, as a quasi-amateur, tried to
6 do this myself, and I cannot see the difference,
7 but I'm not a serologist.

8 Q But you are reporting that that would be a manner
9 in which you could --

11:27 10 A Could be.

11 Q -- identify human sperm?

12 A Could be.

13 Q Okay.

14 A And certainly at that time, as you know,
11:27 15 morphology, looking under the microscope, is not
16 as good as other tests that we know as hairs and
17 fibres and so on.

18 Q But am I correct that you were setting out those
19 two tests as, your words were, "the only way of
11:27 20 excluding this semen from being of non-human
21 origin"?

22 A That's correct.

23 Q Okay. And it goes on to say:

24 "I assume the slides made of
11:28 25 this semen have not been preserved."



1 And that concludes your discussion on this
2 aspect. But when -- in summary then, when we
3 consider the theory relating to dog urine,
4 what -- what were you effectively saying in your
11:28 5 report?

6 A I'm saying that this could be, and show me that I
7 am wrong.

8 Q Okay. And I have been mentioning to you, we've --
9 we have the benefit, now, of some information that
11:28 10 you weren't privy to at the time of your review,
11 and there is some other information as well that I
12 want to bring to your attention to see how your
13 opinion may have been affected, and the first
14 observation I had -- and it, and it perhaps isn't
11:28 15 the most relevant one or most important one --
16 but, again, you've confirmed for us that the key
17 indicator for you in terms of reaching this theory
18 initially was the yellowish colour, as had been
19 described by Lieutenant Penkala, of the substance
11:29 20 found in the snow?

21 A And the fact there were two of the same colour.

22 Q Okay. And how's that relevant, what, how --

23 A Because one contained nothing, so that was not
24 containing any semen, yet it had the same colour.

11:29 25 Q Okay. But if I just follow you through on that,



1 and we follow through what your theory became, the
2 fact that one of them didn't contain semen might
3 be seen to exclude the dog theory that you were
4 mentioning, at least in relation to that
11:29 5 particular spot?

6 A Not necessarily, because as you know, many dogs
7 pee, not all of them contain semen.

8 Q So you mean it would be different dogs depositing
9 one, the one stain, a different dog --

11:29 10 A Why not?

11 Q -- depositing together?

12 A After four days? Why not.

13 Q Okay. And were you aware that Staff Sergeant
14 Paynter described the substance, in his testimony,
11:29 15 as pale yellowish or clearish?

16 A Yes.

17 Q And would those descriptors -- and I guess
18 'clearish' is the most obvious one -- but I take
19 it if the descriptor of that substance had come to
11:30 20 you as clearish, that that wouldn't necessarily
21 have set you off on the same theory relating to
22 dog urine?

23 A No, because by the time he got it that was
24 intermingled with snow and is diluted, --

11:30 25 Q Okay.



1 A -- so the colour would be less yellow.

2 Q And so you were going from the description of the
3 officer who found the --

4 A That's right.

11:30 5 Q -- substance initially? And also, Dr. Markesteyn,
6 we know from the trial testimony of Victor
7 Molchanko, who was the hair and fibre specialist
8 at the lab, that seven human pubic hairs were
9 retrieved from one of the vials, and if we go back
11:30 10 to his original notes they tell us that it was the
11 vial that we're speaking of, or that contained the
12 substance that we're speaking of that had sperm in
13 it as well. Do you recall reviewing that
14 information during your review of the transcripts?

11:30 15 A I don't particularly recall. I probably was aware
16 of it, I could have been aware of it, I don't
17 really recall that. I do recall thinking about it
18 later, at some time, and I became aware of it and
19 I reached some conclusions on what that meant.

11:31 20 Q And how would that have impacted your theory if
21 you were aware of it at the time that you were
22 considering these matters?

23 A If it had been an uncontaminated specimen, meaning
24 it was a specimen which had not been, shall we
11:31 25 say, interfered with, if you find semen in an



1 uncontaminated specimen with human pubic hair it
2 is entirely reasonable to conclude that they
3 belong together and, therefore, would be human.

4 In a contaminated specimen --
11:31 5 the presence of pubic hair at that scene doesn't
6 surprise me at all, this lady was viciously
7 attacked, her panties were removed with, we have
8 reason to believe with force, the fact there are
9 pubic hairs at that scene doesn't surprise me at
11:32 10 all.

11 Q And bringing it to what it actually was, if the
12 seven pubic hairs were actually taken from the
13 stain that we have been referring to, is that
14 different from what you have been -- does that
11:32 15 cause you different considerations from what you
16 have just been referring?

17 A Well if they were together, if they were, let's
18 assume that this is correct and it is relatively
19 uncontaminated, then I think we have to put great
11:32 20 credibility on that. And, also, it means how does
21 it get there? If these sperm were together with
22 the pubic hair, I think an inference can be drawn,
23 which we have already drawn, and that is this; if
24 that is the case, then first of all that sperm
11:32 25 must have been found on the surface, because that



1 meant that an -- a pure ejaculate does not
2 contain, as you know -- we all know that -- does
3 not contain pubic hairs, they don't go with the
4 ejaculate. It could be, therefore, that she
11:33 5 moved, she did not move, that it leaked from the
6 vagina with the pubic hair and stayed together,
7 and if that is the case it was post-mortem
8 excretion of semen and pubic hair, which meant
9 that she was not moving much following the sexual
11:33 10 assault.

11 Q And with that information that you have mentioned,
12 I suppose with the qualifications that you have
13 mentioned, would it have changed the report as
14 presented on this aspect?

11:33 15 A Well, as I said, I had so little confidence in
16 whatever was found that I did not consider it of
17 any significance at all in the sense that, from a
18 scientific point of view, I found it very
19 difficult to believe that, with all that blood
11:33 20 there, it had to be on the surface. If my theory
21 is correct, that to have it together, sticking
22 together, all right, semen and hair sticking
23 together, it meant that they both, they were both
24 together undisturbed, that must have been at the
11:34 25 surface. If it was not on the surface, if it was



1 found in the bottom or half-way down the pile,
2 well then the intermingling, that made no sense at
3 all, that could have been -- occurred from the
4 shovelling alone. It had to be on the surface.
11:34 5 But I'm told that the surface was covered with
6 blood.

7 Now is -- am I now to understand
8 that it was found at the surface not as the result
9 of shovelling, in spite of the blood there, or was
11:34 10 it the result of intermingling with shovels of
11 semen and hairs. And, therefore, I think from a
12 scientific point of view, if unadulterated as I
13 said, if it had not been contaminated, you have to
14 say "look, these are, this is it".

11:35 15 Q This is it?

16 A This is not, you have to say -- it can still be,
17 certainly, but you have to say "we're not 100
18 percent certain of this because we -- there is
19 intermingling going on".

11:35 20 Q We're not 100 percent certain of what, I'm sorry?

21 A That they do belong together.

22 Q Okay.

23 A Because the specimens are churned up.

24 Q Okay. Well let's follow through with this, and do
11:35 25 you recall talking with this -- talking with a



1 professor Neil Boyd on this issue, who is a
2 professor from UBC --

3 A Yes, right.

4 Q -- involved in conducting a review --

11:35 5 A Right.

6 Q -- in about 1991? Do you have a recollection of
7 him bringing this very issue to your attention at
8 that point?

9 A Not really, but he certainly could have.

11:35 10 Q And I haven't -- if we could turn, please, to the
11 document, I believe it's 003688, and I believe
12 it's page 003704, and perhaps, I may be reading
13 more than we need to, but just for context,
14 Professor Boyd writes:

11:36 15 "It is also not impossible that
16 contamination by other organic
17 substances could have caused a positive
18 reading for the 'A' antigen. This could
19 have occurred, for example, through
11:36 20 contact between the sample and dirt on a
21 shovel or through contact between the
22 sample and a leather glove. In June of
23 1990 the Chief Medical Examiner for the
24 Province of Manitoba, Dr. Peter
11:36 25 Markesteyn, suggested that the semen



1 found at the scene might be dog semen
2 from dog urine. He noted that dog urine
3 is the most common yellowish substance
4 found in the snow, and that dog urine
11:36 5 contains traces of dog semen, which test
6 positive for the presence of the 'A'
7 antigen. In his report on the Milgaard
8 case he noted that, "The only way of
9 excluding this semen from being of
11:36 10 non-human origin would have been the
11 morphology and/or species specific
12 antigen-antibody reaction tests.

13 What Dr. Markesteyn did not
14 consider is the trial evidence from hair
11:36 15 and fibre specialist Victor Malchanko of
16 the RCMP Crime Detention Laboratory;
17 Malchanko told the court that he found
18 seven pubic hairs in the semen stain.
19 Dr. Markesteyn now agrees that it is
11:37 20 more probable that this was a human
21 semen stain."

22 And I guess I'll pause there. Do you recall a
23 discussion with Professor Boyd where you
24 confirmed as it's indicated in this report?

11:37 25 A I don't specifically recall it, but I certainly



1 agree with his conclusion. I could have said
2 that, yes.

3 Q So you agree with the conclusion that at this
4 point you agreed that it was more probable that
11:37 5 this was a human semen stain based upon that
6 information?

7 A More probable, yes.

8 Q Okay. And if we turn back to the report,
9 please -- I'm sorry, your report. And as I
11:37 10 mentioned, we also -- I'm sorry, the page prior,
11 continuing our discussion on this aspect. As I
12 mentioned, we also have Staff Sergeant Paynter's
13 original lab notes and his Inquiry testimony and
14 he has testified that the notes, and we reviewed
11:38 15 those together, that he kept at the time,
16 confirmed that an anti-human protein test was done
17 on the substance, first of all, and secondly, that
18 he did conduct a microscopic examination of the
19 substance and identified human spermatozoa. Now,
11:38 20 this would be something that you weren't aware of
21 at the time of your review. If you had had that
22 information that I've just mentioned to you, and
23 it was accurate information, how would that have
24 impacted your opinion?

11:38 25 A It would have -- I would have been less likely to



1 pursue this matter of it being of canine origin.

2 COMMISSIONER MacCALLUM: Where were you
3 getting that?

4 MR. HARDY: I'm sorry, which part?

11:39 5 COMMISSIONER MacCALLUM: Where were you
6 getting that information?

7 MR. HARDY: The lab notes that we referred
8 to during --

9 COMMISSIONER MacCALLUM: Oh, I see, you
11:39 10 referred him to your report, so you are reading
11 this from the lab notes, and -- all right, I
12 understand.

13 MR. HARDY: Yeah, lab notes in
14 combination -- I'm sorry, I probably didn't
11:39 15 present that clearly, Mr. Commissioner.

16 COMMISSIONER MacCALLUM: That's all right.

17 MR. HARDY: The lab notes in combination
18 with what Staff Sergeant Paynter testified to at
19 the Inquiry.

11:39 20 COMMISSIONER MacCALLUM: All right.

21 BY MR. HARDY:

22 Q And, I'm sorry, Dr. Markesteyn, accepting that
23 information as accurate, you've indicated that it
24 would have had an impact then on your opinion?

11:39 25 A It would have, yes.



1 Q And how so?

2 A It would have been less likely that I would have
3 pursued this matter of this being of canine
4 origin.

11:39 5 Q And given that information, would you have
6 included this theory at all in your report?

7 A If I had known that, yes.

8 Q You would have included the theory that it was
9 possibly dog urine in your report if you had known
11:39 10 what we know now?

11 A Oh, I would still have put it in because that's
12 another thing I don't know about Sergeant
13 Paynter's report; that is, pure semen has millions
14 and millions and millions of spermatozoa, dog
11:40 15 urine does not, and there's how many, right, not
16 just were they there, how many. I would have, for
17 the sake of completeness, I would have said are we
18 sure we can exclude this being of non-human
19 origin, I think you have to exclude that, and I
11:40 20 would have raised that, but I would not have drawn
21 any great inference from it.

22 Q Okay. So I think I'm hearing you say that you may
23 have still actually mentioned in your report that
24 the possibility existed that this substance could
11:40 25 have been dog urine?



1 A Yes, or contaminated with it.

2 Q And what about the confirmation that a microscopic
3 examination was done and that Staff Sergeant
4 Paynter indicated that he identified, in terms of
11:40 5 morphology, that the sperm were human sperm?

6 A If I had known that, then I would not have raised
7 the issue of it being of canine origin, I would
8 not.

9 Q Okay. So that particular aspect is more relevant
11:41 10 or more important for purposes of what you are
11 indicating now than some of the others that we've
12 mentioned?

13 A Yes.

14 Q Or more indicative I guess?

11:41 15 A That's right.

16 COMMISSIONER MacCALLUM: Just put that
17 question again, please?

18 MR. HARDY: I had asked him if he was aware
19 of, and we accept Staff Sergeant Paynter's
11:41 20 information as fact for a moment, if he was aware
21 that a microscopic examination of the frozen
22 substance had been conducted by Staff Sergeant
23 Paynter in 1969 and that from that microscopic
24 examination Staff Sergeant Paynter identified
11:41 25 human spermatozoa on the basis of viewing the



1 morphology of the spermatozoa, whether or not he
2 would have still had the opinion that this was
3 possibly dog urine.

4 COMMISSIONER MacCALLUM: Well, but I
11:41 5 understood him to answer to that question, which
6 was put to him before, that it would have
7 impacted his opinion, that he would have thought
8 it was less likely that the substance was of
9 canine origin, but he still would have raised the
11:42 10 question in his report.

11 MR. HARDY: Yes, and perhaps it was my
12 mistake, I combined two factors I think in the
13 question that I initially put to Dr. Markesteyn,
14 those factors being the anti-human test along
11:42 15 with the microscopic examination.

16 COMMISSIONER MacCALLUM: No, no, that was
17 your first question. I mean, it's now apparent,
18 as it was not apparent to him when he did his
19 report, that Paynter had done the desired tests
11:42 20 and you asked him then had you known that at the
21 time would it have impacted your opinion, and he
22 said it would have been, to a degree, impacted,
23 because I wouldn't be quite so confident in the
24 possibility of non-canine origin.

11:42 25 MR. HARDY: Right.



1 COMMISSIONER MacCALLUM: But I still would
2 have mentioned it because there was certain
3 things that I still didn't know, i.e., the
4 quantity of spermatozoa observed under
11:43 5 microscopic examination. Now, which is it?

6 BY MR. HARDY:

7 Q Well, perhaps we can -- Dr. Markesteyn, let's
8 cover it again. What we now know that Staff
9 Sergeant Paynter did is a couple of things,
11:43 10 apparently, and again assuming this to be the
11 case, (a), that he did conduct what he described
12 as an anti-human protein test on this particular
13 frozen substance in 1969 and that he confirmed
14 from that test that this substance was of human
11:43 15 origin, and if I pause there, I'll ask the
16 question, if you had known that information during
17 the time of your deliberations on this matter, how
18 would that have affected your opinion in relation
19 to the possibility that this substance was dog
11:43 20 urine?

21 A I did know that information at the time of my
22 report and that did not influence me because I
23 needed to know how specific that anti-human test
24 was and --

11:43 25 Q Okay. And then -- I'm sorry?



1 A And now the morphology is different.

2 Q Okay. So -- and then the second question or the
3 second part of that is if you had known that a
4 microscopic examination was done of the
11:44 5 spermatozoa by Staff Sergeant Paynter in 1969 and
6 that he had identified the spermatozoa
7 morphologically as being of human origin, how
8 would that have affected your opinion?

9 A Then I would have said, in all I would have said
11:44 10 it is human sperm, I would not have thought that,
11 or I had no reason to adduce that, so it's human
12 sperm perhaps contaminated with dog urine because
13 human sperm doesn't look yellowish.

14 Q Okay. So ultimately at the end of that then you
11:44 15 still would have offered the opinion that it was
16 possibly dog urine?

17 A Contaminated.

18 Q Contaminated with dog urine?

19 A That's right.

11:44 20 Q Okay. And why would you have still added that?

21 A Because if the other stain was identical, which
22 I'm sure is, was dog urine, and it's quite
23 possible that -- it's rather irrelevant, but it is
24 an indication of the contamination that can take
11:45 25 place at scenes when dogs have access to that,



1 that they can contaminate, but I would certainly
2 not have put forward in this report that this is,
3 in all probability, not human, because I would
4 have no reason to do that, I would have said human
11:45 5 it is, sperm it is, he says it is, I go with that,
6 right, and I still think it's possible that it's
7 just a contaminated specimen. I don't think it
8 would have affected anything because it would not
9 affect the humanity of the morphology.

11:45 10 Q Okay. And I hope we're clear on that. So I think
11 what you are saying is in terms of the sperm, the
12 semen at the scene, you would have been confident
13 that it was of human origin?

14 A I would not have any reason to doubt that.

11:45 15 Q And that the only issue that might still have been
16 raised in your deliberations, and perhaps reported
17 on, is the possibility that that human semen had
18 been contaminated with urine, perhaps dog urine?

19 A Whatever.

11:46 20 Q And is that correct?

21 A That's correct.

22 Q Okay. Is that clear, Mr. Commissioner, or can I
23 assist any further in terms of that particular
24 area?

11:46 25 COMMISSIONER MacCALLUM: I think you'll



1 have to wait for the report.

2 BY MR. HARDY:

3 Q Okay. I'll turn you now to the next page of your
4 report under the heading *Blood in Semen from*
11:46 5 *Snowbank*, and of course this talks about the
6 question of whether or not there was blood in the
7 frozen substance found at the scene, and you state
8 at the top of the page:

9 "The evidence suggested that an attempt
11:46 10 was made to determine if the seminal
11 fluid specimen retrieved from the
12 snowbank contained blood. Evidence was
13 given that a method used in hospitals at
14 that time was used for the determination
11:47 15 of blood in urine. This in all
16 probability was the Hemostix test and,
17 if so, would have been used contrary to
18 manufacturer's instructions which
19 specifically limits the use to a
11:47 20 screening test for blood in urine. The
21 evidence given at the trial made it very
22 clear that this test is not specific for
23 blood. Not only do vegetables and
24 leather give a positive reaction but so
11:47 25 do also a range of bacteria and



1 contaminated material such as soil (from
2 shovels) as well as the cytochrome
3 enzymes of spermatozoa themselves. The
4 evidence stated that confirmatory tests
11:47 5 (presumably hemochromogen) failed to
6 confirm that this was blood."

7 And would that be an accurate account then of
8 your thoughts at this time on this particular
9 aspect?

11:47 10 A Yes, sir.

11 Q And was this, would I be correct in guessing that
12 this was largely Dr. Merry's work then that you
13 had consulted on?

14 A That is correct, yes.

11:47 15 Q And I don't know if much turns on it. Mr. Paynter
16 confirmed at the original trial, and again here at
17 the Inquiry, that the confirmatory test was not
18 actually done or was not attempted because there
19 wasn't a sufficient sample. Now, I assume,
11:48 20 though, given the wording of your report, that
21 wouldn't have had an impact though on your
22 ultimate conclusion on that point?

23 A Not really, no.

24 Q Okay. Turn to the next section, subheading

11:48 25 A-Antigens in the Semen from Snowbank, and you



1 state:

2 "If this was uncontaminated semen, then
3 this semen cannot possibly be from Mr.
4 Milgaard as he was stated to be an "A,
11:48 5 non-secretor". A-antigens can find
6 their origin in non-human material such
7 as animal blood and secretions,
8 bacteria, and, again, soil."

9 And again, would that be an accurate account of
11:48 10 your view at the time?

11 A Yes, sir.

12 Q And what was -- I think you probably already
13 answered this, but what was your view on the
14 possibility of non-contamination of that
11:48 15 substance?

16 A Well, actually it was very little possibility of
17 non-contamination.

18 Q Okay. Moving to the next paragraph:

19 "I agree with the opinion expressed by
11:49 20 Mr. Brian Jay that if blood
21 contamination of type A had taken place,
22 but that the amount of blood was so
23 little that it would be Hemostix
24 positive and hemochromogen negative, the
11:49 25 amount of blood would also be too small



1 to show the presence of A-antigen."

2 And we went through this with Dr. Merry, but I
3 assume that in other words, accepting this to be
4 the case, the A antigens that were found in the
11:49 5 frozen substance originally could not be
6 accounted for by the presence of blood?

7 A That is correct.

8 Q And again, do you know personally whether this
9 information should have been known -- or would you
11:49 10 have been aware of this information in 1970?

11 A Yes, I think that was known at the time, yes.

12 Q From your experience and your dealings in matters
13 of that nature?

14 A That's right.

11:49 15 Q The next paragraph states:

16 "The Judge, however, made it quite clear
17 to the jury that, in his opinion, there
18 was no evidence to show that
19 contamination of the semen with blood
11:50 20 had occurred."

21 And you were satisfied with this direction from
22 your review of the trial transcript?

23 A How do you mean satisfied with that direction?

24 Q Perhaps not a good question, but you had clearly
11:50 25 concluded from your review of the trial



1 transcript, or you had clearly observed that the
2 judge had given this direction?

3 A That was my impression, yes.

4 Q Okay. And then the last paragraph under that
5 subheading:

6 "I agree with Dr. Ferris' conclusions on
7 page five of his letter that assuming
8 the fact Mr. Milgaard is blood A,
9 non-secretor and the semen revealed the
10 presence of type A-antigens, a limited
11 number of interpretations can be based
12 on this evidence. He listed them under
13 '1', '2', '3', and '4'. I am in
14 agreement with this opinion. I will not
15 repeat these interpretations as you have
16 them available to you in Dr. Ferris'
17 report."

18 And we've covered these conclusions with Dr.
19 Ferris, and I'll touch upon them indirectly in
20 your conclusion, Dr. Markesteyn.

21 "I must stress, however, my assumption
22 that Mr. Milgaard is an A, non-secretor
23 is based on the evidence submitted at
24 the trial. This assumption could be
25 subject to challenge. The determination



1 of the non-secretor status of Mr.
2 Milgaard, although perhaps acceptable at
3 that time, would now no longer serve as
4 proof of his non-secretor status."

11:51 5 And again, that would be an accurate account of
6 your views on that particular aspect at this
7 time, Dr. Markesteyn?

8 A Yes, sir.

9 Q And I think you expressed for us earlier that you
11:51 10 had grave doubts about the validity of the test
11 that was originally done which suggested that Mr.
12 Milgaard was a non-secretor?

13 A That's correct.

14 Q Move to the next section, *Hair and Fibre Material*
11:51 15 *Recovered from the Nurse's Badge*:

16 "I understand from the evidence given
17 that the hair and fibre material
18 recovered from the nurse's badge did not
19 originate from the nurse's clothing
11:52 20 itself. Obviously, badges from nurses'
21 uniforms have lots of fibres sticking to
22 them in their natural exchange of trace
23 material as the result of normal course
24 of events and obviously does not
11:52 25 necessarily mean that these originated



1 from the assailant. These badges are
2 not washed; they are taken from uniforms
3 and put on again whenever a clean
4 uniform is put on."

11:52 5 Next page:

6 "The presence of hairs and fibres on the
7 badge may have given the impression that
8 there must have been close bodily
9 contact between the assailant and the
11:52 10 deceased. This is perhaps what Dr.
11 Ferris meant when he said: "As present
12 in court I believe it could even have
13 been misleading to the jury."

14 And do you recall whether you shared Dr. Ferris'
11:52 15 concern in this regard?

16 A Well, yes, I -- it didn't make much sense, it
17 didn't mean much to me at all, the presence of
18 these hairs and fibres, unless they were linked to
19 the accused, but they were there. I didn't see
11:53 20 much significance there at the time.

21 Q And do you recall being aware from a review of the
22 transcript that there was no link drawn between
23 those fibres or proven between the fibres?

24 A No, I don't remember that I was aware of that. I
11:53 25 probably wasn't.



1 Q Okay. You didn't think, though, on an observation
2 of this point, that that observation would have
3 had any significance?

4 A Any significance at all, no.

11:53 5 Q And then the last paragraph:

6 "I understand a suggestion was made that
7 close contact of the assailant with the
8 body of the deceased would result in a
9 lot of blood-staining of the assailant's
11:53 10 clothes. If sexual intercourse took
11 place prior to the stabbing this would
12 not necessarily be so. Also, the
13 stabbing alone would not necessarily
14 leave much, if any, blood-stains on the
11:53 15 clothes of the assailant."

16 And again, that was an accurate account of your
17 opinion on those particular matters?

18 A Yes, sir.

19 Q And knowing what you came to know of this attack,
11:53 20 would you, and I realize I'm probably asking you
21 to speculate, but would you have expected the
22 assailant to have blood on his clothes?

23 A It is not unreasonable, but you can actually, or
24 you need not, you need not. It depends on the
11:54 25 amount of bleeding and the direction of the blood



1 and all that, and the way the knife is withdrawn,
2 is blood-stained, and it's reinserted in between,
3 that's called off-cast splattering. Wounds
4 themselves, stab wounds themselves need not bleed
11:54 5 much to the outside of the body, they very often
6 lead to bleeding to the inside of the body. They
7 need not bleed to the outside. In fact, it is
8 well known in emergency medicine that one can miss
9 stab wounds that can indeed be very serious
11:54 10 because they don't bleed because the skin is
11 elastic, so it's fairly variable the amount of
12 blood that is present on a person.

13 Q I'll refer to your conclusion --

14 COMMISSIONER MacCALLUM: Just a second,
11:54 15 before you leave that point. You don't mention
16 anything about the slash wounds on the throat,
17 Doctor.

18 A No. If there was a slash wound -- now, if they
19 hit the carotid --

11:55 20 COMMISSIONER MacCALLUM: It did not.

21 A Well, then they need not bleed much.

22 COMMISSIONER MacCALLUM: But there were
23 multiple.

24 A There were multiple, but they need not, and they
11:55 25 were not very deep if I remember, they certainly



1 did not hit the jugular which is the vein or
2 the artery --

3 COMMISSIONER MacCALLUM: I believe so, yes.

4 A -- so they need not bleed all that much.

11:55 5 COMMISSIONER MacCALLUM: Okay, thanks.

6 Sorry, go ahead.

7 BY MR. HARDY:

8 Q Moving to your conclusion, you state in the first
9 paragraph:

11:55 10 "In conclusion, I have, contrary to Dr.
11 Ferris, no opinion whether the window of
12 opportunity was insufficient for Mr.
13 Milgaard to have committed this crime.
14 I have insufficient data to reach an
11:55 15 opinion."

16 And we've covered that, that was an accurate
17 account then of your position on this matter?

18 A Yes, sir.

19 Q And then the paragraph:

11:55 20 "I agree with Dr. Ferris that the
21 serological evidence presented at the
22 trial failed to link David Milgaard with
23 the semen retrieved from vagina,
24 snowbank, and crotch of panties."

11:56 25 And this was your conclusion at the time?



1 A Yes, sir.

2 Q Next paragraph:

3 "If, to everyone's satisfaction, it was
4 established that the origin of the
11:56 5 yellowish patch was unadulterated,
6 uncontaminated human semen, then the
7 presence of the A-antigen in this
8 specimen clearly, from a serological
9 point of view, could not be Mr.
11:56 10 Milgaard's."

11 A That's right.

12 Q And am I correct then that this was the only basis
13 upon which you were willing to conclude that Mr.
14 Milgaard might be excluded as being the donor of
11:56 15 the semen?

16 A That is correct, at that time, yes.

17 Q And not further than that, as Dr. Ferris concluded
18 in terms of the original forensic evidence,
19 probably excluding Mr. Milgaard?

11:56 20 A Because Dr. Ferris did that because of the A and
21 the secretor stuff and I wasn't sure about that.
22 I can only say I cannot link him.

23 Q Okay.

24 A I cannot say he's not. If I were to have heard
11:57 25 that, if it were, if I were told that he was, and



1 I believed that he was a non-secretor, I would
2 have, like him, I would have said this is not Mr.
3 Milgaard's, I can exclude him, being the source of
4 that semen, but I did not have that degree of
11:57 5 confidence that it wasn't.

6 Q And, I'm sorry, you had referred -- is it just to
7 the secretor aspect?

8 A That's correct, the A stuff, the blood group
9 stuff.

11:57 10 Q But is it also -- your conclusion in that respect
11 also relied upon the semen being human and
12 uncontaminated?

13 A Yes, that's right.

14 Q And then the next paragraph:

11:57 15 "In my opinion, the serological evidence
16 presented at the trial was on very shaky
17 scientific grounds to a degree that it
18 may very well have been erroneous. I do
19 not know what effect, if any, this
11:57 20 evidence had on the jury in order to
21 reach a verdict in Mr. Milgaard's trial.
22 Unless another trial were held, we will
23 never know if another jury, properly
24 instructed on the scientific merits of
11:58 25 these forensic tests, would draw another



1 inference."

2 And have we covered the concerns that you had
3 about the value and presentation of the forensic
4 evidence?

11:58 5 A Yes, you have.

6 Q And you are ultimately saying that if this
7 evidence had been accurately presented, or perhaps
8 not presented at all, is your point that we don't
9 know how a jury in those circumstances may have
11:58 10 reacted?

11 A I would not know, no.

12 Q Right, okay. And again, fair to say that you
13 weren't aware at this point again of the closing
14 arguments of counsel for the defence or for the
11:58 15 Crown?

16 A No, I was not.

17 MR. HARDY: This is likely a good spot to
18 break for lunch, Mr. Commissioner.

19 (Adjourned at 11:58 a.m.)

01:32 20 (Reconvened at 1:32 p.m.)

21 BY MR. HARDY:

22 Q Good afternoon, Dr. Markesteyn. We'll pick up
23 where we left off before the lunch break. We had
24 completed a review of your report and I wanted to
01:32 25 ask you, next, what your recollection was in terms



1 of what was done with the report?

2 A As far as I recall, that report was then submitted
3 to Mr. Williams, and I believe he was on behalf of
4 the Section 690, to the Minister of Justice, and
01:32 5 I'm sure that is where it went, in fact I know it
6 went there.

7 Q Okay, and you would have initially forwarded it to
8 Mr. Asper?

9 A That's correct, yes.

01:33 10 Q And so your understanding was that it may be
11 involved, somehow, in the ongoing Section 690
12 application on behalf of David Milgaard, that your
13 report may have a part to play in that ongoing
14 application?

01:33 15 A I would think so, yes. I think that was the
16 purpose of it, yes.

17 Q And there was a letter that we have from Mr. Asper
18 to Mr. Williams enclosing the report, the document
19 is 157075, and you'll see it's a letter dated June
01:33 20 5th, 1990 directed to Mr. Williams from Mr. Asper.
21 And I will just refer you to the first paragraph,
22 it states:

23 "Please find enclosed a copy
24 of the report of Dr. Peter Markesteyn,
01:33 25 who as you know is the Chief Medical



1 Examiner for the Province of Manitoba.

2 You will note that the report confirms

3 the original report of Dr. James Ferris

4 which was submitted with our

01:33 5 application. However, it goes further

6 to suggest that the samples used to link

7 David Milgaard to the scene of the crime

8 could well have been dog urine, which

9 could have caused the results suggesting

01:34 10 the presence of sperm and/or blood.

11 Assuming that these samples were in fact

12 semen, Dr. Markesteyn confirms that they

13 could not have come from David

14 Milgaard."

01:34 15 And would you have agreed with this

16 characterization of your findings that was

17 provided by Mr. Asper?

18 A Yes, in essence, yes.

19 Q Okay. And just on a couple of points, he notes

01:34 20 first:

21 "You will note that the report confirms

22 the original report of Dr. James Ferris

23 ...",

24 and would you have agreed with that submission?

25 A Yes.



1 Q And I think you advised us earlier that perhaps
2 you went so far as to agree that the serological
3 evidence did not link David Milgaard to the crime,
4 or the forensic evidence, but that you couldn't go
01:34 5 so far as Dr. Ferris went in terms of saying that
6 it probably excluded?

7 A I couldn't go, that's right, I could not link him,
8 but I couldn't say it definitely is not.

9 Q Okay.

01:35 10 A I wasn't going to go that far.

11 Q So your report, then, wouldn't be confirming that
12 aspect of Dr. Ferris' report?

13 A That's correct, yes.

14 Q And then the last sentence in that paragraph, it
01:35 15 states:

16 "Assuming that these samples were in
17 fact semen, Dr. Markesteyn confirms that
18 they could not have come from David
19 Milgaard."

01:35 20 And would you have agreed with that comment?

21 A Well in as far, yes, in as far as that they had --
22 they were A positive and, you know, they
23 certainly -- if it was A positive semen it could
24 not have come from Mr. Milgaard, that's correct.

01:35 25 Q And --



1 A But I have my doubts whether -- that a -- of the
2 positivity of the secretor status was correct.
3 But I think he went a little bit further, it
4 implies a little bit here that I have indeed
01:35 5 excluded David Milgaard, and I did not.

6 Q Okay. And is the answer, in terms of this last
7 sentence, I think in your conclusions in your
8 report what you indicated was that if it was, in
9 fact, uncontaminated, unadulterated human
01:36 10 semen, --

11 A Right.

12 Q -- on that basis Mr. Milgaard could be eliminated?
13 And I assume, perhaps, that this sentence might
14 have been inaccurate to the extent that it did not
01:36 15 include those adjectives?

16 A That's correct, --

17 Q Okay.

18 A -- yes.

19 Q Okay. I'll refer you, moving again
01:36 20 chronologically, to a press article which followed
21 the release of your report, 048870. And, just as
22 a general question, were you expecting some
23 interest from the press, Dr. Markesteyn, following
24 the release of your report?

01:36 25 A Oh yes, I did, yes. Oh yes, and I got it, yeah.



1 Q And I'll just refer you to a couple of pieces.
2 This is from the *StarPhoenix*, a little bit
3 difficult to read, but it's June 6th, 1990,
4 heading *Key evidence in conviction called flawed*,
01:37 5 and I'll just refer you beginning there, please.
6 It states:

7 "A key piece of evidence used
8 to convict David Milgaard of murder was
9 likely worthless, according to a new
01:37 10 forensic review.

11 Alleged semen found in the snow
12 at the scene four days after the murder,
13 which was linked to Milgaard, could have
14 been contaminated by dog urine.

01:37 15 The revelation is contained in
16 a review of forensic evidence by
17 Manitoba's chief medical examiner, to be
18 released today."

19 Just skipping down one paragraph:

01:37 20 "In the report, Dr. Peter
21 Markesteyn says investigators failed to
22 eliminate the possibility that the two
23 yellowish frozen lumps were dog urine.
24 They were found by then lieutenant Joe
01:37 25 Penkala - now Saskatoon's police chief.



1 'The evidence doesn't exclude
2 it (as dog urine),' Markesteyn said from
3 Winnipeg. 'There are various sources of
4 yellow stains in a snowbank.'

5 And would this have been an accurate account of
6 your views at least at this point of time, Dr.
7 Markesteyn?

8 A Yes, that's fairly accurate, yes.

9 Q And when I see the last sentence you've noted, it
01:38 10 appears that you have stated:

11 "'There are various sources of yellow
12 stains in a snowbank.'"; --

13 A Right.

14 Q -- is that something you would have said at the
01:38 15 time?

16 A Well, possibly. Various sources, I mean various
17 sources, I mean there's more than one animal,
18 right, there are many sources of yellow stains,
19 yes.

01:38 20 Q Okay, and I was going to ask you that, what you
21 were using in your use of the phrase "various
22 sources", so can you answer that again?

23 A Could be dogs, could be cats, could be raccoons,
24 could be anything, animals. "Various sources"
01:38 25 could be, as I say, human as well, of course,



1 urine as well.

2 Q Okay.

3 A Could be anything.

4 Q But you are referring, then, to urine, it's just
01:38 5 various sources of urine --

6 A Yes.

7 Q -- in this quote?

8 A That's what I meant, yes.

9 Q Okay. If we move to the next column, please, just
01:38 10 at the top. That's good. It states, beginning at
11 the top:

12 "In an interview, Markesteyn
13 said dog urine contains also both the A
14 antigen and semen, leading him to
01:39 15 question the value of such evidence.

16 'I said it was on very shaky
17 scientific grounds, if indeed not
18 erroneous.'

19 But Markesteyn makes no
20 pronouncement on Milgaard's guilt or
21 innocence.

22 'That's hardly my station, is
23 it?'

24 He does, however, support a
01:39 25 main conclusion of Dr. James Ferris,



1 head of pathology at Vancouver General
2 Hospital, whose 1988 report strongly
3 questioned the value of linking the
4 semen sample to Milgaard.

01:39 5 Like about 15 percent of the
6 population, Milgaard is a
7 'non-secretor,' meaning his body doesn't
8 secrete antigens from the blood into
9 other bodily fluids. Although
01:39 10 Milgaard's blood is Type A, a semen
11 sample from him wouldn't contain the A
12 antigen, as the substance in the snow
13 did.

14 'He cannot be linked to the
01:39 15 semen found in the snowbank,' Markesteyn
16 said."

17 And, again, would this be accurate in terms of
18 the information you would have provided to the
19 press at this time?

01:39 20 A Yes.

21 Q Okay. I refer you to just a couple of other
22 articles that are similar in nature and ask for
23 your comments. The next one is from the *Winnipeg*
24 *Sun*, the document is 159851. You will note it's
01:40 25 an article from June 6th, 1990, again from the



1 Winnipeg Sun, Report gives con new hope:

2 "A report by Manitoba's Chief
3 Medical Examiner is more ammunition for
4 David Milgaard, who maintains he was
01:40 5 wrongly convicted of murder and
6 imprisoned 21 years ago, Milgaard's
7 lawyer said yesterday.

8 Lawyer David Asper, who planned
9 to release the report by Dr. Peter
01:40 10 Markesteyn today, said it supports the
11 findings of a Vancouver pathologist who
12 examined forensic evidence in the case.

13 Dr. James Ferris, head of
14 forensic pathology at Vancouver General
01:40 15 Hospital, concluded in September 1988
16 that evidence presented at Milgaard's
17 1969 trial was interpreted improperly by
18 the court.

19 'It's consistent with Ferris,'
01:40 20 Asper said yesterday of Markesteyn's
21 findings.

22 'They have different
23 approaches, but it certainly forces the
24 Department of Justice to do something.' "

01:41 25 And this is similar to the question I had



1 relating to the other article, and I think we've
2 clarified it; am I correct that your report, and
3 your view and your evidence or evidence today,
4 would be that your report was consistent only to
01:41 5 the extent of the conclusion that the forensic
6 evidence failed to link David Milgaard to the
7 crime?

8 A That is entirely correct, yes.

9 Q And, again, you weren't offering a conclusion or
01:41 10 an opinion, though, on whether it excluded him --

11 A No.

12 Q -- or probably excluded him?

13 A No.

14 Q Okay. Refer next to 025929. I believe this is an
01:41 15 article from the *StarPhoenix* June 7th, 1990,
16 *Doctor in charge of autopsy stays mum*, and just a
17 short paragraph I wanted to refer you to, Dr.
18 Markesteyn. It states:

19 "In an interview, Markesteyn
01:42 20 said he was concerned that people would
21 try to read between the lines of his
22 report and conclude that he is assigning
23 blame.

24 'There is no blame here at
01:42 25 all,' he said."



1 Do you recall giving a comment of this nature?

2 A I don't really recall, but I could have said that
3 because, as you know, in my work I do not do that,
4 and I certainly do not wish, ever, to imply that,
01:42 5 and if anybody -- if I was in response of a
6 question about who, so to speak, screwed this up,
7 or anything like that, I would not go there,
8 because that's laying blame, and I would not do
9 that.

01:42 10 Q And do you recall, though, what motivated you to
11 make this particular comment?

12 A I don't recall, but it's probably under question,
13 you know, who is sort of -- who is to blame here.

14 Q Okay.

01:42 15 A In all probability, that's the case.

16 Q I'm going to refer you to a short video clip that
17 similarly comes from the time period following the
18 release of your report, I think this one's a
19 little bit later, and it was contained in a
01:43 20 program entitled *A Current Affair*, and I think the
21 clip is identified as -- and I may be wrong
22 here -- but the doc. ID is 230173, and I have it
23 as JH2, and it's -- begins at 1925 and continues
24 to 2013. So we'll just take a moment to find that
01:43 25 starting point.



1 (Clip JH2 played)

2 "NARRATOR: ... semen samples were taken
3 from the victim, semen samples were
4 taken from David Milgaard, investigators
01:43 5 never tried to match the two. But then
6 something amazing happened.

7 MR. DAVID ASPER: The forensic evidence at
8 the trial, the only physical evidence
9 that purported to link Milgaard to the
01:44 10 scene, were two yellowish clumps of
11 frozen material found in the snow four
12 days after the girl's body had been
13 found.

14 DR. PETER MARKESTEYN: What is the most
01:44 15 common source of yellow, yellowish,
16 yellow stains in snowbanks? Well that,
17 in Canada at least, is dog urine.

18 MR. DAVID ASPER: What they tendered as
19 Milgaard's semen was, in fact, fido's
01:44 20 urine.

21 NARRATOR: But there is more from this
22 woman, Linda Fisher ..."

23 (Clip JH2 ends)

24 BY MR. HARDY:

01:44 25 Q And do you recall giving interviews of that nature



1 following the release of your report, Dr.
2 Markesteyn?

3 A I probably did, yes. I obviously did, yeah.

4 Q And would your comments there be representative of
01:44 5 the type of information that you would have been
6 providing?

7 A That is the type of information I would be
8 providing, yes.

9 Q And were you aware of Mr. Asper's characterization
01:44 10 of your information --

11 A No.

12 Q -- as indicated on that clip?

13 A I wasn't aware of that.

14 Q And would you have agreed with that
01:45 15 characterization?

16 A Agreed to the extent of what?

17 Q The accuracy of the characterization?

18 A And what was that again?

19 Q I believe Mr. Asper said that the samples were, in
01:45 20 fact, fido's urine?

21 A Oh, in fact?

22 Q Yes?

23 A No, that is -- I just raised that, it was not in
24 fact, no.

01:45 25 Q Okay.



1 A We don't know that, we still don't know that.

2 Q And I'll turn you next to 220863, one further
3 press article. Again, you'll see it's an article
4 *Justice official to meet with forensic pathologist*
01:46 5 from the Saskatoon *StarPhoenix* June 7th, 1990. I
6 refer you to a couple of paragraphs. The report
7 is speaking about -- I'm sorry, it's the next
8 column, actually, is speaking about Dr. Ferris'
9 report and your work, and it notes in the middle
01:46 10 of that column:

11 "His report is supported

12 "...",

13 his being Dr. Ferris:

14 "His report is supported by

01:46 15 one written by Dr. Peter Markesteyn,
16 Manitoba's chief medical examiner, which
17 was made public Wednesday by Milgaard's
18 lawyer.

19 Like Ferris, Markesteyn says
01:47 20 emphatically that semen found at the
21 scene could not have been Milgaard's."

22 And I realize that we're covering this in various
23 different respects, different forms, Dr.
24 Markesteyn, but would I be correct in concluding
25 that you would not agree with the accuracy of



1 that comment?

2 A That's correct.

3 Q Okay. And it's to the same extent as we've
4 described before, that only in the circumstances
01:47 5 that it had been concluded that the semen was
6 uncontaminated, unadulterated human semen, that
7 you would be able to offer that conclusion, and
8 again on the assumption, as well, that Mr.
9 Milgaard was a non-secretor?

01:47 10 A That's right.

11 Q Okay. I'm going to continue to move forward
12 chronologically, and we next come to a letter from
13 a Patricia Alain to Mr. Eugene Williams, the
14 document is 185365. You'll see the letter is
01:47 15 dated June 12th, 1990 and, again, from Ms. Alain
16 to Mr. Williams. And do you know Ms. Alain, or
17 did you know Ms. Alain?

18 A Oh yes, I know her well, yes.

19 Q And that was through work, you understood her to
01:48 20 be a serologist, --

21 A Yes.

22 Q -- working at the Central Forensic Laboratory --

23 A That's right.

24 Q -- for the Government of Canada or for the RCMP?

01:48 25 A Yes, sir.



1 Q I'll read this letter to you beginning in the
2 first paragraph:

3 "I have attached a copy of a
4 report from Dr. Peter Markesteyn, Chief
01:48 5 Medical Examiner, Manitoba. He has
6 reviewed Dr. Ferris' report and all the
7 other information as provided to Dr.
8 Ferris.

9 Dr. Markesteyn has come to the
01:48 10 same conclusions as Dr. Ferris in many
11 areas and introduced a new twist to the
12 semen in the snow, by suggesting that it
13 may have been of canine origin. The
14 comments he makes in this area are
01:48 15 interesting. From personal experience,
16 I have noted that some canine blood will
17 carry A-like antigens. I cannot make
18 any comments regarding canine urine or
19 semen. The morphological differences of
01:49 20 human spermatozoa and canine spermatozoa
21 are several. The experienced examiner
22 would not have any problems in
23 distinguishing between human and canine
24 spermatozoa.

01:49 25 Both Dr. Markesteyn and Dr.



1 Ferris have taken the absolute
2 interpretation of the absence of A
3 and/or B antigens in Milgaard's saliva
4 sample, i.e. that the absence of
01:49 5 antigens is proof positive of a
6 non-secretor. This statement is not an
7 absolute one based on the technology
8 available twenty years ago as compared
9 to that of today."

01:49 10 And would you have any reason to dispute the
11 accuracy of any of Ms. Alain's comments in this
12 letter?

13 A No, I would not.

14 Q Were you aware that she was involved in reviewing
01:49 15 your work at the time?

16 A No, sir.

17 Q We'll move forward next to a memo to file by Mr.
18 Williams, the document is 002507. You'll see it's
19 a memo dated June 16th, 1990 respecting an
01:50 20 interview with Dr. Peter Markesteyn and Dr. Colin
21 Terry, and I'll read some of this to you,
22 beginning in the first paragraph:

23 "On June 12, 1990 I spoke
24 with Drs. Markesteyn and Terry ... The
01:50 25 main objective was to obtain



1 clarification on certain items contained
2 in Dr. Markesteyn's report, and to
3 obtain Dr. Markesteyn's reaction to
4 public announcements that his report
01:50 5 confirmed the findings of Dr. Ferris'
6 report.

7 At the outset, Dr. Markesteyn
8 expressed his concern that there was an
9 inferential tie between the blood this
01:50 10 the victim's vagina, and the semen on
11 the victim's panties and in the
12 snowbank, which could have unfairly
13 influenced the jury. I drew his
14 attention to pages 20-22 of the Crown's
01:50 15 closing address which contained the
16 trial counsel's submissions to the jury
17 concerning the serological evidence, and
18 to the judge's charge. I invited Dr.
19 Markesteyn's comments."

01:50 20 And do you have a recollection of being shown
21 the -- or a portion of the closing address of
22 Crown counsel?

23 A I vaguely do, yes, yes.

24 Q Okay.

01:51 25 A I'm sure that I -- it was shown to me.



1 Q Okay. The next paragraph notes:

2 "Dr. Markesteyn noted that it
3 was fair for the Crown to tell the jury
4 that the evidence neither tied Milgaard
01:51 5 to the crime, nor did it exclude him.
6 Notwithstanding the Crown's position,
7 Dr. Markesteyn felt that the serological
8 evidence was poor, if not erroneous. He
9 noted that the Crown failed to prove
01:51 10 that the sperm in the vagina, on the
11 panties and in the snowbank had anything
12 to do with each other. From a
13 serological point of view no link had
14 been established to his satisfaction."

01:51 15 And would that be an accurate account of comments
16 you would have made to Mr. Williams during this
17 discussion?

18 A Yes, sir.

19 Q And do you have a recollection of this meeting
01:51 20 with Mr. Williams?

21 A Well, I do remember meeting with him, yes.

22 Q Okay. And Dr. Merry being present as well?

23 A Yes.

24 Q I'll continue forward:

01:51 25 "I drew Dr. Markesteyn's



1 attention to paragraph 3 of David
2 Asper's letter to me dated June 6, 1990,
3 and asked whether the following quote
4 accurately summed up the conclusions
01:52 5 contained in his report:

6 On June 5, 1990, we forwarded to you
7 a co[ply of the report of Dr. Peter
8 Markesteyn, which confirms the
9 findings of Dr. Ferris.

01:52 10 Dr. Markesteyn stated that
11 although he agrees with the assumptions
12 contained on page 5 of the Ferris
13 report, he:

14 1. disagrees with the conclusion that
01:52 15 Milgaard could not have done it
16 because there was insufficient
17 time."

18 And:

19 "2. disagrees with the conclusion that
01:52 20 the serological evidence exonerates
21 Milgaard."

22 And I think we've covered those in some detail;
23 that would be accurate --

24 A Yes, sir.

01:52 25 Q -- in terms of information that you were providing



1 to Mr. Williams at the time?

2 A Yes, sir.

3 Q The next paragraph notes:

4 "Dr. Markesteyn also pointed

01:52 5 out that the conclusion that Milgaard is

6 a non-secretor has not been established.

7 The steps taken to collect the saliva

8 sample negated a positive result;

9 moreover, the test procedures in use at

01:52 10 the time were not reliable."

11 And you were continuing to express the same

12 concern that you had expressed earlier at this

13 point?

14 A Yes, that's correct.

01:53 15 Q And the next paragraph:

16 "After showing Dr. Markesteyn

17 photos of the scene, I asked him whether

18 had any comments concerning Dr. Ferris'

19 theory that the body was dumped at that

01:53 20 location. While noting that it was

21 unusual to find the knife underneath the

22 body, and noting the absence of blood

23 around the wounds, Dr. Markesteyn

24 concluded that the widespread location

01:53 25 of the blood spots around the body



1 coupled with the trampling and signs of
2 struggle in the area, suggested that the
3 assault had occurred where the body was
4 found."

01:53 5 And do you recall this particular discussion with
6 Mr. Williams?

7 A Yes.

8 Q And is this a fair representation of your
9 conclusions --

01:53 10 A It is.

11 Q -- on this issue?

12 A Yes, it is.

13 Q You are generally of the view that the assault
14 would have taken place at the scene noted in the
01:53 15 photographs that you had viewed?

16 A Yes.

17 Q And then just moving down the page to:

18 "Findings and Conclusions

19 Although Dr. Markesteyn
01:53 20 criticized several aspects of the
21 serological evidence, it was his opinion
22 that the serological evidence did not
23 exonerate David Milgaard as Gail
24 Miller's killer.

01:54 25 Further, he did not share Dr.



1 Ferris' conclusions that Milgaard did
2 not have enough time to commit the acts
3 which accompanied death. Thirdly, he
4 did not share Dr. Ferris view that the
01:54 5 crime had occurred elsewhere, and the
6 body was then dumped in the alley."

7 And are you comfortable with the accuracy of that
8 summary as provided by Mr. Williams?

9 A I am comfortable with that, yes.

01:54 10 Q In terms of what you would have advised him at
11 that time?

12 A Yes, sir.

13 Q And was there anything else of relevance that you
14 can recall from this particular meeting with Mr.
01:54 15 Williams?

16 A No, not that I recall, no.

17 Q And what was your assessment of Mr. Williams'
18 approach in his discussions with you?

19 A Well Mr. Williams was not, he has not been the
01:54 20 only counsel for the Department of Justice that
21 interviewed me on 690 cases, I have been involved
22 in others. He was firm, and they don't fool
23 around, it's -- it is like an interrogation, but
24 he was professional and he didn't, you know, bang
01:55 25 his fist on my desk or point fingers or anything



1 like that, but he certainly was to the point, and
2 they certainly weigh what everyone has to say and
3 challenges, if necessary, what one says and why
4 one says it. This is an interview which I thought
01:55 5 was professional, courteous, but it wasn't a
6 friendly chat, no, nor is it intended to be.

7 **Q** So you didn't have any concerns, then, with his
8 approach?

9 **A** None whatsoever.

01:55 10 **Q** Okay. If we move forward to a letter dated June
11 27th, 1990, the document is 333472. This is from
12 Mr. Williams to yourself regarding David Milgaard,
13 and just in the first paragraph I note he states:

14 "Thank you for your recent
01:56 15 letter which enclosed the photographs by
16 Dr. Terry and the article authored by
17 Sheila M. Keating entitled 'Information
18 From Penile Swabs in Sexual Assault
19 Cases'."

01:56 20 And do you have a recollection of providing this
21 information to Mr. Williams, --

22 **A** Yes.

23 **Q** -- the photographs and this article?

24 **A** Yes, I do, because I often do that. I, whenever I
01:56 25 receive or review scientific articles, I very



1 often send them on to counsel in case they ever
2 needed that for future cases or whatever.

3 Q And would the photographs referred to be the
4 photographs that we took a look at earlier in
01:56 5 relation to the colour comparison --

6 A Yes.

7 Q -- with the frozen semen and the colour chip
8 chart?

9 A I believe so, yes.

01:56 10 Q Okay. And do you recall this particular article
11 by Ms. Keating and why, in particular, you had
12 forwarded it to -- forwarded it to Mr. Williams?

13 A Well the reason was because there was a case of a
14 sexual assault, and these are the sort of things
01:57 15 that one can do, and in case he ever had another
16 case like that. And I often do that, and I still
17 do with counsel, I often send them cases for their
18 files.

19 Q And I won't turn to the article, we do have a
01:57 20 document reference, it's 002539.

21 Moving forward, we come to
22 another press article, and the document on this
23 one, Dr. Markesteyn, is 026530. You'll see it's
24 from the *Western Report* dated August 13th, 1990,
01:57 25 and if we could move to the next page, please.



1 Just a short portion near the bottom that I was
2 going to refer you to. It states:

3 "Dr. Markesteyn, 59, is the
4 chief medical examiner of Manitoba. He
01:57 5 has concluded that the Crown sample was
6 not semen at all, but dog urine. Dogs
7 normally secrete blood and semen into
8 their urine. Certain canine antigens
9 will register in tests as type A human
01:58 10 antigens. The frozen samples police
11 found were yellow. Dr. Markesteyn froze
12 human sperm samples. In all cases, it
13 remained white. 'I'm not saying
14 Milgaard is innocent,' says the
01:58 15 pathologist, 'But unless there's a new
16 jury, we'll never know what really
17 happened.'"

18 And then just briefly on the next page, I believe
19 that's a picture of yourself, with a caption just
01:58 20 underneath it:

21 "... The Crown's sperm samples were dog
22 urine."

23 And I assume you would have the same
24 clarification that you had for us with respect to
01:58 25 other articles that had attributed this



1 conclusion to you?

2 A Yes. I never said that.

3 Q Okay. And we know that Mr. Milgaard's first
4 Section 690 application was dismissed in February
01:58 5 of 1991, and were you aware of the dismissal of
6 that application at the time, or did you become
7 aware of it?

8 A I became aware of that.

9 Q And were you contacted by anyone in relation to
01:59 10 that decision?

11 A Of Ms. Campbell?

12 Q Yes?

13 A Oh yes, I was, indeed. The press arrived, at --
14 in from New York on this, and they wanted an
01:59 15 interview with me, and as you know I always give
16 interviews when asked, and they wanted to get a --
17 my opinion on the matter. That is to say they
18 started the interview, they flew all the way in
19 with their own cameramen, their own technicians,
01:59 20 and after the usual introductory flattery they
21 started to ask me information about the case and I
22 was waiting. When I -- I knew where they were
23 going, and on several occasions they asked me
24 "doctor, don't you think that Ms. Campbell, you
01:59 25 know, erred here, and should have ordered this,



1 and don't you think he is innocent", and all that
2 stuff, and I said to them "as you know, or you
3 could know, I have no opinion on that, I am just a
4 guy who cuts up people, I have no comment on the
02:00 5 activities or non-activities on the Minister of
6 Justice, this would be highly inappropriate in
7 Canada to do that". They went again and again to,
8 went back to the evidence again, and then they
9 came again, and they tried and tried for about 20
02:00 10 minutes, they really wanted me to say that,
11 somehow or another, Ms. Campbell should get her
12 act together, and I declined, for obvious reasons,
13 to do give such an interview, and I didn't.

14 Q And I would assume that your position with those
02:00 15 reporters or otherwise would have been, I mean on
16 the forensic evidence, would have been as you've
17 already expressed to us and was expressed in your
18 report?

19 A That's right.

02:00 20 Q I'm going to refer you to another article that
21 followed the initial dismissal of Mr. Milgaard's
22 first application. The document reference is
23 012250. We've looked at this article several
24 times in the course of this hearing. It's from
02:01 25 the *Toronto Star* dated, I believe, August 11th,



1 1991, and it's an article by Peter Edwards, and if
2 we turn to the next page, please, just a single
3 paragraph in the middle column, it states in that
4 single paragraph:

02:01 5 "What was presented in court as possibly
6 Milgaard's semen near the crime scene
7 was actually dog urine, concluded
8 Dr. Peter Markesteyn, chief medical
9 examiner of Manitoba in a June, 1990,
02:01 10 statement."

11 And for the same reasons we've covered, I assume
12 you take issue with that --

13 A I do.

14 Q -- characterization?

02:01 15 A Yes.

16 Q And were these -- were these, was this type of
17 reporting that attributed these types of comments
18 to you or these conclusions to you, did that come
19 to your attention at the time? Were you aware of
02:02 20 that?

21 A I was not, no.

22 Q Okay. And if you had been aware of it, would you
23 have done anything about it?

24 A No.

02:02 25 Q And can you give us -- why not?



1 A Well, it's been my policy for many years that I
2 let the press do what the press does and I do not
3 contact the press and if they give the wrong
4 information, I do not get into an argument with
02:02 5 the press. In fact, I was taught that in my
6 learning as a forensic pathologist in the topics
7 of how to deal with the media, to be very careful
8 of this, don't go there because you get into
9 arguments with the press and you get absolutely
02:02 10 nowhere with this, and I have never ever written a
11 letter to the editor in my life.

12 Q Okay. I'll move forward to another article, the
13 document is 008469. It's a little bit out of
14 sequence, this one should have come before the
02:03 15 last one we referred to, I don't think it matters
16 though. The date at the top, although difficult
17 to say, is dated May 15th, 1991, "The Milgaard
18 case: Was justice served?" And this was from the
19 Christian Science Monitor, and there's just a
02:03 20 short portion dealing with your assessment of Mr.
21 Williams that I wanted to refer you to. The page,
22 if we could turn to page 3, please, at the bottom
23 of the middle column, please. You'll see it
24 states:

02:03 25 "Dr. Ferris, the Vancouver



1 forensic pathologist, says the
2 minister's decision was a foregone
3 conclusion when he was interviewed by
4 the investigator. "Mr. Williams was
02:03 5 here to defend the decision that was
6 going to be made" confirming Milgaard's
7 guilt, he says.

8 The Monitor questioned five
9 people Williams interviewed, but only
02:04 10 one found him objective and open-minded.
11 "My impression," says Manitoba chief
12 medical examiner Peter Markesteyn, "is
13 that without putting any pressure on me,
14 he wanted to hear what I had to say and
02:04 15 why I said it."

16 And would that have been accurate in terms of
17 what you would have indicated about your meeting
18 with Mr. Williams at that time?

19 A Yes, exactly.

02:04 20 Q And we'll move forward to a second report by Dr.
21 Merry. If we could turn to 155549, please, you'll
22 see it's a report by Dr. Merry sent to Mr. Asper
23 dated March 6th, 1992, and I won't review it, you
24 and I have had a chance to look at this together
02:04 25 briefly. Did you have any role in the preparation



1 or provision of this report in 1992?

2 A By Dr. Merry?

3 Q Yes.

4 A None.

02:05 5 Q Okay. Were you aware that he was providing a
6 second report or another report to Mr. Asper in
7 relation to the serological evidence?

8 A I was not --

9 Q Okay.

02:05 10 A -- aware of that.

11 Q Were you aware of the RCMP investigation in 1993
12 into allegations of wrongdoing, that certain
13 public officials in their handling of the David
14 Milgaard matter had committed criminal wrongdoing,
02:05 15 were you aware of the investigation that followed
16 by the RCMP in 1993?

17 A I only became aware of it recently. I certainly
18 was not contacted by them in 1993. I do know, now
19 know that such a meeting was held.

02:05 20 Q And were you involved through the '90s in the
21 course of the DNA testing and matters of that
22 nature that we know were ongoing, were you
23 involved in those matters at all?

24 A Not at all.

02:05 25 Q Okay. And what about the Larry Fisher criminal



1 proceedings in the later 1990s, did you have any
2 involvement in those proceedings?

3 A None whatsoever.

4 Q Were you approached by any of the parties
02:06 5 interested?

6 A No, sir.

7 Q I'm just about done. There's one further short
8 passage from Joyce Milgaard's book, *A Mother's*
9 *Story*, that I wanted to refer you to. The
02:06 10 document is 269317 and if we could turn, please,
11 to page 269482. You'll see the chapter is
12 entitled *Scent of Victory* and there's a short
13 mention of your involvement in the first couple of
14 pages of this chapter. First of all, would you
02:06 15 have read this book previously or were you aware
16 of this book, Dr. Markesteyn?

17 A I got a copy, but I have -- I'm sorry to say, I
18 have not read the entire copy, no.

19 Q And just in terms of, just under the title I see a
02:06 20 portion is quoted there:

21 "This semen cannot possibly be from Mr.
22 Milgaard."

23 And would you have ever stated this comment,
24 unqualified as it's set out here, at any point
02:07 25 following the release of your report or at any



1 time I guess?

2 A No, sir.

3 Q And I think probably what happened, if we go to
4 your report, and maybe just for the sake of
02:07 5 completeness we can see where this comes from, if
6 we can go to your report just for a moment,
7 026321, and, I'm sorry, if we can move forward to
8 the last page -- I'm sorry, it's the page prior I
9 think, and you'll see at the beginning of this
02:07 10 paragraph under the heading *A-Antigens in the*
11 *Semen from Snowbank*, it states:

12 "If this was uncontaminated semen, then
13 this semen cannot possibly be from Mr.
14 Milgaard..."

02:08 15 And it looks like that's perhaps where the quote
16 was taken from, and I take it that that
17 information would only be accurate with the words
18 that begin that sentence in your report?

19 A That's right, sir.

02:08 20 Q Okay. And if we can go back to the portion of the
21 chapter that we were referring to of Mrs.
22 Milgaard's book, I'm sorry, 269482, and I just
23 noted in the first paragraph there's mention that
24 you had been trained years ago by Dr. Emson?

02:08 25 A No.



1 Q That wasn't the case?

2 A No, sir.

3 Q Okay.

4 A Not at all.

02:08 5 Q You had just known of Dr. Emson?

6 A Dr. Emson, I knew about Dr. Emson, he was a
7 professor of breast pathology in Saskatoon and I
8 knew him -- and also where Mrs. Milgaard may have
9 gotten this from, Dr. Emson at one time was the
02:09 10 chair of the Canadian Association of Forensic
11 Pathologists or Forensic Scientists and I knew him
12 in that capacity, but he certainly never taught
13 me, no.

14 Q Okay. If we could turn to the next page, please,
02:09 15 just one further portion I was going to refer you
16 to, it's on the second page, or on the right-hand
17 side, the paragraph that I've noted, and it
18 states:

19 "There were other interesting things in
02:09 20 Markesteyn's report besides his dog
21 urine findings. His conclusions about
22 the murder were horrifying. Markesteyn
23 wrote that the killer stayed at the
24 murder scene for at least fifteen
02:09 25 minutes. Gail Miller had died over



1 several minutes, and the killer
2 continued to stab her even as she lay
3 dead. We could only shudder at the
4 thought of his extreme hatred towards
02:10 5 women. Markesteyn could find no
6 explanation why the knife blade had
7 snapped, since no bones were struck by
8 it."

9 And was this, or is this an accurate account of
02:10 10 what you had stated at any point in time?

11 A I think this is a literary license. That is not
12 at all what I said.

13 Q Okay. And there's just one last bit of
14 information I had wanted to bring to your
02:10 15 attention, Dr. Markesteyn. A witness who recently
16 testified, Dr. Kim Rossmo, provided the Commission
17 office with a document from the Encyclopedia of
18 Forensic Science by Susan Bell, 2004, and the
19 document ID is 337736. If we could turn to page 3
02:11 20 of that document, please, this portion here,
21 there's a reference to semen or seminal fluid, and
22 closer to the bottom of that reference it states:

23 "Semen is a thick milky liquid that
24 dries as a crusty, somewhat shiny
02:12 25 material that acquires a slight



1 yellowish tinge as it ages."

2 And were you ever, or were you aware at any point
3 of this information, not stating whether you
4 agreed with it or not, but were you aware at any
02:12 5 point of the possibility that semen on aging
6 could acquire a yellowish tinge?

7 A In frozen state?

8 Q I don't -- at any point were you aware of that
9 possibility?

02:12 10 A I was not aware of this article and I dare say
11 that this may or may not be the case in some cases
12 under normal circumstances, but I am not aware
13 that it changes colour in a frozen state.

14 MR. HARDY: Okay. Dr. Markesteyn, those
02:12 15 are all of the questions that I have for you. My
16 friends may have some questions.

17 BY MR. GIBSON:

18 Q Dr. Markesteyn, for the record, my name is Bruce
19 Gibson, we chatted at the break a couple of times.
02:13 20 I represent the RCMP. I've just a couple of
21 questions for you. Mr. Hardy has been his usual
22 thorough self, so I don't think you'll be up there
23 much longer.

24 In your testimony you mention
02:13 25 that there were some bits of information that you



1 were not provided with. I think you indicated you
2 did not have the closing arguments at trial?

3 A That's correct.

02:13 4 Q You never had any original exhibits from trial for
5 testing?

6 A No, sir.

7 Q And I think you indicated you also never had the
8 preliminary evidence from the original trial?

9 A That's correct, sir.

02:13 10 Q And I want to just look at a document, if I could
11 just call up 025562, please, and this is a report
12 from a Victor Molchanko. I don't know if you
13 remember Victor Molchanko with the RCMP lab?

14 A Yes. I know him well, yeah.

02:14 15 Q And the date of that is March 27th, 1969, and it
16 deals with some of the materials that we've talked
17 a little bit about, certainly this is dealing with
18 the hair sample. If we can go to the next page,
19 please, and just at the bottom here, number 4, if
02:14 20 we could call that up, it indicates:

21 "The hair from Exhibit "I" (vials) was
22 examined and compared microscopically
23 with the hair samples, Exhibits "J" and
24 "K". "

02:14 25 Do you remember seeing this document at all?



1 A No, I do not.

2 Q Okay. And if we could just go to the next page of
3 that document, please, and call up part 4 again,
4 and in it it indicates:

02:14 5 "Six human pubic hairs were removed from
6 one of the vials from Exhibit 'I'.
7 These hairs had characteristics which
8 were similar to those found in the human
9 hair sample, Exhibit "J". (Control
02:15 10 sample of pubic hair from the victim).
11 A common origin is possible."

12 And again, is that the kind of information that
13 may have assisted you when you were first
14 contacted, would have been some good background
02:15 15 as far as trying to make a determination of what
16 those samples may have been?

17 A Yes, sir.

18 Q And if we could go to another document, 008311,
19 and this is the evidence from the preliminary
02:15 20 inquiry for Victor Molchanko, or his evidence,
21 rather, at Mr. Milgaard's preliminary inquiry, and
22 if we can go to page 008323, please, 323, just
23 call the top portion up there, and again Mr.
24 Molchanko is talking about his report and his
02:16 25 findings with respect to the hairs, he says:



1 "A Yes, I did, I differentiated between the
2 two vials, I numbered the first one "I
3 1", and the other one "I 2", the vial
4 marked "I 1", I found seven hairs in it,
02:16 5 seven human pubic hairs.

6 Q And did you...

7 A ...and these were compared with the
8 hair sample, which is Exhibit P.10,
9 allegedly a controlled sample of pubic
02:16 10 hair from the victim. The
11 characteristics on the seven hairs
12 that I found, were similar to the
13 characteristics found in the human
14 pubic hair in P.10, and because of
02:16 15 this similarity, I concluded that the
16 seven hairs originated from the same
17 source as the hair from Exhibit P.10.
18 Pardon me, could have originated from
19 the same source."

02:17 20 And again, I take it that information would have
21 been of assistance to you when you prepared your
22 original views on this subject?

23 A Yes. Am I correct in understanding that those
24 hairs were put in the vial, in the same vial where
02:17 25 the sperm was, in the same vial?



1 Q They were found in the frozen sample and that was
2 put into the vial and then it thawed.

3 A So in one vial both --

4 Q In one vial, yes.

02:17 5 A Both the pubic hair and the hairs?

6 Q The vial -- you are talking about when it was
7 gathered at the scene?

8 A Yeah.

9 Q That's my understanding, correct, and I'm sure
02:17 10 someone will correct me if I'm wrong here. Frozen
11 into a lump, put into a vial, then thawed.

12 A Okay, together.

13 Q Okay. The Penkala report is 006262, that may be
14 of assistance. Thank you, Mr. Loran, hopefully
02:18 15 that will come up here. And I haven't looked at
16 this, but if we call that up, it may be of some
17 assistance. It says he:

18 "...researched the snow in the area
19 where the body of Gail Miller was found.

20 The snow was searched and
21 during the search, two frozen lumps
22 about one inch in diameter, yellowish in
23 color, with hair frozen into the lumps,
24 were found and retained in a frozen
02:18 25 state..."



1 So hopefully that clarifies it for you.

2 A Yes.

3 Q So that is in fact what occurred, he extracted the
4 hairs and then did his analysis. So again, that
02:18 5 would have been information that would have
6 assisted you at the outset, it would be better to
7 have that information from the beginning rather
8 than later on?

9 A Certainly, yes.

02:18 10 Q I think you indicated that you did some tests with
11 respect to the frozen semen that you and Dr. Merry
12 decided to do --

13 A Yes.

14 Q -- where you went to the fertility lab and I think
02:19 15 you were fair in your evidence there and you said
16 that it was a bit of a crude test, if I may put it
17 that way?

18 A It was.

19 Q And that you didn't have semen that was taken from
02:19 20 a body, it was semen at room temperature, it
21 wasn't frozen for four days, and obviously the
22 conditions were not the same?

23 A Exactly.

24 Q The other thing I was going to ask you about that,
02:19 25 I take it there was no contamination that you



1 would have tried to sort of replicate during that
2 experiment, there was no mixture of any kind of
3 blood or anything into the sample?

4 A No, we did not do that.

02:19 5 Q One thing I was wondering about, do you think it's
6 possible that there could have been, the seminal
7 fluid could have drained from the body of Gail
8 Miller and because she had expired at that point
9 in time, that there could have been a discharge of
02:19 10 urine from the body as well and that's possible
11 how some urine could have ended up into that
12 sample?

13 A Exactly, sure, that's possible.

14 Q So that may be a good explanation as to why the
02:20 15 seminal fluid that was eventually identified by
16 Mr. Paynter as being human seminal fluid could
17 have had a yellowish tinge to it because of urine
18 that had perhaps drained into it?

19 A Yes, it's a possibility, yes. Bodies often, as
02:20 20 you know, excrete urine at the time of death.

21 Q Thank you. If I could go to document 026321, and
22 that of course is your report, Doctor, and I want
23 to go to page 6 of that report if I may. I just
24 want to call that portion up there, and you gave
02:20 25 evidence earlier, and I just want to try and



1 clarify a little bit about your contact with Staff
2 Sergeant Paynter. You indicate:

3 "I have been informed that the original
4 notes on which this evidence by Staff
02:21 5 Sgt. Paynter was based are no longer
6 available."

7 And judging by the manner in which you phrase
8 that, and I think you were again fair this
9 morning when you said you think that that perhaps
02:21 10 could have been passed on to you by someone,
11 perhaps Mrs. Milgaard, and possible, but you are
12 not sure, that you may have gathered that
13 information from Mr. Paynter?

14 A Yeah, it's possible that I was informed of that.
02:21 15 Whether that was from, by Mrs. Milgaard, that I
16 don't recall, but it may have been by others, it
17 may have been by Mr. Asper who gave me all the
18 other stuff, and I may have asked him to get that.

19 Q Yes. Just the way it's phrased there, it doesn't
02:21 20 appear that Mr. Paynter told you that because in
21 the next line you say, "Staff Sgt. Paynter
22 informed me..." I think a person sitting down to
23 draft something would likely say, well, Staff
24 Sergeant Paynter informed me that he couldn't
02:21 25 remember the tests and didn't have his notes, just



1 the manner in which that's phrased, so unlikely,
2 if I may say to you, that Staff Sergeant Paynter
3 would have informed you he didn't have his notes
4 considering the fact that they surfaced relatively
02:22 5 shortly after that for the 1992 investigation or
6 '93 investigation by the RCMP?

7 A Well, or whatever, I was left with the impression,
8 whatever the source, that they were not available.

9 Q Yes.

02:22 10 A And I wanted them and I couldn't get them.

11 Q Absolutely, and I'm assuming that when you spoke
12 with Staff Sergeant Paynter, did you ask him then
13 if he still had his notes? Like, do you remember
14 asking him that question?

02:22 15 A I probably did. I wouldn't be surprised because
16 that's what I was after.

17 Q Okay.

18 A But I was more after, as I said before, what the
19 exact test was that he did.

02:22 20 Q And again, it appears that we have his notes now,
21 obviously we do, and Staff Sergeant Paynter has
22 testified with respect to that. I just wanted to
23 make sure that it appeared to you that someone
24 informed you initially that Staff Sergeant
02:23 25 Pearson's notes -- or sorry, Staff Sergeant



1 Paynter's notes weren't available and that's the
2 information you went on?

3 A That's correct.

4 Q And I take it you never contacted Staff Sergeant
02:23 5 Paynter again asking for the notes at any point in
6 time or trying to get ahold of him to get ahold of
7 those notes? His evidence is that he doesn't
8 recall you contacting him for that, but he would
9 have made those available to you?

02:23 10 A Well, I'm sure he would have if he had them, but I
11 didn't ask him, I was specifically, and I was
12 surprised and I remember that, and I expressed
13 concerns because it's a routine test, and he said
14 I don't remember doing that, and I couldn't -- he
02:23 15 must have misunderstood because why would he not
16 remember what is done all the time.

17 Q And the circumstances of your contacting him, was
18 that, did you run into him, was that by telephone?

19 A Probably by telephone. My recollection is -- what
02:23 20 I was after is not the fact that he did or did not
21 do the human origin, because I knew he had done
22 that according to the evidence. As I said before
23 this morning, my quest was how sensitive, how
24 specific is the human test in this specimen if
02:24 25 there were contamination and I referred to that



1 before and I will -- I have now repeated it.

2 Q And I believe you indicate in your report here as
3 well that -- if we can just go to the previous
4 page of this report, page 6 -- sorry, let me just
02:24 5 find that. Page 6 of the report. My apologies.
6 Go back to page 6. I guess that's where we were.
7 Call this portion up at the bottom here, and in
8 your report you say:

9 "The only way of excluding the semen
02:25 10 from being non-human origin would have
11 been the morphology and/or species
12 specific antigen-antibody reaction
13 tests."

14 And those are the tests you are talking about,
02:25 15 the manner in which you phrase that is you can
16 either do morphology testing and you could do the
17 specific antigen-antibody reaction tests, or the
18 specific antigen-antibody reaction tests. In
19 essence, if I read you correctly, Doctor, you are
02:25 20 saying that morphology testing in itself could
21 also clarify that?

22 A Could, depending on the expertise of the
23 serologist.

24 Q All right. Now if we could go to document 185365,
02:26 25 that was a report that was put to you earlier,



1 call the middle paragraph up there, and you
2 indicated that you knew the chief serologist for
3 the RCMP, Patricia Alain?

4 A Yes.

02:26 5 Q And you agreed with her comment that the
6 morphological differences of human spermatozoa and
7 canine spermatozoa are several and the experienced
8 examiner would not have any problem in
9 distinguishing between human and canine
02:26 10 spermatozoa, and I think you indicated earlier you
11 agreed with that. So if the person is
12 experienced, an experienced serologist could tell
13 that difference under morphology testing?

14 A That's what I'm made to believe, yes.

02:26 15 COMMISSIONER MacCALLUM: That last ID was
16 what?

17 MR. GIBSON: It was 185365, it's a one page
18 document, Mr. Commissioner.

19 COMMISSIONER MacCALLUM: Okay.

02:26 20 BY MR. GIBSON:

21 Q I think one of the concerns that you had, and you
22 wouldn't be the first forensic witness to comment
23 on the contamination that could have occurred at
24 the crime scene, and I take it that that was a
02:27 25 concern because of the blood staining and the



1 trampling in the area to get, I guess, proper,
2 pristine samples, if I may put it that way?

3 A Yes.

4 Q And would you agree with me, Doctor, that likely
02:27 5 it would have been better evidence if the
6 original, I guess the vaginal aspirate had been
7 saved as opposed to trying to go and analyse
8 samples later on that were found?

9 A Most certainly, yes.

02:27 10 Q And is that something that a forensic pathologist
11 would routinely save in this type of a case?

12 A Yes, sir.

13 Q And in your discussions with Dr. Emson, did you
14 ever have any opportunity to discuss that aspect
02:27 15 of this case with him, as to why that might not
16 have been saved?

17 A No, I did not. I think I implied that I was
18 surprised, but things can happen.

19 Q And I take it now, Doctor, with us trying to make
02:28 20 determinations with respect to serological
21 testing, A-secretor, non-secretor, morphology
22 testing and that, it's a lot easier now with the
23 advent of DNA to do more specific testing and
24 those other tests have kind of fallen by the way
02:28 25 side?



1 A They are, and of course now with DNA you can
2 indeed exonerate what you couldn't before.

3 MR. GIBSON: Thank you very much, Doctor.
4 Those are my questions.

02:28 5 BY MR. HOPKINS:

6 Q Dr. Markesteyn, my name is Marshall Hopkins, I'm
7 counsel for the former justice Calvin Tallis.

8 As I understand your evidence,
9 sir, the bottom line on the dog urine/human semen
02:29 10 issue today is that you think it's likely or more
11 likely that the material found, the yellowish
12 material found was human semen; is that fair?

13 A It's fair in that if I were to assume -- that's an
14 assumption. If I were to assume that the
02:29 15 specimens were not mixed up all together, then --
16 and if it is correct, if it's not adulterated, if
17 it is correct that the semen and the pubic hair
18 are all together, it's more likely, of course,
19 that it is human, yes.

02:29 20 Q And at the time of trial -- you reviewed some of
21 the trial transcripts I presume?

22 A Yes, sir.

23 Q At the time of trial is it your understanding that
24 the uncontroverted evidence at that time was that
02:29 25 at least one of the samples of this yellowish



1 material was human semen, that that was the
2 evidence at the time?

3 A Yes.

4 Q That it was human semen, and that this human semen
02:30 5 contained type A antigens?

6 A Yes, sir.

7 Q Now, in your report, if we could bring up Dr.
8 Markesteyn's report, doc. ID number 026321 at page
9 026328, and if we could go to the third paragraph
02:30 10 of the conclusion, and if you could bring out the
11 third paragraph of the conclusion. There you say:

12 "If, to everyone's
13 satisfaction, it was established that
14 the origin of the yellowish patch was
02:31 15 unadulterated, uncontaminated human
16 semen, then the presence of the
17 A-antigen in this specimen clearly, from
18 a serological point of view, could not
19 be Mr. Milgaard's."

02:31 20 Now the uncontroverted evidence at trial was that
21 the yellowish patch was human semen, so the
22 conclusion -- and you've underscored the phrase:

23 "... could not be Mr. Milgaard's.",

24 the conclusion that it could not come from Mr.

02:32 25 Milgaard would be properly drawn if -- this is a



1 complex question -- if, one, it was unadulterated
2 and uncontaminated, and two, Mr. Milgaard was a
3 non-secretor; is that fair?

4 A That's fair.

02:32 5 Q And you underscore the phrase:

6 " ... could not be Mr. Milgaard's."

7 to give emphasis to that point?

8 A Yes.

9 Q And so if the evidence at trial was that the
02:32 10 sample was uncontaminated, and Mr. Milgaard was a
11 non-secretor, --

12 A Right.

13 Q -- then that evidence, at trial, would have
14 excluded Mr. Milgaard as the donor of the sample;
02:33 15 is that fair?

16 A Exactly.

17 Q Okay. Now this conclusion on page 8 of your
18 report, I'm going to call it a conditional
19 conclusion, it has an if/then form, and correct me
02:33 20 if I'm wrong, but if the antecedents, the ifs of
21 the conclusion you describe were met, that
22 conclusion would be a very strong conclusion; is
23 that --

24 A Yes, sir, at that time.

02:33 25 Q Now those antecedents, as I think we've just seen,



1 are if the yellowish patch was unadulterated,
2 uncontaminated semen, and the second one is if
3 David Milgaard is a non-secretor, taken together,
4 excludes him?

02:34 5 A That's right.

6 Q And is that an absolute?

7 A Yes.

8 Q Now the uncontroverted evidence at trial was that
9 David Milgaard was a non-secretor?

02:34 10 A Yes, sir.

11 Q So the only other antecedent which would need to
12 be met in order to get to the absolute conclusion
13 that he is excluded as the donor of that sample is
14 the antecedent if the sample was unadulterated and
02:34 15 uncontaminated?

16 A Right.

17 Q Now earlier in your evidence today I heard you
18 draw a distinction between -- and, again, correct
19 me if this isn't fair -- between evidence which
02:34 20 should not be admitted and evidence which, and I
21 believe you said if entered at trial should have
22 been testified to, its strengths and weaknesses?

23 A Yes, sir.

24 Q So you distinguish between two types of evidence,
02:35 25 one which is inadmissible and one which is



1 evidence which, if it comes into trial, we have to
2 comment on?

3 A I didn't say it was inadmissible, I say if it were
4 to be admitted and weighed and had no weight, that
02:35 5 should be told.

6 Q Okay.

7 A I was --

8 Q You're talking about weighing, some evidence needs
9 to be weighed?

02:35 10 A All evidence, forensic evidence, needs to be
11 weighed.

12 Q Now it's an issue in this case whether this
13 yellowish patch was contaminated; is that fair?

14 A Yes.

02:35 15 Q Do we know that it was contaminated?

16 A No, but it could be, it has never been excluded.

17 Q It hasn't been excluded that it's contaminated?

18 A That's correct.

19 Q If it's not contaminated, then the evidence would
02:35 20 tend to exclude David Milgaard, that would be very
21 strong evidence?

22 A Yes. That's what Ferris' conclusion was.

23 Q So we need to look at the evidence of
24 contamination and weigh that evidence; is that
02:36 25 fair?



1 A Yes, sir.

2 Q And if there was some evidence of contamination,
3 could this still be evidence which tended to
4 exclude David Milgaard as the donor?

02:36 5 A No, not -- no, I -- to be definitely excluded it
6 had to be pure sperm with A antigen in it --

7 Q Yes.

8 A -- because he, at that time, was considered not to
9 be able to do that. That's the end of that. The
02:36 10 moment you contaminate it with another substance
11 that could be A, then we don't know.

12 Q That could be A?

13 A That's right.

14 Q Yes, I didn't say it was contaminated with
02:36 15 something that could be A.

16 A Well --

17 Q If it was contaminated with type O blood, for
18 example?

19 A I don't -- that would have made no difference.

02:37 20 Q But that would still be contamination, --

21 A Yes.

22 Q -- but contamination that wouldn't make a
23 difference?

24 A That is correct.

02:37 25 Q So if we had contamination by type O blood, and



1 that's the only source of contamination, then the
2 evidence would still very strongly militate in
3 favour of excluding David Milgaard?

4 A Yes, sir.

02:37 5 Q Similarly, if the only evidence of contamination,
6 as My Friend Mr. Gibson brought up, was perhaps
7 urine from the victim, that as well wouldn't be
8 contamination which would impact adversely on the
9 question whether it excludes Mr. Milgaard?

02:37 10 A No, sir.

11 Q So we actually have to get into considering the
12 particular evidence of contamination in order to
13 fairly consider the impact of contamination on the
14 question of whether or not it excludes, or doesn't
02:37 15 exclude, Mr. Milgaard?

16 A Yes, sir.

17 Q Now is it fair to say that the possible
18 contaminants of relevance in this case were blood,
19 --

02:38 20 A No, sir.

21 Q I'm sorry, I was going to give you a list.

22 A Okay, all right.

23 Q But possible contaminants of relevance; blood, dog
24 urine, perhaps human urine, perhaps a leafy
02:38 25 vegetable material, we've heard that mentioned as



1 a possible source of contamination, possibly
2 leather materials, and you have heard of --

3 A Yes, oh yes, I have.

4 Q -- contamination by leather, and I know at least
02:38 5 one paper that I reviewed suggested that things
6 like household dust could be a contaminant?

7 A Yes, sir.

8 Q I think you mentioned in your report soil as a
9 possible contaminant.

10 A Yes, sir.

11 Q So there is a range of possible contaminants. And
12 don't we need to look at each of those separately
13 and ask ourselves the question "how does that
14 particular contaminant impact or relate to the
02:39 15 question of whether or not this yellowish material
16 tends to exclude Mr. Milgaard?" We have to look
17 at each one of those possible contaminants; don't
18 we?

19 A Yes. The only contaminants that play a forensic
02:39 20 role with regard to inclusion or exclusion is that
21 contaminant which contains A antigen. All the
22 others are not relevant to that issue, to this
23 issue.

24 Q I think that's -- that's my understanding as well,
02:39 25 doctor, is that the only contaminants that would



1 tend to, let us say, undermine the conclusion that
2 Mr. Milgaard is excluded would be contaminants
3 which could contain type A antigens and,
4 therefore, explain the presence of type A antigens
02:40 5 in this semen sample?

6 A That's correct.

7 Q Is that fair?

8 A Yes, sir.

9 Q Now, in this case, those contaminants could have
02:40 10 been -- and correct me again if I'm wrong -- leafy
11 vegetable material?

12 A Yes, sir.

13 Q Was there any evidence of the presence of leafy
14 vegetable material?

02:40 15 A Not to my knowledge, but in order to find that you
16 would have to con -- to examine the shovel.

17 Q So, if there is no evidence of it, is it
18 appropriate to speculate that maybe there was
19 leafy vegetable material?

02:40 20 A Speculation is never appropriate in this setting.
21 What one would bring to the attention of the
22 triers of the fact is that it is possible that a
23 non -- never-used, or that a used shovel contains
24 such material and that the soil contained
02:41 25 vegetable material. Whether that was indeed the



1 case had to be weighed.

2 Q Was there any evidence that there was soil that
3 had contact with this sample?

4 A I believe that there was a shovel used --

02:41 5 Q Uh-huh?

6 A -- to dig it up.

7 Q Uh-huh?

8 A And not only about the sample --

9 Q Was it a soiled shovel? I'm just, I just want to
02:41 10 be clear?

11 A Well I did not get the impression, but it's
12 subject to correction, I didn't think it was a
13 shovel purchased that day at Canadian Tire and one
14 never used before. That, I may be mistaken on
02:41 15 that.

16 Q Right. But I'm just wondering, I mean do we want
17 to assume that soil is present, or is that
18 something which --

19 A I think --

02:41 20 Q -- there has to be evidence of?

21 A Well, it's reasonable to raise the possibility
22 thereof and then exclude it.

23 Q Okay. And that, the same thing, would go with
24 blood, as well, that had type A antigens?

02:42 25 A And dog urine. You can raise the possibility and



1 then exclude it, if you don't, --

2 Q And if you --

3 A -- you still have it.

4 Q Now if you don't exclude dog urine, if you are not
02:42 5 able to rule it out altogether, does that mean
6 that this evidence has no probative value now?

7 A I'm just saying that -- no -- probative value,
8 with respect sir, is a legal term.

9 Q No, let me move away from that term, let me go
02:42 10 back. We have a number of possible contaminants?

11 A Yes, sir.

12 Q Your evidence is that we need to exclude or rule
13 out possible contaminants?

14 A Yes.

02:42 15 Q Even if we don't have any direct evidence that
16 those contaminants existed at that time in the
17 sample?

18 A No, but it could be there.

19 Q Could be?

02:43 20 A Yes.

21 Q It's --

22 A And, therefore, exclude them.

23 Q Okay. We have to rule them out, and if we can't
24 rule them out, does that evidence then lose all
02:43 25 scientific value?



1 A No, but it has to be told to the jury, if that's
2 the case, the relative value thereof.

3 Q Okay. And then we get to relative value, we have
4 to ask ourselves what is the likelihood of a
02:43 5 particular contaminant then being present; don't
6 we?

7 A Yes, sir.

8 Q And so the likelihood is low, then the scientific
9 value of evidence, of evidence which tends to
02:43 10 exclude, is higher?

11 A That's correct, sir.

12 Q And the lower the likelihood of contamination is,
13 the higher the likelihood of this evidence
14 excluding is?

02:43 15 A Yes, sir.

16 Q And this is the kind of evaluation which needs to
17 be done by the jury?

18 A Indeed, yes.

19 Q Now I understand that you did not have an
02:44 20 opportunity to review Mr. Tallis' address to the
21 jury?

22 A I reviewed some of it, yes I have, certainly since
23 I appeared today I have, and I believe it was
24 shown to me by Mr. Williams.

02:44 25 Q If we could go to doc --



1 COMMISSIONER MacCALLUM: Prior to you doing
2 your report? You didn't see it before you did
3 your report?

4 A No, I don't think so.

5 BY MR. HOPKINS:

6 Q If we could go to doc. ID 212178, and at page
7 number 212218, and right at the bottom of the page
8 --

9 A This is the defence?

02:45 10 Q This is the address to the jury by Mr. Tallis, who
11 was defence counsel at the time of the trial.

12 A I only saw a little bit of that only a few hours
13 ago.

14 Q Yeah. Actually just today, then, would be the
02:45 15 first day that you had an opportunity to even look
16 at this?

17 A Yes, sir.

18 Q And you didn't review the entire document, but
19 just portions of it?

02:45 20 A That's right.

21 Q Did you happen to look at this page?

22 A Yes, I believe so, yes I did.

23 Q Now if we could look at the bottom of the page.

24 Now we're at something of a disadvantage here, and
02:45 25 I'll explain to you why.



1 It turns out that, at the time
2 of the appeal in this matter, the jury address
3 here was not transcribed for the purposes of the
4 appeal, and in fact it wasn't transcribed until I
02:45 5 believe 1991 or 1992, and it was transcribed from
6 the notes of the original court reporter who used
7 a shorthand system which was somewhat unique, and
8 so the transcription itself then was done by
9 someone who wasn't sure of every word. And where
02:46 10 we see these ellipses, that means that there are
11 words missing, as many as a few words missing, and
12 so we have to read this keeping that in mind, that
13 the ellipses are not halting conversation or
14 halting -- halting speech, what the ellipses
02:46 15 reflect is just the absence of words that the
16 transcriber was unable to discern.

17 A Yes, sir.

18 Q And we get to the bottom of this page, and we see:

19 "Now this may be, and I suggest is
02:46 20 something that you should consider
21 pretty carefully, and as you see, if in
22 fact the donor of that seminal fluid was
23 an "A" group secretor, and there was no
24 blood, as such, in the seminal fluid
02:47 25 from that person with that "A" grouping,



1 it cannot have been, the man could not
2 have been the ..."

3 And then --

4 A Right.

02:47 5 Q We've heard from Mr. Tallis that the word that
6 followed "the" would probably have been "the
7 accused" or perhaps "the defendant". Now this
8 looks very much like the if/then statement that
9 you have on page 8 --

02:47 10 A That's correct.

11 Q -- of your report?

12 A Yes, sir.

13 Q And so it would appear that Mr. Tallis was
14 certainly alive to the issue that you have
02:47 15 examined in your report?

16 A Yes, sir.

17 Q And that, according to what he is telling the
18 jury, if there was no blood in that semen, no
19 contaminant which would have created type A
02:48 20 antigens --

21 A Uh-huh.

22 Q -- then it could not have come from the accused?

23 A Yes, sir.

24 Q Now he goes on, and I don't know if you have had
02:48 25 an opportunity to review any more of this address,



1 but he goes on to discuss the evidence which
2 suggested contamination of blood, contamination by
3 blood, and argues that the most likely blood, if
4 it was contaminated by blood, would have been the
02:48 5 type O blood of the victim. He, it seems, is
6 mentioning, but again because we have this problem
7 with the transcription it appears to be not
8 complete, mentions perhaps other sources. And we
9 did see in the evidence of Mr. Paynter that he had
02:48 10 considered other sources of contamination, i.e.
11 the leafy material, leather, that kind of thing,
12 and it appears as though he was arguing that the
13 jury had to consider the evidence of
14 contamination, weigh it, and draw an inference,
02:49 15 and in his -- and in this case he suggested the
16 inference would be that the evidence tended to
17 exclude the accused.

18 Now when I said "tended to
19 exclude the accused", earlier you seemed to have a
02:49 20 problem with that, and can we have a middle ground
21 between 'doesn't tell us anything', 'definitely
22 excludes', and 'tends to exclude', is evidence
23 which suggests that perhaps we have an exclusion
24 here without knowing for sure?

02:49 25 A Well I think that is proper, depending on the



1 circumstances, that you can have a variation.

2 Right?

3 And I agree with you, and if I
4 understand it correctly, with the inference drawn
02:50 5 and suggested to the jury. If this is a sample
6 that is, does not contain blood, it cannot be
7 David Milgaard. That's a very firm conclusion at
8 that time, and reasonable to conclude at that
9 time, ignoring the fact whether he was or was not
02:50 10 a secretor.

11 But let's assume it is
12 established he is not a secretor, and if you've
13 got semen with A in it, he ain't the person who
14 produced that semen. That's not possible, period,
02:50 15 so I have no problem with that.

16 Q Thank you. Those are my questions.

17 A Thank you.

18 COMMISSIONER MacCALLUM: Dr. Markesteyn, I
19 just have a question for you before I forget.

02:50 20 I think at various times, and
21 from other witnesses, we've heard of the presence
22 of contaminants such as we've mentioned, leafy
23 vegetables and leather being two of them,
24 yielding a false positive, and I understood that
02:51 25 to mean that there wasn't really A antigens in



1 leather or leafy vegetables, but rather something
2 that reacted in the test like A antigens. What
3 is the case? A antigens is a peculiar -- it's a
4 blood component, is it not?

02:51 5 A Yes.

6 COMMISSIONER MacCALLUM: Is it a protein in
7 the blood?

8 A Yeah, and it is a carbohydrate.

9 COMMISSIONER MacCALLUM: A carbohydrate?

02:51 10 A Yeah, it's a sugar.

11 COMMISSIONER MacCALLUM: It's a sugar?

12 A Yes. That's why the amylase.

13 COMMISSIONER MacCALLUM: Right.

14 A Right.

02:51 15 COMMISSIONER MacCALLUM: So it wouldn't
16 exist in leather in that form, or it wouldn't
17 exist in leafy vegetables in the same form?

18 A No. That's called, in science, the specificity of
19 the test.

20 COMMISSIONER MacCALLUM: Is it?

21 A Cross-contamination. It need not be the same
22 substance, but it reacts to the reagent you used
23 as if it were the same substance.

24 COMMISSIONER MacCALLUM: Yes. So we
02:51 25 shouldn't be talking about leather, or these



1 various contaminants, containing A antigens?

2 A Not containing it, no.

3 COMMISSIONER MacCALLUM: They contain
4 something that shows up as A antigen?

02:52 5 A Right, depending on the reagent you use.

6 COMMISSIONER MacCALLUM: Okay, thanks.

7 A Yes.

8 COMMISSIONER MacCALLUM: If anything arises
9 from that, which I passionately hope it doesn't,
02:52 10 counsel is free to put more questions to the
11 witness. No? Any further cross-examination?

12 BY MS. KNOX:

13 Q Doctor, for the record my name is Catherine Knox,
14 and I'm counsel for the prosecutor in the original
02:52 15 trial, Mr. T.D.R. Caldwell, whose name I'm sure
16 you are familiar with as a result of these
17 proceedings?

18 A Yes, ma'am.

19 Q You, in your report that you sent to Mr. Asper,
02:52 20 documented a series of information that you had
21 been provided with, including lab reports,
22 excerpts from transcript, as I recall you recorded
23 them as we looked at it today?

24 A Yes, ma'am.

02:53 25 Q Sir, do you still have the file of materials that



1 you were provided with?

2 A I looked for it the day I arrived, and I could
3 have sworn I had it, it's a very thick one, and I
4 couldn't find it.

02:53 5 Q Oh yes.

6 A I was looking for it because I had in there,
7 still, copies of the photographs and a whole lot
8 of stuff, and I -- I may still have it, but I was
9 not able to find it before I arrived here.

02:53 10 Q Doctor, there was a, you made reference to the
11 fact that you had the transcript of the evidence
12 of Victor Molchanko, who you knew, at the trial?

13 A Probably, yes.

14 Q Okay. Doctor -- and perhaps Commissioner, if we
02:53 15 could, it's five to 3:00, I would like -- there is
16 a number of pages I would like the witness to look
17 at, I'd like to give it to him over the break,
18 have him go through it, and then ask him a
19 question when he comes back. It will save us all
02:53 20 time if we do it that way, with the permission of
21 the Commissioner, please?

22 COMMISSIONER MacCALLUM: Sure. I just want
23 to make another note on something before we go.

24 MS. KNOX: Sir, for the record, the pages
02:54 25 I'm about to give Dr. Markesteyn are from the



1 transcript page numbers 1074 to 1114, so taking
2 the numbers of the transcript itself, it would be
3 that portion of the trial transcript.

4 COMMISSIONER MacCALLUM: Okay.

02:55 5 MS. KNOX: Thank you.

6 *(Adjourned at 2:55 p.m.)*

7 *(Reconvened at 3:16 p.m.)*

8 BY MS. KNOX:

9 Q Dr. Markesteyn, over the break I asked you to look
03:16 10 at the full portion of the transcript of trial
11 evidence from January, 1970 that was the evidence
12 of Victor Molchanko; correct?

13 A Yes, ma'am.

14 Q And, Mr. Commissioner, the document ID for the
03:17 15 commencement of Victor Molchanko's evidence is
16 176606 which corresponds to page 1074 of the
17 original transcript.

18 COMMISSIONER MacCALLUM: Okay.

19 By MS. KNOX:

03:17 20 Q And the portion I gave concluded through to page
21 1114, and, Doctor, I drew your attention to a
22 portion of that piece of transcript that started
23 at page 176626 in the Commission document, but
24 page 1094 of the actual trial transcript. Do you
03:17 25 recall that?



1 A Yes, ma'am.

2 Q And that page 1094 came after a page that had a
3 break where it was noted that the members of the
4 jury were going to be excused until two o'clock
03:17 5 you'll recall?

6 A Yes, ma'am.

7 Q And the jury was retired until two o'clock?

8 A Yes, ma'am.

9 Q And then it continued at page 1094 which we now
03:17 10 have up on the screen which was a discussion or
11 *voir dire* in the absence of the jury where the
12 subject of discussion was the finding of seven
13 pubic hairs that in Mr. Molchanko's opinion were
14 consistent with human pubic hair. Do you recall?

03:18 15 A Yes, ma'am.

16 Q And that discussion in the *voir dire* continued
17 through for a number of pages to page 1104. If we
18 can go to that page, please. Again, as you will
19 see on the screen, and you saw in the documents I
03:18 20 gave you, a natural break in the transcription
21 where the jury is recalled, and Corporal Molchanko
22 was called back into the room you will agree?

23 A Yes, ma'am.

24 Q And, sir, my request of you was to tell me
03:18 25 whether, to the best of your recollection, you had



1 been sent those pages of transcript by Mr. Asper
2 or his office when they sent you the materials to
3 review in this case, and what is your response to
4 that question, sir?

03:19 5 A To the best of my recollection, I never saw this
6 before and I wish to offer also the opinion that
7 if I had seen it, I most certainly would have
8 remembered it, because this is not an
9 insignificant decision, and I would have
03:19 10 remembered it, so I think it's fair to say I never
11 saw it.

12 Q Just as you never saw the lab report 025562 that
13 Mr. Gibson showed you about the pubic hair being
14 found in that sample?

03:19 15 A That's correct.

16 Q And, sir, would it be fair to say that had you
17 seen it, your theory as to the possibility of dog
18 urine would have been seriously sidelined or might
19 never have been advanced?

03:19 20 A Well, it would have been weakened, yes.

21 Q Okay. Sir, you indicated this morning in response
22 to a question to Mr. Hardy that as a person you
23 were aware that the opinion that you were
24 offering, if used perhaps inappropriately, could
03:19 25 affect the reputations of people involved in this



1 case, but that that was a feeling you had as a
2 person and not as a pathologist. Did I understand
3 you correctly when you said that?

4 A And as the chief medical examiner.

03:20 5 Q And, sir, when you became aware that your opinion
6 or your speculation was being misrepresented in
7 the media, you testified that as a matter of your
8 training and practice you would not go to the
9 media and try to correct their stories. Did I
03:20 10 understand that correctly?

11 A Yes, ma'am.

12 Q Sir, did you go to Mr. Asper or Mr. Wolch and try
13 to get them to correct what was being
14 misrepresented in the media, including some of
03:20 15 which was coming from Mr. Asper and Mrs. Milgaard?

16 A No, I did not.

17 Q Okay. Was there a reason why you didn't go to
18 them?

19 A No. I wasn't perhaps even aware of it.

03:20 20 Q Okay. Sir, had you been aware of it, would it
21 have been a prudent thing for you to do, to go to
22 them and say "listen, you guys are misusing what I
23 gave to you"?

24 A I probably would have discussed that with them.
03:20 25 Not perhaps in those terms, but I would have said



1 that I never said that.

2 **Q** Sir, seeing the clips that you saw today, the TV
3 clips, and seeing the newspaper stories, can you
4 appreciate how significantly people like Mr.
03:21 5 Caldwell were subjected to, I'm going to use the
6 word ridicule, because they were perceived as
7 having been quite ridiculously stupid not to have
8 known that that particular exhibit was in fact dog
9 urine as it was represented or, as you speculated,
03:21 10 could have been dog urine?

11 **A** Oh, I appreciate that, yes.

12 **Q** Sir, you said in your report, if I can go to your
13 report now for my final question, or my final area
14 of questions, and the document number the
03:21 15 Commission is using is 026321, you said at page 7
16 of your report that the assumption that, of Mr.
17 Milgaard's secretor status could be subject to
18 challenge as the testing of the day was very
19 inadequate or inappropriate. Were you contacted
03:21 20 by Mr. Asper or anybody on Mr. Milgaard's behalf
21 and asked to conduct a test to determine his
22 proper secretor status?

23 **A** No, ma'am, I was not asked to do that.

24 MS. KNOX: I have no further questions.

03:22 25 **BY MR. LORAN:**



1 Q Good afternoon, Dr. Markesteyn. My name is Pat
2 Loran and I represent the Saskatoon Police
3 Service. I just wanted to follow up on something
4 that Mr. Gibson took up with you before the break.

03:22 5 If I understood your evidence
6 previously, you based your June 4th, 1990
7 conclusions on the information which was supplied
8 to you; is that correct?

9 A Yes, sir.

03:22 10 Q And to the extent you were given limited
11 information, that may have affected the
12 conclusions you drew; would that be fair to say?

13 A Of course.

14 Q Can we agree you did not receive a transcript of
03:22 15 the preliminary inquiry?

16 A Yes, sir.

17 Q And I'm going to ask to have the preliminary
18 inquiry called up. I've got page 008069. I don't
19 have the doc. ID number, I'm sorry.

03:23 20 COMMISSIONER MacCALLUM: What is it; do you
21 know?

22 MR. LORAN: This is the evidence --

23 COMMISSIONER MacCALLUM: No, no, what is
24 the doc. ID?

03:23 25 MS. ELLERMAN: 008059.



1 COMMISSIONER MacCALLUM: 59.

2 BY MR. LORAN:

3 Q And this is the evidence of Mr. Penkala at the
4 prelim and at line 72 it begins:

03:23 5 "Q And did you come across anything as you
6 searched?

7 A Yes, in my search, I came across two
8 frozen lumps of yellowish substance
9 with hair that was frozen into these
03:24 10 lumps and I retained these and
11 retained them in a frozen state."

12 I know you had expressed concern somewhat earlier
13 about the hair having contaminated the samples.
14 The impression I got was that you had been
03:24 15 concerned that the human pubic hair may have come
16 from the surrounding snow. Did I understand your
17 answers correctly in that regard?

18 A That was one possibility. There was a vicious
19 removal of clothing and to remove pubic hair that
03:24 20 got torn at the same time would not be unheard of.
21 In fact, almost expected.

22 Q Okay. And the -- perhaps I'm going to draw your
23 attention to the trial transcript of Mr., the
24 evidence of Mr. Penkala, at 087504.

03:25 25 COMMISSIONER MacCALLUM: Do you know the



1 doc. ID, Mr. Loran?

2 MR. LORAN: I apologize, Mr. Commissioner,
3 I do not.

4 MS. BOSWELL: 087460.

03:25 5 COMMISSIONER MacCALLUM: Thank you.

6 BY MR. LORAN:

7 Q The evidence given by Mr. Penkala was that at the
8 time he arrived at the scene where the body was,
9 the question:

03:26 10 "Q And as I understand it when you arrived
11 there the surface flesh of the victim
12 was already frozen?

13 A Yes."

14 It was minus 40 I think we've heard on that day,
03:26 15 so it would have been very cold out. Would you
16 agree that if the sample was frozen, that it's
17 unlikely, after it had frozen, that it would be
18 contaminated by human pubic hair which would
19 somehow later become attached to the sample?

03:26 20 A Yes, sir, unlikely.

21 Q Thank you. To the extent that the evidence
22 suggests the pubic hair was there from the outset
23 and frozen into the sample, would you agree that
24 this -- this would tend to militate fairly
03:27 25 strongly against the prospect of the sample being



1 dog urine?

2 A Pure dog -- or contaminated with dog urine, that
3 was a possibility, right, but if it weren't, is
4 that the question? I'm not sure. The fact that
03:27 5 it was found and that it was yellow made me think
6 it was dog urine, or could be.

7 Q Okay. The fact that the pubic hairs were frozen
8 into the sample --

9 A Yes, sir.

03:27 10 Q -- from the outset would tend to suggest quite
11 definitely that the semen in the sample was human,
12 and you've already indicated that from a
13 morphological examination that revealed this
14 appeared to be human sperm, you would accept that
03:28 15 this was very likely human sperm in the sample?

16 A It's more likely than I thought at the time, yes,
17 sir.

18 Q And so at that point we turn to the prospect of
19 the possibility that it may have been contaminated
03:28 20 by dog urine, that's really all that's left; would
21 you not agree?

22 A Well, all that's left, sure, but yes, that is a
23 more likely conclusion to draw, yes.

24 Q And it's speculative to suggest -- that there's
03:28 25 dog urine in the sample is speculative because



1 what we've got is there's a yellowish tinge to it
2 and that's really the basis upon which you
3 speculate there might be dog urine; would you not
4 agree?

03:28 5 A It's remains speculative until proven or until
6 disproven. It was not disproven and therefore it
7 remains speculative, you are correct.

8 MR. LORAN: Thank you very much.

9 **BY MR. WOLCH:**

03:29 10 Q Doctor, Hersh Wolch for David Milgaard. Good to
11 see you again.

12 A Good to see you, Hersh.

13 Q I only have one dog urine question. Am I correct
14 that from David Milgaard's point of view, he would
03:29 15 not want it to be dog urine?

16 A I would assume that, yeah.

17 Q Okay, that's the one question on dog urine. Now I
18 want to get to a different topic. You mentioned
19 that you've had other involvement in Section 690
03:29 20 applications?

21 A Yes, sir.

22 Q Can you just briefly give us an outline of what
23 type of work you've done, other 690s?

24 A I did two homicides, one was the Johnson case in
03:29 25 Nova Scotia, of the lady who allegedly fell down



1 the stairs rather than murdered, and another one
2 was *Harper and Silliboy*, two native persons who
3 claimed they were innocently convicted.

4 Q So you had involvement in 690s and you've also
03:30 5 conducted investigations of your own and I wonder
6 if we can draw on your expertise. The Commission
7 is going to be asked to make recommendations to
8 hopefully guide us in not having the need for
9 690s, or whatever they are called now. Do you
03:30 10 have any recommendations, based on all your
11 expertise, that might be of use to the Commission?

12 A I do, indeed, and I'm very pleased that you asked
13 me that question, because I'm, as you know, aware
14 why some of these inquiries are held, to make
03:30 15 recommendations to prevent similar occurrences
16 from happening.

17 Some 30 years ago I was asked by
18 a Mr. Hogan in Saskatchewan to assist the
19 Department of Justice to establish in Saskatchewan
03:31 20 a medical examiner system because Saskatchewan is
21 one of the few provinces that does not have a
22 forensic pathologist. Now, forensic pathologists
23 are hard to come by, it requires extra years, an
24 extra year of training, it requires an exam and
03:31 25 all that. However, I would strongly recommend



1 that the Department of Justice were to consider,
2 and I made a similar recommendation now in
3 Newfoundland as well, for an academically-based
4 forensic science service headed by a forensic
03:31 5 pathologist, a trained, certified forensic
6 pathologist.

7 That person should have
8 independence from the Department of Justice, what
9 I had in Manitoba. I was appointed at arm's
03:32 10 length, I was a university professor, I was not an
11 employee of the Department of Justice, which gives
12 the forensic pathologist not only the appearance,
13 but also the facts of being able to decide,
14 regardless whether the prosecution or the defence
03:32 15 or whoever, or the police, like it or not. A
16 degree of independence is very important in this
17 field.

18 The absence thereof, if such
19 recommendations were not to be followed, as you
03:32 20 may know I am now appearing more for the defence
21 than in the past, and Saskatchewan to me now is an
22 open field, it is actually quite sad, and I have
23 expressed those concerns to other lawyers who are
24 now retired into the Department of Justice of
03:33 25 Saskatchewan and told them, get yourself a



1 forensic pathologist, all right, get it,
2 especially -- not only in the investigation of
3 adult death, but also children's death.

4 Whether that means a medical
03:33 5 examiner system or a coroner system is not
6 relevant in the sense that the medical examiner
7 has certain functions, the fact is that this
8 person should have some independence of decision
9 and make the decision on the basis of science and
03:33 10 not on the basis of pressures either implied or
11 expressed by persons who have interest in the
12 outcome of the findings.

13 Q Saskatchewan doesn't have this?

14 A No.

03:33 15 Q You say Manitoba does?

16 A Yes, and Alberta has, and Newfoundland has to a
17 point, and Nova Scotia has.

18 Q Ontario?

19 A A coroner system, a coroner system meaning they
03:33 20 have forensic pathologists, and that's another
21 issue that I address, I'm not going into whether
22 it should be a medical examiner system or coroner
23 system. The chief medical examiner does not hold
24 inquests, the chief coroner does, and it's not a
03:34 25 function that I would like to have full time more



1 or less, but all forensic pathologists, all chief
2 medical examiners are forensic pathologists, but
3 at least have a forensic pathologist, a person
4 trained in this field, which is very difficult,
03:34 5 and this is an example of a very difficult case,
6 rape/murders are very difficult, and to have in
7 this province the expertise to do that and the
8 university, university based, why is that? You've
9 heard examples of it. If I need an opinion, I
03:34 10 didn't have to pay anybody, I just go to my friend
11 and I said come on, come on down, come and look at
12 this, which I did in Manitoba as you may be aware.
13 If it was a child abuse case, a child death, I ask
14 the child abuse people, come and have a look.
03:35 15 This is the way to go. And, with respect, if I am
16 allowed to do so, I would make such a
17 recommendation.

18 Q What you are saying is the expert should not be
19 beholden to police, defence or whoever, just the
03:35 20 science?

21 A That's right, and I have expressed that in
22 somewhat funny form in my recommendations which I
23 can speak of perhaps and say that a forensic
24 pathologist is not a police groupie and we should
03:35 25 be independent from the prosecution or defence or



1 whoever else has an interest in the case and not
2 lean towards one way or the other.

3 COMMISSIONER MacCALLUM: Can I clarify, Mr.
4 Wolch --

03:35 5 MR. WOLCH: Please.

6 COMMISSIONER MacCALLUM: -- whether the
7 witness is speaking in general terms about the
8 investigation of sudden death under a medical
9 examiner system or whether he's addressing the
03:35 10 specific issue that we face.

11 MR. WOLCH: I will, Mr. Commission.

12 COMMISSIONER MACCALLUM: Or a substitute
13 for Section 690.

14 MR. WOLCH: Yes, and also I would invite
03:35 15 yourself to ask if you --

16 COMMISSIONER MacCALLUM: You go ahead
17 first.

18 MR. WOLCH: I think you heard the question.

19 A With regards to the investigation of sudden death,
03:36 20 the more -- the better scientifically based an
21 investigation is of any sudden and unexplained
22 death, the less likely we're going to have 696
23 now.

24 COMMISSIONER MacCALLUM: Oh, I see. So you
03:36 25 do mean really that the whole coroner system in



1 Saskatchewan should be overhauled in some way as
2 a move towards independence along the lines of a
3 medical examiner system, but you are not really
4 addressing the establishment of a separate
03:36 5 Commission, for example, to do Section 690
6 applications?

7 A Not at all, no.

8 COMMISSIONER MacCALLUM: Not at all, okay.

9 MR. WOLCH: Does that clarify?

10 COMMISSIONER MacCALLUM: Thank you.

11 BY MR. WOLCH:

12 Q And, Doctor, I appreciate the importance of that
13 recommendation. Are there any other
14 recommendations or should we just --

03:36 15 A Oh, think --

16 Q That's the one?

17 A That's where the meat is, that's where it's at.

18 MR. WOLCH: Thank you. Those are my
19 questions, sir.

03:37 20 COMMISSIONER MacCALLUM: In other words,
21 Doctor, the hope would be that the frequency of
22 wrongful convictions arising out of poor forensic
23 science, the poor application of forensic science
24 would diminish?

03:37 25 A Exactly.



1 COMMISSIONER MacCALLUM: Yes, okay.

2 MR. HARDY: I have no questions on
3 re-examination and perhaps that last matter that
4 was referred to, there will be some further
03:37 5 follow-up on that. I know that there were many
6 recommendations that came out of the Stonechild
7 Inquiry and in terms of the implementation of
8 those recommendations, I don't have the facts at
9 this point in time, but it's something that we
03:37 10 will pursue further.

11 COMMISSIONER MacCALLUM: Thanks, Mr. Hardy.
12 Doctor, thank you very much for coming and for
13 testifying. You are excused.

14 A Thank you.

03:37 15 MR. HARDY: Mr. Commissioner, we are ready
16 to proceed or continue with the video
17 presentation that we began yesterday. I'm in
18 your hands if you would like us to begin now or
19 if you would prefer a short break at this point?

03:38 20 COMMISSIONER MacCALLUM: Oh, you can start
21 right now unless the staff need some time to set
22 it up.

23 MR. HARDY: Okay, it looks like we're ready
24 to proceed.

03:38 25 COMMISSIONER MacCALLUM: Okay.



1 *(Clip VT3 played)*

2 JOYCE MILGAARD: It isn't all of a sudden.
3 I've been fighting for my son for all of that 21
4 years. The first few years we took the normal
03:39 5 channels, you know, of appeals and things like
6 that, but when none of them worked -- I don't
7 know if you are aware, that in 1980 I came to
8 Saskatoon and announced a \$10,000 reward for
9 information leading to the real killer, and we
03:39 10 did get a lot of information at that time which
11 we followed up. We still need -- well, I really
12 believe that what we have with the minister right
13 now is more than enough to open the case.
14 However, they've had it since December of 1988
03:40 15 and I don't know if they are sitting on their
16 hands or what they are doing, but we aren't
17 knowing anything, and I feel that it's long
18 enough.

19 That's why I'm back in
03:40 20 Saskatoon, I'm asking the Saskatoon people for
21 help now. Anybody that knows anything, don't
22 contact the Saskatoon police, come and see me,
23 call my lawyer David Asper in Winnipeg, collect,
24 call him collect, he's waiting there for anybody
03:40 25 that knows anything, even the smallest pieces.



1 It may be that we're going to have to find the
2 real killer in order to proof David's innocence.
3 That seems to be the only thing the Justice
4 Department is going to accept.

03:40 5 INTERVIEWER: (Inaudible).

6 JOYCE MILGAARD: We have a forensic
7 scientist, Dr. Ferris, world renowned, who says
8 David Milgaard could not have committed the
9 offence, period, just like that, and in fact the
03:41 10 evidence shows that someone else did do it. We
11 have a witness -- like, at the trial there were
12 two major witnesses that came forward and claimed
13 that David had reenacted the crime. Now, because
14 our lawyer at that time is now a judge, we have
03:41 15 not even been able to get -- we can't talk to him
16 about it, we have not even been able to get the,
17 you know, his file, we can't find out what
18 information he had access to. There was a
19 statement given at that time when those two boys'
03:41 20 statements were taken of another girl in the room
21 who said it didn't happen. We have found yet
22 another girl that said that wasn't the truth,
23 that they didn't see a reenactment, that they
24 are, you know, embroidering the issue, and they
03:41 25 were in on charges, which they walked on, so



1 there was obviously a deal struck.

2 All of these things, they are
3 so -- I could spend hours on the inconsistencies
4 that are there and I'm just absolutely utterly
03:42 5 convinced, I'm not talking as a mother, I'm
6 talking intellectually after having factually
7 looked at the evidence, my son is innocent, and
8 give me an hour of your time and have you sit
9 down with the trial transcripts and let me walk
03:42 10 you through it and I'll prove it to you too.

11 INTERVIEWER: How's David?

12 MRS. JOYCE MILGAARD: He has his bad days,
13 it's been a -- but he's strong, he's doing well.
14 He's a compassionate and caring man, he's helping
03:42 15 others in his job, and believe it or not, what
16 he's going to do when he gets out is help
17 prisoners and, you know, he wants to go back and
18 help others that are having hard times, because
19 he believes that he's not alone, he believes that
03:42 20 there are lots of other people in prison that are
21 really innocent of the charges.

22 I don't think we've got a good
23 system and I guess that's why I'm here too, is
24 because I think our system has got to change.
03:43 25 What's the good of having a remedy that says you



1 can go to the Justice Department on a 617 if they
2 don't give you any money to go.

3 Our family money has just gone,
4 you know, it's been so expensive. Legal Aid
03:43 5 Saskatchewan, they won't give any money,
6 Manitoba's won't give any money towards helping
7 with this, we've been on our own, and I just
8 really feel that we just have to take these steps
9 in order to get David out. I can't just sit back
03:43 10 and let it -- it won't go away. You know what I
11 mean?

12 INTERVIEWER: What's the reasoning for
13 letting (inaudible).

14 JOYCE MILGAARD: Well, they claim,
03:43 15 Saskatchewan claims that he's in Manitoba,
16 Manitoba claims that the offence took place in
17 Saskatchewan, like, you know, so in the meantime
18 I believe Manitoba Legal Aid has said they will
19 go to Saskatchewan Legal Aid and make
03:44 20 presentations or something, but whether that
21 happens I don't know. In the meantime, we're in
22 the middle and my money has run out.

23 David Asper, the lawyer, has
24 been working on his own money for a long period
03:44 25 of time now because he believes in David and he



1 believes in the evidence we've presented.

2 INTERVIEWER: The Donald Marshall case --

3 MRS. JOYCE MILGAARD: Uh-huh.

4 INTERVIEWER: (Inaudible).

03:44 5 MRS. JOYCE MILGAARD: Oh, definitely. It's
6 so similar in so many ways because at the first
7 in the Donald Marshall case no one knew anything,
8 you know, they all said that this was the case.
9 It's the same in this one, none of the witnesses
03:44 10 that were first interviewed knew any of these
11 things. It wasn't until they had been through
12 some pretty bad situations with the police and
13 involved with the police that suddenly their
14 stories started to change and then suddenly they
03:44 15 saw blood on David's clothes, somebody else saw
16 another thing, you know, all of it was just such
17 manufactured evidence.

18 The credible witnesses at the
19 case were not believed. Like, people that had
03:45 20 nothing to hide, the Danchuks, they saw David,
21 they saw no blood on his clothes. People like
22 the man that saw him at seven o'clock in the
23 morning, a normal young man, granted he walked
24 into the motel without his boots on, but, you
03:45 25 know, indicative that he had been in the car all



1 the time, to get a map, and he wasn't believed.
2 He's really giving him an alibi for the time that
3 Gail Miller was leaving her house. None of it
4 makes sense.

03:45 5 INTERVIEWER: So the (inaudible) that
6 Donald Marshall (inaudible)

7 JOYCE MILGAARD: I hope that it's going to
8 make people aware that, okay, it happened there,
9 it could be happening here, and in fact has
03:45 10 happened here. If the Saskatoon police have
11 nothing to hide, why did, in 1980, when I was out
12 visiting witnesses in Regina, not here in
13 Saskatoon, in Regina, did they take the time and
14 trouble to drive all the way down there and say
03:46 15 to them don't talk to Mrs. Milgaard. Why? 10
16 years after the event they should have opened up
17 the file and said "here you are, Mrs. Milgaard,
18 we know he did it, go to it." They are hiding
19 something. Someone is hiding something.

03:46 20 INTERVIEWER: Where do you go from here?

21 JOYCE MILGAARD: I'm hoping --

22 **(Clip VT3 paused)**

23 COMMISSIONER MacCALLUM: Sorry about this,
24 but we've heard all this before. Was it on a
03:46 25 different tape? This is VT3 and we were



1 listening to VT23 when we broke yesterday?

2 MR. HARDY: Am I correct that the
3 document -- the girls might be able to correct
4 me. I think we had skipped a couple because they
03:46 5 weren't ready to be presented.

6 COMMISSIONER MacCALLUM: Oh.

7 MR. HARDY: In terms of the --

8 COMMISSIONER MacCALLUM: So we're going
9 back?

10 MR. HARDY: Yeah.

11 COMMISSIONER MacCALLUM: So we must have
12 been listening to Mrs. Milgaard say the same
13 thing to another interviewer?

14 MR. HARDY: I'm assuming that.

03:47 15 COMMISSIONER MacCALLUM: Oh, is that right.
16 So can you give me a date? Would you just
17 announce the date of these clips because I don't
18 have that guide that was passed around.

19 MR. HARDY: Okay.

03:47 20 COMMISSIONER MacCALLUM: VT3 took place
21 when?

22 MR. HARDY: VT3, I have unknown but prior
23 to May, 1990.

24 COMMISSIONER MacCALLUM: Okay. That's
03:47 25 fine, thank you, please continue. Oh, you've got



1 a copy for me? Okay.

2 (Clip VT3 restarted)

3 MRS. JOYCE MILGAARD: I will be here when
4 I'm 90. I'm hoping not. I am optimistic that
03:48 5 with the new -- Kim Campbell as the new Minister,
6 I believe that when she sees all of the things
7 that are there. Unfortunately, they can't go
8 into all the things that I can tell you, the
9 inconsistency, because that's not new evidence.

03:48 10 Like I feel that it was strange
11 that there were two knives found at the scene of
12 the crime but one of them got lost. They had one
13 person there, you know, what happen to that other
14 knife?

03:48 15 I'm concerned that a sample
16 from inside the girl was discarded. They have
17 David's seminal fluid, why couldn't they have had
18 a direct comparison? If there was a direct
19 comparison made that would link him why wasn't it
03:49 20 at the trial? There -- it's pretty fishy.

21 INTERVIEWER: So where do you go from here?

22 MRS. JOYCE MILGAARD: I just keep plodding
23 along and hoping that anyone who knows anything
24 will help us fit this puzzle together, and if it
03:49 25 takes being out here, if I have to come to



1 Saskatoon and live here and go door to door to
2 find out what I need to find out I'm going to
3 find my son's -- the real killer that did this
4 and get my son free. Okay?

03:49 5 INTERVIEWER: Thank you.

6 **(Clip VT3 ends)**

7 **(Clip VT11A played)**

8 INTERVIEWER: I guess the Ferris report
9 just reinforced those?

03:50 10 MRS. JOYCE MILGAARD: Oh, when I got that
11 report, when Dr. Ferris said to me he couldn't
12 help me with the genetic testing, which is
13 originally the reason I went there, he said
14 "Mrs. Milgaard, I can't understand why you need
03:50 15 this genetic fingerprinting", and he said, "you
16 have more than enough evidence here to prove that
17 your son is innocent". And I said, "we do? Well
18 will you talk to my lawyer about that, will you
19 put it in writing", and he said, "of course I
03:50 20 will". And, I mean, from that moment on it
21 seemed that things were happening, and an
22 application then went into progress with David.

23 INTERVIEWER: So what do you make of this
24 what I would call foot-dragging on the part of
03:50 25 the Department of Justice? I mean it's been



1 what, about 16 months, David, Joyce, since the
2 formal application was made to Justice to re-open
3 the case?

4 MRS. JOYCE MILGAARD: It went in in
03:50 5 December of 1988 and, you know, --

6 INTERVIEWER: And yet the report, --

7 MRS. JOYCE MILGAARD: Was --

8 INTERVIEWER: -- or the investigation for
9 the department, nothing has reached the
03:51 10 Minister's desk?

11 MRS. JOYCE MILGAARD: Well this was the
12 thing. We tried to be very, very patient, and
13 David Asper kept telling us it's there, Joyce,
14 you know they are going to be doing something,
03:51 15 they are investigating, but I couldn't see
16 anything. And gradually I started to think,
17 well, nothing is happening, absolutely nothing
18 was happening, we're going to have to get more
19 evidence. And yet it doesn't seem right that we
03:51 20 should have to prove that David is innocent by
21 finding the real killer, but that seemed to have
22 been almost the case.

23 And then, of course, we got
24 this anonymous phone call in David's office when
03:51 25 he was on holidays saying that -- gives us the



1 name of someone that they said was the real
2 killer, and I recognized that name, I knew I'd
3 seen it on a police report and through our
4 earlier investigation.

03:51 5 INTERVIEWER: When was that, by the way,
6 Joyce?

7 MRS. JOYCE MILGAARD: That was in February
8 of this year. So of course I went hot-footing
9 out to Saskatchewan, I borrowed a car and I got
03:52 10 out there, and you would have had to be with me,
11 talking to the people that I talked to, to really
12 know and believe that the information I got was
13 so sure. Like I'm never going to say that this
14 man is the real killer, after what happened to my
03:52 15 David you just wouldn't get me saying that, you
16 know. I think that everyone, that has to be
17 proved in a Court of law, but certainly he has
18 more --

19 MR. DAVID ASPER: It answers a lot of
03:52 20 questions.

21 INTERVIEWER: It does, eh?

22 MR. DAVID ASPER: It answers a lot of
23 questions, because it's a very unusual crime
24 scene, and it's very difficult to explain a lot
03:52 25 of the things that happened, bits and pieces of



1 evidence that were found strewn about the
2 neighbourhood, in fact.

3 MRS. JOYCE MILGAARD: And they, the Crown,
4 kept saying, you know, the reason that David
03:53 5 Milgaard did this was because the evidence led
6 back to the Cadrain house. This suspect lived in
7 the Cadrain house. Now, I mean, what --

8 INTERVIEWER: And Cadrain was a witness?

9 MRS. JOYCE MILGAARD: Was a witness.

03:53 10 MR. DAVID ASPER: David had gone to visit
11 this fellow Cadrain in Saskatoon, and as I say,
12 bits and pieces of the contents of I believe the
13 purse, some of the small things from the purse of
14 the deceased were found, you know, in a direction
03:53 15 going from where the body was found down towards
16 Cadrain's house.

17 MRS. JOYCE MILGAARD: And then the wallet
18 was found just a few doors away from that, and
19 the interesting part was the suspect's wallet was
03:53 20 also found outside his house that morning and
21 returned to him, so --

22 INTERVIEWER: So is that, you mean the
23 person whose been interviewed two or three
24 times --

03:53 25 MRS. JOYCE MILGAARD: Yes, that's right,



1 that's part of the statement.

2 INTERVIEWER: -- by the investigator?

3 I want to ask you, David, on
4 what we call the foot-dragging on the part of the
03:53 5 Department of Justice. Is there a rational
6 explanation for that? I mean they have had
7 enough time to at least give it to the Minister's
8 desk for a decision; is there some sort of
9 built-in inertia in that department, is there a
03:54 10 situation?

11 MR. DAVID ASPER: I don't know, because --

12 MRS. JOYCE MILGAARD: They won't tell us.

13 MR. DAVID ASPER: Well, I have --

14 INTERVIEWER: Well there was foot-dragging
03:54 15 in the Donald Marshall case?

16 MR. DAVID ASPER: I know, and I've been so
17 naive about this whole thing, I don't have any
18 great insight. I have some suspicions.

19 INTERVIEWER: Give my one suspicion?

03:54 20 MR. DAVID ASPER: Well, for example, what
21 is the Department of Justice but a large group
22 of --

23 INTERVIEWER: Prosecutors.

24 MR. DAVID ASPER: -- bureaucrats and
03:54 25 prosecutors.



1 INTERVIEWER: Not sympathetic to your
2 material?

3 MR. DAVID ASPER: That's right.

4 INTERVIEWER: And I don't say that
5 disparagingly --

6 MR. DAVID ASPER: No.

7 INTERVIEWER: -- but that's not their
8 purpose.

9 MR. DAVID ASPER: No, that's right. And I
03:54 10 don't ascribe anything evil or bad about having a
11 Department of Justice full of prosecutors, except
12 along comes somebody who now challenges what
13 those people are ingrained to do, which is
14 convict people, and again without any sort of
03:54 15 evil motive they may intellectually and
16 psychologically have a great deal of difficulty
17 accepting that something like this could happen
18 and so they will ponder and pore over the
19 evidence, you know, the evidence and the
03:55 20 transcripts and everything else without having
21 the sense that I have, which is that I get a
22 phone call daily from a guy in jail who wants,
23 demands to know what's going on, and they don't
24 have that pressure and they can have the luxury
03:55 25 of this plodding sort of approach.



1 MRS. JOYCE MILGAARD: And they don't have
2 Joyce Milgaard at their doorstep every day too.

3 MR. DAVID ASPER: Well --

4 INTERVIEWER: And the other thing, because
5 we're talking about humanity, we're talking about
6 human beings, there are major careers on the
7 line?

8 MR. DAVID ASPER: Yes.

9 INTERVIEWER: There are, what, three people
10 from the investigation and the trial, going back
11 to 1969 and 1970, who have responsible positions
12 now in Saskatchewan?

13 MRS. JOYCE MILGAARD: Oh yes. The
14 investigator is now the chief of police in
15 Saskatoon.

16 MR. DAVID ASPER: And this is the guy, the
17 investigator is the guy who found the samples in
18 the snow --

19 MRS. JOYCE MILGAARD: Right.

20 MR. DAVID ASPER: -- which, if all goes
21 well, by the time this show airs will be
22 ridiculed.

23 INTERVIEWER: So you have the investigator
24 who is the police chief?

25 MRS. JOYCE MILGAARD: Yeah. We have --



1 INTERVIEWER: You've got an attorney who is
2 now on the Bench, Justice --

3 MRS. JOYCE MILGAARD: Now on the Court of
4 Appeal.

5 MR. DAVID ASPER: Court of Appeal of
6 Saskatchewan.

7 INTERVIEWER: Of Saskatchewan, and we have
8 one other person?

9 MRS. JOYCE MILGAARD: Oh yes, Mr. Caldwell,
03:56 10 he's in the Justice Department.

11 MR. DAVID ASPER: Works for the Department
12 of Justice.

13 MRS. JOYCE MILGAARD: That's right.

14 INTERVIEWER: So, I mean, you've got major
03:56 15 careers at stake.

16 MRS. JOYCE MILGAARD: Uh-huh."

17 **(Clip VT11A ends)**

18 **(Clip VT11B played)**

19 REPORTER: David Milgaard, he has spent 21
03:56 20 years in prison for a crime he insists he did not
21 commit. Tonight Milgaard is sitting in Stony
22 Mountain Penitentiary while the Federal Justice
23 Department examines new evidence to determine if
24 he should get a new trial.

03:57 25 A key element of that



1 investigation is focused on another suspect. The
2 CBC has learned some revealing details about that
3 suspect's background. Sharon Basaraba of 24
4 Hours reports now from Saskatoon.

03:57 5 MS. SHARON BASARABA: David Milgaard has
6 been in prison for most of his 37 years. He's
7 been denied parole, in part because he refuses to
8 say he's guilty.

9 MR. DAVID MILGAARD: I don't want to have
03:57 10 to report to somebody for the rest of my life for
11 a crime that I didn't commit.

12 MS. SHARON BASARABA: His jury didn't
13 believe him. Following his trial in Saskatoon in
14 1970, Milgaard was found guilty of the murder of
03:57 15 Gail Miller, a 20-year-old nursing assistant.

16 Miller's body was found lying
17 in the snow on a cold January morning in 1969.
18 The jury was told she had been raped and
19 repeatedly stabbed with a paring knife.

03:57 20 David Milgaard arrived in
21 Saskatoon around the same time that Gail Miller
22 was killed. He was on his way here, to the home
23 of one of his friends, Gail Miller's body was
24 found about a block away, and the trail of
03:58 25 evidence appeared to lead back to this house.



1 Her wallet was found two doors away and a
2 blood-stained toque just next door.

3 But Milgaard's friend wasn't
4 the only one living here, there was someone else
03:58 5 in the basement suite, someone who was never
6 brought in for questioning.

7 His name is Larry Earl Fisher.
8 This is what his criminal record looks like
9 today, a history of brutal rapes, sexual
03:58 10 assaults, and in one case attempted murder. His
11 first three crimes took place in Saskatoon,
12 before Gail Miller's murder. But Saskatoon
13 police had no record of Fisher back in 1969.
14 Those crimes didn't come to light until more than
03:58 15 a year later when he was picked up in Winnipeg on
16 yet another rape charge.

17 Lorne Huff is a private
18 investigator and lie detector expert in Winnipeg.
19 20 years ago, he was the police detective who
03:59 20 interrogated Larry Fisher after Fisher was caught
21 in the act of raping a woman. Fisher ultimately
22 confessed to two rapes.

23 MR. LORNE HUFF: The first rape, in
24 particular, was rather brutal. He had a knife
03:59 25 and he dragged this woman into a bush area in the



1 Fort Richmond area at the time, or King's Park I
2 guess we called it then, but he dragged her into
3 the bush and he brutally raped her. He, I can't
4 recall what all the gory details were, but it was
03:59 5 a very brutal rape and he tied her up with her
6 own clothing.

7 MS. SHARON BASARABA: What did he have in
8 his possession, what was --

9 MR. LORNE HUFF: He had a paring knife with
03:59 10 him, on both instances he had a paring knife. It
11 wasn't a big knife, but it was a knife, and he
12 would threaten the women with the knife.

13 MS. SHARON BASARABA: Fisher pleaded guilty
14 to both Winnipeg rapes and was sentenced to 13
03:59 15 years. But Lorne Huff heard more than just those
16 two confessions. Fisher confessed to four other
17 previous sexual assaults in Saskatoon. One of
18 those victims lived less than two blocks from
19 where Gail Miller's body was found.

04:00 20 At the time of those
21 confessions, police already had David Milgaard
22 behind bars for the murder of Gail Miller. Three
23 of Fisher's sexual assaults happened only a few
24 months before Gail Miller's rape and murder, but
04:00 25 that didn't prompt police to re-open their



1 investigation.

2 One person who thought they
3 should have is Fisher's ex-wife, Linda. She
4 refused our request for an on-camera interview,
04:00 5 but in a signed statement given in March of this
6 year Linda Fisher points an accusing finger at
7 her ex-husband. She says "on the night before
8 the morning of the Miller murder Larry again had
9 failed to come home. I had discovered that my
04:00 10 kitchen paring knife was missing."

11 Linda accused her husband of
12 having committed the murder. She remembers his
13 reaction. "My angry accusations stopped him
14 cold. He look at me like a guilty person who had
04:01 15 just been caught. The colour drained from his
16 face and he looked shocked and scared. I will
17 never forget his expression."

18 Linda Fisher says she went to
19 Saskatoon police in January of 1980 and gave them
04:01 20 a statement about her suspicions. She has heard
21 nothing from them since.

22 Joe Penkala is now the chief of
23 police in Saskatoon. In 1969 he was involved in
24 the investigation of Gail Miller's murder. He
04:01 25 has consistently refused comment about the new



1 evidence in the Milgaard case.

2 MR. JOE PENKALA: There is no displayed
3 compassion for the family of Gail Miller, and the
4 media continues to promote the controversy, which
04:01 5 doesn't require to be proven.

6 MR. LORNE HUFF: You can't overlook the
7 fact that this man has now committed these number
8 of rapes, and he lived nearby where this rape and
9 murder had occurred, it's obvious you have to
04:01 10 look into it.

11 MS. SHARON BASARABA: Larry Fisher served
12 8 1/2 years at the Saskatchewan Penitentiary in
13 Prince Albert. He was paroled in 1980. Less
14 than three months later, he raped and tried to
04:02 15 kill a 56-year-old North Battleford woman.

16 Fisher is now back in prison.
17 He refused our request for an interview, but the
18 RCMP have interviewed him twice about Gail
19 Miller's murder. Their investigation, part of
04:02 20 the Justice Department's review, is continuing.

21 Larry Fisher is scheduled for
22 release in 1994, the same year David Milgaard's
23 sentence runs out.

24 For 24 Hours, I'm Sharon
04:02 25 Basaraba.



1 REPORTER: More on this story tonight from
2 our Saskatoon studios. Sharon Basaraba is
3 standing by there.

4 Sharon, Larry Fisher, it would
04:02 5 appear, is a natural suspect in this case; why
6 didn't the police investigate him before now?

7 MS. SHARON BASARABA: Well, that's a good
8 question. There does seem to be some compelling
9 evidence leading back to Larry Fisher.

04:02 10 For example, we tracked the
11 histories of some of his past victims, found they
12 lived right in the same neighbourhood. If he had
13 been -- if they had taken a bus to work, for
14 example, they would have taken the same bus as
04:03 15 Larry Fisher, as did Gail Miller.

16 INTERVIEWER: What happens now?

17 MS. SHARON BASARABA: Well Rick Pearson is
18 the RCMP investigator looking into this case on
19 behalf of the Justice Department. He says the
04:03 20 questioning continues and, as far as we know,
21 Larry Fisher is the only other suspect being
22 investigated in the case.

23 INTERVIEWER: Anything else at all involved
24 in that review you've just mentioned?

04:03 25 MS. SHARON BASARABA: Well it's, as you can



1 *imagine, pretty hard to find new evidence in a*
2 *murder that occurred more than 20 years ago, but*
3 *there have been reports that came out that looked*
4 *at that original evidence.*

04:03 5 *Dr. James Ferris of the*
6 *University of British Columbia and Dr. Markesteyn*
7 *the chief medical examiner of Manitoba, have --*
8 *they are pathologists and they have both taken a*
9 *new look, given a new interpretation to the*
04:03 10 *original evidence, and in fact challenged the*
11 *link between David Milgaard and the murder.*

12 *INTERVIEWER: All right, Sharon, time for*
13 *one more quick question. Any idea of how much*
14 *longer David Milgaard is going to have to wait*
04:03 15 *until -- not until he gets out of jail, but until*
16 *there's some resolution of whether he gets a new*
17 *trial?*

18 *MS. SHARON BASARABA: Well the lawyers*
19 *working on his behalf, of course, have been*
04:04 20 *waiting since December of 1988 when they first*
21 *submitted their application to the Justice*
22 *Department to have the case re-opened. Very few*
23 *details of that investigation have been released.*

24 *We spoke today to the chief*
04:04 25 *investigator, that's Eugene Williams from the*



1 Justice Department in Ottawa, and he says it's
2 impossible to predict exactly how long it will be
3 before this investigation is complete.

04:04 4 INTERVIEWER: Okay, Sharon, thanks for
5 this.

6 MS. SHARON BASARABA: Thanks, Mike.

7 **(Clip VT11B ends)**

8 MR. HARDY: And, Mr. Commissioner, we
9 should be back, now, to where we left off
04:04 10 yesterday.

11 COMMISSIONER MacCALLUM: Okay.

12 **(Clip VT24 played)**

13 REPORTER: For 22 years, David Milgaard has
14 been serving a life sentence for a murder that he
04:05 15 claims he did not commit. Later this morning, an
16 American-based Christian organization will
17 present what it says is new evidence that will
18 show reasonable doubt in the Milgaard case.

19 Milgaard supporters will also
04:05 20 ask the Justice Minister for the second time to
21 re-open his case. Their first appeal, filed in
22 1988, was turned down earlier this year.

23 Joining us this hour in
24 Winnipeg is David Milgaard's mother, Joyce
04:05 25 Milgaard, and his lawyer, David Asper. Good



1 morning to you both.

2 BOTH: Good morning.

3 REPORTER: Mrs. Milgaard, perhaps you could
4 lead us off by telling us a little bit about the
04:05 5 new evidence that has come to light?

6 MRS. JOYCE MILGAARD: The -- which new
7 evidence, the --

8 INTERVIEWER: Well I understand that the
9 ministry group in Toronto is presenting some new
04:05 10 evidence today?

11 MRS. JOYCE MILGAARD: Right. Because we
12 had new evidence come forward in 1980, and then
13 of course we also had new evidence that went to
14 the Minister in 1988, it's -- we have new
04:05 15 evidence, all the time, that is going in.

16 What Jim McCloskey will be
17 presenting in Toronto today is a report that --
18 done by the Centurion Ministries organization.
19 They are based, a non-profit organization based
04:06 20 in Princeton, New Jersey, and that report will
21 detail the findings of the interviews with the
22 victims of a serial rapist who they believe was
23 the real killer, not my son David.

24 INTERVIEWER: Uh-huh. So, above and beyond
04:06 25 the material you already had in 1988 when you



1 first went to the Justice Minister, there is no
2 other new material being presented today; is that
3 correct?

4 MRS. JOYCE MILGAARD: There will be all --
04:06 5 it will be the new material that he has collected
6 during this last --

7 INTERVIEWER: These interviews?

8 MRS. JOYCE MILGAARD: Uh-huh.

9 INTERVIEWER: How did Centurion Ministries
04:06 10 get involved in this case?

11 MRS. JOYCE MILGAARD: Actually, my son
12 David first heard about them from some news media
13 paper that he had read, and I was working on a
14 course in New Jersey at the time, and he said
04:07 15 "eh, mum, this guy is right down there, can you
16 go and see him", and I did. But he wasn't --
17 well he had 3,000 cases a year coming to him
18 asking for help, and there was just no way, he
19 said, he could come to Canada. So I offered to
04:07 20 help on my days off in the office, and that way I
21 thought, you know, I felt I was really helping
22 David, and did that for a number of months.

23 Then in February of 1990, when
24 we got the anonymous phone call which indicated
04:07 25 that Larry Fisher was the real killer, I phoned



1 Jim and I said "eh, I'm on my way out to
2 Saskatoon". I really wasn't phoning for help,
3 just to tell him what was happening. And he said
4 "wait a minute, you can't do that, it's too
04:07 5 dangerous", and he provided an investigator to
6 come up with me. He said "I'll give you this guy
7 for a week, and let's see what we can do, but you
8 can't go on your own". And of course, once that
9 investigator got involved and started giving the
04:08 10 reports back to Jim about what was happening --

11 INTERVIEWER: Then they jumped in?

12 MRS. JOYCE MILGAARD: Oh yes, with both
13 feet.

14 INTERVIEWER: Can we bring Mr. Asper in on
04:08 15 this.

16 Mrs. Milgaard has mentioned a
17 name of someone you suspect to be the person
18 responsible for the murder in question. You are
19 a lawyer; how can you broadcast a name like that?

04:08 20 MR. DAVID ASPER: Well, I want to clarify
21 that, because independent of what anybody might
22 say about Larry Fisher the value of Larry
23 Fisher's evidence, in my opinion, is not to prove
24 that Larry Fisher committed this crime, and it's
04:08 25 not for me to do that, and Larry Fisher is



1 *clothed with the presumption of innocence and all*
2 *the other procedural and legal guarantees that he*
3 *has.*

4 *What the effect of the evidence*
04:08 5 *is, is to disprove that David Milgaard did it.*

6 *Now I appreciate that may seem*
7 *like a subtle difference, but it's an important*
8 *difference, because at a trial of David Milgaard*
9 *all he has to do is raise a reasonable doubt. If*
04:09 10 *we were able to present to the jury the fact that*
11 *this serial rapist was operating, and that the*
12 *modus operandi of his crimes was virtually*
13 *identical to that of Gail Miller, then the jury*
14 *would have reasonable doubt as to whether David*
04:09 15 *Milgaard did it.*

16 *As to the guilt of Larry*
17 *Fisher, I -- I -- it's not my problem, frankly.*

18 *INTERVIEWER: I'm glad you clarified that*
19 *for us because it is a very important legal*
04:09 20 *distinction.*

21 *MR. DAVID ASPER: Absolutely.*

22 *INTERVIEWER: Mr. Asper, the first*
23 *application made to the Minister to review the*
24 *case back in 1988 was finally turned down in*
04:09 25 *1991, you are going to go back to the Justice*



1 Minister to ask for another appeal; is that
2 correct?

3 MR. DAVID ASPER: Yeah. As a matter of
4 fact, late yesterday afternoon a new application
04:09 5 has been sent to the Minister of Justice, I hope
6 that actually by this time it's arrived in
7 Ottawa, and it presents in fairly comprehensive
8 form the new evidence that we've developed, and
9 hopefully the Minister will have a favourable
04:10 10 look at it.

11 INTERVIEWER: Do you have any indication
12 that it will take the Minister of Justice, this
13 time, any less time to process this appeal than
14 it did the first time around?

04:10 15 MR. DAVID ASPER: No, and that's -- and
16 that's a very critical question. One would hope
17 that the effect of this new evidence will cast a
18 very different light on the evidence that the
19 Minister earlier rejected, and to that extent one
04:10 20 would hope that the process will be very, very
21 much quicker.

22 I think that first of all a lot
23 of the legwork has already been done, but
24 secondly, I think that the Department, at the
04:10 25 very least, owes some degree of compassion to



1 David Milgaard, who is having a very, very rough
2 go of things at the present time and, you know,
3 they owe him at least the courtesy of dealing
4 with it quickly. I mean, his freedom is at
04:11 5 stake.

6 INTERVIEWER: Mrs. Milgaard, tell us a
7 little bit about your son at this point in time,
8 22 years into a sentence; how is he, how is his
9 mental state?

04:11 10 MRS. JOYCE MILGAARD: I was up to see him
11 yesterday, and he's very discouraged. He hasn't
12 even wanted to become involved in what's going on
13 right now because he just feels that the
14 government is not listening. I know he was
04:11 15 encouraged by the -- Gail Miller's family --

16 INTERVIEWER: This is the victim's family
17 that's in question?

18 MRS. JOYCE MILGAARD: Yes, uh-huh. Mr.
19 McCloskey went out to see them and gave them the
04:11 20 new information, and that was instrumental in
21 them coming forward giving a statement to us to
22 be given to the press, saying that they believed
23 that there was more than enough evidence to show
24 a reasonable doubt that David Milgaard was not
04:11 25 the -- or not guilty.



1 So I think that that's very,
2 very powerful and important. And, you know, if
3 they can see this from the evidence we've brought
4 forward, surely the Minister of Justice will be
04:12 5 able to see that too.

6 INTERVIEWER: Mr. Asper, if you can in the
7 few moments we have, can you give us a quick
8 precipe as to why the Minister of Justice turned
9 down the application the first time round?

04:12 10 MR. DAVID ASPER: Well, there are three
11 strands of evidence in the case, there is the
12 evidence of Milgaard's companions, there's
13 forensic evidence, and then there's evidence that
14 a re-enactment by Milgaard occurred quite some
04:12 15 time later.

16 One of the companions
17 ultimately totally recanted and admitted that he
18 lied at the trial. The Minister now dismisses
19 that recantation as not credible.

04:12 20 The Minister, even though the
21 forensic evidence was totally discredited, says
22 that the forensic evidence tendered by the Crown
23 at the trial really wasn't that important.

24 And insofar as the re-enactment
04:12 25 is concerned, we provided a witness who



1 contradicted very damning testimony, and the
2 Department of Justice has claimed that it was
3 really a matter of interpretation and that our
4 witness, in fact, corroborates the Crown's
04:13 5 evidence at the time of the trial, a ludicrous
6 proposition. But that's it in a nutshell.

7 INTERVIEWER: Well, let me put it to you
8 bluntly then, why would the Minister of Justice
9 listen this time as opposed to last time?

04:13 10 MR. DAVID ASPER: Well, as I say, one would
11 hope that the -- the new evidence that we're
12 providing her is extraordinarily powerful, and
13 one would hope that the Minister would see the
14 old evidence in a fresh light, and that perhaps
04:13 15 the judgements that she reached were perhaps a
16 little bit premature.

17 INTERVIEWER: David --

18 MRS. JOYCE MILGAARD: Can I make a point
19 here?

04:13 20 INTERVIEWER: Yes, go ahead, Mrs. Milgaard?

21 MRS. JOYCE MILGAARD: I feel that, you
22 know, a lot of people are condemning Kim
23 Campbell, and they may be doing that rightly, but
24 I think the main thing that Canadians folks have
04:13 25 got to look at is that we don't know what Kim



1 Campbell has seen, we don't know what her
2 department has given her, we don't know what she
3 gave to the judge.

4 We don't have a system that
04:14 5 provides openness, and that's what we need, we
6 need the system to change so this secrecy, this
7 closed-door policy, can't go on. Then you can
8 say "well, she's doing wrong".

9 But, you know, I guess I want
04:14 10 this to be opened up so that everyone can see,
11 and all we're asking for is our day in Court, and
12 David's waited a really long time in light of
13 everything we've put in.

14 INTERVIEWER: I want to thank you both for
04:14 15 joining us this morning.

16 MR. DAVID ASPER: Our pleasure.

17 **(Clip VT24 ends)**

18 **(Clip VT25 played)**

19 REPORTER: David Milgaard has spent more
04:14 20 than two decades ... lately he has been doing
21 much of his time in the prison hospital.

22 MRS. JOYCE MILGAARD: His mind, right now,
23 is just ready to snap.

24 REPORTER: His mother has been working for
04:15 25 years to try to have her son set free or at least



1 granted a new trial. Today, she and a group of
2 supporters gathered in candle-light vigil hoping
3 to bring the case to the Prime Minister's
4 attention.

04:15 5 NARRATOR: Each one of the candles that has
6 been lit represents one year out of the 22 years
7 that David has been in prison.

8 REPORTER: Their bid succeeded. Mulroney
9 stopped to chat with Milgaard on his way into a
04:15 10 luncheon.

11 MRS. JOYCE MILGAARD: Anything you could do
12 to help we would be so appreciative of.

13 THE HON. BRIAN MULRONEY: Well I, ah,
14 Ms. Campbell is going to take a look at the new
04:15 15 information.

16 REPORTER: Mulroney told Milgaard the
17 Minister will look at information that's just
18 surfaced in the case, including an allegation
19 that crucial police documents have gone missing.

04:15 20 Milgaard urged speed in the
21 review, and asked that her son be transferred to
22 a minimum security prison while he waits.

23 MRS. JOYCE MILGAARD: It would be terrible
24 for me to have justice for David in Canada and
04:16 25 not have him able to know he's got it.



1 THE HON. BRIAN MULRONEY: Is -- is -- is
2 he --

3 MRS. JOYCE MILGAARD: It's that desperate.

4 THE HON. BRIAN MULRONEY: Is he that sick?

5 MRS. JOYCE MILGAARD: It is that desperate.

6 THE HON. BRIAN MULRONEY: I didn't
7 realize -- I knew he was ill, but I didn't
8 realize he was that sick.

9 MRS. JOYCE MILGAARD: It is exactly. I
04:16 10 would never be coming to you otherwise.

11 THE HON. BRIAN MULRONEY: I will look into
12 it right away.

13 MRS. JOYCE MILGAARD: Thank you.

14 REPORTER: The two spoke for about five
04:16 15 minutes. Milgaard says it's a source of new
16 hope.

17 MRS. JOYCE MILGAARD: He sounded sincere,
18 he sounded -- it sounded encouraging to me that
19 he even knew about the latest information, so it
04:16 20 obviously means that he knows what's going on.

21 INTERVIEWER: Mulroney wished her good
22 luck. Joyce Milgaard says she isn't counting on
23 just luck in her quest to have her son's case
24 re-opened.

04:16 25 Eileen O'Donnell, CKVM First



1 News.

2 (Clip VT25 ends)

3 (Clip VT26 played)

4 NARRATOR: It's one of Canada's most
04:17 5 notorious murder cases, and this man has spent 22
6 years proclaiming his innocence.

7 MR. DAVID MILGAARD: I demand an inquiry
8 into the Justice Department. It's that simple.

9 REPORTER: But does he think Larry Fisher,
04:17 10 a brutal rapist, killed Gail Miller?

11 MR. DAVID MILGAARD: I don't know that he
12 committed the Miller murder, but I hate the man,
13 knowing what he is done for sure.

14 MR. LINDEN McINTYRE: What's the worst part
04:17 15 of being in?

16 REPORTER: From Manitoba, Linden McIntyre
17 has an exclusive interview with David Milgaard, a
18 prisoner waiting for justice.

19 MR. DAVID MILGAARD: I am an innocent man,
04:17 20 right, they have to come and say "we made a
21 mistake, our department has made a mistake".

22 MR. LINDEN McINTYRE: Last September, on
23 our season premiere, The Fifth Estate laid out
24 important new evidence in the David Milgaard
25 case.



1 Milgaard has been in prison for
2 22 years for a murder he insists he did not
3 commit, and a lot of people believe in his
4 innocence. You may remember that, last year, we
04:18 5 told you about witnesses who have changed their
6 testimony, how new witnesses have come forward,
7 and how there may even be a new suspect in one of
8 the most sensational murder cases in Canadian
9 history.

04:17 10 Tonight we're going to revisit
11 the Milgaard case by telling you what happened
12 since we first broadcast our program and by
13 talking to Milgaard himself. We had heard from
14 his family and supporters that he was extremely
04:17 15 depressed and isolated. Instead, we encountered
16 a man waiting for freedom, convinced that he will
17 be vindicated, but angry that it's taking so
18 long.

19 MR. DAVID MILGAARD: There should be an
04:17 20 inquiry into the Justice Department. I demand an
21 inquiry into the Justice Department, it's that
22 simple. Because people can say they demand an
23 inquiry into something, why can't I? There
24 should be an inquiry into the Justice Department.

04:18 25 MR. LINDEN McINTYRE: And what would you



1 hope the outcome of that would be, that inquiry?

2 MR. DAVID MILGAARD: The truth.

3 LINDEN McINTYRE: The truth. Who really
4 killed 20-year-old Gail Miller in Saskatoon early
04:18 5 on January 31st, 1969.

6 Last year The 5th Estate
7 reported that much of the evidence which
8 originally led to David Milgaard's conviction is
9 now in serious doubt. One witness, Milgaard's
04:18 10 friend Ron Wilson, retracted testimony that was
11 crucial in the Crown's case. He now says he lied
12 when he said he saw Milgaard blood stained and
13 with a knife.

14 And we identified this man,
04:18 15 Larry Earl Fisher, a serial rapist who has
16 confessed to three rapes in Saskatoon at about
17 the same time and in the same neighbourhood where
18 Gail Miller was raped and murdered. Fisher
19 denies any involvement in the Miller case.

04:19 20 MR. LARRY FISHER: The cops have already
21 had my name for 21 years. Now, if they had some
22 concrete evidence, why didn't they charge me 21
23 years ago?

24 MR. LINDEN McINTYRE: The trouble with
04:19 25 Larry Fisher's logic is that by the time the



1 Saskatoon police learned about his confession,
2 David Milgaard was already behind bars for the
3 Miller murder. Since our broadcast, Federal
4 Justice Minister Kim Campbell has refused to
04:19 5 re-open the case.

6 THE HON. KIM CAMPBELL: ...if you want your
7 son to have a fair hearing, don't approach me
8 personally. I'm sorry.

9 MR. LINDEN MCINTYRE: However, this
04:19 10 investigator, working for a U.S. advocacy group,
11 has helped prepare a new submission to the
12 Justice Department, this time focusing on the
13 crimes of Larry Fisher. They contend that his
14 methods, techniques and peculiarities amount to a
04:19 15 signature, the signature of the man who killed
16 Gail Miller.

17 In recent weeks the Saskatoon
18 Police Department, whose members built the case
19 against David Milgaard, have admitted that key
04:20 20 files concerning Larry Fisher have disappeared.
21 In one of the most dramatic recent developments,
22 Prime Minister Brian Mulroney raised the hopes of
23 the Milgaard family in this encounter with Joyce
24 Milgaard, who continues her long campaign to free
04:20 25 her son from prison.



1 P.M. BRAIN MULRONEY: I'll look it right
2 away.

3 MRS. JOYCE MILGAARD: Thank you.

4 MR. LINDEN McINTYRE: Mulroney has since
04:20 5 backed away from direct involvement in the case.

6 MR. DAVID MILGAARD: I want to see the
7 Justice Department to come and see me and my
8 family and say we made a mistake, it's that
9 simple. I am an innocent man, they have to come
04:20 10 and say we made a mistake, our department has
11 made a mistake, and that's what I want to see
12 done.

13 MR. LINDEN McINTYRE: Why is it so
14 important to you, though, to hear those people
04:20 15 say we made a mistake?

16 MR. DAVID MILGAARD: Because they're the
17 ones that are sitting down right now, okay,
18 outside of a prison, while I sit in the cage, and
19 people are telling them you've made a mistake and
04:21 20 they're doing nothing about it.

21 MR. LINDEN McINTYRE: But you can get out
22 of the cage by saying, okay, I am the
23 (unintelligible).

24 MR. DAVID MILGAARD: I can't get out of the
04:21 25 cage by saying that to the National Parole Board



1 because I didn't do it. Would you admit to doing
2 something as lousy as that if you didn't do it?

3 MR. LINDEN McINTYRE: I don't know what I
4 would admit to if I sat where you sit for 23
04:21 5 years. I might admit that the world was flat,
6 you know, after 23 years.

7 MR. DAVID MILGAARD: The person that sat
8 down across from me and said that once, okay, a
9 lady whose name I won't mention, right, even
04:21 10 though she was a National Parole Board person,
11 okay, in her own kind of friendly way saying,
12 "David, if you go in there and say you are not
13 guilty, you are not going to get out for a long
14 time. Even if you aren't or you are, it doesn't
04:21 15 matter, go in there and say you are guilty and
16 you'll get out quicker." I asked her the same
17 thing that you just asked me, what would you do,
18 you know, given the same situation. She said, "I
19 would do anything to get out of prison." The
04:21 20 same position you are taking. I said I won't.

21 MR. LINDEN McINTYRE: But my point is
22 there, it reaches a certain point, you've been in
23 here 23 years. It could take you 23 more years
24 to get them to come around to admitting that they
04:22 25 made a mistake, when you could probably get out



1 of here by just saying, okay, you didn't make a
2 mistake. What's stopping you from --

3 MR. DAVID MILGAARD: When I stand before
4 the National Parole Board and they paint a
04:22 5 picture of a person that is supposed to have
6 raped and murdered a woman, I feel a sense of
7 hostility towards that picture, it really bugs
8 me. I hate people like that. I hate Larry
9 Fisher, you know, just knowing what he's done for
04:22 10 sure. I don't know that he committed the Miller
11 murder, right, but I hate the man knowing what
12 he's done for sure.

13 MR. LINDEN McINTYRE: To the other women?

14 MR. DAVID MILGAARD: Yes, and people inside
04:22 15 prison feel that way. A lot of people on the
16 street think it's all fine inside prison and
17 stuff, right. You know, we feel as strongly as
18 men anywhere. Probably even stronger sometimes.

19 MR. LINDEN McINTYRE: What about the other
04:23 20 guys, you know, the guys that, the fellow you
21 were travelling with, Wilson?

22 MR. DAVID MILGAARD: Ron Wilson? I'm glad
23 he told the truth. It helped us.

24 MR. LINDEN McINTYRE: But you forgive him
04:23 25 for having sold you out in the first place?



1 MR. DAVID MILGAARD: I don't hold anything
2 against him. I remember his mother as being, and
3 his family as being nice people.

4 MR. LINDEN McINTYRE: Where do you get this
04:23 5 compassion that you have for everybody? I mean
6 --

7 MR. DAVID MILGAARD: Truthfully?

8 MR. LINDEN McINTYRE: Yeah.

9 MR. DAVID MILGAARD: Jesus Christ.

04:23 10 MR. LINDEN McINTYRE: You are a religious
11 man?

12 MR. DAVID MILGAARD: I consider myself a
13 religious person, yes.

14 MR. LINDEN McINTYRE: What's the worst part
04:23 15 about being in?

16 MR. DAVID MILGAARD: I don't know,
17 sometimes I guess trying to find time I guess for
18 yourself away from the chatter of the day, you
19 know, wanting to be able to just feel
04:23 20 comfortable.

21 MR. LINDEN McINTYRE: I sometimes imagine
22 which would be the worst, with just the human
23 creation and the confinement of prison, or is it
24 the sense of injustice when you believe that you
04:24 25 are wrongfully in there, which is worse?



1 MR. DAVID MILGAARD: Well, for me, the
2 injustice, okay, is in fact being part of a
3 picture, it's not just being locked down. I'm
4 not a big person in some country, I'm a man
04:24 5 that's inside a prison and I've been here for 23
6 years and I do feel a soreness and an anger at
7 being left out and being screwed. I just put in
8 my mind that eventually the facts as they stand,
9 there's no reason for them to be ignored and that
04:24 10 they will in fact get me free.

11 MR. LINDEN McINTYRE: Do you get the
12 feeling it's a little bit like digging your way
13 out with a spoon, with a teaspoon, you know, sort
14 of --

04:24 15 MR. DAVID MILGAARD: That's a nice way to
16 put it, because basically there have been people
17 inside penitentiaries with just a spoon, you
18 know, they escape by scraping through a cement
19 block over a period of two or three months and
04:25 20 stuff like that. This has been very much like
21 that for me.

22 MR. LINDEN McINTYRE: You get depressed, I
23 mean, not just like feeling blue, you get
24 clinically depressed from time to time?

04:25 25 MR. DAVID MILGAARD: I really get down



1 there. I get to the point sometimes where I'm
2 sitting still in the house kind of twiddling my
3 thumbs like this and looking at the walls and
4 saying, you know, when am I getting out of here
04:25 5 and how, how, how, and, you know, who is going to
6 get me out, and all that does for me sometimes is
7 it gets me depressed.

8 MR. LINDEN McINTYRE: Have you been damaged
9 by this? I mean, like, are you going to take
04:25 10 scars out of here?

11 MR. DAVID MILGAARD: Well, the whole
12 picture is one of rather than seeing myself too
13 much scarred, right, whether I am or I'm not,
14 right, it's the hold on my thinking, a picture of
04:26 15 out, close, or it's forthcoming anyway, right,
16 and to hold to the strength of looking to an
17 optimistic picture.

18 MR. LINDEN McINTYRE: Do you think of
19 yourself as being healthy?

04:26 20 MR. DAVID MILGAARD: Yes, yes. Sore, but
21 healthy.

22 MR. LINDEN McINTYRE: And a survivor?

23 MR. DAVID MILGAARD: A week or two ago I
24 wasn't doing, you know, all that good. I'm
04:26 25 feeling better now. Sore, but healthy.



1 MR. LINDEN McINTYRE: The big issue is
2 whether or not David Milgaard is a threat to
3 society I guess. I mean, that's what --

4 MR. DAVID MILGAARD: Do I sound like a
04:26 5 threat to you?

6 MR. LINDEN McINTYRE: No.

7 MR. DAVID MILGAARD: Thank you. I like to
8 think that I'm friendly, that people like me and
9 that I like people. I like me.

04:26 10 MR. LINDEN McINTYRE: You like you?

11 MR. DAVID MILGAARD: Yup, I do.

12 MR. LINDEN McINTYRE: You would like to be
13 David Milgaard's neighbour?

14 MR. DAVID MILGAARD: I wouldn't mind having
04:26 15 just a neighbour, period.

16 **(Clip VT26 ends)**

17 **(Clip VT27 played)**

18 REPORTER: ... story, Federal Justice Kim
19 Campbell says she expects to make a decision on
04:27 20 the fate of David Milgaard in the near future.
21 Milgaard says he was wrongfully convicted of
22 murder 23 years ago.

23 Now, in the last two years his
24 mother has made a number of pleas to have the
04:27 25 case re-opened, pleas that have been aimed at



1 both the justice minister and the prime minister.
2 The latest now from Jacque Barbeau.

3 MR. JACQUE BARBEAU: David Milgaard has
4 spent more than half his life in prison for a
04:27 5 murder he says he didn't commitment. Now
6 Milgaard is trying to get a second trial to prove
7 his innocence.

8 MRS. JOYCE MILGAARD: We're not asking
9 anyone to say David is innocent at this point,
04:27 10 we're simply asking that it be brought before --
11 opened up.

12 MR. JACQUE BARBEAU: Milgaard's mother
13 Joyce is also fighting for her son's freedom.
14 Today she was on Parliament Hill meeting MPs,
04:28 15 include Liberal leader Jean Chretien.

16 P.M. JEAN CHRETIEN: We're doing our best
17 and wish you the best of luck.

18 MRS. JOYCE MILGAARD: Well, I thank you.
19 Thank you for coming.

04:28 20 MR. JACQUE BARBEAU: In the House of
21 Commons, the opposition pressed the government to
22 grant Milgaard a new trial.

23 MR. RUSSELL MacLELLAN: When is the
24 Minister going to use her authority to do justice
04:28 25 to David Milgaard, release the file to his lawyer



1 and re-open the case so this new evidence can be
2 brought forward?

3 THE HON. KIM CAMPBELL: I will do that as
4 quickly as I can and consistent with my duty, and
04:28 5 I have no apologies to make with the speed with
6 which it's being done. I believe I owe it to the
7 Canadian people to do this with great care and
8 thoroughness.

9 MR. JACQUE BARBEAU: The government said
04:28 10 it's ready to grant one of Milgaard's requests.
11 He has been asking to be transferred from Stony
12 Mountain Penitentiary to a nearby prison. Today
13 the solicitor general said Milgaard was offered a
14 transfer, but he refused.

04:28 15 MR. DOUG LEWIS: Please be assured that the
16 prison authorities remain open to consider the
17 possibility of a transfer should your son wish to
18 raise the request again.

19 MRS. JOYCE MILGAARD: I don't know that my
04:28 20 son understood what the warden was saying at that
21 point. He has sent a request to the, to
22 Saskatoon appealing the decision that they
23 denied, so the request is in the works. I think
24 there's a communication problem here.

04:29 25 JACQUE BARBEAU: David Milgaard --



1 *(Clip VT27 ends)*

2 MR. HARDY: That's likely a good spot to
3 break for the day, Mr. Commissioner.

4 COMMISSIONER MacCALLUM: All right.

04:29 5 *(Adjourned at 4:29 p.m.)*

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OFFICIAL QUEEN'S BENCH COURT REPORTERS' CERTIFICATE:

We, Karen Hinz, CSR, and Donald G. Meyer, RPR, CSR,
Official Queen's Bench Court Reporters for the Province of
Saskatchewan, hereby certify that the foregoing pages
contain a true and correct transcription of our shorthand
notes taken herein to the best of my knowledge, skill, and
ability.

_____, CSR

Karen Hinz, CSR

Official Queen's Bench Court Reporter

_____, RPR, CSR

Donald G. Meyer, RPR, CSR

Official Queen's Bench Court Reporter



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| \$10,000 ^[1] - 33766:8 | | | | |
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| '90s ^[1] - 33711:20 '93 ^[1] - 33724:6 'a' ^[2] - 33657:18, 33658:6 'but ^[1] - 33705:15 'clearish' ^[1] - 33652:18 'definitely' ^[1] - 33744:21 'dr ^[1] - 33590:21 'he ^[1] - 33687:14 'i' ^[1] - 33718:6 'if ^[1] - 33591:4 'information' ^[1] - 33703:17 'it ^[1] - 33548:19 'microscopic' ^[1] - 33619:2 'non ^[1] - 33687:7 'non-secretor' ^[1] - 33687:7 'scientific' ^[1] - 33547:22 'tends' ^[1] - 33744:22 'the' ^[1] - 33685:1 'there' ^[4] - 33590:2, 33685:3, 33685:11, 33689:24 'they' ^[1] - 33688:22 'unused' ^[1] - 33640:8 | 1 1 ^[10] - 33543:20, 33558:23, 33568:19, 33603:1, 33613:20, 33614:2, 33671:13, 33699:14, 33719:3, 33719:4 1/2 ^[1] - 33786:12 10 ^[3] - 33577:23, 33580:13, 33771:15 100 ^[2] - 33656:17, 33656:20 1074 ^[2] - 33749:1, 33749:16 1094 ^[3] - 33749:24, 33750:2, 33750:9 10:29 ^[1] - 33616:6 10:51 ^[1] - 33616:7 11 ^[1] - 33581:5 1104 ^[1] - 33750:17 1114 ^[2] - 33749:1, 33749:21 11:58 ^[1] - 33679:19 11th ^[1] - 33707:25 12 ^[7] - 33583:20, 33602:2, 33629:4, 33629:15, 33629:23, 33696:23 12th ^[2] - 33546:12, 33694:15 13 ^[2] - 33585:23, 33784:14 13th ^[3] - 33551:21, 33552:14, 33704:24 14 ^[2] - 33553:21, 33556:7 14th ^[1] - 33533:21 15 ^[3] - 33605:13, 33608:15, 33687:5 155505 ^[1] - 33543:13 155507 ^[1] - 33553:15 155549 ^[1] - 33710:21 157075 ^[1] - 33680:19 159851 ^[1] - 33687:24 15th ^[4] - 33553:14, | 2 2 ^[11] - 33543:25, 33567:8, 33568:20, 33569:12, 33608:17, 33613:22, 33614:9, 33615:25, 33671:13, 33699:19, 33719:3 20 ^[3] - 33707:9, 33783:19, 33788:2 20-22 ^[1] - 33697:14 20-year-old ^[2] - 33782:15, 33803:4 2004 ^[1] - 33715:18 2006 ^[1] - 33533:21 2013 ^[1] - 33690:24 204511 ^[1] - 33571:22 21 ^[5] - 33688:6, 33766:3, 33781:19, 33803:21, 33803:22 212178 ^[1] - 33741:6 212218 ^[1] - 33741:7 22 ^[5] - 33789:13, 33795:8, 33799:6, 33801:5, 33802:2 220863 ^[1] - 33693:2 220901 ^[1] - 33546:13 23 ^[6] - 33806:4, 33806:6, 33806:23, 33809:5, 33811:22 230098 ^[1] - 33580:1 230173 ^[1] - 33690:22 24 ^[2] - 33782:3, 33786:24 25 ^[2] - 33581:5, 33581:6 269317 ^[1] - 33712:10 269482 ^[2] - 33712:11, 33713:22 27 ^[1] - 33564:2 27th ^[2] - 33703:11, 33717:15 | | |
| 0 | | | | |
| 0 ^[1] - 33554:10 000002 ^[4] - 33592:15, 33607:9, 33616:16, 33636:5 002507 ^[1] - 33696:18 002510 ^[1] - 33558:13 002539 ^[1] - 33704:20 003688 ^[1] - 33657:11 003704 ^[1] - 33657:12 004726 ^[1] - 33551:17 004730 ^[1] - 33553:9 006262 ^[1] - 33720:13 008059 ^[1] - 33754:25 008069 ^[1] - 33754:18 008311 ^[1] - 33718:18 008323 ^[1] - 33718:22 008469 ^[1] - 33709:13 012250 ^[1] - 33707:23 025562 ^[2] - 33717:11, | | | | |



| | | | | | |
|--|---|---|---|---|--|
| <p>37 ^[1] - 33782:6 38 ^[2] - 33577:23, 33580:13 3:00 ^[1] - 33748:15 3:16 ^[1] - 33749:7</p> | <p>7</p> | <p>absolutely ^[5] - 33607:13, 33613:3, 33709:9, 33768:4, 33775:17 abuse ^[2] - 33762:13, 33762:14 academically ^[1] - 33760:3 academically-based ^[1] - 33760:3 accept ^[3] - 33662:19, 33757:14, 33767:4 acceptable ^[1] - 33672:2 accepted ^[1] - 33624:16 accepting ^[3] - 33660:22, 33670:3, 33779:17 access ^[4] - 33560:5, 33586:18, 33665:25, 33767:18 accidents ^[1] - 33540:15 accompanied ^[1] - 33702:3 accomplished ^[1] - 33614:15 according ^[5] - 33617:23, 33639:7, 33684:9, 33725:22, 33743:17 account ^[13] - 33591:9, 33624:25, 33632:5, 33632:14, 33643:10, 33668:7, 33669:9, 33672:5, 33674:16, 33676:17, 33685:5, 33698:15, 33715:9 accounted ^[1] - 33670:6 accuracy ^[5] - 33571:8, 33692:17, 33693:25, 33696:11, 33702:7 accurate ^[29] - 33539:20, 33542:12, 33545:12, 33548:21, 33559:6, 33559:19, 33569:20, 33591:9, 33592:2, 33593:15, 33612:19, 33624:25, 33632:13, 33643:10, 33659:23, 33660:23, 33668:7, 33669:9, 33672:5, 33674:16, 33676:16, 33685:5, 33685:8, 33687:17, 33698:15, 33699:23, 33710:16, 33713:17, 33715:9 accurately ^[2] -</p> | <p>33679:7, 33699:4 accusations ^[1] - 33785:13 accused ^[11] - 33561:22, 33561:23, 33613:20, 33622:22, 33628:11, 33673:19, 33743:7, 33743:22, 33744:17, 33744:19, 33785:11 Accused ^[1] - 33621:16 accused's ^[1] - 33621:18 accusing ^[1] - 33785:6 achieved ^[1] - 33614:19 acquire ^[1] - 33716:6 acquires ^[1] - 33715:25 act ^[3] - 33615:15, 33707:12, 33783:21 acted ^[1] - 33576:12 active ^[2] - 33598:16, 33611:1 activities ^[2] - 33707:5 acts ^[1] - 33702:2 actual ^[2] - 33607:21, 33749:24 add ^[2] - 33592:12, 33598:3 added ^[1] - 33665:20 addition ^[1] - 33593:22 address ^[9] - 33559:16, 33561:21, 33697:15, 33697:21, 33740:20, 33741:10, 33742:2, 33743:25, 33761:21 addressed ^[3] - 33588:16, 33604:1, 33622:1 addresses ^[1] - 33603:3 addressing ^[2] - 33763:9, 33764:4 adduce ^[1] - 33665:11 adjacent ^[2] - 33638:22, 33638:25 adjectives ^[1] - 33683:15 Adjourned ^[4] - 33616:6, 33679:19, 33749:6, 33814:5 administration ^[2] - 33539:6, 33541:17 admissible ^[1] - 33638:15 admit ^[3] - 33806:1, 33806:4, 33806:5 admitted ^[5] - 33560:9, 33732:20, 33733:4, 33796:17, 33804:19 admitting ^[1] - 33806:24</p> | <p>adult ^[1] - 33761:3 adulterated ^[1] - 33729:16 advanced ^[2] - 33583:10, 33751:19 advent ^[1] - 33728:23 adversely ^[1] - 33735:8 advise ^[1] - 33570:3 advised ^[5] - 33560:8, 33579:17, 33643:11, 33682:1, 33702:10 advocacy ^[1] - 33804:10 Affair ^[1] - 33690:20 Affairs ^[1] - 33567:3 affect ^[3] - 33585:4, 33666:9, 33751:25 affected ^[5] - 33651:13, 33664:18, 33665:8, 33666:8, 33754:11 affidavit ^[2] - 33592:7, 33592:21 affidavits ^[1] - 33604:11 after-dinner ^[4] - 33596:18, 33600:20, 33601:6, 33601:16 afternoon ^[5] - 33602:3, 33629:6, 33679:22, 33754:1, 33794:4 afterwards ^[1] - 33569:8 age ^[1] - 33624:19 ages ^[1] - 33716:1 aging ^[1] - 33716:5 ago ^[12] - 33605:11, 33615:20, 33688:6, 33696:8, 33713:24, 33741:13, 33759:17, 33783:19, 33788:2, 33803:23, 33810:23, 33811:22 agree ^[16] - 33610:17, 33659:1, 33659:3, 33669:19, 33671:6, 33676:20, 33682:2, 33693:25, 33728:4, 33745:3, 33750:22, 33754:14, 33756:16, 33756:23, 33757:21, 33758:4 agreed ^[12] - 33559:15, 33567:4, 33574:22, 33609:23, 33659:4, 33681:15, 33681:24, 33682:20, 33692:14, 33716:4, 33727:5, 33727:11 Agreed ^[1] - 33692:16 agreement ^[3] - 33608:18, 33608:21,</p> | |
| <p>4</p> | <p>8</p> | | | | |
| <p>4 ^[5] - 33539:25, 33639:6, 33671:13, 33717:19, 33718:3 40 ^[9] - 33568:10, 33569:6, 33613:13, 33615:2, 33615:3, 33615:16, 33641:10, 33641:18, 33756:14 4:29 ^[1] - 33814:5 4th ^[7] - 33566:3, 33571:24, 33589:19, 33591:15, 33636:1, 33636:13, 33754:6</p> | <p>8 ^[3] - 33731:17, 33743:9, 33786:12</p> | | | | |
| <p>5</p> | <p>A</p> | | | | |
| <p>5 ^[2] - 33699:6, 33699:12 50% ^[1] - 33572:12 56 ^[1] - 33607:9 56-year-old ^[1] - 33786:15 58 ^[2] - 33616:17, 33636:6 59 ^[2] - 33705:3, 33755:1 5th ^[2] - 33680:20, 33803:6</p> | <p>A-antigen ^[5] - 33640:14, 33648:19, 33670:1, 33677:7, 33730:17 A-antigens ^[4] - 33668:25, 33669:5, 33671:10, 33713:10 A-like ^[1] - 33695:17 A-secretor ^[1] - 33728:21 ability ^[1] - 33815:7 able ^[17] - 33561:12, 33599:23, 33605:9, 33625:21, 33631:1, 33694:7, 33734:9, 33739:5, 33748:9, 33760:13, 33767:15, 33767:16, 33772:3, 33793:10, 33796:5, 33799:25, 33808:19 absence ^[11] - 33541:23, 33564:25, 33609:12, 33610:21, 33611:17, 33696:2, 33696:4, 33700:22, 33742:15, 33750:11, 33760:18 absent ^[2] - 33609:25, 33610:8 absolute ^[4] - 33696:1, 33696:7, 33732:6, 33732:12 Absolutely ^[2] - 33724:11, 33793:21</p> | | | | |
| <p>6</p> | | | | | |
| <p>6 ^[5] - 33699:2, 33722:23, 33726:4, 33726:5, 33726:6 617 ^[2] - 33592:10, 33769:1 690 ^[9] - 33543:22, 33555:25, 33680:4, 33680:11, 33702:21, 33706:4, 33758:19, 33763:13, 33764:5 690s ^[3] - 33758:23, 33759:4, 33759:9 696 ^[1] - 33763:22 6th ^[3] - 33684:3, 33687:25, 33710:23</p> | | | | | |



| | | | | |
|---|---|--|--|---|
| <p>33671:14 agrees [2] - 33658:19, 33699:11 ahead [5] - 33585:22, 33603:11, 33676:6, 33763:16, 33797:20 ahold [2] - 33725:6 Aid [3] - 33769:4, 33769:18, 33769:19 aimed [1] - 33811:25 ain't [1] - 33745:13 air [1] - 33578:18 airs [2] - 33582:13, 33780:21 Alain [5] - 33694:13, 33694:15, 33694:16, 33694:17, 33727:3 Alain's [1] - 33696:11 Albert [5] - 33560:9, 33561:5, 33561:17, 33562:21, 33786:13 Alberta [3] - 33541:3, 33541:12, 33761:16 alcohol [1] - 33594:9 alibi [1] - 33771:2 alike [1] - 33640:23 alive [1] - 33743:14 allegation [1] - 33799:18 allegations [1] - 33711:12 Alleged [1] - 33684:11 alleged [5] - 33578:7, 33613:12, 33613:19, 33636:12, 33639:5 allegedly [4] - 33614:5, 33649:20, 33719:9, 33758:25 Allegedly [2] - 33554:16, 33605:18 alley [7] - 33554:5, 33554:6, 33554:10, 33554:16, 33554:25, 33605:17, 33702:6 allowed [4] - 33541:1, 33576:18, 33576:25, 33762:16 allows [1] - 33591:4 almost [5] - 33542:3, 33586:13, 33637:18, 33755:21, 33775:22 alone [4] - 33622:20, 33656:4, 33674:13, 33768:19 alternative [1] - 33621:15 alternatives [1] - 33618:4 altogether [1] - 33739:5 amateur [1] - 33650:5</p> | <p>amazing [2] - 33566:18, 33691:6 American [1] - 33789:16 American-based [1] - 33789:16 ammunition [1] - 33688:3 amount [6] - 33616:2, 33669:22, 33669:25, 33674:25, 33675:11, 33804:14 amounts [1] - 33624:17 amylase [1] - 33746:12 analyse [1] - 33728:7 analysis [2] - 33573:15, 33721:4 anatomy [1] - 33563:16 Anatomy [1] - 33540:4 anger [1] - 33809:6 angry [2] - 33785:13, 33802:17 animal [4] - 33564:17, 33567:15, 33669:7, 33685:17 animals [3] - 33646:1, 33649:16, 33685:24 ankle [1] - 33619:24 announce [1] - 33772:17 announced [1] - 33766:8 announcements [1] - 33697:4 anonymous [2] - 33775:24, 33791:24 answer [8] - 33560:2, 33590:2, 33625:15, 33625:21, 33649:22, 33663:5, 33683:6, 33685:22 answered [2] - 33563:2, 33669:13 answers [3] - 33755:17, 33776:19, 33776:22 antecedent [2] - 33732:11, 33732:14 antecedents [2] - 33731:20, 33731:25 anti [5] - 33649:8, 33659:16, 33663:14, 33664:12, 33664:23 anti-human [5] - 33649:8, 33659:16, 33663:14, 33664:12, 33664:23 antibody [6] - 33648:22, 33649:3, 33658:12, 33726:12, 33726:17, 33726:18 antigen [27] - 33566:13,</p> | <p>33567:6, 33567:8, 33567:15, 33568:22, 33572:10, 33572:13, 33572:18, 33574:11, 33622:18, 33640:14, 33648:19, 33649:3, 33657:18, 33658:7, 33658:12, 33670:1, 33677:7, 33686:14, 33687:12, 33726:12, 33726:17, 33726:18, 33730:17, 33734:6, 33736:21, 33747:4 antigen-antibody [5] - 33649:3, 33658:12, 33726:12, 33726:17, 33726:18 antigens [26] - 33564:21, 33565:1, 33567:18, 33572:19, 33628:8, 33640:12, 33668:25, 33669:5, 33670:4, 33671:10, 33687:8, 33695:17, 33696:3, 33696:5, 33705:8, 33705:10, 33713:10, 33730:5, 33737:3, 33737:4, 33738:24, 33743:20, 33745:25, 33746:2, 33746:3, 33747:1 anything [1] - 33744:21 Anyway [1] - 33599:6 anyway [2] - 33600:15, 33810:15 apes [1] - 33646:3 apologies [2] - 33726:5, 33813:5 apologize [1] - 33756:2 apparent [9] - 33585:24, 33588:25, 33616:23, 33617:13, 33617:18, 33624:1, 33636:14, 33663:17, 33663:18 appeal [5] - 33742:2, 33742:4, 33789:21, 33794:1, 33794:13 Appeal [6] - 33579:10, 33582:21, 33582:22, 33592:7, 33781:4, 33781:5 appealing [1] - 33813:22 appeals [1] - 33766:5 appear [6] - 33555:21, 33588:24, 33592:24, 33723:20, 33743:13, 33787:5 appearance [3] -</p> | <p>33631:12, 33640:25, 33760:12 Appearances [1] - 33535:1 appeared [5] - 33638:18, 33724:23, 33740:23, 33757:14, 33782:25 appearing [1] - 33760:20 application [17] - 33543:20, 33544:10, 33556:1, 33592:9, 33680:12, 33680:14, 33681:5, 33706:4, 33706:6, 33707:22, 33764:23, 33774:22, 33775:2, 33788:21, 33793:23, 33794:4, 33796:9 applications [2] - 33758:20, 33764:6 applied [1] - 33633:5 apply [4] - 33573:21, 33627:24, 33628:20 appointed [1] - 33760:9 appreciate [7] - 33544:3, 33544:6, 33555:2, 33753:4, 33753:11, 33764:12, 33793:6 appreciated [1] - 33589:11 appreciative [1] - 33799:12 approach [5] - 33553:8, 33702:18, 33703:8, 33779:25, 33804:7 approached [1] - 33712:4 approaches [1] - 33688:23 appropriate [2] - 33737:18, 33737:20 approximate [2] - 33633:24, 33634:5 approximated [1] - 33631:13 area [14] - 33555:2, 33637:9, 33637:17, 33637:19, 33638:22, 33638:25, 33666:24, 33695:14, 33701:2, 33720:18, 33728:1, 33753:13, 33783:25, 33784:1 areas [2] - 33605:25, 33695:11 argues [1] - 33744:3 arguing [1] - 33744:12</p> | <p>argument [2] - 33600:19, 33709:4 arguments [5] - 33595:3, 33623:11, 33679:14, 33709:9, 33717:2 arises [1] - 33747:8 arising [2] - 33560:20, 33764:22 arm's [1] - 33760:9 arrived [7] - 33706:13, 33748:2, 33748:9, 33756:8, 33756:10, 33782:20, 33794:6 artery [1] - 33676:2 article [29] - 33546:11, 33546:14, 33547:8, 33548:9, 33550:2, 33550:24, 33551:16, 33551:22, 33553:5, 33567:10, 33589:19, 33589:21, 33683:20, 33687:25, 33689:1, 33689:15, 33693:3, 33703:16, 33703:23, 33704:10, 33704:19, 33704:22, 33707:20, 33707:23, 33708:1, 33709:12, 33716:10 articles [4] - 33619:22, 33687:22, 33703:25, 33705:25 ascribe [1] - 33779:10 aspect [21] - 33573:16, 33575:19, 33599:17, 33601:19, 33606:7, 33612:11, 33614:22, 33615:21, 33624:5, 33625:13, 33636:4, 33644:19, 33651:2, 33655:14, 33659:11, 33662:9, 33668:9, 33672:6, 33678:7, 33682:12, 33728:14 aspects [3] - 33540:10, 33632:16, 33701:20 Asper [110] - 33542:15, 33542:20, 33543:1, 33543:3, 33543:7, 33543:15, 33548:14, 33551:1, 33551:10, 33553:14, 33553:17, 33555:14, 33558:5, 33561:3, 33563:5, 33563:24, 33565:11, 33565:20, 33570:6, 33570:7, 33570:9, 33570:25, 33572:1, 33577:9, 33578:3, 33578:6, 33578:25,</p> |
|---|---|--|--|---|



| | | | | |
|--|--|---|---|---|
| <p>33579:2, 33579:17, 33580:20, 33581:20, 33581:25, 33582:8, 33582:12, 33582:22, 33583:18, 33584:1, 33584:3, 33584:11, 33584:14, 33584:19, 33584:23, 33585:4, 33585:8, 33585:10, 33585:14, 33585:25, 33586:2, 33586:7, 33586:11, 33586:15, 33586:19, 33586:24, 33587:3, 33587:20, 33587:24, 33588:24, 33590:10, 33591:4, 33591:24, 33595:10, 33647:2, 33680:8, 33680:17, 33680:20, 33681:17, 33688:8, 33688:20, 33691:7, 33691:18, 33692:19, 33710:22, 33711:6, 33723:17, 33747:19, 33751:1, 33752:12, 33752:15, 33753:20, 33766:23, 33769:23, 33775:13, 33776:19, 33776:22, 33777:10, 33778:11, 33778:13, 33778:16, 33778:20, 33778:24, 33779:3, 33779:6, 33779:9, 33780:3, 33780:8, 33780:16, 33780:20, 33781:5, 33781:11, 33789:25, 33792:14, 33792:20, 33793:21, 33793:22, 33794:3, 33794:15, 33796:6, 33796:10, 33797:10, 33798:16</p> <p>Asper's [3] - 33551:7, 33692:9, 33699:2</p> <p>asphyxia [1] - 33609:6</p> <p>aspirate [3] - 33616:12, 33626:23, 33728:6</p> <p>assailant [7] - 33617:22, 33636:23, 33673:1, 33673:9, 33674:7, 33674:15, 33674:22</p> <p>assailant's [1] - 33674:9</p> <p>Assault [1] - 33703:18</p> <p>assault [13] - 33578:8, 33609:19, 33613:12, 33620:2, 33621:22, 33633:2, 33633:11, 33639:15, 33644:10,</p> | <p>33655:10, 33701:3, 33701:13, 33704:14</p> <p>assaults [3] - 33783:10, 33784:17, 33784:23</p> <p>assess [3] - 33544:13, 33545:9, 33545:10</p> <p>assessment [3] - 33608:18, 33702:17, 33709:20</p> <p>assigning [1] - 33689:22</p> <p>assist [3] - 33541:17, 33666:23, 33759:18</p> <p>assistance [3] - 33719:21, 33720:14, 33720:17</p> <p>Assistant [2] - 33534:2, 33534:5</p> <p>assistant [1] - 33782:15</p> <p>assisted [4] - 33541:21, 33649:6, 33718:13, 33721:6</p> <p>assisting [1] - 33541:18</p> <p>association [1] - 33543:3</p> <p>Association [1] - 33714:10</p> <p>assume [18] - 33547:13, 33550:13, 33597:24, 33625:19, 33627:15, 33650:24, 33654:18, 33668:19, 33670:3, 33683:13, 33705:23, 33707:14, 33708:11, 33729:13, 33729:14, 33738:17, 33745:11, 33758:16</p> <p>assumed [2] - 33608:25, 33629:20</p> <p>Assuming [3] - 33564:22, 33681:11, 33682:16</p> <p>assuming [5] - 33629:20, 33664:10, 33671:7, 33724:11, 33772:14</p> <p>assumption [6] - 33553:1, 33671:21, 33671:24, 33694:8, 33729:14, 33753:16</p> <p>assumptions [1] - 33699:11</p> <p>assured [2] - 33571:1, 33813:15</p> <p>attached [4] - 33568:11, 33695:3, 33756:19</p> <p>attack [8] - 33555:6, 33555:9, 33602:1, 33616:1, 33629:9, 33631:20, 33633:21,</p> | <p>33674:19</p> <p>attacked [1] - 33654:7</p> <p>attacks [1] - 33609:20</p> <p>attempt [4] - 33574:2, 33610:11, 33610:15, 33667:9</p> <p>attempted [3] - 33578:8, 33668:18, 33783:10</p> <p>attempts [1] - 33609:22</p> <p>attended [2] - 33560:18, 33637:1</p> <p>attending [1] - 33538:14</p> <p>attention [12] - 33556:20, 33556:21, 33651:12, 33657:7, 33697:14, 33699:1, 33708:19, 33715:15, 33737:21, 33749:21, 33755:23, 33799:4</p> <p>attorney [2] - 33582:18, 33781:1</p> <p>attributed [4] - 33587:16, 33587:18, 33705:25, 33708:17</p> <p>Audio [1] - 33534:11</p> <p>August [3] - 33540:2, 33704:24, 33707:25</p> <p>authored [1] - 33703:16</p> <p>authorities [1] - 33813:16</p> <p>authority [1] - 33812:24</p> <p>autopsies [2] - 33541:19, 33633:1</p> <p>autopsy [20] - 33593:24, 33594:2, 33594:12, 33594:13, 33604:22, 33608:25, 33610:13, 33611:10, 33616:13, 33619:1, 33619:13, 33620:23, 33626:23, 33630:17, 33631:10, 33631:18, 33631:21, 33633:7, 33634:12, 33689:16</p> <p>available [13] - 33545:21, 33625:12, 33631:22, 33631:24, 33646:17, 33646:25, 33648:15, 33671:16, 33696:8, 33723:6, 33724:8, 33725:1, 33725:9</p> <p>Avenue [4] - 33554:10, 33554:11, 33554:14, 33605:16</p> <p>awaiting [1] - 33542:6</p> <p>aware [52] - 33550:14, 33550:23, 33551:6,</p> | <p>33551:7, 33565:19, 33574:12, 33574:15, 33574:17, 33575:16, 33588:25, 33605:7, 33647:21, 33648:9, 33652:13, 33653:15, 33653:16, 33653:18, 33653:21, 33659:20, 33662:18, 33662:20, 33670:10, 33673:21, 33673:24, 33679:13, 33692:9, 33692:13, 33696:14, 33706:5, 33706:7, 33706:8, 33708:19, 33708:22, 33711:5, 33711:10, 33711:11, 33711:15, 33711:17, 33712:15, 33716:2, 33716:4, 33716:8, 33716:10, 33716:12, 33751:23, 33752:5, 33752:19, 33752:20, 33759:13, 33762:12, 33766:7, 33771:8</p> | <p>Based [1] - 33574:24</p> <p>based [19] - 33565:4, 33589:6, 33599:3, 33606:2, 33625:11, 33646:16, 33659:5, 33671:11, 33671:23, 33696:7, 33723:5, 33754:6, 33759:10, 33760:3, 33762:8, 33763:20, 33789:16, 33790:19</p> <p>basement [1] - 33783:5</p> <p>basis [9] - 33550:4, 33617:9, 33638:5, 33662:25, 33677:12, 33683:12, 33758:2, 33761:9, 33761:10</p> <p>battery [1] - 33564:9</p> <p>Battleford [1] - 33786:15</p> <p>Beauchamp [1] - 33593:14</p> <p>became [8] - 33541:24, 33601:11, 33601:12, 33652:1, 33653:18, 33706:8, 33711:17, 33752:5</p> <p>become [5] - 33546:2, 33563:9, 33706:6, 33756:19, 33795:12</p> <p>becomes [1] - 33608:2</p> <p>began [1] - 33765:17</p> <p>begin [4] - 33591:24, 33606:25, 33713:18, 33765:18</p> <p>beginning [9] - 33585:24, 33605:11, 33607:11, 33684:5, 33686:10, 33695:1, 33696:22, 33713:9, 33721:7</p> <p>begins [5] - 33577:22, 33581:4, 33584:1, 33690:23, 33755:4</p> <p>begun [1] - 33555:10</p> <p>behalf [7] - 33545:1, 33604:13, 33680:3, 33680:12, 33753:20, 33787:19, 33788:19</p> <p>behind [2] - 33784:22, 33804:2</p> <p>behold [2] - 33567:9, 33567:16</p> <p>beholden [1] - 33762:19</p> <p>beings [2] - 33581:23, 33780:6</p> <p>Beitel [1] - 33534:7</p> <p>believes [6] - 33564:9, 33564:17, 33768:19,</p> |
| B | | | | |
| <p>backed [1] - 33805:5</p> <p>background [4] - 33547:16, 33578:7, 33718:14, 33782:3</p> <p>bacteria [2] - 33667:25, 33669:8</p> <p>bacteriology [1] - 33563:16</p> <p>bad [3] - 33768:12, 33770:12, 33779:10</p> <p>Badge [1] - 33672:15</p> <p>badge [2] - 33672:18, 33673:7</p> <p>badges [2] - 33672:20, 33673:1</p> <p>Balkans [1] - 33541:23</p> <p>bang [1] - 33702:24</p> <p>Barbeau [6] - 33812:2, 33812:3, 33812:12, 33812:20, 33813:9, 33813:25</p> <p>bars [2] - 33784:22, 33804:2</p> <p>Basaraba [13] - 33782:3, 33782:5, 33782:12, 33784:7, 33784:13, 33786:11, 33786:25, 33787:2, 33787:7, 33787:17, 33787:25, 33788:18, 33789:6</p> | | | | |



| | | | | |
|---|---|--|---|--|
| <p>33769:25, 33770:1 Bell^[1] - 33715:18 belong^[2] - 33654:3, 33656:21 belonged^[1] - 33578:12 belonging^[1] - 33571:19 below^[2] - 33592:12, 33592:23 Bench^[6] - 33582:19, 33781:2, 33815:1, 33815:3, 33815:14, 33815:18 benefit^[1] - 33651:9 benzidine/peroxide^[1] - 33573:12 beside^[1] - 33642:2 best^[7] - 33563:2, 33594:15, 33750:25, 33751:5, 33812:16, 33812:17, 33815:6 better^[7] - 33562:18, 33634:14, 33635:3, 33721:6, 33728:5, 33763:20, 33810:25 between^[20] - 33583:18, 33589:14, 33593:2, 33614:4, 33657:20, 33657:21, 33673:9, 33673:22, 33673:23, 33675:2, 33689:21, 33695:23, 33697:9, 33719:1, 33727:9, 33732:18, 33732:19, 33732:24, 33744:21, 33788:11 beyond^[3] - 33540:19, 33624:19, 33790:24 bid^[1] - 33799:8 big^[3] - 33784:11, 33809:4, 33811:1 bit^[21] - 33599:24, 33615:1, 33616:19, 33636:4, 33641:7, 33646:4, 33649:14, 33683:3, 33683:4, 33684:2, 33690:19, 33709:13, 33715:13, 33717:17, 33721:16, 33723:1, 33741:12, 33790:4, 33795:7, 33797:16, 33809:12 bits^[4] - 33604:18, 33716:25, 33776:25, 33777:12 bladder^[2] - 33621:3, 33624:14 blade^[8] - 33632:5, 33632:7, 33632:9,</p> | <p>33632:22, 33634:9, 33634:17, 33635:12, 33715:6 blame^[4] - 33689:23, 33689:24, 33690:8, 33690:13 bleed^[9] - 33610:2, 33610:5, 33611:11, 33611:13, 33675:4, 33675:7, 33675:10, 33675:21, 33676:4 Bleeding^[1] - 33618:6 bleeding^[7] - 33608:5, 33609:10, 33611:2, 33612:2, 33612:4, 33674:25, 33675:6 block^[2] - 33782:24, 33809:19 blocks^[1] - 33784:18 blood^[127] - 33555:8, 33557:10, 33563:19, 33564:7, 33564:25, 33567:11, 33567:14, 33572:9, 33572:11, 33573:5, 33573:6, 33574:3, 33574:10, 33575:24, 33592:9, 33607:19, 33607:22, 33609:12, 33610:21, 33610:24, 33611:3, 33611:15, 33611:17, 33611:18, 33611:22, 33616:24, 33617:3, 33617:12, 33617:18, 33617:20, 33617:23, 33617:25, 33618:4, 33618:16, 33619:18, 33619:21, 33619:22, 33619:25, 33620:8, 33620:9, 33620:24, 33621:2, 33621:13, 33621:17, 33622:5, 33622:6, 33622:14, 33622:17, 33622:20, 33622:22, 33622:24, 33623:1, 33623:2, 33623:17, 33623:23, 33624:1, 33624:11, 33624:17, 33626:10, 33628:10, 33630:25, 33635:16, 33635:18, 33637:6, 33637:17, 33638:24, 33639:11, 33642:25, 33645:4, 33645:14, 33648:24, 33649:14, 33649:21, 33655:19, 33656:6, 33656:9, 33667:6, 33667:12, 33667:15, 33667:20, 33667:23,</p> | <p>33668:6, 33669:7, 33669:20, 33669:22, 33669:25, 33670:6, 33670:19, 33671:8, 33674:9, 33674:14, 33674:22, 33674:25, 33675:2, 33675:12, 33678:8, 33681:10, 33687:8, 33687:10, 33695:16, 33697:9, 33700:22, 33700:25, 33705:7, 33722:3, 33727:25, 33734:17, 33734:25, 33735:18, 33735:23, 33738:24, 33742:24, 33743:18, 33744:2, 33744:3, 33744:4, 33744:5, 33745:6, 33746:4, 33746:7, 33770:15, 33770:21, 33783:2, 33803:12 Blood^[2] - 33621:16, 33667:4 blood-stained^[5] - 33619:18, 33619:21, 33624:1, 33675:2, 33783:2 blood-staining^[5] - 33619:22, 33619:25, 33620:8, 33620:9, 33674:9 blood-stains^[1] - 33674:14 bloodstain^[1] - 33617:14 bloodstained^[1] - 33638:18 bloodstaining^[1] - 33637:6 Bloos^[1] - 33535:10 blow^[1] - 33552:11 blue^[1] - 33809:23 blunt^[2] - 33609:1, 33609:21 bluntly^[1] - 33797:8 Board^[3] - 33805:25, 33806:10, 33807:4 Bobs^[1] - 33535:5 bodies^[1] - 33633:3 Bodies^[1] - 33722:19 bodily^[2] - 33673:8, 33687:9 body^[48] - 33554:3, 33554:8, 33555:1, 33556:5, 33563:23, 33569:13, 33572:8, 33606:11, 33606:14, 33613:24, 33614:6, 33614:14, 33615:6,</p> | <p>33628:1, 33629:5, 33629:25, 33635:18, 33636:16, 33636:24, 33637:2, 33637:7, 33637:10, 33637:11, 33637:17, 33638:23, 33638:25, 33639:10, 33674:8, 33675:5, 33675:6, 33687:7, 33691:12, 33700:19, 33700:22, 33700:25, 33701:3, 33702:6, 33720:19, 33721:20, 33722:7, 33722:10, 33756:8, 33777:15, 33782:16, 33782:23, 33784:19 Boechler^[1] - 33534:11 bone^[2] - 33633:4, 33633:8 bones^[3] - 33632:10, 33632:23, 33715:7 book^[4] - 33712:8, 33712:15, 33712:16, 33713:22 boots^[1] - 33770:24 born^[1] - 33597:16 borrowed^[1] - 33776:9 Boswell^[3] - 33534:4, 33581:14, 33756:4 bottom^[14] - 33607:11, 33608:22, 33616:10, 33617:16, 33656:1, 33705:1, 33709:22, 33715:22, 33717:19, 33726:7, 33729:9, 33741:7, 33741:23, 33742:18 bound^[1] - 33637:18 Boychuk^[1] - 33535:8 Boyd^[3] - 33657:1, 33657:14, 33658:23 boyfriend^[1] - 33598:18 boys'^[1] - 33767:19 Brain^[1] - 33805:1 Brand^[1] - 33593:13 break^[13] - 33577:4, 33616:5, 33633:10, 33679:18, 33679:23, 33716:19, 33748:17, 33749:9, 33750:3, 33750:20, 33754:4, 33765:19, 33814:3 breaks^[2] - 33632:25, 33633:4 breast^[1] - 33714:7 breathing^[1] - 33607:24 Brian^[7] - 33669:20,</p> | <p>33799:13, 33800:1, 33800:4, 33800:6, 33800:11, 33804:22 briefly^[5] - 33592:5, 33593:7, 33705:18, 33710:25, 33758:22 bring^[7] - 33651:12, 33715:14, 33730:7, 33730:10, 33737:21, 33792:14, 33799:3 bringing^[2] - 33654:11, 33657:7 British^[1] - 33788:6 broadcast^[3] - 33792:19, 33802:12, 33804:3 broke^[1] - 33772:1 broken^[3] - 33632:9, 33632:22, 33633:6 brought^[5] - 33735:6, 33783:6, 33796:3, 33812:10, 33813:2 Brown^[1] - 33558:16 Bruce^[4] - 33535:9, 33557:13, 33593:11, 33716:18 bruising^[1] - 33613:4 brutal^[4] - 33783:9, 33783:24, 33784:5, 33801:10 brutally^[1] - 33784:3 bugs^[1] - 33807:7 built^[2] - 33778:9, 33804:18 built-in^[1] - 33778:9 bull^[1] - 33598:3 bureaucrats^[1] - 33778:24 bus^[2] - 33787:13, 33787:14 bush^[2] - 33783:25, 33784:3</p> |
| C | | | | |
| <p>Cadrain^[8] - 33560:9, 33561:6, 33561:17, 33562:21, 33777:6, 33777:7, 33777:8, 33777:11 Cadrain's^[1] - 33777:16 cage^[3] - 33805:18, 33805:22, 33805:25 Caldwell^[5] - 33535:5, 33583:1, 33747:15, 33753:5, 33781:9 Calvin^[2] - 33535:14, 33729:7 camera^[2] - 33542:4,</p> | | | | |



| | | | | |
|---|--|---|---|---|
| <p>33785:4 cameramen [1] - 33706:19 campaign [1] - 33804:24 Campbell [11] - 33706:11, 33706:24, 33707:11, 33773:5, 33797:23, 33798:1, 33799:14, 33804:4, 33804:6, 33811:19, 33813:3 Campbells [1] - 33585:12 Canada [7] - 33535:12, 33592:11, 33691:17, 33694:24, 33707:7, 33791:19, 33799:24 Canada's [1] - 33801:4 Canadian [4] - 33714:10, 33738:13, 33802:8, 33813:7 Canadians [1] - 33797:24 cancer [2] - 33567:12, 33567:13 Candace [1] - 33534:3 candle [1] - 33799:2 candle-light [1] - 33799:2 candles [1] - 33799:5 canine [14] - 33640:6, 33660:1, 33661:3, 33662:7, 33663:9, 33663:24, 33695:13, 33695:16, 33695:18, 33695:20, 33695:23, 33705:8, 33727:7, 33727:9 cannot [15] - 33577:2, 33598:6, 33614:7, 33614:25, 33635:20, 33650:6, 33669:3, 33677:22, 33677:24, 33687:14, 33695:17, 33712:21, 33713:13, 33743:1, 33745:6 capacity [2] - 33541:14, 33714:12 caption [1] - 33705:19 captioned [1] - 33556:10 car [5] - 33613:21, 33614:1, 33614:4, 33770:25, 33776:9 carbohydrate [2] - 33746:8, 33746:9 care [1] - 33813:7 career [1] - 33538:24 careers [3] - 33581:23,</p> | <p>33780:6, 33781:15 careful [3] - 33598:25, 33628:22, 33709:7 carefully [1] - 33742:21 caring [1] - 33768:14 carotid [1] - 33675:19 carried [2] - 33554:17, 33605:19 carry [1] - 33695:17 carrying [1] - 33554:25 case [84] - 33544:22, 33546:15, 33546:20, 33548:18, 33548:19, 33551:11, 33553:25, 33563:10, 33596:14, 33598:21, 33604:16, 33604:21, 33604:23, 33611:3, 33615:15, 33620:11, 33621:10, 33624:22, 33626:15, 33627:9, 33627:23, 33628:4, 33633:6, 33654:24, 33655:7, 33658:8, 33664:11, 33670:4, 33688:12, 33690:15, 33704:1, 33704:13, 33704:15, 33704:16, 33706:21, 33709:18, 33714:1, 33716:11, 33728:11, 33728:15, 33733:12, 33735:18, 33737:9, 33738:1, 33740:2, 33744:15, 33746:3, 33751:3, 33752:1, 33758:24, 33762:5, 33762:13, 33763:1, 33766:13, 33770:2, 33770:7, 33770:8, 33770:19, 33775:3, 33775:22, 33778:15, 33783:10, 33786:1, 33787:5, 33787:18, 33787:22, 33788:22, 33789:18, 33789:21, 33791:10, 33793:24, 33796:11, 33799:3, 33799:18, 33800:23, 33801:25, 33802:11, 33803:11, 33803:19, 33804:5, 33804:18, 33805:5, 33811:25, 33813:1 cases [9] - 33604:18, 33702:21, 33704:2, 33704:17, 33705:12, 33716:11, 33791:17, 33801:5, 33802:8 Cases' [1] - 33703:19 cast [2] - 33675:3,</p> | <p>33794:17 catalyze [1] - 33573:11 Catherine [2] - 33535:5, 33747:13 cats [1] - 33685:23 caught [2] - 33783:20, 33785:15 caused [4] - 33565:22, 33615:9, 33657:17, 33681:9 causes [1] - 33539:7 cavities [1] - 33608:6 cavity [3] - 33607:22, 33617:15, 33624:2 Cbc [1] - 33782:2 cells [2] - 33573:21, 33626:10 cement [1] - 33809:18 Central [1] - 33694:22 Centre [1] - 33564:4 Centurion [2] - 33790:18, 33791:9 Certain [1] - 33705:8 certain [22] - 33541:8, 33545:25, 33564:17, 33573:20, 33574:9, 33576:19, 33580:24, 33599:2, 33627:14, 33627:22, 33628:17, 33630:19, 33634:11, 33635:1, 33635:10, 33656:18, 33656:20, 33664:2, 33697:1, 33711:12, 33761:7, 33806:22 certainly [36] - 33571:6, 33597:12, 33597:14, 33597:25, 33603:17, 33605:9, 33609:18, 33610:16, 33614:12, 33614:16, 33615:3, 33615:16, 33615:23, 33626:12, 33627:24, 33630:12, 33633:4, 33650:14, 33656:17, 33657:9, 33658:25, 33666:1, 33675:25, 33682:23, 33688:23, 33690:4, 33703:1, 33703:2, 33711:17, 33714:12, 33717:17, 33728:9, 33740:22, 33743:14, 33751:7, 33776:17 Certainly [2] - 33616:3, 33721:9 Certificate [1] - 33815:1 certified [1] - 33760:5 certify [1] - 33815:4 cervicitis [2] -</p> | <p>33618:14, 33623:19 cervix [2] - 33618:12, 33621:8 chain [1] - 33603:12 chair [1] - 33714:10 challenge [2] - 33671:25, 33753:18 challenged [1] - 33788:10 challenges [2] - 33703:3, 33779:12 challenging [1] - 33551:4 chance [4] - 33591:21, 33593:6, 33646:5, 33710:24 change [3] - 33768:24, 33770:14, 33798:6 changed [3] - 33611:24, 33655:13, 33802:5 changes [2] - 33619:3, 33716:13 channels [1] - 33766:5 chapter [3] - 33712:11, 33712:14, 33713:21 characteristics [4] - 33635:1, 33718:7, 33719:11, 33719:13 characterization [5] - 33681:16, 33692:9, 33692:15, 33692:17, 33708:14 charge [13] - 33556:9, 33556:13, 33556:21, 33557:5, 33557:12, 33557:14, 33557:23, 33594:4, 33595:1, 33689:16, 33697:18, 33783:16, 33803:22 charges [2] - 33767:25, 33768:21 chart [2] - 33642:2, 33704:8 chat [3] - 33577:14, 33703:6, 33799:9 chatted [1] - 33716:19 chatter [1] - 33808:18 checked [3] - 33567:2, 33626:1, 33626:3 checking [1] - 33630:3 Cheryl [1] - 33534:5 chest [2] - 33607:22, 33608:6 Chief [7] - 33538:21, 33540:2, 33541:24, 33657:23, 33680:25, 33688:2, 33695:4 chief [32] - 33540:7, 33540:9, 33540:10, 33540:20, 33540:23,</p> | <p>33541:2, 33541:4, 33541:9, 33546:18, 33551:24, 33552:20, 33563:11, 33582:6, 33582:16, 33590:6, 33684:17, 33684:25, 33693:16, 33705:4, 33708:8, 33710:11, 33727:2, 33752:4, 33761:23, 33761:24, 33762:1, 33780:14, 33780:24, 33785:22, 33788:7, 33788:24 child [5] - 33542:6, 33542:9, 33762:13, 33762:14 children's [1] - 33761:3 chip [2] - 33642:2, 33704:7 Chretien [2] - 33812:15, 33812:16 Chris [1] - 33535:8 Christ [1] - 33808:9 Christian [2] - 33709:19, 33789:16 chronic [1] - 33618:13 chronologically [4] - 33546:11, 33563:4, 33683:20, 33694:12 churned [1] - 33656:23 Cid [1] - 33615:13 circumstances [9] - 33539:8, 33539:10, 33561:21, 33642:15, 33679:9, 33694:4, 33716:12, 33725:17, 33745:1 Ckvm [1] - 33800:25 claim [1] - 33769:14 claimed [3] - 33759:3, 33767:12, 33797:2 claims [3] - 33769:15, 33769:16, 33789:15 clarification [3] - 33597:9, 33697:1, 33705:24 clarified [2] - 33689:2, 33793:18 clarifies [1] - 33721:1 clarify [5] - 33723:1, 33726:21, 33763:3, 33764:9, 33792:20 Clark [1] - 33593:3 clean [1] - 33673:3 clear [15] - 33542:20, 33554:23, 33564:12, 33578:18, 33597:2, 33617:11, 33637:5, 33638:12, 33647:24, 33648:1, 33666:10,</p> |
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|---|---|---|---|---|
| <p>33666:22, 33667:22, 33670:16, 33738:10 clearer [1] - 33599:24 clearish [2] - 33652:15, 33652:20 clearly [9] - 33565:16, 33637:8, 33648:5, 33648:13, 33660:15, 33670:24, 33671:1, 33677:8, 33730:17 Clerk[1] - 33534:7 client/solicitor [1] - 33576:14 clinic [1] - 33568:7 clinically [1] - 33809:24 Clip[48] - 33536:5, 33536:6, 33536:7, 33536:8, 33536:9, 33536:10, 33536:11, 33536:12, 33536:19, 33536:20, 33536:21, 33536:22, 33536:23, 33536:24, 33536:25, 33537:1, 33537:2, 33537:3, 33537:4, 33537:5, 33537:6, 33537:7, 33537:8, 33537:9, 33577:25, 33579:13, 33581:8, 33581:11, 33581:17, 33583:3, 33691:1, 33691:23, 33766:1, 33771:22, 33773:2, 33774:6, 33774:7, 33781:17, 33781:18, 33789:7, 33789:12, 33798:17, 33798:18, 33801:2, 33801:3, 33811:16, 33811:17, 33814:1 clip [9] - 33577:17, 33577:22, 33579:15, 33580:9, 33581:3, 33690:16, 33690:21, 33692:12 clips [3] - 33753:2, 33753:3, 33772:17 close [3] - 33673:8, 33674:7, 33810:15 closed [1] - 33798:7 closed-door [1] - 33798:7 closer [1] - 33715:22 closing [6] - 33595:2, 33623:10, 33679:13, 33697:15, 33697:21, 33717:2 clothed [1] - 33793:1 clothes [6] - 33614:10, 33674:10, 33674:15,</p> | <p>33674:22, 33770:15, 33770:21 clothing [9] - 33612:16, 33612:23, 33619:23, 33634:19, 33634:21, 33672:19, 33755:19, 33784:6 clumps [1] - 33691:10 co [2] - 33609:1, 33609:20 co-existing [2] - 33609:1, 33609:20 co[p]y [1] - 33699:7 coat [5] - 33609:13, 33611:17, 33611:19, 33612:23, 33632:6 Code[2] - 33543:23, 33592:10 coffee [1] - 33566:22 cold [3] - 33756:15, 33782:17, 33785:14 Colin[3] - 33563:7, 33563:18, 33696:20 colleague [1] - 33563:21 collect [3] - 33700:7, 33766:23, 33766:24 collected [1] - 33791:5 color [1] - 33720:23 coloration [1] - 33641:3 colour [11] - 33642:1, 33642:3, 33642:12, 33651:18, 33651:21, 33651:24, 33653:1, 33704:5, 33704:7, 33716:13, 33785:15 colours [1] - 33642:5 Columbia[1] - 33788:6 column [5] - 33686:9, 33693:8, 33693:10, 33708:3, 33709:23 combination [2] - 33660:14, 33660:17 combined [1] - 33663:12 comfortable [3] - 33702:7, 33702:9, 33808:20 coming [6] - 33752:15, 33765:12, 33791:17, 33795:21, 33800:10, 33812:19 commencement [1] - 33749:15 commencing [3] - 33619:4, 33619:8, 33620:12 comment [21] - 33548:16, 33548:24, 33549:1, 33583:23,</p> | <p>33603:5, 33603:6, 33605:14, 33609:8, 33612:24, 33614:22, 33621:1, 33682:20, 33690:1, 33690:11, 33694:1, 33707:4, 33712:23, 33727:5, 33727:22, 33733:2, 33785:25 commented [2] - 33611:21, 33615:4 commenting [2] - 33558:6, 33606:7 comments [15] - 33548:22, 33560:19, 33587:16, 33587:17, 33613:16, 33616:15, 33687:23, 33692:4, 33695:14, 33695:18, 33696:11, 33697:19, 33698:15, 33700:18, 33708:17 Commission[13] - 33533:2, 33533:14, 33534:1, 33534:2, 33534:7, 33648:10, 33715:16, 33749:23, 33753:15, 33759:6, 33759:11, 33763:11, 33764:5 Commissioner[89] - 33536:15, 33538:3, 33538:5, 33538:6, 33538:11, 33552:5, 33552:9, 33552:13, 33552:16, 33575:23, 33576:1, 33579:22, 33580:1, 33580:2, 33580:6, 33580:8, 33580:11, 33580:15, 33600:11, 33616:5, 33660:2, 33660:5, 33660:9, 33660:15, 33660:16, 33660:20, 33662:16, 33663:4, 33663:16, 33664:1, 33666:22, 33666:25, 33675:14, 33675:20, 33675:22, 33676:3, 33676:5, 33679:18, 33727:15, 33727:18, 33727:19, 33741:1, 33745:18, 33746:6, 33746:9, 33746:11, 33746:13, 33746:15, 33746:20, 33746:24, 33747:3, 33747:6, 33747:8, 33748:14, 33748:21, 33748:22, 33749:4, 33749:14,</p> | <p>33749:18, 33754:20, 33754:23, 33755:1, 33755:25, 33756:2, 33756:5, 33763:3, 33763:6, 33763:12, 33763:16, 33763:24, 33764:8, 33764:10, 33764:20, 33765:1, 33765:11, 33765:15, 33765:20, 33765:25, 33771:23, 33772:6, 33772:8, 33772:11, 33772:15, 33772:20, 33772:24, 33789:8, 33789:11, 33814:3, 33814:4 commit [6] - 33613:22, 33702:2, 33781:21, 33782:11, 33789:15, 33802:3 commitment [2] - 33613:25, 33812:5 committed [9] - 33541:23, 33676:13, 33711:14, 33767:8, 33785:12, 33786:7, 33792:24, 33801:12, 33807:10 common [7] - 33577:11, 33596:4, 33624:12, 33626:12, 33658:3, 33691:15, 33718:11 commonly [5] - 33624:18, 33627:9, 33640:4, 33640:6, 33648:4 Commons[1] - 33812:21 communication [1] - 33813:24 companions [2] - 33796:12, 33796:16 compare [1] - 33642:2 compared [3] - 33696:8, 33717:22, 33719:7 comparison [4] - 33642:13, 33704:5, 33773:18, 33773:19 compassion [3] - 33786:3, 33794:25, 33808:5 compassionate [1] - 33768:14 compelling [1] - 33787:8 complete [6] - 33548:17, 33592:25, 33593:18, 33608:21,</p> | <p>33744:8, 33789:3 completed [5] - 33558:20, 33558:23, 33570:4, 33591:16, 33679:24 completeness [3] - 33641:20, 33661:17, 33713:5 complex [1] - 33731:1 component [1] - 33746:4 compounded [1] - 33605:23 comprehensive [1] - 33794:7 compressibility [2] - 33634:21, 33634:22 compromise [2] - 33605:4, 33605:6 con [2] - 33688:1, 33737:16 concern [16] - 33545:3, 33565:13, 33565:22, 33583:9, 33596:8, 33605:2, 33605:3, 33615:9, 33622:11, 33622:13, 33673:15, 33697:8, 33700:12, 33727:25, 33755:12 Concerned[1] - 33623:8 concerned [11] - 33600:23, 33601:11, 33601:12, 33603:22, 33603:25, 33610:4, 33623:7, 33689:20, 33755:15, 33773:15, 33796:25 concerning [4] - 33570:6, 33697:17, 33700:18, 33804:20 concerns [18] - 33574:16, 33583:11, 33597:5, 33597:8, 33636:10, 33639:3, 33639:17, 33639:18, 33644:19, 33644:21, 33644:23, 33645:20, 33679:2, 33703:7, 33725:13, 33727:21, 33760:23 conclude [5] - 33635:17, 33654:2, 33677:13, 33689:22, 33745:8 concluded [11] - 33555:10, 33571:11, 33670:25, 33677:17, 33688:15, 33694:5, 33700:24, 33705:5,</p> |
|---|---|---|---|---|



| | | | | |
|---|---|--|---|---|
| <p>33708:7, 33719:15, 33749:20 concludes [2] - 33574:6, 33651:1 concluding [2] - 33615:10, 33693:24 conclusion [48] - 33549:22, 33550:23, 33553:2, 33553:4, 33565:1, 33568:19, 33597:10, 33597:12, 33598:25, 33624:4, 33625:24, 33630:15, 33635:20, 33639:21, 33644:8, 33646:10, 33659:1, 33659:3, 33668:22, 33671:20, 33675:13, 33676:8, 33676:10, 33676:25, 33678:10, 33686:25, 33689:5, 33689:9, 33694:7, 33699:14, 33699:19, 33700:5, 33706:1, 33710:3, 33730:10, 33730:11, 33730:22, 33730:24, 33731:17, 33731:19, 33731:21, 33731:22, 33732:12, 33733:22, 33737:1, 33745:7, 33757:23 Conclusions [1] - 33701:18 conclusions [19] - 33544:17, 33550:15, 33562:22, 33569:21, 33574:21, 33574:22, 33575:5, 33653:19, 33671:6, 33671:18, 33683:7, 33695:10, 33699:4, 33701:9, 33702:1, 33708:18, 33714:21, 33754:7, 33754:12 concrete [1] - 33803:22 concur [3] - 33607:3, 33612:17, 33623:25 condemning [1] - 33797:22 conditional [1] - 33731:18 conditions [1] - 33721:22 conduct [4] - 33595:14, 33659:18, 33664:11, 33753:21 conducted [5] - 33548:12, 33623:15, 33641:16, 33662:22, 33759:5</p> | <p>conducting [2] - 33564:8, 33657:4 confessed [3] - 33783:22, 33784:16, 33803:16 confession [1] - 33804:1 confessions [2] - 33784:16, 33784:21 confidence [2] - 33655:15, 33678:5 confident [4] - 33589:20, 33589:23, 33663:23, 33666:12 confinement [1] - 33808:23 confirm [6] - 33553:22, 33579:15, 33590:20, 33601:14, 33624:24, 33668:6 confirmation [1] - 33662:2 confirmatory [2] - 33668:4, 33668:17 confirmed [12] - 33546:24, 33579:16, 33595:9, 33603:13, 33618:1, 33644:2, 33651:16, 33658:24, 33659:16, 33664:13, 33668:16, 33697:5 confirming [2] - 33682:11, 33710:6 confirms [5] - 33681:2, 33681:12, 33681:21, 33682:17, 33699:8 confusing [2] - 33546:3, 33602:9 confusion [1] - 33604:19 Congram [1] - 33534:3 connected [1] - 33564:4 connecting [1] - 33600:20 connection [1] - 33597:3 consent [2] - 33614:18 consider [11] - 33617:13, 33621:5, 33651:3, 33655:16, 33658:14, 33735:13, 33742:20, 33744:13, 33760:1, 33808:12, 33813:16 considerable [1] - 33637:5 consideration [3] - 33606:10, 33634:19, 33641:4</p> | <p>considerations [2] - 33574:24, 33654:15 considered [10] - 33545:16, 33550:10, 33550:21, 33566:4, 33592:3, 33598:7, 33600:4, 33638:15, 33734:8, 33744:10 considering [6] - 33569:21, 33633:16, 33633:19, 33653:22, 33724:4, 33735:11 consistency [2] - 33631:19, 33634:13 consistent [7] - 33619:4, 33619:8, 33629:9, 33688:19, 33689:4, 33750:14, 33813:4 consistently [1] - 33785:25 consulted [4] - 33564:6, 33565:16, 33570:19, 33668:13 consulting [1] - 33541:14 contact [14] - 33542:24, 33544:24, 33549:8, 33549:9, 33555:23, 33565:11, 33657:20, 33657:21, 33673:9, 33674:7, 33709:3, 33723:1, 33738:3, 33766:22 contacted [9] - 33542:15, 33542:21, 33564:1, 33591:2, 33706:9, 33711:18, 33718:14, 33725:4, 33753:19 contacting [2] - 33725:8, 33725:17 contain [15] - 33567:20, 33572:23, 33640:17, 33642:21, 33642:23, 33642:24, 33652:2, 33652:7, 33655:2, 33655:3, 33687:11, 33737:3, 33745:6, 33747:3, 33815:5 contained [19] - 33568:22, 33592:15, 33598:12, 33640:15, 33640:18, 33640:23, 33645:14, 33648:19, 33651:23, 33653:11, 33667:12, 33684:15, 33690:19, 33697:1, 33697:15, 33699:5, 33699:12, 33730:5,</p> | <p>33737:24 containing [3] - 33651:24, 33747:1, 33747:2 contains [8] - 33539:20, 33568:22, 33640:8, 33645:11, 33658:5, 33686:13, 33736:21, 33737:23 contaminant [6] - 33736:6, 33736:9, 33736:14, 33736:21, 33740:5, 33743:19 contaminants [13] - 33735:18, 33735:23, 33736:11, 33736:17, 33736:19, 33736:25, 33737:2, 33737:9, 33739:10, 33739:13, 33739:16, 33745:22, 33747:1 contaminate [2] - 33666:1, 33734:10 contaminated [23] - 33557:10, 33638:9, 33645:17, 33646:9, 33654:4, 33656:13, 33662:1, 33665:12, 33666:7, 33666:18, 33668:1, 33684:14, 33733:13, 33733:15, 33733:17, 33733:19, 33734:14, 33734:17, 33744:4, 33755:13, 33756:18, 33757:2, 33757:19 Contaminated [2] - 33665:17, 33665:18 contamination [36] - 33638:1, 33639:17, 33645:3, 33645:5, 33646:5, 33646:7, 33647:12, 33648:24, 33649:19, 33657:16, 33665:24, 33669:14, 33669:17, 33669:21, 33670:19, 33721:25, 33725:25, 33727:23, 33733:24, 33734:2, 33734:20, 33734:22, 33734:25, 33735:1, 33735:5, 33735:8, 33735:12, 33735:13, 33736:1, 33736:4, 33740:12, 33744:2, 33744:10, 33744:14, 33746:21 contend [1] - 33804:13 contents [5] - 33571:9, 33577:7, 33591:2,</p> | <p>33591:22, 33777:12 context [7] - 33583:24, 33596:18, 33605:8, 33616:14, 33630:23, 33636:2, 33657:13 continue [11] - 33541:14, 33549:19, 33577:5, 33608:23, 33612:8, 33640:2, 33641:6, 33694:11, 33698:24, 33765:16, 33772:25 continued [4] - 33626:22, 33715:2, 33750:9, 33750:16 continues [9] - 33550:3, 33573:3, 33577:23, 33581:6, 33586:6, 33690:23, 33786:4, 33787:20, 33804:24 continuing [8] - 33602:21, 33618:22, 33624:9, 33643:24, 33646:13, 33659:11, 33700:11, 33786:20 Continuing [1] - 33642:18 continuity [3] - 33636:11, 33638:13, 33639:4 contradicted [1] - 33797:1 contrary [4] - 33541:2, 33568:5, 33667:17, 33676:10 Control [1] - 33718:9 controlled [1] - 33719:9 controls [1] - 33645:20 controversy [1] - 33786:4 conversation [9] - 33553:21, 33562:25, 33566:18, 33571:4, 33643:7, 33643:11, 33647:23, 33648:5, 33742:13 conversations [2] - 33558:15, 33566:22 convict [2] - 33684:8, 33779:14 convicted [7] - 33546:23, 33548:3, 33552:3, 33552:24, 33688:5, 33759:3, 33811:21 Conviction [1] - 33533:4 conviction [3] - 33579:12, 33684:4,</p> |
|---|---|--|---|---|



| | | | | |
|--|---|---|---|---|
| <p>33803:8 convictions [1] - 33764:22 convinced [2] - 33768:5, 33802:16 cop [1] - 33586:13 copies [2] - 33594:19, 33748:7 cops [1] - 33803:20 copy [10] - 33539:13, 33558:19, 33559:2, 33559:15, 33571:3, 33680:23, 33695:3, 33712:17, 33712:18, 33773:1 corner [1] - 33585:22 Coroner [1] - 33546:15 coroner [10] - 33540:11, 33540:20, 33541:2, 33541:4, 33761:5, 33761:19, 33761:22, 33761:24, 33763:25 coroners [1] - 33606:12 Corporal [1] - 33750:21 correct [96] - 33538:20, 33538:22, 33538:25, 33539:11, 33539:24, 33540:5, 33541:8, 33541:11, 33542:1, 33542:13, 33542:23, 33542:24, 33545:8, 33545:11, 33547:24, 33557:19, 33559:21, 33560:22, 33572:21, 33573:2, 33573:17, 33574:23, 33594:24, 33595:2, 33599:1, 33601:23, 33602:16, 33606:9, 33611:9, 33614:21, 33614:23, 33620:7, 33620:10, 33626:4, 33627:8, 33629:21, 33635:5, 33640:20, 33641:2, 33641:17, 33642:13, 33642:14, 33644:4, 33647:20, 33648:16, 33650:18, 33650:22, 33654:18, 33655:21, 33666:20, 33666:21, 33668:11, 33668:14, 33670:7, 33672:13, 33677:12, 33677:16, 33678:8, 33680:9, 33682:13, 33682:24, 33683:2, 33683:16, 33689:2, 33689:8, 33693:24, 33694:2, 33700:14, 33717:3,</p> | <p>33717:9, 33719:23, 33720:9, 33720:10, 33725:3, 33729:16, 33729:17, 33731:19, 33732:18, 33733:18, 33734:24, 33737:6, 33737:10, 33740:11, 33743:10, 33749:12, 33751:15, 33752:9, 33752:13, 33754:8, 33758:7, 33758:13, 33772:2, 33772:3, 33791:3, 33794:2, 33815:5 corrected [1] - 33576:11 correction [1] - 33738:12 correctly [5] - 33726:19, 33745:4, 33752:3, 33752:10, 33755:17 correspondence [4] - 33543:13, 33543:16, 33553:16, 33553:18 corresponds [1] - 33749:16 corroborates [1] - 33797:4 corroborating [1] - 33614:3 Counsel [2] - 33534:2, 33538:4 counsel [15] - 33576:15, 33576:19, 33593:2, 33595:3, 33623:11, 33625:16, 33679:14, 33697:22, 33702:20, 33704:1, 33704:17, 33729:7, 33741:11, 33747:10, 33747:14 counsel's [1] - 33697:16 count [2] - 33629:15, 33629:16 counting [1] - 33800:22 country [2] - 33541:9, 33809:4 couple [12] - 33546:16, 33592:17, 33641:21, 33664:9, 33681:19, 33684:1, 33687:21, 33693:6, 33712:13, 33716:19, 33716:20, 33772:4 coupled [1] - 33701:1 course [37] - 33539:7, 33549:25, 33559:25, 33562:12, 33562:17,</p> | <p>33565:8, 33566:13, 33569:15, 33579:21, 33583:12, 33592:1, 33595:6, 33595:13, 33596:4, 33597:15, 33603:16, 33612:1, 33620:20, 33634:13, 33635:23, 33641:24, 33667:5, 33672:23, 33685:25, 33707:24, 33711:21, 33722:22, 33729:1, 33729:18, 33754:13, 33774:19, 33775:23, 33776:8, 33788:19, 33790:13, 33791:14, 33792:8 court [5] - 33658:17, 33673:12, 33688:18, 33708:5, 33742:6 Court [14] - 33534:8, 33541:21, 33579:10, 33582:20, 33582:22, 33592:7, 33776:17, 33781:3, 33781:5, 33798:11, 33815:1, 33815:3, 33815:14, 33815:18 courteous [1] - 33703:5 courtesy [1] - 33795:3 courtroom [1] - 33578:20 courts [1] - 33549:15 cover [3] - 33577:4, 33602:19, 33664:8 covered [9] - 33552:25, 33573:16, 33588:4, 33656:5, 33671:18, 33676:16, 33679:2, 33699:22, 33708:11 covering [1] - 33693:22 cows [1] - 33598:4 Cox [1] - 33535:11 created [1] - 33743:19 creation [1] - 33808:23 credibility [1] - 33654:20 credible [2] - 33770:18, 33796:19 crime [25] - 33549:24, 33558:4, 33578:9, 33578:22, 33579:9, 33601:3, 33613:19, 33614:1, 33615:13, 33648:3, 33676:13, 33681:7, 33682:3, 33689:7, 33698:5, 33702:5, 33708:6, 33727:24, 33767:13, 33773:12, 33776:23, 33781:20, 33782:11,</p> | <p>33792:24 Crime [2] - 33643:2, 33658:16 crimes [5] - 33541:23, 33783:11, 33783:14, 33793:12, 33804:13 criminal [3] - 33711:14, 33711:25, 33783:8 Criminal [3] - 33541:21, 33543:23, 33592:10 critical [1] - 33794:16 criticized [1] - 33701:20 Cross [1] - 33746:21 cross [11] - 33543:6, 33572:10, 33572:13, 33585:2, 33618:2, 33623:15, 33640:13, 33645:5, 33646:5, 33646:7, 33747:11 cross-contamination [3] - 33645:5, 33646:5, 33646:7 Cross-contamination [1] - 33746:21 cross-examination [4] - 33543:6, 33585:2, 33618:2, 33747:11 cross-examinations [1] - 33623:15 cross-react [1] - 33640:13 crotch [5] - 33598:11, 33598:14, 33619:19, 33619:21, 33676:24 Crown [11] - 33541:18, 33560:3, 33578:7, 33623:11, 33679:15, 33697:22, 33698:3, 33698:9, 33705:5, 33777:3, 33796:22 Crown's [9] - 33553:25, 33554:12, 33558:6, 33605:14, 33697:14, 33698:6, 33705:21, 33797:4, 33803:11 crucial [2] - 33799:19, 33803:11 crude [1] - 33721:16 crusty [1] - 33715:24 Csr [8] - 33534:8, 33534:9, 33815:2, 33815:12, 33815:13, 33815:16, 33815:17 culpable [1] - 33585:20 Current [1] - 33690:20 curriculum [2] - 33539:13, 33592:8 cut [4] - 33552:11, 33634:7, 33634:8 cuts [1] - 33707:4</p> | <p>Cv [1] - 33539:16 cystitis [1] - 33621:3 cytochromes [1] - 33573:10 cytocrome [1] - 33668:2</p> |
| D | | | | |
| <p>daily [1] - 33779:22 damaged [1] - 33810:8 damning [1] - 33797:1 Dan [1] - 33546:14 Danchuks [1] - 33770:20 dangerous [1] - 33792:5 dare [1] - 33716:10 daresay [1] - 33545:14 darkness [1] - 33606:16 data [1] - 33676:14 date [9] - 33540:1, 33551:17, 33551:21, 33552:12, 33577:19, 33709:16, 33717:15, 33772:16, 33772:17 dated [23] - 33543:15, 33546:12, 33553:14, 33553:17, 33556:4, 33558:14, 33563:5, 33569:24, 33569:25, 33571:22, 33571:24, 33589:19, 33591:15, 33602:25, 33680:19, 33694:15, 33696:19, 33699:2, 33703:10, 33704:24, 33707:25, 33709:17, 33710:23 daunting [1] - 33544:4 David [190] - 33533:4, 33535:2, 33535:11, 33542:11, 33543:21, 33546:20, 33548:14, 33550:8, 33550:19, 33550:21, 33552:1, 33552:22, 33559:17, 33560:6, 33560:11, 33563:5, 33563:24, 33565:11, 33565:20, 33570:6, 33570:15, 33570:21, 33570:25, 33574:9, 33575:13, 33578:3, 33578:5, 33578:6, 33578:8, 33578:12, 33578:14, 33578:25, 33579:2, 33579:8, 33581:20, 33581:25, 33582:8, 33582:12, 33582:22,</p> | | | | |



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|---|---|---|--|---|
| 33583:18, 33584:3, 33584:11, 33584:14, 33584:19, 33584:23, 33585:4, 33585:8, 33585:10, 33585:14, 33586:2, 33586:7, 33586:11, 33586:15, 33586:19, 33586:24, 33587:3, 33589:22, 33590:10, 33592:21, 33604:12, 33604:13, 33676:22, 33680:12, 33681:7, 33681:13, 33682:3, 33682:18, 33683:5, 33684:8, 33688:4, 33688:8, 33689:6, 33691:4, 33691:7, 33691:18, 33699:1, 33701:23, 33703:12, 33711:13, 33732:3, 33732:9, 33733:20, 33734:4, 33735:3, 33745:7, 33758:10, 33758:14, 33766:23, 33767:8, 33767:13, 33768:11, 33769:9, 33769:23, 33769:25, 33770:20, 33774:22, 33775:1, 33775:13, 33775:20, 33776:15, 33776:19, 33776:22, 33777:4, 33777:10, 33778:3, 33778:11, 33778:13, 33778:16, 33778:20, 33778:24, 33779:3, 33779:6, 33779:9, 33780:3, 33780:8, 33780:16, 33780:20, 33781:5, 33781:11, 33781:19, 33782:5, 33782:9, 33782:20, 33784:21, 33786:22, 33788:11, 33788:14, 33789:13, 33789:24, 33789:25, 33790:23, 33791:12, 33791:22, 33792:20, 33793:5, 33793:8, 33793:14, 33793:21, 33794:3, 33794:15, 33795:1, 33795:24, 33796:10, 33797:10, 33797:17, 33798:16, 33798:19, 33799:7, 33799:24, 33801:7, 33801:11, 33801:17, 33801:19, 33801:24, 33802:19, 33803:2, 33803:8, 33804:2, 33804:19, 33805:6, 33805:16, | 33805:24, 33806:7, 33806:12, 33807:3, 33807:14, 33807:22, 33808:1, 33808:7, 33808:9, 33808:12, 33808:16, 33809:1, 33809:15, 33809:25, 33810:11, 33810:20, 33810:23, 33811:2, 33811:4, 33811:7, 33811:11, 33811:13, 33811:14, 33811:20, 33812:3, 33812:9, 33812:25, 33813:25 David's [5] - 33767:2, 33770:15, 33773:17, 33775:24, 33798:12 days [13] - 33569:15, 33622:8, 33638:4, 33638:21, 33639:14, 33644:9, 33652:12, 33684:12, 33691:12, 33721:21, 33768:12, 33791:20 dead [3] - 33610:1, 33611:4, 33715:3 deal [3] - 33709:7, 33768:1, 33779:16 dealing [5] - 33539:5, 33578:20, 33709:20, 33717:17, 33795:3 dealings [1] - 33670:12 deals [1] - 33717:16 dealt [3] - 33543:5, 33556:23, 33623:17 death [34] - 33539:7, 33539:8, 33539:9, 33539:10, 33540:11, 33540:14, 33540:15, 33540:25, 33541:2, 33542:5, 33542:8, 33561:21, 33599:10, 33599:11, 33607:4, 33607:5, 33607:21, 33608:4, 33608:24, 33612:6, 33617:10, 33624:8, 33628:24, 33633:1, 33633:15, 33702:3, 33722:20, 33761:3, 33762:13, 33763:8, 33763:19, 33763:22 Deborah [2] - 33592:7, 33604:11 decades [1] - 33798:20 Deceased [1] - 33626:21 deceased [15] - 33554:3, 33554:13, 33572:8, 33594:9, | 33605:15, 33609:13, 33617:19, 33617:22, 33618:5, 33627:2, 33628:12, 33639:12, 33673:10, 33674:8, 33777:14 deceased's [2] - 33554:8, 33612:15 December [4] - 33544:11, 33766:14, 33775:5, 33788:20 decide [1] - 33760:13 decided [3] - 33568:2, 33568:6, 33721:12 decision [11] - 33579:11, 33592:6, 33706:10, 33710:2, 33710:5, 33751:9, 33761:8, 33761:9, 33778:8, 33811:19, 33813:22 decline [1] - 33606:4 declined [3] - 33548:15, 33555:19, 33707:12 declining [1] - 33548:24 decomposition [1] - 33617:9 deep [1] - 33675:25 deeply [1] - 33637:15 defence [9] - 33541:19, 33623:12, 33679:14, 33741:9, 33741:11, 33760:14, 33760:20, 33762:19, 33762:25 defend [1] - 33710:5 defendant [1] - 33743:7 definitely [4] - 33682:8, 33734:5, 33757:11, 33770:5 degree [6] - 33555:5, 33663:22, 33678:4, 33678:17, 33760:16, 33794:25 degrees [1] - 33641:10 delegates [1] - 33541:5 deliberations [4] - 33562:22, 33592:1, 33664:17, 33666:16 delivered [1] - 33590:9 demand [3] - 33801:7, 33802:20, 33802:22 demands [1] - 33779:23 denied [2] - 33782:7, 33813:23 denies [1] - 33803:19 Department [34] - 33543:21, 33544:10, 33544:19, 33551:3, 33555:24, 33567:3, | 33688:24, 33702:20, 33759:19, 33760:1, 33760:8, 33760:11, 33760:24, 33767:4, 33769:1, 33774:25, 33778:5, 33778:21, 33779:11, 33781:10, 33781:11, 33781:23, 33787:19, 33788:22, 33789:1, 33794:24, 33797:2, 33801:8, 33802:20, 33802:21, 33802:24, 33804:12, 33804:18, 33805:7 department [7] - 33570:19, 33594:13, 33775:9, 33778:9, 33798:2, 33801:21, 33805:10 Department's [1] - 33786:20 deposit [1] - 33602:13 deposited [1] - 33629:4 depositing [2] - 33652:8, 33652:11 depressed [4] - 33802:15, 33809:22, 33809:24, 33810:7 depth [2] - 33632:4, 33634:17 derived [1] - 33638:24 describe [2] - 33637:8, 33731:21 described [10] - 33572:16, 33608:9, 33609:10, 33631:10, 33638:7, 33642:16, 33651:19, 33652:14, 33664:11, 33694:4 Description [1] - 33536:2 description [1] - 33653:2 Description' [1] - 33619:2 descriptions [1] - 33637:3 descriptor [1] - 33652:19 descriptors [1] - 33652:17 desired [1] - 33663:19 desk [3] - 33702:25, 33775:10, 33778:8 desperate [2] - 33800:3, 33800:5 detail [5] - 33576:3, 33602:20, 33622:2, 33699:22, 33790:21 detailed [1] - 33637:9 | details [4] - 33545:17, 33782:2, 33784:4, 33788:23 detect [3] - 33574:3, 33645:16, 33647:13 detected [1] - 33626:25 detective [1] - 33783:19 detector [1] - 33783:18 Detention [1] - 33658:16 determination [5] - 33541:22, 33548:1, 33667:14, 33671:25, 33718:15 determinations [2] - 33635:7, 33728:20 determine [18] - 33539:3, 33540:11, 33540:13, 33540:25, 33541:1, 33546:21, 33631:2, 33634:12, 33635:2, 33637:21, 33644:24, 33645:4, 33646:21, 33647:8, 33647:18, 33667:10, 33753:21, 33781:23 determined [5] - 33572:18, 33575:14, 33596:16, 33625:10, 33643:25 determines [1] - 33634:16 determining [1] - 33569:5 developed [1] - 33794:8 developments [1] - 33804:21 diagnose [1] - 33610:25 diameter [1] - 33720:22 die [1] - 33610:19 died [2] - 33607:14, 33714:25 difference [10] - 33589:12, 33589:14, 33612:5, 33642:10, 33650:6, 33727:13, 33734:19, 33734:23, 33793:7, 33793:8 differences [2] - 33695:19, 33727:6 different [14] - 33562:15, 33574:20, 33633:21, 33652:8, 33652:9, 33654:14, 33654:15, 33665:1, 33688:22, 33693:23, 33758:18, 33771:25, 33794:18 differentiated [1] - 33719:1 |
|---|---|---|--|---|



| | | | | |
|---|---|---|---|---|
| <p>differently [2] - 33625:12, 33625:13</p> <p>difficult [12] - 33619:11, 33625:15, 33632:8, 33632:21, 33641:12, 33655:19, 33684:3, 33709:16, 33762:4, 33762:5, 33762:6, 33776:24</p> <p>difficulty [1] - 33779:16</p> <p>dig [2] - 33586:15, 33738:6</p> <p>digging [1] - 33809:12</p> <p>diluted [1] - 33652:24</p> <p>diminish [1] - 33764:24</p> <p>dinner [4] - 33596:18, 33600:20, 33601:6, 33601:16</p> <p>dire [2] - 33750:11, 33750:16</p> <p>direct [7] - 33565:11, 33583:22, 33607:14, 33739:15, 33773:18, 33805:5</p> <p>directed [5] - 33543:14, 33553:16, 33556:4, 33591:24, 33680:20</p> <p>direction [7] - 33557:15, 33631:11, 33670:21, 33670:23, 33671:2, 33674:25, 33777:14</p> <p>Director [1] - 33534:3</p> <p>dirt [1] - 33657:20</p> <p>dis [1] - 33625:6</p> <p>disadvantage [1] - 33741:24</p> <p>disagree [4] - 33575:8, 33624:10, 33624:14, 33625:6</p> <p>disagrees [2] - 33699:14, 33699:19</p> <p>disappeared [1] - 33804:20</p> <p>discarded [2] - 33628:8, 33773:16</p> <p>discern [1] - 33742:16</p> <p>discharge [1] - 33722:9</p> <p>discolouration [1] - 33617:6</p> <p>discouraged [1] - 33795:11</p> <p>discovered [2] - 33639:14, 33785:9</p> <p>discredited [1] - 33796:21</p> <p>discuss [9] - 33574:19, 33576:15, 33596:6, 33599:9, 33600:6, 33614:23, 33728:14,</p> | <p>33744:1</p> <p>discussed [7] - 33596:7, 33599:7, 33630:8, 33647:2, 33647:3, 33752:24</p> <p>discusses [1] - 33576:15</p> <p>discussion [32] - 33556:7, 33558:12, 33562:1, 33576:24, 33583:15, 33583:17, 33583:25, 33595:10, 33595:17, 33595:24, 33599:12, 33599:22, 33599:23, 33600:1, 33603:13, 33604:2, 33606:25, 33615:12, 33615:21, 33626:22, 33635:24, 33643:14, 33647:14, 33647:15, 33651:1, 33658:23, 33659:11, 33698:17, 33701:5, 33750:10, 33750:12, 33750:16</p> <p>discussions [11] - 33555:14, 33556:17, 33558:8, 33559:22, 33576:8, 33576:19, 33583:6, 33596:1, 33603:15, 33702:18, 33728:13</p> <p>diseases [1] - 33539:3</p> <p>dish [2] - 33642:2, 33642:11</p> <p>disintegrate [1] - 33573:9</p> <p>dismissal [2] - 33706:5, 33707:21</p> <p>dismissed [1] - 33706:4</p> <p>dismisses [1] - 33796:18</p> <p>disparagingly [1] - 33779:5</p> <p>displayed [1] - 33786:2</p> <p>disprove [1] - 33793:5</p> <p>disproven [2] - 33758:6</p> <p>dispute [2] - 33571:8, 33696:10</p> <p>distance [1] - 33614:4</p> <p>distinction [2] - 33732:18, 33793:20</p> <p>distinguish [1] - 33732:24</p> <p>distinguishing [2] - 33695:23, 33727:9</p> <p>distribute [1] - 33570:9</p> <p>distribution [1] - 33570:6</p> <p>disturbance [2] - 33555:8, 33637:25</p> | <p>division [2] - 33563:14, 33563:15</p> <p>Dna [3] - 33711:21, 33728:23, 33729:1</p> <p>doc [9] - 33579:23, 33579:25, 33690:22, 33730:8, 33740:25, 33741:6, 33754:19, 33754:24, 33756:1</p> <p>doctor [3] - 33596:23, 33706:24, 33736:25</p> <p>Doctor [15] - 33675:17, 33689:16, 33722:22, 33726:19, 33728:4, 33728:19, 33729:3, 33747:13, 33748:10, 33748:14, 33749:21, 33758:10, 33764:12, 33764:21, 33765:12</p> <p>Doctors [1] - 33539:23</p> <p>doctors [2] - 33578:19, 33596:19</p> <p>document [49] - 33539:14, 33539:18, 33539:25, 33543:13, 33546:13, 33553:9, 33555:22, 33558:13, 33563:6, 33569:24, 33583:14, 33583:20, 33583:21, 33589:17, 33591:18, 33592:15, 33592:16, 33607:8, 33607:10, 33616:16, 33616:17, 33636:6, 33642:7, 33657:11, 33680:18, 33687:24, 33694:14, 33696:18, 33703:11, 33704:20, 33704:22, 33707:22, 33709:13, 33712:10, 33715:17, 33715:19, 33715:20, 33717:10, 33717:25, 33718:3, 33718:18, 33722:21, 33726:24, 33727:18, 33741:18, 33749:14, 33749:23, 33753:14, 33772:3</p> <p>Document [3] - 33534:4, 33534:5, 33581:14</p> <p>documentation [2] - 33543:19, 33609:5</p> <p>documented [1] - 33747:20</p> <p>documents [3] - 33546:10, 33750:19, 33799:19</p> <p>dog [65] - 33566:3, 33567:19, 33568:24,</p> | <p>33572:8, 33572:9, 33572:23, 33575:2, 33578:23, 33579:17, 33580:18, 33580:24, 33588:18, 33600:12, 33640:7, 33640:22, 33643:17, 33643:18, 33649:13, 33650:4, 33651:3, 33652:3, 33652:9, 33652:22, 33658:1, 33658:2, 33658:4, 33658:5, 33661:9, 33661:14, 33661:25, 33663:3, 33664:19, 33665:12, 33665:16, 33665:18, 33665:22, 33666:18, 33681:8, 33684:14, 33684:23, 33685:2, 33686:13, 33691:17, 33705:6, 33705:21, 33708:7, 33714:20, 33729:9, 33735:23, 33738:25, 33739:4, 33751:17, 33753:8, 33753:10, 33757:1, 33757:2, 33757:6, 33757:20, 33757:25, 33758:3, 33758:13, 33758:15, 33758:17</p> <p>dog's [2] - 33567:22, 33568:21</p> <p>dogs [17] - 33566:16, 33566:20, 33566:25, 33567:1, 33567:4, 33567:18, 33572:12, 33572:18, 33640:9, 33646:6, 33649:16, 33652:6, 33652:8, 33665:25, 33685:23</p> <p>Dogs [4] - 33566:25, 33640:10, 33640:12, 33705:6</p> <p>dogs' [1] - 33640:11</p> <p>doin' [1] - 33586:3</p> <p>Don [1] - 33534:9</p> <p>Donald [6] - 33770:2, 33770:7, 33771:6, 33778:15, 33815:2, 33815:17</p> <p>done [43] - 33541:20, 33544:12, 33565:12, 33566:15, 33569:2, 33575:15, 33594:12, 33594:17, 33601:2, 33603:18, 33603:20, 33615:23, 33625:7, 33628:18, 33635:11, 33638:6, 33644:25, 33647:7, 33647:10,</p> | <p>33659:16, 33662:3, 33663:19, 33665:4, 33668:18, 33672:11, 33680:1, 33699:15, 33708:23, 33712:7, 33725:16, 33725:21, 33740:17, 33742:8, 33758:23, 33790:18, 33794:23, 33801:13, 33805:12, 33807:9, 33807:12, 33813:6</p> <p>donor [7] - 33565:4, 33578:16, 33677:14, 33731:14, 33732:13, 33734:4, 33742:22</p> <p>door [4] - 33774:1, 33783:2, 33798:7</p> <p>doors [2] - 33777:18, 33783:1</p> <p>doorstep [2] - 33581:19, 33780:2</p> <p>doubt [14] - 33550:6, 33562:3, 33575:21, 33576:4, 33607:13, 33633:14, 33638:6, 33648:8, 33666:14, 33789:18, 33793:9, 33793:14, 33795:24, 33803:9</p> <p>doubts [3] - 33575:20, 33672:10, 33683:1</p> <p>Doug [2] - 33593:3, 33813:15</p> <p>Down [1] - 33637:23</p> <p>down [23] - 33548:10, 33593:21, 33616:19, 33619:14, 33638:17, 33641:7, 33656:1, 33684:19, 33701:17, 33723:22, 33758:25, 33762:11, 33768:9, 33771:14, 33777:15, 33789:22, 33791:15, 33793:24, 33796:9, 33805:17, 33806:8, 33809:3, 33809:25</p> <p>Dr [232] - 33536:3, 33538:8, 33538:10, 33538:13, 33539:15, 33542:17, 33543:11, 33543:24, 33544:1, 33544:8, 33544:16, 33545:9, 33545:10, 33546:7, 33546:24, 33547:11, 33547:23, 33550:13, 33550:14, 33553:11, 33555:12, 33555:17, 33558:15, 33558:18, 33558:20, 33558:23, 33560:5,</p> |
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| | | | | |
|--|--|---|--|---|
| 33562:7, 33563:7, 33563:9, 33564:2, 33564:6, 33565:10, 33565:16, 33565:20, 33568:2, 33570:3, 33570:7, 33570:14, 33570:16, 33570:21, 33571:2, 33571:21, 33572:1, 33573:16, 33574:13, 33577:7, 33578:13, 33578:18, 33579:3, 33579:15, 33579:21, 33580:17, 33583:5, 33583:22, 33583:25, 33589:1, 33589:5, 33589:15, 33590:6, 33590:13, 33591:20, 33592:8, 33592:19, 33593:12, 33593:25, 33595:24, 33596:2, 33596:5, 33596:11, 33599:7, 33599:16, 33600:3, 33600:24, 33601:24, 33603:2, 33603:3, 33603:14, 33606:7, 33606:24, 33607:1, 33607:3, 33607:8, 33607:12, 33607:20, 33608:10, 33608:20, 33609:17, 33611:9, 33612:14, 33612:19, 33612:20, 33612:24, 33613:9, 33614:24, 33615:21, 33616:9, 33616:14, 33616:22, 33617:1, 33618:1, 33618:13, 33618:24, 33619:5, 33622:10, 33623:25, 33624:10, 33624:15, 33624:24, 33625:3, 33625:11, 33625:25, 33626:25, 33628:15, 33629:2, 33630:9, 33630:22, 33631:15, 33636:3, 33636:8, 33639:3, 33639:16, 33639:18, 33643:1, 33643:10, 33643:15, 33643:21, 33653:5, 33657:24, 33658:13, 33658:19, 33660:22, 33663:13, 33664:7, 33668:12, 33670:2, 33671:6, 33671:16, 33671:18, 33671:20, 33672:7, 33673:10, 33673:14, 33676:10, 33676:20, 33677:17, 33677:20, 33679:22, 33680:24, | 33681:3, 33681:12, 33681:22, 33682:5, 33682:12, 33682:17, 33683:23, 33684:20, 33685:6, 33686:25, 33688:9, 33688:13, 33689:17, 33691:14, 33692:1, 33693:8, 33693:13, 33693:15, 33693:23, 33695:4, 33695:6, 33695:7, 33695:9, 33695:10, 33695:25, 33696:20, 33697:2, 33697:3, 33697:5, 33697:7, 33697:18, 33698:2, 33698:7, 33698:22, 33698:25, 33699:7, 33699:9, 33699:10, 33700:4, 33700:16, 33700:18, 33700:23, 33701:19, 33701:25, 33702:4, 33703:16, 33704:23, 33705:3, 33705:11, 33708:8, 33709:25, 33710:20, 33710:22, 33711:2, 33712:16, 33713:24, 33714:5, 33714:6, 33714:9, 33715:15, 33715:16, 33716:14, 33716:18, 33721:11, 33728:13, 33729:6, 33730:7, 33745:18, 33748:25, 33749:9, 33754:1, 33767:7, 33774:11, 33788:5, 33788:6 draft [1] - 33723:23 dragged [2] - 33783:25, 33784:2 dragging [3] - 33774:24, 33778:4, 33778:14 drained [3] - 33722:7, 33722:18, 33785:15 dramatic [1] - 33804:21 draw [8] - 33630:15, 33643:1, 33643:10, 33643:15, 33643:21, 33653:5, 33657:24, 33658:13, 33658:19, 33660:22, 33663:13, 33664:7, 33668:12, 33670:2, 33671:6, 33671:16, 33671:18, 33671:20, 33672:7, 33673:10, 33673:14, 33676:10, 33676:20, 33677:17, 33677:20, 33679:22, 33680:24, | 33698:25, 33749:21, 33754:12 dries [1] - 33715:24 drive [1] - 33771:14 Drs [1] - 33696:24 drug [1] - 33594:8 drugs [1] - 33594:9 due [4] - 33565:8, 33621:2, 33633:1, 33633:2 Due [1] - 33605:22 dumb [1] - 33590:23 dumped [2] - 33700:19, 33702:6 during [22] - 33540:8, 33557:12, 33560:18, 33560:20, 33566:18, 33566:22, 33595:6, 33596:2, 33603:16, 33628:23, 33636:21, 33637:20, 33643:11, 33653:14, 33660:8, 33664:16, 33698:16, 33720:21, 33722:1, 33791:6 dust [1] - 33736:6 duty [1] - 33813:4 dying [2] - 33610:2, 33636:21 | either [8] - 33541:18, 33548:7, 33564:12, 33611:10, 33617:21, 33638:13, 33726:16, 33761:10 ejaculate [2] - 33655:1, 33655:4 ejaculated [1] - 33569:12 ejaculates [1] - 33640:5 Ejaculation [1] - 33614:17 elastic [1] - 33675:11 element [1] - 33781:25 elements [1] - 33613:18 eliminate [1] - 33684:22 eliminated [1] - 33683:12 Ellerman [2] - 33534:5, 33754:25 ellipses [3] - 33742:10, 33742:13, 33742:14 elsewhere [1] - 33702:5 embarrassment [1] - 33607:24 embellish [1] - 33601:7 embroidering [1] - 33767:24 emergency [1] - 33675:8 emphasis [1] - 33731:7 emphatically [1] - 33693:20 employee [1] - 33760:11 Emson [38] - 33562:7, 33593:12, 33593:25, 33595:24, 33596:2, 33596:5, 33596:11, 33599:7, 33599:16, 33600:3, 33600:24, 33601:25, 33603:14, 33607:1, 33607:20, 33608:10, 33611:9, 33617:1, 33618:1, 33618:13, 33618:24, 33619:5, 33625:3, 33625:11, 33625:25, 33626:25, 33630:9, 33631:15, 33643:1, 33643:10, 33643:15, 33643:21, 33713:24, 33714:5, 33714:6, 33714:9, 33728:13 Emson's [6] - 33616:22, 33624:10, 33624:15, 33624:24, 33629:2, 33630:23 enactment [2] - 33796:14, 33796:24 | enclosed [4] - 33543:18, 33556:8, 33680:23, 33703:15 enclosing [1] - 33680:18 encounter [1] - 33804:23 encountered [1] - 33802:15 encouraged [1] - 33795:15 encouraging [2] - 33578:5, 33800:18 Encyclopedia [1] - 33715:17 end [7] - 33554:7, 33563:3, 33567:19, 33596:24, 33601:4, 33665:14, 33734:9 ended [1] - 33722:11 endometrium [4] - 33618:12, 33619:3, 33619:7, 33621:8 Ends [11] - 33536:6, 33536:8, 33536:10, 33536:12, 33536:22, 33536:24, 33537:1, 33537:3, 33537:5, 33537:7, 33537:9 ends [11] - 33579:13, 33581:11, 33583:3, 33691:23, 33774:6, 33781:17, 33789:7, 33798:17, 33801:2, 33811:16, 33814:1 entered [3] - 33635:18, 33639:24, 33732:21 enthusiastic [1] - 33568:3 entire [3] - 33588:21, 33712:18, 33741:18 entirely [2] - 33654:2, 33689:8 entitled [3] - 33690:20, 33703:17, 33712:12 environment [1] - 33627:11 enzyme [1] - 33648:21 enzymes [3] - 33564:18, 33573:10, 33668:3 erred [1] - 33706:25 erroneous [3] - 33678:18, 33686:18, 33698:8 escape [1] - 33809:18 escaped [1] - 33596:21 escaping [1] - 33611:3 especially [1] - 33761:2 Esq [5] - 33534:2, |
| E | | | | |
| Earl [2] - 33783:7, 33803:15 earliest [1] - 33565:25 early [1] - 33803:4 easier [1] - 33728:22 east [1] - 33554:11 east/west [3] - 33554:5, 33554:15, 33605:17 easy [2] - 33583:21, 33634:23 Eddie [2] - 33535:8, 33593:9 Edgar [1] - 33592:21 edges [1] - 33634:2 editor [1] - 33709:11 Edmondson [1] - 33593:11 Edward [1] - 33533:7 Edwards [1] - 33708:1 effect [6] - 33572:16, 33627:17, 33628:15, 33678:19, 33793:4, 33794:17 effectively [2] - 33640:20, 33651:4 eights [1] - 33632:3 Eileen [1] - 33800:25 | | | | |



| | | | | |
|---|--|---|---|---|
| <p>33535:7, 33535:8, 33535:9, 33535:14 essence [2] - 33681:18, 33726:19 Esson [1] - 33534:10 establish [4] - 33564:10, 33564:24, 33640:11, 33759:19 established [5] - 33677:4, 33698:14, 33700:6, 33730:13, 33745:12 establishes [1] - 33579:8 establishment [1] - 33764:4 Estate [2] - 33801:23, 33803:6 estimate [1] - 33628:4 estimated [1] - 33632:4 estimates [1] - 33634:15 etc [1] - 33641:14 Eugene [6] - 33555:23, 33556:5, 33569:23, 33570:1, 33694:13, 33788:25 evaluation [2] - 33558:1, 33740:16 evening [1] - 33602:15 event [6] - 33557:20, 33602:9, 33623:22, 33628:6, 33646:20, 33771:16 events [1] - 33672:24 eventually [2] - 33722:15, 33809:8 everywhere [1] - 33635:19 evidence [238] - 33546:19, 33547:1, 33547:7, 33547:10, 33547:14, 33547:15, 33547:16, 33547:19, 33548:6, 33550:4, 33550:7, 33550:18, 33550:20, 33551:2, 33551:20, 33551:25, 33552:21, 33553:24, 33554:21, 33554:22, 33554:23, 33555:7, 33557:9, 33557:12, 33557:13, 33557:16, 33559:17, 33564:23, 33565:5, 33570:15, 33570:17, 33570:20, 33571:13, 33572:4, 33579:4, 33584:6, 33584:9, 33584:15, 33584:16, 33584:25,</p> | <p>33585:1, 33585:16, 33586:25, 33587:11, 33587:23, 33588:6, 33589:3, 33589:6, 33589:24, 33590:12, 33590:14, 33592:22, 33592:25, 33593:5, 33593:7, 33593:18, 33598:11, 33599:2, 33599:4, 33601:9, 33606:4, 33606:21, 33607:20, 33609:25, 33610:17, 33610:18, 33611:14, 33611:20, 33613:11, 33613:15, 33614:3, 33616:22, 33617:4, 33617:11, 33617:24, 33618:25, 33619:15, 33619:19, 33620:18, 33621:21, 33627:16, 33629:2, 33629:21, 33631:22, 33632:18, 33637:11, 33637:14, 33637:16, 33637:19, 33638:11, 33638:15, 33639:8, 33639:12, 33639:22, 33644:3, 33644:18, 33646:16, 33658:14, 33667:9, 33667:21, 33668:4, 33670:18, 33671:12, 33671:23, 33672:16, 33676:21, 33677:18, 33678:15, 33678:20, 33679:4, 33679:7, 33682:3, 33682:4, 33684:4, 33684:7, 33684:16, 33685:1, 33686:15, 33688:12, 33688:16, 33689:3, 33689:6, 33691:7, 33691:8, 33697:17, 33698:4, 33698:8, 33699:20, 33701:21, 33701:22, 33707:8, 33707:16, 33711:7, 33717:8, 33718:19, 33718:20, 33721:15, 33722:25, 33723:4, 33725:7, 33725:22, 33728:5, 33729:8, 33729:24, 33730:2, 33730:20, 33731:9, 33731:13, 33732:8, 33732:17, 33732:19, 33732:20, 33732:24, 33733:1, 33733:8, 33733:10, 33733:19, 33733:21, 33733:23, 33733:24, 33734:2, 33734:3,</p> | <p>33735:2, 33735:5, 33735:12, 33737:13, 33737:17, 33738:2, 33738:20, 33739:6, 33739:12, 33739:15, 33739:24, 33740:9, 33740:13, 33744:1, 33744:9, 33744:13, 33744:16, 33744:22, 33748:11, 33749:11, 33749:15, 33754:5, 33754:22, 33755:3, 33755:24, 33756:7, 33756:21, 33767:10, 33768:7, 33770:1, 33770:17, 33773:9, 33774:16, 33775:19, 33777:1, 33777:5, 33779:19, 33781:23, 33782:25, 33786:1, 33787:9, 33788:1, 33788:4, 33788:10, 33789:17, 33790:5, 33790:7, 33790:10, 33790:12, 33790:13, 33790:15, 33792:23, 33793:4, 33794:8, 33794:17, 33794:18, 33795:23, 33796:3, 33796:11, 33796:12, 33796:13, 33796:21, 33796:22, 33797:5, 33797:11, 33797:14, 33801:24, 33803:7, 33803:22, 33813:1 Evidence [4] - 33607:1, 33627:17, 33627:25, 33667:12 evidence' [1] - 33547:22 evidenced [1] - 33609:13 evident [1] - 33619:16 evil [2] - 33779:10, 33779:15 evolved [2] - 33566:5, 33641:2 ex [2] - 33785:3, 33785:7 ex-husband [1] - 33785:7 ex-wife [1] - 33785:3 exact [2] - 33577:19, 33724:19 exactly [4] - 33580:22, 33710:19, 33789:2, 33800:9 Exactly [5] - 33629:14, 33721:23, 33722:13, 33731:16, 33764:25</p> | <p>exam [1] - 33759:24 examination [18] - 33543:6, 33585:2, 33602:3, 33617:5, 33617:8, 33618:2, 33619:11, 33638:4, 33659:18, 33662:3, 33662:21, 33662:24, 33663:15, 33664:5, 33665:4, 33747:11, 33757:13, 33765:3 examinations [1] - 33623:15 examine [2] - 33595:5, 33737:16 examined [8] - 33550:5, 33572:3, 33598:9, 33636:17, 33643:1, 33688:12, 33717:22, 33743:15 Examiner [7] - 33538:21, 33540:2, 33541:25, 33657:23, 33681:1, 33688:3, 33695:5 examiner [26] - 33540:8, 33540:9, 33540:23, 33541:3, 33541:5, 33546:19, 33551:24, 33552:20, 33563:12, 33590:6, 33684:17, 33693:16, 33695:21, 33705:4, 33708:9, 33710:12, 33727:8, 33752:4, 33759:20, 33761:5, 33761:6, 33761:22, 33761:23, 33763:9, 33764:3, 33788:7 examiners [3] - 33541:10, 33606:12, 33762:2 examines [1] - 33781:23 examining [3] - 33551:20, 33629:5, 33637:2 example [9] - 33540:19, 33623:15, 33657:19, 33734:18, 33762:5, 33764:5, 33778:20, 33787:10, 33787:14 examples [1] - 33762:9 except [1] - 33779:11 excerpted [1] - 33592:22 excerpts [1] - 33747:22 Excerpts [1] - 33543:25 exchange [1] - 33672:22</p> | <p>exclude [27] - 33550:10, 33571:16, 33571:19, 33578:16, 33584:11, 33589:5, 33589:9, 33589:10, 33602:16, 33652:3, 33661:18, 33661:19, 33678:3, 33685:1, 33698:5, 33733:20, 33734:4, 33735:15, 33736:16, 33738:22, 33739:1, 33739:4, 33739:12, 33739:22, 33740:10, 33744:17, 33744:19 exclude' [1] - 33744:22 excluded [17] - 33571:12, 33571:14, 33572:6, 33588:20, 33589:4, 33649:19, 33677:14, 33682:6, 33683:5, 33689:10, 33689:12, 33731:14, 33732:13, 33733:16, 33733:17, 33734:5, 33737:2 excludes [7] - 33565:3, 33570:17, 33585:16, 33589:8, 33732:4, 33735:9, 33735:14 excludes' [1] - 33744:22 excluding [8] - 33550:21, 33648:25, 33650:20, 33658:9, 33677:19, 33726:9, 33735:3, 33740:14 exclusion [2] - 33736:20, 33744:23 exclusive [1] - 33801:17 excrete [2] - 33566:25, 33722:20 excretion [1] - 33655:8 exculpated [1] - 33570:15 excused [2] - 33750:4, 33765:13 Executive [1] - 33534:3 Exhibit [5] - 33717:21, 33718:6, 33718:9, 33719:8, 33719:17 exhibit [1] - 33753:8 exhibits [2] - 33595:6, 33717:4 Exhibits [1] - 33717:23 exist [2] - 33746:16, 33746:17 existed [2] - 33661:24, 33739:16</p> |
|---|--|---|---|---|



| | | | | |
|--|--|---|--|--|
| <p>existing [3] - 33609:1, 33609:20, 33644:22</p> <p>exonerate [3] - 33560:1, 33701:23, 33729:2</p> <p>exonerated [1] - 33559:17</p> <p>exonerates [1] - 33699:20</p> <p>expected [3] - 33558:22, 33674:21, 33755:21</p> <p>expecting [2] - 33549:5, 33683:22</p> <p>expects [2] - 33565:6, 33811:19</p> <p>expensive [1] - 33769:4</p> <p>experience [10] - 33566:7, 33567:25, 33608:11, 33625:19, 33625:23, 33626:8, 33626:17, 33626:18, 33670:12, 33695:15</p> <p>experienced [4] - 33695:21, 33727:7, 33727:12</p> <p>experiment [2] - 33568:2, 33722:2</p> <p>expert [3] - 33606:15, 33762:18, 33783:18</p> <p>expertise [5] - 33606:13, 33726:22, 33759:6, 33759:11, 33762:7</p> <p>expired [1] - 33722:8</p> <p>explain [8] - 33609:16, 33610:4, 33632:9, 33632:21, 33632:24, 33737:4, 33741:25, 33776:24</p> <p>explained [2] - 33573:1, 33641:1</p> <p>explains [3] - 33573:25, 33622:17, 33623:3</p> <p>explanation [3] - 33715:6, 33722:14, 33778:6</p> <p>exposure [1] - 33641:14</p> <p>express [3] - 33587:22, 33599:17, 33700:11</p> <p>expressed [17] - 33555:17, 33559:1, 33580:17, 33580:20, 33587:23, 33624:15, 33669:19, 33672:9, 33697:8, 33700:12, 33707:17, 33725:12, 33755:12, 33760:23, 33761:11, 33762:21</p> | <p>expressing [2] - 33588:5, 33622:11</p> <p>expression [2] - 33640:21, 33785:17</p> <p>extend [1] - 33545:2</p> <p>extension [1] - 33576:13</p> <p>extensive [1] - 33637:24</p> <p>extensively [2] - 33636:18, 33639:8</p> <p>extent [10] - 33551:9, 33571:5, 33637:22, 33683:14, 33689:5, 33692:16, 33694:3, 33754:10, 33756:21, 33794:19</p> <p>external [2] - 33621:24, 33631:11</p> <p>extra [3] - 33604:24, 33759:23, 33759:24</p> <p>extract [1] - 33545:24</p> <p>extracted [1] - 33721:3</p> <p>extradition [1] - 33542:6</p> <p>extraordinarily [1] - 33797:12</p> <p>extreme [2] - 33628:1, 33715:4</p> <p>extremely [1] - 33802:14</p> <p>eye [1] - 33564:13</p> <p>eyes [2] - 33609:7, 33610:8</p> | <p>33737:22, 33742:4, 33742:22, 33745:9, 33748:11, 33753:8, 33755:21, 33757:4, 33757:7, 33761:7, 33767:9, 33771:9, 33777:2, 33786:7, 33788:10, 33793:10, 33794:4, 33797:4, 33809:2, 33809:10</p> <p>factors [2] - 33663:12, 33663:14</p> <p>facts [4] - 33544:22, 33760:13, 33765:8, 33809:8</p> <p>factually [1] - 33768:6</p> <p>Fahrenheit [1] - 33641:11</p> <p>failed [12] - 33550:8, 33550:18, 33590:16, 33617:3, 33624:23, 33628:11, 33668:5, 33676:22, 33684:21, 33689:6, 33698:9, 33785:9</p> <p>fair [19] - 33679:12, 33698:3, 33701:8, 33721:15, 33723:8, 33729:12, 33729:13, 33731:3, 33731:4, 33731:15, 33732:19, 33733:13, 33733:25, 33735:17, 33737:7, 33751:10, 33751:16, 33754:12, 33804:7</p> <p>fairly [9] - 33544:4, 33579:6, 33627:9, 33675:11, 33685:8, 33735:13, 33756:24, 33794:7</p> <p>fairness [6] - 33596:9, 33601:5, 33611:6, 33611:19, 33623:9, 33648:4</p> <p>fallen [1] - 33728:24</p> <p>falls [1] - 33540:12</p> <p>false [1] - 33745:24</p> <p>familiar [3] - 33544:21, 33554:1, 33747:16</p> <p>family [11] - 33544:15, 33545:2, 33590:10, 33769:3, 33786:3, 33795:15, 33795:16, 33802:14, 33804:23, 33805:8, 33808:3</p> <p>far [11] - 33548:21, 33594:6, 33602:14, 33680:2, 33682:2, 33682:5, 33682:10, 33682:21, 33718:15,</p> | <p>33787:20</p> <p>Farris [1] - 33587:14</p> <p>fascinating [1] - 33548:20</p> <p>fatal [2] - 33608:1, 33608:10</p> <p>fate [1] - 33811:20</p> <p>favour [1] - 33735:3</p> <p>favourable [1] - 33794:9</p> <p>fax [1] - 33559:15</p> <p>fear [2] - 33596:15, 33601:1</p> <p>February [8] - 33566:2, 33602:6, 33636:1, 33636:13, 33639:6, 33706:4, 33776:7, 33791:23</p> <p>Federal [6] - 33543:21, 33551:13, 33555:24, 33781:22, 33804:3, 33811:18</p> <p>feelings [1] - 33551:7</p> <p>feet [1] - 33792:13</p> <p>fell [1] - 33758:25</p> <p>fellow [2] - 33777:11, 33807:20</p> <p>felt [4] - 33551:10, 33615:1, 33698:7, 33791:21</p> <p>female [1] - 33583:19</p> <p>Female [8] - 33584:10, 33584:13, 33584:17, 33584:21, 33585:3, 33586:4, 33587:1, 33587:12</p> <p>females [1] - 33627:23</p> <p>Ferris [57] - 33542:17, 33543:11, 33543:24, 33544:1, 33544:9, 33545:9, 33545:10, 33546:7, 33547:11, 33555:17, 33578:1, 33578:4, 33578:13, 33581:9, 33589:1, 33589:5, 33590:13, 33590:14, 33590:20, 33590:21, 33592:9, 33596:11, 33603:2, 33606:24, 33607:12, 33608:20, 33612:14, 33612:20, 33613:9, 33614:24, 33615:21, 33636:8, 33671:19, 33673:11, 33676:11, 33676:20, 33677:17, 33677:20, 33681:3, 33681:22, 33682:5, 33686:25, 33688:13, 33688:19, 33693:13,</p> | <p>33693:19, 33695:8, 33695:10, 33696:1, 33699:9, 33699:12, 33702:4, 33709:25, 33767:7, 33774:8, 33774:11, 33788:5</p> <p>Ferris [26] - 33544:16, 33547:23, 33550:3, 33550:15, 33583:25, 33589:15, 33592:8, 33603:3, 33607:3, 33607:8, 33612:24, 33616:15, 33623:25, 33636:3, 33639:3, 33639:16, 33671:6, 33671:16, 33673:14, 33682:12, 33693:8, 33695:6, 33697:5, 33700:18, 33702:1, 33733:22</p> <p>Ferriss [3] - 33548:18, 33549:21, 33551:4</p> <p>fertility [3] - 33568:6, 33568:8, 33721:14</p> <p>fertilize [1] - 33598:4</p> <p>few [8] - 33741:12, 33742:11, 33759:21, 33766:4, 33777:18, 33784:23, 33788:22, 33796:7</p> <p>Fibre [1] - 33672:14</p> <p>fibre [3] - 33653:7, 33658:15, 33672:17</p> <p>fibres [6] - 33650:17, 33672:21, 33673:6, 33673:18, 33673:23</p> <p>fido's [2] - 33691:19, 33692:20</p> <p>field [3] - 33760:17, 33760:22, 33762:4</p> <p>fifteen [1] - 33714:24</p> <p>Fifth [1] - 33801:23</p> <p>fight [1] - 33613:4</p> <p>fighting [2] - 33766:3, 33812:13</p> <p>file [15] - 33558:14, 33560:6, 33560:16, 33560:17, 33561:16, 33562:20, 33563:5, 33563:25, 33569:23, 33570:1, 33696:17, 33747:25, 33767:17, 33771:17, 33812:25</p> <p>filed [1] - 33789:21</p> <p>files [2] - 33704:18, 33804:20</p> <p>final [2] - 33753:13</p> <p>finally [1] - 33793:24</p> <p>findings [29] - 33540:18, 33545:18,</p> |
|--|--|---|--|--|



| | | | | |
|--|--|---|---|--|
| <p>33546:7, 33547:3, 33548:16, 33548:25, 33549:1, 33551:5, 33557:6, 33557:7, 33557:24, 33558:1, 33574:12, 33577:9, 33583:25, 33584:1, 33594:3, 33594:6, 33596:6, 33619:7, 33681:16, 33688:11, 33688:21, 33697:5, 33699:9, 33714:21, 33718:25, 33761:12, 33790:21</p> <p>Findings^[1] - 33701:18</p> <p>fine ^[8] - 33565:15, 33585:24, 33591:5, 33598:23, 33599:13, 33600:10, 33772:25, 33807:16</p> <p>finger ^[1] - 33785:6</p> <p>fingerprinting ^[1] - 33774:15</p> <p>fingers ^[1] - 33702:25</p> <p>finished ^[1] - 33546:25</p> <p>firm ^[3] - 33644:7, 33702:22, 33745:7</p> <p>first ^[50] - 33539:22, 33546:16, 33551:22, 33552:19, 33558:16, 33566:4, 33588:8, 33588:11, 33592:13, 33607:2, 33616:14, 33620:20, 33639:2, 33641:22, 33646:23, 33649:11, 33651:13, 33654:24, 33659:17, 33663:17, 33676:8, 33680:21, 33681:20, 33695:2, 33696:22, 33703:13, 33706:3, 33707:22, 33712:13, 33713:23, 33718:13, 33719:2, 33727:22, 33741:15, 33763:17, 33766:4, 33770:6, 33770:10, 33783:11, 33783:23, 33788:20, 33789:21, 33791:1, 33791:12, 33793:22, 33794:14, 33794:22, 33796:9, 33802:12, 33807:25</p> <p>First^[4] - 33566:7, 33569:10, 33712:14, 33800:25</p> <p>firstly ^[2] - 33618:4, 33630:6</p> <p>Fisher^[31] - 33535:10, 33691:22, 33711:25,</p> | <p>33783:7, 33783:13, 33783:20, 33783:21, 33784:13, 33784:16, 33785:6, 33785:18, 33786:11, 33786:16, 33786:21, 33787:4, 33787:9, 33787:15, 33787:21, 33791:25, 33792:22, 33792:24, 33792:25, 33793:17, 33801:9, 33803:15, 33803:18, 33803:20, 33804:13, 33804:20, 33807:9</p> <p>Fishers ^[4] - 33784:23, 33785:3, 33792:23, 33803:25</p> <p>fishy ^[1] - 33773:20</p> <p>fist ^[1] - 33702:25</p> <p>fit ^[3] - 33557:13, 33570:11, 33773:24</p> <p>five ^[5] - 33632:3, 33671:7, 33710:8, 33748:15, 33800:14</p> <p>five-eights ^[1] - 33632:3</p> <p>flat ^[1] - 33806:5</p> <p>flattery ^[1] - 33706:20</p> <p>flawed ^[1] - 33684:4</p> <p>flesh ^[1] - 33756:11</p> <p>flew ^[1] - 33706:18</p> <p>fluid ^[15] - 33573:6, 33573:7, 33573:14, 33624:19, 33645:9, 33645:12, 33645:14, 33667:11, 33715:21, 33722:7, 33722:15, 33722:16, 33742:22, 33742:24, 33773:17</p> <p>fluids ^[3] - 33617:6, 33645:6, 33687:9</p> <p>fluorescent ^[1] - 33568:18</p> <p>focused ^[1] - 33782:1</p> <p>focusing ^[2] - 33610:20, 33804:12</p> <p>folks ^[1] - 33797:24</p> <p>follow ^[9] - 33577:21, 33583:22, 33597:2, 33597:3, 33651:25, 33652:1, 33656:24, 33754:3, 33765:5</p> <p>follow-up ^[1] - 33765:5</p> <p>followed ^[6] - 33683:20, 33707:21, 33711:15, 33743:6, 33760:19, 33766:11</p> <p>following ^[13] - 33543:19, 33608:13, 33608:16, 33613:25,</p> | <p>33617:10, 33627:7, 33627:21, 33655:9, 33683:23, 33690:17, 33692:1, 33699:3, 33712:25</p> <p>Following^[1] - 33782:13</p> <p>follows ^[1] - 33590:11</p> <p>fool ^[1] - 33702:22</p> <p>foot ^[3] - 33774:24, 33778:4, 33778:14</p> <p>foot-dragging ^[3] - 33774:24, 33778:4, 33778:14</p> <p>footing ^[1] - 33776:8</p> <p>force ^[3] - 33609:1, 33609:21, 33654:8</p> <p>forces ^[1] - 33688:23</p> <p>forearms ^[1] - 33609:2</p> <p>foregoing ^[1] - 33815:4</p> <p>foregone ^[1] - 33710:2</p> <p>Forensic^[5] - 33624:21, 33694:22, 33714:10, 33714:11, 33715:18</p> <p>forensic ^[78] - 33538:24, 33539:1, 33539:2, 33540:21, 33540:22, 33540:24, 33543:11, 33544:18, 33546:19, 33551:25, 33552:21, 33557:3, 33557:15, 33563:12, 33563:14, 33570:15, 33570:17, 33570:20, 33571:12, 33572:3, 33576:13, 33579:4, 33584:9, 33585:15, 33588:6, 33588:10, 33589:3, 33589:23, 33590:12, 33601:13, 33604:11, 33605:4, 33605:8, 33606:9, 33606:11, 33624:3, 33624:7, 33632:18, 33632:19, 33633:13, 33638:5, 33677:18, 33678:25, 33679:3, 33682:4, 33684:10, 33684:16, 33688:12, 33688:14, 33689:5, 33691:7, 33693:4, 33707:16, 33709:6, 33710:1, 33727:22, 33728:10, 33733:10, 33736:19, 33759:22, 33760:4, 33760:5, 33760:12, 33761:1, 33761:20, 33762:1, 33762:2, 33762:3, 33762:23, 33764:22,</p> | <p>33764:23, 33767:6, 33796:13, 33796:21, 33796:22</p> <p>forget ^[3] - 33569:3, 33745:19, 33785:17</p> <p>forgive ^[1] - 33807:24</p> <p>form ^[6] - 33644:21, 33731:19, 33746:16, 33746:17, 33762:22, 33794:8</p> <p>formal ^[2] - 33545:5, 33775:2</p> <p>former ^[1] - 33729:7</p> <p>forms ^[1] - 33693:23</p> <p>Fort^[1] - 33784:1</p> <p>forth ^[1] - 33593:1</p> <p>forthcoming ^[1] - 33810:15</p> <p>forward ^[17] - 33538:9, 33625:25, 33666:2, 33694:11, 33696:17, 33698:24, 33703:10, 33704:21, 33709:12, 33710:20, 33713:7, 33767:12, 33790:12, 33795:21, 33796:4, 33802:6, 33813:2</p> <p>forwarded ^[5] - 33602:24, 33680:7, 33699:6, 33704:12</p> <p>forwarding ^[1] - 33591:13</p> <p>four ^[13] - 33569:14, 33569:15, 33597:16, 33627:4, 33638:4, 33638:21, 33639:14, 33644:9, 33652:12, 33684:12, 33691:11, 33721:21, 33784:16</p> <p>fourth ^[1] - 33621:6</p> <p>frame ^[4] - 33546:2, 33597:19, 33613:10, 33614:25</p> <p>frank ^[1] - 33617:12</p> <p>frankly ^[1] - 33793:17</p> <p>Fraye^[1] - 33535:11</p> <p>free ^[6] - 33544:24, 33747:10, 33774:4, 33798:25, 33804:24, 33809:10</p> <p>Free^[1] - 33546:14</p> <p>freedom ^[3] - 33795:4, 33802:16, 33812:13</p> <p>freeze ^[1] - 33641:9</p> <p>freezer ^[5] - 33568:9, 33568:14, 33569:3, 33569:16, 33641:18</p> <p>freezing ^[12] - 33602:12, 33618:11, 33619:12, 33621:7,</p> | <p>33628:1, 33629:12, 33629:17, 33629:23, 33629:25, 33630:5, 33630:21, 33631:2</p> <p>frequency ^[1] - 33764:21</p> <p>fresh ^[2] - 33569:11, 33797:14</p> <p>friend ^[3] - 33762:10, 33783:3, 33803:10</p> <p>Friend^[1] - 33735:6</p> <p>friendly ^[3] - 33703:6, 33806:11, 33811:8</p> <p>friends ^[2] - 33716:16, 33782:23</p> <p>froze ^[1] - 33705:11</p> <p>frozen ^[52] - 33550:1, 33566:1, 33568:19, 33569:6, 33572:7, 33574:4, 33575:2, 33597:20, 33597:22, 33597:24, 33597:25, 33598:2, 33627:25, 33628:3, 33628:21, 33628:24, 33628:25, 33630:10, 33630:12, 33630:13, 33630:14, 33635:25, 33637:15, 33638:16, 33642:3, 33642:11, 33662:21, 33664:13, 33667:7, 33670:5, 33684:23, 33691:11, 33704:7, 33705:10, 33716:7, 33716:13, 33720:1, 33720:21, 33720:23, 33720:24, 33721:11, 33721:21, 33755:8, 33755:9, 33755:11, 33756:12, 33756:16, 33756:17, 33756:23, 33757:7</p> <p>Frozen^[1] - 33720:10</p> <p>frustration ^[1] - 33544:14</p> <p>full ^[7] - 33548:9, 33550:24, 33552:7, 33568:7, 33749:10, 33761:25, 33779:11</p> <p>fully ^[1] - 33605:7</p> <p>function ^[5] - 33540:7, 33540:9, 33541:6, 33542:3, 33761:25</p> <p>functions ^[1] - 33761:7</p> <p>funny ^[1] - 33762:22</p> <p>future ^[2] - 33704:2, 33811:20</p> |
|--|--|---|---|--|



| | | | | |
|---|---|---|---|--|
| <p>G</p> <p>Gail^[27] - 33590:17, 33601:16, 33607:14, 33616:13, 33629:25, 33701:23, 33714:25, 33720:19, 33722:7, 33771:3, 33782:15, 33782:21, 33782:23, 33783:12, 33784:19, 33784:22, 33784:24, 33785:24, 33786:3, 33786:18, 33787:15, 33793:13, 33795:15, 33801:10, 33803:4, 33803:18, 33804:16</p> <p>gape^[1] - 33634:1</p> <p>gaping^[1] - 33634:4</p> <p>Garrett^[1] - 33535:6</p> <p>Gary^[1] - 33593:11</p> <p>gathered^[4] - 33630:18, 33720:7, 33723:12, 33799:2</p> <p>general^[6] - 33601:11, 33608:18, 33637:4, 33683:22, 33763:7, 33813:13</p> <p>General^[2] - 33687:1, 33688:14</p> <p>generally^[4] - 33553:7, 33555:6, 33614:21, 33701:13</p> <p>genetic^[2] - 33774:12, 33774:15</p> <p>genital^[2] - 33618:9, 33618:18</p> <p>genitalia^[1] - 33621:24</p> <p>genitals^[1] - 33621:18</p> <p>genito^[3] - 33618:8, 33620:19, 33621:20</p> <p>genito-urinary^[3] - 33618:8, 33620:19, 33621:20</p> <p>George^[1] - 33593:8</p> <p>Gerse^[1] - 33593:9</p> <p>Gibson^[10] - 33535:9, 33536:13, 33716:17, 33716:19, 33727:17, 33727:20, 33729:3, 33735:6, 33751:13, 33754:4</p> <p>Giles^[1] - 33593:14</p> <p>girl^[3] - 33767:20, 33767:22, 33773:16</p> <p>girl's^[1] - 33691:12</p> <p>girls^[1] - 33772:3</p> <p>given^[26] - 33555:4, 33583:9, 33596:13, 33605:7, 33609:14,</p> | <p>33612:25, 33627:17, 33627:18, 33627:25, 33628:4, 33661:5, 33667:13, 33667:21, 33668:20, 33671:2, 33672:16, 33673:7, 33754:10, 33756:7, 33767:19, 33785:5, 33788:9, 33795:22, 33798:2, 33806:18</p> <p>glad^[2] - 33793:18, 33807:22</p> <p>Glasgow^[2] - 33645:25, 33646:2</p> <p>glove^[1] - 33657:22</p> <p>gonna^[2] - 33585:13, 33585:14</p> <p>gory^[1] - 33784:4</p> <p>Government^[2] - 33535:4, 33694:24</p> <p>government^[3] - 33795:14, 33812:21, 33813:9</p> <p>gradually^[1] - 33775:16</p> <p>grant^[2] - 33812:22, 33813:10</p> <p>granted^[2] - 33770:23, 33799:1</p> <p>gratitude^[1] - 33545:3</p> <p>grave^[4] - 33575:20, 33575:21, 33576:4, 33672:10</p> <p>great^[8] - 33547:17, 33569:9, 33633:5, 33654:19, 33661:21, 33778:18, 33779:16, 33813:7</p> <p>ground^[1] - 33744:20</p> <p>grounds^[2] - 33678:17, 33686:17</p> <p>group^[14] - 33546:5, 33567:12, 33567:14, 33572:9, 33572:11, 33574:11, 33579:3, 33617:25, 33678:8, 33742:23, 33778:21, 33790:9, 33799:1, 33804:10</p> <p>groupie^[1] - 33762:24</p> <p>grouping^[4] - 33563:20, 33564:7, 33588:21, 33742:25</p> <p>guarantees^[1] - 33793:2</p> <p>guess^[18] - 33571:23, 33581:9, 33604:10, 33621:5, 33652:17, 33658:22, 33662:14, 33713:1, 33726:6,</p> | <p>33728:1, 33728:6, 33768:23, 33774:8, 33784:2, 33798:9, 33808:17, 33811:3</p> <p>guessing^[1] - 33668:11</p> <p>guide^[2] - 33759:8, 33772:18</p> <p>guilt^[7] - 33553:2, 33562:3, 33562:11, 33599:14, 33686:20, 33710:7, 33793:16</p> <p>guilty^[9] - 33571:7, 33599:21, 33782:8, 33782:14, 33784:13, 33785:14, 33795:25, 33806:13, 33806:15</p> <p>guy^[8] - 33582:8, 33582:9, 33707:4, 33779:22, 33780:16, 33780:17, 33791:15, 33792:6</p> <p>guys^[4] - 33596:20, 33752:22, 33807:20</p> <p>H</p> <p>habits^[1] - 33561:22</p> <p>Hague^[1] - 33541:22</p> <p>hair^[29] - 33653:7, 33654:1, 33654:5, 33654:22, 33655:6, 33655:8, 33655:22, 33658:14, 33672:17, 33717:18, 33717:21, 33717:23, 33718:9, 33718:10, 33719:8, 33719:10, 33719:14, 33719:17, 33720:5, 33720:23, 33729:17, 33750:14, 33751:13, 33755:9, 33755:13, 33755:15, 33755:19, 33756:18, 33756:22</p> <p>Hair^[1] - 33672:14</p> <p>hairs^[21] - 33650:16, 33653:8, 33654:9, 33654:12, 33655:3, 33656:11, 33658:18, 33673:6, 33673:18, 33718:5, 33718:7, 33718:25, 33719:4, 33719:5, 33719:11, 33719:16, 33719:24, 33720:5, 33721:4, 33750:13, 33757:7</p> <p>half^[2] - 33656:1, 33812:4</p> <p>half-way^[1] - 33656:1</p> <p>Hall^[2] - 33592:7,</p> | <p>33604:12</p> <p>halting^[3] - 33742:13, 33742:14</p> <p>hand^[2] - 33585:22, 33714:16</p> <p>handled^[1] - 33601:13</p> <p>handling^[1] - 33711:13</p> <p>hands^[2] - 33765:18, 33766:16</p> <p>happy^[1] - 33598:5</p> <p>hard^[4] - 33638:19, 33759:23, 33768:18, 33788:1</p> <p>hardly^[2] - 33549:8, 33686:22</p> <p>Hardy^[54] - 33534:2, 33536:4, 33538:5, 33538:7, 33538:12, 33552:5, 33552:7, 33552:10, 33552:15, 33552:18, 33576:2, 33579:14, 33579:22, 33579:25, 33580:4, 33580:7, 33580:9, 33580:12, 33580:16, 33581:12, 33581:16, 33583:4, 33600:17, 33616:4, 33616:8, 33660:4, 33660:7, 33660:13, 33660:17, 33660:21, 33662:18, 33663:11, 33663:25, 33664:6, 33667:2, 33676:7, 33679:17, 33679:21, 33691:24, 33716:14, 33716:21, 33751:22, 33765:2, 33765:11, 33765:15, 33765:23, 33772:2, 33772:7, 33772:10, 33772:14, 33772:19, 33772:22, 33789:8, 33814:2</p> <p>Harper^[1] - 33759:2</p> <p>Harry^[1] - 33597:5</p> <p>hate^[4] - 33801:12, 33807:8, 33807:11</p> <p>hatred^[1] - 33715:4</p> <p>head^[3] - 33563:13, 33687:1, 33688:13</p> <p>headed^[1] - 33760:4</p> <p>heading^[6] - 33607:1, 33620:22, 33635:22, 33667:4, 33684:4, 33713:10</p> <p>headings^[1] - 33606:23</p> <p>Health^[2] - 33540:4, 33564:3</p> <p>healthy^[3] - 33810:19, 33810:21, 33810:25</p> | <p>hear^[3] - 33549:5, 33710:14, 33805:14</p> <p>heard^[19] - 33574:1, 33599:25, 33600:21, 33603:21, 33647:21, 33677:24, 33732:17, 33735:25, 33736:2, 33743:5, 33745:21, 33756:14, 33762:9, 33763:18, 33771:24, 33784:15, 33785:20, 33791:12, 33802:13</p> <p>hearing^[4] - 33595:11, 33661:22, 33707:24, 33804:7</p> <p>heart^[4] - 33607:19, 33609:7, 33610:10, 33610:25</p> <p>heavy^[1] - 33639:11</p> <p>heed^[1] - 33544:20</p> <p>held^[3] - 33678:22, 33711:19, 33759:14</p> <p>Helen^[1] - 33593:9</p> <p>help^[11] - 33597:2, 33597:3, 33766:21, 33768:16, 33768:18, 33773:24, 33774:12, 33791:18, 33791:20, 33792:2, 33799:12</p> <p>helped^[2] - 33804:11, 33807:23</p> <p>helpful^[1] - 33606:22</p> <p>helping^[3] - 33768:14, 33769:6, 33791:21</p> <p>helps^[1] - 33574:18</p> <p>Hematopathologist^[1] - 33564:3</p> <p>hemochromogen^[2] - 33668:5, 33669:24</p> <p>hemostix^[4] - 33573:22, 33573:25, 33575:5, 33575:24</p> <p>Hemostix^[2] - 33667:16, 33669:23</p> <p>hereby^[1] - 33815:4</p> <p>herein^[1] - 33815:6</p> <p>Hermanus^[2] - 33536:3, 33538:10</p> <p>herself^[1] - 33542:5</p> <p>Hersh^[4] - 33535:2, 33584:5, 33758:10, 33758:12</p> <p>hesitate^[1] - 33556:12</p> <p>hide^[2] - 33770:20, 33771:11</p> <p>hiding^[2] - 33771:18, 33771:19</p> <p>higher^[2] - 33740:10, 33740:13</p> <p>highly^[3] - 33555:2,</p> |
|---|---|---|---|--|



| | | | | |
|---|---|--|---|--|
| <p>33567:17, 33707:6 Hill [1] - 33812:14 himself [2] - 33647:4, 33802:13 Hinz [3] - 33534:8, 33815:2, 33815:13 histology [1] - 33594:10 histories [1] - 33787:11 history [3] - 33592:18, 33783:9, 33802:9 hit [4] - 33633:8, 33633:25, 33675:19, 33676:1 hits [1] - 33633:4 Hogan [1] - 33759:18 hold [9] - 33597:20, 33598:1, 33598:6, 33629:13, 33631:15, 33761:23, 33808:1, 33810:14, 33810:16 holding [1] - 33542:4 holds [3] - 33541:4, 33541:7, 33609:5 holidays [1] - 33775:25 home [3] - 33591:3, 33782:22, 33785:9 homicide [1] - 33540:15 homicides [1] - 33758:24 Hon [8] - 33535:13, 33799:13, 33800:1, 33800:4, 33800:6, 33800:11, 33804:6, 33813:3 Honourable [1] - 33533:6 hope [14] - 33544:16, 33546:9, 33666:10, 33688:1, 33747:9, 33764:21, 33771:7, 33794:5, 33794:16, 33794:20, 33797:11, 33797:13, 33800:16, 33803:1 hopefully [4] - 33720:14, 33721:1, 33759:8, 33794:9 hopes [1] - 33804:22 hoping [5] - 33546:6, 33771:21, 33773:4, 33773:23, 33799:2 Hopkins [5] - 33535:14, 33536:14, 33729:5, 33729:6, 33741:5 horrifying [1] - 33714:22 Hospital [2] - 33687:2, 33688:15 hospital [1] - 33798:21</p> | <p>hospitals [2] - 33573:4, 33667:13 hostile [1] - 33627:11 hostility [1] - 33807:7 hot [1] - 33776:8 hot-footing [1] - 33776:8 hour [3] - 33629:15, 33768:8, 33789:23 Hours [2] - 33782:4, 33786:24 hours [10] - 33597:16, 33602:2, 33607:16, 33627:5, 33627:7, 33627:20, 33629:4, 33629:23, 33741:12, 33768:3 House [1] - 33812:20 house [7] - 33771:3, 33777:6, 33777:7, 33777:16, 33777:20, 33782:25, 33810:2 household [1] - 33736:6 Huff [5] - 33783:17, 33783:23, 33784:9, 33784:15, 33786:6 Hugh [1] - 33534:10 Human [1] - 33641:9 human [105] - 33564:11, 33564:13, 33564:19, 33564:23, 33572:10, 33572:20, 33573:7, 33581:23, 33596:17, 33597:7, 33600:4, 33600:13, 33600:25, 33603:18, 33627:16, 33640:5, 33640:13, 33642:23, 33644:1, 33644:10, 33644:17, 33644:24, 33645:3, 33645:5, 33645:9, 33645:15, 33645:16, 33646:9, 33646:10, 33646:21, 33647:7, 33647:9, 33647:11, 33647:18, 33648:20, 33648:22, 33648:23, 33648:24, 33649:1, 33649:8, 33649:14, 33649:15, 33649:17, 33650:11, 33650:20, 33653:8, 33654:1, 33654:3, 33658:10, 33658:20, 33659:5, 33659:16, 33659:19, 33661:18, 33662:5, 33662:25, 33663:14, 33664:12, 33664:14, 33664:23, 33665:7,</p> | <p>33665:10, 33665:11, 33665:13, 33666:3, 33666:4, 33666:13, 33666:17, 33669:6, 33677:6, 33678:11, 33683:9, 33685:25, 33694:6, 33695:20, 33695:23, 33705:9, 33705:12, 33718:5, 33718:8, 33719:5, 33719:13, 33722:16, 33725:21, 33725:24, 33726:10, 33727:6, 33727:9, 33729:12, 33729:19, 33730:1, 33730:4, 33730:15, 33730:21, 33735:24, 33750:14, 33755:15, 33756:18, 33757:11, 33757:14, 33757:15, 33780:6, 33808:22 humanity [3] - 33581:22, 33666:9, 33780:5 humans [1] - 33646:7 Humans [1] - 33567:1 husband [2] - 33785:7, 33785:11</p> <p style="text-align: center;">I</p> <p>icy [1] - 33568:11 Id [11] - 33579:23, 33579:25, 33690:22, 33715:19, 33727:15, 33730:8, 33741:6, 33749:14, 33754:19, 33754:24, 33756:1 idea [2] - 33547:6, 33788:13 ideally [2] - 33584:4, 33584:5 identical [3] - 33540:10, 33665:21, 33793:13 Identification [2] - 33631:17, 33631:23 identification [1] - 33554:21 identified [11] - 33580:9, 33638:3, 33644:17, 33648:11, 33659:19, 33662:4, 33662:24, 33665:6, 33690:21, 33722:15, 33803:14 identify [1] - 33650:11 identity [2] - 33539:9, 33540:13 if/then [2] - 33731:19,</p> | <p>33743:8 ifs [1] - 33731:20 ignored [1] - 33809:9 ignoring [1] - 33745:9 ill [1] - 33800:7 imagine [5] - 33544:14, 33546:8, 33560:25, 33788:1, 33808:21 immediately [4] - 33554:2, 33608:10, 33637:9, 33638:22 imminent [5] - 33619:4, 33619:8, 33620:12, 33620:14, 33630:20 immobilized [2] - 33608:2, 33612:25 immobilizing [1] - 33608:11 impact [9] - 33557:6, 33557:7, 33557:24, 33557:25, 33660:24, 33668:21, 33735:8, 33735:13, 33736:14 impacted [6] - 33562:21, 33653:20, 33659:24, 33663:7, 33663:21, 33663:22 implementation [1] - 33765:7 implied [3] - 33548:4, 33728:17, 33761:10 implies [1] - 33683:4 imply [1] - 33690:4 importance [1] - 33764:12 important [13] - 33561:19, 33579:6, 33603:19, 33607:17, 33651:15, 33662:10, 33760:16, 33793:7, 33793:19, 33796:2, 33796:23, 33801:24, 33805:14 importantly [1] - 33603:20 impossible [3] - 33615:16, 33657:15, 33789:2 impression [14] - 33547:25, 33556:19, 33562:2, 33614:24, 33622:3, 33624:24, 33633:18, 33648:14, 33671:3, 33673:7, 33710:11, 33724:7, 33738:11, 33755:14 imprisoned [1] - 33688:6 imprisonment [1] - 33560:21</p> | <p>improperly [1] - 33688:17 in-camera [1] - 33542:4 inability [1] - 33638:12 inaccurate [1] - 33683:14 inadequate [1] - 33753:19 inadmissible [2] - 33732:25, 33733:3 inappropriate [2] - 33707:6, 33753:19 inappropriately [1] - 33751:24 Inaudible [3] - 33584:18, 33767:5, 33770:4 inaudible [3] - 33769:13, 33771:5, 33771:6 incarceration [1] - 33560:18 inch [2] - 33632:3, 33720:22 include [4] - 33571:15, 33571:18, 33683:15, 33812:15 included [3] - 33547:14, 33661:6, 33661:8 includes [1] - 33563:15 Including [1] - 33641:18 including [7] - 33540:24, 33543:23, 33607:5, 33637:1, 33747:21, 33752:14, 33799:18 inclusion [1] - 33736:20 inconsistencies [1] - 33768:3 inconsistency [1] - 33773:9 incorporated [1] - 33603:10 incorrect [3] - 33557:17, 33599:1, 33626:13 incorrectly [1] - 33549:23 incredible [2] - 33609:12, 33611:16 inculcate [1] - 33570:21 Indeed [1] - 33740:18 indeed [13] - 33548:20, 33575:21, 33618:15, 33621:9, 33635:3, 33644:10, 33675:9, 33683:4, 33686:17,</p> |
|---|---|--|---|--|



| | | | | |
|--|--|--|---|---|
| <p>33706:13, 33729:2, 33737:25, 33759:12 independence [4] - 33760:8, 33760:16, 33761:8, 33764:2 independent [3] - 33579:8, 33762:25, 33792:21 Index [1] - 33536:1 indicate [7] - 33614:3, 33621:21, 33629:22, 33636:19, 33639:13, 33723:2, 33726:2 indicated [18] - 33558:21, 33558:24, 33560:7, 33570:5, 33658:24, 33660:23, 33662:4, 33683:8, 33692:12, 33710:17, 33717:1, 33717:7, 33721:10, 33727:2, 33727:10, 33751:21, 33757:12, 33791:24 indicates [3] - 33631:1, 33717:20, 33718:4 indicating [2] - 33589:25, 33662:11 indication [3] - 33630:4, 33665:24, 33794:11 indicative [2] - 33662:14, 33770:25 indicator [2] - 33641:3, 33651:17 indirect [1] - 33619:15 indirectly [2] - 33615:20, 33671:19 individual [2] - 33608:2, 33631:9 individuals [3] - 33558:25, 33583:6, 33608:12 inertia [1] - 33778:9 infections [1] - 33566:20 inference [10] - 33622:4, 33622:19, 33623:6, 33629:10, 33654:22, 33661:21, 33679:1, 33744:14, 33744:16, 33745:4 inferential [1] - 33697:9 inflammation [6] - 33618:9, 33618:18, 33621:3, 33621:19, 33621:23, 33624:13 inflicted [4] - 33607:15, 33611:5, 33612:17, 33633:15 Infliction [1] - 33614:13</p> | <p>influence [2] - 33583:13, 33664:22 influenced [1] - 33697:13 information [64] - 33539:20, 33544:24, 33559:19, 33560:12, 33561:5, 33561:6, 33561:8, 33561:13, 33561:15, 33561:16, 33561:25, 33562:19, 33562:20, 33585:12, 33587:19, 33630:7, 33630:18, 33633:19, 33635:6, 33651:9, 33651:11, 33653:14, 33655:11, 33659:6, 33659:22, 33659:23, 33660:6, 33660:23, 33661:5, 33662:20, 33664:16, 33664:21, 33670:9, 33670:10, 33687:18, 33692:5, 33692:7, 33692:10, 33695:7, 33699:25, 33703:21, 33706:21, 33709:4, 33713:17, 33715:14, 33716:3, 33716:25, 33718:12, 33719:20, 33721:5, 33721:7, 33723:13, 33725:2, 33747:20, 33754:7, 33754:11, 33766:9, 33766:10, 33767:18, 33776:12, 33795:20, 33799:15, 33799:17, 33800:19 informed [15] - 33624:20, 33640:7, 33642:25, 33643:3, 33646:14, 33646:18, 33646:24, 33647:1, 33648:20, 33723:3, 33723:14, 33723:22, 33723:24, 33724:3, 33724:24 ingrained [1] - 33779:13 initial [4] - 33545:13, 33638:4, 33639:21, 33707:21 initiated [2] - 33542:22, 33545:6 injuries [7] - 33607:25, 33608:3, 33608:14, 33608:16, 33609:2, 33609:4, 33612:17 injury [7] - 33608:12, 33609:21, 33610:13, 33618:8, 33620:18,</p> | <p>33621:19, 33621:23 injustice [2] - 33808:24, 33809:2 Inland [1] - 33534:11 inmate [1] - 33546:22 inner [2] - 33612:15, 33612:23 innocence [10] - 33553:3, 33562:11, 33589:21, 33599:14, 33686:21, 33767:2, 33793:1, 33801:6, 33802:4, 33812:7 innocent [13] - 33549:14, 33552:2, 33552:23, 33589:25, 33705:14, 33707:1, 33768:7, 33768:21, 33774:17, 33775:20, 33801:19, 33805:9, 33812:9 innocently [1] - 33759:3 inquest [3] - 33541:4, 33541:5, 33541:7 inquests [1] - 33761:24 inquiries [1] - 33759:14 inquiring [1] - 33600:2 inquiry [14] - 33542:2, 33542:4, 33603:12, 33718:20, 33718:21, 33754:15, 33754:18, 33801:7, 33802:20, 33802:21, 33802:23, 33802:24, 33803:1 Inquiry [7] - 33533:2, 33533:23, 33563:8, 33659:13, 33660:19, 33668:17, 33765:7 inside [6] - 33675:6, 33773:16, 33807:14, 33807:16, 33809:5, 33809:17 insight [1] - 33778:18 insignificant [1] - 33751:9 insists [2] - 33781:20, 33802:2 insofar [2] - 33589:2, 33796:24 Inspector [1] - 33540:4 instance [1] - 33649:13 instances [2] - 33541:1, 33784:10 Instead [1] - 33802:15 instead [1] - 33634:2 Institution [1] - 33546:22 instructed [1] - 33678:24</p> | <p>instructions [1] - 33667:18 instrumental [1] - 33795:20 insufficient [6] - 33606:3, 33617:24, 33623:22, 33676:12, 33676:14, 33699:16 intact [4] - 33626:25, 33627:13, 33627:20, 33628:25 integrity [7] - 33584:7, 33584:8, 33627:19, 33636:11, 33638:14, 33639:4, 33639:17 intellectually [2] - 33768:6, 33779:15 intendant [1] - 33607:23 intended [1] - 33703:6 intercepted [2] - 33554:13, 33605:15 intercourse [8] - 33598:19, 33602:13, 33627:7, 33627:21, 33628:5, 33628:12, 33629:22, 33674:10 interest [6] - 33551:4, 33559:1, 33595:15, 33683:23, 33761:11, 33763:1 interested [2] - 33540:17, 33712:5 interesting [5] - 33548:19, 33601:8, 33695:15, 33714:19, 33777:19 interfere [1] - 33649:21 interfered [1] - 33653:25 intermingled [2] - 33640:16, 33652:24 intermingling [3] - 33656:2, 33656:10, 33656:19 internal [3] - 33609:9, 33621:24, 33631:12 International [1] - 33541:21 interpretation [3] - 33696:2, 33788:9, 33797:3 interpretations [3] - 33617:20, 33671:11, 33671:15 interpreted [4] - 33549:23, 33578:16, 33619:10, 33688:17 interpreting [1] - 33628:22</p> | <p>interrogated [1] - 33783:20 interrogation [1] - 33702:23 intervened [1] - 33629:12 intervention [1] - 33602:11 interview [12] - 33590:24, 33595:21, 33686:12, 33689:19, 33696:20, 33703:4, 33706:15, 33706:18, 33707:13, 33785:4, 33786:17, 33801:17 interviewed [6] - 33702:21, 33710:3, 33710:9, 33770:10, 33777:23, 33786:18 interviewer [1] - 33772:13 Interviewer [61] - 33578:1, 33578:4, 33578:23, 33579:1, 33581:9, 33581:21, 33582:1, 33582:15, 33582:18, 33582:24, 33767:5, 33768:11, 33769:12, 33770:2, 33770:4, 33771:5, 33771:20, 33773:21, 33774:5, 33774:8, 33774:23, 33775:6, 33775:8, 33776:5, 33776:21, 33777:8, 33777:22, 33778:2, 33778:14, 33778:19, 33778:23, 33779:1, 33779:4, 33779:7, 33780:4, 33780:9, 33780:23, 33781:1, 33781:7, 33781:14, 33787:16, 33787:23, 33788:12, 33789:4, 33790:8, 33790:24, 33791:7, 33791:9, 33792:11, 33792:14, 33793:18, 33793:22, 33794:11, 33795:6, 33795:16, 33796:6, 33797:7, 33797:17, 33797:20, 33798:14, 33800:21 interviews [6] - 33595:14, 33604:5, 33691:25, 33706:16, 33790:21, 33791:7 intimately [1] - 33544:21 intrigued [1] - 33548:17</p> |
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| | | | | |
|---|---|--|--|--|
| <p>introduced [1] - 33695:11</p> <p>introductory [1] - 33706:20</p> <p>invalid [2] - 33573:7, 33575:6</p> <p>investigate [2] - 33586:12, 33787:6</p> <p>investigated [1] - 33787:22</p> <p>investigating [1] - 33775:15</p> <p>investigation [20] - 33582:2, 33594:18, 33601:17, 33711:11, 33711:15, 33724:5, 33724:6, 33761:2, 33763:8, 33763:19, 33763:21, 33775:8, 33776:4, 33780:10, 33782:1, 33785:1, 33785:24, 33786:19, 33788:23, 33789:3</p> <p>investigations [3] - 33626:9, 33626:17, 33759:5</p> <p>investigator [14] - 33582:6, 33582:9, 33582:15, 33710:4, 33778:2, 33780:14, 33780:17, 33780:23, 33783:18, 33787:18, 33788:25, 33792:5, 33792:9, 33804:10</p> <p>investigators [3] - 33624:23, 33684:21, 33691:4</p> <p>invite [1] - 33763:14</p> <p>invited [1] - 33697:18</p> <p>involved [22] - 33542:10, 33545:9, 33551:13, 33563:9, 33566:17, 33583:7, 33611:20, 33615:14, 33633:21, 33657:4, 33680:11, 33696:14, 33702:21, 33711:20, 33711:23, 33751:25, 33770:13, 33785:23, 33787:23, 33791:10, 33792:9, 33795:12</p> <p>involvement [13] - 33542:22, 33543:4, 33543:9, 33543:10, 33545:6, 33547:5, 33549:6, 33712:2, 33712:13, 33758:19, 33759:4, 33803:19, 33805:5</p> <p>Irene [1] - 33534:7</p> | <p>irrelevant [1] - 33665:23</p> <p>isolated [1] - 33802:15</p> <p>issue [20] - 33567:5, 33568:23, 33616:23, 33623:16, 33625:4, 33657:1, 33657:7, 33662:7, 33666:15, 33701:11, 33708:12, 33729:10, 33733:12, 33736:22, 33736:23, 33743:14, 33761:21, 33763:10, 33767:24, 33811:1</p> <p>issues [2] - 33539:5, 33564:7</p> <p>item [1] - 33592:12</p> <p>items [2] - 33592:17, 33697:1</p> <p>itself [7] - 33557:14, 33580:7, 33616:1, 33672:20, 33726:20, 33742:8, 33749:2</p> | <p>job [2] - 33602:17, 33768:15</p> <p>Joe [4] - 33593:3, 33684:24, 33785:22, 33786:2</p> <p>John [2] - 33593:8, 33593:10</p> <p>Johnson [1] - 33758:24</p> <p>Joining [1] - 33789:23</p> <p>joining [1] - 33798:15</p> <p>jokes [1] - 33596:19</p> <p>Jordan [1] - 33534:2</p> <p>Joseph [1] - 33593:8</p> <p>journal [2] - 33567:17</p> <p>journalist [1] - 33549:13</p> <p>Joyce [78] - 33535:3, 33581:18, 33582:5, 33582:11, 33582:17, 33582:20, 33583:1, 33583:18, 33585:6, 33585:9, 33585:11, 33586:10, 33586:14, 33586:16, 33586:22, 33587:2, 33590:4, 33590:18, 33712:8, 33766:2, 33767:6, 33768:12, 33769:14, 33770:3, 33770:5, 33771:7, 33771:21, 33773:3, 33773:22, 33774:10, 33775:1, 33775:4, 33775:7, 33775:11, 33775:13, 33776:6, 33776:7, 33777:3, 33777:9, 33777:17, 33777:25, 33778:12, 33780:1, 33780:2, 33780:13, 33780:19, 33780:25, 33781:3, 33781:9, 33781:13, 33781:16, 33789:24, 33790:6, 33790:11, 33791:4, 33791:8, 33791:11, 33792:12, 33795:10, 33795:18, 33797:18, 33797:21, 33798:22, 33799:11, 33799:23, 33800:3, 33800:5, 33800:9, 33800:13, 33800:17, 33800:22, 33804:23, 33805:3, 33812:8, 33812:13, 33812:18, 33813:19</p> <p>judge [6] - 33541:7, 33556:23, 33557:8, 33671:2, 33767:14, 33798:3</p> <p>Judge [2] - 33594:4,</p> | <p>33670:16</p> <p>Judges [1] - 33556:9</p> <p>judge's [4] - 33556:13, 33556:21, 33557:23, 33697:18</p> <p>judgements [1] - 33797:15</p> <p>judging [1] - 33723:7</p> <p>judicial [2] - 33541:6, 33592:18</p> <p>jugular [1] - 33676:1</p> <p>July [1] - 33540:2</p> <p>jumped [2] - 33603:11, 33792:11</p> <p>June [20] - 33533:21, 33558:23, 33571:22, 33571:24, 33589:19, 33591:15, 33657:22, 33680:19, 33684:3, 33687:25, 33689:15, 33693:5, 33694:15, 33696:19, 33696:23, 33699:2, 33699:6, 33703:10, 33708:9, 33754:6</p> <p>junk [5] - 33584:16, 33587:10, 33587:11, 33587:23, 33588:2</p> <p>jury [30] - 33556:10, 33556:19, 33585:5, 33594:5, 33595:1, 33670:17, 33673:13, 33678:20, 33678:23, 33679:9, 33697:13, 33697:16, 33698:3, 33705:16, 33740:1, 33740:17, 33740:21, 33741:10, 33742:2, 33743:18, 33744:13, 33745:5, 33750:4, 33750:7, 33750:11, 33750:21, 33782:12, 33782:18, 33793:10, 33793:13</p> <p>Justice [53] - 33533:6, 33535:12, 33535:14, 33540:3, 33543:22, 33544:10, 33544:20, 33551:3, 33551:13, 33555:25, 33582:19, 33680:4, 33688:24, 33693:4, 33702:20, 33707:6, 33759:19, 33760:1, 33760:8, 33760:11, 33760:24, 33767:3, 33769:1, 33774:25, 33775:2, 33778:5, 33778:21, 33779:11, 33781:2, 33781:10, 33781:12,</p> | <p>33781:22, 33786:20, 33787:19, 33788:21, 33789:1, 33789:20, 33791:1, 33793:25, 33794:5, 33794:12, 33796:4, 33796:8, 33797:2, 33797:8, 33801:8, 33802:20, 33802:21, 33802:24, 33804:4, 33804:12, 33805:7, 33811:18</p> <p>justice [9] - 33539:6, 33541:18, 33593:3, 33709:18, 33729:7, 33799:24, 33801:18, 33812:1, 33812:24</p> |
| K | | | | |
| <p>Karen [3] - 33534:8, 33815:2, 33815:13</p> <p>Karst [2] - 33535:8, 33593:9</p> <p>Keating [2] - 33703:17, 33704:11</p> <p>keep [2] - 33568:10, 33773:22</p> <p>keeping [1] - 33742:12</p> <p>Keith [1] - 33593:9</p> <p>kept [4] - 33569:16, 33659:15, 33775:13, 33777:4</p> <p>Key [2] - 33549:21, 33684:4</p> <p>key [5] - 33641:3, 33651:16, 33684:7, 33781:25, 33804:19</p> <p>kidneys [1] - 33566:16</p> <p>kill [2] - 33615:8, 33786:15</p> <p>killed [5] - 33542:5, 33782:22, 33801:10, 33803:4, 33804:15</p> <p>killer [11] - 33701:24, 33714:23, 33715:1, 33766:9, 33767:2, 33774:3, 33775:21, 33776:2, 33776:14, 33790:23, 33791:25</p> <p>Kim [9] - 33585:12, 33715:16, 33773:5, 33797:22, 33797:25, 33804:4, 33804:6, 33811:18, 33813:3</p> <p>kind [12] - 33539:12, 33542:16, 33561:11, 33564:16, 33613:5, 33718:12, 33722:2, 33728:24, 33740:16,</p> | | | | |



| | | | | |
|---|--|--|--|--|
| 33744:11, 33806:11, 33810:2 Kings [1] - 33784:1 Kirby [1] - 33593:10 kitchen [1] - 33785:10 Kleiv [2] - 33593:8, 33593:14 knees [1] - 33609:3 Knife [1] - 33631:7 knife [37] - 33631:9, 33631:19, 33632:2, 33632:5, 33632:7, 33632:9, 33632:22, 33632:25, 33633:2, 33633:4, 33633:5, 33633:15, 33633:17, 33633:24, 33634:1, 33634:7, 33634:10, 33635:1, 33635:3, 33635:8, 33635:14, 33635:17, 33635:18, 33635:19, 33675:1, 33700:21, 33715:6, 33773:14, 33782:19, 33783:24, 33784:9, 33784:10, 33784:11, 33784:12, 33785:10, 33803:13 knives [2] - 33633:21, 33773:11 knowing [7] - 33565:21, 33674:19, 33744:24, 33766:17, 33801:13, 33807:9, 33807:11 knowledge [8] - 33544:12, 33624:17, 33625:23, 33626:8, 33626:14, 33631:13, 33737:15, 33815:6 known [18] - 33568:16, 33572:13, 33573:13, 33608:24, 33625:12, 33625:24, 33626:7, 33661:7, 33661:9, 33662:6, 33663:20, 33664:16, 33665:3, 33670:9, 33670:11, 33675:8, 33714:5, 33753:8 knows [4] - 33766:21, 33766:25, 33773:23, 33800:20 Knox [9] - 33535:5, 33536:16, 33747:12, 33747:13, 33748:24, 33749:5, 33749:8, 33749:19, 33753:24 Kosovo [1] - 33541:25 Krogan [1] - 33535:4 Krogan-stevly [1] - | 33535:4 Kujawa [1] - 33535:6 L lab [17] - 33594:16, 33601:3, 33615:13, 33648:3, 33648:11, 33648:12, 33653:8, 33659:13, 33660:7, 33660:11, 33660:13, 33660:17, 33717:13, 33721:14, 33747:21, 33751:12 Laboratory [4] - 33624:21, 33643:3, 33658:16, 33694:22 laboratory [4] - 33573:15, 33594:2, 33594:6, 33594:11 lack [3] - 33605:23, 33609:5, 33609:9 ladies [1] - 33598:16 lady [3] - 33654:6, 33758:25, 33806:9 laid [1] - 33801:23 lain [1] - 33638:23 Lana [1] - 33535:4 land [1] - 33588:23 lane [2] - 33554:18, 33605:19 lapse [2] - 33569:5, 33569:8 large [2] - 33636:25, 33778:21 largely [1] - 33668:12 Larry [24] - 33535:10, 33711:25, 33783:7, 33783:20, 33785:8, 33786:11, 33786:21, 33787:4, 33787:9, 33787:15, 33787:21, 33791:25, 33792:22, 33792:24, 33792:25, 33793:16, 33801:9, 33803:15, 33803:20, 33803:25, 33804:13, 33804:20, 33807:8 Last [2] - 33801:22, 33803:6 last [21] - 33575:17, 33603:5, 33606:19, 33612:12, 33620:21, 33627:21, 33632:20, 33671:4, 33674:5, 33682:14, 33683:6, 33685:9, 33709:15, 33713:8, 33715:13, 33727:15, 33765:3, | 33791:6, 33797:9, 33802:4, 33811:23 late [1] - 33794:4 lately [1] - 33798:20 latest [2] - 33800:19, 33812:2 laughed [1] - 33596:24 law [2] - 33540:25, 33776:17 lawyer [13] - 33548:14, 33555:24, 33590:10, 33596:19, 33688:7, 33693:18, 33766:23, 33767:14, 33769:23, 33774:18, 33789:25, 33792:19, 33812:25 Lawyer [1] - 33688:8 lawyers [4] - 33542:25, 33603:7, 33760:23, 33788:18 lay [1] - 33715:2 laying [1] - 33690:8 lead [5] - 33606:1, 33633:12, 33675:6, 33782:25, 33790:4 leader [1] - 33812:15 leading [3] - 33686:14, 33766:9, 33787:9 leafy [8] - 33735:24, 33737:10, 33737:13, 33737:19, 33744:11, 33745:22, 33746:1, 33746:17 leaked [1] - 33655:5 lean [1] - 33763:2 learned [5] - 33547:5, 33594:25, 33603:7, 33782:2, 33804:1 learning [1] - 33709:6 least [14] - 33567:6, 33608:15, 33634:23, 33652:4, 33685:6, 33691:17, 33714:24, 33729:25, 33736:4, 33762:3, 33778:7, 33794:25, 33795:3, 33798:25 leather [9] - 33657:22, 33667:24, 33736:2, 33736:4, 33744:11, 33745:23, 33746:1, 33746:16, 33746:25 leave [3] - 33604:8, 33674:14, 33675:15 leaving [1] - 33771:3 led [2] - 33777:5, 33803:8 left [12] - 33549:20, 33585:22, 33605:11, 33611:13, 33616:10, | 33620:16, 33679:23, 33724:7, 33757:20, 33757:22, 33789:9, 33809:7 left-hand [1] - 33585:22 Legal [3] - 33769:4, 33769:18, 33769:19 legal [4] - 33561:10, 33739:8, 33793:2, 33793:19 legislation [1] - 33540:12 legs [1] - 33609:3 legwork [1] - 33794:23 length [3] - 33632:7, 33634:16, 33760:10 less [12] - 33602:2, 33610:24, 33614:12, 33614:16, 33653:1, 33659:25, 33661:2, 33663:8, 33762:1, 33763:22, 33784:18, 33794:13 Less [1] - 33786:13 Lett [2] - 33546:14, 33547:4 letter [20] - 33543:14, 33545:12, 33548:6, 33553:13, 33556:3, 33556:5, 33571:25, 33574:6, 33579:21, 33671:7, 33680:17, 33680:19, 33694:12, 33694:14, 33695:1, 33696:12, 33699:2, 33703:10, 33703:15, 33709:11 letters [1] - 33593:1 letting [1] - 33769:13 level [1] - 33544:14 Lewis [3] - 33593:3, 33593:13, 33813:15 Liberal [1] - 33812:15 liberate [1] - 33573:10 license [1] - 33715:11 lie [1] - 33783:18 lied [2] - 33796:18, 33803:11 Lieutenant [3] - 33566:2, 33636:1, 33651:19 lieutenant [1] - 33684:24 life [5] - 33628:23, 33709:11, 33782:10, 33789:14, 33812:4 light [8] - 33568:16, 33641:14, 33783:14, 33790:5, 33794:18, 33797:14, 33798:12, | 33799:2 lightness [1] - 33606:17 likelihood [5] - 33612:15, 33740:4, 33740:8, 33740:12, 33740:13 likely [24] - 33564:14, 33577:8, 33577:11, 33579:17, 33617:1, 33620:1, 33620:6, 33621:13, 33659:25, 33661:2, 33663:8, 33679:17, 33684:9, 33723:23, 33728:4, 33729:10, 33729:11, 33729:18, 33744:3, 33757:15, 33757:16, 33757:23, 33763:22, 33814:2 limit [2] - 33613:16, 33628:5 limited [4] - 33603:4, 33626:11, 33671:10, 33754:10 limits [1] - 33667:19 limp [1] - 33606:16 Linda [5] - 33691:22, 33785:3, 33785:6, 33785:11, 33785:18 Linden [29] - 33801:14, 33801:16, 33801:22, 33802:25, 33803:3, 33803:24, 33804:9, 33805:4, 33805:13, 33805:21, 33806:3, 33806:21, 33807:13, 33807:19, 33807:24, 33808:4, 33808:8, 33808:10, 33808:14, 33808:21, 33809:11, 33809:22, 33810:8, 33810:18, 33810:22, 33811:1, 33811:6, 33811:10, 33811:12 line [5] - 33581:24, 33723:21, 33729:9, 33755:4, 33780:7 lines [2] - 33689:21, 33764:2 lining [1] - 33628:2 link [18] - 33550:8, 33550:19, 33567:10, 33578:8, 33578:13, 33590:16, 33628:11, 33673:22, 33676:22, 33677:22, 33681:6, 33682:3, 33682:7, 33689:6, 33691:9, 33698:13, 33773:19, 33788:11 |
|---|--|--|--|--|



| | | | | |
|--|--|--|--|---|
| <p>linked [4] - 33622:9, 33673:18, 33684:13, 33687:14</p> <p>linking [1] - 33687:3</p> <p>lip [1] - 33610:13</p> <p>liquid [1] - 33715:23</p> <p>list [7] - 33545:15, 33587:6, 33592:2, 33592:23, 33593:4, 33593:15, 33735:21</p> <p>listed [2] - 33604:9, 33671:12</p> <p>listen [2] - 33752:22, 33797:9</p> <p>listening [3] - 33772:1, 33772:12, 33795:14</p> <p>listing [1] - 33591:25</p> <p>lit [1] - 33799:6</p> <p>literary [1] - 33715:11</p> <p>live [2] - 33608:13, 33774:1</p> <p>lived [4] - 33777:6, 33784:18, 33786:8, 33787:12</p> <p>liver [3] - 33609:11, 33611:4, 33611:11</p> <p>living [4] - 33597:13, 33627:23, 33628:19, 33783:4</p> <p>Lloyd [1] - 33593:11</p> <p>located [3] - 33554:4, 33554:6, 33554:8</p> <p>location [2] - 33700:20, 33700:24</p> <p>locked [1] - 33809:3</p> <p>logic [1] - 33803:25</p> <p>look [39] - 33545:17, 33547:13, 33555:18, 33568:1, 33568:20, 33569:16, 33569:18, 33577:6, 33592:5, 33593:6, 33593:15, 33602:18, 33616:18, 33641:6, 33650:2, 33656:14, 33665:13, 33704:4, 33710:24, 33717:10, 33733:23, 33736:12, 33736:16, 33741:15, 33741:21, 33741:23, 33748:16, 33749:9, 33762:11, 33762:14, 33785:14, 33786:10, 33788:9, 33794:10, 33797:25, 33799:14, 33799:17, 33800:11, 33805:1</p> <p>looked [13] - 33555:22, 33569:7, 33609:18, 33640:23, 33642:22, 33650:4, 33707:23,</p> | <p>33720:15, 33747:23, 33748:2, 33768:7, 33785:16, 33788:3</p> <p>looking [5] - 33650:15, 33748:6, 33787:18, 33810:3, 33810:16</p> <p>looks [6] - 33633:17, 33634:4, 33713:15, 33743:8, 33765:23, 33783:8</p> <p>Loran [11] - 33535:7, 33536:17, 33720:14, 33753:25, 33754:2, 33754:22, 33755:2, 33756:1, 33756:2, 33756:6, 33758:8</p> <p>Lorne [5] - 33783:17, 33783:23, 33784:9, 33784:15, 33786:6</p> <p>lose [6] - 33597:13, 33597:14, 33597:18, 33627:3, 33627:18, 33739:24</p> <p>loss [1] - 33607:22</p> <p>lost [2] - 33616:18, 33773:12</p> <p>lousy [1] - 33806:2</p> <p>low [3] - 33567:9, 33567:16, 33740:8</p> <p>lower [1] - 33740:12</p> <p>luck [3] - 33800:22, 33800:23, 33812:17</p> <p>ludicrous [1] - 33797:5</p> <p>lump [1] - 33720:11</p> <p>lumps [7] - 33566:1, 33642:20, 33684:23, 33720:21, 33720:23, 33755:8, 33755:10</p> <p>lunch [2] - 33679:18, 33679:23</p> <p>luncheon [1] - 33799:10</p> <p>lung [3] - 33608:5, 33611:13</p> <p>lungs [2] - 33609:7, 33610:10</p> <p>luxury [1] - 33779:24</p> <p>lying [1] - 33782:16</p> | <p>33538:3, 33538:6, 33538:11, 33552:5, 33552:9, 33552:13, 33552:16, 33575:23, 33576:1, 33579:22, 33580:2, 33580:6, 33580:8, 33580:11, 33580:15, 33600:11, 33660:2, 33660:5, 33660:9, 33660:16, 33660:20, 33662:16, 33663:4, 33663:16, 33664:1, 33666:25, 33675:14, 33675:20, 33675:22, 33676:3, 33676:5, 33727:15, 33727:19, 33741:1, 33745:18, 33746:6, 33746:9, 33746:11, 33746:13, 33746:15, 33746:20, 33746:24, 33747:3, 33747:6, 33747:8, 33748:22, 33749:4, 33749:18, 33754:20, 33754:23, 33755:1, 33755:25, 33756:5, 33763:3, 33763:6, 33763:12, 33763:16, 33763:24, 33764:8, 33764:10, 33764:20, 33765:1, 33765:11, 33765:20, 33765:25, 33771:23, 33772:6, 33772:8, 33772:11, 33772:15, 33772:20, 33772:24, 33789:11, 33814:4</p> <p>Mackie [2] - 33593:9, 33593:10</p> <p>MacLellan [1] - 33812:23</p> <p>main [3] - 33686:25, 33696:25, 33797:24</p> <p>maintains [1] - 33688:4</p> <p>major [5] - 33581:23, 33607:19, 33767:12, 33780:6, 33781:14</p> <p>majority [1] - 33538:24</p> <p>Malchanko [2] - 33658:15, 33658:17</p> <p>male [3] - 33566:25, 33596:23, 33640:7</p> <p>males [2] - 33568:8, 33624:19</p> <p>man [16] - 33743:1, 33768:14, 33770:22, 33770:23, 33776:14, 33786:7, 33801:5, 33801:12, 33801:19, 33802:16, 33803:14,</p> | <p>33804:15, 33805:9, 33807:11, 33808:11, 33809:4</p> <p>man's [1] - 33588:23</p> <p>Manager [3] - 33534:4, 33534:5, 33581:14</p> <p>Manitoba [24] - 33538:22, 33540:3, 33540:4, 33540:5, 33541:12, 33549:16, 33563:13, 33564:5, 33598:3, 33657:24, 33681:1, 33695:5, 33705:4, 33708:9, 33710:11, 33760:9, 33761:15, 33762:12, 33769:15, 33769:16, 33769:18, 33788:7, 33801:16</p> <p>Manitoba's [8] - 33546:18, 33551:24, 33552:20, 33590:6, 33684:17, 33688:2, 33693:16, 33769:6</p> <p>manner [12] - 33540:14, 33541:1, 33572:14, 33574:7, 33599:11, 33612:6, 33643:21, 33650:8, 33723:7, 33724:1, 33726:15</p> <p>manufactured [1] - 33770:17</p> <p>manufacturer's [1] - 33667:18</p> <p>map [1] - 33771:1</p> <p>maps [1] - 33605:24</p> <p>March [3] - 33710:23, 33717:15, 33785:5</p> <p>marked [1] - 33719:4</p> <p>Markesteyn [112] - 33536:3, 33538:8, 33538:9, 33538:10, 33538:13, 33539:15, 33546:24, 33548:12, 33548:15, 33550:14, 33551:1, 33553:12, 33555:12, 33558:15, 33558:19, 33558:20, 33558:24, 33560:5, 33564:6, 33565:10, 33570:2, 33570:3, 33570:8, 33570:14, 33570:16, 33570:22, 33577:8, 33578:19, 33579:3, 33579:15, 33580:17, 33583:5, 33583:22, 33584:15, 33586:3, 33586:7, 33586:8, 33586:11, 33586:12, 33586:17,</p> | <p>33587:14, 33590:7, 33590:19, 33591:1, 33591:6, 33591:20, 33592:19, 33606:8, 33609:17, 33612:19, 33622:10, 33628:16, 33639:19, 33653:5, 33657:25, 33658:13, 33658:19, 33660:22, 33663:13, 33664:7, 33671:20, 33672:7, 33679:22, 33680:24, 33681:12, 33682:17, 33683:23, 33684:21, 33685:2, 33685:7, 33686:12, 33686:19, 33687:15, 33688:10, 33689:18, 33689:19, 33691:14, 33692:2, 33693:15, 33693:19, 33693:24, 33695:4, 33695:9, 33695:25, 33696:20, 33696:24, 33697:7, 33698:2, 33698:7, 33699:8, 33699:10, 33700:4, 33700:16, 33700:23, 33701:19, 33704:23, 33705:3, 33705:11, 33708:8, 33710:12, 33712:16, 33714:22, 33715:5, 33715:15, 33716:14, 33716:18, 33729:6, 33745:18, 33748:25, 33749:9, 33754:1, 33788:6</p> <p>Markesteyn's [10] - 33571:2, 33590:8, 33616:9, 33688:20, 33697:2, 33697:3, 33697:19, 33698:25, 33714:20, 33730:8</p> <p>Marshall [6] - 33535:14, 33729:6, 33770:2, 33770:7, 33771:6, 33778:15</p> <p>Marvin [1] - 33535:10</p> <p>match [1] - 33691:5</p> <p>Material [1] - 33672:14</p> <p>material [29] - 33542:17, 33545:20, 33560:24, 33604:14, 33605:4, 33642:24, 33643:1, 33645:11, 33668:1, 33669:6, 33672:17, 33672:23, 33691:11, 33715:25, 33729:11, 33729:12, 33730:1, 33735:25, 33736:15, 33737:11,</p> |
| M | | | | |
| <p>ma'am [10] - 33747:18, 33747:24, 33749:13, 33750:1, 33750:6, 33750:8, 33750:15, 33750:23, 33752:11, 33753:23</p> <p>Maccallum [76] - 33533:7, 33536:15,</p> | | | | |



| | | | | |
|--|--|--|--|--|
| <p>33737:14, 33737:19, 33737:24, 33737:25, 33744:11, 33779:2, 33790:25, 33791:2, 33791:5 materials [14] - 33544:7, 33545:13, 33545:15, 33547:13, 33556:11, 33591:25, 33592:2, 33604:9, 33604:10, 33604:12, 33717:16, 33736:2, 33747:25, 33751:2 matter [37] - 33540:17, 33542:11, 33542:15, 33542:22, 33543:4, 33545:4, 33555:18, 33556:10, 33556:17, 33556:25, 33557:18, 33562:15, 33574:18, 33576:9, 33576:21, 33591:11, 33591:16, 33596:3, 33596:8, 33599:8, 33611:6, 33613:17, 33614:11, 33622:1, 33647:25, 33660:1, 33661:3, 33664:17, 33676:17, 33706:17, 33711:14, 33742:2, 33752:7, 33765:3, 33794:3, 33797:3, 33806:15 matters [9] - 33542:25, 33623:19, 33633:22, 33653:22, 33670:12, 33674:17, 33709:15, 33711:21, 33711:23 Mccloskey [2] - 33790:16, 33795:19 Mcdonald [1] - 33593:11 Mcintyre [29] - 33801:14, 33801:16, 33801:22, 33802:25, 33803:3, 33803:24, 33804:9, 33805:4, 33805:13, 33805:21, 33806:3, 33806:21, 33807:13, 33807:19, 33807:24, 33808:4, 33808:8, 33808:10, 33808:14, 33808:21, 33809:11, 33809:22, 33810:8, 33810:18, 33810:22, 33811:1, 33811:6, 33811:10, 33811:12 Mclean [1] - 33535:3 McLeod [1] - 33593:11 mean [36] - 33557:1,</p> | <p>33561:10, 33579:2, 33585:9, 33586:2, 33587:4, 33587:9, 33598:15, 33601:10, 33603:23, 33633:25, 33634:6, 33652:8, 33663:17, 33670:23, 33672:25, 33673:17, 33685:16, 33685:17, 33707:15, 33738:16, 33739:5, 33745:25, 33763:25, 33769:11, 33774:20, 33774:25, 33777:7, 33777:22, 33778:6, 33781:14, 33795:4, 33808:5, 33809:23, 33810:9, 33811:3 meaning [7] - 33540:12, 33540:15, 33624:6, 33647:12, 33653:23, 33687:7, 33761:19 means [10] - 33564:14, 33583:12, 33603:9, 33605:1, 33634:8, 33654:20, 33742:10, 33761:4, 33800:20 meant [9] - 33588:22, 33594:8, 33594:14, 33653:19, 33655:1, 33655:8, 33655:23, 33673:11, 33686:8 meantime [2] - 33769:17, 33769:21 meat [1] - 33764:17 mechanism [1] - 33607:4 media [6] - 33709:7, 33752:7, 33752:9, 33752:14, 33786:4, 33791:12 medical [30] - 33540:7, 33540:9, 33540:23, 33541:3, 33541:5, 33541:9, 33546:18, 33551:24, 33552:20, 33560:8, 33561:9, 33563:11, 33590:6, 33606:12, 33624:16, 33684:17, 33693:16, 33705:4, 33708:8, 33710:12, 33752:4, 33759:20, 33761:4, 33761:6, 33761:22, 33761:23, 33762:2, 33763:8, 33764:3, 33788:7 Medical [8] - 33538:21, 33540:2, 33541:25, 33564:5, 33657:23,</p> | <p>33680:25, 33688:3, 33695:5 medically [1] - 33627:15 medicine [1] - 33675:8 Medicine [1] - 33539:23 meet [1] - 33693:4 meeting [6] - 33698:19, 33698:21, 33702:14, 33710:17, 33711:19, 33812:14 meets [2] - 33554:15, 33605:16 melted [3] - 33637:20, 33638:17, 33639:9 melting [1] - 33637:22 members [3] - 33594:5, 33750:3, 33804:18 memo [12] - 33558:11, 33558:13, 33563:5, 33563:6, 33563:23, 33563:25, 33569:19, 33569:23, 33569:25, 33571:9, 33696:17, 33696:19 memory [1] - 33643:13 men [1] - 33807:18 menstrual [1] - 33617:3 menstruation [13] - 33617:4, 33618:10, 33618:23, 33618:25, 33619:5, 33619:9, 33619:15, 33620:3, 33620:5, 33620:13, 33623:18, 33630:20, 33630:24 mental [1] - 33795:9 mention [9] - 33555:21, 33565:25, 33610:13, 33630:22, 33675:15, 33712:13, 33713:23, 33716:24, 33806:9 mentioned [26] - 33569:2, 33575:18, 33576:3, 33592:14, 33596:13, 33598:24, 33610:9, 33611:16, 33611:24, 33620:21, 33630:16, 33633:23, 33655:11, 33655:13, 33659:10, 33659:12, 33659:22, 33661:23, 33662:12, 33664:2, 33735:25, 33736:8, 33745:22, 33758:18, 33787:24, 33792:16 mentioning [6] - 33561:24, 33626:18, 33633:7, 33651:8, 33652:4, 33744:6</p> | <p>mentions [2] - 33563:7, 33744:8 merits [1] - 33678:24 Merry [21] - 33563:7, 33563:9, 33563:18, 33564:2, 33565:10, 33565:16, 33565:20, 33568:2, 33571:21, 33572:1, 33573:16, 33574:13, 33579:21, 33670:2, 33698:22, 33710:21, 33710:22, 33711:2, 33721:11 Merry's [1] - 33668:12 met [2] - 33731:21, 33732:12 method [1] - 33667:13 methodology [2] - 33644:11, 33645:18 methods [1] - 33804:14 Meyer [3] - 33534:9, 33815:2, 33815:17 microscope [3] - 33650:2, 33650:3, 33650:15 microscopic [9] - 33619:6, 33619:10, 33659:18, 33662:2, 33662:21, 33662:23, 33663:15, 33664:5, 33665:4 microscopically [1] - 33717:22 middle [6] - 33693:9, 33708:3, 33709:23, 33727:1, 33744:20, 33769:22 might [22] - 33572:19, 33572:23, 33587:12, 33587:19, 33592:19, 33605:4, 33629:8, 33630:4, 33649:6, 33650:4, 33652:2, 33658:1, 33666:15, 33677:14, 33683:13, 33728:15, 33751:18, 33758:3, 33759:11, 33772:3, 33792:21, 33806:5 Mike [1] - 33789:6 Milgaard [264] - 33533:4, 33535:2, 33535:3, 33542:11, 33543:21, 33544:15, 33545:1, 33546:5, 33546:15, 33546:20, 33547:1, 33548:2, 33549:14, 33549:24, 33550:8, 33550:19, 33550:21, 33552:2,</p> | <p>33552:23, 33553:24, 33554:13, 33559:18, 33560:6, 33560:11, 33560:18, 33562:4, 33565:4, 33570:16, 33570:21, 33571:7, 33571:12, 33571:19, 33571:20, 33574:9, 33575:13, 33576:20, 33578:5, 33578:9, 33578:12, 33578:14, 33581:18, 33581:19, 33582:5, 33582:11, 33582:17, 33582:20, 33583:1, 33583:18, 33585:6, 33585:9, 33585:11, 33586:10, 33586:14, 33586:16, 33586:22, 33587:2, 33589:4, 33589:7, 33590:4, 33590:10, 33590:16, 33590:18, 33590:24, 33592:22, 33593:2, 33595:18, 33599:21, 33604:12, 33604:14, 33605:15, 33621:22, 33622:13, 33623:4, 33658:7, 33669:4, 33671:8, 33671:22, 33672:2, 33672:12, 33676:13, 33676:22, 33677:14, 33677:19, 33680:12, 33681:7, 33681:14, 33682:3, 33682:19, 33682:24, 33683:5, 33683:12, 33684:8, 33684:13, 33687:4, 33687:6, 33688:4, 33689:6, 33691:4, 33691:9, 33694:9, 33698:4, 33699:15, 33699:21, 33700:5, 33701:23, 33702:1, 33703:12, 33705:14, 33709:17, 33711:14, 33712:22, 33713:14, 33714:8, 33723:11, 33723:15, 33730:25, 33731:2, 33731:10, 33731:14, 33732:3, 33732:9, 33733:20, 33734:4, 33735:3, 33735:9, 33735:15, 33736:16, 33737:2, 33745:7, 33752:15, 33758:10, 33766:2, 33767:6, 33767:8, 33768:12, 33769:14, 33770:3, 33770:5, 33771:7, 33771:15,</p> |
|--|--|--|--|--|



| | | | | |
|---|---|---|---|---|
| 33771:17, 33771:21, 33772:12, 33773:3, 33773:22, 33774:10, 33774:14, 33775:4, 33775:7, 33775:11, 33776:7, 33777:3, 33777:5, 33777:9, 33777:17, 33777:25, 33778:12, 33780:1, 33780:2, 33780:13, 33780:19, 33780:25, 33781:3, 33781:9, 33781:13, 33781:16, 33781:19, 33781:21, 33782:5, 33782:9, 33782:14, 33782:20, 33784:21, 33786:1, 33788:11, 33788:14, 33789:13, 33789:18, 33789:19, 33789:25, 33790:3, 33790:6, 33790:11, 33791:4, 33791:8, 33791:11, 33792:12, 33792:16, 33793:5, 33793:8, 33793:15, 33795:1, 33795:6, 33795:10, 33795:18, 33795:24, 33796:14, 33797:18, 33797:20, 33797:21, 33798:19, 33798:22, 33799:9, 33799:11, 33799:16, 33799:20, 33799:23, 33800:3, 33800:5, 33800:9, 33800:13, 33800:15, 33800:17, 33800:22, 33801:7, 33801:11, 33801:17, 33801:19, 33801:24, 33802:1, 33802:11, 33802:13, 33802:19, 33803:2, 33803:12, 33804:2, 33804:19, 33804:23, 33804:24, 33805:3, 33805:6, 33805:16, 33805:24, 33806:7, 33807:3, 33807:14, 33807:22, 33808:1, 33808:7, 33808:9, 33808:12, 33808:16, 33809:1, 33809:15, 33809:25, 33810:11, 33810:20, 33810:23, 33811:2, 33811:4, 33811:7, 33811:11, 33811:14, 33811:20, 33811:21, 33812:3, 33812:6, 33812:8, 33812:18, 33812:22, 33812:25, 33813:13, | 33813:19, 33813:25 Milgaard's ^[41] - 33548:13, 33553:2, 33555:25, 33560:21, 33562:11, 33589:21, 33589:22, 33590:15, 33677:10, 33678:3, 33678:21, 33686:20, 33687:10, 33688:6, 33688:16, 33691:19, 33693:17, 33693:21, 33696:3, 33706:3, 33707:21, 33708:6, 33710:6, 33712:8, 33713:22, 33718:21, 33730:19, 33730:23, 33731:6, 33753:17, 33753:20, 33758:14, 33783:3, 33786:22, 33789:24, 33796:12, 33803:8, 33803:9, 33811:13, 33812:12, 33813:10 militate ^[2] - 33735:2, 33756:24 milky ^[1] - 33715:23 Miller ^[23] - 33590:17, 33601:17, 33607:14, 33616:13, 33714:25, 33720:19, 33722:8, 33771:3, 33782:15, 33782:21, 33784:22, 33785:8, 33786:3, 33787:15, 33793:13, 33801:10, 33801:12, 33803:4, 33803:18, 33803:19, 33804:3, 33804:16, 33807:10 Miller's ^[10] - 33629:25, 33701:24, 33782:16, 33782:23, 33783:12, 33784:19, 33784:24, 33785:24, 33786:19, 33795:15 millilitres ^[1] - 33611:15 millions ^[3] - 33661:13, 33661:14 mimic ^[1] - 33572:19 mind ^[5] - 33557:18, 33742:12, 33798:22, 33809:8, 33811:14 minded ^[1] - 33710:10 mine ^[2] - 33565:13, 33575:10 minimum ^[1] - 33799:22 Minister ^[23] - 33535:11, 33680:4, 33707:5, 33773:5, 33789:20, 33790:14, | 33791:1, 33793:23, 33794:1, 33794:5, 33794:9, 33794:12, 33794:19, 33796:4, 33796:8, 33796:18, 33796:20, 33797:8, 33797:13, 33799:17, 33804:4, 33804:22, 33812:24 minister ^[3] - 33766:12, 33812:1 Minister's ^[3] - 33775:10, 33778:7, 33799:3 minister's ^[1] - 33710:2 ministers ^[1] - 33593:2 Ministries ^[2] - 33790:18, 33791:9 ministry ^[1] - 33790:9 Minus ^[1] - 33615:19 minus ^[8] - 33568:9, 33569:6, 33615:2, 33615:3, 33615:16, 33615:19, 33641:18, 33756:14 minute ^[4] - 33544:16, 33614:12, 33614:16, 33792:4 minutes ^[12] - 33577:22, 33577:23, 33580:13, 33581:5, 33581:6, 33608:13, 33608:16, 33707:10, 33714:25, 33715:1, 33800:15 misleading ^[1] - 33673:13 misrepresented ^[2] - 33752:6, 33752:14 miss ^[1] - 33675:8 missed ^[1] - 33592:21 missing ^[4] - 33742:11, 33785:10, 33799:19 mistake ^[10] - 33663:12, 33801:21, 33805:8, 33805:10, 33805:11, 33805:15, 33805:19, 33806:25, 33807:2 mistaken ^[1] - 33738:14 mistakes ^[1] - 33590:23 misunderstood ^[1] - 33725:15 misusing ^[1] - 33752:22 mix ^[2] - 33649:12, 33649:13 mixed ^[3] - 33616:24, 33649:12, 33729:15 mixing ^[1] - 33637:16 mixture ^[4] - 33617:18, 33622:5, 33622:7, | 33722:2 mobility ^[2] - 33597:11, 33597:18 model ^[2] - 33567:11, 33567:15 modus ^[1] - 33793:12 Molchanko ^[10] - 33593:12, 33593:13, 33653:7, 33717:12, 33717:13, 33718:20, 33718:24, 33748:12, 33749:12, 33750:21 Molchanko's ^[2] - 33749:15, 33750:13 moment ^[18] - 33545:17, 33552:12, 33569:2, 33569:19, 33571:24, 33577:7, 33591:15, 33595:22, 33602:19, 33604:4, 33605:11, 33615:20, 33648:13, 33662:20, 33690:24, 33713:6, 33734:10, 33774:20 moments ^[1] - 33796:7 money ^[6] - 33769:2, 33769:3, 33769:5, 33769:6, 33769:22, 33769:24 Monitor ^[2] - 33709:19, 33710:8 monkeys ^[1] - 33646:3 months ^[5] - 33775:1, 33784:24, 33786:14, 33791:22, 33809:19 moreover ^[1] - 33700:9 morning ^[17] - 33538:3, 33538:4, 33538:5, 33538:6, 33538:13, 33629:25, 33723:9, 33725:23, 33751:21, 33770:23, 33777:20, 33782:17, 33785:8, 33789:15, 33790:1, 33790:2, 33798:15 Morning ^[1] - 33538:11 morphological ^[4] - 33649:23, 33695:19, 33727:6, 33757:13 morphologically ^[1] - 33665:7 morphology ^[12] - 33649:2, 33650:15, 33658:11, 33662:5, 33663:1, 33665:1, 33666:9, 33726:11, 33726:16, 33726:20, 33727:13, 33728:21 mortem ^[1] - 33655:7 most ^[18] - 33542:1, | 33554:8, 33557:15, 33617:1, 33638:8, 33640:4, 33640:6, 33651:15, 33652:18, 33658:3, 33691:14, 33744:3, 33751:7, 33782:6, 33801:4, 33802:8, 33804:21 Most ^[1] - 33728:9 motel ^[1] - 33770:24 Mother ^[1] - 33589:20 mother ^[7] - 33589:22, 33768:5, 33789:24, 33798:24, 33808:2, 33811:24, 33812:12 Mother's ^[1] - 33712:8 motile ^[3] - 33626:25, 33627:6, 33627:13 motility ^[5] - 33597:10, 33597:13, 33597:14, 33597:18, 33627:4 motivated ^[1] - 33690:10 motive ^[1] - 33779:15 Mountain ^[3] - 33546:21, 33781:22, 33813:12 Move ^[1] - 33672:14 move ^[19] - 33546:10, 33548:10, 33569:23, 33571:17, 33571:21, 33585:21, 33621:15, 33631:7, 33655:5, 33686:9, 33694:11, 33696:17, 33703:10, 33704:25, 33709:12, 33710:20, 33713:7, 33739:9, 33764:2 moved ^[3] - 33613:2, 33613:5, 33655:5 movements ^[1] - 33636:20 moving ^[9] - 33560:4, 33563:4, 33593:21, 33598:5, 33613:7, 33641:7, 33655:9, 33683:19, 33701:17 Moving ^[4] - 33618:3, 33669:18, 33676:8, 33704:21 Mps ^[1] - 33812:14 mucosa ^[1] - 33617:10 Mulroney ^[11] - 33799:8, 33799:13, 33799:16, 33800:1, 33800:4, 33800:6, 33800:11, 33800:21, 33804:22, 33805:1, 33805:4 multiple ^[2] - 33675:23, |
|---|---|---|---|---|



| | | | | |
|---|--|---|--|---|
| 33675:24 mum [3] - 33591:1, 33689:16, 33791:15 murder [36] - 33546:23, 33550:12, 33550:19, 33551:20, 33552:2, 33552:23, 33590:1, 33590:17, 33638:21, 33684:8, 33684:12, 33688:5, 33714:22, 33714:24, 33782:14, 33783:10, 33783:12, 33784:22, 33784:24, 33785:8, 33785:12, 33785:24, 33786:9, 33786:19, 33788:2, 33788:11, 33789:14, 33792:18, 33801:5, 33801:12, 33802:2, 33802:8, 33804:3, 33807:11, 33811:22, 33812:5 murdered [3] - 33759:1, 33803:18, 33807:6 Murray [1] - 33558:16 must [10] - 33543:2, 33579:6, 33606:4, 33643:16, 33654:25, 33655:24, 33671:21, 33673:8, 33725:15, 33772:11 | near [6] - 33554:14, 33572:7, 33613:23, 33705:1, 33708:6, 33811:20 nearby [2] - 33786:8, 33813:12 necessarily [9] - 33589:1, 33612:25, 33628:20, 33633:12, 33652:6, 33652:20, 33672:25, 33674:12, 33674:13 necessary [2] - 33609:8, 33703:3 neck [2] - 33609:2, 33609:6 need [30] - 33553:6, 33587:10, 33588:13, 33592:15, 33604:14, 33604:16, 33609:20, 33612:4, 33632:12, 33657:13, 33674:24, 33675:4, 33675:7, 33675:21, 33675:24, 33676:4, 33732:11, 33733:23, 33736:12, 33739:12, 33746:21, 33759:8, 33762:9, 33765:21, 33766:11, 33774:2, 33774:14, 33798:5, 33798:6 needed [4] - 33567:15, 33597:9, 33664:23, 33704:2 needs [5] - 33644:10, 33644:13, 33733:8, 33733:10, 33740:16 negated [1] - 33700:8 negative [2] - 33594:10, 33669:24 neighbour [2] - 33811:13, 33811:15 neighbourhood [3] - 33777:2, 33787:12, 33803:17 Neil [1] - 33657:1 neutered [1] - 33567:8 never [26] - 33588:20, 33624:22, 33626:10, 33640:18, 33678:23, 33691:5, 33705:16, 33706:2, 33709:10, 33714:12, 33717:4, 33717:7, 33725:4, 33733:16, 33737:20, 33737:23, 33738:14, 33751:5, 33751:10, 33751:12, 33751:19, 33753:1, 33776:13, 33783:5, 33785:17, | 33800:10 never-used [1] - 33737:23 nevertheless [1] - 33555:3 new [40] - 33589:20, 33589:23, 33590:3, 33684:9, 33688:1, 33695:11, 33705:15, 33773:5, 33773:9, 33781:23, 33781:24, 33785:25, 33788:1, 33788:9, 33788:16, 33789:17, 33790:5, 33790:6, 33790:9, 33790:12, 33790:13, 33790:14, 33791:2, 33791:5, 33794:4, 33794:8, 33794:17, 33795:20, 33797:11, 33799:1, 33799:14, 33800:15, 33801:24, 33802:6, 33802:7, 33804:11, 33812:22, 33813:1 New [3] - 33706:14, 33790:20, 33791:14 Newfoundland [6] - 33541:11, 33542:2, 33566:15, 33626:10, 33760:3, 33761:16 news [1] - 33791:12 News [1] - 33801:1 newspaper [2] - 33549:13, 33753:3 next [48] - 33538:8, 33546:11, 33553:13, 33559:13, 33560:4, 33563:4, 33565:7, 33569:23, 33571:17, 33571:21, 33585:21, 33591:18, 33607:11, 33612:8, 33613:7, 33618:3, 33626:21, 33631:7, 33635:21, 33640:2, 33641:7, 33646:13, 33648:17, 33667:3, 33668:24, 33669:18, 33670:15, 33672:14, 33678:14, 33679:25, 33686:9, 33687:23, 33689:14, 33693:2, 33693:7, 33694:12, 33696:17, 33698:1, 33700:3, 33700:15, 33704:25, 33705:18, 33708:2, 33714:14, 33717:18, 33718:2, 33723:21, 33783:2 | Next [3] - 33636:7, 33673:5, 33677:2 nice [3] - 33563:17, 33808:3, 33809:15 night [2] - 33598:19, 33785:7 no-man's [1] - 33588:23 Non [1] - 33627:13 non [37] - 33557:3, 33560:8, 33561:9, 33574:10, 33589:7, 33604:11, 33605:4, 33622:15, 33626:25, 33627:6, 33649:1, 33650:20, 33658:10, 33661:18, 33663:24, 33669:5, 33669:6, 33669:14, 33669:17, 33671:9, 33671:22, 33672:1, 33672:4, 33672:12, 33678:1, 33694:9, 33696:6, 33700:6, 33707:5, 33726:10, 33728:21, 33731:3, 33731:11, 33732:3, 33732:9, 33737:23, 33790:19 non-activities [1] - 33707:5 non-canine [1] - 33663:24 non-contamination [2] - 33669:14, 33669:17 non-forensic [2] - 33604:11, 33605:4 non-human [6] - 33649:1, 33650:20, 33658:10, 33661:18, 33669:6, 33726:10 non-medical [2] - 33560:8, 33561:9 non-motile [2] - 33626:25, 33627:6 Non-motile [1] - 33627:13 non-profit [1] - 33790:19 non-secretor [18] - 33574:10, 33589:7, 33622:15, 33669:5, 33671:9, 33671:22, 33672:1, 33672:4, 33672:12, 33678:1, 33694:9, 33696:6, 33700:6, 33728:21, 33731:3, 33731:11, 33732:3, 33732:9 non-testing [1] - 33557:3 None [5] - 33583:8, | 33703:9, 33711:4, 33712:3, 33771:3 none [5] - 33585:18, 33597:16, 33607:17, 33766:6, 33770:9 nonetheless [1] - 33544:5 Normal [1] - 33573:7 normal [4] - 33672:23, 33716:12, 33766:4, 33770:23 normally [3] - 33600:25, 33604:23, 33705:7 North [1] - 33786:15 north/south [3] - 33554:4, 33554:19, 33605:20 northward [2] - 33554:18, 33605:20 note [19] - 33539:22, 33540:1, 33543:14, 33546:13, 33547:17, 33553:10, 33570:18, 33592:6, 33592:18, 33607:17, 33616:22, 33621:15, 33632:20, 33681:2, 33681:21, 33687:24, 33703:13, 33748:23 noted [18] - 33540:1, 33544:18, 33611:10, 33612:10, 33618:18, 33620:5, 33642:5, 33643:22, 33658:2, 33658:8, 33685:9, 33695:16, 33698:2, 33698:9, 33701:14, 33713:23, 33714:17, 33750:3 notes [29] - 33545:24, 33644:13, 33646:15, 33646:25, 33648:11, 33648:12, 33648:15, 33653:10, 33659:13, 33659:14, 33660:7, 33660:11, 33660:13, 33660:17, 33681:19, 33693:9, 33698:1, 33700:3, 33723:4, 33723:25, 33724:3, 33724:13, 33724:20, 33724:25, 33725:1, 33725:5, 33725:7, 33742:6, 33815:6 nothing [12] - 33544:12, 33590:19, 33624:7, 33636:19, 33651:23, 33770:20, 33771:11, 33775:9, 33775:17, |
| N | | | | |
| nah [2] - 33587:9 naive [1] - 33778:17 name [12] - 33716:18, 33729:6, 33747:13, 33747:15, 33754:1, 33776:1, 33776:2, 33783:7, 33792:17, 33792:19, 33803:21, 33806:9 Narrator [4] - 33691:2, 33691:21, 33799:5, 33801:4 narrower [1] - 33634:10 National [3] - 33805:25, 33806:10, 33807:4 native [1] - 33759:2 natural [4] - 33624:8, 33672:22, 33750:20, 33787:5 nature [11] - 33545:19, 33567:16, 33604:11, 33605:9, 33623:19, 33635:7, 33670:13, 33687:22, 33690:1, 33691:25, 33711:22 | | | | |



| | | | | |
|--|--|---|---|--|
| 33785:21, 33805:20 noting [3] - 33618:4, 33700:20, 33700:22 notorious [1] - 33801:5 Notwithstanding [2] - 33644:15, 33698:6 Nova [3] - 33541:11, 33758:25, 33761:17 nowadays [1] - 33634:13 nowhere [1] - 33709:10 number [23] - 33539:14, 33555:4, 33558:24, 33559:6, 33567:8, 33568:19, 33568:20, 33569:12, 33604:10, 33626:11, 33636:25, 33671:11, 33717:19, 33730:8, 33739:10, 33741:7, 33748:16, 33750:17, 33753:14, 33754:19, 33786:7, 33791:22, 33811:24 numbered [1] - 33719:2 numbers [2] - 33749:1, 33749:2 nurse [1] - 33590:17 Nurse's [1] - 33672:15 nurse's [2] - 33672:18, 33672:19 nurses' [1] - 33672:20 nursing [1] - 33782:15 nutshell [1] - 33797:6 | 33697:3 obtaining [1] - 33559:1 obvious [4] - 33637:25, 33652:18, 33707:12, 33786:9 Obviously [2] - 33614:6, 33672:20 obviously [11] - 33574:19, 33576:15, 33603:19, 33606:6, 33634:20, 33672:24, 33692:3, 33721:21, 33724:21, 33768:1, 33800:20 occasion [3] - 33541:18, 33543:6, 33556:20 occasions [1] - 33706:23 occur [2] - 33565:7, 33608:7 occurred [16] - 33554:16, 33554:24, 33558:4, 33605:18, 33613:14, 33615:10, 33656:3, 33657:19, 33670:20, 33701:3, 33702:5, 33721:3, 33727:23, 33786:9, 33788:2, 33796:14 occurrence [4] - 33624:6, 33624:8, 33624:12, 33626:13 occurrences [1] - 33759:15 occurs [1] - 33646:6 off-cast [1] - 33675:3 offence [4] - 33550:9, 33613:23, 33767:9, 33769:16 offer [6] - 33553:22, 33589:2, 33603:1, 33606:2, 33694:7, 33751:6 offered [3] - 33665:15, 33791:19, 33813:13 offering [3] - 33544:7, 33689:9, 33751:24 office [6] - 33541:6, 33549:7, 33715:17, 33751:2, 33775:24, 33791:20 officer [4] - 33564:15, 33631:18, 33631:24, 33653:3 Officer [1] - 33534:10 officers [1] - 33554:22 official [1] - 33693:4 Official [5] - 33534:8, 33815:1, 33815:3, | 33815:14, 33815:18 officials [1] - 33711:13 often [11] - 33549:8, 33609:21, 33609:22, 33633:3, 33640:8, 33675:5, 33703:24, 33704:1, 33704:16, 33704:17, 33722:19 old [2] - 33538:18, 33797:14 Oleksyn [1] - 33593:10 on-camera [1] - 33785:4 once [3] - 33615:7, 33792:8, 33806:8 one [112] - 33546:3, 33551:18, 33554:24, 33555:3, 33555:10, 33561:20, 33566:10, 33566:21, 33566:22, 33574:1, 33575:1, 33575:5, 33575:14, 33581:3, 33582:25, 33583:13, 33589:17, 33589:24, 33590:2, 33609:20, 33610:12, 33611:12, 33611:21, 33612:2, 33612:10, 33616:20, 33620:16, 33621:9, 33632:24, 33637:12, 33640:16, 33640:23, 33640:24, 33641:22, 33641:23, 33642:7, 33642:21, 33644:10, 33644:12, 33651:15, 33651:23, 33652:2, 33652:9, 33652:18, 33653:9, 33675:8, 33684:19, 33685:17, 33687:23, 33693:2, 33693:15, 33696:7, 33703:3, 33703:4, 33704:15, 33704:23, 33709:14, 33709:15, 33710:10, 33712:7, 33714:9, 33714:15, 33715:13, 33718:6, 33719:2, 33719:3, 33720:3, 33720:4, 33720:22, 33727:17, 33727:21, 33729:25, 33731:1, 33732:2, 33732:25, 33736:5, 33736:17, 33737:21, 33738:13, 33748:3, 33755:18, 33758:13, 33758:17, 33758:24, 33759:1, 33759:21, 33763:2, 33764:16, 33770:7, | 33770:9, 33773:12, 33778:19, 33781:8, 33782:23, 33783:4, 33783:10, 33788:13, 33794:19, 33797:10, 33797:13, 33799:5, 33799:6, 33801:4, 33802:7, 33804:21, 33810:12, 33813:10 One [11] - 33553:5, 33583:14, 33585:16, 33640:14, 33642:20, 33722:5, 33784:17, 33785:2, 33794:16, 33796:16, 33803:9 one's [2] - 33566:11, 33690:18 ones [1] - 33805:17 ongoing [4] - 33631:5, 33680:11, 33680:13, 33711:22 Ontario [1] - 33761:18 open [10] - 33617:19, 33710:10, 33760:22, 33766:13, 33775:2, 33784:25, 33789:21, 33804:5, 33813:1, 33813:16 open-minded [1] - 33710:10 opened [6] - 33771:16, 33788:22, 33798:10, 33800:24, 33811:25, 33812:11 openness [1] - 33798:5 operandi [1] - 33793:12 operating [1] - 33793:11 opinion [58] - 33543:11, 33544:8, 33544:13, 33546:1, 33548:7, 33552:1, 33552:22, 33553:23, 33555:16, 33562:15, 33563:21, 33589:1, 33589:2, 33599:20, 33599:21, 33601:25, 33603:1, 33606:2, 33607:3, 33608:8, 33609:12, 33610:18, 33612:14, 33612:18, 33613:10, 33620:1, 33623:25, 33624:25, 33628:9, 33629:19, 33632:14, 33640:21, 33651:13, 33659:24, 33660:24, 33663:2, 33663:7, 33663:21, 33664:18, 33665:8, 33665:15, 33669:19, 33670:17, | 33671:14, 33674:17, 33676:11, 33676:15, 33678:15, 33689:10, 33701:21, 33706:17, 33707:3, 33750:13, 33751:6, 33751:23, 33752:5, 33762:9, 33792:23 opinions [5] - 33545:9, 33545:25, 33571:7, 33599:13, 33605:7 opportunity [7] - 33593:23, 33595:5, 33676:12, 33728:14, 33740:20, 33741:15, 33743:25 Opportunity [2] - 33612:9, 33613:8 opposed [2] - 33728:7, 33797:9 opposition [1] - 33812:21 optimistic [2] - 33773:4, 33810:17 option [7] - 33618:17, 33618:20, 33618:23, 33620:4, 33620:20, 33621:5, 33621:6 order [9] - 33622:13, 33622:22, 33644:7, 33678:20, 33732:12, 33735:12, 33737:15, 33767:2, 33769:9 ordered [1] - 33706:25 organic [1] - 33657:16 organization [3] - 33789:16, 33790:18, 33790:19 organizations [1] - 33558:25 organs [2] - 33609:2, 33609:6 origin [36] - 33596:17, 33600:2, 33600:5, 33600:13, 33618:15, 33640:5, 33640:6, 33644:1, 33644:24, 33645:5, 33645:9, 33645:16, 33646:1, 33646:22, 33647:9, 33647:19, 33649:1, 33649:17, 33650:21, 33658:10, 33660:1, 33661:4, 33661:19, 33662:7, 33663:9, 33663:24, 33664:15, 33665:7, 33666:13, 33669:6, 33677:4, 33695:13, 33718:11, 33725:21, 33726:10, |
| O | | | | |
| o'clock [3] - 33750:4, 33750:7, 33770:22 Odonnell [1] - 33800:25 oath [1] - 33601:9 object [1] - 33638:20 objections [1] - 33559:14 objective [2] - 33696:25, 33710:10 objectivity [2] - 33605:5, 33605:6 observation [7] - 33612:21, 33623:5, 33632:20, 33635:10, 33651:14, 33674:1, 33674:2 observations [3] - 33610:20, 33611:23, 33620:12 observed [2] - 33664:4, 33671:1 obtain [2] - 33696:25, | | | | |



| | | | | |
|---|--|---|--|--|
| <p>33730:14 original [34] - 33544:9, 33547:14, 33574:3, 33584:9, 33588:6, 33593:16, 33594:16, 33595:3, 33595:6, 33595:14, 33596:6, 33603:15, 33604:5, 33646:15, 33646:25, 33648:11, 33648:12, 33648:14, 33653:10, 33659:13, 33668:16, 33677:18, 33681:3, 33681:22, 33717:4, 33717:8, 33719:22, 33723:3, 33728:6, 33742:6, 33747:14, 33749:17, 33788:4, 33788:10 originally [5] - 33583:7, 33670:5, 33672:11, 33774:13, 33803:8 originate [1] - 33672:19 originated [5] - 33617:21, 33643:6, 33672:25, 33719:16, 33719:18 Otherwise [2] - 33569:19, 33597:15 otherwise [6] - 33566:10, 33580:21, 33613:2, 33622:15, 33707:15, 33800:10 Ottawa [2] - 33789:1, 33794:7 ought [1] - 33625:16 ourselves [2] - 33736:13, 33740:4 outcome [2] - 33761:12, 33803:1 outer [1] - 33628:4 outline [1] - 33758:22 outset [6] - 33543:8, 33543:17, 33697:7, 33721:6, 33756:22, 33757:10 outside [8] - 33612:2, 33612:4, 33614:17, 33615:11, 33675:5, 33675:7, 33777:20, 33805:18 oval [1] - 33634:2 over-simplifying [1] - 33601:23 overhauled [1] - 33764:1 overlook [1] - 33786:6 overseeing [1] - 33542:2 owe [2] - 33795:3,</p> | <p>33813:6 owes [1] - 33794:25 own [16] - 33541:4, 33546:2, 33562:9, 33562:10, 33592:13, 33625:22, 33626:7, 33706:19, 33759:5, 33769:7, 33769:24, 33784:6, 33792:8, 33806:11</p> <p style="text-align: center;">P</p> <p>P.10 [3] - 33719:8, 33719:14, 33719:17 pads [1] - 33619:17 page [69] - 33539:22, 33539:25, 33583:20, 33585:21, 33585:23, 33593:21, 33602:21, 33605:10, 33607:9, 33607:11, 33608:17, 33608:22, 33616:9, 33616:10, 33616:16, 33616:20, 33617:17, 33618:3, 33635:21, 33636:6, 33636:7, 33637:23, 33657:12, 33659:10, 33667:3, 33667:8, 33671:7, 33673:5, 33699:12, 33701:17, 33704:25, 33705:18, 33708:2, 33709:21, 33709:22, 33712:11, 33713:8, 33714:14, 33714:16, 33715:19, 33717:18, 33718:2, 33718:22, 33722:23, 33726:4, 33726:6, 33727:17, 33730:8, 33731:17, 33741:6, 33741:7, 33741:21, 33741:23, 33742:18, 33743:9, 33749:1, 33749:16, 33749:20, 33749:23, 33749:24, 33750:2, 33750:9, 33750:17, 33750:18, 33753:15, 33754:18 Page [2] - 33536:2, 33726:5 pages [7] - 33697:14, 33712:14, 33748:16, 33748:24, 33750:17, 33751:1, 33815:4 paint [1] - 33807:4 pale [1] - 33652:15 panties [11] - 33598:11,</p> | <p>33598:17, 33601:20, 33619:18, 33619:20, 33619:23, 33619:25, 33654:7, 33676:24, 33697:11, 33698:11 paper [2] - 33736:5, 33791:13 paragraph [49] - 33550:25, 33551:23, 33552:19, 33558:16, 33559:13, 33560:4, 33560:16, 33584:2, 33602:18, 33606:19, 33611:25, 33612:13, 33616:20, 33619:14, 33628:15, 33639:2, 33640:2, 33641:8, 33642:19, 33646:13, 33646:24, 33648:17, 33669:18, 33670:15, 33671:4, 33674:5, 33676:9, 33676:19, 33677:2, 33678:14, 33680:21, 33682:14, 33684:19, 33689:17, 33695:2, 33696:22, 33698:1, 33699:1, 33700:3, 33700:15, 33703:13, 33708:3, 33708:4, 33713:10, 33713:23, 33714:17, 33727:1, 33730:9, 33730:11 paragraphs [2] - 33546:17, 33693:6 Pardon [1] - 33719:18 paring [4] - 33782:19, 33784:9, 33784:10, 33785:10 Park [1] - 33784:1 Parker [1] - 33593:8 Parliament [1] - 33812:14 parole [1] - 33782:7 Parole [3] - 33805:25, 33806:10, 33807:4 paroled [1] - 33786:13 part [19] - 33557:15, 33579:7, 33579:11, 33594:11, 33645:22, 33645:24, 33660:4, 33665:3, 33680:13, 33718:3, 33774:24, 33777:19, 33778:1, 33778:4, 33782:7, 33786:19, 33801:14, 33808:14, 33809:2 partial [1] - 33613:13 particular [32] - 33559:23, 33565:19,</p> | <p>33576:20, 33604:21, 33604:23, 33606:7, 33611:25, 33614:22, 33624:4, 33625:4, 33625:13, 33634:24, 33635:3, 33635:8, 33645:2, 33652:5, 33662:9, 33664:12, 33666:23, 33668:8, 33672:6, 33674:17, 33690:11, 33701:5, 33702:14, 33704:10, 33704:11, 33735:12, 33736:14, 33740:5, 33753:8, 33783:24 particularly [3] - 33583:21, 33637:15, 33653:15 parties [4] - 33540:17, 33559:7, 33595:15, 33712:4 party [1] - 33595:18 passage [1] - 33712:8 passed [2] - 33723:10, 33772:18 passing [2] - 33593:1, 33632:8 passionately [1] - 33747:9 past [2] - 33760:21, 33787:11 Pat [2] - 33535:7, 33754:1 patch [5] - 33677:5, 33730:14, 33730:21, 33732:1, 33733:13 Pathologist [1] - 33551:20 pathologist [35] - 33538:24, 33539:1, 33539:2, 33540:21, 33540:22, 33540:24, 33561:20, 33562:2, 33562:5, 33566:8, 33567:25, 33576:13, 33590:13, 33590:22, 33596:5, 33606:9, 33606:12, 33634:15, 33645:22, 33688:11, 33693:4, 33705:15, 33709:6, 33710:1, 33728:10, 33752:2, 33759:22, 33760:5, 33760:6, 33760:12, 33761:1, 33762:3, 33762:24 Pathologists [1] - 33714:11 pathologists [9] - 33541:20, 33544:18,</p> | <p>33601:1, 33636:17, 33759:22, 33761:20, 33762:1, 33762:2, 33788:8 Pathology [1] - 33607:1 pathology [8] - 33563:13, 33563:15, 33594:12, 33625:20, 33634:24, 33687:1, 33688:14, 33714:7 patient [1] - 33775:12 Patricia [2] - 33694:13, 33727:3 pause [4] - 33592:11, 33644:15, 33658:22, 33664:15 Paused [1] - 33536:20 paused [1] - 33771:22 pay [1] - 33762:10 Paynter [33] - 33557:13, 33574:2, 33592:23, 33592:25, 33593:12, 33603:18, 33644:3, 33644:16, 33646:16, 33646:18, 33647:16, 33647:22, 33652:14, 33660:18, 33662:4, 33662:23, 33662:24, 33663:19, 33664:9, 33665:5, 33668:15, 33722:16, 33723:2, 33723:5, 33723:13, 33723:20, 33723:21, 33723:24, 33724:2, 33724:12, 33724:21, 33725:5, 33744:9 Paynter's [5] - 33648:10, 33659:12, 33661:13, 33662:19, 33725:1 Pearson [1] - 33787:17 Pearson's [1] - 33724:25 peculiar [1] - 33746:3 peculiarities [1] - 33804:14 pee [2] - 33566:20, 33652:7 penetrated [1] - 33607:18 penetration [1] - 33632:4 Penile [1] - 33703:18 penis [1] - 33624:13 penitentiaries [1] - 33809:17 Penitentiary [3] - 33781:22, 33786:12, 33813:12 Penkala [11] - 33566:2,</p> |
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| | | | | |
|--|---|---|--|---|
| <p>33593:9, 33636:1, 33651:19, 33684:25, 33720:13, 33755:3, 33755:24, 33756:7, 33785:22, 33786:2</p> <p>People [1] - 33770:21</p> <p>people [43] - 33539:3, 33539:4, 33546:1, 33567:13, 33582:1, 33583:12, 33591:4, 33611:20, 33615:14, 33625:16, 33626:3, 33628:19, 33636:24, 33636:25, 33648:3, 33689:20, 33707:4, 33710:9, 33751:25, 33753:4, 33762:14, 33766:20, 33768:20, 33770:19, 33771:8, 33776:11, 33779:13, 33779:14, 33780:9, 33797:22, 33802:3, 33802:22, 33805:14, 33805:19, 33807:8, 33807:14, 33807:15, 33808:3, 33809:16, 33811:8, 33811:9, 33813:7</p> <p>perceived [1] - 33753:6</p> <p>percent [3] - 33656:18, 33656:20, 33687:5</p> <p>performed [4] - 33574:8, 33646:20, 33647:8, 33647:18</p> <p>performing [1] - 33615:15</p> <p>Perhaps [2] - 33578:23, 33670:24</p> <p>perhaps [55] - 33539:13, 33548:7, 33551:18, 33552:25, 33557:11, 33557:12, 33558:9, 33572:17, 33577:3, 33577:4, 33592:5, 33597:2, 33597:8, 33601:10, 33601:25, 33602:2, 33602:14, 33607:7, 33616:13, 33625:20, 33636:23, 33640:15, 33640:17, 33651:14, 33657:12, 33663:11, 33664:7, 33665:12, 33666:16, 33666:18, 33672:2, 33673:10, 33679:7, 33682:1, 33683:13, 33713:15, 33722:18, 33723:9, 33723:11, 33735:6, 33735:24, 33743:7,</p> | <p>33744:8, 33744:23, 33748:14, 33751:24, 33752:19, 33752:25, 33755:22, 33762:23, 33765:3, 33790:3, 33797:14, 33797:15</p> <p>period [12] - 33540:8, 33553:7, 33573:19, 33577:18, 33614:20, 33628:25, 33690:17, 33745:14, 33767:9, 33769:24, 33809:19, 33811:15</p> <p>permission [1] - 33748:20</p> <p>perpetrate [1] - 33613:19</p> <p>perpetrator [3] - 33550:11, 33550:22, 33589:4</p> <p>person [35] - 33542:5, 33562:13, 33566:8, 33567:25, 33568:3, 33582:25, 33583:11, 33595:21, 33613:21, 33614:11, 33615:8, 33615:15, 33623:3, 33675:12, 33723:22, 33727:11, 33742:25, 33745:13, 33751:22, 33752:2, 33760:7, 33761:8, 33762:3, 33773:13, 33777:23, 33781:8, 33785:2, 33785:14, 33792:17, 33806:7, 33806:10, 33807:5, 33808:13, 33809:4</p> <p>personal [5] - 33562:10, 33599:21, 33625:22, 33626:7, 33695:15</p> <p>personally [3] - 33606:3, 33670:8, 33804:8</p> <p>persons [3] - 33597:13, 33759:2, 33761:11</p> <p>perspective [1] - 33621:1</p> <p>Peter [18] - 33536:3, 33538:8, 33538:10, 33546:24, 33570:2, 33590:7, 33657:24, 33680:24, 33684:20, 33688:9, 33691:14, 33693:15, 33695:4, 33696:20, 33699:7, 33708:1, 33708:8, 33710:12</p> <p>petri [2] - 33642:2,</p> | <p>33642:11</p> <p>phone [4] - 33549:16, 33775:24, 33779:22, 33791:24</p> <p>phoned [1] - 33791:25</p> <p>phoning [1] - 33792:2</p> <p>phosphatase [1] - 33648:21</p> <p>photo [1] - 33641:23</p> <p>Photocopy [1] - 33543:20</p> <p>photographs [12] - 33594:1, 33605:24, 33631:14, 33631:17, 33631:20, 33631:23, 33701:15, 33703:15, 33703:23, 33704:3, 33704:4, 33748:7</p> <p>photos [2] - 33641:21, 33700:17</p> <p>phrase [5] - 33685:21, 33723:7, 33726:15, 33730:22, 33731:5</p> <p>phrased [2] - 33723:19, 33724:1</p> <p>physical [1] - 33691:8</p> <p>pick [2] - 33605:10, 33679:22</p> <p>picked [1] - 33783:15</p> <p>picture [8] - 33599:24, 33705:19, 33807:5, 33807:7, 33809:3, 33810:12, 33810:14, 33810:17</p> <p>piece [2] - 33684:7, 33749:22</p> <p>pieces [4] - 33684:1, 33766:25, 33776:25, 33777:12</p> <p>pile [1] - 33656:1</p> <p>pitcher [2] - 33568:7, 33569:14</p> <p>place [24] - 33539:10, 33556:20, 33558:9, 33573:20, 33583:16, 33583:17, 33602:1, 33602:14, 33613:23, 33614:5, 33616:4, 33616:18, 33628:6, 33629:22, 33639:15, 33649:20, 33665:25, 33669:21, 33674:11, 33701:14, 33769:16, 33772:20, 33783:11, 33807:25</p> <p>Place [1] - 33533:16</p> <p>planned [1] - 33688:8</p> <p>play [5] - 33577:20, 33581:7, 33599:15, 33680:13, 33736:19</p> | <p>Played [11] - 33536:5, 33536:7, 33536:9, 33536:11, 33536:19, 33536:23, 33536:25, 33537:2, 33537:4, 33537:6, 33537:8</p> <p>played [13] - 33577:25, 33579:5, 33579:6, 33581:8, 33581:17, 33691:1, 33766:1, 33774:7, 33781:18, 33789:12, 33798:18, 33801:3, 33811:17</p> <p>pleaded [1] - 33784:13</p> <p>pleas [2] - 33811:24, 33811:25</p> <p>pleased [1] - 33759:12</p> <p>pleasure [1] - 33798:16</p> <p>plodding [2] - 33773:22, 33779:25</p> <p>Pm [6] - 33679:20, 33749:6, 33749:7, 33805:1, 33812:16, 33814:5</p> <p>point [67] - 33547:9, 33548:25, 33549:17, 33549:20, 33550:13, 33554:17, 33554:24, 33555:1, 33555:10, 33558:3, 33565:17, 33575:17, 33576:23, 33579:20, 33580:19, 33591:14, 33601:13, 33601:14, 33604:8, 33605:19, 33615:25, 33616:15, 33623:10, 33625:1, 33627:8, 33629:5, 33629:12, 33629:13, 33629:16, 33634:24, 33655:18, 33656:12, 33657:8, 33659:4, 33668:22, 33674:2, 33675:15, 33677:9, 33679:8, 33679:13, 33685:6, 33690:25, 33698:13, 33700:13, 33702:25, 33703:1, 33712:24, 33715:10, 33716:2, 33716:5, 33716:8, 33722:8, 33725:5, 33730:18, 33731:7, 33757:18, 33758:14, 33761:17, 33765:9, 33765:19, 33795:7, 33797:18, 33806:21, 33806:22, 33810:1, 33812:9, 33813:21</p> <p>pointed [2] - 33634:10, 33700:4</p> | <p>points [3] - 33599:22, 33681:19, 33785:6</p> <p>police [28] - 33564:14, 33568:17, 33582:6, 33582:16, 33636:16, 33636:17, 33637:8, 33684:25, 33705:10, 33760:15, 33762:19, 33762:24, 33766:22, 33770:12, 33770:13, 33771:10, 33776:3, 33780:14, 33780:24, 33783:13, 33783:19, 33784:21, 33784:25, 33785:19, 33785:23, 33787:6, 33799:19, 33804:1</p> <p>Police [3] - 33535:7, 33754:2, 33804:18</p> <p>policy [3] - 33549:3, 33709:1, 33798:7</p> <p>ponder [1] - 33779:18</p> <p>pools [1] - 33638:3</p> <p>poor [3] - 33698:8, 33764:22, 33764:23</p> <p>population [1] - 33687:6</p> <p>pore [1] - 33779:18</p> <p>porosity [1] - 33637:14</p> <p>portion [28] - 33548:10, 33550:25, 33554:4, 33554:6, 33554:7, 33554:15, 33554:19, 33585:23, 33600:1, 33605:17, 33605:21, 33607:8, 33643:14, 33646:23, 33697:21, 33705:1, 33709:20, 33712:20, 33713:20, 33714:15, 33715:20, 33718:23, 33722:24, 33726:7, 33749:3, 33749:10, 33749:20, 33749:22</p> <p>portions [5] - 33546:16, 33553:6, 33553:11, 33583:23, 33741:19</p> <p>position [8] - 33540:20, 33540:23, 33548:21, 33591:10, 33676:17, 33698:6, 33707:14, 33806:20</p> <p>positions [2] - 33582:3, 33780:11</p> <p>positive [15] - 33564:19, 33567:20, 33572:9, 33573:9, 33573:23, 33575:7, 33657:17, 33658:6, 33667:24, 33669:24,</p> |
|--|---|---|--|---|



| | | | | |
|--|--|---|--|--|
| <p>33682:22, 33682:23, 33696:5, 33700:8, 33745:24</p> <p>positivity [1] - 33683:2</p> <p>possession [2] - 33623:10, 33784:8</p> <p>possibilities [3] - 33598:22, 33610:7, 33623:17</p> <p>possibility [21] - 33566:4, 33572:6, 33602:11, 33645:1, 33661:24, 33663:24, 33664:19, 33666:17, 33669:14, 33669:16, 33684:22, 33716:5, 33716:9, 33722:19, 33738:21, 33738:25, 33751:17, 33755:18, 33757:3, 33757:19, 33813:17</p> <p>possible [34] - 33553:23, 33561:20, 33561:22, 33566:14, 33568:20, 33568:21, 33574:9, 33602:12, 33608:14, 33610:22, 33630:17, 33632:7, 33645:4, 33645:12, 33647:3, 33649:12, 33665:23, 33666:6, 33718:11, 33722:6, 33722:10, 33722:13, 33723:11, 33723:14, 33735:17, 33735:23, 33736:1, 33736:9, 33736:11, 33736:17, 33737:22, 33739:10, 33739:13, 33745:14</p> <p>possibly [12] - 33566:12, 33575:2, 33661:9, 33663:3, 33665:16, 33669:3, 33685:16, 33708:5, 33712:21, 33713:13, 33736:1</p> <p>post [1] - 33655:7</p> <p>post-mortem [1] - 33655:7</p> <p>Postmortem [1] - 33621:7</p> <p>postmortem [7] - 33609:15, 33610:23, 33610:24, 33617:5, 33617:8, 33618:11, 33624:6</p> <p>potential [3] - 33623:6, 33638:1, 33639:22</p> <p>powerful [2] - 33796:2, 33797:12</p> | <p>practice [1] - 33752:8</p> <p>practicing [1] - 33625:19</p> <p>pre [1] - 33583:14</p> <p>pre-report [1] - 33583:14</p> <p>precipe [1] - 33796:8</p> <p>precise [1] - 33637:4</p> <p>predated [1] - 33571:23</p> <p>predict [1] - 33789:2</p> <p>prefer [1] - 33765:19</p> <p>prelim [5] - 33586:18, 33586:24, 33587:5, 33587:7, 33755:4</p> <p>preliminary [6] - 33595:11, 33717:8, 33718:19, 33718:21, 33754:15, 33754:17</p> <p>premature [1] - 33797:16</p> <p>premiere [1] - 33801:23</p> <p>preparation [2] - 33544:1, 33710:25</p> <p>preparations [2] - 33593:19, 33595:13</p> <p>prepare [2] - 33606:22, 33804:11</p> <p>prepared [4] - 33544:8, 33593:24, 33603:2, 33719:21</p> <p>preparing [1] - 33547:2</p> <p>presence [27] - 33541:22, 33564:20, 33564:24, 33575:24, 33611:22, 33616:24, 33617:13, 33619:21, 33620:24, 33624:1, 33628:7, 33628:18, 33630:25, 33645:9, 33654:5, 33658:6, 33670:1, 33670:6, 33671:10, 33673:6, 33673:17, 33677:7, 33681:10, 33730:16, 33737:4, 33737:13, 33745:21</p> <p>present [13] - 33564:18, 33565:2, 33609:4, 33618:14, 33660:15, 33673:11, 33675:12, 33698:22, 33738:17, 33740:5, 33789:17, 33793:10, 33795:2</p> <p>presentation [2] - 33679:3, 33765:17</p> <p>presentations [1] - 33769:20</p> <p>presented [14] - 33547:10, 33550:7, 33572:4, 33590:15,</p> | <p>33655:14, 33676:21, 33678:16, 33679:7, 33679:8, 33688:16, 33708:5, 33770:1, 33772:5, 33791:2</p> <p>presenting [2] - 33790:9, 33790:17</p> <p>presently [1] - 33541:8</p> <p>presents [1] - 33794:7</p> <p>preserved [1] - 33650:25</p> <p>press [18] - 33546:11, 33549:1, 33549:5, 33549:7, 33559:12, 33589:18, 33683:20, 33683:23, 33687:19, 33693:3, 33704:22, 33706:13, 33709:2, 33709:3, 33709:5, 33709:9, 33795:22</p> <p>Press [2] - 33546:14, 33567:10</p> <p>pressed [1] - 33812:21</p> <p>pressure [3] - 33633:6, 33710:13, 33779:24</p> <p>pressures [1] - 33761:10</p> <p>presumably [1] - 33668:5</p> <p>presume [1] - 33729:21</p> <p>presumption [1] - 33793:1</p> <p>pretty [5] - 33578:18, 33742:21, 33770:12, 33773:20, 33788:1</p> <p>prevent [1] - 33759:15</p> <p>preventable [1] - 33542:9</p> <p>previous [6] - 33603:12, 33603:13, 33629:4, 33629:23, 33726:3, 33784:17</p> <p>previously [4] - 33591:20, 33642:15, 33712:15, 33754:6</p> <p>Prime [2] - 33799:3, 33804:22</p> <p>prime [1] - 33812:1</p> <p>Prince [1] - 33786:13</p> <p>Princeton [1] - 33790:20</p> <p>principle [1] - 33576:12</p> <p>prison [18] - 33768:20, 33781:20, 33782:6, 33786:16, 33798:21, 33799:7, 33799:22, 33802:1, 33804:25, 33805:18, 33806:19, 33807:15, 33807:16, 33808:23, 33809:5,</p> | <p>33812:4, 33813:12, 33813:16</p> <p>prisoner [1] - 33801:18</p> <p>prisoners [1] - 33768:17</p> <p>pristine [1] - 33728:2</p> <p>private [1] - 33783:17</p> <p>privilege [1] - 33576:14</p> <p>privy [1] - 33651:10</p> <p>probability [3] - 33666:3, 33667:16, 33690:15</p> <p>probable [3] - 33658:20, 33659:4, 33659:7</p> <p>probative [2] - 33739:6, 33739:7</p> <p>problem [10] - 33562:4, 33584:3, 33585:15, 33591:6, 33727:8, 33744:6, 33744:20, 33745:15, 33793:17, 33813:24</p> <p>problems [1] - 33695:22</p> <p>procedural [1] - 33793:2</p> <p>procedures [1] - 33700:9</p> <p>proceed [3] - 33538:7, 33765:16, 33765:24</p> <p>proceeded [1] - 33545:18</p> <p>proceeding [1] - 33641:4</p> <p>Proceedings [4] - 33533:12, 33533:23, 33536:1, 33538:1</p> <p>proceedings [3] - 33712:1, 33712:2, 33747:17</p> <p>process [5] - 33609:17, 33636:21, 33637:20, 33794:13, 33794:20</p> <p>proclaiming [1] - 33801:6</p> <p>produced [2] - 33621:21, 33745:14</p> <p>product [1] - 33645:17</p> <p>professional [6] - 33543:7, 33560:7, 33561:9, 33562:14, 33702:24, 33703:5</p> <p>Professor [2] - 33657:14, 33658:23</p> <p>professor [6] - 33563:12, 33566:17, 33657:1, 33657:2, 33714:7, 33760:10</p> <p>profit [1] - 33790:19</p> | <p>program [2] - 33690:20, 33802:12</p> <p>progress [1] - 33774:22</p> <p>promote [1] - 33786:4</p> <p>prompt [1] - 33784:25</p> <p>pronouncement [1] - 33686:20</p> <p>proof [3] - 33672:4, 33696:5, 33767:2</p> <p>proper [4] - 33585:1, 33728:1, 33744:25, 33753:22</p> <p>properly [3] - 33585:19, 33678:23, 33730:25</p> <p>proposition [1] - 33797:6</p> <p>prosecution [2] - 33760:14, 33762:25</p> <p>prosecutor [1] - 33747:14</p> <p>Prosecutors [1] - 33778:23</p> <p>prosecutors [2] - 33778:25, 33779:11</p> <p>prospect [2] - 33756:25, 33757:18</p> <p>prostate [1] - 33624:14</p> <p>protein [4] - 33649:10, 33659:16, 33664:12, 33746:6</p> <p>prove [7] - 33638:13, 33698:9, 33768:10, 33774:16, 33775:20, 33792:23, 33812:6</p> <p>proved [1] - 33776:17</p> <p>proven [5] - 33566:10, 33617:11, 33673:23, 33758:5, 33786:5</p> <p>provide [4] - 33539:12, 33565:8, 33570:8, 33571:3</p> <p>provided [16] - 33560:13, 33560:23, 33577:8, 33585:25, 33601:25, 33644:5, 33681:17, 33687:18, 33695:7, 33702:8, 33715:16, 33717:1, 33747:21, 33748:1, 33792:5, 33796:25</p> <p>provides [1] - 33798:5</p> <p>providing [10] - 33559:14, 33561:6, 33574:13, 33587:19, 33692:6, 33692:8, 33699:25, 33703:20, 33711:5, 33797:12</p> <p>Province [5] - 33540:3, 33540:4, 33657:24, 33681:1, 33815:3</p> |
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| | | | | |
|---|--|--|---|---|
| <p>province ^[1] - 33762:7</p> <p>provinces ^[2] - 33541:9, 33759:21</p> <p>provincial ^[1] - 33541:7</p> <p>provision ^[1] - 33711:1</p> <p>proximate ^[1] - 33554:9</p> <p>prudent ^[1] - 33752:21</p> <p>psychiatric ^[7] - 33560:6, 33560:10, 33560:15, 33560:19, 33561:16, 33562:4, 33562:20</p> <p>psychiatrist ^[1] - 33560:17</p> <p>psychologically ^[1] - 33779:16</p> <p>puberty ^[1] - 33624:20</p> <p>pubic ^[25] - 33653:8, 33654:1, 33654:5, 33654:9, 33654:12, 33654:22, 33655:3, 33655:6, 33655:8, 33658:18, 33718:5, 33718:10, 33719:5, 33719:9, 33719:14, 33720:5, 33729:17, 33750:13, 33750:14, 33751:13, 33755:15, 33755:19, 33756:18, 33756:22, 33757:7</p> <p>public ^[4] - 33542:2, 33693:17, 33697:4, 33711:13</p> <p>pump ^[1] - 33611:1</p> <p>puncture ^[1] - 33611:12</p> <p>purchased ^[1] - 33738:13</p> <p>pure ^[4] - 33646:8, 33655:1, 33661:13, 33734:6</p> <p>Pure ^[1] - 33757:2</p> <p>purported ^[2] - 33579:9, 33691:9</p> <p>purpose ^[6] - 33542:7, 33543:9, 33543:10, 33642:1, 33680:16, 33779:8</p> <p>purposes ^[5] - 33561:18, 33604:15, 33642:12, 33662:10, 33742:3</p> <p>purse ^[2] - 33777:13</p> <p>pursuant ^[2] - 33543:22, 33592:10</p> <p>pursue ^[2] - 33660:1, 33765:10</p> <p>pursued ^[1] - 33661:3</p> <p>put ^[24] - 33603:8, 33625:25, 33634:1, 33634:2, 33654:19,</p> | <p>33661:11, 33662:16, 33663:6, 33663:13, 33666:2, 33673:3, 33673:4, 33719:24, 33720:2, 33720:11, 33721:16, 33726:25, 33728:2, 33747:10, 33774:19, 33797:7, 33798:13, 33809:7, 33809:16</p> <p>putting ^[2] - 33587:14, 33710:13</p> <p>puzzle ^[1] - 33773:24</p> | <p>33663:23, 33665:22, 33670:16, 33753:7, 33757:10, 33760:22, 33796:14</p> <p>quote ^[3] - 33686:7, 33699:3, 33713:15</p> <p>quoted ^[2] - 33570:23, 33712:20</p> <p>quoting ^[1] - 33550:3</p> | <p>33786:18, 33787:18</p> <p>re ^[14] - 33551:20, 33576:7, 33592:9, 33765:3, 33775:2, 33784:25, 33788:22, 33789:21, 33796:14, 33796:24, 33800:24, 33804:5, 33811:25, 33813:1</p> <p>re-enactment ^[2] - 33796:14, 33796:24</p> <p>re-examination ^[1] - 33765:3</p> <p>re-examining ^[1] - 33551:20</p> <p>re-open ^[5] - 33775:2, 33784:25, 33789:21, 33804:5, 33813:1</p> <p>re-opened ^[3] - 33788:22, 33800:24, 33811:25</p> <p>re-tested ^[1] - 33576:7</p> <p>reabsorbed ^[1] - 33640:9</p> <p>reach ^[4] - 33553:4, 33644:7, 33676:14, 33678:21</p> <p>reached ^[5] - 33568:18, 33597:12, 33653:19, 33775:9, 33797:15</p> <p>reaches ^[1] - 33806:22</p> <p>reaching ^[2] - 33553:2, 33651:17</p> <p>react ^[1] - 33640:13</p> <p>reacted ^[2] - 33679:10, 33746:2</p> <p>reacting ^[1] - 33572:10</p> <p>reaction ^[10] - 33573:12, 33573:23, 33649:3, 33658:12, 33667:24, 33697:3, 33726:12, 33726:17, 33726:18, 33785:13</p> <p>reactions ^[1] - 33573:20</p> <p>reacts ^[2] - 33572:14, 33746:22</p> <p>read ^[18] - 33546:3, 33548:11, 33552:15, 33558:17, 33569:20, 33593:18, 33606:21, 33616:21, 33639:16, 33684:3, 33689:21, 33695:1, 33696:21, 33712:15, 33712:18, 33726:19, 33742:12, 33791:13</p> <p>reading ^[6] - 33549:19, 33559:13, 33636:14, 33657:12, 33657:18,</p> | <p>33660:10</p> <p>ready ^[7] - 33538:7, 33589:2, 33765:15, 33765:23, 33772:5, 33798:23, 33813:10</p> <p>reagent ^[2] - 33746:22, 33747:5</p> <p>real ^[10] - 33586:13, 33636:10, 33766:9, 33767:2, 33774:3, 33775:21, 33776:1, 33776:14, 33790:23, 33791:25</p> <p>realize ^[4] - 33674:20, 33693:22, 33800:7, 33800:8</p> <p>really ^[32] - 33543:5, 33561:19, 33579:8, 33592:20, 33600:8, 33610:4, 33612:5, 33615:1, 33653:17, 33657:9, 33668:23, 33690:2, 33705:16, 33707:10, 33745:25, 33757:20, 33758:2, 33763:25, 33764:3, 33766:11, 33768:21, 33769:8, 33771:2, 33776:11, 33791:21, 33792:2, 33796:23, 33797:3, 33798:12, 33803:3, 33807:7, 33809:25</p> <p>reason ^[18] - 33556:18, 33571:8, 33575:8, 33588:17, 33588:19, 33599:9, 33600:23, 33630:25, 33654:8, 33665:11, 33666:4, 33666:14, 33696:10, 33704:13, 33752:17, 33774:13, 33777:4, 33809:9</p> <p>reasonable ^[11] - 33550:6, 33627:15, 33630:15, 33635:17, 33654:2, 33738:21, 33745:8, 33789:18, 33793:9, 33793:14, 33795:24</p> <p>reasonably ^[4] - 33550:10, 33550:21, 33578:15, 33637:4</p> <p>reasoning ^[1] - 33769:12</p> <p>reasons ^[8] - 33566:7, 33572:25, 33578:12, 33578:15, 33588:7, 33605:8, 33707:12, 33708:11</p> |
| R | | | | |
| <p>raccoons ^[1] - 33685:23</p> <p>raise ^[5] - 33643:17, 33738:21, 33738:25, 33793:9, 33813:18</p> <p>raised ^[12] - 33568:23, 33568:25, 33625:6, 33633:9, 33643:16, 33661:20, 33662:6, 33663:9, 33666:16, 33692:23, 33804:22</p> <p>range ^[5] - 33540:1, 33602:2, 33627:22, 33667:25, 33736:11</p> <p>rape ^[10] - 33613:12, 33615:8, 33615:10, 33626:9, 33626:17, 33783:16, 33783:23, 33784:5, 33784:24, 33786:8</p> <p>rape/murders ^[1] - 33762:6</p> <p>raped ^[5] - 33782:18, 33784:3, 33786:14, 33803:18, 33807:6</p> <p>rapes ^[5] - 33783:9, 33783:22, 33784:14, 33786:8, 33803:16</p> <p>raping ^[1] - 33783:21</p> <p>rapist ^[4] - 33790:22, 33793:11, 33801:10, 33803:15</p> <p>rather ^[12] - 33564:12, 33610:18, 33622:23, 33634:16, 33645:17, 33665:23, 33718:21, 33721:7, 33746:1, 33759:1, 33783:24, 33810:12</p> <p>rational ^[1] - 33778:5</p> <p>Ray ^[1] - 33593:10</p> <p>ray ^[1] - 33633:2</p> <p>Rcmp ^[11] - 33535:9, 33658:16, 33694:24, 33711:11, 33711:16, 33716:20, 33717:13, 33724:6, 33727:3,</p> | | | | |
| Q | | | | |
| <p>Qb ^[1] - 33534:8</p> <p>Qc ^[4] - 33535:2, 33535:6, 33535:10, 33535:11</p> <p>qualifications ^[1] - 33655:12</p> <p>qualify ^[1] - 33562:12</p> <p>qualms ^[1] - 33599:10</p> <p>quantity ^[3] - 33611:22, 33617:24, 33664:4</p> <p>quasi ^[1] - 33650:5</p> <p>quasi-amateur ^[1] - 33650:5</p> <p>Queen's ^[4] - 33815:1, 33815:3, 33815:14, 33815:18</p> <p>quest ^[2] - 33725:23, 33800:23</p> <p>questioned ^[2] - 33687:3, 33710:8</p> <p>questioning ^[2] - 33783:6, 33787:20</p> <p>questions ^[18] - 33544:23, 33560:2, 33563:2, 33577:21, 33588:11, 33644:19, 33716:15, 33716:16, 33716:21, 33729:4, 33745:16, 33747:10, 33753:14, 33753:24, 33764:19, 33765:2, 33776:20, 33776:23</p> <p>quick ^[2] - 33788:13, 33796:7</p> <p>quicker ^[2] - 33794:21, 33806:16</p> <p>quickly ^[4] - 33603:11, 33626:1, 33795:4, 33813:4</p> <p>Quincy ^[1] - 33586:8</p> <p>quite ^[12] - 33621:9, 33624:11, 33638:2, 33647:3, 33648:3,</p> | | | | |



| | | | | |
|--|---|--|--|--|
| <p>recalled [2] - 33603:17, 33750:21</p> <p>recantation [1] - 33796:19</p> <p>recanted [1] - 33796:17</p> <p>receive [3] - 33594:25, 33703:25, 33754:14</p> <p>received [6] - 33539:22, 33545:13, 33559:6, 33561:13, 33630:7, 33648:10</p> <p>receives [1] - 33571:2</p> <p>receiving [1] - 33556:13</p> <p>recent [3] - 33703:14, 33804:17, 33804:21</p> <p>recently [3] - 33542:1, 33711:17, 33715:15</p> <p>recognize [3] - 33539:15, 33641:23, 33650:5</p> <p>recognized [3] - 33589:14, 33601:18, 33776:2</p> <p>recollection [25] - 33542:20, 33557:14, 33559:10, 33559:20, 33565:9, 33570:11, 33571:4, 33576:10, 33594:15, 33594:22, 33595:16, 33599:7, 33643:19, 33647:15, 33647:16, 33647:24, 33648:2, 33657:6, 33679:25, 33697:20, 33698:19, 33703:20, 33725:19, 33750:25, 33751:5</p> <p>recollections [1] - 33576:24</p> <p>recommend [1] - 33759:25</p> <p>recommendation [3] - 33760:2, 33762:17, 33764:13</p> <p>recommendations [8] - 33759:7, 33759:10, 33759:15, 33760:19, 33762:22, 33764:14, 33765:6, 33765:8</p> <p>Reconvened [4] - 33538:2, 33616:7, 33679:20, 33749:7</p> <p>record [5] - 33716:18, 33747:13, 33748:24, 33783:8, 33783:13</p> <p>recorded [1] - 33747:22</p> <p>recovered [5] - 33636:12, 33638:7, 33638:21, 33639:6, 33672:18</p> | <p>Recovered [1] - 33672:15</p> <p>recycle [1] - 33567:1</p> <p>red [1] - 33626:10</p> <p>redressing [1] - 33613:13</p> <p>reenacted [1] - 33767:13</p> <p>reenactment [1] - 33767:23</p> <p>Refer [1] - 33689:14</p> <p>refer [21] - 33553:5, 33553:11, 33558:4, 33583:15, 33602:18, 33616:14, 33641:22, 33675:13, 33680:21, 33683:19, 33684:1, 33684:5, 33687:21, 33689:17, 33690:16, 33693:6, 33705:2, 33707:20, 33709:21, 33712:9, 33714:15</p> <p>reference [9] - 33553:10, 33592:13, 33595:23, 33607:7, 33704:20, 33707:22, 33715:21, 33715:22, 33748:10</p> <p>referred [9] - 33547:8, 33560:16, 33660:7, 33660:10, 33678:6, 33704:3, 33709:15, 33725:25, 33765:4</p> <p>referring [15] - 33547:23, 33551:19, 33561:15, 33562:5, 33562:19, 33601:20, 33615:20, 33641:15, 33643:8, 33649:5, 33650:1, 33654:13, 33654:16, 33686:4, 33713:21</p> <p>refers [1] - 33619:3</p> <p>reflect [1] - 33742:15</p> <p>refresh [2] - 33591:21, 33643:13</p> <p>refused [5] - 33785:4, 33785:25, 33786:17, 33804:4, 33813:14</p> <p>refuses [1] - 33782:7</p> <p>regard [11] - 33541:16, 33551:8, 33559:11, 33574:14, 33606:14, 33614:2, 33614:9, 33619:19, 33673:15, 33736:20, 33755:17</p> <p>regarded [1] - 33567:17</p> <p>regarding [2] - 33695:18, 33703:12</p> <p>regardless [1] -</p> | <p>33760:14</p> <p>regards [4] - 33545:23, 33598:14, 33612:6, 33763:19</p> <p>Regina [3] - 33643:3, 33771:12, 33771:13</p> <p>register [1] - 33705:9</p> <p>regular [2] - 33540:20, 33540:22</p> <p>Reid [1] - 33593:8</p> <p>reinforced [1] - 33774:9</p> <p>reinforces [1] - 33581:10</p> <p>reinserted [1] - 33675:2</p> <p>rejected [1] - 33794:19</p> <p>relate [2] - 33596:9, 33736:14</p> <p>related [4] - 33551:19, 33558:3, 33558:10, 33567:12</p> <p>relates [5] - 33606:11, 33612:12, 33618:17, 33620:20, 33634:17</p> <p>relating [11] - 33539:7, 33555:15, 33558:12, 33561:5, 33561:16, 33562:21, 33612:11, 33635:24, 33651:3, 33652:21, 33689:1</p> <p>relation [11] - 33569:5, 33575:17, 33580:18, 33610:21, 33612:21, 33623:16, 33652:4, 33664:18, 33704:5, 33706:9, 33711:7</p> <p>relationship [1] - 33543:7</p> <p>relative [2] - 33740:2, 33740:3</p> <p>relatively [4] - 33608:4, 33608:8, 33654:18, 33724:4</p> <p>release [12] - 33577:10, 33577:19, 33580:19, 33587:20, 33683:21, 33683:24, 33688:9, 33690:18, 33692:1, 33712:25, 33786:22, 33812:25</p> <p>released [2] - 33684:18, 33788:23</p> <p>relevance [3] - 33702:13, 33735:18, 33735:23</p> <p>relevant [6] - 33561:17, 33651:15, 33651:22, 33662:9, 33736:22, 33761:6</p> <p>reliable [1] - 33700:10</p> <p>relied [3] - 33543:25,</p> | <p>33579:11, 33678:11</p> <p>religious [2] - 33808:10, 33808:13</p> <p>remain [1] - 33813:16</p> <p>remained [1] - 33705:13</p> <p>remains [3] - 33628:25, 33758:5, 33758:7</p> <p>remarkable [1] - 33638:2</p> <p>remedy [1] - 33768:25</p> <p>remember [18] - 33561:3, 33566:16, 33645:21, 33646:19, 33647:5, 33647:17, 33673:24, 33675:25, 33698:21, 33717:13, 33717:25, 33723:25, 33724:13, 33725:12, 33725:14, 33725:16, 33802:4, 33808:2</p> <p>remembered [2] - 33751:8, 33751:10</p> <p>remembers [1] - 33785:12</p> <p>reminded [1] - 33588:13</p> <p>removal [1] - 33755:19</p> <p>remove [1] - 33755:19</p> <p>removed [4] - 33612:16, 33637:11, 33654:7, 33718:5</p> <p>rendered [1] - 33543:11</p> <p>renowned [2] - 33590:21, 33767:7</p> <p>repeat [2] - 33601:10, 33671:15</p> <p>repeated [1] - 33726:1</p> <p>repeatedly [1] - 33782:19</p> <p>replicate [1] - 33722:1</p> <p>report [182] - 33540:16, 33544:2, 33544:8, 33545:16, 33546:3, 33547:2, 33547:23, 33548:16, 33548:18, 33549:21, 33550:3, 33550:5, 33555:20, 33557:8, 33558:20, 33558:22, 33559:2, 33559:3, 33565:8, 33570:4, 33570:7, 33570:8, 33570:10, 33570:23, 33571:2, 33571:21, 33571:22, 33571:23, 33574:13, 33574:20, 33577:7, 33577:10, 33577:13, 33577:19, 33578:2, 33580:19, 33580:23,</p> | <p>33581:9, 33583:14, 33585:25, 33586:5, 33587:13, 33587:20, 33589:15, 33589:18, 33590:8, 33590:14, 33590:20, 33591:13, 33591:15, 33591:18, 33591:22, 33593:24, 33594:12, 33597:23, 33598:10, 33598:24, 33599:25, 33602:19, 33602:22, 33602:24, 33603:2, 33603:3, 33603:4, 33604:2, 33606:23, 33607:8, 33608:17, 33608:25, 33610:13, 33611:11, 33616:10, 33617:16, 33619:1, 33620:23, 33621:11, 33630:11, 33630:17, 33631:10, 33633:7, 33636:3, 33639:1, 33642:18, 33648:8, 33651:5, 33655:13, 33658:7, 33658:24, 33659:8, 33659:9, 33660:10, 33661:6, 33661:9, 33661:13, 33661:23, 33663:10, 33663:19, 33664:22, 33666:2, 33667:1, 33667:4, 33668:20, 33671:17, 33679:24, 33680:1, 33680:2, 33680:13, 33680:18, 33680:24, 33681:2, 33681:3, 33681:21, 33681:22, 33682:11, 33682:12, 33683:8, 33683:21, 33683:24, 33684:20, 33687:2, 33688:2, 33688:9, 33689:2, 33689:4, 33689:22, 33690:18, 33692:1, 33693:6, 33693:9, 33693:11, 33693:14, 33695:4, 33695:6, 33697:2, 33697:4, 33697:6, 33699:5, 33699:7, 33699:13, 33707:18, 33710:20, 33710:22, 33711:1, 33711:6, 33712:25, 33713:4, 33713:6, 33713:18, 33714:20, 33717:11, 33718:24, 33720:13, 33722:22, 33722:23, 33726:2, 33726:4, 33726:5, 33726:8, 33726:25,</p> |
|--|---|--|--|--|



| | | | | |
|---|--|--|--|--|
| <p>33730:7, 33730:8, 33731:18, 33736:8, 33741:2, 33741:3, 33743:11, 33743:15, 33747:19, 33751:12, 33753:12, 33753:13, 33753:16, 33774:8, 33774:11, 33775:6, 33776:3, 33782:10, 33790:17, 33790:20 Report^[2] - 33688:1, 33704:24 reported ^[2] - 33666:16, 33803:7 Reporter^[14] - 33781:19, 33787:1, 33789:13, 33790:3, 33798:19, 33798:24, 33799:8, 33799:16, 33800:14, 33801:9, 33801:16, 33811:18, 33815:14, 33815:18 reporter ^[1] - 33742:6 reporters ^[1] - 33707:15 Reporters^[2] - 33534:8, 33815:3 Reporters^[1] - 33815:1 reporting ^[2] - 33650:8, 33708:17 reports ^[12] - 33543:24, 33545:10, 33560:19, 33574:20, 33592:8, 33594:8, 33594:16, 33648:6, 33747:21, 33782:4, 33788:3, 33792:10 represent ^[2] - 33716:20, 33754:2 representation ^[1] - 33701:8 representative ^[1] - 33692:4 represented ^[1] - 33753:9 represents ^[1] - 33799:6 reputations ^[1] - 33751:25 request ^[22] - 33543:1, 33545:5, 33545:19, 33545:25, 33548:5, 33548:13, 33553:22, 33555:12, 33555:15, 33558:5, 33558:19, 33559:3, 33559:23, 33602:25, 33606:5, 33750:24, 33785:4, 33786:17, 33813:18, 33813:21, 33813:23 requested ^[2] -</p> | <p>33551:1, 33570:7 requesting ^[1] - 33570:10 requests ^[2] - 33559:7, 33813:10 require ^[3] - 33544:23, 33556:12, 33786:5 required ^[1] - 33613:18 requires ^[2] - 33759:23, 33759:24 research ^[4] - 33566:15, 33566:19, 33567:11, 33628:17 researched ^[1] - 33720:18 reservation ^[1] - 33631:1 reside ^[1] - 33538:16 resolution ^[1] - 33788:16 respect ^[12] - 33550:15, 33594:7, 33601:24, 33620:4, 33678:10, 33705:24, 33718:25, 33721:11, 33724:22, 33728:20, 33739:8, 33762:15 respecting ^[7] - 33558:15, 33560:15, 33562:25, 33570:1, 33576:9, 33576:20, 33696:19 respects ^[1] - 33693:23 respond ^[1] - 33606:5 responded ^[1] - 33643:21 response ^[4] - 33602:25, 33690:5, 33751:3, 33751:21 responsible ^[3] - 33582:3, 33780:11, 33792:18 rest ^[1] - 33782:10 Restarted^[1] - 33536:21 restarted ^[1] - 33773:2 restriction ^[1] - 33605:22 result ^[19] - 33607:14, 33608:3, 33608:5, 33618:7, 33619:12, 33620:1, 33620:2, 33621:19, 33623:18, 33624:12, 33633:15, 33636:20, 33636:23, 33656:8, 33656:10, 33672:23, 33674:8, 33700:8, 33747:16 results ^[1] - 33681:9 retained ^[3] - 33720:24, 33755:10, 33755:11</p> | <p>retention ^[1] - 33551:14 retesting ^[1] - 33557:3 rethink ^[1] - 33584:24 retired ^[5] - 33538:20, 33538:21, 33541:13, 33750:7, 33760:24 Retired^[1] - 33535:15 retracted ^[1] - 33803:10 retrieved ^[6] - 33622:7, 33627:6, 33644:8, 33653:9, 33667:11, 33676:23 return ^[4] - 33614:1, 33616:9, 33617:16, 33639:1 returned ^[1] - 33777:21 revealed ^[2] - 33671:9, 33757:13 revealing ^[1] - 33782:2 revelation ^[1] - 33684:15 review ^[58] - 33542:16, 33543:16, 33545:16, 33545:21, 33545:25, 33546:16, 33547:19, 33548:6, 33548:13, 33551:2, 33553:6, 33553:18, 33560:2, 33561:18, 33563:23, 33571:25, 33589:20, 33589:23, 33590:3, 33590:8, 33590:11, 33590:19, 33591:2, 33593:23, 33595:7, 33596:13, 33603:16, 33604:15, 33604:21, 33604:24, 33605:3, 33631:25, 33636:3, 33641:16, 33644:11, 33644:13, 33644:18, 33648:12, 33651:10, 33653:14, 33657:4, 33659:21, 33670:22, 33670:25, 33673:21, 33679:24, 33684:10, 33684:16, 33703:25, 33710:23, 33740:20, 33741:18, 33743:25, 33751:3, 33786:20, 33787:24, 33793:23, 33799:21 reviewed ^[21] - 33539:18, 33546:19, 33547:9, 33547:11, 33551:25, 33552:21, 33591:19, 33592:1, 33593:5, 33593:16, 33596:25, 33604:9, 33606:3, 33611:19, 33623:14, 33631:14,</p> | <p>33659:14, 33695:6, 33729:20, 33736:5, 33740:22 reviewing ^[6] - 33541:19, 33544:6, 33546:25, 33629:19, 33653:13, 33696:14 reviews ^[1] - 33546:15 revisit ^[1] - 33802:10 reward ^[1] - 33766:8 Richmond^[1] - 33784:1 Rick^[1] - 33787:17 riddled ^[1] - 33579:4 ridicule ^[1] - 33753:6 ridiculed ^[2] - 33582:14, 33780:22 ridiculously ^[1] - 33753:7 right-hand ^[1] - 33714:16 rightly ^[1] - 33797:23 ripped ^[1] - 33614:10 rise ^[1] - 33564:18 rises ^[1] - 33544:15 role ^[3] - 33599:15, 33710:25, 33736:20 Ron^[2] - 33803:10, 33807:22 room ^[4] - 33569:13, 33721:20, 33750:22, 33767:20 Rossmo^[1] - 33715:16 rough ^[1] - 33795:1 round ^[1] - 33796:9 routine ^[2] - 33603:23, 33725:13 routinely ^[1] - 33728:11 Rpr^[4] - 33534:9, 33815:2, 33815:16, 33815:17 rule ^[4] - 33739:5, 33739:12, 33739:23, 33739:24 rulers ^[1] - 33631:16 run ^[3] - 33606:16, 33725:18, 33769:22 running ^[1] - 33580:13 runs ^[1] - 33786:23 Russell^[1] - 33812:23</p> | <p>33596:16, 33628:24, 33645:6, 33646:8, 33646:9, 33657:20, 33657:22, 33668:19, 33687:4, 33687:11, 33696:4, 33700:8, 33705:5, 33717:18, 33718:9, 33718:10, 33719:8, 33719:9, 33720:1, 33722:3, 33722:12, 33731:10, 33731:14, 33732:13, 33732:14, 33737:5, 33738:3, 33738:8, 33739:17, 33745:5, 33751:14, 33756:16, 33756:19, 33756:23, 33756:25, 33757:8, 33757:11, 33757:15, 33757:25, 33773:15 samples ^[24] - 33549:22, 33564:22, 33582:9, 33628:21, 33636:11, 33638:14, 33639:5, 33645:25, 33681:6, 33681:11, 33682:16, 33691:2, 33691:3, 33692:19, 33705:10, 33705:12, 33705:21, 33717:23, 33718:16, 33728:2, 33728:8, 33729:25, 33755:13, 33780:17 Sandra^[1] - 33534:4 sanitary ^[1] - 33619:17 Saskatchewan ^[23] - 33533:17, 33535:4, 33582:4, 33582:23, 33582:24, 33592:6, 33759:18, 33759:19, 33759:20, 33760:21, 33760:25, 33761:13, 33764:1, 33769:5, 33769:15, 33769:17, 33769:19, 33776:9, 33780:12, 33781:6, 33781:7, 33786:12, 33815:4 Saskatoon ^[31] - 33533:17, 33535:7, 33582:7, 33590:17, 33693:5, 33714:7, 33754:2, 33766:8, 33766:20, 33766:22, 33771:10, 33771:13, 33774:1, 33777:11, 33780:15, 33782:4, 33782:13, 33782:21, 33783:11, 33783:12, 33784:17, 33785:19,</p> |
| S | | | | |
| <p>sad ^[1] - 33760:22 sake ^[4] - 33592:13, 33641:20, 33661:17, 33713:4 saliva ^[3] - 33643:1, 33696:3, 33700:7 sample ^[41] - 33572:20,</p> | | | | |



| | | | | |
|--|---|--|---|---|
| 33785:23, 33787:2, 33792:2, 33803:4, 33803:16, 33804:1, 33804:17, 33813:22 Saskatoon's [1] - 33684:25 sat [2] - 33806:4, 33806:7 satisfaction [4] - 33619:16, 33677:3, 33698:14, 33730:13 satisfied [2] - 33670:21, 33670:23 Saturday [2] - 33590:5, 33591:3 save [2] - 33728:11, 33748:19 saved [2] - 33728:7, 33728:16 saw [14] - 33579:21, 33626:10, 33741:12, 33750:19, 33751:5, 33751:11, 33751:12, 33753:2, 33770:15, 33770:20, 33770:21, 33770:22, 33803:12 scale [1] - 33605:23 scaled [1] - 33605:24 scared [1] - 33785:16 scarred [1] - 33810:13 scars [1] - 33810:10 scenario [1] - 33588:21 scene [40] - 33549:23, 33550:1, 33554:2, 33566:2, 33568:24, 33578:9, 33579:9, 33588:9, 33594:2, 33605:25, 33606:10, 33606:14, 33635:25, 33636:13, 33636:18, 33637:1, 33637:3, 33637:25, 33638:2, 33638:11, 33639:7, 33654:5, 33654:9, 33658:1, 33666:12, 33667:7, 33681:7, 33684:12, 33691:10, 33693:21, 33700:17, 33701:14, 33708:6, 33714:24, 33720:7, 33727:24, 33756:8, 33773:11, 33776:24 Scene [2] - 33635:22, 33636:9 scenes [2] - 33606:13, 33665:25 Scent [1] - 33712:12 scheduled [1] - 33786:21 School [1] - 33564:5 | science [10] - 33588:10, 33625:11, 33634:23, 33746:18, 33760:4, 33761:9, 33762:20, 33764:23 Science [2] - 33709:19, 33715:18 Sciences [1] - 33564:3 scientific [18] - 33547:1, 33547:7, 33547:15, 33547:19, 33557:25, 33559:17, 33569:9, 33579:5, 33587:25, 33644:7, 33655:18, 33656:12, 33678:17, 33678:24, 33686:17, 33703:25, 33739:25, 33740:8 Scientific [1] - 33567:10 scientifically [1] - 33763:20 scientist [1] - 33767:7 Scientists [1] - 33714:11 scientists [1] - 33570:19 Scotia [3] - 33541:12, 33758:25, 33761:17 scraping [1] - 33809:18 screen [3] - 33577:24, 33750:10, 33750:19 screening [1] - 33667:20 screwed [2] - 33690:6, 33809:7 search [3] - 33637:9, 33720:21, 33755:7 searched [3] - 33639:8, 33720:20, 33755:6 searching [2] - 33637:13, 33637:20 season [1] - 33801:23 second [14] - 33553:13, 33588:14, 33605:10, 33618:17, 33621:15, 33665:2, 33665:3, 33675:14, 33710:20, 33711:6, 33714:16, 33732:2, 33789:20, 33812:6 secondly [3] - 33550:20, 33659:17, 33794:24 seconds [6] - 33577:23, 33580:14, 33581:5, 33581:6, 33614:11, 33614:15 secrecy [1] - 33798:6 secrete [2] - 33687:8, 33705:7 | secreted [1] - 33640:9 secretion [1] - 33565:3 secretions [4] - 33617:7, 33617:14, 33624:2, 33669:7 secretor [34] - 33574:8, 33574:10, 33575:13, 33575:25, 33588:22, 33589:7, 33589:8, 33622:15, 33669:5, 33671:9, 33671:22, 33672:1, 33672:4, 33672:12, 33677:21, 33678:1, 33678:7, 33683:2, 33687:7, 33694:9, 33696:6, 33700:6, 33728:21, 33731:3, 33731:11, 33732:3, 33732:9, 33742:23, 33745:10, 33745:12, 33753:17, 33753:22 Section [10] - 33543:22, 33555:25, 33592:10, 33643:25, 33680:4, 33680:11, 33706:4, 33758:19, 33763:13, 33764:5 section [6] - 33606:19, 33613:7, 33631:7, 33632:13, 33668:24, 33672:14 security [1] - 33799:22 Security [1] - 33534:10 see [74] - 33539:22, 33543:10, 33545:15, 33545:24, 33548:6, 33553:16, 33555:20, 33556:3, 33556:22, 33556:24, 33558:13, 33565:25, 33567:11, 33568:15, 33568:17, 33569:25, 33571:24, 33585:13, 33585:14, 33586:7, 33587:22, 33589:5, 33591:5, 33591:14, 33592:23, 33593:1, 33593:4, 33595:22, 33604:4, 33605:1, 33610:10, 33621:5, 33632:24, 33634:23, 33642:10, 33650:6, 33651:12, 33660:9, 33673:19, 33680:19, 33685:9, 33693:3, 33694:14, 33696:18, 33704:23, 33709:23, 33710:22, 33712:11, 33712:19, 33713:5, 33713:9, | 33741:2, 33742:10, 33742:18, 33742:21, 33744:9, 33750:19, 33758:11, 33758:12, 33763:24, 33766:22, 33767:23, 33775:15, 33791:16, 33792:7, 33795:10, 33795:19, 33796:3, 33796:5, 33797:13, 33798:10, 33805:6, 33805:7, 33805:11 seeing [4] - 33717:25, 33753:2, 33753:3, 33810:12 seem [5] - 33610:20, 33615:25, 33775:19, 33787:8, 33793:6 sees [1] - 33773:6 self [2] - 33566:11, 33716:22 Semen [5] - 33616:11, 33667:4, 33668:25, 33713:11, 33715:23 semen [132] - 33549:22, 33557:9, 33564:11, 33564:19, 33564:23, 33565:2, 33566:25, 33567:7, 33567:20, 33568:1, 33568:5, 33568:13, 33568:19, 33569:6, 33569:11, 33571:18, 33571:20, 33573:18, 33573:21, 33575:7, 33578:10, 33578:17, 33578:22, 33590:15, 33602:14, 33616:24, 33617:18, 33622:5, 33622:7, 33622:14, 33622:19, 33623:1, 33623:2, 33624:11, 33636:12, 33638:3, 33638:6, 33638:8, 33638:17, 33639:5, 33640:8, 33640:11, 33640:15, 33640:17, 33640:24, 33641:9, 33642:21, 33642:23, 33643:4, 33643:18, 33644:1, 33644:8, 33644:17, 33645:11, 33648:18, 33648:25, 33650:20, 33650:25, 33651:24, 33652:2, 33652:7, 33653:25, 33655:8, 33655:22, 33656:11, 33657:25, 33658:1, 33658:5, 33658:9, 33658:18, 33658:21, | 33659:5, 33661:13, 33666:12, 33666:17, 33669:2, 33669:3, 33670:19, 33671:9, 33676:23, 33677:6, 33677:15, 33678:4, 33678:11, 33681:12, 33682:17, 33682:23, 33683:10, 33684:11, 33686:14, 33687:4, 33687:10, 33687:15, 33691:2, 33691:3, 33691:19, 33693:20, 33694:5, 33694:6, 33695:12, 33695:19, 33697:10, 33704:7, 33705:6, 33705:7, 33708:6, 33712:21, 33713:12, 33713:13, 33715:21, 33716:5, 33721:11, 33721:19, 33721:20, 33726:9, 33729:9, 33729:12, 33729:17, 33730:1, 33730:4, 33730:16, 33730:21, 33732:2, 33737:5, 33743:18, 33745:13, 33745:14, 33757:11 seminal [13] - 33573:6, 33573:7, 33573:13, 33624:18, 33638:14, 33667:10, 33715:21, 33722:6, 33722:15, 33722:16, 33742:22, 33742:24, 33773:17 Seminal [2] - 33635:22, 33636:9 send [3] - 33587:8, 33704:1, 33704:17 sensational [1] - 33802:8 sense [12] - 33550:18, 33551:10, 33580:23, 33601:9, 33655:17, 33656:2, 33673:16, 33761:6, 33771:4, 33779:21, 33807:6, 33808:24 sensitive [2] - 33649:18, 33725:23 sent [8] - 33598:2, 33643:2, 33710:22, 33747:19, 33751:1, 33751:2, 33794:5, 33813:21 sentence [11] - 33607:2, 33620:16, 33620:21, 33682:14, 33683:7, 33683:13, |
|--|---|--|---|---|



| | | | | |
|--|--|---|---|--|
| <p>33685:9, 33713:18, 33786:23, 33789:14, 33795:8</p> <p>sentenced [1] - 33784:14</p> <p>separate [3] - 33574:13, 33605:9, 33764:4</p> <p>separately [1] - 33736:12</p> <p>September [2] - 33688:15, 33801:22</p> <p>sequence [1] - 33709:14</p> <p>Serge [1] - 33535:6</p> <p>sergeant [1] - 33647:4</p> <p>Sergeant [27] - 33574:1, 33592:23, 33592:25, 33603:17, 33644:3, 33644:16, 33647:16, 33647:22, 33648:10, 33652:13, 33659:12, 33660:18, 33661:12, 33662:3, 33662:19, 33662:22, 33662:24, 33664:9, 33665:5, 33723:2, 33723:24, 33724:2, 33724:12, 33724:21, 33724:24, 33724:25, 33725:4</p> <p>serial [3] - 33790:22, 33793:11, 33803:15</p> <p>series [1] - 33747:20</p> <p>serious [2] - 33675:9, 33803:9</p> <p>seriously [1] - 33751:18</p> <p>serological [16] - 33550:7, 33550:18, 33550:20, 33676:21, 33677:8, 33678:15, 33682:2, 33697:17, 33698:7, 33698:13, 33699:20, 33701:21, 33701:22, 33711:7, 33728:20, 33730:18</p> <p>serologically [1] - 33640:13</p> <p>serologist [10] - 33563:19, 33625:21, 33644:12, 33645:23, 33650:3, 33650:7, 33694:20, 33726:23, 33727:2, 33727:12</p> <p>Serology [1] - 33643:25</p> <p>serology [5] - 33563:16, 33626:3, 33635:4, 33635:11, 33646:5</p> <p>serve [1] - 33672:3</p> <p>served [2] - 33709:18, 33786:11</p> | <p>service [1] - 33760:4</p> <p>Service [2] - 33535:7, 33754:3</p> <p>services [2] - 33551:14, 33576:12</p> <p>serving [1] - 33789:14</p> <p>set [7] - 33618:4, 33621:6, 33649:11, 33652:21, 33712:24, 33765:21, 33798:25</p> <p>setting [3] - 33563:18, 33650:18, 33737:20</p> <p>seven [9] - 33653:8, 33654:12, 33658:18, 33719:4, 33719:5, 33719:11, 33719:16, 33750:12, 33770:22</p> <p>several [9] - 33606:21, 33608:13, 33622:8, 33695:21, 33701:20, 33706:23, 33707:23, 33715:1, 33727:7</p> <p>Sexual [1] - 33703:18</p> <p>sexual [13] - 33578:8, 33598:18, 33602:1, 33602:13, 33609:19, 33615:15, 33628:5, 33655:9, 33674:10, 33704:14, 33783:9, 33784:17, 33784:23</p> <p>sexually [1] - 33598:16</p> <p>Sgt [4] - 33646:16, 33646:17, 33723:5, 33723:21</p> <p>shaky [2] - 33678:16, 33686:16</p> <p>shall [1] - 33653:24</p> <p>Shane [1] - 33593:10</p> <p>shaped [1] - 33554:5</p> <p>share [7] - 33551:9, 33576:23, 33591:7, 33595:16, 33639:3, 33701:25, 33702:4</p> <p>shared [2] - 33639:18, 33673:14</p> <p>sharing [1] - 33612:20</p> <p>Sharon [16] - 33782:3, 33782:5, 33782:12, 33784:7, 33784:13, 33786:11, 33786:24, 33787:2, 33787:4, 33787:7, 33787:17, 33787:25, 33788:12, 33788:18, 33789:4, 33789:6</p> <p>shedding [1] - 33624:11</p> <p>Sheila [1] - 33703:17</p> <p>shiny [1] - 33715:24</p> <p>shock [1] - 33607:23</p> | <p>shocked [1] - 33785:16</p> <p>short [13] - 33550:24, 33581:3, 33614:19, 33615:12, 33616:2, 33689:17, 33690:16, 33705:1, 33709:20, 33712:7, 33712:12, 33765:19</p> <p>shorthand [2] - 33742:7, 33815:5</p> <p>shortly [2] - 33562:9, 33724:5</p> <p>shovel [6] - 33657:21, 33737:16, 33737:23, 33738:4, 33738:9, 33738:13</p> <p>shovelled [1] - 33637:12</p> <p>shovelling [2] - 33656:4, 33656:9</p> <p>shovels [2] - 33656:10, 33668:2</p> <p>show [12] - 33555:9, 33577:24, 33578:17, 33581:3, 33582:13, 33631:18, 33651:6, 33670:1, 33670:18, 33780:21, 33789:18, 33795:23</p> <p>showed [2] - 33628:1, 33751:13</p> <p>showing [1] - 33700:16</p> <p>shown [3] - 33697:20, 33697:25, 33740:24</p> <p>shows [2] - 33747:4, 33767:10</p> <p>shudder [1] - 33715:3</p> <p>sick [2] - 33800:4, 33800:8</p> <p>side [5] - 33568:12, 33568:14, 33637:12, 33714:17, 33728:25</p> <p>sidelined [1] - 33751:18</p> <p>sides [1] - 33614:14</p> <p>sign [2] - 33613:3, 33613:4</p> <p>signaling [1] - 33603:6</p> <p>signature [2] - 33804:15</p> <p>signed [1] - 33785:5</p> <p>significance [9] - 33617:15, 33620:25, 33624:3, 33632:19, 33633:13, 33655:17, 33673:20, 33674:3, 33674:4</p> <p>significant [1] - 33610:14</p> <p>significantly [1] - 33753:4</p> | <p>signs [5] - 33609:6, 33610:7, 33610:10, 33628:1, 33701:1</p> <p>silence [1] - 33610:15</p> <p>silent [4] - 33570:23, 33609:1, 33619:20, 33620:23</p> <p>Silliboy [1] - 33759:2</p> <p>similar [9] - 33551:16, 33606:23, 33687:22, 33688:25, 33718:8, 33719:12, 33759:15, 33760:2, 33770:6</p> <p>similarity [1] - 33719:15</p> <p>Similarly [1] - 33735:5</p> <p>similarly [1] - 33690:17</p> <p>simple [4] - 33649:15, 33801:8, 33802:22, 33805:9</p> <p>simplify [2] - 33602:10, 33628:14</p> <p>simplifying [2] - 33601:23, 33602:17</p> <p>simply [4] - 33572:17, 33617:8, 33629:21, 33812:10</p> <p>sincere [1] - 33800:17</p> <p>single [2] - 33708:2, 33708:4</p> <p>sit [4] - 33768:8, 33769:9, 33805:18, 33806:4</p> <p>sits [1] - 33573:19</p> <p>sitting [6] - 33533:15, 33723:22, 33766:15, 33781:21, 33805:17, 33810:2</p> <p>situation [3] - 33606:1, 33778:10, 33806:18</p> <p>situations [1] - 33770:12</p> <p>Six [1] - 33718:5</p> <p>six [2] - 33592:14, 33627:7</p> <p>size [1] - 33631:11</p> <p>skill [1] - 33815:6</p> <p>skin [2] - 33633:25, 33675:10</p> <p>skip [2] - 33585:22, 33619:14</p> <p>skipped [1] - 33772:4</p> <p>skipping [1] - 33684:19</p> <p>slash [2] - 33675:16, 33675:18</p> <p>slide [1] - 33594:1</p> <p>slides [2] - 33604:22, 33650:24</p> <p>slight [1] - 33715:25</p> <p>slightest [1] - 33565:24</p> <p>slightly [1] - 33638:18</p> | <p>slow [2] - 33608:4, 33608:8</p> <p>sluffing [1] - 33617:9</p> <p>small [4] - 33624:17, 33638:3, 33669:25, 33777:13</p> <p>smallest [1] - 33766:25</p> <p>smothered [1] - 33610:16</p> <p>snap [1] - 33798:23</p> <p>snapped [1] - 33715:7</p> <p>snow [28] - 33555:9, 33564:12, 33564:15, 33568:1, 33568:11, 33578:11, 33578:24, 33582:10, 33598:13, 33637:6, 33637:12, 33637:15, 33639:9, 33641:12, 33651:20, 33652:24, 33658:4, 33684:11, 33687:12, 33691:11, 33695:12, 33720:18, 33720:20, 33755:16, 33780:18, 33782:17</p> <p>snowbank [10] - 33622:8, 33623:1, 33644:9, 33667:12, 33676:24, 33685:4, 33685:12, 33687:15, 33697:12, 33698:11</p> <p>Snowbank [4] - 33635:23, 33667:5, 33668:25, 33713:11</p> <p>snowbanks [3] - 33566:9, 33640:4, 33691:16</p> <p>so-called [2] - 33569:11, 33622:6</p> <p>society [1] - 33811:3</p> <p>soil [6] - 33668:1, 33669:8, 33736:8, 33737:24, 33738:2, 33738:17</p> <p>soiled [1] - 33738:9</p> <p>soiling [1] - 33637:16</p> <p>sold [1] - 33807:25</p> <p>solicitor [1] - 33813:13</p> <p>Someone [1] - 33771:19</p> <p>someone [9] - 33720:10, 33723:10, 33724:23, 33742:9, 33767:10, 33776:1, 33783:4, 33783:5, 33792:17</p> <p>sometimes [6] - 33601:6, 33807:18, 33808:17, 33808:21, 33810:1, 33810:6</p> <p>somewhat [9] -</p> |
|--|--|---|---|--|



| | | | | |
|---|--|---|--|---|
| <p>33596:10, 33603:22, 33604:1, 33610:3, 33619:11, 33715:24, 33742:7, 33755:12, 33762:22</p> <p>somewhere [2] - 33597:23, 33630:18</p> <p>son [14] - 33589:25, 33766:3, 33768:7, 33774:4, 33774:17, 33790:23, 33791:11, 33795:7, 33798:25, 33799:21, 33804:7, 33804:25, 33813:17, 33813:20</p> <p>son's [3] - 33774:3, 33800:23, 33812:13</p> <p>soon [3] - 33551:25, 33552:21, 33571:1</p> <p>Sore [2] - 33810:20, 33810:25</p> <p>soreness [1] - 33809:6</p> <p>Sorry [6] - 33581:12, 33589:17, 33605:10, 33615:19, 33676:6, 33771:23</p> <p>sorry [28] - 33571:18, 33581:16, 33596:11, 33599:16, 33602:6, 33607:10, 33612:10, 33616:18, 33616:19, 33632:19, 33656:20, 33659:9, 33659:10, 33660:4, 33660:14, 33660:22, 33664:25, 33678:6, 33693:7, 33712:17, 33713:7, 33713:8, 33713:22, 33724:25, 33726:4, 33735:21, 33754:19, 33804:8</p> <p>sort [11] - 33566:17, 33591:10, 33604:14, 33629:12, 33690:13, 33704:14, 33722:1, 33778:8, 33779:14, 33779:25, 33809:13</p> <p>sorts [1] - 33563:16</p> <p>sound [6] - 33542:12, 33569:20, 33584:6, 33584:7, 33587:18, 33811:4</p> <p>sounded [3] - 33800:17, 33800:18</p> <p>source [15] - 33560:8, 33561:9, 33561:11, 33596:6, 33620:8, 33621:13, 33621:17, 33678:3, 33691:15, 33719:17, 33719:19,</p> | <p>33724:8, 33735:1, 33736:1, 33800:15</p> <p>sources [10] - 33685:3, 33685:11, 33685:16, 33685:17, 33685:18, 33685:22, 33685:24, 33686:5, 33744:8, 33744:10</p> <p>South [2] - 33554:10, 33554:11</p> <p>southern [1] - 33554:7</p> <p>Speaker [8] - 33584:10, 33584:13, 33584:17, 33584:21, 33585:3, 33586:4, 33587:1, 33587:12</p> <p>speaking [9] - 33601:15, 33612:12, 33616:12, 33647:24, 33653:11, 33653:12, 33693:7, 33693:8, 33763:7</p> <p>special [1] - 33641:13</p> <p>specialist [2] - 33653:7, 33658:15</p> <p>specialty [2] - 33564:8, 33575:9</p> <p>species [4] - 33643:5, 33649:2, 33658:11, 33726:11</p> <p>specific [23] - 33547:12, 33553:10, 33594:22, 33603:9, 33645:9, 33645:16, 33646:21, 33647:8, 33647:11, 33647:18, 33649:3, 33649:17, 33649:18, 33658:11, 33664:23, 33667:22, 33725:24, 33726:12, 33726:17, 33726:18, 33728:23, 33763:10</p> <p>specifically [8] - 33539:5, 33557:8, 33559:12, 33561:24, 33625:8, 33658:25, 33667:19, 33725:11</p> <p>specificity [1] - 33746:18</p> <p>specimen [11] - 33627:1, 33645:3, 33653:23, 33653:24, 33654:1, 33654:4, 33666:7, 33667:11, 33677:8, 33725:24, 33730:17</p> <p>specimens [6] - 33568:10, 33573:8, 33573:14, 33646:22, 33656:23, 33729:15</p> | <p>speculate [3] - 33674:21, 33737:18, 33758:3</p> <p>speculated [2] - 33611:25, 33753:9</p> <p>speculating [1] - 33558:2</p> <p>speculation [2] - 33611:7, 33752:6</p> <p>Speculation [1] - 33737:20</p> <p>speculative [5] - 33555:3, 33757:24, 33757:25, 33758:5, 33758:7</p> <p>speech [5] - 33596:18, 33600:21, 33601:6, 33601:16, 33742:14</p> <p>speed [4] - 33608:1, 33608:6, 33799:20, 33813:5</p> <p>spend [2] - 33632:12, 33768:3</p> <p>spent [4] - 33781:19, 33798:19, 33801:5, 33812:4</p> <p>sperm [55] - 33566:12, 33568:22, 33596:16, 33596:23, 33597:11, 33597:20, 33597:21, 33597:22, 33598:2, 33598:8, 33598:12, 33598:16, 33598:18, 33600:2, 33600:13, 33601:20, 33601:21, 33627:1, 33627:3, 33627:5, 33627:11, 33627:13, 33627:16, 33627:18, 33627:24, 33628:6, 33628:10, 33628:19, 33628:24, 33629:3, 33630:13, 33645:10, 33645:11, 33645:12, 33645:17, 33649:13, 33650:11, 33653:12, 33654:21, 33654:24, 33662:5, 33665:10, 33665:12, 33665:13, 33666:5, 33666:11, 33681:10, 33698:10, 33705:12, 33705:21, 33719:25, 33734:6, 33757:14, 33757:15</p> <p>Sperm [1] - 33626:21</p> <p>spermatozoa [16] - 33572:24, 33573:9, 33659:19, 33661:14, 33662:25, 33663:1, 33664:4, 33665:5,</p> | <p>33665:6, 33668:3, 33695:20, 33695:24, 33727:6, 33727:7, 33727:10</p> <p>sperms [3] - 33598:3, 33603:24, 33650:4</p> <p>spite [1] - 33656:9</p> <p>splattering [1] - 33675:3</p> <p>spoken [1] - 33570:5</p> <p>spoon [2] - 33809:13, 33809:17</p> <p>spot [5] - 33585:12, 33641:12, 33652:5, 33679:17, 33814:2</p> <p>spots [2] - 33578:10, 33700:25</p> <p>squirted [1] - 33568:13</p> <p>stab [14] - 33555:4, 33607:6, 33607:15, 33607:18, 33608:9, 33609:11, 33609:15, 33609:24, 33612:22, 33614:13, 33634:8, 33675:4, 33675:9, 33715:2</p> <p>stabbed [1] - 33782:19</p> <p>stabbing [4] - 33610:23, 33610:24, 33674:11, 33674:13</p> <p>staff [2] - 33647:4, 33765:21</p> <p>Staff [31] - 33534:1, 33534:6, 33574:1, 33592:22, 33592:25, 33644:3, 33644:16, 33646:16, 33646:17, 33647:15, 33647:21, 33648:10, 33652:13, 33659:12, 33660:18, 33662:3, 33662:19, 33662:22, 33662:24, 33664:8, 33665:5, 33723:1, 33723:4, 33723:21, 33723:23, 33724:2, 33724:12, 33724:21, 33724:24, 33724:25, 33725:4</p> <p>stain [8] - 33566:8, 33641:10, 33652:9, 33654:13, 33658:18, 33658:21, 33659:5, 33665:21</p> <p>stained [7] - 33619:18, 33619:21, 33624:1, 33638:24, 33675:2, 33783:2, 33803:12</p> <p>staining [8] - 33617:2, 33619:22, 33619:25, 33620:8, 33620:9,</p> | <p>33639:11, 33674:9, 33727:25</p> <p>stains [10] - 33555:8, 33566:9, 33639:13, 33640:3, 33640:15, 33674:14, 33685:4, 33685:12, 33685:18, 33691:16</p> <p>Stains [3] - 33635:22, 33635:23, 33636:9</p> <p>stairs [1] - 33759:1</p> <p>stake [2] - 33781:15, 33795:5</p> <p>stand [4] - 33576:11, 33596:14, 33807:3, 33809:8</p> <p>standing [2] - 33573:8, 33787:3</p> <p>Star [2] - 33551:18, 33707:25</p> <p>Starphoenix [5] - 33553:8, 33589:19, 33684:2, 33689:15, 33693:5</p> <p>start [5] - 33581:12, 33581:15, 33598:5, 33627:3, 33765:20</p> <p>started [7] - 33620:14, 33706:18, 33706:21, 33749:22, 33770:14, 33775:16, 33792:9</p> <p>Starting [1] - 33636:8</p> <p>starting [2] - 33558:16, 33690:25</p> <p>starts [2] - 33612:3, 33634:1</p> <p>state [20] - 33546:17, 33557:7, 33602:23, 33608:23, 33613:8, 33617:17, 33618:5, 33618:23, 33621:16, 33623:21, 33626:24, 33642:19, 33667:7, 33669:1, 33676:8, 33716:7, 33716:13, 33720:25, 33755:11, 33795:9</p> <p>statement [9] - 33549:12, 33696:6, 33708:10, 33743:8, 33767:19, 33778:1, 33785:5, 33785:20, 33795:21</p> <p>statements [2] - 33636:15, 33767:20</p> <p>States [1] - 33542:7</p> <p>states [37] - 33543:16, 33550:25, 33551:23, 33552:19, 33553:19, 33556:6, 33563:24,</p> |
|---|--|---|--|---|



| | | | | |
|---|---|--|--|---|
| <p>33570:2, 33572:2, 33572:22, 33589:21, 33593:21, 33597:23, 33605:12, 33606:20, 33607:2, 33607:12, 33607:20, 33612:13, 33616:21, 33631:8, 33636:8, 33639:2, 33648:17, 33670:15, 33680:22, 33682:15, 33684:6, 33686:10, 33689:18, 33703:13, 33705:2, 33708:3, 33709:24, 33713:11, 33714:18, 33715:22 stating [6] - 33572:17, 33573:18, 33608:18, 33628:15, 33628:17, 33716:3 station [4] - 33547:18, 33560:1, 33606:17, 33686:22 status [7] - 33574:8, 33588:22, 33672:1, 33672:4, 33683:2, 33753:17, 33753:22 stayed [2] - 33655:6, 33714:23 stays [1] - 33689:16 steps [2] - 33700:7, 33769:8 stevelly [1] - 33535:4 sticking [3] - 33655:21, 33655:22, 33672:21 sticks [1] - 33557:18 still [28] - 33588:18, 33631:22, 33633:14, 33644:18, 33644:21, 33656:16, 33661:11, 33661:23, 33663:2, 33663:9, 33664:1, 33664:3, 33665:15, 33665:20, 33666:6, 33666:15, 33693:1, 33704:16, 33724:13, 33734:3, 33734:20, 33735:2, 33739:3, 33747:25, 33748:7, 33748:8, 33766:11, 33810:2 stomach [2] - 33567:12, 33567:14 Stonechild [1] - 33765:6 Stony [3] - 33546:21, 33781:21, 33813:11 stop [1] - 33615:8 stopped [2] - 33785:13, 33799:9 stopping [1] - 33807:2</p> | <p>stories [3] - 33752:9, 33753:3, 33770:14 Story [1] - 33712:9 story [2] - 33787:1, 33811:18 strands [1] - 33796:11 strange [1] - 33773:10 strangle [1] - 33610:11 strangled [2] - 33610:1, 33610:16 strangulation [4] - 33609:22, 33609:25, 33610:7 street [2] - 33554:9, 33807:16 strength [4] - 33599:4, 33633:5, 33640:1, 33810:16 strengths [1] - 33732:22 stress [1] - 33671:21 strewn [1] - 33777:1 stroll [1] - 33606:16 strong [4] - 33615:1, 33731:22, 33733:21, 33768:13 stronger [1] - 33807:18 strongly [5] - 33687:2, 33735:2, 33756:25, 33759:25, 33807:17 struck [4] - 33632:11, 33632:23, 33715:7, 33768:1 struggle [4] - 33554:16, 33554:24, 33605:18, 33701:2 stuck [1] - 33614:5 students [1] - 33588:12 studios [1] - 33787:2 study [1] - 33590:5 stuff [15] - 33563:17, 33587:7, 33589:8, 33598:13, 33600:12, 33615:2, 33645:24, 33677:21, 33678:8, 33678:9, 33707:2, 33723:18, 33748:8, 33807:17, 33809:20 stupid [1] - 33753:7 sub [1] - 33635:22 sub-heading [1] - 33635:22 subheading [5] - 33607:12, 33616:11, 33626:21, 33668:24, 33671:5 subject [6] - 33585:1, 33671:25, 33719:22, 33738:12, 33750:12, 33753:17</p> | <p>subjected [1] - 33753:5 submission [2] - 33681:24, 33804:11 submissions [2] - 33604:13, 33697:16 submitted [8] - 33543:20, 33544:9, 33573:14, 33631:15, 33671:23, 33680:2, 33681:4, 33788:21 subsection [1] - 33612:8 substance [30] - 33550:1, 33572:7, 33574:4, 33575:2, 33635:25, 33640:21, 33642:3, 33642:11, 33651:19, 33652:14, 33652:19, 33653:5, 33653:12, 33658:3, 33659:17, 33659:19, 33661:24, 33662:22, 33663:8, 33664:13, 33664:14, 33664:19, 33667:7, 33669:15, 33670:5, 33687:12, 33734:10, 33746:22, 33746:23, 33755:8 substances [1] - 33657:17 substitute [1] - 33763:12 subtle [1] - 33793:7 succeeded [1] - 33799:8 sudden [4] - 33763:8, 33763:19, 33763:21, 33766:2 suddenly [2] - 33770:13, 33770:14 sufficient [2] - 33635:6, 33668:19 sugar [2] - 33746:10, 33746:11 suggest [4] - 33681:6, 33742:19, 33757:10, 33757:24 suggested [13] - 33542:19, 33607:5, 33613:10, 33613:14, 33616:25, 33657:25, 33667:9, 33672:11, 33701:2, 33736:5, 33744:2, 33744:15, 33745:5 suggesting [2] - 33681:9, 33695:12 suggestion [4] - 33622:25, 33629:8, 33630:6, 33674:6</p> | <p>suggestions [1] - 33568:5 suggests [2] - 33744:23, 33756:22 suicide [1] - 33540:15 suite [1] - 33783:5 summary [3] - 33577:9, 33651:2, 33702:8 summed [1] - 33699:4 Sun [2] - 33687:24, 33688:1 Sunday [1] - 33564:1 supplied [1] - 33754:7 support [7] - 33544:17, 33546:6, 33579:3, 33579:11, 33589:20, 33589:24, 33686:24 Support [1] - 33534:6 supported [2] - 33693:11, 33693:14 supporters [3] - 33789:19, 33799:2, 33802:14 supporting [2] - 33548:7, 33548:8 supportive [1] - 33590:4 supports [2] - 33553:25, 33688:10 suppose [1] - 33655:12 supposed [1] - 33807:5 surely [1] - 33796:4 surface [8] - 33654:25, 33655:20, 33655:25, 33656:4, 33656:5, 33656:8, 33756:11 surfaced [2] - 33724:4, 33799:18 surprise [4] - 33549:11, 33638:19, 33654:6, 33654:9 surprised [4] - 33638:12, 33724:15, 33725:12, 33728:18 surrounded [1] - 33556:17 surrounding [5] - 33554:2, 33559:22, 33605:25, 33645:10, 33755:16 surroundings [1] - 33606:15 survivability [4] - 33601:21, 33607:6, 33612:7, 33628:18 survived [1] - 33608:15 survivor [1] - 33810:22 Susan [1] - 33715:18 suspect [7] - 33578:17, 33777:6, 33782:1,</p> | <p>33787:5, 33787:21, 33792:17, 33802:7 suspect's [2] - 33777:19, 33782:3 suspicion [1] - 33778:19 suspicious [2] - 33778:18, 33785:20 Swabs [1] - 33703:18 sweat [1] - 33642:25 sworn [3] - 33538:9, 33538:10, 33748:3 Sworn [1] - 33536:3 sympathetic [1] - 33779:1 syringe [1] - 33568:13 system [15] - 33742:7, 33759:20, 33761:5, 33761:19, 33761:22, 33761:23, 33763:9, 33763:25, 33764:3, 33768:23, 33768:24, 33798:4, 33798:6</p> |
| | | | | T |
| | | | | <p>Tshaped [1] - 33554:5 talks [1] - 33667:5 Tallis [6] - 33535:14, 33623:16, 33729:7, 33741:10, 33743:5, 33743:13 Tallís [1] - 33740:20 tampering [1] - 33638:10 tampons [1] - 33619:17 tape [3] - 33580:6, 33581:4, 33771:25 task [3] - 33544:4, 33547:19, 33563:20 taught [2] - 33709:5, 33714:12 Tcu [1] - 33533:16 Tdr [2] - 33535:5, 33747:15 teach [1] - 33588:12 tears [1] - 33642:25 teaspoon [1] - 33809:13 technical [2] - 33578:11, 33578:15 Technician [1] - 33534:11 technicians [1] - 33706:19 techniques [2] - 33641:13, 33804:14 technology [1] - 33696:7</p> |



| | | | | |
|--|--|---|--|--|
| <p>telecom [1] - 33570:1</p> <p>telephone [5] -</p> <p>33553:20, 33565:20,</p> <p>33590:24, 33725:18,</p> <p>33725:19</p> <p>temperature [4] -</p> <p>33569:13, 33615:9,</p> <p>33721:20</p> <p>tend [4] - 33733:20,</p> <p>33737:1, 33756:24,</p> <p>33757:10</p> <p>tended [3] - 33734:3,</p> <p>33744:16, 33744:18</p> <p>tendered [3] -</p> <p>33553:24, 33691:18,</p> <p>33796:22</p> <p>tends [2] - 33736:16,</p> <p>33740:9</p> <p>term [4] - 33587:25,</p> <p>33603:7, 33739:8,</p> <p>33739:9</p> <p>terms [39] - 33545:12,</p> <p>33558:6, 33561:5,</p> <p>33569:20, 33587:16,</p> <p>33587:22, 33591:21,</p> <p>33599:22, 33600:4,</p> <p>33601:11, 33603:5,</p> <p>33604:8, 33612:24,</p> <p>33613:1, 33615:25,</p> <p>33633:16, 33636:3,</p> <p>33639:16, 33641:3,</p> <p>33643:14, 33646:23,</p> <p>33647:14, 33651:17,</p> <p>33662:4, 33666:11,</p> <p>33666:23, 33677:18,</p> <p>33679:25, 33682:5,</p> <p>33683:6, 33687:17,</p> <p>33699:25, 33702:10,</p> <p>33710:16, 33712:19,</p> <p>33752:25, 33763:7,</p> <p>33765:7, 33772:7</p> <p>terrible [1] - 33799:23</p> <p>territory [1] - 33640:12</p> <p>Terry [3] - 33696:21,</p> <p>33696:24, 33703:16</p> <p>test [64] - 33564:19,</p> <p>33568:8, 33568:12,</p> <p>33568:16, 33568:17,</p> <p>33569:2, 33569:5,</p> <p>33569:10, 33573:4,</p> <p>33573:5, 33573:8,</p> <p>33573:22, 33573:25,</p> <p>33574:2, 33574:7,</p> <p>33575:6, 33575:21,</p> <p>33575:22, 33575:24,</p> <p>33575:25, 33588:9,</p> <p>33588:10, 33594:12,</p> <p>33598:13, 33600:15,</p> <p>33600:25, 33603:18,</p> <p>33603:23, 33635:11,</p> | <p>33644:23, 33644:24,</p> <p>33645:2, 33645:8,</p> <p>33647:7, 33647:11,</p> <p>33648:21, 33648:23,</p> <p>33649:10, 33649:14,</p> <p>33649:15, 33649:22,</p> <p>33649:23, 33658:5,</p> <p>33659:16, 33663:14,</p> <p>33664:12, 33664:14,</p> <p>33664:23, 33667:16,</p> <p>33667:20, 33667:22,</p> <p>33668:17, 33672:10,</p> <p>33700:9, 33721:16,</p> <p>33724:19, 33725:13,</p> <p>33725:24, 33746:2,</p> <p>33746:19, 33753:21</p> <p>tested [6] - 33569:11,</p> <p>33573:13, 33574:4,</p> <p>33576:7, 33580:25,</p> <p>33588:19</p> <p>testified [12] - 33563:8,</p> <p>33625:14, 33627:2,</p> <p>33639:25, 33647:22,</p> <p>33649:7, 33659:14,</p> <p>33660:18, 33715:16,</p> <p>33724:22, 33732:22,</p> <p>33752:7</p> <p>testifying [1] -</p> <p>33765:13</p> <p>Testimony [1] -</p> <p>33533:14</p> <p>testimony [18] -</p> <p>33538:14, 33542:21,</p> <p>33593:15, 33596:25,</p> <p>33609:14, 33611:10,</p> <p>33618:24, 33619:6,</p> <p>33624:10, 33630:19,</p> <p>33630:23, 33652:14,</p> <p>33653:6, 33659:13,</p> <p>33716:24, 33797:1,</p> <p>33802:6, 33803:10</p> <p>testing [16] - 33557:3,</p> <p>33564:20, 33565:6,</p> <p>33638:5, 33641:24,</p> <p>33711:21, 33717:5,</p> <p>33726:16, 33726:20,</p> <p>33727:13, 33728:21,</p> <p>33728:22, 33728:23,</p> <p>33753:18, 33774:12</p> <p>tests [26] - 33564:9,</p> <p>33575:15, 33634:12,</p> <p>33634:14, 33635:4,</p> <p>33635:10, 33641:15,</p> <p>33646:21, 33647:8,</p> <p>33647:18, 33649:4,</p> <p>33649:5, 33650:16,</p> <p>33650:19, 33658:12,</p> <p>33663:19, 33668:4,</p> <p>33678:25, 33705:9,</p> <p>33721:10, 33723:25,</p> | <p>33726:13, 33726:14,</p> <p>33726:17, 33726:18,</p> <p>33728:24</p> <p>thaw [1] - 33598:5</p> <p>thawed [2] - 33720:2,</p> <p>33720:11</p> <p>thawing [4] - 33618:11,</p> <p>33621:7, 33630:21,</p> <p>33631:3</p> <p>theater [1] - 33599:15</p> <p>themselves [4] -</p> <p>33539:4, 33668:3,</p> <p>33675:4</p> <p>theories [1] - 33558:4</p> <p>theory [22] - 33553:25,</p> <p>33554:12, 33558:6,</p> <p>33560:3, 33566:5,</p> <p>33579:20, 33580:18,</p> <p>33580:20, 33583:10,</p> <p>33605:14, 33641:1,</p> <p>33651:3, 33651:17,</p> <p>33652:1, 33652:3,</p> <p>33652:21, 33653:20,</p> <p>33655:20, 33661:6,</p> <p>33661:8, 33700:19,</p> <p>33751:17</p> <p>Therefore [2] - 33628:3,</p> <p>33628:9</p> <p>therefore [24] -</p> <p>33539:5, 33544:19,</p> <p>33565:3, 33567:21,</p> <p>33568:23, 33576:14,</p> <p>33580:25, 33581:1,</p> <p>33588:16, 33588:20,</p> <p>33598:23, 33606:4,</p> <p>33611:1, 33614:7,</p> <p>33621:4, 33622:16,</p> <p>33627:19, 33630:13,</p> <p>33654:3, 33655:4,</p> <p>33656:11, 33737:4,</p> <p>33739:22, 33758:6</p> <p>thereof [10] - 33571:5,</p> <p>33594:19, 33610:10,</p> <p>33612:7, 33640:1,</p> <p>33646:11, 33649:14,</p> <p>33738:22, 33740:2,</p> <p>33760:18</p> <p>they've [2] - 33604:17,</p> <p>33766:14</p> <p>thick [3] - 33634:19,</p> <p>33715:23, 33748:3</p> <p>thickness [1] - 33632:6</p> <p>thighs [1] - 33609:3</p> <p>thinking [2] - 33653:17,</p> <p>33810:14</p> <p>third [4] - 33618:23,</p> <p>33620:4, 33730:9,</p> <p>33730:11</p> <p>Thirdly [1] - 33702:3</p> <p>Thomas [1] - 33593:10</p> | <p>Thor [2] - 33593:8,</p> <p>33593:13</p> <p>thorough [1] - 33716:22</p> <p>thoroughness [1] -</p> <p>33813:8</p> <p>thoughts [4] -</p> <p>33575:18, 33576:4,</p> <p>33576:6, 33668:8</p> <p>thousand [1] -</p> <p>33611:15</p> <p>threat [2] - 33811:2,</p> <p>33811:5</p> <p>threaten [1] - 33784:12</p> <p>three [9] - 33582:1,</p> <p>33613:17, 33777:23,</p> <p>33780:9, 33783:11,</p> <p>33786:14, 33796:10,</p> <p>33803:16, 33809:19</p> <p>Three [1] - 33784:22</p> <p>threefold [1] - 33575:1</p> <p>throat [1] - 33675:16</p> <p>throughout [1] -</p> <p>33538:23</p> <p>thumbs [1] - 33810:3</p> <p>tie [4] - 33589:9,</p> <p>33610:21, 33622:13,</p> <p>33697:9</p> <p>tied [2] - 33698:4,</p> <p>33784:5</p> <p>ties [1] - 33629:2</p> <p>tinge [4] - 33716:1,</p> <p>33716:6, 33722:17,</p> <p>33758:1</p> <p>tip [2] - 33633:3,</p> <p>33634:11</p> <p>Tire [1] - 33738:13</p> <p>tissue [5] - 33608:5,</p> <p>33631:5, 33634:22,</p> <p>33645:6, 33646:10</p> <p>tissues [1] - 33619:13</p> <p>title [2] - 33546:15,</p> <p>33712:19</p> <p>titled [1] - 33612:9</p> <p>today [19] - 33538:14,</p> <p>33539:18, 33570:4,</p> <p>33590:9, 33684:18,</p> <p>33688:10, 33689:3,</p> <p>33696:9, 33729:10,</p> <p>33732:17, 33740:23,</p> <p>33741:14, 33747:23,</p> <p>33753:2, 33783:9,</p> <p>33788:24, 33790:10,</p> <p>33790:17, 33791:2</p> <p>Today [3] - 33799:1,</p> <p>33812:14, 33813:12</p> <p>Toews [1] - 33535:13</p> <p>together [22] -</p> <p>33591:19, 33622:9,</p> <p>33634:2, 33634:3,</p> <p>33652:11, 33654:3,</p> | <p>33654:17, 33654:21,</p> <p>33655:6, 33655:21,</p> <p>33655:22, 33655:23,</p> <p>33655:24, 33656:21,</p> <p>33659:15, 33707:12,</p> <p>33710:24, 33720:12,</p> <p>33729:15, 33729:18,</p> <p>33732:3, 33773:24</p> <p>tonight [1] - 33787:1</p> <p>Tonight [2] - 33781:21,</p> <p>33802:10</p> <p>took [16] - 33558:8,</p> <p>33583:17, 33596:14,</p> <p>33613:20, 33613:22,</p> <p>33614:8, 33632:5,</p> <p>33639:15, 33649:20,</p> <p>33674:10, 33704:4,</p> <p>33754:4, 33766:4,</p> <p>33769:16, 33772:20,</p> <p>33783:11</p> <p>top [8] - 33540:1,</p> <p>33585:22, 33639:2,</p> <p>33667:8, 33686:10,</p> <p>33686:11, 33709:16,</p> <p>33718:23</p> <p>topic [1] - 33758:18</p> <p>topics [1] - 33709:6</p> <p>toque [1] - 33783:2</p> <p>torn [1] - 33755:20</p> <p>Toronto [5] - 33549:12,</p> <p>33551:18, 33707:25,</p> <p>33790:9, 33790:17</p> <p>totally [5] - 33573:6,</p> <p>33578:22, 33610:17,</p> <p>33796:17, 33796:21</p> <p>touch [2] - 33562:8,</p> <p>33671:19</p> <p>touched [1] - 33628:13</p> <p>touches [1] - 33572:15</p> <p>towards [6] - 33715:4,</p> <p>33763:2, 33764:2,</p> <p>33769:6, 33777:15,</p> <p>33807:7</p> <p>Tr [2] - 33572:13,</p> <p>33572:18</p> <p>trace [1] - 33672:22</p> <p>traces [1] - 33658:5</p> <p>tracked [1] - 33787:10</p> <p>tract [8] - 33566:19,</p> <p>33617:7, 33618:8,</p> <p>33618:9, 33618:19,</p> <p>33620:19, 33621:20,</p> <p>33621:25</p> <p>trail [1] - 33782:24</p> <p>trained [3] - 33713:24,</p> <p>33760:5, 33762:4</p> <p>training [4] - 33645:23,</p> <p>33645:24, 33752:8,</p> <p>33759:24</p> <p>trampled [2] -</p> |
|--|--|---|--|--|



| | | | | |
|---|--|--|--|---|
| 33636:18, 33639:9 trampling [4] - 33636:20, 33636:22, 33701:1, 33728:1 transcribed [3] - 33742:3, 33742:4, 33742:5 transcriber [1] - 33742:16 transcript [18] - 33556:9, 33583:16, 33592:9, 33670:22, 33671:1, 33673:22, 33747:22, 33748:11, 33749:1, 33749:2, 33749:3, 33749:10, 33749:17, 33749:22, 33749:24, 33751:1, 33754:14, 33755:23 Transcript [2] - 33533:12, 33538:1 transcription [5] - 33580:3, 33742:8, 33744:7, 33750:20, 33815:5 transcripts [8] - 33543:25, 33592:24, 33593:4, 33595:11, 33653:14, 33729:21, 33768:9, 33779:20 transfer [2] - 33813:14, 33813:17 transferred [2] - 33799:21, 33813:11 travelling [1] - 33807:21 trepidation [2] - 33596:15, 33601:2 trial [75] - 33547:2, 33547:14, 33547:16, 33550:8, 33551:21, 33554:22, 33560:10, 33572:4, 33579:7, 33582:2, 33584:9, 33584:24, 33586:25, 33589:3, 33590:11, 33590:16, 33592:9, 33592:25, 33593:16, 33595:3, 33601:25, 33613:11, 33613:15, 33618:2, 33639:23, 33639:24, 33644:5, 33644:17, 33653:6, 33658:14, 33667:21, 33668:16, 33670:22, 33670:25, 33671:24, 33676:22, 33678:16, 33678:21, 33678:22, 33688:17, 33691:8, 33697:16, 33717:2, | 33717:4, 33717:8, 33729:20, 33729:21, 33729:23, 33730:20, 33731:9, 33731:13, 33732:8, 33732:21, 33733:1, 33741:11, 33747:15, 33748:12, 33749:3, 33749:10, 33749:24, 33755:23, 33767:11, 33768:9, 33773:20, 33780:10, 33781:24, 33782:13, 33788:17, 33793:8, 33796:18, 33796:23, 33797:5, 33799:1, 33812:6, 33812:22 tried [7] - 33650:5, 33691:5, 33707:9, 33722:1, 33775:12, 33786:14 triers [1] - 33737:22 trouble [2] - 33771:14, 33803:24 true [1] - 33815:5 trust [1] - 33554:1 truth [4] - 33767:22, 33803:2, 33803:3, 33807:23 Truthfully [1] - 33808:7 try [10] - 33542:8, 33545:24, 33546:1, 33622:16, 33634:23, 33689:21, 33722:25, 33752:9, 33752:12, 33798:25 trying [8] - 33559:8, 33581:15, 33718:15, 33725:6, 33728:7, 33728:19, 33808:17, 33812:6 tube [1] - 33638:17 Turn [1] - 33668:24 turn [29] - 33539:14, 33539:25, 33543:12, 33546:12, 33551:16, 33553:15, 33556:3, 33558:11, 33583:19, 33591:18, 33592:16, 33607:7, 33607:9, 33607:11, 33616:16, 33636:5, 33642:9, 33657:10, 33659:8, 33667:3, 33693:2, 33704:19, 33708:2, 33709:22, 33710:21, 33712:10, 33714:14, 33715:19, 33757:18 turned [3] - 33789:22, 33793:24, 33796:8 Turning [1] - 33635:21 | turns [2] - 33668:15, 33742:1 Tv [1] - 33753:2 twelve [1] - 33627:20 twenty [2] - 33646:19, 33696:8 twice [1] - 33786:18 twiddling [1] - 33810:2 twist [1] - 33695:11 two [40] - 33543:23, 33546:17, 33566:6, 33578:10, 33588:11, 33592:8, 33622:25, 33638:3, 33639:13, 33640:14, 33642:20, 33650:19, 33651:21, 33663:12, 33684:22, 33691:5, 33691:10, 33719:2, 33720:21, 33731:2, 33732:24, 33745:23, 33750:4, 33750:7, 33755:7, 33758:24, 33759:2, 33767:12, 33767:19, 33773:11, 33777:23, 33783:1, 33783:22, 33784:16, 33784:18, 33798:20, 33800:14, 33809:19, 33810:23, 33811:23 twofold [1] - 33550:17 tying [1] - 33549:24 Type [1] - 33687:10 type [23] - 33561:15, 33586:8, 33587:18, 33595:18, 33600:12, 33608:12, 33617:25, 33669:21, 33671:10, 33692:5, 33692:7, 33705:9, 33708:16, 33728:11, 33730:5, 33734:17, 33734:25, 33737:3, 33737:4, 33738:24, 33743:19, 33744:5, 33758:23 typed [2] - 33623:23, 33628:7 types [3] - 33587:17, 33708:17, 33732:24 | 33796:17 ultraviolet [2] - 33568:16, 33641:14 umm [2] - 33549:2, 33586:15 unable [2] - 33637:21, 33742:16 unadulterated [8] - 33656:12, 33677:5, 33683:9, 33694:6, 33730:15, 33731:1, 33732:1, 33732:14 uncomfortable [1] - 33606:6 unconsciousness [1] - 33608:7 uncontaminated [18] - 33573:18, 33575:7, 33635:14, 33635:16, 33653:23, 33654:1, 33654:19, 33669:2, 33677:6, 33678:12, 33683:9, 33694:6, 33713:12, 33730:15, 33731:2, 33731:10, 33732:2, 33732:15 uncontroverted [3] - 33729:24, 33730:20, 33732:8 under [27] - 33540:12, 33547:25, 33552:4, 33553:1, 33576:12, 33601:9, 33606:23, 33606:25, 33616:11, 33619:1, 33620:21, 33633:18, 33642:15, 33648:13, 33650:2, 33650:3, 33650:15, 33664:4, 33667:4, 33671:4, 33671:12, 33690:12, 33712:19, 33713:10, 33716:12, 33727:13, 33763:8 undermine [1] - 33737:1 underneath [3] - 33637:7, 33700:21, 33705:20 underscore [1] - 33731:5 underscored [1] - 33730:22 understood [5] - 33663:5, 33694:19, 33745:24, 33754:5, 33813:20 undisturbed [1] - 33655:24 undressing [1] - 33613:12 | unexplained [1] - 33763:21 unfairly [1] - 33697:12 Unfortunately [1] - 33773:7 unheard [1] - 33755:20 Unidentified [8] - 33584:10, 33584:13, 33584:17, 33584:21, 33585:3, 33586:4, 33587:1, 33587:12 uniform [1] - 33673:4 uniforms [2] - 33672:21, 33673:2 unintelligible [1] - 33805:23 unique [1] - 33742:7 United [1] - 33542:7 University [3] - 33563:13, 33564:5, 33788:6 university [5] - 33563:18, 33567:4, 33760:10, 33762:8 unjustly [2] - 33546:22, 33548:2 unknown [2] - 33583:19, 33772:22 Unless [3] - 33576:25, 33617:11, 33678:22 unless [8] - 33566:9, 33567:7, 33576:11, 33576:18, 33634:10, 33673:18, 33705:15, 33765:21 unlikely [4] - 33632:1, 33724:1, 33756:17, 33756:20 unpreserved [1] - 33568:24 unprotected [1] - 33588:8 unqualified [1] - 33712:24 unreasonable [1] - 33674:23 unrelated [1] - 33578:22 unusual [4] - 33617:6, 33638:8, 33700:21, 33776:23 unwilling [2] - 33576:23, 33614:22 up [41] - 33552:11, 33554:25, 33577:24, 33597:17, 33605:10, 33649:11, 33656:23, 33679:22, 33690:6, 33699:4, 33707:4, 33716:22, 33717:11, |
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|---|---|---|--|--|
| 33717:20, 33718:3, 33718:23, 33720:15, 33720:16, 33722:11, 33722:24, 33726:7, 33727:1, 33729:15, 33730:7, 33735:6, 33738:6, 33747:4, 33750:10, 33754:3, 33754:4, 33754:18, 33765:5, 33765:22, 33766:11, 33771:16, 33783:15, 33784:5, 33792:6, 33795:10, 33798:10, 33812:11 urethra [1] - 33624:13 urged [1] - 33799:20 urinary [5] - 33566:19, 33618:8, 33620:19, 33621:20, 33621:25 urinate [1] - 33640:10 urine [89] - 33564:15, 33564:16, 33564:18, 33566:3, 33566:9, 33566:11, 33566:14, 33566:24, 33567:20, 33567:22, 33568:21, 33568:24, 33572:8, 33572:23, 33573:5, 33575:3, 33578:23, 33579:18, 33580:18, 33580:24, 33588:18, 33600:12, 33620:24, 33621:2, 33640:6, 33640:7, 33640:10, 33640:11, 33640:16, 33640:18, 33640:22, 33643:18, 33651:3, 33652:22, 33658:2, 33658:4, 33661:9, 33661:15, 33661:25, 33663:3, 33664:20, 33665:12, 33665:16, 33665:18, 33665:22, 33666:18, 33667:15, 33667:20, 33681:8, 33684:14, 33684:23, 33685:2, 33686:1, 33686:4, 33686:5, 33686:13, 33691:17, 33691:20, 33692:20, 33695:18, 33705:6, 33705:8, 33705:22, 33708:7, 33714:21, 33722:10, 33722:11, 33722:17, 33722:20, 33735:7, 33735:24, 33738:25, 33739:4, 33751:18, 33753:9, 33753:10, 33757:1, 33757:2, 33757:6, | 33757:20, 33757:25, 33758:3, 33758:13, 33758:15, 33758:17 urine/human [1] - 33729:9 usual [2] - 33706:20, 33716:21 uterus [8] - 33597:15, 33597:18, 33628:2, 33630:5, 33630:11, 33630:12, 33630:21 utterly [1] - 33768:4 | various [13] - 33545:17, 33591:25, 33593:1, 33593:4, 33611:20, 33685:3, 33685:11, 33685:16, 33685:21, 33686:5, 33693:22, 33745:20, 33747:1 Various [2] - 33685:16, 33685:24 vegetable [5] - 33735:25, 33737:11, 33737:14, 33737:19, 33737:25 vegetables [4] - 33667:23, 33745:23, 33746:1, 33746:17 vein [1] - 33676:1 verdict [1] - 33678:21 vessels [1] - 33607:19 Veterinary [1] - 33567:3 viable [1] - 33618:20 vial [10] - 33653:11, 33719:3, 33719:24, 33719:25, 33720:2, 33720:3, 33720:4, 33720:6, 33720:11 vials [4] - 33653:9, 33717:21, 33718:6, 33719:2 Vic [1] - 33535:13 vicious [1] - 33755:18 viciously [1] - 33654:6 victim [8] - 33612:25, 33636:21, 33691:3, 33718:10, 33719:10, 33735:7, 33744:5, 33756:11 victim's [3] - 33697:10, 33697:11, 33795:16 victims [3] - 33784:18, 33787:11, 33790:22 Victor [9] - 33593:12, 33653:6, 33658:15, 33717:12, 33717:13, 33718:20, 33748:12, 33749:12, 33749:15 Victory [1] - 33712:12 video [5] - 33577:17, 33580:7, 33580:9, 33690:16, 33765:16 view [28] - 33544:7, 33562:9, 33562:10, 33588:5, 33599:17, 33601:13, 33609:9, 33612:20, 33613:1, 33616:1, 33620:6, 33621:12, 33632:10, 33632:22, 33634:24, 33637:14, 33637:24, 33655:18, 33656:12, | 33669:10, 33669:13, 33677:9, 33689:3, 33698:13, 33701:13, 33702:4, 33730:18, 33758:14 viewed [1] - 33701:15 viewing [1] - 33662:25 views [5] - 33562:13, 33562:17, 33672:6, 33685:6, 33719:22 vigil [1] - 33799:2 vindicated [1] - 33802:17 violence [1] - 33555:6 virtually [1] - 33793:12 virtue [1] - 33565:2 visible [2] - 33564:13, 33610:8 visit [1] - 33777:10 visiting [1] - 33771:12 vitae [2] - 33539:13, 33592:8 voir [2] - 33750:11, 33750:16 Volume [1] - 33533:22 volunteered [1] - 33599:13 Vt11a [4] - 33536:23, 33536:24, 33774:7, 33781:17 Vt11b [4] - 33536:25, 33537:1, 33781:18, 33789:7 Vt23 [1] - 33772:1 Vt24 [4] - 33537:2, 33537:3, 33789:12, 33798:17 Vt25 [4] - 33537:4, 33537:5, 33798:18, 33801:2 Vt26 [4] - 33537:6, 33537:7, 33801:3, 33811:16 Vt27 [4] - 33537:8, 33537:9, 33811:17, 33814:1 Vt3 [11] - 33536:19, 33536:20, 33536:21, 33536:22, 33766:1, 33771:22, 33771:25, 33772:20, 33772:22, 33773:2, 33774:6 | 33792:4 waited [2] - 33569:15, 33798:12 waiting [5] - 33706:22, 33766:24, 33788:20, 33801:18, 33802:16 waits [1] - 33799:22 walk [2] - 33606:16, 33768:9 walked [4] - 33554:14, 33605:16, 33767:25, 33770:23 wallet [3] - 33777:17, 33777:19, 33783:1 walls [1] - 33810:3 wants [3] - 33586:11, 33768:17, 33779:22 warden [1] - 33813:20 washed [1] - 33673:2 ways [1] - 33770:6 weakened [1] - 33751:20 weakness [1] - 33599:4 weaknesses [2] - 33640:1, 33732:22 weapon [1] - 33634:24 Wednesday [2] - 33533:21, 33693:17 week [3] - 33565:7, 33792:7, 33810:23 weeks [1] - 33804:17 weigh [3] - 33703:2, 33733:24, 33744:14 weighed [4] - 33733:4, 33733:9, 33733:11, 33738:1 weighing [1] - 33733:8 weight [1] - 33733:4 well-known [1] - 33568:16 west [1] - 33554:9 Western [1] - 33704:24 whatsoever [2] - 33703:9, 33712:3 whereas [2] - 33541:5, 33628:17 Whereas [1] - 33627:21 white [3] - 33564:12, 33641:11, 33705:13 whole [7] - 33584:24, 33587:4, 33646:4, 33748:7, 33763:25, 33778:17, 33810:11 widespread [1] - 33700:24 width [2] - 33632:3, 33634:9 wife [1] - 33785:3 Williams [40] - 33555:23, 33556:1, |
| | V | | W | |
| | Vagina [2] - 33616:11, 33626:21 vagina [26] - 33597:14, 33597:25, 33598:12, 33598:14, 33614:17, 33616:25, 33617:12, 33617:19, 33618:12, 33621:4, 33621:8, 33622:6, 33622:17, 33623:2, 33627:2, 33627:4, 33627:6, 33627:11, 33628:10, 33630:5, 33630:13, 33630:14, 33655:6, 33676:23, 33697:10, 33698:10 vaginal [8] - 33616:12, 33617:7, 33617:10, 33617:14, 33624:2, 33626:22, 33628:11, 33728:6 vaginas [1] - 33628:19 vaguely [1] - 33697:23 valid [5] - 33575:22, 33588:2, 33588:6, 33597:12, 33598:15 validity [2] - 33544:13, 33672:10 value [15] - 33543:11, 33579:5, 33581:2, 33588:16, 33639:22, 33679:3, 33686:15, 33687:3, 33739:6, 33739:7, 33739:25, 33740:2, 33740:3, 33740:9, 33792:22 Vancouver [5] - 33590:12, 33687:1, 33688:11, 33688:14, 33709:25 variable [1] - 33675:11 variation [1] - 33745:1 variety [2] - 33578:11, 33578:14 | | W-5 [1] - 33540:11 wait [6] - 33569:14, 33586:5, 33587:13, 33667:1, 33788:14, | |



| | | | |
|---|--|--|--|
| <p>33556:5, 33556:14, 33558:9, 33558:12, 33558:14, 33559:4, 33559:25, 33560:13, 33561:1, 33561:7, 33561:25, 33562:25, 33569:24, 33570:1, 33571:6, 33595:1, 33680:3, 33680:18, 33680:20, 33694:13, 33694:16, 33696:18, 33698:16, 33698:20, 33700:1, 33701:6, 33702:8, 33702:15, 33702:19, 33703:12, 33703:21, 33704:12, 33709:21, 33710:4, 33710:9, 33710:18, 33740:24, 33788:25 Williams' [1] - 33702:17 willing [1] - 33677:13 Wilson [4] - 33535:6, 33803:10, 33807:21, 33807:22 Window [2] - 33612:9, 33613:7 window [2] - 33629:16, 33676:11 Winnipeg [14] - 33538:16, 33546:14, 33590:25, 33591:3, 33596:12, 33624:21, 33685:3, 33687:23, 33688:1, 33766:23, 33783:15, 33783:18, 33784:14, 33789:24 wish [5] - 33613:16, 33690:4, 33751:6, 33812:17, 33813:17 wished [1] - 33800:21 withdrawn [1] - 33675:1 witness [12] - 33538:8, 33715:15, 33727:22, 33747:11, 33748:16, 33763:7, 33767:11, 33777:8, 33777:9, 33796:25, 33797:4, 33803:9 witnesses [12] - 33593:19, 33595:15, 33603:16, 33604:6, 33636:15, 33745:21, 33767:12, 33770:9, 33770:18, 33771:12, 33802:5, 33802:6 Wolch [13] - 33535:2, 33536:18, 33752:12, 33758:9, 33758:10, 33763:4, 33763:5,</p> | <p>33763:11, 33763:14, 33763:18, 33764:9, 33764:11, 33764:18 woman [5] - 33691:22, 33783:21, 33783:25, 33786:15, 33807:6 womb [2] - 33597:24 women [3] - 33715:5, 33784:12, 33807:13 wonder [2] - 33612:3, 33759:5 wondering [3] - 33630:3, 33722:5, 33738:16 word [3] - 33742:9, 33743:5, 33753:6 wording [1] - 33668:20 words [10] - 33629:15, 33639:16, 33645:7, 33650:19, 33670:3, 33713:17, 33742:11, 33742:15, 33764:20 Works [1] - 33781:11 works [2] - 33604:25, 33813:23 world [5] - 33590:21, 33598:3, 33598:4, 33767:7, 33806:5 worse [1] - 33808:25 worst [3] - 33801:14, 33808:14, 33808:22 worth [1] - 33622:3 worthless [1] - 33684:9 wound [4] - 33611:5, 33611:15, 33634:3, 33675:18 wounds [27] - 33555:5, 33607:6, 33607:15, 33607:18, 33608:9, 33609:11, 33609:15, 33609:24, 33610:2, 33610:5, 33611:2, 33611:12, 33612:3, 33612:22, 33613:1, 33614:13, 33631:9, 33632:2, 33633:15, 33633:17, 33633:24, 33633:25, 33634:18, 33675:4, 33675:9, 33675:16, 33700:23 Wounds [2] - 33631:8, 33675:3 write [1] - 33545:22 writes [1] - 33657:14 writing [2] - 33563:24, 33774:19 written [2] - 33693:15, 33709:10 wrongdoing [2] - 33711:12, 33711:14</p> | <p>Wrongful [1] - 33533:3 wrongful [1] - 33764:22 wrongfully [2] - 33808:25, 33811:21 wrongly [2] - 33619:9, 33688:5 wrote [1] - 33714:23</p> <p>X</p> <p>x-ray [1] - 33633:2</p> <p>Y</p> <p>year [11] - 33541:24, 33759:24, 33776:8, 33783:15, 33785:6, 33786:22, 33789:22, 33791:17, 33799:6, 33802:4, 33803:6 years [33] - 33596:12, 33596:25, 33646:19, 33688:6, 33696:8, 33709:1, 33713:24, 33759:17, 33759:23, 33766:4, 33771:16, 33781:20, 33782:6, 33783:19, 33784:15, 33786:12, 33788:2, 33789:13, 33795:8, 33798:25, 33799:6, 33801:6, 33802:2, 33803:21, 33803:23, 33806:5, 33806:6, 33806:23, 33809:6, 33811:22, 33811:23 yellow [12] - 33564:11, 33566:8, 33568:22, 33569:6, 33653:1, 33685:4, 33685:11, 33685:18, 33691:15, 33691:16, 33705:11, 33757:5 Yellowish [2] - 33635:23, 33640:3 yellowish [31] - 33566:9, 33568:1, 33568:20, 33568:21, 33572:7, 33639:13, 33640:14, 33641:2, 33641:10, 33642:20, 33651:18, 33652:15, 33658:3, 33665:13, 33677:5, 33684:23, 33691:10, 33691:15, 33716:1, 33716:6, 33720:22, 33722:17, 33729:11, 33729:25,</p> | <p>33730:14, 33730:21, 33732:1, 33733:13, 33736:15, 33755:8, 33758:1 yesterday [8] - 33546:25, 33688:7, 33688:20, 33765:17, 33772:1, 33789:10, 33794:4, 33795:11 yielding [1] - 33745:24 York [1] - 33706:14 young [1] - 33770:23 yourself [11] - 33543:14, 33553:14, 33553:17, 33556:4, 33591:21, 33703:12, 33705:19, 33760:25, 33763:15, 33808:18, 33810:19 Yup [1] - 33811:11</p> <p>Z</p> <p>zebras [1] - 33646:3 Zoo [1] - 33646:2</p> |
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