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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.
March 28, 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
18 GRETCHEN HOFF VARNER
19 ERIC HELLERMAN
19 BRUCE COREY

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)

MICHAEL A. CARDOZO
Corporation Counsel for the City of New York
Attorney for Defendants
BY: HEIDI GROSSMAN
BRENDA E. COOKE
JOSEPH MARUTOLLO
MORGAN D. KUNZ
SUZANNA PUBLICKER
LINDA DONAHUE
LISA M. RICHARDSON
JUDSON VICKERS

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1 (Trial resumed)

2 THE COURT: Please be seated. Good morning, everyone.

3 LUIS PICHARDO, resumed.

4 DIRECT EXAMINATION (cont'd)

5 D3sWflo1 Pichardo - direct

6 BY MS. HOFF VARNER:

7 Q. Good morning, Officer Pichardo.

8 A. Good morning.

9 Q. When you stop and frisk someone, you have to fill that out
10 in your activity buy log, isn't that right?

11 MR. MARUTOLLO: Objection as to form.

12 THE COURT: Overruled.

13 BY MS. HOFF VARNER:

14 Q. You can go ahead and answer.

15 A. Yes.

16 Q. And I'm going to show you Plaintiffs' Exhibit 97, which is
17 in evidence. This is the New York City Police Academy training
18 memo, No. 0708. And it should come up in just a minute,
19 except, since it's not, I'm just going to go ahead and show you
20 a hard copy of the training memo.

21 Do you recognize this document?

22 A. Yes, ma'am.

23 Q. And that is the training memo on activity logs, isn't that
24 right?

25 A. Yes, ma'am.

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- 1 Q. And you were trained on this document, weren't you?
2 A. Yes, ma'am.
3 Q. And according to this document, you have to write all of
4 your activities in your memo book, isn't that right?
5 A. Yes, ma'am.
6 Q. That includes stops, isn't that right?
7 A. Yes, ma'am.
8 Q. And, in your experience, supervisors review your memo book,
9 isn't that correct?
10 A. Correct.
11 Q. And sometimes they even review it every day, isn't that
12 right?
13 A. Correct.
14 Q. However, isn't it true that you have never met with your
15 supervising officer to discuss your memo book entries?
16 A. Can you repeat that question?
17 Q. Isn't it true that you've never met with a supervisor to
18 discuss your memo book entries?
19 A. I always cause, my supervisor always check my memo book.
20 Q. They always checked your memo book?
21 A. Yes.
22 Q. But they never discussed your memo book with you, did they?
23 A. They do.
24 Q. So, if you look at your deposition, page 90, line 23:
25 "Q. Do you ever meet with your, have you ever had to meet with

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1 your supervising officer to discuss your memo book entries?

2 "A. Not that I remember."

3 Did I read that correctly?

4 A. Yes, ma'am.

5 Q. So at least as of 2009, you had never discussed your memo
6 book entries with your supervisor?

7 MR. MARUTOLLO: Objection to form.

8 THE COURT: Overruled.

9 A. Sorry. What was the question?

10 Q. At least as of 2009, at the time of your deposition, you
11 had never discussed your memo book entries with a supervisor?

12 A. I remember they always check my memo book and they told me,
13 Do you write the name, stuff like that.

14 Q. But as of 2009, at the time of your deposition, you just
15 testified that you don't recall ever having discussed your memo
16 book entries with a supervisor?

17 A. At that moment, I didn't remember that.

18 Q. Okay. So I'm going to show you your memo book from the
19 night of January 12, 2008, which has been marked as Plaintiffs'
20 Exhibit 121. I'm just going to walk it up to you.

21 A. All right.

22 Q. And do you recognize this document?

23 A. Yes, ma'am.

24 Q. And this is your memo book from the night of January 12,
25 2008, isn't that correct?

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1 A. Correct.

2 Q. And that was the same night that you stopped Mr. Deon
3 Dennis, isn't that right?

4 A. Yes, ma'am.

5 MS. HOFF VARNER: Your Honor, I move Plaintiffs'
6 Exhibit 121 into evidence.

7 MR. MARUTOLLO: No objection, your Honor.

8 THE COURT: 121 is received.

9 (Plaintiffs' Exhibit 121 received in evidence)

10 BY MS. HOFF VARNER:

11 Q. If you don't mind, Officer Pichardo, I'll take that back so
12 I can put it up on the screen. Did you get a chance to look at
13 it?

14 A. Yeah.

15 Q. These are the portions of your memo book that include the
16 night of January 12, 2008. There's nothing in here related to
17 your encounter with Deon Dennis, is there?

18 A. Correct.

19 Q. So you didn't write anything about the stop of Mr. Dennis
20 in your activity log, did you?

21 A. That incident, I didn't wrote it. That stop, I didn't
22 wrote it.

23 THE COURT: You didn't what?

24 THE WITNESS: I didn't wrote it.

25 THE COURT: You didn't write it. Okay.

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1 BY MS. HOFF VARNER:

2 Q. You were never disciplined for failing to write about the
3 stop of Mr. Dennis in your activity log, were you?

4 A. No.

5 Q. In fact, you don't know of anyone, including your fellow
6 officers, who have ever been disciplined for failing to make
7 required entries in their activity logs, isn't that right?

8 A. I can only talk about mine, memo book, my personal. But I
9 don't know if another officer got disciplined for that.

10 Q. You don't know if another officer got disciplined, you
11 don't remember any other officer getting disciplined, do you?

12 A. I don't remember.

13 Q. You don't remember?

14 A. Yeah.

15 Q. Now I want to talk about the UF250 form. You're familiar
16 with the UF250 form, correct?

17 A. Yes, ma'am.

18 Q. And since you've been at the NYPD, you've been told that
19 you filled out the UF250 form incorrectly on at least two
20 occasion, isn't that right?

21 A. Can you repeat that question?

22 Q. Sure. Since you've been at the NYPD, you've been told that
23 you filled out the UF250 form incorrectly on at least two
24 occasions, isn't that right?

25 A. Probably, yes.

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- 1 Q. It was approximately two times?
2 A. Approximate, probably, yes.
3 Q. And both of those times you were corrected for failing to
4 sign your name to the UF250, correct?
5 A. Could be, yeah.
6 Q. You don't recall?
7 A. I can't recall right now.
8 Q. So if you look at your deposition, page 120, lines two
9 through eight:
10 "Q. Of the two times that you can remember, what specifically
11 did the supervisor say was wrong with the UF250 that you filled
12 out?
13 "A. I forgot to sign my name.
14 "Q. That is it?
15 "A. Yes."
16 Did I read that correctly?
17 A. Yes, ma'am.
18 Q. So when those supervisors spoke with you about forgetting
19 to sign your name, they weren't speaking with you about why you
20 made a particular stop, were they?
21 A. Not that I remember.
22 Q. And they weren't speaking with you about whether you had
23 reasonable suspicion for the stop, were they?
24 A. I can't remember that.
25 Q. You didn't write a UF250 for the stop of Mr. Dennis, did

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1 you?

2 A. No.

3 Q. And no one ever spoke with you about the failure to fill
4 out a UF250, did they?

5 A. Well, I have probable cause to write violations, a C
6 summons, that was my main purpose. Until he got active
7 warrants, I put him under arrest.

8 Q. But I think you testified yesterday that you didn't give
9 Mr. Dennis a summons, did you?

10 A. No, because he have active warrant.

11 Q. Were you aware that there was a complaint made to the CCRB
12 about the stop of Mr. Dennis?

13 A. I can't remember CCRB calling me for that.

14 Q. So you were never contacted by anybody from the CCRB about
15 a complaint involving Mr. Dennis, were you?

16 A. Not that I remember.

17 Q. And you were never contacted by anybody from the Office of
18 the Chief of Department regarding a complaint involving Mr.
19 Dennis, were you?

20 A. Not that I remember right now.

21 Q. At the time of your deposition in 2009, you were in the
22 anticrime unit, correct?

23 A. Correct.

24 Q. And you said yesterday that you're currently in the Street
25 Narcotics Enforcement Unit?

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- 1 A. Yes, ma'am.
2 Q. That's SNEU?
3 A. SNEU, yeah.
4 Q. When did you transfer from anticrime to SNEU?
5 A. When?
6 Q. Yes.
7 A. Approximately three years.
8 Q. Three years ago?
9 A. Yes.
10 Q. So approximately 2010?
11 A. Approximately, yes.
12 Q. And you've been in SNEU ever since that point?
13 A. Yes, ma'am.
14 MS. HOFF VARNER: Just give me one moment, your Honor.
15 No further questions, your Honor.
16 THE COURT: Mr. Marutollo.
17 CROSS-EXAMINATION
18 BY MR. MARUTOLLO:
19 Q. Good morning, Officer Pichardo.
20 A. Good morning.
21 Q. Where are you currently employed?
22 A. 28th Precinct.
23 Q. How long have you actually been employed with the New York
24 City Police Department?
25 A. Approximately eight years.

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D3sWfl01 Pichardo - cross

- 1 Q. What was your next assignment after the community policing
2 unit?
3 A. Anticrime.
4 Q. What were your duties and responsibilities as an anticrime
5 officer?
6 A. Stop crime before it's happening.
7 Q. What kind of crimes were you focusing on in anticrime?
8 A. Robbery, burglary, and guns.
9 Q. How long were you assigned to anticrime?
10 A. Approximately one and a half years.
11 Q. And you testified that after anticrime, you were assigned
12 to your present position in the Street Narcotics Enforcement
13 Unit, is that right?
14 A. Yes, sir.
15 Q. What are your current duties as an officer in the Street
16 Narcotics Enforcement Unit?
17 A. We deal with the street narcotics level in the 28th, around
18 the 28th Precinct.
19 Q. Turning your attention to January 12, 2008, what unit were
20 you working out of on the date of the incident?
21 A. CPU.
22 Q. And that's the community policing unit?
23 A. Yes, sir.
24 Q. So you were not working in the anticrime unit on that day?
25 A. In 2009?

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D3sWflol Pichardo - cross

- 1 Q. At the time of this incident, January 12, 2008. You were
2 not working in anticrime, right?
3 A. Sorry.
4 Q. Let me rephrase the question.
5 A. All right.
6 Q. On January 12, 2008 --
7 A. Yeah.
8 Q. -- you just testified you were working in the community
9 policing unit?
10 A. Yes.
11 Q. And that was not the anticrime unit?
12 A. That was not the anticrime unit.
13 Q. Were you working overtime that night?
14 A. Yes, sir.
15 Q. And were you working with any other officers?
16 A. Yes, sir.
17 Q. Who were you working with?
18 A. I was working with Officer Salmeron.
19 Q. Was she your regular partner?
20 A. No.
21 Q. Were you in uniform that night?
22 A. Yes, sir.
23 Q. On January 12, 2008, where were you when you first observed
24 Mr. Deon Dennis?
25 A. I was inside of the NYPD van.

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D3sWfl01 Pichardo - cross

- 1 Q. Were you driving that vehicle?
2 A. I was the passenger. The front passenger in the van.
3 Q. And where were you, where was that vehicle driving?
4 A. It was driving on Seventh Avenue.
5 Q. And why were you driving on Seventh Avenue that evening?
6 A. Basically, at that time, there's a lot of people drinking
7 and smoking in that area.
8 Q. Were you familiar with that area?
9 A. Yes. I'm familiar to that area.
10 Q. How are you familiar with that area?
11 A. I used to be a beat officer in CPU, so I know most of the
12 complaint comes in Seventh Avenue, between that area.
13 Q. What kind of complaints were you aware of in that area?
14 A. Smoking marijuana, drinking, and loud music.
15 Q. When you say drinking, what do you mean?
16 A. Drinking alcohol.
17 Q. Where did you first see Mr. Dennis?
18 A. I observed the defendant standing in front of 2034 Seventh
19 Avenue.
20 Q. Was the street well lit?
21 A. Yes, sir.
22 Q. Can you describe the vehicle you were driving in?
23 A. I was driving a van with the NYPD logo on the side, white
24 and blue.
25 Q. And you testified that you were in the passenger's seat?

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Pichardo - cross

- 1 A. Yes, sir.
- 2 Q. Which side of the car was closer to where Mr. Dennis was
- 3 standing?
- 4 A. The passenger's side.
- 5 Q. What, if anything, did you observe Mr. Dennis do?
- 6 A. I observed the defendant standing in front of the location
- 7 with a bottle of alcohol and holding it in a plastic cup.
- 8 Q. And when you're referring to the defendant, you're
- 9 referring to Mr. Deon Dennis?
- 10 A. Yes, sir.
- 11 Q. After you first saw Mr. Dennis, what happened next?
- 12 A. I get out from the, I get out from the van, and I was
- 13 walking toward the defendant, and he's still holding the
- 14 plastic cup and drinking from the plastic cup, and I can see
- 15 the, a brown liquid in the plastic cup.
- 16 Q. Was he taking drinks as you were walking towards him?
- 17 A. Yes, sir.
- 18 Q. After you walked towards him, what happened next?
- 19 A. I saw the Hennessy bottle and I saw the plastic cup and I
- 20 smelled the plastic cup. It was alcohol, and then we proceed
- 21 to ask for his identification. And Officer Salmeron check over
- 22 the radio -- I don't know. I can't remember how she made the
- 23 warrant check, and she told me that he had an open, an active
- 24 warrant.
- 25 Q. I just want to go back for a minute. Did you pick up the

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D3sWflol Pichardo - cross

- 1 bottle?
2 A. Yes.
3 Q. And did the bottle have any label on it?
4 A. Yes.
5 Q. What was the label?
6 A. Hennessy.
7 Q. Did you smell the bottle?
8 A. Yes.
9 Q. What did it smell like?
10 A. Alcohol.
11 Q. I'm sorry if you said this, but did you smell Mr. Dennis'
12 cup?
13 A. Yes, sir.
14 Q. What did the cup smell like?
15 A. Alcohol.
16 Q. So why did you stop Mr. Dennis?
17 A. He was in a violation for open container.
18 Q. And did you originally intend to give Mr. Dennis a summons?
19 A. Yes, sir.
20 Q. And why is that?
21 A. He was drinking in public view, in the public view.
22 Q. And why didn't you issue Mr. Dennis a summons?
23 A. Because Officer Salmeron told me that he has an active
24 warrant.
25 Q. What did that mean to you?

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D3sWflol Pichardo - cross

1 Q. In retrospect, do you believe that you should have?

2 A. Yes, sir.

3 Q. What training did you receive at the Police Academy
4 regarding stop, question, and frisk?

5 A. Police Academy, they have scenarios, lectures, and tacks
6 about stop, question, and frisk.

7 Q. Was there any role play?

8 A. Yeah, role plays.

9 Q. Have you been trained on stop, question, and frisk since
10 you left the academy?

11 A. Yes.

12 Q. What kind of training have you received regarding stop,
13 question, and frisk since you left the academy?

14 A. In roll call, the training sergeant always call and train
15 us. My personal sergeant, and we go to Robbins Neck to be
16 retrained for stop, question, and frisk.

17 Q. And was that part of a refresher course at Robbins Neck?

18 A. Yes, sir.

19 Q. Do you ever receive any training informally from your
20 supervisors on stop, question, and frisk?

21 A. Yes.

22 Q. During your direct examination, you indicated that your
23 supervisors discussed target numbers with you in 2009, correct?

24 A. Correct.

25 Q. And you also stated during your direct examination that

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D3sWflol Pichardo - cross

1 Q. Did you receive any extra compensation if you did meet
2 those target numbers?

3 A. No.

4 Q. Since 2009, have any supervisors ever required you to
5 complete a certain number of stops, arrests, or summonses?

6 A. No.

7 Q. At any point in your career, did you ever feel pressured to
8 make an unlawful stop?

9 A. No.

10 Q. Officer Pichardo, do you know if the NYPD has a policy
11 regarding racial profiling?

12 A. Yes.

13 Q. Before I discuss racial profiling, since 2009, have you met
14 with your supervisors to discuss entries in your memo books?

15 A. Yes.

16 Q. I'm sorry. Just going back to the racial profiling, what
17 do you understand the NYPD's policy regarding racial profiling
18 to be?

19 A. Well, we cannot stop a person based on their religion,
20 their color, and --

21 Q. And when did you first learn about the NYPD's policy
22 prohibiting racial profiling?

23 A. In the Police Academy.

24 Q. Did you ever receive any training on policing in a
25 multicultural society while at the Police Academy?

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D3sWflol Pichardo - cross

1 A. Yes.

2 MR. MARUTOLLO: May I have one moment, your Honor.

3 I have no further questions, your Honor.

4 THE COURT: Okay.

5 MS. HOFF VARNER: Just one moment, your Honor.

6 THE COURT: Sure.

7 REDIRECT EXAMINATION

8 BY MS. HOFF VARNER:

9 Q. Officer Pichardo, the NYPD is a paramilitary organization,
10 isn't that right?

11 A. Correct.

12 Q. So if the supervisor tells you that he or she expects you
13 to get five summonses during a tour, you're going to do
14 everything you can to get those five summonses during a tour,
15 aren't you?

16 A. Everything that I see, I'm going to do it.

17 Q. And you testified that in the time period where supervisors
18 were asking you for numbers you had never been denied overtime
19 or transferred or suffered adverse consequences for failing to
20 meet your numbers, correct?

21 A. Correct.

22 Q. But you never failed to meet your numbers, isn't that
23 right?

24 A. That's right.

25 Q. In fact, I think you said yesterday --

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D3sWflol Pichardo - redirect

- 1 A. Well --
2 Q. -- that you were a good worker and that the supervisor had
3 never spoken to you about failing to make your numbers, isn't
4 that correct?
5 A. It's not, every day I didn't get those numbers. Some days
6 it was nothing and they never told me nothing about it. Other
7 time, they want my numbers.
8 Q. But you did say that you were a good worker, is that right?
9 A. Yes, sir -- yes, ma'am. Sorry.
10 Q. You testified just now that since 2009 no one had ever
11 required you to make numbers?
12 A. Correct.
13 Q. When in 2009 did that change?
14 A. When?
15 Q. Mm-hmm.
16 A. I think after the new contract, police contract, and during
17 the media.
18 Q. Do you remember when that was?
19 A. I can't remember that.
20 Q. When you say the new police contract, can you tell me a
21 little bit more about what you mean?
22 A. What I heard, you know. I never read it. I heard that the
23 supervisor, they can't ask for numbers. That's what I heard.
24 Q. That they can't ask for numbers?
25 A. Yeah.

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D3sWflol1 Pichardo - redirect

1 Q. Have you ever heard of operations order 52?

2 A. I have to see it. I can't --

3 Q. I'm going to show you what's been already introduced in
4 evidence as Plaintiffs' Exhibit 285.

5 MR. MARUTOLLO: Objection, your Honor. Just for
6 purposes of duplicative testimony, Officer Pichardo is not one
7 of the officers whose current assignment applies with respect
8 to operations order 52. And this order came out after he had
9 already been assigned to that present assignment. So to the
10 extent that there's any cross-examination on this issue, there
11 will be other officers who will be testifying who are, in
12 fact --

13 THE COURT: That's a good argument. I really don't
14 want repetitive testimony. We've seen operations order 52.
15 You have had a chance to do direct on this witness. This is
16 supposed to be redirect. I'm afraid you're going to go over
17 your entire direct again, and I don't have the patience for it.
18 Why do we need this document with this witness? I have seen
19 this document. It's a nonjury trial. I understand it.
20 Mr. Marutollo makes a good point. This officer wasn't even in
21 a position to have this applied by the time it came out.

22 Is that it?

23 MR. MARUTOLLO: Correct.

24 THE COURT: I prefer you not go over this with him.

25 MS. HOFF VARNER: Your Honor, if I may, he testified

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D3sWflol Pichardo - redirect

1 that after 2009, the performance requirements changed in the
2 NYPD, and I'm just trying to establish what it was that changed
3 that requirement to make numbers.

4 THE COURT: Just ask him.

5 MS. HOFF VARNER: I did, and he said it was the police
6 contract.

7 THE COURT: Yes?

8 MS. HOFF VARNER: Then he said he needed to see a
9 document to refresh his recollection.

10 THE COURT: Show him the document. But I'm not going
11 to look at him anymore. Ask him if this refreshes his
12 recollection. We have to start moving this along a little bit
13 more. I'm finding that the plaintiffs' examinations are
14 getting repetitive and long, especially on redirect; they're
15 repeating the direct. In case you haven't been watching that,
16 I've been watching it. We're don't have redirect of redirect.
17 Show him the document. That's what's happening. We're running
18 through the whole direct again.

19 BY MS. HOFF VARNER:

20 Q. Officer Pichardo, do you recognize this document?

21 A. I recognize -- to be honest, I recognize NYPD, but I
22 can't --

23 Q. Have you ever heard of performance goals?

24 A. Performance, yes.

25 Q. You testified that there was a change to the police

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D3sWflol1 Pichardo - redirect

- 1 contract and that after that change, the supervisors couldn't
2 tell you to make numbers anymore. After that change, have you
3 ever been subject to a performance goal?
4 A. Performance, like they asking me for numbers? No, they
5 never, after that.
6 Q. Have they ever told you that there's a specific performance
7 goal for your tour?
8 A. No.
9 Q. Do you continue to report the number of stops, arrests, and
10 summonses in your monthly performance reports?
11 A. Yes, ma'am.
12 Q. Can you remember when exactly that change was?
13 A. I can't remember.
14 Q. Was it right after your deposition in 2009?
15 A. I can't remember that. I just --
16 Q. Could it have been --
17 A. After 2009, yes, it happened.
18 Q. After 2009, but you can't remember when after 2009?
19 A. Right.
20 Q. And you testified that you moved from anticrime to SNEU in
21 approximately 2010, isn't that right?
22 A. Approximately.
23 Q. And in SNEU, you focus on making drug-related arrests,
24 isn't that right?
25 A. Yes, ma'am.

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D3sWflol Pichardo - redirect

1 Q. There's an observation team who reports the description of
2 a crime, isn't that correct?

3 A. Yes, ma'am.

4 Q. And an apprehension team then goes and stops those people,
5 isn't that correct?

6 A. Correct.

7 Q. So since 2010, when you became part of SNEU, you don't
8 really making stops based on reasonable suspicion at all, do
9 you?

10 A. Most of the stop, we have probable cause.

11 Q. And so for most of those stops, you're generally not
12 looking for people to stop based on reasonable suspicion, isn't
13 that right?

14 MR. MARUTOLLO: Objection to form.

15 A. That is depending --

16 THE COURT: Overruled.

17 A. -- depending on the date. If we don't have an OP, a person
18 that's looking, sometimes we're driving around, we have
19 reasonable suspicion that this person's doing something, we
20 stop them.

21 Q. But, in general, when you go out for an SNEU tour, you're
22 looking to make stops based on probable cause, correct?

23 A. Most of the time.

24 MS. HOFF VARNER: No further questions.

25 THE COURT: Thank you.

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D3sWflol1 Pichardo - redirect

1 Anything further for this witness, Mr. Marutollo?

2 MR. MARUTOLLO: No further questions.

3 THE COURT: Thank you. You may step down.

4 (Witness excused)

5 THE COURT: Next witness.

6 MR. CHARNEY: Plaintiffs call Cormac Joyce.

7 CORMAC JOYCE,

8 called as a witness by the Plaintiffs,

9 having been duly sworn, testified as follows:

10 THE COURT: Thank you.

11 DIRECT EXAMINATION

12 BY MS. PATEL:

13 Q. Good morning, Officer Joyce.

14 A. Good morning.

15 Q. You entered the New York Police Academy around July 2002,
16 isn't that correct?

17 A. In 2002, correct.

18 Q. And you ended your service with the New York Police
19 Department in January of 2009 or December of 2008, is that
20 right?

21 A. Yes.

22 Q. And when you left the New York Police Department, you began
23 working with the New Jersey State Police Department, is that
24 correct?

25 A. Yes.

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D3sWflol Joyce - direct

1 Q. Are you still employed with the New Jersey State Police?

2 A. Yes.

3 Q. What's your position?

4 A. Trooper.

5 Q. Isn't it true that you were involved in a stop of Mr. David
6 Floyd on February 27, 2008?

7 A. Yes.

8 Q. And that stop occurred in front of a residential home,
9 isn't that right?

10 A. Yes.

11 Q. On Beach Avenue, in the Bronx?

12 A. I believe so.

13 Q. Do you recall that the address was 1359 Beach Avenue?

14 A. I don't recall the address.

15 Q. You later came to learn that Mr. Floyd lived at that
16 address, is that right?

17 A. That's correct.

18 (Continued on next page)

19

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21

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23

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25

D3s9flo2 Joyce - direct

- 1 Q. And there was a second person stopped with Mr. Floyd; isn't
2 that right?
3 A. Yes.
4 Q. And you later learned the second person also lived at that
5 address; is that right?
6 A. I don't recall.
7 Q. Well in any case I'm going to refer to the second person as
8 David Floyd's neighbor. You'll understand who I'm talking
9 about, right?
10 A. I guess so.
11 Q. Well, you just testified that there was a second person
12 stopped with David Floyd, right?
13 A. Yes.
14 Q. Both men were black, weren't they?
15 A. I don't recall.
16 Q. But Mr. Floyd was African-American. Right? You recall
17 that?
18 A. I believe so.
19 Q. You don't remember much about Mr. Floyd or his neighbor, do
20 you?
21 A. I remember the stop. Not a hundred percent.
22 Q. You can't recall Mr. Floyd's height, hairstyle, or weight,
23 can you?
24 A. Not at this time.
25 Q. Could you recall his height, weight, or hairstyle in 2009?

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D3s9flo2

Joyce - direct

- 1 A. Yeah.
2 Q. Yes?
3 A. Yes.
4 Q. Your testimony is yes?
5 A. Yes.
6 Q. I'm handing you your -- do you recall being deposed in this
7 case?
8 A. Yes.
9 Q. And that deposition was on August 25, 2009. Do you recall
10 that?
11 A. I don't recall the date.
12 Q. But you swore to tell the truth at that deposition, right?
13 A. Yes.
14 Q. I'm going to hand you your deposition transcript from that
15 deposition. I just ask that I'll refer you to certain pages
16 and if you could just focus on those pages.
17 Can you please turn to page 131, line 18.
18 "How would you describe his hairstyle?
19 "I don't remember.
20 "Q. Do you recall his approximate height?
21 "A. I don't remember.
22 "Q. Did he have facial hair?
23 "A. I don't remember.
24 "Q. Do you recall his appropriate -- his approximate weight?
25 "A. I don't remember."

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D3s9flo2 Joyce - direct

1 Did I read that correctly?

2 A. You're jumping all over the place a little bit. If it's in
3 here, then I must have said it.

4 Q. And Mr. Floyd -- for the record that was 131, 18 through
5 20. And then 132, 15 through 17. And 131 -- I'm sorry 131, 16
6 through 20. And 132, 15 through 20.

7 You can't remember what Mr. Floyd was wearing, can you?

8 A. At this time, no.

9 Q. Could you remember it at the time of your deposition?

10 A. Probably not.

11 Q. That was in 2009, right?

12 A. Stop was in 2009? Or the deposition was in 2009?

13 Q. The deposition.

14 A. I believe the deposition was in 2009.

15 Q. If you could just turn to the front page. You can see it
16 says August 25, 2009. Is that correct?

17 A. Yes.

18 Q. Do you have any reason to think that that wasn't the date
19 of your deposition?

20 A. No.

21 Q. You can't remember what the neighbor was wearing; isn't
22 that right?

23 A. At this time, no.

24 Q. And you couldn't remember it in 2009, could you?

25 A. Probably not.

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D3s9flo2 Joyce - direct

1 Q. But it's fair to say that other than his -- other than the
2 race, you can't really remember much about Mr. Floyd or the
3 other person who was stopped?

4 MR. KUNZ: Objection.

5 THE COURT: All right.

6 MR. KUNZ: I believe it's a mischaracterization. I
7 think he said he didn't really specifically remember what race
8 either member.

9 THE COURT: I think he acknowledged Mr. Floyd's race
10 as African-American. He did say that.

11 MR. KUNZ: As long as we're all clear.

12 THE COURT: Okay. Thank you.

13 Q. Officer Joyce, on February 27, 2008 you were assigned to an
14 anticrime unit in the 43rd precinct; is that right?

15 A. Correct.

16 Q. You were patrolling with Sergeant James Kelly and Officer
17 Eric Hernandez; is that true?

18 A. Correct.

19 Q. And the three of you were working in plainclothes; isn't
20 that right?

21 A. Yes.

22 Q. And that means that you weren't wearing your uniform; isn't
23 that right?

24 A. That's right.

25 Q. And the three of you were patrolling in an unmarked

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D3s9flo2 Joyce - direct

1 vehicle; isn't that right?

2 A. Yes.

3 Q. And at some point in the afternoon you drove down Beach
4 Avenue, right?

5 A. Most likely.

6 Q. And then you observed two men in front of a residential
7 building on Beach Avenue; is that right?

8 A. Correct.

9 Q. And they were in front of the door of a residential
10 building; isn't that right?

11 A. That's correct.

12 Q. And the two men -- they had their backs to you; isn't that
13 right?

14 A. At some points, yes, that's correct.

15 Q. When you first observed them?

16 A. I don't recall.

17 Q. Well, but you did see them in front of a residential
18 building, right?

19 A. Yes.

20 Q. But you can't remember much about that building, can you?

21 A. Other than that it's a residential building.

22 Q. And isn't it true that you don't remember if it was a
23 single family dwelling or an apartment building?

24 A. It was a multiple family dwelling.

25 Q. You don't remember the color of the building or the color

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D3s9flo2 Joyce - direct

1 of the door where they were standing in front of?

2 A. I don't recall at this time.

3 Q. You didn't recall it in 2009, 18 months after the stop
4 either, did you?

5 A. I'm not sure if I did or not.

6 Q. Let's turn to page 135, line 2.

7 MR. KUNZ: Slight objection, your Honor. Are we
8 impeaching or refreshing his recollection because he could just
9 read it if it's going to refresh his recollection.

10 THE COURT: That's true.

11 MS. PATEL: I'm impeaching him.

12 MR. KUNZ: I think he said he doesn't remember what he
13 said in 2009 so it would be improper impeachment.

14 THE COURT: If that's the answer, he didn't remember
15 what he said in 2009. Is that your last answer?

16 THE WITNESS: Yes, ma'am.

17 THE COURT: Well that's true. That's not impeachment.
18 That is refreshing recollection if you want to show him what he
19 said in 2009 and then ask him if it refreshes his recollection.
20 If it doesn't, you can read it in. Probably is going to end up
21 slower, but.

22 MS. PATEL: Can you read please page 135, line 2
23 through 4. You can just read 2 through 10.

24 (Pause)

25 THE WITNESS: It's labeled here 134 and 136. There is
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D3s9flo2 Joyce - direct

1 "Do you recall if there were stairs to the door?

2 "I don't remember."

3 I didn't remember it at the deposition.

4 Q. Thank you.

5 I'm going to show you what's Defendants' Exhibit N-10 Bates
6 stamped NYC-2-28757.

7 Officer Joyce, do you recognize the building where David
8 Floyd was stopped in that photograph?

9 A. No.

10 Q. You can't recall whether David Floyd was stopped in a
11 building depicted in that photograph, can you?

12 A. I can't remember at this time.

13 Q. Officer Joyce, at some point while you were driving down
14 Beach Avenue the car stopped, right?

15 A. I'm not sure where we were driving.

16 Q. You don't recall that -- if the stop occurred on Beach
17 Avenue in the Bronx?

18 A. It occurred on Beach Avenue in front of a residential house
19 but I don't recall where we were driving exactly. Could have
20 been stopped -- we were stopped. At some point we might have
21 driven on Beach Avenue.

22 Q. So you don't recall where you -- where the car was stopped
23 at all prior to approaching the residential building?

24 A. It was stopped a distance away from the two males in front
25 of the residential house. Where exactly it was stopped, I

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D3s9flo2 Joyce - direct

1 don't remember at this time.

2 Q. The question is it was -- the question I'm asking is:
3 Wasn't it stopped on Beach Avenue?

4 A. I don't recall at this time.

5 Q. And, in fact, you can't remember -- you can't remember
6 whether it was stopped on the street, the sidewalk, or the
7 front lawn, can you?

8 A. It wasn't stopped on the front lawn because there was no
9 front lawns there. It could have been stopped on the sidewalk
10 or the street.

11 Q. I'd ask that you please turn to your deposition testimony
12 on page 131, line 2 through 8.

13 "Q. Was the car stopped on the sidewalk?

14 "A. I don't remember.

15 "Mr. Hasan: Objection."

16 MR. KUNZ: Objection, your Honor. This isn't
17 impeachment. He's saying the exact same thing. He doesn't
18 remember where the car was stopped. And those are the answers
19 he's giving here.

20 THE COURT: What's the point of this, Ms. Patel?

21 MS. PATEL: He said that it wasn't stopped on the
22 front lawn. In his testimony here he says he doesn't remember
23 if it was stopped on the front lawn.

24 THE COURT: That's the same answer. If he doesn't
25 remember, he says today he doesn't remember.

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D3s9flo2

Joyce - direct

1 MS. PATEL: No. He said it couldn't have been stopped
2 on the front lawn. It would have been the sidewalk or the
3 street.

4 THE COURT: You can read that part.

5 "Q. Was the car stopped on the front lawn?

6 "A. I don't remember."

7 But regardless, the car was stopped somewhere.

8 Did I read that correctly? I'm sorry. Did I read that
9 correctly?

10 THE COURT: Wait a minute. All you just read me was
11 "I don't remember." The answer was I don't remember. We just
12 did that.

13 MS. PATEL: That's right.

14 "Was the car stopped on the front lawn?

15 "I don't remember."

16 THE COURT: Right. And that's just what we had here.

17 MS. PATEL: No, your Honor. He stated that it
18 couldn't have been stopped on the front lawn.

19 THE COURT: Okay. Here. That's what he said here?

20 MS. PATEL: Excuse me?

21 THE COURT: That's what he said here at trial?

22 MS. PATEL: That's right.

23 THE COURT: Then he said "I don't remember."

24 MS. PATEL: That's right.

25 THE COURT: Which is it?

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D3s9flo2 Joyce - direct

1 A. Specifically -- exact words, no.

2 Q. Anything specific about the actions of Mr. Floyd or the
3 other individual, right?

4 A. Specifically -- in general we were talking about his
5 actions.

6 Q. But you don't remember anything specific that you stated --
7 that anyone stated about the actions of Mr. Floyd or the other
8 individual while you were in the car?

9 A. What I recall was his actions of looking back --

10 Q. Officer Joyce, I'm just asking you: You don't recall the
11 conversation that was in the car, the specific conversation
12 of -- excuse me. Which -- the specific actions that were
13 discussed while you were in the car, you don't recall the
14 specific actions that were discussed, do you?

15 A. You mean the exact words? Or --

16 Q. Yes.

17 A. In general, I can give you a general.

18 Q. I'm asking you if you can remember exactly specifically
19 what actions were discussed. Yes or no.

20 A. Yes.

21 Q. Okay. Can you please turn to page 130, lines 10 through
22 15.

23 "Did Sergeant Kelly say anything?"

24 Excuse me. I'm sorry. Let's start on page 129, 19 through
25 20 -- sorry. 129, lines 19 through 130, 2.

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D3s9flo2 Joyce - direct

1 "Q. Do you recall discussing Mr. Floyd or the other individual
2 with the other two officers while you were in the car.

3 "I don't remember exactly what was said. The
4 conversation -- the conversation was brought up about the
5 actions of the individual."

6 And then on line -- down further, page 130, line 10 through
7 15, "Did Sergeant Kelly say anything?

8 "A. I don't remember.

9 "Q. Did Officer Hernandez say anything?

10 "A. I don't remember."

11 And you also stated on page 130, line 3 through 5, "Do you
12 recall who brought up the conversation?

13 "A. I don't remember."

14 Did I read that correctly?

15 A. Yes.

16 Q. You testified you observed them for two minutes before
17 getting out of the car, right?

18 A. Roughly two minutes, yes.

19 Q. At any time prior to approaching them, did you notice --
20 sorry.

21 At any time prior to approaching them -- prior to
22 approaching them you noticed that one of them was holding keys,
23 didn't you?

24 A. Yes.

25 Q. And then you approached the two men, didn't you?

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D3s9flo2

Joyce - direct

1 A. Correct.

2 Q. And you announced yourself as police, right?

3 A. Correct.

4 Q. And they understood that you were police, right?

5 A. I would imagine so.

6 Q. And then you began questioning them; isn't that right?

7 A. After we identified ourselves as police by saying it and we
8 had our shields out, we began a conversation with them.

9 Q. Isn't it true that you were stand -- you and the other two
10 officers were standing between them and the street?

11 A. I believe we were.

12 Q. And if they walked away you would have prevented them from
13 leaving, right?

14 A. Correct.

15 Q. So you asked them for ID; isn't that right?

16 A. Yes.

17 Q. Okay, Officer Joyce. You mentioned the 250. When you
18 refer to UF 250, you're referring to the stop, question and
19 frisk form that's completed following a stop, question and
20 frisk; isn't that right?

21 A. Yes, ma'am.

22 Q. I'm giving the witness Plaintiffs' Exhibit 74. Do you
23 recognize this document as a blank UF 250 form?

24 A. Yes.

25 MS. PATEL: Your Honor, I move this into evidence.

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D3s9flo2 Joyce - direct

1 MR. KUNZ: No objection.

2 THE COURT: The number again?

3 MS. PATEL: Seventy-four.

4 THE COURT: Seventy-four is received.

5 (Plaintiffs' Exhibit 74 received in evidence)

6 MR. KUNZ: Your Honor, just before we get into this we
7 just noticed that the revision date on this particular copy is
8 May 2011 and Officer Joyce retired from the New York City
9 police department in 2009. So this was not an operative
10 document when he worked at the NYPD.

11 THE COURT: You just said no objection but do we have
12 the version that existed in '09?

13 MR. CHARNEY: We do. It's another exhibit. It's
14 going to take us a second.

15 MS. PATEL: I can continue.

16 Q. I'm going to show you what's been marked as Defendants'
17 Exhibit X4 Bates stamped NYC 107 to NYC 112.

18 You recognize this document as the UF 250 form that you
19 filled out following the stop, question, frisk of David Floyd?

20 A. Yes.

21 Q. And that's in NYC 107 to 108. And stapled to that is
22 NYC 109 through 112 which you'll recall is the
23 computer-generated printout of the UF 250; isn't that correct?

24 A. I'm not sure. Normally if I can recall we don't see this.
25 This is just administrative paperwork.

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D3s9flo2 Joyce - direct

1 Q. You wouldn't have entered this yourself?

2 A. I don't believe so, no.

3 Q. Do you see -- do you see on NYC 111?

4 MR. KUNZ: Your Honor, I'm sorry. Could I get a copy
5 of this document.

6 MS. PATEL: It's Defendants' Exhibit X4. Sorry. Do
7 you need a copy?

8 MR. KUNZ: I have it now. Go ahead.

9 Q. On the page Bates stamped NYC 111, do you see it says
10 sign-off reporter, and it has your name P.O. M. Joyce?

11 A. Yes.

12 Q. And so it's fair to say this is the computer-generated
13 version of the UF 250 form, correct?

14 A. I'm not sure.

15 Q. Do you want a moment to look at it?

16 A. What was your question again?

17 THE COURT: The question was: Is this the
18 computer-generated version of the UF 250? If you look it over,
19 can you tell that?

20 THE WITNESS: Yes.

21 MS. PATEL: I'd like to move this into evidence,
22 please.

23 THE COURT: Any objection?

24 MR. KUNZ: No objection.

25 THE COURT: What's the number again?

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D3s9flo2

Joyce - direct

1 MS. PATEL: X4.

2 THE COURT: Defendants' X4 is received.

3 (Defendants' Exhibit X-4 received in evidence)

4 MR. KUNZ: I'm sorry. Same as some of the exhibits
5 yesterday. This one does have some dates of birth on it. So
6 we just --

7 THE COURT: This one what?

8 MR. KUNZ: This exhibit has some dates of birth on it.
9 So we just need to make sure those get redacted.

10 THE COURT: They will be redacted.

11 MS. PATEL: Yes, your Honor.

12 THE COURT: The plaintiffs should remember to do that
13 before you submit it in the record.

14 MS. PATEL: Okay.

15 Q. Officer Joyce, when you were a police officer in the New
16 York police department you received training on how to complete
17 a UF 250 form, correct?

18 A. Correct.

19 Q. I apologize that there is this -- it's actually slightly
20 cut off here. This is the way it was produced to us. But I
21 think it's -- you have an understanding of what it's going to
22 say?

23 A. Yes, ma'am.

24 Q. While I'm trying to get to the right place.

25 Can you please tell us why you filled this out and not

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D3s9flo2 Joyce - direct

1 there's a caption that says: What circumstances led to the
2 stop.

3 Do you see that?

4 A. Yes.

5 Q. And you have checked one box; is that right?

6 A. Correct.

7 Q. And that box is furtive movements; isn't that right?

8 A. Correct.

9 Q. And the furtive movement you observed was jostling of the
10 doorknob; isn't that right?

11 A. Amongst others, correct.

12 THE COURT: Amongst others. What were the others?

13 THE WITNESS: Amongst over movements.

14 MS. PATEL: But for the purpose of this form --

15 THE COURT: Excuse me, Ms. Patel. I asked a question.

16 MS. PATEL: Oh, I'm sorry.

17 THE COURT: What was the amongst others?

18 THE WITNESS: He was jostling keys. He was also
19 peering into the window. And he was also looking back as if he
20 was, you know, seeing if anybody was watching him while he was
21 jostling the door.

22 Q. Can I get that read back because I didn't hear it.

23 THE COURT: He was also appearing into the windows.

24 He was also looking back as if he was, you know, seeing if
25 anybody was watching him while he's jostling the door.

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D3s9flo2 Joyce - direct

1 Q. The question here is for purposes of checking off furtive
2 movement on this form, the only thing you observed was jostling
3 of the doorknob; isn't that right?

4 A. I don't understand the question.

5 Q. When you checked off this box, you checked off furtive
6 movement. Do you -- because you observed jostling of the
7 doorknob, right?

8 A. Correct.

9 Q. And that's the only reason you checked that off on this
10 form?

11 THE COURT: He just said there were other furtive
12 movements and I asked him what were the other ones. He
13 described them.

14 MS. PATEL: Okay. Well I -- I'm trying to establish
15 so I can impeach him with his deposition testimony.

16 Q. Can you please go to page 179 lines 3 through 8.

17 A. I'm sorry what was the number.

18 Q. 179 lines 3 through 8.

19 "What were the furtive movements?"

20 "A. It would be jostling of the doorknob.

21 "Q. Any other furtive movements?"

22 "A. Not that I remember."

23 Did I read that correctly?

24 A. Yes.

25 Q. Looking at further down on the page of NYC 107 in

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D3s9flo2 Joyce - direct

- 1 Defendants' Exhibit X-4 do you see the box that's captioned if
2 physical force was used indicate type?
3 A. Yes.
4 Q. And you checked two boxes; isn't that right?
5 A. Correct.
6 Q. You checked hands on suspect; isn't that correct?
7 A. Correct.
8 Q. And then you checked -- so you put your hands on Mr. Floyd;
9 is that right?
10 A. Correct.
11 Q. And then there is a box suspect against wall/car.
12 Do you see that?
13 A. Yes.
14 Q. Is that because you -- and that's because you put Mr. Floyd
15 against the wall; isn't that right?
16 A. Yes.
17 Q. And you frisked Mr. Floyd, didn't you?
18 A. Correct.
19 Q. Then on the second page of this form, which is NYC 108,
20 there's another box that says additional circumstances/factors.
21 Do you see that?
22 A. Yes.
23 Q. It says check all that apply, right?
24 A. Yes.
25 Q. And you checked three boxes; is that right?

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D3s9flo2

Joyce - direct

1 A. Yes.

2 Q. You checked evasive, false or inconsistent responses to
3 officer's question?

4 THE COURT: I'm sorry. Where is that one?

5 MS. PATEL: The right-hand column, the first --

6 THE COURT: So you're skipping the left-hand column.

7 MS. PATEL: I'm going start with that one.

8 THE COURT: Okay.

9 MS. PATEL: It says evasive, false or inconsistent
10 response to officer's question.

11 Do you see that?

12 THE WITNESS: Yes.

13 Q. And you checked that box, right?

14 A. Yes.

15 Q. And you checked that box because Mr. Floyd had an
16 out-of-state ID; isn't that right?17 A. He was giving false information to the police. That's why
18 I checked that box off. At that time when I was asking him he
19 didn't give me an ID.20 Q. Let's turn to page 180, line 19 of your deposition
21 transcript. Nineteen through 181, 6.22 "Q. Do you see the box checked evasive, false or inconsistent
23 response to officer's question?

24 "A. Yes.

25 "Q. What were the evasive, false or inconsistent response to

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D3s9flo2

Joyce - direct

1 officer's questions that led you to check this box?

2 "A. I don't remember. It was probably in response to when I
3 asked either Mr. Floyd or the other individual if he lived
4 there. And it's probably because of the out-of-state ID."

5 And then further below on page 183, lines 8 through 10.

6 MR. KUNZ: Just after that question and answer there
7 was another question and answer that comes before that further
8 explains.

9 THE COURT: Okay.

10 MR. KUNZ: So the question is:

11 "Q. Besides the out-of-state ID, do you recall any other
12 reasons why you checked the evasive, false or inconsistent
13 response to officer's questions?

14 "Mr. Hasan: Objection.

15 "A. There must have been a couple of reasons, at least, why I
16 checked that box. At this time I don't remember."

17 MS. PATEL: And then on line -- further below on --
18 excuse me page 183 lines 8 through 10, "Do you recall any other
19 reason you checked that box?

20 "A. At this time I don't recall."

21 Did I read that correctly?

22 THE WITNESS: Correct.

23 Q. In the same right-hand column you checked -- you marked an
24 X next to ongoing investigation, e.g., robbery pattern; isn't
25 that right?

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D3s9flo2

Joyce - direct

- 1 A. Yes.
- 2 Q. And you checked ongoing investigation, e.g., robbery
- 3 pattern because you believed that there was a burglary pattern
- 4 in the area; isn't that correct?
- 5 A. There was a burglary pattern in the area.
- 6 Q. Okay. I'm showing the witness what's been marked -- excuse
- 7 me Defendants' Exhibit L-4 titled patrol borough Bronx burglary
- 8 pattern sheet.
- 9 Have you ever seen this before?
- 10 A. Is this for the date in question, around that date?
- 11 Q. Well have you ever seen it before?
- 12 It's dated 3-7-08.
- 13 A. I'm not exactly sure if I have seen this before.
- 14 Q. You don't -- today sitting here you don't recognize it
- 15 though, do you?
- 16 A. I recognize that it's a pattern sheet. But just by looking
- 17 at it for a few seconds I'm not sure about the dates or if I
- 18 have seen this before.
- 19 I have seen burglary patterns. And sheets. And one of the
- 20 sheets I saw was in question around that date of the stop.
- 21 Q. Do you recall seeing this particular one?
- 22 A. I might have. Right now I don't recall.
- 23 Q. Officer Joyce, what was the basis then for your
- 24 understanding that there was a burglary pattern?
- 25 A. The basis was that the detective borough Bronx felt a --

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D3s9flo2

Joyce - direct

1 Q. Ask you to speak up. I'm having a hard time hearing.

2 A. Can you repeat the question again.

3 Q. What was your basis for understanding that there was a
4 burglary pattern?

5 A. The detective borough Bronx started a burglary trend that
6 developed into a pattern and they handed out the pattern to the
7 local precincts.

8 Q. Who did you receive this local pattern -- was it a document
9 that you received?

10 A. It was a sheet that looked like that.

11 Q. And you were provided that sheet?

12 A. Correct.

13 Q. When were you provided that sheet?

14 A. I don't recall at this time.

15 Q. Do you recall where you were provided that sheet?

16 A. Most likely in the 43 station house.

17 Q. Did this burglary pattern coincide with burglaries
18 happening in broad daylight?

19 A. Yes.

20 Q. Did this burglary pattern coincide with burglaries in broad
21 daylight at the front doors of residential homes?

22 A. I don't recall.

23 Q. Did this burglary pattern coincide with burglaries in broad
24 daylight at the front doors of the residential homes when those
25 front doors faced the street?

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D3s9flo2 Joyce - direct

- 1 Q. Let's go to -- you don't recall if he reviewed -- if he
2 discussed this particular form with you, do you?
3 A. He might have. At this time I don't recall.
4 Q. Just to go back to that burglary pattern. What were the
5 parameters of the burglary pattern that you were informed
6 about?
7 A. What I can remember at this date was, it was residential
8 buildings, in the afternoon, during daylight. And that's all I
9 can remember.
10 Q. And that was in the 43rd precinct?
11 A. Correct.
12 Q. Or all of the Bronx?
13 A. That one pattern that we're talking about now was just for
14 the 43.
15 Q. Just for the 43?
16 A. Correct.
17 Q. And was it specific to Beach Avenue?
18 A. I don't recall. I know it was an area of Beach Avenue.
19 Q. The burglary pattern that was discussed was in the area of
20 Beach Avenue?
21 A. Correct.
22 Q. What do you mean by area?
23 A. The surrounding neighborhood of Beach Avenue.
24 Q. The surrounding neighborhood. Okay.
25 Officer Joyce I'm going to show you Plaintiffs' Exhibit

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D3s9flo2

Joyce - direct

1 180. It's a three-page document, NYC 630 to 632.

2 Does this document contain entries from your memo book?

3 A. Yes.

4 MS. PATEL: I'd like to move to admit.

5 MR. KUNZ: Dates of birth on it but otherwise no
6 objection.

7 THE COURT: Please redact those before they are placed
8 in the record.

9 MS. PATEL: Yes, your Honor.

10 THE COURT: So this is exhibit.

11 MS. PATEL: 180. Plaintiffs' Exhibit 180.

12 THE COURT: Yes. 180 is received.

13 (Plaintiffs' Exhibit 180 received in evidence)

14 Q. Looking at the second page of the document, Bates stamped
15 631, NYC 631, do you see here -- do you see here a star next to
16 the numbers 2-27. Do you see that?

17 A. Yes.

18 Q. And it says Wednesday -- WED tour 0800 times 1635.

19 Do you see that?

20 A. Yes.

21 Q. And that means that you had a tour on Wednesday,
22 February 27 that ended at 4:35; is that right?

23 A. Correct.

24 Q. And started at 8:00 a.m; is that correct?

25 A. Yes, ma'am.

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D3s9flo2 Joyce - direct

- 1 Q. And then the next line says, 0400 PFD at 43 PCT.
2 Do you see that?
3 A. I think it says 0800.
4 Q. This number -- I'm sorry. This is -- you believe this is
5 0800?
6 A. Yes.
7 Q. And what does PFD mean?
8 A. Present for duty.
9 Q. This indicated that you were present for duty at the 43rd
10 precinct at 8:00 a.m.?
11 A. Correct.
12 Q. And then the next line says 1635 EOT PO Joyce 31274, right?
13 A. Correct.
14 Q. And that indicates that the end of your tour happened at
15 4:35 p.m., correct?
16 A. Correct.
17 Q. Is this the full extent of your entry for February 27 on
18 this page?
19 A. On that page -- if you can scan out. Most likely, yes.
20 That's the only entry for that date.
21 Q. I can bring it up to you if you like.
22 A. Yes. Just for that date -- for the 27th the only spot I
23 have written down on that page is right there, what we just
24 discussed.
25 Q. If we turn to the next page, NYC 632 we see a note. Do you

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D3s9flo2 Joyce - direct

- 1 Q. So at the time that you were a New York police department
2 officer did you know whether or not this was permissible under
3 New York police department policy?
4 A. I don't recall. It probably -- like I said, it probably
5 wasn't the correct, exactly how to do it.
6 Q. Your note here includes the name Forrester, Ashar, correct?
7 A. Correct.
8 Q. I'm not going to read the dates of birth into the record.
9 But you can see that there is a date of birth on -- indicated
10 next to it, right?
11 A. Yes, ma'am.
12 Q. The next thing written here is 1359 Beach Avenue. Do you
13 see that?
14 A. Yes.
15 Q. And then there's the name Floyd, David, with the date of
16 birth; isn't that right?
17 A. Yes.
18 Q. And then you have written next to it, 250. Do you see
19 that?
20 A. Correct.
21 Q. And the date, 2-27-08?
22 A. Yes.
23 Q. And then there's a note that says -- there's BURG. Do you
24 see that?
25 A. Yes.

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D3s9flo2 Joyce - direct

1 Q. It's fair to say that this note is the full extent of your
2 notes -- notations regarding the circumstances of the stop on
3 February 27, 2008 for Mr. Floyd; isn't that right?

4 A. Most likely all of the notes are the fly page, what we're
5 seeing here, and then the lined page with my tour date.

6 Q. Do you have any reason to believe that you would have notes
7 somewhere else?

8 A. Besides the UF 250, no.

9 Q. But for your memo book these --

10 A. No. That would be it then.

11 Q. And so the full extent of your notation regarding the
12 circumstances of the stop, the factual circumstances of the
13 stop is that note BURG; is that right?

14 A. I don't understand the question.

15 Q. The only notation you have in the two pages that we've
16 reviewed regarding the circumstances for the stop is the note
17 BURG, correct?

18 A. Correct.

19 Q. And that presumably is shorthand for burglary?

20 A. Correct.

21 Q. Right?

22 Officer Joyce, are you sure that you wrote this note on
23 February 27, 2008?

24 A. Yes. I'm sure. Because I know I wouldn't be able to
25 remember all that.

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D3s9flo2 Joyce - direct

1 Q. And it's NYPD policy, isn't it, that a supervisor is
2 supposed to sign off on your memo book, correct?

3 A. Correct.

4 Q. And you testified already that Sergeant Kelly was your
5 supervisor for that tour, right?

6 A. Yes, ma'am.

7 Q. Did you -- do you see anywhere here where he signed off on
8 your memo book entry for February 27, 2008?

9 These are the three lined pages on NYC 631?

10 A. No. For the 27th he didn't sign the memo book.

11 Q. At some point during your service as an NYPD officer you
12 received training on how to adequately complete a memo book; is
13 that right?

14 A. Yes, ma'am.

15 Q. I'm putting up what's already been admitted as Plaintiffs'
16 Exhibit 97. Do you see this document that says New York City
17 Police academy training memo dated February 2008?

18 A. Yes.

19 Q. With the number 07-08?

20 A. Yes.

21 Q. Let me read the second sentence of that paragraph which
22 says, "Activity log entries must chronologically record all
23 assignments, information pertaining to assignments; i.e.,
24 action taken, narratives and serial numbers of forms prepared,
25 summons prepared or served, car stops, stops, question and

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D3s9flo2 Joyce - direct

1 frisk and radio run."

2 You see that, right?

3 A. Yes.

4 Q. And you understand that this was the department procedure
5 when you were a New York police department officer, correct?

6 A. I didn't understand exactly. What I understood was, you
7 know, you have to write down most, if not all, of your activity
8 in your memo book on the lined pages.

9 Q. So your testimony is that your understanding of the
10 policies that you're supposed to put most of the information in
11 your memo book?

12 A. Of your daily activity of that day, yes, you're supposed to
13 enter that in your memo book.

14 Q. While you were an NYPD officer -- excuse me one moment.

15 (Pause)

16 While you were an NYPD officer, your supervisors regularly
17 inspected your memo book; isn't that right?

18 A. Correct.

19 Q. And, in fact, it was -- I think you may have already
20 testified that it was NYPD policy for them to sign off on your
21 memo books, correct?

22 A. Yes, ma'am.

23 Q. So you don't remember ever being told you didn't have a
24 legal basis for a stop, question and frisk, do you?

25 A. I don't understand the question.

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D3s9flo2 Joyce - direct

1 Q. You were never told that you didn't have a legal basis for
2 a stop, question and frisk by a supervisor, were you?

3 A. I don't recall at this time.

4 Q. You already testified that it was NYPD policy to write
5 every UF -- I'm sorry. Was it the -- it was NYPD policy to
6 write every UF 250 in your memo book, correct?

7 A. Yes, ma'am.

8 Q. But, in fact, you did not record every UF 250 in your memo
9 book, did you?

10 A. Most likely I wrote down every -- not every 250 in my memo
11 book. If I had a notebook on me and I didn't have my memo book
12 with me, I would write it on the note -- notepad I had.

13 Q. When you were an NYPD officer, you believed that there was
14 a difference between what was written in policy and what
15 happened in practice; isn't that right?

16 A. I don't understand your question.

17 Q. When you were an officer with the New York police
18 department?

19 A. Okay.

20 Q. Did you believe that there was a difference between what
21 was written in policy and what happens in practice?

22 MR. KUNZ: Objection. I'm not really sure what policy
23 we're talking about. Get specific instead of a general
24 question.

25 THE COURT: You're talking about memo books?

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D3s9flo2

Joyce - direct

1 MS. PATEL: Documenting --
2 THE WITNESS: I can answer the question.
3 MS. PATEL: Documenting the 250s in your memo books.
4 THE COURT: Right. Okay. Go ahead.
5 THE WITNESS: What was the full question now?
6 Q. When you were an NYPD officer, you believed that there was
7 a difference between what was written in policy and what
8 happened in practice, right?
9 A. No.
10 Q. Please turn to page 184, line 24 through 185, 4.
11 "Q. What do you mean --
12 A. Hold -- I'm sorry. Page 184 and what was the line?
13 Q. Line 24?
14 A. Okay.
15 MS. PATEL:
16 "Q. What do you mean by the distinction between practice and
17 policy?
18 "A. Practice means you do it every so often. Um and policy is
19 you must write every 250 in your memo book."
20 Did I read that correctly?
21 A. Yes.
22 THE COURT: Okay. Let's take our morning recess now
23 for ten minutes and reconvene at a quarter to twelve.
24 (Recess)
25 (Continued on next page)

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D3s9flo2

Joyce - direct

1345

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D3sWflo3 Joyce - direct

1 THE COURT: We need the witness back.

2 Please be seated.

3 Ms. Patel.

4 BY MS. PATEL:

5 Q. Officer Joyce, you've never been disciplined for failing to
6 include a stop, question, frisk, in your memo book, have you?

7 A. I don't believe so.

8 Q. Have you discussed this lawsuit with Officer Hernandez or
9 Sergeant Kelly?

10 A. Yes.

11 Q. And you've discussed the lawsuit with Officer Hernandez at
12 least five times, is that right?

13 A. I would assume so, yes.

14 MS. PATEL: That's it.

15 THE COURT: All right. Mr. Kunz.

16 MS. PATEL: I'm sorry, your Honor. I forgot. I have
17 a few more questions. I'm so sorry.

18 Q. Officer Joyce, do you recall giving a sworn statement that
19 half the Bronx looked like the Latino complainant as part of
20 the CCRB proceeding?

21 MR. KUNZ: Objection, your Honor. I don't know what
22 this is from.

23 THE COURT: It's a sworn statement.

24 MR. KUNZ: Right, I understand that, but if she can
25 give me a copy of it.

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D3sWflo3

Joyce - direct

1 THE COURT: What's the prior sworn statement?
2 MS. PATEL: It's from, it's NYC4015. It's not an
3 exhibit. 4015 to 4021.
4 THE COURT: What is that?
5 MS. PATEL: It's a CCRB case closing form.
6 MR. KUNZ: Then it's certainly not a sworn statement
7 of the officer.
8 THE COURT: Ms. Patel, is it a sworn statement of the
9 officer?
10 MS. PATEL: I'm asking him a question about --
11 THE COURT: No. You put in the question that it's a
12 prior sworn statement.
13 MS. PATEL: Yes, that's right.
14 THE COURT: You asked: Do you recall giving a sworn
15 statement. Do you have a sworn statement of his?
16 MS. PATEL: He was, he was, he provided a sworn
17 statement to the CRRB.
18 THE COURT: Do you have it?
19 MS. PATEL: There is a direct quote from his sworn
20 statement.
21 THE COURT: So you don't have his sworn statement?
22 MS. PATEL: I'm asking --
23 THE COURT: You have a document that quotes it.
24 MS. PATEL: That's right. I'm asking if he recalls
25 providing a sworn, making this statement during his sworn

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D3sWflo3 Joyce - direct

1 testimony.

2 THE COURT: Okay. There's a basis for the question.

3 I'll allow it.

4 MR. KUNZ: The other thing I would point out, your

5 Honor, is that it's not on their exhibit list.

6 THE COURT: I know. She's not using the exhibit.

7 She's going to ask whether he recalls giving a sworn statement

8 to the CCRB in which he said --

9 MR. KUNZ: Yes, and based on the way that she started

10 the quote, I believe it could be highly prejudicial if the

11 question itself was asked.

12 THE COURT: I don't understand what you just said.

13 I'm allowing her to ask the following question: Do you recall

14 giving a sworn statement to the CCRB in which you said, and

15 then give the quote.

16 BY MS. PATEL:

17 Q. In which you said that half the Bronx looked like the

18 Latino complainant.

19 A. I don't recall.

20 Q. I'm handing you what's been Bates stamped NYC-4015 to

21 NYC4021, and I can direct your attention to NYC4017.

22 MR. KUNZ: Your Honor --

23 THE COURT: I'm going to allow this to be used to

24 refresh recollection, of course.

25 MR. KUNZ: I totally understand. I just don't have a

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D3sWflo3 Joyce - direct

1 copy of it.

2 THE COURT: All right.

3 MS. PATEL: I can show to him first.

4 THE COURT: No. After he's through, show him.

5 BY MS. PATEL:

6 Q. The second full paragraph, can you please read that
7 paragraph?

8 THE COURT: To yourself.

9 BY MS. PATEL:

10 Q. To yourself.

11 Did you read the paragraph?

12 A. Yes. Some of it's blurry, though.

13 MS. GROSSMAN: Your Honor, is this the only copy?

14 Because we don't have a copy to look at.

15 THE COURT: I know. Mr. Kunz just said that. I don't
16 need to be told the same thing twice. Please, folks. Mr. Kunz
17 just said I don't have a copy. I said you will have it as soon
18 as the witness finishes looking at it. It doesn't help for
19 another lawyer to tell me the same thing.

20 BY MS. PATEL:

21 Q. Has your memory been refreshed as to whether you said,
22 "that's half the Bronx," after being shown a picture of the
23 Latino complainant?

24 A. No.

25 MS. PATEL: That's it.

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D3sWflo3 Joyce - direct

1 THE COURT: All right. Mr. Kunz.

2 CROSS-EXAMINATION

3 BY MR. KUNZ:

4 Q. Good almost afternoon, Trooper Joyce. Thanks for sticking
5 with us.

6 Before we get started about the incident, I just want to go
7 over a little bit about yourself. You said you're currently
8 employed by the New Jersey State Police?

9 A. Correct.

10 Q. What do you do for the New Jersey State Police?

11 A. Trooper.

12 Q. And when were you employed by the NYPD?

13 A. From 2002 to 2009, I believe.

14 Q. What's your educational background?

15 A. 60 college credits.

16 THE COURT: I'm sorry. 60 college credits?

17 THE WITNESS: Yes.

18 THE COURT: Where was that?

19 THE WITNESS: That was at four different colleges.

20 BY MR. KUNZ:

21 Q. What did you study at these different colleges?

22 A. Sociology, criminal justice.

23 Q. Are you married?

24 A. Yes.

25 Q. Do you have children?

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D3sWflo3

Joyce - cross

1 A. Yes.

2 Q. You said you were appointed to the NYPD in 2002, is that
3 correct?

4 A. Correct.

5 Q. How long were you at the NYPD academy?

6 A. Six months.

7 Q. Could you briefly walk the Court through your various
8 assignments with the NYPD after you graduated the academy?9 A. I was assigned to the 44 Precinct as patrol. Then I was
10 assigned to the detective borough Bronx, establishing robbery
11 patterns, burglary patterns, trends. And then I was assigned
12 to the 43rd Precinct patrol, 43rd Precinct burglary
13 apprehension team, and then the anticrime team in the 43.

14 Q. Were you working on February 27 of 2008?

15 A. Yes.

16 Q. What were you doing that day?

17 A. Anticrime.

18 Q. Can you briefly tell the Court what an anticrime unit does?

19 A. The anticrime teams address the seven major crimes, some of
20 which are rape, robbery, assaults, weapons, shooting incidents.
21 And also we address the quality-of-life conditions as well.22 Q. How does the anticrime team go about doing that enforcement
23 work?24 A. We talk to the detectives in the 43rd Precinct and other
25 detectives in narcotics and gangs. We talk to patrol. We

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D3sWflo3 Joyce - cross

1 gather information through trends and patterns, and we talk to
2 other supervisors that work in the 43 Precinct.

3 Q. When you're out in the field as an anticrime officer, do
4 you ever do observations, make observations?

5 A. Yes.

6 Q. What sort of observations do you do as an anticrime
7 officer?

8 A. Whether it's walking around in plain clothes or whether
9 it's sitting in an unmarked car observing the, you know,
10 general public go throughout their day at certain
11 intersections, certain building, certain parks.

12 Q. So can you briefly tell the Court what neighborhoods are
13 covered by the 43rd Precinct?

14 A. That would be Soundview, Parkchester, and Castle Hill.

15 Q. And can you tell the Court what the type of buildings in
16 the neighborhood is? Is it residential, commercial,
17 industrial?

18 A. Not too many commercial buildings there, but there's a
19 majority of small, mainly two, two-story residential buildings,
20 and also there's housing developments in the 43.

21 Q. In policing, are you familiar with the term "crime
22 condition"?

23 A. Yes.

24 Q. Can you explain to the Court what a crime condition is?

25 A. Crime condition is basically a, an area of the precinct

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D3sWflo3 Joyce - cross

1 that has a spike in certain crimes, whether it's, you know, the
2 violent crimes or it's just the petty quality-of-life
3 violations.

4 Q. And do you know how crime conditions are identified?

5 A. Crime conditions, they're identified by the 61s that are
6 generated in that area. And if there's, I don't think there's
7 a set number, but once it reaches a certain point, then that's
8 considered basically a condition that needs to be addressed.

9 Q. You just testified that when you worked for the detective
10 bureau, you did some work in developing patterns?

11 A. Correct.

12 Q. Could you tell the Court a little bit about that work?

13 MS. PATEL: Objection, your Honor. I'm not sure
14 there's really a foundation for this. I don't think he worked
15 for, his title and his position when he was doing crime
16 conditions analysis has not been established. He's not an
17 expert in crime conditions analysis. He's never been a
18 sergeant or lieutenant or precinct commander.

19 THE COURT: I don't think all that was the question.
20 The question was: "You just testified that when you worked for
21 the detective bureau, you did some work in developing patterns.
22 Could you tell the Court a little bit about that work?"

23 That means the work that you did. Nothing to do with
24 being expert. What was the work you did in developing
25 patterns. I'll allow that. It was his work.

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D3sWflo3

Joyce - cross

- 1 A. We developed patterns throughout the Bronx, if there was a
2 spike in, the descriptions of people had to match the
3 description of the crime in a certain area. If that's what I
4 can recall, it had to come together to fit what a logical
5 person would say that, you know, this specific type of person
6 is committing this specific type of crime in that specific
7 area.
- 8 Q. When you were working in the 43rd Precinct around the time
9 of February 2008, were you aware of the crime conditions in the
10 43rd Precinct?
- 11 A. Yes.
- 12 Q. How did you become aware of the crime conditions in the
13 43rd Precinct?
- 14 A. Whether it's specifically by seeing the trends and patterns
15 that were developed, we had gotten that paperwork from probably
16 the detectives in the 43 and also speaking with patrol, day
17 tour, four to 12, midnight patrol, talking with domestic
18 violence officers, the detectives upstairs, and other outside,
19 you know, gang and narcotics units.
- 20 Q. Did you ever speak with civilians, with citizens, of the
21 43rd Precinct?
- 22 A. Yes.
- 23 Q. Could you please tell the Court if those conversations with
24 civilians educated your knowledge of the crime conditions at
25 all?

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D3sWflo3 Joyce - cross

1 A. Yes. You know, we had certain shop owners that we would go
2 in and talk to. They would say, you know, couple of these guys
3 are waiting for kids once they get out of school, and I've seen
4 them, you know, rob them of iPhones, not iPhones back then.

5 THE COURT: Cell phones?

6 A. Cell phones or music, MP3 players, and also a couple of
7 them mentioned when rush hour gets out of the train stations,
8 people would wait to rob some people as well.

9 Q. So what did you do with that knowledge? How did the
10 knowledge of crime conditions affect your policing as an
11 anticrime officer?

12 A. During the times that school let out, we would, you know,
13 hang out at the school exits. Also at the rush hour times we
14 would hang out where the trains let off people.

15 Q. In your experience as an anticrime officer in the 43rd
16 Precinct, when you went out on patrol, was it difficult to see
17 crime happening?

18 A. No.

19 Q. Can you tell the Court a little bit more about that?

20 A. We just had a sense, I guess that's why we were on the
21 crime team, of preventing crime. We could tell who, you know,
22 where the drugs were being dealt, you know, prior individuals
23 with prior arrests for dangerous weapons, and if you just do it
24 for a while, you have a, you have that sense of what's going
25 on. And walking through the park you could point out who is

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D3sWflo3 Joyce - cross

1 the money guy, who is the drug guy. It's -- hard to explain,
2 but --

3 Q. Now, directing your attention to February 27 of 2008, do
4 you recall a specific crime pattern that you were working on
5 that day?

6 A. The burglary pattern.

7 Q. And what do you remember about that burglary pattern?

8 A. What I can remember is burglaries of a residential building
9 or dwelling, and it was during the daytime. And that's all I
10 can remember at this time.

11 Q. If I showed you the patrol borough Bronx burglary pattern
12 sheet, would that refresh your recollection about more
13 details --

14 MS. PATEL: Objection. I already tried to do that,
15 your Honor, and he said he's never seen that document, that he
16 doesn't recall seeing that document.

17 THE COURT: It doesn't matter. You can show anybody
18 anything to refresh recollection. You can show him The New
19 York Times, it doesn't matter. It either refreshes
20 recollection or not. It doesn't matter what the document is.
21 He can read it, and he'll honestly say whether it refreshes his
22 recollection.

23 MS. PATEL: I just wanted to point out I already
24 showed him this exact document, and it didn't refresh his
25 recollection.

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D3sWflo3

Joyce - cross

1 THE COURT: Oh.

2 MR. KUNZ: In the interest of expediency, we'll move
3 on.

4 THE COURT: You showed him the same document to
5 refresh his recollection?

6 MS. PATEL: Yes, your Honor.

7 THE COURT: You said he said never saw it before.
8 That wouldn't be the question. Did you ask him whether it
9 refreshed his recollection, or did you ask him whether he saw
10 it before?

11 MS. PATEL: I think I asked him a few questions,
12 whether or not this was the basis, whether he recalled seeing
13 this document in order to understand -- I don't remember the
14 exact questions. There were a few.

15 THE COURT: The only one that counts is does it
16 refresh your recollection.

17 But if you're willing to move on, Mr. Kunz, that's
18 fine.

19 MR. KUNZ: We're willing to move on.

20 Q. You said when you went out on patrol that day, your
21 anticrime patrol, you were aware of a burglary pattern in the
22 area?

23 A. Yes.

24 Q. And did that knowledge of a burglary pattern affect the
25 police work that you did that day?

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D3sWflo3

Joyce - cross

1 A. Yes.

2 Q. In what way?

3 A. The main objection was to hopefully stop a burglary or put
4 an end to that pattern.5 Q. Did it affect where you went and did your routine
6 patrolling that day?

7 A. Yes.

8 Q. How so?

9 A. We would gather information from the patterns and trends,
10 and we would, you know, specifically hit that area of the
11 pattern or the trend. If the pattern was going on in one
12 section of the precinct, obviously we wouldn't go to the other
13 side of the precinct to deter that crime.

14 MS. PATEL: Excuse me. Can I hear that again?

15 THE COURT: You mean the answer?

16 MS. PATEL: Yes, your Honor.

17 THE COURT: "We would take the information from the
18 patterns and trends, and we would, you know, specifically hit
19 that area of the pattern or the trend. If the pattern was
20 going on in one section of the precinct, obviously we wouldn't
21 go to the other side of the precinct to deter that crime."

22 BY MR. KUNZ:

23 Q. So directing your attention to February 27, 2008, when did
24 you first start your tour that morning?

25 A. I believe it was eight in the morning.

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D3sWflo3 Joyce - cross

- 1 Q. What were you wearing that day?
2 A. I don't recall. Civilian clothes.
3 Q. And who were you with that day?
4 A. Sergeant Kelly and Officer Hernandez.
5 Q. During questioning earlier today, you were asked if
6 Sergeant Kelly had signed your memo book that day, and you said
7 that he had not, is that correct?
8 A. Correct.
9 Q. But Sergeant Kelly was with you throughout the day that
10 day?
11 A. I think in the morning I had court. I don't believe he was
12 with me at court. And then in the afternoon going back to the
13 43, he was obviously with me at that time.
14 Q. Did you normally work with Sergeant Kelly and Officer
15 Hernandez?
16 A. Yes.
17 Q. How long had you been working with them?
18 A. I believe it was over six months. I'm not really sure, in
19 the crime team. I believe it was over six months.
20 Q. How were the three of you traveling that day?
21 A. In an unmarked car.
22 Q. Do you remember who was driving?
23 A. I do not.
24 Q. How did you end up in the vicinity of Beach Avenue that
25 day?

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D3sWflo3 Joyce - cross

1 A. We were trying to hit the area of the pattern that was in
2 the area of Beach Avenue.

3 Q. What, if anything, caught your attention on Beach Avenue?

4 A. Two males acting suspiciously in front of a residential
5 building.

6 Q. What about them was suspicious?

7 A. I believe it was David who was looking in the windows, and
8 one of them was jostling the doorknob. And one of them had a
9 set of keys on them, you know, seemed like he was trying to fit
10 each key, looking for, you know, the key that fit that
11 doorknob. And they were also looking back as to, if anybody
12 was watching them.

13 Q. Do you remember in your questioning earlier when you were
14 asked if you had stated those additional suspicious movements
15 at your deposition?

16 A. Yes. I remember.

17 Q. And the section of your deposition --

18 MS. PATEL: Objection. That's a mischaracterization
19 of the question that I asked.

20 THE COURT: At the deposition?

21 MR. KUNZ: I can clarify, your Honor.

22 THE COURT: All right.

23 BY MR. KUNZ:

24 Q. During questioning earlier today, you indicated that the
25 suspicious activity that you saw was jostling of the keys,

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D3sWflo3 Joyce - cross

1 looking in the window, and looking up and down the street, is
2 that correct?

3 A. Correct.

4 Q. And Ms. Patel confronted you with a section of your
5 deposition that suggested you had only, at your deposition,
6 talked about the jostling of the keys, is that correct?

7 A. Correct.

8 MS. PATEL: Objection again.

9 THE COURT: Your first objection was not well founded.
10 That was exactly what you asked. Your question was, Do you
11 remember in your questioning earlier when you were asked if you
12 had stated those additional suspicious movements at your
13 deposition. That is what you asked. And then you read the
14 deposition and he hadn't. So let's be careful about
15 over-objecting. It's a waste of time and time is precious
16 here. This is a long trial. So that is exactly what you
17 asked.

18 But go ahead, Mr. Kunz. Let's straighten it out, if
19 you want him to explain why he didn't mention the others at the
20 deposition. Is that what you want?

21 MR. KUNZ: Actually, there was a section of his
22 deposition earlier that was not quoted where he specifically
23 mentioned it. I can read it into the record for expediency.

24 THE COURT: That's fine.

25 MR. KUNZ: The question is on page 128, lines ten

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D3sWflo3

Joyce - cross

1 through 17:

2 "Q. Why do you believe that he was looking back nervously?

3 "A. I saw him multiple times jostling with the door and
4 looking to, behind him, to his left, behind his left shoulder,
5 looking behind him to the right, behind his right shoulder,
6 multiple times."7 Q. Do you remember giving those answers to those questions at
8 your deposition?

9 A. Yes, sir.

10 MR. KUNZ: If I could just have one second, your
11 Honor.

12 Q. How long had you observed the men before approaching them?

13 A. Roughly two minutes.

14 Q. Can you describe what the area around the house is like?

15 A. Mostly, I believe it's two-story residential dwellings.
16 Not a lot of foot traffic there. And I -- it was close to the
17 Cross-Bronx.18 Q. What significance did the fact that it was close to the
19 Cross-Bronx Expressway have?20 A. In some crimes that are committed, it's easy-on-easy-off
21 access to jump off the Cross-Bronx, do what you got to do and
22 jump back on to get away.

23 THE COURT: Talking about in a vehicle?

24 THE WITNESS: Yes, ma'am.

25 THE COURT: Not on foot?

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D3sWflo3 Joyce - cross

1 THE WITNESS: No.

2 BY MR. KUNZ:

3 Q. Did you see anything in the possession of the men before
4 you approached them?

5 A. One of the men had a big ring of keys and the other man had
6 black backpack.

7 Q. What significance, if any, did the black backpack have?

8 A. Previous experience, that's where the burglars like to keep
9 their tools, burglary tools. They'll keep screwdriver,
10 hammers, knives, sometimes weapons, crowbar, things of that
11 nature.

12 Q. How did you approach the men?

13 A. We approached on foot, shields out, and began to have a
14 conversation with the men by explaining that we're police
15 officers.

16 Q. Were the men frisked?

17 A. Mr. Floyd was frisked, and I'm pretty sure the other
18 individual was as well.

19 Q. Why were they frisked?

20 A. We had believed that they were in the process of committing
21 a violent felony, burglary.

22 Q. Was there any other reason why they were frisked?

23 A. For our safety, I believe there was a suspicious bulge and
24 also that --

25 THE COURT: You do believe there was a suspicious

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D3sWflo3

Joyce - cross

1 bulge?

2 THE WITNESS: What I could remember, yes.

3 THE COURT: Have you noted that anywhere before?

4 THE WITNESS: I'm not sure.

5 THE COURT: Where was this suspicious bulge?

6 THE WITNESS: I'm not sure.

7 THE COURT: I mean what part of the body.

8 THE WITNESS: I'm not -- I don't recall at this time.

9 And also, they weren't complying with our directions
10 to keep their hands out of their pockets.

11 BY MR. KUNZ:

12 Q. Did you go inside of their pockets?

13 A. No.

14 Q. How did the incident end?

15 A. It ended well. You know, they -- we found that they had
16 proof that they lived there and we asked them to, multiple
17 times to provide any reason why, you know, that they lived
18 there, and, finally, and I forget how, they did enter lawfully
19 into the apartment. And I think one of the males had a piece
20 of mail with his name and his address on it inside the
21 apartment.

22 Q. How long was the entire encounter, approximately?

23 A. I would say maybe ten minutes.

24 MR. KUNZ: I don't have any other questions at this
25 time.

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D3sWflo3 Joyce - cross

1 REDIRECT EXAMINATION

2 BY MS. PATEL:

3 Q. Officer Joyce, isn't it true that 1359 Beach Avenue, where
4 this stop occurred, is in the Parkchester neighborhood of the
5 43rd Precinct?

6 A. I don't believe so.

7 Q. Where do you believe that this is?

8 THE COURT: What neighborhood, in other words, would
9 you call it?

10 THE WITNESS: I'm not sure. Maybe the Castle Hill
11 Avenue -- Castle Hill area.

12 BY MS. PATEL:

13 Q. How long did you -- but it's not Soundview, right?

14 A. I don't believe so.

15 Q. If I can please show the defendant -- I'm sorry, the
16 witness what's been marked as Defendants' Exhibit I10. It's a
17 Google map.

18 Does this picture accurately represent the area of the 43rd
19 Precinct, some of the areas of the 43rd Precinct?

20 A. Yes, this is in the 43rd Precinct.

21 MS. PATEL: Your Honor, I'd like to move this map into
22 evidence.

23 MR. KUNZ: It's beyond the scope of my
24 cross-examination of him, but I don't have an objection.

25 THE COURT: It came up because I think maybe the

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D3sWflo3 Joyce - redirect

1 Cross-Bronx, proximity to the Cross-Bronx, the kind of
2 neighborhood you can get to so quickly from the Cross-Bronx, so
3 because of that I think it is fair rebuttal. The exhibit is
4 received also.

5 And the exhibit number?

6 MS. PATEL: Defendants' Exhibit IT.

7 THE COURT: Defendants' I10 is received.

8 (Defendants' Exhibit I10 received in evidence)

9 THE COURT: In fact, this does depict the Cross-Bronx
10 in the upper portion of the map.

11 BY MS. PATEL:

12 Q. Officer Joyce, it's your understanding, correct, that --
13 I'm sorry. Just bear with me.

14 Do you see that this line here in the middle is the Bronx
15 River Parkway?

16 A. Yes. That's what it says.

17 Q. And this large thoroughfare on the top is the Cross-Bronx
18 Expressway, correct?

19 A. Yes, ma'am.

20 Q. And isn't it true that when you cross the Bronx River
21 Parkway, that neighborhood becomes Soundview, right?

22 THE COURT: I'm sorry. When you cross --

23 MS. PATEL: To the left.

24 THE COURT: From the right to the left?

25 MS. PATEL: Yes, your Honor. Thank you.

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D3sWflo3 Joyce - redirect

1 THE COURT: Okay.

2 When you cross over the Bronx River Parkway, from the
3 right of that diagram, to the left, your question is: Does
4 that become Soundview? Yes? Is that right?

5 THE WITNESS: If you asked ten people, you would
6 probably get five different answers.

7 THE COURT: What's your answer?

8 THE WITNESS: I don't know.

9 THE COURT: Okay.

10 THE WITNESS: I guess so.

11 THE COURT: I don't know, I guess so?

12 THE WITNESS: If somebody that lived there their whole
13 life and told me that's the dividing area, then I guess that's
14 the dividing area.

15 THE COURT: But you're not sure yourself?

16 THE WITNESS: No.

17 BY MS. PATEL:

18 Q. But you've been an officer in the 43rd Precinct for how
19 many years, did you testify?

20 A. Back in '09, I forget what I testified to.

21 Q. Several years, I guess.

22 A. A couple years.

23 Q. And you said that you also analyzed crime data which would
24 include addresses in the 43rd Precinct, correct?

25 A. Back in '09, '08, yes, ma'am.

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D3sWflo3 Joyce - redirect

- 1 Q. And you see on this map that there's a subway station that
2 says Morrison Avenue, Soundview. Do you see that?
3 A. Yes.
4 Q. And that is to the left of the Bronx River Parkway, is that
5 right?
6 A. Yes, ma'am.
7 Q. And it's in the direction of right to left, if you're on
8 the Cross-Bronx Expressway, correct?
9 A. Yes.
10 Q. You testified quite a bit about crime analysis and crime
11 data that you were engaged in when you were a police officer,
12 is that right?
13 A. Yes, ma'am.
14 Q. But sitting here today, you can't remember reviewing any
15 crime data for the 43rd Precinct on February 27, 2008, can you?
16 A. Most likely, we probably had that trend or the pattern
17 sheet with us.
18 Q. Okay. But I'm asking you if you specifically recall ever
19 actually looking at crime data for that pattern.
20 A. Yes.
21 Q. When did you do that? You testified on direct --
22 A. Sometime within the time period of the day in question.
23 Q. Do you recall speaking to any community members about a
24 crime pattern on February 27, 2008?
25 A. I don't recall.

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D3sWflo3 Joyce - redirect

1 Q. Do you recall speaking to any supervisors or officers from
2 other precincts about crime patterns on February 27, 2008?

3 A. Specifically, on that date, I don't recall.

4 Q. You testified today that you saw Mr. Floyd specifically
5 looking into the window of the home, isn't that right?

6 A. Correct.

7 Q. But at your deposition, under oath, you never mentioned
8 Mr. Floyd was looking into the window, did you?

9 A. I don't recall if I did or not.

10 Q. And that deposition was in 2009, correct?

11 A. Correct.

12 Q. So the first time you remember this detail is today, five
13 years later?

14 MR. KUNZ: Objection, your Honor. That's not what he
15 said.

16 THE COURT: No, that's not what he said. But I don't
17 know when else he might have mentioned it.

18 Do you know when you first mentioned the
19 looking-into-the-windows part of this?

20 THE WITNESS: I mean, it was, it was a kind of a long
21 time ago.

22 THE COURT: Right.

23 THE WITNESS: Some days I remember it like it was
24 yesterday.

25 THE COURT: Right, but that wasn't my question. Do

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D3sWflo3 Joyce - redirect

1 you remember ever telling anybody before today that that was
2 one of the things you noticed? Did you write it? Did you tell
3 anyone? Or is this the first time you're saying it?

4 THE WITNESS: No. I've told it to fellow officers,
5 sergeants, you know, people who have asked me about the case.

6 THE COURT: Did you write it anywhere?

7 THE WITNESS: I don't think so. I didn't.

8 THE COURT: Okay.

9 THE WITNESS: No, ma'am.

10 THE COURT: Okay.

11 BY MS. PATEL:

12 Q. But you didn't tell anyone at your deposition that
13 Mr. Floyd was looking into the window, did you?

14 A. I don't recall if I did or not.

15 THE COURT: We'll need a stipulation on that. I'm not
16 going to read the whole deposition.

17 MS. PATEL: Of course.

18 THE COURT: When you get a chance over lunch, just
19 confirm that it's not there.

20 MR. KUNZ: Yes, your Honor.

21 THE COURT: Go ahead.

22 MS. PATEL: Okay.

23 THE COURT: It's not in your memo book either, right?

24 THE WITNESS: No, ma'am.

25 THE COURT: Right. Okay.

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D3sWflo3 Joyce - redirect

1 BY MS. PATEL:

2 Q. And there was nothing in the UF250 form that he looked in
3 the window, was there?

4 A. Yes, there was.

5 THE COURT: It was on the 250?

6 THE WITNESS: Not specifically. I didn't write
7 specifically he was looking on the window, but on the back page
8 of the 250, there was a bunch of -- there's, I think, three
9 boxes I checked, and I think one of them described not exactly
10 but what I was thinking of his specific actions.

11 THE COURT: But none of them would have said looking
12 in the window.

13 THE WITNESS: Not specifically. No, ma'am.

14 THE COURT: No, okay. So he says it's subsumed in one
15 of those boxes but not explicitly referenced.

16 BY MS. PATEL:

17 Q. Would you say the actions that you're describing, isn't
18 that considered casing?

19 A. It depends who you ask, ma'am.

20 THE COURT: Sorry?

21 THE WITNESS: Depends who you ask.

22 THE COURT: She's asking you. When checking out the
23 store windows, is that casing? We used to say casing the
24 joint.

25 THE WITNESS: It all depends on the totality of the

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D3sWflo3

Joyce - redirect

1 circumstances.

2 THE COURT: Would you have called that casing the
3 joint?

4 THE WITNESS: Yes, I would.

5 THE COURT: You would. Okay.

6 BY MS. PATEL:

7 Q. Can you tell me which of these boxes it's subsumed under?

8 THE COURT: Looking in the windows, remember you said
9 that was part of what you were thinking?

10 THE WITNESS: Yes.

11 THE COURT: Okay.

12 THE WITNESS: It might be on the first page then. I
13 haven't filled one of these out since 2009.

14 THE COURT: So we'll turn to the first page.

15 THE WITNESS: Yes.

16 THE COURT: Okay. The only one you checked there was
17 "furtive movements."

18 THE WITNESS: Yes.

19 THE COURT: So it would be subsumed in that?

20 THE WITNESS: Or that, and also there's a top portion
21 on the back of this page that's cut off as well.

22 Can you flip over to that?

23 THE COURT: He wants you to turn to the second page at
24 the top.

25 THE WITNESS: All the way on the top. I think it's

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D3sWflo3 Joyce - redirect

1 the right. I haven't seen one of these in a while. The top,
2 right there, where it says "leading to reasonable fear for
3 safety." Is that what I -- I can't read that one.

4 THE COURT: That isn't checked off.

5 THE WITNESS: Most likely, it's the first page with
6 the furtive movements.

7 THE COURT: Furtive movements.

8 THE WITNESS: Yeah.

9 THE COURT: Okay.

10 BY MS. PATEL:

11 Q. Furtive movements. But here, on this first page, it says
12 "actions indicative of casing a victim or location." Do you
13 see that?

14 A. Yes, ma'am.

15 Q. You didn't check that box, did you?

16 A. No, ma'am.

17 Q. And you testified a moment ago that furtive movements would
18 have covered looking back and jostling, looking back at the, at
19 behind, behind Mr. Floyd and looking in the window, is that
20 right?

21 A. In my opinion, that's correct.

22 Q. Okay. So can you turn to page 178, line 24.

23 MR. KUNZ: I'm sorry. What are we doing here?

24 THE COURT: I don't know. Deposition? That's what
25 she's asking him to look at. You're looking at it.

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D3sWflo3

Joyce - redirect

1 MS. PATEL: Page 178, line 24.

2 MR. KUNZ: He answered the questions. I don't
3 understand.

4 MS. PATEL: It impeaches what he said.

5 THE COURT: Go ahead.

6 BY MS. PATEL:

7 Q. Question: "Do you recall the furtive movements that led
8 you to check that box?"

9 "A. Yes.

10 "Q. What were the furtive movements?"

11 "A. It would be jostling the doorknob.

12 "Q. Any other furtive movements?"

13 "A. Not that I remember."

14 MR. KUNZ: So we read this exact same one on direct.

15 THE COURT: We did. We read the exact same one.

16 MR. KUNZ: And I read the clarification.

17 THE COURT: And you read the clarification.

18 MS. PATEL: The point is, your Honor --

19 THE COURT: I don't think the clarification mentioned
20 the windows, did it?

21 MR. KUNZ: No, it did not.

22 THE COURT: What is it, Ms. Patel?

23 MS. PATEL: That's okay.

24 THE COURT: Okay.

25 (Continued on next page)

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D3sWflo3

Joyce - redirect

1

1 Q. You testified that you observed Mr. Floyd looking back
2 nervously; is that right?

3 A. Correct.

4 Q. But you can't recall if he -- when you observed that if you
5 were to his right or left, can you?

6 A. I can't recall at this time.

7 Q. And you couldn't recall in 2009, 18 months after the stop
8 occurred, could you?

9 A. I'm not sure what I said in the deposition.

10 MS. PATEL: I think I just have one more --

11 THE WITNESS: If it said I didn't remember, I didn't
12 remember then.

13 Q. You testified a moment ago that Mr. Floyd had a black
14 backpack; is that correct?

15 A. Either Mr. Floyd or the other individual.

16 Q. You can't remember which one?

17 A. No.

18 Q. At this time.

19 And -- but you can't remember, can you, if he was wearing
20 the backpack when you observed him, can you?

21 A. What do you mean by wearing?

22 THE COURT: Was it on his shoulders?

23 THE WITNESS: I don't recall.

24 Q. And you also -- you testified just now that it was black;
25 is that right?

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D3s9flo4

Joyce - redirect

- 1 A. Correct.
- 2 Q. Okay. Please go to your deposition at line 132, line 5
- 3 through 7.
- 4 "Q. Do you remember the color of the backpack?
- 5 "A. I don't remember."
- 6 Did I read that correctly?
- 7 A. What number was that again, ma'am?
- 8 Q. Page 132, lines 5 through 7.
- 9 A. Correct.
- 10 Q. I read that correctly?
- 11 A. Yes, ma'am.
- 12 Q. And that deposition was taken 18 months following the stop,
- 13 correct?
- 14 A. If you say so, yes. The deposition was August 25 of '09.
- 15 Q. So the first time you're mentioning the color of the
- 16 backpack is today; is that right?
- 17 A. No.
- 18 Q. Did you make a notation of the backpack being black in your
- 19 memo book?
- 20 A. No.
- 21 Q. Or in the UF 250 form?
- 22 A. I don't believe so.
- 23 Q. And it's also true that today you testified for the first
- 24 time that you observed a suspicious bulge on Mr. Floyd's
- 25 person; isn't that right?

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D3s9flo4 Joyce - redirect

1 A. I don't know if I said that in the disposition or not, in
2 August of '09.

3 MS. PATEL: I would just ask again.

4 THE WITNESS: If it's not in there.

5 THE COURT: I would ask for a stipulation, when you
6 have time to review it, that it's not there.

7 Q. And also it's not in your memo book, is it?

8 A. I don't believe so.

9 Q. And the UF 250 form has a box for suspicious bulge and
10 that's not checked either, is it?

11 A. I don't believe so.

12 MS. PATEL: Well let's look at it so the record is
13 clear.

14 Q. On this first page it says suspicious bulge slash --
15 suspicious bulge object under, "What were circumstances which
16 led to the stop?"

17 Do you see that box?

18 A. Yes.

19 Q. And you didn't check that, did you?

20 A. No, ma'am.

21 Q. Today you testified that -- you testified today that you
22 just -- you have a sense that helps you determine whether
23 there's criminal activity going on, right?

24 A. I said that, correct.

25 Q. But you're not allowed to make stops and frisks based on

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D3s9flo4 Joyce - redirect

1 just a sense, are you?

2 A. No.

3 Q. You need reasonable suspicion, right?

4 A. Correct.

5 Q. And it has to be individualized; is that correct?

6 A. What do you mean by individualized?

7 Q. It has to be particular to the person you're stopping,
8 correct?

9 A. Correct.

10 Q. Officer Joyce, did you stop Mr. Floyd just -- because you
11 just had a sense that there was criminal activity going on?

12 A. No.

13 Q. Wasn't it true -- it is true, right, that Mr. Floyd was not
14 committing a crime, right?

15 A. He did not commit a crime.

16 THE COURT: Mr. Kunz, anything further?

17 MR. KUNZ: No, your Honor, no further questions.

18 THE COURT: Then you're done. Thank you.

19 (Witness excused)

20 THE COURT: Your next witness.

21 MS. PATEL: Officer Eric Hernandez.

22 ERIC HERNANDEZ,

23 called as a witness by the Plaintiffs,

24 having been duly sworn, testified as follows:

25 (Continued on next page)

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D3s9flo4 Joyce - redirect

1 DIRECT EXAMINATION

2 BY MS. PATEL:

3 Q. Good afternoon, Officer Hernandez.

4 A. Good afternoon.

5 Q. You've been a police officer with the New York police
6 department since about 2000, right?

7 A. Yes, ma'am.

8 Q. That's 13 years, correct?

9 A. Approximately, yes.

10 Q. And in 2008 you were an anticrime unit officer; is that
11 correct?

12 A. Yes, ma'am.

13 Q. Are you still an officer in the anticrime unit?

14 A. No, ma'am.

15 Q. What's your current assignment?

16 A. I do community affairs.

17 Q. Is that in the 43rd precinct?

18 A. Yes, ma'am.

19 Q. For how long have you done community affairs in the 43rd
20 precinct?

21 A. Approximately two years.

22 Q. It's true, isn't it, that you were involved in the stop of
23 Mr. David Floyd on February 27, 2008?

24 A. Yes, ma'am.

25 Q. And the stop occurred in front of a residential home; is

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D3s9flo4

Hernandez - direct

1 that right?

2 A. Yes, ma'am.

3 Q. And it was on Beach Avenue?

4 A. Yes, ma'am.

5 Q. And the address where the stop occurred was 1359 Beach
6 Avenue; isn't that right?

7 A. I don't really remember the address.

8 Q. But you later came to know that Mr. Floyd lived at -- in
9 the home at the address where he was stopped; is that correct?

10 A. Yes.

11 Q. And there was a second person stopped with Mr. Floyd that
12 day, wasn't there?

13 A. Yes.

14 Q. And you came to learn that that second person also lived at
15 that address in that home?

16 A. Yes.

17 Q. So I'm going to refer to the second person as Mr. Floyd's
18 neighbor. But you'll understand who I'm referring to, right?

19 A. Yes, ma'am.

20 Q. Both men were black, weren't they?

21 A. Yes, ma'am.

22 Q. Officer Hernandez, did you speak to any officers -- any New
23 York police department officers about your testimony today?

24 A. No, ma'am.

25 Q. But you spoke to Sergeant Kelly -- strike that.

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D3s9flo4

Hernandez - direct

- 1 On February 28 -- February 27, 2008 you were assigned to
2 the anticrime unit in the 43rd precinct; is that right?
3 A. Yes, ma'am.
4 Q. And that's in the Bronx?
5 A. Yes, ma'am.
6 Q. And you were patrolling that day with Sergeant Kelly and
7 officer Cormac Joyce; is that right?
8 A. Yes, ma'am.
9 Q. And you were patrolling in plainclothes; is that right?
10 A. Yes, ma'am.
11 Q. In an unmarked vehicle, right?
12 A. Yes, ma'am.
13 Q. And at some point you were driving down Beach Avenue; is
14 that right?
15 A. Yes, ma'am.
16 Q. Sometime in the afternoon on February 27?
17 A. Yes, ma'am.
18 Q. And the first thing you saw, Mr. Hernandez, was that two
19 men were standing in front of a private house doorway; is that
20 correct?
21 A. The first thing -- I don't know. I can't -- it's not the
22 first thing from when -- the first thing I saw from what time
23 period -- I don't understand the question.
24 Q. Fair enough. As you're driving down Beach Avenue you came
25 to notice two men standing in front of a private house doorway,

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D3s9flo4

Hernandez - direct

1 correct?

2 A. Yes, ma'am.

3 Q. And at some point the vehicle stopped on Beach Avenue; is
4 that correct?

5 A. Yes, ma'am.

6 Q. On Beach Avenue, right?

7 A. Yes, ma'am.

8 Q. And the vehicle stopped in the middle of the street; is
9 that right?

10 A. Yes, ma'am.

11 Q. While you were in the car you and the other officers did
12 not discuss any specific reasons that these individuals may
13 have appeared suspicious, did you?

14 A. No, ma'am.

15 Q. So you can't recall what specific reasons -- the specific
16 actions and reasons that you observed from the car that led you
17 to stop the vehicle, can you?

18 A. Yes, I can.

19 Q. You saw them close together, focused on the lock of the
20 front door, right?

21 A. Yes, ma'am.

22 Q. Did you -- how long did you observe them while you were in
23 the car?

24 A. Say approximately three to five minutes.

25 Q. While you were in the car, their backs were to you,

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D3s9flo4

Hernandez - direct

- 1 correct?
2 A. Yes, ma'am.
3 Q. But you can see their hands from the car, right?
4 A. I could see -- at times I could see the hands, yes.
5 Q. And you could see that Mr. Floyd had keys in his hand,
6 right?
7 A. I don't recall who had the keys but I could see a bunch of
8 keys, yes. One or two hands, yes.
9 Q. There wasn't anything else -- sorry.
10 And there wasn't anything else in their hands that you
11 could see, right?
12 A. Not that I could see, no.
13 Q. And then you -- you got out of the car and someone
14 announced "Police," right?
15 A. Yes, ma'am.
16 Q. And you started asking them questions, right?
17 A. Yes, ma'am.
18 Q. And when you did that, you were -- you were standing
19 between them and the street; is that right?
20 A. Yes, ma'am.
21 Q. After that you didn't really speak to Mr. Floyd, did you?
22 A. After --
23 Q. After your initial approach?
24 A. Yes, I did.
25 Q. You did. You were primarily focused on the neighbor; isn't

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D3s9flo4 Hernandez - direct

1 that right?

2 A. At a certain point, yes.

3 Q. And the neighbor's movements didn't increase your suspicion
4 that he was engaging in criminal behavior, did it?

5 A. Increase my suspicion, no.

6 Q. And you couldn't see Mr. Floyd make any suspicious
7 movements, could you?

8 A. I didn't --

9 MR. KUNZ: Objection. At what point in time? He's
10 already testified to suspicious actions he saw the men take.
11 So I just want to know at what point in time during the stop
12 we're talking about.

13 MS. PATEL: After you approached.

14 THE WITNESS: I couldn't notice Floyd at that point,
15 no.

16 Q. So the answer is that you didn't see Mr. Floyd make any
17 suspicious movements, did you?

18 A. No.

19 Q. And you didn't believe that Mr. Floyd or the other
20 individual were concealing a weapon or had a suspicious bulge,
21 did you?

22 A. Can you repeat that question.

23 Q. You didn't believe that Mr. Floyd -- that either of the two
24 men were concealing a weapon or had a suspicious bulge, did
25 you?

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D3s9flo4

Hernandez - direct

- 1 A. I didn't notice -- I didn't -- I didn't -- how can I say
2 it. It wasn't out of my mind that they could have at that
3 moment, no.
- 4 THE COURT: No, it wasn't out of your mind. But you
5 didn't see it?
- 6 THE WITNESS: No, I did not, no, ma'am.
- 7 THE COURT: You didn't observe a suspicious bulge?
- 8 THE WITNESS: I did not observe, no, I did not.
9 Sorry, ma'am.
- 10 THE COURT: That's okay. Thank you.
- 11 Q. And at some point you went with the neighbor into the house
12 to allow him to retrieve proof that he lived in the house,
13 right?
- 14 A. Yes. We went around the corner, behind the house.
- 15 Q. And at some point you frisked the neighbor, right?
- 16 A. Yes, ma'am.
- 17 Q. And you remember, don't you, patting down his waistband?
- 18 A. Yes, ma'am.
- 19 Q. But you didn't find anything when you frisked him, did you?
- 20 A. No, ma'am.
- 21 Q. But you're not able to remember if you asked him to put his
22 hands up against the wall, can you?
- 23 A. Not that I remember, no.
- 24 Q. Or how you frisked him?
- 25 A. I know I frisked him, yes. I know how I frisked him, yes.

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Hernandez - direct

1 Q. And on that date was Sergeant Kelly your supervisor?

2 A. Yes, ma'am.

3 MS. PATEL: I'm giving the witness Plaintiffs' Exhibit
4 181.

5 Does this document contain your -- entries from your
6 activity log?

7 THE WITNESS: Yes.

8 Say that again. Sorry.

9 Q. Is this document an excerpt of your memo book?

10 A. Yes.

11 MS. PATEL: I'd like to move this into evidence,
12 Plaintiffs' Exhibit 181.

13 MR. KUNZ: No objection.

14 THE COURT: All right. 181 is received.

15 (Plaintiffs' Exhibit 181 received in evidence)

16 Q. And you said Sergeant Kelly was your supervisor that day,
17 right?

18 A. Yes, ma'am.

19 Q. Do you see here a notation 2-27-08 WED with a star next to
20 it?

21 A. Yes, ma'am.

22 Q. It's a little hard to see.

23 A. No. It was good.

24 Q. You can see it?

25 A. Yeah.

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Hernandez - direct

- 1 Q. And you can see that it says next to WED 02-27-08 it says
2 1200 by 2035. Do you see that?
3 A. Yes, ma'am.
4 Q. What does that indicate?
5 A. My tour of duty.
6 Q. Your tour of duty was 12:00 p.m. to 6:35 p.m.?
7 A. 8:35 p.m.
8 Q. Sorry. The next line directly below that says assignment
9 043 A/C.
10 And I take that to mean that you were assigned to the
11 43rd precinct in anticrime; is that right?
12 A. Yes, ma'am.
13 Q. And then it says R3028 what does that indicate?
14 A. That's the radio I was assigned for that day.
15 Q. And then below that it says 1300, with Sergeant Kelly's
16 signature next to it; isn't that right?
17 A. Yes, ma'am.
18 Q. Are those three lines the complete entry -- excuse me. The
19 next line below that says 2035 EOT and then there is -- it
20 looks like another signature next to it; is that right?
21 A. Yes, ma'am.
22 Q. And that indicates end of tour, 6:35 p.m. -- 8:35 p.m.?
23 A. Yes, ma'am.
24 Q. It's true that those four lines are the complete entry in
25 your memo book for February 27, 2008, right?

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D3s9flo4

Hernandez - direct

1 A. Yes, ma'am.

2 Q. And looking at this document you have no activity log entry
3 for the stop of David Floyd or his neighbor in your notation
4 for 2-27-08, do you?

5 A. That's correct.

6 Q. Isn't it true that the reason that you didn't include an
7 entry is probably because Mr. Joyce, Officer Joyce did the 250?

8 A. That's correct, ma'am.

9 Q. And you don't know if you need to include a stop in your
10 memo book if another officer fills out the UF 250; is that
11 right?

12 A. That wasn't my practice at that time.

13 Q. At that time.

14 So in 2008 you -- you did not -- your practice was to not
15 include stops in your memo book if other officers filled out
16 the 250. Is that your testimony?

17 A. Yes. That's correct.

18 Q. But you were trained, weren't you, on how to fill out a
19 memo book?

20 A. Yes, I was, ma'am.

21 Q. And you were never disciplined for the failure to include a
22 memo book -- a UF 250 in your memo book, were you?

23 A. I was not, ma'am.

24 Q. And Sergeant Kelly signed off on this particular memo book
25 entry, right?

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Hernandez - direct

1 A. Yes, ma'am.

2 Q. And, in fact, you're not aware of any officer being
3 disciplined for failing to fill out a 250 properly?

4 A. I've heard of it but I can't personally say I've known --
5 went and talked to the person about it and, you know, things
6 like that.

7 Q. As of 2009 you weren't aware of any officer being
8 disciplined for failing to fill out a 250 properly; isn't that
9 right?

10 A. Once again I've heard of people getting in trouble for it
11 but I don't know the end result of it.

12 Q. My question is though as of 2009 had you heard of any
13 officer being disciplined -- you had not been -- you were not
14 aware of any officer being disciplined for improperly filling
15 out a 250, were you?

16 A. I still -- I've never -- I've heard of people getting in
17 trouble for it but I don't know what happened from the result.

18 THE COURT: You say you've heard, but anybody you knew
19 personally?

20 THE WITNESS: No, ma'am. Just kind of rumors going
21 around the precinct that people got in trouble for it.

22 THE COURT: But nobody you knew?

23 THE WITNESS: No, ma'am.

24 Q. Officer Hernandez, you've been the subject of about six
25 unsubstantiated civilian complaints arising from allegedly bad

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D3s9flo4 Hernandez - direct

1 stops; isn't that right?

2 MR. KUNZ: Objection, your Honor.

3 THE COURT: I'll allow that.

4 THE WITNESS: I don't know the numbers of what they
5 were but I know I have a couple of CCRBs.

6 THE COURT: You don't know if they were for alleged
7 unjustified stops?

8 THE WITNESS: No, ma'am.

9 THE COURT: You don't know that?

10 THE WITNESS: No.

11 Q. And there were about six of them, right?

12 A. That I've been called to CCRB probably.

13 Q. Have you ever been put on monitoring as a result of
14 civilian complaints?

15 A. Yes, I have, ma'am.

16 Q. When were you put on monitoring?

17 MR. KUNZ: Objection. If it's related to stops CCRB.

18 THE COURT: Well I don't know that anybody knows that
19 but I'll allow the question.

20 So when was that?

21 THE WITNESS: Can you --

22 THE COURT: I think she said when, when were you put

23 on --

24 THE WITNESS: I think it was 2004 I want to say,
25 maybe.

D3s9flo4

Hernandez - direct

- 1 Q. I just want to go back for a moment to your answer that you
2 had observed the -- you had observed the two men for three to
3 five minutes before you left the vehicle.
4 You recall you said that, right?
5 A. Yes. Approximately around that time.
6 Q. And you testified that you saw them with keys, right?
7 A. A lot of keys, yes.
8 Q. And they were only fiddling with the keys for how long, a
9 minute?
10 A. Three to five minutes, ma'am.
11 Q. They were fiddling with the keys for three to five minutes?
12 A. Yes.
13 Q. So your testimony is you observed them fiddling with keys
14 for three the five minutes?
15 A. With a lot of keys, yes, approximately.
16 Q. And when you say fiddling with, what does that mean?
17 A. They had approximately anywhere from a hundred to a hundred
18 keys on a wire and they were trying one by one to put them into
19 the lock of the front door of the house.
20 Q. You recall today a hundred to 150 keys?
21 A. It was a lot of keys, yes. I would say -- I would say like
22 a hundred keys on that ring.
23 Q. Okay. Mr. Hernandez -- excuse me, Officer Hernandez, do
24 you recall sitting for a deposition in this case?
25 A. Yes.

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D3s9flo4

Hernandez - direct

1 Q. And if I told you that the date of that deposition was
2 August 5, 2009, does that sound right?

3 A. I couldn't tell you a date, no.

4 Q. But you were under oath during the time of your deposition?

5 A. Yes, ma'am.

6 Q. I'm going to hand you a transcript from your deposition
7 testimony.

8 A. Okay.

9 Q. The date indicated on the front is August 5, 2009. Do you
10 see that?

11 A. Yes, ma'am.

12 Q. I would ask that you only refer to the pages when I direct
13 you to them.

14 A. Okay.

15 Q. Can you please turn to page 145, line 18 through 146, line
16 8?

17 A. Your Honor can I go to the back for a minute. My reading
18 glasses, I forgot them.

19 THE COURT: No. What we'll do instead is take our
20 luncheon recess now. Reconvene --

21 THE WITNESS: I'm sorry.

22 THE COURT: That's okay. We were going to stop in two
23 minutes. We'll stop now and reconvene at 10 after 2.

24 (Luncheon recess)
25

D3s9flo4

Hernandez - direct

1

AFTERNOON SESSION

2

2:20 p.m.

3

THE COURT: Please be seated.

4

Ms. Patel.

5

DIRECT EXAMINATION CONTINUED

6

BY MS. PATEL:

7

Q. Officer Hernandez, did you talk to your attorneys about
your testimony during the lunch break?

8

9

A. No, ma'am.

10

Q. Before we left we were talking about the keyring that you
observed. You said that it had about 150 keys and that it was
a large keyring, right?

11

12

13

A. Approximately 100, 150.

14

Q. And that must have been a pretty large keyring, right?

15

A. It was more like a coat hanger, some kind of large wire.

16

It wasn't a keyring. I never seen a keyring that big.

17

Q. A large --

18

A. Some --

19

Q. A large wire with 150 keys. It must have been really
heavy. Did it look really heavy?

20

21

A. I couldn't estimate -- I couldn't say how heavy it was, no.

22

Q. But it must have been?

23

THE COURT: Well if it had 150 metal keys it would be
heavy.

24

25

THE WITNESS: Depends to whom, ma'am.

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D3s9flo4

Hernandez - direct

1 THE COURT: It wouldn't fit in your pocket?

2 THE WITNESS: No. Of course not, ma'am. No it
3 wouldn't.

4 Q. And it must have been pretty difficult to jostle 150 keys,
5 right?

6 A. I don't know. Depending to who, ma'am. I don't know.

7 Q. Do you know what neighborhoods -- I'm sorry. What
8 neighborhoods are in the 43rd precinct?

9 A. Neighborhoods. We have Soundview and Parkchester which
10 covers from Bronx River to Castle Hill and from Soundview to
11 East Tremont which is the Parkchester area of the precinct.

12 Q. Would you say that 1359 Beach Avenue is in the Parkchester
13 area?

14 A. Closer to the Parkchester, yes, ma'am.

15 Q. I'm going to put on the screen already admitted exhibit --
16 Defendants' Exhibit X-4.

17 Officer Hernandez, this is a copy of the stop, question and
18 frisk report, UF 250 report, completed for the stop of David
19 Floyd on February 27, 2008; is that correct?

20 Do you see it?

21 A. It seems to be, yes, ma'am.

22 Q. Just a few questions here.

23 Isn't it true that Officer Joyce completed the 250 for this
24 stop?

25 A. Yes, ma'am.

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D3s9flo4

Hernandez - direct

1 Q. And you now know that the location of the stop was 1359
2 Beach Avenue, looking at this document, right?

3 A. Yes, ma'am.

4 Q. But it's also true -- I'm going to go to the second page
5 which is NYC 108.

6 You can see here that for -- there's a caption that says
7 additional -- that says additional circumstances/factors,
8 correct?

9 THE COURT: Do you see that box?

10 THE WITNESS: She keeps moving it.

11 I don't see it right now.

12 THE COURT: Additional circumstances/factors.

13 THE WITNESS: Yes, ma'am.

14 Q. And there is a evasive, false or inconsistent response to
15 officer's questions checked.

16 Can you see that it's checked?

17 A. Yes, ma'am.

18 Q. Isn't it true that you don't know why Officer Joyce checked
19 that box, is it?

20 A. I do not know.

21 Q. And there is also a box checked "ongoing investigations,
22 e.g., robbery pattern, correct?

23 A. Yes, ma'am.

24 Q. That box is also checked?

25 A. Yes, ma'am.

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D3s9flo4

Hernandez - direct

- 1 Q. And you don't know why that box was checked either, do you?
2 A. No, I don't, ma'am.
3 Q. You testified earlier that you were put on monitoring in
4 2004, correct?
5 A. Approximately, ma'am.
6 Q. Approximately 2004.
7 How long were you placed on monitoring?
8 A. I believe it was two years.
9 Q. Two years. So from approximately 2004 to 2006?
10 A. Approximately, yes.
11 Q. Do you remember the date on which you were taken off of
12 monitoring?
13 A. No, ma'am.
14 Q. Was it around Christmas of that year?
15 A. I couldn't tell you, ma'am.
16 Q. Was it hot outside when you were taken --
17 A. I couldn't tell you.
18 Q. Do you remember in 2004 when you -- more specifically the
19 date that you were put on monitoring?
20 A. I do not recall.
21 Q. From 2004 until 2006 do you recall civilian complaints
22 filed against you related to stop and frisk?
23 A. I don't recall if it was for stop and frisk, no.
24 Q. But you recall there were civilian complaints filed against
25 you relating to allegedly bad stops?

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D3s9flo4

Hernandez - direct

1 A. No. I don't remember -- I know there were CCRBs against me
2 but I don't recall what they were for.

3 Q. While you were on monitoring there were CCRBs against you?

4 A. Yes, ma'am.

5 Q. I'm going to show you what's Bates stamped as NYC-3990 to
6 3995.

7 I direct you to the line and portion that says the date.

8 A. The first line, ma'am? The first one?

9 Q. Yes. The date of the incident.

10 A. Okay.

11 Q. Does that refresh -- does this document refresh your
12 recollection regarding whether you had a CCRB complaint filed
13 against you while you were on monitoring?

14 A. I can see the date, yes.

15 But it doesn't refresh that I had it that day. But I could
16 tell I had one from the document, yes.

17 Q. It refreshes your recollection that you had a CCRB
18 complaint filed against you in November of 2004, correct?

19 A. Yes, ma'am.

20 Q. You testified that you were on monitoring in 2004, right?

21 A. Yes, ma'am.

22 Q. Do you recall a CCRB complaint filed against you for an
23 incident in June 3, 2005 arising from a stop and frisk --
24 allegedly bad stop?

25 A. I don't recall that.

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D3s9flo4

Hernandez - direct

1 Q. I'm going to show you a document Bates stamped NYC-3996 to
2 NYC-4004. It's captioned CCRB case closing form. Can you
3 direct your attention to the date again.

4 A. Yes. 6-3, 2005.

5 Q. Does that refresh your recollection regarding whether you
6 had a CCRB complaint filed against you for an incident in
7 June -- June 3, 2005?

8 A. Yes, ma'am.

9 Q. And you were on monitoring in 2005, correct?

10 A. Yes. I think so, yes.

11 MS. PATEL: Nothing further.

12 THE COURT: Mr. Kunz.

13 MR. KUNZ: Before I start could we also see copies of
14 those two things you just refreshed his recollection.

15 CROSS-EXAMINATION

16 BY MR. KUNZ:

17 Q. Good afternoon, Officer. Thanks for staying with us.

18 Before we get started to talk about the incident I just
19 want to get a little background on yourself.

20 How long have you been with the NYPD?

21 A. Approximately twelve-and-a-half years.

22 Q. And you were at the academy for about how long?

23 A. Eight months.

24 Q. And could you just briefly walk the court through your
25 various assignments at the NYPD after the academy.

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D3s9flo4

Hernandez - cross

1 A. I went to the 90 first in Brooklyn for field training.
2 From that I went back to the academy. Then I went to the
3 43rd precinct. Did patrol -- impact in the 43. Sorry.

4 Q. And what did you do after that?

5 A. After impact I went to patrol. After patrol I went to
6 conditions. From conditions I went to anticrime. And from
7 anticrime, I'm community affairs right now. Sorry.

8 Q. Can you briefly tell the court about your duties and
9 responsibilities as a community affairs officer?

10 A. Community affairs I'm pretty much the middle person
11 between -- the liaison between the community and the 43
12 precinct. Also, the middle man or liaison from the community
13 to the commander of the precinct.

14 Q. What sort of activities do you do in that position?

15 A. We set up safety briefings for the kids.

16 We talk to seniors about internet abuse, getting robbed in
17 elevators, stuff like that. Also we do festivals in the
18 summer. And we ref for basketball games. And we do a lot with
19 the churches.

20 Q. Did you ever go to any community meetings?

21 A. Every first Wednesday of the month we have a community
22 meeting in the 43 precinct.

23 Q. Could you describe your interaction with the public in your
24 current role as a community liaison officer?

25 A. Pretty much when you come to the meetings I give them a

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D3s9flo4 Hernandez - cross

1 contact person -- a contact number. I have a department phone
2 where they could call me any time as long as it's not -- I tell
3 them not to use my number as a 911. I have them call 911 for
4 emergencies. Pretty much they call me for complaints. We have
5 numerous people that come to the meetings and also give us
6 complaints of the neighborhoods of activity, illegal activity
7 is going on in the precinct.

8 Q. Now, who do you report to in your role as a community
9 liaison officer?

10 A. I report to the CO.

11 Q. Now directing your attention to February 27 of 2008. What
12 was your assignment that day?

13 A. I was assigned to anticrime in the 43.

14 Q. And what tour did you work that day?

15 A. I worked 1200 by 8:35.

16 Q. During your direct testimony just now you talked about the
17 specific neighborhoods that are within the 43rd precinct.

18 Could you just describe the neighborhood around where the
19 incident happened, what type of neighborhood is that?

20 A. Where the incident happened was a -- one-family houses,
21 two-family houses, majorly. One- or two-building houses around
22 that area. Very quiet during the day. Approximately around
23 3:00 some -- more or less, there's a school that gets dismissed
24 and you get a lot of pedestrian traffic at that time. But
25 after that, it kind of quiets down a little bit more until the

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D3s9flo4 Hernandez - cross

1 residents get back home.

2 Q. Now in policing are you familiar with the term called crime
3 condition?

4 A. Yes, I am.

5 Q. Can you explain to the court what your understanding of a
6 crime condition is?

7 A. Crime conditions is when we get numerous complaints via
8 civilians or to 911 calls or even complaints of crimes that we
9 get reports are made and certain areas are considered crime
10 condition areas.

11 Q. When you were working in the 43rd precinct in February of
12 2008 were you aware of the crime conditions going on in the
13 precinct?

14 A. Yes, sir.

15 Q. How did you become aware of the crime conditions?

16 A. Numerous ways. We had the -- my sergeant just tell us the
17 crime conditions that we had in the precinct areas. We used to
18 go to -- come in the morning, go into the previous day's, 61s,
19 which are the complaints, and we see what kind of robberies or
20 burgs or crimes were committed in certain areas and we try to
21 hit -- go to the locations and try to prevent it from happening
22 again.

23 Q. Did you ever speak with civilians in the precinct about
24 crime conditions?

25 A. Yes.

D3s9flo4

Hernandez - cross

1 Q. Can you tell the court a little bit about that?

2 A. Like I'm saying, in the meetings we used to have, we still
3 have, people that come down and they tell us about people that
4 hang on the stores, selling the drugs. People that having --
5 selling drugs from their apartments and they want to do
6 something about it. People that walks -- that walk around the
7 precinct with guns. People that have guns. So on and so on.

8 Q. Do you speak Spanish, Officer?

9 A. Yes, I do.

10 Q. Do you ever use your Spanish, specifically around the time
11 of February 2008, to communicate with the community?

12 A. Yes. All the time.

13 (Continued on next page)

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D3sWflo5

Hernandez - cross

1 BY MR. KUNZ:

2 Q. Does your knowledge of the crime conditions in the precinct
3 affect the way that you carried out your duties as an anticrime
4 officer?

5 A. Yes, it does, on occasions.

6 Q. And how so?

7 A. A lot of times when we had high condition, which is a high
8 amount of robberies or, or burgs, or so on and so on, assaults,
9 it would focus our team to go to that location to keep our eye
10 more on that location than other locations.11 Q. On February the 27th, 2008, you were working as an
12 anticrime officer?

13 A. Yes, sir.

14 Q. What were you wearing that day?

15 A. Plain clothes.

16 Q. Who were you working with that day?

17 A. I was working with Officer Joyce Cormac and Sergeant Kelly.

18 Q. How were you traveling that day?

19 A. Our unmarked vehicle.

20 Q. Who was driving?

21 A. I don't recall.

22 Q. Prior to the incident in question, what were you doing that
23 day on patrol?

24 A. Just doing routine patrol.

25 Q. How did you end up in the vicinity of Beach Avenue?

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Hernandez - cross

1 A. Just checking out, we were checking out the patterns of
2 robberies that were going, and the burgs that were going on in
3 that neighborhood.

4 Q. And could you tell the Court about your knowledge of
5 patterns in the neighborhood at that time?

6 A. We had a lot of robberies going on next to the Cross-Bronx,
7 people -- and burgs also. People just committing the crimes
8 and, and seems like they were getting on the highway for easy
9 access to go either way they had to go to. So that's kind of,
10 we trying to focus on these areas.

11 Q. Was there any specific pattern that you were aware of that
12 day?

13 A. We had, we had, the burg, we had a burg pattern going on on
14 the private houses, on the northern part of the precinct, and
15 we also had a robbery pattern going on on the train stations,
16 on Westchester Avenue.

17 Q. Now, focusing your attention on the burglary pattern --

18 MR. KUNZ: Can you switch to the Elmo, please.

19 Q. -- I'm going to show you what's been entered into
20 evidence --

21 MS. PATEL: This has not been entered into evidence.

22 MR. KUNZ: Okay. I thought it had.

23 Q. I'm going to show you Defendants' Exhibit L4, for
24 identification purposes. Take a look at this document and let
25 me know if you've ever seen it before.

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D3sWflo5 Hernandez - cross

1 A. I don't remember. I don't remember seeing in particular
2 this one, but I've seen documents like these.

3 Q. Now, looking at the document, take a minute to look at the
4 document and read through it closely, and I want to ask you, is
5 this the pattern document, or is this a document that lays out
6 the pattern you were aware of on that particular day?

7 MS. PATEL: Objection. Didn't he just say he doesn't
8 remember seeing this document?

9 MR. KUNZ: I believe he said he didn't remember seeing
10 this specific document.

11 THE COURT: He said I don't remember seeing this
12 particular one, but I've seen documents like these.

13 MR. KUNZ: Right.

14 THE COURT: So.

15 MR. KUNZ: I want him to take a closer look at it, and
16 I want him to tell me if this particular document lays out the
17 pattern that he says he was aware of on that day.

18 THE COURT: Okay. That doesn't mean he saw this one.

19 MR. KUNZ: I totally understand that, your Honor.

20 THE COURT: Is this the type of document that lays out
21 the pattern that you had testified to?

22 THE WITNESS: Yes, ma'am, it does.

23 THE COURT: Okay.

24 BY MR. KUNZ:

25 Q. Does this lay out the specific pattern that you testified

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Hernandez - cross

1 you were aware of?

2 MS. PATEL: Objection. How does he know that if he
3 can't recall that this document is what he relied on?

4 THE COURT: I agree with that. That objection is
5 correct. It's been established that it's the type of document
6 that describes the pattern, and so it's certainly like the one
7 he saw. That's okay, but he can't testify this is the one
8 because he said he can't recall seeing this one.

9 MR. KUNZ: Yes, your Honor.

10 Q. Have you had a moment to review that?

11 A. Yes, sir.

12 Q. After reviewing it, does that refresh your recollection
13 about the specifics of the pattern that you were aware of that
14 day?

15 A. It looks like the, covering the residence, the one house or
16 two-family houses in that location of where the pattern was
17 happening, yes.

18 Q. If you look at the column that says date, do you see that?

19 A. Yes.

20 Q. Looking through those dates, does that refresh your
21 recollection about the dates that the burglaries laid out in
22 this pattern occurred?

23 A. I look at the dates and they do have, they do coincide with
24 the patterns that was going on in that area, yes.

25 Q. I'm going to show you what's been marked as Defendants'

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D3sWflo5 Hernandez - cross

1 Exhibit K13 for purposes of this trial. Do you recognize that
2 document?

3 A. Yes, I do.

4 Q. What do you recognize it to be?

5 A. This is a document that I assisted your office in making to
6 identify the pattern that we had.

7 Q. And does this document accurately reflect the locations of
8 the burglaries and the pattern that you had?

9 A. Yes, sir.

10 MR. KUNZ: I'd move this document into evidence, your
11 Honor.

12 THE COURT: As what, a demonstrative exhibit?

13 MR. KUNZ: Yes, as a map that accurately reflects the
14 locations of the burglaries for the pattern that he's aware of.

15 MS. PATEL: It's not to scale.

16 MR. KUNZ: That's Google. It's a Google map.

17 MS. PATEL: We don't know what the distance is between
18 this very large area.

19 MR. KUNZ: I'll say it is the exact same map that the
20 plaintiffs entered into evidence. The only thing is that there
21 are markers on it that indicate where the specific burglaries
22 happened.

23 THE COURT: How did you put these markers on? How did
24 you know of these specific locations when you put the markers
25 on? How did you know of these locations?

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Hernandez - cross

1 THE WITNESS: We looked at the document that we had
2 that had the pattern, the rob, the burgs that were done at the
3 precinct.
4 MS. PATEL: What document?
5 THE COURT: The one you just saw?
6 THE WITNESS: Yes. The one he just showed me, yes.
7 THE COURT: Just showed you?
8 THE WITNESS: Yes.
9 THE COURT: So you've seen that before?
10 THE WITNESS: I've seen that document, yes.
11 THE COURT: Let me see the map. Okay? Thank you.
12 MS. PATEL: Your Honor, I would just say he said he
13 didn't recognize it as the document from which he knew about
14 the burglary pattern.
15 THE COURT: Right. He kept saying it was the type of
16 document --
17 MR. KUNZ: I think he said that at the time of the
18 incident in 2008, he didn't remember seeing that specific
19 document.
20 MS. PATEL: So then what's the basis for now marking
21 on this map?
22 THE COURT: He prepared this map with the locations
23 based on the document that was shown to him. He used that
24 document to prepare this. Anybody could have done it. It
25 wouldn't have taken him. What he's saying is the information

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D3sWflo5 Hernandez - cross

1 from that document was plotted on to this map. It could have
2 been done by a paralegal. It didn't require him. But that's
3 how it was prepared.

4 MS. PATEL: But the addresses and the information from
5 which he used is not into evidence yet.

6 THE COURT: No, it's not in evidence, but he's saying
7 the documents on which he relied to prepare this document, this
8 exhibit. Now that I understand how it was created, I'll allow
9 it. I understand it relies on another document, the so-called
10 pattern report, even though he doesn't recognize it as the one
11 he relied on then. But he can authenticate it as a document
12 used by the police department to track burglary information and
13 he relied on that document to prepare this map. That's all.

14 MR. KUNZ: I'd move the map into evidence, your Honor.

15 THE COURT: Yes. I've received the map into evidence.

16 (Defendants' Exhibit K13 received in evidence)

17 THE COURT: I just want it clear for the record he
18 didn't prepare it based on his own knowledge; he prepared it
19 based on this report.

20 MR. KUNZ: Yes.

21 THE COURT: This business record, so to speak, from
22 the police department. He took the one record and plotted it
23 on to the map.

24 MR. KUNZ: I identified the detective who prepared
25 that actual document and we're prepared to produce him to

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Hernandez - cross

1 authenticate that document. The plaintiffs have indicated that
2 they were willing to stipulate to the authenticity. If that's
3 an issue, we can have the detective come in.

4 THE COURT: Okay. We'll see. Right now I understand
5 the basis for the marks on the map.

6 MR. KUNZ: Yes, your Honor.

7 Q. Directing your attention to Defendants' Exhibit K13 that I
8 have up on the big screen here, this mark right here, what does
9 this indicate?

10 A. That is where the stop was, where the stop happened, Beach
11 Avenue.

12 Q. And these other marks here, what do they indicate?

13 A. Those are burgs that occurred in the 43 Precinct.

14 THE COURT: Over what time period, do you know?

15 THE WITNESS: As what the paper said, we have 1/4/08,
16 1/7/08, 1/17/08, and 1/28/08.

17 THE COURT: All in January of 2008?

18 THE WITNESS: Yes, ma'am.

19 THE COURT: One, two, three, four, five, six of them.

20 MR. KUNZ: Seven.

21 THE WITNESS: Let me look back.

22 THE COURT: No. Beach Avenue is a stop.

23 MR. KUNZ: There's two of them very close together on
24 Stratford Avenue, your Honor.

25 THE COURT: Seven, you're right.

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Hernandez - cross

1 The seven stops that are marked to the left of the
2 Bronx River Parkway, they're all based on this report?

3 THE WITNESS: Yes, ma'am.

4 THE COURT: And they all occurred in January of 2008?

5 THE WITNESS: All but one that happened on 2/2/08,
6 ma'am, on the back page. On the back of the page. I'm sorry.

7 THE COURT: Okay. Thank you.

8 MR. KUNZ: Your Honor, just to make this easier, I
9 would renew my motion to admit the Exhibit L4, which is the
10 pattern document, into evidence.

11 THE COURT: Only if it's by stipulation. They said
12 they were going to stipulate to the authenticity.

13 MR. KUNZ: That's my understanding.

14 MR. CHARNEY: The only thing we're a little unclear
15 about is, are the defendants representing that this is the
16 document that the stopping officers relied on for the burglary
17 pattern?

18 THE COURT: No. I don't think so because then this
19 officer can't authenticate that. But it is a duly prepared
20 report of the police department on or about the date indicated,
21 and he can have the officer testify about it.

22 MR. CHARNEY: We don't have any problem with the
23 authenticity.

24 THE COURT: Then I'm taking that record as the basis
25 for putting the red dots on the map.

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D3sWflo5 Hernandez - cross

1 MR. CHARNEY: I guess we're just a little unclear
2 about what the relevance is.

3 THE COURT: To show that there actually were
4 burglaries on those dates in those locations, whether or not
5 these police officers can identify that record as the one they
6 relied on, these seven burglaries actually occurred in January
7 '08 and very early February '08.

8 MR. CHARNEY: That's fine, your Honor.

9 MR. KUNZ: Thank you, your Honor.

10 Just to clarify, I think when we were talking before,
11 somebody said that the red pins indicated stops, but they
12 indicate burglaries.

13 THE COURT: Yes, burglaries. I don't think anybody
14 said otherwise. Burglaries.

15 MR. CHARNEY: One of them is a stop, your Honor.

16 THE COURT: Yes, the one on the right of the Bronx
17 River Parkway. These are on the left of the Bronx River
18 Parkway. All seven on the left are burglaries. The one on the
19 far right is the stop in question.

20 If we get any further clarification, we'll have
21 nothing but confusion, so please don't say the word "clarify."
22 BY MR. KUNZ:

23 Q. Now, can you please tell the Court a little bit about the
24 area shown on this map, the area of the 43rd Precinct depicted
25 here?

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Hernandez - cross

- 1 A. The area we have above, where you see Westchester is a lot
2 of single family, double-family houses. When you're going down
3 from Westchester, where you see the first three dots, a lot of
4 the residential area. And then when you go a little bit lower
5 than that, that's when you start getting the buildings and the
6 housing developments. So, and going like that.
- 7 Q. And directing your attention to the actual stop of
8 Mr. Floyd, what, if anything, first caught your attention on
9 Beach Avenue that day?
- 10 A. My first thing that caught my attention was two individuals
11 in front of a door with a large wire key ring, whatever you
12 want to call it, with a bunch of keys, trying to open a door.
- 13 Q. Now, there was quite a bit of back and forth earlier today
14 about how many keys were on the key chain. Did you count the
15 keys on the key chain?
- 16 A. I did not.
- 17 Q. And at your deposition, do you remember how many keys you
18 said approximately were on the key chain?
- 19 A. No, I don't recall.
- 20 Q. I'm going to show you your deposition to refresh your
21 recollection.
- 22 A. Yes, sir.
- 23 Q. So directing you to page 145, lines 21 through 25, and then
24 on page 146, lines one through five, just read those to
25 yourself.

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Hernandez - cross

1 A. Okay.

2 Q. Does that refresh your recollection of how you testified at
3 your deposition?

4 A. Yes.

5 Q. What did you say at your deposition about the number of
6 keys, the approximate number of keys, that you saw?

7 A. Over 50 keys.

8 Q. How long did you observe the men before conducting a stop
9 of them?10 A. I would say anywhere from three to five minutes,
11 approximately.

12 Q. Where were you observing from?

13 A. From Beach Avenue.

14 Q. What, if any, suspicious activity did you observe for those
15 three to five minutes while you were watching the men?16 A. I observed both men so focused on this lock and with so
17 many keys, attempting to open the lock, changing keys and
18 trying to open the lock. One of the gentlemen looked towards
19 Beach Avenue. I thought he saw us, but he apparently -- I
20 don't know. He just went back to the keys and went back to the
21 lock and just kept on continue trying keys, and he just, I just
22 found it suspicious.23 Q. What did you find suspicious about the fact that someone,
24 that one of the men had looked up and down Beach Avenue?25 MS. PATEL: Objection. That's not what he said. He
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D3sWflo5 Hernandez - cross

1 didn't say up and down.

2 MR. KUNZ: I could rephrase.

3 Q. What did you find suspicious about the way one of the men
4 looked up Beach Avenue, I believe is what he said?

5 MS. PATEL: Looked at.

6 A. He looked back and it seems like he was looking to see if
7 anybody was watching him. And he couldn't, in my view, he
8 didn't see us, and that's why he went back to whatever he was
9 doing.

10 Q. After observing the men, what did you do next?

11 A. We observed a little more, a little longer. At one point,
12 somebody said, Let's go. Somebody opened the door, something
13 like that, and we had exited the vehicle towards the two
14 gentlemen.

15 Q. Do you remember any discussion in the vehicle before
16 exiting the vehicle?

17 A. No.

18 Q. What happened when you got out of the vehicle?

19 A. I recall walking towards the gentlemen. I saw my -- I took
20 out my shield. I saw Joyce Cormac go for his shield, pull it
21 out. One of us said, "Police." And we approached the
22 gentlemen and wanted to find out what was going on.

23 Q. And what happened next?

24 A. Sergeant Kelly and Joyce focused on one gentleman a little
25 bit. I kind of tried to keep my eye on him but also checking

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D3sWflo5 Hernandez - cross

1 on the guy I had also. We would try to determine who lived in
2 that apartment. One of the gentlemen said he lived around the
3 corner. He kept on trying to get to his, like touching his
4 pants and stuff. I said, Stop moving around.

5 At one point, I said, Does he have ID. He told me his ID
6 was in back of the house and told me one time and then I told
7 Sergeant Kelly that this guy says he lived in the back, that he
8 has his ID in the back of the house. At that point I said, Do
9 you have any kind of ID. He went for his pocket one more
10 time --

11 MS. PATEL: Your Honor, this is getting unresponsive.
12 I don't know what the question is.

13 THE COURT: I think it's responsive enough. We all
14 know what we're talking about here. We're going over the
15 incident.

16 Why don't you continue and finish.

17 THE WITNESS: Thank you, ma'am.

18 A. At that point, I told him, Don't move anymore. And then
19 right there he stopped, right there.

20 Q. Did you frisk the man?

21 A. Yes, I did.

22 Q. Why did you frisk him?

23 A. For my safety.

24 THE COURT: What does that mean?

25 THE WITNESS: I feared for my safety, ma'am.

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D3sWflo5 Hernandez - cross

1 THE COURT: Why?

2 THE WITNESS: He just kept on moving too much
3 visually, and I felt uncomfortable. And I knew I had to take
4 him to the back of the house to find out he lived there. And I
5 know I had my, it was three cops to two persons in the front,
6 and I went to the back with him. I just wanted to make sure
7 that for my safety I was going to be all right going back there
8 and checking on the ID he said he had in the back.

9 BY MR. KUNZ:

10 Q. Was there anything about the nature of the crime that you
11 were investigating that led to the frisk?

12 A. Burglaries, it's a violent crime. Most people that commit
13 burglaries have some kind of weapon to defend themselves if
14 they get caught by the owner of the house, if they're inside
15 the house.

16 Q. What happened after the frisk?

17 A. At that point --

18 THE COURT: Could you explain how you conducted the
19 frisk?

20 THE WITNESS: I patted the outside part of his, of his
21 clothing, ma'am. And at that point, we, I proceeded with him
22 to the back of the house. The back of the house, door was
23 open. I asked him to let me know what -- when I first looked
24 in the apartment, it was the kitchen, ma'am, your Honor, so I
25 asked the gentleman was there anything in the kitchen that he

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1 could ID as his ID or something in the kitchen that I could
2 tell that it was his, that he's been in that apartment before
3 and it is his apartment.

4 BY MR. KUNZ:

5 Q. What happened after you determined that it was his
6 apartment?

7 A. After I determined it was his apartment, we went, we walked
8 back to the front of the building, the front of the apartment
9 house. I told the sergeant, I told the Sergeant Kelly that he
10 was good to go, that he did live here, apparently. And we, we,
11 we started discussing why we stopped them and everybody was
12 happy, everybody was -- we were good to go, and we walked away.

13 Q. How long did the whole encounter last?

14 A. I would say ten to 20 minutes. I don't -- more or less.

15 Q. Just to clarify, do you know if the gentleman that you
16 frisked and then brought behind the house was Mr. Floyd?

17 A. I would say no.

18 Q. You think it's the neighbor?

19 A. Yes.

20 Q. The other fellow?

21 A. Floyd's neighbor.

22 Q. During your questioning earlier today, you were asked about
23 two CCRB investigations. Do you remember that?

24 A. Yes.

25 Q. One of them, the date of the incident was June the third,

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D3sWflo5 Hernandez - cross

1 2005. Do you remember that?

2 A. The one she gave me?

3 Q. Yes.

4 A. I think so, yes.

5 Q. Do you know the result of that CCRB investigation?

6 A. It was not founded.

7 MS. PATEL: It was what? I didn't hear.

8 THE COURT: Unfounded.

9 BY MR. KUNZ:

10 Q. Do you know if that is the specific legal terminology that
11 the Civilian Complaint Review Board used?

12 A. No, it was not.

13 Q. Do you know the specific terminology?

14 A. It's hard for me to pronounce, but it's unsubstantiated.

15 THE COURT: Unsubstantiated?

16 THE WITNESS: Yes, ma'am.

17 BY MR. KUNZ:

18 Q. If I showed you the document, would it refresh your
19 recollection?

20 THE COURT: No. We don't need to do that. He said
21 unsubstantiated. He had trouble pronouncing it. That's all.

22 MR. KUNZ: It was actually exonerated, your Honor.

23 THE COURT: It was? I guess we'll go with that.

24 BY MR. KUNZ:

25 Q. For the June 3, 2005, CCRB investigation, is it your

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D3sWflo5 Hernandez - cross

1 understanding that CCRB exonerated you for any --

2 MS. PATEL: Your Honor --

3 THE COURT: If the form says "exonerated," that's what
4 the CCRB said.

5 MS. PATEL: They objected to us asking questions about
6 the circumstances of the stop.

7 THE COURT: And we're not going to because the finding
8 was exonerated.

9 MS. PATEL: That's right.

10 THE COURT: Okay.

11 BY MR. KUNZ:

12 Q. The other CCRB investigation that they asked you about, the
13 incident date was November the third, 2004. Do you recall
14 that?

15 A. Yes.

16 Q. Do you know the result of that CCRB investigation?

17 A. Same thing.

18 Q. Exonerated?

19 A. Yes.

20 Q. So for both those two CCRB investigations, you were
21 exonerated of any possible misconduct?

22 A. Yes, sir.

23 MR. KUNZ: If I could just have one moment.

24 No further questions, your Honor.

25 THE COURT: Thank you, Mr. Kunz.

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Hernandez - cross

1 Ms. Patel.

2 REDIRECT EXAMINATION

3 BY MS. PATEL:

4 Q. I just want to clarify a few things about this map. Six of
5 the seven burglaries happened in January of '08, is that
6 correct?

7 A. Yes, ma'am.

8 Q. And the stop occurred on February 28, is that right?

9 A. Yes, ma'am.

10 Q. I'm sorry. 27th, right?

11 A. Yes, ma'am.

12 Q. All of these burglaries, wouldn't you say, happened in the
13 Soundview neighborhood?

14 A. No, ma'am.

15 Q. You wouldn't? You wouldn't characterize this as Soundview?

16 A. Not at all.

17 Q. Okay. In order to get to any of these, you would have to
18 cross the Bronx River Parkway, correct?

19 A. Bronx River Parkway, yes.

20 Q. And all of these occurred more than a mile away from 1359
21 Beach Avenue, right?

22 A. Approximately.

23 THE COURT: Is the Bronx River Parkway a neighborhood
24 divider? So one neighborhood is on the left and a different
25 neighborhood is on the right?

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Hernandez - redirect

1 THE WITNESS: No. Not really, no.

2 THE COURT: They're all the same?

3 THE WITNESS: Yes.

4 When you get off the Bronx River, if you took it
5 straight down, that would be considered Soundview. So it's way
6 lower than this map is right now.

7 THE COURT: Right. Here you say the left and the
8 right are both one neighborhood?

9 THE WITNESS: That's considered like the Parkchester
10 neighborhood, which is the high, the north part of the Bronx,
11 of our precinct. Sorry.

12 THE COURT: Both sides?

13 THE WITNESS: Yes, ma'am.

14 THE COURT: Both sides?

15 THE WITNESS: Yes, ma'am.

16 MR. KUNZ: I'm sorry. There was a question that was
17 asked, and I don't know if there was an answer, but it was
18 whether or not these crimes were more than a mile away.

19 MS. PATEL: And he answered that question.

20 MR. KUNZ: I'll represent that they are all less than
21 a mile away.

22 MR. CHARNEY: Judge, that's the second time he's
23 testified.

24 THE COURT: I understand that Mr. Kunz is not a
25 witness. I understand that. He's not under oath. He's not a

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D3sWflo5 Hernandez - redirect

1 witness. If you want to call a witness or recross, we'll see.
2 But your statement doesn't count as evidence.

3 MR. KUNZ: Yes, your Honor.

4 BY MS. PATEL:

5 Q. Officer Hernandez --

6 THE WITNESS: Your Honor, I think I said -- I don't
7 recall, but I think I said it's approximately a mile.

8 THE COURT: You did. You said approximately a mile.

9 THE WITNESS: Yes.

10 BY MS. PATEL:

11 Q. Mr. Hernandez, were you ever placed on monitoring again
12 after 2006?

13 A. Not that I know of, no.

14 Q. However, you do have additional CCRB complaints that were
15 filed against you related to stops after 2006, correct?

16 A. I don't recall.

17 Q. I'm going to show you what's been marked, two documents,
18 one which has been marked NYC4012 to 4013.

19 MR. KUNZ: Your Honor, I think this is beyond the
20 scope of my cross-examination. I clarified the two CCRBs that
21 they covered in their direct and didn't go beyond that at all.
22 Now they apparently want to introduce two additional ones.

23 MS. PATEL: It was rehabilitation, and I'm just trying
24 to show that it was a continued pattern.

25 THE COURT: I'll allow it.

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Hernandez - redirect

1 MR. KUNZ: Could I see copies?

2 MS. PATEL: I only have one, but I will give them to
3 you.

4 Q. The second one is NYC-4005 to 4011. Can you please look at
5 the dates of these two documents. They're both CCRB case
6 closing forms. Look at them to yourself. Don't read them out
7 loud.

8 A. Okay.

9 Q. Does this refresh your recollection --

10 THE COURT: Now you have to show them to Mr. Kunz.

11 MS. PATEL: Yes.

12 Q. Does this refresh your recollection --

13 THE COURT: One second.

14 MS. PATEL: Let me write the date down.

15 THE COURT: Give him a minute to look at it.

16 Are we ready to proceed or not?

17 MR. KUNZ: Yes. I'm sorry.

18 THE COURT: Go ahead.

19 BY MS. PATEL:

20 Q. Does that refresh your recollection regarding whether a
21 CCRB complaint was filed against you on March 13, 2007, related
22 to a stop encounter?

23 A. Yes, ma'am.

24 Q. And also April 30, 2007, there was another civilian
25 complaint filed against you regarding a stop encounter?

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D3sWflo5

Hernandez - redirect

1 A. Yes, ma'am.

2 Q. Is that right?

3 A. Yes, ma'am.

4 MR. KUNZ: Just to clarify, I think it's actually May
5 30.

6 MS. PATEL: I'm sorry. May. May 30, 2007. Just as a
7 shortcut --

8 MR. KUNZ: Sure. Appreciate that.

9 BY MS. PATEL:

10 Q. And it's true, isn't it, that the May 2007 complaint was
11 withdrawn, correct?

12 A. Yes. For the paperwork you have, it looked like that.
13 Yes.

14 Q. And the other one was not substantiated as well, right?

15 A. Yes.

16 Q. Were you ever disciplined?

17 A. For?

18 Q. Were you ever disciplined or were any of these discussed
19 with you?

20 A. Discussed, yes.

21 Q. By your supervisors?

22 A. Yes. I don't know if they, those specific ones were, but
23 I've been discussed about complaints that I've had before, yes.

24 Q. Okay. Let me just check one thing.

25 MS. PATEL: Thank you.

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Hernandez - redirect

1 THE COURT: Anything further, Mr. Kunz?

2 MR. KUNZ: No, your Honor.

3 THE COURT: Thank you, sir.

4 (Witness excused)

5 THE COURT: Next witness, Mr. Charney.

6 MR. CHARNEY: Our next witness is James Kelly.

7 THE COURT: Will he be taking the rest of the time
8 today?

9 MR. CHARNEY: Probably. I know we have to stop at
10 3:50.

11 THE COURT: Right.

12 Tomorrow, are we going to have deposition readings, or
13 are we going to have a live witness?

14 MR. CHARNEY: We are not going to have any live
15 witnesses, but we had been discussing maybe playing the
16 remainder of the tapes. We now have transcripts.

17 THE COURT: Oh, very helpful.

18 MR. KUNZ: I suspect we might just need to finish --

19 THE COURT: Is that Kelly?

20 MR. CHARNEY: I guess we can try.

21 MR. KUNZ: We need to finish Kelly tomorrow.

22 THE COURT: We will start first thing.

23 MS. GROSSMAN: Your Honor, just on the tapes that
24 Mr. Charney just mentioned, we still have to work out
25 incorporating the city's cross-designations so that we read it

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1 one time for you. I think that's what you mentioned you would
2 prefer.

3 THE COURT: That's what I would prefer. Right.

4 JAMES KELLY,

5 called as a witness by the Plaintiffs,

6 having been duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 BY MR. CHARNEY:

9 Q. Good afternoon, Sergeant Kelly.

10 A. Good afternoon.

11 Q. You joined the New York Police Department in July of 1998,
12 right?

13 A. Correct.

14 Q. You became a sergeant in August of 2005?

15 A. Correct.

16 Q. And you were a sergeant in the 43rd Precinct at that time?

17 A. Yes.

18 Q. And so how long were you a sergeant in the 43rd Precinct?

19 A. How long? I'm still there. It's seven and a half years.

20 Q. So since August of 2005?

21 A. Correct.

22 Q. Now, in February of 2008, you were an anticrime sergeant in
23 the 43rd?

24 A. Correct.

25 Q. And as an anticrime sergeant in the 43rd, you directly

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D3sWflo5 Kelly - direct

- 1 supervised five anticrime unit officers, is that right?
2 A. Yes.
3 Q. And two of the anticrime officers you supervised in
4 February of 2008 were Cormac Joyce and Eric Hernandez, right?
5 A. Yes.
6 Q. And at that time, your direct supervisor was Lieutenant
7 Guimares, is that right?
8 A. Yes, that's right.
9 Q. Is G-U-I-M-A-R-E-S?
10 A. I think so, yeah.
11 Q. And was Lieutenant Guimares the special operations
12 lieutenant in the 43rd Precinct?
13 A. Yes, he was.
14 Q. Sergeant Kelly, you participated along with officers Joyce
15 and Hernandez in a stop and frisk of David Floyd, correct?
16 A. Yes.
17 Q. And that encounter took place on February 27, 2008, right?
18 A. Yes.
19 Q. And you were previously deposed in this case, right?
20 A. Yes, I was.
21 Q. And that was on August 7, 2009?
22 A. I believe so.
23 Q. And so that was about a year and a half or so after the
24 stop in question, correct?
25 A. Yes, it was.

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D3sWflo5 Kelly - direct

1 Q. And you were present for the entire stop and frisk
2 encounter with Mr. Floyd, correct?

3 A. Yes.

4 Q. And you reviewed and signed the UF250 form that was
5 completed for this stop?

6 A. Yes.

7 Q. I'd like to show what's already been admitted, I believe,
8 as Defendants' Exhibit X4.

9 MR. CHARNEY: Put it up. You can start with the first
10 page. Let's actually get to the second page.

11 Q. I want to show you the second page of this document. It's
12 Bates numbered NYC108, I believe.

13 MR. CHARNEY: Thank you, Ms. Patel.

14 Q. Sergeant Kelly, do you see your signature on this document?

15 A. Yes.

16 Q. And does that signature indicate that you reviewed this
17 completed UFT250 form?

18 A. Yes.

19 Q. And you would not have signed this UF250 form if you did
20 not believe the information on the form to be true and
21 accurate, correct?

22 A. Correct.

23 Q. Now, I want to turn back to the first page.

24 THE COURT: I would like to understand what your
25 signature means. What does it mean? Does it mean you reviewed

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D3sWflo5 Kelly - direct

1 it? You fact checked it? What does it mean?

2 THE WITNESS: Just that I reviewed it.

3 THE COURT: Just physically read it?

4 THE WITNESS: Yeah.

5 THE COURT: And you signed it?

6 THE WITNESS: If anything stood out, maybe I would
7 question the officer on it.

8 THE COURT: It doesn't indicate anything other than
9 you read it; that's what the signature means? You read it?

10 THE WITNESS: Oh, yeah, I read them.

11 THE COURT: That's all? It could be more, but
12 minimally --

13 THE WITNESS: Minimumly, yes.

14 THE COURT: That's what the signature means. Okay.

15 MR. CHARNEY: Thank you, your Honor. That's a very
16 important clarification.

17 Q. Looking at the first page, 107, I want to move a little bit
18 down towards the bottom half. Do you see where it says "if
19 physical force was used indicate type"? See that?

20 A. Yes.

21 Q. It looks like the form indicated two forms of force were
22 used during this stop, right?

23 A. Yes.

24 Q. One was hands on suspect?

25 A. Correct.

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D3sWflo5 Kelly - direct

1 Q. And the other was suspect against wall or car?

2 A. Correct.

3 Q. Do you recall testifying at your deposition in August of
4 2009 that you did not remember whether or not Mr. Floyd was
5 ever made to stand against a wall during this encounter?

6 A. No, I don't remember.

7 Q. And with respect to the hands on the suspect, do you recall
8 testifying at your deposition in August of 2009 that you could
9 not remember which of the three of you -- officers Joyce,
10 Hernandez, or yourself -- put hands on Mr. Floyd?

11 A. I don't remember what I said at the deposition, but I still
12 don't remember who may have.

13 Q. Okay, okay. Now, I want to, this is a little bit tricky,
14 but if you look at the second page, 108, at the top, and I
15 apologize because I know the top is kind of cut off on this.

16 MR. CHARNEY: Actually, you're right. Let's turn to
17 page one -- I think it's 111.

18 MS. PATEL: 110.

19 MR. CHARNEY: 110.

20 Q. Sergeant Kelly, do you recognize this document, first of
21 all, this page of the document?

22 A. No.

23 Q. Have you ever seen a document that looks similar to this?

24 A. Not that I remember.

25 Q. Are you aware that UF250 forms, after they're completed,

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1 are entered into an electronic database?

2 A. That's what I'm assuming this is.

3 MR. CHARNEY: So maybe we can, if we can hand a copy
4 to the witness and have him review it.

5 Q. I want you to review pages 110 and 111, and then I'm just
6 going to ask you a couple questions.

7 A. Okay. Okay.

8 Q. Okay. So you have had a chance to review those pages.
9 Based on your review of those pages and your review of the
10 handwritten UF250 on the first two pages, is it fair to say
11 that the second and third, I'm sorry, the third and fourth
12 pages are the electronic version of the handwritten UF250?

13 A. Yeah, that's fair to say.

14 Q. So is it fair to say that the information in the electronic
15 version is the same as the information in the handwritten
16 version?

17 A. I would assume so.

18 Q. So I just want to ask you on page NYC110, which I believe
19 is the third page of this document, do you see at the bottom
20 where it says was "person frisked"?

21 A. Yes.

22 Q. And you see it says yes?

23 A. Okay.

24 Q. So it's correct that Mr. Floyd was frisked during this
25 encounter, correct?

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D3sWflo5 Kelly - direct

1 A. I'm assuming he was. I hope he was.

2 Q. Okay. But at your deposition, you testified that you could
3 not remember whether or not Mr. Floyd was frisked, correct?

4 A. Right.

5 Q. Now, Sergeant Kelly, would you agree that whether or not a
6 frisk took place is an important detail about a stop?

7 A. It depends. I'm assuming that a frisk took place because
8 what we were suspicious of was a possible violent crime, so --

9 Q. I understand, but my question is whether or not somebody is
10 frisked during a stop and frisk encounter, you would agree that
11 that's an important detail about that encounter. Correct?

12 A. I guess so.

13 Q. And whether or not force was used during a stop and frisk
14 encounter, you would agree that's an important detail about it?

15 A. Yes.

16 Q. Okay. Thank you.

17 Now, one of your responsibilities as an anticrime unit
18 sergeant was to review your officers' memo books, right?

19 A. Correct.

20 Q. And another term for memo book is activity log, right?

21 A. Correct.

22 Q. And isn't it true that NYPD policy requires that officers
23 record the details of their stops and frisks, all of their
24 stops and frisks in their memo books?

25 A. Yes.

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D3sWflo5 Kelly - direct

1 Q. And that was, in fact, NYPD policy in February of 2008,
2 correct?

3 A. I don't know.

4 Q. I want to show you --

5 MR. CHARNEY: I think this has been in evidence,
6 Plaintiffs' Exhibit 98. I think we used this with one of the
7 officers last week, but I will --

8 Do we know if it's in evidence? It is? So this is a
9 document already in evidence. We're going to pull it up on the
10 screen.

11 Q. Sergeant Kelly, this is Exhibit 98. Do you recognize this
12 document?

13 A. Yes.

14 Q. What is this document?

15 A. It's the patrol guide procedure on stop and frisk.

16 Q. And do you see the date at the top?

17 A. Yes.

18 Q. So this patrol guide section was enacted in 2003, correct?

19 A. Yes.

20 Q. And so this patrol guide section existed in February of
21 2008?

22 A. Okay.

23 Q. If you scroll down to, I believe, paragraph number -- keep
24 going. No. 7, do you see that?

25 A. Yes.

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D3sWflo5 Kelly - direct

1 Q. What does that say?

2 A. "Enter details in activity log."

3 Q. So the patrol guide section states that officers are
4 supposed to enter the details of their stops in their activity
5 logs, correct?

6 A. Right.

7 Q. So it is fair to say that in February of 2008, NYPD policy
8 required stops to be entered in officers' memo books, correct?

9 A. Yes.

10 Q. And the reason that the officers are supposed to put the
11 stops in their memo books is because the memo book entries, the
12 purpose of those memo book entries is to help officers remember
13 the details of the stops at a later time if they're asked about
14 them, correct?

15 A. Right. So is the 250.

16 Q. Right. But doesn't NYPD policy also require that activity
17 log entries contain all the details of a stop, even details
18 that are not on the 250 form?

19 A. Yes.

20 Q. I want to show you Plaintiffs' Exhibit 180, which I believe
21 has also been admitted into evidence this morning.

22 (Continued on next page)

23

24

25

D3s9flo6 Kelly - direct

- 1 Q. This is Plaintiffs' Exhibit 180. Sergeant, do you
2 recognize this document?
3 A. Yes.
4 Q. What is this document?
5 A. It's Officer Joyce's memo book at the time.
6 Q. When you say at the time you mean as of --
7 A. It was opened July 30 of 2007.
8 Q. I'm going to show you the second page of the document which
9 is Bates stamped NYC 631. Now, if we look near the bottom of
10 the page can you see, Officer Joyce's memo book entries for the
11 date February 27, 2008?
12 A. Yes.
13 Q. And do you see anywhere in the February 27, 2008 entry any
14 mention of the stop of Mr. Floyd?
15 A. No.
16 Q. And then turning to the next page of the document, this is
17 NYC 632. Do you see -- first of all, do you know what this
18 page of this document is?
19 A. It's just the other side, like the fly page we would call
20 it.
21 Q. And here do you see any mention of the stop of Mr. Floyd?
22 A. I see the 27th of February that it looks like he stopped
23 Mr. David Floyd and I guess a Forrester, a Mr. Forrester at
24 1359 Beach for burglary.
25 Q. Now, based on your understanding of NYPD policy do you

D3s9flo6

Kelly - direct

- 1 consider this to be an adequate memo book entry for the stop of
2 Mr. Floyd?
3 A. No.
4 Q. What is missing from this entry?
5 A. It should have been documented in his memo book on the
6 regular lines with --
7 Q. Beyond documenting it on regular lines, is there anything
8 else wrong with this memo book entry in your view?
9 A. Maybe it should have had the time.
10 Q. Anything else?
11 A. (No response).
12 Q. Okay. Did you ever speak to Officer Joyce about the fact
13 that this memo book entry was not adequate?
14 A. No.
15 Q. And I assume you never disciplined him for that?
16 A. No.
17 Q. I want to show you Plaintiffs' Exhibit 181.
18 This is Plaintiffs' Exhibit 181. Do you recognize this
19 document, Sergeant?
20 A. It looks to be Officer Hernandez's memo book.
21 Q. Would this also be for the same period of time?
22 A. I can't really make that out.
23 Q. Maybe the second page will help us with that. This is page
24 NYC 634. Do you see here -- do you see here a memo book entry
25 for February 27, 2008?

D3s9flo6

Kelly - direct

- 1 A. Yes.
- 2 Q. Looks like there's several entries on that date. You
3 signed Officer Hernandez's memo book on this date?
- 4 A. Yes. It looks like at 1:00 in the afternoon.
- 5 Q. That was a little bit prior to the stop of Mr. Floyd,
6 correct?
- 7 A. Correct.
- 8 Q. Now, do you see anywhere on the February 27, 2008 entries
9 any mention of the stop of Mr. Floyd?
- 10 A. No.
- 11 Q. So Officer Hernandez violated NYPD policy, didn't he?
- 12 A. I guess so. I mean Joyce did the 250 so I wouldn't -- I
13 wouldn't -- I don't know.
- 14 Q. Okay. You never spoke to Officer Hernandez about his memo
15 book?
- 16 A. No.
- 17 Q. You said Joyce did the 250. So is it your understanding
18 that NYPD policy only requires the officer who filled out the
19 250 to have an activity log entry even if there are other
20 officers who participated in the stop?
- 21 A. I don't know.
- 22 Q. I want to look at -- actually this has not been admitted in
23 evidence. So first I'm going to show this to the witness and
24 see if he recognizes this document. Two-sided.
- 25 A. It's my memo book for the time.

D3s9flo6 Kelly - direct

- 1 MR. CHARNEY: Plaintiffs would want to move this into
2 evidence?
3 MR. KUNZ: No objection.
4 THE COURT: What's the number on that?
5 MR. CHARNEY: It's Plaintiffs' Exhibit 179.
6 THE COURT: All right. 179 is received.
7 (Plaintiffs' Exhibit 179 received in evidence)
8 Q. So Sergeant Kelly you said that this document appears to be
9 your memo book entries for the period of time covering David
10 Floyd's stop. Would you look at the second page.
11 Do you see there we have an entry for February 27, 2008?
12 A. Yes.
13 Q. And did you include anywhere under February 27, 2008 an
14 entry for the stop of Mr. Floyd?
15 A. No.
16 Q. And so you also violated NYPD policy, correct?
17 A. Yes.
18 Q. And why didn't you include a memo book entry for this stop?
19 A. I would have assumed that Joyce did, that Officer Joyce
20 did.
21 Q. But we just looked at Officer Joyce's, correct?
22 A. Yep.
23 Q. And that didn't really have much information either?
24 A. No.
25 Q. Now you -- do you remember testifying at your deposition

D3s9flo6 Kelly - direct

1 that -- on August 7, 2009 that nothing stood out to you on the
2 day of the Floyd stop. Do you recall testifying to that?

3 MR. KUNZ: Can I get a line and page?

4 MR. CHARNEY: If he doesn't remember I was going to
5 refresh his recollection but I can --

6 THE COURT: I don't think he has to give you the line.
7 The officer says he remembers saying that.

8 MR. CHARNEY: You do, okay.

9 THE WITNESS: If it's in the deposition, then I guess
10 I said it, right?

11 Q. Well do you remember it sitting here today?

12 A. Deposition was --

13 THE COURT: First you said yes.

14 THE WITNESS: Okay. Yes.

15 THE COURT: After the lawyer spoke, it was a different
16 answer. We'll go with the yes.

17 MR. CHARNEY: Thank you, your Honor.

18 Q. So sitting here today the only sources of information that
19 you have about the -- what specifically happened during the
20 stop of Mr. Floyd are the UF 250 form, correct?

21 A. Correct.

22 Q. And your own memories in your head of what happened that
23 day, right?

24 A. Correct.

25 Q. Now, at your August 2009 deposition, Sergeant, do you

D3s9flo6 Kelly - direct

1 remember being asked about a March 2007 stop and frisk incident
2 you were involved in which was the subject of a civilian
3 complaint?

4 A. No.

5 Q. I'm going to show you your deposition see if it refreshes
6 your recollection. I want you to turn to page 116 and I
7 apologize for the extremely small type.

8 If you can read from lines -- to yourself -- if you can
9 read from lines 116 -- I'm sorry, line 14 on page 116
10 through -- actually to the end of -- to the end of page 118.
11 You can just let me know when you're done.

12 A. Okay.

13 Q. So having read those pages does that refresh your
14 recollection of being asked about a March 2007 stop and frisk
15 incident that you were involved in?

16 A. Yes.

17 Q. So do you recall that when you were asked about this
18 incident, you were asked about it in August of 2009, that you
19 could only remember it a little bit?

20 A. I still don't remember the incident but I-- I'm looking at
21 what I read here. It looks like I went down to CCRB for a stop
22 that was exonerated.

23 Q. So you also remember testifying at your deposition in
24 August of 2009 that your memory of the stop was not as clear to
25 you?

D3s9flo6

Kelly - direct

- 1 A. Right. Yes.
- 2 Q. And do you also recall testifying at your deposition that
- 3 you never made a memo book entry for that stop either?
- 4 A. Yes.
- 5 Q. And you also remember testifying that you were never
- 6 disciplined for failing to make that memo book entry?
- 7 A. Yes. That's what it says in the deposition.
- 8 Q. Now, Sergeant Kelly, was one of your responsibilities as an
- 9 anticrime sergeant to review the paperwork of the stop and
- 10 frisks that the officers under your supervision did?
- 11 A. Yes.
- 12 Q. And you would do that pretty regularly?
- 13 A. Yes.
- 14 Q. I want to show you Plaintiffs' Exhibit 178. This has not
- 15 been admitted into evidence.
- 16 Do you recognize -- you can take a second to look at this.
- 17 It's several pages.
- 18 Do you recognize this exhibit?
- 19 A. Yes.
- 20 Q. What is it?
- 21 A. It appears to be copies of Police Officer Hernandez's
- 22 monthly activity report.
- 23 Q. And these are the monthly activity reports for which
- 24 months?
- 25 A. I'm looking now. September of 2007. October, November --

D3s9flo6 Kelly - direct

1 all of 2007 -- December of 2007. January of 2008. February of
2 2008. March 2008. I guess all the way to August of 2008.

3 Q. And you were Officer Hernandez's supervisor in the
4 anticrime unit from at least February 2008 through August of
5 2008; is that right?

6 A. Correct.

7 MR. CHARNEY: I would move that this come into
8 evidence.

9 MR. KUNZ: No objection.

10 THE COURT: The number again?

11 MR. CHARNEY: This was 178.

12 THE COURT: 178 is received.

13 (Plaintiffs' Exhibit 178 received in evidence)

14 Q. We can turn to -- I'll tell you which page I want to start
15 with. I'm going to start with February of 2008 because that's
16 one of the months we're very concerned about here.

17 So that would be page NYC_26692.

18 Do you see that page?

19 A. Yes.

20 Q. So this document -- first of all, can you tell us what
21 information this document includes?

22 A. (No response).

23 Q. Or what information is included on this document?

24 A. Pretty much just accounting for Officer Hernandez, what he
25 did for the month, his days off, he took a chart day, that he

D3s9flo6 Kelly - direct

- 1 was a community policing officer. He had a detail.
2 Q. Does it also document how many stop and frisks he conducted
3 in the month of February 2008?
4 A. Yes.
5 Q. So it looks like he conducted nine in that month?
6 A. Yes. That's what it says, yes.
7 Q. And then skipping ahead two pages to 6694 which is the
8 March 2008?
9 A. Okay.
10 Q. Now this monthly report also indicates he did nine stop and
11 frisks in March, correct?
12 A. Yes.
13 Q. And then skipping ahead two more to April. You see he did
14 five; is that right?
15 A. The bottom is missing. But yes, that's what it looks like.
16 Q. So, so far for February, March and April we have 23 stops,
17 right?
18 A. Yes.
19 Q. And then we look at May. It looks like he did 13; is that
20 correct?
21 A. Yes.
22 Q. So now we're up to 36?
23 A. Yes.
24 Q. And then we skip ahead to June and it looks like we got ten
25 more?

D3s9flo6

Kelly - direct

- 1 A. Yep. Yes.
- 2 Q. So that's 46, right --
- 3 A. I'm not counting along with you. Yes.
- 4 Q. And then we go to July and we have six more?
- 5 A. (No response).
- 6 Q. So that's -- right. We got six for July?
- 7 A. Yes.
- 8 Q. So now we got 52. And then lastly for August it looks like
- 9 we got 12, right?
- 10 A. Yes.
- 11 Q. So that's 64 stops that he did between February and August
- 12 of 2008, right?
- 13 A. Yes.
- 14 Q. Now you would have reviewed the paperwork for those 64
- 15 stops; is that right?
- 16 A. Probably a good portion of them, yes.
- 17 Q. And would it be fair to say that the other four officers in
- 18 your unit did -- some probably did less, some probably did
- 19 more, but did roughly around the same number?
- 20 A. I don't know. Probably roughly, yes.
- 21 Q. So again doing a little math if we had five officers
- 22 roughly doing about 60 stops in that period August -- I'm sorry
- 23 February to August, that would be about 300 or so stops that
- 24 your unit did, right?
- 25 A. Yes.

D3s9flo6

Kelly - direct

- 1 Q. And you said that you reviewed a good portion of those
2 stops?
- 3 A. Yes.
- 4 Q. And so then if we try to extrapolate out a little more, if
5 you got about 300 for that six-month period, if we go ahead a
6 year to August of '09. So now we're another year out. Would
7 it be fair to say that by that point you could have reviewed
8 five or six hundred stops by that point?
- 9 A. Depending. Probably, yes.
- 10 Q. And you yourself also conducted stop and frisks from time
11 to time when you were an anticrime -- as an anticrime sergeant
12 in the 43rd precinct?
- 13 A. Yes.
- 14 Q. But sitting here today you can't remember off the top of
15 your head much of anything about any of those individual stops
16 that you did, can you?
- 17 A. You'd have to be a lot more specific than that.
- 18 Q. Well do you remember testifying at your deposition in
19 August of 2009 that you couldn't even remember how many stops
20 you had done the prior month, July of 2009?
- 21 A. Probably not.
- 22 Q. So in order to remember you'd have to look at paperwork,
23 right?
- 24 A. Yes.
- 25 Q. You'd have to look at the 250?

D3s9flo6

Kelly - direct

- 1 A. Yes.
- 2 Q. And the memo book?
- 3 A. The 250s I would look at.
- 4 Q. You wouldn't look at the memo book?
- 5 A. Maybe. Depending on the stop.
- 6 Q. So you believed that by looking at a 250 you can know all
- 7 of the important facts about whether or not a stop -- what
- 8 happened during a stop?
- 9 A. Yeah. Yes.
- 10 Q. You'll know what the officer actually observed?
- 11 A. What he's saying -- I wasn't there so I can't tell exactly
- 12 what.
- 13 Q. So I want to talk a little bit about the stop of Mr. Floyd.
- 14 You were patrolling in an unmarked NYPD vehicle on the date of
- 15 the stop, correct?
- 16 A. Yes.
- 17 Q. And you testified at your deposition, didn't you, that you
- 18 first observed Mr. Floyd while you and Officers Hernandez and
- 19 Joyce were driving southbound on Beach Avenue in the Bronx?
- 20 A. Yes.
- 21 Q. I want to show you exhibit -- Defendants' Exhibit I-10. I
- 22 don't think it's been admitted. Actually I think it may have
- 23 been admitted during Mr. Floyd's testimony.
- 24 MR. CHARNEY: Can we pull I-10 up on the screen. Blow
- 25 it up and then move it over to the right.

D3s9flo6

Kelly - direct

- 1 I'm just going to hand this to the witness. Because
2 the picture I don't think really is clear. So I'm going hand
3 this to you.
- 4 Q. Do you see on this map over to the right side Beach Avenue?
5 A. I mean I know where it is. I don't clearly see it on the
6 map, no.
- 7 Q. Well I guess looking down in the bottom right corner it
8 runs from south to north. So do you see going down to the
9 bottom right and running kind of up the page do you see where
10 Beach Avenue is. Maybe I can --
- 11 A. I see -- yes, I see where it is.
- 12 Q. Now on this map doesn't it indicate that Beach Avenue
13 runs -- actually runs northbound. It's a one way street?
14 A. Yes.
- 15 Q. But you guys were driving southbound on Beach Avenue?
16 A. For some reason that's what I remember.
- 17 Q. Isn't it true that even before you stopped the car you had
18 determined that -- you had already made the determination that
19 Mr. Floyd and the man he was with at the time were attempting
20 to burglarize the house at 1359 Beach Avenue?
21 A. I don't know if it was even before I stopped the car. But
22 at some point I reasonably suspected them to be breaking into
23 the house, yes.
- 24 Q. Do you have your deposition in front of you?
25 A. Yes.

D3s9flo6 Kelly - direct

- 1 Q. If you could turn to page 33, line 10. Just let me know
2 when you're ready.
- 3 A. Okay.
- 4 Q. And this reads.
- 5 "Q. Before you stopped the vehicle what did you suspect the
6 two individuals were doing?"
- 7 A. Right.
- 8 Q. "Mr. Hasan: Objection to the form of the question.
- 9 "A. I felt that they were breaking into a house, that they
10 were going to burglarize the house."
11 Do you see that?
- 12 A. Yes.
- 13 Q. So then it is correct that you had already made the
14 determination that Mr. Floyd was trying to burglarize the house
15 before you had even stopped the car, right?
- 16 A. Something made me stop, yes.
- 17 Q. And you based this determination on three things, right?
18 Based on what you said was a burglary pattern in the vicinity,
19 right?
- 20 A. Correct.
- 21 Q. And we're going to come back to that one. Your observation
22 of Mr. Floyd and the other man, as you put it, playing with the
23 handle of the front door of the apartment?
- 24 A. Yes.
- 25 Q. That's the second reason, right. And then you also

D3s9flo6 Kelly - direct

1 mentioned a backpack or duffel bag that you said you saw on the
2 ground next to Mr. Floyd, right?

3 A. At their feet, yes.

4 Q. But while you were in the car you didn't observe Mr. Floyd
5 or the other man holding any burglary tool?

6 A. I didn't see their hands.

7 Q. And you didn't have a suspect description that you believed
8 they fit, right?

9 A. No.

10 Q. And they didn't appear to be casing the building, right,
11 walking around, looking in, or anything like that?

12 A. No. They were more involved than that.

13 Q. And you didn't see any suspicious bulges, right?

14 A. No.

15 Q. Now each of the details that I just mentioned, three --
16 well let's actually focus on the -- not the burglary pattern
17 but the other two.

18 The playing with the lock. That's not reported on the
19 UF 250 form, is it?

20 You can look at X-4 again if you want. Or you can feel
21 free to look through plaintiffs -- we don't have it up there.
22 Okay. Well let's look at X-4 again.

23 So do you see anywhere on page one any mention of playing
24 with locks or turning locks or fiddling with locks or anything
25 like that?

D3s9flo6 Kelly - direct

- 1 A. No. But he does have X'd off furtive movement.
2 Q. But there is no specific mention of playing with a lock or
3 fiddling with a lock, right?
4 A. No.
5 Q. And page two. Do you see anywhere any mention anywhere of
6 fiddling with a lock?
7 A. No.
8 Q. So -- and the memo books we looked at earlier, yours and
9 Officer Hernandez's and Officer Joyce's, there was no mention
10 of fiddling with the lock in any of those, right?
11 A. No.
12 Q. So your basis for that -- your memory of that just comes
13 from your head, right?
14 A. Yes.
15 Q. In terms of this observation of playing with the lock that
16 you said you observed, isn't it true that at the time you say
17 you observed this both Mr. Floyd and the other man's back were
18 to you?
19 A. Yes.
20 Q. So you couldn't actually see what they were doing with
21 their hands, right?
22 A. I didn't see their hands, no.
23 Q. And so you didn't see what was in their hands, right?
24 A. No.
25 Q. So you couldn't, from when you were in the car, you

D3s9flo6

Kelly - direct

- 1 couldn't see whether or not Mr. Floyd or the other man were
2 putting a key into the door of the lock, right?
- 3 A. No.
- 4 Q. And, again, the behavior that you did observe from the car
5 you testified at your deposition was turning the door handle
6 and the lock. Do you remember saying that?
- 7 A. I just remember them shaking -- it looked like their backs
8 were moving.
- 9 Q. Can we turn to page 37 of your deposition.
- 10 A. Yes.
- 11 Q. And line 12. Actually let's go up to line 7. It says.
12 "Q. Earlier you said that before you exited the vehicle you
13 saw two males playing with the door; is that correct?
14 "Mr. Hasan: Objection.
15 "A. I think I said that, yes.
16 "Q. What do you mean by playing?
17 "A. Like shaking the door, trying to force the door open,
18 turning the handle of the lock."
19 Do you recall saying that?
- 20 A. Yes.
- 21 Q. Now, isn't turning a handle or turning a lock also
22 consistent with someone who would try to be opening it with a
23 key?
- 24 A. I just remember -- it was clear to me that they were trying
25 to get into the door. Somewhat forcefully.

D3s9flo6

Kelly - direct

1 Q. I understand that but isn't turning a lock or turning a
2 handle also consistent with trying to open it with a key?

3 A. I guess so, yes.

4 Q. And, in fact, that is what Mr. Floyd and the other man were
5 trying to do, right? They were trying to open the door with
6 keys, right?

7 A. I don't know.

8 THE COURT: I mean as it turned out.

9 THE WITNESS: As it turned out -- at the time, I think
10 they were trying anything to get into.

11 Q. But as it turned out, the judge is correct, as it turned
12 out, that what they were trying to do?

13 A. I'm not sure. I saw a keyring.

14 THE COURT: I thought you eventually learned.

15 THE WITNESS: I eventually learned to see a keyring.
16 They didn't have the key to the apartment. It was locked
17 inside.

18 THE COURT: I thought you eventually learned that one
19 of them lived there.

20 THE WITNESS: I didn't mention anything about that
21 earlier, no.

22 MR. CHARNEY: We may get to that.

23 Q. So is it your testimony that turning a door handle or
24 turning a lock is not consistent with trying to open that door
25 with keys?

D3s9flo6

Kelly - direct

- 1 A. It could be.
- 2 Q. And then, in fact, at some point during this encounter
- 3 later on you did learn that is actually what they were trying
- 4 to do?
- 5 A. I don't know.
- 6 Q. Okay.
- 7 A. They had keys. Not for that door.
- 8 Q. Okay. Now you also -- isn't it true that from the car you
- 9 only observed them playing with the handle of this door for
- 10 about 20 to 30 seconds?
- 11 A. I just saw them -- I couldn't see their hands. So I don't
- 12 know what they were doing with their hands or the door. I saw
- 13 them forcefully trying to get into -- through the door.
- 14 Q. That was only for about 20 to 30 seconds, right?
- 15 A. Maybe. Which initially made me stop. We may have watched
- 16 longer. I don't remember.
- 17 Q. Do you remember testifying at your deposition that you only
- 18 observed them for about 20 to 30 seconds before you decided
- 19 that they were burglarizing the apartment?
- 20 A. That's what it says, yes.
- 21 Q. Now you've worked in New York City for a long time, right,
- 22 Sergeant Kelly?
- 23 A. Like 14-and-a-half years.
- 24 Q. And in the Bronx for a lot of that time?
- 25 A. Yes.

D3s9flo6 Kelly - direct

- 1 Q. There was a lot of old apartment buildings in the Bronx,
2 right?
- 3 A. Old and new.
- 4 Q. But there are a lot of old ones, right?
- 5 A. Yes.
- 6 Q. In the neighborhoods you patrol?
- 7 A. Yes.
- 8 Q. And a lot of those apartment buildings have very old door
9 locks, right?
- 10 A. Yes.
- 11 Q. So isn't it somewhat commonplace to see somebody, or
12 somebody who is trying to get into an apartment, even with
13 keys, to sometimes struggle for 20, 30 seconds?
- 14 A. No. I mean if I'd see that I'd stop.
- 15 Q. Anybody you saw doing that?
- 16 A. I'd look into it a little further if they were forcefully
17 trying to get in, yes.
- 18 Q. Now, you said -- again, going through the reasons you
19 suspected that there was a burglary happening, we just talked
20 about the playing with the door. I want to talk about the bag
21 you say you observed. Now you said you observed this bag at
22 the feet of the two men?
- 23 A. Yes.
- 24 Q. And so that was right kind of in front of the door, right?
- 25 A. I just remember the bag being like in between the two men

D3s9flo6

Kelly - direct

1 at their feet.

2 Q. And the two men were in front of the door of the apartment,
3 right?

4 A. I don't know if one man was more in front of the door --
5 yes. They were in front of the door.

6 Q. And this was a basement apartment, correct?

7 A. Ground floor. I don't know if it was a basement.

8 Q. Can we look at -- I believe what's been previously admitted
9 as Defendants' Exhibit N-10.

10 I've been informed that the version that was admitted had
11 an X on it so this actually hasn't been admitted. Let me ask
12 defendants.

13 MR. KUNZ: No objection.

14 THE COURT: No objection. What's the exhibit number?

15 MR. CHARNEY: This is N-10.

16 THE COURT: N-10 is received.

17 (Defendants' Exhibit N-10 received in evidence)

18 Q. Sergeant Kelly, do you recognize this photograph?

19 A. Yes.

20 Q. What's it a photograph of?

21 A. It's a photograph of 1359 Beach, the house that they were
22 trying to get into.

23 Q. And maybe I'll make the X -- actually I'm going to give it
24 to you. If you can mark on here to the best of your
25 recollection with an X where -- what door you observed

D3s9flo6

Kelly - direct

- 1 Mr. Floyd and --
2 A. The house is updated since then. There was no fence.
3 There was no -- but -- do you want it back after?
4 MR. CHARNEY: Sure. Thank you. Thanks a lot.
5 Q. So it looks like you marked an X next to the -- on the
6 ground floor of the building right next to the door, front door
7 on the ground floor, correct?
8 A. Correct.
9 Q. So is that the door that you observed --
10 A. Yes.
11 MR. CHARNEY: If we can zoom in a little bit here.
12 Q. Do you see, as we zoom in, that there are actually stairs
13 going down from the sidewalk to the entryway of that door?
14 A. No. I can't tell from that.
15 Q. You can't see a railing there?
16 A. No.
17 Q. Do you recall at the time or --
18 THE COURT: You mean the lower awning?
19 MR. CHARNEY: Yeah, the lower awning. You don't see a
20 metal staircase? Stair railing.
21 THE WITNESS: I see the fence.
22 MR. CHARNEY: Silver railing.
23 THE COURT: Below the lower.
24 THE WITNESS: On the right-hand side, if that's what
25 that is. I don't know what that is.

D3s9flo6

Kelly - direct

1 MR. CHARNEY: Unfortunately not too clear.

2 Q. Well is it correct that the doorway -- this door that the
3 two men were standing next to, is actually a couple of stairs
4 down from the level of the sidewalk?

5 A. I don't know.

6 Q. Do you remember?

7 A. (No response).

8 Q. Well let me see?

9 A. I don't remember two stairs that day, if that's what you're
10 getting at.

11 Q. I understand. I'm asking you if looking at the picture
12 now -- looking at this photograph, do you see that the doorway
13 is actually a couple of stairs down from the sidewalk?

14 A. It looks like it may be sunken down a little bit yes.

15 Q. So if we assume that's the way it looked on the date of the
16 stop, isn't it fair to say that from the street -- the bottom
17 of the doorway is somewhat obstructed from the street? In
18 other words you can't quite make out everything at the bottom?

19 A. If it was still the same now?

20 MR. KUNZ: I'm going to object to that question. I
21 don't believe this witness has said this accurately reflects
22 the way it looked that day.

23 MR. CHARNEY: I'm saying assuming it does.

24 THE COURT: I'll take it as a hypothetical. Assuming
25 that photograph is accurate.

D3s9flo6 Kelly - direct

1 THE WITNESS: It looks to me -- I don't know if it was
2 like that that day.

3 MR. CHARNEY: So if we assume it was, isn't it --
4 looking at that picture, the bottom of the doorway, the very
5 bottom is obstructed, right? You can't see it clearly from the
6 street in this photograph.

7 THE WITNESS: Right.

8 Q. So if -- if this is how the apartment looked on the date of
9 the stop and you said that the bag was at their feet, your view
10 of the bag was not a hundred percent clear, right?

11 A. Yes, it was. One hundred percent. I don't think both men
12 could have fit down in that little stairway. There was a bag
13 at their feet.

14 Q. So you saw a bag but you don't remember if it was open or
15 not, right?

16 A. I don't remember if it was open or not.

17 Q. And you don't remember if it was a backpack or a duffel
18 bag, right?

19 A. No.

20 Q. And up didn't see any burglary tools sticking out of it,
21 right?

22 A. Nothing sticking out of it.

23 Q. I want to ask you about this burglary pattern. Before you
24 got here we heard just a little bit of testimony about it.

25 Now you testified at your deposition that there had been a

D3s9flo6 Kelly - direct

- 1 burglary pattern in the area at the time of the stop, right?
2 A. Yes.
3 Q. And by area you meant the vicinity, the blocks, the
4 neighborhood around 1359 Beach Avenue, correct?
5 A. Correct.
6 Q. So you weren't talking about a burglary pattern that
7 encompassed the whole 43rd precinct, right?
8 A. I don't know.
9 Q. Do you recall where this burglary pattern was, the one that
10 you believed encompassed 1359 Beach Avenue?
11 A. It was in the same area.
12 Q. By area you meant neighborhood, right?
13 A. Yes.
14 Q. You meant the surrounding blocks?
15 A. Correct.
16 Q. And the reason is because, as an anticrime sergeant you're
17 supposed to study the crime trends of the precinct to figure
18 out the specific locations within the precinct where crime is
19 happening, right?
20 A. Correct.
21 Q. So you're really trying to focus on small areas where you
22 see a lot of crime, right?
23 A. It depends on what you mean by small area. It varies.
24 Q. Well I asked you earlier --
25 A. If a person is doing burglaries, they're not going to stay

D3s9flo6 Kelly - direct

1 on the same block doing them. That would be too easy. So
2 they're going to move around from block to block.

3 Q. 43rd precinct is really big, right?

4 A. It's a large precinct.

5 Q. And it includes several different neighborhoods, right?

6 A. Correct.

7 Q. So there's Castle Hill, right?

8 A. Correct.

9 Q. There's Parkchester, right?

10 A. I don't know if that's a separate neighborhood, but
11 that's -- the Parkchester complex is.

12 Q. Castle --

13 A. I would still consider it Soundview.

14 Q. So -- but there are several neighborhoods, right?

15 A. Yes.

16 Q. Okay.

17 THE COURT: All right. It's just ten of. I went as
18 long as I could. But it's just ten of. So we have to stop for
19 the day. We're going to pick up first thing tomorrow morning
20 at 10:00. So for those of you who won't be here, have a good
21 holiday. For everyone else, I'll see you tomorrow at 10:00.
22 And we will be stopping at 1:00.

23 (Adjourned to March 29, 2013 at 10:00 a.m.)

24

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18	Exhibit No.		Received
19	1211285
20	741323
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1 1781443

2 DEFENDANT EXHIBITS

3 Exhibit No. Received

4 X-41325

5 I101366

6 K131409

7 N-101456

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