

D4J8FLO1

1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 DAVID FLOYD, et al.,

4 Plaintiffs,

5 v.

08 CV 1034(SAS)

6 CITY OF NEW YORK, et al.,

7 Defendants.

8 -----x

New York, N.Y.  
April 19, 2013  
10:00 a.m.

10 Before:

11 HON. SHIRA A. SCHEINDLIN,

12 District Judge

13 APPEARANCES

14 BELDOCK LEVINE & HOFFMAN, LLP  
15 Attorneys for Plaintiffs

15 BY: JENN ROLNICK BORCHETTA  
16 JONATHAN MOORE

17 COVINGTON & BURLING, LLP  
17 Attorneys for Plaintiffs

18 BY: KASEY MARTINI  
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19 ERIC HELLERMAN  
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20 CENTER FOR CONSTITUTIONAL RIGHTS  
21 Attorneys for Plaintiffs

21 BY: DARIUS CHARNEY  
22 SUNITA PATEL  
22 BAHAR AZMY

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APPEARANCES (Cont'd)

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1 (Trial resumed)

2 THE COURT: Good morning.

3 I received the city's schedule. I received it last  
4 night or this morning, I guess last night. And the plaintiffs'  
5 attorneys have obviously seen it too. OK.

6 I do have two problems. They are my problems, not  
7 yours, but it may cause some readjustment. I can't be here the  
8 whole day on May 3rd. I can only be here half the day. I have  
9 to stop at 1:00.

10 MS. COOKE: OK.

11 THE COURT: You scheduled Dennis Smith.

12 MS. COOKE: I think we can probably find some  
13 availability the following Monday, the 6th. I will confirm.

14 THE COURT: So I just wanted you to know well in  
15 advance I have to stop at 1:00.

16 And May 1st has issues too. I think I foolishly  
17 agreed to speak from 1 to 2:30.

18 MS. COOKE: I think you told us that. We had  
19 anticipated a long lunch on that day.

20 THE COURT: It's not lunch. I am going to speak  
21 somewhere, and I think I am supposed to speak from 1 to 2:30.  
22 So a chunk out of the middle.

23 MR. MOORE: You will be back on that day?

24 THE COURT: I thought maybe I would stop from 12:30 to  
25 3, and then maybe sit later.

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1           So the 1st is a little cut up, but now I have to take  
2 the afternoon of the 3rd off. So those are a couple of  
3 changes, but we can talk about it more. That's all I know  
4 right now.

5       LEROY DOWNS,  
6           called as a witness by the plaintiffs,  
7           having been duly sworn, testified as follows:

8           THE COURT: State your full name, first and last,  
9 spelling both for the record.

10          THE WITNESS: Leroy Downs, L-E-R-O-Y, D-O-W-N-S.

11          THE COURT: Thank you.

12 DIRECT EXAMINATION

13 BY MS. PATEL:

14 Q. Good morning, Mr. Downs.

15 A. Good morning.

16 Q. Where do you live?

17 A. 147 Daniel Low Terrace.

18          THE COURT: You are going to have to speak way up.  
19 Maybe the move the chair closer and speak into the mike.

20 A. 147 Daniel Low Terrace, Staten Island, New York 10301.

21 Q. How long have you lived on Staten Island?

22 A. I came to America in about when I was five. So  
23 30-something years.

24 Q. Where did you live prior to Staten Island?

25 A. I was born in Devonshire, England.

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1 Q. What brought you to the United States?

2 A. My grandmother came over.

3 Q. When you moved to the U.S., who did you live with?

4 A. My grandmother.

5 Q. Do you have any children?

6 A. No. I am expecting one though.

7 Q. Where are you currently employed?

8 A. I work for Project Hospitality in Staten Island.

9 Q. What is Project Hospitality?

10 A. It's a nonprofit agency that -- they help the homeless,  
11 people with HIV, undocumented communities find jobs,  
12 homeless -- not homeless shelters, but we have a women and  
13 children shelter also.

14 Q. What are your job responsibilities at Project Hospitality?

15 A. I am a substance abuse counselor.

16 Q. How long have you --

17 THE COURT: Can you possibly speak up more? I am  
18 sitting right here and I can't hear you.

19 Q. You're kind of soft-spoken. If you can try to speak  
20 louder.

21 THE COURT: One way to do is just lean closer.

22 THE WITNESS: All right. OK.

23 THE COURT: You're a substance abuse counselor?

24 THE WITNESS: Yes.

25 THE COURT: How long have you been doing that?

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1 THE WITNESS: 15 years. It will be my 16th year.

2 Q. Mr. Downs, do you recall being stopped by New York Police  
3 Department officers on the evening of August 20, 2008?

4 A. Yes.

5 Q. What day of the week was August 20, 2008?

6 A. I believe it was a Wednesday, because we have a food pantry  
7 also, and I do food pantry runs for the clients on Wednesdays.

8 Q. What was the weather like that evening?

9 A. It was sunny. It was warm. It was really warm out.

10 Q. Did you go to work on August 20, 2008?

11 A. Yes.

12 Q. How did you get home on August 20, 2008?

13 A. I walked.

14 Q. Around what time did you leave work that day?

15 A. About 6:20.

16 Q. What did you do when you first arrived at home?

17 A. I didn't go into the house. I was actually sitting on my  
18 front step.

19 MS. PATEL: I am showing the witness Defendants'  
20 Exhibit P10.

21 Q. Do you recognize what is depicted in this photograph?

22 A. Yes.

23 Q. What is it?

24 A. That's my home.

25 MS. PATEL: I move to admit.

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1 MR. KUNZ: No objection.

2 P10 was multiple photographs.

3 MS. PATEL: That's right. I am seeking to admit

4 NYC\_2\_28754.

5 THE COURT: That page of P10 is received.

6 (Defendants' Exhibit P10, Bates NYC\_2\_28754, received  
7 in evidence)

8 Q. Mr. Downs, is this the step you were sitting on when you  
9 first arrived home?

10 A. Yes.

11 THE COURT: Of course, the record doesn't reflect the  
12 word "this." It's the only step under the front door, right?

13 THE WITNESS: Yes.

14 Q. Did you stand up while you were speaking on the phone?

15 A. Yes.

16 Q. What were you doing when you stood up?

17 A. I was on the cell phone talking to a friend of mine.

18 Q. Where were you standing when you stood up?

19 A. I stood up, and I walked in front of where the gate is.

20 Q. In front of that fence?

21 A. Yes.

22 Q. On the sidewalk or which part of the fence?

23 A. The front of the fence. You see how there is a cutout and  
24 then there is this part. It's the very front of the fence.

25 Q. The portion of the fence adjacent to the sidewalk, correct?

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1 A. Yes.

2 Q. What, if anything, did you have in your hands?

3 A. I had an earpiece and I had the cell phone.

4 Q. In one hand you had your cell phone?

5 A. Yes.

6 Q. In the other hand you had? Can you say that again, what  
7 did you have in your other hand?

8 A. My mouthpiece.

9 Q. A mouthpiece?

10 A. The mouthpiece to the earpiece. It's not Bluetooth. It  
11 had a wire, analog, old school.

12 Q. As you were standing in front of the fence speaking on your  
13 cell phone, what happened?

14 A. I was talking to a friend, and I witnessed a black Crown  
15 Victoria drive past me and went up to the corner of my block,  
16 which is Daniel Low Terrace and Fort.

17 Q. Is there anything else that you noticed about that car when  
18 it drove by?

19 A. No. I just saw it drive to the corner and the reverse  
20 lights came on and it reversed back.

21 Q. What was your impression of that car when it drove out?

22 A. That it was a cop car.

23 Q. What do you mean by that?

24 A. I thought it was an unmarked cop car.

25 THE COURT: What made you think that?

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1 THE WITNESS: It was a black unmarked car. Crown  
2 Victoria. I'm sorry.

3 THE COURT: OK.

4 THE WITNESS: They don't drive too many Crown  
5 Victorias in Staten Island.

6 THE COURT: You don't see too many Crown Victorias in  
7 Staten Island?

8 THE WITNESS: That are not cop cars. They got it  
9 locked down.

10 Q. How many doors did the car have?

11 A. Four.

12 Q. What happened? You said you saw it reverse?

13 A. Yes.

14 Q. Then what happened?

15 A. They reversed back to me and double-parked in front of my  
16 house.

17 Q. Did you end your call with your friend before the officers  
18 said anything to you?

19 A. As soon as they got in front of the house, they got out,  
20 and I was like, let me hit you back, and I cut the phone call  
21 short.

22 Q. You said they got out of the car?

23 A. Yes.

24 Q. How did they get out of the car?

25 A. They jumped out.

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D4J8FLO1 Downs - direct

1 Q. What did they do?

2 A. They started coming towards me.

3 THE COURT: How many were "they"?

4 THE WITNESS: There was two.

5 THE COURT: They both got out?

6 THE WITNESS: Yes.

7 THE COURT: The two front doors?

8 THE WITNESS: The two front doors.

9 Q. You said they jumped out?

10 A. Yes.

11 Q. Were they in uniform?

12 A. No.

13 Q. What race were the two officers?

14 A. They were Caucasian.

15 Q. What were their hair color?

16 A. One had like blondish hair and the other had like dark  
17 brown or blackish hair.

18 Q. What were they wearing?

19 A. I believe the blond haired one, he had like a black  
20 T-shirt.

21 Q. You said one had a black T-shirt. What about the other  
22 one?

23 A. The other one was a little bit easier to identify because  
24 he was wearing a Jets jersey.

25 THE COURT: A what?

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D4J8FLO1 Downs - direct

1 THE WITNESS: A Jets jersey.

2 THE COURT: What month was this again?

3 THE WITNESS: This was August.

4 THE COURT: It was light?

5 THE WITNESS: It was bright.

6 Q. Is there anything else you can say about the Jets jersey?

7 A. It was a Brett Favre jersey.

8 Q. Do you recall the color of the jersey?

9 A. I think it was green or blue or something to that effect.

10 Q. Do you remember today what the color was?

11 A. I don't want to say something wrong. I think it was --

12 THE COURT: Maybe you don't remember.

13 THE WITNESS: Yeah. It could have been green or blue.

14 THE COURT: But you're not sure?

15 THE WITNESS: I know it said Favre on the back of his  
16 jersey.

17 THE COURT: It said what?

18 THE WITNESS: Favre.

19 THE COURT: I didn't want to say something stupid, but  
20 what is Brett Favre?

21 THE WITNESS: He is a football player. It's just one  
22 name on the back, Favre. I am not a Jets fan, but I remember  
23 it.

24 THE COURT: You knew it?

25 THE WITNESS: Yes. I knew it was a football jersey.

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D4J8FLO1 Downs - direct

1 Q. What did they say, if anything, as they approached you?

2 A. They got out, approached me a little aggressive, and they  
3 said, Hey, buddy, you look like you're smoking weed.

4 Q. What was their tone?

5 A. Aggressive.

6 Q. Did you feel you were free to leave?

7 A. No.

8 Q. How did you respond when they made that statement?

9 A. I actually just started explaining to them that I'm a drug  
10 counselor. I have been doing it for years. I know the old  
11 captain of the 120. I am on my cell phone. I am talking to a  
12 friend. I am not smoking weed.

13 THE COURT: Were you smoking a cigarette?

14 THE WITNESS: No. I was talking on my mouthpiece.

15 THE COURT: OK.

16 THE WITNESS: How does that look like weed? If I was  
17 smoking weed, it would be all over me. You would smell it as  
18 soon as you come near me.

19 Q. Was there an odor of marijuana around you?

20 A. No.

21 Q. Was there any smoke around you?

22 A. No.

23 Q. At that point where were you standing?

24 A. I was standing on the sidewalk in front of my house.

25 MS. PATEL: I think maybe I will have him mark that.

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- 1     Q. Can you mark where you were standing when they first
- 2     approached? Just make an X.
- 3     A. Here.
- 4     Q. Where were they standing?
- 5     A. They were coming out of the car.
- 6     Q. Were they in front of you?
- 7     A. Yes.
- 8     Q. Your back was to the fence?
- 9     A. Yes.
- 10    Q. What happened next?
- 11    A. They came at me and they were like, you look like you're
- 12    smoking weed, get the F against the fence, or something to that
- 13    effect.
- 14    Q. Did they put their hands on you?
- 15    A. Yes.
- 16    Q. How did they put their hands on you?
- 17    A. They were pushing me backwards. So I guess my momentum, I
- 18    was backpedaling because they were pushing me towards the
- 19    fence.
- 20            THE COURT: Was your back towards the fence or your
- 21    front?
- 22            THE WITNESS: My back.
- 23            THE COURT: They were pushing your chest?
- 24            THE WITNESS: Yes.
- 25    Q. Were you pat down or searched?

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Downs - direct

1 A. Yes.  
2 THE COURT: Which one? Can you tell me what they did?  
3 THE WITNESS: I'm sorry. I am new to this.  
4 THE COURT: That's OK.  
5 THE WITNESS: They pat me down. They went down my  
6 leg, my left leg, around my back, around the front.  
7 THE COURT: All on the outside of your clothing?  
8 THE WITNESS: Yes.  
9 THE COURT: They didn't reach into any pocket?  
10 THE WITNESS: They later on searched me.  
11 THE COURT: Later on?  
12 THE WITNESS: Meaning after that, after the pat-down.  
13 THE COURT: Right after the pat-down, they went into  
14 your pocket?  
15 THE WITNESS: My pockets.  
16 THE COURT: Which pocket?  
17 THE WITNESS: Front pants pockets and back pants  
18 pockets, but I didn't have anything in my back pant pockets.  
19 THE COURT: But they went in and checked?  
20 THE WITNESS: They took everything out of my pockets.  
21 THE COURT: Did you have a jacket on?  
22 THE WITNESS: No.  
23 THE COURT: So just pants pockets.  
24 THE WITNESS: T-shirt.  
25 Q. You said that they were patting you down in your waist area

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1 and down your legs?

2 A. Yes.

3 Q. What did they take out of your pockets?

4 A. I had a wallet, I had my wallet, my keys, and I had a bag  
5 of cookies, like a dispenser from the machine, cookies.

6 THE COURT: Like a package of cookies?

7 THE WITNESS: Yes.

8 Q. When they were doing this, where were you physically?

9 A. Now I am pinned against the fence.

10 Q. They had pinned you against the fence?

11 A. Yeah.

12 Q. Where were they standing while they were searching you?

13 A. One was on the left-hand side of me and the other was on  
14 the right-hand side.

15 Q. Do you remember which one was on either side?

16 A. Yeah, because of the jersey. The jersey was on the right  
17 and the blond haired gentleman was on the left.

18 THE COURT: How tall are you?

19 THE WITNESS: 6'4".

20 THE COURT: Were they shorter?

21 THE WITNESS: Yeah.

22 THE COURT: They were both shorter?

23 THE WITNESS: Yeah.

24 Q. Do you remember approximately how short they were?

25 A. They were shorter than me, like 5'8", 5'9". But one was

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1    stockier and the other one was slimmer.

2    Q.    What did they do with your wallet?

3    A.    They opened it up.    They went through it.    They were taking  
4    out all of my stuff.

5    Q.    At the time that they were doing that, what was your  
6    impression of why they were doing that?

7    A.    I was frustrated.    I am like, why are you doing this?

8    Q.    While they were doing it, what were you thinking was the  
9    reason they were doing that?

10   A.    They were looking for the weed, the imaginary weed.

11   Q.    Did either officer ask permission to frisk you?

12   A.    No.

13   Q.    Did you give them permission to pat you down?

14   A.    No.

15   Q.    Did either officer ask you for permission to search you?

16   A.    No.

17   Q.    Did you give them permission to search you?

18   A.    No.

19   Q.    Did you give them permission to go through your wallet?

20   A.    No.

21   Q.    Approximately how long do you think this incident lasted?

22   A.    It felt like 10, 15 minutes I was out there.

23            THE COURT:    Do you think it really was that long?

24            THE WITNESS:    I don't know.

25            THE COURT:    You don't know?

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- 1 THE WITNESS: It could have been 10, 15, somewhere.  
2 Q. Then what happened?  
3 A. After they finished searching me, they gave me my stuff and  
4 walked -- like walking back to their vehicle.  
5 Q. As they were leaving, did you say anything to them?  
6 A. Yeah. I asked them for their badge numbers.  
7 Q. Did the officers provide you with their badge numbers?  
8 A. No.  
9 Q. What did they say in response to the -- what did they do in  
10 response to the request for the badge numbers?  
11 A. Nothing. They laughed me off and I think they said, the  
12 last thing they said to me, I'm lucky they didn't lock me up,  
13 or something like that.  
14 Q. Did they at any point use profanity after they searched  
15 you?  
16 A. Yes.  
17 Q. What did they say?  
18 A. I'm just doing my F'ing job.  
19 Q. Did they say F'ing?  
20 A. No. They said the word.  
21 Q. Do you recall whether the officers used profanity at any  
22 other point during the stop, search and frisk?  
23 A. Get it up against the F'ing fence.  
24 Q. Around what time did this encounter take place?  
25 A. This was around 6:45.

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1 Q. What did you do after the officers drove off?

2 A. Me and a friend, Mr. Joseph, he actually witnessed like the  
3 end of the stop, and he came down. He saw me arguing with the  
4 officers when they were leaving, and me and Charles walked to  
5 the precinct. I believe I walked.

6 Q. You said that someone arrived at some point during the  
7 stop?

8 A. Yes.

9 Q. Who arrived?

10 A. I'm sorry. Charles Joseph, a friend of mine. He actually  
11 lives in the condo on the corner of the block.

12 Q. You said that you went to the precinct afterwards?

13 A. Yes.

14 Q. Which precinct?

15 A. The 120 Precinct.

16 Q. Do you remember how you went to the precinct?

17 A. Funny enough, I thought we drove at one point, and actually  
18 I had to ask Charles. Charles, did we drive or did we walk?  
19 He said, No, I think we walked.

20 MR. KUNZ: Objection. It is hearsay.

21 THE COURT: It is hearsay. That's stricken.

22 What do you think now?

23 THE WITNESS: I believe I walked. I could have been  
24 wrong about the driving.

25 Q. Are you sure you walked?

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1 A. I believe so, yes.

2 THE COURT: How long a walk is it?

3 THE WITNESS: Five, ten minutes. It's a close walk.

4 Q. Why did you go to the 120th Precinct following the  
5 encounter?

6 A. To make a complaint.

7 Q. Why did you want to file a complaint?

8 A. Because I felt my rights were violated. I felt  
9 disrespected.

10 Q. What did you do when you entered the precinct to file a  
11 civilian complaint?

12 A. I went to the desk, and I saw an officer sitting at the  
13 desk.

14 Q. What, if anything, did you tell the officer?

15 A. I believe I said -- you know, I told him what happened, and  
16 he was like, you know, I can't do anything, you have to through  
17 CCRB, or something to that effect.

18 Q. Other than saying you had to go through CCRB, did he say  
19 anything else?

20 A. I don't recall.

21 Q. Did he give you a reason why he couldn't take your civilian  
22 complaint?

23 A. Yeah. Because -- oh, because I didn't have a badge number,  
24 which they didn't provide me.

25 Q. Do you know the officer's name?

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1 A. Yeah, Officer Moon.

2 THE COURT: Moon?

3 THE WITNESS: Yes.

4 THE COURT: That was the person --

5 THE WITNESS: M-O-O-N.

6 THE COURT: That was the one you complained to at the  
7 precinct?

8 THE WITNESS: Yes.

9 Q. How did you know his name was Officer Moon?

10 A. He was in uniform. He had his tag.

11 Q. Did he provide you with any information about how to file a  
12 civilian complaint with the CCRB?

13 A. No.

14 Q. Did he provide you the phone number?

15 A. No.

16 Q. Any other instructions?

17 A. No.

18 Q. While you were at the precinct or in the vicinity of the  
19 precinct, did you ever observe the two officers who stopped  
20 you?

21 A. Yes.

22 Q. How many times?

23 A. Twice.

24 Q. What was the first occasion when you saw the two police  
25 officers?

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- 1    A.  I believe I walked outside and they were driving into  
2    the -- there is like a driveway at the 120, because I work  
3    right next door to the 120.  And they were driving through, and  
4    I saw them in the car as they were coming through.  
5    Q.  How did you know it was the same police officers?  
6    A.  I will never forget that guy's face.  But it was the same  
7    guys that stopped me in front of my house prior.  It wasn't too  
8    long after.  
9    Q.  What did you do in response to seeing them in the car?  
10  A.  I took down their license plate of the vehicle as it was  
11  driving through.  
12  Q.  Did you say anything to them?  
13  A.  I said, Hey, buddy, I got your license plate.  
14  Q.  Did they respond in any way?  
15  A.  No, but I know they heard me because the window was down.  
16  Q.  What did you observe the car do next?  
17  A.  It drove to, I think that's Wall.  There is a baseball  
18  field on Richmond Terrace.  So it drove to the light and made a  
19  quick left.  
20  Q.  You observed the car drive out of the precinct?  
21  A.  Yes.  
22  Q.  What was the second time when you observed the police  
23  officers?  
24  A.  The second time was when I was inside the precinct, because  
25  I wasn't taking no for an answer, I just stayed there, and the

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1 officer -- the two officers came through the backdoor with two  
2 suspects.

3 Q. Is there anything that you recall about those two suspects?

4 A. They were probably young and black.

5 Q. When you said that you saw the license plate, what did you  
6 do?

7 A. I wrote it down on my left hand I believe.

8 Q. How did you react when you saw the officers the second  
9 time?

10 A. Inside the precinct?

11 Q. Yes.

12 A. I said to Officer Moon, that's them.

13 Q. How did you know it was them?

14 A. It's the same officers that stopped me prior, and he was  
15 wearing the Brett Favre jersey.

16 Q. Did you ask Officer Moon anything else?

17 A. Yeah. I said, Can you get their badge numbers?

18 Q. Did Officer Moon obtain their badge numbers as you had  
19 requested?

20 A. No.

21 Q. What did he do?

22 A. Officer Moon walked over to the two officers, and I  
23 couldn't hear what they were saying, they whispered something,  
24 and he came back. I felt sort of bad for Officer Moon, but he  
25 came back and he said, maybe you can ask them, something to

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1 that effect.

2 Q. At some point while the officers that stopped you were in  
3 the precinct, did you go back outside?

4 A. Yes.

5 Q. What did you do?

6 A. That's when I went outside, because the car was parked  
7 outside, I figured the car would be there. So I ran outside  
8 and took a picture of the license plate.

9 Q. How do you know that you took the picture of the vehicle  
10 that they were driving?

11 A. Because they were in that car when they drove --

12 Q. How do you know it was the car that they were driving?

13 A. Because they drove through the first time when I wrote down  
14 the license plate.

15 Q. Because the license plate was the same?

16 A. It was the same car. There was no other car out there.

17 MS. PATEL: I am showing -- I am showing the -- it's  
18 already admitted in evidence as part of Plaintiffs' Exhibit  
19 166, NYC\_2\_25052.

20 Q. Mr. Downs, is this the photograph that you took?

21 A. This is a copy of a copy of the photo that I took.

22 Q. What did you do with the photograph after you took it?

23 A. I gave it to CCRB.

24 Q. I might have to show it to you.

25 Can you read the license plate that's on there, the

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1 numbers?

2 A. This is a bad copy. CDE 1368.

3 MS. PATEL: Move for admission for all purposes.

4 MR. KUNZ: No objection.

5 MS. PATEL: It is not admitted for all purposes.

6 THE COURT: It is now.

7 MS. PATEL: As 166C.

8 (Plaintiffs' Exhibit 166C received in evidence)

9 MS. PATEL: For the record, I will redact the  
10 statement here because it's hearsay. It's not his notes.

11 THE COURT: I understand it's hearsay, but that's  
12 actually his testimony too. He testified he took that photo,  
13 and you said that's the vehicle used by the two officers who  
14 stopped you.

15 THE WITNESS: Yes.

16 THE COURT: So it's his testimony. That's not your  
17 handwriting?

18 THE WITNESS: No.

19 THE COURT: But it is your statement.

20 THE WITNESS: Yes.

21 Q. Did you ever give Officer Moon the information about the  
22 license plate?

23 A. Yes.

24 Q. Did he say anything in response?

25 A. No. He said I should go to CCRB.

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1    Q. Did you ever speak to a supervisor while you were at the  
2    120th Precinct that evening?

3    A. Yeah. I believe -- I was sitting there for hours, and I  
4    just tried to stop somebody that looked official in the  
5    passing, and I think his name was Officer Perez or something.

6            THE COURT: I can't hear you.

7    A. I think his name was Officer Perez. And I stopped him and  
8    said, Hey, this is what happened, I'm just trying to get these  
9    two officers' badge numbers. And he was like, OK, just give me  
10   some time, I will look into it, I will take care of it.

11   Q. Was he an officer, do you recall?

12   A. Yeah. He was plain clothes.

13   Q. Did you believe him to be a supervisor?

14   A. I believe so.

15   Q. You said you waited at the precinct. How long did you wait  
16   at the precinct?

17   A. It was dark at that point. It was hours.

18   Q. Then what did you do?

19   A. I think Officer Perez, he took my name and number, and he  
20   was going to call me back in an hour. I was there forever and  
21   there was no call so I just left and went home.

22            THE COURT: Just while there is a pause, can somebody  
23   remind me, is there a 250 on this stop?

24            MR. CHARNEY: No.

25   Q. Were you ever able to file a complaint at the precinct?

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1 A. No.

2 Q. How did you feel as you walked home?

3 A. Frustrated, angry.

4 MS. PATEL: Showing the witness Plaintiffs' Exhibit  
5 484.

6 Q. What does this depict?

7 A. That's like the area where I live and work.

8 Q. Is it a fair and accurate representation?

9 A. Yes.

10 MS. PATEL: Move for the admission of a Google map.

11 MR. KUNZ: No objection.

12 THE COURT: 484 is received.

13 (Plaintiffs' Exhibit 484 received in evidence)

14 MS. PATEL: I am also showing the witness what is  
15 marked as 484A, which is the same map.

16 Q. Do you see a marking on this map?

17 A. Yes.

18 Q. What does that marking depict?

19 A. That's my home.

20 Q. How did that mark get there?

21 A. I marked it this morning.

22 Q. Can you just say again when you did it?

23 A. This morning I marked it.

24 MS. PATEL: I move for the admission of 484A.

25 MR. KUNZ: No objection.

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1 (Plaintiffs' Exhibit 484A received in evidence)

2 Q. Can you describe where the precinct is?

3 A. The precinct is -- am I supposed to point here?

4 Q. You want to put a dot? Let's put a dot where the precinct  
5 is.

6 Are you familiar with the intersection or where the  
7 intersection of York and Brighton is?

8 A. Yes.

9 Q. Is it depicted on this map?

10 A. York and Brighton.

11 Q. Am I correct that this is Brighton?

12 A. Yes.

13 Q. And this is York?

14 A. Yes.

15 Q. Approximately how long would it take to drive from the  
16 precinct to Brighton and York?

17 A. Five minutes.

18 Q. Did you submit a complaint to the CCRB against the officers  
19 who stopped, frisked and searched you on August 20, 2008?

20 A. Yes.

21 Q. How did you submit that complaint?

22 A. I believe online.

23 Q. When did you submit that?

24 A. I believe it was the next day.

25 Q. You were interviewed, correct?

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1     A.  Yes.

2     Q.  You went in person for an interview, is that right?

3     A.  Yes.

4     Q.  Did you provide the photograph to the CCRB?

5     A.  Yes.

6     Q.  Did you provide the name of Officer Moon?

7     A.  Yes.

8     Q.  Did you provide a description of the officers that stopped  
9     you?

10    A.  Yes.

11    Q.  And their clothing?

12    A.  Yes.

13    Q.  Are you aware that police officers were interviewed in  
14    connection with your CCRB complaint?

15    A.  Yes.

16    Q.  Are you aware of the results of the complaint against  
17    Officer Moon?

18    A.  Yes.

19    Q.  What are they?

20    A.  I believe they said that he was supposed to take my report,  
21    take my --

22    Q.  Your complaint?

23    A.  Complaint.  Excuse me.

24    Q.  Other than attempting to file a complaint at the 120th  
25    Precinct and filing a CCRB complaint, did you complain to any

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1 other New York Police Department officials?

2 A. Yeah. I spoke with like everyone in America. I am joking.

3 I'm sorry. I spoke with a Sergeant David Goodwin. I spoke

4 with deputy inspector --

5 Q. Who is Sergeant Goodwin?

6 A. Sergeant Goodwin was a sergeant at the 122.

7 Q. The 122nd Precinct?

8 A. Yes.

9 Q. Is that also in Staten Island?

10 A. Yes.

11 Q. Who else did you talk to?

12 A. The deputy inspector of the 120 at that time.

13 Q. Who was that?

14 A. At that time, it was Deputy Inspector Denesopolis. There  
15 is a new deputy inspector there.

16 Q. What was the reaction of the deputy inspector when you told  
17 him about the way you were treated?

18 A. I mean, you know, he was like, you know, Lee, it was  
19 probably an isolated incident. He sent me to the citizens'  
20 police academy to -- I guess to educate me on what's their  
21 policies and what they do on the street, stuff like that.

22 Q. How long is the citizens' police academy?

23 A. I think it was 11 months.

24 Q. After you completed that, did you still believe that your  
25 rights were violated?

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1 A. Yes.

2 Q. Mr. Downs, why did you decide to be a witness in this case?

3 A. I am passionate about this situation because I believe  
4 stop, question and frisk is a violation of our rights. I mean,  
5 I feel many times it's a sad situation, but young black males  
6 are being profiled in this city, and I have been through not  
7 just one stop, it's been all my life.

8 MR. KUNZ: Objection, your Honor.

9 THE COURT: I am going to allow the generality of what  
10 he is saying.

11 Did you say you have been stopped other times?

12 THE WITNESS: Many times.

13 THE COURT: I will allow that general statement. Is  
14 that it?

15 Q. Is there any other reason why you decided to be a witness  
16 today?

17 A. I have -- like I said, I have a son, a newborn son coming  
18 into this world, and I pray that they don't get profiled, not  
19 just him, but any other child. People growing up in this  
20 world, it's sad when you can't stand in front of your house and  
21 be on a cell phone without being accused. It's just  
22 ridiculous.

23 Q. That's it. Thank you.

24 MR. KUNZ: Before I get started with the questioning,  
25 late last night I noticed that there was a slight problem with

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1 the CCRB file, Plaintiffs' Exhibit 166. The copy that was  
2 included in plaintiffs' exhibit list did not include the last  
3 like 20 pages of the CCRB file. It just ended. So I would  
4 just like to get the entire CCRB file into evidence, as it  
5 should have been included with that exhibit.

6 MS. PATEL: I have never seen it. So I would request  
7 I at least get a chance to see it before it's admitted into  
8 evidence and this witness can authenticate the CCRB records.

9 THE COURT: I understand. You're right. Until you  
10 have had a chance to review it, we won't admit it.

11 Have you ever seen photographs of these two police  
12 officers that you say stopped you?

13 THE WITNESS: Basically, at CCRB, it was like ten  
14 months later, they had -- they put them in a lineup, and they  
15 were in uniform. I didn't want to pick the wrong person. They  
16 were like, do you -- I'm like, I think he looks like this, but  
17 I don't want to get anybody in trouble.

18 MR. KUNZ: Part of the documents that were not  
19 included in the CCRB file are the ones that deal with the photo  
20 array that Mr. Downs was shown, and I may want to show him one  
21 or more of those documents.

22 THE COURT: This seems totally inappropriate to be  
23 bringing that to court on Friday, April 19, at quarter to 11,  
24 when we have been doing this case for years and you have known  
25 about this stop for years, and Ms. Patel hasn't seen it, the

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1 witness hasn't seen it. He could have come yesterday or the  
2 day before, looked at the officers who testified and said,  
3 yeah, that's the guy. He should have just looked at those two  
4 who came into court and said yes or no. That would have been  
5 straightforward and simple.

6 Maybe we should still do that because I reread their  
7 testimony and they, of course, said this never happened. So  
8 somebody may not be testifying completely accurately under  
9 oath, and I'm troubled. So I am not really interested in that  
10 lineup. I don't know how it was conducted. I don't know the  
11 quality of the photographs. You haven't seen them, Ms. Patel.  
12 You don't know whether it's a fair lineup. I am not allowing  
13 this. I am definitely not allowing this at this time. If you  
14 want to bring this witness back and bring the two police  
15 officers back, we will do it the right way.

16 MR. KUNZ: For the record, the Bates numbers that I  
17 want to get in, Plaintiffs' Exhibit 166 ended at Bates stamp  
18 25144, and the CCRB file actually goes to 25172.

19 THE COURT: Maybe for the record you will explain why  
20 those 20 pages were not produced till this morning.

21 MR. KUNZ: They have Bates stamp numbers on them.  
22 They absolutely were produced.

23 THE COURT: I thought the point was they were not  
24 produced.

25 MR. KUNZ: They were produced.

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1 MS. PATEL: If they were produced, it could have been  
2 an error in our filing system or in the copy received. I am  
3 saying I have never seen them. The version that we admitted  
4 into evidence didn't have them. Mr. Kunz raised that problem  
5 with me for the first time as we were sitting down. This is  
6 the first time I am seeing them now. I am not saying they were  
7 never produced. I don't know.

8 THE COURT: I misunderstood.

9 MS. PATEL: It is something that could have been  
10 raised when we moved to admit this earlier this week.

11 MR. KUNZ: The CCRB file was admitted through Joan  
12 Thompson earlier this week. And when the plaintiffs presented  
13 it, it was presented as the entire case file, and I just  
14 noticed last night that it was not.

15 MS. PATEL: The Bates range has been on our exhibit  
16 list for two months.

17 THE COURT: The Bates range which includes these?

18 MS. PATEL: Does not.

19 MR. KUNZ: The point is it's only a partial file. We  
20 can move on. For completeness, I think it should be --

21 THE COURT: I know you think so. Until I hear more  
22 about it I don't think so. I don't know why we just don't have  
23 the people come in, all three people, and take a look.

24 MS. PATEL: Originally, those officers would have  
25 testified immediately afterwards.

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1                   THE COURT: I know. It's kind of an important point  
2 since they swore under oath that this never happened. Because  
3 if the Court concludes that any witness has perjured him or  
4 herself, that's a serious problem.

5 CROSS-EXAMINATION

6 BY MR. KUNZ:

7 Q. Mr. Downs, before we talk about the incident a little bit,  
8 I just want to talk about your neighborhood. What neighborhood  
9 of Staten Island is it?

10 A. I live in St. George, but St. George and New Brighton area  
11 is right next to one another.

12 Q. You don't think that your particular block in Staten Island  
13 has a lot of crime?

14 A. No.

15 Q. But you did testify at your deposition that just a few  
16 blocks away on Jersey Street there is a lot of crime?

17 A. Yes.

18 Q. In fact, you have heard stories about people being mugged  
19 and robbed on the streets just a few blocks away from your  
20 house?

21 A. Definitely, yes.

22 Q. And your house is directly between the police precinct and  
23 these high-crime blocks that you talked about, right?

24 A. Yes.

25 Q. You have also said that police cars often drive through

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D4J8FLO1 Downs - cross

1 your neighborhood when they leave the precinct to go to these  
2 high-crime areas, right?

3 A. No. They go back to the precinct. Mine is a one-way going  
4 up. So they go up, turn to the right on Fort, and go down St.  
5 Marks, and turn down Wall Street, and that's the precinct.  
6 Mine is a one-way.

7 Q. I guess my point is, it's common for you to see police cars  
8 driving past your house?

9 A. Yes.

10 Q. Now, you just testified on direct that you attended the  
11 citizens' police academy?

12 A. Yes.

13 Q. This is for nonpolice officers, right?

14 A. Yeah.

15 Q. It's held at the actual police academy?

16 A. Yes.

17 Q. I think you said it was a 10- to 11-month program?

18 A. Roughly.

19 Q. You went several times per week to take these classes?

20 A. I believe it was twice a week.

21 Q. You received much the same training that actual police  
22 officers receive, correct?

23 A. No. No.

24 Q. I am going to hand you a copy of your deposition.

25 MS. PATEL: Can I get the question repeated, the  
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1 initial question?

2 (Record read)

3 MS. PATEL: I just object because I am not sure that  
4 the witness has any knowledge of the training they receive at  
5 the police academy.

6 THE COURT: I think that's a good point. How would he  
7 know if it's the same?

8 MR. KUNZ: I could ask what his understanding of the  
9 course work is.

10 Q. What was your understanding of the course work as compared  
11 to the classes that police officers take?

12 A. They give you a basic training of what they teach the  
13 officers.

14 Q. So directing your attention to your deposition, page 32,  
15 lines 19 through 23.

16 I am sorry. Your deposition was on January 25, 2013?

17 A. I don't remember exactly.

18 Q. Look at the front page.

19 MS. PATEL: I object. The question on this line  
20 doesn't seem to be the same question that you just asked.

21 Q. You took the deposition on January 25, 2013?

22 A. Yes.

23 Q. Before I asked you questions on that day, you took an oath  
24 to tell the truth?

25 A. Yes.

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1 Q. So on page 32, lines 19 through 23, were you asked the  
2 following question and did you give the following answer:

3 "Q. And what sort of stuff did they talk about?

4 "A. Everything. They are supposed to give you a crash course  
5 on what they teach the officers, supposedly to give us the  
6 sense that we understand why this happened, you know."

7 Did you give that answer to that question?

8 A. Yes.

9 MS. PATEL: Again --

10 THE COURT: It's not identical, but I get the point.

11 Q. This work at the academy included classroom lectures?

12 A. Yes.

13 Q. And role-playing exercises?

14 A. Yes, I believe so.

15 Q. I think, in fact, at the deposition you said that you would  
16 volunteer, you would raise your hand a lot to participate in  
17 the role-play exercises?

18 A. I put up my hand about the stop, question and frisk  
19 section, definitely.

20 Q. That was my next question actually. This course that you  
21 took, it included training on stop, question and frisk,  
22 correct?

23 A. Yes.

24 Q. And you thought the training was very practical?

25 A. Very much.

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- 1 Q. You thought it was excellent training?  
2 A. Yes.  
3 Q. In fact, you also used the word wonderful training?  
4 A. It was good.  
5 Q. And you thought the instructors were great?  
6 A. Sergeant Shelly was the best.  
7 Q. Now, during your direct exam you said that you thought the  
8 incident happened on a Wednesday, is that correct?  
9 A. I believe so.  
10 Q. But you're not 100 percent sure about that?  
11 A. I think because I connect my food pantry, I work at a soup  
12 kitchen on Wednesday, and we provide food for the homeless on  
13 that day. So I believe it was that day.  
14 Q. Just to be clear, are you 100 percent sure?  
15 A. I am not 100 percent, but I think.  
16 Q. The incident happened at about 6:45 p.m.?  
17 A. Yes.  
18 Q. And that time 6:45 p.m., that's what you said at the  
19 deposition, that's also what you told CCRB, correct?  
20 A. Yes.  
21 Q. Now, you also said during your direct examination today  
22 that it was warm outside?  
23 A. Yes.  
24 Q. But at the deposition, you told me that you didn't remember  
25 what the temperature was, right?

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D4J8FL01 Downs - cross

1 A. I don't know the temperature, but it was warm, yes.

2 Q. You were wearing blue jeans and a black T-shirt?

3 A. I believe so, yes.

4 Q. The pants that you were wearing, they were baggy pants, not  
5 tight?

6 A. No. I don't rock tight jeans, sorry.

7 Q. They were baggy?

8 A. Yeah, sort of.

9 Q. On your possession you had a cell phone, your wallet, keys,  
10 and a bag of cookies, right?

11 A. Yes.

12 Q. You had the cell phone in your hand?

13 A. Yes.

14 Q. But everything else was in your pockets?

15 A. Yes.

16 Q. And you were not carrying a bag of any kind?

17 A. No.

18 Q. Now, before the incident happened, you walked home,  
19 correct?

20 A. Yes.

21 Q. Your work is within walking distance of your home?

22 A. I am right next door to the precinct.

23 THE COURT: No. Your job. He is saying the distance  
24 between your job and your home.

25 THE WITNESS: Five minutes, five, ten minutes.

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D4J8FL01 Downs - cross

- 1 Q. The next question was, and your work is also right next to  
2 the precinct?  
3 A. Yes.  
4 Q. So when you first got home that day, you were on the phone  
5 and you sat on the step?  
6 A. Yes.  
7 Q. Sat on that step there?  
8 A. Yes.  
9 Q. When you were sitting on the step, that's a pretty small  
10 step, right?  
11 A. Uh-huh.  
12 Q. So when you were sitting on the step, you were basically  
13 sort of sitting on the ground?  
14 A. Yes.  
15 Q. Were your knees bent?  
16 A. I don't remember.  
17 Q. But you're pretty tall, right?  
18 A. Yes.  
19 Q. So if your knees were bent, they would be up towards your  
20 chest?  
21 A. I don't remember if my knees were bent or they were  
22 straight, if I had them straight. I don't remember.  
23 Q. Now, at your deposition, you stated that the phone call  
24 ended right as the incident with the police was starting,  
25 right?

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D4J8FL01 Downs - cross

1 A. Yeah. Because I said, let me call you back, click.

2 Q. So your phone records would show exactly when the incident  
3 began?

4 A. Yes.

5 Q. I asked you for those records at your deposition, right?

6 A. Yes.

7 Q. But you have never provided them?

8 A. I said you can subpoena the phone log.

9 Q. But you have never provided the records?

10 A. I don't have the records. I don't have the cell phone.

11 Q. That's a no, you haven't provided them?

12 THE COURT: No, he doesn't have them he said. He  
13 can't provide what he doesn't have.

14 MR. KUNZ: For the record, we put in a document  
15 request.

16 THE COURT: I understand. He says he doesn't have  
17 those records.

18 MR. KUNZ: We also asked for the phone number and the  
19 carrier so we can subpoena the records.

20 THE COURT: Nobody provided that?

21 Were you asked for the cell phone carrier and a phone  
22 number?

23 THE WITNESS: I think in the deposition he asked me  
24 that.

25 THE COURT: Did you answer?

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D4J8FL01 Downs - cross

1 THE WITNESS: Yeah. Read the deposition.

2 Q. We can go to that section of the deposition, but I believe  
3 you said at the deposition you did not recall the carrier?

4 MS. PATEL: I think that's what he said. This is a  
5 phone that he had years ago.

6 MR. CHARNEY: Five years ago.

7 THE COURT: I just asked you, did you provide the  
8 carrier and the phone number? And you said yes. Did you or  
9 didn't you?

10 THE WITNESS: I think I said something to the effect  
11 in the deposition, I can give you the company.

12 THE COURT: Did you?

13 THE WITNESS: No one asked me to give them anything.  
14 If somebody would request me, I am going to give it to them.

15 THE COURT: They asked that at the deposition?

16 THE WITNESS: They asked me, and I said in the future.

17 THE COURT: You didn't know then, but you said I can  
18 give it to you.

19 THE WITNESS: Yeah.

20 THE COURT: Then nobody followed up?

21 THE WITNESS: Yes.

22 THE COURT: OK.

23 Q. In addition to the carrier, I also asked what the number  
24 was, correct?

25 A. Right.

D4J8FL01

Downs - cross

1 Q. But you didn't remember what that was either?

2 A. Five years ago, I am not sure if I had the same number.  
3 That's what I was saying.

4 Q. Earlier today you testified that you had been sitting on  
5 the step and then you stood up?

6 A. Right.

7 Q. Shortly before or right as the police were driving by?

8 MS. PATEL: Objection. That's mischaracterizing his  
9 testimony.

10 THE COURT: Mischaracterizing in what sense? Shortly  
11 before or right as the police were driving by?

12 MS. PATEL: He testified that he was standing in front  
13 of the fence walking back and forth when the police officers  
14 drove by.

15 THE COURT: You need to go back two questions.

16 Counsel said, "Earlier today you testified that you  
17 had been sitting on the step and then you stood up?"

18 That's right, correct?

19 THE WITNESS: Yes.

20 THE COURT: Where were you when the police officers  
21 arrived?

22 THE WITNESS: I was in front of the fence.

23 THE COURT: Were you standing or walking?

24 THE WITNESS: I was standing at that point.

25 Q. Do you want to turn to page 59 of your deposition?

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D4J8FL01

Downs - cross

1           Line 4 through 10, were you asked the following  
2       questions and did you give the following answers:

3       "Q. So you were initially sitting on the step talking on the  
4       phone?

5       "A. Right.

6       "Q. When did you first see the police?

7       "A. I'm on the phone and I am in front of the house, and I  
8       watched them go by. I knew that they were there because I work  
9       next to the precinct."

10          Did you give those answers to those questions?

11          THE COURT: What is inconsistent about that?

12          MR. KUNZ: He did not testify at his deposition that  
13       he stood up before the police arrived.

14          THE COURT: I don't know how you can draw that  
15       inference from what you just read.

16          MR. KUNZ: I asked, he was sitting down and what  
17       happened next, and he said the police drove by.

18          THE COURT: Right. They did, but he didn't say  
19       whether he was still sitting or whether he stood in the  
20       meantime. It seems to me that was just silly and kind of a  
21       waste of my time.

22          (Continued on next page)

23  
24  
25

D4j9flo2 Downs - cross

1 Q. Well, in fact, nowhere in the deposition did you tell me  
2 that you had stood up --

3 THE COURT: Now, Mr. Kunz, he obviously stood up. He  
4 was standing at some point in this incident. From sitting he  
5 got to standing. We don't know when. You're not going to find  
6 it in the deposition. Of course he stood up. Otherwise, he'd  
7 be sitting today on the stoop.

8 MS. PATEL: For the record he did testify that he was  
9 standing up.

10 THE COURT: Obviously he stood up at some point or  
11 he'd still be sitting there.

12 Q. It was a Crown Victoria, right?

13 A. Yes.

14 Q. A black one?

15 A. Yes.

16 Q. And you recognized it as a police vehicle as soon as you  
17 saw it?

18 A. Yes.

19 Q. And you recognized this as a police vehicle because it's  
20 common to see black Crown Victorias police in your  
21 neighborhood, right?

22 A. Yes.

23 Q. And you have personal experience about that?

24 A. Personal experience -- I have seen --

25 Q. Because you work right near the precinct?

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D4j9flo2

Downs - cross

1 A. Yes.

2 Q. So you see black Crown Victorias coming and going from the  
3 precinct all day long, right?4 A. Coming from the precinct all day -- I'm not sitting outside  
5 the precinct all day long. I work.6 Q. But you personally, you know, when you're going to and from  
7 work, you personally see these black Crown --8 A. There's many different color Crown Victorias. There's blue  
9 and black.10 THE COURT: All he's saying is you've seen the black  
11 ones come and go from the precinct?12 THE WITNESS: I know what a Crown Victoria looks  
13 like --14 THE COURT: No, no. I'm not saying that. But you  
15 know it's a cop car --

16 THE WITNESS: Cop car, yes.

17 THE COURT: -- because you've seen them coming and  
18 going from the precinct over the years, right?

19 THE WITNESS: Yes.

20 Q. So the car drives past you, correct, initially?

21 A. Correct.

22 Q. And then it goes all the way up the block to Fort Place?

23 A. Yeah. The corner, the stop sign, there's a stop sign on  
24 the corner of my block.

25 Q. So I'm going to show you the rest of the photographs from

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D4j9flo2

Downs - cross

1 Defendants' P10. The one on Bates stamp 28755. Can you tell  
2 me what that is?

3 A. That's my home.

4 THE COURT: I'm sorry?

5 THE WITNESS: That's my home.

6 Q. And then the one at 28756, can you tell me what that is?

7 A. That's my block.

8 THE COURT: My what?

9 THE WITNESS: My block.

10 Q. So this one is taken from someone standing in the street in  
11 front of your house and looking up the street in the direction  
12 of traffic?

13 A. I guess so.

14 Q. Yes?

15 A. I guess so. That's what you're telling me.

16 THE COURT: He doesn't know where the photographer was  
17 standing. He's just looking at that as a lay person trying to  
18 figure out where the photographer was standing.

19 MR. KUNZ: I understand, yes.

20 THE COURT: He wasn't there when the photographer  
21 stood there.

22 MS. PATEL: Your Honor, the photograph of the "down  
23 the block" to me it looks like it's a distorted angle.

24 THE COURT: You're not testifying either. So you  
25 weren't there when the photographer was doing it. He wasn't

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Downs - cross

1 there when the photographer was doing it. So it's a pretty  
2 silly question again.

3 The photographer knows where he stood. If you want to  
4 call the photographer in, do it.

5 MR. KUNZ: I move --

6 THE COURT: No, since we don't not the angle of that  
7 second one looking up the block and we don't have the  
8 photographer, I don't know if it's a fair and accurate  
9 representation. All this witness can say is that's my block.

10 If you want it for the limited purpose of "that's my  
11 block" we'll take it solely for that purpose.

12 BY MR. KUNZ:

13 Q. Okay. I'm sorry. Is that your house right there?

14 A. Yes.

15 Q. So your house is in this photograph?

16 A. Yes.

17 MR. KUNZ: So I move to admit this as a photograph of  
18 his block showing his house.

19 THE COURT: It does show his house.

20 I do not know that it's a fair and accurate  
21 representation of the block. I don't know if it shows the stop  
22 sign he testified to.

23 But it does show his house. For the limited purpose  
24 of saying that's the block on which my house is, I'll take it.

25 Q. So showing this -- this gray house with the white metal

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D4j9flo2

Downs - cross

1 gate on the right-hand side just near the blue car, that's your  
2 house, correct?

3 A. Yes.

4 Q. And Fort Place is up here at the top of the hill at the top  
5 of this street?

6 A. Yes.

7 THE COURT: It's one-way traffic, right? That block,  
8 one way?

9 THE WITNESS: It's an interesting block. When you go  
10 up this way it's one way. But when you -- you can make a  
11 right. So it actually splits.

12 You get me?

13 THE COURT: No. But that's okay. I'm not very --

14 THE WITNESS: You can make a right and you can make a  
15 left. But when you make a left you can't come down, do you  
16 understand what I'm saying, on Fort. It's a split.

17 THE COURT: Okay.

18 Q. So you also have testified that the police officers drove  
19 all the way up to Fort Place and then backed all the way down?

20 A. They drove to the corner, yes.

21 THE COURT: And then they backed down the street?

22 THE WITNESS: Yeah, reversed.

23 Q. And that's a long ways up to the stop sign, right?

24 A. I don't know. They stopped at the corner.

25 Q. Well when you're standing in front of your house can you

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D4j9flo2 Downs - cross

1 see the corner?

2 A. Yes. It's right at the corner.

3 My house is one, two, three buildings. Three. The  
4 corner. The condo.

5 THE COURT: Is the condo the tall beige one?

6 Q. The condo, the tall beige one, is three separate buildings,  
7 right?

8 A. No. It's one building.

9 It's one building. It has indents. It's one  
10 building.

11 MR. KUNZ: The picture is what it is.

12 THE COURT: No. He knows. He lives on the block. He  
13 says it's one building with three indents. Three indentations.  
14 It's not separated buildings. It's all attached. But it's got  
15 indentations.

16 THE WITNESS: Yes.

17 Q. Not to belabor this point. But the crosswalk where you  
18 see, I think it's written on the street "stop," that's Fort  
19 Place? That's where the --

20 A. Yeah.

21 Q. So you saw the cops drive all the way up there and then  
22 reverse all the way back?

23 A. Yes.

24 Q. Now when the officers exited the vehicle they spoke to you,  
25 correct?

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D4j9flo2

Downs - cross

1 A. Yes.

2 Q. In fact, the first thing they said to you was, "Hey, buddy,  
3 it looks like you're smoking weed"?

4 A. Yes.

5 Q. And there were two officers, correct?

6 A. Yes.

7 Q. One with dark hair and one with blondish hair?

8 A. Yes.

9 Q. Both white?

10 A. Yes.

11 Q. And I think you said at your CCRB that both of them looked  
12 Italian?

13 A. Could be. Probably.

14 Q. Now, at the deposition you said that the one with blondish  
15 hair was a little bit taller than the one with dark hair,  
16 right?

17 A. Could have been. Could have been.

18 Q. Well is that what you said at your deposition?

19 A. I don't remember every line of my deposition.

20 Q. I understand that. Turn to page 62, lines 13 to 17. Read  
21 it silently to yourself.

22 MS. PATEL: Can you tell me the lines again.

23 MR. KUNZ: 62, 13 through 17.

24 MS. PATEL: Your Honor, the question was --

25 THE COURT: No. No. No. He is reading it to himself

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D4j9flo2 Downs - cross

1 to see if it refreshes his recollection. Either it does or it  
2 doesn't.

3 MR. KUNZ: Start with line 10. It might provide the  
4 context.

5 THE COURT: Start with line 10. Read it to yourself  
6 through line 17 and just see if it refreshes your recollection.  
7 If it doesn't, say it doesn't refresh my recollection. If it  
8 does, say it does.

9 THE WITNESS: It says he was a little shorter than the  
10 chunkier one.

11 THE COURT: I didn't ask you what it says. I said:  
12 Does it refresh your recollection as to which one was taller?  
13 Either it refreshes your recollection as you sit here today or  
14 it doesn't.

15 Does it help you remember which one was taller?

16 THE WITNESS: No.

17 THE COURT: Okay. That's fine.

18 Q. So sitting here today what is your memory about which one  
19 was taller, the dark-haired one or the blond one?

20 A. I'm taller than both of them so they both looked short to  
21 me.

22 Q. So sitting here today you don't know?

23 THE COURT: He just said that.

24 MR. KUNZ: So then I'm going to impeach him with this  
25 section.

D4j9flo2 Downs - cross

1 Page 62, line 10.

2 "Q. The one that had blondish hair, do you remember his  
3 height, what his height and weight was?

4 "A. He was strong -- he was a stronger built gentleman.

5 "Q. How tall was he?

6 "A. I'm not great with numbers, man. He was shorter than me.

7 They were both shorter than me. They were like five/eight.

8 The one with darker hair was a little shorter than the chunkier

9 one."

10 THE COURT: That is totally consistent with the  
11 testimony I heard here today.

12 Go on, Mr. Kunz.

13 Q. So then -- so you said that the one with the blondish hair  
14 had a stronger build?

15 A. Yes.

16 THE COURT: If you'd like him to identify these two  
17 officers would you bring them back to court and so we can take  
18 a look at them and say yes, those are the two guys who stopped  
19 me. This is way off on the wrong track. This is sounding like  
20 an ID in a criminal case, which it is not. I'd like the  
21 officers brought here.

22 Can you ask that they be brought back for further  
23 questions. I mean this is -- does not make any sense to me,  
24 whether one guy is half an inch shorter than another is not the  
25 point of this case. Either these are the two guys who made the

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Downs - cross

1 stop or they didn't. They were just here yesterday.  
2 Unfortunately, because of timing, he didn't get to see them.

3 Can you bring them back? I'm directing the city:  
4 Reproduce these two officers. Call their precincts. Get them  
5 in here. And have him take a look. And we'll be done with  
6 this problem.

7 Either those were the two guys who made the stop or  
8 they weren't. Of course, they both testified under oath that  
9 they didn't. I'd like him to take a look at them. I really  
10 would. I'm ordering it. I've really had it with this  
11 identification. I want those two officers back in court.

12 Can you get them in here today when Mr. Downs is still  
13 here and off of work?

14 MR. KUNZ: I can absolutely try.

15 THE COURT: Maybe we should take a break and you do  
16 that. Send somebody to make a phonecall.

17 MS. PUBLICKER: I'll go make a phonecall, your Honor.

18 THE COURT: Thank you.

19 Can you hang around here until they get here?

20 THE WITNESS: I will try but I was going to  
21 Connecticut.

22 THE COURT: You're going to Connecticut?

23 THE WITNESS: I'll come back.

24 THE COURT: We'll see. I'm going to try to get them  
25 right in.

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D4j9flo2 Downs - cross

1 Q. Now on your direct examination you said that the football  
2 jersey that one of them was wearing was green, possibly blue?

3 A. Yes.

4 Q. But when you first made this statement to CCRB on the  
5 phone, you said it was green, correct, the jersey?

6 A. I believe so.

7 Q. And when you did your CCRB full interview you said the  
8 jersey was green, correct?

9 A. I believe --

10 MS. PATEL: Wait. I couldn't hear.

11 THE COURT: I wouldn't take it too seriously,  
12 Ms. Patel. The difference between green and blue does not  
13 interest me very much. Green blue. Blue green. Pretty much  
14 the same.

15 Can we move on.

16 MR. KUNZ: Just one more question on that point, your  
17 Honor.

18 Q. At your deposition, I also asked you what color the jersey  
19 was and you also said it was green.

20 MS. PATEL: Your Honor, that question was not asked at  
21 the deposition. I know that for a fact.

22 THE COURT: Okay. Maybe you'll find it, Mr. Kunz, and  
23 point it out to Ms. Patel.

24 MR. KUNZ: It's page 63, line 21 through 64, line 3.

25 MS. PATEL: There is no question here about the color  
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D4j9flo2 Downs - cross

1 of the jersey.

2 THE COURT: Are you mistaken, Mr. Kunz?

3 MR. KUNZ: I'm sorry, your Honor. Hold on one second.

4 Yes, Your Honor, I may be mistaken on that.

5 I believe I was mistaken on that. I apologize.

6 Q. Now you also said on your direct examination that you would  
7 never forget their faces, correct?

8 A. Yeah, I remember saying that.

9 THE COURT: You said that this morning?

10 THE WITNESS: Yeah, I did.

11 But it's the jersey that connects the faces. That's  
12 what I'm saying.

13 THE COURT: You did say, "I'd never forget that face."

14 THE WITNESS: Yeah.

15 Q. But you did see photo arrays with these men in the photo  
16 arrays, correct?

17 A. Yes. In uniform, yes.

18 Q. And you were not able to pick out either of them, right?

19 A. No.

20 MS. PATEL: How does he know what's in the photo array  
21 or what's not?

22 THE COURT: He looked at a photo array and he was not  
23 able to pick them out.

24 MS. PATEL: Right. Okay.

25 Q. So, going back to the incident. You were sitting there on

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D4j9flo2 Downs - cross

1 the step when the black Crown Victoria reverses down the block  
2 and the two officers that you described -- I'm sorry. You're  
3 right.

4 You've testified that you were standing in front of  
5 your house when the two officers reversed down the block and  
6 got out of the vehicle, correct?

7 A. Yes.

8 Q. And, again, the first thing they said to you was, "Hey,  
9 buddy, it looks like you're smoking weed," right?

10 A. Yes.

11 Q. Now when the officers had driven by you, you were holding  
12 the microphone to your cellphone?

13 A. The ear piece. The ear piece is my ear. And it has the  
14 wire with the mouthpiece. Right.

15 Q. And on the wire there's a microphone. And that's what you  
16 were speaking into?

17 A. Yes.

18 Q. Now, I believe you said you ended your phonecall right as  
19 the police sort of got out of the vehicle and approached you?

20 A. Yeah.

21 Q. So I'm going to show you a picture. This is from  
22 Plaintiffs' Exhibit 166. It is Bates stamped number 00025051.

23 Is that you, Mr. Downs?

24 A. Yes, that's me.

25 Q. And that's a photograph taken at the Civilian Complaint

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D4j9flo2 Downs - cross

1 Review Board?

2 A. Yes.

3 Q. And you were demonstrating the manner in which you were  
4 holding the microphone when the police drove by?

5 A. Yes.

6 Q. And, in fact, this photograph is indeed an accurate picture  
7 of how you were holding the microphone that day, correct?

8 A. I was holding the microphone. This is -- the ear piece is  
9 in and I was talking. That's it.

10 Q. And this photograph --

11 THE COURT: I guess what he's saying was your hand as  
12 close to your mouth as it is in this photograph?

13 THE WITNESS: Like this. No, probably around here.

14 THE COURT: So this is not the way you were holding  
15 the --

16 THE WITNESS: I mean --

17 THE COURT: Your hand wasn't that close?

18 THE WITNESS: No. It wasn't like this. No, it was  
19 like here.

20 THE COURT: So your hand was further from your mouth  
21 than depicted in that photograph.

22 THE WITNESS: Okay.

23 THE COURT: Is that right?

24 THE WITNESS: Yes.

25 THE COURT: Okay.

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D4j9flo2 Downs - cross

1 Q. Turn to page 66 of your deposition.

2 Were you asked the following question and did you give  
3 the following answer.

4 "Q. Is that an accurate photograph of what you looked like or  
5 how you were holding your phone?

6 "A. Close enough, yeah."

7 Did you give that answer to that question?

8 A. Yes.

9 Q. Now, were you also -- you also told me at your deposition  
10 that you thought it was legitimate for the officers to ask you  
11 questions about smoking marijuana, right?

12 A. No. I said to -- I think to the effect of: If the officer  
13 would have just asked me, Hey, are you smoking marijuana, and  
14 there was no marijuana, it could have stopped there. But it  
15 didn't stop there.

16 Q. So turn to page 70 of your deposition, lines 11 through 17.

17 "Q. The initial approach, when they initially came up to you,  
18 they said that we think that you are smoking marijuana?

19 "A. Yes.

20 "Q. Do you think that's a legitimate basis for the police to  
21 question someone?

22 "A. Question, absolutely. To search, no, no."

23 Did you give those answers to those questions?

24 A. Yes.

25 Q. Now, we've already talked about this a little bit or I'm

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D4j9flo2 Downs - cross

1 sorry you talked about this on direct examination. The  
2 officers frisked you and then also went inside your pockets and  
3 searched you; is that correct?

4 A. Yes.

5 Q. And at the time you had a number of things in your pants  
6 pocket, correct?

7 A. A number of things.

8 THE COURT: Well, we know. He had -- you had a  
9 wallet, the keys, and the cookies.

10 Were they all on one side?

11 THE WITNESS: No. In both pockets.

12 THE COURT: That's the total for both pockets. The  
13 wallet, the keys, and the cookies. That's the total.

14 THE WITNESS: Yes.

15 Q. And you also stated that the officers put you up against a  
16 fence; is that correct?

17 A. Yes.

18 Q. Going back to P10, Bates stamped 28754. That's this fence  
19 in front of your house here?

20 A. Yes.

21 Q. And I think you've described the fence as about four feet  
22 tall?

23 A. I believe so, yes.

24 Q. And you're six/four?

25 A. Yes.

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D4j9flo2 Downs - cross

1 Q. So, the fence only goes partway up your body?

2 A. Yes.

3 Q. Now, you're not sure if it was one or both of the officers  
4 who put their hands on you, correct?

5 A. I believe it was -- they both were pushing me but.

6 THE COURT: So they were both pushing you?

7 THE WITNESS: Yeah, because they came at me as soon as  
8 they came out of the car.

9 Q. How about the frisk and the search? Was it -- do you  
10 remember if it was one officer or both officers?

11 A. They were both on my side. They took out -- one had my  
12 stuff on this side. The other one had the stuff on that side.  
13 Because they went through my both front and back pockets.

14 Q. So page 71 of your deposition, lines 22 through 24.

15 "They both did it, the pat-down?

16 "A. I believe so. No. I believe it was one officer. I don't  
17 remember."

18 MS. PATEL: For completeness.

19 THE COURT: Go ahead.

20 MS. PATEL: Your Honor, the next just immediately  
21 following.

22 "Q. But they both put their hands on you at the same time?

23 "A. Yes. I think so. They got me to the fence."

24 BY MR. KUNZ:

25 Q. So you think that both of them put their hands on you to

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D4j9flo2 Downs - cross

1 get you against the fence but you don't remember if it was one  
2 or both of them that actually did the frisk and the search,  
3 correct?

4 A. I'm not sure. They both had my stuff out. That's all I  
5 remember. I don't want to say the wrong thing.

6 Q. I understand that.

7 And you also said that they took the things out of  
8 your pockets, correct?

9 A. Yes.

10 Q. The keys, the wallet, the bag of cookies?

11 A. Yes.

12 Q. So, after the officers told you that they thought you were  
13 smoking marijuana you had a conversation with them, correct?

14 A. During the -- actually prior to me getting searched there  
15 was, you know, there was a conversation.

16 Q. And you told them you were on the phone, not smoking  
17 marijuana, right?

18 A. Yes.

19 Q. And you told them you knew an NYPD captain?

20 A. Yes.

21 Q. And you told them that you were a drug counselor?

22 A. Yes.

23 Q. And during this conversation the officers were using a  
24 strong tone of voice but they were not yelling, correct?

25 A. No. They weren't yelling.

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D4j9flo2 Downs - cross

- 1 Q. And you were frustrated in this conversation, right?  
2 A. Yes, definitely.  
3 Q. And your frustration came through in your tone of voice?  
4 A. Probably, yes.  
5 Q. And you were very upset about it?  
6 A. Yes, I was upset.  
7 Q. Now the officers never took out their guns, correct?  
8 A. No. Definitely not.  
9 Q. And the entire encounter lasted about ten minutes?  
10 A. Felt like ten, fifteen minutes.  
11 Q. So if the incident started at about 6:45 and it lasted ten  
12 to fifteen minutes, the officers left at about 7 p.m.  
13 A. It's roughly. It's not in concrete.  
14 Q. And then after the incident you went to the police  
15 precinct?  
16 A. Yes.  
17 Q. And you testified today that you walked to the police  
18 precinct?  
19 A. Yeah.  
20 Q. But you told me at the deposition that you drove to the  
21 precinct?  
22 A. Yes. Because at the deposition I actually thought that I  
23 drove. Yes.  
24 Q. It's fair to say that your memory about the incident has  
25 changed over time?

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D4j9flo2 Downs - cross

1 A. No. Just I don't know every single instance of the  
2 situation five years later, four-and-a-half years later.

3 Q. Right. So your deposition was January 25, 2013?

4 A. Mm-hmm, mm-hmm.

5 Q. So, when you arrived at the police precinct -- how long of  
6 a drive is it to the -- I'm sorry how long of a walk is it to  
7 the police precinct?

8 A. Five, ten minutes.

9 Q. So 6:45 the incident starts. Ten to fifteen minutes it's  
10 about 7. You leave. You arrived at the police precinct about  
11 7:05, 7:10?

12 MS. PATEL: He testified it was about ten minutes, the  
13 incident. And Mr. Kunz is adding five minutes to say it's 7  
14 instead of 6:50.

15 THE COURT: Actually his testimony originally was ten  
16 to fifteen. So I don't know.

17 MS. PATEL: I thought he said five or ten -- ten  
18 minutes.

19 THE COURT: Well originally maybe he said it felt like  
20 ten to fifteen. And then when I pressed him he said probably  
21 ten.

22 Q. So I mean obviously these are not exact?

23 A. No.

24 Q. You didn't check your watch and right down the times?

25 A. No. I didn't have a stopwatch.

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D4j9flo2 Downs - cross

1 Q. But the rough timeline would put you at the precinct at  
2 about 7:05, 7:10, something like that?

3 A. Possibly.

4 Q. Now, before you walked into the police precinct, you saw a  
5 black Crown Victoria leaving the precinct; is that correct?

6 A. I believe they were driving through the precinct -- the  
7 precinct driveway, yes.

8 Q. And you say that you recognized the men in the black Crown  
9 Vic as the same men that you had just encountered, right?

10 A. Yes.

11 Q. And you noted down the license plate number. You wrote it  
12 on your hand?

13 A. I believe I wrote it on my hand.

14 Q. But you're not a hundred percent sure about that, if you  
15 wrote it on your hand? You may have written it on something  
16 else?

17 A. I believe I wrote it on my hand.

18 Q. You also yelled after the vehicle as it drove away, "I've  
19 got your license plate," right?

20 A. Yes.

21 Q. And the men that were driving the vehicle didn't seem to  
22 respond to that at all, correct?

23 A. No. But I believe they heard me.

24 Q. And then you watched the car as it left the precinct and it  
25 took a left down Richmond Terrace, correct?

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D4j9flo2 Downs - cross

- 1 A. It took -- this is Wall. It they made a left down Richmond  
2 Terrace, yes.
- 3 Q. So looking at the map here, this mark here is the police  
4 precinct?
- 5 A. Yes.
- 6 Q. And a left down Richmond Terrace would have them heading  
7 up --
- 8 A. Yes.
- 9 Q. -- I guess north on the map here?
- 10 A. If that's north, yes. If that's north.
- 11 Q. And the intersection that you identified before of York and  
12 Brighton is in the opposite direction of where the officers,  
13 you saw the officers turning, correct?
- 14 A. Opposite. I don't know what you mean by that.
- 15 Q. Well if the police come out the police precinct and take a  
16 left and go up Richmond Terrace, on the photograph up, that is  
17 the opposite direction from the police precinct from the  
18 intersection of York and Brighton, correct?
- 19 A. I can't say correct because I don't know what you're trying  
20 to say.
- 21 Q. You see the map I'm pointing at here on the screen?
- 22 A. Yes.
- 23 Q. And this intersection here is York and Brighton?
- 24 A. Yes.
- 25 Q. And going up the map at an angle here, you get to the

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1 police precinct, right?

2 A. Yeah, I guess so.

3 Q. And you saw the police officers continue on in a different  
4 direction, right?

5 A. They went down Richmond Terrace, yeah.

6 Q. Okay. So after noting the license plate number down you  
7 went inside the police precinct, correct?

8 A. Yes.

9 Q. I'm sorry?

10 A. Yes.

11 Q. And inside you spoke to Police Officer Moon, correct?

12 A. Yes.

13 Q. And you told Officer Moon that you wanted to make a  
14 complaint, correct?

15 A. Yes.

16 Q. And he told you to contact CCRB, correct?

17 A. Yes.

18 Q. And the next day you did, in fact, contact CCRB, correct?

19 A. Yes.

20 Q. And correct me if I'm wrong but I believe you had  
21 previously contacted CCRB for a different incident?

22 A. I don't remember offhand, sir.

23 Q. Well in any event you were -- you found the contact  
24 information for CCRB on the internet, correct?

25 A. Yes.

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D4j9flo2

Downs - cross

- 1 Q. And so then you were in the police precinct waiting I guess  
2 to speak to a supervisor when you saw the same two officers  
3 that you believed you had interacted with come into the  
4 precinct?  
5 A. No. I was actually talking to Officer Moon.  
6 Q. So you were standing there talking to Officer Moon and  
7 these two officers came into the precinct, correct?  
8 A. Yes.  
9 Q. And when you saw them that's -- walk into the precinct,  
10 that's when you ran outside and you snapped a photograph of a  
11 vehicle, correct?  
12 A. No. That's when I said that's them to Officer Moon.  
13 Q. So you said that's them to Officer Moon?  
14 A. Yeah.  
15 Q. But at some point that day when the officers were inside  
16 the precinct you did, in fact, leave the precinct and go take  
17 the photograph?  
18 A. No, I didn't. I just went outside because I walked out the  
19 door, took -- snapped the picture.  
20 Q. So you walked outside the precinct and took the photograph?  
21 A. Yes.  
22 Q. And you picked the -- the vehicle that you picked to take  
23 the photograph of it was the same one that you had written down  
24 the license plate number of, correct?  
25 A. Yes.

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D4j9flo2 Downs - cross

1 Q. And you don't recall if there were any other black Crown  
2 Victorias in the parking lot that day, right?

3 A. No, I don't recall.

4 Q. I'm sorry?

5 A. No.

6 Q. No, you don't recall?

7 A. No, I don't.

8 Q. So there could have been more, you just don't know?

9 A. No.

10 Q. I'm sorry?

11 MS. PATEL: Objection. I think this the same kind of  
12 "it's possible" question that the court has been sustaining.

13 THE COURT: So there could have been more because  
14 anything is possible. So objection is sustained.

15 Q. So now after the two officers -- going back to -- so after  
16 you snapped the photograph, you went back inside the precinct,  
17 correct?

18 A. Yes.

19 Q. Yes?

20 A. Yes.

21 Q. Now you state that after the two officers who you believed  
22 were the ones that had stopped you, they went to the desk and  
23 they started -- they started dealing with people that they had  
24 under arrest, correct?

25 MS. PATEL: Objection. He didn't testify that he saw  
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1 them go to a desk and do anything.

2 THE COURT: Well we'll find out.

3 What did you see?

4 THE WITNESS: No. I just saw when they brought the  
5 two individuals in, and I just pointed to them and said that's  
6 them. I don't know what they did with the other two  
7 individuals.

8 THE COURT: So you didn't see where they went with the  
9 two?

10 THE WITNESS: No.

11 THE COURT: Okay.

12 Q. Well they stayed in that same room as you, correct?

13 A. Who?

14 Q. The two officers.

15 A. They left. They -- I didn't see them after that. After my  
16 discussion with Officer Moon --

17 THE COURT: Well I guess what he's asking is: How  
18 long were they in your sight in that room?

19 THE WITNESS: Um.

20 THE COURT: Just leaving? Just a few seconds?

21 THE WITNESS: They came and processed and probably  
22 left.

23 THE COURT: Well when you say "and processed" did you  
24 see them -- how long were they in the room with you? Was it  
25 minutes or seconds?

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1 THE WITNESS: It was minutes. It wasn't long.

2 THE COURT: Minutes?

3 THE WITNESS: It wasn't long.

4 Q. And it was during those minutes that Officer Moon, you say,  
5 went over and spoke to the men?

6 A. Yeah.

7 Q. And you saw him walk over and speak; is that correct?

8 A. Yes.

9 Q. And they weren't very far away from you? They were maybe  
10 fifteen feet away from you?

11 A. No.

12 I'm not great with distance but they weren't too far  
13 away.

14 Q. As far as you and I are away from each other?

15 A. Probably a little closer.

16 MR. KUNZ: So I don't know if it's possible to  
17 stipulate that I'm probably 20 feet away from the witness?

18 MS. PATEL: That's fine. I'm also not very good with  
19 distances.

20 So if Mr. Moore is saying it's 30, then maybe we  
21 should go with someone who is good with distances.

22 Q. But in any event it's shorter than the distance that you  
23 and I are?

24 A. Yeah, it was a little closer.

25 Q. And at that point you didn't ask them for their names and

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1 shields again, right?

2 A. No. Officer Moon said maybe you can ask them or something  
3 to that effect. I'm like: Are you kidding me?

4 Q. But you didn't ask them?

5 A. No. I'm not going to ask them.

6 THE COURT: Well, your testimony is you asked them at  
7 the scene, right?

8 THE WITNESS: Yes.

9 THE COURT: And they didn't give it to you?

10 THE WITNESS: No.

11 Q. But at the precinct when given the opportunity to ask them  
12 again you did not?

13 THE COURT: You've asked that question two or three  
14 times now and his answer is no.

15 Q. Now, while you were waiting you also spoke to a supervisor,  
16 correct, a sergeant?

17 A. I believe so.

18 Q. And you told him what happened?

19 A. Yes.

20 Q. And he's told you that he would look into it, correct?

21 A. Yes.

22 Q. And I think you also said that you gave him your cellphone  
23 number?

24 A. I believe so.

25 Q. And you saw that sergeant a couple other times that night

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1 coming and going but he was never able to tell you who the  
2 officers were, correct?

3 A. Right.

4 Q. So you waited in the precinct for a couple of hours?

5 A. I was there for a while.

6 Q. Could have been two to three hours?

7 A. It was dark so I was there for a while.

8 THE COURT: You gave Sergeant Perez your cellphone  
9 number?

10 THE WITNESS: Yes.

11 THE COURT: Maybe Sergeant Perez has the cellphone  
12 number.

13 Q. It could have been two to three hours but you don't really  
14 recall exactly how long it was?

15 A. I don't recall exactly. It was a while.

16 Q. So then you made the CCRB complaint the next day, right?

17 A. Yes.

18 Q. And Officer Moon had told you how to make -- told you to  
19 make the CCRB complaint?

20 A. He told me I have to go to CCRB to make a complaint, yes.

21 Q. But you've also spoken to many other NYPD officers about  
22 the incident, correct?

23 A. Yes.

24 Q. You spoke to Deputy Inspector Denesopolis?

25 A. Yes.

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D4j9flo2 Downs - cross

1 Q. You spoke to Sergeant Goodwin?

2 A. Yes.

3 Q. You spoke to a city council member?

4 A. I think I e-mailed councilman McMahan.

5 Q. And was it Deputy Inspector Denesopolis that connected you  
6 with the citizens --

7 A. Yes. Yes.

8 Q. Now, you're alleging in this case that this incident had to  
9 do with your race; is that correct?

10 A. Yes.

11 Q. But this isn't the first time that you've accused someone  
12 of racially profiling you, is it?

13 A. I don't recall.

14 Q. Well, in fact, one time you called the police on a private  
15 establishment, a store, because you thought they were racially  
16 profiling you?

17 A. Definitely, yes.

18 Q. And, in fact, the reason you thought they were racially  
19 profiling you is because you think it's a Staten Island thing,  
20 right?

21 A. Staten Island has some racial issues going on. Major  
22 racial issues actually.

23 Q. Now during this incident with the officers none of the  
24 officers that you interacted with that night said anything that  
25 would suggest the stop had to do with your race, did they?

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Downs - cross

1 A. No.

2 Q. And none of the officers you dealt with that night,  
3 including the two that stopped you, none of them made any  
4 comment about your race?

5 A. No.

6 Q. None of them made any comment about your skin color?

7 A. No.

8 Q. And none of them made any racial slurs of any kind?

9 A. No.

10 MR. KUNZ: No further questions.

11 THE COURT: Before we do redirect -- I assume you have  
12 some redirect, Ms. Patel.

13 MS. PATEL: Yes, your Honor.

14 THE COURT: We'll take our morning recess now and  
15 reconvene at quarter to twelve.16 I notice that we're a little short of seats in the  
17 courtroom so if it stays that way maybe the press people will  
18 sit in the jury box. Okay. Anyway, quarter to twelve.

19 (Recess)

20 MS. PATEL: Your Honor, I actually don't have any  
21 questions for Mr. Downs. The only thing -- I can either do it  
22 through a question through the witness or I can just tell you  
23 that the portion of the -- in the deposition where he did  
24 provide the carrier, the cellphone carrier.

25 THE COURT: Make a record. So the proper way to do it

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D4j9flo2 Downs - cross

1 is on redirect.

2 REDIRECT EXAMINATION

3 BY MS. PATEL:

4 Q. Mr. Downs, at your deposition do you recall providing the  
5 cellphone carrier that you had?

6 A. I don't remember.

7 Q. I'm going to show you a page from the deposition. It's  
8 page 56, lines 8 through 12. Can you just read that to  
9 yourself.

10 (Pause)

11 Just those lines 8 through 12.

12 Q. Does that refresh your recollection regarding whether you  
13 testified to a specific carrier at the time of the stop?

14 A. Yes.

15 Q. And what was that carrier?

16 A. Sprint.

17 MS. PATEL: Nothing further.

18 THE COURT: Was the number provided?

19 MS. PATEL: No. Were you asked -- do you recall  
20 whether you asked -- you were asked whether you save your phone  
21 bills?

22 THE WITNESS: No. I don't save my phone bills but  
23 they asked me that, yes.

24 MS. PATEL: How did you respond?

25 THE WITNESS: I said I can provide that for you here.

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Downs - redirect

1 I can get the phone number for you.

2 THE COURT: You said I can get the phone number?

3 THE WITNESS: It says I think I can get it for you.

4 If you need like the Sprint, you know -- they were questioning  
5 to see if --

6 THE COURT: I'm just wondering what it says in the  
7 transcript.

8 MS. PATEL: They said do you save your phone bill?

9 No.

10 Do you have any records of the call log that you made?

11 No.

12 And he said but you guys can get that.

13 That's what he said. Nothing further.

14 MR. KUNZ: Also for clarity I think we should read the  
15 section about the carrier. So this is page 56, line 3. "I  
16 don't recall if it was the same number."

17 MS. PATEL: I think it's line 9.

18 "At the time, who was the carrier?"

19 "A. I believe it was Sprint. I believe."

20 THE COURT: All right. So anybody have any further  
21 questions for the witness?

22 Now what about the officers?

23 MR. KUNZ: So the --

24 MS. GROSSMAN: Your Honor may I be heard?

25 THE COURT: You weren't here during this conversation.

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1 I'd like to hear from Mr. Kunz first. I addressed Mr. Kunz.  
2 I'd like Mr. Kunz to respond.

3 What have you found out?

4 MR. KUNZ: We're working on both of the officers.  
5 Neither of them are on duty today. They are -- we are  
6 attempting to get them here as expeditiously as possible.  
7 Realistically I think it's going to be a couple of hours at a  
8 minimum.

9 THE COURT: Right.

10 MR. KUNZ: I understand your Honor's order. But I  
11 think for the record we just want to put down a couple  
12 objections.

13 One is obviously if it's just these two gentlemen who  
14 come in, it's going to be pretty obvious who they are.

15 THE COURT: Either he recognizes them or he doesn't.  
16 Given the photo spread that you showed, I think he's  
17 established some level of credibility in not having just  
18 pointed anybody out. He said he didn't want to get anybody in  
19 trouble. If he wasn't sure, he wasn't going to do it. That's  
20 something.

21 So I understand that that's not a lineup. In a  
22 criminal case that's called a show-up. You put one person in  
23 front of somebody and the person says, yeah, that's the guy who  
24 did it.

25 He either recognizes them or he doesn't. I will take

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D4j9flo2 Downs - redirect

1 the testimony for what it's worth.

2 MR. KUNZ: I understand that your Honor for the record  
3 we would obviously want it to be an actual lineup.

4 THE COURT: No way. That's not what we're doing. We  
5 are not trying a criminal case. I'm not looking for somebody  
6 to identify the perpetrator of a crime which will then have to  
7 be proved beyond a reasonable doubt. We're not doing that.

8 I know the difference between a lineup and a show-up.  
9 I understand that. I want to know if he recognizes the two who  
10 swore under oath that they never saw him and had nothing to do  
11 with this. Maybe that's so. Maybe he'll say wrong guys.

12 I don't know what he'll say. But until he sees them  
13 in person I'm not going to know.

14 MR. KUNZ: I understand that, your Honor.

15 THE COURT: I think this testimony should be on the  
16 record. Either he'll say right guys or wrong guys. I don't  
17 know what he'll say.

18 MR. KUNZ: The only other point I would make is that  
19 at no point during the discovery into this incident did the  
20 plaintiffs demand an identification procedure of any kind. We  
21 could have dealt with that obviously during discovery but it  
22 never came up.

23 And then I'm sorry I just want to consult for one  
24 second.

25 MS. GROSSMAN: Your Honor may I be heard on this

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1 particular subject.

2 THE COURT: No. I've had it with this subject for  
3 now. They're not going to make it in here in the next two  
4 hours. He has to go somewhere today. There is no reason to go  
5 on with this now. We should go on with the trial now.

6 You said you're on your way to Connecticut?

7 MS. GROSSMAN: I wanted to let you know that from the  
8 city's perspective these officers need to have independent  
9 counsel. And we are arranging to get independent counsel  
10 because of the suggestion that I understand was made about the  
11 truthfulness of the statement.

12 THE COURT: I did not question them. I said  
13 anybody -- anybody who testifies falsely in this trial may have  
14 committed perjury. I did not say they did. I'm not indicating  
15 that they did. But anybody who is proved to have done so will  
16 have done so. Everybody took an oath. Any witness in this  
17 trial may have committed perjury.

18 MS. GROSSMAN: My --

19 THE COURT: Do I think I've heard some perjured  
20 testimony in the last four weeks? From somebody? From all the  
21 witnesses I've heard? Yeah, I think somebody, of all those  
22 four weeks, I think I've heard it already. Proving it is a  
23 different issue.

24 You don't know who I'm referring to. It could be a  
25 plaintiff witness. It could be a defense witness. I think

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D4j9flo2 Downs - redirect

1 I've already heard it.

2 All I said is if anybody did, that's a problem.

3 I didn't accuse these people of it.

4 MS. GROSSMAN: I absolutely understand.

5 THE COURT: I don't know if they're the right people.  
6 Until he looks at them and hopefully gives an honest answer I  
7 don't know.

8 MS. GROSSMAN: I totally understand that. I  
9 absolutely understand.

10 But these officers -- given my instruction from my  
11 superiors is that we need to arrange to have them represented  
12 independently. And we are ascertaining and endeavoring to do  
13 that immediately. So I just wanted to alert you to that  
14 because that may just affect the remainder of the day. We're  
15 trying to bring them down and trying to comply with your  
16 ruling. I just wanted you to know.

17 THE COURT: I don't think it's going to work out. If  
18 he needs to leave here and cannot wait, can come back at 2:30  
19 or 3:00 when they might actually be here, I'm not going to get  
20 it done anyway.

21 What is your schedule today?

22 THE WITNESS: I'm going to Connecticut.

23 THE COURT: Do you have to leave at a certain time for  
24 Connecticut? What are you going to Connecticut for? Is it  
25 personal or business?

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D4j9flo2 Downs - redirect

1 THE WITNESS: Personal.

2 THE COURT: Do you have to leave at a certain time?  
3 Can you be back here at 3:00 when the officers might actually  
4 be able to come to the courtroom?

5 I think it's important to know who the officers are.  
6 Either we've got the right two or the wrong two.

7 THE WITNESS: Okay.

8 THE COURT: You can do it?

9 THE WITNESS: Yes, I can.

10 THE COURT: Now do you think they can be here in a  
11 couple hours?

12 MS. GROSSMAN: I understand someone is coming from  
13 New Jersey. So we called and they are immediately trying to  
14 come down. And we're trying to ascertain where we can find  
15 independent counsel so that everything can happen and try to be  
16 accomplished by today. I just wanted you to know that and  
17 that's why I'm interjecting myself at this time in the  
18 proceedings.

19 THE COURT: I think you should remain, Mr. Downs, if  
20 you can possibly adjust the time of your trip. You're  
21 certainly free to go the next few hours. But I think this is  
22 an important issue.

23 THE WITNESS: Okay.

24 THE COURT: One way or the other.

25 Okay. Thank you. So you're excused for now. There

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1 are no further questions.

2 I'll see you say 3:00. Or if you leave your cellphone  
3 number with the counsel, if we know they're not coming they can  
4 call you and say --

5 THE WITNESS: I'll wait.

6 THE COURT: If you leave --

7 MS. PATEL: I have his cellphone.

8 THE COURT: You know how to reach him?

9 MS. PATEL: Yes, your Honor.

10 THE COURT: That's all I was trying to say. If they  
11 need to reach you.

12 Thank you.

13 (Witness excused)

14 THE COURT: All right. The next witness.

15 MS. HOFF VARNER: Plaintiffs' next witness is David  
16 Ourlicht.

17 DAVID OURLICHT,

18 called as a witness by the Plaintiffs,

19 having been duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MS. HOFF VARNER:

22 Q. Good morning, Mr. Ourlicht.

23 A. Good morning.

24 Q. I see that you're on crutches. Do you want to tell the  
25 court why you're on crutches.

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D4j9flo2 Ourlicht - direct

- 1 A. I was in Vermont a couple of months ago snowboarding and I  
2 ran into a tree.  
3 Q. Got it.  
4 Are you a plaintiff in this case?  
5 A. Yes, I am.  
6 Q. And where did you grow up?  
7 A. In Manhattan.  
8 Q. Where do you now live?  
9 A. In Manhattan.  
10 Q. What is your educational background?  
11 A. I have a bachelor's from University at Albany and I am  
12 currently applying to law schools for the fall.  
13 Q. Prior to graduating from Albany, did you attend any other  
14 college?  
15 A. I transferred from St. John's University.  
16 Q. In Queens?  
17 A. In Queens.  
18 Q. How old are you?  
19 A. Twenty-five.  
20 Q. What is your racial background?  
21 A. Black and white.  
22 Q. I'd like to turn your attention to January 30, 2008.  
23 Do you remember being stopped by the NYPD on that  
24 date?  
25 A. Yes, I do.

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D4j9flo2 Ourlicht - direct

1 Q. What were you doing before you were stopped?

2 A. I had just left school and I was taking my girlfriend at  
3 the time to her job. I was walking her to her job.

4 Q. What did you do then?

5 A. I turned around and walked back to my house towards my  
6 house.

7 Q. And were you going straight back to your house?

8 A. Yeah. I was going to the deli on the corner of where I was  
9 staying at the time. And to get a sandwich because I just was  
10 in class all day and was hungry. And the deli is right around  
11 the corner from my house.

12 Q. What was the weather like that day?

13 A. It was chilly. It was chilly. Cold.

14 Q. Do you remember what you were wearing?

15 A. A black winter jacket Marmot. And it might have had a  
16 hoodie on. Sneakers and jeans.

17 Q. Can you describe the jacket. Specifically how many pockets  
18 did the jacket have?

19 A. It's a down jacket. It has six pockets. Two in the front.  
20 Two in the side. And then two in the inside.

21 Q. Did you have anything in your pockets?

22 A. Yes, I did. I had keys, phone, wallet, passport, a  
23 notebook, pens, paper, I had a iPod.

24 Q. And were all of those things in the same pocket?

25 A. No.

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D4j9flo2 Ourlicht - direct

1 Q. So let's take them one by one. In which pocket were your  
2 keys?

3 A. They would have been in my interior chest pocket.

4 Q. And your wallet?

5 A. Same.

6 Q. Passport?

7 A. Same place.

8 Q. What about the phone?

9 A. I don't recall exactly where it was. It would either be in  
10 that place because that's my safe pocket, it's closest to --  
11 nothing falls out of there. But it could have been in my right  
12 front pocket because if I was using it or had just used it I  
13 would put it right back in there because it's easier access  
14 than going into my inside pocket.

15 Q. What about the iPod?

16 A. It would have been the same place that the phone would have  
17 been, the front right pocket because I'm right handed and it's  
18 just easy access.

19 Q. You said that you had a notebook in your pocket?

20 A. Yes.

21 Q. Did you have to fold the notebook up to get it to fit  
22 inside a pocket?

23 A. No. The pockets on my coat were pretty decent size. They  
24 were square. So I was able to just put it in like this.

25 THE COURT: What do you mean like this?

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D4j9flo2 Ourlicht - direct

1 THE WITNESS: It fit in my pocket like that.

2 THE COURT: For the record, you're holding a rather  
3 large piece of paper, holding it against your suit.

4 What you really mean you were able to put the paper in  
5 your pocket.

6 THE WITNESS: It was able to go into my front pocket  
7 right here.

8 Q. And was it flat when you put it into your pocket?

9 A. Yes.

10 Q. And did any of the notebook stick out from your pocket?

11 A. Yes. A good -- at least 25 percent of it. Maybe a little  
12 more.

13 Q. And the pockets that were in the front of your jacket, were  
14 they sort of up close above your waist or below your waist?

15 A. Adjacent.

16 Q. Adjacent above or adjacent below?

17 A. The beginning of the pockets I believe would be right where  
18 my waistline would be.

19 Q. Did those things that you just described make a bulge in  
20 your pockets?

21 A. No.

22 Q. And you said I think that you didn't recall if you were  
23 wearing a hoodie; is that correct?

24 A. I can't remember exactly.

25 Q. If you were wearing a hoodie, was the hood on the

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D4j9flo2 Ourlicht - direct

1 sweatshirt pulled up over your head?

2 A. No. I don't believe so. I would remember wearing a hoodie  
3 if I had the hood pulled up.

4 Q. What street were you on?

5 A. I believe 164th Street in Queens.

6 Q. What happened next?

7 A. I was, after I dropped her off, I turned around and started  
8 walking up 164th Street. And that's when I saw a police  
9 scooter driving the opposite side of the street and made eye  
10 contact for like a split second. Then I kept walking up the  
11 street.

12 Q. Did you change your behavior at all when you saw the police  
13 officer coming up the street?

14 A. No. It was like a regular -- like I was doing what I was  
15 doing before I seen him.

16 Q. Can you describe the vehicle that you saw.

17 A. It was three-wheeled scooter.

18 Q. Did it have any markings or colors on it?

19 A. It had lights on the top. And it was blue and white.  
20 NYPD. And I believe I wrote down the number.

21 Q. You said it was NYPD?

22 A. It said NYPD on the side.

23 THE COURT: You wrote down the numbers?

24 THE WITNESS: Yeah.

25 THE COURT: When did you do that?

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D4j9flo2

Ourlicht - direct

1 THE WITNESS: After, when he took my identification.

2 THE COURT: Later? Not when you first saw --

3 THE WITNESS: No. No. No. Sorry.

4 Q. How many people were in the vehicle?

5 A. One.

6 Q. Was that person wearing a uniform?

7 A. Yes, he was.

8 Q. Do you now know the name of that person?

9 A. Yes. Officer Moran.

10 Q. I'm showing you what's been marked for identification as  
11 Plaintiffs' Exhibit 485.

12 Do you recognize this document?

13 A. Yes, I do.

14 Q. What is it?

15 A. It's a map of the surrounding area.

16 Q. The area surrounding what?

17 A. St. John's University and where I lived, that area.

18 Q. Is the place where you were stopped depicted on this map?

19 A. Yes.

20 Q. Can you mark that place with a number 1.

21 A. Yes.

22 THE COURT: Did you say the officer was on a scooter?

23 THE WITNESS: Yes.

24 THE COURT: So he's not in a vehicle?

25 THE WITNESS: Like the three-wheel scooters.

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Ourlicht - direct

1 THE COURT: It is like a little vehicle?

2 THE WITNESS: Like a little -- when I was in Africa,  
3 they were called boda-bodas. So that's like the taxis that we  
4 took around the place.

5 THE COURT: So you were inside something?

6 THE WITNESS: Yeah. And he's driving on the street.

7 THE COURT: But it's in an enclosed space?

8 THE WITNESS: Yes.

9 Q. Did you mark the one on the map?

10 A. I'm sorry.

11 Q. You marked it with a very small one?

12 A. Do you want me to make it bigger?

13 Q. No. That's fine.

14 Is the place where you were living at the time, is  
15 that also depicted on this map?

16 A. Yes.

17 Q. Can you mark that place with an H for home.

18 A. I wrote it a little bigger for you.

19 Q. Thank you.

20 MS. HOFF VARNER: Your Honor, I would move Plaintiffs'  
21 Exhibit 485 into evidence.

22 MR. MARUTOLLO: No objection, your Honor.

23 THE COURT: 485 received.

24 (Plaintiffs' Exhibit 485 received in evidence)

25 Q. Just for the record, you indicated the number one right

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1 here and that's where Officer Moran stopped you?

2 A. Yes.

3 Q. And then the H is right here. And that's where your room  
4 was at the time, correct?

5 A. Yes.

6 Q. So what happened -- what was the next time that you saw  
7 Officer Moran?

8 A. After he drove -- had driven past me?

9 Q. Yes.

10 A. When I was at that corner, right where I crossed the street  
11 to that corner where the one is, that's when he pulled up  
12 alongside of me.

13 Q. What happened after he pulled up next to you?

14 A. He asked me what I was doing over here, where I was going.

15 Q. Was he still inside the vehicle when he was asking you  
16 these questions?

17 A. The first couple of questions. Then he asked for my ID.

18 Q. Did you respond?

19 A. Yes.

20 Q. What did you say?

21 A. I said why are you stopping me?

22 And he said where are you going? Do you go to school  
23 around here?

24 I said why are you asking me this?

25 He said can I see some ID?

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Ourlicht - direct

1 I said why do you need to see ID? What did I do?

2 He said it looks like you have a gun on you.

3 Q. At some point did Officer Moran get out of the car?

4 A. Yes. When he asked me for ID -- while he was doing that,  
5 he was getting out of the car. And he said to me -- and then  
6 when I said why do you need to see ID? What have I done?

7 He said it looks like you have a gun on you, and he  
8 patted me in my front waist area.

9 Q. While you were having this conversation with Officer Moran  
10 prior to the point where he patted you down, what was your tone  
11 of voice?

12 A. Like I'm talking to you right now.

13 Q. Were you yelling?

14 A. No.

15 Q. Were you being hostile?

16 A. No.

17 Q. Why didn't you just walk away when officer started asking  
18 you questions?

19 A. He was a police officer. He had a gun. I don't know  
20 anybody that would in that situation, walk away from a  
21 situation like that.

22 Q. So you said that he started patting you down. Can you  
23 describe exactly where he touched you.

24 A. He touched me in my front waist area, where my belt buckle  
25 would be, that front region.

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D4j9flo2 Ourlicht - direct

1 Q. Did he touch you on your chest or by your rib cage?

2 A. No. He touched me here.

3 THE COURT: Here indicating?

4 THE WITNESS: I'm sorry.

5 THE COURT: Waistline?

6 THE WITNESS: He patted me on the waistline. And I  
7 had my hands like this. And you know and then I gave him my  
8 identification.

9 MR. MARUTOLLO: Can you, just for the record, I didn't  
10 see where he puts his hands. He said he had his hands like  
11 this.

12 THE COURT: I thought he said on his waist.

13 I see. You're right. Then you had your hands by your  
14 shoulders.

15 THE WITNESS: When he said I thought you had a gun on  
16 you, that's when I put my hands up like this.

17 THE COURT: Like this being by your shoulders.

18 THE WITNESS: Right.

19 By my shoulders. To let him know that. So he could  
20 see them. And while I was doing that, he was touching my front  
21 waist area.

22 Q. And you gestured towards the front of your waist where your  
23 belt buckle would be, correct?

24 A. Yeah. That's where he touched me.

25 THE COURT: On the outside of your clothing?

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D4j9flo2 Ourlicht - direct

1 THE WITNESS: The outside of my clothing.

2 THE COURT: He didn't put his hands in any pockets?

3 THE WITNESS: Not at this point, no.

4 THE COURT: Okay.

5 Q. Did you eventually give him your ID?

6 A. Absolutely. As soon as he said looks like you have a gun  
7 on you, I immediately told him I -- can I give you my  
8 identification? I gave him my passport. I said here's my  
9 passport. Here's my St. John's ID, student ID. I go to  
10 school. I go to St. John's University.

11 THE COURT: You say you gave it to him. Did you reach  
12 into your pocket?

13 THE WITNESS: Yes. I let him know that I was giving  
14 it to him. After he was patting me in the front, I said would  
15 you like my -- here's my -- I will give you my identification.

16 THE COURT: Where was it?

17 THE WITNESS: It was in my inside breast pocket.

18 THE COURT: Were you wearing a suit jacket?

19 THE WITNESS: No.

20 I was wearing -- it was like a winter jacket. But it  
21 has like a zip, where the zipper was, it had a little pocket  
22 inside.

23 THE COURT: So you reached into that little pocket and  
24 gave him your passport?

25 THE WITNESS: Passport and my student ID. Because I  
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D4j9flo2 Ourlicht - direct

1 figured if he understood that I was going to St. John's  
2 University at the time that -- my -- where -- everything that I  
3 was doing made more sense, so I figured that would help.

4 Q. What did Officer Moran do with the ID?

5 A. He took it. And he took it and started looking at it,  
6 writing down. And I said now that you have my information do  
7 you mind if I take down yours? And he said sure. And I told  
8 him I was going -- I made it clear that I was going to pull out  
9 a pen and a piece of paper because I had all that in my pockets  
10 because I just came from class. And I began to write down his  
11 badge number, the nameplate, and the number on his scooter.

12 Q. Did he tell you his name or the numbers?

13 A. No. I saw it. And I wrote it down.

14 Q. What happened then?

15 A. Then backup came. Patrol car. It pulled up alongside.  
16 And as the -- the car pulled up, the officers were getting out.  
17 He goes okay now you're going to get the full treatment, get  
18 against the wall.

19 THE COURT: Okay.

20 Q. Did he say, "Now you're getting the full treatment, get  
21 against the wall," before or after the other police officers  
22 arrived?

23 A. It was almost simultaneously.

24 Q. How many other police officers came out of the backup car?

25 A. Two.

D4j9flo2

Ourlicht - direct

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THE COURT: Was that a marked car?

THE WITNESS: It was a patrol car.

THE COURT: Patrol car. And the two came out of that car were uniformed?

THE WITNESS: Fully uniformed.

Q. And can you describe anything else about those officers?

A. It was an older gentleman and then a younger gentleman.

Q. Were they both -- what was their race?

A. They were both white.

Q. Do you know if the other officers heard Officer Moran say, "Now you're getting the full treatment, get against the wall"?

A. I don't know.

Q. So what did you do?

A. I got against the wall.

Q. Did you say anything as you were walking up to the wall?

A. No. I was more in disbelief with myself, that all this was happening at this point, you know. I had just left school and you know now my hands are above my head, I'm getting pat down around the corner from where I live. It was upsetting.

THE COURT: What time of the day was this?

THE WITNESS: Around 2:00.

THE COURT: In the afternoon?

THE WITNESS: In the afternoon, yes.

Q. So at that point did you yell at Officer Moran?

A. No.

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D4j9flo2 Ourlicht - direct

1 Q. Did you -- were you threatening him at all?

2 A. Absolutely not.

3 Q. And were you angry?

4 A. No. I was scared. I was upset. I was scared. I was more  
5 of disbelief that anything like --

6 Q. So what happened when you got to the wall?

7 A. I put my hands against it above my head and spread my legs.

8 Q. Which direction were you facing?

9 A. The wall.

10 Q. Then what happened?

11 A. They proceeded to pat me down again, go into all of my  
12 pockets. They took everything out, my notebook, my pens,  
13 papers that I had from classes.

14 THE COURT: You say pockets. This is both jacket  
15 pockets and pants pockets?

16 THE WITNESS: Right. I didn't have anything in my  
17 jeans pockets.

18 THE COURT: But they looked?

19 THE WITNESS: They went -- right. They went into my  
20 jeans pockets. They took everything out of my coat pockets and  
21 threw it on the floor right next to me.

22 THE COURT: You didn't have anything in your jeans  
23 pockets?

24 THE WITNESS: No. I didn't have anything in my jeans  
25 pockets.

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D4j9flo2

Ourlicht - direct

1 And then told me to sit down on the floor next to my  
2 stuff. I couldn't pick it up yet, at that time.

3 Q. You couldn't pick the stuff up at that point?

4 THE COURT: You said floor. It's the ground?

5 THE WITNESS: On the pavement.

6 Q. So then what did you do?

7 A. I sat there. And waited. Officer Moran went into his  
8 scooter.

9 Q. Which direction were you facing at this point?

10 A. I was facing towards the street.

11 Q. So your back was against the same wall that you had been  
12 searched on?

13 A. Yes. I was sitting up against -- they told me to sit down  
14 right up against the wall, so I did.

15 Q. During the stop and the frisk and the search did a crowd  
16 ever gather?

17 A. No.

18 Q. Did anyone ever stop to look at you?

19 A. No. There were people around, high school kids around, you  
20 know, walking by, people were looking and -- like -- but it  
21 wasn't -- there weren't people standing around and you know  
22 pulling out their cameras or anything like that. It wasn't a  
23 scene -- it was a scene for me because I was -- you know, I was  
24 just against the wall and all my stuff was on the floor but,  
25 you know.

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D4j9flo2 Ourlicht - direct

- 1 Q. But no one ever stopped?  
2 A. I don't believe so.  
3 Q. So at this point you said that Officer Moran went back to  
4 his scooter. Could you see what they was doing from inside the  
5 scooter?  
6 A. He had my passport in his hand and he was talking into the  
7 radio.  
8 Q. What were the other officers doing at this point?  
9 A. Just standing around.  
10 Q. Did you ever speak to them?  
11 A. The younger officer, I noticed that my iPod was playing.  
12 So I asked if I could turn off my iPod. Because I didn't want  
13 to do anything without them knowing that I was doing anything  
14 just in case.  
15 Q. Did Officer Moran allow -- I'm sorry. Did the other  
16 officer allow you to turn off the iPod?  
17 A. Yeah. He was very nice. He was like sure.  
18 Q. At some point did Officer Moran come back to you?  
19 A. Yes, he did.  
20 Q. What happened then?  
21 A. He asked me for my address.  
22 Q. Did you give it to him?  
23 A. Yes, I did.  
24 Q. Do you know why he asked for your address?  
25 A. No.

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D4j9flo2 Ourlicht - direct

1 Q. Do you -- could you tell that he was writing it on  
2 something?

3 A. Yeah. I mean I could tell you what I thought.

4 THE COURT: No. No. That's okay.

5 Q. What did you say to him when he asked you for the address?

6 A. I gave it to him. I said -- would you like me to say my  
7 address?

8 THE COURT: No. That's okay. But you gave your  
9 address. Did you see him write it down or you saw him writing?

10 THE WITNESS: Yes. Well I gave him my address and  
11 then he asked me again. And I gave him the same address. And  
12 he asked me again. And I say -- and he said don't lie to me.  
13 And I was trying to tell him I'm not lying to you. This is my  
14 address -- excuse me.

15 Before that, I asked him do you want my mailing  
16 address or do you want my residence around here? Because I was  
17 living -- I didn't get mail to the house because I was living  
18 in a room with other people I didn't know on the second floor  
19 of a -- college living, so. And I lived in the city so I just  
20 kept that as my mailing address. He said mailing address. So  
21 I gave that to him.

22 THE COURT: Okay.

23 THE WITNESS: Then I told him my address. I said 74  
24 Fifth Avenue 14th Street.

25 THE COURT: He said what's your address. I told him  
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D4j9flo2 Ourlicht - direct

1 that again. He said stop lying to me. I said I'm not lying to  
2 you. He said you're lying to me. You can't live on  
3 14th Street and Fifth Avenue because those are two streets  
4 and you can't live on two streets.

5 And I explained to him that Fifth Avenue runs like  
6 this. And 14th and 13th Street are streets. So you can live  
7 in between two streets, as I did. And I gave him my zip code.  
8 And then I gave him my address again. And I gave him my zip  
9 code and my apartment number. And then he finished writing.

10 (Continued on next page)

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D4J8FLO3 Ourlicht - direct

- 1 Q. Do you know what he was writing your address on?  
2 A. A ticket.  
3 Q. So what happened then?  
4 A. He gave me a ticket.  
5 Q. What did you say?  
6 A. What am I getting a ticket for?  
7 Q. Then what did he say?  
8 A. Disorderly conduct.  
9 Q. Did you say anything then?  
10 A. Yeah, I did. I said, that's fuck -- excuse me, that's F'd  
11 up. You think I'm some young punk kid that's not going to  
12 stand up for myself, and I am, and I will, and I'm going to  
13 fight this.  
14 Q. When you said, "I'm going to fight this," what did you mean  
15 you were going to fight this?  
16 A. The injustice that just happened to me, the ticket, the  
17 stop.  
18 Q. Did you mean you were going to get into a physical fight  
19 with Officer Moran?  
20 A. Absolutely not.  
21 Q. After you said that, what did Officer Moran say to you?  
22 A. He said, Yeah, yeah, I love it when you guys try to fight.  
23 You're not going to win.  
24 Q. Then what happened?  
25 A. I walked away. I went home.

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D4J8FLO3 Ourlicht - direct

1 Q. What happened with that summons for disorderly conduct?

2 A. It got thrown out.

3 MR. MARUTOLLO: Objection. It's outside the  
4 scope -- the fact that there is a summons is in evidence and  
5 the stop here is at issue, not the outcome of the summons.

6 MR. MOORE: They introduced it yesterday with Officer  
7 Moran. So I think it's fair for him to --

8 THE COURT: Was it dismissed?

9 THE WITNESS: It was thrown out.

10 THE COURT: It was dismissed. OK.

11 Q. Did you ever file a CCRB complaint about this incident?

12 A. I believe my mother did.

13 Q. Why didn't you file it?

14 A. I didn't know how to. I was in middle school. I'm  
15 dyslexic so doing stuff like that is difficult for me and my  
16 family was there to support me.

17 THE COURT: You said you were in middle school?

18 THE WITNESS: I was in the middle of the semester.

19 THE COURT: I understand.

20 THE WITNESS: There was a lot on my plate at the time.

21 Q. Do you know what came of that CCRB complaint?

22 A. No, I do not.

23 Q. I now would like for you to turn your attention to the  
24 second time that you were stopped by the police that's at issue  
25 in this case. Do you remember the stop that occurred on

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D4J8FLO3 Ourlicht - direct

1 February 21, 2008?

2 A. Yes.

3 Q. Do you know what day of the week February 21, 2008 was?

4 A. I believe it was a Thursday.

5 Q. At the time of your deposition, were you able to recall the  
6 date of this incident?

7 A. I don't believe so. I'm sorry. Did you say the date or  
8 the day?

9 Q. The date.

10 A. No, I don't believe so.

11 Q. At some point, was your recollection refreshed about the  
12 date of the incident?

13 A. Yes.

14 Q. What were you doing when you were stopped?

15 A. I was heading to my parents' house for dinner.

16 Q. Were you with anyone else?

17 A. It was with my friend Anthony.

18 Q. How were you getting to your parents' house?

19 A. The train station was a quick five, six, seven minute walk  
20 to the F train, and I take that to my house.

21 Q. On the way to the train, were you stopped by the police?

22 A. Yes.

23 Q. I am going to show you Plaintiffs' Exhibit 45 one more time  
24 and ask you to mark the location of the second stop on the map  
25 with a number 2.

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D4J8FLO3

Ourlicht - direct

- 1 A. OK.
- 2 Q. There is a 2 right here, just around the corner from where
- 3 you marked your house. Is that where the second stop was?
- 4 A. Yes.
- 5 Q. You were walking to the subway station that is here at
- 6 169th Street?
- 7 A. No. It was on 168th -- it's that right there. That's the
- 8 back of the train station, and that's the closer entrance.
- 9 That's the main entrance.
- 10 Q. What was the weather like that night?
- 11 A. It was cold, it was cool out.
- 12 Q. What were you wearing?
- 13 A. The same jacket that I was wearing the previous incident.
- 14 Q. That's the --
- 15 A. Jeans, sneakers.
- 16 Q. Were you wearing a hoody that night?
- 17 A. Possibly.
- 18 Q. What, if anything, did you have in your pockets?
- 19 A. My phone, my keys, my wallet, my passport, and a little
- 20 portable Advil I had because my wisdom teeth, before I got them
- 21 removed.
- 22 Q. Do you know how many Advil fit in that little container?
- 23 A. It was a container of 20. There was probably couple -- I
- 24 had just got it so there were probably a couple missing. It
- 25 was pretty full.

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D4J8FLO3 Ourlicht - direct

1 Q. What was Anthony wearing?

2 A. He was wearing a winter jacket with a fur along the hood,  
3 jeans and sneakers.

4 Q. What race is Anthony?

5 A. Italian, white.

6 Q. What happened when you and Anthony were walking to the  
7 subway?

8 A. We got stopped by an undercover police car.

9 Q. How did the car approach you?

10 A. It pulled up, right as soon as we hit that little corner,  
11 they pulled up right alongside of me and asked me to come  
12 there.

13 Q. How many officers were inside the car?

14 A. Four.

15 Q. Were the windows rolled down?

16 A. Yes.

17 Q. All four windows were rolled down?

18 A. From what I could tell, yes.

19 Q. How do you know that they were police officers?

20 A. When they had called me to approach the car -- besides the  
21 car itself, when they had called me to approach the car, one of  
22 the officers in the passenger seat I believe had shown me his  
23 badge. It was on like a chain, like a dog chain in a leather  
24 case.

25 Q. Are you confident sitting here today that the men were NYPD

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D4J8FLO3 Ourlicht - direct

1 officers?

2 A. Yes. They told me they were police. They showed me their  
3 badge, and they said, we're looking for guns, let me see your  
4 identification.

5 Q. Can you describe the officers in any further detail?

6 A. They were all pretty dressed similar, hooded sweatshirts,  
7 hats like with New York, like NY on it, not -- maybe like -- if  
8 you go to Chinatown, you see the tourist hats, the tourists  
9 would buy, like those. Baseball caps that had to do with New  
10 York.

11 Q. Not necessarily related to sports teams?

12 A. They could have been, but I remember them being New York  
13 hats.

14 Q. Did they have guns?

15 A. Yes.

16 Q. What race were the officers?

17 A. They were white.

18 Q. All four of them were white?

19 A. Yes.

20 Q. Did all four of them have guns?

21 A. Yes.

22 Q. Let's take the officer who was driving. Do you recall what  
23 color hair he had?

24 A. As of right now, it was probably brownish, blondish, like  
25 lighter colored hair.

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D4J8FLO3 Ourlicht - direct

1 Q. How old was this officer?

2 A. My assumption was around 30s. They were older. They  
3 weren't younger.

4 Q. You said they weren't younger?

5 A. They weren't younger, no. They were, it felt like  
6 experienced. I don't know if that helps.

7 Q. Were any of the officers wearing uniforms?

8 A. No.

9 Q. What about the officer in the passenger seat, do you  
10 remember anything specific about what he looked like?

11 A. I think he had a green hoody on, hooded sweatshirt.

12 Q. What kind of pants was he wearing?

13 A. Jeans, but I'm not 100 percent sure right now.

14 Q. Was he also in his mid-30s?

15 A. Yes.

16 Q. Which officer showed you the badge?

17 A. That officer, the passenger, he showed me his badge.

18 Q. The officers that were in -- were there two officers in the  
19 back seat?

20 A. Yes.

21 Q. What did they look like?

22 A. Similar. They were all in similar attire.

23 Q. Can you describe the car?

24 A. It was like a Lincoln Town Car, like a livery cab type of  
25 car, dark colored, back window tinted, like black tinted,

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D4J8FLO3 Ourlicht - direct

1 antenna the left corner.

2 Q. So the car comes up and at some point did they say  
3 something to you and Ant?

4 MR. MARUTOLLO: Objection, your Honor. This is one of  
5 the incidents in which there are no officers. It's one of the  
6 John Doe incidents in which we will have testimony from  
7 investigators later in this trial. Therefore, it's not been  
8 proven that these are actually police officers, and we would  
9 object on hearsay grounds.

10 THE COURT: His testimony is that he was sure they  
11 were police officers. He said one of them showed him a badge.  
12 So you can contest his testimony, but that's his testimony. So  
13 given his testimony, there is a basis to bring out their  
14 statements as statements of a party opponent. At the end of  
15 the day, I suppose I can find him not credible and reject it,  
16 but now that's his testimony.

17 So What did they say?

18 THE WITNESS: When they first pulled over, they asked  
19 me to come there. They said, We're looking for guns, let me  
20 see your identification. I gave the officer my passport and my  
21 St. John's's ID.

22 Q. Were they still in the car at this point?

23 A. At that point. As soon as I handed them my identification,  
24 that's when they all got out of the car.

25 Q. Then what happened?

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D4J8FLO3 Ourlicht - direct

1 THE COURT: When you say all, how many got out of the  
2 car?

3 THE WITNESS: Four.

4 A. They told me to back up against the fence that was there.  
5 Three officers came to me and surrounded -- two were to my side  
6 and one was in front of me.

7 THE COURT: Where was your friend?

8 THE WITNESS: He was maybe 10 feet to my left talking  
9 to one of the other officers.

10 THE COURT: OK.

11 Q. Did you feel free to leave at this point?

12 A. No.

13 Q. Did the officers say anything else to you?

14 A. At that point, they were asking me what I was doing, where  
15 I was going. I tried to explain to them I had just left my  
16 house, and I was going to my parents' house. I was going home.  
17 They were like, I thought you live around the corner. I was,  
18 no, I go to school here. This is where I live while I'm going  
19 to classes and stuff like that. But I am going to my parents'  
20 house to have dinner.

21 Q. Did they tell you what they were looking for?

22 A. They kept saying, We're looking for guns. While this is  
23 all going on, they are searching me.

24 THE COURT: When you say searching, would you describe  
25 that?

D4J8FLO3 Ourlicht - direct

1 THE WITNESS: Yeah. They patted me down from my legs.  
2 They went into my pockets. They didn't take anything out, but  
3 they went in and went like this.

4 THE COURT: When you say in your pockets --

5 THE WITNESS: My jeans and my pants pockets.

6 THE COURT: Jeans and pants?

7 THE WITNESS: I'm sorry. My jeans and my coat, my  
8 jacket.

9 Q. Did they say anything during the search?

10 A. They kept saying, We don't care about BS drugs. We don't  
11 care about that. All we're looking for is guns. We're looking  
12 for guns.

13 Q. Did they say BS or did they actually use the profane term?

14 A. They said the French word.

15 Q. Did they find any guns or weapons on you?

16 A. No.

17 Q. Did they find any drugs on you?

18 A. No.

19 Q. While you were being searched, could you see what was going  
20 on with your friend Anthony?

21 A. Yes.

22 Q. What did you see?

23 A. He was face-to-face with the other officer talking to him.  
24 The officer asked for his ID. He gave him his identification.  
25 He was looking at it and talking to him. I don't know exactly

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D4J8FLO3 Ourlicht - direct

1 what they were talking about because I was in the middle.

2 Q. After you were searched, did you hear that officer say  
3 anything to Anthony?

4 A. Yes. He said, you smell like weed, and went into his  
5 pocket and pulled out a joint from his pocket.

6 Q. What do you mean a joint?

7 A. Like a little bag of marijuana.

8 Q. Like a little plastic bag?

9 A. Like a little button bag of marijuana.

10 Q. What did the officer do with that?

11 A. He goes, Look what I found? He pulled it out and then put  
12 it right back into his pocket. Then came over to me, and I got  
13 searched again, even more aggressively that time. The whole  
14 time they're saying, We know you have something on you, we are  
15 going to find it, tell us now, we know you have something on  
16 you. They went into my Advil pill thing. They went into my  
17 socks. They touched the inside rim of my waistline.

18 Q. So they ran their hands along the inside of your waistband?

19 A. Not their hands, but just to see if I had anything in  
20 there. They went into every pocket again.

21 Q. Did they feel around the zipper of your jeans?

22 A. Yes. The little flap, they pulled it to the side and felt  
23 up and down it.

24 Q. Did they tell you they were going to arrest you?

25 A. Yes. The whole time that they were searching me, they're

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D4J8FLO3 Ourlicht - direct

- 1 like, We know you have something on you. As soon as we find  
2 it, we're arresting you. If I find anything on you, we're  
3 arresting you. Just tell me. I kept telling them, I don't  
4 have anything on me.
- 5 Q. How many officers were involved in this search?  
6 A. Four.
- 7 Q. Where was Anthony at this point?  
8 A. He was standing in the same place he was.
- 9 Q. Did the officers find anything during this second search?  
10 A. No.
- 11 Q. What happened then?  
12 A. They were, OK, you guys can leave. And me and Anthony  
13 started walking away. And then all of a sudden we hear,  
14 Anthony. And we turn around, and they give him his  
15 identification, and they're like, be more careful next time.  
16 And then they drove off.
- 17 Q. So the police officer was the one who said Anthony?  
18 A. Yes. He called him by his name. Because we had already  
19 started walking off, and we were 15 feet away from the initial  
20 stop, and that's when the police officer did that.
- 21 Q. Did you ask for the names of those officers?  
22 A. No.
- 23 Q. Did you ask for their badge numbers?  
24 A. No.
- 25 Q. Why not?

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D4J8FLO3 Ourlicht - direct

1 A. I was scared. It was nighttime. The last time I did that  
2 I got a ticket. There was nobody around. It was nighttime.  
3 There was nobody around. It's a residential area. There are  
4 houses all over the place. I felt that, if I would have done  
5 something like that, it could have jeopardized my safety. So I  
6 chose not to.

7 Q. Do you think you were stopped because of your race?

8 A. I do.

9 Q. Why?

10 A. While I was stopped, you know, I was treated differently.

11 THE COURT: Differently than what?

12 THE WITNESS: Than my friend was. I had three  
13 officers who came to me. I got put against the wall. I got  
14 searched very thoroughly and aggressively. You know, just the  
15 fact that, you know, they pulled a little bag of marijuana off  
16 of my friend's pocket and then put it back, and then came to me  
17 and said, if we find anything on you, we're going to arrest  
18 you, to me, that was a sign of I wasn't getting the same  
19 treatment that my friend was.

20 Q. Your friend was white, correct?

21 A. Yes.

22 Q. So I would now like to turn your attention to the third  
23 stop at issue in this case. Do you remember the date of that  
24 stop?

25 A. It was either January 6 or 9, I believe.

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D4J8FLO3 Ourlicht - direct

1 Q. You said January. Is that right?

2 A. June. I'm sorry. I get the two Js confused.

3 Q. Either June 6 or 9, 2008, correct?

4 A. Yes.

5 Q. You didn't recall the date of this stop at your deposition,  
6 did you?

7 A. I don't believe I could remember it at the time.

8 Q. What, if anything, refreshed your recollection about the  
9 date of the stop after the deposition?

10 A. Well, talking to my lawyers -- when that incident happened,  
11 I was scheduled to meet up with him later that day. So after  
12 we figured out what day I was supposed to meet with up with him  
13 and stuff like that.

14 Q. What were you doing that day before you were stopped?

15 A. What was I doing? I was helping a friend clean out and  
16 move stuff around in his apartment. There was construction in  
17 the building and the construction was like for the bathrooms.  
18 So I guess on the floors the bathroom -- for that apartment,  
19 the bathrooms are all the same on the same layout. So they  
20 were doing it for the whole building. So there was a lot of  
21 paint chips on the ground, and he asked me to put like plastic  
22 over certain things, move certain things out of there. He has  
23 a little girl, he is my friend, and he asked me for help and I  
24 helped him.

25 Q. What was your friend's name?

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D4J8FLO3 Ourlicht - direct

- 1 A. Lionel.  
2 Q. Where did he live?  
3 A. He lived on 115th and Park Avenue.  
4 Q. What time did you go over to his house?  
5 A. Around -- I got there around 8 in the morning.  
6 Q. Did there come a point where you left his apartment to go  
7 outside?  
8 A. Yeah. We were in there for like an hour or so, and he was  
9 like, you want to go smoke a cigarette? I said, all right. So  
10 I went outside with him.  
11 Q. What race is Lionel?  
12 A. He is black.  
13 Q. When you went outside to smoke a cigarette, where did you  
14 go?  
15 A. To the benches in the enclosed area of his building. So  
16 his building has like a fence around it. Then there is an  
17 entrance, then the building is to the right, and then the  
18 benches are all to the left. I was there.  
19 Q. Were there other people sitting on the benches?  
20 A. Yeah. There were other people out there.  
21 Q. What was the race of the other people that were out there?  
22 A. They were black.  
23 Q. Were they men or women?  
24 A. I believe they were all men.  
25 Q. At some point did you see police?

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D4J8FLO3 Ourlicht - direct

1 A. Yes, I did.

2 Q. Can you describe how you saw them?

3 A. We are sitting on the bench. He is smoking a cigarette and  
4 talking. We see these two officers walking from Lexington  
5 Avenue in the middle of the complex, and then they turned into  
6 the -- we saw them turn into that fenced in area to the  
7 building. As soon as they turned in, they started like rushing  
8 and pulled out their guns and told everybody to get on the  
9 floor.

10 Q. What did the officers look like?

11 A. White males.

12 Q. Were they in uniform?

13 A. Yes, hats and everything.

14 Q. Did they have guns?

15 A. They had drawn their weapons and pointed them in our area  
16 and were yelling, We heard there is a gun, everybody get on the  
17 floor.

18 Q. Sitting here today, are you confident that these two  
19 officers were NYPD officers?

20 A. Absolutely.

21 Q. So what did they say as they were entering that enclosed  
22 area?

23 A. They were yelling, Get down, we heard there's a gun,  
24 everybody lay down on the ground, get on the floor.

25 Q. What did you do?

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D4J8FLO3 Ourlicht - direct

- 1 A. As they commanded. It was a pretty intense situation. I  
2 tried to move as smooth, as slowly and smooth as possible. I  
3 didn't want to get shot.
- 4 Q. Did you see any other police officers on the scene?
- 5 A. Yeah. As that was going on, a paddy wagon, a police van  
6 pulled up, the blue and white police van with lights on it, and  
7 a whole bunch of officers got out.
- 8 Q. What did those officers look like?
- 9 A. White males.
- 10 Q. Were they in uniform?
- 11 A. They were in uniform. I didn't get a good look at all  
12 those officers, because as this was happening, I was getting to  
13 the floor.
- 14 Q. Did they have guns?
- 15 A. Yes.
- 16 Q. Were their weapons drawn at the time that they came up?
- 17 A. I believe so, and they were running in the direction.
- 18 Q. Are you confident that these additional officers were NYPD  
19 officers as you sit here today?
- 20 A. Yes.
- 21 Q. What did the paddy wagon look like?
- 22 A. It was standard blue and white, lights on top. I believe I  
23 wrote down the number on the side.
- 24 Q. Did it have an NYPD logo on it?
- 25 A. Yes.

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D4J8FLO3 Ourlicht - direct

1 Q. You said that you laid down on the ground. Can you  
2 describe how you were lying on the ground?

3 A. My chin was touching the pavement, and at some point so was  
4 my forehead, and my hands were above my head like this.

5 THE COURT: Showing his hands behind his head, clasped  
6 together around his head.

7 THE WITNESS: Sorry.

8 THE COURT: That's OK.

9 Q. What happened then?

10 A. I was lying on the ground for a while. Time, I can't be  
11 exact with that. Then we started getting searched. I got  
12 lifted up from -- I had a belt on, and I got lifted up from my  
13 belt where my buttocks is, and he lifted me up, and he went  
14 like this and searched my waist area, the front of the waist.  
15 He tapped my pockets, he tapped my jean pockets and stuff like  
16 that. Then he dropped me, and then he went to other people. I  
17 was laying on the floor.

18 Q. Did he put his hands inside the waistband of your jeans?

19 A. He didn't put his hands inside the waistband, but he  
20 thumbed in the inside. He was making sure I didn't have a gun.

21 Q. How did you feel at this point?

22 A. I was terrified. While I was laying there, I could feel  
23 the gun pointed at me. I could see out of my peripheral vision  
24 the police officers, the way they are standing. I was very  
25 frightened. I have never had a gun pointed at me ever and it's

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D4J8FLO3 Ourlicht - direct

1 scary.

2 Q. What happened next?

3 A. They told us we could get up after a certain amount of  
4 time. OK, everybody can stand up. I was all dirty so I was  
5 brushing everything off of me. One officer is like, yeah, the  
6 reason why we did this is because we got a report there was a  
7 gun in the area, and can I get everybody's name and ID? I  
8 didn't have my ID on me at that time. So I gave him my name.  
9 They dismissed us.

10 Q. Do you know if there was a gun somewhere in the area?

11 A. No, I don't know.

12 Q. Did you see anyone from the courtyard get arrested?

13 A. No.

14 Q. Did you see any of the officers retrieve a gun?

15 A. No.

16 Q. Did you ask for the names or badge numbers of those  
17 officers?

18 A. No, I did not.

19 Q. Why not?

20 A. I just had a gun pointed at me. I was pretty shaken up. I  
21 didn't want any conversation, especially since the last time I  
22 did that I got a ticket. I didn't want any other -- I  
23 wanted -- the only thing in my mind was I want to get out of  
24 here. We didn't even go back to his house.

25 Q. Where did you go?

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D4J8FLO3 Ourlicht - direct

1 A. I left. I went to meet with my lawyers, and we walked out,  
2 and I was like, listen, I have got to get out of here. While  
3 we were walking out of the complex, I passed the police van,  
4 and I had put the identifying numbers on the side into my phone  
5 so I could have something. I didn't want to flat out ask all  
6 of them so I figured I would just get whatever information I  
7 could get.

8 Q. Do you know the number of the van?

9 A. I believe I do.

10 Q. What do you believe it is?

11 A. 59644? My dyslexia might have jumbled up some of the  
12 numbers.

13 Q. I am going to show you a document that's titled, "Plaintiff  
14 David Ourlicht's responses and objections to Defendant City of  
15 New York's third set of interrogatories and request for  
16 production of documents."

17 I am going to ask you to read it silently.

18 MR. MARUTOLLO: Can I have a copy of that as well?

19 MS. HOFF VARNER: I don't have a copy. It was  
20 produced to the city.

21 MR. MARUTOLLO: It was produced about four years ago.

22 MS. HOFF VARNER: That's true. I can pass it over to  
23 you in just a minute.

24 Q. Just read this portion silently to yourself.

25 A. OK.

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D4J8FLO3 Ourlicht - direct

1 Q. Does that refresh your recollection as to the number of the  
2 van?

3 A. Yes.

4 Q. So what is the number of the van?

5 A. 59466.

6 MS. HOFF VARNER: I would also like the record to  
7 reflect that I refreshed his recollection with his response to  
8 defendants' interrogatory number 24.

9 And I am now passing it over to Mr. Marutollo.

10 Q. Mr. Ourlicht, why did you decide to become a plaintiff in  
11 this case?

12 A. I have had a lot of incidents like this growing up, and I  
13 felt like it was time for me to stand up for myself and for  
14 others like me and do something. It's one thing to be  
15 victimized and just complain about it, but I think I needed to  
16 step up to the plate. So that's why I made that decision.

17 MS. HOFF VARNER: Just one moment, your Honor.

18 The only thing I would like to do, for the convenience  
19 of the Court, I am going to circle the numbers that he wrote on  
20 the map so that we can actually see what they are.

21 So this was stop number one, stop number two, and this  
22 was the room that he lived in when he was at St. John's that  
23 year.

24 Q. Is that correct, Mr. Ourlicht?

25 A. Yes.

D4J8FLO3

Ourlicht - direct

1 MS. HOFF VARNER: No further questions, your Honor.

2 THE COURT: It's so close to the lunch break. We

3 could do five more minutes or just break now and reconvene.

4 Let's break now and reconvene at 2.

5 You have to be back at 2.

6 (Luncheon recess)

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D4J8FLO3

Ourlicht - direct  
AFTERNOON SESSION  
2:05 p.m.

1

2

3

DAVID OURLICHT, resumed.

4

THE COURT: Mr. Marutollo.

5

CROSS EXAMINATION

6

BY MR. MARUTOLLO:

7

Q. Good afternoon, Mr. Ourlicht.

8

A. Good afternoon.

9

Q. You claim that you have never been a member of a street  
gang, right?

10

11

A. Yes.

12

MS. HOFF VARNER: Objection.

13

THE COURT: What is the objection?

14

MS. HOFF VARNER: The question is about whether he has  
ever been a member of a street gang?

15

16

THE COURT: The question was, You claim you have never  
been a member of a street gang? I will allow it.

17

18

A. Yes.

19

Q. Yes, you claim that you have never been a member of a  
street gang?

20

21

A. Yes.

22

Q. But in January 2008, you were a member of a Facebook group  
called the Latin Kings and Queens Nation, right?

23

24

MS. HOFF VARNER: Objection.

25

THE COURT: I will allow it.

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D4J8FLO3 Ourlicht - cross

1 Is that what it says on your Facebook page?

2 THE WITNESS: I believe so.

3 Q. You're aware that the Latin Kings are a street gang?

4 A. Yes.

5 Q. You actually joined that Latin Kings and Queens Facebook  
6 group the night before your January 30, 2008 stop, is that  
7 right?

8 A. I'm not sure.

9 Q. Well, I will get back to that in a second to help refresh  
10 your recollection.

11 But in January 2008, you were also a member of the  
12 Black P. Stone Nation Facebook group, is that right?

13 THE COURT: Let me get that name again.

14 MR. MARUTOLLO: Black P. Stone Nation.

15 THE COURT: Facebook page.

16 A. Yes.

17 Q. And you're also aware that the Black P. Stone Nation is a  
18 street gang, correct?

19 A. Yes.

20 Q. And you even made a statement six days before your January  
21 30, 2008 stop on the Black P. Stone Nation Facebook page saying  
22 that six members of the gang GDK must die, is that right?

23 A. I don't remember. I don't recall.

24 Q. We will get back to that as well.

25 At your deposition, you testified you didn't know what  
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D4J8FLO3 Ourlicht - cross

1 the Black P. Stone Nation gang even was, right?

2 A. Right. Correct.

3 Q. But you did know what it was?

4 A. I do now.

5 Q. At the time of your deposition, you didn't know what it  
6 was?

7 A. No.

8 Q. I am going to hand you your errata sheet, which contains an  
9 affidavit related to your May 14, 2009 deposition.

10 I will hand you your deposition too for context. This  
11 is your deposition taken on May 14, 2009.

12 You swore to tell the truth at your deposition?

13 A. Yes.

14 Q. You were represented by an attorney at your deposition?

15 A. Yes, I was.

16 Q. If you could look on page 1 of your errata sheet. So not  
17 the page of your affidavit, but the page that's actually  
18 numbered 1.

19 A. Yes.

20 Q. It says 186:16?

21 A. Yes.

22 Q. Again, just to give context, you were asked at your  
23 deposition -- withdrawn.

24 If you could turn to page 186 of your deposition, and  
25 also turn to line 17 through 20.

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D4J8FLO3

Ourlicht - cross

1 MS. HOFF VARNER: I am going to object as improper  
2 impeachment. Nothing in the deposition portion he is going to  
3 read is inconsistent with what Mr. Ourlicht just testified to.

4 MR. MARUTOLLO: That's not accurate.

5 "Q. Are you a member of the Black P. Stone Nation?

6 "A. No.

7 "Q. You have never heard of it?

8 "A. No."

9 So your deposition --

10 THE COURT: The first question and answer certainly  
11 isn't inconsistent. He never said he was a member.

12 The second question is? Say it again.

13 "Q. You have never heard of it?

14 "A. No."

15 THE COURT: I think he said that here too. He didn't  
16 know what it was until after his deposition.

17 MR. MARUTOLLO: For context, your Honor.

18 Q. Mr. Ourlicht, if you could turn to your errata sheet. You  
19 corrected your testimony, isn't it true, where it says on your  
20 errata sheet page 186:16, you changed that answer from, "No,"  
21 to, "Yes, Black P. Stone Nation is a street gang."

22 And the reason for your change was, "The question  
23 frightened me. But when I was asked a few minutes later  
24 whether I was a member of that gang, I indicated that I did  
25 know what it was."

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D4J8FLO3 Ourlicht - cross

1 MS. HOFF VARNER: With all due respect, he is  
2 referring to a subsequent portion of the deposition, page 187,  
3 line 17, where he said, "No, I have never been a member of  
4 anything like that," which implies only that he knew it was  
5 something to which you could become a member.

6 Q. Now, Mr. Ourlicht, just to be clear, you indicated that  
7 you're not actually a member of either the Latin Kings or the  
8 Black P. Stone Nation regardless of these Facebook groups?

9 A. Right.

10 Q. So you just wanted to give off that appearance that you  
11 were a member of these tough street gangs, right?

12 A. No.

13 Q. Let me show you first for your identification.

14 MR. MARUTOLLO: This has already been premarked as  
15 Defendants' Exhibit Y1. But I would like to take one  
16 particular page out, your Honor, and mark it as Defendants'  
17 Exhibit Y1A, which is Bates stamped number NYC 8426.

18 Q. Mr. Ourlicht, that's you in that photograph, right?

19 A. Yes. I am in the photograph.

20 Q. The title of that photograph is, "Top Gunners can't be  
21 stopped," is that right?

22 A. Yes.

23 MR. MARUTOLLO: I would like to move admission of that  
24 photograph.

25 THE COURT: I don't know what this is.

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D4J8FLO3

Ourlicht - cross

1 MR. MARUTOLLO: This is related to his efforts to --

2 THE COURT: I don't know what this photograph is.

3 MR. MARUTOLLO: It's a photograph from his Facebook  
4 page.

5 THE COURT: I don't know when it was posted.

6 MR. MARUTOLLO: September 18, 2007, prior to these  
7 incidents.

8 MS. HOFF VARNER: We would object on relevance. It's  
9 hearsay. To the extent that it was pulled off of his Facebook  
10 page, it's certainly hearsay. And to the extent that he is  
11 trying to ask questions about what is depicted in the  
12 photograph, it's simply irrelevant. There is no way that the  
13 officers who stopped Mr. Ourlicht on any of those occasions  
14 could have known.

15 THE COURT: Absolutely not.

16 MS. HOFF VARNER: Absolutely.

17 THE COURT: They couldn't have known. I guess you're  
18 trying to say it goes to his credibility somehow?

19 MR. MARUTOLLO: As well as his bias in this case, his  
20 animus, and for his veracity. I have just a few more questions  
21 related to this gang issue.

22 THE COURT: I don't know of any gang issue. And I  
23 don't know what this photograph really is. I don't know if he  
24 posted it. I don't know how postings work. I don't know what  
25 it all means. It's vague to me.

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D4J8FLO3 Ourlicht - cross

1 MS. HOFF VARNER: The only thing in the record about  
2 where this comes from is it's at the bottom of the page, added  
3 September 18, 2007. It's pulled straight off his Facebook  
4 page. There is no indicia of reliability about where or when  
5 or how this photograph was taken.

6 THE COURT: I agree with that. I don't know where or  
7 when it was taken. I don't know who posted it. Really, it is  
8 a collateral matter for you to go into any further.

9 MR. MARUTOLLO: May I refresh Mr. Ourlicht's memory in  
10 terms of the context of where this photo is as it's part of his  
11 larger Facebook page?

12 THE COURT: I don't know that his memory is exhausted.  
13 I haven't heard him say that. So you can't refresh his  
14 recollection if he hasn't exhausted his recollection.

15 MR. MARUTOLLO: May I ask him if this photo was part  
16 of his Facebook profile, as part of his Facebook identity? We  
17 have a number of pages, if he needs to, to refresh his memory.

18 MS. HOFF VARNER: I want to raise one other thing. By  
19 the actual text on this picture, it says, "From the album, pics  
20 my Roman Kaplune." That is not David Ourlicht. It's not part  
21 of his photo album, as best I understand it.

22 THE COURT: Is his photograph in it?

23 MR. MARUTOLLO: Yes, your Honor. He is in the  
24 photograph making a gang sign.

25 MS. HOFF VARNER: I would object to that

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D4J8FLO3 Ourlicht - cross

1 characterization.

2 THE COURT: I think the real answer is you can't prove  
3 up this point by extrinsic evidence. All you can ask him is,  
4 is he a member of this gang. If he says no, you're bound by  
5 the answer. So I am not going to allow this photograph into  
6 evidence. But I will allow the question.

7 Which gang is this one, supposedly?

8 MR. MARUTOLLO: Top Gunners.

9 THE COURT: Were you at any time a member of a group  
10 called Top Gunners?

11 THE WITNESS: Yeah. But it's not a gang. It was a  
12 group of friends that came together and we just -- like, that  
13 was our group. It was like seven or eight of us. Nobody has  
14 criminal records or been involved in any violent instance. We  
15 were just high school friends.

16 THE COURT: That's all I am going to allow on the  
17 group called Top Gunners.

18 BY MR. MARUTOLLO:

19 Q. Is it your testimony, Mr. Ourlicht, that you never posted  
20 anything on either the Latin Kings or the Black P. Stone Nation  
21 Facebook pages?

22 THE COURT: On their pages?

23 MR. MARUTOLLO: Yes. And when I say posted, your  
24 Honor, did he actually type anything that would appear on the  
25 Internet page for those gangs.

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D4J8FLO3

Ourlicht - cross

1 THE COURT: That seems to be extrinsic evidence. The  
2 only thing I would allow is if he is member of the Latin Kings  
3 or he is a member of the other. If he says no, that's it. You  
4 can't prove it up by extrinsic evidence.

5 Are you a member of the Latin Kings?

6 THE WITNESS: No.

7 THE COURT: Are you a member of the Black P. Stone  
8 something or other?

9 THE WITNESS: No.

10 MR. MOORE: For the record, if he had been a member of  
11 both, he would be dead now.

12 THE COURT: You can't testify, Mr. Moore. That's  
13 stricken.

14 MR. MARUTOLLO: Can I have one moment, your Honor?

15 BY MR. MARUTOLLO:

16 Q. Mr. Ourlicht, you admitted at your deposition that you  
17 wrote on Facebook, "Fuck bitches, kill pussy, and live the  
18 fucking life."

19 MR. MARUTOLLO: My apologies, your Honor.

20 MS. HOFF VARNER: Objection. He testified to what he  
21 testified to at his deposition. The inclusion of this point is  
22 far more prejudicial. It's not probative of anything and it's  
23 not relevant to anything in this case.

24 THE COURT: Mr. Marutollo made his argument as to why  
25 he thinks it is relevant. He thinks it goes to bias.

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D4J8FLO3

Ourlicht - cross

1 Is this a comment about police? I didn't hear it all.  
2 Luckily I was spared. Is it about police?

3 MR. MARUTOLLO: It's about living the life.

4 THE COURT: That's irrelevant. If he made a comment  
5 about police, that you could show is a bias against police or  
6 the NYPD, I would have allowed it.

7 MS. HOFF VARNER: I would move to strike his --

8 THE COURT: The record probably heard it. I didn't.  
9 The motion to strike is granted.

10 Q. Mr. Ourlicht, you also admitted at your deposition that you  
11 referred to your friends as "nigga," N-I-G-G-A?

12 MS. HOFF VARNER: Objection.

13 THE COURT: Sustained.

14 MS. HOFF VARNER: Also move to strike on that.

15 THE COURT: Well, questions aren't evidence. I say to  
16 the jury, questions aren't evidence, only answers. So I will  
17 tell it to myself. Don't get excited about the question. It's  
18 not evidence.

19 Q. Mr. Ourlicht, I would like to turn your attention to the  
20 January 2008 incident described during your direct examination.

21 While you were walking on 164th Street towards Grand  
22 Central Parkway, you saw Officer Moran driving a scooter in the  
23 opposite direction, right?

24 A. Correct.

25 Q. And you saw the officer looking at you as he drove past

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D4J8FLO3 Ourlicht - cross

1 you, right?

2 A. Yes, sir.

3 Q. In fact, you say that Officer Moran was rubbernecking  
4 really hard as he was driving by you?

5 A. Correct.

6 Q. You testified on direct examination that it was a chilly  
7 and cold day, is that right?

8 A. Yes.

9 Q. And you were wearing a black Marmot jacket, right?

10 A. Correct.

11 Q. And underneath that jacket you were wearing a black baggy  
12 sweatshirt with possibly a hood, is that right?

13 MS. HOFF VARNER: Objection.

14 THE COURT: What is the objection?

15 MS. HOFF VARNER: He testified he couldn't recall  
16 whether he was wearing that or not.

17 MR. MARUTOLLO: That's not accurate. He testified he  
18 couldn't recall if he was wearing the hood, but everything else  
19 he did testify.

20 MS. HOFF VARNER: He testified that he wasn't wearing  
21 the hood and he couldn't recall --

22 THE COURT: Were you wearing a black sweatshirt?

23 THE WITNESS: I could have been. I don't remember at  
24 the time. Usually if it's cold enough, I would wear a  
25 sweatshirt underneath my jacket. But I don't remember.

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D4J8FLO3 Ourlicht - cross

1 THE COURT: What is the question now?

2 Q. Mr. Ourlicht, you described the jacket as a big jacket, is  
3 that right?

4 A. It's a winter jacket, yes.

5 Q. As a big jacket?

6 A. It's a winter jacket. It's a down jacket. It has down  
7 feathers in it.

8 Q. You described the jacket as puffy, right?

9 A. Correct.

10 Q. This jacket contained six pockets, right?

11 A. Yes.

12 Q. Two of the pockets were on the front lower part of the  
13 jacket, right?

14 A. Correct.

15 Q. And your front pockets were big enough to hold a spiral  
16 five subject notebook, isn't that right?

17 A. Right, my notebook.

18 Q. A five subject notebook?

19 A. Four subject, five subject.

20 Q. Five subject?

21 A. Right.

22 Q. In fact, you testified that you had at least one five  
23 subject notebook in your jacket that day, right?

24 A. Correct.

25 Q. And you put this notebook in your right front pocket,

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D4J8FLO3 Ourlicht - cross  
1 right?

2 A. No. My left pocket.

3 Q. Turning your attention to your deposition, page 50, lines 1  
4 to 3.

5 "Q. Which pocket would the notebook have been in?

6 "A. Right one. Well, it's the front, but the right front  
7 one."

8 Did you give those answers to those questions?

9 A. I believe so.

10 THE COURT: So which is it?

11 THE WITNESS: It was in the left side. I might  
12 have -- I confuse the two.

13 THE COURT: OK. You're sure now it's the left?

14 THE WITNESS: It was absolutely the left.

15 Q. At your deposition, which was closer in time to this  
16 incident, when you said the right side, that was incorrect?

17 THE COURT: He just said that was incorrect.

18 A. I'm dyslexic.

19 THE COURT: All he is asking is that was incorrect.

20 A. I made a mistake.

21 Q. You're aware that Officer Moran searched your right side  
22 where he thought the suspicious bulge was, right?

23 MS. HOFF VARNER: Objection.

24 THE COURT: What is wrong with that?

25 Do you know what side --

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D4J8FLO3 Ourlicht - cross

1 THE WITNESS: He didn't touch any of my sides. He  
2 touched the front of my jacket.

3 Q. In addition to the notebook, you also had your keys,  
4 wallet, passport and phone in your jacket pockets, right?

5 A. Yes.

6 Q. You were also carrying a video iPod in your jacket?

7 A. A mini one, yes.

8 Q. And your jacket fell halfway between your knees and your  
9 hips, such that the jacket would cover the front pockets of  
10 most of your jeans, is that right?

11 A. The beginning of my pockets, not my pockets in general. My  
12 jacket came to about right here.

13 THE COURT: I can't see.

14 THE WITNESS: I'm sorry. My jacket came to about  
15 right here.

16 THE COURT: Indicating --

17 THE WITNESS: It would cover the beginning of my  
18 jeans.

19 THE COURT: So indicating the bottom of a typical  
20 man's suit jacket.

21 Q. Going back to Officer Moran, at some point you believe that  
22 officer made a U-turn in his scooter, right?

23 A. That's what I saw.

24 Q. About two minutes after the officer first observed you, he  
25 spoke to you, right?

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D4J8FLO3

Ourlicht - cross

1 A. I don't exactly recall the amount of time it took between  
2 he passing me and me getting to the corner. Exactly, I don't  
3 know how much time passed exactly. I can't remember.

4 Q. Maybe to refresh your recollection, if you could read  
5 silently to yourself page 61, lines 5 through 7.

6 THE COURT: While you're reading silently to yourself,  
7 Ms. Grossman, do you have any update on those officers?

8 MS. GROSSMAN: They are not here yet. But I do just  
9 want to register an objection, your Honor. We just think this  
10 whole procedure, by having the officers come to court, is  
11 unduly suggestive.

12 THE COURT: This is an open courtroom and they  
13 testified in an open courtroom yesterday, and if I hadn't taken  
14 them out of order they would have been in the hall when Mr.  
15 Downs came and went. There is nothing inappropriate about  
16 this. They were here. They were in this open courtroom  
17 publicly available for this whole room to see. He would have  
18 been the next witness. I asked for them to be out of order.  
19 Ordinarily we would have the plaintiff and then we would have  
20 the officers on the stop. That's the typical order. This all  
21 happened because we went out of order. He has every right to  
22 see them, and should. So you can object. I am going to order  
23 them to be present. I am asking him to look at them, and he  
24 will either say up or down, these are absolutely the guys, or  
25 they are not.

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D4J8FLO3 Ourlicht - cross

1 MS. GROSSMAN: The probative value of having a  
2 identification in court right now, when the witness didn't even  
3 identify this person years ago, is just of no value.

4 THE COURT: That's good. That's an argument that you  
5 can make. If I were to ever make a fact-finding to the  
6 contrary, you can make that argument again. You can make it in  
7 this court. You can make it in the higher court. You can make  
8 it in the highest court of the nation. But right now that's  
9 what I am ordering. They were here publicly. But for taking  
10 them out of order, he would have seen them come and gone and in  
11 the hall.

12 MS. GROSSMAN: Also, the fact that the plaintiff is  
13 going to see two officers come into this courtroom at the  
14 request of your Honor, when --

15 THE COURT: Do you expect him to lie? Is that what  
16 you're really saying? That he is just going to say, they  
17 walked in, those must be the guys. That's what you're saying.  
18 You don't trust him to tell the truth, clearly.

19 MS. GROSSMAN: I think that's why we have suggestive  
20 lineup.

21 THE COURT: I already told you this is not a criminal  
22 case. This is not beyond a reasonable doubt. This is not a  
23 bank robbery or a homicide. He has every right to look at the  
24 officers who testified.

25 Let me back up. Why were those two officers here?

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D4J8FLO3 Ourlicht - cross

1 Who chose those two to come in and say it didn't happen?

2 MS. GROSSMAN: The plaintiffs.

3 THE COURT: How did you get those two names?

4 MR. CHARNEY: The CCRB did an investigation and  
5 determined that those were the two officers who were driving  
6 the vehicle that Mr. Downs identified the license plate for.  
7 One of them testified that he was wearing a Jets jersey. It's  
8 in the record.

9 THE COURT: A Jets jersey.

10 MR. CHARNEY: We know that Mr. Downs testified to the  
11 same thing.

12 THE COURT: So there is a basis for all of this. They  
13 came in and gave their testimony. He has a right to see them.  
14 This is public. Anybody had a right to see them.

15 MS. GROSSMAN: He did see them years ago and he didn't  
16 identify them.

17 THE COURT: That's absolutely false. He could not  
18 select them out of a lineup because he said, I didn't want to  
19 make a wrong identification. I didn't want to get anybody in  
20 trouble. I couldn't pick them out of this lineup. I don't  
21 know how that lineup was composed. I don't know what it looked  
22 like. I don't intend to look at. I am not going over this.  
23 They are ordered to be here.

24 MS. GROSSMAN: We are going to comply with your order.

25 THE COURT: I just wanted an update so I know whether

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1 to keep the man sitting here as opposed to going to  
2 Connecticut.

3 MS. GROSSMAN: I don't have an update at this point.

4 THE COURT: Can you get one? Can you see if they are  
5 in transit? Can anybody try to identify if they are on their  
6 way?

7 MS. GROSSMAN: Yes, your Honor.

8 THE COURT: Mr. Marutollo.

9 BY MR. MARUTOLLO:

10 Q. Just going back, Mr. Ourlicht, immediately after you  
11 crossed the street, Officer Moran pulled up directly next to  
12 you, right?

13 A. Correct.

14 Q. The officer was alone at that point?

15 A. Correct.

16 Q. The officer initially asked you questions while sitting in  
17 his vehicle, right?

18 A. Yes.

19 Q. And the officer asked if you went to school there, right?

20 I'm sorry. Do you go to school here?

21 A. If I go to school around here, yes.

22 Q. You said why in response?

23 A. Yes.

24 Q. Officer Moran asked you if you had ID, correct?

25 A. Yes.

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D4J8FLO3 Ourlicht - cross

1 Q. And you said why in response, right?

2 A. Correct.

3 Q. The officer asked you a second time for your ID, right?

4 A. Correct.

5 Q. And the officer even asked you a third time for your ID,  
6 right?

7 A. Maybe. I don't recall exactly.

8 Q. And the officer at some point exited his vehicle, right?

9 I'm sorry. Exited the scooter at some point?

10 A. Yes.

11 Q. When he exited, Officer Moran said that, the reason why I  
12 stopped you is because it looks like you have a gun, right?

13 A. Correct.

14 Q. Officer Moran then touched your front waist to see if you  
15 had a gun or anything on you, right?

16 MS. HOFF VARNER: Objection to the characterization.

17 THE COURT: That's true. He doesn't know why.

18 He can't go into his mind.

19 Anyway, he touched your front waistband?

20 THE WITNESS: As soon as he said, it looks like you  
21 have a gun, I raised my hands and he touched my front  
22 waistband.

23 Q. At that point, Officer Moran was still the only officer at  
24 the scene?

25 A. Correct.

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D4J8FLO3 Ourlicht - cross

1 Q. The officer did not take anything out of your pockets  
2 during this initial pat-down, correct?

3 A. Correct.

4 Q. Now, two other officers arrived at the scene in a squad car  
5 later, is that right?

6 A. Yes.

7 Q. And the officers at some point searched your jacket and  
8 jean pockets, right?

9 A. Correct.

10 Q. The officers took out your wallet, keys, notebooks, pens,  
11 video iPod, correct?

12 A. Correct.

13 Q. So, therefore, you could have had more than one notebook on  
14 you that day?

15 A. I had one notebook. It was a five subject notebook. I  
16 didn't take more than five classes.

17 Q. Let me turn your attention to page 81, lines 4 through 9.

18 "Q. What did he take out of your jacket pockets?

19 "A. Everything that was in it. So I believe at this point he  
20 had my passport and my ID still. So he took my wallet out, my  
21 keys, took the notebooks, like the pens and everything,  
22 whatever, loose change or whatever was in there, my iPod. I  
23 believe that's it."

24 Q. Did you give those answers to those questions?

25 THE COURT: Did you say notebooks?

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D4J8FLO3 Ourlicht - cross

1 THE WITNESS: It might have been a grammatical in my  
2 speech.

3 THE COURT: The reporter might have gotten it wrong.  
4 You think that you had one notebook?

5 THE WITNESS: It's a five subject notebook.

6 THE COURT: I am not terribly interested. An "S" can  
7 creep in there very easily by the reporter.

8 Q. Just to be fair, you did fill out an errata sheet in this  
9 case and you never corrected that error, correct?

10 A. The "S," it must have slipped by me. I didn't see it.

11 Q. The whole search took about five minutes, right?

12 A. The initial pat-down or when I was against the wall?

13 Q. When you were against the wall.

14 A. I don't know exactly how long it took but --

15 Q. Now, at the end of this encounter, you told Officer Moran  
16 "that's fucked up," correct?

17 A. No.

18 THE COURT: I'm sorry?

19 A. I'm sorry. Are you talking about the end of that or the  
20 end of when I got my ticket and I was walking away?

21 Q. At some point during this encounter you said that, correct?

22 A. I said, "This is fucked up."

23 Q. And you testified that you believe you were stoped because  
24 of your race, right?

25 A. Yes, I did testify to that.

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D4J8FLO3 Ourlicht - cross

1 Q. But no officer made any comments about your race that day,  
2 did they?

3 A. No.

4 Q. Now, I would like to turn your attention to the second  
5 incident that you testified about during your direct  
6 examination. You don't know when exactly this incident  
7 occurred, is that correct?

8 A. The exact date?

9 Q. Right.

10 A. I believe that is correct.

11 Q. You only know this incident occurred at some point in  
12 February of 2008, right?

13 A. Yes. It occurred sometime in February of 2008.

14 Q. Even though you testified, I believe on direct, that you  
15 thought it occurred February 21, 2008, in your affidavit in  
16 this case that was part of the summary judgment motion, that  
17 was attached to the summary judgment motion, you claim that the  
18 second incident occurred on a weekday evening in February 2008  
19 at 6 p.m., correct?

20 MS. HOFF VARNER: Objection. There is nothing  
21 inconsistent between February 21 and a weekday evening in  
22 February.

23 THE COURT: That's true.

24 Q. You didn't specify February 21 in the affidavit that you  
25 swore to under oath, right?

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D4J8FLO3

Ourlicht - cross

1 THE COURT: You don't remember what you put down?

2 Q. I can refresh your memory if you would like.

3 THE COURT: It's not a matter of refreshing his  
4 memory. The affidavit says what it says. It's in the court  
5 record. What does it say?

6 MR. MARUTOLLO: It says February 2008.

7 THE COURT: It sounds like it is February 2008.

8 MS. HOFF VARNER: It says a weekday evening in  
9 February 2008.

10 Q. This is significant because the officers were unable to be  
11 identified for this incident, right?

12 MS. HOFF VARNER: Objection. How he is supposed to  
13 know that?

14 THE COURT: Sustained.

15 Q. Now, you were in a lot of pain on the date of this  
16 incident, right?

17 A. A lot? I was in pain because of my wisdom teeth, but I  
18 wasn't in a lot of pain. I had gotten my wisdom teeth, all  
19 four of them removed, and after that it was fine. That was  
20 more painful.

21 Q. You don't remember whether you smoked marijuana that day,  
22 do you?

23 MS. HOFF VARNER: Objection. It's irrelevant.

24 THE COURT: It goes to perception I suppose. He could  
25 have had a distorted perception.

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D4J8FLO3

Ourlicht - cross

1 That's the purpose of it, right, Mr. Marutollo?

2 MR. MARUTOLLO: Yes.

3 THE COURT: Were you high at the time?

4 THE WITNESS: I do not believe I was because I was  
5 heading to my parents' house for dinner.

6 (Continued on next page)

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D4j9flo4 Ourlicht - cross

1 Q. Well at your deposition you actually testified you smoked  
2 marijuana --

3 MS. HOFF VARNER: Objection.

4 Q. -- once a month, right?

5 MS. HOFF VARNER: Objection.

6 THE COURT: That is irrelevant. Whether he smokes it  
7 once a month is not relevant.

8 What is relevant is whether it distorted his  
9 perception at the time of the incident.

10 Q. One more note about the date of this February 2008  
11 incident. You claim that on the date of the incident you  
12 called your parents on your Verizon cellphone right after the  
13 incident, right?

14 A. Yes.

15 Q. And your Verizon cellphone number at the time was  
16 (917)572-0847, right?

17 A. I believe so.

18 Q. And you're aware that defendants subpoenaed that number  
19 from Verizon and no records were found?

20 MS. HOFF VARNER: Objection, your Honor. He's not  
21 aware of any of that.

22 THE COURT: You have no awareness of what the  
23 defendants did, do you?

24 THE WITNESS: No. I remember them calling my parents  
25 because --

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D4j9flo4

Ourlicht - cross

1 THE COURT: That's not my question.

2 He doesn't know what the defendants did.

3 MS. HOFF VARNER: I would actually move to strike that  
4 question. I know --

5 THE COURT: The question is in evidence. And I know  
6 all about that. But it doesn't matter. I'll strike it.

7 MS. HOFF VARNER: Thank you, your Honor.

8 Q. Now with respect to this February incident, you testified  
9 that you were walking with your friend Anthony, correct?

10 A. Correct.

11 Q. And you testified that no one else was around besides  
12 Anthony and subsequently the officers, right?

13 A. Correct.

14 Q. And Anthony was your roommate at the time your deposition  
15 was taken, right?

16 A. At the time of the deposition, yes. But at that time he  
17 was not.

18 Q. Right. At the time of your deposition though he was your  
19 roommate?

20 A. Right. Correct.

21 THE COURT: Which was this January?

22 MR. MARUTOLLO: No. I'm sorry. This was May 14,  
23 2009.

24 THE COURT: Okay.

25 Q. And at the time of your deposition you indicated that you  
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D4j9flo4 Ourlicht - cross

1 didn't know Anthony's last name, right?

2 A. Correct. I couldn't tell you his last name.

3 Q. And you even testified that you could not even find out his  
4 last name, right?

5 A. I don't remember.

6 Q. Well to refresh --

7 MS. HOFF VARNER: Can I have a page number?

8 MR. MARUTOLLO: I'm telling you. Refresh your  
9 recollection, Mr. Ourlicht, if you could turn to page 116,  
10 lines 8 through 9. Read that silently to yourself to see if  
11 that refreshes your recollection.

12 THE COURT: You came back at a good time. He's  
13 reading silently to refresh his recollection.

14 Do we have a small update?

15 MS. GROSSMAN: The attorneys who are going to be  
16 representing -- independent counsel who will be representing  
17 Detective Giacona and Sergeant Mahoney are here to answer your  
18 questions, your Honor.

19 THE COURT: I have no questions. I want them brought  
20 into the courtroom.

21 MS. GROSSMAN: Well we are no longer going to be  
22 representing the officers.

23 THE COURT: I heard that.

24 MS. GROSSMAN: In this capacity. So these attorneys  
25 would like to address the court.

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D4j9flo4

Ourlicht - cross

1 THE COURT: All right. Fine. Where are they?

2 MS. GROSSMAN: I'll get them.

3 THE COURT: Just take a break now.

4 MS. GROSSMAN: Your Honor, the attorneys are here. Do  
5 you want to wait or do you --

6 THE COURT: No. No. Come on up. Your name, sir.

7 MR. MOSCHELLA: Good afternoon, your Honor.

8 James Moschella M-O-S-C-H-E-L-L-A counsel to the  
9 police department's detectives endowment association.

10 THE COURT: And you?

11 MR. QUINN: Good afternoon, your Honor.

12 Andrew Quinn Q-U-I-N-N general counsel for the  
13 sergeants benevolent association.

14 THE COURT: Do you folks want to be heard on my order  
15 that these two witnesses who testified in open court yesterday  
16 at this trial return to this trial so that they can be viewed  
17 by the person who says that they stopped him. That's all.

18 MR. MOSCHELLA: Yes. We would like the opportunity to  
19 be heard on that.

20 THE COURT: Go ahead. Be heard.

21 MR. MOSCHELLA: Certainly as to my client's position,  
22 your Honor, it's -- we were not present in court during the  
23 testimony. We certainly weren't present during your Honor's  
24 order or remarks with regard to that testimony. But as it's  
25 been conveyed to me, there were certain terms used with regards

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1 to some of the testimony, specifically.

2 THE COURT: This is absolutely false. If anybody told  
3 you that I indicated that there was a possibility that they had  
4 committed perjury, that's false. That's just false.

5 I said I have concern that any witness in this case  
6 might have. And to forestall any concern that I have, I would  
7 like this man to be able to view these two officers because  
8 each swore this incident never happened, they never saw that  
9 man. There was a picture of the man. They never saw him.  
10 They never stopped him etc. etc.

11 He took the stand today, described the officers who  
12 did stop him, described the stop in great detail, described the  
13 license plate of the car they drove, described what they wore.  
14 And we should find out whether these are the men that he says  
15 stopped him. Then we'll know something.

16 Until he's had a chance to look at them, which would  
17 have happened yesterday but for the fortuity that they were  
18 taken out of order because I wanted to use the time yesterday.  
19 It was that simple. They were to follow his testimony. And  
20 all of this would have been avoided.

21 They were in a public courtroom. They are officers.  
22 They have to testify when called.

23 MR. MOSCHELLA: Of course, your Honor.

24 THE COURT: They can be recalled for further  
25 testimony. If any side wants to, I'll allow that. They're

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1 going to come back to the courtroom. They're ordered to. I  
2 don't understand your -- anything I've heard so far.

3 MR. QUINN: Judge, if they're being called back to  
4 offer testimony, that's one thing. But if they're being called  
5 back to participate in a suggestive show-up procedure.

6 THE COURT: They are not accused of anything. This is  
7 not a show-up in a criminal case. This is a civil case.  
8 They're not defendants. They're not involved in a criminal  
9 case. The complainant, so-called, the plaintiff here should  
10 have a right to view the officers who took the stand and denied  
11 ever seeing him, denied ever stopping him despite the fact that  
12 there is some evidence in the CCRB records linking him --  
13 linking them to the car that has been identified as the car  
14 that passed him on that day.

15 He may take one look at them and say wrong guys. I  
16 don't know what he'd say. But he has a right to see them.  
17 They were here in a public courtroom. And it's all a fortuity  
18 that this didn't happen yesterday.

19 And if any side wishes to recall him I will allow  
20 that. And, of course, it's a public courtroom and anybody who  
21 is here is here. So it seems to me we're dancing on the head  
22 of a pin because they came to an open courtroom and, as I said,  
23 it's all a fortuity that he didn't see them yesterday.

24 MR. QUINN: Your Honor, a number things.

25 First of all, your characterization of what occurred

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1 in court -- we haven't read the transcript so we don't know.

2 THE COURT: I understand that.

3 MR. QUINN: We have been told that there has at least  
4 been a suggestion that perjury could have been committed.

5 THE COURT: By any number of witnesses in this case.

6 MR. QUINN: Well, your Honor, I only represent --

7 THE COURT: On both sides, if that's helpful to you.

8 Anybody --

9 MR. QUINN: Judge --

10 THE COURT: Excuse me. If I'm talking, you're not,  
11 Mr. Quinn.

12 All I said is, and I repeat it, in any case I have  
13 there is a possible that somebody took the oath and didn't tell  
14 the truth. Whether it's these two or other two, I don't know.  
15 But I think he is entitled to see these two people and say  
16 whether they were the officers or not the officers who stopped  
17 him.

18 They're the ones who took the stand and denied the  
19 stop, both of them, under oath yesterday, as I said, despite  
20 certain facts such as the license plate and what they were  
21 wearing, etc., etc.

22 Let him look at them and say up or down, yes or no.

23 Maybe he'll say I can't be sure. That's the end of it.

24 MR. MOSCHELLA: May I, your Honor?

25 Of course, if the answer is yes, that's absolutely the

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1 officer who did it --

2 THE COURT: Then it's just a matter of credibility,  
3 who I believe.

4 MR. MOSCHELLA: It would seem to me that that might  
5 implicate the officers' Fifth Amendment rights.

6 THE COURT: Not Fifth Amendment. You know there is no  
7 Fifth Amendment right not to make -- in other words, this is  
8 not a statement. To stand in this courtroom is not a  
9 statement. They have no Fifth Amendment privilege not to be in  
10 a courtroom. What they can't be compelled to do is to say  
11 anything.

12 MR. QUINN: No, Judge, but you have to tie the  
13 procedure with their testimony. If Mr. Downs points to my  
14 client and says now I think that's the guy, even though it's my  
15 understanding that he was shown a photo array within two years  
16 after the incident, was not able to identify my client. My  
17 client is going to walk in. He is one of two people that he is  
18 going to be asked to identify which is blatantly suggestive.  
19 If the police tried to do this, Judge --

20 THE COURT: For what purpose?

21 But this isn't the police. That's the entire point.  
22 This isn't the police and it isn't a prosecution.

23 I'm trying to understand the facts of a stop, a stop  
24 of 4.5 million stops that were made. I'm trying to understand  
25 this stop. That's all I'm trying to do.

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1 MR. QUINN: Your Honor, it was conveyed to us that  
2 there was at least the potential --

3 THE COURT: There's always a potential. When somebody  
4 takes the oath and testifies in a proceeding, at deposition or  
5 at trial, there is always the chance that person lied whoever  
6 that is. We've had a hundred witnesses in this case. There's  
7 a possibility, because there's always a possibility, that one  
8 of them lied, five of them lied, or fifteen of them lied. I  
9 don't know.

10 MR. QUINN: But, Judge, in the several hundred cases  
11 I've tried, I've never heard a judge suggest that a witness may  
12 have committed perjury.

13 THE COURT: Oh, Mr. Quinn, then you have tried a lot  
14 less cases than have been tried in the Southern District of New  
15 York. Judges of this court have referred witnesses to the U.S.  
16 Attorney's Office to be prosecuted for perjury. It happens all  
17 the time in this court. You're just wrong.

18 MR. QUINN: If that happens all time, how could I  
19 possibly walk my client in to --

20 THE COURT: Because they have an obligation to come to  
21 court. They're police officers. And I need them to be here so  
22 he can see them. It's a public -- did they testify publicly?  
23 If they didn't want to testify, they could have said: We're  
24 not testifying, we're not coming to court. Then I think there  
25 would have been proceedings and the police department may have

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1 an obligation, I think, when subpoenaed. But that's neither  
2 here nor there.

3 All I'm saying is physically they should be viewed by  
4 this witness. Not a photo array. Physically.

5 And the part about it being a suggestive show-up.  
6 This is not a prosecution. I am not the police. So it's got  
7 nothing to do with that.

8 And it's not Fifth Amendment because nobody is asking  
9 them to say a word. Just stand there. Well, obviously --  
10 obviously, you're very worried about them coming into court and  
11 being seen by Mr. -- I forget --

12 MR. QUINN: That is completely inaccurate.

13 THE COURT: I don't think it's inaccurate.

14 MR. QUINN: You're the one who raised the specter of  
15 perjury.

16 THE COURT: Of any witness in this entire case. I am  
17 concerned about it. I'm concerned about taking the oath and  
18 what I hear from the testimony after the oath is taken. And  
19 I'm concerned enough that there was an absolute denial of ever  
20 having seen this man. And he testified that he would know them  
21 if he saw them. So I'd like him to see them and he would have  
22 yesterday.

23 MR. QUINN: You raised the specter of perjury  
24 specifically related to my client.

25 THE COURT: That's not true. That's not true.

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1 MR. QUINN: That's how it's conveyed to me. Without  
2 having had the benefit, having learned about this entire matter  
3 an hour-and-a-half ago.

4 THE COURT: I'm ordering you to produce your clients  
5 in the courtroom. If you don't do it, I will consider contempt  
6 proceedings against both of you. You leave me no choice.  
7 There is nothing wrong with bringing back a witness who  
8 testified in a public trial to stand here for a minute, walk in  
9 and walk out.

10 I am not a prosecutor. I'm not the police. I'm not  
11 bound to any rules of lineup, show-ups, or anything else. I  
12 want the man to see these two people up or down yes or no.  
13 That's the end of it.

14 MR. MOSCHELLA: If the results of that show-up, that  
15 identification results in a referral to a prosecutorial  
16 authority for that --

17 THE COURT: I have no idea now what it's going to  
18 result in. I can't tell you -- I can't predict the future.

19 MR. QUINN: That's why we can't produce them, your  
20 Honor.

21 THE COURT: Can't produce them?

22 MR. QUINN: That's correct. I would be abrogating --

23 THE COURT: I'm ordering you to produce them. I want  
24 to ask them more questions. They were a witness at this trial.  
25 As far as I'm concerned, they're being recalled as a witness at

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1 this trial. I'll make it simpler. I have questions for them.  
2 His testimony has raised questions in my mind that I want to  
3 ask these witnesses.

4 MR. QUINN: Your Honor, obviously, if they don't  
5 appear you can strike their testimony. I understand that.

6 THE COURT: That's a thought.

7 MR. QUINN: You're asking me to put my client at risk  
8 for criminal prosecution. You're asking me to abrogate his  
9 Fifth Amendment rights.

10 THE COURT: No, I'm not asking you to abrogate his  
11 Fifth Amendment rights. I just told you. It is not  
12 testimonial to stand in this room. That's not a statement.  
13 And you know that.

14 MR. QUINN: I do. But they also testified  
15 yesterday --

16 THE COURT: They did. Under oath. And that's on the  
17 record.

18 MR. QUINN: Which has been relayed to me the court has  
19 opined that it could be potentially perjurious and because of  
20 that I cannot produce my client.

21 THE COURT: You're ordered to produce your client for  
22 further testimony. I have further questions of both of those  
23 witnesses that arose out of today's testimony. The court  
24 recalls the witnesses.

25 MR. QUINN: Would the court, at the very least, grant  
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1 us the ability to review transcripts both from yesterday's  
2 testimony --

3 THE COURT: It won't --

4 MR. QUINN: -- and the proceedings today.

5 THE COURT: It won't make any difference to me. I  
6 have further questions for these witnesses. If they wish to  
7 take the stand and take the Fifth as to any further questions,  
8 that's okay. They have the right to do that. I have further  
9 questions that arose from today's testimony. I'd like to  
10 question those witnesses further.

11 MR. QUINN: It has to be this afternoon?

12 THE COURT: Well I wanted it this afternoon because  
13 Mr. Downs is here and I didn't want him to lose another day at  
14 work to have to come back in. But I'd like it to be when he  
15 can see them.

16 MR. QUINN: Judge, I haven't had the opportunity to  
17 review my client's testimony, Mr. Downs' testimony, the  
18 comments by the court.

19 THE COURT: It won't matter to me.

20 MR. QUINN: It does to me, Judge. I have to advise my  
21 client whether or not it's in his best interest to appear.

22 THE COURT: To appear. He has to appear.

23 It may be in his best interests to take the Fifth.  
24 But he has to appear.

25 He's directed to appear in this trial. I have further

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1 questions of a witness who testified at this trial.

2 He's entitled to take the Fifth as to questions. I  
3 understand that. There is no doubt about that. And you're  
4 right to advise him as to whether to take the Fifth. You may  
5 want to review the testimony.

6 But if I want to ask them further questions, they have  
7 to come back. If they take the Fifth, that's up to them.

8 MR. QUINN: Judge, I will indicate that I am going to  
9 instruct my client Jim Mahoney not to appear today. I have not  
10 had enough opportunity to review the transcripts, to discuss  
11 this matter with him and advise him properly. So I am  
12 instructing -- I am being, in fairness to the court, I am going  
13 to be instructing my client at his attorney's advice not to  
14 appear this afternoon.

15 THE COURT: And when will he appear? I am directing  
16 him to appear at this trial. I have further questions for  
17 those witnesses based on today's testimony. I'm directing them  
18 to appear in this courtroom.

19 I understand if you want it not to be today so you can  
20 spend all this time going over it. I'm still going to direct  
21 them to appear. It doesn't matter how much you review it, but  
22 I understand you don't feel prepared to counsel him properly.  
23 That's fair.

24 When is he going to appear.

25 MR. QUINN: Judge, I won't know until I've had the  
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1 opportunity to review the paperwork and I'm not guaranteeing --

2 THE COURT: It's not up to you. And it's not up to  
3 him. I'm in the middle of a trial.

4 Are you in the habit of telling a court I'll get there  
5 when I get there?

6 If you're not going to do it today, you're going to do  
7 it Monday. That's the end of it.

8 I have to have a commitment as to when this client is  
9 coming into this courtroom.

10 MR. MOORE: Judge, Mr. Downs can be here on Monday.

11 THE COURT: Monday.

12 MR. CHARNEY: We can provide the transcripts to  
13 counsel this evening.

14 THE COURT: Monday. I'll see your clients and you  
15 Monday. They're directed to be here Monday. I have questions  
16 for them. And how you proceed with those questions is up to  
17 you.

18 MR. QUINN: Very good, Judge.

19 MR. MOSCHELLA: Thank you, your Honor.

20 THE COURT: We start at 10:00.

21 Mr. Downs, there is no point in staying any further  
22 now. They're not going to be here today. Thank you.

23 MR. MARUTOLLO: May I proceed, your Honor?

24 THE COURT: In a minute.

25 All right, Mr. Marutollo.

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1 MR. MARUTOLLO: Thank you, your Honor.

2 BY MR. MARUTOLLO:

3 Q. Just going back, Mr. Ourlicht, we were discussing the  
4 second incident, February 2008 incident. And I just asked you  
5 some questions about your friend Anthony and you had testified  
6 that Anthony was the only other person present for this stop,  
7 right?

8 A. Correct.

9 Q. And you testified that Anthony was your roommate at the  
10 time the deposition was taken but that you could not find out  
11 his last name. And I then directed you to page 116 of your  
12 deposition transcript, lines 6 through 9 to have you read those  
13 lines to yourself to see if that refreshed your memory about  
14 whether you could find out his name.

15 A. Okay.

16 Q. So does that refresh your memory that you could not really  
17 find out his last name?

18 A. Well, it's not that I said no. I said not really, meaning  
19 I didn't know how at that time I was going to get that  
20 information to you.

21 Q. Even though Anthony lived with you?

22 A. Correct. But at this time, when I took the deposition, it  
23 was May 14. And he already went back to Connecticut at that  
24 point. And I moved out and transferred schools. And I lost  
25 contact with him unfortunately.

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1 Q. And Anthony was one of your Facebook friends, right?

2 A. But I haven't -- I haven't been on Facebook since 2008.

3 Q. You haven't been on Facebook since 2008?

4 A. Yeah. 2008. Maybe 2009. Somewhere.

5 Q. 2009?

6 A. Yeah.

7 Q. But at the time of your deposition which was also in  
8 2009 --

9 A. But --

10 Q. -- you did have a Facebook account, right?

11 A. I did but I didn't have the password and everything  
12 accessible to me. And I didn't go -- I didn't log onto it.

13 Q. You didn't have Anthony's phone number?

14 A. I did at the time but -- actually I don't -- I should have  
15 had his phone number but I don't know what was in my phone at  
16 that time.

17 Q. So just to be clear you were living with this person during  
18 the year at St. John's, right?

19 A. Correct.

20 Q. He's the only other person who is a witness to this stop  
21 beside the officers?

22 A. Correct.

23 Q. And you couldn't find his last name?

24 A. I didn't know the last name at the time. I mean --

25 Q. You couldn't find it?

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1 MS. HOFF VARNER: Objection. It's a  
2 mischaracterization of the testimony.

3 THE COURT: He didn't say he couldn't find it. He  
4 said he didn't know how to go about it, something like that.  
5 He didn't say it was an impossibility. He said he didn't know  
6 how he would pursue it.

7 MS. HOFF VARNER: Thank you.

8 Q. Just going back to the end of this February incident, you  
9 were wearing the same jacket you wore during the January 30,  
10 2008 incident?

11 A. Correct.

12 Q. And that was that black Marmot jacket that had six pockets  
13 in it, correct?

14 A. Correct.

15 Q. And that's the same jacket that could fit a five-subject  
16 notebook in one of the pockets?

17 A. In the front pocket, yes.

18 Q. And you were carrying your keys, wallet, passport, phone  
19 and some Advil in your pockets during this February incident,  
20 right?

21 A. Correct.

22 Q. And you allege that a black Lincoln Town Car pulled up from  
23 behind you and Anthony, correct?

24 MS. HOFF VARNER: Objection. That's not what he  
25 actually alleged.

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1 THE COURT: I don't remember.

2 MS. HOFF VARNER: The testimony --

3 THE COURT: Well, you shouldn't coach me.

4 What did you say happened?

5 THE WITNESS: I said it was a dark colored -- it

6 was -- I couldn't tell for sure if it was black. It was

7 nighttime. But it was a darker colored car.

8 Q. You don't know if the car had a New York license plate,

9 correct?

10 A. I did not see the license plates.

11 Q. And there were four individuals in the car, right?

12 A. Correct.

13 Q. And you can only describe the driver as a white male with

14 blond hair in his mid 30s wearing a sweatshirt and a hat that

15 possibly had a New York logo on it, right?

16 MS. HOFF VARNER: Objection. It mischaracterizes the

17 testimony again.

18 THE COURT: Is that what you said?

19 THE WITNESS: I -- yeah, they all looked similar.

20 They were wearing hoodies, and New York hats and --

21 THE COURT: Is it true that you described the driver

22 as a white male with blond hair in his mid 30s wearing a

23 sweatshirt and a hat that possibly had a New York logo on it?

24 THE WITNESS: It was a lightish colored hair. I don't

25 know if it was blond. But, yeah, that sounds --

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1 THE COURT: Sounds right?

2 THE WITNESS: Yeah.

3 Q. And you could only describe the person in the front  
4 passenger's seat as a big white male in his mid 30s wearing a  
5 hat and a hoodie; is that right?

6 MS. HOFF VARNER: Objection. It --

7 THE COURT: Is that your description?

8 THE WITNESS: A green hoodie.

9 They were all dressed similar. So they all had either  
10 hooded sweatshirts on and jackets -- and/or jackets. And they  
11 all had baseball caps. So they were all dressed very similar.

12 THE COURT: Okay.

13 Q. And you testified that the driver and the passenger showed  
14 you his badge, correct -- showed you their badge, correct?

15 A. The passenger.

16 Q. Well with respect to that badge. At the time of your  
17 deposition you could not remember any details about the badge,  
18 correct?

19 A. I believe I said it was on a dog chain and it had a leather  
20 case. It was in a leather case.

21 Q. But you couldn't remember the color of the badge or any  
22 other numbers on the badge, right?

23 A. Right. No. It wasn't -- it wasn't -- it was a flat -- he  
24 showed it to me and then he put it away. To let me know he was  
25 police.

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1 Q. Now again with respect to this February incident, the  
2 individuals inside the Town Car asked you to come to the  
3 window, correct?

4 A. Yeah. Yes.

5 Q. The individuals inside the car said, "Excuse me. Could you  
6 come here?"

7 A. Something along those lines, yes.

8 Q. And the individual did not pull out a weapon at that point,  
9 right?

10 A. No. They didn't pull out weapons at all.

11 Q. And you immediately assumed that they were police officers,  
12 right?

13 A. I knew they were police officers. Yes.

14 Q. And then you decided to walk over to the car, right?

15 A. Usually when police officers ask you to speak to them, you  
16 do as they ask, especially if you're alone only with one other  
17 person at nighttime. So yes, I did approach the car.

18 THE COURT: At their direction?

19 THE WITNESS: At their direction.

20 THE COURT: Right.

21 Q. Well was it at their direction or was it a question that  
22 was asked of you?

23 A. No. They asked me to come to the car.

24 Q. And you responded by walking over to the car?

25 A. Yes.

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1 Q. And as you walked over to the vehicle you said something to  
2 the effect of: What's up? Or: What's going on? Correct?

3 A. Correct.

4 Q. And the individuals in the car informed you that they were  
5 police and looking for guns, right?

6 A. Correct.

7 Q. And you responded: Oh, all right. Correct?

8 A. Well, yeah. When he said we're looking for guns and we're  
9 police and he showed me his badge and everything like that,  
10 yeah, I was like okay.

11 Q. And the individuals in the car then asked for your ID,  
12 correct?

13 A. Correct.

14 Q. And you provided them with your ID?

15 A. My passport and my St. John's ID.

16 Q. And after providing them with the ID, the individuals  
17 exited the vehicle, right?

18 A. Correct.

19 Q. And after they exited the vehicle, you claimed that they  
20 stopped you and patted you down, correct?

21 A. The --

22 MS. HOFF VARNER: Objection to the characterization.  
23 He said after they exited the vehicle you claim they stopped  
24 you and patted you down, which is a mischaracterization of the  
25 testimony.

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1 And also the legal definition of when a stop occurred  
2 is not really one that this witness has testified to.

3 THE COURT: Sustained. Just please rephrase.

4 Q. Okay. After they exited the vehicle you claim that they  
5 approached you and patted you down, correct?

6 A. Correct. They told me to back up and get against the fence  
7 that was there. And they started patting me down and going in  
8 my pockets.

9 Q. And these individuals indicated repeatedly that they were  
10 looking for guns, right?

11 A. Yes. They kept saying: We're only looking for guns. We  
12 don't care about BS drugs. We don't care about that stuff.  
13 Only looking for guns out here.

14 Along those lines.

15 Q. Now during this pat-down, you observed your friend Anthony  
16 talking to one of the individuals, right?

17 MS. HOFF VARNER: Objection to the characterization as  
18 a pat-down. The witness testified that it was a search.

19 THE COURT: That's true.

20 Q. During this encounter you observed your friend Anthony  
21 talking to one of the individuals, right?

22 A. There were four individuals in the car. They all got out  
23 and three of them came to me and the other one individual was  
24 talking to Anthony, yes, correct.

25 Q. And you heard one of the individuals tell Anthony that he

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1 smelled like weed, right?

2 A. Correct.

3 Q. And you saw the officers search your friend Anthony, right?

4 A. Yes, I did at that point.

5 Q. So the officers did search Anthony?

6 A. Yeah. He -- they went into his pocket.

7 But I was already searched before any of that had ever  
8 happened. Before the officer said that's him, because while  
9 I -- as soon as I --

10 Q. Just to be clear. You just testified that they went into  
11 Anthony's pockets, right?

12 A. Yes.

13 Q. And you saw that Anthony had a ten dollar bag of weed on  
14 him, right?

15 A. Correct.

16 MS. HOFF VARNER: Objection to the ten dollar  
17 characterization. He never said that.

18 MR. MARUTOLLO: He said it at as his deposition, your  
19 Honor.

20 THE WITNESS: You asked me what type, to describe it.  
21 And that was the best way I was able to -- the amount of  
22 marijuana that he was carrying.

23 THE COURT: It was a small amount?

24 THE WITNESS: It was like this much.

25 THE COURT: Yeah.

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1 Indicating for the record a very small circle with his  
2 thumb and first finger.

3 Q. And throughout this encounter you never asked the officers  
4 for their names, right?

5 A. Correct. It was uncomfortable. I didn't feel comfortable  
6 enough to do that.

7 Q. Now you claim that you were stopped based on your race  
8 because of the way you were treated versus the way Anthony was  
9 treated, right?

10 A. Correct.

11 Q. But Anthony wasn't free to leave either, right?

12 A. No. He wasn't -- no, he wasn't free to leave.

13 Q. And he was also searched, right?

14 A. Yes, he was.

15 Q. Now, on August 24, 2009 you participated in a photo array  
16 to identify the NYPD officers allegedly involved in this  
17 February 2008 incident, right?

18 A. Correct.

19 Q. And you did not definitively identify anyone from the  
20 photographs as the officers that allegedly stopped you in  
21 February of 2008?

22 MS. HOFF VARNER: Objection to the term definitively.  
23 He doesn't know what the outcome of any of that photo array  
24 was.

25 THE COURT: The what?

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D4j9flo4

Ourlicht - cross

1 MR. MARUTOLLO: He testified at his deposition --

2 THE COURT: He doesn't know what the outcome?

3 Did you identify anybody from the photo array?

4 THE WITNESS: I did not a hundred percent -- I  
5 couldn't do that. I said this could -- this person looks  
6 familiar but I couldn't say it was him or him because I  
7 wasn't --

8 THE COURT: You pointed out who you thought looked  
9 familiar?

10 THE WITNESS: Yes, I did.

11 THE COURT: Do you know how many different ones you  
12 pointed out?

13 THE WITNESS: A good amount of like people.

14 THE COURT: Like more than three guys, four guys? How  
15 many guys did you point out, do you remember?

16 THE WITNESS: I don't know.

17 THE COURT: Okay.

18 Q. Isn't it true that you pointed out seven photographs that  
19 may possibly have been one of officers?

20 MS. HOFF VARNER: He just testified that he doesn't  
21 know. There has been nothing to refresh his recollection.

22 MR. MARUTOLLO: I can refresh your recollection.

23 THE COURT: Did he say seven at the deposition?

24 MR. MARUTOLLO: Your Honor, if you count the numbers  
25 there are seven.

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D4j9flo4 Ourlicht - cross

1 MS. HOFF VARNER: Your Honor --

2 THE COURT: Count what numbers?

3 MR. MARUTOLLO: Basically at his deposition, you know,  
4 he was shown --

5 MS. HOFF VARNER: Your Honor --

6 THE COURT: One second, please.

7 MR. MARUTOLLO: He was shown a number of photographs.

8 THE COURT: Right.

9 MR. MARUTOLLO: If you count the number of photographs  
10 in which he said something to the effect of this officer may  
11 possibly have been the person or I'm not a hundred percent sure  
12 that number totaled seven.

13 THE COURT: Will you accept the lawyer's  
14 representation that you said it seven times?

15 THE WITNESS: Yes.

16 THE COURT: Okay.

17 Q. So turning your attention to the third incident, the  
18 June 2008 incident you discussed during your direct examination  
19 at the time of your deposition you did not even remember what  
20 month this alleged incident occurred, right?

21 A. Correct. I couldn't recall at the time.

22 Q. And you just described it during your deposition as  
23 springish, correct?

24 THE COURT: As what? I'm sorry?

25 MR. MARUTOLLO: Spring and then he put ish.

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D4j9flo4 Ourlicht - cross

1 Q. Springish? Is that correct?

2 A. I believe so, yes.

3 Q. And at the time of your deposition you only knew the year  
4 of the alleged incident, correct?

5 A. I don't recall.

6 Q. I could refresh your memory if you want to turn to page 152  
7 lines 20 through 21.

8 Actually you want to go 18 to 21 if that reminds you.

9 A. Okay.

10 (Pause)

11 MS. HOFF VARNER: I just ask the witness to refer all  
12 the way to page 153 line 2 for the full testimony.

13 THE COURT: So read all the way to 153, line 2.

14 MS. HOFF VARNER: Yes, your Honor.

15 THE COURT: Read all that.

16 THE WITNESS: Okay.

17 Q. Does that refresh your recollection that you only knew the  
18 year of the alleged incident?

19 A. At this time, yes.

20 Q. Now, you also, as we discussed earlier, signed an affidavit  
21 dated November 1, 2011 in which you stated that the date of the  
22 alleged incident was a weekday morning in early June 2008,  
23 right?

24 A. Correct.

25 Q. And you've since testified that the incident may have

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D4j9flo4 Ourlicht - cross  
1 occurred on June 6 or June 9, 2008, right?

2 A. Correct.

3 Q. And you remember that because it just so happened to be the  
4 same day that you were meeting with your attorneys, right?

5 A. Right. I was supposed to meet up with them later, later in  
6 that day.

7 Q. And ultimately you're still not sure of the exact date of  
8 incident, right?

9 A. Correct.

10 Q. Now, in any event the third incident here occurred at 115th  
11 and Park in Harlem; is that correct?

12 A. Correct.

13 Q. And you were sitting with your friend Lionel Simpson on a  
14 bench in the building seating area at the time of the alleged  
15 incident, right?

16 A. Correct.

17 Q. And you claim that there were two to three other men around  
18 on different benches in that area, right?

19 A. There was two to three people around that area, different  
20 benches.

21 Q. And you were sitting on the bench for about ten minutes,  
22 right?

23 A. Yeah.

24 Q. And at that point you claim that two male uniformed police  
25 officers walked quickly through the housing complex, right?

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D4j9flo4 Ourlicht - cross

1 A. Correct.

2 Q. You claim that the officers took their guns out and yelled:  
3 There's a gun around here. Everybody get on the floor.

4 A. Correct.

5 Q. And at the time you claim that the officers were yelling a  
6 police van pulled up and three to four individuals got out of  
7 the police van, right?

8 A. Correct.

9 Q. And you claim that these other officers then ran towards  
10 the housing complex, right?

11 A. Correct.

12 Q. And after this incident unfolded you testified you were on  
13 the ground, correct?

14 A. Correct.

15 Q. And while you were on the ground you allege that the  
16 officers informed you that they received reports that there is  
17 a gun around here, right?

18 A. Correct.

19 Q. And while you were on the ground these individuals patted  
20 you down, right?

21 A. Correct.

22 Q. They didn't take anything out of your pockets, right?

23 A. Correct.

24 Q. And at the end of the encounter the individuals told you  
25 again that somebody had a gun around here and apologized,

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D4j9flo4 Ourlicht - cross

1 correct?

2 A. Something along those lines, yeah. Like sorry about that,  
3 but we got a call that there was a gun in the area, so, you  
4 know. And then you guys can leave.

5 Q. And you testified that you had to wait around, right?

6 A. I'm sorry?

7 Q. You had to wait around that area to see if there was  
8 actually a gun there?

9 A. No. I had just -- I was, you know, after laying on the  
10 floor for however time and having a gun pointed at me, the only  
11 thing I wanted to do was get out of that situation. So I did  
12 not wait around. I left as soon as I was -- I got the  
13 permission from the police officers that I could leave, I left.

14 Q. And the officers never made any comments about your race  
15 during this incident either, correct?

16 A. Correct.

17 Q. Now, again, with respect to this June incident you only  
18 know that the officers were white males in uniform, right?

19 A. Correct.

20 MS. HOFF VARNER: Objection. Mischaracterizes his  
21 testimony.

22 THE COURT: Did you know more than that?

23 THE WITNESS: Well, yes. There were two officers that  
24 I specifically remember of detail. One of them was really big  
25 and had a baldhead. And the other one had gingerish colored

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D4j9flo4 Ourlicht - cross

1 hair. And those were the only -- because most of the time I  
2 was laying down on the floor. But after I got up and, you  
3 know, was talking that's when I -- I noticed those guys.

4 Q. You never mentioned those hair colors at your deposition  
5 though, right?

6 A. Yes, I did.

7 MR. MARUTOLLO: Your Honor, go through this if you'd  
8 like. Perhaps we can stipulate --

9 MS. HOFF VARNER: Alternatively we could just look at  
10 page 167 of his deposition transcript, lines 6 through 12.

11 THE COURT: Which say.

12 MS. HOFF VARNER: Which say, "There was a bunch of  
13 them. I receive vividly one with a baldhead, big guy with a  
14 baldhead, and one of them with orange hair.

15 THE COURT: I guess you were in error, Mr. Marutollo.

16 MR. MARUTOLLO: I believe it was just the gingerly  
17 aspect, your Honor.

18 THE COURT: I think you were in error, right?

19 MR. MARUTOLLO: I admit that I was in error.

20 THE COURT: So we can move on.

21 MR. MARUTOLLO: I do want to note that the hair  
22 color --

23 THE COURT: I think orange and ginger are the same.

24 Q. And again you participated in a photo array on August 24,  
25 2009 about this incident, right?

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D4j9flo4 Ourlicht - cross

1 A. Correct.

2 Q. And again you did not definitively identify anyone from the  
3 photographs as these officers that were allegedly present for  
4 this incident, right?

5 A. Correct.

6 Q. And instead you only identified the photographs of eleven  
7 individuals who may possibly have been the NYPD officers  
8 present at the incident, right?

9 A. Correct.

10 Q. Now you testified about three stops today, right?

11 A. Yes, I did.

12 Q. And you allege that you were stopped by only white males,  
13 right?

14 A. In those three incidents, yes.

15 Q. But you yourself have testified that you're biracial,  
16 right?

17 A. Yes, I am.

18 Q. And you've testified on direct examination you are black  
19 and white, right?

20 A. Yes, I am.

21 Q. So you don't know if any of the officers who stopped you  
22 were biracial, right?

23 MS. HOFF VARNER: Objection.

24 THE COURT: You don't know, do you?

25 THE WITNESS: No, I don't. I don't know.

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D4j9flo4 Ourlicht - cross

1 THE COURT: He doesn't know.

2 Q. And you're testifying that you were never stopped by a  
3 Hispanic officer?

4 A. In these three incidents, no.

5 Q. Or an African-American officer?

6 A. In these three incidents, no.

7 Q. Or a female officer?

8 A. No.

9 Q. Are you aware that the NYPD is now made up of a majority  
10 minority officers?

11 MS. HOFF VARNER: Objection.

12 THE COURT: What does that matter? He answered your  
13 questions. He does not believe he was stopped by a woman. He  
14 does not believe he was stopped by an African-American. And he  
15 does not believe he was stopped by a Hispanic in these three  
16 incidents. That's all that matters.

17 MR. MARUTOLLO: May I have one moment?

18 No further questions.

19 THE COURT: Thank you, Ms. Hoff Varner.

20 MS. HOFF VARNER: May I have one moment.

21 THE COURT: Sure.

22 (Pause)

23 REDIRECT EXAMINATION

24 BY MS. HOFF VARNER:

25 Q. Just a few questions, Mr. Ourlicht.

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D4j9flo4 Ourlicht - redirect

1 With respect to the first stop that took place on  
2 January 30, 2008 you testified that the officer searched you  
3 and took objects out of your pockets, correct?

4 A. Correct.

5 Q. Were those objects that you were carrying on you in the  
6 same pocket or in different pockets?

7 A. Everything that was in any of my pockets was out and on the  
8 floor.

9 Q. But the -- you testified that you had a notebook and keys  
10 and a wallet and a phone?

11 A. Mm-hmm.

12 Q. Were those things all in the same pocket?

13 A. No, they were not.

14 Q. And turning to the second stop. You just gave some  
15 testimony about what the badge looked like that the officers  
16 showed you. Do you remember giving that testimony?

17 A. Yes.

18 Q. Do you remember the color of the case of the badge?

19 A. It was -- I remember it was a leather badge. I -- I  
20 don't -- you know I don't want to assume anything of what color  
21 it was.

22 Q. Do you recall testifying in your deposition that it was a  
23 black leather badge?

24 MR. MARUTOLLO: Objection, your Honor. That's leading  
25 the witness.

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Ourlicht - redirect

1 THE COURT: We don't need to waste time.  
2 You don't remember saying that at the deposition or  
3 you do?  
4 THE WITNESS: I don't remember saying it.  
5 THE COURT: So read the deposition.  
6 MS. HOFF VARNER: So deposition page 132, line 13  
7 and -- 13 through 16.  
8 "Q. Was the badge in some sort of a case?  
9 "A. It was leather, a leather case-ish.  
10 "Q. What color case?  
11 "A. Black. It was a dark collar black."  
12 THE COURT: Sos that's what you said then?  
13 THE WITNESS: Yeah, it was a -- correct.  
14 Q. At the time of that second stop you testified that the  
15 officer said "excuse me" and asked you to come over to the  
16 window, correct?  
17 A. Correct.  
18 Q. At that point did you understand that you had an option not  
19 to come over to the window?  
20 A. No, I didn't.  
21 Q. Why not?  
22 A. Because usually when a police officer -- you know with guns  
23 and they tell you to do something, you do it. It's a respect  
24 thing. If somebody were -- anybody, you know, were to approach  
25 me on the street whether it be a homeless person or not you

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D4j9flo4 Ourlicht - redirect

1 know and ask me a question I'm not going to just walk by them  
2 and ignore them.

3 Q. Did it feel like an ordinary question or did it feel like  
4 an order?

5 A. Usually when the police tell you to do something you do  
6 what they say.

7 Q. And at the time that they started interacting with you did  
8 you feel like you were free to leave that encounter?

9 A. No.

10 Q. At some point you said "all right" to the police officer.  
11 Do you remember saying that?

12 A. I don't recall.

13 Q. You just told Mr. Marutollo that when the police started  
14 talking to you at one point you said "all right." Do you  
15 remember that?

16 THE COURT: Which of the three stops?

17 MS. HOFF VARNER: We're still on the second stop.

18 THE WITNESS: I don't recall. Maybe.

19 THE COURT: Is that the one where they said everybody  
20 get down?

21 MS. HOFF VARNER: This is the stop with the livery car  
22 and the four officers who were in plain clothes.

23 Q. So I believe that you testified that they said: We're  
24 police. We're looking for guns.

25 And then you responded: Oh, all right. And then you

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D4j9flo4 Ourlicht - redirect

1 gave them your ID. Does that refresh your recollection?

2 A. Yes.

3 Q. So my actual question is when you said "all right," did you  
4 mean that it was all right for them to stop and search you?

5 A. No. I was understanding that they were police and they  
6 were looking for guns and -- you know --

7 MR. MARUTOLLO: Objection, your Honor. In terms of  
8 that last answer. To those words that he just uttered, your  
9 Honor.

10 THE COURT: That's fine.

11 MR. MARUTOLLO: Your Honor, I think if I can clarify  
12 my objection it's really to the -- he said "all right" and to  
13 go into anymore discussion about what he said, he's testified  
14 he said "all right" so the words speaks for --

15 THE COURT: She's asking what was his understanding of  
16 what the police said. He's allowed to give his understanding.  
17 We've had that kind of question a hundred times in this case,  
18 What was your understanding of what so and said?

19 MR. MARUTOLLO: I believe the question was what was  
20 the meaning of "all right."

21 THE COURT: Understanding what the police said. They  
22 said they were looking for guns.

23 I'm going to allow it. Objection overruled. Go  
24 ahead.

25 Q. Did you ever consent to being stopped or searched by the

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D4j9flo4 Ourlicht - redirect

1 police?

2 A. No. I didn't think I had a choice.

3 Q. You and Anthony were both searched in that incident,  
4 correct?

5 A. Correct.

6 Q. You were searched before Anthony was searched, correct?

7 A. Correct.

8 MR. MARUTOLLO: Objection. This has been asked and  
9 answered.

10 THE COURT: We have had that a number of times.

11 MS. HOFF VARNER: I thought it might have been  
12 unclear.

13 THE COURT: No, it wasn't unclear.

14 MS. HOFF VARNER: Thank you, your Honor.

15 Q. How much light was on the street on the night of  
16 February 21, 2008 when you were stopped by those four police  
17 officers?

18 A. It was nighttime out and the area was -- it was  
19 residential. So it was houses. There -- there is a couple of  
20 streetlights but it was -- compared to, you know, I live in  
21 Manhattan, it's dark.

22 Q. Was your inability to definitively identify officers in the  
23 photo array related to the fact that it was nighttime and dark  
24 when you were stopped?

25 A. Yes.

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D4j9flo4 Ourlicht - redirect

1 Q. Similarly with respect to the third incident you were lying  
2 on the ground for the majority of that incident, correct?

3 A. Correct.

4 Q. And so it was -- was it hard to see the faces of various  
5 officers?

6 A. Correct. I was afraid to lift my head up too high because  
7 I didn't know what would have happened to me if they thought I  
8 was, you know, making the wrong movement. So most of the time  
9 my chin was on the floor, my forehead or whatever.

10 Q. Was your inability to definitively identify any officer at  
11 the photo array related to the fact that you were lying  
12 facedown for the majority of that incident?

13 MR. MARUTOLLO: Objection to the leading nature of  
14 that question, your Honor.

15 THE COURT: I'll allow it.

16 Were you facedown for most of this incident?

17 THE WITNESS: Yes.

18 MS. HOFF VARNER: Just one moment, your Honor. I  
19 think I'm done. Let me just check.

20 No further questions.

21 MR. MARUTOLLO: Just a few clarifying questions.

22 RE-CROSS EXAMINATION

23 BY MR. MARUTOLLO:

24 Q. Mr. Ourlicht, you just testified on redirect examination  
25 about the second February 2008 incident, right?

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Ourlicht - recross

1 A. Correct.

2 Q. And you said that you didn't feel free to leave because  
3 when somebody asks you something like "excuse me, could you  
4 come here" and have their guns out you don't feel free to  
5 leave, right?

6 A. I believe I said that that's why I approached them. But my  
7 fear of leaving was because, one, I was -- my back was to a  
8 fence and three officers were surrounding me. So that's part  
9 of the reason why I felt like I couldn't leave.

10 Q. I'm sorry. I'm talking about when the livery car first  
11 came up to you and you had that first exchange.

12 A. Okay.

13 Q. The individuals inside the car said, "Excuse me, could you  
14 come here?"

15 During that initial exchange, those officers never  
16 took out their guns, right?

17 A. Correct. They never pulled out guns throughout the whole  
18 time.

19 Q. So throughout the entire February incident they never took  
20 out their guns, right?

21 A. No. Their guns were right here in plain sight.

22 Q. But they never pulled their guns out, right?

23 A. No, they did not. They did not do that. Thank God.

24 Q. The only thing they said to you during that first encounter  
25 with them was, "Excuse me, could you come here," right?

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Ourlicht - recross

1 A. Right.

2 MS. HOFF VARNER: Objection.

3 A. And then after that they said we're looking for guns. That  
4 was their sentence completely.

5 MR. MARUTOLLO: No further questions.

6 THE COURT: Anything further?

7 MS. HOFF VARNER: Nothing, your Honor.

8 THE COURT: Thank you. All set.

9 (Witness excused)

10 MR. CHARNEY: Plaintiffs call Assistant Commissioner  
11 Philip McGuire.

12 MR. MOORE: Just to advise you that we were attempting  
13 to work something out but we were unable to, so they will be  
14 back at 10:00 on Monday.

15 PHILIP McGUIRE,

16 called as a witness by the Plaintiffs,

17 having been duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MR. CHARNEY:

20 Q. Good afternoon, Commissioner.

21 A. Good afternoon.

22 Q. Commissioner McGuire what is your educational background?

23 A. I have a bachelor's degree in electrical engineering from  
24 Manhattan College.

25 I have a master's degree in electrical engineering and

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D4j9flo4

McGuire - direct

1 systems analysis from what was then Brooklyn Polytechnic.

2 And I have a master's degree in urban and public  
3 affairs from Carnegie Mellon University in Pittsburgh.

4 Q. Have you taken any courses in statistics?

5 A. Yes.

6 Q. Commissioner, when did you join the New York police  
7 department?

8 A. 1973 July.

9 Q. And currently you are head --

10 THE COURT: That's 40 years?

11 THE WITNESS: Getting there.

12 Q. Happy anniversary I guess coming.

13 Currently you are the head of the crime analysis and  
14 program planning section of the OMAP office in NYPD?

15 A. Yes, I am.

16 Q. So for purposes of my questioning I'm going to use a couple  
17 acronyms to speed things up. I want to make sure we understand  
18 each other. So I'm going to refer to crime analysis and  
19 program planning section as CAPPS. Is that fine?

20 A. Yes.

21 Q. And then when I use the term OMAP I'm referring to the  
22 office of management analysis and planning, okay?

23 A. Yes.

24 Q. And you've been the head of CAPPS since 1994; is that  
25 right?

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D4j9flo4 McGuire - direct

1 A. Well I was in the unit before that. But I've been an  
2 assistant commissioner since then.

3 Q. And so have you been a head of the CAPPs unit since 1994?

4 A. Yes.

5 Q. And you've been working in OMAP and what it used to be  
6 called, I guess, the office of programs and policies since --  
7 since the 1970s, correct?

8 A. Yes.

9 Q. Now the head of OMAP, the commanding officer of OMAP is  
10 Jack Donahue; is that right?

11 A. Yes.

12 Q. And then OMAP is under the -- under the supervision of  
13 Deputy Commissioner Michael Farrell, correct?

14 A. Yes.

15 Q. And Commissioner Farrell is the deputy commissioner of  
16 strategic initiatives?

17 A. Yes.

18 Q. Now one of the things that CAPPs does is to manage the  
19 NYPD's crime reporting system, correct?

20 A. Yes.

21 Q. And so that would include managing the what's called the  
22 OmniForm database, right?

23 A. Yes.

24 Q. And the OmniForm database includes the electronic versions  
25 of all crime complaint reports that are filed with the NYPD,

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D4j9flo4 McGuire - direct

1 correct?

2 A. Yes.

3 Q. So it's fair to say that you're familiar with the NYPD's  
4 crime complaint data, correct?

5 A. Yes.

6 Q. Now, are you also familiar with a study that the New York  
7 state Attorney General's office did in 1999 of the New York  
8 police department's stop-and-frisk practices?

9 A. Yes.

10 Q. And, in fact, you were asked at that time to review the  
11 report and to do a critique of it, correct?

12 A. Yes.

13 Q. I'm going to show you what's been marked as Plaintiffs'  
14 Exhibit 333.

15 THE COURT: Is that already in evidence?

16 MR. CHARNEY: It's not in evidence so I have to show  
17 it to him.

18 THE COURT: Right.

19 Q. Commissioner, if you need a minute I was just going to ask  
20 you if you could tell me if you recognize this document.

21 A. Yes.

22 Q. What is the document?

23 A. It's the report -- the Attorney General's report.

24 Q. So this is the report that you reviewed and did a critique  
25 of back in 1999; is that right?

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D4j9flo4

McGuire - direct

1 A. Yes.

2 MS. GROSSMAN: Your Honor, I just want to say that I  
3 believe this doesn't include all the appendices. It's just --  
4 there's missing information.

5 Q. Other than the appendices, does there appear to be anything  
6 else in your recollection that is missing from the body of the  
7 report?

8 A. It's been a long time since I have seen it.

9 Q. Okay.

10 THE COURT: I suppose you should be able to stipulate  
11 that the only part missing is the appendices.

12 Do you know of any other part that's missing,  
13 Ms. Grossman?

14 MS. GROSSMAN: Not at this point.

15 THE COURT: So that's it.

16 THE WITNESS: I think there was a cover.

17 MR. CHARNEY: There was a cover and for some reason on  
18 the Attorney General's website the cover is not available.

19 THE COURT: Other than the cover and the appendices,  
20 that's the report?

21 THE WITNESS: Yes.

22 MR. CHARNEY: So, your Honor, we would move for the  
23 admission solely again for purposes of notice. Not for the  
24 truth of the matters asserted.

25 THE COURT: This is a different report than the RAND  
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D4j9flo4  
report?

McGuire - direct

1

2

MR. CHARNEY: Yes.

3

THE COURT: What year was the RAND one?

4

MR. CHARNEY: The RAND one was 2007.

5

THE COURT: This is 1999?

6

MR. CHARNEY: Yes.

7

THE COURT: Any objection for the limited purpose?

8

MS. GROSSMAN: Yes, I have asserted my objections. I  
don't think it's relevant. It's 1999. It's dated. So we do  
object, but.

10

11

THE COURT: I guess it tells us notice as of 1999.

12

Can't be more.

13

MR. CHARNEY: We would think that the --

14

THE COURT: Can't be more or less than that. Whatever  
it contains is notice as of that date.

15

16

MR. CHARNEY: So we would move for the admission for  
purposes of notice.

17

18

THE COURT: Solely for that purpose.

19

MR. CHARNEY: I mean I guess '99 going forward.

20

THE COURT: I understand. Going forward. Whatever  
was in that report is deemed to have been given to the police  
department and it was theoretically aware of what was in the  
report as of 1999.

21

22

23

24

MR. CHARNEY: So it's admitted for that purpose?

25

THE COURT: Limited purpose, yes.

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D4j9flo4

McGuire - direct

1 (Plaintiffs' Exhibit 333 received in evidence)

2 Q. So, Commissioner, it's correct, right, that --

3 THE COURT: What was your position in 1999, the same  
4 as --

5 THE WITNESS: I was commissioner of -- the same.

6 THE COURT: Same?

7 THE WITNESS: Same place.

8 THE COURT: Position you have now?

9 THE WITNESS: Yes.

10 THE COURT: And you did receive this report, critique  
11 it?

12 THE WITNESS: Yes.

13 THE COURT: All right.

14 Q. So you were aware then as of 1999 that the Attorney  
15 General's office in this report found significant racial  
16 disparities in the NYPD's stop-and-frisk patterns, correct?

17 A. That's what they reported to have found, yes.

18 Q. And it found that these disparities -- again, I'm just  
19 asking you what they found -- the Attorney General's office  
20 found that these disparities existed even after controlling for  
21 crime, correct?

22 A. That's what they reported.

23 Q. And you're also aware and you were aware in 1999 that the  
24 Attorney General's office recommended a set of next steps to  
25 take in response to its findings, correct?

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D4j9flo4 McGuire - direct

1 A. I recall that there was something like that at the end of  
2 the report.

3 Q. And among the next steps that they recommended were that an  
4 open dialogue between the Attorney General's office and the  
5 police department around these findings and this data take  
6 place, correct?

7 A. That may have been, if you say it's there.

8 Q. Do you want to look at Exhibit -- actually you know what,  
9 I'll put it up on the screen now that it's in evidence just for  
10 the -- I'm going to show you page XVI of Exhibit 333.

11 Showing you page XVI of Exhibit 333. You can either  
12 look on the screen or a copy.

13 Do you see where it says, "In addition as part of the  
14 OAG's ongoing work in this area, the Attorney General seeks to  
15 open a dialogue with the department, as well as with scholars,  
16 community leaders, members of the organized bar, and others  
17 about the meaning of the UF 250 data and analysis and whether  
18 and what sort of changes might be appropriate in light of this  
19 report."

20 Do you see that?

21 A. Yes.

22 Q. And so you would agree that in 1999 you were aware that the  
23 Attorney General's office was seeking a dialogue with the  
24 police department about the meaning of the data and their  
25 analysis, correct?

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D4j9flo4 McGuire - direct

1 A. I probably did not focus much on that part of the report.

2 Q. Fair enough.

3 Do you know whether anybody else in the police  
4 department did focus on these next step -- the next step  
5 portion of the report?

6 A. I don't recall.

7 Q. So you don't have any knowledge whether, in fact, the NYPD  
8 did engage in such a dialogue with the Attorney General's  
9 office?

10 A. Not that I'm aware.

11 Q. And you don't know whether or not the police department  
12 discussed whether or not any changes should be made to the  
13 stop-and-frisk practices in light of this report, right?

14 A. At that particular point in time there were a lot of people  
15 looking at the stop-question-and-frisk data.

16 I'm not aware -- we prepared data for the city  
17 council, the U.S. Civil Rights Commission got involved. Other  
18 than people who were involved in getting data, I -- other than  
19 that, I don't know.

20 Q. So just -- and I'll just ask one more question and move on.

21 So you're not aware whether or not any officials in  
22 the police department did have discussions with the Attorney  
23 General's office about whether any changes should be made to  
24 the stop-and-frisk practices in light of this report?

25 A. No.

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McGuire - direct

1 Q. Now, you didn't agree with the Attorney General's findings,  
2 correct?

3 A. I had questions about them.

4 Q. So did you agree with the findings that there were racial  
5 disparities that should be looked at?

6 A. No.

7 Q. And, in fact, the New York police department went out and  
8 hired an outside consulting firm to analyze the same  
9 stop-and-frisk data that the AG's office had analyzed, right?

10 A. Yes.

11 Q. And the reason you hired this outside firm is because the  
12 NYPD wanted to have someone independent from the police  
13 department look at the data, correct?

14 A. I believe that was the reason, yes.

15 Q. So you don't consider the Attorney General's office to be  
16 an agency that's independent of the police department?

17 A. I don't think that's what that means.

18 Q. Well --

19 THE COURT: Can you answer the question. Do you  
20 consider them independent of the police department?

21 THE WITNESS: Well they are obviously independent  
22 politically.

23 THE COURT: Okay.

24 THE WITNESS: They're another part of government.

25 THE COURT: Okay.

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McGuire - direct

1 Q. And you would agree with me that Attorney General's office  
2 is the highest law enforcement office in New York State,  
3 correct?

4 A. I believe that's the way they're characterized, yes.

5 Q. And would you also agree that there have been situations or  
6 projects that the NYPD and the AG's office have collaborated  
7 on, right?

8 A. I suspect there have been.

9 Q. So you don't have any reason to believe that the Attorney  
10 General's office is in some way biased against the police  
11 department, right?

12 A. I have no reason to believe that they would be.

13 Q. Now, one of the responsibilities of CAPPs, your unit, is to  
14 provide reports on the New York police department's  
15 stop-question-and-frisk statistics on a quarterly basis to the  
16 New York City council, correct?

17 A. Yes.

18 Q. And your office, your unit has been responsible for doing  
19 this since 2002, correct?

20 A. Yes.

21 Q. And isn't it true that these quarterly reports to the city  
22 council are required under New York City law?

23 A. Yes.

24 Q. And that this requirement has actually been in place since  
25 at least the last quarter of 2002, correct?

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D4j9flo4 McGuire - direct

1 A. I don't know the exact date but it's around that era.

2 Q. Now do you recall that the NYPD failed to provide the  
3 quarterly stop-and-frisk reports to the city council from the  
4 fourth quarter of 2003 through the end of 2005?

5 A. What do you mean by failed?

6 Q. Well, you just testified that these reports were supposed  
7 to be provided on a quarterly basis, right?

8 A. Yes.

9 Q. Are you aware that there was a period of time as I just  
10 laid out for you, fourth quarter of 2003 until the end of 2005,  
11 where these reports were not being provided on a quarterly  
12 basis?

13 A. The unit that was producing those had become very  
14 backlogged in going through and keying them into a system and  
15 then quality reviewing them and preparing them for  
16 distribution.

17 (Continued on next page)

18

19

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21

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D4J8FLO5

McGuire - direct

1 Q. Is the answer then that yes, during this period of time  
2 that I just mentioned, the reports were not being provided to  
3 the City Council?

4 A. Probably that period of time. I don't recall the exact  
5 dates exactly. I have to go back and check on it.

6 MR. CHARNEY: I am going to show the witness a  
7 document that has been marked as Plaintiffs' 45. I used this  
8 yesterday with Inspector Riley to refresh recollection. I am  
9 not seeking to admit it into evidence, but I believe I will  
10 give defense counsel yet another copy.

11 Q. I want to see if this refreshes your recollection as to the  
12 period of time when the police department was not providing  
13 this data to the City Council.

14 You're free to read the whole thing, but if you want  
15 to look particularly at the second page where it says "but  
16 until yesterday." Do you see that?

17 Does that refresh your recollection that, having  
18 looked at this article, that from the end of 2003 through 2005,  
19 the department had not provided the quarterly data to the City  
20 Council?

21 A. Yes.

22 Q. Now, looking still at the article in front of you, it is  
23 true, though, that in February of 2007, the police department  
24 at that point did provide all four quarters of the 2006 stop  
25 and frisk data to the City Council, is that right?

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D4J8FLO5

McGuire - direct

1 A. Yes.

2 Q. Now, I want to move on to the RAND study. You recall that  
3 the RAND Corporation was hired to do a study of the police  
4 department's 2006 stop and frisk data, and they were hired to  
5 do this in March of 2007, correct?

6 A. Yes.

7 Q. So that was only about a month after the police department  
8 had provided the 2006 stop and frisk statistics to the City  
9 Council, correct?

10 A. Yes.

11 Q. And so would you agree with me that following the  
12 production of the 2006 statistics to the City Council in  
13 February of 2007, that there were concerns raised by members of  
14 the public and elected officials and others about the racial  
15 disparities that appeared in the 2006 stop data?

16 A. I don't know how to answer that. I don't remember what was  
17 in the press or the papers at that time.

18 Q. Looking at the document in front of you, does that --

19 A. It's one article.

20 Q. I guess, does that refresh your recollection that there  
21 were concerns raised?

22 A. Well, in this article there are.

23 THE COURT: That's not his question. Does reading the  
24 article to yourself refresh your own recollection that these  
25 questions were raised? If the answer is no, say no.

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McGuire - direct

1 A. Not really.

2 Q. Now, you're aware that the decision to hire the RAND  
3 Corporation to do this stop and frisk study was made only four  
4 months after the NYPD fatal shooting of Sean Bell, correct?

5 A. I guess so. The dates line up that way, sure.

6 Q. And you recall that following that shooting, there were  
7 concerns raised in the public, by elected officials and others,  
8 about whether or not that incident was in any way due to racial  
9 bias?

10 A. I seem to remember it being more about how many shots were  
11 fired and the problems with they being -- they had been in a  
12 nightclub.

13 Q. You don't recall anybody in the public or the press  
14 alleging or expressing concern that this incident may have been  
15 the result of racial bias on the part of police officers?

16 A. It may have been raised. That's not the salient point that  
17 I remember about that incident.

18 Q. Would you agree, though, that that incident did rekindle  
19 frustrations and suspicions in certain communities about  
20 whether or not the police department was engaged in racial  
21 profiling or racial bias?

22 A. I can't speak for those communities.

23 Q. I am asking does that -- that was badly worded.

24 Do you recall whether or not at that time hearing in  
25 the press or in the public or elected officials that this

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1 incident had rekindled some of those older frustrations and  
2 suspicions in these communities?

3 A. I may have heard that.

4 Q. Now, would you agree that the reason the NYPD wanted RAND  
5 to conduct this analysis was so that the NYPD could provide  
6 assurances to the public that the NYPD was not engaged in  
7 racial profiling?

8 A. I really don't know the reasons why the department decided  
9 to do it at that time.

10 Q. Is it your testimony that you had no role in the decision  
11 to hire RAND to conduct this study?

12 A. No, I had no role.

13 Q. Do you know who in the department made that decision?

14 A. The police commissioner.

15 Q. Are you just speculating or that's what you know?

16 A. It would have to have passed through him anyway. He would  
17 have to approve it.

18 Q. Do you know if the idea was first raised by Commissioner  
19 Farrell?

20 A. It may very well have been.

21 Q. But you don't know one way or the other?

22 A. No.

23 Q. Now, your involvement in the development of the RAND report  
24 included -- first of all, it included providing the RAND  
25 researcher, Dr. Ridgeway, with the data that he used to conduct

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D4J8FLO5 McGuire - direct

1 his analysis, correct?

2 A. Yes.

3 Q. And you were also responsible at a certain point for  
4 providing comments on the initial drafts of the report that  
5 Dr. Ridgeway did, right?

6 A. Yes.

7 Q. Now, the data that you did provide to Dr. Ridgeway to  
8 conduct his analysis, it included the NYPD's UF-250 data for  
9 2006, right?

10 A. Yes.

11 Q. And in addition to that, you also provided him with some  
12 summary data, which was in a spreadsheet form, that provided  
13 tallies of the race of suspects and arrestees for various  
14 categories of crime for the years 2005 and 2006, correct?

15 A. Yes. I think it also had victim data in it too.

16 Q. I want to show you another exhibit.

17 I am going to show you what has previously been  
18 marked -- actually, I think this may have been admitted  
19 yesterday as Exhibit 321.

20 I guess I will ask you first, and then I will move for  
21 the admission, do you recognize this document?

22 A. Yes.

23 Q. Is it fair to say that this document is an e-mail from you  
24 to Dr. Ridgeway in July of 2007, which attaches the  
25 spreadsheets with the tallies by race of crime suspects and

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D4J8FLO5 McGuire - direct

1 Q. Those four categories were violent crimes, correct?

2 A. Yes.

3 Q. Arrests for weapons offenses right?

4 A. Yes.

5 Q. Arrests for property offenses, right?

6 A. Could you --

7 Q. Let's scroll down then.

8 A. We can look at the table. I haven't committed them to  
9 memory.

10 Q. I understand.

11 A. That's the definition of what we gave them.

12 Q. Let's go back up to page 4 then.

13 So you see here it explains what each category is. It  
14 explains that the violent crime category would include murders,  
15 non-negligent homicide, rape, robbery and felony assault.  
16 Property crimes include burglaries, grand larceny, grand  
17 larceny auto. Then it tells you all arrest data is by arrest  
18 data.

19 This doesn't actually tell you which categories of  
20 arrest data were given. I guess we do need to go down a little  
21 further.

22 Why don't we look at the table because that, I think,  
23 explains it.

24 Here we go. So here we have one category -- this is  
25 for Asians. Let me just ask you, you did this for Asians,

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D4J8FLO5 McGuire - direct

- 1 whites, Latinos and blacks, correct?  
2 A. Yes.  
3 Q. Is it fair to say that each of these columns represents the  
4 categories of the data that you gave to Dr. Ridgeway?  
5 A. Yes.  
6 Q. So you gave him the statistics -- before I ask you that,  
7 the statistics were provided for each precinct, right?  
8 A. Yes.  
9 Q. So for each precinct, you gave him the tallies broken down  
10 by race for murder victims, right?  
11 A. Yes.  
12 Q. As well as murder suspects, right?  
13 A. Yes.  
14 Q. Shooting victims, right?  
15 A. Yes.  
16 Q. Shooting suspects, right?  
17 A. Yes.  
18 Q. Violent crime victims, right?  
19 A. Yes.  
20 Q. Violent crime suspects, right?  
21 A. Yes.  
22 Q. Gun arrests?  
23 A. Yes.  
24 Q. Murder arrests?  
25 A. Yes.

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D4J8FLO5 McGuire - direct

- 1 Q. Violent crime arrests?  
2 A. Yes.  
3 Q. Weapons arrests?  
4 A. Yes.  
5 Q. Property crime arrests?  
6 A. Yes.  
7 Q. Drug crime arrests, right?  
8 A. Yes.  
9 Q. So for arrests, you gave Dr. Ridgeway, I guess  
10 it's -- murder and violence, you broke those up into two,  
11 right?  
12 A. I think this table was one that we had at hand. And after  
13 discussion with him of the data that he wanted to do his  
14 analysis, this fit the bill.  
15 Q. So it's fair to say that for the arrestee data, you gave  
16 him data on, I guess we will call it five crime categories,  
17 even though murder falls within violent crimes, five crime  
18 categories for the arrest data, right?  
19 A. You could say four, because the gun arrests and the murder  
20 arrests would be probably under those.  
21 Q. OK. So is it fair if I say violent crime, weapons  
22 offenses, property and drugs?  
23 A. Yes.  
24 Q. Then for the crime suspect data, though, you only gave him  
25 data on violent crime categories, right?

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D4J8FLO5

McGuire - direct

1 A. Yes.

2 Q. So my first question is, with respect to the arrest data  
3 categories, is the reason you gave him those four is because  
4 those were the four that were used in the attorney general's  
5 study?

6 A. I believe so.

7 Q. That's because one of the things that Dr. Ridgeway was  
8 going to do in his study was to replicate the analysis done by  
9 the attorney general's office, right?10 A. I believe that was going to be one of his analyses that he  
11 did, yes.

12 Q. The police department was OK with that, right?

13 A. Yes.

14 Q. But you testified earlier that you disagreed with the  
15 attorney general's findings, right?16 A. Well, I believe the disagreement we had, one of the primary  
17 disagreements with the attorney general's findings was  
18 essentially the -- I guess you could call it the benchmark  
19 used, and that one was the prior year's arrests. One of the  
20 things that Dr. Ridgeway proposed to do in this study was to  
21 look at the issue of benchmarking for this kind of a question.  
22 So he was going to compare various means of benchmarking.23 Q. One of the benchmarks he was going to use was the same one  
24 that was used in the attorney general's report, right?

25 A. I believe it actually was a slightly more refined version

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D4J8FLO5 McGuire - direct

1 from a later paper by Professor Fagan.

2 Q. Just so we are clear, Professor Fagan is Jeffrey Fagan,  
3 plaintiffs' expert in this case, right?

4 A. Yes.

5 Q. And Professor Fagan worked with the attorney general's  
6 office on the 1999 attorney general's report, correct?

7 A. Yes.

8 Q. And so when you say that, the method that Dr. Ridgeway  
9 replicated was a method that Professor Fagan had used in both  
10 the AG's report in 1999 and a subsequent article that he  
11 published, right?

12 A. I believe it was closer to the article's methodology  
13 because it may have changed.

14 Q. Is it your recollection that the article's methodology was  
15 to use arrests as a benchmark?

16 A. Yes.

17 Q. And the categories of arrest, you would agree, would have  
18 been the violent crimes, the weapons, the property crimes, and  
19 the drug crimes, right?

20 A. I believe those were the categories used in the AG's  
21 report.

22 Q. Dr. Ridgeway was going to use the same ones here in the  
23 RAND report, right?

24 A. Yes.

25 Q. And the police department was OK with that?

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D4J8FLO5 McGuire - direct

1 A. Yes.

2 Q. Now, with respect to the crime suspect data, the only data  
3 that you provided to Dr. Ridgeway for crime suspects was  
4 violent crime suspects, correct?

5 A. Yes.

6 Q. In fact, this decision to provide him with the violent  
7 crime suspect data, that was the police department's decision,  
8 right?

9 A. I think it was probably joined.

10 Q. But the only option you presented to for crime suspect data  
11 was this violent crime suspect data, right?

12 A. I don't know that I would characterize it that way, that  
13 the only. Most of this research that he did, had he asked for  
14 anything to do any of the work that he was doing, we would  
15 given it to him.

16 Q. But I guess what I am trying to figure out is at the time  
17 the decision was made, the initial decision was made to provide  
18 him with data on crime suspects, the only data at that point  
19 that you offered up to him as an option for a crime suspect  
20 benchmark is violent crime suspects, right?

21 A. Well, it was readily available at the time.

22 Q. So the answer is yes?

23 A. He was comfortable with it.

24 Q. The answer is yes?

25 A. Yes.

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D4J8FLO5 McGuire - direct

1 Q. Now, you're aware, Commissioner, that violent crime  
2 suspects -- first of all, I have two questions.

3 You're aware that when it comes to the NYPD's stop and  
4 frisk activity, that violent crime is the suspected crime in  
5 only about 15 percent of all stops, right?

6 A. Yes.

7 Q. And that a much larger percentage of stops, in other words,  
8 more than 15 percent of the stops, are on suspicion of property  
9 crimes, right?

10 A. Yes.

11 Q. But you never provided Dr. Ridgeway with any crime suspect  
12 data regarding property crimes, correct?

13 A. Yes.

14 Q. Nor did you provide him with any crime suspect data for  
15 drug crimes, right?

16 A. Well, the suspect data for drug crime would be the  
17 arrestees, essentially, because the vast majority of it are  
18 instances in which there is an arrest already made, and he had  
19 that.

20 Q. What about, for example, for trespass crimes, you didn't  
21 provide him the suspect descriptions for those either, right?

22 A. No.

23 Q. Then with respect to weapons, suspected weapons crimes, not  
24 the arrestees, you didn't provide him data on that either,  
25 right?

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D4J8FLO5 McGuire - direct

1 A. Well, again, suspected weapons crimes are a miniscule  
2 amount. You either make a weapons arrest because you found  
3 somebody in possession or it becomes a subsidiary charge to  
4 another arrest, robbery, homicide.

5 Q. Got it. Is it fair to say that with respect to -- I will  
6 ask you about three categories.

7 With respect to drug crimes and weapons crimes, let's  
8 start with those, would you agree that most crime complaints  
9 for those two categories are police officer generated?

10 A. Yes. They are proactive.

11 Q. In other words, the reports for those crimes are not  
12 usually the result of a civilian making a report to the police  
13 department, right?

14 A. Right.

15 Q. Would you also agree that that's true for trespass crimes  
16 as well?

17 A. I don't know about that.

18 Q. So you don't know whether or not most trespass crime  
19 complaints --

20 A. I think it's a mix.

21 Q. But for drugs and weapons, you would agree that most of the  
22 crime complaints that are generated are generated by police  
23 officers themselves, right?

24 A. Yes.

25 Q. Now, you testified earlier that if Dr. Ridgeway had

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D4J8FLO5 McGuire - direct

1 requested crime suspect data for categories other than violent  
2 crime, you would have provided it to him, is that true?

3 A. Yes.

4 Q. But sitting here today, you know that actually at no point  
5 did you provide him with any other categories of suspected  
6 crime data, right?

7 A. He didn't ask for anything more.

8 Q. The answer is you didn't provide it, right?

9 A. Yes.

10 Q. Do you recall that he did at a certain point ask you for  
11 the crime suspect data for drug offenses?

12 A. I believe it came up, and we had a discussion similar to  
13 the one that you just had, and he realized it was in the arrest  
14 data.

15 Q. Now, the reason that the police department chose only to  
16 provide him with the violent crime data was because that was  
17 the category where suspect descriptions were most readily  
18 available, correct?

19 A. Yes.

20 Q. By readily available you mean that was the category of  
21 crime where the percentage of crime complaints that had a  
22 suspect race were the highest, right?

23 A. Yes. At this point in time, we were giving out -- this  
24 data was a tabulation of wanted suspects, not arrested  
25 suspects.

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D4J8FLO5 McGuire - direct

- 1 Q. So with respect to wanted, unarrested suspects, violent  
2 crime was the category that had the highest percentage of  
3 complaints where a suspect race was provided, right?  
4 A. Yes.  
5 Q. It's fair to say that that percentage was more than 75  
6 percent, right?  
7 A. Which percentage?  
8 Q. The percentage of violent crime complaints where a suspect  
9 race was known was more than 75 percent, right?  
10 A. Not in this data. This was taken from the complaint  
11 reports, wanted.  
12 Q. In wanted it was less than 75 percent?  
13 A. Probably more like 50-some-odd percent.  
14 Q. Let me ask you this. So you gave Dr. Ridgeway data on  
15 crime complaints where suspect race was unknown in almost 50  
16 percent of the cases, is that right?  
17 A. Yes.  
18 Q. And you were comfortable with him using that as a benchmark  
19 to assess the racial disparities in the NYPD's stop and frisk  
20 practices?  
21 A. I don't think he was using it for that. He was using it to  
22 do a comparison between the different types of benchmarks.  
23 That was a different section of the report.  
24 Q. But in chapter 3 of the report, and maybe we should just  
25 look at chapter 3 of the report, doesn't Dr. Ridgeway actually

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D4J8FLO5

McGuire - direct

1 present findings on whether or not black and white and Latino  
2 pedestrians were stopped at a higher or lower rate than the  
3 representation in the violent criminal suspect population?

4 A. He contrasts the three approaches. In fact, I think the  
5 arrest approach in that comparison that he does actually  
6 produces a lower rate for one of the comparisons, if I  
7 remember.

8 Q. My question is, didn't you hire the RAND Corporation to  
9 assess whether or not the police department was engaging in  
10 racial profiling?

11 A. That was one of the assessments they were supposed to make.

12 Q. So they were assessing whether or not the racial  
13 disparities that everybody knows about exist in the data was in  
14 fact due to racial profiling or just due to something else?

15 MS. GROSSMAN: Can you just read that question back?

16 (Record read)

17 Q. Isn't that what Dr. Ridgeway --

18 A. I don't know if that's what they were supposed to be doing.

19 THE COURT: Were they picking up what it was  
20 attributable to?

21 THE WITNESS: I think in the section that they were  
22 doing the analysis of the various benchmarking methods, the  
23 first step in the analysis is to attempt to determine if there  
24 are other causes that might produce the disparate statistics.

25 THE COURT: That's what he just said.

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McGuire - direct

1 A. From a research point of view, it's you want to first get  
2 rid of the possible causes, and that is by no means a  
3 clear -- by no means there is a clear answer to that even today  
4 with all these different benchmarking measures.

5 Secondly, after that, the residue that's left, you  
6 still have -- just because you have done that and removed some  
7 of those other causes does not necessarily mean that what is  
8 left is racial profiling. It just means that you still have --

9 THE COURT: He never said that. He just said the  
10 intent was to figure out what might have caused the disparity.

11 A. No. You're not determining the cause. You're just  
12 determining whether the disparity can be explained by certain  
13 other things that are present in the environment.

14 Q. Would you agree with me that the RAND report or the police  
15 department -- the police department's interpretation of the  
16 RAND report was that the RAND study of the data did not reveal  
17 any racial profiling on the part of the police department, is  
18 that your understanding of the RAND report?

19 THE COURT: The conclusion reached in the RAND report.

20 A. I think that's the conclusion that the department drew,  
21 yes.

22 Q. And that conclusion is based, in part, on what is called  
23 the external benchmarking analysis that Dr. Ridgeway performed,  
24 correct?

25 A. Yes.

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McGuire - direct

1 Q. That external benchmarking analysis includes using the  
2 violent crime suspect data as a benchmark and to assess whether  
3 or not the racial disparities in the stop and frisk data, how  
4 those reflect whether they are higher or lower than the racial  
5 breakdown in the violent crime suspect data, right?

6 A. I believe so, yes.

7 Q. So my question, I guess, is, if that was the benchmark that  
8 Dr. Ridgeway was doing, were you comfortable with him doing  
9 that analysis using violent crime suspect data in which the  
10 race of the suspect was missing in almost 50 percent of the  
11 cases?

12 A. In comparison using last year's arrests, yeah, I think it's  
13 a comparable -- I think none of the benchmarking methods that  
14 are in use are perfect.

15 THE COURT: I guess his question is are they equally  
16 bad or are some better than others?

17 THE WITNESS: Let me go back a bit, if I may?

18 THE COURT: Sure.

19 A. Violent crime becomes important because the department's  
20 response to violent crime is sort of built in. If you call for  
21 a car and you're calling for a robbery in progress, it's going  
22 to be given a higher priority than another crime. Violent  
23 crimes are also given higher priority in terms of investigative  
24 resources and certainly the ones that are open and unsolved.

25 And also violent street crime is a patrol objective

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McGuire - direct

1 where there is more attention paid to areas of the city with  
2 violent street crime. So it's not that people make stops  
3 having reasonable suspicion for violent crime. It's that when  
4 you put people in high crime areas, they will make reasonable  
5 suspicion stops for all kinds of crime that occur in those  
6 areas.

7 Q. But then if that's the case, why not use the levels of  
8 crime in the different precincts and look at it that way?  
9 Wouldn't that be a better way to do it?

10 A. Because the suspect descriptions, those that you have, are  
11 essentially standing in as a surrogate for the pool of people  
12 who are committing crime.

13 Q. Let me ask you that. That brings up a very good question  
14 that I have been wondering about since this case began.

15 So you just said that using the violent crime suspects  
16 is a --

17 THE COURT: Were you a lawyer when this case began?

18 MR. CHARNEY: Not when Daniels began.

19 THE COURT: That was my slight attempt at humor.

20 MR. CHARNEY: Daniels, I was a school teacher at the  
21 time.

22 Can you read back his last answer?

23 (Record read)

24 Q. Your testimony is that the violent crime suspect data is  
25 the surrogate for the pool of people that are committing

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McGuire - direct

1 crimes, right?

2 A. Yes.

3 Q. Is it your belief that that pool of people that are  
4 committing crimes are then the surrogate for the pool of people  
5 who would engage in behavior that the police officers would  
6 think was suspicious and then make stops pursuant to, right?

7 A. Yes.

8 Q. Now, you're aware that 90 percent of stops that the police  
9 department conducts each year, approximately 90 percent, do not  
10 result in the uncovering of evidence of crime, right?

11 A. If they don't rise to probable cause for an arrest or a  
12 summons.

13 Q. Which means that they didn't find any evidence of a crime,  
14 right?

15 A. Right. But it doesn't mean there might not have been a  
16 crime in progress or a crime interrupted.

17 Q. If 90 percent of the people that are being stopped are not  
18 actually engaging in any criminal activity when they are being  
19 stopped, the police department doesn't have any basis to assume  
20 that the pool of people that they are stopping overlaps with  
21 the pool of people who are committing crimes in New York City,  
22 isn't that true?

23 A. No. Because of what I just said. Some of the people that  
24 they are stopping were probably about to or might have  
25 committed a crime and nobody knows what portion of the rest of

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McGuire - direct

1 the people that didn't get arrested were in that situation.

2 THE COURT: You don't really know?

3 THE WITNESS: I don't know. Nobody knows. The police  
4 officer on the scene is probably the better one to make a  
5 judgment about his reasonable suspicion.

6 THE COURT: All I am saying is you don't know that any  
7 of them were about to commit a crime?

8 THE WITNESS: The number could be zero to 50 percent.

9 THE COURT: But you don't know?

10 THE WITNESS: It's bigger than zero.

11 THE COURT: You don't really even know that?

12 THE WITNESS: I think it's bigger than zero because  
13 you hear from officers that they believe they have stopped  
14 somebody, but they didn't have enough probable cause. Somebody  
15 trying to break in cars, they were going down looking in, maybe  
16 trying a couple of doors, and they got interrupted, and they  
17 asked what is he doing there, and he goes on his way. At that  
18 particular point in time, they may have interrupted a crime.  
19 There's probably hundreds of others.

20 MR. CHARNEY: I move to strike the answer that talks  
21 about what other officers have told him. I would say that's  
22 hearsay.

23 THE COURT: As a general manner, I asked him how he  
24 comes to the conclusion that some percentage of this group were  
25 about to commit a crime. And he answered in generalities. I

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1 will allow it.

2 Q. Your testimony was you probably think that that number is  
3 pretty small, right?

4 A. I don't think it's a huge number. It's not 100 percent.

5 Q. You said --

6 A. It could be larger than 10 percent, larger than 20 percent.

7 THE COURT: You don't know?

8 THE WITNESS: No. I think that's the issue with all  
9 of this, is that you don't know.

10 THE COURT: All I wanted to do now is pin down that  
11 you don't know.

12 THE WITNESS: No.

13 Q. You have no empirical basis to make a conclusion or  
14 assumption that there is an overlap, a significant overlap  
15 between the population of people that the police department is  
16 stopping and frisking and the population of people that are  
17 committing crimes in New York City, right?

18 A. I'm still not sure I would agree with that.

19 Q. Well, then let me ask you a hypothetical. If we assume  
20 that this overlap is a very small number. Let's assume it was  
21 one percent. In that case, that would mean that most of the  
22 people that were being stopped and frisked were in fact not  
23 criminals, right?

24 A. Yes.

25 Q. The police department has no basis to assume that

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McGuire - direct

1 law-abiding black New Yorkers behave more suspiciously than  
2 law-abiding white New Yorkers, right?

3 A. How did you get suspicion in there? The people who are  
4 recording these stops are officers that have been trained how  
5 they have reasonable suspicion.

6 THE COURT: Hold on. That's where the word suspicion  
7 came from. You said, how did that get into your question?  
8 That's how. Stops are based on reasonable suspicion. So he  
9 said, in this hypothetical, where there is the one percent  
10 overlap, you have no reason to believe that blacks behave more  
11 suspiciously than whites, do you?

12 THE WITNESS: I have no idea because --

13 THE COURT: That's all you need to say. That's what I  
14 thought the answer would be. That sounds fair.

15 Go ahead.

16 But that was a hypothetical. If the hypothetical is  
17 there is a 50 percent overlap, then that would be quite  
18 different, right? That's a question for you.

19 THE WITNESS: Yes.

20 THE COURT: If it was a 50 percent overlap, that would  
21 be very different, right?

22 THE WITNESS: Yes.

23 Q. So then I guess my question to you is, that in order for a  
24 crime suspect to be a good surrogate for the population of  
25 people who the police department would likely stop and frisk,

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1 there has to be a significant overlap between those people who  
2 are actually committing crimes and the population of people who  
3 is being stopped by the police, correct?

4 A. Yes.

5 Q. At this point we just have no idea what that overlap is,  
6 right?

7 A. Right.

8 Q. But you're still comfortable with using crime suspect as  
9 the benchmark to assess racial disparities in the police  
10 department's stop and frisk practices, right?

11 A. Yes.

12 Q. Now, going back to the RAND study, and this is a slightly  
13 different question, but in a situation where the crime suspect  
14 data you are using is missing the race of suspects in almost 50  
15 percent of the cases, you're actually comfortable with still  
16 using that as the benchmark to assess racial disparities in  
17 stop patterns?

18 A. Yes.

19 Q. You're not worried about selection bias?

20 A. The proportions that we see in that data were very, very  
21 consistent year to year. They are also actually quite  
22 consistent across the city, across precincts. So there is  
23 probably -- there is no absolute evidence about the overlap,  
24 but it gives one somewhat additional confidence that there is  
25 not some unknown population out there committing violent crimes

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1 other than the one you're getting from that. And we have also  
2 over time increased the amount of information available.

3 When Professor Ridgeway did this, this was almost a  
4 groundbreaking study, in the sense that it was one of the first  
5 places where some sort of study looked at several different  
6 benchmarks and made some attempt to try and contrast them  
7 versus one another. And, in fact, I think Dr. Ridgeway left in  
8 some caveats about the crime suspect benchmark and said that it  
9 wasn't error free. There is no perfect benchmark.

10 Q. I understand that.

11 A. We can get better as time goes on, and I think we have. We  
12 now use all the suspect information. We now use arrest  
13 information to augment, because for each of those violent  
14 crimes, we do know in many cases when an arrest has been made.  
15 So for the violent crimes, we can get up to 85 percent by  
16 including the arrest data.

17 Q. But we are talking about in 2007, when you gave him the  
18 data, you only gave him crime suspect data where you said 50  
19 percent of the cases were missing a suspect description by  
20 race?

21 A. Yes.

22 Q. My question is, the police department was comfortable  
23 concluding from Dr. Ridgeway's analysis that there was no  
24 racial profiling based on a benchmark in which suspect race was  
25 missing in 50 percent of the cases?

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1 A. Yes. Because the results didn't change when we got 85  
2 percent.

3 Q. In 2007, when the report came out, you didn't do another  
4 analysis at that point, right?

5 A. Because for those other reasons I said. There was a  
6 consistency to these percentages. There was no evidence  
7 anywhere that there was some hidden violent crime population  
8 someplace that we weren't arresting. There was no reason to  
9 believe that the violent crime distribution that we were  
10 getting in the violent crimes was dramatically different from  
11 what the 100 percent violent crime would have been had we known  
12 100 percent.

13 Q. I want to look at this Exhibit 321, if we can scroll down  
14 to some of the other tables, the next page. I will tell you  
15 what page.

16 I want to ask you about this chart here. Is it fair  
17 to say that this chart takes those tallies, the numbers of  
18 different crime suspects and crime victims and arrestees by  
19 precinct and actually gives you percentages broken down by race  
20 for the city, correct?

21 A. I believe so, yes.

22 Q. So I want to look for 2005, first of all.

23 You see there for violent crime suspects, it says  
24 blacks --

25 THE COURT: I'm lost.

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McGuire - direct

- 1 MR. CHARNEY: The second table. The one that has  
2 percentages for 2005.
- 3 THE COURT: Isn't that whole page 2005?
- 4 MR. CHARNEY: Yes. But The top is not percentages.  
5 THE COURT: But the whole page is 2005.
- 6 Q. The second table is 2005 and it has percentages, right?  
7 THE COURT: How is it different from the third table?  
8 MR. CHARNEY: I can explain that.
- 9 Q. Let's just look at the second table first. It looks like  
10 you have five racial categories: Asian, white, black, Hispanic  
11 and other, correct?
- 12 A. Yes.
- 13 Q. Now, other includes other race besides those four, correct?  
14 A. It includes unknowns also.
- 15 Q. So for 2005, it looks like 39 percent of the violent crime  
16 suspects for 2005 were black, right?
- 17 A. If you include the unknown as a category.
- 18 THE COURT: If you include the unknown?
- 19 Q. If you don't include it or you do include it?
- 20 A. If you don't include the unknowns, you get the percentages  
21 that are down at the bottom.
- 22 Q. Why would you not want to include the unknowns?
- 23 A. You want to get the distribution of the cases that you did  
24 know. The unknowns are more likely to be distributed like that  
25 than they are anything else.

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1 Q. What is that based on?

2 A. That's based on the analysis from before, that these  
3 percentages hadn't changed over years so there was no evidence  
4 that there was some missing violent crime population other  
5 than.

6 THE COURT: I don't understand that.

7 A. It's really a sampling.

8 THE COURT: The word unknown means somebody was unable  
9 to identify the race of the person?

10 THE WITNESS: Right.

11 THE COURT: So you're speculating that the unknown  
12 group would break down the same way as the four groups?

13 THE WITNESS: Well, the naive assumption would be to  
14 make that assumption initially.

15 THE COURT: I don't understand it.

16 If 40 percent of the known group is black, you're  
17 assuming 40 percent of the unknown group is black, is that it?

18 THE WITNESS: You're essentially doing that, when you  
19 remove the unknowns, you're then calculating the percentage  
20 based upon a new total.

21 THE COURT: Aren't you assuming that of the unknown  
22 group, the breakdown is the same percentages? So 40 percent of  
23 black?

24 THE WITNESS: That would be my naive assumption.

25 THE COURT: What does that mean?

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McGuire - direct

1 THE WITNESS: It's a first assumption that you have to  
2 make.

3 THE COURT: You think it's a good assumption?

4 THE WITNESS: It may not be the best.

5 THE COURT: Do you think it's credible?

6 THE WITNESS: Last year's arrest activities, which is  
7 what Fagan used in his study, that's the people that were  
8 arrested, which reflects pretty much the same statistics.

9 That's what I am saying. The benchmarks, they are not  
10 perfect devices. We can try and make them better as we go  
11 forward. And these are initial benchmarks that were in use at  
12 this particular time. The arrest statistics would give you the  
13 same kind of breakdown.

14 THE COURT: So when it says violent crime arrests in  
15 the middle table, only 1.4 percent unknown.

16 THE WITNESS: Right.

17 THE COURT: Once they are arrested, it's a very small  
18 number. But when they are only suspected --

19 THE WITNESS: Look at the violent crime arrests in the  
20 lowest table.

21 THE COURT: Yes. It should be almost identical to the  
22 middle, because the middle table only had -- I am talking about  
23 the violent crime arrests.

24 THE WITNESS: If you look at the bottom table. Now  
25 look at the violent crime suspects. Then look at the violent

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1 crime arrests. The percentages are very, very close to one  
2 another.

3 THE COURT: Because you presumed in the unknown group  
4 that it would break out the same way as the known. There is a  
5 presumption in the bottom table.

6 THE WITNESS: So all I am saying is that the method  
7 used in Fagan attorney general's report is no better or no  
8 worse than the crime suspects.

9 THE COURT: No better and no worse is something.

10 THE WITNESS: They are competitive with another.

11 BY MR. CHARNEY:

12 Q. If that's the case, why is it that the police department  
13 rejected the attorney general's findings but accepted the RAND  
14 findings?

15 A. The attorney general's findings also, using arrest  
16 statistics from the prior year, the department operations, it  
17 didn't seem to be a practical approach. Police operations are  
18 always based upon what is happening now, not what happened last  
19 year.

20 Q. Aren't these suspect statistics for the year prior to 2006?

21 A. Well, it's listed as 2005.

22 Q. Wasn't the RAND study of the 2006 stop and frisk data,  
23 aren't you actually using the prior year as well?

24 A. I don't think the suspect they used is prior year. It's  
25 there for the arrest data because Fagan's arrest model used the

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1 prior year.

2 THE COURT: These are 2005 figures, both for suspects  
3 and arrestees, and it's in the 2006 report.

4 Q. Isn't Dr. Ridgeway also using prior year here?

5 A. I don't think so. I think he is using 2006.

6 THE COURT: It says 2005.

7 Q. To be fair, he was given both years. My question is, he  
8 was given 2005, right?

9 A. He was given -- as I told you before, the data was a  
10 convenience set of tables. So he wanted '05 and '06 data  
11 because I believe Professor Fagan's approach required the prior  
12 year's arrests. So Professor Fagan's approach used the 2005  
13 arrest data in conjunction with 2006 stops. Whereas the other  
14 comparison used the 2006 violent crime suspects with the 2006  
15 stops.

16 Q. So you're saying that because RAND used more concurrent  
17 arrest and suspect data, that's what made it, in your view,  
18 more reliable?

19 A. They didn't use the arrest data.

20 Q. They did. Didn't they also replicate his analysis? They  
21 did both.

22 A. That's what I am saying. You're approaching the suspect  
23 analysis as though it's different from his, and that's true.  
24 They used the more current data, and they replicated his  
25 process, which happened to use year before arrest data.

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McGuire - direct

1 Q. Earlier you testified that, with respect to trying to  
2 assign the unknowns to the various racial categories, that you  
3 would look at the arrest data, and that would make you  
4 comfortable that you were assigning them correctly, right?

5 So you were still using arrest data, right, like Dr.  
6 Fagan used arrest data, right?

7 A. No. I was just using arrest data to make a point.

8 THE COURT: Weren't you using arrest data to project  
9 the breakdown of the unknown group?

10 THE WITNESS: No. I was using the arrest data to  
11 compare it to the suspect data in that one table, just that  
12 they are similar.

13 THE COURT: You were using arrest data for that  
14 purpose.

15 Q. Didn't you also testify because the attorney general's  
16 report did rely on arrest data as a measure of criminal  
17 activity?

18 A. Yes.

19 Q. So I guess my question is -- and then I asked you, I know  
20 this is getting confusing, but I asked you, if it was OK for  
21 RAND to use arrest data to measure the relative criminal  
22 participation of the different races -- and when I say use  
23 arrest data, I mean using it to be able to ascribe this unknown  
24 section of the crime suspects to the various racial categories.  
25 If they were still using arrest data as part of their analysis,

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D4J8FLO5 McGuire - direct

1 and the attorney general was using arrest data as part of his  
2 analysis, I asked you why was the attorney general's report  
3 less reliable to the police department and RAND?

4 A. We felt the suspect data was the more important, more  
5 practically important.

6 Q. But you now testified that the suspect data was in some  
7 ways reliant on the arrest data, right?

8 A. No.

9 THE COURT: I thought you just said that. I too  
10 thought you just said that.

11 You use it at least as a cross-check?

12 THE WITNESS: But it's not used in any of the  
13 comparisons that Dr. Ridgeway -- it's not used in that manner  
14 in any of the comparisons directly that's in that study.

15 Q. I know we are trying to move this along. Maybe we should  
16 turn to Defendants' K6, which is the RAND report. It's already  
17 been admitted in evidence. If we can actually turn to page 17  
18 of the report. I will give you the Bates number. The Bates  
19 number is NYC\_2\_28804. Actually, I'm sorry. 8803.

20 So looking at this page here, you will see that the  
21 section heading is arrests in 2005, right?

22 A. Uh-huh.

23 Q. And you see it will go on for another couple of pages. And  
24 on the page 28805, which is two pages after this, there is a  
25 table which compares stop rates to seven external benchmarks.

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McGuire - direct

- 1 Do you see that?  
2 A. Yes.  
3 Q. And the first four benchmarks listed there are actually  
4 arrest benchmarks, right?  
5 A. Yes.  
6 Q. So RAND did use arrests as a benchmark as well, correct?  
7 A. Because they were doing a comparison between the methods.  
8 Q. The question is, they did use arrests as one of their  
9 benchmarks?  
10 A. Yes.  
11 Q. And they actually came up with the results for those  
12 benchmarks?  
13 A. Yes.  
14 Q. In fact, with respect to the weapons arrests, when using  
15 that as a benchmark, didn't RAND find that black pedestrians  
16 were actually being stopped at significantly higher rates than  
17 their representation within the weapons arrestee population,  
18 isn't that right?  
19 A. Looking at that chart, where is it in the text, because the  
20 chart doesn't seem to say that.  
21 Q. If you look at the fourth set of bar graphs where it says  
22 "weapons arrests"?  
23 A. Yes.  
24 Q. And the light colored bar is black, right? And that's  
25 going to the right, which is positive. It says, "Increase in

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1 stops relative to benchmark percentage."

2 A. But the confidence integral intersects with zero, which  
3 means that it's not submitting it.

4 Q. You are aware that the percentage was about 8 percent  
5 higher in terms of stops for blacks on weapons charges than for  
6 arrests of blacks on weapons charges, right?

7 A. If that's what it says in the text. I can't see that  
8 section.

9 Q. If you turn back to Bates number NYC\_2\_28779.

10 THE COURT: You want to consult?

11 MR. MOORE: I thought it was right there.

12 THE COURT: You want to consult with Mr. Charney  
13 instead of whispering aloud?

14 Why don't you pause a second, Mr. Charney?

15 Q. Can we go back to the same page we were just looking at?

16 On the same page as the bar graph, if we go underneath  
17 the bar graph --

18 MR. MOORE: Right before and right after.

19 Q. Go back to the preceding page at the bottom. The last  
20 sentence says, "Officers stopped black suspects for suspected  
21 weapons possession at a rate 8 percent greater than their  
22 weapon arrest rate." Do you see that?

23 A. Yes.

24 Q. That's what Dr. Ridgeway found, right?

25 A. Somewhere in there there is a discussion of the confidence

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1 integral, and when the confidence integral, that line touches  
2 zero, it means it's not a statistically significant result.

3 Q. I understand, but 8 percent is 8 percent, right?

4 THE COURT: He read the sentence correctly is really  
5 all he is asking you.

6 THE WITNESS: OK.

7 Q. Doesn't the next sentence say, "White suspects, on the  
8 other hand, have a stop rate that is 11 percent lower than  
9 their weapon arrest rate." Do you see that?

10 A. Yes.

11 Q. That's something else that Dr. Ridgeway found?

12 A. Yes.

13 Q. Given those results, did that raise any concerns with the  
14 police department that maybe they should at least look further  
15 into, at a minimum, the weapons stops that the police  
16 department was doing to see if there was racial bias?

17 A. I think if you look at the homicides and the shootings, the  
18 black arrestees and suspects are predominant in that category.  
19 So that would not surprise the department to have stops for  
20 weapons to be higher. Because, again, going back to suspects  
21 being the surrogate for the underlying criminal activity, it  
22 wouldn't be surprising to have stopped more blacks for weapons  
23 when 70 or 80 percent of the suspects in shootings are black.

24 Q. But this says that whites are being arrested more often for  
25 weapons than they are being stopped for weapons. So you would

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D4J8FLO5 McGuire - direct

1 agree that whites are being arrested for weapons possession,  
2 right?

3 A. I am sure there are some.

4 Q. So it didn't bother you that whites were being stopped less  
5 often for weapons possession than they were being arrested for,  
6 while blacks were being stopped more often for weapons  
7 possession than they were being arrested for?

8 A. It comes down to the type of use. Obviously, they are not  
9 shooting people with the weapons.

10 THE COURT: You know who is shooting people from these  
11 arrests? You said, obviously, they are not shooting people.  
12 Do you know?

13 THE WITNESS: From the suspects of shootings and the  
14 suspects in homicides, they are predominantly African-American.

15 THE COURT: That's known. But that's not what he is  
16 talking about. He is talking about under-stopping and  
17 over-stopping. You don't have a theory for accounting for the  
18 under-stopping and over-stopping, do you?

19 THE WITNESS: For these particular percentages, since  
20 they are not statistically significant, they weren't  
21 considered.

22 THE COURT: You don't have a theory for why one is  
23 under and one is over?

24 THE WITNESS: No, not here.

25 Q. I am going to move on a little bit here.

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McGuire - direct

1 Now, at any point, either before or after the RAND  
2 study was published, was the police department at all concerned  
3 that the violent crime suspect benchmark was incomplete since  
4 you didn't have any other crime categories included in that  
5 benchmark?

6 A. I wouldn't say it was concerned. I think we were trying to  
7 improve things as we went along.

8 Q. You're aware that, and I think I have already asked you  
9 this, but violent crimes are the suspected crimes in a really  
10 small percentage of all stops, right?

11 A. Yes.

12 Q. So you weren't concerned at all that the violent crime  
13 suspect benchmark was maybe not a good surrogate for the  
14 population of people that were being stopped and frisked by the  
15 police department?

16 A. No. Because the distribution of -- as we expanded and  
17 looked at other types of crime, the distributions by race were  
18 not that much different in the other crime categories that we  
19 knew.

20 Q. You're saying you did that during conducting of the RAND  
21 research or right after the study came out?

22 A. Well, I think the production of our enforcement report was  
23 in 2008 for the very first time also.

24 Q. Let's take a look at that because I was actually going to  
25 get to that.

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McGuire - direct

1 THE COURT: It is 4:30. We always stop at 4:30.  
2 You will have to come back on Monday to finish the  
3 testimony.

4 Mr. Moore, can I see you and Ms. Grossman at the side  
5 bar?

6 (Discussion held off the record at side bar)  
7 (Adjourned to April 22, 2013, at 10:00 a.m.)

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14 PLAINTIFF EXHIBITS

15 Exhibit No. Received

16 166C . . . . . .4113

17 484 . . . . . .4115

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22 DEFENDANT EXHIBITS

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24 P10, Bates NYC\_2\_28754, . . . . . .4096

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