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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK  
2 -----X

3 DAVID FLOYD, et al.,

3  
4 Plaintiffs,

5 v. 08 CV 1034(SAS)

6 CITY OF NEW YORK, et al.,

7 Defendants.

8 -----X

New York, N.Y.  
April 17, 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  
 20 CENTER FOR CONSTITUTIONAL RIGHTS  
 21 Attorneys for Plaintiffs  
 21 BY: DARIUS CHARNEY  
 22 SUNITA PATEL  
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 23  
 24  
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1 APPEARANCES (Cont'd)  
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 2 MICHAEL A. CARDOZO  
 3 Corporation Counsel for the City of New York  
 3 Attorney for Defendants  
 4 BY: HEIDI GROSSMAN  
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7 JUDSON VICKERS

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1 (Trial resumed)

2 MR. MOORE: Can I raise a matter with you before we  
3 start the witness?

4 I reflected on the question you asked me at the end of  
5 yesterday, whether you had learned anything from Lieutenant  
6 Barrelli, and I have to say when I went back and looked at what  
7 I intended to ask him compared to what I did ask him, which was  
8 basically to identify documents, I had to agree with you, that

9 I really didn't get to the substance of what I wanted to ask  
10 him. So I would ask that I be permitted to either recall him  
11 or designate his deposition testimony.

12 THE COURT: And you didn't get to what you wanted to  
13 get to because you were intimidated by my saying that we have  
14 to move quickly?

15 MR. MOORE: I felt a bit pressured by the urgency of  
16 the hour and by what you had expressed, yes.

17 THE COURT: He was the last witness yesterday?

18 MR. MOORE: He was the last witness.

19 THE COURT: He was very short.

20 MR. MOORE: Basically, I introduced some documents and  
21 you said, what did I learn?

22 THE COURT: I have got it. All right.

23 He is retired?

24 MR. MOORE: He is retired.

25 THE COURT: Where is he working?

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1 MS. RICHARDSON: He is no longer working in the city.  
2 He is retired. He lives outside of the city. It was  
3 burdensome for him to get here yesterday.

4 THE COURT: Where does he live?

5 MS. RICHARDSON: I believe he lives in Nassau County,  
6 but he has a wife and a mother that he cares for. He has two  
7 children. I mean, I would object to recalling him. We had him  
8 here yesterday.

9 THE COURT: It's true, but we only had him for 15  
10 minutes. That's why I said at the end, what did we do? We

11 just read from the documents. d4h9f1of It may be that the effort was to  
12 get him out and to accommodate him. We were going to take him  
13 Palmieri. I was surprised that we skipped to Barrelli, and I  
14 remember that Mr. Moore said, I am doing this at the request of  
15 the city. The city has asked me to take Barrelli first. Do  
16 you remember that? Because they were both here. In fact, you  
17 said, I call Palmieri, and the city said, no, no. It was the  
18 city's request. It really was 4:15. I think everything was  
19 rushed. That's why at the end I said, what happened? It went  
20 so fast. Maybe he was trying to accommodate him, get him on  
21 and off, and in that effort lost sight of what he was here for,  
22 because all he did was read from documents.

23 well, your choice is to bring him back or consent to  
24 the deposition. I would like to know what the man had to say  
25 and, clearly, he didn't get a chance to say it yesterday

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1 because they were trying to accommodate him. They put him on  
2 and it was rushed.

3 MS. RICHARDSON: They had to subpoena him for  
4 yesterday. The subpoena was only for yesterday. So they had  
5 to call him yesterday. But we can discuss with plaintiffs'  
6 counsel during the break about how we can proceed.

7 THE COURT: OK. Take a look at the deposition. You  
8 might not care. He is going to bring that material out. So  
9 take a look at it.

10 COSMO PALMIERI,

11 called as a witness by the plaintiffs,  
12 having been duly sworn, testified as follows:

13 THE COURT: State your full name, your first and last,  
Page 5

14 spelling both.

15 THE WITNESS: Cosmo Palmieri, C-O-S-M-O,

16 P-A-L-M-I-E-R-I.

17 DIRECT EXAMINATION

18 BY MR. CHARNEY:

19 Q. Good morning. Is it still Lieutenant Palmieri?

20 A. Yes.

21 Q. Good morning, Lieutenant Palmieri.

22 You joined the police department in 1994, correct?

23 A. Yes.

24 Q. You became a lieutenant in the 43rd Precinct in the Bronx

25 in 2007, is that right?

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Palmieri - direct

1 A. Correct.

2 Q. Then in September of 2008, you became the integrity control  
3 officer in the 43rd Precinct?

4 A. Yes.

5 Q. Is that still your position?

6 A. Yes.

7 Q. So at the time that you became the integrity control  
8 officer in the 43rd Precinct, your precinct commander was  
9 Charles Ortiz, is that right?

10 A. That's correct.

11 Q. That's who you reported to directly?

12 A. Yes.

13 Q. Who is your CO now?

14 A. Deputy Inspector Green.

15 Q. Was Inspector Green the executive officer at the time in

16 September 2008 that you became the IC<sup>d4h9f1of</sup>?  
17 A. I believe so.  
18 Q. Now, you recall giving a deposition in this case?  
19 A. Yeah. I recall doing it, yes.  
20 Q. It was back in October of 2009?  
21 A. Yes.  
22 Q. Do you recall that you testified then that 80 percent of  
23 your job as an integrity control officer was to monitor  
24 overtime?  
25 A. Correct.

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D4H8FLO1 Palmieri - direct

1 Q. So is it fair to say that the other 20 percent of your job  
2 was to inspect police officers to make sure they were doing  
3 their jobs properly?  
4 A. I probably shouldn't have put a percentage on the time, but  
5 most of my time is allocated to monitoring overtime. I can't  
6 give you a percentage how much time is -- I monitor police  
7 officers constantly.  
8 Q. But the vast majority of the monitoring you do is related  
9 to preventing overtime abuses?  
10 A. Yeah, from officers.  
11 Q. So I want to talk about then the portion of your time spent  
12 monitoring other activities of officers.  
13 So is it true that the way that you monitor officers  
14 to make sure they were doing their jobs properly, one way would  
15 be to review their memo books, right?  
16 A. Correct.  
17 Q. You would also speak with them from time to time?  
18 A. Yes.

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19 Q. You also responded to radio runs to see how they handled  
20 them?

21 A. Yes.

22 Q. And you sometimes visited them on foot post, right?

23 A. Correct.

24 Q. Other than that, you didn't do anything else really to  
25 monitor officer activity, right?

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Palmieri - direct

1 A. No. I do a number of other things.

2 Q. You recall giving a deposition in this case, and I want to  
3 show you this transcript from your deposition.

4 You swore to tell the truth at that deposition, right?

5 A. Correct.

6 Q. If you can turn to page 17, and I apologize for the small  
7 type. If we look at page 17, line 9. The question that was  
8 asked was:

9 "Q. How do you ensure that police officers don't break the  
10 law?

11 "A. By questioning them and reviewing their memo books.

12 "Q. What percentage of your time is spent ensuring that  
13 officers don't break the law?

14 "MR. HAZAN: Objection.

15 "A. Well, like I said, stealing time from the city  
16 is -- stealing money from the city is breaking the law. It  
17 falls into the same 100 percent. The 80 percent of overtime  
18 monitoring is part of the not breaking the law.

19 "Q. What else do you do to ensure that police officers don't  
20 break the law besides questioning them and reviewing their memo

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21 books?

22 "A. Try to monitor them while they are on duty.

23 "Q. How do you monitor them while they are on duty?

24 "A. By questioning them and reviewing their memo books.

25 "Q. Anything else?

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Palmieri - direct

1 "A. Respond to radio runs that they have to go to.

2 "Q. Does that mean that you join them on radio runs?

3 "MR. HAZAN: Objection.

4 "A. No.

5 "Q. What do you mean by respond to radio runs that they go to?

6 "A. I try to get there before them and see how they handle the  
7 job.

8 "Q. Do you do anything else to monitor officers while they are  
9 on duty?"

10 MS. RICHARDSON: Your Honor, I am not sure --

11 THE COURT: Why are you reading this lengthy passage?

12 MR. CHARNEY: Because I listed things that he does to  
13 monitor officers. He agreed with each of them. And I said, Is  
14 that it? And he said, No, I do other things. And this  
15 passage, as I will get to, shows that these are the only things  
16 that he does to monitor officers. So I am trying to impeach  
17 him. If he would just stipulate that the items I listed are  
18 what he does to monitor and nothing else, then I don't have to  
19 read this lengthy passage.

20 MS. RICHARDSON: Your Honor, I think if we go further  
21 on in the deposition, he did talk about -- on the next page he  
22 does talk about other things he did. He talks about visiting  
23 officers in the hospital.

24 MR. CHARNEY: That's where I was going to end. We are  
25 going to end with visiting in the hospital. That's it.

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Palmieri - direct

1 MS. RICHARDSON: I don't know how this is inconsistent  
2 with what he just said.

3 THE COURT: Apparently, there is a question as to  
4 whether there are more things than listed. Mr. Charney would  
5 like to limit it to that which he said at the deposition.

6 I suppose you can read that section to yourself and  
7 say whether you agree with it now.

8 where did you want to stop?

9 MR. CHARNEY: I was actually going to stop only  
10 about -- I think I only had seven lines left.

11 I can list them to you again and you can tell me if  
12 there is anything else.

13 THE COURT: why don't you just do that?

14 MS. RICHARDSON: This is also from 2009.

15 THE COURT: I know. As of 2009, what is the question?

16 BY MR. CHARNEY:

17 Q. As of 2009, what you did to monitor officers to make sure  
18 they weren't breaking the law, one was to review their memo  
19 books, correct?

20 A. Correct.

21 Q. You would go out on radio runs to observe to see how they  
22 responded, right?

23 A. Correct.

24 Q. You would visit them on foot posts, correct?

25 A. Correct.

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D4H8FLO1 Palmieri - direct

1 Q. You would visit them in the hospital, right?

2 A. Correct.

3 Q. You would question them when you reviewed their memo books,  
4 right?

5 A. Correct.

6 Q. That's it?

7 A. No.

8 THE COURT: In 2009, was there anything more you did  
9 then?

10 A. I'm sorry I didn't list them now, but I do numerous other  
11 things to monitor officers.

12 Q. Such as?

13 A. I visit corruption prone locations.

14 THE COURT: You visit what?

15 THE WITNESS: Corruption prone locations.

16 THE COURT: OK.

17 A. We keep a list of locations that we think are hazardous,  
18 and we visit them. We monitor them on jobs. We watch them  
19 handle a job. We go to court and see if they are attending  
20 court. We watch their testimony at court, going to traffic  
21 court and testifying properly.

22 Q. Let me move on then.

23 Now as the ICO in the 43rd Precinct, you attend  
24 biweekly meetings with other ICOs from other precincts in the  
25 Bronx, correct?

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Palmieri - direct

1 A. Correct.

2 Q. At none of these meetings has the issue of stop, question  
3 and frisk ever been discussed, right?

4 A. Not that I recall.

5 Q. You also, as part of your job as an ICO in the 43rd  
6 Precinct, attend biweekly meetings -- commanding officer  
7 meetings?

8 A. Correct.

9 Q. Is that a meeting that takes place in the 43rd Precinct?

10 A. Yes.

11 Q. So that would be with the CO of your precinct, correct?

12 A. Correct. CO or XO if he is on vacation.

13 Q. Then also other supervisors from the 43rd Precinct?

14 A. Yes.

15 Q. At these meetings, stop and question and frisk has never  
16 been discussed either, right?

17 A. Not in length, no.

18 Q. Well, as of 2009, it hadn't been discussed at all, right?

19 A. Not that I recall.

20 Q. Now, you mentioned that one of the things you do to monitor  
21 officers is to review their memo books, right?

22 A. Correct.

23 Q. But you don't specifically review their memo books to make  
24 sure that they are properly documenting stops and frisks,  
25 correct?

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Palmieri - direct

1 A. If I came across that type of entry, I would make sure they

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2 are properly documenting.

3 Q. But you're not specifically looking to make sure that if an  
4 officer has done a stop, that that's recorded in their memo  
5 book?

6 A. No. I am looking at a random day and seeing what entries  
7 they have for that day, and if that happens to be one of the  
8 entries, it would be reviewed.

9 Q. Now, you're aware of the audits that the quality assurance  
10 division does of your precinct's stop, question and frisk  
11 paperwork?

12 A. I am aware that they do audits.

13 Q. Are you aware that, with respect to the item in that audit  
14 that deals specifically with officers recording their stops in  
15 their memo books, the 43rd Precinct has received a substandard  
16 score each of the last four years?

17 A. I have heard that, you know, they received substantial -- a  
18 failing score because they might have partial entries or no  
19 entries at all.

20 Q. Since you have been the ICO of the 43rd Precinct, you have  
21 not taken any steps to ensure that officers were properly  
22 documenting stops and frisks in their activity logs, right?

23 A. I was ensuring that they make proper activity log entries.  
24 If that fell under the entries that I am reviewing, I would  
25 take steps.

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Palmieri - direct

1 Q. Specifically, with respect to this problem that was  
2 identified on the audits that I just mentioned, you have not  
3 done anything specifically to address that particular problem  
4 since you have been the ICO?

5 A. That one thing, no.

6 Q. In fact, as of 2009, you believe that that had not even  
7 been raised as an issue in the 43rd Precinct, right?

8 A. I don't recall.

9 Q. If you want to look at your deposition to see if that  
10 refreshes your recollection, if you turn to page 38, line 16,  
11 and if you just want to read the question and then the answer  
12 there and then I will ask you.

13 A. "QUESTION: What if anything --"

14 Q. You can read it to yourself. Sorry.

15 Does that refresh your recollection that as of your  
16 deposition in October 2009, the issue of whether or not  
17 officers were properly documenting their stops in their  
18 activity logs had not come up?

19 A. That's correct.

20 Q. So it's fair to say that Deputy Inspector Ortiz never  
21 discussed with you this issue of officers failing to document  
22 stops in their activity logs?

23 A. Not just stops. He had discussed activity log entries, but  
24 not just stops.

25 Q. Since you have been the integrity control officer at the  
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Palmieri - direct

1 43rd Precinct, you have never questioned an officer about a  
2 stop and frisk they conducted, correct?

3 A. Correct.

4 Q. And you have never reviewed, since you have been the ICO,  
5 you have never reviewed the legality or propriety of a stop and  
6 frisk conducted by an officer at the 43rd Precinct, correct?

7 A. If I reviewed if a stop was legal?  
 8 Q. Yes.  
 9 A. If I am doing overtime and I am reviewing 250s, I would  
 10 review them.  
 11 Q. So you're saying as an ICO, you have reviewed a 250?  
 12 A. As a lieutenant, I have reviewed a 250.

13 THE COURT: When you reviewed the 250, what were you  
 14 looking for?

15 THE WITNESS: To see if it was -- if it was done  
 16 properly, if they filled it out properly and if it was a proper  
 17 stop.

18 THE COURT: How did you decide whether it was a proper  
 19 stop?

20 THE WITNESS: If the stop was based on reasonable  
 21 suspicion.

22 THE COURT: How did you figure that out?

23 THE WITNESS: The crime suspected and the reason that  
 24 he stopped him.

25 THE COURT: The checked marks in the boxes?

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1 THE WITNESS: Usually I have the officer in front of  
 2 me when I get the 250.

3 THE COURT: Usually you do?

4 THE WITNESS: Yes. Because it's not part of my ICO  
 5 duties; it's part of an impact tour, which I will do in  
 6 addition to my ICO duties.

7 THE COURT: And you actually talk to the officer while  
 8 you're looking at the form?

9 THE WITNESS: Yes. And then I will sign the form.

10 Q. Your testimony is that when you review a 250, you talk to  
11 the officer about what they wrote on there?

12 A. If I am signing it, yes. They hand it to me, and I ask  
13 them about it.

14 THE COURT: What happens if you don't think that there  
15 was reasonable suspicion?

16 THE WITNESS: I will tell them that this isn't proper.

17 THE COURT: Then what?

18 THE WITNESS: I haven't had an instance where --

19 THE COURT: You never found one?

20 THE WITNESS: I never found one that was.

21 Q. Can you turn to page 56 of your deposition, line  
22 14 -- actually, line 7, and I am going to read a question and  
23 answer.

24 You just testified that you do speak to officers when  
25 you review their 250s?

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D4H8FLO1 Palmieri - direct

1 THE COURT: He just said that.

2 Q. Page 56, line 7:

3 "Q. Have you ever reviewed a completed UF-250 form in your  
4 role as an ICO?

5 "A. No.

6 "Q. In the approximately 20 UF-250s that you have reviewed,  
7 did you note any deficiency in their completion?

8 "A. No."

9 MS. RICHARDSON: Objection.

10 "Q. Did you discuss with them --"

11 MR. CHARNEY: Please let me finish, Ms. Richardson.

12 THE COURT: Those two questions that you read were  
13 both consistent.

14 Mr. Charney, you don't read it if it's not  
15 inconsistent. Neither of those were inconsistent.

16 Next question.

17 MR. CHARNEY: I just want to make sure we get the  
18 context.

19 THE COURT: I'm sorry. You don't get to make up the  
20 rules. Neither of those were inconsistent.

21 "Q. Did you discuss them with the officer that completed the  
22 UF-250?

23 "A. If I had a question, I would discuss it, but I had no  
24 questions.

25 "Q. Does that mean that you did not discuss the completed

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D4H8FLO1 Palmieri - direct

1 UF-250s with the officers?

2 "A. I did not discuss it."

3 Do you remember giving that answer to those questions?

4 A. But that was as my role as an integrity control officer.

5 Q. That's not true, Lieutenant.

6 MR. CHARNEY: This is why I have to read more because  
7 we get the answer. Earlier it says --

8 THE COURT: You said earlier in your role as a control  
9 officer.

10 MR. CHARNEY: But earlier he was asked if he ever  
11 reviewed UF-250s at all, and he said yes, as he said here  
12 today, when he was a lieutenant in impact.

13 Q. So my question is, in your role as a lieutenant in impact,  
14 when you would review 250s, did you ever discuss the 250s with

15 the officers?

16 A. Yes.

17 MR. CHARNEY: Do I have to read the answer again that  
18 he just gave to the question in the deposition?

19 The question in the deposition was, "Did you discuss  
20 with them, the officer that completed the UF-250?"

21 "Does that mean you did not discuss the completed  
22 UF-250s with the officers?"

23 And the answer was, "I did not discuss it."

24 THE COURT: But that seemed to be after you had talked  
25 about being the integrity control officer.

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Palmieri - direct

1 MR. CHARNEY: Then I am going to have to read earlier,  
2 your Honor. Because if you remember --

3 MS. RICHARDSON: We have been over this.

4 MR. CHARNEY: That's not true, your Honor.

5 THE COURT: This talking to each other is not helpful.  
6 If you have a portion that clarifies which capacity, go ahead.

7 MR. CHARNEY: I am going to go then to page 55, line  
8 11.

9 "Q. Since becoming the ICO of the 43rd Precinct, how many  
10 times have you reviewed UF-250 forms?"

11 "A. I don't have a specific number. Last year maybe 20,  
12 roughly, approximately.

13 "Q. Why did you review the approximately 20 completed 250s?"

14 "A. Because the officers were under my direct supervision.

15 "Q. Was that in your role as an integrity control officer?"

16 "A. No."

17 Then later, when I say I am referring to 20 UF-250s, I  
18 am referring to these 20 UF-250s.

19 BY MR. CHARNEY:

20 Q. So my question again is, isn't it true that when you  
21 reviewed 250s as an impact lieutenant, you did not discuss  
22 those 250s with the officers who completed them?

23 A. As an impact lieutenant, I did discuss UF-250s.

24 If you look at line 7 on page 56, "Have you ever  
25 reviewed a completed UF-250 form in the role as an ICO?" Then

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1 you asked me about the 20 UF-250s.

2 Q. Which is in your role as a lieutenant.

3 A. You keep switching back and forth.

4 THE COURT: I know that happened at the deposition  
5 too. It seemed like it was going back and forth. So it's a  
6 little unclear. Therefore, your testimony today is, when you  
7 did it in the impact unit, you did sit with them?

8 THE WITNESS: Yes.

9 Q. So these 20 250s you recall that you were asked about at  
10 your deposition, those were reviewed as an ICO?

11 A. No. They were reviewed as an impact lieutenant.

12 Q. As an impact lieutenant, you didn't ask officers about the  
13 250s that they completed?

14 THE COURT: That's when he said he did.

15 MR. CHARNEY: Your Honor, it says --

16 THE COURT: It's no use, Mr. Charney. I have got it  
17 in the record. It's argument. The record is clear. You have  
18 made the point. I will review it, I am sure. It's in the  
19 transcript.

20           Anyway, the bottom line is, when you were acting as an  
21 integrity control officer, did you sign off on 250s then?

22           THE WITNESS: No.

23           THE COURT: You never signed?

24           THE WITNESS: Not as an integrity control officer.

25           THE COURT: As an integrity control officer, did you

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Palmieri - direct

1 review 250s for any reason?

2           THE WITNESS: No.

3           THE COURT: You didn't sign them and didn't review  
4 them?

5           THE WITNESS: No.

6           THE COURT: You only signed and reviewed as the impact  
7 lieutenant?

8           THE WITNESS: Yes.

9           THE COURT: None of them were insufficient you said?

10          THE WITNESS: Yes.

11          THE COURT: It was only 20?

12          THE WITNESS: Yes.

13          THE COURT: How long did you do that?

14          THE WITNESS: I don't do the impact that often.

15          THE COURT: I see.

16 Q. Is the assistant integrity control officer at your precinct  
17 Sergeant LeBlanc?

18 A. Yes.

19 Q. So you never discussed with Sergeant LeBlanc the 43rd  
20 Precinct's compliance with NYPD policies and procedures  
21 regarding stop and frisk?

22 A. No, I haven't discussed it.

23 Q. In fact, since you have been the integrity control officer  
24 at the 43rd Precinct, you have never discussed the NYPD's stop  
25 and frisk policies and procedures with any other member of the

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Palmieri - direct

1 precinct, have you?

2 A. No. That's the training sergeant's job.

3 Q. But you would agree that one of your jobs is to monitor  
4 officers to make sure they are not breaking the law, right?

5 A. Correct.

6 Q. That would include not violating the Fourth Amendment,  
7 right?

8 A. Correct.

9 Q. That would include not violating the Fourteenth Amendment,  
10 right?

11 A. Can you let me know -- can you read the Fourteenth  
12 Amendment to explain?

13 Q. Do you know about the equal protection clause of the  
14 Fourteenth Amendment?

15 A. I'm sorry.

16 Q. In other words --

17 MR. CHARNEY: Withdrawn.

18 Q. You do what the Fourth Amendment is, right?

19 A. Stop, question -- is that pertaining to illegal searches?

20 Q. Yes.

21 A. Yes.

22 Q. Now, I want to show you what has been previously admitted  
23 as Defendants' Exhibit F5.

24 Do you recognize this document, Lieutenant Palmieri?  
Page 21

25 A. Yes.

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3668

D4H8FLO1

Palmieri - direct

1 Q. Is this the patrol guide section setting forth the duties  
2 and responsibilities of a precinct integrity control officer?

3 A. Correct.

4 Q. You see number 4 there, it says, "Make recommendations to  
5 commanding officer concerning integrity control"?

6 A. Yes.

7 Q. Did you ever make any recommendations to Inspector Ortiz  
8 when he was your commanding officer regarding stop, question  
9 and frisk or UF-250s?

10 A. No.

11 Q. With respect to activity log entries, the only  
12 recommendation you made was that it's important for supervisors  
13 to review officers' activity logs, right, that's the only  
14 recommendation you made?

15 A. Yes. It's one of them.

16 Q. But you never recommended, for example, that supervisors  
17 review officer activity logs at the same time that they are  
18 reviewing a completed 250, right?

19 A. That's correct.

20 Q. And you have never made any recommendations to supervisors  
21 in the 43rd Precinct about how much detail officers should put  
22 in their activity logs about a stop and frisk that they  
23 conduct, right?

24 A. That's correct.

25 Q. Now, this patrol guide section I think further down also

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D4H8FLO1 Palmieri - direct

1 states that, as the integrity control officer, you are required  
2 to review sergeants' memo books, right?

3 A. Yes.

4 Q. It looks like paragraph 16?

5 A. OK.

6 Q. That is one of the duties you performed when you were a  
7 integrity control officer, correct?

8 A. Correct.

9 Q. But at no point when you reviewed a sergeant's activity log  
10 entry as the ICO of the 43rd Precinct did you ever question a  
11 sergeant about an entry regarding stop, question and frisk,  
12 correct?

13 A. Correct.

14 Q. I want to show you what has been previously admitted as  
15 plaintiffs' 184.

16 Do you recognize this document, Lieutenant?

17 A. Yes. It's an operations order.

18 Q. This is the operations order for the police department  
19 regarding racial profiling, is that correct?

20 A. Correct.

21 Q. So would this be one of the policies you would be  
22 responsible for making sure officers did not violate in the  
23 43rd Precinct?

24 A. Yes.

25 Q. But you have never discussed this policy with anyone in the

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D4H8FLO1 Palmieri - direct  
Page 23

1 43rd Precinct, right?

2 A. No.

3 Q. In fact, you have never discussed the issue of racial  
4 profiling generally with any member of the 43rd Precinct,  
5 correct?

6 A. No.

7 Q. Now, if we can blow this up a little bit, and again, I  
8 apologize, as I always do, for the dark writing or the dark  
9 highlighting. But do you see in paragraph 4 it says,  
10 "Commanding officers will establish a self-inspection protocol  
11 within their command to ensure that the contents of this order  
12 are complied with"?

13 A. Right. Yes.

14 Q. Are you familiar with the self-inspections that are done in  
15 the 43rd Precinct pursuant to this order?

16 A. I'm not sure which ones apply to this.

17 Q. Are you familiar with what is known as the work sheet  
18 802(a) self-inspection?

19 A. Yes.

20 Q. Do you conduct that self-inspection?

21 A. I do now.

22 Q. When did you start doing it?

23 A. About two months ago.

24 Q. Prior to that you didn't do it, right?

25 A. Correct.

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3671

D4H8FLO1

Palmieri - direct

1 Q. Are you aware that the inspection protocols state that the  
2 integrity control officer for the precinct is supposed to do

3 them?

4 A. I'm aware now.

5 Q. But you weren't aware of that till about two months ago?

6 A. Back in 2009, I believe we discussed this, but I don't have  
7 hand out the self-inspections. It was the way it was before I  
8 was the integrity control officer and it just continued that  
9 way.

10 Q. You didn't only not hand them out, you didn't actually  
11 conduct them, right?

12 A. I conduct some self-inspections. I don't conduct those  
13 two -- one of them I do now.

14 Q. The 802(a), up until two months ago, you did not conduct in  
15 your role as the ICO, right?

16 A. Correct.

17 Q. The other self-inspection that I want to ask you about is  
18 the work sheet 802 self-inspection. Are you familiar with  
19 that?

20 A. I'm familiar with what it is, yes. I have never done it.

21 Q. OK. That's the self-inspection where somebody in the  
22 command will review 25 completed UF-250 forms?

23 A. Correct.

24 Q. And you don't conduct that self-inspection either, right?

25 A. Correct.

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3672

D4H8FLO1

Palmieri - direct

1 Q. The 802 self-inspection, is that conducted by a Sergeant  
2 Mohammed?

3 A. It's conducted by a captain now. Back then it was  
4 conducted by Sergeant Mohammed.

5 Q. By back then you mean 2009?

6 A. Correct.

7 Q. But you never discussed the self-inspections with Sergeant  
8 Mohammed, right?

9 A. Correct.

10 Q. Since you have been the ICO of the 43rd Precinct, you  
11 haven't taken any steps to monitor officer compliance with NYPD  
12 policies and procedures regarding stop and frisk, correct?

13 A. Have I done anything to monitor them?

14 Q. Yes.

15 A. I monitor officers, and if that falls while I am monitoring  
16 them, if that issue arises while I am monitoring, I would take  
17 steps, but I haven't had the opportunity to.

18 Q. You haven't had the opportunity to monitor an officer to  
19 ensure that they are complying with the stop and frisk  
20 policies?

21 A. Correct.

22 MR. CHARNEY: One minute, your Honor.

23 No further questions.

24 THE COURT: Who is doing it?

25 Ms. Richardson?

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3673

D4H8FLO1

Palmieri - direct

1 MS. RICHARDSON: Yes, your Honor.

2 CROSS-EXAMINATION

3 BY MS. RICHARDSON:

4 Q. Good morning, Lieutenant Palmieri.

5 A. Good morning.

6 Q. You just said that you haven't had the opportunity to  
7 monitor officer compliance with the stop, question and frisk

8 policy. What did you mean when you said that?

9 A. As my role as the integrity control officer, I haven't had  
10 a situation where I observed them making a stop and doing a  
11 UF-250 and not complying or complying with the policy.

12 THE COURT: Either complying or not complying, you  
13 haven't observed the stop?

14 THE WITNESS: I haven't had the situation.

15 THE COURT: Of observing the stop on the street?

16 THE WITNESS: Correct.

17 THE COURT: You could have looked at the form though?

18 THE WITNESS: Yes. As an impact lieutenant, I did.

19 THE COURT: As the ICO, you could have looked at the  
20 form, could you not have?

21 THE WITNESS: Yes, I could have.

22 Q. Now, do you recall that you were asked some questions about  
23 802(a) self-inspections?

24 A. Yes.

25 Q. Prior to two months ago when you began conducting those

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3674

D4H8FLO1 Palmieri - cross

1 self-inspections, was anyone at your command preparing the  
2 802(a) self-inspections?

3 A. Yes.

4 Q. How did you come to start conducting those  
5 self-inspections?

6 A. The commanding officer thought I should start conducting  
7 them, and he assigned it to me.

8 Q. Have you been conducting them since that time?

9 A. Yes.

10 Q. Now, has the issue of improper or incomplete memo book

11 entries ever been raised at the monthly borough ICO meetings  
12 that you attend?

13 A. Yes.

14 Q. What, if anything, was discussed at those meetings?

15 A. Chief Purtell instructed us to inspect memo books more  
16 thoroughly. We have to start having the sergeants inspect them  
17 more thoroughly and make sure they are done properly.

18 Q. What, if anything, did you do in response to Chief  
19 Purtell's instruction?

20 A. Well, I review sergeants' memo books to make sure that they  
21 are reviewing the officers.

22 MS. RICHARDSON: Can I have one minute, your Honor?

23 Q. Does the 802(a) self-inspection -- does the 802  
24 self-inspection by the Sergeant Mohammed involve review of  
25 UF-250s?

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3675

D4H8FLO1

Palmieri - cross

1 A. Yes.

2 MS. RICHARDSON: No further questions.

3 THE COURT: Anything further?

4 MR. CHARNEY: Just briefly.

5 REDIRECT EXAMINATION

6 BY MR. CHARNEY:

7 Q. I want to make sure I understand what you just said. I  
8 think her Honor just asked you this question. In your role as  
9 the ICO, I just want to make sure I understand, you haven't  
10 reviewed UF-250 forms?

11 A. Correct.

12 MR. CHARNEY: No further questions.

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I'm sorry. One question.

Q. The meeting you had with Chief Purtell, you said where he instructed you to review the memo books of supervisors, when was that meeting?

A. Two or three years ago.

Q. It was after your deposition, right?

A. Yes.

MR. CHARNEY: No further questions.

THE COURT: Anything?

MS. RICHARDSON: Nothing further.

THE COURT: We are finished.

MR. COREY: Plaintiffs call Cornelio McDonald.

(Continued on next page)

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3676

D4H8FLO1 Palmieri - redirect

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15

CORNELIO McDONALD,

called as a witness by the plaintiffs,  
having been duly sworn, testified as follows:

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

THE WITNESS: Cornelio D. McDonald, C-O-R-N-E-L-I-O,  
M-C-D-O-N-A-L-D.

THE COURT: You are going to have to keep your voice  
up the whole time so we can all hear you.

DIRECT EXAMINATION

BY MR. COREY:

Q. Good morning, Mr. McDonald.

A. Good morning.

Q. Mr. McDonald, where do you live?

A. 67-15 Parsons Boulevard, Fresh Meadows, New York.

- 16 Q. That's in Queens?  
17 A. Yes.  
18 Q. How long have you lived at that address?  
19 A. About 19 years.  
20 Q. How long have you lived in the Fresh Meadows area?  
21 A. About 42 years.  
22 Q. Do you live with anyone else?  
23 A. Yes.  
24 Q. Who do you live with?  
25 A. My daughter and my fiance.

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3677

D4H8FLO1 McDonald - direct

- 1 Q. Mr. McDonald, is English your first language?  
2 A. No.  
3 Q. What is your first language?  
4 A. Spanish.  
5 Q. Are you currently employed?  
6 A. Yes.  
7 Q. Where are you employed?  
8 A. Cavalry Staffing.  
9 THE COURT: What is Cavalry Staffing?  
10 THE WITNESS: That's a place where I drive cars  
11 around.  
12 Q. Mr. McDonald, do you recall what you were doing on December  
13 18, 2009?  
14 A. Yes.  
15 MR. MARUTOLLO: Objection, your Honor. The stop  
16 occurred on December 19, 2009, and anything happened the day  
17 before I think is irrelevant.

d4h9f1of

18 THE COURT: I don't know that. It may lead to it.

19 MR. COREY: It's not disputed that the stop occurred  
20 the next day. I am just trying to give the context.

21 THE COURT: There may be context. I just don't know.  
22 what were you doing on the 18th?

23 THE WITNESS: I was taking care of my moms.

24 Q. What do you mean by taking care of your mom?

25 A. Feeding her, giving her a shower, cleaning up the house for

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3678

D4H8FLO1

McDonald - direct

1 her.

2 Q. Is that something that you do regularly?

3 MR. MARUTOLLO: Objection.

4 THE COURT: I will allow it.

5 Go ahead.

6 THE COURT: You do that regularly?

7 THE WITNESS: Yeah.

8 THE COURT: She lives alone?

9 THE WITNESS: She used to.

10 Q. Mr. McDonald, where did your mother live in December 2009?

11 A. 67-36 Parsons Boulevard, Fresh Meadows, New York.

12 Q. What type of building did your mother live in at that time?

13 A. City complex, city housing.

14 THE COURT: New York City Housing Authority?

15 THE WITNESS: Yes.

16 Q. Did the building that your mother lived in, did it have a  
17 name?

18 A. Pomonok Houses.

19 Q. Mr. McDonald, to your knowledge, what is the racial makeup  
20 of the people who live on your mother's side of the block?

- 21 A. 80 percent black.  
22 Q. You said you lived at 67-15 Parsons?  
23 A. Yes.  
24 Q. Where is your house in relation to your mother's house?  
25 A. Across the street.

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3679

D4H8FLO1

McDonald - direct

- 1 Q. What type of building do you live in?  
2 A. I live in a co-op, private home.  
3 Q. You say?  
4 A. Co-op apartments, private home.  
5 Q. It's private?  
6 A. Yes.  
7 Q. To your knowledge, what is the racial makeup of the people  
8 who live on that side of the block?  
9 A. 80 percent white.  
10 Q. So at some point did you leave your mother's house to go  
11 home?  
12 A. Yes.  
13 THE COURT: This is still on the 18th.  
14 THE WITNESS: 1:00 in the morning.  
15 THE COURT: OK.  
16 Q. How many hours were you at your mother's house?  
17 A. About ten hours, 12, 10.  
18 Q. Do you usually leave your mother's house so late?  
19 A. That was a Friday. That was -- it was a Friday. She was  
20 expecting family members coming in.  
21 THE COURT: She was expecting family members?  
22 Q. What happened when you left your mother's house?

d4h9f1of

23 A. I left my mom's house, walked down the steps. I was  
24 getting ready to cross the street. I see a van make a U-turn,  
25 and as I was getting ready to cross the second street, it

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3680

D4H8FLO1

McDonald - direct

1 stopped right in front of me.

2 Q. So let's just back up for a second here.

3 Can you just briefly describe that stretch of Parsons  
4 Boulevard?

5 A. It's a long block. It's like two blocks in one and it's  
6 got a divider in between.

7 Q. It's got a?

8 A. A divider.

9 Q. So are there cars parked along the divider?

10 A. Yes, on both sides.

11 Q. Where were you when you saw this van pull up in front of  
12 you?

13 A. I was getting ready to cross the street on one street off  
14 the island.

15 Q. So you were not on the island of the divider?

16 A. No.

17 Q. You were in between two parked cars?

18 A. Yes.

19 Q. Which side of the parked cars? You said there are cars on  
20 both side of the island.

21 A. I was on the east side of the island.

22 Q. Would that be the first set of parked cars or second set?

23 A. Second set.

24 Q. When the van pulled up in front of you, did you feel like  
25 you could walk away from the van?

D4H8FLO1 McDonald - direct

1 A. No.

2 Q. why is that?

3 A. Because I was trapped in between parked cars and the van  
4 and cars behind me.

5 Q. So the van was parallel to the parked cars?

6 A. Yes.

7 THE COURT: Was this a marked van?

8 THE WITNESS: No.

9 THE COURT: Just a plain van. You didn't know who was  
10 in it?

11 THE WITNESS: No.

12 Q. Do you remember the color of the van?

13 A. Yeah. Red.

14 Q. Could you tell how many people were in the van?

15 A. Three.

16 Q. Could you tell where they were sitting?

17 A. Two in the front and one in the back.

18 Q. Do you remember what the weather was like when you left  
19 your mother's house?

20 A. It was cold, between 20 and 30 degrees.

21 Q. Were you wearing a jacket?

22 A. Yes.

23 Q. When the van pulled up in front of you, do you remember  
24 where your hands were?

25 A. Yes.

♀

D4H8FLO1

McDonald - direct

1 Q. Where were they?

2 A. In my coat pocket.

3 Q. Before that, when you were walking across Parsons, where  
4 were your hands?

5 A. In my coat pocket.

6 Q. Did you ever remove your hands from your jacket pockets  
7 when you were crossing the street?

8 A. No.

9 Q. Can you just describe the way you were walking across the  
10 street?

11 A. Normal walk.

12 Q. Did you look behind you at any point?

13 A. No.

14 Q. Did you lean your body sideways?

15 A. No.

16 Q. What about when you passed through the west set of parked  
17 cars in the island, can you describe how you passed through  
18 them?

19 A. Side, walking like sideways.

20 Q. You said you were wearing a jacket, right?

21 A. Yes.

22 Q. Did you have anything in your jacket pockets?

23 A. Yeah.

24 Q. What did you have?

25 A. I had my cell phone and my keys in my pocket.

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D4H8FLO1

McDonald - direct

1 Q. What pocket was your cell phone in?

2 A. Left side.

3 Q. Left jacket pocket?

4 A. Yes.

5 Q. And your keys were where?

6 A. In my pants pocket.

7 Q. So what happened when the van pulled up in front of you?

8 what happened next?

9 A. They stop in front of me and they asked me where I was  
10 coming from.

11 THE COURT: When you say they asked you, they were in  
12 the car when they asked you?

13 THE WITNESS: Yes.

14 THE COURT: Called out through the window?

15 THE WITNESS: Rolled down the window and asked me  
16 where I was coming from.

17 Q. You said there were three people in the car. Which person  
18 asked you where you were coming from?

19 A. The driver.

20 Q. So did you give them a response?

21 A. Excuse me?

22 Q. Did you give them a response?

23 A. Yes.

24 Q. What was it?

25 A. Why you stopping me for?

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3684

D4H8FLO1

McDonald - direct

1 Q. Did they respond to you?

2 A. Yes.

3 Q. What did they say?

4 A. You're a wise guy.

5 THE COURT: Did you answer their question when they  
6 said where are you coming from?

7 THE WITNESS: After a while, yes.

8 THE COURT: Not at first. First you said, why are you  
9 stopping me?

10 THE WITNESS: Right.

11 Q. Mr. McDonald, while you and the driver were speaking, were  
12 you physically moving in any way?

13 A. No.

14 Q. You said the van had no markings or logos on it?

15 A. Correct.

16 Q. Were the men wearing uniforms?

17 A. No.

18 Q. Did either man ever identify himself as a police officer?

19 A. Once they came out, they identified themselves.

20 THE COURT: When the man in the driver's seat first  
21 said to you, where are you coming from, and you said, what are  
22 you stopping me for, did you think they were police?

23 THE WITNESS: No. Because he didn't show a shield.

24 THE COURT: When you said, what are you stopping me  
25 for, what did you mean by stopping if you didn't think they

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3685

D4H8FLO1

McDonald - direct

1 were police?

2 THE WITNESS: Because he ran in front of me. I  
3 thought he was going to go by, but he cut right in front of me.

4 THE COURT: That's what you meant by, what are you  
5 stopping me for, you didn't know who they were?

6 THE WITNESS: No.

d4h9f1of

7 THE COURT: You didn't think they were police then?

8 THE WITNESS: No.

9 THE COURT: Not right then?

10 THE WITNESS: No.

11 Q. So what happened next?

12 A. Once I said, why you stopping me for, and they said, you're  
13 a wise guy, they came out and they started searching me.

14 THE COURT: I lost the order. At that point, had they  
15 told you they were police?

16 THE WITNESS: No. He stepped out. Then he came up  
17 out with his shield. Then the other guy came out with his  
18 shield.

19 THE COURT: Before they searched you, they did show  
20 you their shield?

21 THE WITNESS: Yes. And then he searched me.

22 THE COURT: What did he do?

23 THE WITNESS: Feel my pockets.

24 THE COURT: Did he go in the pocket or just patted  
25 from the outside?

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3686

D4H8FLO1

McDonald - direct

1 THE WITNESS: Patted from the outside. They wanted to  
2 know what was in my pocket and told me to take out my keys.

3 THE COURT: They didn't put their hand in your pocket?

4 THE WITNESS: Not to my recollection.

5 THE COURT: Then you took out your keys?

6 THE WITNESS: Yeah, because he told me to take out my  
7 keys.

8 BY MR. COREY:

d4h9f1of

- 9 Q. which man was touching you?
- 10 A. The driver in the back.
- 11 Q. Excuse me?
- 12 A. Not the driver. The one in the back, in the back seat.
- 13 Q. Can you describe that man, the man who came out of the
- 14 back?
- 15 A. Tall, about 6'3", 6'4", mustache, black hair.
- 16 Q. what about the driver who also came out, can you describe
- 17 him, please?
- 18 A. A little heavier, a little taller than me.
- 19 THE COURT: were these folks black or white?
- 20 THE WITNESS: They was all white.
- 21 Q. Mr. McDonald, did the men find any weapons on you?
- 22 A. No.
- 23 Q. Did they find any drugs on you?
- 24 A. No.
- 25 Q. while the man in the back was touching your body, were you

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3687

D4H8FLO1 McDonald - direct

- 1 moving any part of your body?
- 2 A. No.
- 3 Q. So what happened after the man finished touching you?
- 4 A. He asked me for identification.
- 5 Q. Did you give it to him?
- 6 A. Yes.
- 7 Q. Then what happened?
- 8 A. Then I asked for their information.
- 9 Q. Did either man give it to you?
- 10 A. Only one.
- 11 Q. which one?

12 A. The driver.

13 THE COURT: What did he give you?

14 THE WITNESS: His information. He said he was Officer  
15 Anderson.

16 Q. Then what happened?

17 A. Then I went home.

18 Q. Mr. McDonald, did either officer at any point say they saw  
19 a suspicious bulge in your pocket?

20 A. No. They never spoke to me about that.

21 Q. To your recollection, did you have any sort of bulge in  
22 your pocket?

23 A. Maybe my keys, but not no bulge.

24 Q. Where were your keys?

25 A. In my pants pocket.

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3688

D4H8FLO1

McDonald - direct

1 Q. Did you refuse to comply with any of the instructions they  
2 gave you?

3 A. No.

4 Q. Did you raise your voice at any point?

5 A. No.

6 Q. Did you do anything physically that you intended to be  
7 physically threatened?

8 A. No.

9 THE COURT: How about the officers, were they polite  
10 to you?

11 THE WITNESS: Not exactly.

12 THE COURT: In what way were they not polite?

13 THE WITNESS: Once I asked them, you know, why you

14 searching me, then they said, you know, to protect themself.

15 THE COURT: OK.

16 Q. Mr. McDonald, do you believe you were stopped because of  
17 your race?

18 A. That night, yes.

19 Q. Why is that?

20 A. Because I was the only one out there, and they had people  
21 coming from the bowling alley.

22 Q. Were you the only one out there or were there other people  
23 coming from the bowling alley?

24 A. Other people out there from the bowling alley.

25 Q. So just because there were other people out there in the

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3689

D4H8FLO1

McDonald - direct

1 bowling alley, why do you think that means you were stopped  
2 because of your race?

3 A. Well, they didn't bother with anybody coming from the  
4 bowling alley. They was bothering me, and I was going home.

5 Q. Do you remember the race of anyone that was coming out of  
6 the bowling alley?

7 A. It could have been Asian, white.

8 Q. Mr. McDonald, how did you feel after the encounter ended?

9 A. Embarrassed, ashamed.

10 Q. Why is that?

11 A. Because there was no reason to stop me. I didn't do  
12 anything.

13 MR. COREY: One moment, your Honor.

14 Nothing further at this point.

15 THE COURT: How long did the whole thing take from the  
16 time you first saw the red van pull up in front of you until

17 you went on your way home?

18 THE WITNESS: About seven to ten minutes.

19 THE COURT: Was it that long?

20 THE WITNESS: Yeah.

21 THE COURT: OK.

22 Mr. Marutollo.

23 THE COURT: You understand this is one of the lawyers  
24 from the city. They get to ask you questions.

25 THE WITNESS: Yes.

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3690

D4H8FLO1

McDonald - direct

1 CROSS-EXAMINATION

2 BY MR. MARUTOLLO:

3 Q. Good morning, Mr. McDonald.

4 A. Good morning.

5 Q. You're a class member in this case, correct?

6 A. Yes.

7 Q. You just testified that you believe you were stopped by the  
8 NYPD based upon your race?

9 A. Yes.

10 Q. This isn't the first time you believe that a governmental  
11 entity has discriminated against you because of your race,  
12 correct?

13 MR. COREY: Objection.

14 THE COURT: What is the basis?

15 MR. COREY: I don't see the relevance.

16 THE COURT: It could be animus, motive.

17 MR. COREY: Was it against the NYPD? If not, how is  
18 that relevant?

d4h9f1of

19 THE COURT: I think they are allowed to bring it out.

20 It may go to credibility.

21 Was this first time you complained about something

22 like this?

23 THE WITNESS: About NYPD?

24 THE COURT: No. About race as a factor in something

25 that happened to you?

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3691

D4H8FLO1

McDonald - cross

1 THE WITNESS: Yeah.

2 THE COURT: It was the first time?

3 THE WITNESS: Well, not with NYPD.

4 THE COURT: What was the other time?

5 THE WITNESS: I got job discrimination.

6 THE COURT: OK.

7 Q. You actually claim that the postal service fired you

8 because of your race, isn't that correct?

9 A. Yes.

10 Q. You believe that the U.S. -- you actually sued them for

11 unlawful racial discrimination, isn't that correct?

12 A. It's in court right now.

13 THE COURT: It's pending now?

14 THE WITNESS: It's pending.

15 MR. MARUTOLLO: Your Honor, it's actually been closed,

16 this case has been closed. The case McDonald v. U.S. Postal

17 Service, 08 Cv. 4936, has actually been closed. The complaint

18 is dismissed in its entirety.

19 Q. In that complaint, you alleged that the postal service

20 falsified records of African-Americans, right?

21 A. In that case?

22 Q. Yes.

23 A. The case is pending.

24 THE COURT: He thinks it's closed. You think it's  
25 still pending? Do you have a lawyer in that case?

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3692

D4H8FLO1

McDonald - cross

1 THE WITNESS: No. I am doing it pro se.

2 Q. Just to be clear, in that case, though, in that lawsuit,  
3 you did claim that the U.S. Postal Service falsified records of  
4 African-Americans, right?

5 A. I believe so.

6 MR. COREY: He has already elicited the fact he is  
7 suing the postal service for racist behavior. I don't see why  
8 the details are at all relevant.

9 THE COURT: What was the civ. number?

10 MR. MARUTOLLO: There are actually multiple lawsuits,  
11 but the lawsuit I am referring to is 08 Cv. 4936. And if you  
12 look at docket entry number 22, there has been a clerk's  
13 judgment indicating plaintiff's case is dismissed. From  
14 October 15, 2009.

15 THE COURT: We will look at the whole docket sheet.

16 Q. You have also filed a separate lawsuit against a white male  
17 for racial discrimination, right?

18 A. Yes.

19 Q. And that lawsuit was also dismissed against you?

20 A. That one was dismissed.

21 Q. By the way, you have no recollection of how many lawsuits  
22 you filed as a plaintiff, right?

23 A. Not offhand.

d4h9f1of

24 Q. Turning your attention to December 19, 2009, your encounter  
25 with NYPD officers occurred between 1 a.m. and 2 a.m., correct?

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3693

D4H8FLO1

McDonald - cross

1 A. Yes.

2 Q. You claim that prior to your stop, you exited your mother's  
3 home that night, correct?

4 A. Yes.

5 Q. And you claim that you were outside about five to seven  
6 minutes from the time you left your mother's home until the  
7 time you were stopped, is that right?

8 A. About that.

9 Q. You claim it was cold that night?

10 A. Yes.

11 Q. You were wearing jeans, a shirt, a hat and a jacket that  
12 night, right?

13 A. Yes.

14 Q. I would like to show you Defendants' Exhibit B2.

15 MR. MARUTOLLO: This is actually also Plaintiffs'  
16 Exhibit 230.

17 THE COURT: Can you see that picture on your screen?

18 THE WITNESS: Yes.

19 Q. While this is up here on the elmo, I want to show you these  
20 four photos of a coat, and I will ask you questions about them  
21 in a second.

22 MR. MARUTOLLO: Again, this is Plaintiffs' Exhibit  
23 230.

24 Q. Now, at your deposition, you testified that you believed  
25 that this was the jacket you were wearing on December 19, 2009,

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D4H8FLO1

McDonald - cross

1 is that correct?

2 A. Yes.

3 Q. That's you in the jacket, correct?

4 A. Yes.

5 Q. That was a jacket of yours taken at your deposition?

6 A. Yes.

7 Q. That was the jacket you actually wore to your deposition?

8 A. Yes.

9 Q. This jacket goes beyond the pockets of the pants you were  
10 wearing, correct?

11 A. Yes.

12 Q. Now, you had your jacket zipped up that night, correct?

13 A. Yes.

14 Q. You claim you had your keys in your jacket pocket?

15 You had your keys in your jacket pocket, correct?

16 A. No. In pants pocket my keys.

17 Q. I am going to hand you the deposition transcript which was  
18 taken on December 21, 2012. And this is the original copy of  
19 your deposition transcript.

20 You were under oath during this deposition, correct?

21 A. Yes.

22 Q. You asked questions and you gave answers to questions at  
23 your deposition?

24 A. Yes.

25 Q. I would like to turn your attention to page 41, line 17,

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D4H8FLO1

d4h9f1of  
McDonald - cross

1 through page 42, line 1. So you can turn to that page.

2 Page 41, line 17:

3 "Q. Now, did you have anything in that jacket on December 19,  
4 2009?

5 "A. No, but my keys.

6 "Q. Which pocket did you have your keys in?

7 "A. My right.

8 "Q. Your right pocket?

9 "A. Yes."

10 Did you give those answers to those questions?

11 A. Yes. Right pocket means my jean pocket.

12 (Continued on next page)

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3696

D4h9f1o2

McDonald - cross

1 Q. By the deposition I was asking you specifically about your  
2 jacket pocket, right?

Page 47

3 A. I probably misunderstood you. I'm sorry.

4 Q. In any event you said that those keys on direct examination  
5 could have caused a bulge, right?

6 A. Well they told me to take it out.

7 Q. I just wanted to clarify. On direct examination you said  
8 that they could have caused a bulge?

9 MR. COREY: I think that's a mischaracterization of  
10 his testimony.

11 THE COURT: I think that's what he said, he doubted  
12 it.

13 Q. You also claim on the left side of your jacket pocket you  
14 had your cellphone, correct?

15 A. Yes.

16 Q. And you claim also that you had your wallet in your jeans  
17 pocket, right?

18 A. Yes. In my back pocket wallet.

19 Q. You claim that you were stopped by NYPD officers while on  
20 the concrete island on Parsons Boulevard?

21 A. On the island. On the street. Yes.

22 THE COURT: Which is it? On the island? Were you on  
23 the island already?

24 THE WITNESS: I was trying to cross the street.

25 THE COURT: So you weren't on the island yet?

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3697

D4h9f1o2

McDonald - cross

1 THE WITNESS: No. I was on the street.

2 Q. But the stop actually occurred when you were talking to the  
3 officers on the island, correct?

4 A. No. It happened in the street.

5 Q. I'd just like to turn your attention to page 45, line 1  
6 through 18.

7 "Q. When did you first see the police after you exited your  
8 mother's home on December 19, 2009?

9 "A. When I seen the police?"

10 There was then an objection about reading the question  
11 back. Then on line ten it says:

12 "Q. You can answer.

13 "A. When I was on the island.

14 "Q. I'm sorry?

15 "A. When I was on the island, they stopped me."

16 Did you give those answers to those questions?

17 A. I was not on the island. I was on the street when they  
18 stopped me.

19 Q. But you gave those answers to those questions, right?

20 A. Yeah, because it was a little misleading.

21 Q. The question of where you were stopped was misleading?

22 A. Well, yeah, because when I said I was on the island I was  
23 crossing the street between parked cars.

24 MR. MARUTOLLO: By the way, your Honor, we ask that  
25 Plaintiffs' Exhibit 230 be entered into evidence. It is the

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3698

D4h9flo2 McDonald - cross

1 photographs that are currently on the ELMO.

2 THE COURT: Yeah. That's fine.

3 (Plaintiffs' Exhibit 230 received in evidence)

4 Q. I'd also now like to show you through the monitor on your  
5 screen Defendants' Exhibit L10.

6 Do you see that, Mr. McDonald?

7 A. Yes.

8 Q. And I'd just like to go through each of these photographs.

9 Let me first actually turn your attention to

10 NYC\_20025824.

11 Is this the location of where you were stopped?

12 A. That's not the location, no.

13 Q. Where were you stopped then?

14 A. Further down.

15 Q. Well actually let me --

16 THE COURT: Further down which way? Looking toward --

17 THE WITNESS: Right where the sanitation truck is.

18 THE COURT: I think I see that. Okay.

19 That's where you were stopped?

20 THE WITNESS: Yes.

21 THE COURT: And you were coming from the right-hand

22 side or the left-hand side?

23 THE WITNESS: If he goes back to the first picture. I

24 went behind the building so -- from there, I came around, and

25 walked down, there's little steps over there that I walked down

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3699

D4h9f1o2

McDonald - cross

1 to.

2 Q. So actually just looking at each photograph in succession,

3 this first photograph, what is this a photograph of? This is

4 Bates stamped number 2582 at the end.

5 A. That is like my mother's building.

6 Q. And then the next photograph?

7 A. (No response).

8 Q. That's -- this is again, 2583, this is as you're exiting

9 your mother's building?

10 A. No. I didn't exit there.

11 Q. This is across the street from your mother's building?

12 A. Right.

13 Q. I'm sorry. 25283.

14 And that -- on the photograph the building across the  
15 street, is there a bowling alley over there?

16 A. By where the sanitation truck is, yes.

17 Q. The --

18 THE COURT: Wait one second. There's a bowling alley  
19 where the sanitation truck is?

20 THE WITNESS: Yeah. That's the entrance over there.  
21 You can see.

22 THE COURT: I see. Okay. Thank you.

23 Q. Can you go to the next photograph.

24 I'm sorry. The next one after that as well.

25 I'm sorry. The next after that.

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3700

D4h9f1o2

McDonald - cross

1 You already talked -- is that the bowling alley right  
2 there, the smaller building across the street?

3 A. Yes.

4 Q. Right where that sanitation truck is?

5 A. Yes. The entrance going down.

6 Q. And that's Jib Lanes?

7 A. Yes.

8 Q. Now when you talked earlier about the demographics of the  
9 racial make-up of your area, you indicated that the side of the  
10 street that your mother's house was on was 80 percent black?

11 A. Yes.

12 Q. What's the basis for that statement?

13 A. Excuse me?

14 THE COURT: He's asking you how do you know that.

15 THE WITNESS: Because they got sued to have minorities  
16 move in.

17 Q. Were you one of the litigants in that lawsuit?

18 A. No. That was -- no.

19 Q. And are there -- are there a lot of buildings on your  
20 mother's side of street?

21 A. Just housing complex.

22 Q. How many floors are in these housing complexes?

23 A. Some are three. Some are seven.

24 Q. About how many housing buildings are on that street?

25 A. You got me. I don't know.

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3701

D4h9f1o2

McDonald - cross

1 Q. More than 10 or 20?

2 A. Could be more than 20.

3 Q. On your side of the street, you testified that that's  
4 80 percent white?

5 A. Yes.

6 Q. And what's your basis for that, that number?

7 A. That's because most of them all electricians.

8 Q. I'm sorry?

9 A. Most of them are electricians and union members.

10 Q. So that's your basis for saying there's 80 percent white  
11 people on that side of the street?

12 A. Well most of them is white lives over there.

13 Q. And there are very few buildings on that side of the  
14 street, correct?

d4h9f1of

- 15 A. What do you mean, a few?
- 16 Q. There are not as many buildings on the so-called 80 percent
- 17 white side of the street than on your mother's side of the
- 18 street; isn't that right?
- 19 A. I don't know.
- 20 Q. Now, going back to the stop, the bowling alley called Jib
- 21 Lanes, that was about 25 feet from where you were stopped by
- 22 the NYPD that night, right?
- 23 A. About 25 feet? Could be less, yeah.
- 24 Q. So it could be less than 25 feet?
- 25 A. Yeah.

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3702

D4h9flo2

McDonald - cross

- 1 Q. And there are residences, your mother's home included,
- 2 about 50 yards from where you were stopped by the NYPD that
- 3 night, right?
- 4 A. I don't understand what you mean by that.
- 5 Q. So the night you were stopped --
- 6 A. Yeah.
- 7 Q. Where you were physically stopped was about 50 yards from
- 8 residences, the Pomonok houses?
- 9 A. No.
- 10 Q. So just turn again to page 45, lines 19 through 21.
- 11 "Q. How far away was that island on Parsons Boulevard from
- 12 your mother's home?
- 13 "A. About 50 yards."
- 14 Did you give that answer to that question?
- 15 A. Yeah.
- 16 Q. Now, in order to get to the island in the middle of the
- 17 street, you did not cross at the crosswalk, right?

d4h9f1of

18 A. Correct.

19 Q. You crossed in the middle of the street?

20 A. Yeah. There's a little cross thing over there.

21 Q. Well, you didn't cross in the crosswalk?

22 A. Well they consider that crosswalk, but they don't mark it  
23 on the floor.

24 Q. So how is it considered a crosswalk?

25 A. Because it's got a slope for people with shopping carts to

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3703

D4h9f1o2

McDonald - cross

1 come up when they cross the street.

2 Q. So -- you said you were walking on the side during your  
3 direct examination?

4 A. What do you mean, on the side?

5 Q. You said as you were walking past cars, you were walking on  
6 the sideway?

7 A. Yeah. To go in between the cars.

8 Q. And you were shifting your weight towards one side?

9 A. Just moved my body a little.

10 Q. So you were moving your body a little?

11 A. Just to walk through the cars.

12 Q. You claim that the -- one of the officers in the van put  
13 down his window, correct?

14 A. Yes.

15 Q. Now you claim that on your direct examination that you  
16 said: why are you stopping me, right?

17 A. Correct.

18 Q. And you asked that question even though you didn't know if  
19 these were, in fact, police officers?

d4h9f1of

20 A. Right.

21 Q. So when random cars come up to you, you just assume you're  
22 being stopped by the police?

23 A. If they ask me questions it's different.

24 Q. So the officer ultimately did identify himself as a police  
25 officer, right?

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3704

D4h9flo2

McDonald - cross

1 A. Not right away.

2 Q. But at some point he did identify himself as a police  
3 officer, correct?

4 A. He had to.

5 Q. And you claim that there were three individuals in the van  
6 that night, right?

7 A. Correct.

8 Q. But you don't know that the third individual was a police  
9 officer, do you?

10 A. He never came out.

11 Q. And you never saw his face, right?

12 A. I seen half his face.

13 Q. I want to turn your attention to page 52, lines 23 through  
14 25.

15 "Q. Can you describe the third individual who never left the  
16 van?"

17 "A. No. I never got a chance to see his face."

18 Did you give that answer to that question?

19 A. Yeah, but you could see half his face. I didn't see the  
20 whole face.

21 Q. Now you only interacted with two officers who came out with  
22 silver badges, correct?

23 A. My recollection, yes.  
24 Q. And you claim that the driver provided you with his name  
25 Anderson and a shield number 30482; is that correct?

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3705

D4h9flo2

McDonald - cross

1 A. Whatever I gave the attorneys, yes.  
2 Q. And that was the number you gave the attorneys, correct?  
3 A. If that's the number, yes.  
4 Q. Now you claim that the -- during the course of the search  
5 the officer never put your hand in his pocket during your  
6 direct examination, correct?  
7 A. He never put his hands in my pocket?  
8 Q. Yes.  
9 A. He told me to put my hands in my pocket, take out my keys.  
10 Q. But he never put his hand in your pocket?  
11 A. I can't remember all that.  
12 Q. What do you mean you can't remember all that?  
13 A. I can't remember if he put his hands in my pocket or not.  
14 Q. So when you testified earlier you said he didn't put his  
15 hands in, is that incorrect?  
16 A. No. He probably did.  
17 Q. So first during direct examination you said he didn't put  
18 his hands in your pockets. Now you're saying he probably did  
19 put his hands in your pockets?  
20 MR. COREY: I think on direct he said he didn't  
21 remember whether he put his hands in his pockets.  
22 MR. MARUTOLLO: I don't believe that's true.  
23 THE COURT: I don't recall.  
24 I know he said that the officer patted down the

25 outside of the pocket.

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3706

D4h9f1o2

McDonald - cross

1 Do you remember you said that, Mr. McDonald?

2 THE WITNESS: Yes.

3 THE COURT: And then I asked you whether he put his  
4 hand in your pocket. You said you weren't sure or you didn't  
5 remember.

6 THE WITNESS: Right. I wasn't sure.

7 THE COURT: And you aren't sure now?

8 THE WITNESS: Right.

9 THE COURT: I think that's the best we're going to  
10 get.

11 Q. Well as the second officer was interacting with you, the  
12 officer said that he was trying to protect himself, right?

13 A. Correct.

14 Q. And, in fact, the officer said that the reason for the stop  
15 was to protect himself, correct?

16 A. The search, yes.

17 Q. And you -- excuse me, your Honor. I'm sorry.

18 The officers told you that they wanted to make sure  
19 you didn't have a weapon; isn't that right?

20 THE COURT: Did the officers say that, they wanted to  
21 be sure you weren't carrying a weapon?

22 THE WITNESS: I don't remember that.

23 THE COURT: You don't remember that?

24 THE WITNESS: No.

25 THE COURT: By the way, I know I'm jumping ahead. But

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D4h9f1o2 McDonald - cross

1 is there a 250 on this stop?

2 MR. MARUTOLLO: Yes, your Honor.

3 THE COURT: Any reason I can't see it now? It's a  
4 little ahead of it but I'd like to take a look at it.

5 MR. MOORE: It's Plaintiffs' Exhibit 226, Judge.

6 THE COURT: Can I get a copy of it for a minute? I'm  
7 sure it's going to be coming.

8 Thank you. Appreciate it.

9 Q. Well just to refresh your recollection, you just said you  
10 didn't remember if they asked you whether or not you had a  
11 weapon.

12 If you could turn to page 58 of your deposition. If  
13 you could read lines -- I'm sorry 58, line 25 through 59, line  
14 6. If you could just read that to yourself and tell me if that  
15 refreshes your recollection.

16 MR. COREY: Sorry which page?

17 MR. MARUTOLLO: 58, I'm sorry, 25 through 59, 6.

18 Q. So does that refresh your recollection, Mr. McDonald?

19 A. Yeah.

20 Q. So the officers did, in fact, tell you they wanted to make  
21 sure you didn't have a weapon, right?

22 A. I didn't have any, so.

23 Q. I'm sorry?

24 A. I didn't have any.

25 Q. Well that wasn't my question.

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D4h9f1o2 McDonald - cross

d4h9f1of

1 The officers said to you that they wanted to make sure  
2 you didn't have a weapon; isn't that right?

3 A. They was trying to protect their self. That's what I  
4 remember.

5 Q. Let me just again out loud in court then, on page 58,  
6 again, 25 through 59, 6.

7 "Q. Did the officers say they were looking for weapons?

8 "A. They wanted to make sure I didn't have any. That's what  
9 they said.

10 "Q. when you said they didn't have any --

11 "A. They told me they were searching me to make sure I didn't  
12 have a weapon on me."

13 Did you give those answers to those questions?

14 A. I gave those answers, yeah.

15 Q. And you were never handcuffed during this encounter, right?

16 A. No.

17 Q. You weren't issued a summons, right?

18 A. No.

19 Q. The officers didn't use profanity, right?

20 A. No.

21 Q. And you didn't file any complaints about this stop, right?

22 A. No.

23 Q. You didn't contact the civilian complaint review board  
24 about this stop, right?

25 A. No.

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3709

D4h9f1o2

McDonald - cross

1 Q. Or the internal affairs bureau of the NYPD?

2 A. No.

3 Q. Despite the fact that you filed a number of other lawsuits,  
Page 59

4 you've never sued anyone about this stop?

5 A. Excuse me?

6 MR. COREY: Your Honor, I object to the form of that.

7 THE COURT: Go ahead.

8 Q. You've never sued anyone about this stop, correct?

9 A. No.

10 Q. And, in fact, you consider it a stop every time an officer  
11 says hello to you; isn't that right?

12 A. I believe so.

13 Q. And any time an officer asks you a question, you think  
14 that's a stop too, don't you?

15 A. He stop me from doing what I'm doing, yeah.

16 Q. So any time an officer asks you how you're doing, you  
17 consider that a stop?

18 A. Which they never did.

19 MR. MARUTOLLO: No further questions, your Honor.

20 THE COURT: Thank you, Mr. Marutollo.

21 Mr. Corey.

22 Did the officers tell you why they stopped you?

23 THE WITNESS: They never told me.

24 THE COURT: Did you ask?

25 THE WITNESS: I was just -- I wasn't in the mood to

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3710

D4h9f1o2

McDonald - cross

1 hear anything from them.

2 MR. MARUTOLLO: Your Honor, actually before, if we  
3 could just enter L10 into evidence.

4 THE COURT: There is no problem with that, right, Mr.  
5 Corey?

d4h9f1of

6 MR. COREY: No problem. No objection.

7 THE COURT: Okay. L10 is received.

8 (Defendants' Exhibit L10 received in evidence)

9 REDIRECT EXAMINATION

10 BY MR. COREY:

11 Q. Mr. McDonald, do you think that the government in general  
12 is racist?

13 A. No.

14 Q. Do you remember the city's lawyer asking you some questions  
15 about the racial make-up of both sides of Parsons, the  
16 racial -- how many whites and how many blacks lived on each  
17 side of the block?

18 Do you remember that?

19 A. Yes.

20 Q. And you said that about 80 percent of your side is white?

21 A. Correct.

22 Q. And that's based on -- first of all, how long have you  
23 lived there, at that address?

24 A. Nineteen years.

25 Q. So, is that 80 percent an estimate based on your own

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3711

D4h9flo2

McDonald - redirect

1 experience?

2 A. Yes.

3 Q. Now, Mr. McDonald, is your mother's unit located directly  
4 on Parsons or is it located in the interior of the block?

5 A. Inside. Interior.

6 Q. When you stepped out of your mother's door, could you  
7 describe the path that you usually take to get to your house?

8 MR. MARUTOLLO: Objection, your Honor, to relevance.

Page 61

d4h9f1of

9 MR. COREY: I'll move on, your Honor. Withdrawn.

10 THE COURT: I don't know what was objectionable about  
11 it. But okay. If you want to withdraw it, go ahead.

12 Q. And so Mr. McDonald, you also testified just now that you  
13 think that when a cop says hello it's a stop?

14 A. Yes.

15 Q. Did the cops on December 19 merely say hello?

16 A. No. They didn't say hello.

17 Q. Did they do more than say hello?

18 A. They just stopped me and questioned me and searched me.

19 MR. COREY: Just one moment, your Honor.

20 (Pause)

21 Q. Now, Mr. McDonald, I'm not clear -- at some point the  
22 officers said they were trying to protect themselves?

23 A. Yes.

24 Q. So, did you understand that to be an explanation as to why  
25 they were doing what they were doing?

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3712

D4h9f1o2

McDonald - redirect

1 A. (No response).

2 Q. Did it make any sense to you?

3 A. No. It did not make no sense.

4 Q. The postal service suit, is that on appeal right now?

5 A. Yes.

6 MR. COREY: Thank you, your Honor.

7 THE COURT: Anything further?

8 MR. MARUTOLLO: Nothing, your Honor.

9 THE COURT: All right. You're all set. Thank you.  
10 You're done.

11 (Witness excused)

12 who is next?

13 MR. COREY: Your Honor, plaintiffs call Officer Edward  
14 French.

15 THE COURT: Are we going to have Brown today?

16 MS. BORCHETTA: No, your Honor. We've decided not to  
17 call him.

18 THE COURT: He's not going to be called at all?

19 MS. BORCHETTA: Your Honor, if I may take this moment  
20 to address a scheduling issue that it appears that we might be  
21 running into today, which is that we had anticipated that the  
22 integrity control officers would take longer than they did and  
23 that they would take up more of the time today and because of  
24 that it looks like at the pace we're moving that we -- we'll  
25 see -- but that we might finish earlier today than expected.

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3713

D4h9f1o2

McDonald - redirect

1 One of the problems that we're having is that when we've -- we  
2 discuss frequently with the city the schedule. As the Court  
3 knows, we're sort of simultaneously putting on witnesses. A  
4 lot of these witnesses are NYPD witnesses. We've had to  
5 coordinate with the city to have people appear. And in our  
6 discussions with the city they don't give us an estimate of  
7 time that they're going with witnesses although we share that  
8 with them. And because of that it's been a little bit  
9 difficult to be accurate in this final week of witnesses. And  
10 there are a number of NYPD witnesses that we understand can't  
11 appear until next week. And that's what sort of created this  
12 issue.

13 THE COURT: You know I don't have any court time to  
Page 63

14 lose. You know that. So maybe you need to start working the  
15 phones.

16 You have Mr. Downs listed for Friday. Maybe you can  
17 reach him and get him here today. That's the only one I see  
18 who is a class member.

19 MS. BORCHETTA: We could --

20 THE COURT: That's the only one. Everybody else is  
21 NYPD.

22 MS. BORCHETTA: Your Honor, regarding --

23 MS. GROSSMAN: Mr. Ourlicht also.

24 THE COURT: That's not until next Monday.

25 MS. BORCHETTA: We have already attempted to speak to

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3714

D4h9flo2

McDonald - redirect

1 Mr. Downs about coming earlier because we saw this coming. And  
2 my understanding is that he was not able to get out of work.  
3 We could attempt to contact him again. We will attempt to  
4 contact him again.

5 THE COURT: Right. Who else -- other than that, I  
6 need to see if the city can cooperate and find any of these  
7 people for this afternoon. I really don't have time to lose.

8 What does it mean when it says NYPD:RAND?

9 MS. BORCHETTA: We were just trying to give some  
10 indication of the topic.

11 THE COURT: The person is NYPD?

12 MS. BORCHETTA: Everyone other than Leroy Downs and  
13 David Ourlicht is NYPD.

14 MS. PUBLICKER: Your Honor, if I may, Officer  
15 Rothenberg could be available this afternoon to testify.

16 THE COURT: That would be very good. Truly be  
17 helpful. I don't have time to not be in court two hours.  
18 MS. PUBLICKER: Understood, your Honor.  
19 THE COURT: That would be like a brownie point.  
20 MS. PUBLICKER: I'll make it happen.  
21 MR. MOORE: We'll all make it happen.  
22 THE COURT: That would truly be helpful. I just don't  
23 have the hours.  
24 But thanks for letting me know about Brown.  
25 I'm sorry to keep you waiting.

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3715

D4h9flo2 McDonald - redirect

1 EDWARD FRENCH,  
2 called as a witness by the Plaintiffs,  
3 having been duly sworn, testified as follows:  
4 DIRECT EXAMINATION  
5 BY MR. COREY:  
6 Q. Good morning, Officer French.  
7 A. Good morning.  
8 Q. Officer French, you had an encounter with Cornelio McDonald  
9 on December 19, 2009, correct?  
10 A. Yes.  
11 Q. When did you become a member of the NYPD?  
12 A. I was hired July 1, 2003.  
13 Q. And what's your current assignment?  
14 A. I currently work for the narcotics borough in the Bronx.  
15 Q. But beginning in early 2005 you were assigned to Police  
16 Service Area 9 or PSA 9?  
17 A. Yes.  
18 Q. And in December of 2009 you were assigned to the anticrime

19 unit within PSA 9?

20 A. Yes.

21 Q. And that unit patrols in plain clothes?

22 A. Yes.

23 Q. Unmarked cars as well?

24 A. Yes.

25 Q. And the anticrime unit covers all the housing developments

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3716

D4h9flo2

French - direct

1 in PSA 9, right?

2 A. It covers numerous housing developments in PSA 9. There  
3 are several housing developments at the precincts that they're  
4 located in actually govern.

5 Q. Do you remember taking a deposition in this case?

6 A. Excuse me?

7 Q. Do you remember taking a deposition in this case?

8 A. Yes.

9 Q. It was January of this year, right?

10 A. Yes.

11 Q. And you swore to tell the truth?

12 A. I did.

13 Q. I'd like to show you a copy of that deposition.

14 If you could turn your attention to page 29, line 16.

15 I'll just read the question and answer.

16 "Q. Did your anticrime unit, the one that you were in, were  
17 there particular housing developments that you patrolled in, or  
18 did you actually patrol all of the housing developments at  
19 PSA 9?

20 "we patrolled all of the housing developments."

21 Did I read that correctly?  
d4h9f1of

22 A. That's correct. We patrolled all the housing developments  
23 that were covered by PSA 9.

24 Q. One of the duties of the anticrime unit was to address  
25 crime conditions, right?

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3717

D4h9flo2 French - direct

1 A. Correct.

2 Q. And one of the ways you addressed crime conditions in PSA 9  
3 was to conduct stops?

4 A. Correct.

5 Q. And your understanding was that a robbery pattern is a  
6 crime condition?

7 A. Yes.

8 Q. And it's your understanding, is it not, that merely two  
9 robberies with similar circumstances in Queens could constitute  
10 a robbery pattern?

11 A. Yes.

12 Q. And that robbery pattern would encompass all of Queens?

13 A. It could.

14 Q. And you recall that there were, in fact, crime patterns  
15 encompassing all of Queens when you were in the anticrime unit,  
16 right?

17 A. I do recall a robbery pattern at that time, yes.

18 THE COURT: I'm sorry. I do recall what?

19 THE WITNESS: I recall a robbery pattern at that time,  
20 yes.

21 Q. And the robbery pattern encompassed all of Queens?

22 A. I don't remember the exact location.

23 Q. I'm just going to show you your deposition and maybe that  
Page 67

24 will refresh your recollection.

25 Could you turn to page 42, line 10. Let me know when

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3718

D4h9flo2

French - direct

1 you're there. And read it silently to yourself, please.

2 A. Okay. I'm there.

3 Q. Can you read it slightly to yourself.

4 Let me know when you're finished.

5 A. I'm finished.

6 Q. Did it refresh your recollection of whether you recalled  
7 crime patterns encompassing all of Queens?

8 A. It could encompass all of Queens. I believe in my  
9 deposition I stated it could be all of Queens. I don't  
10 remember the exact --

11 Q. Let's just read what you said.

12 MR. MARUTOLLO: Your Honor, I think this is improper  
13 impeachment. He's testifying the same at his deposition as he  
14 is here today.

15 THE COURT: Is it different or not, Mr. Corey? If  
16 it's the same we don't take it.

17 It seems to be a little problem, a little disease  
18 running around the lawyers thinking if it's the same you read  
19 it in.

20 MR. COREY: I asked him whether he recalled an actual  
21 crime pattern, in fact, that encompassed the entire borough.  
22 He said -- what is your answer?

23 THE WITNESS: My answer is I do recall a robbery  
24 pattern at that particular time, but I do not remember the  
25 exact --

♀

3719

D4h9f1o2 French - direct

1 MR. COREY: I move to strike that as nonresponsive.

2 THE COURT: What's the question you want to ask him  
3 now?

4 MR. COREY: I want to ask him whether he recalls that,  
5 in fact, there were anticrime patterns defined as encompassing  
6 the entire Borough of Queens.

7 THE COURT: You're asking him that now? Nothing to do  
8 with the deposition?

9 MR. COREY: Yes. Well, I'm asking him that now.

10 THE COURT: Okay. At that time back in 2009 do you  
11 remember a crime pattern that encompassed the entire Borough of  
12 Queens.

13 THE WITNESS: As I said before, I don't remember the  
14 exact locations of the crime -- of the robbery pattern. It may  
15 have been all of Queens. I don't remember.

16 THE COURT: So it may have, it may not have. That's  
17 what you remember. Right? You're not sure?

18 THE WITNESS: I'm not sure. Correct.

19 Q. Well at your deposition you remembered, right?

20 A. My deposition states that it could be all of Queens but --

21 Q. I'm sorry. Are you looking at the same page?

22 A. Yes. My answer on line 13, "It could be all of Queens."

23 THE COURT: Is that the same thing you were referring  
24 to, Mr. Corey, the sentence that said, "It could be all of  
25 Queens"?

♀

3720

d4h9f1of

D4h9f1o2 French - direct

1 MR. COREY: The copy I have says, "It encompassed the  
2 whole borough?"

3 "A. Yes."

4 THE COURT: What page and line is that?

5 MR. COREY: 42.

6 THE WITNESS: I'm sorry. I'm looking at 41. I'm  
7 sorry.

8 THE COURT: Take a look at page 42 line -- one second.  
9 Line what?

10 MR. COREY: Line 10.

11 THE COURT: Line 10. What is the question and answer  
12 at page 42 --

13 MR. COREY: Starts with an answer.

14 THE COURT: Okay.

15 MR. COREY: "Oh, I do recall crime patterns within  
16 Queens, yes.

17 "Q. It encompassed the whole borough?"

18 "A. Yes."

19 MR. MARUTOLLO: Just to be clear. Three lines before  
20 that, starting on line three, "In other words, you said it  
21 could be all of Queens?"

22 "A. Right."

23 So, again, it's consistent with what he's saying.

24 THE COURT: That part is, that you read. But the  
25 other part isn't.

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3721

D4h9f1o2 French - direct

1 So he said both. He answered yes when the question

2 was asked, "was it all of Queens?" He said yes. He said both.

3 MR. MARUTOLLO: I think these questions are, in fact,  
4 crime patterns in general.

5 This is not talking about the incident. And I don't  
6 want to give the court --

7 THE COURT: The incident? Or the robbery crime  
8 pattern that was mentioned?

9 MR. MARUTOLLO: I think at this point in the  
10 deposition they were merely talking about definitions of  
11 patterns.

12 THE COURT: I'm not sure. I'm not looking at the  
13 entire deposition transcript. I don't know.

14 But I'll allow it because it may be that he's  
15 referring to the robbery crime pattern and said, "Yes, all of  
16 Queens." I don't know. I'm not looking at the entire  
17 deposition.

18 Q. You know from working in Queens that it's geographically  
19 the largest borough in New York?

20 A. Yes.

21 Q. The anticrime unit of PSA 9 patrolled housing developments  
22 as far north as Astoria houses; is that right?

23 A. Yes.

24 Q. And as far south as Baisley houses?

25 A. Yes.

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3722

D4h9flo2

French - direct

1 Q. And if I showed you a map of Queens would you be able to  
2 mark where those two housing complexes are?

3 A. Yes.

4 MR. COREY: Your Honor, may I show the witness a map  
Page 71

5 so we can understand the scope of his jurisdiction, PSA 9?

6 MR. MARUTOLLO: I'm sorry?

7 THE COURT: The answer is yes. But let's take our  
8 morning recess and he'll look at that and we'll reconvene at  
9 quarter to twelve.

10 (Recess)

11 THE COURT: Please be seated. Where did we leave off?

12 MR. COREY: Your Honor I believe I was asking the  
13 witness whether he could identify the furthest north and  
14 furthest south housing developments that are in PSA 9 on a map  
15 of Queens. I would like to approach the witness and ask him to  
16 do so.

17 Do you have a pen?

18 THE WITNESS: I actually do have one.

19 Q. So if you could just mark Astoria houses, approximately;  
20 and Baisley houses, approximately.

21 So Officer French the northwestern circle you drew is  
22 that Astoria houses?

23 A. Yes.

24 Q. And you can see another circle is Baisley, right?

25 A. Yes.

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3723

D4h9f1o2

French - direct

1 MR. COREY: I would just move to admit this, your  
2 Honor, as Plaintiffs' Exhibit 466.

3 THE COURT: Any objection?

4 MR. MARUTOLLO: Just I guess the relevance, your  
5 Honor.

6 THE COURT: I don't know that either.

d4h9f1of

7 what's the relevance?

8 MR. COREY: Your Honor, one of the reasons Officer  
9 French claims that he stopped Mr. McDonald is because he was  
10 aware of a robbery pattern. And it doesn't appear that he's  
11 knowledgeable of where the robbery pattern was. But I'd like  
12 to show the scope of the area he patrols.

13 THE COURT: I see.

14 MR. COREY: So it goes to the reasonableness.

15 THE COURT: I'll take the map and the testimony.

16 (Plaintiffs' Exhibit 466 received in evidence)

17 MR. MOORE: Do you want a copy, Judge?

18 THE COURT: Sure. For the record I'll need a copy,  
19 yes.

20 MR. MOORE: We'll get one to you.

21 THE COURT: Sure.

22 Q. PSA 9 encompasses several different precincts, right?

23 A. Yes.

24 Q. You had an encounter with Cornelio McDonald as you've  
25 previously testified, right?

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3724

D4h9f1o2

French - direct

1 A. Yes.

2 Q. And you encountered him just north of Parsons Boulevard and  
3 Jewel near the Pomonok houses?

4 A. Yes.

5 Q. And you were patrolling in an unmarked vehicle; is that  
6 right?

7 A. Yes.

8 Q. It was a red van?

9 A. Yes.

d4h9f1of

10 Q. And you were with a partner, right?

11 A. Yes.

12 Q. But you don't remember whether you or your partner was  
13 driving, right?

14 A. No, I don't.

15 Q. And you don't remember whether you were parked or moving  
16 before you saw Mr. McDonald?

17 A. No, I don't.

18 Q. And you don't remember what your partner was doing during  
19 the encounter?

20 A. No, I don't.

21 Q. And, in fact, you don't recall anything Mr. McDonald said  
22 to you at any point during the encounter?

23 A. That's correct.

24 Q. So you got out of the van to approach Mr. McDonald at some  
25 point, didn't you?

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3725

D4h9flo2

French - direct

1 A. Yes.

2 Q. And after you got out you identified yourself as a police  
3 officer?

4 A. Yes.

5 Q. I'd like to show you a document -- actually we've  
6 already -- well I will show you a document marked as  
7 Defendants' Exhibit R2.

8 MR. COREY: Your Honor this is, I think, the UF 250  
9 which you've already seen.

10 THE COURT: Actually on this copy it says Plaintiffs'  
11 Exhibit 226.

12 MR. COREY: They're the same.  
13 THE COURT: I'll just admit it as Plaintiffs' Exhibit  
14 226 but you can show it to him as the way it's marked. It  
15 doesn't matter.  
16 (Plaintiffs' Exhibit 226 received in evidence)  
17 Q. Do you recognize that document?  
18 A. Yes.  
19 Q. What is it?  
20 A. This is the UF 250 that I filled out.  
21 MR. COREY: I don't believe we moved --  
22 THE COURT: I just said I'll take it in evidence as  
23 Plaintiffs' Exhibit 266.  
24 So you filled this out. When it says specify which  
25 felony, can you tell me what you wrote there?

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3726

D4h9flo2 French - direct

1 THE WITNESS: I wrote CPW which stands for criminal  
2 possession of a weapon.  
3 THE COURT: Okay.  
4 Q. Officer French -- so you see on side two there you checked  
5 looks like area has high incidence of reported offense of type  
6 under investigation, right?  
7 A. Yes.  
8 Q. And you claim you checked that box because you understood  
9 there was a robbery pattern where you encountered Mr. McDonald?  
10 A. I believe there was a robbery pattern in that general  
11 vicinity at that time.  
12 Q. So one thing your understanding was based on was an arrest  
13 for armed robbery you made about a month earlier?  
14 A. Yes.

d4h9f1of

15 Q. And another thing that led you to believe there was a  
16 robbery pattern was a knowledge of a man holding up commercial  
17 establishments?

18 A. Yes.

19 Q. But at the time you stopped Mr. McDonald you didn't know  
20 where in Queens those hold-ups had occurred, did you?

21 A. No.

22 Q. The third thing that led you to believe there was a robbery  
23 pattern was your knowledge of a man burglarizing residential  
24 establishments; is that right?

25 A. Yes.

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3727

D4h9f1o2

French - direct

1 Q. But again you at the time you stopped Mr. McDonald you  
2 didn't know where in Queens those burglaries had taken place?

3 A. Correct.

4 Q. And by the way, for that burglary pattern you didn't know  
5 whether they -- any of them occurred within the vicinity of the  
6 Pomonok houses, did you?

7 A. No, I don't.

8 Q. And for the robbery pattern, supposed robbery pattern, you  
9 didn't know whether those -- any of those incidents occurred in  
10 the vicinity of the Pomonok houses, did you?

11 A. No.

12 Q. So those were the only three pieces of information you had  
13 in December of 2009 that caused you to believe there was a  
14 robbery pattern where you stopped Mr. McDonald; is that right?

15 A. Before we turned out each day our sergeant would address --

16 Q. I'm not really --

d4h9f1of

17 A. I'm just trying to explain to you. I'm just saying the  
18 fact that we were at Pomonok houses that night might have been  
19 the condition of a robbery pattern might have been addressed.  
20 Because normally we would work in 114 precinct. The fact that  
21 we were in Pomonok houses means we were probably addressing  
22 some sort of condition.

23 Q. But you don't remember what?

24 A. I don't remember what.

25 Q. But you did review the December crime complaint data for

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3728

D4h9f1o2

French - direct

1 the area where you stopped Mr. McDonald before you stopped him,  
2 didn't you?

3 A. No.

4 Q. In fact, you don't recall any instance where your sergeant  
5 in the anticrime unit showed you crime complaint reports, do  
6 you?

7 A. No.

8 Q. And you didn't stop Mr. McDonald for robbery and burglary,  
9 did you?

10 A. No.

11 Q. So you also, it looks like, checked off time of day, day of  
12 week, season corresponding to reports of criminal activity,  
13 right?

14 A. Yes.

15 Q. And you claim that's because you understood the crime  
16 happened when it was dark out?

17 A. Yes.

18 Q. And December 19 is when the stopped occurred?

19 A. Yes. It was the early morning hours of December 19.

d4h9f1of

20 Q. And December 19 that's one of the shortest days of the  
21 year, right?

22 A. Yes.

23 Q. So it's dark for a long period of time? Fair to say?

24 A. Yes, it is.

25 Q. On that day.

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3729

D4h9f1o2

French - direct

1 And you also claim that you saw a suspicious bulge in  
2 Mr. McDonald's jacket pocket?

3 A. Yes.

4 Q. But before you stopped Mr. McDonald, his hands were in his  
5 jacket pocket, right?

6 A. Yes.

7 Q. And again this was December? So it was cold?

8 A. Yes.

9 Q. So was there anything about Mr. McDonald's clothing that  
10 you felt was inappropriate for the weather?

11 A. No.

12 Q. And it was dark out, right?

13 A. Yes.

14 Q. And you don't remember how far away you were when you first  
15 saw him?

16 A. No.

17 Q. And you don't remember the material of the jacket?

18 A. Excuse me?

19 Q. And you don't remember the material of the jacket?

20 A. No, I don't.

21 Q. And you told him to remove his hands from his pockets?

d4h9f1of

22 A. Yes.

23 Q. At some point.

24 And he complied?

25 A. Yes.

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3730

D4h9f1o2

French - direct

1 Q. And you frisked him, right?

2 A. Yes.

3 Q. And you claim you felt something in his jacket pocket,  
4 right?

5 A. Yes.

6 Q. And you reached into his jacket pocket?

7 A. Yes.

8 Q. And you claim you reached into his jacket pocket because  
9 you couldn't tell from your frisk whether he had a weapon,  
10 right?

11 A. Yes.

12 Q. What, if anything, did you find in his jacket pocket when  
13 you reached inside?

14 A. I removed a cellphone from his jacket pocket.

15 Q. You didn't find a weapon?

16 A. No.

17 Q. You didn't find any drugs?

18 A. No.

19 Q. You were issued a pistol by the NYPD, right?

20 A. Yes.

21 Q. You were trained how to use it?

22 A. Yes.

23 Q. So you generally know what pistol feels like?

24 MR. MARUTOLLO: Objection, your Honor, to this line of  
Page 79

25 questioning about his use of a pistol or anything along those

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3731

D4h9flo2

French - direct

1 lines.

2 THE COURT: I don't know where it's going.

3 MR. COREY: I was just trying establish that he  
4 understands what a pistol feels like.

5 THE COURT: I thought that might be right.

6 Q. And isn't it true that in your experience a cellphone is  
7 one of the most common items you find when you search a  
8 pedestrian?

9 A. Yes.

10 Q. And yet you still claim that after you frisked Mr. McDonald  
11 you thought he might have had a weapon him?

12 A. Yes.

13 Q. But you don't recall the size of the cellphone?

14 A. No.

15 Q. Or the color?

16 A. No.

17 Q. Or the brand?

18 A. No.

19 Q. You don't recall whether it was a flip phone?

20 THE COURT: A what?

21 MR. COREY: A flip phone. Sorry.

22 THE COURT: Flip phone.

23 THE WITNESS: No.

24 Q. And you don't recall whether it felt metal or plastic, do  
25 you?

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D4h9flo2 French - direct

1 A. No.

2 Q. I'd like to show you just briefly a document marked as  
3 Defendants' Exhibit B5.

4 MR. COREY: Your Honor -- first, Officer French, let  
5 me ask you.

6 Q. Do you recognize that document?

7 A. Yes.

8 Q. What is it?

9 A. This is an operations order detailing activity logs.

10 MR. COREY: So, your Honor, I know that we've seen  
11 this document before. And I just have a few questions. I  
12 think it will actually just be faster if I let him use the  
13 document.

14 THE COURT: Okay.

15 Q. If you could just turn to the second page of that document.

16 Do you see where it says 1715 SQF?

17 A. Yes.

18 Q. Would you just read that?

19 A. 1715 SQF. UF 250. Suspected male randomly looking in  
20 apartment windows. 1781 Marmion Avenue. Male. Asian. Wong,  
21 Victor. Date of birth 9-17-73.

22 Q. There's an arrow, I guess, linking sort of a box with text  
23 in it to the left saying stop and frisk, right?

24 A. Yes.

25 Q. Could you please read that.

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1 A. "When an MOS has cause to temporarily detain and/or frisk  
2 an individual, it is imperative that a detailed entry be made  
3 as indicated."

4 Q. Now if you could go back to the first page, paragraph two.  
5 Could you read that aloud, please?

6 A. "Any member of the service required to prepare an activity  
7 log --

8 MR. MARUTOLLO: I just object, your Honor, as  
9 cumulative having him read this entry into the record.

10 THE COURT: Which one are we having him read, which  
11 paragraph?

12 MR. COREY: Paragraph two.

13 THE COURT: I'll read it to myself. You read it to  
14 yourself too. Okay.

15 Okay. We've both read it. It's already been read in  
16 the record.

17 MR. COREY: I understand, your Honor.

18 Q. So are you done reading it?

19 A. I'm done.

20 Q. So you understand that this operations order requires  
21 officers to document the reason for a stop, right?

22 A. Yes.

23 Q. And in the example in the appendix, the second page, the  
24 reason for the stop would be looking into I guess apartment  
25 windows; is that right?

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D4h9flo2

French - direct

1 A. Yes.

2 Q. And you have received training on how to properly document

3 a stop in a memo book?

4 A. Yes.

5 Q. I want to show you another document briefly. It's  
6 Plaintiffs' Exhibit 231.

7 Do you recognize that document?

8 A. Yes.

9 Q. What is it?

10 A. That is a photocopy of my memo book.

11 Q. What time period does it cover?

12 A. It covers the time between October 17, 2009 and January 9,  
13 2010.

14 MR. COREY: Your Honor, we'd move to admit Plaintiffs'  
15 Exhibit 231.

16 MR. MARUTOLLO: No objection. Just for the record  
17 though it's only the excerpt of that date.

18 THE COURT: I was just going to say. It's just that  
19 date, right?

20 MR. COREY: Absolutely.

21 THE COURT: Okay. Fine. What's the exhibit number  
22 again?

23 MR. COREY: Plaintiffs' 231.

24 THE COURT: 231 is received.

25 (Plaintiffs' Exhibit 231 received in evidence)

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1 Q. By the way, a memo book is the same thing as an activity  
2 log. That's your understanding?

3 A. Yes.

4 Q. Can you turn to the third page of the exhibit which bears  
5 Bates number NYC 22804.

6 A. Okay.

7 Q. Can you read what you wrote.

8 A. That is the pedigree information for Cornelio McDonald.

9 THE COURT: Can you read it.

10 THE WITNESS: It's McDonald, Cornelio. 67-15 Parsons  
11 Boulevard. Apartment 2K. Date of birth is --

12 MR. MARUTOLLO: If we could just take out the date of  
13 birth for the record.

14 THE COURT: Skip the date of birth. Good. Thank you.

15 Q. Can you turn to the next page and read what you wrote.

16 A. 0155. Stop one male black. Corner of Jewel and Parsons  
17 for CPW. McDonald, Cornelio. Date of birth --

18 THE COURT: Skip --

19 THE WITNESS: slash frisk. Cellphone. 250 prepared.

20 Q. CPW is criminal possession of a weapon, right?

21 A. Yes.

22 Q. You just testified that you are required to document the  
23 reason for a stop in your memo book, right?

24 A. Yes.

25 Q. And you've been trained to do so?

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D4h9flo2

French - direct

1 A. Yes.

2 Q. And you believe that you indicated the reason for your stop  
3 of McDonald, Mr. McDonald, by writing down the crime you  
4 suspected, CPW?

5 A. As well as suspicious bulge, yes.

6 Q. Well where do you write suspicious bulge in the memo book?

7 A. I'm sorry. I didn't write it.

d4h9f1of

8 But CPW does document the reason why I stopped him. I  
9 suspected criminal possession of a weapon.

10 Q. And you don't believe operations order 44 requires you to  
11 write down the reason you suspected a crime?

12 A. No. I believe that is a complete memo book entry.

13 Q. And you believe that even though the example that we just  
14 looked at lists an officer's observations of what the suspect  
15 was doing, not a crime?

16 A. I believe that this document is completely complete.

17 Q. And in 2009 you generally did not include the reason you  
18 suspected a person of a crime for which you stopped them, did  
19 you?

20 A. I suspected the person to be committing criminal possession  
21 of a weapon, and that's what I documented.

22 Q. It's actually not my question.

23 I'm asking in 2009 did you generally include the  
24 reason you suspected the crimes for which you stopped people?

25 A. No.

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D4h9f1o2

French - direct

1 MR. COREY: One moment, your Honor.

2 Q. I'm sorry for the interruption. But you said that you  
3 generally did not include the reason you suspected a person for  
4 a crime?

5 A. No. I included the reason why I stopped him and I believe  
6 that was enough.

7 Q. And none of your supervisors ever told you this practice  
8 violated NYPD policy, did they?

9 A. No.

10 Q. Your regular supervisor in December of 2009 was Sergeant  
Page 85

11 Loria; is that right?

12 A. Yes.

13 Q. And he wasn't present at the stop, was he?

14 A. No.

15 Q. And you don't recall Sergeant Loria ever asking you to see  
16 your memo book for the entry for Mr. McDonald's stop, do you?

17 A. For that particular entry, no.

18 Q. And it was your normal practice -- excuse me. It was your  
19 normal practice in 2009 to fill out the UF 250s when you got  
20 back to the precinct, right?

21 A. Yes.

22 Q. I'd like to show you just one more document.

23 This is Plaintiffs' Exhibit 229. Do you recognize  
24 that?

25 A. Yes.

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D4h9flo2

French - direct

1 Q. And what is it?

2 A. This is a copy of my monthly activity report for the month  
3 of November, December 2009 as well as January 2010.

4 Q. Looks like you made 17 stops in November 2009?

5 A. That's correct, yes.

6 Q. And 10 in December of 2009?

7 MR. MARUTOLLO: Your Honor, just to be clear, I don't  
8 believe this document is in evidence yesterday.

9 MR. COREY: I'm trying to establish the relevance of  
10 it.

11 MR. MARUTOLLO: We don't have any objection.

12 THE COURT: What's the number again?

13 MR. COREY: Plaintiffs' Exhibit 229.  
14 THE COURT: 229 received.  
15 (Plaintiffs' Exhibit 229 received in evidence)  
16 Q. So, I guess 27 total stops in November and December?  
17 A. That's correct, yes.  
18 Q. And it was your normal practice to give your sergeant your  
19 250s after you filled them out?  
20 A. Yes.  
21 Q. But you don't recall Sergeant Loria ever asking you about  
22 anything you had written on the stop on the UF 250 for the stop  
23 of Mr. McDonald?  
24 A. No.  
25 Q. And you don't recall discussing the facts of any of these

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D4h9f1o2 French - direct

1 27 stops with the sergeant, do you?  
2 A. No.  
3 MR. COREY: Nothing further at this time, your Honor.  
4 THE COURT: Mr. Marutollo.  
5 MR. MARUTOLLO: Thank you, your Honor.  
6 CROSS-EXAMINATION  
7 BY MR. MARUTOLLO:  
8 Q. Good morning, Detective French.  
9 A. Good morning.  
10 Q. How long have you been employed by the NYPD?  
11 A. Since July 1, 2003. So a little less than ten years now.  
12 Q. Did you attend and graduate from the police academy?  
13 A. I did.  
14 Q. And what is your present rank with the NYPD?  
15 A. My current rank is detective third grade.

d4h9f1of

16 Q. When were you promoted to detective?

17 A. January of this year.

18 Q. And what is your current command?

19 A. My current command is narcotics borough Bronx.

20 Q. How long have you been working in narcotics borough Bronx?

21 A. I've been since August of 2011. So a little bit less than  
22 two years now.

23 Q. And what are your duties and responsibilities as a  
24 detective with Bronx narcotics?

25 A. Bronx narcotics basically I'm assigned to the 46 module.

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D4h9flo2

French - cross

1 we investigate narcotic complaints involving -- in the 46  
2 precinct.

3 Q. Now prior to working in narcotics borough Bronx, where were  
4 you assigned?

5 A. I was assigned to the anticrime team in PSA 9.

6 Q. And how long had you been working in PSA 9?

7 A. I was assigned to PSA 9 in January of 2005 up until my  
8 transfer to narcotics which is -- which was August of 2011. So  
9 about seven years.

10 Q. And you were working as an anticrime officer on December 18  
11 through 19, 2009, right?

12 A. I was, yes.

13 Q. What were your duties and responsibilities as an anticrime  
14 officer in PSA 9?

15 A. As an anticrime officer, basically we patrolled the housing  
16 developments that were assigned to us in plain clothes and  
17 unmarked cars. And we would address -- we would tend to

18 address the more violent types of crimes such as armed  
19 robberies, burglaries, as well as criminal possessions of a  
20 weapon.

21 Q. During your time in the anticrime unit, how did you learn  
22 about crime patterns in a particular area?

23 A. Before we turned out each day our sergeant would hold an  
24 informal meeting with whatever members were present. And he  
25 would address the conditions of the day.

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D4h9flo2

French - cross

1 Q. would he address patterns if such patterns existed?

2 A. Yes, he would.

3 Q. I'd just like to turn your attention to Plaintiffs' Exhibit  
4 229 which is already in evidence.

5 If you could just go to December.

6 So just turning your attention to the December 2009  
7 monthly activity report which is part of Plaintiffs' Exhibit --  
8 Trial Exhibit 229. What were your declared conditions that you  
9 were to address that month?

10 A. Declared conditions were general enforcement against crime,  
11 quality of life traffic violations as well as criminal  
12 possession of a weapon.

13 Q. On this document what does AC 1 mean?

14 A. AC 1 stands for anticrime.

15 Q. So how did you address the declared conditions in  
16 December 2009?

17 A. Basically what we would do is we would use our  
18 omnipresence. We would patrol the housing developments. We  
19 would interact with the community. We would stop, question and  
20 possibly frisk individuals as well as make arrests.

21 Q. Now were there days in December 2009 when you did not  
22 complete any UF 250s?

23 A. Yes.

24 Q. Could you just count in December 2009 how many days you did  
25 not complete UF 250s?

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D4h9f1o2

French - cross

1 THE COURT: How many days on which you were on duty.

2 MR. MARUTOLLO: I'm sorry. That he was on duty and  
3 with AC 1, meaning anticrime unit, and didn't complete a  
4 UF 250.

5 THE COURT: Okay.

6 THE WITNESS: I believe it's going to be ten.

7 Q. And for those ten days were you punished in any way for not  
8 completing UF 250s?

9 A. No.

10 Q. Now, according to Plaintiffs' Trial Exhibit 229, you  
11 completed 17 UF 250s in November 2009 and 10 UF 250s in  
12 December 2009.

13 Were you punished in any way for this reduction?

14 A. No.

15 Q. So turning your attention now to the stop of Mr. McDonald.  
16 Did your tour actually begin on December 18, 2009?

17 A. Yes.

18 Q. Do you remember what hours you were working that night?

19 A. Yes. We were working 1800 by 0235 which is 6:00 in the  
20 evening to 2:35 in the morning.

21 Q. Did you attend a meeting with your sergeant at start of  
22 your tour that day?

d4h9f1of

23 A. Yes. Again, before we turn out each day, our crime  
24 sergeant would address the conditions that needed to be met.

25 Q. What particular conditions and patterns were you focusing

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D4h9flo2

French - cross

1 on during your tour starting December 18, 2009?

2 A. There were two robbery patterns that I was aware of at that  
3 time.

4 Q. What were those robbery patterns?

5 A. One robbery pattern was male black with a firearm holding  
6 up commercial establishments. And the other pattern was a male  
7 black burglarizing residences.

8 THE COURT: Did you know anything more about the  
9 suspect's description other than male black?

10 THE WITNESS: I don't recall any further description  
11 of the subject.

12 Q. Just to be clear. Do you not recall any further  
13 description today or do you -- during that time was there more  
14 detail given?

15 A. There might have been. If there was more information it  
16 would have been provided at the meeting before we turned out.  
17 But at this time I don't remember.

18 MR. COREY: Your Honor, that's just pure speculation.

19 THE COURT: No. It's his experience. If there was  
20 more information, it would have been stated at the meeting. If  
21 there was any. He's not saying whether there was or wasn't.  
22 But if there was, it would be part of a meeting.

23 Q. Now during that meeting with your sergeant that night, did  
24 your sergeant or any other superior officer tell you that you  
25 had to conduct a certain number of stops that night?

D4h9flo2

French - cross

1 A. No.

2 Q. How were you traveling that night?

3 A. I believe we were in a red unmarked van.

4 Q. Who was in the van with you that night?

5 A. I believe I was working with Officer Nacelewicz.

6 Q. Was anyone else in the van at the time of the stop of  
7 Mr. McDonald?

8 A. No.

9 Q. Were you in uniform that night?

10 A. No.

11 Q. Did you have a shield?

12 A. Yes.

13 Q. Where was it?

14 A. My shield -- when I was in the anticrime unit my shield  
15 would hang around my neck.

16 Q. Did there come a time when you observed Mr. Cornelio  
17 McDonald?

18 A. Yes.

19 Q. Where were you when you first observed him?

20 A. I was within the van.

21 Q. And --

22 THE COURT: Which position?

23 THE WITNESS: Excuse me?

24 THE COURT: Which position in the van?

25 THE WITNESS: I don't remember. I don't remember if I

♀

D4h9f1o2 French - cross

1 was driving or if I was the passenger or not.

2 Q. And why were you in that area that night near Parsons  
3 Boulevard?

4 A. Again, we were patrolling the Pomonok houses. Just routine  
5 patrol. Addressing conditions and, you know, our sergeant  
6 advised us about.

7 Q. Were you familiar with that area?

8 A. Yes. We worked in that area before.

9 Q. Had you made any arrests in that area prior to December 19,  
10 2009?

11 A. Yes. It was either late November or early December I  
12 arrested an armed subject for a robbery right in the vicinity,  
13 approximately five hundred feet from where I stopped  
14 Mr. McDonald.

15 Q. Now at approximately what time did you encounter  
16 Mr. McDonald?

17 A. I believe it was 0155 in the morning.

18 Q. And where was Mr. McDonald when you first observed him?

19 A. When I first observed Mr. McDonald he was on the sidewalk.

20 Q. I'm sorry. Go ahead.

21 A. He was on the sidewalk. He proceeded to walk down the  
22 sidewalk. He walked between two parked cars. And he proceeded  
23 to cross Parsons Boulevard from a west to east direction.

24 Q. Was he crossing in a crosswalk?

25 A. No.

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D4h9f1o2 French - cross

1 Q. Where was he crossing?

d4h9f1of

2 A. He was crossing a little bit north of the intersection.

3 THE COURT: North of what?

4 THE WITNESS: A little bit north of the intersection  
5 of Parsons and Jewel.

6 Q. Was Mr. McDonald by himself?

7 A. Yes.

8 Q. When you first saw Mr. McDonald what, if anything, did you  
9 observe?

10 A. When I first observed Mr. McDonald I observed him with both  
11 hands in his pockets. He had both hands tight against his  
12 body. And he was leaning towards one side. And I observed  
13 what I thought was a suspicious bulge in his left front pocket.

14 Q. Did anything obstruct your view?

15 A. Not that I can remember.

16 Q. Why did you decide to stop Mr. McDonald?

17 A. Again, I observed a suspicious bulge, in accordance with  
18 his mannerisms as well as the time of day and the vicinity.

19 Q. When you say his mannerisms, what made those mannerisms  
20 come to your attention?

21 A. Against he's holding his hands close to his body. He's  
22 leaning to one side. I believe he's got something in his  
23 pocket that he's trying to hold tight to him.

24 Q. What are you basing that on?

25 THE COURT: You said his hands were in his pockets?

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D4h9f1o2

French - cross

1 THE WITNESS: His hands were in his pockets, yes.

2 THE COURT: You also said his hands were close to his  
3 body?

4 THE WITNESS: Yeah. He had his jacket pulled tight.

5 THE COURT: It was cold that night, wasn't it?

6 THE WITNESS: Yes.

7 Q. But in addition to those mannerisms you also said you  
8 observed a suspicious bulge?

9 A. That's correct, yes.

10 Q. And I believe, correct me if I'm wrong, but you said the  
11 crime patterns and the time as well?

12 A. Yes.

13 THE COURT: wait. Let's go back to the suspicious  
14 bulge. where did you observe that? what pocket?

15 THE WITNESS: It was in his left pocket.

16 THE COURT: where his hand was?

17 THE WITNESS: Yes.

18 So in addition to his hand, I also observed something  
19 else within that pocket.

20 THE COURT: Okay.

21 Q. And where did you stop Mr. McDonald?

22 A. I stopped Mr. McDonald -- it was right on the center median  
23 which is like a sidewalk. Parsons Boulevard is a divided  
24 highway, north and southbound lanes divided by a maybe one --  
25 maybe a two-foot like sidewalk type divider.

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D4h9f1o2 French - cross

1 Q. Now, you've testified that you were aware at the time of a  
2 robbery pattern that indicated that an African-American male  
3 was holding up commercial establishments, right?

4 A. Yes.

5 (Continued on next page)

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D4H8FLO3                      French - cross

1    Q.    At the time you stopped Mr. McDonald, was he walking in the  
2    vicinity of a bowling alley called Jib Lanes?

3    A.    Yes.

4    Q.    Is Jib Lanes a commercial establishment?

5    A.    Yes.

6    Q.    You also testified that at the time you were aware of a  
7    pattern of an African-American male burglarizing residents, is  
8    that right?

d4h9f1of

- 9 A. Yes.
- 10 Q. At the time you stopped Mr. McDonald, was he only feet away
- 11 from the Pomonok Houses?
- 12 A. Yes.
- 13 Q. And the Pomonok Houses are residences?
- 14 A. Yes.
- 15 Q. Going back to the stop, did you speak to Mr. McDonald as
- 16 you were approaching him?
- 17 A. I did. I identified myself as a police officer, as well as
- 18 I asked Mr. McDonald to take his hands out of his pocket.
- 19 Q. Did Mr. McDonald stop walking when you started speaking to
- 20 him?
- 21 A. Yes.
- 22 Q. Did he take his hands out of his pocket?
- 23 A. Yes.
- 24 Q. What did you say to him next?
- 25 A. At that point, I asked Mr. McDonald where he was coming

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D4H8FLO3

French - cross

- 1 from.
- 2 Q. Do you remember if at any point Mr. McDonald was getting
- 3 loud?
- 4 A. I do remember Mr. McDonald getting loud. I don't remember
- 5 at exactly what point of our interaction that he actually did
- 6 become loud.
- 7 Q. Did you frisk Mr. McDonald?
- 8 A. I did.
- 9 Q. How did you frisk him?
- 10 A. I frisked his outermost jacket and the pocket that I
- 11 observed the suspicious bulge.

12 THE COURT: You put your hand in his pocket?

13 THE WITNESS: I patted the outside.

14 THE COURT: And then you put your hand in?

15 THE WITNESS: Yes.

16 THE COURT: Afterwards.

17 THE WITNESS: Yes.

18 Q. Why did you frisk Mr. McDonald?

19 A. I frisked Mr. McDonald because once he took his hands out  
20 of his pocket, there was still a suspicious bulge in the  
21 pocket. At that point I frisked the pocket that I observed the  
22 suspicious bulge and I felt a hard object that I couldn't  
23 identify.

24 Q. Were you in fear of your safety?

25 A. Yes.

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D4H8FLO3

French - cross

1 Q. After frisking Mr. McDonald, what did you do next?

2 A. After I frisked Mr. McDonald, I couldn't identify the hard  
3 object that I felt. At that point, I reached into his left  
4 pocket and removed what turned out to be a cell phone.

5 Q. At some point did you obtain Mr. McDonald's name and  
6 address?

7 A. Yes.

8 Q. Again, where was your badge throughout this encounter?

9 A. My badge was hanging around my neck.

10 Q. Did you provide your shield number to Mr. McDonald?

11 A. Yes.

12 Q. What was your shield number at that time?

13 A. At that time, my shield number was 30482.

d4h9f1of

14 Q. Prior to leaving, did you explain to Mr. McDonald the basis  
15 for his stop?

16 A. Yes.

17 Q. What did you say?

18 A. I explained to Mr. McDonald that the reason I stopped him  
19 was that I saw the bulge in his pocket. I thought he might be  
20 in possession of a weapon and that was the reason why I stopped  
21 him.

22 Q. After you got his pedigree information and wrote it down,  
23 what, if anything, did you do next?

24 A. At that point, Mr. McDonald was free to go. I left the  
25 location, as did Mr. McDonald.

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D4H8FLO3

French - cross

1 Q. At any point, did you refer to yourself as Anderson?

2 A. No.

3 Q. Did your partner refer to himself as Anderson?

4 A. No.

5 Q. Was there any officer named Anderson in your anticrime  
6 unit?

7 A. No.

8 Q. Had you ever worked with someone named Anderson?

9 A. No.

10 MR. MARUTOLLO: Can I have one moment, your Honor?

11 Q. Just turning your attention to your training, Detective  
12 French, what training have you received from the NYPD regarding  
13 stop, question and frisk?

14 A. I have received training in the police academy. I have  
15 received training at Rodman's Neck after we requalify with  
16 firearms twice a year. Every time we requalify, there is a

d4h9f1of

17 lecture before we actually shoot. Stop, question and frisk has  
18 been brought up numerous times. In the different commands I  
19 have worked in, numerous times training sergeants have brought  
20 the subject up. As well as just working with more experienced  
21 officers and supervisors.

22 Q. Was the sergeant at the time, Sergeant Loria, was he ever  
23 physically present for a stop that you conducted?

24 A. Many times. Him being the anticrime sergeant, he was out  
25 with us a lot of the times.

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D4H8FLO3

French - cross

1 Q. Now, what training, if any, have you received regarding how  
2 to identify an armed suspect?

3 A. Again, at Rodman's Neck, every time we requalify, there is  
4 also a video simulation, they call it FATS, which its sole  
5 purpose is to identify armed subjects. That's something that  
6 most times that I have been at the range I recall going to.

7 Q. Now, did you ever receive informal training from other  
8 officers regarding how to identify an armed suspect?

9 A. Absolutely. Just working with more experienced officers,  
10 as well as other supervisors, training sergeants have brought  
11 the subject up numerous times, as well as in the police  
12 academy.

13 Q. Just to be clear, were you trained on characteristics of  
14 armed subjects prior to December of 2009?

15 A. Yes.

16 Q. Do you know if the NYPD has a policy regarding racial  
17 profiling?

18 A. Yes.

d4h9f1of

19 Q. what do you understand that policy to be?  
20 A. That a person cannot be stopped based solely on his  
21 religion, race, creed, beliefs, or any reasons like that.  
22 Q. Have you received any training throughout your career on  
23 the racial profiling policy?  
24 A. Yes. The subject has been brought up numerous times by the  
25 training sergeant. I have received training in the police

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D4H8FLO3

French - cross

1 academy. Again, I have received training at Rodman's Neck and  
2 fellow officers and supervisors.

3 MR. MARUTOLLO: Can I have one moment, your Honor?

4 Nothing further, your Honor.

5 THE COURT: All right. Anything?

6 MR. COREY: One moment, your Honor.

7 THE COURT: Sure.

8 MR. COREY: Nothing further.

9 THE COURT: All set. Thank you.

10 THE WITNESS: Thank you, your Honor.

11 THE COURT: The next witness you're going to call?

12 MR. MOORE: We are going to hear from Sergeant Michael  
13 Loria now.

14 MICHAEL LORIA,

15 called as a witness by the plaintiffs,

16 having been duly sworn, testified as follows:

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

19 THE WITNESS: Sergeant Michael, M-I-C-H-A-E-L, Loria,  
20 L-O-R-I-A.

21 DIRECT EXAMINATION

22 BY MR. MOORE:

23 Q. Good afternoon, Sergeant Loria.

24 A. Good afternoon.

25 Q. Are you still a sergeant?

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3755

D4H8FLO3

Loria - direct

1 A. I am retired.

2 Q. When did you retire?

3 A. March 1st.

4 Q. Keep your voice up a little bit. Maybe move closer to the  
5 microphone so people can hear you.

6 March 1st of this year?

7 A. Yes, sir.

8 Q. So you were a police officer for about 21 years?

9 A. A little more than 21 years, sir.

10 Q. You were promoted to sergeant in 1998, correct?

11 A. Yes, sir.

12 Q. Among the units you worked in was the old street crime  
13 unit, correct?

14 A. That's correct, sir.

15 Q. When were you in the street crime unit?

16 A. I believe, maybe 1997.

17 Q. Just in 1997?

18 A. It was for a short time.

19 Q. Then in '98, you were promoted to sergeant, correct?

20 A. Yes, sir.

21 Q. At some point in 2000, you were assigned as a sergeant in  
22 the anticrime unit of PSA 9, correct?

23 A. In 2000?

d4h9f1of

24 Q. Yes.

25 A. Yes, sir.

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D4H8FLO3

Loria - direct

1 Q. So you were a sergeant in the anticrime unit of PSA 9 from  
2 the year 2000 until you retired, correct?

3 A. Yes, sir.

4 Q. So that's about 12 years, correct?

5 A. Yes, sir.

6 Q. A little more than 12 years. All right.

7 Part of your responsibilities in the anticrime unit of  
8 PSA 9 is to patrol in and around public housing projects in  
9 Queens, correct?

10 A. That's correct.

11 Q. How do you determine how you focus your work on each day,  
12 how do you determine that?

13 A. We look at the weekly conditions report, see where our  
14 crime trends and patterns are. Our CO, commanding officer,  
15 would also assign us to developments to work in.

16 Q. Let me show you what was previously introduced as  
17 Plaintiffs' Exhibit 229. Do you recognize this document?

18 A. Yes, I do. That's Officer French's monthly performance  
19 report.

20 Q. You were supervising him in December of 2009, correct?

21 A. Yes, I was.

22 Q. Did you work the midnight -- 4 to 12 shift -- what shift  
23 did you work in December of 2009?

24 A. We started at 1755, which is 5:55 p.m., to 2:30 in the  
25 morning the following morning.

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D4H8FLO3

Loria - direct

1 Q. What I understand is, you see on the top there, it says  
2 "conditions to be addressed"?

3 A. Yes, sir.

4 Q. You see that?

5 A. Yes.

6 Q. There is one that is written in there, which is just  
7 general enforcement, right?

8 A. Yes, sir.

9 Q. Then there is one that says CPW. That stands for criminal  
10 possession of a weapon, right?

11 A. That's correct.

12 Q. When is that portion of the form filled out? At the  
13 beginning of the month?

14 A. It could be filled out any time during the month.

15 Q. Well, this is the monthly performance report for French for  
16 November of 2009. Then there is one for December of 2009 and  
17 the condition to be addressed is also CPW. Do you see that?

18 A. Yes, sir.

19 Q. Then January 2010, it's the same condition, CPW, correct?

20 A. That's correct.

21 Q. So does the officer just choose which condition to address  
22 when he fills this out?

23 A. We are a plain clothes unit that get assigned to high-crime  
24 locations and CPW is part of the conditions and crime patterns  
25 that we address.

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D4H8FLO3

d4h9f1of  
Loria - direct

1 Q. So the officer would choose which condition to write on  
2 that monthly performance report?

3 MR. MARUTOLLO: Objection. At what point?

4 THE COURT: At that time. Is it the officer's choice  
5 to put down the crime condition or is he directed which one to  
6 put down?

7 THE WITNESS: He would be directed.

8 Q. So if an officer had a partner, would the partner have the  
9 same condition to be addressed, would he be directed by the  
10 supervisor to address the same condition?

11 A. It could be CPW. It could be robberies, phone snatchings,  
12 larcenies.

13 THE COURT: That's what I just asked you. Could the  
14 officer pick which one?

15 THE WITNESS: He would be directed.

16 THE COURT: So if this fellow had a partner, do you  
17 think the partner would put down the same one?

18 THE WITNESS: We could have two conditions. It could  
19 be CPW/robbery condition for that month.

20 THE COURT: One might be directed to put down one and  
21 one might be directed to put down another in the same month?

22 THE WITNESS: They may just put down one and one.

23 THE COURT: "They" being the officers?

24 THE WITNESS: Yes.

25 THE COURT: Might put down one or the other?

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D4H8FLO3

Loria - direct

1 THE WITNESS: Yes.

2 THE COURT: So they do have some choice as to what to  
Page 105

d4h9f1of

3 write there. They are directed to put down A or B, and they  
4 can choose, is that what you're saying?

5 THE WITNESS: Yes.

6 BY MR. MOORE:

7 Q. Do you recall that Officer French's partner at this time  
8 was an Officer Nacelewicz?

9 A. Nacelewicz.

10 MR. MARUTOLLO: I just wanted to object to the form of  
11 the question, just because he said "at this time."

12 THE COURT: December 2009.

13 Q. Do you recall what his crime pattern condition, what his  
14 condition that he was addressing at this same period of time  
15 was?

16 A. Officer Nacelewicz?

17 Q. Yes.

18 A. It was probably a CPW/robbery, seventh major condition.

19 Q. Do you recall exactly what it was or are you just making an  
20 assumption?

21 A. I don't recall exactly what it was.

22 Q. Let me show you this document. It's not marked. I just  
23 want to show it to refresh your recollection. It's the  
24 performance reports of Officer Nacelewicz. Does that refresh  
25 your memory as to what condition he was addressing?

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D4H8FLO3

Loria - direct

1 A. Prevent robberies and homicides on my post.

2 Q. That refreshes your recollection that that's the conditions  
3 he was addressing during that period, correct?

4 A. Correct.

5 Q. Does it also refresh your recollection that he put down the  
6 same entry for both December of 2009 and January of 2010?

7 A. Yes.

8 MR. MOORE: Your Honor, if you would like to have that  
9 document part of the record, I can mark it as part of the  
10 record.

11 THE COURT: It's up to you.

12 MR. MOORE: We might as well mark it. 467.

13 THE COURT: Any objection?

14 MR. MARUTOLLO: Which document?

15 THE COURT: 467.

16 MR. MARUTOLLO: It's already Plaintiffs' Exhibit 228.  
17 We have no objection.

18 THE COURT: 467 received.

19 MR. MARUTOLLO: Just to clarify, that's not a new  
20 document. That's Plaintiffs' Exhibit 228.

21 MR. MOORE: Is it already 228?

22 It's Plaintiffs' 228.

23 THE COURT: Then forget the number 467. 228.

24 (Plaintiffs' Exhibit 228 received in evidence)

25 Q. So what I understood you to say in response to the judge's

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D4H8FLO3

Loria - direct

1 questions was that the officer can put down, has a choice what  
2 to put down on this monthly performance report, correct, had  
3 some choice?

4 A. Correct.

5 Q. Let me show you what was introduced into evidence as  
6 Plaintiffs' Exhibit 226. This is the UF-250 that Officer  
7 French filled out with respect to Cornelio McDonald on December

8 19, 2009. It's already introduced into evidence.

9 You weren't present at that stop, correct?

10 A. No, I wasn't.

11 Q. But you see up there, the condition, which  
12 felony/misdemeanor suspected, you see there he put CPW?

13 A. Yes.

14 Q. Is that because that was the condition he was addressing  
15 generally that month, CPW?

16 MR. MARUTOLLO: Objection, your Honor. I think it  
17 calls for speculation.

18 THE COURT: One second.

19 It does call for speculation. Objection sustained.

20 Q. To your knowledge, did Officer French put down CPW on this  
21 UF-250 because that was the general condition he was addressing  
22 at this period of time, to your knowledge?

23 THE COURT: Do you know why he did what he did? Do  
24 you know his state of mind?

25 THE WITNESS: At that time?

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D4H8FLO3

Loria - direct

1 THE COURT: Yes.

2 THE WITNESS: Do I know his state of mind? It looked  
3 like he stopped him for a CPW.

4 THE COURT: That's not the question. Do you know why  
5 he put that down? You don't know, do you?

6 THE WITNESS: No.

7 Q. So let's go to the stop and look at Plaintiffs' Exhibit  
8 226, which once again is the UF-250 concerning this stop by  
9 Officer French.

d4h9f1of

10 Did you just hear Officer French's testimony? Were  
11 you in the courtroom?

12 A. No, I was not.

13 Q. Now, you weren't present for the stop, correct?

14 A. I wasn't present.

15 Q. So you have no personal knowledge of the stop, correct?

16 A. No, I don't.

17 Q. The only knowledge you would have of this stop would be  
18 from either reviewing the 250 or talking to Officer French,  
19 correct?

20 A. That's correct.

21 Q. You don't recall ever reviewing this 250, do you?

22 A. I did review it because I signed it.

23 Q. You don't recall when you reviewed it, do you?

24 A. The exact date, no.

25 Q. It could have been some days afterwards, right?

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D4H8FLO3

Loria - direct

1 A. That's correct.

2 Q. When you're reviewing the 250, you're just reviewing it to  
3 make sure it's signed by the officer and all the boxes are  
4 filled in, correct?

5 A. And that he had reasonable suspicion to stop this person.

6 Q. Do you recall giving a deposition in this case where you  
7 were asked that question, why were you reviewing the UF-250?

8 A. Yes.

9 Q. And do you recall being asked this question and giving this  
10 answer on page 27, line 3:

11 "Q. When you review 250s form in your practice, what are you  
12 reviewing it for?

13 "A. Make sure that it's signed and all the boxes are filled  
14 in.

15 "Q. Are you reviewing it for anything else?

16 "A. No."

17 Do you recall being asked those questions and giving  
18 those answers at your deposition?

19 A. Yes. But I think I --

20 Q. Do you recall being asked those questions?

21 A. Yes.

22 Q. That was a deposition that was taken January 15, 2013,  
23 correct, just a couple of months ago?

24 A. That's correct.

25 Q. At that time, you were represented by counsel for the city,  
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D4H8FLO3

Loria - direct

1 correct?

2 A. Yes.

3 Q. That was Mr. Marutollo and Ms. Publicker?

4 A. Yes.

5 Q. And you took an oath to tell the truth, correct?

6 A. Yes.

7 Q. Now, on this form, it's your understanding, is it not, that  
8 officers are instructed to check off all boxes that apply,  
9 correct?

10 A. That's correct.

11 Q. So if there is more than one circumstance that led Officer  
12 McDonald -- Officer French to stop Mr. McDonald, he would have  
13 checked off more than one box, correct?

14 A. That's correct.

15 Q. The only box he checked off here, in terms of what were the  
16 circumstances which led to the stop, was suspicious bulge,  
17 correct?

18 A. Yes.

19 Q. Then there is some handwriting that follows below that and  
20 it says "cell phone." Do you see that?

21 A. Yes.

22 Q. That doesn't mean that's what he saw, that means that's  
23 what he found after he frisked and searched the individual,  
24 correct?

25 MR. MARUTOLLO: Objection, your Honor.

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D4H8FLO3

Loria - direct

1 THE COURT: What is the objection?

2 MR. MARUTOLLO: It calls for speculation. I think the  
3 question was what Officer French meant.

4 THE COURT: It wasn't what he meant. He wrote the  
5 word cell phone.

6 MR. MARUTOLLO: The question --

7 MR. MOORE: I will rephrase it.

8 Q. What does that mean to you, Sergeant Loria, when an officer  
9 checks off suspicious bulge and then writes cell phone, what  
10 does that mean to you?

11 A. The suspicious bulge turned out to be a cell phone.

12 Q. It doesn't mean that the suspicious bulge that he is  
13 describing it when he looked at it as possibly a cell phone,  
14 correct?

15 MR. MARUTOLLO: Objection.

16 THE COURT: I have no idea why Mr. Moore would want to  
17 ask that question. That's a different point. You want to

18 object to it? Sustained.

19 Q. In any event, you believe in looking at this that was the  
20 result of what his frisk and search reveal was, a cell phone,  
21 correct?

22 A. That's correct.

23 Q. You don't really know why Officer French checked off that  
24 box or wrote cell phone because you never asked him about this  
25 250, correct?

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D4H8FLO3

Loria - direct

1 MR. MARUTOLLO: Objection. I think that still calls  
2 for speculation.

3 THE COURT: The second question is fine.

4 You never asked him, right?

5 THE WITNESS: Not that I recall.

6 Q. You didn't ask him because you didn't see a reason to ask  
7 him, right?

8 A. Correct.

9 Q. Because when you reviewed this form, that looked OK to you,  
10 correct?

11 A. That's correct.

12 Q. That's why you signed it with your signature on the second  
13 page, correct? That's your signature there, Sergeant Loria?

14 A. Yes, sir.

15 Q. In your experience, Sergeant Loria, just the mere fact of a  
16 suspicious bulge alone is not enough to establish reasonable  
17 suspicion of criminal possession of a weapon, correct?

18 A. A suspicious bulge can lead to a stop.

19 THE COURT: If that's the only thing? If that was the

20 only thing that the officer could check, is that enough to  
21 allow a stop? That's what he asked you.

22 THE WITNESS: Yes, your Honor.

23 THE COURT: You think it is. OK.

24 Q. Let me direct you to your deposition which you took a  
25 couple of months ago. On page 36, line 15, the question was

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D4H8FLO3

Loria - direct

1 put to you:

2 "Q. OK. In your experience, is a suspicious bulge alone  
3 reasonable suspicion of criminal possession of a weapon?

4 "A. Alone, no. Suspicious bulge, there would be other  
5 circumstances."

6 That's the testimony you gave at your deposition just  
7 a couple of months ago, correct?

8 MR. MARUTOLLO: I would object to that as improper  
9 impeachment. The question was related to the boxes filled out  
10 by Officer French, and it's in the context of questioning about  
11 this 250, in particular, where there are other circumstances.

12 THE COURT: Overruled. He was asked clearly and  
13 explicitly if that is sufficient standing alone, and he said  
14 no. At that time, he said no. And that is contradictory to  
15 what he said here today.

16 Q. Now, do you recall testifying at your deposition just a  
17 couple of months ago that if you're not present at a stop and  
18 you review a 250, you do not review it to determine whether  
19 there was reasonable suspicion. Do you recall testifying to  
20 that at the time at your deposition on January 15, 2013?

21 A. Yes.

22 Q. You also recall, do you not, testifying at your deposition

23 that you did not recall anybody in the NYPD ever telling you,  
24 in sum or substance, that you should review a 250 to determine  
25 whether there was reasonable suspicion. That's what you also

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D4H8FLO3

Loria - direct

1 testified to in your deposition in January, correct?

2 A. Yes. But I think I changed it on that form.

3 Q. We are going to get to that. And that deposition was on  
4 January 15, 2013, correct?

5 A. That's correct.

6 Q. And you made some changes to that deposition on February  
7 12, 2013, correct?

8 A. That's correct.

9 Q. And those changes were made to your deposition after you  
10 became aware that you were going to be a witness in this case,  
11 correct?

12 MR. MARUTOLLO: Objection, your Honor. That calls for  
13 speculation.

14 THE COURT: No. It's just a matter of timing. He  
15 either knew it or not.

16 He is just asking, did the changes occur after you  
17 became aware that you would be a trial witness?

18 THE WITNESS: No. I believe I made a mistake, and I  
19 wanted to correct them.

20 THE COURT: That wasn't the question. At the time you  
21 made the changes, did you know you were going to be a trial  
22 witness? He is trying to get the timing.

23 THE WITNESS: I believe I already knew I was going to  
24 be.

25 Q. Did you know that the city was trying to prevent you from  
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D4H8FLO3 Loria - direct

1 being a witness in the case?

2 MR. MARUTOLLO: Objection, your Honor.

3 THE COURT: You mean had written some letters asking  
4 that he not be called, is that what you mean?

5 MR. MOORE: Yes. Well, I am not sure. There was an  
6 argument in court on January --

7 THE COURT: Were you aware of any such argument that  
8 the city was trying to preclude you from being a witness at  
9 trial? Were you aware of that argument being made?

10 THE WITNESS: No.

11 MR. MOORE: I just want to ask the Court to take  
12 notice of the fact that on January 13, in this court, the city  
13 argued --

14 THE COURT: That doesn't matter. If he wasn't aware  
15 it, it's totally irrelevant.

16 MR. MOORE: You don't want to hear it?

17 THE COURT: No.

18 BY MR. MOORE:

19 Q. In any event, you changed several of your answers on  
20 February 12, 2013, correct?

21 A. That's correct.

22 Q. Two of those answers you changed were on page 41 of your  
23 deposition. Let me hand you --

24 MR. MOORE: Can I hand him the errata sheet, your  
25 Honor?

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D4H8FLO3 Loria - direct

1 THE COURT: Sure.

2 Q. The answer you gave on page 41 where you said -- you were  
3 asked a question beginning on page 40:

4 "Q. But if you're not present at a stop and you're reviewing  
5 the 250 related to a stop, do you review that 250 at all to  
6 determine whether there was reasonable suspicion?"

7 At your deposition, you said, "I would say no."

8 When you reviewed your deposition, you changed that  
9 answer from "I would say no" to "based on my review of the face  
10 of the 250, I would say yes."

11 So you changed your answer from no to yes, correct?

12 MR. MARUTOLLO: I would like to object. For the  
13 record, just for clarity sake, at his same deposition, later in  
14 the deposition, specifically, page 68, line 23 to 24, he said,  
15 "Yes, I would review it to see if he had reasonable suspicion."  
16 So that testimony was also during his deposition.

17 THE COURT: OK.

18 Q. In any event, on the transcript on page 41, you changed the  
19 answer from no to yes, correct?

20 A. Yes, sir.

21 Q. Then you were asked on page 41, the question, "Has anyone  
22 in the NYPD ever told you, in sum or substance, that you should  
23 review a 250 to determine whether there was reasonable  
24 suspicion for a stop?"

25 At that time, you said, "Not that I recall, no." And

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D4H8FLO3 Loria - direct

1 on February 12, when you reviewed your deposition, you changed  
2 that from, "Not that I recall, no," to, "Although I don't  
3 recall specific instances, based on my training, yes."

4 So you changed your answer there from no to yes,  
5 correct?

6 A. Yes, sir.

7 Q. And the reason you gave for changing your answer was that  
8 you misunderstood the question, right?

9 A. Yes.

10 Q. All right. Now, you were also asked at the deposition,  
11 going to page 43, you were asked the question:

12 "Q. All right. Looking at this 250 form today, are you able  
13 to determine whether Officer French had a reasonable suspicion  
14 to stop Cornelio McDonald?"

15 There is an objection.

16 "You can answer."

17 Then you say, "Reasonable suspicion to initiate the  
18 initial stop?"

19 "Q. Right.

20 "A. Like I said, I wasn't there on the initial stop.

21 "Q. So you can't tell looking at this?

22 "A. I can't tell."

23 That's the answer you gave at your deposition in  
24 January of 2013, correct?

25 MR. MARUTOLLO: I would first object to the form. I  
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D4H8FLO3

Loria - direct

1 am not sure if that was impeachment or not. But to the extent  
2 it was impeachment, Sergeant Loria also clarified at his  
3 deposition. On page 60, lines 10 through 14:

4 "Q. Are you now testifying that looking at this 250 you're  
5 able to conclude whether there is reasonable suspicion for the  
6 stop?"

7 And then on line 14:

8 "A. Yes."

9 So just for clarity sake, to the extent it's  
10 impeachment.

11 BY MR. MOORE:

12 Q. Just for clarity sake, that clarification came after a  
13 break where you had a discussion with counsel, correct?

14 A. That's correct.

15 Q. Now, were you aware whether there was any kind of robbery  
16 condition on December 18 or 19, 2009?

17 A. We were assigned to that development. So that's where we  
18 usually focus our attention on, would be the robberies and guns  
19 that probably was the condition that day.

20 Q. But you don't recall, do you, as you sit here today,  
21 whether in fact you had personal knowledge that there was a  
22 robbery condition on that day, correct, December 18 or December  
23 19?

24 A. I don't recall a specific robbery pattern.

25 Q. You can't tell from looking at Officer French's 250 whether

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D4H8FLO3

Loria - direct

1 there was any kind of robbery condition, correct?

2 A. No.

3 Q. When you went to review your deposition in February of  
4 2013, on February 12, you changed that answer as well, the  
5 answer you gave on line 15, from, "I don't recall," to, "I am

6 aware of robberies and gun-related patterns in the vicinity of  
7 where Mr. McDonald was stopped and that we were to address  
8 robbery conditions at the time of the December 19, 2009 stop."

9 So you changed your answer to that question as well,  
10 correct?

11 A. Yes. Yes, sir.

12 Q. And the reason you gave for the change there was that your  
13 current recollection, meaning the recollection as you're  
14 writing the errata sheet, is different from what it was during  
15 the deposition, correct?

16 A. Yes.

17 Q. That's the reason you gave for making the change, correct?

18 A. Well, I went back and I checked --

19 Q. You also met with your --

20 MR. MARUTOLLO: I think he was still answering the  
21 question.

22 THE COURT: All right.

23 A. I went back and checked activity reports of those -- of  
24 that month, and there was CPW and there were robbery  
25 conditions -- CPW/robbery on their activity reports, and we

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D4H8FLO3

Loria - direct

1 were focused -- that's what my unit was focused on, gun and  
2 robbery related crimes, at that location and at that time, and  
3 working in that development.

4 Q. You also met with counsel for the city, correct, before you  
5 made those changes, correct?

6 A. That's correct.

7 Q. Did they direct you to go back and do that search?

8 MR. MARUTOLLO: Objection, your Honor.

9 THE COURT: Objection sustained.

10 Q. Now, you were also asked at the deposition in January,  
11 "Would there need to be some crime condition that Officer  
12 French was aware of in order for the time of the stop, the  
13 location of the stop, and suspicious bulge to be reasonable  
14 suspicion?"

15 And your answer at the time was, "I believe so, yes."

16 Do you recall that?

17 A. Yes, sir.

18 Q. But you changed that answer to your deposition as well,  
19 correct?

20 A. That's correct.

21 Q. You changed it from, "I believe so, yes," to, "I don't  
22 believe so," correct?

23 A. I don't believe so --

24 Q. That's the change you made in your answer, correct?

25 A. Yes. But if Officer French would have saw somebody with a

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D4H8FLO3

Loria - direct

1 bulge --

2 THE COURT: On the errata sheet, it was changed from,  
3 "I believe so, yes," to, "I don't believe so." It's right on  
4 the sheet. So he did change it to those words, yes.

5 Q. You changed it because you said you misunderstood the  
6 question, right?

7 A. Yes.

8 MR. MARUTOLLO: Your Honor, he also said, "And I  
9 misspoke."

10 THE COURT: Both of that appears on the document that

11 I am looking at.

12 MR. MOORE: If counsel for the city could just wait  
13 until the appropriate time to get up.

14 Anyway, I will go on.

15 Q. Then you were asked at the deposition, "So, if there were  
16 no crime conditions, then the time of the stop, the location of  
17 the stop, and suspicious bulge, those three things would not be  
18 reasonable suspicion, correct?"

19 And your answer was, "That's correct."

20 That's the answer you gave at your deposition,  
21 correct?

22 THE COURT: That's what you first said, right?

23 THE WITNESS: Yes, your Honor.

24 Q. Then you changed that from, "That's correct," to, "That is  
25 not correct," right?

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D4H8FLO3

Loria - direct

1 A. Yes, sir.

2 THE COURT: We are going to stop now for the luncheon  
3 recess and reconvene at 10 after 2.

4 (Luncheon recess)

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3777

D4H8FLO3

Loria - direct

1

AFTERNOON SESSION

2

2:10 p.m.

3

MICHAEL LORIA, resumed.

4

BY MR. MOORE:

5

Q. Sergeant Loria, we were talking before the break about how you supervise your officers with respect to their 250 activity.

6

You recall that, right?

7

A. Yes, sir.

8

Q. You don't recall if you have ever discussed a 250 that you review with the officers who actually completed the 250, do you?

9

10

11

A. I don't recall specific times, but I am sure over my career I have talked to officers about 250s.

12

13

Q. Do you recall being asked at your deposition, on page 77, beginning on line 16:

14

15

16 "Q. Have you ever discussed a <sup>d4h9f1of</sup> 250 that you reviewed with the  
17 officer who completed the 250?

18 "A. I don't recall."

19 Then the next question was:

20 "Q. You don't recall having done that or you don't recall  
21 whether you have done that?

22 "A. I don't recall having done that."

23 Do you recall being asked those questions and giving  
24 those answers at your deposition?

25 A. Yes, sir.

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3778

D4H8FLO3

Loria - direct

1 Q. You then made some changes in your errata sheet after you  
2 reviewed the deposition, right?

3 A. That's correct.

4 Q. You changed the answer from, "I don't recall," to, "I can't  
5 recall a specific instance, but I have discussed 250s with  
6 officers under my supervision."

7 That's what you said in your errata sheet, correct?

8 MR. MARUTOLLO: Your Honor, just for clarification,  
9 there were two changes there on the errata sheet for each of  
10 those questions. The first one actually said, "I can't recall  
11 a specific instance, but when I verify an arrest, I have  
12 discussed stop circumstances which lead to the arrest."

13 MR. MOORE: You're absolutely right.

14 Q. Your counsel pointed out that you changed both the answers  
15 to the two questions I read, correct?

16 A. That's correct.

17 Q. Thank you.

18 You don't recall, though, ever telling an officer who  
Page 123

19 was under your supervision, in sum or substance, that he  
20 shouldn't have conducted a frisk that you observed or that you  
21 reviewed, correct?

22 A. That's correct.

23 Q. You don't recall ever having an occasion where an officer  
24 under your supervision who conducted a stop that you believe  
25 would require reasonable supervision, but then you developed a

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3779

D4H8FLO3

Loria - direct

1 concern that they didn't have reasonable supervision, you never  
2 had occasion --

3 THE COURT: Are you saying reasonable supervision or  
4 reasonable suspicion?

5 MR. MOORE: I'm sorry. Reasonable suspicion.

6 THE COURT: Thank you. You said supervision.

7 Q. You don't recall that circumstance ever occurring, correct?

8

9 A. Repeat the question.

10 Q. You don't recall an occasion where an officer under your  
11 supervision conducted a stop that you believe would require  
12 reasonable suspicion, but you believed that the officer -- but  
13 you had a concern that the officer didn't have reasonable  
14 suspicion? You don't recall that circumstance ever having  
15 occurring, do you?

16 MR. MARUTOLLO: Objection just to form.

17 THE COURT: It's still very long. I think I got it  
18 the second time. Did you?

19 THE WITNESS: I am kind of lost.

20 THE COURT: You will have to shorten it then.

21 Q. Let me direct your attention to your deposition on page 78.

22 MR. MARUTOLLO: Objection, your Honor. I don't think  
23 that's proper impeachment.

24 THE COURT: It's not meant for impeachment. If you  
25 want to read the question you asked and pose it here, if it

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D4H8FLO3

Loria - direct

1 makes it easier for you to frame it, that's OK.

2 MR. MOORE: Let me do it this way because it's similar  
3 to the question I asked previously.

4 Q. You don't recall ever discussing with an officer whether  
5 you had a concern about whether they had reasonable suspicion  
6 when you were reviewing that officer's 250, right, you don't  
7 recall that ever happening?

8 A. No, I don't.

9 Q. That was clear hopefully.

10 You also don't recall ever giving an officer under  
11 your supervision any instructions about stop or frisk, correct?

12 A. I don't recall a specific instance when, but I do hold  
13 informal discussions with my guys.

14 Q. OK. When you answered that question at the deposition you  
15 just said, "I don't recall," correct?

16 A. Yes.

17 Q. Then when you went over your deposition, you added that  
18 last portion, correct?

19 A. That's correct.

20 Q. Now, is it your understanding that when an officer is  
21 conducting a stop based upon reasonable suspicion, that the  
22 person who is being stopped must answer questions posed by the  
23 officer, is that your understanding?

24 A. No. He doesn't have to answer any questions.

25 Q. At your deposition, do you recall saying that that was your

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D4H8FLO3

Loria - direct

1 understanding?

2 A. Yes. I was mistaken.

3 Q. So you changed your answer on that occasion when you  
4 reviewed it from saying, yes, that was your understanding, to  
5 no, that wasn't your understanding, right?

6 A. The person doesn't have to answer the questions.

7 Q. So you agree with me you changed your answer from yes to  
8 no, right?

9 A. That's correct.

10 Q. You don't recall ever personally giving instructions to an  
11 officer under your supervision regarding the levels of  
12 suspicion that an officer has to understand with regard to  
13 their contacts with an individual?

14 Do you understand what I am referring to? There's  
15 four levels of suspicion with regard to an officer's contact  
16 with an individual on the street, right? You know what I am  
17 referring to?

18 MR. MARUTOLLO: I would object to the form.

19 THE COURT: There is a long prelude.

20 Are you aware of the four levels stated in the state  
21 court's DeBour decision?

22 THE WITNESS: Yes.

23 Q. You don't recall ever personally giving instructions to  
24 officers about those levels of suspicion, do you?

25 A. Probably not formal instruction, but I have given informal

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3782

D4H8FLO3 Loria - direct

1 instruction on the levels of suspicion.

2 Q. Again, at your deposition, you said you didn't recall, you  
3 didn't add that additional information that you just added  
4 here, correct?

5 A. That's correct.

6 Q. So that's another instance where you changed your  
7 deposition, correct?

8 A. That's correct.

9 Q. You don't recall ever being told by one of your supervisors  
10 that you need to instruct your officers about the different  
11 levels of suspicion, right?

12 A. I don't recall that.

13 Q. You don't recall any lieutenant ever telling you that you  
14 need to instruct your police officers about stop and frisk,  
15 correct?

16 A. That's correct.

17 Q. You don't recall any lieutenant ever telling you you need  
18 to discuss with an officer under your supervision what  
19 reasonable suspicion is, right?

20 A. That's correct.

21 Q. Now, going back to the UF-250, and I am sorry if I asked  
22 this previously, and I am sure if I did, many people will get  
23 up and object, on the UF-250 filled out by Officer French,  
24 which is Plaintiffs' Exhibit 226, the only box he checked was  
25 suspicious bulge. That's just the preliminary question. The

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3783

D4H8FLO3 Loria - direct

1 only box he checked was suspicious bulge there, correct?

2 MR. MARUTOLLO: Objection to form. He pointed to  
3 there. You are referring only to that.

4 Q. In the section that says, "what were circumstances which  
5 led to stop," that's the only box he checked there, right?

6 A. That's correct.

7 Q. And you would agree with me that a suspicious bulge without  
8 any other circumstances would not permit somebody to stop  
9 somebody else, correct?

10 A. A suspicious bulge can cause an officer to stop somebody.

11 Q. It can?

12 A. Can.

13 MR. MARUTOLLO: Objection. I think this is cumulative  
14 testimony.

15 THE COURT: We did this before the lunch break. He  
16 said that, and then you pointed out he said the opposite at the  
17 deposition.

18 MR. MOORE: I wasn't sure. Since we have already done  
19 that, I won't go back over it.

20 Q. You agree that officers are supposed to report information  
21 about a stop, details of a stop in their memo books, correct?

22 A. That's correct.

23 Q. And you reviewed the memo books on occasion of your  
24 officers, correct?

25 A. That's correct.

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D4H8FLO3 Loria - direct

1 Q. Showing you what was previously marked as Plaintiffs'

2 Exhibit 231, which was the memo book entry from Officer French,  
3 I know it's hard to read, but do you believe that's a  
4 sufficient entry with regard to Officer French's stop of  
5 Cornelio McDonald in his memo book?

6 MR. MARUTOLLO: I object to the extent that there is  
7 more than just the entry that's being shown on the elmo screen  
8 right now.

9 THE COURT: The only other entry I thought was the  
10 pedigree.

11 MR. MARUTOLLO: That's true.

12 THE COURT: So that's the description, if you can make  
13 this out at all. If not, we can read it to you because we had  
14 it in the record earlier. But in addition to this narrative,  
15 there was pedigree -- name, date of birth, and address. So  
16 considering the pedigree, plus this, is that sufficient in your  
17 view?

18 THE WITNESS: I believe so, yes.

19 Q. Even though there's no details, pertinent details regarding  
20 the stop entered in the memo book, correct?

21 A. Did he put CPW in the entry?

22 Q. He put CPW. That's all that's mentioned in terms of the  
23 actual criminal conduct, CPW. Do you see that?

24 A. This is his memo book to help recollect his memory, and he  
25 did record the stop in his memo book.

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D4H8FLO3 Loria - direct

1 Q. One of your jobs is to make sure your officers are making  
2 adequate entries in their memo books, correct?

3 A. That's correct.

4 Q. That's not just something you do as a matter of practice,  
Page 129

5 that's New York City Police Department regulations, that's what  
6 you are required to ensure that your officers do, correct?

7 A. That's correct.

8 Q. And you believe that this entry standing alone is a  
9 sufficient entry on that day by Officer French?

10 MR. MARUTOLLO: I object. Asked and answered.

11 THE COURT: Yes. He just said it was. Sustained.

12 Q. You don't recall ever reviewing an activity log of an  
13 officer where you found that the facts supporting a stop and  
14 frisk were not there, correct?

15 A. I don't recall that.

16 Q. You don't recall ever discussing with an officer whether  
17 the officer had reasonable suspicion after reviewing the memo  
18 book entry about a stop, you don't recall having that kind of  
19 discussion, right?

20 A. I don't recall that, sir.

21 Q. Again, no one in the NYPD has ever told you, in sum or  
22 substance, that when you're reviewing entries about stops in  
23 activity logs, you should be reviewing them to determine  
24 whether there is reasonable suspicion, nobody in the NYPD has  
25 ever told you that, correct?

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D4H8FLO3

Loria - direct

1 A. Not that I recall.

2 Q. You made a memo book entry for this day as well, correct?

3 Let me show you what has been marked Plaintiffs'  
4 Exhibit 31.

5 I'm sorry. Not 31. Plaintiffs' Exhibit 227.

6 Can you identify this as excerpts from your memo book,

7 Sergeant Loria?

8 A. Yes, sir.

9 MR. MOORE: Move the admission of Plaintiffs' Exhibit  
10 227.

11 MR. MARUTOLLO: No objection.

12 THE COURT: 227 is received.

13 (Plaintiffs' Exhibit 227 received in evidence)

14 Q. This is the front cover of your memo book, correct?

15 A. That's correct.

16 Q. Then the entry with respect to -- at least the relevant  
17 entries with respect to December 18 appear on Bates stamp  
18 numbered 2808. Those are the entries that you made that are  
19 relevant to the stop, correct?

20 MR. MARUTOLLO: Objection, your Honor. I don't  
21 believe that --

22 MR. MOORE: I will withdraw that.

23 Q. These are the entries that you made with respect to Officer  
24 French on that day, correct?

25 A. And Officer Nacelewicz also.

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D4H8FLO3 Loria - direct

1 Q. Also known as Naz, right?

2 A. Yes, sir.

3 Q. This shows that they were partners that day, correct?

4 A. That's correct.

5 MR. MOORE: I have nothing further, Judge.

6 THE COURT: Mr. Marutollo.

7 MR. MARUTOLLO: Thank you, your Honor.

8 MR. MOORE: Just so the record is complete, I do want  
9 to make a representation with respect to the timing of these

10 changes, because we advised you in the conference on January 31  
11 specifically why we thought Sergeant Loria's testimony was  
12 relevant because he had already testified that he would not be  
13 able to conclude from looking at the 250 that there was  
14 reasonable suspicion, and it was only after that that these  
15 changes occurred.

16 MR. MARUTOLLO: Again, at the time of his deposition,  
17 he did indicate that there was reasonable suspicion for the  
18 stop. Well, there was testimony earlier in the deposition to  
19 correct that. At the time of the January 31st conference, we  
20 had not gotten back the witness's deposition transcript so the  
21 timing here I think is irrelevant. In any event, he is on the  
22 stand now.

23 MR. MOORE: We had the transcript.

24 MR. MARUTOLLO: We didn't have a transcript. That was  
25 the more important thing.

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D4H8FLO3

Loria - direct

1 MR. MOORE: Anyway, nothing further.

2 (Continued on next page)

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3789

D4h9flo4

Loria - cross

1 CROSS-EXAMINATION

2 BY MR. MARUTOLLO:

3 Q. Good afternoon again, Sergeant Loria.

4 A. Good afternoon, sir.

5 Q. How long are you employed by the NYPD?

6 A. A little over 21 years, sir.

7 Q. And I believe you testified you retired March 1, 2013?

8 A. That's correct.

9 Q. And when were you promoted to sergeant?

10 A. August of 1998.

11 Q. And how did you receive that promotion?

12 A. It was a sergeant's exam.

13 Q. Upon being promoted to sergeant, did you receive any  
14 training?

d4h9f1of

15 A. Yes. I received leadership training.

16 Q. And do you remember what was discussed at that training  
17 generally?

18 A. Responsibilities of a sergeant.

19 Q. Was supervision of officers discussed?

20 A. That's correct.

21 Q. During your time as an anticrime sergeant, how did you  
22 ensure that officers under your supervision were conducting  
23 stops based on reasonable suspicion?

24 A. The officers that I supervised were under my direct  
25 supervision. We went out as a team. I observed then out in

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D4h9f1o4

Loria - cross

1 the field. I checked out their memo books, and their formal  
2 training, informal training as far as sitting in the -- our  
3 office before we went out for tour and instructing them.

4 Q. Did you review 250s as part of your duties?

5 A. Yes, I did.

6 Q. Did you ever monitor the radio?

7 A. Yes. For description jobs, heavy jobs with descriptions.

8 Q. And if you would hear radio calls about individuals fitting  
9 the description what, if anything, would you do?

10 MR. MOORE: Object to the form, Judge. I think it's  
11 speculative.

12 THE COURT: Let me review that.

13 I'll allow that.

14 THE WITNESS: Could you repeat the question please.

15 THE COURT: He said if you would hear radio calls  
16 about individuals fitting the description what, if anything,

d4h9f1of

17 would you do?

18 THE WITNESS: I would respond to those locations and  
19 observe my officers.

20 Q. And were you ever present for stops that officers under  
21 your supervision made?

22 A. Yes.

23 Q. How frequently would you be present for these stops?

24 A. Very frequently. They were, like I said, under my direct  
25 supervision. We all worked together in the same development.

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D4h9f1o4

Loria - cross

1 Q. Now, as an anticrime sergeant what, if anything, would you  
2 do at the start of a given tour?

3 A. We would have informal meetings in the office, discuss any  
4 crime patterns, robbery conditions, anything of a pertinent  
5 information that would happen on that tour. We give color of  
6 the day out.

7 Q. Would you also give out assignments and things like that?

8 A. Yes.

9 Q. How did you learn about conditions that needed to be  
10 addressed during a given tour?

11 A. They would have a weekly conditions report that would be  
12 hung up within the command. And it was the officer's  
13 responsibilities to look at the board, familiarize themselves  
14 with the locations. And I would also have a handout. And I  
15 would hand it out in my office and they would take a look at  
16 that.

17 Q. Prior to December 19, 2009 did you personally observe  
18 Officer French making any stops?

19 A. Yes.

d4h9f1of

- 20 Q. And how long was Officer French under your supervision?  
21 A. Around five years, I would guess.  
22 Q. And how often were you in the field with Officer French?  
23 A. Basically everyday he worked, I worked, we were all  
24 together out in the field.  
25 Q. Did you have an understanding of how Officer French

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D4h9flo4

Loria - cross

- 1 conducted stops?  
2 A. Yes. Officer French he would, you know, explain the reason  
3 for his stops. He would make lawful stops. And he would fill  
4 out his 250s.  
5 Very courteous towards the person he was stopping.  
6 Q. At the start of your tour on December 18, 2009 did you have  
7 a meeting with officers under your supervision?  
8 MR. MOORE: I'm sorry. What date was it?  
9 MR. MARUTOLLO: December 18.  
10 THE WITNESS: Yes, I did.  
11 Q. And do you remember if Officer French was present at that  
12 meeting?  
13 A. Yes.  
14 Q. And following the meeting on December 18, 2009 did you see  
15 Officer French at any point during your tour that night?  
16 A. Yes, I believe it was approximately 1:25 in the morning. I  
17 did a van holiday integrity inspection of their van, which is a  
18 citywide program for shopping on duty during the holidays. So  
19 I had to inspect their van, make sure there was no unauthorized  
20 packages in their van.  
21 Q. There were no unauthorized packages in their van, right?

d4h9f1of

22 A. No, sir.

23 Q. Did you see who, if anyone, was working with Officer  
24 French?

25 A. Officer Nacelewicz.

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D4h9f1o4

Loria - cross

1 Q. Was he the only other person working with Officer French?

2 A. Yes, sir.

3 Q. And just to be clear, were you present for the stop of  
4 Mr. McDonald on December 19, 2009?

5 A. No, I wasn't.

6 Q. As a supervisor have you ever subjected officers under your  
7 command to a quota?

8 A. No, sir.

9 Q. Have you ever punished officers under your command for  
10 failing to conduct a certain number of stops, summonses, or  
11 arrests?

12 A. No, sir.

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

14 (Pause)

15 Nothing further.

16 THE COURT: Mr. Moore.

17 REDIRECT EXAMINATION

18 BY MR. MOORE:

19 Q. What about numerical goals? Did you ever set any kind of  
20 numerical goals for your officers in terms of their enforcement  
21 activity?

22 A. Referring to quotas?

23 Q. No. I'm referring to numerical goals.

24 A. No numerical goals were ever set. Our only job was to

25 address the conditions that were assigned.

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3794

D4h9f1o4

Loria - redirect

1 Q. Did you ever suggest it would be a good idea to get a  
2 certain number of stops or a certain number of arrests or a  
3 certain number of C summonses?

4 MR. MARUTOLLO: Objection. I think this was asked and  
5 answered.

6 THE COURT: No. I'll allow it.

7 MR. MOORE: No. He asked about quotas.

8 THE COURT: I understand.

9 Go ahead.

10 THE WITNESS: No, sir.

11 Q. Are you aware of any supervisors in the PSA 9 who used  
12 numerical goals or numerical standards to try to motivate their  
13 officers?

14 A. No, sir.

15 Q. You've never heard that having taken place anywhere in the  
16 police department?

17 Is that your testimony?

18 A. That's my testimony.

19 Q. You said you went to leadership training when you became a  
20 sergeant, correct?

21 A. Yes, sir.

22 Q. And part of that leadership training was to train you how  
23 to be a good supervisor, right?

24 A. Yes, sir.

25 Q. And being a good supervisor meant your officers were

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D4h9flo4 Loria - redirect

1 complying with departmental regulations, right?

2 A. Yes, sir.

3 Q. And one of the departmental regulations that you would be  
4 wanting to get your supervisors to comply with is the  
5 regulations with what they're supposed to put in their memo  
6 book, correct?

7 A. That's correct.

8 Q. And one of the things you were taught in the leadership  
9 training was that in their memo books if it's a stop and frisk  
10 they're supposed to put pertinent details in their memo books  
11 about the stop and frisk, correct?

12 A. Yes, sir.

13 Q. And you're specifically trained that that means not just  
14 repeating what the checked off boxes are. That's actually  
15 putting the details in their memo book relative to the actual  
16 stop and frisk, correct?

17 MR. MARUTOLLO: Objection, your Honor.

18 This training leadership course I believe took place  
19 in 2000. I'm not sure exactly -- if 250s were even available  
20 in 2000.

21 THE COURT: I'm sorry?

22 MR. MARUTOLLO: Withdraw that last part.

23 Just to be clear. This was from 2000.

24 THE COURT: Thank you for adding that. That sounds  
25 like testimony to me.

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d4h9f1of

1           When was the leadership training course?

2           THE WITNESS: I took it in, when I got promoted, your  
3 Honor, in 1998.

4           THE COURT: You took it in 1998?

5           THE WITNESS: I'm sorry. I got promoted in 1998, yes.

6           THE COURT: And you took it then?

7           THE WITNESS: Yes.

8           THE COURT: Regardless of that, were you taught that,  
9 and then your question was, that the entry in the memo book  
10 should have more details than just what's on the check-off  
11 form?

12           THE WITNESS: I don't recall them telling me that it  
13 should be more than what's in the check-off box.

14           THE COURT: Really? They can just repeat the  
15 check-off boxes in the memo book?

16           THE WITNESS: There should be details.

17           THE COURT: Should there be details beyond what's on  
18 the UF 250 check-off box form?

19           THE WITNESS: I believe it's what the officer needs  
20 that he can recollect that stop.

21 BY MR. MOORE:

22 Q. From time to time as you were a sergeant did you get  
23 operations orders or training material that talked about the  
24 importance of officers putting details in their memo books?

25 A. I'm sure somewhere down the line I did.

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3797

D4h9flo4

Loria - redirect

1 Q. And from time to time did that reinforce in your mind the  
2 importance of officers putting details about the stop in their

3 memo book beyond just what is checked off on the UF 250?

4 A. I believe the officer puts in what he can recollect.

5 Q. No.

6 My question is: Do you recall getting any training  
7 materials or in-service training, any kind of materials while  
8 you were a sergeant that reinforced for you as a sergeant the  
9 importance of officers putting the details of a stop and frisk  
10 in their memo book beyond simply repeating what's been checked  
11 off on the form?

12 A. I don't recall that.

13 MR. MOORE: Nothing further, Judge.

14 THE COURT: Anything further, Mr. Marutollo?

15 MR. MARUTOLLO: No, your Honor.

16 THE COURT: Your next witness.

17 MS. BORCHETTA: Plaintiffs call Jonathan Rothenberg.

18 JONATHAN ROTHENBERG,

19 called as a witness by the Plaintiffs,

20 having been duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MS. BORCHETTA:

23 Q. Good afternoon, Officer Rothenberg.

24 A. Good afternoon.

25 MS. BORCHETTA: Before we start, I just wanted to

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3798

D4h9flo4

Rothenberg - direct

1 advise the Court that Officer Rothenberg stopped class member  
2 Ian Provost, whom you'll remember we are putting on through  
3 deposition.

4 THE COURT: Yes.

5 MS. BORCHETTA: I didn't know whether the Court wanted

d4h9f1of

6 me to summarize anything before the deposition testimony?

7 THE COURT: I suspect the defense would not like you  
8 to do that although -- although I have not had a chance to  
9 review that deposition testimony. So it is unfortunate because  
10 I don't know anything about this stop.

11 MS. BORCHETTA: I think it will become clear.

12 THE COURT: Maybe you wouldn't object -- who is cross  
13 examining this witness?

14 MS. PUBLICKER: I am, your Honor.

15 THE COURT: Maybe let Ms. Publicker tell me about the  
16 stop, then they can't object if she wrongly summarized.

17 Can you just summarize just the stop as you recall it  
18 from the deposition.

19 MS. PUBLICKER: There is a dispute between Officer  
20 Rothenberg and Mr. Provost.

21 THE COURT: Of course. What's the outlines of the  
22 stop?

23 MS. PUBLICKER: It was outside of the Seth Low houses,  
24 which is a housing development in Brooklyn at 365 Sackman  
25 Street. Mr. Provost left the building. I believe he crossed

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D4h9f1o4

Rothenberg - direct

1 Sackman toward Sackman and Belmont.

2 He testified that he said hello to Officer Rothenberg  
3 and his partner, walked past them, I believe he said ten to  
4 fifteen feet.

5 Ten to fifteen feet past him Officer Rothenberg said  
6 excuse me.

7 And again according to Mr. Provost, he then turned

8 around, was questioned by Officer Rothenberg.

9 There are, again, disputes of fact about what  
10 happened. But Officer Rothenberg then arrested him, placed him  
11 in handcuffs, and took him to PSA 2 where, again, we dispute  
12 the relevance of this, but he was issued two summonses; one for  
13 a knife with a blade greater than four inches and another for  
14 disorderly conduct.

15 THE COURT: That's helpful.

16 All right. Ms. Borchetta.

17 BY MS. BORCHETTA:

18 Q. On November 24, 2009 you stopped Ian Provost, correct?

19 A. Correct.

20 Q. And you were on that date working foot patrol in Police  
21 Service Area 2 in Brooklyn, correct?

22 A. Correct.

23 THE COURT: Where is that? What section of Brooklyn  
24 is that?

25 THE WITNESS: Brownsville.

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3800

D4h9flo4 Rothenberg - direct

1 Q. Police Service Areas are referred to as PSA, right?

2 A. Correct.

3 Q. You were working in the operation impact tour that day in  
4 PSA 2, correct?

5 A. Yes.

6 Q. And you were working in an impact zone, right?

7 A. Yes.

8 Q. That impact zone covered a few New York City Housing  
9 developments, right?

10 A. Correct.

11 Q. One of the housing developments was the Seth Low houses,  
12 correct?

13 A. Yes.

14 Q. And the Seth Low houses are located, at least one of the  
15 buildings, at 365 Sackman Street?

16 A. Yes.

17 Q. As of November 24, 2009 you had been out of the police  
18 academy for a little over a year, right?

19 A. Correct.

20 Q. You graduated from the police academy in July 2008?

21 A. Yes.

22 Q. You stopped Mr. Provost on the sidewalk, right?

23 A. Yes.

24 Q. And that was at about 2:30 in the afternoon, right?

25 A. Yes.

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3801

D4h9flo4

Rothenberg - direct

1 Q. And it was a weekday, correct?

2 A. I don't recall right now.

3 THE COURT: well did you give us a date?

4 MS. BORCHETTA: November 24, 2009.

5 THE COURT: Thank you.

6 Q. And am I correct that you say you stopped Mr. Provost  
7 because you saw a knife sticking out of his back pants pocket?

8 A. Yes.

9 Q. And he was wearing cargo pants, right?

10 A. Carpenter pants.

11 THE COURT: what is carpenter pants?

12 THE WITNESS: The -- just the terminology for a pant

13 that carpenters wear. They have a loop on the side.  
14 Q. Would you say that they have big back pants pockets?  
15 A. Yes.  
16 Q. And it was in the back pants pocket that you say you saw  
17 this knife, right?  
18 A. His rear right pocket, yes.  
19 Q. Are you aware that according to Mr. Provost he voluntarily  
20 told you he had the knife in his back pocket after you began to  
21 frisk him?  
22 A. No.  
23 Q. You filled out a memo book entry for the encounter with  
24 Mr. Provost, right?  
25 A. Correct.

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3802

D4h9flo4

Rothenberg - direct

1 Q. Going to hand you what's been marked as Plaintiffs' Exhibit  
2 277.  
3 Do you recognize this?  
4 A. Yes.  
5 Q. This is your memo book entry covering the encounter with  
6 Mr. Provost, correct?  
7 A. Correct.  
8 THE COURT: You're offering it?  
9 MS. BORCHETTA: Yes.  
10 THE COURT: Any objection?  
11 MS. PUBLICKER: No objection, your Honor.  
12 THE COURT: 277 is received.  
13 (Plaintiffs' Exhibit 277 received in evidence)  
14 Q. Looking at Plaintiffs' 277. Do you see your entry related  
15 to the encounter with Mr. Provost?

d4h9f1of

16 A. Yes.

17 Q. Could you please read the entirety of your entry related to  
18 that stop?

19 A. 1423. One male black stopped for possible CT. Criminal  
20 trespass. Provost, Ian. Corner of Belmont and Sackman.  
21 235-17 130th Avenue, Rosedale, New York 11422.

22 1427. One under by me for CPW.

23 THE COURT: One under for what?

24 THE WITNESS: Criminal possession of a weapon.

25 THE COURT: Right.

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3803

D4h9f1o4

Rothenberg - direct

1 THE WITNESS: 1430. 62 admin. 1445. 96 times 2 for  
2 Provost by me. Summons number 43 --

3 MS. BORCHETTA: That's fine. That's summons number  
4 there.

5 THE WITNESS: Summons numbers. Two of them.

6 Q. And that's your entry related to Mr. Provost, right?

7 A. Yes.

8 Q. And am I correct that for the stop you put one male black  
9 stopped for possible criminal trespass, right?

10 A. Correct.

11 Q. That's what CT stands for, right?

12 A. Yes.

13 Q. So you say you stopped him for a knife. But in your memo  
14 book you say one male stopped for possible criminal trespass,  
15 right?

16 A. Correct.

17 Q. And, in fact, during the stop you told Mr. Provost that you

18 were stopping him on suspicion of criminal trespass, right?  
19 A. Correct.  
20 Q. Going back to walk through this encounter. You were  
21 standing on the corner of Belmont and Sackman when you -- right  
22 before the stop of Mr. Provost, right?  
23 A. About ten feet from the corner, yes.  
24 Q. And the location where you encountered Mr. Provost was  
25 across the street from 365 Sackman, right?

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3804

D4h9flo4 Rothenberg - direct

1 A. The location where I was standing, yes.  
2 Q. Now, before you stopped Mr. Provost you say that you  
3 observed him going in and out of the Seth Low buildings, right?  
4 A. Correct.  
5 Q. You say you saw him in and around the buildings all  
6 morning, right?  
7 A. Correct.  
8 Q. And you say you noticed him entering the building without a  
9 key, right?  
10 A. Yes.  
11 Q. Are you aware that he says that he left the building just  
12 once that day to go pick up his lunch?  
13 A. No.  
14 Q. In any event, you agree that -- well, you say that you  
15 observed that he would wait for somebody else to use a key with  
16 the door and that he would slip in behind them. That's what  
17 you say you saw that day?  
18 A. Yes.  
19 Q. But, in any event you would agree that you did not have  
20 reasonable suspicion that he was engaging in criminal trespass,

d4h9f1of

21 right?

22 A. No.

23 Q. And that's because he could very well have been visiting  
24 someone lawfully in that building, right?

25 A. Yes.

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3805

D4h9f1o4

Rothenberg - direct

1 Q. And, in fact, you later learned that he was lawfully  
2 visiting his girlfriend in that building, right?

3 A. That wasn't verified.

4 Q. Did he tell you that later?

5 A. Later on, yes.

6 Q. And at some point you're standing at the corner of Sackman  
7 and Belmont and you observed Mr. Provost exiting 365 Sackman,  
8 right?

9 A. Yes.

10 Q. And he walked towards you, right?

11 A. Correct.

12 Q. And, in fact, he walked right past you, correct?

13 A. Correct.

14 Q. And as he walked past you that's when you say you saw this  
15 knife sticking out of the back of his pocket -- let me try that  
16 again -- that's when you say you saw this knife sticking out of  
17 his back pants pocket, right?

18 A. Correct. I saw the knife sticking about two inches from  
19 his right rear pocket.

20 Q. Well, you say that you could see only about an  
21 inch-and-a-half to two inches of the handle of the knife  
22 sticking out of his pocket, right?

23 A. Yes, it was a material -- it was a blade sandwiched by two  
24 materials, like a piece of metal sandwiched by -- I don't know  
25 if it was real wood or fake wood. But it clearly looked like a

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3806

D4h9flo4

Rothenberg - direct

1 knife.

2 Q. But the most that you could see at the time was an  
3 inch-and-a-half to two inches, right? That's what you say?

4 A. Yes.

5 Q. And that's all you could see of the knife, according to  
6 you, right?

7 A. Yes.

8 Q. And that's one-and-a-half to two inches of the handle,  
9 right?

10 A. It's a folding knife. It was a handle and the blade.

11 Q. But at the time all you could see was an inch-and-a-half to  
12 two inches of a handle, right?

13 A. Yes.

14 Q. And at the time you weren't sure that it was a knife,  
15 right?

16 A. Not a hundred percent, no.

17 Q. But you believed, even though you couldn't tell whether or  
18 not it was a knife, that he was violating the law against  
19 having a knife in plain view, right?

20 A. I'm sorry. Say that again.

21 Q. You believed, even though you couldn't yourself tell  
22 whether or not it was a knife, that he was violating the law  
23 against having a knife in plain view, right?

24 A. I saw what I believed to be a knife and I stopped him  
25 solely based on that.





2 right?

3 A. Of course.

4 Q. But you didn't draw a weapon, right?

5 A. No.

6 Q. And you also, although you feared for your safety, you say,  
7 asked him whether he lived in the area, right?

8 A. Yes.

9 Q. And you also asked him whether he lived in that building  
10 that he had just exited, right?

11 A. I don't recall specifically asking that. I remember asking  
12 him a few questions to divert his attention from the fact that  
13 I knew he had a knife.

14 Q. But one of them was whether he lived in the building,  
15 right?

16 A. Yes.

17 Q. And you also informed him that he had to be visiting  
18 someone in order to go into that building, right?

19 A. No.

20 Q. I'm sorry. Counsel do you have the CCRB transcript?

21 Do you recall being interviewed by the CCRB about this  
22 stop?

23 A. Yes.

24 Q. And you gave a statement to the CCRB, correct?

25 A. Correct.

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3810

D4h9f1o4

Rothenberg - direct

1 Q. And that was a truthful statement, correct?

2 A. Correct.

3 Q. I'm going to hand you a copy of the transcript --

d4h9f1of

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THE COURT: Is it marked?  
MS. BORCHETTA: -- from that interview.  
THE COURT: It has to be marked as something to hand  
it to him for identification.  
MS. BORCHETTA: I'm not going to admit it.  
THE COURT: It has to be marked for the record.

Anything. 468?  
MS. PUBLICKER: It's a transcript from a different one  
of plaintiffs' exhibits, from one of plaintiffs' exhibits --  
264, but it's only part of it.

THE COURT: We can mark it for identification as 264T.  
Fine. Okay.

BY MS. BORCHETTA:  
Q. So I'm handing you Plaintiffs' 264T.  
If you look at page 6 of that transcript, and lines 18  
to 22. You told the CCRB that you had told Mr. Provost that he  
needed to be visiting someone in the building, right?

A. Correct.

Q. And it was at that point you were standing in front of  
Mr. Provost, right?

A. No.

Q. Well, let me ask a different question.

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♀ 3811

D4h9f1o4 Rothenberg - direct

1 After having this exchange with Mr. Provost, from a  
2 position of standing in front of him, you reached behind him to  
3 grab the knife out of his pocket, right?  
4 A. I was to Mr. Provost's extreme right. My partner was to  
5 Mr. Provost's extreme left.  
6 Q. But from a position of standing in front of Mr. Provost,

d4h9f1of

7 you reached behind him to grab the knife out of his pants  
8 pocket, right?

9 A. I wasn't directly in front of him, no.

10 Q. But you were standing -- you say you were standing slightly  
11 to his right, correct?

12 A. Extremely to his right.

13 Q. Well let's take a look at your deposition. Do you recall  
14 being deposed in this case?

15 A. Yes.

16 Q. That was on January 14, 2013?

17 A. Yes.

18 Q. And you took an oath to tell the truth during that  
19 deposition, correct?

20 A. Yes.

21 Q. And did you tell the truth during that deposition, correct?

22 A. Yes.

23 Q. If you look at page 45 of your deposition. And are you  
24 there?

25 A. Yes.

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3812

D4h9flo4

Rothenberg - direct

1 Q. Line 21 through 24.

2 "Q. So from a position of standing in front of him, you  
3 reached to Mr. Provost's back pocket and took out the knife?

4 "A. Correct."

5 MS. PUBLICKER: And I would just --

6 MS. BORCHETTA: Let me just finish.

7 Q. Do you remember giving that answer to that question?

8 A. Yes.

9 MS. PUBLICKER: I would direct the Court's attention  
10 to page 44, lines 5 to 11.

11 "Q. So Mr. Provost was facing you and you were to his right?

12 "A. Mr. Provost had the knife in his right back pocket. I was  
13 on Mr. Provost's right and facing him. I reached with my left  
14 hand.

15 "Q. Wait. I'm sorry. You were on his right?

16 "A. Mr. Provost's right, yes."

17 BY MS. BORCHETTA:

18 Q. Mr. Provost attempted to use his cell phone during the stop  
19 before you retrieved the knife, right?

20 A. Before I what the knife?

21 THE COURT: Retrieved.

22 MS. BORCHETTA: Retrieved the knife.

23 THE WITNESS: Yes.

24 Q. And you told him not to use his cell phone, right?

25 A. That's correct.

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3813

D4h9f1o4

Rothenberg - direct

1 Q. And you believe he may have put the phone into his pocket  
2 after you told him that, right?

3 A. Yeah. I don't recall really the situation with the phone.

4 Q. But he may have put it in his pocket, right?

5 A. Correct.

6 Q. And you may have let him put it in his pocket even though  
7 at that moment you say you feared that he might pull a knife  
8 out from his pocket, right?

9 A. Correct.

10 Q. Now at the time of this encounter you were standing near a  
11 schoolyard, correct?

- 12 A. Yes.
- 13 Q. And there was a fence along the schoolyard, correct?
- 14 A. Correct.
- 15 Q. And you placed Mr. Provost in handcuffs, right?
- 16 A. Correct.
- 17 Q. And then you placed him against the fence of the
- 18 schoolyard, right?
- 19 A. Correct.
- 20 Q. And you were at that point arresting Mr. Provost, you say,
- 21 for possession of the knife, right?
- 22 A. That's correct. And disorderly conduct.
- 23 Q. And -- well we'll get to the disorderly conduct.
- 24 But you then called a supervisor to verify the report
- 25 and recommendation, right?

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3814

D4h9f1o4

Rothenberg - direct

- 1 A. That's correct.
- 2 Q. And that supervisor -- the supervisor who arrived on the
- 3 scene was Sergeant Houlahan, right?
- 4 A. Correct.
- 5 Q. And you thereafter issued Mr. Provost summonses for
- 6 disorderly conduct and possession of a knife in plain view,
- 7 right?
- 8 A. Incorrect. The summons was for knife with a blade longer
- 9 than four inches.
- 10 Q. But you believed that he had violated the law for having a
- 11 knife in plain view, right?
- 12 A. Yes.
- 13 Q. And you say that the knife was longer than four inches but

14 you have no record that indicates the length of the knife,  
15 right?  
16 A. No. Just verification.  
17 Q. But you have no record today that indicates the length of  
18 the knife, right?  
19 A. I believe on the voucher it's stated that the blade is  
20 longer than four inches.  
21 Q. It doesn't say the length that it was though, right?  
22 A. Not specifically, no.  
23 Q. And although you issued Mr. Provost a summons for  
24 disorderly conduct, he did not do anything that would  
25 constitute disorderly conduct before you stopped him, right?

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3815

D4h9flo4

Rothenberg - direct

1 A. No.  
2 Q. And although you issued a summons for disorderly conduct,  
3 he at no time was engaging in fighting, right?  
4 A. No.  
5 Q. And he was at no time engaging in conduct that would  
6 constitute tumultuous behavior in your understanding of the  
7 disorderly conduct statute, right?  
8 A. He was being loud and boisterous. That's what he was cited  
9 for.  
10 Q. That wasn't my question.  
11 You understand that the disorderly conduct references  
12 tumultuous behavior?  
13 A. Sub one, yes. There are seven sections.  
14 Q. And my question to you is: He was not engaging in  
15 tumultuous behavior in your understanding of that phrase in the  
16 disorderly conduct statute, right?

17 A. Right.

18 Q. Going back to your memo book for a moment, that is  
19 Plaintiffs' Exhibit 277. You did not include any information  
20 about the circumstances leading to your stop of Mr. Provost,  
21 right?

22 A. Correct.

23 Q. And no superior officer in the NYPD ever discussed with you  
24 your activity log entry with respect to the stop of  
25 Mr. Provost, right?

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3816

D4h9flo4

Rothenberg - direct

1 A. Correct.

2 Q. You did not complete a UF 250 for the stop, right?

3 A. No.

4 Q. And am I correct that no one in the NYPD has ever explained  
5 to you the reason that you were required to document stops in  
6 UF 250s?

7 A. Stops for 250s are done on reasonable suspicion.

8 This was a probable cause stop.

9 Q. I understand that. But my question is -- or I understand  
10 that's what you're saying.

11 But my question is whether -- that no one in the NYPD  
12 has ever told you the reason behind completing a UF 250 form?

13 A. Are you talking about pertaining to this stop?

14 Q. I'll rephrase it.

15 No one in the NYPD has ever explained to you the  
16 purpose of documenting a stop on a UF 250?

17 A. No. I know why we do 250s. Yes.

18 THE COURT: No. But did somebody explain that to you?

19 THE WITNESS: I can't specifically recall, but I'm  
20 sure somebody has.

21 THE COURT: By the way, when you say this was a  
22 probable cause stop, you mean at the time you stopped him you  
23 had probable cause to believe that he was carrying an unlawful  
24 knife?

25 THE WITNESS: Yes.

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3817

D4h9f1o4

Rothenberg - direct

1 THE COURT: That's what you believed?

2 THE WITNESS: Yes, your Honor.

3 THE COURT: Okay.

4 Q. Turning again to your deposition at page 104. Beginning at  
5 the bottom of the page, line 25, do you remember the following  
6 questions and giving the following answers?

7 "Q. Okay. So no one in the police department has ever  
8 explained to you why you need to complete a 250 form?

9 "A. No."

10 That's ending at page 105, line 4.

11 Do you recall giving that answer to that question?

12 A. Yes.

13 Q. You say that you've received trainings at roll calls  
14 relating to stop and frisk, right?

15 A. Yes.

16 Q. But you can't recall anything about those trainings, right?

17 A. Such as?

18 Q. My question is whether -- that you can't recall anything  
19 about those trainings, right?

20 A. Not specifically, no.

21 Q. Turn to your deposition, page 119. Reading from lines 9 to  
Page 159



24 Q. I'm asking you whether you recall anything from trainings  
25 about the NYPD's policy regarding racial profiling other than

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3819

D4h9flo4

Rothenberg - direct

1 that racial profiling is not allowed?

2 A. I remember the substance of the training. I don't remember  
3 who gave it or where I received it.

4 Q. I'm sorry. You do remember the substance of training?

5 A. Yes.

6 Q. Looking at your deposition at page 126, from lines 5 to 13.  
7 Do you remember giving the following answers to the following  
8 questions?

9 "Q. What was the substance of the training you received at the  
10 police academy about racial profiling?

11 "A. I previously stated it. You're not allowed to do it.  
12 Zero tolerance for it.

13 "Q. Is there anything more you can tell me about the training  
14 you received at the police academy regarding racial profiling?

15 "A. I don't recall."

16 Do you recall giving those answers to those questions?

17 A. Yes.

18 MS. PUBLICKER: Your Honor, again, this is not  
19 inconsistent with what Officer Rothenberg testified.

20 THE COURT: Ms. Borchetta, what makes you think it's  
21 inconsistent?

22 MS. BORCHETTA: Because he's saying now that he can  
23 recall substance. And it doesn't seem to me that he can recall  
24 substance. He testified that he couldn't recall anything about  
25 it.

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Page 161

D4h9f1o4

Rothenberg - direct

1 THE COURT: I think it's a semantic problem. He,  
2 again, says he can't recall where, when, who, what, just the  
3 general notion that it must have happened.

4 Q. So a supervisor has -- I'm sorry, supervising officer has  
5 never said to you in sum or substance that he or she had a  
6 concern about a stop that you conducted, right?

7 A. No.

8 Q. And a supervisor has never said to you in sum or substance  
9 that he or she had a concern that you had engaged in racial  
10 profiling, right?

11 A. No.

12 Q. And a supervisor has never said to you in sum or substance  
13 that he or she had a concern that you stopped someone based  
14 solely on race, right?

15 A. No.

16 Q. And you testified at deposition that you've never been  
17 disciplined for conduct related to a stop, right?

18 A. Correct.

19 Q. And you testified at deposition that you have never been  
20 disciplined for conduct related to a frisk, right?

21 A. Correct.

22 Q. And you testified at deposition that you have never been  
23 disciplined for conduct related to an arrest, right?

24 A. Correct.

25 Q. But before you stopped Mr. Provost there was an OCD

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1 investigation into an allegation that you stopped someone also  
2 in PSA 2 based on his race, right?

3 MS. PUBLICKER: Your Honor, she's questioning about an  
4 unsubstantiated allegation regarding a stop which at motion in  
5 limine conference your Honor has already ruled officers cannot  
6 be questioned on.

7 MS. BORCHETTA: No. That's absolutely not correct.  
8 He was disciplined.

9 MS. PUBLICKER: Are you talking about Exhibit 279?

10 MS. BORCHETTA: Yes.

11 MS. PUBLICKER: He was not disciplined. That is not  
12 what this actually indicates.

13 MS. BORCHETTA: This indicates that he received a  
14 penalty.

15 MS. PUBLICKER: No.

16 THE COURT: You two look at that time same document at  
17 the same time.

18 MS. PUBLICKER: We are looking at the same document.

19 THE COURT: Then you can't read it differently. It's  
20 all in English.

21 MS. BORCHETTA: Penalty instructed.

22 THE COURT: Penalty instructed.

23 Remember we had CCRB testimony, that woman who  
24 testified from CCRB. The most common given was instructions.

25 MS. PUBLICKER: I understand. However, the

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3822

1 allegation -- the issue is that -- the allegation on the form  
2 she's reading, it's not an allegation of an unlawful stop.

3 It's IAB OCD notification.

4 The issue is that this was a spinoff case to another  
5 investigation. And this is what's called a BCAT screen. It is  
6 just a transmittal sheet.

7 So the allegation is notifying another agency that  
8 there was an investigation. The disposition is that that  
9 condition was noted.

10 It does state penalty instructed, but that doesn't  
11 actually relate to Officer Rothenberg.

12 THE COURT: But you're testifying. Now you're  
13 testifying. I can't have you testify.

14 MS. PUBLICKER: I'm saying, your Honor, is that --

15 THE COURT: She has a basis to ask him. There's a  
16 good faith basis for the question. He'll give the answer.

17 MS. PUBLICKER: Yes, your Honor.

18 THE COURT: Okay. Go ahead.

19 What's the question?

20 Q. So you were, in fact, the subject of an OCD investigation  
21 into an allegation that you stopped and arrested someone based  
22 on racial profiling, right?

23 A. Yes.

24 Q. And I'm going to show you what's been marked as Plaintiffs'  
25 279. Do you recognize that?

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3823

D4h9f1o4

Rothenberg - direct

1 A. No.

2 MS. BORCHETTA: Your Honor, I'd ask that the city  
3 stipulate to the admission of this as a business record and  
4 we'll seek to admit it otherwise tomorrow with the

5 representative from the police department from the office of  
6 chief of department.

7 But this is an allegation of racial profiling within  
8 the NYPD and the OCD. And this court did not, as Ms. Publicker  
9 represented, preclude that type of investigation. In fact,  
10 this Court --

11 THE COURT: I did preclude it if it was only an  
12 allegation that was not substantiated and nothing more occurred  
13 other than the allegation. But you're saying here there's  
14 something beyond the allegation.

15 MS. BORCHETTA: Your Honor, I'm sorry. We will get  
16 the transcript for the Court. But, in fact, the CCR -- so  
17 limited CCRB allegations. Because they are external, an  
18 external agency. But as one of our allegations in this case is  
19 whether or not the NYPD seriously or meaningfully investigates  
20 allegations of racial profiling, that we be permitted to ask  
21 questions about investigations.

22 THE COURT: I said when it's an OCD allegation, then  
23 even the allegation can come in even without knowing what the  
24 disposition was.

25 MS. BORCHETTA: Exactly, your Honor.

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D4h9flo4 Rothenberg - direct

1 THE COURT: If I said it, I said it.

2 MS. PUBLICKER: Not to be cross-examined with the  
3 officer. It was supposed to come in with the other -- the  
4 policy witnesses, not against the officer himself.

5 THE COURT: It doesn't matter who it comes in. She's  
6 offering the document now.

7 MS. PUBLICKER: For Officer Rothenberg to be  
Page 165

8 cross-examined.

9 MS. BORCHETTA: I'm not going to question him about  
10 the facts.

11 THE COURT: Right. She's not doing that. That's  
12 done. She said: was there an allegation made against you?  
13 He's conceded yes. And that's it. Now she's just offering the  
14 document.

15 MS. GROSSMAN: Your Honor, for the failure to  
16 investigate claim.

17 THE COURT: I understand.

18 MS. GROSSMAN: We have a witness coming in tomorrow  
19 who is going to be addressing these particular issues. And in  
20 keeping with your Honor's ruling in limine that the witness not  
21 be questioned about it.

22 THE COURT: She's not going any further. She's done  
23 with that. All she did was ask him whether he was the subject  
24 of the allegation. He said yes. And that's it. Now you're  
25 just putting in the document.

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3825

D4h9f1o4

Rothenberg - direct

1 MS. BORCHETTA: I would like to ask him whether anyone  
2 spoke to him about it.

3 THE COURT: Just to show the investigation occurred.  
4 As part of an investigation were you ever questioned  
5 about this?

6 THE WITNESS: No.

7 THE COURT: All right. So that's it.

8 Now the document should come in. I don't see a  
9 problem with that. It's in accordance with my in limine

10 ruling.

11 So what's the number?

12 MS. BORCHETTA: 279.

13 THE COURT: 279 is received but for a limited purpose.  
14 Not for the truth of the allegation but solely to show the  
15 notice, what was done following an investigation or not.

16 BY MS. BORCHETTA:

17 Q. I'm sorry, Officer Rothenberg. You said that no one ever  
18 discussed that with you?

19 THE COURT: He did say that, and I heard it.

20 MS. BORCHETTA: I'm sorry.

21 THE COURT: I think there's a habit of repeating it to  
22 make sure I've heard it. I've heard it.

23 MS. BORCHETTA: Respectfully, I was asking so I could  
24 make sure I heard it myself.

25 Q. To your knowledge, did you ever receive any instructions

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D4h9f1o4 Rothenberg - direct

1 related to this?

2 A. No.

3 MS. GROSSMAN: Your Honor, I'm just saying. It's just  
4 the questions imply that there was some misconduct that was  
5 sustained against this officer.

6 THE COURT: No. To the contrary. Absolutely not. An  
7 allegation was made. Then the question is whether he was  
8 questioned as part of any investigation. He said no. And  
9 there was no discipline. He just said that too. There was no  
10 problem. Only an allegation. And she's showing what was done  
11 or not done to follow up.

12 MS. BORCHETTA: No further questions.  
Page 167

d4h9f1of

13 THE COURT: No further questions.  
14 Okay. Ms. Publicker.

15 MS. PUBLICKER: Yes, your Honor.

16 CROSS-EXAMINATION

17 BY MS. PUBLICKER:

18 Q. Good afternoon, Officer Rothenberg.

19 A. Good afternoon.

20 Q. You don't currently work on patrol, do you?

21 A. No.

22 Q. And why not?

23 A. I sustained an injury in the line of duty.

24 Q. And when was that?

25 A. August 31 of this year -- of this past year.

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3827

D4h9f1o4

Rothenberg - cross

1 Q. Did you have a particular sector or post in PSA 2 that you  
2 were patrolling on November 24, 2009?

3 A. Yes.

4 Q. What post was that?

5 A. Post 242.

6 Q. What area does that post cover?

7 A. The Seth Low houses.

8 Q. Were you familiar with the Seth Low houses on November 24,  
9 2009?

10 A. Yes.

11 Q. How were you familiar with them?

12 A. I worked that post quite frequently especially in the  
13 previous 20, 30 days before.

14 Q. Were you familiar with crime conditions of the Seth Low

d4h9f1of

15 houses at that time?

16 A. Yes.

17 Q. What were those crime conditions?

18 A. Shootings, robberies, and quality of life offenses.

19 Q. How did you learn about those crimes?

20 A. Via roll calls and just by working the area.

21 Q. So when did you first see Mr. Provost on November 24, 2009?

22 A. Earlier in the morning.

23 Q. What made you notice him?

24 A. I noticed him when he was going in and out of the buildings

25 he was never using a key. He was either opening the doors or

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D4h9flo4

Rothenberg - cross

1 going in behind people or waiting for people to leave and then

2 going in before the door closed.

3 Q. Had you ever seen him before that day?

4 A. No.

5 Q. And there did come a time when you actually spoke to and

6 encountered Mr. Provost later that day, correct?

7 A. Yes.

8 Q. And why did you notice him at that time?

9 A. He walked by me and I noticed a knife in his rear right

10 pocket.

11 Q. Could you explain for the court what the knife looked like

12 in his pocket.

13 A. It was a piece of metal sandwiched between -- it was either

14 fake wood or real wood, I'm not a hundred percent sure on that,

15 with a ring attached on the end of it.

16 Q. Are you familiar with knives?

17 A. Yes.

d4h9f1of

18 Q. And how are you familiar with knives?

19 A. I was in the Marine Corps and I've always handled knives.

20 Q. There did come a time when you took the knife out of

21 Mr. Provost's pocket, correct?

22 A. Yes.

23 Q. And what did the knife look like when it was out of his

24 pocket?

25 A. Approximately six to seven inches long, a piece of metal

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D4h9f1o4

Rothenberg - cross

1 sandwiched by two materials with a ring on it. It looked like  
2 a buck knife.

3 Q. Why did you ask Mr. Provost questions about where he was  
4 coming from?

5 A. Just to distract his attention from the fact that I knew  
6 that he had a knife.

7 Q. Why did you want to distract his attention?

8 A. Just good tactics to not draw attention to the fact that  
9 you know that he has a knife.

10 Q. Did you stop Mr. Provost on reasonable suspicion of  
11 criminally trespassing?

12 A. No.

13 Q. When you removed this knife from Mr. Provost did you remove  
14 that knife as part of a frisk?

15 A. No.

16 Q. Did there come a point in time when Mr. Provost was  
17 frisked?

18 A. Yes.

19 Q. When was that?

20 A. Before being placed into the patrol car, before being  
21 transported PSA 2.  
22 Q. Was that after he was handcuffed?  
23 A. Yes. There was a search incident to a lawful arrest. It  
24 was just a frisk done on scene.  
25 Q. What happened after you removed the knife from

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3830

D4h9f1o4 Rothenberg - cross

1 Mr. Provost's pocket?  
2 A. He was placed in cuffs and a large group started to form.  
3 Q. Why were you concerned about a group forming?  
4 MS. BORCHETTA: Objection.  
5 THE COURT: I'll allow it.  
6 MS. BORCHETTA: He just hadn't said he was concerned.  
7 THE COURT: Were you concerned about a group forming?  
8 THE WITNESS: Yes.  
9 THE COURT: Why?  
10 THE WITNESS: I had previously been assaulted by a  
11 group of people that -- in that area.  
12 Q. Where were you assaulted?  
13 A. The front of 131 Belmont.  
14 Q. Where is 131 Belmont in relation to 365 Sackman?  
15 A. A matter of feet away.  
16 Q. What did that group do to you?  
17 A. I was knocked unconscious and I was assaulted. I was  
18 kicked, punched.  
19 Q. Do you remember Mr. Provost using the phone during his  
20 encounter with you that day?  
21 A. Yes.  
22 Q. What happened when you saw the phone?

d4h9f1of

23 A. I asked him to put it away.

24 Q. why did you ask him to put it away?

25 A. Because I felt that it was important that somebody with a

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3831

D4h9flo4

Rothenberg - cross

1 weapon was listening to my instructions and if he was going to

2 be on the phone he wasn't able to.

3 Q. In which pocket was Mr. Provost's knife?

4 A. Right rear.

5 Q. Did you ever see Mr. Provost reach toward his rear right

6 pocket during your encounter with him?

7 A. No.

8 Q. I believe you stated that you called a supervisor to the

9 scene; is that correct?

10 A. Yes.

11 Q. And that was Sergeant Houlahan?

12 A. Yes.

13 Q. What happened when Sergeant Houlahan arrived at the scene?

14 A. He deemed it necessary that we leave the scene as soon as

15 possible just because of the large groups that were forming.

16 Q. Did you tell Sergeant Houlahan why you had arrested

17 Mr. Provost at the scene?

18 A. Yes.

19 Q. Where was Mr. Provost taken following his arrest?

20 A. PSA 2.

21 Q. Did you go with him to PSA 2?

22 A. Yes.

23 Q. Who else went with you?

24 A. Sergeant Houlahan.

25 Q. Did anyone else go with you? <sup>d4h9f1of</sup>

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3832

D4h9f1o4                      Rothenberg - cross

1 A. Not that I recall.

2 Q. What happened when you arrived at PSA 2?

3 A. He was placed in front of the desk and logged in, in the  
4 prisoner entry sheet.

5 Q. When you were at the precinct did you show Sergeant  
6 Houlahan the knife?

7 A. Yes.

8 Q. And did you -- what did you tell him about the knife at  
9 that time?

10 A. After looking at it and talking, we determined that it  
11 wasn't a gravity knife because of the fact that the ring  
12 assisted it open. So we determined to give Mr. Provost two  
13 summonses in lieu of arrest.

14 THE COURT: Summonses for what?

15 THE WITNESS: A knife greater than four inches and  
16 disorderly conduct too.

17 Q. So at some point you did believe that it was a gravity  
18 knife?

19 A. Yes.

20 Q. Why did you believe it was a gravity knife?

21 A. Because if you held it by the ring, the knife opened up to  
22 full lock.

23 Q. But Sergeant Houlahan instructed you that it was not a  
24 gravity knife; is that correct?

25 A. That's correct.

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d4h9f1of

1 I was rushing my entries, just so I could get my  
2 partner who was already on the streets caught up.

3 THE COURT: Just remind me of those two abbreviations.

4 THE WITNESS: I wrote stopped for criminal trespass  
5 when it was should have been one male stopped for criminal  
6 possession of a weapon.

7 THE COURT: Thank you.

8 Q. Have you ever been subject to a quota?

9 A. No.

10 Q. Have you ever been pressured to conduct a certain number of  
11 stops, arrests, or summonses?

12 A. No.

13 Q. Have you ever felt that if you did not conduct a certain  
14 number of stops, arrests, or summonses that you would be  
15 punished?

16 A. No.

17 Q. Have you ever felt pressure to make unconstitutional stops,  
18 arrests, or summonses?

19 A. No.

20 MS. PUBLICKER: Your Honor, if I could have one  
21 minute.

22 (Pause)

23 No further questions, your Honor.

24 Thank you Officer Rothenberg.

25 THE COURT: Ms. Borchetta.

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3835

D4h9f1o4 Rothenberg - cross

1 MS. BORCHETTA: Just very briefly, your Honor.

2 REDIRECT EXAMINATION

3 BY MS. BORCHETTA:

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4 Q. Officer Rothenberg you just testified that Mr. Provost's  
5 behavior, you say, caused you to fear because a large crowd was  
6 forming, right?

7 A. That's correct.

8 Q. But you also believed that Mr. Provost's behavior during  
9 the stop was quite common, right, in your experience?

10 A. Yes.

11 Q. And you just testified about gravity knives, right?

12 A. Yes.

13 Q. You didn't think that the knife in Mr. Provost's back  
14 pocket was a gravity knife when you first saw it, right?

15 When you first saw the knife in Mr. Provost's back  
16 pocket, you didn't think it was a gravity knife, right?

17 A. No. Not at that time.

18 Q. And you couldn't see the knife with the blade in  
19 Mr. Provost's back pocket when you first saw it, right?

20 A. The knife of the -- the blade of the knife, no.

21 Q. I'm sorry. Let me try that again. You couldn't see the  
22 blade of the knife when you first saw the knife in  
23 Mr. Provost's back pocket, right?

24 A. I couldn't.

25 Q. You couldn't see the entire knife -- the entire blade,

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D4h9flo4

Rothenberg - redirect

1 right?

2 A. No.

3 Q. You saw some piece of blade between two pieces of wood,  
4 right?

5 A. Correct.

6 Q. So you saw an inch-and-a-half <sup>d4h9f1of</sup> to two inches of that, right?  
7 A. Correct.  
8 Q. But you didn't see four to seven inches of knife blade,  
9 right?  
10 A. No.  
11 Q. And you couldn't see how long the knife was when you first  
12 saw it right?  
13 A. No. But I identified it as knife.  
14 Q. Well when you first saw it you weren't sure whether it was  
15 a knife, right?  
16 A. I wasn't a hundred percent sure.  
17 Q. And you say that you wrote that you stopped Mr. Provost for  
18 possible criminal trespass in your memo book entry because you  
19 were rushing, right?  
20 A. Yes.  
21 Q. And you say that you should have written CPW instead of CT,  
22 right?  
23 A. Correct.  
24 Q. And CPW is one additional letter than CT, right?  
25 A. Correct.

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3837

D4h9f1o4

Rothenberg - redirect

1 MS. BORCHETTA: No further questions, your Honor.  
2 THE COURT: Anything further?  
3 MS. PUBLICKER: No, your Honor.  
4 THE COURT: Thank you.  
5 THE WITNESS: Thank you. Have a good day.  
6 (Witness excused)  
7 MS. BORCHETTA: We've arranged to have two additional  
8 people here I'm not sure which one it would be.

9           If I could take this moment to address with the court  
10 a scheduling issue for later in the week. The plaintiffs and  
11 the city were working together during the lunch break because  
12 we're moving faster than we thought we would, which is a first  
13 for this case.

14           And as I said, we have arranged with the city to have  
15 two additional officers here now so we'll have more testimony  
16 today. The issue is the next few days. And that is this.

17           We have testimony on Thursday. It appears that we  
18 might have a full day but we might not. And on Friday that's  
19 the same problem. And the issue that we're having is that  
20 we've moved up the two remaining class member witnesses. But  
21 the rest of the witnesses are NYPD witnesses.

22           THE COURT: Wait a minute. The two remaining class  
23 member witnesses are?

24           MS. BORCHETTA: Downs. So Downs will be on Friday.  
25 As well as Ourlicht will now be on Friday.

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D4h9f1o4

Rothenberg - redirect

1           And we've also moved up -- we worked with the city to  
2 move up other NYPD witnesses. But the only other NYPD  
3 witnesses that we're calling cannot appear until next week.  
4 And so we're just wondering -- I can give you the specifics and  
5 the specific names but I don't know.

6           THE COURT: No. Then the city will have to start its  
7 case and call somebody.

8           MS. BORCHETTA: That's what I was wondering.

9           THE COURT: Do I have your list yet?

10          MS. BORCHETTA: The order was to get it to us today.

d4h9f1of

11 MS. GROSSMAN: Right. We're going to provide -- your  
12 Honor, today I just want you to know, because you did say we'd  
13 get some brownie points. We put two additional -- we put three  
14 additional witnesses out of order.

15 THE COURT: Right.

16 MS. GROSSMAN: For today.

17 THE COURT: I know.

18 MS. GROSSMAN: That we weren't planning to call today.

19 THE COURT: I know. We won't get through three.

20 MR. KUNZ: We've already got through one. And I think  
21 we can probably do the next two.

22 MS. GROSSMAN: We'll see.

23 THE COURT: I didn't realize we got through one of the  
24 three.

25 MS. GROSSMAN: And so this is just shaking up the

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D4h9f1o4

Rothenberg - redirect

1 entire schedule that we need to now readjust what we're doing  
2 today, what we're going to provide the plaintiffs with today,  
3 and we're going to make best efforts. But in terms of  
4 witnesses that have unavailability that we've locked in for  
5 other dates it's just -- we have to work out the schedule.

6 THE COURT: I'm not talking about the remainder of the  
7 people on the plaintiffs' list that had already counted on  
8 being called next week. But some of those, the week after  
9 even, your week starting the week after. Just call them in.  
10 We can take your case out of order. It doesn't matter. It's  
11 all kind of going that way anyway. Many of the witnesses  
12 called in the plaintiffs' case so far are really your  
13 witnesses. So anybody who can get in here saves us time on the

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14 back end.

15 MS. GROSSMAN: We'll go back. We'll call and find out  
16 availability. But we just -- and we will try our best. I'm  
17 just hoping --

18 THE COURT: All I'm saying is that on the list I have  
19 of the plaintiffs' witnesses, numbers 16 through 30 may have  
20 counted on the dates assigned to them. Right. The chart I  
21 have. So from Reiter through, you know, they may have already  
22 planned their lives. But the folks who weren't even going to  
23 get called until the week of April 29, they may be free. You  
24 probably haven't even tried them for these weeks because they  
25 don't even have a fixed date yet. In other words, names I

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D4h9f1o4

Rothenberg - redirect

1 haven't even seen, your list, the list you're producing today,  
2 fine. Some of them may be able to be called earlier.

3 I can't afford downtime. You know I can't. It's to  
4 everybody's advantage to finish but mostly mine because I've  
5 got another big trial behind it.

6 MS. GROSSMAN: We understand. Right now we have to go  
7 back and ascertain who is available.

8 THE COURT: Right. I understand.

9 MS. GROSSMAN: We're here right now. We're not --

10 THE COURT: But there are people back at the office  
11 that you could be in contact with for sure.

12 MS. GROSSMAN: Your Honor, we just need a little time  
13 to caucus and figure out who could be available.

14 THE COURT: So we won't know who. But you'll fill the  
15 time. Between you and the plaintiffs the time will be filled.

d4h9f1of

16 MS. GROSSMAN: What about their expert witness?  
17 Mr. Reiter could -- it's their case. Maybe that might be a  
18 possibility on Friday.

19 MS. BORCHETTA: The issue with Mr. Reiter he's in  
20 Georgia. And we have moved him up. He will go on Monday.

21 THE COURT: So it's going a day earlier.

22 MS. BORCHETTA: Yes.

23 THE COURT: In any event.

24 MS. GROSSMAN: We'll see.

25 THE COURT: I can't lose time Thursday or Friday.

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3841

D4h9f1o4

Rothenberg - redirect

1 MS. BORCHETTA: Just so the Court is aware, the  
2 parties have agreed to put on the remainder of Inspector  
3 Barrelli through deposition, Lieutenant Barrelli.

4 THE COURT: Good. From yesterday.

5 So please -- I'm waiting for marked depositions  
6 anyway. I don't know if we have all the transcripts in. I  
7 know you're working with my clerk on that. But the more that  
8 come in, the better because we're starting to read them and get  
9 them organized. So I don't want a delay there either.

10 Yes, Mr. Kunz.

11 MR. KUNZ: I just wanted to apologize to the court.  
12 Sergeant Mahoney and Officer Giacona, who is following him,  
13 were anticipated to testify on Friday. So they weren't wearing  
14 suits today.

15 THE COURT: That's no problem.

16 MR. KUNZ: We just wanted to apologize for that.

17 THE COURT: That's the least of my problems, the very  
18 least. Okay.

19 JAMES MAHONEY,  
20 called as a witness by the Plaintiffs,  
21 having been duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MS. PATEL:

24 Q. Officer Mahoney you were on duty with the Brooklyn South  
25 gang squad on August 20, 2008, correct?

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3842

D4h9f1o4 Mahoney - direct

1 A. I was.

2 MS. PATEL: And also, your Honor, just so that it's  
3 clear. This testimony is related to someone who -- a stop --

4 THE COURT: I saw that on the list. Downs.

5 MS. PATEL: He's not testified.

6 THE COURT: Right. That's a problem for me  
7 contextually again. I don't know anything about the Downs  
8 stop. Who is going to cross-examine this witness?

9 Mr. Kunz, since on the last one you may not have been  
10 in the courtroom.

11 The defense obviously wouldn't want you to summarize  
12 it. It would make them nervous.

13 If you would tell me briefly about this stop. You  
14 can't quarrel with what you say because you're saying it. So  
15 give me some idea of what this stop is about.

16 MR. KUNZ: So Mr. Downs alleges that after work one  
17 day he was sitting on the stoop outside of his house when two  
18 police officers drove by in plain clothes in an unmarked  
19 vehicle. They got out. They asked him if he was smoking  
20 marijuana. A conversation followed. Mr. Downs claims he was

21 frisked. He then went to the police precinct and made a  
22 complaint about it.

23 For context, Officer Giacona and Sergeant Mahoney were  
24 identified by the CCRB as being involved. But as you'll hear  
25 they themselves --

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3843

D4h9flo4

Mahoney - direct

1 MS. PATEL: I think this is getting into the testimony  
2 of the witness.

3 THE COURT: That's fine. I wanted a brief idea about  
4 the general facts of stop. Thank you.

5 Go ahead.

6 MS. PATEL: I'll just repeat my question.

7 BY MS. PATEL:

8 Q. Officer Mahoney you were on duty with Brooklyn South gang  
9 squad on August 20, 2008, correct?

10 A. I was.

11 Q. And the Brooklyn South gang squad is a plain clothes  
12 assignment; is that right?

13 A. Yes.

14 Q. You were on duty with Officer James -- I'm sorry, with  
15 Officer Scott Giacona that day; is that correct?

16 A. Yes, ma'am.

17 Q. You were assigned to suppression; is that right?

18 A. Yes.

19 Q. And you worked from 3 p.m. to 11:35 p.m.?

20 A. I believe so.

21 Q. And at 3:15 you signed out of your command at the Brooklyn  
22 South gang squad to conduct enforcement at the 120th precinct;  
23 is that right?

24 A. I believe so.

25 Q. And the 120th precinct is in Staten Island; is that right?

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3844

D4h9f1o4

Mahoney - direct

1 A. Yes, ma'am.

2 MS. PATEL: Your Honor, there was an exhibit that was  
3 admitted through Joan Thompson, Plaintiffs' Exhibit 166. And  
4 I'd like to put up on the screen two pages from that.

5 THE COURT: That should be fine. The exhibit is in  
6 evidence.

7 Q. I'm putting up on the screen NYC-2- 25074 through NYC 2-  
8 25075. Actually maybe we should -- let's try this -- which is  
9 an excerpt of Plaintiffs' Exhibit 166.

10 And this is a movement sheet for the gang squad --  
11 gang division of the Brooklyn South gang squad; is that  
12 correct?

13 A. Yes. That's roll call.

14 Q. The roll call. Okay.

15 And you see your name is on there, right?

16 A. Yes.

17 MS. PATEL: This exhibit was offered only for notice  
18 purposes. I would just ask that it now be admitted for the  
19 truth of the matter as well, these pages.

20 THE COURT: I understand.

21 MR. KUNZ: I mean you could ask him what his  
22 assignment was and I don't see why -- but, yeah, no objection.

23 THE COURT: Okay. These two pages are admitted for  
24 all purposes.

25 Q. And on August 20, 2008 you were traveling in an unmarked

♀

3845

D4h9f1o4 Mahoney - direct

1 NYPD vehicle; is that right?

2 A. I was.

3 Q. And it was a black Crown Victoria?

4 A. Yes.

5 Q. And it had a license plate CGE -- I'm sorry CDE 1368; is  
6 that correct?

7 A. I don't recall the license plate.

8 Q. I'm showing the witness NYC-2-25100 which is an excerpt of  
9 Plaintiffs' Exhibit 166. It's a fax receipt from the CCRB  
10 requesting information on who was driving the vehicle with  
11 license plate CDE 1368. Can you just read those two lines.

12 THE COURT: To himself.

13 MS. PATEL: To himself.

14 THE COURT: Okay.

15 THE WITNESS: Okay.

16 Q. Does that refresh your recollection regarding whether you  
17 were assigned to CDE 1368?

18 A. That's our 8098. We don't refer to our cars through  
19 license plates. We refer to them through numbers.

20 Q. You agree that this document says on that day you were  
21 assigned to a car with the license place CDE 1368?

22 A. Yes, ma'am.

23 MS. PATEL: I would admit this page into evidence as  
24 well.

25 MR. KUNZ: My only problem with that, this is not his

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D4h9f1o4 Mahoney - direct

1 document, and he did not conduct this search. So I don't think  
2 he can authenticate this.

3 MS. PATEL: If the defendants are not willing to admit  
4 this for that purpose I would ask that they would bring someone  
5 in to authenticate it. This is an important document.

6 THE COURT: I understand.

7 It seems to me it might be able to come in as a past  
8 recollection recorded. He has said this was the vehicle he was  
9 assigned to at that point; isn't that right?

10 THE WITNESS: Your Honor, to be honest, I wouldn't be  
11 able to tell you if that was the license plate of the vehicle.

12 THE COURT: No, but the number.

13 THE WITNESS: 8098?

14 THE COURT: That's on there?

15 THE WITNESS: It's not on that document.

16 THE COURT: It's not on that document?

17 THE WITNESS: She showed me a license plate number  
18 with my name and my old partner.

19 MS. PATEL: This is a -- this was produced by the city  
20 in the course of discovery. It is a document with a -- signed  
21 by a sergeant in the NYPD attesting to the fact that that  
22 license plate number was attached to a car driven by Officer  
23 Mahoney.

24 I would say that we should get a stipulation to be  
25 able to admit this. And if not then -- I mean unfortunately

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3847

D4h9f1o4 Mahoney - direct

1 this is a very important document.

2 THE COURT: I assume all the documents you put into  
3 evidence are very important.

4 If you don't want to stipulate to it, then you'll have  
5 to find --

6 MR. KUNZ: I'll look into it. This is the first time  
7 I've been asked about it.

8 THE COURT: Otherwise, we'll have to have the  
9 custodian come in and testify to its being a business record or  
10 the accuracy or whatever they can testify to.

11 But I won't accept it now. We'll see -- you'll confer  
12 with counsel.

13 Q. You'll agree that this document does state that you were  
14 assigned to a vehicle with the license plate number CDE 1368,  
15 correct?

16 A. Yes. It says my name and it says the license plate number.

17 Q. And you effected two arrests that day; is that correct?

18 A. I did not.

19 Q. You did not?

20 A. I did not make an arrest that day.

21 MS. PATEL: Sorry, your Honor. One moment.

22 (Pause)

23 MR. KUNZ: I don't want to do a speaking objection but  
24 I think we could alleviate this confusion. I believe the  
25 sergeant is saying that he did not take the arrests but --

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1 THE COURT: That's what I thought he was saying.

2 MR. KUNZ: I think if she asks if his partner had  
3 arrests, we might --

4 THE COURT: I thought she might do that.

d4h9f1of

5 I think that's all he's saying. He was not designated  
6 the arresting officer.

7 Q. Officer Giacona, who was on duty with you that day, was  
8 listed as effectuating the arrest, correct?

9 A. Yes.

10 Q. And you were there with him when that arrest took place?

11 A. Yes.

12 Q. You're aware, aren't you, that a Mr. Leroy Downs filed a  
13 CCRB complaint against you for an incident on August 20, 2008,  
14 correct?

15 A. Yes.

16 Q. And you testified at the CCRB on January 16, 2009, right?

17 A. Yes.

18 Q. Related to that incident?

19 A. Yes.

20 Q. And you reviewed that testimony in January of this year; is  
21 that right?

22 A. Yes.

23 Q. And at the CCRB you testified under oath, correct?

24 A. Yes.

25 Q. And your union representative was there, right?

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D4h9f1o4

Mahoney - direct

1 A. Yes.

2 Q. And you told the CCRB that day that you didn't engage in  
3 any reasonable suspicion stops, correct?

4 A. Yes.

5 Q. But that you -- you testified that you stopped people all  
6 day -- stopped people to talk to them all day long, right?

d4h9f1of

7 A. I believe that was taken out of context.

8 Q. Did you make the statement that you stopped people to talk  
9 to them all day long?

10 A. I may have made the statement that I stopped people but  
11 that's not the context I was trying to use.

12 I stop to talk to people all day long is what I mean.

13 Q. Sure I understand that.

14 I'm just asking: Did you make this statement -- did  
15 you tell the CCRB that you stop people to talk to them all day  
16 long?

17 A. If that's what it says, yes.

18 Q. If I showed you the transcript of the CCRB testimony would  
19 that refresh your recollection?

20 A. Yes.

21 MS. PATEL: I'm sorry, your Honor. I strike all of  
22 that. I apologize.

23 Q. Officer Mahoney, you own a blue Jets Jersey, correct?

24 A. I do.

25 Q. And at the CCRB you denied any memory of stopping and

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D4h9f1o4 Mahoney - direct

1 frisking Mr. Downs, right?

2 A. I did.

3 Q. On that day you didn't complete any UF 250s, did you?

4 A. I did not.

5 MS. PATEL: Your Honor, this is another part of  
6 Plaintiffs' Exhibit 166. NYC-2-25064 through 65.

7 Any objection?

8 MR. KUNZ: No. The document is in evidence.

9 Q. This is your memo book, correct?

d4h9f1of

10 A. Yes.

11 Q. These are the entries?

12 A. Yes.

13 Q. From that day, correct?

14 A. Yes.

15 Q. Also putting on the screen already admitted another excerpt  
16 from 166, NYC-2-25081 to 84.

17 This is stop, question frisk report index coversheet;  
18 is that correct?

19 A. I believe so, yes.

20 Q. And it's for the 120th precinct, right?

21 A. Yes.

22 Q. Same request. This is from the same case file for  
23 August 20, 2008. And it just -- you see here, Officer, that  
24 there is no -- there's nothing -- it's completely redacted,  
25 correct?

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D4h9f1o4

Mahoney - direct

1 A. Yes.

2 MS. PATEL: Just move these two pages in as well.

3 THE COURT: What do they tell me? They're completely  
4 redacted.

5 MS. PATEL: That there was no UF 250 from the officer.

6 THE COURT: Why do I need the documents at all? He  
7 said there was no UF 250, right?

8 You told me that?

9 THE WITNESS: Yes, your Honor.

10 THE COURT: No quarrel about it. I don't need anymore  
11 paper. So I'm not receiving those two.

d4h9f1of

12 Q. Officer Mahoney, you're aware, aren't you, that the CCRB  
13 substantiated a complaint by Mr. Downs against you for abuse of  
14 authority, correct?

15 A. I am.

16 Q. And the CCRB found you abused your authority when you  
17 failed to provide your shield information to Mr. Downs; isn't  
18 that right?

19 A. That's what they found, yes.

20 Q. Showing the witness Plaintiffs' Exhibit 172, which is a  
21 letter from the CCRB addressed to you.

22 Do you recognize that letter?

23 A. Yes.

24 MS. PATEL: I just move this into evidence, your  
25 Honor.

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D4h9flo4

Mahoney - direct

1 MR. KUNZ: No objection.

2 THE COURT: What is the exhibit?

3 MS. PATEL: 172.

4 THE COURT: 172 is received.

5 (Plaintiffs' Exhibit 172 received in evidence)

6 Q. And this letter says there was a substantiated complaint  
7 for abuse of authority, correct?

8 A. Substantiated. Right here, yes. Failed to provide shield.

9 Q. Were you ever disciplined following that civilian  
10 complaint?

11 A. I was.

12 Q. What was the discipline you received?

13 A. I -- it was issued a command -- a B command discipline and  
14 five vacation days docked.

d4h9f1of

15 Q. You've been the subject of several civilian complaints  
16 arising from stops and frisks, haven't you?

17 A. I don't know.

18 I'm sorry, counsel. That five days I was docked was  
19 for improper memo book entries, which were deficient.

20 Q. Was that arising out of this incident?

21 A. It was out of the incident but it was -- I was disciplined  
22 for improper memo book entries.

23 Q. You were not disciplined for failing to provide your shield  
24 to Mr. Downs?

25 A. No. I was disciplined for, you know, deficiency -- my memo

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D4h9f1o4

Mahoney - direct

1 book entries weren't up to par.

2 Q. Okay. And you've been the subject -- you said that you  
3 don't recall being the subject of several civilian complaints  
4 arising out of stop and frisks?

5 A. I mean you can give me specific examples.

6 Q. Do you recall a civilian complaint against you from --  
7 arising from an incident on December 4, 2007?

8 A. No.

9 Q. Do you recall an incident -- a civilian complaint in 2007  
10 where you were accused of planting drugs?

11 A. No.

12 Q. Do you recall ever having a discussion with a supervisor  
13 related to an incident in 2007 where you were accused of  
14 planting drugs?

15 A. Do I specifically recall? No.

16 MS. PATEL: Let me show the witness.

17 THE COURT: When you say specifically, I mean  
18 regardless of when it was, do you ever remember being accused  
19 by somebody?

20 THE WITNESS: Of planting drugs? No.

21 THE COURT: Nobody?

22 THE WITNESS: I'm sorry, your Honor. I've never been  
23 accused of planting evidence on anybody.

24 MS. PATEL: I can show this to the witness to refresh  
25 his recollection.

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3854

D4h9flo4

Mahoney - direct

1 THE COURT: Sure. See if it does.

2 MS. PATEL: I would like to move for --

3 THE COURT: Does it have an exhibit number?

4 MS. PATEL: It's for 168.

5 THE COURT: Okay.

6 Just going to show it to you, ask you --

7 MS. PATEL: I'm sorry, your Honor.

8 THE COURT: Wrong?

9 MS. PATEL: I made a mistake.

10 THE COURT: A little apology. It was somebody else.

11 THE WITNESS: That's okay.

12 THE COURT: The question didn't have a basis. Okay.

13 MS. PATEL: Okay. I take that back. There is basis.

14 I apologize.

15 THE COURT: Now it is you. All right.

16 BY MS. PATEL:

17 Q. I'm going to show you Plaintiffs' Exhibit 168. Direct your

18 attention to NYC-2-27448. I'm sorry. 447.

19 Do you see your name listed there?

20 A. Yes.

21 Q. Just read that to yourself.

22 A. Okay.

23 Q. Does that refresh your recollection regarding whether you  
24 were ever -- there was ever a civilian complaint filed against  
25 you for planting drugs?

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D4h9f1o4

Mahoney - direct

1 A. If that's what that said, yes. But I don't remember ever  
2 going down and somebody saying this guy accused you of planting  
3 drugs. I'm sorry.

4 Q. You don't recall --

5 A. I don't recall that.

6 Q. -- ever being questioned about it by a supervisor?

7 A. No. I've been questioned by supervisors in regards to  
8 arrests before, and they come down as communication.

9 Q. Not that specific incident?

10 A. Not that specific incident. I'm sorry.

11 MS. PATEL: Your Honor, I would move for the  
12 admission. It's going to be authenticated by a witness  
13 tomorrow. It's -- I'm sorry. It's an office of chief of  
14 department.

15 THE COURT: We'll wait. Let's wait for tomorrow. I'm  
16 not going to do it now. I don't have the proper witness now.

17 MR. KUNZ: The only other thing I would note, your  
18 Honor, it was an exonerated investigation.

19 THE COURT: That too.

20 That too but I'm not taking it now anyway.

21 MR. MOORE: Judge let me just say because we've had to

22 sort of speed this up, that's why we're fumbling a little bit.

23 THE COURT: I do realize that. I knew that.

24 Q. Do you recall being the subject of a civilian complaint  
25 arising from an incident on January 15, 2008?

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D4h9f1o4

Mahoney - direct

1 A. Not specifically.

2 Q. And do you recall being the subject of a civilian complaint  
3 where -- for -- where you were -- in -- out of an incident  
4 arising -- an incident in 2008 where you had allegedly pulled  
5 up next to two people, searched, frisked and handcuffed them?

6 A. No. I'm sorry. I don't recall.

7 Q. I'm going to show you what's been marked as Plaintiffs'  
8 Exhibit 432. which is an IAB slash office of chief of  
9 department notification. And I'm showing the witness  
10 NYC-2-28724.

11 A. Right here?

12 Q. Your name is right here, right?

13 A. Okay.

14 Q. Does that refresh your recollection?

15 A. No.

16 Q. Regarding an incident -- no?

17 A. No, it does not.

18 Q. Were you ever -- did a supervisor ever discuss this  
19 civilian complaint with you?

20 A. Not that I recall. But if it came down as a communication,  
21 I'm sure they did.

22 Q. Sorry?

23 A. If it came down like that, you get discussed with during  
24 communications, you discuss dispute arrests and stuff like that

25 with supervisors. But I don't remember specifically.

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D4h9f1o4

Mahoney - direct

1 Q. Do you recall ever being disciplined for that?

2 A. No.

3 MS. PATEL: Same issue, your Honor. We'll just do it  
4 tomorrow.

5 Q. Do you recall having to produce your memo book for that  
6 investigation in 2008?

7 MR. KUNZ: Objection. Which investigation?

8 MS. PATEL: The one we just talked about in 2008.

9 THE WITNESS: Not specifically, no.

10 Q. You've also been investigated by the internal affairs  
11 bureau for complaints arising out of stop and frisk, haven't  
12 you?

13 A. I don't know specifics.

14 Q. Do you recall a civilian complaint filed against you out of  
15 an incident on March 26, 2009 where it was alleged that you  
16 cracked a boy's skull?

17 A. No, not specifically.

18 That I personally cracked somebody's skull? No.

19 MR. KUNZ: Your Honor, if that's the allegation,  
20 that's patently outside the scope of what we have talked about.

21 MS. PATEL: It's arising from a stop and frisk.

22 THE COURT: You didn't say that earlier. But in any  
23 event, he doesn't recall any such thing.

24 Q. And do you recall an allegation from March 2006 -- sorry  
25 March 26, 2009 for missing property?

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D4h9f1o4 Mahoney - direct

1 A. No.

2 THE COURT: What are you showing him?

3 MS. PATEL: I'm showing the witness what's been marked  
4 as Plaintiffs' Exhibit 431, which is an IAB file, an internal  
5 investigations bureau file, and I'm going to show him page --

6 MR. MOORE: One second, Judge.

7 MS. PATEL: I'm sorry, your Honor.

8 (Pause)

9 NYC-2-28456.

10 Do you see your name there?

11 THE WITNESS: Yes.

12 Q. On NYC-2-28457.

13 A. Okay. How far do you want me to --

14 Q. Do you see that?

15 MR. KUNZ: I guess I'd say if the plaintiffs intend to  
16 put this document in through someone who is testifying  
17 tomorrow, the document speaks for itself. It's a 283 page IAB  
18 investigation, so.

19 MS. PATEL: We don't intend to put in the entire file.

20 THE COURT: I understand.

21 They wanted to show him a page to see if it refreshed  
22 his recollection. But to actually offer it, you'll do that  
23 tomorrow through another witness.

24 MS. PATEL: I don't think we can authenticate it  
25 through the witness tomorrow, but someone that the city intends

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D4h9f1o4 Mahoney - direct  
Page 197

1 to call.

2 THE COURT: Okay.

3 Q. Does that refresh your recollection regarding an incident  
4 where a complainant alleged that you cracked a boy's skull?

5 A. Vaguely. But it says I hit him in the back of the head  
6 with my radio.

7 In the gang division, our radios are about this big.

8 THE COURT: Be that as it may, that's the allegation?

9 THE WITNESS: Yes.

10 The radios are so small -- when you usually say a  
11 police radio, you're thinking of the big Manhattan old or  
12 Brooklyn patrol radio, which could be used as a weapon. It's  
13 hard. It's very big.

14 But the radios that we're issued when we're in the  
15 gang division are very small. They're about yea big, about  
16 that thick. I don't see how that would crack somebody's skull.  
17 I think it would be impossible to do.

18 Q. Do you recall hitting somebody on the head with your radio?

19 A. No. I don't -- we've gotten to, basically when trying to  
20 effect an arrest and being in resisting arrest, and get into  
21 fights and stuff like that with the perpetrators, you know,  
22 using the necessary force to place them under arrest.

23 But that specific incident where I hit somebody over  
24 the head with a tiny radio and cracked their skull, absolutely  
25 not.

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3860

D4h9flo4

Mahoney - direct

1 Q. Let the record reflect that the witness was indicating that  
2 the radio was how big again?

3 A. Very small. Probably about --<sup>d4h9f1of</sup>

4 THE COURT: He's going like this,  
5 three-inches-by-three-inches.

6 THE WITNESS: Yeah. It's very small.

7 MS. PATEL: Four-by-four.

8 THE WITNESS: The radios issued to officers in the  
9 gang squad are very different than the average police radio  
10 that you would see.

11 Q. How heavy do you think it is?

12 A. Less than what pound. I mean maybe like eight ounces.

13 MR. KUNZ: Your Honor, this is --

14 THE WITNESS: I wouldn't know for sure.

15 MR. KUNZ: Not within the scope -- we're here to talk  
16 about a stop. This appears to be some sort of excessive force  
17 allegation that I guess was never even substantiated so I don't  
18 understand.

19 THE COURT: why is this relevant?

20 MR. CHARNEY: This is related to his memory and it's  
21 an incident that arises from a stop encounter.

22 THE COURT: Is it part of a stop and frisk encounter?

23 MS. PATEL: Yes, your Honor.

24 THE COURT: All right.

25 MR. KUNZ: Well --

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3861

D4h9f1o4 Mahoney - direct

1 THE WITNESS: I'm sorry, counselor.

2 MR. KUNZ: I think there's a question there as well  
3 but.

4 MS. PATEL: It was produced as a file related -- I  
5 mean that was your Court -- the Court's ruling was to produce

d4h9f1of

6 files arising -- of complaints arising from stops and frisks.

7 THE WITNESS: Counsel, I filled out a stop frisk for  
8 that incident?

9 MS. PATEL: I didn't say that. I'm sorry. We're just  
10 trying to decide.

11 THE WITNESS: I'm sorry. But what you showed me and  
12 what it said in the body of the story doesn't even state that  
13 it was a stop and frisk. It stated that it was a probable  
14 cause arrest and a struggle ensued thereafter.

15 It doesn't say that I went to stop and question them.  
16 It just says that they were going to be placed under arrest and  
17 "my boy got hit in the head" it said in quotations. He tried  
18 running and got hit in the head.

19 Q. I mean I can read from the document, if --

20 A. I'm a little unclear. If I didn't do a --

21 THE COURT: The only reason to show the document or to  
22 read from it is to show that you have a basis for the question.

23 MS. PATEL: Yes, your Honor.

24 THE COURT: If it says something about a stop or a  
25 stop and frisk or something that indicates that, then maybe you

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D4h9f1o4

Mahoney - direct

1 have a fair basis. Otherwise you shouldn't be asking this  
2 question.

3 MS. PATEL: Yes, your Honor. It says that seven  
4 detectives came out of a Dodge Charger in plain clothes, went  
5 up to the complainant, and then asked him to put his hands up  
6 against the wall, etc. I don't want to keep reading.

7 THE COURT: Right. I didn't hear anything there that

8 sounded like a stop and frisk.

9 As he said, it could have been a probable cause  
10 arrest, an arrest on a warrant. It could have been a lot of  
11 things. But there is no indication there that that's a  
12 reasonable suspicion street stop. I don't know what it is.

13 MR. KUNZ: The other thing is we produced the file  
14 based on the short summaries. And I believe when we saw this  
15 one we said it may have been related. So we, in an abundance  
16 of caution, produced the file. But I think when you look close  
17 at the file I think the sergeant is correct. It looks more  
18 like an arrest.

19 THE COURT: So let's not have anything more on this.

20 MS. PATEL: I was just asking if he remembered.

21 THE COURT: Okay.

22 Q. Do you recall settling a lawsuit filed in October 2006?

23 MR. KUNZ: Your Honor, I'm going to object to this  
24 line of questioning. I don't think this -- a settled lawsuit  
25 could possibly have any relevance.

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3863

D4h9f1o4 Mahoney - direct

1 MS. GROSSMAN: Your Honor, there was in limine rulings  
2 that you made on the settlement of lawsuits, so.

3 MS. PATEL: Your Honor said -- I mean we're allowed to  
4 ask questions to test memory. The defendants have been doing  
5 that of our witnesses.

6 THE COURT: Not if I specifically ruled out  
7 settlements on lawsuits, unrelated lawsuits. I don't remember  
8 that I did but Ms. Grossman says I did. So that's that.

9 MS. PATEL: They were required to provide us the  
10 information.

11 It's supposed to be on a case-by-case -- your Honor  
12 was going to rule on a case-by-case basis.

13 THE COURT: Maybe.

14 MS. PATEL: There was an in limine motion filed and it  
15 was on a case-by-case basis.

16 THE COURT: In other words, my ruling said I would  
17 have to evaluate them one by one.

18 MS. PATEL: That's right, your Honor.

19 MS. GROSSMAN: First of all, even if this is so,  
20 plaintiffs have not -- this is not something that was  
21 identified to us as a possible issue that we could have raised  
22 with you to work out whatever it is.

23 THE COURT: I agree. That's maybe because we took it  
24 out of order and it's all been confusing.

25 But I think, Ms. Patel, we'll have to put this off.

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D4h9flo4

Mahoney - direct

1 It may require, unfortunately, for the officer to come back.  
2 But I think you need to confer with the defense. I don't know  
3 what this case is about that was settled. You need to talk to  
4 each other since I said I would review each one on a  
5 case-by-case basis.

6 Again, I don't really like the idea of doing that  
7 because it's nonjury. And the less can I see the better. But  
8 I would have to just maybe take an offer of proof or something.  
9 But it's very complicated when it's nonjury. I'm not anxious  
10 to see what I then won't admit but I don't know what it is.

11 why don't you start it by showing it to them and  
12 talking to each other.

d4h9f1of

13 MS. PATEL: No more questions.  
14 THE COURT: So who is --  
15 MS. GROSSMAN: Your Honor, I just want to say that the  
16 plaintiffs were supposed to identify whatever it is they sought  
17 to use. I'm just saying.  
18 THE COURT: I know but he was taken out of order,  
19 right?  
20 MS. GROSSMAN: He was scheduled this week.  
21 THE COURT: So.  
22 MS. GROSSMAN: They were supposed to let us know last  
23 week.  
24 MS. BORCHETTA: Your Honor, we're meant to identify  
25 exhibits. We don't necessarily have to inform them of what we

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3865

D4h9f1o4 Mahoney - direct

1 intend to ask a witness.  
2 THE COURT: But if there was an exhibit she wanted to  
3 use, I think the settlement papers themselves or the complaint  
4 or something. It sounds like there's an exhibit involved.  
5 That's why Ms. Grossman is saying I don't know what case  
6 they're referring to. I don't know what the case is about.  
7 MS. PATEL: I wasn't going to offer it as an exhibit.  
8 THE COURT: Well. All right. That I understand. But  
9 I can't rule in limine and the defendant can't advocate against  
10 a position if they don't know what case you're talking about.  
11 MS. PATEL: We'll confer.  
12 THE COURT: Thank you.  
13 Mr. Kunz.  
14 CROSS-EXAMINATION  
15 BY MR. KUNZ:

16 Q. Good afternoon, Sergeant.

17           Could you just tell the Court very briefly your  
18 history with the NYPD.

19 A. I'm a currently the anticrime sergeant in the 72nd  
20 precinct.

21           Before that I was a detective in Brooklyn South gang  
22 squad. I was in the gang squad for five years. June of '07  
23 through about August of this year.

24           And before that I was a police officer in the 9th  
25 precinct assigned to the SNEU team. Before that the grand

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D4h9f1o4

Mahoney - cross

1 larceny team.

2           And before that I was in field training. And before  
3 that I was in the police academy.

4 Q. When did you graduate from the police academy?

5 A. I was sworn in July 1, 2003. I graduated right before New  
6 Year's in 2003. So late December, the actual date.

7 Q. In 2008 you were assigned to the Brooklyn South gang squad?

8 A. I was.

9 Q. And can you just tell the court very briefly what sort of  
10 work you did as a member of the Brooklyn South gang squad?

11 A. We did more proactive work. We targeted drug offenders,  
12 violent offenders, tried to get guns, tried to get, you know,  
13 went to high crime areas, mainly.

14 Q. And why was it that, as a Brooklyn South gang squad member,  
15 why was it that you were in Staten Island for a period of time?

16 A. I believe there was a spike in crime but that was --  
17 somebody made that decision well above my pay rate.

d4h9f1of

- 18 Q. And how long were you in Staten Island doing work?  
19 A. I want to say six to about eight months, maybe.  
20 Q. Now in your work as a member of gang squad did you ever  
21 have occasion to conduct reasonable suspicion stops?  
22 A. I did.  
23 Q. And as a police officer what level of suspicion do you need  
24 in order to conduct a stop like that?  
25 A. You need reasonable suspicion of penal law, misdemeanor or

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D4h9flo4

Mahoney - cross

- 1 a felony.  
2 Q. Are you allowed to frisk people that you stop?  
3 A. On a case-by-case basis, yes.  
4 Q. And what sort of information do you need to know in order  
5 to frisk someone?  
6 A. Whether it was a violent crime or you have reasonable --  
7 fear for your safety or the safety of somebody, civilian.  
8 Q. Now when you conduct a reasonable suspicion stop of someone  
9 do you fill out any paperwork?  
10 A. Yes, you do.  
11 Q. What paperwork do you fill out?  
12 A. Uniform Form 250.  
13 Q. What was your practice? Did you complete those forms when  
14 you conducted a stop?  
15 A. I did.  
16 Q. And how about if you frisked someone? Do you also -- do  
17 you fill out a form?  
18 A. The same form.  
19 Q. And if you stopped someone and frisk them, did you also  
20 fill out paperwork?

21 A. Yes. It would be the UF 250.

22 Q. On the date of the alleged incident, August 20, 2008, I  
23 believe, did I hear you say on examination earlier that your  
24 partner had a couple arrests that day?

25 A. Yes.

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D4h9f1o4

Mahoney - cross

1 Q. Do you know what time those arrests were?

2 A. I believe they were 1640 hours.

3 MS. PATEL: Objection, your Honor. The partner is  
4 going to testify immediately thereafter. I just -- I don't  
5 really see the point of having this witness testify about that.

6 THE COURT: Were they not together?

7 MR. KUNZ: They were together.

8 THE COURT: So he's allowed to do it too.

9 Q. Did you say 1640 or 640?

10 A. 640 I'm sorry. 1840.

11 Q. So 6:40 p.m. was the --

12 A. Yes.

13 Q. Now you said you received a command discipline from the  
14 NYPD for the incident; is that correct?

15 A. For improper memo book entries.

16 Q. And were your memo book entries improper?

17 A. Yes.

18 Q. And is that why you agreed to the discipline?

19 A. Yes.

20 Q. Do you have any -- has your practice in regard to memo  
21 books changed since that incident?

22 A. Drastically.

23 Q. Can you explain to the court how so.

24 A. Just now, your Honor, you basically put everything in your  
25 memo book. You have to document. And back then I, shame on

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D4h9flo4

Mahoney - cross

1 me, I was lax. I just basically put when I'd go out, when I'd  
2 come back. If I had personally an arrest, I'd put it in there.  
3 But if my partner had an arrest, I wouldn't. Now I put  
4 everything. If I'm with -- me and you are together and you  
5 have an arrest, I'll put that in there. Everything.

6 Q. Currently in your job as a sergeant do you supervise other  
7 officers in regard to their memo books?

8 A. I do.

9 Q. What do you look for when you supervise other officers?

10 A. Make sure that all the entries are legible, make sure that  
11 everything is in there that needs to be in there regarding  
12 whether it's a job, a UF 250, an arrest, voucher, anything in  
13 particular.

14 Q. Do you know an officer named Police Officer Moon?

15 A. No.

16 Q. You also said that you own a blue football jersey?

17 A. Yes.

18 Q. Which team was it for?

19 A. It's the Jets throwback to the New York Titans.

20 Q. And it was blue? It was not green?

21 A. It was blue with gold trim.

22 MR. KUNZ: One second, your Honor.

23 Nothing further, your Honor.

24 THE COURT: Thank you. Anything further for this  
25 witness, Ms. Patel?

D4h9f1o4 Mahoney - cross

1 MS. PATEL: One moment, your Honor.

2 (Pause)

3 REDIRECT EXAMINATION

4 BY MS. PATEL:

5 Q. You just testified that you now put more detail in your  
6 memo book; is that right?

7 A. I do.

8 Q. Is that since -- in the last few weeks?

9 A. No. That's been for a while now. Especially since I got  
10 promoted to sergeant.

11 Q. When were you promoted to sergeant?

12 A. The end of August of this year.

13 MR. KUNZ: Last year.

14 THE WITNESS: Last year. I'm sorry. Obviously.

15 MS. PATEL: Nothing further.

16 THE COURT: Okay. All set. Thank you.

17 THE WITNESS: Thank you, your Honor. Again, sorry.

18 THE COURT: No problem.

19 (Witness excused)

20 THE COURT: The next witness.

21 MS. PUBLICKER: I'll get him, your Honor.

22 THE COURT: Okay. Thank you. And that's going to be.

23 MS. PATEL: Scott Giacona.

24 MS. GROSSMAN: Your Honor while we're waiting we may  
25 need until to tomorrow to give the schedule. We are working

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D4h9f1o4 Mahoney - redirect

1 through. And we're trying to come up with a proposal for  
2 Thursday to fill in the space. But we may need to have until  
3 tomorrow and today just to confer with the final schedule.

4 MS. BORCHETTA: We would only ask that the ones they  
5 know for next week, we'd like to know.

6 MS. GROSSMAN: That's why we need to speak with  
7 witnesses.

8 SCOTT GIACONA,  
9 called as a witness by the Plaintiffs,  
10 having been duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MS. PATEL:

13 Q. Good afternoon.

14 A. Good afternoon.

15 Q. Are you still a police officer in the Brooklyn South gang  
16 squad?

17 A. Yes, ma'am.

18 Q. And you were on duty with the Brooklyn South gang squad on  
19 August 20, 2008, correct?

20 A. I believe so, yes.

21 Q. And that's a plain clothes assignment, right?

22 A. Yes, ma'am.

23 Q. And you were on duty with Officer James Mahoney; is that  
24 correct?

25 A. Yeah. As far as I remember, yes.

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D4h9f1o4 Giacona - direct

1 Q. You were assigned to suppression that day, right?

2 A. Yes, ma'am.

3 Q. And you worked from 3:00 p.m. to 11:35; is that correct?

4 A. Yes, ma'am. That was part of my scheduled tour.

5 THE COURT: What does suppression mean?

6 THE WITNESS: Gang suppression. It's not the  
7 investigation so much. It's more the street enforcement.

8 Q. And at 3:15 you signed out of your command at Brooklyn  
9 South gang squad to conduct enforcement in 120th precinct,  
10 right?

11 A. I don't have the paperwork in front of me. I can't be a  
12 hundred percent sure.

13 THE COURT: Where is the 120th precinct?

14 THE WITNESS: Staten Island.

15 MS. PATEL: This is NYC-2-25074 to 75 of Plaintiffs'  
16 Exhibit 166.

17 Q. Is this the Brooklyn South gang division movement sheet?  
18 Do you see that?

19 A. Yes.

20 Q. And it's dated August 20, 2008, correct?

21 A. Yes.

22 Q. And you see your name there?

23 A. Yes.

24 Q. And do you see your name there Giacona slash Mahoney?

25 A. Yes, ma'am.

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D4h9f1o4

Giacona - direct

1 Q. 1515. And it says that you were -- it indicates you're  
2 being signed out to 120th precinct, correct?

3 A. Yes, ma'am.

d4h9f1of

4 Q. On August 20, 2008 you were traveling an unmarked NYPD  
5 vehicle, correct?

6 A. I believe so, yes.

7 Q. It was a black Crown Victoria?

8 A. Yes. I believe so.

9 Q. And it had a license plate CDE 1368, correct?

10 A. That I'm not sure of, no.

11 Q. Showing the witness NYC-2-25100.

12 MR. KUNZ: This is the exact same thing we went  
13 through with Mahoney.

14 MS. PATEL: Right. But this might refresh his  
15 recollection.

16 THE COURT: Go ahead.

17 Q. Sorry. Plaintiffs' Exhibit 166. Just read that to  
18 yourself there.

19 A. That is really small. I can't even make that out.

20 Q. Just read it to yourself. I'm sorry.

21 Does that refresh your recollection -- so on  
22 August 20, 2008 you were driving a vehicle with the license  
23 plate number CDE 1368?

24 A. According to that paper, yes.

25 MR. KUNZ: So I mean objection. The same situation

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D4h9f1o4 Giacona - direct

1 with the last witness.

2 THE COURT: And I suggested that if you can't work it  
3 out, we'll have to get a records custodian. She's just trying  
4 to tie the people to the car. If this doesn't work for you as  
5 a stipulation, we'll have to get witnesses.

6 MR. KUNZ: I agree. I just need to be able to look at  
Page 211

7 the document.

8 THE COURT: That's fine.

9 BY MS. PATEL:

10 Q. I'm sorry. Did you say that does refresh your recollection  
11 that you were driving in --

12 A. I'm not sure what the license plate was on that vehicle,  
13 ma'am. We go by car numbers. The car number was 8098, the  
14 NYPD assigned number.

15 So I'm just not sure what that plate was on that  
16 vehicle. I can't confirm or deny what the plate was.

17 Q. But you agree, don't you, that this -- this document states  
18 that you were driving a vehicle on August 20, 2008 with the  
19 license plate number CDE 1368?

20 A. I agree that, yeah, according to that document I was  
21 driving a vehicle with that plate number.

22 Q. And on August 20, 2008 you effected two arrests, correct?

23 A. I believe so, yes.

24 Q. And you said that it was a black Crown Victoria, correct?

25 A. I believe so, yeah.

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D4h9f1o4

Giacona - direct

1 Q. How many doors would it have?

2 A. I believe it had four.

3 Q. And were the windows tinted?

4 A. If I remember correctly, yeah, they were.

5 Q. They were. And what was the -- what year was that car  
6 made?

7 A. Oh, I don't know. I don't remember.

8 Q. Do you remember anything else about the car?

d4h9f1of

- 9 A. No.
- 10 Q. You're aware, aren't you, that Leroy Downs filed a CCRB  
11 complaint against you, correct?
- 12 A. Yes.
- 13 Q. And you testified at the CCRB following that complaint; is  
14 that right?
- 15 A. Yes.
- 16 Q. And you testified under oath, correct?
- 17 A. Yes.
- 18 Q. And that was on January 16, 2009, right?
- 19 A. I don't remember the exact date, no.
- 20 Q. Would you take my word for it?
- 21 A. Sure.
- 22 Q. And you reviewed that testimony in January of this year,  
23 correct?
- 24 A. I believe so, yes.
- 25 Q. In preparation for submitting a declaration; is that right?

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Giacona - direct

- 1 A. I don't understand what you just said, but.
- 2 Q. Did you submit a sworn statement in this case?
- 3 A. I believe I did, yeah.
- 4 Q. That was in January of this year?
- 5 A. I don't remember the exact date.
- 6 Q. But around January 8 of this year. Do you remember that?
- 7 A. No. But okay. I don't know the exact date. So I don't  
8 want to confirm or deny it. I don't know.
- 9 Q. Okay. At the CC -- I'm sorry.
- 10 On August 20, 2008 you didn't complete any UF 250s,  
11 did you?

d4h9f1of

12 A. I don't believe I did, no.

13 Q. And when you testified at the CCRB -- when you were  
14 interviewed at the CCRB you said that you stop people all day  
15 to talk -- you stop people to talk to them all day long, right?

16 A. I believe that's what I said. But it was like taken out of  
17 context, I think. I meant I stop to speak to people all day  
18 long, not that I physically stop people and then talk to them.

19 Q. But you said those words, that you stop people to talk to  
20 them all day long, right?

21 A. Sure.

22 Q. And at the CCRB you denied any memory of stopping, frisking  
23 or searching Mr. Leroy Downs, right?

24 A. Yes.

25 Q. Putting on the screen NYC-2-25059 through 61 which is an

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D4h9flo4

Giacona - direct

1 excerpt from Plaintiffs' Exhibit 166 already admitted for  
2 notice purposes.

3 Officer, this is an excerpt from your memo book,  
4 correct?

5 A. Yeah. Looks like the cover of the memo book.

6 Q. And it's dated August 20, 2008, right?

7 A. Correct.

8 Q. This is the second page of that, correct?

9 A. Looks like it, yeah.

10 Q. It says you were on enforcement with PO Mahoney?

11 A. Yes.

12 Q. And then here it says two under, correct?

13 A. Yes, ma'am.

14 Q. And that indicates two arrests?  
 15 A. Yes, ma'am.  
 16 MS. PATEL: I just move this to be admitted for all  
 17 purposes.  
 18 MR. KUNZ: No objection.  
 19 THE COURT: Did it have its own exhibit number?  
 20 MS. PATEL: No. It's an excerpt from Plaintiffs'  
 21 Exhibit 166.  
 22 THE COURT: All right, well.  
 23 MS. PATEL: We can have them marked individually.  
 24 THE COURT: Or call it 166A or B or C.  
 25 MS. PATEL: Sure.

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D4h9f1o4 Giacona - direct

1 THE COURT: Okay. So it's received. We'll worry  
 2 about the marking later.  
 3 Coordinate with defense and just agree on the letter  
 4 that goes with 166.  
 5 Q. You're aware, aren't you, that the CCRB substantiated  
 6 Mr. Downs' complaint against you for abuse of authority,  
 7 correct?  
 8 A. I believe so, yes.  
 9 Q. And the CCRB found that you abused your authority when you  
 10 failed to provide your shield information to Mr. Downs,  
 11 correct?  
 12 A. I believe that was the case, yes.  
 13 Q. Putting on the screen NYC-2-25156, Plaintiffs' Exhibit  
 14 171 -- actually I'm sorry. This has not been admitted, I don't  
 15 think.  
 16 I'm showing the witness Plaintiffs' Exhibit 171 which

d4h9f1of

17 is a letter from the CCRB addressed to you; is that right?

18 A. Yes.

19 THE COURT: You say it's already been admitted?

20 MS. PATEL: Actually this has not been admitted. I'm  
21 sorry. So I'd move to have it admitted.

22 MR. KUNZ: No objection to 171.

23 THE COURT: Okay. 171 received.

24 (Plaintiffs' Exhibit 171 received in evidence)

25 Q. Were you ever disciplined for the -- for failing to provide

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Giacona - direct

1 your shield information to Mr. Downs?

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

3 Q. You've been the subject of a few civilian complaints  
4 arising from stops and frisks, haven't you?

5 A. I don't know if they arise from stops and frisks but I have  
6 had, yes, a few CCRBs.

7 Q. And not just CCRBs but other civilian complaints as well,  
8 correct?

9 A. What do you mean by other civilian complaints?

10 Q. Have you ever been -- you've been the subject of civilian  
11 complaints filed with the office of chief of department  
12 correct?

13 A. I don't know, to be honest with you.

14 Q. Or the internal affairs bureau?

15 A. Internal affairs investigations, yeah, I'm sure I have.

16 Q. Do you recall being the subject of a complaint arising from  
17 an incident on December 4, 2007 where you were accused of  
18 planting drugs?

d4h9f1of

19 A. No, ma'am.

20 Q. Showing the witness what's been marked as 168, NYC-2-2748.

21 Do you see your name?

22 A. Yes.

23 Q. If you could read to yourself.

24 A. Sure.

25 (Pause)

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Giacona - direct

1 Q. Does that refresh your recollection regarding a complaint  
2 against you planting drugs?

3 A. No, ma'am.

4 Q. Do you recall whether a supervisor ever discussed with you  
5 a complaint arising out of that incident that you just read?

6 A. No, ma'am.

7 MR. KUNZ: Just for the record, again, this was the  
8 same one we went over with Mahoney and it was exonerated.

9 THE COURT: He doesn't even remember the event.

10 Q. Do you recall an IAB investigation against you for failing  
11 to provide your name or shield?

12 A. No, ma'am.

13 MR. KUNZ: Is it in connection with the stop?

14 MS. PATEL: No. This is Exhibit 430.

15 MR. KUNZ: So if it's not in connection with the  
16 stop-question-frisk, then we object.

17 MS. PATEL: Oh, I thought you meant the stop at issue.

18 THE COURT: Are you representing it is in connection  
19 with a stop?

20 MS. PATEL: Yes, your Honor.

21 THE COURT: It looks like our time has run for today.  
Page 217

d4h9f1of

22 Even though I know the hope was to get Officers Mahoney and  
23 Giacona done because they came in, but I don't think we can  
24 finish.

25 Ms. Patel, I said I think we've run out of time. Why?

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D4h9f1o4

Giacona - direct

1 How much do you have?

2 MS. PATEL: This is my last question.

3 THE COURT: Last question. Oh, well, okay. But he  
4 might not have much. We'll see. What is it, Ms. Patel? What  
5 is your last question?

6 Q. I'm showing the witness Plaintiffs' Exhibit 430.

7 MR. KUNZ: What page?

8 MS. PATEL: NYC-2-28323 through 324.

9 Q. Does that refresh your recollection regarding an incident?

10 MS. GROSSMAN: Can we just have a chance to read it?

11 MR. KUNZ: I'm sorry. Just hang on for one second.

12 THE COURT: Tell us when you're ready, Mr. Kunz.

13 MR. KUNZ: Go ahead.

14 THE COURT: Does it refresh your recollection of what?

15 MS. PATEL: Does it refresh your recollection?

16 THE WITNESS: No, ma'am.

17 THE COURT: Of what?

18 MS. PATEL: Regarding the allegations made on April 4,  
19 2009 against you for failing to provide your shield or name.

20 THE WITNESS: No, ma'am.

21 THE COURT: It doesn't?

22 THE WITNESS: No, ma'am.

23 THE COURT: Okay. It doesn't refresh his

24 recollection. And you said that was your last question.

25 Mr. Kunz, do you have some cross? Because it's 4:30.

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D4h9flo4

Giacona - direct

1 MR. KUNZ: I have some questions to ask. I think we  
2 should probably adjourn.

3 THE COURT: So unfortunately you have to come back.

4 THE WITNESS: That's okay.

5 THE COURT: That's the way it is. 10:00 tomorrow.

6 For the case or two in the back, I'll be about ten  
7 minutes. I'll be back.

8 Yes, Ms. Grossman.

9 MS. GROSSMAN: Your Honor I just wanted to say that in  
10 light of the adjustment of the schedule we are just going to  
11 need until tomorrow at 5:00.

12 THE COURT: I heard that.

13 MS. GROSSMAN: Thank you.

14 (Adjourned to April 18, 2013 at 10:00 a.m.)

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4 Exhibit No.	Received
5 230 . . . . .	.3698
6 466 . . . . .	.3723
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8 231 . . . . .	.3734
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12 277 . . . . .	.3802
13 172 . . . . .	.3852
14 171 . . . . .	.3878

15 DEFENDANT EXHIBITS

16 Exhibit No.	Received
17 L10 . . . . .	.3710

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