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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 DAVID FLOYD, et al.,

4 Plaintiffs,

5 v.

08 CV 1034(SAS)

6 CITY OF NEW YORK, et al.,

7 Defendants.

8 -----x

New York, N.Y.
April 22, 2013
10:13 a.m.

10 Before:

11 HON. SHIRA A. SCHEINDLIN,

12 District Judge

13 APPEARANCES

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1 THE COURT: Good morning everyone. Please be seated.
2 Mr. Charney, are you there because we're in the middle
3 of a witness?

4 MR. CHARNEY: I know you have to address --

5 THE COURT: I think we should probably take care of
6 the other issue first. I received a letter from Mr. Quinn. Is
7 he here?

8 MR. QUINN: I am, your Honor. May I approach?

9 THE COURT: And also Mr. Moschella.

10 MR. MOSCHELLA: Good morning, your Honor.

11 THE COURT: I read your letter, Mr. Quinn. And I'm
12 torn whether to ask the questions that I thought I should ask
13 as follow-up questions or to accept your suggestion of just
14 allowing Mr. Downs to take a look at the witnesses who we would
15 have seen but for the fortuity of the order in which the
16 testimony unfolded and then ask him a few questions.

17 I guess what I would do, I would start with the first
18 of those. Let them, one by one, come up, sit on the stand for
19 a minute, maybe talk for a minute so we can hear their voice,
20 just: What's your name, what's your rank, just something like
21 that, and then ask them to leave. Ask Mr. Downs whether he
22 recognizes either of them. And then I'll consider what to do
23 from there. We'll see. But, for now, keep it very simple.

24 So which one would you like to produce first?

25 MS. GROSSMAN: Your Honor may I just be heard?

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1 THE COURT: Yes.

2 MS. GROSSMAN: I just want to alert the court or
3 remind the court that there was a sequestration order in place
4 that the plaintiffs asked for.

5 THE COURT: But the plaintiff testified first in every
6 other stop and the plaintiffs all remained in the room after
7 they testified first when they heard the police officers. I
8 watched every one unfold. The plaintiff would tell his
9 version, sit in the audience, and the police officers would
10 come in. So the sequestration would never have separated -- in
11 fact, the police would have stayed out while Mr. Downs
12 testified but not vice versa.

13 All right. Can you -- who do you want to bring in
14 first.

15 MR. QUINN: We recommend Giacona first, your Honor.

16 THE COURT: Sure.

17 While we're waiting, Mr. Charney, who is the witness
18 we're in the middle of?

19 MR. CHARNEY: Assistant Commissioner McGuire who is
20 here.

21 THE COURT: Where is he?

22 Now I remember.

23 MS. PATEL: Your Honor, we stipulated something. I
24 could put it on the record while we're waiting.

25 THE COURT: He's here.

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1 MR. MOSCHELLA: May he, your Honor?

2 THE COURT: Please.

3 SCOTT GIACONA, resumed.

4 BY THE COURT:

5 Q. Good morning.

6 A. Good morning.

7 Q. Please be seated.

8 Detective Giacona, right?

9 A. Yes, ma'am.

10 Q. Just wanted to ask you again where are you assigned now?

11 A. Brooklyn South gang squad.

12 Q. What's your rank now?

13 A. Detective.

14 Q. Since when have you been a detective?

15 A. I got promoted February last year.

16 Q. February 2012?

17 A. Yes.

18 Q. Where is your precinct?

19 A. We work out of the Brooklyn Army Terminal.

20 Q. Now you do?

21 A. Yes.

22 THE COURT: All right. I think that's all I wanted to
23 ask for now. But one more thing maybe.

24 Mr. Downs, could you just stand up for a minute.

25 Because a photograph is different from a person.

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1 Q. Do you recognize him particularly?

2 A. No, ma'am.

3 THE COURT: Okay. Thank you.

4 That's it for now.

5 If you would just remain in the area, though, I'd
6 appreciate it.

7 THE WITNESS: No problem, ma'am.

8 THE COURT: Thank you.

9 (Witness excused)

10 THE COURT: I'm sorry. What was the stipulation,
11 Ms. Patel, that you wanted to tell me?

12 MS. PATEL: Yes, your Honor.

13 The defendants raised on Wednesday that there was
14 potentially an error with Plaintiffs' Exhibit 166 which was
15 submitted for notice purposes through Joan Thompson. And so
16 I've looked at it and we would have no problem -- we discussed
17 just adding these pages to Plaintiffs' 166. I can provide the
18 court with the corrected copy.

19 So just for the record we're adding NYC-2-00025145
20 through NYC-2-25172 to Plaintiffs' Exhibit 166.

21 THE COURT: Okay. Thank you.

22 JAMES MAHONEY, resumed.

23 BY THE COURT:

24 Q. Please be seated. You're Sergeant Mahoney, right?

25 A. Yes, your Honor.

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1 Q. Where are you assigned now?

2 A. 72nd precinct.

3 Q. Which borough is the 72nd precinct?

4 A. In Brooklyn.

5 Q. Which part of the Brooklyn?

6 A. Sunset Park.

7 Q. How long have you been at that particular precinct?

8 A. Since September. September of 2012.

9 Q. Where were you assigned before that?

10 A. Brooklyn South gang squad.

11 Q. Is that out of a particular area?

12 A. It's our office was in Brooklyn Army Terminal, which is
13 also in Sunset Park. But we covered mainly Brooklyn South,
14 South of Eastern Parkway basically.

15 Q. Just one other question for you.

16 THE COURT: I'd like Mr. Downs to stand.

17 Q. Seeing him in person, ask if that refreshes your
18 recollection at all.

19 THE COURT: Would you mind standing for a moment
20 Mr. Downs. Thank you.

21 Q. Do you think you recognize this gentleman?

22 THE WITNESS: No, I'm sorry, your Honor.

23 THE COURT: No. Okay. Thank you. I don't have any
24 further questions right now but I'd like you to stay in the
25 area for a little bit if you could.

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1 THE WITNESS: Thank you very much.

2 THE COURT: Thank you.

3 (Witness excused)

4 THE COURT: Well, Mr. Downs, would you like to come up
5 or just answer a couple questions from there? It's up to you.
6 Thank you.

7 LEROY DOWNS, resumed.

8 BY THE COURT:

9 Q. Please be seated. Good morning.

10 So you've had an opportunity to see these two
11 individuals and hopefully hear them speak a little bit. Can
12 you tell us honestly do you think you recognize one or both of
13 them?

14 A. Yes. Both of them.

15 Q. You do? Do you say those are the two gentlemen who did
16 stop you?

17 A. Yes.

18 THE COURT: That's really all -- I think all I needed
19 to ask Mr. Downs.

20 Anybody else think they had any others questions? No.

21 Thank you so much for coming back to court.

22 Appreciate it.

23 (Witness excused)

24 THE COURT: You're free to go.

25 Okay.

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1 Given the in-court identification I don't think I have
2 any further questions of -- unless there's something you would
3 like.

4 MR. QUINN: No, your Honor.

5 MR. MOSCHELLA: Not at this time. Thank you, your
6 Honor.

7 THE COURT: Is that fair for the lawyers too? Is
8 there anything particular that wanted to do before I let them
9 go?

10 MS. GROSSMAN: Your Honor, we just reserve the right
11 after this to give consideration to what the witnesses may have
12 looked like before. So we may want to provide further
13 information at a later time, but not right now.

14 THE COURT: The witnesses, they were in plain clothes.
15 That's for sure. They weren't in suits.

16 Would you like them to come in in sweatshirts saying
17 Fave on the back?

18 MR. MOORE: Farb, Judge.

19 THE COURT: I knew I was going to get it wrong. But
20 in any event, that's how they would look most similar to how
21 they looked at the time.

22 Anyway, anything from the plaintiffs?

23 MS. PATEL: No, your Honor.

24 THE COURT: Then thank the officers, detective and
25 sergeant, for coming in. And they're free to go.

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1 Thank you, Mr. Charney. We're going to continue.

2 Is it Commissioner McGuire?

3 PHILIP MCGUIRE, resumed.

4 THE COURT: Good morning.

5 DIRECT EXAMINATION CONTINUED

6 BY MR. CHARNEY:

7 Q. Good morning, Commissioner McGuire?

8 A. Good morning.

9 Q. Before I continue with the questioning I just wanted to ask
10 you: Have you spoken to your counsel since we were here
11 Friday?

12 A. Briefly this morning.

13 Q. Was it about the subject of your testimony?

14 A. Some items, yeah.

15 THE COURT: I'm sorry?

16 THE WITNESS: Yes.

17 THE COURT: Maybe you have to raise the mic a little
18 bit because I didn't hear your answer easily.

19 That's good. Thank you.

20 MR. CHARNEY: The only thing I'll mention on the
21 record, your Honor, is the witness is technically on cross
22 because he's a hostile witness and I didn't think that hostile
23 witnesses were supposed to speak to their attorneys during the
24 pending of cross but I don't --

25 THE COURT: Well technically you're right and you're
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1 wrong; a., He's not very hostile. He seemed like a nice fellow
2 last week. But secondly -- I understand you're calling an
3 adverse party. You're calling an adverse witness. I
4 understand that. And so it's akin to cross. But technically
5 it's direct. It's not cross.

6 The better practice I can state both to the witness,
7 but more importantly the city, is that you really shouldn't
8 discuss the substance of the testimony while an adverse witness
9 is on direct because it's akin to cross. But it's happened
10 here. That's that.

11 Q. Have you since Friday spoken to the defendants' expert in
12 this case, Professor Dennis Smith?

13 A. Yes.

14 Q. And what did you speak to Professor Smith about?

15 A. He essentially imparted to me that he thought my testimony
16 was good. We didn't have an extended conversation.

17 Q. Did you talk about any of the substance of your testimony
18 specifically?

19 A. One item.

20 Q. What was that?

21 A. And that was the item that when we had the discussion about
22 the stops whether all of the people that had been stopped were
23 innocent or whether there was some reasonable suspicion that
24 some of them were going to commit crime.

25 Q. And what -- and so what was -- what did you discuss

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1 specifically on that issue?

2 A. We argued a little bit about I thought that inferentially
3 because crime had gone down that that, along with the
4 consistency of the distribution of suspects over the years
5 suggested that the officers' reasonable suspicion stops had
6 some effect on crime.

7 Q. Okay. And did you discuss -- did you or Professor Smith --
8 sorry.

9 THE COURT: I'm sorry. Could you read back that
10 answer.

11 (Record read)

12 THE COURT: That was your position that you just
13 described?

14 THE WITNESS: Yes.

15 THE COURT: Not his?

16 THE WITNESS: Yes.

17 THE COURT: Because you said you argued.

18 THE WITNESS: We talked about whether you could really
19 inferentially assume that.

20 THE COURT: You do? The bottomline is you do.

21 THE WITNESS: I do, yes.

22 Q. But I thought that you said that what you were speaking to
23 him about was whether or not the people that were being stopped
24 were, in fact, innocent of criminal activity?

25 A. (No response).

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McGuire - direct

1 Q. Is that what you were discussing?

2 A. The discussion was -- I think where we left off was sort of
3 we agreed to disagree and that no one knew what proportion of
4 that entire population were in the process of committing a
5 crime. The only evidence we have is that the officers had
6 essentially recorded reasonable suspicion stops so at least in
7 their minds the people were going to commit a crime. And we
8 were discussing the fact that crime has gone down considerably
9 in the city. So that was -- you know, whether or not that was
10 a good inferential piece of evidence to that effect.

11 Q. So would it be fair to say that both of you agreed that
12 there really is no way to determine whether or not the people
13 that are being stopped in New York City were, in fact, in the
14 process of trying to commit a crime when they were stopped?

15 A. Other than the evidence that we have that the officers did.

16 THE COURT: That the what?

17 THE WITNESS: That the officers thought that they were
18 in the process of committing a crime because they made a
19 reasonable suspicion stop.

20 Q. When you use the term reasonable suspicion stop, you're
21 just referring to stops that end up in the recording of a 250,
22 right?

23 A. I'm assuming that the officers met all of the requirements
24 of both state and federal rulings on stops.

25 Q. So you're assuming that the stops that officers are making

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1 comply with the Fourth Amendment?

2 A. Yes.

3 Q. And you believe that all stops made by NYPD officers in New
4 York City every year comply with the Fourth Amendment?

5 A. For the most part, yes.

6 Q. So let's go back to some of the stuff we were talking about
7 on Friday. Just real quickly going back I have a couple
8 questions about the Attorney General's report again.

9 You had mentioned on Friday that you had been asked to
10 do a critique of the report when it came out, correct?

11 A. Yes.

12 Q. And you were asked to do that by Deputy Commissioner
13 Farell, correct?

14 A. Yes.

15 Q. And then with respect to the findings of the Attorney
16 General's report, we had discussed on Friday the fact that the
17 Attorney General had found that there were racial disparities
18 in who was being stopped even after controlling for crime,
19 correct?

20 A. Yes.

21 Q. And are you aware that the Attorney General found that
22 those disparities were even larger when looking at the stop
23 activity of officers from the street crimes unit?

24 A. I believe there was a focus on that unit in particular.

25 Q. And do you recall that the disparities that were found for

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1 stops made by those officers were actually larger than the
2 disparities found for other NYPD officers that were making
3 stops?

4 A. I think that was essentially one of the -- one of their
5 findings.

6 Q. Now, on Friday we were also discussing the RAND report and
7 comparing the relative strengths and weaknesses of that report
8 as compared to the Attorney General's report.

9 Do you recall that when you were testifying on
10 Friday -- I'm going to hand you actually a copy of the
11 transcript from Friday so that you can follow along. Here you
12 go.

13 If you want turn to page 4320. It's near the end.

14 A. What was the number again?

15 Q. 4320. Page 4320.

16 A. Okay.

17 Q. So on Friday you testified that the method used in the
18 Attorney General's report which was to use arrests as
19 benchmark -- as the benchmark was no better or no worse than
20 the crime suspect benchmark that RAND used, correct?

21 A. Well that appeared to be the -- well, I don't say
22 absolutely no better or worse; that Ridgeway's, I think, final
23 sort of decision was that suspect was somewhat better but it
24 was flawed just like all of benchmarks.

25 Q. And then I asked you -- I asked you if you know if that's

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McGuire - direct

1 the case why did the police department reject the Attorney
2 General's findings but accept RAND's findings.

3 And you answered that because the Attorney General had
4 used arrest data from the preceding year whereas RAND has used
5 crime suspect data from the same year and you saw that, using
6 that older data, as a problem, right?

7 A. Well the arrest data also only gives you part of the story
8 and it was old.

9 Q. Okay. Well let me break that down first.

10 In terms of the arrests giving you part of the story,
11 doesn't violent crime suspect data also only give you part of
12 the story, because you're only looking at violent crimes?

13 A. Yes. It only gives you part of the story.

14 Q. So both of them only give you part of the story, right?

15 A. Right.

16 Q. Now in terms of the arrest data being old, do you have any
17 reason to think that the demographics of arrestees in New York
18 City differ in any really significant way from year to year?

19 A. Well I think at the level that he was doing the analysis by
20 precinct, etc., things can vary from year to year. The overall
21 statistics have a tendency to be fairly stable. But there can
22 be variations over precincts. It may depend upon the
23 particular initiatives that the department has in a particular
24 year. So there are -- there are other things that may affect
25 it.

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- 1 Q. And, in fact, for the 2005 and 2006 statistics that you
2 provided to Professor Ridgeway, the arrest -- the demographics
3 of the arrestees really was essentially the same from 2005 and
4 2006, right?
5 A. The summary data across the whole city.
6 Q. Was the same, right?
7 A. Close.
8 Q. So that if he had used the 2006 arrestee data his results
9 on the external benchmarking analysis would have probably been
10 the same, right?
11 A. They might have been. But if I recall, they were also
12 analyzing things at the precinct level.
13 Q. Okay. But in chapter three of the RAND report there is no
14 mention -- there is no breakdown of statistics at the precinct
15 level, right?
16 A. No. But that comes into the statistics that are being
17 computed there.
18 Q. What is your basis for that conclusion?
19 A. Excuse me.
20 Q. What is your basis for that conclusion?
21 A. Because both Ridgeway's approach in replicating RAND's --
22 replicating Commissioner Fagan's study and in the suspect data
23 you're doing things by precinct.
24 Q. Well I understand you provided the data to him at the
25 precinct level. But does he report findings in any way at the

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McGuire - direct

1 correct?

2 A. Yes.

3 Q. And we had talked at length about how what the police
4 department did was ascribe that other category, the unknowns,
5 to divide them up amongst the various other racial groups based
6 on their relative percentages, right?

7 A. No. I said that's one way you could look at handling the
8 unknown. I didn't say that we did anything.

9 Q. No. I understand.

10 A. We excluded it.

11 Q. So you excluded it and you said --

12 A. If you look at the percentages in the table below.

13 Q. So then you excluded that 40 percent of all crime
14 complaints from the data set -- are you saying that this is
15 the -- well actually let's look at 2006 since that's what
16 Dr. Ridgeway actually used.

17 So I'm going to turn to a couple pages ahead here.

18 This is 2006.

19 Actually, this I have very -- I have a very -- I'm
20 very curious about. Because now if you look at violent crime
21 suspects Blacks are now up to 68 percent and other has gone to
22 .1 percent from 42 percent in one year.

23 And so I guess my question to you is: Do you know why
24 that is? Why there's all of a sudden the Blacks have jumped
25 from 39 percent to 67 percent and the unknowns have gone down

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1 from 42 percent to .1 percent?

2 THE COURT: Can I see the 2005 again.

3 MR. CHARNEY: Yes.

4 THE COURT: You remember that but I want to be sure
5 you're right. I'm sure you are right. But I want to see it.

6 MR. CHARNEY: In 2005 we had 39 percent for Blacks and
7 42 percent unknown or other. And then the following year, the
8 year that -- the year of data that Professor Ridgeway used, now
9 Blacks are at 68 percent and the unknowns have gone down to
10 .1 percent.

11 Q. My question to you is since this was data that the police
12 department provided, do you know why that is?

13 THE WITNESS: Off the top of my head, no.

14 THE COURT: Do you find that --

15 THE WITNESS: No, I don't.

16 THE COURT: Do you find that a surprising change?

17 THE WITNESS: Yes. I think there's a mistake in the
18 table.

19 THE COURT: Which one?

20 THE WITNESS: Well I think the bottom one looks a
21 little bit more like the previous one. When we took out the
22 unknowns, whether there's a transposition of data from some
23 other part of the table or --

24 THE COURT: So if you were -- I know you're not sure
25 but if you said that there may be an error. Do you think the

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McGuire - direct

1 THE COURT: That's how it totals to 39.

2 MR. CHARNEY: So it looks like at the precinct level,
3 even when you break it down by precinct, you really have nobody
4 in that unknown category.

5 THE WITNESS: There's obviously a mistake in the
6 table. I -- you know, I haven't seen or even looked at this in
7 a number of years. So I will go back and try and find out what
8 mistake was made in the table and if we can correct it.

9 Q. Isn't this what you gave to Professor Ridgeway though?

10 A. Yes, we did.

11 Q. Isn't this what he used to conduct his analysis?

12 A. I believe so.

13 Q. So is it your testimony that he was using erroneous data to
14 conduct the external benchmarking analysis?

15 A. He may have been. Until I check it, I don't know how off
16 it is from what he should have gotten.

17 Q. You would agree that if unknowns went from 42 percent to
18 .1 percent that would be a huge error, correct?

19 A. Yes.

20 Q. Now you had testified on Friday that you believe that the
21 population that is committing violent crimes in New York City
22 is the best surrogate for the population that would be engaged
23 in the -- most likely to engage in the suspicious behaviors
24 that would lead to stops, right?

25 A. Repeat that.

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1 THE COURT: Me too.

2 Q. The population that is committing crimes -- in other words,
3 the crime suspect population for New York City, the violent
4 crime suspect population, is in your view the best surrogate to
5 use for the population that would be engaging in suspicious
6 behavior that would lead to officers making stops, right?

7 A. That was our initial assumption and it has changed over the
8 years to be all. It has changed --

9 THE COURT: All what?

10 THE WITNESS: It has changed over the years to be all
11 suspects.

12 Q. So violent crimes is at all.

13 So even if we say all, so your position -- and you
14 agree with me -- is that the population of all criminal
15 suspects in New York City is the best surrogate for the
16 population of people that the police department is stopping and
17 frisking every year, right?

18 A. No. That's not what I said.

19 I said it's the best estimate we have of the people
20 that are involved in criminal activity.

21 Q. And then my question is: The estimate of the people that
22 are involved in criminal activity, you believe that that
23 estimation is the best surrogate for the estimation of the
24 group of people that is engaging in the targeted behaviors that
25 cause officers to make stops, right?

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1 A. It's the best benchmark that you could use for those kinds
2 of comparisons.

3 Q. Now, you also testified that the police department's -- it
4 was the police department who presented -- actually strike
5 that. I'm going to move on a little bit here.

6 Actually if you can turn back to page 4310 of that
7 transcript you have in front of you. Line 3. This is the
8 transcript from Friday. His testimony from Friday. I just
9 want to confirm that the answer you gave is still your answer
10 today. Starting on line 3. I'll read it to you. It says.

11 "Q. Is it your belief that the pool of people that are
12 committing crimes are then the surrogate for the pool of people
13 who would engage in behavior that the police officers would
14 think was suspicious and then make stops pursuant to, right?

15 "A. Yes."

16 That's still your answer today?

17 A. Yes.

18 Q. Okay. Now it's true that the data that you gave -- the
19 violent crime suspect data that you gave to Dr. Ridgeway, that
20 was the only option for suspect data that you presented to
21 Dr. Ridgeway back in 2007, right?

22 A. Yes.

23 Q. And that's because violent crime suspects were the most
24 readily identifiable by race, correct?

25 A. Yes.

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McGuire - direct

1 Q. Because for the suspects for the other crime categories, a
2 much lower percentage of those were known, the race of those
3 suspects were known, right?

4 A. For the wanted suspects, yes.

5 Q. Okay. Well, the only ones you would -- so you're saying
6 for arrestees you would know it, right?

7 A. Yes.

8 Q. But you said that crime suspect is a better benchmark than
9 arrestees, right?

10 A. No. I said that the -- our current thinking is that the
11 entire suspect population is made up of the merge of the two
12 together.

13 Q. We'll get to that later. But I guess what I'm saying is if
14 you had to pick one or the other -- because at the time in 2007
15 you could only pick one or the other, your position was that
16 the violent crime suspect was a better benchmark than
17 arrestees; is that right?

18 A. Yes.

19 Q. And is the reason for that -- let's actually go to Exhibit
20 K6 which is the RAND report and I want to see if you agree with
21 RAND's explanation for why crime suspect is a better benchmark
22 than arrestees.

23 This is page NYC-2-28804. It's page 17 of the RAND
24 report -- actually I'm sorry. Let me go to the prior page,
25 page 16 which is 28803.

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D4M9FL01

McGuire - direct

1 So you see here -- I'm going to zoom in a little
2 bit -- you see here this is a discussion of the arrestee
3 benchmark here. It makes mention to Professor Fagan's 2007
4 article.

5 Now down here I want to read starting where it says,
6 "Though such data may roughly capture the racial distribution
7 of participation in crimes for which one is likely to be
8 caught, they may be less applicable to situations documented in
9 250s. Arrests can also..." first of all, do you know what he
10 means by that, "less applicable"?

11 THE COURT: He can't know what he means.

12 Q. What do you understand that to mean?

13 A. I suspect it means that some crimes produce arrests more --
14 are more likely to produce arrests than some others.

15 Q. Well would you agree that violent crimes are probably more
16 likely to submit -- to produce arrests than others?

17 A. In some cases. It depends on the situations.

18 Q. Then I want to go on. It says "Arrests can also take place
19 some distance away from where the crime actually occurred."

20 Do you see that?

21 A. Yes.

22 Q. That one is pretty I think self-explanatory.

23 This is the one that I really want to ask you about,
24 "More problematic is that if officers are racially biased in
25 the prior year they will have arrested a disproportionate

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D4M9FLO1 McGuire - direct

1 fraction of non-Whites, and that same bias will cause them to
2 over-stop non-Whites in the current year. Such a benchmark may
3 actually hide bias if its exists."

4 So do you agree with that statement by Dr. Ridgeway?

5 A. I'd have to think about it a bit. I probably did at the
6 time. I don't know whether I would raise any objections to it,
7 but the way it's phrased --

8 Q. If officers are racially biased, and they are
9 over-arresting Blacks and Latinos, then that bias is not going
10 to show up in the stop data, right, because there's also going
11 to be the same disproportion, right?

12 A. I don't know that that's necessarily true.

13 Q. So if --

14 A. I think -- you're talking about two different sets of
15 events.

16 Q. I understand. But if you're using it as a benchmark you
17 are trying to use arrests as a measure of who would be stopped,
18 right?

19 A. Right.

20 Q. So what I'm saying is if officers are making racially
21 biased arrests, then you're not going to see the bias when you
22 look at the stop data, right?

23 A. If you're using the arrests that were hypothetically
24 racially biased to check against them.

25 Q. Okay. Right. So you agree with me?

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D4M9FLO1

McGuire - direct

1 A. Yeah. Yes.

2 Q. So then it's possible that -- well so then using arrest
3 data as a benchmark could actually result in -- well the
4 disparities that you would see when using arrests as a
5 benchmark could actually be lower than they are in reality,
6 right?

7 A. If your hypothetical were true.

8 Q. Okay. So the problem that Dr. Ridgeway -- your
9 understanding of the problem Dr. Ridgeway is identifying here
10 is that using arrests as a benchmark may actually result in an
11 underreporting of racial bias in stop patterns, right?

12 A. That that's one of the items that he discusses, yes,
13 besides the other two.

14 Q. Well -- all right. I'm not going to ask about that
15 anymore.

16 Now you mentioned earlier that the data you gave to
17 Professor Ridgeway, the suspect and the arrestee data were
18 disaggregated at the precinct level, correct?

19 A. Yes.

20 Q. Now you're aware that Professor Fagan in his analysis for
21 this case initially did his analysis at the precinct level as
22 well, right?

23 A. Yes.

24 Q. And you're aware that the defendants in this case severely
25 criticized him for that, correct?

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D4M9FLO1

McGuire - direct

1 A. Yes.

2 Q. And the reason that the defendants criticized him, right,
3 is that because the police department actually analyzes crime
4 and focuses its resources on geographical areas that are
5 smaller than precincts, correct?

6 A. Yes.

7 Q. So that any analysis that would accurately -- an -- I'm
8 sorry. Strike that -- let me withdraw and slow down.

9 For an analysis to accurately assess or I'm sorry
10 reliably assess the racial patterns and stop activity it would
11 be necessary to do that analysis at a level -- a geographic
12 level much smaller than precincts, right?

13 A. Yes.

14 Q. But RAND did it at the precinct level, correct?

15 A. Yes.

16 Q. And the police department didn't have any concern that that
17 might have undermined the validity of RAND's results?

18 A. No.

19 Q. Now you also mentioned earlier that one of your roles in
20 the development of the RAND report was to review drafts of the
21 report that were provided to you in the fall of 2007, correct?

22 A. Yes.

23 Q. And one of those drafts was provided to you in October of
24 2007, correct?

25 A. I don't remember the exact dates. But we looked at

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McGuire - direct

1 several.

2 Q. Do you recall that in one of those drafts both you and
3 Commissioner Farell raised concerns about how Dr. Ridgeway had
4 described the three primary benchmarks census, arrest, and
5 crime suspect?

6 A. Yes.

7 Q. And your concern was that he had gone from describing crime
8 suspect more favorable in an earlier draft to describing all
9 three rather neutrally in this new draft, right?

10 A. Yes.

11 Q. And so you disagreed with his having described all three
12 neutrally as opposed to saying that crime suspect was clearly
13 superior, right?

14 A. I don't know that we disagreed. I think we just brought it
15 to his attention and asked him why he changed his opinion or
16 why he rewrote it, changed the reference in the report.

17 Q. And based on that discussion he then revised it further to
18 make it more -- to make crime suspect more favorable, correct?

19 A. I think he took what we -- the discussion that we had and
20 he made the changes that he wanted to make.

21 Q. But you would agree that the changes he ended up making for
22 the final report describe crime suspect more favorable than the
23 other two, right?

24 A. But less favorable than he initially did, yes.

25 Q. But more favorable than the other two, right?

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D4M9FLO1 McGuire - direct

1 A. By a very slight margin.

2 Q. We're going to look at those in a second.

3 Let me first show you what's already in evidence as
4 Plaintiffs' Exhibit 325. This is an e-mail exchange between I
5 believe it's Inspector Terry Riley who works with you in OMAP,
6 correct?

7 A. Yes.

8 Q. And Dr. Ridgeway.

9 I just want to see if you agree with what -- this is
10 the e-mail from -- sorry. It's starting on the -- the from is
11 on the prior page. This is from Inspector Riley to
12 Dr. Ridgeway. This is October 24, 2007.

13 So he starts by asking when he's coming to New York.
14 Then he says, "The reason I ask is we would like to discuss the
15 reasoning behind the decision to not assert any particular
16 benchmark as being superior to the others. Commissioners
17 Farrell and McGuire are unclear as to why there was such a
18 departure from draft one's acceptance of crime suspect
19 description as being superior, although admittedly less than
20 perfect, to utilizing the census. The paper does not seem to
21 cite any specific reasons why suspect description is unreliable
22 to the same degree as the census benefit mark -- which does
23 have more specific explanations.

24 "I have to admit I too was a bit confused. There is
25 more at work in suspect descriptions than the explicit

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D4M9FL01 McGuire - direct

1 description provided to an officer via 911/radio, which I might
2 add is a weighty factor in an officer's decision to stop a
3 crime suspect."

4 I'm going to stop there for a second.

5 Now you're generally familiar with the UF 250
6 statistics that the police department keeps?

7 A. Yes.

8 Q. So you're aware that stops done pursuant to a radio run are
9 less than one-third of all of the stops that the police
10 department conducts each year?

11 A. Yes.

12 Q. And you're also aware that stops made where the reason for
13 the stop indicated is "fits description" constitute less than
14 fifteen percent of all stops that officers make each year?

15 A. Yes.

16 Q. So then this statement, "which I might add is a weighty
17 factor in an officer's decision to stop a crime suspect," do
18 you agree with that?

19 A. I think Inspector Riley was talking from his personal
20 experience as a police officer when he was drafting this. That
21 was his personal opinion.

22 I think the question that Commissioner Farell and I
23 had initially was not to that level of detail. It was like,
24 hey, why did you change your tune? Explain it to us. Come
25 talk to us about it.

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D4M9FLO1

McGuire - direct

1 Q. Got it.

2 So if I may, I mean I -- we went over this with
3 Inspector Riley himself so I don't know if it's necessary to go
4 over with you.

5 But I do want to show you Dr. Ridgeway's response
6 because this is actually where I want to see what you think.

7 So this is his response to Inspector Riley's e-mail.

8 So he says he can come to New York whenever he is
9 needed and he's happy to have a phonecall to discuss the issue.

10 Then he says, "I didn't intend for the document to
11 suggest that all of the benchmarks were equally flawed, though
12 I see sentences that indicate that; example, rather than claim
13 the superiority of any of them. I can tidy that part up to
14 indicate that census is really ridiculous, arrest is highly
15 problematic and suspect descriptions is more promising but
16 still has issues (and the report does say that)."

17 Then he goes on to talk about what two of the three
18 peer reviewers said about crime suspect and I want to ask you
19 about this.

20 "Two of the three reviewers strongly indicated that
21 the report gave too much credence to the external benchmarks.
22 For example, one reviewer noted: First, I think the paper
23 needs to be more forthcoming about the potential problems with
24 using suspect descriptions as benchmarks. It is suspect
25 descriptions interacted with the visible population in the

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D4M9FLO1

McGuire - direct

1 locations where officers are deployed that should determine the
2 racial composition of stops."

3 So let me ask you a question about that.

4 Do you agree that a -- in order to really have a
5 legitimate benchmark you have to have both a measure of the
6 criminal activity in the area as well as a measure of the
7 population that would be available to be stopped?

8 A. I think this goes back to the discussion of benchmarks that
9 are based on trying to get a measure of the people that are
10 actually committing crime. And one of those features is that
11 all of the researchers have come back to again and again is
12 well nobody really knows who is on the street at this
13 particular time as well as who might be on the street at this
14 particular time and acting suspiciously. The only information
15 we have from that whole process is the reasonable suspicion
16 stops that the officers made.

17 Q. I understand. But my question was do you agree with this
18 statement that this reviewer made about benchmarks where he
19 says, "It is suspect descriptions interacted with the visible
20 population in the locations where officers are deployed that
21 should determine the racial..."

22 A. I think he was talking about this ideal case where you
23 actually knew that information and "interacted" is -- I'm not
24 quite sure what he means by interacted, presumably statistical
25 analysis of some sort.

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D4M9FLO1 McGuire - direct

1 Q. Do you agree then that a really valid, a reliable -- I
2 shouldn't use though words interchangeably.

3 A good benchmark needs to measure both the level of
4 the crime in the area as well as a measure of the population
5 that would be available to be stopped? Do you agree with that?

6 A. In an ideal world, yes, where you could observe all of
7 that.

8 Q. Okay. Now, after -- the report -- I'm sorry.

9 The report came out in November of 2007, correct, the
10 RAND report?

11 A. Yes, I believe so.

12 Q. And is it fair to say that the police department's
13 conclusions that you drew from this report and its findings was
14 that the police department was not engaging in racially biased
15 stops and frisks?

16 A. Yes.

17 Q. Now we talked on Friday about how Dr. Ridgeway's analysis
18 did reveal that Blacks were being stopped at a higher
19 percentage on suspicion of weapons offenses than they were
20 being arrested for weapons offense, right?

21 A. From the comparison analysis, yes.

22 Q. And he found that Whites were actually being stopped at a
23 lower rate for weapons crimes than they were actually being
24 arrested for weapons crimes, right?

25 A. I believe so, yes.

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D4M9FLO1

McGuire - direct

1 Q. And that didn't concern you, that maybe at least with
2 respect to stops for weapons there might be some racial bias
3 going on?

4 A. Because if you look at his chart the statistical
5 significance of those results was very low.

6 Q. But the actual percentages were right? Blacks were being
7 stopped at an eight percent higher rate, right?

8 A. Well the statistical confidence intervals that he had
9 computed meant that that eight percent could be minus four to
10 twelve or something like that, or minus eight to plus eight. I
11 don't remember what the range was. But the confidence interval
12 essentially gives you some idea of the range, the probability
13 that the range may make that statistic far different from what
14 the actual mean is or the expected value.

15 Q. But the raw percentage was eight percent, correct? Eight
16 percent difference between --

17 A. I believe that's what he put in the report, yes.

18 Q. And for Whites, they were being stopped as an eleven
19 percent less likely to be stopped for weapons crimes than they
20 were to be arrested for -- arrested for weapons crimes, right?

21 A. Yes. That was what he put in the report.

22 Q. And that percentage didn't raise any concerns for you?

23 A. Again, because it wasn't statistically significant.

24 Q. And you're also aware that when Dr. Ridgeway used the
25 violent crime suspect benchmark, the one that the police

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D4M9FL01 McGuire - direct

1 department preferred, that he found that Hispanics were being
2 stopped at rates five to ten percent higher than their
3 proportion -- I'm sorry, their representation within the
4 violent crime suspect group, right?

5 A. Yes.

6 Q. And that didn't raise any concern for you?

7 A. I think it raised some interest in possibly looking into it
8 deeper or it raised some concerns where the, you know, the --
9 even the suspect benchmark was probably, as he reported,
10 somewhat flawed. It's not perfect.

11 (Continued on next page)

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D4M8FLO2

McGuire - direct

1 Q. Now, you said it raised concerns and that it made you look
2 into it further. Did the police department ever look into --

3 A. I was talking about it from my perspective, in that over
4 the years we have moved from just the violent suspects to a
5 more encompassing population, which is all crime; and, also, we
6 combined the arrests with the suspect information from the
7 complaints because the issue is who is committing the crime,
8 and for a number of crimes, particularly in the violent area,
9 when you combine both arrests and complaints, you get a much
10 higher percentage of knowledge about who appears to be
11 committing those crimes in the city.

12 Q. But my question was, did you look into further to see if
13 this finding of Hispanics being overstopped was actually a
14 systemic problem in the police department?

15 A. I did not.

16 Q. Do you know if anyone in OMAP did?

17 A. I'm not aware of it.

18 Q. Do you know if anybody else in the police department did?

19 A. I think the findings of the RAND report were widely
20 disseminated so I don't know if they did or not.

21 Q. You mentioned that the issue was really who was committing
22 the crime, right, that's the issue with respect to figuring out
23 if there is racial bias in stops?

24 A. Yes.

25 Q. Again, just to confirm, that's based on your assumption

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D4M8FLO2

McGuire - direct

1 that who is committing a crime overlaps with who is being
2 stopped, right?

3 A. Resources are deployed to areas where there is high crime.
4 So it would be unusual to not find that people who are stopped,
5 the distribution of race ethnicity would be similar to what we
6 find when we look at who is committing the crime from the
7 suspect perspective.

8 So the question is, if you look at those and one is
9 seriously different than the other, then you might have a
10 question to look at things. But if you're trying to do
11 comparisons of benchmarks or disparate impact, who does the
12 crime matters.

13 Q. Well, it matters because there is a presumption that the
14 people who would be engaging in the behaviors that would lead
15 officers to make stops are likely to come from the same
16 population of people that's committing crime, right?

17 A. Yes.

18 Q. Now, in addition to the external benchmarking analysis that
19 Dr. Ridgeway did, he also did what is called an internal
20 benchmarking analysis?

21 A. Yes.

22 Q. That analysis involved comparing the stop patterns of what
23 he characterized as similarly situated officers, correct?

24 A. Yes.

25 Q. So that would be officers who worked the same command,

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D4M8FLO2

McGuire - direct

1 percent of the stops done in 2006, correct?

2 A. I believe so.

3 Q. So that means that 46 percent, almost half of the stops
4 that were done that year, were excluded from that analysis,
5 right?

6 A. Yes.

7 Q. So, again, did you have any concerns about selection bias
8 in that analysis?

9 A. I think it was possible, but again, it was an attempt to
10 provide additional information about this whole process. None
11 of these measures, none of these analyses are perfect.

12 Q. I understand. But the police department relied on them to
13 conclude that you didn't have a racial profiling problem,
14 right?

15 A. Yes.

16 Q. And when the attorney general did a similar analysis, you
17 were not comfortable concluding that you did have a racial
18 profiling problem, right?

19 A. Well, similar, but not the same and what we thought was
20 deficient.

21 Q. All right. So, again, going to the internal benchmarking
22 analysis, Dr. Ridgeway did in fact find that there were 15
23 officers in the police department who in 2006 had overstopped
24 pedestrians of color, correct?

25 A. Yes, I believe that was his findings.

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D4M8FLO2

McGuire - direct

1 Q. In addition to that, and this goes to my question about the
2 2700, do you recall him saying that, While this data suggests
3 that only a small fraction of officers most active in
4 pedestrian stops may be outliers, the stops made by the other
5 15,855 officers that we could not analyze may still be of
6 concern? Do you remember him saying that?

7 A. Not particularly, but if you're reading from the report, he
8 obviously did.

9 Q. This is in evidence already. This is Defendants' P6.

10 You see here, he says, "While the data suggest that
11 only a small fraction of the officers most active in pedestrian
12 stops may be outliers, the stops made by the 15,855 that we
13 could not analyze may still be of concern"?

14 A. OK.

15 Q. Did that raise any concerns for the police department that,
16 again, this internal benchmarking analysis was not telling the
17 whole story?

18 A. We understood that it was not -- it was incomplete.

19 Q. Now, after the RAND report came out, you attended a meeting
20 with Deputy Commissioner Farrell to discuss the recommendations
21 that RAND had made, correct?

22 A. I believe so.

23 Q. Do you recall that one of those recommendations -- I am
24 going to put it up here on the screen. This is Defendants'
25 Exhibit K6, page NYC_2_28782.

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D4M8FLO2

McGuire - direct

1 So here we have the recommendations from the RAND
2 report. I want to look at this second one here.

3 "The NYPD should review --"

4 THE COURT: Where are you?

5 MR. CHARNEY: Right here.

6 THE COURT: Thank you.

7 Q. "The NYPD should review the boroughs with the largest
8 racial disparities in stop outcomes."

9 Here it talks about, right, racial -- by post-stop
10 outcomes, you agree with me that means, for example, who gets
11 frisked during a stop, who gets force used against them, who
12 gets searched, right?

13 A. Yes.

14 THE COURT: Does that continue? Who gets summonsed,
15 who gets arrested?

16 MR. CHARNEY: I believe so.

17 A. Yes.

18 Q. Here RAND says that, "For some particular subsets of stops,
19 there are racial disparities, and in some boroughs for some
20 outcomes the disparities are fairly large. In particular,
21 there was evidence of large racial differences in frisk rates
22 in several boroughs. For example, on Staten Island, officers
23 frisked 20 percent of white suspects and 29 percent of
24 similarly situated black suspects. Officers were likelier to
25 use force of some kind against black suspects in Brooklyn South

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D4M8FLO2 McGuire - direct

1 than they were to use it against similarly situated white
2 suspects (29 percent versus 22 percent)."

3 Then he goes to say, "However, the use of force
4 finding on which we base this recommendation may be the result
5 of incomplete details on the reason officers used force, the
6 subject of the next recommendation. Regardless, a closer
7 review of these outcomes in these boroughs may suggest changes
8 in training, policies or practices that can reduce these
9 disparities."

10 The NYPD never implemented this recommendation, did
11 it?

12 A. I'm not aware of what happened as a result of that
13 recommendation.

14 Q. But you do recall discussing this recommendation with
15 Deputy Commissioner Farrell?

16 A. Well, I believe some of the statistics, if you look at the
17 Staten Island ones in particular, it appeared to us to be more
18 of an arrest resulting situation, because the arrests were also
19 higher in Staten Island, and when you arrest, you must search
20 and you must frisk, or you search anyway.

21 Q. But this talks about frisks; it doesn't talk about arrests,
22 right?

23 A. The reason the frisk comes along, many officers will check
24 off both when they make an arrest.

25 Q. But the bottom line is that the police department didn't

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D4M8FLO2

McGuire - direct

1 take a closer look at the Staten Island stops to see what was
2 really going on, right?

3 A. Well, I think, as part of this, there were more closely
4 looked at audits being put together of the stops citywide and
5 there may have been some -- I wasn't involved in that directly,
6 but that may have been a way to respond to this also. And,
7 also, this report, as I said before, was widely distributed to
8 the operation executives also.

9 Q. Are you aware if the police department put in place any
10 changes in training, policies or practices to address this
11 particular finding about racial disparities in stop outcomes in
12 certain boroughs?

13 A. I'm not aware of that.

14 Q. You personally were not involved in implementing such a
15 recommendation, right?

16 A. No.

17 Q. Do you recall Commissioner Farrell ever stating one way or
18 the other whether the police department was going to implement
19 this recommendation?

20 A. No.

21 Q. Now, one of the other recommendations by RAND -- I am
22 almost done here -- and this is on page NYC_2_28833. This is
23 page 46 of the RAND report. It's the last page of the body of
24 the report.

25 It says, "The NYPD should identify, flag, and

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D4M8FLO2 McGuire - direct

1 investigate officers with out of the ordinary stop patterns."

2 It says, "Our analysis indicates that the racial
3 distribution of stops for several officers is skewed
4 substantially from those of their colleagues. We recommend
5 that the NYPD review these flagged officers and incorporate
6 into their early warning system a component that flags officers
7 with extreme deviations from their colleagues. These measured
8 disparities are evidence that these officers differ
9 substantially from their peers. However, they are not
10 necessarily conclusive evidence that these officers practice
11 racially biased policing. Supervisors may then investigate and
12 address the disparities."

13 Is it correct that this recommendation is referring to
14 those 15 officers that we talked about earlier who overstopped
15 pedestrians of color?

16 A. I believe so, yes.

17 Q. Now, this recommendation says to actually -- it suggests
18 that the police department should review those 15 officers,
19 right? It says, "We recommend that the NYPD review these
20 flagged officers." Do you see that?

21 A. Yes.

22 Q. The police department never did that, did it?

23 A. No, it did not.

24 Q. Then it says, "And incorporate into their early warning
25 system a component that flags officers with extreme deviations

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D4M8FLO2 McGuire - direct

1 from their colleagues."

2 Now, what I want to ask you about that is, the police
3 department did go ahead and purchase from RAND the software
4 that Dr. Ridgeway used for his internal benchmarking analysis,
5 right?

6 A. Yes.

7 Q. After a long struggle, you were able to run it on the 2007
8 data, correct?

9 A. Yes, we did.

10 Q. After that, you never ran it again, right?

11 A. Correct.

12 Q. So then it's fair to say that you never incorporated that
13 software into the police department's early warning system,
14 right?

15 A. Yes.

16 MR. CHARNEY: No further questions, your Honor.

17 If I could just have a minute to move all of my stuff.

18 THE COURT: All right.

19 CROSS-EXAMINATION

20 BY MS. GROSSMAN:

21 Q. Good morning, Commissioner.

22 A. Good morning.

23 Q. Now, we have heard some discussion about this merged
24 database. Mr. Charney briefly addressed it on direct. Do you
25 remember?

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D4M8FLO2 McGuire - cross

1 A. Yes.

2 Q. Now, there came a time that you prepared a database of the
3 crime complaints and the arrest records to be produced to the
4 plaintiffs in Floyd, right?

5 A. Yes.

6 Q. And you prepared one database which contained crime
7 complaints only, correct?

8 A. Yes.

9 Q. And that was for the years 2004 through 2012, correct?

10 A. Yes.

11 Q. And you prepared a separate database of arrest records
12 only?

13 A. Yes.

14 MS. GROSSMAN: Your Honor, just to give you a preview,
15 we just want to address what Professor Fagan's criticism was
16 about the merged database. So if you just bear with us, we are
17 trying to set up the explanation of how the databases were
18 merged and we wanted to address Professor Fagan's criticisms of
19 the way the data was merged. So that's we are developing here.

20 Q. So you prepared a separate database of the arrest records
21 only?

22 A. Yes.

23 Q. That was for the years 2004 to 2012?

24 A. Yes.

25 Q. And the complaint databases for 2004 through 2012 have

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D4M8FLO2 McGuire - cross

1 suspect descriptions contained in them, right?

2 A. Yes.

3 Q. And these suspect descriptions include physical
4 characteristics of the suspects, right?

5 A. Yes.

6 Q. And that would include descriptions like age, sex, race and
7 ethnicity, correct?

8 A. Yes.

9 Q. And the arrest databases, separate and apart from the
10 complaint databases, for 2004 through 2012, also have
11 descriptions of people who are arrested, right?

12 A. Yes.

13 Q. And these descriptions also include age, sex, race and
14 ethnicity, correct?

15 A. Yes.

16 Q. So there came a time when you merged the two -- let me go
17 back.

18 Some of the suspect descriptions contained in the
19 arrest databases are not contained in the complaint databases,
20 right?

21 A. Yes.

22 Q. So there came a time when you merged these two databases?

23 A. Yes.

24 Q. You did that for the years 2009 through 2012, right?

25 A. Yes.

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D4M8FLO2

McGuire - cross

1 Q. And you did that because you wanted to associate the
2 complaint report with the corresponding arrest report, right?

3 A. Yes.

4 Q. Is it fair to say that because the complaint databases we
5 just discussed were not associated with the arrest databases we
6 just discussed, the suspects known to the department in those
7 databases would be undercounted?

8 MR. CHARNEY: Objection.

9 A. Yes.

10 THE COURT: I didn't understand it.

11 Q. The information in the complaint report that Professor
12 Fagan had undercounted the total number of suspect descriptions
13 that were corrected by merging the arrest database, correct?

14 MR. CHARNEY: Objection. That's an argument. That's
15 a conclusion.

16 THE COURT: Then she said, correct, question mark. So
17 he is supposed to confirm that statement if he can.

18 Can you? This is serious business here.

19 A. The complaint file that was given to the plaintiffs include
20 wanted suspects. The arrest file included arrested suspects.
21 While there is some overlap, there is information in the arrest
22 file about people that were arrested essentially at the scene,
23 or close to the scene, that are not in the wanted suspects
24 group that's in the complaints. So to get a complete picture
25 of the information that we had about all of the people

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D4M8FLO2 McGuire - cross

1 committing a crime, a type of crime, you have to add the
2 two -- you have to merge the two of them together to get that
3 complete picture.

4 MS. GROSSMAN: If I may, I would like to put on the
5 screen a demonstrative exhibit that will illustrate what
6 Commissioner McGuire is discussing.

7 MR. CHARNEY: I have never seen it, so I can't agree
8 to have this on the screen until I see it.

9 MS. GROSSMAN: It's just explaining exactly what --

10 THE COURT: If you had the demonstrative prepared, it
11 would have been appropriate to share it to counsel before using
12 it. When did you have it prepared?

13 MS. GROSSMAN: It was just recently. I'm sorry, your
14 Honor.

15 THE COURT: I don't know what just recently means.
16 What is just recently? After Friday?

17 MS. GROSSMAN: I must have received it on Thursday.

18 THE COURT: You should have given it to counsel on
19 Friday.

20 MS. GROSSMAN: My apologies. But I think, your Honor,
21 if you want to understand it --

22 THE COURT: I understand. But Mr. Charney had the
23 right to see the exhibit and try to have a chance to work with
24 it.

25 MR. CHARNEY: I didn't get to show it to Professor
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McGuire - cross

1 Fagan.

2 THE COURT: It wasn't prepared till Thursday.

3 MR. CHARNEY: I don't know why since they have known
4 Commissioner McGuire was going to testify for a long time.5 The point is that in the documents that the defendants
6 did produce, there is actually a description of the process,
7 which I can't verify if this is an accurate summary or
8 explanation of that process, which is an actual exhibit that
9 they could use.10 THE COURT: Can you verify at the recess, in the 10 or
11 15 minute break? Then can you go back and look at it or not?

12 MS. GROSSMAN: Let me just say --

13 THE COURT: We can put off using it until he has had a
14 chance to work with it because he should have had it as soon as
15 you had it.

16 MS. GROSSMAN: We provided the readme files.

17 THE COURT: The what files?

18 MS. GROSSMAN: We provided the information that
19 supports this demonstrative to the plaintiffs way before
20 Thursday.21 THE COURT: That may be. Now he wants to compare the
22 demonstrative to the files you produced. He hasn't had the
23 opportunity to do that. I won't allow it now, but either after
24 the morning recess or the luncheon recess, whichever it takes,
25 we can do it. But hopefully you will have time to look at it

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D4M8FLO2 McGuire - cross

1 over the morning recess.

2 MR. CHARNEY: I would ask that we not have questions
3 about it.

4 THE COURT: I am sure she has other material to
5 cross-examine with. We can go back to that demonstrative.

6 MR. CHARNEY: The other thing, your Honor, is I would
7 say that this process, the description of it is hearsay because
8 we don't have any basis at this point to know that it's
9 Commissioner McGuire who is the one that conducted this
10 process.

11 THE COURT: She can lay that foundation. The process
12 being the merging?

13 MR. CHARNEY: Yes.

14 THE COURT: You can ask him that.

15 BY MS. GROSSMAN:

16 Q. Commissioner McGuire, can you explain the process that you
17 followed to merge the databases?

18 MR. CHARNEY: The question is, was he the one who did
19 it?

20 THE COURT: Was it you?

21 THE WITNESS: I supervised it.

22 THE COURT: You supervised it?

23 THE WITNESS: My staff did it.

24 THE COURT: At your direction?

25 THE WITNESS: Yes.

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D4M8FLO2

McGuire - cross

1 THE COURT: What were your directions? What did you
2 tell them to do?

3 THE WITNESS: I told them to come up with a process to
4 identify all of the suspects that we knew about for each crime
5 that we had on the record. And those suspects may be
6 unarrested suspects plus arrested suspects. And that's the
7 process they put in place for me.

8 MR. CHARNEY: I guess the question is, are you the one
9 that developed what the process would be or is that somebody
10 else?

11 THE WITNESS: In conjunction with my staff.

12 THE COURT: Go ahead.

13 BY MS. GROSSMAN:

14 Q. Well, you're aware of some of Professor Fagan's criticisms
15 about the merged database, correct?

16 A. Yes.

17 Q. One of the criticisms Professor Fagan has is he identified
18 some spatial problems with the merger, right, of the database?

19 A. He mentioned something about spatial issues, yes.

20 Q. And you're aware that Professor Fagan testified, in sum and
21 substance, that he was uncertain about the method used to link
22 the complaints and the arrests because he believed it was done
23 through some sort of statistical algorithm involving spatial
24 dimensions as well as time, is that right?

25 A. I believe so.

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D4M8FLO2

McGuire - cross

1 Q. Are the arrest and complaint information linked by a
2 statistical algorithm involving space and time?

3 A. No.

4 Q. You are also aware that Professor Fagan is critical of the
5 merged database because he found arrest situations that
6 occurred time wise before the complaint, right?

7 A. Yes.

8 Q. First, about how many records fall into this category for
9 any given year?

10 A. I believe about 5 or 6,000.

11 Q. That is out of how many total arrests?

12 A. Over 200,000 I think in each of the years.

13 Q. Are the arrests that occurred before the complaint reports,
14 were they entered properly -- were they properly recorded? I'm
15 sorry. Let me rephrase that question.

16 Are the arrests that occurred before the complaint
17 report was entered properly recorded?

18 A. Yes.

19 Q. Can you explain that?

20 A. They fall into three groups. One is, when someone is
21 arrested, the priority given to processing the paperwork is
22 with the arrest processing. So you have a situation where
23 someone can be arrested at 9:00 at night and that will be the
24 arrest time. By the time the complaint gets entered and the
25 complaint number is chosen by the system and associated with

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McGuire - cross

1 that arrest, it may be 2:00 in the morning. Or over the
2 weekend it could be a two-day delay. So there is a group of
3 records that may appear, if you compare the dates, as though
4 the arrest occurred before the complaint, but it is merely the
5 processing, the result of the processing.

6 THE COURT: It's not merely that. The arrest did
7 occur before the complaint.

8 THE WITNESS: Before the recording of the complaint in
9 the computer system.

10 THE COURT: Before the complaint was written up.

11 THE WITNESS: Yes. We are not talking about the court
12 complaint. We are talking about the officer's complaint report
13 that describes what crime took place.

14 THE COURT: Still, they made the arrest before they
15 prepared the complaint report, even if it's just minutes,
16 right? If they make the arrest on the street --

17 THE WITNESS: You're talking about the arrest
18 occurrence time. We are talking about the arrest being
19 recorded in the computer system and a time stamp being put on
20 the arrest report of the time. And Professor Fagan found that
21 there were some arrests -- time stamps that occurred before the
22 complaint report. So that can happen. So for periods one,
23 two, three days. That was one group.

24 Q. About how many accounted -- about how many of the incidents
25 fell into that category?

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McGuire - cross

1 A. I think it was like 3 to 4,000 or so. So that took a
2 fairly sizable chunk.

3 Q. Are there any other?

4 A. There are two other situations that will produce that same
5 kind of chip, where the arrest appears to be happening before
6 the complaint. One of them is that up until October of last
7 year, the department was using an old booking system for the
8 outside agencies, and there I am talking about Port Authority,
9 the railway police and others. They would record their arrests
10 from their own facilities, and those facilities were connected
11 electronically to an old booking system that the department ran
12 called the OLBS, online booking system.

13 So that system did not allow you to record the crime
14 complaint, this report. So what the other agencies did was
15 they made their arrest, they processed it through their link to
16 our booking system, but only the booking portion. They did
17 their own complaint report within their own agency, put it in
18 the mail and sent it to a precinct. So the precinct would get
19 this sometime after, and sometimes it could be literally months
20 because they were batched together at the other agency, and
21 then they came into the PD, and then they were held and maybe
22 processed all together. So they were catching up, essentially,
23 and we were putting in their complaint report information into
24 our system and associating it with the arrest that they had
25 made sometime before. So that's the second situation that can

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McGuire - cross

1 result in a difference in these times.

2 The third situation is various auditing groups within
3 the police department will look at complaint arrest situations
4 after the fact, and they will determine that there should have
5 been -- the arrest was valid, the original complaint report
6 that was associated with that arrest was valid, but you need
7 another complaint report because of our reporting capabilities.
8 Either there was a second victim, such as in an assault and
9 they put both victims on one complaint report and should have
10 been two complaint reports, or perhaps there was another crime
11 that occurred. And then the command that produced and made the
12 original arrest will be directed to add another complaint
13 report, which can be some time by the time the audits are
14 taken, the samples are taken, and the auditors review things,
15 that could be months later also.

16 In fact, there were two instances, two records that
17 were 10,000 days different, which were mistakes. They were
18 computer glitches of some sort, and we were not able to
19 determine what had caused them. But the vast bulk of the
20 differences were legitimate, if unusual within the system.
21 They were special cases.

22 Q. Now, in addition to your responsibilities that you
23 described the other day, do you also prepare other reports,
24 statistical reports, for the police department?

25 A. Yes.

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D4M8FLO2

McGuire - cross

1 Q. Have you prepared a report known as the reasonable
2 suspicion report for 2011 and 2012 for the police department?

3 A. Yes.

4 THE COURT: I think we should take our break now, and
5 I am hoping that Mr. Charney and his team can look at that
6 demonstrative. We will reconvene at about quarter to 12, which
7 is about 12 minutes. It gives you some time.

8 (Recess)

9 THE COURT: Mr. Charney, have you had a chance to
10 review that demonstrative?

11 MR. CHARNEY: Yes. As best we can tell, I don't know
12 if it's inconsistent with the documents we already have. I am
13 not going to object to it coming in, but I do want to note for
14 the record, because I know there has been a lot of back and
15 forth about these issues about disclosing exhibits and not
16 giving them in advance, and I would just note that this
17 particular exhibit, I think this is a pretty egregious example
18 of this, because not only is it an incredibly substantive
19 exhibit, very complicated, but not only is this something they
20 didn't disclose they were using until today, they never even
21 gave it to us until today. Which is very different than
22 telling somebody, I am going to use Exhibit 323, which you
23 already have, and then telling you right before.

24 So I think this is a very egregious example. So I
25 would request that going forward, because I know defendants

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D4M8FLO2

McGuire - cross

1 have inundated you with letters and complaints about this, that
2 they refrain from doing so because this is an example of
3 throwing stones at glass houses, I would say.

4 Thank you, your Honor.

5 THE COURT: I would also say that Ms. Grossman
6 referred to it as a demonstrative exhibit. So were I
7 instructing the jury, I would say it is for a limited purpose.
8 It is not actually for the substance, but merely to put in a
9 graphic form the testimony I have already heard. So I will
10 take it only as a demonstrative exhibit. To the extent that
11 you later show, maybe through redirect, that it's inconsistent
12 with the evidence of record or the testimony, then I will
13 discount it.

14 Anyway, I am taking it as a demonstrative exhibit,
15 which is what you offered it for, Ms. Grossman.

16 MS. GROSSMAN: Yes, your Honor.

17 Is there a copy?

18 MS. GROSSMAN: Yes.

19 THE COURT: Thank you.

20 MS. GROSSMAN: Not to belabor the point, I just note
21 that there are many times Mr. Moore has put out demonstrative
22 exhibits at the last minute, and we have allowed it to be used
23 for the convenience of the Court. So I am not looking to --
24 it's a long trial. We are all trying our best here. There is
25 no interest in trying to misrepresent anything or misrepresent

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D4M8FLO2 McGuire - cross

1 testimony or do anything that we shouldn't be doing.

2 THE COURT: Over the weekend letters came in
3 complaining that the plaintiff has declined to identify which
4 exhibits they intend to use with which witness and has merely
5 said, it will be the following exhibits or any exhibit already
6 in evidence. Since there are 200 exhibits already in evidence,
7 the defense complaint is that's not much in the way of notice
8 of which exhibits they intend to use. So I was going to get to
9 that complaint, but it's in the context of those letters that
10 he made his speech.

11 Let's finish Commissioner McGuire.

12 MS. GROSSMAN: Just for purposes of having a clear
13 record, why don't we refer to this as Defendants' Exhibit D14.

14 THE COURT: Right.

15 BY MS. GROSSMAN:

16 Q. Commissioner McGuire, looking at this demonstrative
17 exhibit, looking to the left, you see where it says crime
18 complaint records?

19 A. Yes.

20 Q. The crime complaint records, there is a table underneath
21 the crime complaint records, correct?

22 A. Yes.

23 Q. In that table, does that represent the fields that are
24 included in the crime complaint databases that were provided to
25 Professor Fagan?

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D4M8FLO2

McGuire - cross

- 1 A. Yes.
- 2 Q. OK. So one of the fields that is included in the crime
3 complaint databases is the date of the complaint at the top
4 here, correct?
- 5 A. Yes.
- 6 Q. Then the record creation date, correct?
- 7 A. Yes.
- 8 Q. Then a unique complaint ID number, correct?
- 9 A. Yes.
- 10 Q. Number 3.
- 11 Then fourth, there is the offense description?
- 12 A. Yes.
- 13 Q. And then five, there is a reference there, law code
14 category description. Can you explain what that is?
- 15 A. I believe that is the felony misdemeanor violation.
- 16 Q. And then it has perp sequence number.
- 17 A. Yes.
- 18 Q. That's in the complaint database?
- 19 A. Yes.
- 20 Q. Then you get to the last three on this table, which has
21 suspect age, suspect sex, and suspect race, correct?
- 22 A. Yes.
- 23 Q. Those are the suspect descriptions that are contained in
24 the complaint database?
- 25 A. Yes.

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D4M8FLO2 McGuire - cross

- 1 Q. Now, moving to the far side of this demonstrative, you see
2 that it has a table under arrest records, correct?
3 A. Yes.
4 Q. And these are the fields that are included in the arrest
5 database that was provided to Professor Fagan, correct?
6 A. Yes.
7 Q. And one of the fields has a unique arrest number, correct?
8 A. Yes.
9 Q. The second one has the arrest date?
10 A. Yes.
11 Q. The third has -- I will move on to the descriptions, the
12 bottom three. Arrestee reported age?
13 A. Yes.
14 Q. Arrestee sex code?
15 A. Yes.
16 Q. And that represents male or female, correct?
17 A. Yes.
18 Q. And arrestee race description?
19 A. Yes.
20 Q. So now looking in the center table, there is a reference to
21 an association file, correct?
22 A. Yes.
23 Q. And you see that it has a unique ID number and an arrow
24 pointed to the unique complaint ID number in the crime
25 complaint record?

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D4M8FLO2

McGuire - cross

1 A. Yes.

2 Q. Then you see under the table association file, you see
3 unique arrest ID, and then an arrow pointing to the right under
4 arrest record, which says unique arrest ID?

5 A. Yes.

6 Q. Can you explain to the Court how the two databases were
7 merged and how you can ensure that the complaint records are
8 associated with the arrest records?9 A. The complaint record and the arrest record, other than that
10 date dif field, which I will get to in a moment, were the data
11 that were supplied to the plaintiffs initially as separate
12 files.13 Within our relational database, the OmniForm system,
14 when a complaint is entered and there is an arrest made for
15 that complaint at that time, this association file is created
16 within the system that says this arrest is connected to that
17 complaint.18 So if you provide somebody with that file, you can now
19 link them together. That was not supplied until we supplied
20 the merged data, that association file. And all it is is a
21 cross-reference table that was created at the time these
22 records were entered into the system.23 Q. In terms of the known suspect description, can you explain
24 to the Court how that actually ended up adding information
25 about the suspect descriptions known to the police department?

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D4M8FLO2

McGuire - cross

1 A. The types of situations we were really interested, and
2 that's where the date dif comes in, were situations in which
3 the arrest was made no more than within the 24 hours of the
4 complaint being recorded. Because we were trying to avoid
5 including arrests that essentially were made later, possibly
6 months later, upon investigation. Because some of those would
7 have been unarrested suspects in the complaint file. So we
8 would have ended up double counting.

9 So then we applied this 24-hour rule, which is the
10 date dif, and unfortunately we didn't look at it from the sense
11 of arrests occurring before complaints. So we picked up all of
12 these other arrests that we discussed before from the other
13 agencies. They are valid arrests and they are valid linkages.

14 So what we are essentially doing is merely connecting
15 the complaint with the arrest, so that at the time an incident
16 occurs, if you had three suspects and you made one arrest, two
17 of the suspects remained unarrested, so they would in the
18 complaint file. One of them was actually arrested on the
19 scene, and that would be in the associated arrest with that
20 complaint.

21 Q. And in terms of the total number of suspects known to the
22 police department as a result of merging these two databases
23 for all crime, what is the percentage of known suspects known?

24 A. Across all of the crimes, it's about 63 percent, and for
25 the violent crimes it's much higher. It can range up into the

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D4M8FLO2

McGuire - cross

1 90s. For robbery, for instance, it was 85 percent when you
2 pulled both of these together because robberies produce many
3 arrests at the scene.

4 THE COURT: What does that 63 figure represent?

5 THE WITNESS: The 63 percent is across all of the
6 crimes.

7 THE COURT: It represents what?

8 THE WITNESS: It represents the percentage of
9 complaints that have a suspect, either arrested or unarrested,
10 for which you know the race ethnicity.

11 Q. Now, before the break we started talking about other
12 statistical reports that you also are responsible for
13 preparing?

14 A. Yes.

15 Q. Let me show you what has been marked as Defendants' Exhibit
16 Y8.

17 MR. CHARNEY: Do you have a copy?

18 MS. GROSSMAN: Yes.

19 MR. CHARNEY: Thank you.

20 MS. GROSSMAN: Your Honor, just as a housekeeping
21 matter, I would like to move to admit the demonstrative
22 exhibit.

23 THE COURT: As a demonstrative exhibit, D14 is
24 received.

25 (Defendants' Exhibit D14 received in evidence)

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D4M8FLO2

McGuire - cross

1 Q. Referring to Defendants' Y8, can you tell the Court what
2 this is?

3 A. It's the report that does a statistical overview of
4 reasonable suspicion stops in New York City in 2011. It's a
5 precinct based comparison and it includes stop descriptions and
6 crime suspect descriptions, as well as activity.

7 THE COURT: It was issued when?

8 MR. CHARNEY: This past December.

9 THE COURT: December 2012 it was issued?

10 THE WITNESS: I believe so.

11 THE COURT: It's issued by your office?

12 THE WITNESS: Yes.

13 MS. GROSSMAN: I move to admit, your Honor.

14 MR. CHARNEY: We object on hearsay grounds. This is
15 not a business record. It was a one-time report that was done
16 in December of this year, coincidentally, a month after
17 Professor Fagan's analysis of that same data came out. This is
18 not something produced in the ordinary course of business
19 because it is a one-time report. And so it's an out-of-court
20 statement. I would move to exclude it.

21 MS. GROSSMAN: There are tallies and just statistical
22 compilations of all crime.

23 THE COURT: There is obviously a narrative in there.
24 There are conclusions and interpretations and all kinds of
25 things in it. How do you respond to the argument that it

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D4M8FLO2

McGuire - cross

1 shouldn't be admitted because it is hearsay? It's not a
2 business record, is it?

3 MS. GROSSMAN: It is a business record. The police
4 department issued this. It is publicly available. It's on the
5 police department Web site.

6 THE COURT: Neither of those are characteristics of a
7 business record. There may be another exception, public
8 records, but not business records.

9 We have to look. We can't just make these up. We can
10 read the words. I know 803(6) well so I doubt that it is a
11 business record. Some of the material contained in it are
12 probably business records. The statistics that are compiled
13 are probably made and kept in the ordinary course of business,
14 but the report isn't.

15 Let's look at the public record. Public records
16 exception says, "A record or statement of a public office if
17 (a) sets out (1) the office's activities; (2) a matter observed
18 while under a legal duty to report, but not including in a
19 criminal case a matter observed by law enforcement personnel;
20 or (3) in a civil case or against the government in a criminal
21 case, factual findings from a legally authorized investigation;
22 and (b) neither the source information nor other circumstances
23 indicate a lack of trustworthiness."

24 So I think it satisfies (b). The question is, does it
25 satisfy (a), the public records exception? It doesn't, of

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D4M8FLO2 McGuire - cross

1 course, set out the office's activities.

2 MS. GROSSMAN: Yes, it does, your Honor. We have
3 radio runs reported.

4 THE COURT: Mr. Charney, if you interrupt, I can't
5 follow what she is saying.

6 It sets out what?

7 MS. GROSSMAN: It sets out all radio runs. It sets
8 out the total number of crime complaints. It sets out the
9 total number of arrests and criminal court summonses issued.
10 It sets out reasonable suspicion stops. Then it also sets out
11 residential population disaggregated by precinct.

12 THE COURT: What is the office?

13 MR. CHARNEY: CAPP. This does not set out the
14 activity for CAPP.

15 THE COURT: That stands for what again?

16 MR. CHARNEY: Crime analysis and program planning
17 section.

18 THE COURT: That is what this witness is the head of?

19 MR. CHARNEY: Yes.

20 THE COURT: It doesn't set out the activities of CAPP.

21 MR. CHARNEY: No.

22 THE COURT: How about a matter observed while under a
23 legal duty to report? Does it satisfy number two, a matter
24 observed while under a legal duty to report? They are tracking
25 these statistics all the time.

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D4M8FLO2

McGuire - cross

1 MR. CHARNEY: This is not one of those mandated
2 reports that they are supposed to give to the City Council.

3 THE COURT: Nor does it say that in the public records
4 exception.

5 MR. CHARNEY: I don't think this is something that
6 they are legally obligated to produce because they only
7 produced it once.

8 THE COURT: Are they under a legal duty to report
9 statistics, so to speak?

10 MR. CHARNEY: General statistics. The question is,
11 are the specific statistics that are in this report something
12 that they are legally obligated to report, and I would argue
13 no.

14 THE COURT: That's what they are there for.
15 What does CAPP stand for again?

16 THE WITNESS: Crime analysis and program planning.

17 THE COURT: They are there for crime analysis.

18 MR. CHARNEY: I understand. But CAPP is not under a
19 legal duty to report the statistics in this report to the
20 public or to this court or to the City Council. That's my
21 question. This is different than the reports that CAPP does
22 provide to the City Council on a quarterly basis. That's not
23 what this is.

24 THE COURT: I am convinced it's not 803(6). It's not
25 a business record. Whether it's a public record is a closer

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D4M8FLO2

McGuire - cross

1 call, but I understand the argument about legal duty. I
2 actually have to look into this and research it.

3 Does this report do anything other than just pull the
4 statistics out?

5 MS. GROSSMAN: It's very helpful for your Honor.

6 THE COURT: Does it analyze the statistics or just
7 report in raw numbers?

8 MS. GROSSMAN: It reports in raw numbers, plus what we
9 have been discussing about known crime suspects. It would be
10 easy to show you just the first page just so you know what
11 you're ruling on. You can choose whether you want to accept it
12 or not. I think if I can just show you --

13 THE COURT: Are there analyses, conclusions,
14 recommendations, are there things like that? Maybe you can
15 extract the data only and leave out analyses, conclusions or
16 recommendations.

17 MS. GROSSMAN: There are no recommendations, your
18 Honor.

19 MR. CHARNEY: That's hearsay as well, your Honor.
20 Statistics would be hearsay.

21 THE COURT: Well, that may not be right. If we just
22 look at the public records exception, it's possible.

23 MS. GROSSMAN: Can I just show you one page?

24 This is representative of all the entries.

25 MR. CHARNEY: The one other thing I would like to say,

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D4M8FLO2

McGuire - cross

1 this is no different than the RAND report, which we didn't try
2 to admit for the truth. It's a government report that has very
3 important statistics in it, which are very relevant to this
4 case. We believe it's extremely self-serving. And to put it
5 in and not let the RAND report in -- I'm sorry, the attorney
6 general's report in for the truth would be completely
7 contradictory. They are really no different in our view.

8 MS. GROSSMAN: We have provided the raw data to
9 Professor Fagan, complaint data, arrest data, and, also, all
10 the -- if I may -- all the experts relied on census data. This
11 is nothing more than, if you look at this, it's just the
12 residential population broken down, disaggregated citywide and
13 then it's broken down by precinct.

14 MR. CHARNEY: It has crime suspect data.

15 MS. GROSSMAN: Then it has all known crime suspects
16 broken down specifically. As you can see, Asian, black,
17 Hispanic, white. Then it has known violent crime suspects that
18 we have been talking about. Then we have a statistics about
19 the person stopped and disaggregated by race.

20 THE COURT: The problem with this is this is just one
21 page. I really don't know what is on all the other pages.

22 MS. GROSSMAN: The others pages are just like this.

23 MR. CHARNEY: Your Honor --

24 THE COURT: Mr. Charney, you have got to stop
25 interrupting Ms. Grossman. It is just not helpful. Force

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D4M8FLO2 McGuire - cross

1 yourself to wait until she finishes each sentence.

2 MS. GROSSMAN: What happens is each page that follows
3 now disaggregates citywide totals down by precinct. It is
4 First Precinct, and then it goes Fifth Precinct, and continues.
5 That is pretty much the sum and substance of these reports.

6 THE COURT: I don't understand the time frame either.
7 For what time period is this?

8 MS. GROSSMAN: All of 2011.

9 Your Honor, the police department looks at this type
10 of information concerning suspect description and the
11 correlation between suspect description and stops. And so this
12 is very -- this analysis, it's not analysis, laying out the
13 numbers the way they are laid out is a visual way of seeing the
14 correlation.

15 THE COURT: Can this witness tell me what data he used
16 to find these numbers?

17 MS. GROSSMAN: Sure.

18 THE COURT: Is there anything in this report other
19 than breaking it up by precinct so that every page looks like
20 the page now on the screen?

21 MS. GROSSMAN: Right.

22 THE COURT: There is nothing else here? There is no
23 narrative?

24 MS. GROSSMAN: There is an explanation at the very
25 beginning about what the source of the information is.

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McGuire - cross

1 THE COURT: Which I was going to ask him anyway.

2 MS. GROSSMAN: I would just add, at the very bottom,
3 this is just a -- sorry. You have radio runs just for context,
4 the total number of radio runs. This would be in the First
5 Precinct we are looking at. Total number of crime complaints
6 in the First Precinct.

7 Then down here, arrest and criminal court summonses
8 issued, just raw numbers, issued in that year in that precinct.

9 And then at the very bottom, reasonable suspicion
10 stops for the 2011 arising out of the First Precinct. It's
11 really a tally in some ways, but it's also taking what we have
12 been discussing about known suspect description and just doing
13 the math.

14 THE COURT: Mr. Charney, now it is your turn. But the
15 question I have for you is, the attorney general's report goes
16 well beyond numbers. It does have narratives, analyses,
17 recommendations. It's a different kind of piece. If Ms.
18 Grossman has correctly or accurately described this, it is page
19 after page on the numbers, some on a graph or table basis, but
20 it's just numbers, and he is going to tell me the source of
21 each number. There is nothing else there. He doesn't draw
22 conclusions.

23 Right? You don't end up by saying, therefore this
24 proves that?

25 THE WITNESS: No.

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McGuire - cross

1 THE COURT: So it's just the numbers. So with that,
2 Mr. Charney, I am happy to hear from you.

3 MR. CHARNEY: The first piece is that there were
4 obviously decisions made about which data to use and which data
5 to not use.

6 THE COURT: We are going to find that out. Where he
7 drew these numbers from?

8 MR. CHARNEY: For example, they use known crime
9 suspects. They don't use arrests. They say they use census
10 data. We haven't had the opportunity to check it. To us, this
11 is akin to an expert report, where you have a lot of data that
12 is being relied on that is clearly hearsay, and then it's being
13 used to run numbers and produce the results of those numbers.
14 They have an expert. They are trying to get in a second expert
15 report.

16 THE COURT: I don't view it that way. This is just
17 data. He is going to tell you where he drew it from. And if
18 you feel again -- how long have you had this report, Mr.
19 Charney?

20 MR. CHARNEY: It came out in December.

21 THE COURT: So you have had months to look at it.

22 MR. CHARNEY: Yes. We always believed that it was
23 hearsay because they have an expert who has done his own
24 analysis.

25 THE COURT: This is not an analysis. This is data.

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McGuire - cross

1 MR. CHARNEY: He actually had to perform the
2 calculations. There are hundreds of thousands of crime
3 complaints, hundreds of thousands of stops. There had to be
4 millions of people that live in the city, that all of those
5 numbers had to be crunched to get these results, because we
6 have residential population, we have crime suspects.

7 THE COURT: The residential population figures, do
8 those come from the census?

9 THE WITNESS: Yes.

10 MR. CHARNEY: What year?

11 THE COURT: I will ask that.

12 THE WITNESS: 2010.

13 THE COURT: That column is pretty benign. It comes
14 right out of the census.

15 And persons stopped, where do those figures come from?
16 Is that from the UF-250 data?

17 THE WITNESS: Yes.

18 THE COURT: So that's from the UF-250 database, which
19 we all know the problems, not every stop was recorded. But
20 anyway, there it is. That's only as good as the UF-250s. I
21 understand the last column, when it says race or stop, it's
22 only as good as the 250s themselves.

23 Do you agree with that?

24 THE WITNESS: Yes.

25 THE COURT: Now the middle two columns. That's the
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McGuire - cross

1 bone of contention. What is the source of the data in the all
2 known crime suspects column?

3 THE WITNESS: It's the merge of the complaint and
4 arrest data that we just discussed.

5 THE COURT: And the known violent crime suspects,
6 where does that come from?

7 THE WITNESS: Is the subset for violent crimes within
8 that merged database.

9 THE COURT: So the attacks you have on the merged
10 database, you have brought them out and you will continue to
11 bring them out anyway. This just puts on a piece of paper the
12 information from that merged database. To the extent you
13 convince the Court that the merged database is somehow flawed,
14 so is this.

15 MR. CHARNEY: Here is the problem. The merged
16 database was created for the purposes of this litigation. So
17 he is now relying on what is clearly not something that's done
18 under the legal obligation to report.

19 THE COURT: I understand that the merged database is
20 not a public record. It wouldn't come in as a public records
21 exception. I also don't think it is a business record. I
22 don't find that that matters. This is the source of the
23 statistics that he is putting in this chart. The statistics
24 are only as good as the source from which they come, right.

25 MR. CHARNEY: I understand.

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McGuire - cross

1 THE COURT: And you have attacked the merged database.
2 You have to attack it, not because of this report, but because
3 of Dr. Fagan's analysis and Dr. Smith's analysis. So you're
4 going to be attacking that anyway. So I don't quite understand
5 what is your concern with this so long as the representation is
6 correct that there is no narrative here that purports to draw
7 any conclusions from it. It's just the tables, page after page
8 of tables.

9 Is that still what you say?

10 MS. GROSSMAN: Yes.

11 THE COURT: Anything else should be redacted out.

12 MS. GROSSMAN: Other than a map.

13 THE COURT: Mr. Charney, you're muttering, but if you
14 want on the record the statement there are three pages of text,
15 then you ought to review the three pages of text, Ms. Grossman,
16 and redact it. All I really want are the tables. The first
17 page and then the breakout by precinct. I don't want the three
18 pages of text. And I don't want to read them to decide that I
19 don't want them because then I have read them, which is the
20 problem with a nonjury.

21 MS. GROSSMAN: It just explains --

22 THE COURT: I don't need any further explanation. So
23 taking out the three pages of text, including just the numbers,
24 I know where the numbers come from, I know what they purport to
25 state. That's it. I will allow it for that purpose.

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McGuire - cross

1 MR. CHARNEY: I understand, although we would just for
2 the record note that we still don't think it meets any of the
3 hearsay exceptions.

4 THE COURT: OK.

5 What is this document called?

6 MS. GROSSMAN: Defendants' Exhibit Y8.

7 THE COURT: Y8 is received, minus the three pages of
8 text, just the tables.

9 (Defendants' Exhibit Y8 received in evidence)

10 MS. GROSSMAN: We will remove them, but there is no
11 analysis. It's just a description of what each of the
12 categories are.

13 THE COURT: I don't need it. I just got the testimony
14 live.

15 MS. GROSSMAN: Very good.

16 Your Honor, we have a similar report for 2012 that's
17 Defendants' Exhibit B14. And we would ask to admit that report
18 as well. It's the same exact type of report except for 2012.

19 THE COURT: If 2011 didn't come out until December
20 2012, when did 2012 come out?

21 MS. GROSSMAN: It came out just immediately before I
22 produced it to the plaintiffs.

23 THE COURT: When was that?

24 MS. GROSSMAN: Last week.

25 MR. CHARNEY: We haven't had a chance to look at these
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McGuire - cross

1 numbers.

2 MS. GROSSMAN: It's the same kind of statistics.

3 THE COURT: I know. But the plaintiffs haven't had an
4 opportunity to work with it, to show it to their expert. They
5 are not prepared to cross-examine on it. I can do it, but not
6 now. It's not right. They need time to look at these pages,
7 be ready to cross-examine. In fact, the Commissioner is
8 probably going to have to come back.

9 (Continued on next page)

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D4m9flo3

1 MS. GROSSMAN: Your Honor, may I suggest that at least
2 we conditionally admit it and subject to any further revisiting
3 on this issue so that we don't have to bring the witness back
4 for that purpose.

5 THE COURT: It's not so hard. You work in New York,
6 right?

7 THE WITNESS: Yes, I do.

8 THE COURT: Where's your office?

9 THE WITNESS: Right across the street.

10 THE COURT: Worst case he comes back. I have to be
11 fair to both sides. They haven't had that report. It's full
12 of numbers. They need to talk to their expert about those
13 numbers. They need to study those numbers. I'm not going to
14 have them cross-examine after a one-hour lunch break.

15 So you may have to come back. It's not the biggest
16 deal whether you spend the day across the street or here.

17 THE WITNESS: I've been treated pleasantly enough
18 here.

19 THE COURT: Yeah. That's what I thought.

20 So you'll come back. So I'm not going to take the
21 2012 now.

22 MR. CHARNEY: Your Honor, I would also note that they
23 didn't put this on their list of exhibits that they sent us
24 last week for Commissioner McGuire. They put Y8, the 2011 one.
25 But this is the first I'm hearing they were going to use this.

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1 THE COURT: You may have noticed so far it's not
2 admitted, Mr. Charney. We'll revisit it after you've had some
3 time to work with it.

4 BY MS. GROSSMAN:

5 Q. Well now, Commissioner McGuire, you also prepared crime and
6 enforcement activity reports in New York City?

7 A. Yes.

8 Q. I'm going to show you what's been market as Defendants'
9 Exhibit Q6.

10 Can you explain to the court what this is.

11 A. It's an overview of victimology, wanted suspect information
12 and arrest activity. And I believe there's one table in here
13 with stop activity for a number of different crimes recorded by
14 the NYPD.

15 Q. And so this is a compilation of crime and enforcement
16 activity reports for various periods of time, right? January 1
17 to June 30, 2008?

18 A. Well we produced them on a six-month cycle. So we produced
19 mid year and end year since 2008. And we produced them through
20 2012.

21 Q. But the copies that we have here aren't all the years.

22 MS. GROSSMAN: We have just a few years, your Honor.

23 Q. One is for January 1 to June 30, 2008?

24 A. Yes.

25 Q. That starts at Bates number NYC 3811.

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McGuire - cross

1 And then moving on to NYC 214646 we see the crime and
2 enforcement activity in New York City for January 1 to June 30,
3 2009.

4 Do you see that?

5 A. Yes.

6 Q. And then moving on to NYC-2-22828. That's the crime and
7 enforcement activity in New York City from January 1 to
8 June 30, 2012, correct?

9 A. Yes.

10 MS. GROSSMAN: Your Honor, we move to admit Q6.

11 MR. CHARNEY: No objection. Just regular course of
12 business.

13 THE COURT: Mr. Charney, are you speaking for the
14 record?

15 MR. CHARNEY: I'm sorry.

16 This is actually a public record that they do produce
17 to the city council every quarter so we don't have a problem
18 with it.

19 THE COURT: Thank you. Q6 is received.

20 (Defendants' Exhibit Q6 received in evidence)

21 Q. Now, Mr. Charney asked you a question on direct about
22 suspect description and crime rate.

23 Do you remember the questions about that?

24 A. Yes.

25 Q. Do you understand that Professor Fagan is using a benchmark

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D4m9flo3 McGuire - cross

1 of suspect description and crime rate?

2 A. I don't believe his analysis includes suspect description.

3 Q. And why do you believe that's a problem?

4 A. Well who commits the crime is an important factor in doing
5 the kinds of analysis that was done.

6 Q. Did professor -- did Dr. Ridgeway actually ask you for
7 suspect descriptions for nonviolent crimes?

8 A. No.

9 Q. Now did you help -- the UF 250 form that's currently in
10 existence, did you actually help create that, the 250 form?

11 A. Well the one that's in existence -- there was a prior one
12 before it.

13 Q. Yes.

14 A. So each time it goes through revision usually my unit
15 tabulates data from the existing database and supplies it to
16 the people that are deciding to make whatever changes to the
17 form.

18 THE COURT: So that wasn't really her question.

19 Did you have input into the form of the current UF 250
20 personally?

21 THE WITNESS: Not the selection of that particular
22 form factor, which is the type that you slip it into a memo
23 book.

24 THE COURT: I don't understand your answer. There's a
25 UF 250 form. Did you have input into its revision?

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McGuire - cross

1 THE WITNESS: I had some input.

2 THE COURT: What was your input?

3 THE WITNESS: My input was usually to tabulate
4 whatever the data was so that people could make comparisons
5 about what boxes and what organization of the data.

6 In other words we've been involved in tabulating 250
7 data all the way back to -- we're on I guess the fourth or
8 fifth form. So the early reforms that were created in the late
9 '90s --

10 THE COURT: So by being involved in tabulating, you
11 made recommendations for revising the form?

12 THE WITNESS: And we would ask a question.

13 So we were involved in the dialogue that was involving
14 many people within the department about how to redesign the
15 form.

16 THE COURT: I see. Okay.

17 Q. So you were aware of the very old version of the UF 250
18 form which contained a narrative, correct?

19 A. Yes.

20 Q. And what were some of the problems that existed by having a
21 narrative?

22 A. It was difficult to determine what the exact reason that
23 was being articulated by the officer. You couldn't do it using
24 computers. You would have to actually read the form and see
25 what the specific story was that the officer was telling.

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McGuire - cross

1 Q. And what problems did that present from a data entry
2 standpoint?

3 A. Well, you also, when you did the data entry, you were now
4 trying to replicate what was often written in the officers' own
5 hand, sometimes verbosely, sometimes very tersely. And you
6 then had to get all of that into the system correctly. So it
7 created a greater burden on the people that were doing the
8 entry when they did quality control. So it was a big burden to
9 have to go back to each report and look at it and see did we
10 get it right or did we even understand the officer's writing
11 possibly.

12 Q. Is that one of the reasons why check-off boxes were
13 included in the current forms of the 250s?

14 A. Yes.

15 Q. And there was also a requirement that the information
16 contained in the 250 forms be provided to the city council,
17 correct?

18 A. Yes.

19 Q. And so were these check -- how did these check-off boxes
20 facilitate providing that information to the city council?

21 A. Well we were able to respond to the law that said that they
22 wanted to know what the reasons for stop were by gender and by
23 race ethnicity.

24 Q. Now moving on -- I'm sorry, going backwards -- to the
25 internal benchmarking that Mr. Charney asked you about. I want

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D4m9flo3 McGuire - cross

1 to show you what's been market as Defendants' Exhibit N6.

2 Can you explain to the Court what defendants N6 is.

3 A. It is the output from Dr. Ridgeway's program to do the
4 internal benchmarking.

5 MS. GROSSMAN: Your Honor, I move to admit Defendants'
6 N6.

7 MR. CHARNEY: I need to know what year because it's
8 totally unclear.

9 THE COURT: These figures, what year did they
10 represent?

11 THE WITNESS: This is 2007 stop data.

12 THE COURT: 2007 stop data.

13 MR. CHARNEY: Also, your Honor, this would be no less
14 hearsay than the RAND report because it's doing the same
15 analysis. And the RAND report only came in for notice. We
16 would ask that this only come in for notice.

17 MS. GROSSMAN: Well, this is not part of the RAND
18 report. This was something that the police department actually
19 did in response to the RAND recommendations.

20 THE COURT: So he's saying he accepts it for notice.
21 It shows the response but he's saying the fact they did it
22 shows that they did something in response to learning of a
23 problem. But he's saying it shouldn't be offered for the
24 accuracy or truth of its statement.

25 MS. GROSSMAN: The results are the results so it would
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D4m9flo3

McGuire - cross

1 be offered for the truth of what the results are. Which is the
2 results of the internal benchmarking report.

3 THE COURT: It's just back where we were before under
4 what theory of admissibility. This is a statement of the
5 police department, right. If it doesn't fall under the hearsay
6 exception, you can't offer your own statement in evidence. It
7 could be offered by an adverse party but it has to fall under
8 an exception to be offered here.

9 So, again, is this a business record are these reports
10 made on a regular basis over the years? Does this always come
11 out every quarter?

12 THE WITNESS: No.

13 THE COURT: Annually or semiannually? Or it was one
14 specific project?

15 THE WITNESS: It was done once to test -- essentially
16 test the RAND software that they supplied to us to do the
17 internal benchmarking.

18 THE COURT: Doesn't qualify as a business record.
19 This one doesn't sound like a public record at all this was an
20 internal effort I suppose to, as you said, test the software
21 that you got from RAND.

22 So I think I'll accept it solely for the purpose of
23 notice, that is, the response the police department made to a
24 problem.

25 So what's the exhibit number again?

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D4m9flo3

McGuire - cross

1 MS. GROSSMAN: Defendants' N6.

2 THE COURT: N6 is received for a limited purpose.

3 (Defendants' Exhibit N6 received in evidence)

4 Q. So can you explain to the Court what this -- what the
5 results of this internal benchmarking means.

6 A. Dr. Ridgeway was using a particular type of statistical
7 analysis to examine the stops of an individual officer compared
8 to a set of similarly situated stops made by other officers
9 within 2007.

10 Q. And what do the results tell you?

11 THE COURT: You're talking about Ridgeway did. What
12 were you doing here?

13 THE WITNESS: I'm looking at the results of what his
14 program produced. His program had the intent of -- what he
15 told us was that the program internally essentially compared
16 officer A's --

17 THE COURT: Are these statistics run by your office,
18 or these were run by him?

19 THE WITNESS: These were run by -- they were run in my
20 office on a computer in my office that had the software that --

21 THE COURT: So they weren't in his report? They
22 weren't run by him?

23 MS. GROSSMAN: Correct.

24 THE WITNESS: No. Not these specific statistics.

25 THE COURT: Right. Not these specific statistics.

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McGuire - cross

1 Okay. Go ahead.

2 THE WITNESS: So essentially each officer was compared
3 against a group of similarly situated officers. And then that
4 comparison was to essentially determine what the percentage of
5 that officer's stops were by race ethnicity. Particularly for
6 the Hispanic and the black groups of people stopped. And then
7 the program also indicated if there was a -- if the two
8 percentages were different; in other words, that officer A
9 stopped Blacks at rate X and his similarly situated comparison
10 group stopped at a different rate.

11 THE COURT: How many officers did you analyze here?

12 THE WITNESS: This was analyzed for about 2700
13 officers. In other words, they were the officers in 2007 that
14 had produced 50 or more stops.

15 THE COURT: Okay.

16 THE WITNESS: So what that then -- it produced a list
17 that ranked the officers, these comparisons, by whether there
18 was a high probability or a low probability of it being an
19 outlier. In other words, was this officer, did he appear to be
20 statistically different from the reference group of similarly
21 situated officers.

22 THE COURT: Right. Okay.

23 Q. And what was the conclusion with respect to black
24 individuals?

25 MR. CHARNEY: Object on hearsay because he's going to
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D4m9flo3

McGuire - cross

1 basically testify to the results of that analysis for the truth
2 and I would argue that's hearsay because the analysis itself is
3 hearsay.

4 THE COURT: Well but I said I would allow it in for
5 the purpose of showing the police department's response because
6 that's the response to notice and that's really what the case
7 is about and to understand their response you have to
8 understand what their data showed them otherwise the response
9 makes no sense.

10 MR. CHARNEY: That may be right but I guess the truth
11 of that finding --

12 THE COURT: I don't have to really take it for its
13 truth. But it's still all part of their response. If they
14 concluded from running this data there was no problem, then in
15 their argument it would justify taking no further steps. So
16 part it's part of the notice response issue.

17 MR. CHARNEY: As long as it's not coming in for the
18 truth.

19 THE COURT: I understand. But you understand that's a
20 fine line difference.

21 MR. CHARNEY: I understand.

22 THE COURT: Can't be helped. That's how the law is.

23 So what did it show about the 2700 that you looked at?

24 THE WITNESS: It showed that there were no officers
25 over-stopping either Blacks or Whites at the 80 percent

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D4m9flo3 McGuire - cross

1 confidence level.

2 THE COURT: There were no outliers?

3 THE WITNESS: No outliers. They were under-stopping.

4 The ones that were more significant than the 80 percent level
5 were essentially under-stopping rather than over-stopping.

6 THE COURT: Whether you said these are officers who
7 made 50 stops.

8 THE WITNESS: A year.

9 THE COURT: The year.

10 THE WITNESS: 2007.

11 Q. And can you explain what the 50 percent confidence level
12 would be?

13 THE COURT: Did you say 50 or 80?

14 THE WITNESS: Eighty was what we, in reasonable
15 judgment, applied. And we looked to see who was over 80.
16 There were none.

17 Then we looked between the 50 and 80 -- because
18 50 percent has no -- because it's essentially a coin toss. So
19 in other words, if you're at 50 or close to 50 it's essentially
20 a coin toss of whether you were really different statistically
21 from the officers that you were being compared with.

22 Q. How come you -- Mr. Charney asked you questions about the
23 15 flagged officers that were noted in the RAND report.

24 Do you remember that?

25 A. Yes.

D4m9flo3

McGuire - cross

1 Q. How come the police department didn't identify the 15
2 flagged officers?

3 A. I believe they couldn't because of the RAND Corporation's
4 IRB regulations. They couldn't identify individuals because of
5 that sort of research limitation.

6 Q. So why did the police department choose to run the software
7 against 2007 data instead of the 2006 data that was reflected
8 in the RAND report?

9 A. It was more current and it would at least give us two years
10 to make broad comparisons between how the software operated.

11 Q. Now, Mr. Charney asked you questions about reports to the
12 city council and it took the police department a little time to
13 provide the reports to the city council.

14 Do you remember those questions?

15 A. Yes.

16 Q. Can you explain why it took the amount of time it did take
17 to provide the reports to the city council.

18 A. Well given the amount of resources that could be dedicated
19 to doing the entry, we had fallen behind. And we were also
20 working on efforts to start collecting the data in a closer to
21 realtime mode, which we did start doing January 1 of 2006.

22 I think he also mentioned that the later data actually
23 became available before the older data. The older data was
24 data that we were entering ourselves and we had a small unit of
25 officers that were doing that essentially full time. And we

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McGuire - cross

1 just fell behind. We just -- we could not keep up with the
2 demand. So that was one of the reasons that prompted us to
3 have a separate development program where we were pushing this
4 out to the precincts so they could enter it citywide.

5 Q. Now, do you recall the -- going back to Dr. Ridgeway's
6 analysis and the comparison of benchmarks. The analysis that
7 Dr. Ridgeway conducted regarding Dr. Fagan's model which uses
8 arrest data from the year before, do you recall what the
9 conclusions were in the RAND report for use of that particular
10 benchmark?

11 A. Well, I think there were two conclusions. He did present
12 some of the statistics. And I believe I think Blacks were
13 stopped at about the same rate as they appeared in the arrest
14 activity. But he also did confidence intervals for each of his
15 comparisons and the ones using the arrest activity had
16 confidence intervals that were very wide which made the
17 percentages that they produced not statistically significant.

18 Q. And I have a few more questions.

19 So one of the conclusions in Dr. Ridgeway's report
20 that's reflected in the RAND report is that Hispanic suspects,
21 however, appeared to be stopped at a rate slightly higher, six
22 percent, than the representation among arrestees.

23 Do you remember that?

24 A. Yes.

25 Q. What does six percent higher mean with respect to every

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McGuire - cross

1 hundred individuals -- every hundred Hispanics who may be
2 arrested?

3 A. Well for a hundred -- there would be 106 compared to a 100.

4 Q. And in your view that was not statistically significant?

5 A. Right.

6 Q. And he also concluded that black suspects were stopped at
7 nearly the same rate, about one percent less as the
8 representation among arrestees would suggest, right?

9 A. Yes.

10 Q. The software that the police department purchased regarding
11 the internal benchmarking, what did the results that -- what
12 did the results of the 2007 internal benchmarking report tell
13 you about the future use of that software?

14 A. It really didn't pick out anybody being all that unusual.
15 And given the statistical nature of it -- we also looked at
16 some of the internal statistics such as if someone was even
17 marginally different. When you look at the number of stops
18 that they did, the difference might be one stop a month or two
19 stops a month. So in terms of the other things that we were
20 contemplating doing as a result of the RAND, increasing the
21 audits or the 250s and doing things like that, this did not
22 appear to be a very productive way to proceed.

23 We also had concerns about the software itself because
24 it was very complicated and it took us a while to get it
25 working with the assistance of Mr. Ridgeway. And we felt that

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McGuire - cross

1 if it were going to be used on a regular basis we would
2 probably have to integrate it with some other software.

3 THE COURT: So after you did it once in 2007 --

4 THE WITNESS: Yes.

5 THE COURT: -- you didn't do it again?

6 THE WITNESS: No.

7 THE COURT: Never used it again?

8 THE WITNESS: Never used it again.

9 Q. Now, was there consideration -- did you consider using
10 it -- let me withdraw that.

11 Is there some concern about using it on a yearly basis
12 versus a quarterly basis?

13 A. Well one of the things we had discussed with Dr. Ridgeway
14 was because we were doing it in 2007, you had to wait for the
15 whole year to be finished, so we were doing it in 2008
16 essentially. And we would have liked to have been able to
17 monitor -- do some monitoring in a much more timely fashion and
18 do it quarterly. But the problem was that the statistical
19 significance levels were unlikely to be very high, doing it
20 quarterly, because there were too few stops to do because
21 the -- part of the statistical requirements were that you could
22 do it for officers that did 50 or more stops. So in a full
23 year we had 2700 of them. In only a quarter, you wouldn't have
24 had anywhere near that number of officers.

25 MS. GROSSMAN: I have no further questions.

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McGuire - cross

1 THE COURT: I'm not going to start the redirect now.
2 I will give you the luncheon recess, of course. And we'll pick
3 up at 2:00 with the redirect.

4 Okay. Come back at 2:00.
5 (Luncheon recess)
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McGuire - cross
AFTERNOON SESSION

2:08 p.m.

THE COURT: Please be seated.

PHILIP MCGUIRE, resumed

THE COURT: Mr. Charney.

MR. CHARNEY: Thank you, your Honor.

REDIRECT EXAMINATION

BY MR. CHARNEY:

Q. Good afternoon, Commissioner.

A. Good afternoon.

Q. In the break between your finishing the questioning from Ms. Grossman and now did you speak to your attorneys?

A. Very briefly.

Q. Did you speak about the substance of your testimony?

A. Just telling me that things were going well.

Q. Now I wanted to ask you about the RAND internal benchmarking issue again. You had mentioned in response to questions from Ms. Grossman because of RAND's I guess it was IRB requirements you couldn't identify the 15 officers from 2006 who had been found to have over-stopped pedestrians of color.

Do you remember that?

A. That's what I understood that it was RAND's IRB that prevented them from sharing the information back to us.

Q. But the NYPD, once you have the software you could have

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McGuire - redirect

1 gone back yourself and figured who those 15 were, correct?

2 A. Yes.

3 Q. But you chose not to do that?

4 A. Yes. Because it was several years later.

5 Q. Well isn't it true that you -- internal benchmarking was
6 done for 2007 by NYPD, right?

7 A. Yes.

8 Q. And in that year you say that you didn't find any
9 over-stoppers, right?

10 A. Yes.

11 Q. Now RAND did it for 2006 and they found 15, correct?

12 A. Yes.

13 Q. So you had one year where you had 15 and you had one year
14 where you didn't have any, correct?

15 A. Yes.

16 Q. And you never ran the software again after that, right?

17 A. No.

18 Q. So the decision not to run it again was based only on those
19 two years' results, right?

20 A. Yes.

21 Q. Now, I want to show you -- this is a document that was used
22 as a demonstrative in this case and has been used with I think
23 other witnesses.

24 This is a table of the number of stops per year done
25 by the police department since 2002.

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McGuire - redirect

1 Now you notice here, right, that each year from 2002
2 through 2011 the stops went up except for one year, right, and
3 that year is 2007, correct?

4 A. Yes.

5 Q. So in that ten-year period, 2007 is an outlier because it's
6 the only year where stops went down, correct?

7 A. Well, you know that now. At the time we were making the
8 decision it was early 2008 so we had no idea what the future
9 was going to hold.

10 Q. Well from 2002 through 2007 in that six-year period the
11 only year where stops went down was 2007, right?

12 A. Well, you can also view the 506,000 as an outlier.

13 Q. But my question is the only year in that six-year period
14 where stops went down was 2007, right?

15 A. Yes.

16 Q. And so was the police department at all concerned that the
17 results of the internal benchmarking for 2007 could have in any
18 way been affected by the fact that this was the only year in
19 the past six where the stops had decreased?

20 A. From the way that Dr. Ridgeway described what his internal
21 benchmarking was doing, the total number of stops I don't think
22 had much to do with it.

23 Q. And it's correct that after -- after looking at the 2007
24 data, the police department at no other point ran the software
25 on any subsequent years of data, right?

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McGuire - redirect

1 A. No, we did not.

2 Q. Now you said that in 2000 -- I'm sorry in -- the decision
3 was made not to go back and identify the 15 from 2006 who had
4 over-stopped pedestrians of color, right?

5 A. Right.

6 Q. And you said the reason was because now you were in what
7 2008 by that point and so you didn't think it was --

8 A. Yes.

9 Q. -- necessary?

10 A. Well, yeah. We were -- actually it was late 2008. If I
11 remember correctly, it was August of 2008 when we finally were
12 able to successfully run the RAND software.

13 Q. But I guess my question is, is was there ever any concern
14 that -- or ever any interest in figuring out what might have
15 been going on with those 15 officers in 2006 with respect to
16 supervision or the command they were in to see if those played
17 any role in their over-stopping people of color?

18 A. Well I think we learned something from looking at the 2007
19 data. We learned how to look at it more deeply. The only data
20 we had for the 2006 was the actual couple of tables that were
21 in the RAND report. And if you look at those, there are some
22 officers in the 15 that were barely above the flip of a coin
23 because he used a very conservative cutoff, 50, where, as he
24 said, that .8 or eighty percent was what was recommended in the
25 literature, I believe, if I'm quoting him correctly, from

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McGuire - redirect

1 memory.

2 So when we look at it we had, you know, the -- if I
3 could explain a bit. This internal benchmarking report is
4 essentially a list of all 2700 officers. So it's rather
5 enormous. And then also included with this is like a four-page
6 analysis of each one of the officers. So this is about 10,000
7 pages of information that was not available at the time when we
8 looked at just the 2006 report. All we had was Ridgeway's
9 report. When we actually ran it we could look behind it so we
10 could ask ourselves questions about whether the officers --
11 like if the officer was say 30 stops more than the benchmark or
12 his internal comparison, and you looked at his history, he
13 might have essentially made a stop-and-a-half more each month.
14 So the question is how would one tease out meaning from that by
15 going back when you're doing the stops.

16 There was the second point also in that you had people
17 that appeared on one list that were on the other as having
18 fewer stops. So we were essentially picking up some of the
19 officers -- not necessarily all, I don't remember exactly how
20 many, but some had -- were listed as over-stopping Blacks
21 perhaps and under-stopping Hispanics. So if you looked at the
22 total minority stops, their total percentage was almost in line
23 with the benchmark. It was just this difference between who
24 they were stopping.

25 In some cases people don't give you ID or they can't.

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McGuire - redirect

1 They don't have it on them. There is no probable cause for an
2 arrest so you make your best judgment about whether they are
3 black or black Hispanic. So there could be variation there
4 too.

5 So when you look at all of these things in their
6 totality, we didn't have enough information about 2006 beyond
7 the fact that there were 15 and some of them were not, you
8 know -- a few of them were closer to the flip of a coin. We
9 couldn't get behind the data. But when we did get behind it,
10 when we looked at 2007, there were other things that we could
11 look at because of the richness of the data for 2007.

12 So sort of in that judgment between the two years we
13 ended up saying it wasn't really giving us much.

14 Q. But my question is couldn't you have run the benchmarking
15 analysis on the 2006 data and actually gotten behind it to see
16 what was going on with these 15?

17 A. I guess we could have, sure.

18 Q. So my question is: There was no discussion about doing
19 that given that there had been 15 that were flagged?

20 A. I think it was more the other way around. It was when we
21 first got the software before we had all the troubles getting
22 it up and running it was like well we could always do 2006 but
23 then 2006 was over, 2007 was over. So now we have 2007 data.
24 So it was: Well, we might as well run it on that for the first
25 time.

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McGuire - redirect

1 Q. But I guess to the extent that something may have been
2 going on -- I'm sorry, going on with those 15 officers in terms
3 of their assignments or their commander or their supervisors in
4 2006 wouldn't the police department want to know what was going
5 on so that if there were problems with particular commands or
6 with particular supervisors you want to address that?

7 A. Well we hadn't arrived at the conclusion yet that there
8 were problems.

9 Let us put it this way. It was all likelihood if 2007
10 had produced a similarly high bunch of officers then the
11 chances were like we were getting some consistency with the
12 software, maybe there's something to this. But we got this
13 wide variation in the number of officers being selected and it
14 was -- and then we started digging into it and looking at all
15 of the other features, the ones that were up and the ones that
16 were down, the closeness to the coin flip.

17 Q. But that was only for '07 though, right?

18 A. Yes.

19 Q. But '07 you said that the software didn't produce any
20 over-stoppers anyway?

21 A. Right.

22 Q. But you never looked at the variations for 2006 where there
23 were over-stoppers identified, right?

24 A. No, we did not.

25 Q. Okay. I'm going to move on.

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McGuire - redirect

1 MS. GROSSMAN: Your Honor just I would just like to
2 make reference to the exhibit that the witness referred to.
3 That's Defendants' Exhibit N6, the internal benchmarking
4 exhibit.

5 MR. CHARNEY: Which is only admitted for purposes of
6 notice. Just to keep the record clear.

7 Q. So let's go back to this merge file business for a second.
8 This is the demonstrative which Ms. Grossman showed you. This
9 is I guess Defendants' Exhibit D14.

10 I just want to make sure I understand how this works.
11 Is it correct that the purpose of the merge exercise that you
12 conducted is to identify for a certain number of the crime
13 complaints where there was no suspect race provided to see if
14 you could actually figure that out by looking at an arrest that
15 you matched with that crime complaint? Is that the --

16 A. No.

17 Q. -- the objective that you were trying to achieve?

18 A. No.

19 Q. So the objective was not to figure out suspect race in
20 those crime complaints where there was no suspect race? That
21 wasn't the purpose of the exercise?

22 A. Well, that wasn't the only -- as I said before, there are
23 complaint reports that only have wanted suspects. There are
24 also complaint reports that have arrests as well as wanted
25 suspects and there are also complaint reports that have only

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McGuire - redirect

1 arrests.

2 Q. Okay.

3 A. So the idea was to mix all of those together to get the
4 most accurate description of all of the people that were either
5 arrested suspects or unarrested suspects during the particular
6 years in question.

7 Q. Well then let me ask you this. So by definition this
8 process does involve incorporating arrestee data into the crime
9 complaint data, correct?

10 A. (No response).

11 Q. You are --

12 A. I guess you could describe it that way. You're
13 attaching -- what you're essentially doing is creating a record
14 that may have whatever suspect -- suspect one, two, three and
15 then you tack on to the end of that any arrestees that may be
16 associated with that complaint also.

17 Q. So then one of the outcomes of this process was that for
18 crime complaints where previously there had been no suspect
19 race description now there was a suspect race description based
20 on the matching arrest report that went with that crime
21 complaint report?

22 A. For some, yes.

23 Q. Do you have a sense of how many that was?

24 A. It can be pulled from the data. Off the top of my head I
25 don't remember how many.

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McGuire - redirect

1 Q. But I guess my question is, is in doing --

2 A. Actually around 200,000 arrest reports were added to the
3 complaint file. That -- I can get that close. I don't know
4 how many on each.

5 Q. And so is that your -- so is your testimony that there were
6 now, after the merging process, there were now 200,000 more
7 crime complaints that had a suspect race than had previously
8 had a suspect race?

9 A. Well we started out with all of the suspects. So some of
10 the suspects -- on the arrest side the suspect race was known
11 in 99 percent.

12 Q. I'm talking about the crime complaint side.

13 A. But on the crime complaint side that was not necessarily
14 true. So in some cases we added additional suspects.

15 Q. I'm sorry. You added additional to -- in other words, if
16 there was a complaint with --

17 A. Two unarrested suspects.

18 Q. You added a third?

19 A. No. We -- there may have be an arrest at, you know, on the
20 scene, in close proximity to the occurrence. And that -- the
21 whole point to this was that in a situation like that, you
22 would have two unarrested suspects in the complaint record and
23 the arrestee would be in the arrest record. So there were
24 three people known to have participated in that crime.

25 Q. Three different people?

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McGuire - redirect

1 A. Three different people. Two of them are unarrested
2 suspects and one of them is an arrested suspect. So we merged
3 the two of them together. So now we have three suspects. And
4 you may or may not -- maybe of those two that are unarrested
5 you know the race and ethnicity of one and maybe you don't know
6 it for the other. And now you have -- whatever that adds
7 together, it adds additional information. So when you're
8 finished you have more information about all of the suspects,
9 both arrested and unarrested, all attached to the complaint
10 report.

11 Q. But one of the things that you're doing then is you are, in
12 fact, incorporating arrestee data into your crime complaint
13 data, correct?

14 A. Yes.

15 Q. Now earlier when I was asking you questions I asked you
16 about one of the concerns with using arrestee as a benchmark,
17 right?

18 A. Mm-hmm.

19 Q. And one of the concerns is that to the extent that arrests
20 are being made on the basis of racial bias, if you use arrests
21 as a benchmark you're actually then -- it could hide the bias
22 in the stop patterns, right?

23 A. Yes.

24 Q. So in this merge process by incorporating arrestee data
25 into the crime complaint data couldn't you, in fact, then be

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D4m9flo3 McGuire - redirect

1 creating that exact risk?

2 A. If your hypothesis was correct, yes, you could be
3 incorporating that bias in the data itself.

4 Q. And you're aware that there have been recent reports that
5 for certain categories of crime in New York City there have
6 been allegations that there could be racial bias in arrest
7 patterns. Are you aware of that?

8 MS. GROSSMAN: Objection.

9 THE COURT: I'll let him say whether he's aware of the
10 allegation. It doesn't make it true. Just an allegation.

11 Are you aware of that?

12 THE WITNESS: Yes.

13 THE COURT: You are. Okay.

14 Q. Now the other thing I wanted to ask you about this merge
15 process is you mentioned that you -- the parameter you were
16 using to try to link an arrest to a particular complaint report
17 was time. In other words, you wanted to look at the ones that
18 were 24 hours apart. Those were the ones you thought you could
19 merge; is that right?

20 A. No. We merged them all. We used the 24 hours to keep
21 within the timeframe that would allow us to say that these were
22 essentially contemporaneous events.

23 In other words, these were arrests -- the arrests we
24 were adding were only those arrests that occurred at or about
25 the time of the complaint. We were not incorporating arrests

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McGuire - redirect

1 that would have been made weeks or months later by
2 investigative follow-up.

3 Q. But the reason is because you wanted to make sure that
4 these arrests, in fact, could be linked to particular crime
5 complaints that that was --

6 A. No. That's not the fact that they could be linked. It has
7 nothing to do with the linkage. It has to do with not double
8 counting somebody as both an unarrested suspect and an arrested
9 suspect.

10 Q. Let me ask you this. Other than time, in other words,
11 other than linking or merging based on the proximity of time
12 did you use any other parameters?

13 A. The linking is not based upon the proximity of time. The
14 linking is based upon the cross-reference list that occurs
15 within the database. We were only restricting the links that
16 we were choosing to do statistics on to those that were within
17 the 24-hour window.

18 Q. So let me ask you this. These are the fields in the two
19 respective databases that you were using to do your merge
20 process?

21 A. Yes.

22 Q. So, in other words, in order to determine if a crime
23 complaint went with a particular arrest report you would be
24 looking at the date of the arrest and the date of the
25 complaint; is that right? Is that one of the things you would

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McGuire - redirect

1 look at to see if you would -- these two could be --

2 A. No. The first thing that was looked at was the association
3 file that said those arrests are hooked with those complaints.
4 That's the very first thing.

5 Q. That doesn't cover all the complaints or all the arrests,
6 right?

7 A. Yes, it does. It covers everything. Even the ones that
8 had arrests made six months later.

9 We started with all of the complaints that occurred
10 within the year. We then looked in our system for all the
11 arrests that were ever attached to those complaints. Then we
12 applied the 24-hour rule using the arrest date and the date of
13 the record creation date on the complaint report. It was the
14 secondary filter applied to a match that was done as a result
15 of the association file.

16 Q. So then the effect of that was to add or to -- add even
17 more --

18 A. No. It was to actually keep out some of the arrests.

19 Q. Now these -- this association file, you basically assumed
20 the accuracy of this?

21 In other words, that anything that was already linked
22 within the association file you concluded that that arrest
23 necessarily went with that complaint?

24 A. Yes.

25 Q. And what is the basis for that assumption?

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McGuire - redirect

1 A. Because that's the way the -- these records are processed
2 into the OmniForm system.

3 Q. Now, but -- I mean my question is how do you know that the
4 process that's used assures that this arrest was, in fact, a
5 good arrest in response to a particular crime complaint?

6 A. This is the system we've used since 2004 and I'm sure we
7 would have heard it from the courts if we had been linking the
8 wrong complaints to the wrong arrests. This is what follows
9 that case as it goes on through the criminal justice system.

10 And we've done our own audits at times. We've done
11 studies that look at particular crime analysis patterns.

12 Q. But this association file does not in any way assess if, in
13 fact, these arrests were valid arrests, right?

14 In other words, they may be linked in terms of this
15 was made pursuant to a particular crime complaint but there's
16 notice assessment of whether the arrest that was made was, in
17 fact, a legitimate arrest; in other words, that this arrest --

18 A. I don't know what you mean by "legitimate."

19 Q. In other words, that the arrest was of the person that, in
20 fact, committed the crime.

21 A. It was the arrest made by probable cause by the officers at
22 the time they record the complaint.

23 Q. Well, you just said that -- but I guess my question is, is
24 someone can call in a crime complaint, right, saying that
25 there's been a robbery, I've been robbed, right?

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McGuire - redirect

1 A. Yes.

2 Q. And then somebody could be arrested pursuant to that
3 complaint, right?

4 A. Yes.

5 Q. But it's not necessarily the person who actually committed
6 the robbery, right?

7 A. I would hope that in most cases it is.

8 Q. But there is no way of knowing that by looking at the
9 association file, correct?

10 A. How would I know that?

11 Q. Well that's my question. You wouldn't know it, right?

12 A. No. I mean you're asking -- that's usually a determination
13 of the courts afterwards.14 Q. I understand. But I guess it seems to me, and correct me
15 if I'm wrong, that there is an assumption here that in order to
16 do this merge process there is an assumption that a person
17 arrested pursuant to a particular crime complaint is, in fact,
18 the person that committed that crime, correct?

19 A. Yes.

20 Q. Okay. I just wanted -- but this assumption is not based on
21 any actual independent analysis you did to determine that the
22 arrestees that match each of these crime complaints, in fact,
23 committed the crimes that were reported, right?24 A. For most of these situations the reason why you're
25 arresting somebody is either a victim has told you that that's

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McGuire - redirect

1 the person that's done the crime or you've, in fact, arrested
2 the person almost at the time they committed the crime. It's
3 not an investigative arrest where detectives are studying this
4 case and doing a follow-up investigation for months later.
5 It's at the scene usually.

6 Q. So you're saying that -- well, first of all, you don't know
7 the percentage of arrests, do you, that take place at the time
8 the crime complaint is filed or within 24 hours? Do you know
9 how many, what percentage of --

10 A. As I said, 200,000 of the arrests that were merged, that's
11 what we were left with when we did that additional filtering on
12 the date.

13 Q. Are you also saying that of to those 200,000 those are all
14 pursuant to a crime complaint where there's an actual
15 description of the suspect?

16 A. No. They can be ones that are proactive where the officer
17 is the person who has viewed the offense.

18 Q. And that's actually -- let me ask about that.

19 That particular group, the proactive ones, that's
20 purely an officer initiated arrest, right?

21 A. Yes.

22 Q. The crime complaint is generated by the officer, right?

23 A. Yes.

24 Q. So if the officer, were, in fact, biased that wouldn't --
25 you wouldn't -- that would then be inserted into this -- in

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McGuire - redirect

1 other words, the data would be infected by that bias, right?

2 MS. GROSSMAN: Objection.

3 THE COURT: It's a hypothetical question. I'll allow
4 it.

5 THE WITNESS: Hypothetically, yeah. Yes.

6 (Continued on next page)

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McGuire - redirect

1 Q. Other than the time, the 24-hour limit that you were using,
2 did you use any kind of spatial parameter, in other words, you
3 wanted to check to make sure that the arrests and the crime
4 complaints, the locations were a certain distance apart from
5 each other?

6 A. No.

7 Q. What about offense category? In other words, we see over
8 here there is actually an offense description, and I assume a
9 penal law category for what the crime, the alleged crime is.
10 Was there any effort to make sure that the charge on which the
11 person was arrested matched the crime category in the
12 complaint?

13 A. No.

14 Q. I want to ask you about, I guess it's Defendants' Exhibit
15 Y8, which has been admitted into evidence. This is the 2011,
16 what you call reasonable suspicion stops report.

17 First of all, by reasonable suspicion stops, you're
18 referring to what are known as level three encounters under the
19 DeBour case, right?

20 A. I believe so.

21 Q. So when you use the term reasonable suspicion, that's just
22 your shorthand for that particular type of encounter, right?

23 A. Well, it's the case in which the officers have had
24 reasonable suspicion to stop somebody.

25 Q. What I am saying is you don't actually know if all the

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D4M8FLO4

McGuire - redirect

1 stops that are documented, that the data documents in this
2 report, were in fact based on reasonable suspicion, right?

3 A. I don't have personal knowledge of it, no.

4 Q. So this report purports to, on a precinct-by-precinct
5 basis, to compare the percentage of stops of various
6 demographic groups, racial groups, compare those percentages
7 with the percentages of crimes committed by those particular
8 racial groups, correct?

9 A. Yes.

10 Q. Now, are you aware -- it does it for every single precinct
11 in the police department, right?

12 A. Yes.

13 Q. And there are 76 of them, correct?

14 A. Yes.

15 Q. Are you aware that in almost half of those 76 precincts,
16 the percentage of stops that were done of Hispanic pedestrians
17 was actually higher than the percentage of crimes committed by
18 Hispanic pedestrians in those precincts?

19 A. I guess that's possible.

20 THE COURT: That's not his question.

21 THE WITNESS: I haven't looked at the statistics.

22 THE COURT: You could look through all 76 precincts
23 and verify whether that's right or not?

24 THE WITNESS: Yes.

25 THE COURT: You don't know it as you sit here?

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McGuire - redirect

1 THE WITNESS: No. I'd have to look.

2 Q. Are you aware that in 36 of the 76, which is about 47
3 percent of the precincts, the percentage of stops that were
4 done of black pedestrians was actually higher than the
5 percentage of crimes that were committed by black pedestrians?

6 A. That could also be true. You're not talking about the
7 counts; you're talking about the percentages.

8 Q. Yes.

9 A. Yes. OK.

10 Q. And this report, the reasonable suspicion stops report, the
11 first time that the police department put a report like this
12 out was December of 2012, right?

13 A. I believe so.

14 Q. But CAPP, your office, has been analyzing crime data for
15 many, many years, correct?

16 A. Yes.

17 Q. The police department has also been reporting the stop and
18 frisk data for at least, as you say, 11 years, going back to
19 2002, right?

20 A. Yes.

21 Q. But not until three months before this trial did the police
22 department put out a report like this, correct?

23 A. Yes.

24 Q. And this report, in fact, came out in December of 2012, a
25 month after Professor Fagan's most recent report came out,

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McGuire - redirect

1 correct?

2 A. I don't remember the date of his report, but if that's when
3 it was, that's when it was.4 Q. But you know this report, this 2011 reasonable suspicion
5 stops report, did come out after Professor Fagan's most recent
6 report, correct?

7 A. Yes.

8 Q. Now, Ms. Grossman asked you some questions about the old
9 UF-250 form that had a narrative and the new form which has got
10 check boxes, right?11 And you testified that one of the problems with the
12 narrative form was that it was difficult to determine the
13 reason for the stop that was recorded on the form, right?14 A. Well, it was difficult to determine that once you had
15 automated it. If you're talking about thousands and thousands
16 of forms, you essentially had to read them.17 Q. Well, currently, even on the current form, there is a check
18 box other where there could be a narrative associated with that
19 stop factor, right?

20 A. Yes.

21 Q. Are you aware that in the, I guess now, ten years of data
22 that Professor Fagan looked at, going back to 2004, there were
23 over, I believe over half a million stops where other was
24 checked off? Are you aware of that?

25 A. I'm not aware of the precise numbers, but yes, it's used.

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McGuire - redirect

1 Q. So that means there could be up to half a million
2 narratives in the 250s that were filled out by officers, right?

3 A. In addition to other checked boxes on the form, yes.

4 Q. And yet the police department has been able as an
5 electronic data entry matter to enter all of those text strings
6 into the database, right?

7 A. Mercifully, they are short, because there is not much room
8 to write. You can't write a story.

9 Q. But those have been entered, right?

10 A. Yes.

11 Q. Did anyone in the police department, did anyone express
12 concern, when the switch was made to the check box form from
13 the narrative form, that by giving officers boxes to check, it
14 would prevent the NYPD from capturing whether those officers
15 were able to actually articulate reasonable suspicion?

16 A. I wasn't aware of it.

17 MR. CHARNEY: No further questions, your Honor.

18 THE COURT: All right.

19 RE-CROSS-EXAMINATION

20 BY MS. GROSSMAN:

21 Q. Did the RAND software identification of the 15
22 over-stoppers mean that the stops they made were not based on
23 reasonable suspicion?

24 A. No.

25 Q. Did the NYPD draw any conclusions about the 15

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1 over-stoppers when the 13 under-stoppers were also identified?

2 A. No.

3 Q. Now, Mr. Charney asked you questions about, why didn't you
4 run the 2006 data to identify the 15 flagged officers that RAND
5 identified. And you then gave testimony about the reason why
6 the police department ran the software against the 2007 data,
7 correct?

8 A. Yes.

9 Q. Now, is it easier to find out information and follow up on
10 what is going on with an officer and their supervisors with
11 more current data as opposed to going back to 2006?

12 A. Yes.

13 Q. Is that one of the reasons why the police department chose
14 to run the 2007 data instead of rerun the 2006?

15 A. I believe it was.

16 MS. GROSSMAN: I have no further questions.

17 THE COURT: Are we done with this witness?

18 MR. CHARNEY: The only issue is there was Exhibit B14,
19 the 2012 version of the reasonable suspicion stops report, and
20 we haven't had a chance to look at it. I actually don't
21 recall, was that admitted into evidence?

22 THE COURT: No.

23 MR. CHARNEY: The question I have is, if the
24 defendants are trying to admit it, we would ask that we be
25 allowed to question the assistant commissioner at a later time.

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McGuire - recross

1 THE COURT: I told him that he might be called back to
2 answer your questions.

3 How long do you think you would need to review it?

4 MR. CHARNEY: If we could have, I guess, at least till
5 Thursday maybe to review it.

6 THE COURT: Let's make a mental note to revisit this
7 Thursday morning.

8 OK. All set.

9 MS. BORCHETTA: The plaintiffs call Julie Schwartz.

10 JULIE SCHWARTZ,

11 called as a witness by the plaintiffs,

12 having been duly sworn, testified as follows:

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

15 THE WITNESS: Julie, J-U-L-I-E, Schwartz,

16 S-C-H-W-A-R-T-Z.

17 DIRECT EXAMINATION

18 BY MS. BORCHETTA:

19 Q. Good afternoon, Commissioner Schwartz.

20 A. Good afternoon.

21 MS. BORCHETTA: Your Honor, I would just like to
22 advise the Court, as we have before, that with this witness
23 some of our questions will go to remedy.

24 As you can see, Chris Dunn is here so to the extent he
25 has any questions.

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1 THE COURT: OK.

2 Q. You are currently the commissioner of the Department
3 Advocate's Office?

4 A. Deputy commissioner.

5 Q. Who do you report to?

6 A. Commissioner Kelly.

7 Q. The Department Advocate's Office is sometimes referred to
8 as DAO, correct?

9 A. Some people refer to it that way.

10 Q. For the court reporter's assistance today, I will refer to
11 it as DAO. OK?

12 A. OK.

13 Q. The DAO is responsible for the NYPD's internal discipline
14 process, correct?

15 A. Yes.

16 Q. The DAO is, among other things, responsible for handling
17 substantiated CCRB complaints against members of the NYPD,
18 right?

19 A. Yes.

20 Q. The DAO is also responsible for handling internal NYPD
21 complaints against members of the police department, right?

22 A. Some, yes.

23 Q. DAO is, among other things, responsible for disciplining
24 officers who have conducted unlawful stops and frisks, right?

25 A. No. The police commissioner disciplines. We make

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1 recommendations to the police commissioner.

2 Q. But the DAO is responsible for processing the discipline
3 against those officers, right?

4 A. We make recommendations to the police commissioner on the
5 appropriate -- what we believe to be the appropriate
6 discipline, and the police commissioner makes the final say.

7 Q. So the DAO makes recommendations to the police commissioner
8 about the appropriate penalties for officers who have conducted
9 unlawful stops and frisks, right?

10 A. Yes.

11 Q. When did you become the deputy commissioner of the
12 Department Advocate's Office?

13 A. I started as an assistant commissioner in 2005, and then I
14 believe at some point in 2007, 2008, I was promoted to deputy
15 commissioner.

16 Q. Your responsibilities as assistant commissioner and deputy
17 commissioner are essentially the same, right?

18 A. For the most part, yes.

19 Q. As the deputy commissioner, you're the top person in DAO,
20 correct?

21 A. Yes.

22 Q. Prior to working in the NYPD's DAO, you were a criminal
23 prosecutor in Brooklyn, right?

24 A. I was an assistant district attorney in Brooklyn, and when
25 I left, I was the bureau chief of the sex crimes special

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1 victims unit.

2 THE COURT: In Brooklyn?

3 THE WITNESS: In Brooklyn.

4 Q. You became the deputy bureau chief of the sex crimes unit
5 in 1996, right?

6 A. If that's what you say. I think so. Around there. I was
7 there from '89 to 2004.

8 Q. And you became the bureau chief of the sex crimes unit in
9 2000?

10 A. Approximately, yes.

11 Q. I want to briefly go over with you the various ways that
12 cases can come in to DAO.

13 DAO receives cases of alleged officer misconduct
14 through CCRB, right?

15 A. That's one possible way, yes.

16 Q. But DAO only receives substantiated CCRB cases, right?

17 A. When we are talking about misconduct, yes.

18 Q. And DAO receives cases also of alleged officer misconduct
19 through IAB, right?

20 A. It's another way that cases can come to us, yes.

21 Q. And only substantiated IAB cases go to DAO, right?

22 A. For the most part. Sometimes the Internal Affairs Bureau
23 or other investigative units may come to us prior to
24 substantiation because they have questions about a case, and we
25 provide advice and guidance.

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1 Q. But cases go to DAO for further action after they have been
2 substantiated by IAB?

3 A. Certain cases that are prescribed by the patrol guide, yes.

4 Q. And DAO receives cases of alleged officer misconduct also
5 sometimes through ICOs within a command, right?

6 A. Sometimes, yes.

7 Q. And DAO receives cases of alleged officer misconduct
8 sometimes from the NYPD's equal employment opportunity office,
9 right?

10 A. Yes.

11 Q. And DAO sometimes receives cases of alleged officer
12 misconduct through the City of New York's department of
13 investigations unit?

14 A. Very limited, but yes.

15 Q. But in your experience, DAO receives improper stop and
16 frisk allegations through CCRB primarily, right?

17 A. Correct.

18 Q. That includes allegations of improper stop and frisks,
19 right?

20 A. Yes. That was what you asked me before.

21 Q. That includes allegations of improper stop and frisks that
22 is are lodged by other officers, right?

23 A. I can't tell you how CCRB gets their cases. They get their
24 cases through various ways. We receive -- well, the police
25 commissioner receives substantiated CCRB cases, and then they

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1 are sent to the Department Advocate's Office for review and to
2 proceed.

3 Q. You are aware that sometimes DAO receives allegations
4 through CCRB about improper stop and frisks that are originated
5 by an officer?

6 A. They can come in any way. Any person can make any
7 complaint to CCRB.

8 Q. So my question, though, is in your experience, you have
9 seen CCRB allegations come in to DAO that are from other
10 officers, right?

11 A. The officer would have to be off duty for it to come from
12 CCRB. If it was an on duty, then it would not be in CCRB's
13 purview because it wouldn't be a civilian at the time. So I
14 have only seen them a couple of times when an officer is off
15 duty and makes an allegation in that context.

16 Q. But if someone within the NYPD observed an unlawful stop
17 and frisk, you would expect that to be reported to you through
18 the CCRB, right?

19 A. No.

20 Q. Do you recall being deposed in this case?

21 A. Yes.

22 Q. I am going to hand you a copy of the transcript of your
23 deposition that was taken in this case on August 27, 2009.

24 You took an oath before giving testimony at that
25 deposition, correct?

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1 A. Yes.

2 Q. And you swore to tell the truth, right?

3 A. Yes.

4 Q. And you did tell the truth, right?

5 A. Yes.

6 Q. If you turn to page 38.

7 A. One second. Yes.

8 Q. 38, beginning at line 20, and reading to page 39, 17.

9 Do you recall giving the following answers to the
10 following questions:

11 "Q. Would an improper stop, question and frisk ever come from
12 an investigation unit?

13 "A. No.

14 "Q. Why is that?

15 "A. Because they would be handled by the Civilian Complaint
16 Review Board investigations.

17 "Q. What if an internal person in the police department
18 noticed that another officer had done an improper stop,
19 question and frisk, how would that allegation come to you?

20 "A. Through the CCRB."

21 Do you recall giving those answers to those questions?

22 A. Yes.

23 Q. In fact, even when an officer's supervisor is the one
24 lodging an allegation against an officer for an improper stop
25 and frisk, you would expect that allegation also to come to

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1 your office through CCRB?

2 A. No.

3 Q. Unless it was handled at the command level?

4 A. No. It can come through a myriad of ways. The officer can
5 report it to IAB. IAB could then send it to CCRB. The officer
6 could call CCRB. The officer could handle it on a command
7 level and I would never see it. CCRB -- you're mixing kind of
8 apples and oranges because --

9 Q. Let me stop you there. Let's go back to your deposition.
10 Starting at page 39.

11 A. Sure.

12 Q. Line 21. Do you remember giving the following answer to
13 the following question:

14 "Q. What if a direct supervisor notices that someone he is
15 supervising has done an improper stop, question and frisk,
16 where would that complaint go?

17 "A. It should be referred to the Civilian Complaint Review
18 Board."

19 Do you recall giving that answer to that question?

20 MS. COOKE: I object. I would ask to read the rest
21 because the examiner actually interrupted that answer and then
22 the answer continued.

23 So line 5, page 40, the examiner interrupted with the
24 phrase "would that."

25 And then the answer, line 6, is continuing, "Unless it

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1 was handled at the command level, which I would not see it."

2 Q. Do you recall giving those answers to those questions?

3 A. Yes.

4 Q. So except for situations when an allegation by a superior
5 officer is handled at the command level, you would expect a
6 supervising officer's allegation of an improper stop and frisk
7 to come to your office through the CCRB, right?

8 A. Not exactly. Because an officer can still report it to
9 Internal Affairs, who will then refer it to the CCRB.

10 Q. In that case, it's still coming to your office through the
11 CCRB, right?

12 A. Yes.

13 Q. If the allegation is handled at the command level, your
14 office would never see it, right?

15 A. I wouldn't say never, but most likely would not see it.

16 Q. After receiving substantiated complaints, DAO reviews the
17 complaint case file, right?

18 A. Are we talking about from CCRB?

19 Q. From anywhere, CCRB, IAB, wherever DAO oversees a case
20 file, DAO will then review the case file, right?

21 A. No. We have different processes for CCRB and an
22 investigative unit.

23 Q. Let's focus on CCRB. When you get a CCRB substantiated
24 case file, the DAO reviews the case file?

25 A. The assigned advocate will review the case folder, correct.

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1 Q. The DAO will also review the officer's CCRB history, right?

2 A. As part of the review of the case, they will review their
3 whole disciplinary history, if they have one.

4 Q. That could include the CCRB history if there is one?

5 A. Yes.

6 Q. DAO will also review an evaluation from the subject
7 officer's superior, right?

8 A. Part of the advocate that is reviewing the case, part of
9 the whole review would be to receive a background information
10 report from the commanding officer of that particular officer
11 that's in question.

12 Q. That commanding officer review is submitted after the case
13 file is received by DAO, right?

14 A. Yes.

15 Q. So that's an evaluation that the DAO does once some sort of
16 disciplinary action against the officer is being investigated,
17 right?

18 A. Once the substantiated complaint is received at the
19 Department Advocate's Office, we then contact that member's
20 commanding officer and ask for an evaluation.

21 Q. So it's not an evaluation that the commanding officer is
22 doing say on a yearly basis, right?

23 A. No. It's for the purpose -- so it's as timely as can be
24 for the purpose of making a determination on that particular
25 member of the service.

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- 1 Q. DAO considers the commanding officer's evaluation in
2 reviewing the case file, right?
- 3 A. It's part of what is considered in making a recommendation
4 on the appropriate penalty, not on whether or not to
5 substantiate misconduct.
- 6 Q. But it is considered by DAO, right?
- 7 A. In making a penalty recommendation.
- 8 Q. So the answer to that question is yes?
- 9 A. In making a penalty recommendation.
- 10 Q. DAO uses that commanding officer evaluation, in part, to
11 assess the credibility of the officer, right?
- 12 A. No. It has nothing do with credibility of the officer.
- 13 Q. But DAO does consider the evaluation in assessing the case
14 file?
- 15 A. In making a recommendation on penalty.
- 16 Q. DAO's review of the case file is limited to documentary
17 review, right?
- 18 A. I'm not sure what you mean by that.
- 19 Q. DAO does not conduct any investigation, right?
- 20 A. We are not an investigative unit.
- 21 Q. So you do not conduct any investigation, right?
- 22 A. No. But we may send something -- depending on what kind of
23 case we are talking about, if the folder is not complete, we
24 may request additional investigation.
- 25 Q. But DAO doesn't interview any witnesses itself, right?

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1 A. At what point?

2 THE COURT: At any point. Are you limited to
3 documents or do you actually --

4 THE WITNESS: We interview witnesses. We are trial
5 attorneys so when we make -- we don't interview them in the
6 sense of an investigation, but if we have to go to trial, then
7 the witnesses are obviously going to be prepared for trial. We
8 interview them. We may call them to make sure we have their
9 cooperation.

10 THE COURT: Short of trial, would you interview
11 people?

12 THE WITNESS: Yes. Sometimes to make a determination
13 on how to go with the case, we want to make sure someone is
14 going to cooperate, they are available, things of that nature.
15 Q. But in the ordinary course, when DAO is deciding whether to
16 pursue discipline or what discipline to pursue on a particular
17 CCRB case, DAO will not interview the witnesses, right?

18 A. No. That's not correct. When we are deciding a level of
19 discipline, especially if we are between maybe a command
20 discipline or charges and specifications, we are going to reach
21 out to the complaining witness to make sure they are available,
22 that they are willing to cooperate, because that's a key factor
23 in evaluating the strength of the case.

24 THE COURT: Would you also go over the substance of
25 their complaint with them?

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1 THE WITNESS: Yes.

2 Q. You just mentioned that you do that in the case of charges
3 and specifications or command disciplines, right?

4 A. Or command disciplines -- if we write a command discipline,
5 we have to think that that could possibly be a case that is
6 going to be charges and specifications. Because if the member
7 refuses the command discipline, we have to be willing and able
8 to write charges and specifications. So there are many times
9 that we reach out when we are making a decision on how to go
10 forward with the case. It may not be a full-blown interview,
11 but we still want to make sure that we have a cooperative
12 complaining witness, that they are accessible, that they are
13 consistent with what they said.

14 Q. Ordinarily, when DAO gets a case file from the CCRB and is
15 deciding whether to issue a penalty, the DAO investigator
16 doesn't interview witnesses unless it somehow feels the CCRB
17 investigation is deficient, right?

18 A. That's not correct. I don't have investigators.

19 Q. I'm sorry. You don't have?

20 A. Investigators.

21 Q. The advocate in your office would not ordinarily interview
22 witnesses?

23 A. I would say we contact our witnesses a reasonable part of
24 the time and do a preliminary interview to gauge their
25 cooperation when we receive a case. Sometimes we don't have

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1 the luxury or the benefit of that because we receive it with
2 such a short statute of limitations we have to make a quick
3 decision. But especially when it's something that requires a
4 complaining witness to -- it would be important for them to
5 participate for the success of the case, then we are definitely
6 going to try to reach out to that person and gauge their
7 cooperation.

8 Q. So you're reaching out to the witness whether to cooperate,
9 right?

10 A. For the most part. That's the first part of the process.

11 Q. If you don't have time, then you don't reach out to the
12 witnesses?

13 A. Sometimes, unfortunately, we have an 18-month statute of
14 limitation, and when we get cases with a very short statute of
15 limitations, sometimes we can't get that answer quickly, and we
16 will have to make decisions. It's not how I prefer to operate,
17 but, unfortunately, sometimes we are stuck with that.

18 Q. The police commissioner has final say on whether a penalty
19 is given in a particular case, right?

20 A. Yes.

21 Q. After conducting the case file review, the DAO makes a
22 recommendation to the police commissioner about what action
23 should be taken with respect to the case, right?

24 A. I make a recommendation to the police commissioner.

25 Q. So the answer is yes?

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Schwartz - direct

- 1 A. No. Because you keep saying the DAO and that's an office.
2 I am the department advocate. So I make the recommendation,
3 sometimes to the first deputy commissioner, and then sometimes
4 directly to the police commissioner.
5 Q. When you take action, you take them on behalf of the DAO,
6 right?
7 A. Yes. You keep calling it DAO. I don't really use that
8 term.
9 Q. So you as the department advocate make a recommendation to
10 the police commissioner of what action should be taken with
11 respect to a complaint, right?
12 A. Either sometimes directly to him and sometimes through the
13 first deputy commissioner.
14 Q. You as the department advocate recommend one of four
15 options, instructions, command discipline, service of charges
16 and specifications, or no discipline, right?
17 A. That's not how it works.
18 Q. Are you able to answer that question yes or no?
19 A. No, I can't answer that yes or no.
20 Q. You can recommend instructions, right?
21 A. Yes, I can recommend instructions.
22 Q. You can recommend a command discipline, right?
23 A. Correct.
24 Q. You can recommend service of charges and specifications,
25 right?

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1 A. That does not go through that process. If through the
2 review of the case we at the Department Advocate's Office
3 determine that the case rises to the level of charges and
4 specifications, then those charges will be drafted, and that
5 member of the service will be served with those charges.

6 THE COURT: The charges will be drafted by your
7 office?

8 THE WITNESS: I have 25 attorneys who work for me, and
9 I have about five on the CCRB team. So they will draft the
10 charges. They are signed by my commanding officer and myself,
11 and then the member is called in and they are served by my
12 sergeant.

13 THE COURT: So you don't need the commissioner --

14 THE WITNESS: He will see it later on on the back end.

15 THE COURT: You can bring charges and specifications
16 yourself like a prosecutor?

17 THE WITNESS: I am kind of like the DA for the police
18 department.

19 THE COURT: Right. What are the ones you can
20 recommend? You started out with instructions.

21 THE WITNESS: Instructions and command disciplines.

22 THE COURT: Just those two?

23 THE WITNESS: There's two different processes. The
24 instructions and the command discipline, I make my
25 recommendation to the police commissioner. Sometimes if there

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1 is time, to the first deputy commissioner and then the police
2 commissioner.

3 THE COURT: Those are the two you can recommend?

4 THE WITNESS: Those I recommend.

5 THE COURT: Can you also recommend no action?

6 THE WITNESS: Yes.

7 THE COURT: So there are three things you can
8 recommend.

9 THE WITNESS: Right.

10 THE COURT: No action, instructions or command
11 discipline.

12 THE WITNESS: Correct.

13 THE COURT: Then, in addition, you can bring charges.

14 Is there anything else you can do besides the three
15 recommendations or bringing charges and specifications?

16 THE WITNESS: Not that I can think of.

17 THE COURT: Those are the four. Now we know all four.

18 BY MS. BORCHETTA:

19 Q. The lowest level of discipline that an officer can receive
20 is instructions, right?

21 A. Yes.

22 Q. You recommend an instruction only in cases where a member
23 of service has committed some misconduct that is not serious,
24 right?

25 A. That's not exactly correct.

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D4M8FLO4 Schwartz - direct

1 Q. Do you recall being deposed in the case of Davis v. The
2 City of New York?

3 A. Yes.

4 Q. I am going to hand you a copy of your deposition from that
5 case, which was taken on December 6, 2011?

6 A. Thank you.

7 MS. COOKE: Can I have a copy of that?

8 Thank you.

9 Q. If you turn to page 60. You were under oath during this
10 deposition?

11 A. Yes.

12 Q. You swore to tell the truth?

13 A. Yes.

14 Q. And you did tell the truth?

15 A. Yes.

16 Q. I am going to start reading at page 59, line 19, reading
17 through page 60, line 8.

18 Do you recall giving the following testimony in
19 response to the following questions:

20 "Q. In what ways are NYPD personnel disciplined within the
21 department? What are the different forms of punishment?

22 "A. Well, discipline has many levels. It can be informal
23 discipline. That would happen on a command level. That would
24 not come to the advocate's office. There is various -- maybe
25 if I start just explaining the various levels of discipline,

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1 maybe that will help you.

2 "Q. Yes.

3 "A. OK. So the first level of discipline would be
4 instructions. Instructions are when a member of the service
5 has committed some misconduct that is not serious misconduct."

6 Did you give that testimony?

7 MS. COOKE: That's an incomplete answer. The answer
8 continues on for two and a half more pages.

9 MS. BORCHETTA: It doesn't say anything further about
10 that point.

11 A. That's why I couldn't answer your other question. It's
12 generally -- instructions are generally used -- it is an
13 informal kind of discipline. It's generally used when the
14 misconduct is not serious. However, it also has to be
15 something that the person would benefit from being instructed
16 by. So it's used when the officer -- it could be perceived as
17 somewhat serious, but the officer makes a good faith mistake,
18 thinks that he or she is doing the right thing. That would be
19 an opportunity for instructions where the tactics employed were
20 not proper. Those are the kind of instances where we use
21 instructions.

22 Q. Generally, you issue --

23 THE COURT: Ms. Cooke, you're not going to read all of
24 it.

25 MS. COOKE: Not all of the answer, but the remainder
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1 of that answer that relates to the issue of instructions. She
2 then moves on command discipline. I will stop there, but I
3 would like to read through line 20.

4 THE COURT: OK.

5 MS. COOKE: I will read the entire answer from line 5
6 stopping at line 20.

7 "A. OK. So the first level of discipline would be
8 instructions. Instructions are when a member of the service
9 has committed some misconduct that is not serious misconduct.
10 It is generally when they have made a good faith mistake and
11 the best way to treat that is to instruct the officer so that
12 he or she doesn't make the mistake again. It could be
13 regarding tactics, you know, on a car stop, and they did it
14 improperly. Well, I don't want them to get hurt. So we would
15 send them back and they did it wrong. They thought they were
16 doing it right. So we would normally send them mostly likely
17 to the police academy to be trained in tactics. So that is
18 instructions."

19 THE COURT: Thank you.

20 BY MS. BORCHETTA:

21 Q. So, generally, you recommend instructions in cases where a
22 member of service has committed misconduct that is not serious
23 or where the member of service has made a good faith error,
24 right?

25 A. Yes, in opportunities where they can benefit from being

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1 instructed on something.

2 Q. Now, the next highest level of discipline above
3 instructions is a command discipline, right?

4 A. Yes.

5 Q. There are A command disciplines and B command disciplines?

6 A. Yes.

7 Q. The most serious level of discipline is charges and
8 specifications, right?

9 A. Yes.

10 Q. The range of discipline for charges and specifications is
11 warn and admonish up to 30 days' vacation time, right?

12 A. No.

13 Q. I'm sorry. The range of discipline for a command
14 discipline is warn and admonish up to 30 vacation days per
15 charge?

16 A. No. An A command discipline is warn and admonish up to
17 five vacation days. A B command discipline can be warn and
18 admonish or instructions again to 10 vacation days.

19 Q. A warn and admonish means a warning from the commanding
20 officer not to repeat the conduct and an explanation as to why
21 the conduct was problematic?

22 A. It could be that. It could also fall into a retraining on
23 a particular issue that the officer or he or she needs to be
24 retrained.

25 Q. It could also be simply a warning from the commanding

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1 officer verbally and an explanation verbally as to why the
2 conduct was not appropriate, right?

3 A. Correct.

4 Q. A B command discipline includes a range of discipline from
5 warn and admonish up to ten vacation days?

6 A. Yes.

7 Q. With the exception of some more serious B command
8 disciplines, both A and B command disciplines can be done at
9 the command level without input from you, right?

10 A. A command disciplines can be done at the command level.
11 There are some B command disciplines that can be done at the
12 command level which are enumerated in the patrol guide. And
13 the remainder have to come through to the Department Advocate's
14 Office for a consultation.

15 Q. With respect to those more serious B command disciplines,
16 you either give a recommendation for a penalty or leave it up
17 to the command?

18 A. Correct.

19 Q. With respect to both instructions and command disciplines,
20 you do not have personal knowledge about how the penalty is
21 meted out at the command level, right?

22 A. No. That's incorrect.

23 Q. You don't know how the command carries out the penalty?

24 A. That's not correct.

25 Q. How is that not correct?

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D4M8FLO4

Schwartz - direct

1 A. If we make a recommendation, it's got to come back to us
2 that it's complete so I know what happened, and we don't close
3 out our case -- say, for example, we recommend a B and three
4 vacation days. Then the command would take that B and three
5 days, but then they send it back to us to indicate that that
6 was done. So I know it's happened. If we send it --
7 Q. Let me cut you off there. What you're saying I don't think
8 is inconsistent with what I am saying. What I am saying is,
9 you don't personally know how at the command level the penalty
10 is given to the officer, right?
11 A. Then I don't understand your question because I think I do
12 know.
13 Q. Let me rephrase it. You receive notification from the
14 command that the discipline has been meted out, right?
15 A. And what it was.
16 Q. Right. But you don't know, for example, what, if anything,
17 is said to the subject officer when he or she receives the
18 discipline, right?
19 A. You are talking about a warn and admonish situation?
20 Q. I am asking you any situation, you are not personally there
21 to observe what the subject officer is told when he or she is
22 given the penalty, right?
23 A. I am not there, but sometimes we write out the instructions
24 ourselves, and then we get it back. So I am assuming -- I am
25 making the expectation that if I take the time to write out

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1 instructions, and they are in a written form and they are in a
2 letter that goes in someone's file, I do know what is going on
3 because the command will send it back that it's done. If it's
4 an informal warn and admonish, then I don't know what the
5 commanding officer said to that particular member of the
6 service.

7 Q. No matter what, you don't know what was said to the subject
8 officer, right, you have no personal knowledge of that?

9 A. Correct.

10 Q. Going back to charges and specifications, the range of
11 discipline for charges and specifications can be from warn and
12 admonish up to 30 vacation days, right?

13 A. No.

14 Q. It can also include suspensions?

15 A. It can go up to termination.

16 Q. It can include up to 30 vacation days lost?

17 A. That's one of the options.

18 Q. It can include 30 suspension days?

19 A. Per charge and specification.

20 THE COURT: I thought you said it can also go as far
21 as termination from the job? Finished?

22 THE WITNESS: Finished. Goodbye.

23 Q. The DAO is responsible for prosecuting all charges and
24 specifications against members of the police department, right?

25 A. Yes.

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D4M8FLO4 Schwartz - direct

1 Q. DAO will prosecute charges and specifications ultimately at
2 an administrative trial unless they are otherwise resolved,
3 right?

4 A. They can be negotiated and that also goes in front of the
5 deputy commissioner of trials, where a plea is taken and then
6 the paperwork is filled out and it goes through various levels
7 of the department.

8 Q. But short of that negotiation, if it's not otherwise
9 resolved, charges and specifications go to trial, right?

10 A. There are a couple of other options that could happen, but
11 for the most part, it would happen the way you're saying it.

12 Q. The only cases that the DAO prosecutes at trial are cases
13 that are seeking charges and specifications?

14 A. We can only prosecute cases at trial if we serve the member
15 of the service with charges and specifications.

16 Q. So if the penalty is instructions, for example, there is no
17 trial, right?

18 A. If the penalty is instructions, there is no trial, that's
19 correct.

20 Q. You can also recommend that the department should be unable
21 to prosecute, right?

22 A. In what context?

23 Q. Let's take a CCRB substantiated cases. You can recommend
24 unable to prosecute, right?

25 A. I recommend no disciplinary action.

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D4M8FLO4 Schwartz - direct

1 Q. Sometimes, though, you have seen that referred to as unable
2 to prosecute, right?

3 A. I have seen the CCRB call it something like DUP, but we
4 call it no disciplinary action.

5 Q. So for you there is no difference between the NYPD not
6 issuing discipline and the NYPD declining to issue discipline?

7 A. I'm just saying no disciplinary action.

8 Q. You sometimes recommend no disciplinary action on CCRB
9 substantiated cases?

10 A. If I cannot -- that's what we call it, no disciplinary
11 action.

12 Q. Generally, you recommend no disciplinary action in the
13 context of substantiated CCRB complaints when you do not
14 believe the CCRB investigation meets the preponderance of the
15 evidence standard, when you do not believe CCRB applied the
16 proper legal analysis, or when you believe that the case will
17 be hard to prove, right?

18 A. I'm a lawyer. I am not being obnoxious, but that was a
19 compound question. We do an analysis. We determine, first of
20 all, the --

21 Q. Since you said you didn't understand the question, I will
22 try to break it down.

23 You recommend unable to prosecute -- you recommend no
24 discipline in some substantiated CCRB complaints based on your
25 belief that the CCRB investigation did not meet the

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1 preponderance of the evidence standard, right? That's one
2 situation where you would recommend no discipline?

3 A. If after a review of the case folder and the investigation,
4 we determine that it doesn't meet the preponderance -- the
5 evidence does not rise to the level of preponderance of the
6 evidence, then we take no disciplinary action. We would
7 recommend no disciplinary action.

8 Q. And you would recommend no discipline on a substantiated
9 CCRB complaint sometimes because you believe that the CCRB
10 applied an improper legal analysis, right?

11 A. After a review and if there was an improper legal analysis,
12 and we were not able to prosecute, then we would recommend no
13 disciplinary action.

14 Q. That's your opinion of whether there has been an improper
15 legal analysis, right?

16 A. I am the department advocate. That's my job to evaluate
17 all the cases that come in. Whether it's from CCRB, from IAB,
18 we have to determine if we have enough to go forward.

19 Q. So it's your opinion as the department advocate as to
20 whether there was a proper legal analysis, right?

21 A. It's taking the law and applying it to the facts and making
22 the recommendation through the appropriate channels.

23 Q. Another circumstance in which you would recommend no
24 discipline on a substantiated CCRB complaint is when you
25 believe that it would be hard to prove the case, right?

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1 A. After review, if it's determined by my office --

2 Q. Can you answer that question yes or no?

3 A. No, I can't.

4 Q. One situation in which you would recommend no discipline
5 for a substantiated CCRB would be in a case where you believe
6 the case would be too hard to prove, right?

7 A. That's not really accurate, no.

8 Q. Look at your deposition from the Floyd case.

9 A. That was the second one you gave me?

10 Q. The first one.

11 A. Sure.

12 Q. It's the one from 2009.

13 A. OK.

14 Q. If you look at page 153, starting at line 21, and going to
15 154, line 16, do you recall giving the following answer to the
16 following question:

17 A. I still haven't found 153.

18 Q. You're looking for 153, line 21.

19 A. Got it.

20 MS. BORCHETTA: For the record, I am reading through
21 to page 154, line 16.

22 Q. Do you recall giving the following answer to the following
23 question:

24 "Q. Why don't we start with that one then. Why would the
25 department be unable to prosecute and substantiate CCRB

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1 complaints specifically?

2 "A. We would be unable to prosecute because CCRB did not
3 complete its investigation. We could be unable to prosecute
4 because in fact they did not meet the burden of evidence. We
5 could be unable to prosecute because they did an improper legal
6 analysis and there is actually no misconduct on the part of the
7 subject officer. We could be unable to prosecute because it
8 would be difficult to prove. For example, there are many
9 times, which seems to be the new unfortunate, is when their own
10 investigator either unsubstantiates or exonerates and the board
11 releases, and those are the most hardest to prove."

12 Did you give that testimony?

13 A. Yes.

14 Q. In 2007, you're aware that the NYPD declined to pursue
15 punishment against 34 percent of the cases where the CCRB found
16 misconduct, right?

17 A. We took no disciplinary action -- I don't know if that's
18 the exact number, I would have to look up it up, but it was
19 somewhere in the 30 percent range.

20 Q. I am going to hand you what has previously been admitted
21 into evidence. It's Plaintiffs' Exhibit 111. I will represent
22 that this is the 2007 CCRB report.

23 MS. BORCHETTA: Your Honor, I have another copy. We
24 have given it to you previously, but I can give it to you
25 again.

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1 THE COURT: It's OK.

2 MS. COOKE: This is 111?

3 MS. BORCHETTA: Yes.

4 Q. If you go to the page in this report stamped at the bottom
5 NYC 7676.

6 Do you see the section on police department
7 dispositions?

8 A. Yes.

9 Q. There it says that the department chose not to pursue or
10 discipline officers at a rate of 34 percent of the time, right?

11 A. That's what it says, yes.

12 Q. You have seen this before, right?

13 A. A long time ago.

14 Q. In fact, NYPD's OMAP unit reviews each annual CCRB report,
15 right?

16 A. I believe so, yes.

17 Q. And you also review CCRB's annual reports, right?

18 A. Part of it.

19 Q. You only review part of it?

20 A. Yes.

21 Q. Even though your office is responsible for pursuing
22 discipline against officers with substantiated CCRB complaints?

23 A. Yes. There are parts of it that have nothing to do with
24 what I do, or we do.

25 Q. Also, in 2007, a majority of the cases in which the NYPD

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1 declined to pursue discipline were abuse of authority cases,
2 such as stop and frisk allegations, right?

3 A. We took no disciplinary action -- probably the most would
4 be abuse of authority because that's the largest percentage of
5 cases that we get. So that would only make sense.

6 Q. You're also aware that in 2007 attorneys at CCRB began
7 reviewing every substantiated CCRB case, right?

8 A. They were hired in late 2007. So I don't know when they
9 began reviewing it. I can't answer that.

10 Q. But you know that they were hired in 2007?

11 A. Late 2007.

12 Q. So you know that they were hired in late 2007, yes?

13 A. Yes.

14 Q. In 2008, a year after attorneys began reviewing all
15 substantiated CCRB cases, the NYPD declined to pursue
16 discipline in 31 percent of the substantiated CCRB cases,
17 right?

18 A. Again, I don't know the exact number, but if you're reading
19 from it and it says 31 percent, it sounds like it's in the
20 ballpark.

21 Q. I am going to show you a page from the 2011 report that's
22 already been admitted into evidence. The report itself is
23 Defendants' P12, and this is page 17. You see there is a chart
24 at the bottom of the page?

25 A. Yes.

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1 Q. You see that in 2007, the NYPD pursued no discipline in 104
2 cases, right?

3 A. Is that the green?

4 Q. Yes.

5 THE COURT: The darker green.

6 Q. Right?

7 A. I see that on the chart, yes.

8 Q. You do know that attorneys at CCRB did start reviewing all
9 substantiated CCRB cases, right?

10 A. But you have got to understand the process. We are always
11 behind. So if they are reviewing --

12 Q. I understand. My question is, do you understand that after
13 the attorneys were hired in 2007, they did begin reviewing
14 every CCRB substantiated allegation, right?

15 A. I don't know that for a fact. I know at some point they
16 reviewed some CCRBs. I don't know if it was every one of them.

17 Q. You don't understand from CCRB that an attorney at CCRB
18 reviews every substantiated CCRB allegation?

19 A. At some point they had four attorneys. Then they had one.
20 They had layoffs. I don't know if they look at every single
21 one. Honestly, it wouldn't be proper for me to say that's what
22 they do. That's their internal mechanisms that they have
23 there.

24 Q. So you, as a department advocate for the NYPD with
25 responsibility for deciding whether to pursue discipline in

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1 substantiated CCRB cases, don't know whether the CCRB attorneys
2 review substantiated cases?

3 A. They don't work for me. I don't know what they do. I know
4 my attorney reviews every case that comes to our office.

5 Q. That's not important to you to know?

6 A. What their attorneys do in their training, it's not really
7 relevant. I hope that they do it. It seems that it would be
8 for the best interest of everyone, but I can't say if they do
9 it or not. I have no idea.

10 Q. Both CCRB and the Department Advocate's Office apply a
11 preponderance of the evidence standard, right?

12 A. I hope so, yes.

13 Q. When it comes to search and seizure allegations, you're
14 both applying the same law, right?

15 A. We should be, yes.

16 Q. And in the cases in which you recommend no discipline on
17 substantiated CCRB cases, it's fair to say that you and CCRB
18 disagree with whether the preponderance of the evidence
19 standard was met, right?

20 A. On some of the cases that we are recommending no
21 disciplinary action. There could be other reasons that -- it's
22 not just the preponderance of the evidence.

23 THE COURT: What might be other reasons that despite
24 CCRB's recommendation, you wouldn't recommend any discipline?

25 THE WITNESS: There is no identification of the

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1 officer. We get cases where they are not identified.

2 THE COURT: What does that mean?

3 THE WITNESS: They will say that this is the only
4 Hispanic officer that worked that night, but they never did a
5 show-up or a photo array. So I can't go forward because I
6 don't know who the officer should be. There are a lot of
7 variables that happen. Sometimes it's the strength of the
8 case.

9 THE COURT: Then you would just be differing as to
10 whether the standard is met.

11 THE WITNESS: Sometimes it's that. Sometimes there
12 are other issues.

13 THE COURT: I was trying to get at those other issues.

14 THE WITNESS: Like I said, sometimes it's just a
15 faulty investigation. Sometimes it's a poor legal analysis.
16 Sometimes it's a credibility determination.

17 THE COURT: Credibility, you can't second-guess that
18 because you're not redoing the witness testimony that CCRB saw,
19 right?

20 THE WITNESS: A lot of the cases that we have issues
21 with are within the abuse of authority, and sometimes it ends
22 up being a he said, he said or a she said, she said, and there
23 is nothing that brings it to 51 percent.

24 THE COURT: But you didn't see the witnesses.

25 THE WITNESS: It doesn't matter. Because if one

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D4M8FLO4

Schwartz - direct

1 witness says A happened and the other witness says B
2 happened --

3 THE COURT: The trier of fact makes credibility
4 findings. That's very interesting because in our court, and
5 you're used to the regular courts too, nobody can second-guess
6 me on credibility because the appellate court didn't see the
7 witnesses. So I can say I believed A, but didn't believe B.
8 That's unreviewable because the appellate level didn't see the
9 witnesses. So how do you second-guess the credibility?

10 THE WITNESS: I am saying they haven't met the
11 preponderance because it's how you get to 51 percent.

12 THE COURT: You believe one witness and think the
13 other one was not truthful.

14 THE WITNESS: But that's not the standard that should
15 be used for substantiation. Substantiation has to have
16 something that brings you -- if you look at what is
17 substantiated and what is unsubstantiated, the standard that is
18 used by CCRB, if they can't bring it to 51 percent --

19 THE COURT: I know. But we do that by deciding who is
20 telling the truth and who is lying.

21 THE WITNESS: That's not the standard that they use at
22 CCRB.

23 THE COURT: What do they use?

24 THE WITNESS: You need a little corroboration. So
25 say, for example, on a force case, if the witness says he put

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1 the handcuffs too tight and the officer says I didn't, but then
2 you have marks on the hand, then clearly the complainant --

3 THE COURT: Without the marks on the hand, the trier
4 of fact, so to speak, can't believe one or disbelieve the
5 other, they can't do that?

6 THE WITNESS: The investigator, their standards are
7 wouldn't be substantiated if they believed one person over the
8 other, unless they have something that they can pinpoint that
9 would bring it that one percentage over. That's the standard
10 that the CCRB uses, that all of the investigative units use.

11 (Continued on next page)

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D4m9flo5

Schwartz - direct

1 Q. I'm actually going to have questions about the credibility
2 assessments at your office later in my examination.

3 But the only cases that the department advocate proves
4 at trial are cases with charges and specifications, right?

5 A. The only cases that would go to trial are cases where
6 charges and specifications have been served on the officer.

7 Q. Right. So in the case -- in a case where the penalty
8 issued is instructions, the department advocate's office
9 doesn't need to prove anything at a trial, right?

10 A. On instructions, there is no trial. So there wouldn't be a
11 need for that. That's correct.

12 Q. Now, you're aware that in 2007 the CCRB expressed a concern
13 about the rate at which the NYPD declined to pursue punishment,
14 right?

15 A. Yes.

16 Q. And it wasn't just the CCRB that expressed that concern,
17 correct? You heard that from other sources?

18 A. Such as.

19 Q. You heard from the New York Civil Liberties Union, right?

20 A. Probably.

21 Q. I'm going to show you what's been marked as Plaintiffs'
22 Exhibit 112. You've seen this before, right?

23 A. Yes.

24 Q. And this is a report by the New York Civil Liberties Union
25 from -- covering 1994 to 2006, right?

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D4m9flo5 Schwartz - direct

1 A. That's what it says, yes.

2 MS. BORCHETTA: Your Honor I'd move to admit
3 Plaintiffs' 112.

4 MS. COOKE: Your Honor, we would object. This is the
5 report for which the Civil Liberties Union has been unable to
6 provide proof of notice to the department.

7 MS. BORCHETTA: We would --

8 MS. COOKE: If I could finish.

9 MS. BORCHETTA: I think it would go to your objection.
10 We're only seeking to admit it for the purpose of notice. And
11 this witness has seen it in her capacity as department
12 advocate.

13 THE COURT: When did she see it?

14 THE WITNESS: I saw parts of it a long time ago.

15 THE COURT: Well then I guess it was received by the
16 police department, or she wouldn't have seen it.

17 THE WITNESS: I think I saw it in a deposition.

18 MS. BORCHETTA: I could point you to the deposition
19 where you said you testified that you've seen it before the
20 deposition.

21 THE WITNESS: I've definitely seen parts of it. I
22 couldn't tell you when your Honor.

23 THE COURT: If she saw parts of it in her job, then it
24 was received by the police department. That takes care of a
25 big problem that I can put aside finally.

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D4m9flo5

Schwartz - direct

1 MS. COOKE: Further object to the content being
2 received for the proof.

3 THE COURT: Right, it's not. It's like many exhibits
4 that have been received in this case. It's just for notice.

5 MS. COOKE: With that limitation. To the extent that
6 there are pieces of content she hasn't received --

7 THE COURT: I can't parse that. If she saw portions,
8 then the report was received at the police department,
9 something I've always believed without having the proof to
10 prove it. But I've always believed it to be true. Now I know
11 it's true. She received parts of it. So the report was
12 received on somebody's desk at the police department.

13 MS. COOKE: My point was to that the witness shouldn't
14 be examined on portions of the report she doesn't recognize.

15 MS. BORCHETTA: I won't.

16 THE COURT: I'm not going to give that limitation as a
17 matter of fact. The report landed on somebody's desk. That
18 certain portions got forwarded to her by somebody is fine. But
19 clearly that report landed in the police department. I always
20 thought it landed somewhere in the police department, even
21 though we couldn't find the person who did the delivery; the
22 postman or the clerk or somebody who sent it over. But I
23 really had little doubt that it was received there.

24 MS. COOKE: Just, your Honor, I believe the witness
25 said she doesn't recall the report from her deposition, whether

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1 or not she recalls --

2 THE COURT: But Ms. Borchetta said if you want me to
3 waste the time I can show you the question and answer where she
4 said at the deposition that she reviewed it before the
5 deposition. So somehow it found its way to the police
6 department.

7 MS. COOKE: It sounded different from the witness
8 stand. I was just confirming.

9 THE COURT: You're right.

10 The witness said: I think I saw it at my deposition.

11 Mr. Borchetta said: Should I spend the time showing
12 you your question and answer where at deposition you said
13 you've seen it previously.

14 So why don't you read the question and answer so
15 Ms. Cooke will have comfort that you're not making it up. Tell
16 her the page and line. Let her hear it.

17 MS. BORCHETTA: Okay. So starting at page 133.

18 THE WITNESS: Which deposition?

19 Q. I'm sorry. This is in this case, the Floyd case, the 2009
20 deposition.

21 Okay. Beginning at line -- I'm sorry. Are you at
22 page 133?

23 Beginning at line 15 and reading through page 134,
24 line 9. Referring to this mission failure report that was
25 marked as an exhibit.

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1 "Q. The top of page 6 of the report says, quote, The police
2 department has consistently and persistently withheld documents
3 or delayed the production of the documents needed by the CCRB
4 to investigate police misconduct complaints, end quote. Have
5 you ever heard that criticism before reading it in this report
6 today?

7 "A. Not since 2005.

8 "Q. Had you heard it before 2005?

9 "A. I saw this written before. I have seen this.

10 "Q. I should have asked you that. Have you seen this report
11 before?

12 "A. I have seen parts. I have seen this report. I cannot say
13 I read it from front to back."

14 Do you recall giving that testimony?

15 A. That's what I think I just said before.

16 THE COURT: No. Before you said I think I saw it at
17 the deposition. But at the deposition you said you probably --
18 you very likely saw it before.

19 THE WITNESS: I've probably seen parts of it before.

20 THE COURT: Yeah.

21 Q. And in that report the New York Civil Liberties Union
22 raises a concern that the NYPD's failure to pursue
23 discipline -- about the NYPD's failure to pursue discipline in
24 substantiated cases, right?

25 A. I think you just -- before you showed me some point, but I

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1 closed it where.

2 Q. If you look at page 19.

3 A. Give me one second, please.

4 Where would you like me to look?

5 Q. So my question is that you were aware that the New York
6 Civil Liberties Union in addition to the CCRB raised a concern
7 about the rate at which the NYPD declined to pursue discipline
8 in substantiated CCRB cases?

9 A. Where is that on page 19? Just so I can.

10 Q. I'll read the heading "NYPD disposition of substantiated
11 complaints. Condoning police misconduct."

12 Do you see that?

13 A. I do.

14 Q. So you were aware that the New York Civil Liberties Union
15 was raising a concern, as the CCRB was, about the rate at which
16 the NYPD declined to pursue discipline in substantiated
17 complaints? Right?

18 A. If you want to call that that, sure.

19 Q. And despite these concerns being raised by both the CCRB
20 and others, the NYPD continued to decline to pursue discipline
21 in substantiated CCRB cases in the following years, right?

22 A. We were not able to take -- do discipline on certain cases.
23 I don't know which years you're talking about, but there's
24 always a small percentage of cases, sometimes larger, that we
25 aren't able to take disciplinary action on.

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1 Q. Well, you're saying that you're unable to take action. But
2 however it's characterized, in the years after concerns were
3 raised by the CCRB and others about the rate at which the NYPD
4 declined to pursue discipline in substantiated CCRB cases, the
5 NYPD continued in some substantiated CCRB cases to decline to
6 pursue discipline, right?

7 A. In some cases we were not able to take any disciplinary
8 action. However, we did other things to help avert that trend
9 so that we were able to help them and move forward. And as you
10 can see the numbers go down.

11 Q. Well I'll get to that in a minute. But I think the numbers
12 speak for themselves so I won't belabor the point.

13 In 2011, 57 percent of all cases in which the
14 department declined to pursue discipline were stop-and-frisk
15 and refusal to provide name and shield number, right?

16 A. I don't know that to be true.

17 Q. I'm going to hand you what's previously -- oh, I think --
18 no -- I don't think I gave this to you. P12, do you have this?

19 I don't think so. I'll hand you --

20 A. 112?

21 Q. I'll hand you what's been previously marked as P12, which
22 is the 2011 CCRB report. And it's already in evidence.

23 Turn to page 18. Looking at the -- are you at page

24 18?

25 A. Yes.

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1 Q. Looking in the right-hand column, the paragraph that begins
2 in looking.

3 Do you see that paragraph?

4 A. The last paragraph?

5 Q. Yes.

6 Read that paragraph to yourself.

7 (Pause)

8 So I'll ask the question again.

9 In 2011, 50 percent -- 57 percent of all cases of
10 which the department declined to pursue discipline were
11 stop-and-frisk cases and refusal to provide name and shield
12 number, right?

13 A. That's what the CCRB report says.

14 Q. So, even if, as you suggested earlier, the rate at which
15 the NYPD declines to pursue discipline, even assuming that that
16 number, for that rate, actually went down in 2011, more than
17 half of the cases in which the NYPD declined to pursue
18 discipline in 2011 included stop-and-frisk cases, right?

19 THE COURT: You said stop-and-frisk and --

20 MS. BORCHETTA: And failure to give --

21 THE COURT: Badge.

22 Q. So I'll rephrase it.

23 Even in 2011, even if we assume that the rate at which
24 the NYPD declined to pursue discipline got better, more than
25 half of the cases in which the NYPD declined to pursue

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1 discipline were stop-and-frisk cases and cases in which name
2 and shield number were not provided, right?

3 A. But the majority of cases that we receive fall within that
4 so you're kind of -- 80 percent of the cases that we get from
5 CCRB approximately are within the abuse of authority category.
6 So I don't know if that -- so that's kind of misleading.

7 Q. But stop and frisk --

8 A. It is the largest amount of cases that we have that we
9 aren't able to prosecute.

10 Q. But stop and frisk is not the only type of conduct that's
11 included within abuse of authority, right?

12 A. Name and shield is also included in abuse of authority.

13 Q. But there are other types of conduct in abuse of authority,
14 right?

15 A. For the most part it's stop, question and frisk, name and
16 shield. It could be a bad search of a vehicle or a home. And
17 sometimes a threat to arrest.

18 Q. And is only stop and frisk and failure to provide shield
19 number that make up the 57 percent of the cases in 2011 that
20 the NYPD declined to pursue discipline, right?

21 A. According to the CCRB report.

22 Q. I'm going to show you what's previously been admitted as
23 Defendants' Exhibit U13. And I'll hand you a copy because it's
24 small print.

25 A. Thank you.

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1 Q. Do you see in this chart it indicates that it's showing the
2 department disposition of substantiated CCRB cases between 2002
3 and 2012?

4 A. I see that's on the chart, yes.

5 Q. And do you see that it indicates where the NYPD issued
6 discipline compared to when the NYPD did not issue discipline,
7 right?

8 A. Yes.

9 Q. And you would agree that as of 2012 the NYPD did not issue
10 discipline in almost 30 percent of the substantiated CCRB
11 cases, right?

12 A. Yes.

13 But there's a reason why that number went up that's
14 not within the advocate's office or the department's control.

15 Q. But it did go up, right?

16 A. It did go up, yes.

17 Q. And even when it was at its lowest in 2011 the rate was
18 still almost 20 percent that the NYPD issued no discipline on
19 substantiated CCRB cases, right?

20 A. The chart says 19 percent, correct.

21 THE COURT: What's the highest? I'm having trouble
22 reading. Is it 2008?

23 MS. BORCHETTA: Yes.

24 THE COURT: And what's that percentage?

25 MS. BORCHETTA: 2008, 44 percent.

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1 THE COURT: 44.

2 Q. In substantiated CCRB cases the NYPD pursues instructions
3 more often than any other form of discipline, right?

4 A. Not always but some years.

5 Q. Well --

6 A. It depends on, you know -- it has increased due to the fact
7 that the abuse of authority cases increased and therefore it's
8 the more appropriate penalty.

9 Q. Well I will show you page 18 from the 2011 report which is
10 Defendants' P12 already in evidence.

11 And from 2007 through 2011 it's true, you would agree
12 with me, that the NYPD issued instructions over any other form
13 of discipline in substantiated CCRB cases, right?

14 A. It's the largest portion.

15 Q. And yet in 2008 CCRB raised a concern about the rate at
16 which the NYPD issued instructions over other more serious
17 forms of discipline, right?

18 A. I'm not exactly sure. I know they raised it at some point
19 and if you say it was 2008, then -- it was in that timeframe.

20 Q. So you were aware of the CCRB's concern at the time, right?

21 A. At some point in that general time, yes.

22 Q. In about 2008, right?

23 A. Yes.

24 Q. Despite that concern from CCRB in 2010 and 2011, the NYPD
25 pursued instructions over other forms of discipline at an even

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1 higher rate than in previous years, right?

2 A. We try our best to match the discipline to the misconduct.

3 Q. That's not the question I asked you.

4 I asked you that, despite your awareness of the CCRB's
5 concern about the rate at which the NYPD issued instructions
6 over other forms of more serious discipline, the NYPD actually
7 increased in 2010 and 2011 the number of cases in which
8 instructions were the penalty, right?

9 A. There were changes in CCRB as well and that concern doesn't
10 stay consistent from 2008. There was changes in leadership.
11 There was changes -- positive changes in leadership, positive
12 changes in the relationship.

13 So there's other times in those years where they were
14 commending the discipline rate. So we try our best to --

15 THE COURT: This actually seems nonresponsive.

16 Do you move to strike?

17 MS. BORCHETTA: Yes.

18 THE COURT: Granted.

19 Now ask your question again.

20 Q. You would agree that -- let me start it differently.

21 Despite the CCRB's raising a concern that you were
22 aware of in 2008 at the rate at which the NYPD issued
23 instructions over other more serious forms of discipline, the
24 NYPD in 2010 and 2011 increased the cases in which instructions
25 were the issued penalty, right?

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1 A. Yes.

2 Q. Now CCRB when it substantiates a case recommends a penalty,
3 right?4 A. Sometimes. The board sometimes sends the case with a
5 recommended penalty. Excuse me. Let me withdraw that. With a
6 recommended form of discipline. They don't recommend
7 penalties.

8 Q. Well they can recommend charges, right?

9 A. Sometimes they recommend charges and specifications, yes.

10 Q. Sometimes they recommend command disciplines, right?

11 A. Correct.

12 Q. And sometimes they recommend instruction, right?

13 A. Correct.

14 Q. Do you even consider CCRB recommendations a penalty?

15 A. We -- it's part of what we consider when we make -- it's
16 not penalty. It's -- it's what the level of discipline should
17 be. And we consider that in the overall evaluation when we
18 evaluate the case that comes from CCRB.19 Q. I'm going to show you a page from the 2011 report and the
20 appendices to that report which, again, have previously been
21 admitted as Defendants' P12. And this is table 30.22 So this table shows the CCRB disciplinary
23 recommendations for officers in substantiated cases from 2007
24 to 2011, right?

25 A. Yes.

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1 Q. And in every year from 2007 to 2011 the CCRB most often
2 recommended charges, right?

3 A. Charges and specifications, yes.

4 Q. And excluding the cases in which there was no
5 recommendation, CCRB recommended instructions the least often,
6 right?

7 A. Yes.

8 Q. And in 2010 CCRB recommended charges in 259 cases and
9 instructions in only 19, right?

10 A. Yes.

11 Q. And in 2010 the NYPD issued instructions in 137 cases and
12 charges in only 22, right?

13 A. Well that's -- those were cases that were closed in 2010.
14 That doesn't mean how many we issued. The numbers never equal
15 each other.

16 Q. But that's still true that in 2010 the NYPD issued 137
17 instructions and 22 charges, right?

18 A. But those could be cases from 2009, 2008.

19 Q. But the answer is still yes, right?

20 A. Not really.

21 THE COURT: She's saying it didn't occur in that year.
22 It was closed in that year. So the actual instructions might
23 have been two years earlier or the charges -- the charges might
24 have been two years earlier by the time they resolved. That's
25 all she's saying. So these were closed in 2010.

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1 Did I get that right?

2 THE WITNESS: Yes.

3 MS. BORCHETTA: I understand that. For the closed
4 cases, understanding that they might not match up to the 2010
5 CCRB closed cases, understanding that, in 2010 the NYPD issued
6 137 instructions and 22 charges, right?

7 THE WITNESS: We closed 137 cases with instructions
8 and 22 cases with charges.

9 Q. And --

10 A. And specifications.

11 Q. In 2011 the CCRB recommended instructions in 149 cases and
12 instructions in only 15, right?

13 A. Charges and specifications in 149 cases. Not instructions.

14 Q. I'm sorry. The CCRB in 2011 recommended charges and
15 specifications in 149 cases and instructions in 15, right?

16 A. That's what the chart says, yes.

17 Q. And in 2011 the NYPD issued 139 instructions?

18 A. Once again, and I'm not trying to -- those about to be
19 closed in 2011.

20 THE COURT: I think we've exhausted this. I get it.

21 Q. So even when the NYPD agrees with the CCRB that police
22 misconduct has occurred, the NYPD frequently disagrees with the
23 penalty that should be imposed, right?

24 A. Again, it's not the penalty. It's the level of
25 recommendation of the discipline.

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1 THE COURT: Wait a minute. That was doublespeak.
2 That's the penalty.

3 THE WITNESS: No. The penalty would be what the
4 penalty is, is it vacation days?

5 THE COURT: Then it's semantics. It's still
6 semantics. What she's saying is the level --

7 THE WITNESS: The level recommendation.

8 THE COURT: Right.

9 THE WITNESS: We do an independent evaluation. We
10 take that into account. Sometimes we go --

11 THE COURT: Right. All her question was: Does your
12 level of discipline differ from that recommended by the CCRB?

13 THE WITNESS: Many times, yes.

14 THE COURT: Many times, yes.

15 Q. And again just as a foundational point for my next
16 questions.

17 In 2010 and 2011 NYPD pursued instructions in the
18 majority of cases in which discipline was pursued, right?

19 A. Yes.

20 Q. Given that instructions were the penalty in the majority of
21 the cases for which the NYPD issued discipline in 2010 and
22 2011, is it fair to say that you did not believe in a majority
23 of cases in 2010 and 2011 that were substantiated by the CCRB
24 involved serious misconduct?

25 A. We believed that the appropriate level and the best way to

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1 handle those cases was through instruction.

2 Q. So in the majority of cases you did not think that the
3 conduct was serious, right?

4 A. It didn't rise to the level of charges and specifications.

5 THE COURT: The point is instructions is your least
6 serious form of discipline, right?

7 THE WITNESS: Yes.

8 THE COURT: Okay.

9 Q. Are you at all concerned that the rate at which the NYPD
10 declines to pursue discipline on substantiated CCRB cases and
11 the rate at which the NYPD issues the least serious form of
12 discipline on those substantiated cases sends a message to
13 police officers that CCRB complaints will not be taken
14 seriously by the department?

15 A. No. Because when we do -- we've been doing instructions.
16 We've been upping the type of instructions. And our recidivism
17 rate since 2005 is we've only had three officers reoffend for
18 the same misconduct. So I believe they work and they send a
19 message to our officers that we want you to do the right thing
20 out there and we take it very seriously because we keep
21 changing it and improving on the kind of instructions that we
22 give.

23 Q. But when you say recidivism, you're not talking about
24 whether there are repeat allegations against an officer, right?

25 A. Three officers have -- we've only had three officers who

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1 have received instructions repeated for the same allegation.
2 And the amount --

3 THE COURT: That's what she's saying -- excuse me.
4 Hold on.

5 So you're not tracking allegations?

6 THE WITNESS: We do that too.

7 THE COURT: You track even allegations against the
8 same person?

9 THE WITNESS: And I think the last time that we
10 looked, I think it's like 30 from 2005. And that person would
11 never get instructions again for the same thing.

12 THE COURT: In other words, it would be higher next
13 time.

14 THE WITNESS: Higher.

15 Q. But your office does not become aware of allegations that
16 are unsubstantiated at CCRB against an officer unless you look
17 for that, right?

18 A. There's a part of my office that puts together the members
19 of the service that go before the CCRB profile and assessment
20 committee. And so in that context we see unsubstantiated
21 allegations as well if those officers fall within the
22 guidelines for that command.

23 Q. And that's the only context in which you would be seeing
24 unsubstantiated allegations against an officer, right?

25 A. Correct.

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1 Q. We'll come back to that later.

2 But let's now turn back to this issue of credibility
3 and the department advocate's office assessment of credibility
4 in CCRB cases.

5 Now at the time of your deposition in 2009 in this
6 case you believed that the CCRB needed to do a better job of
7 assessing the credibility of complainants, right?

8 A. I felt that they could do a better job, yes, that's
9 correct.

10 Q. And you believed in 2009, at least at the time of your
11 deposition, that the CCRB tended to give more weight to the
12 complainant's version of events, right?

13 A. I believed that in instances where there was equal if, to
14 get it over to that 51 percent, they would say if the
15 complainant said the same thing a couple times then, therefore,
16 they were using that as the standard to substantiate a case.

17 Q. So the answer is yes, you did believe that CCRB too heavily
18 credited complainants, right?

19 A. I couldn't hear you. I'm sorry.

20 Q. The answer is yes, you did believe that the CCRB too
21 heavily credited complainants, right?

22 A. I believe on some occasions they credited complaining
23 witnesses over police officers.

24 Q. Do you still believe that?

25 A. I think it's getting better and a lot better, actually.

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1 Q. But you still believe that in some cases they over-credit
2 the complainants' view, right?

3 A. Not that much anymore.

4 Q. And your suggestion that they're getting better, that's
5 happened after you in 2009 voiced your opinion that the CCRB
6 was too heavily crediting complainants?

7 A. I don't think it's because I voiced my opinion. I think
8 it's because of the steps the two agencies have taken together
9 to improve the quality of the investigations.

10 Q. So because of steps that the NYPD has taken, the CCRB no
11 longer too heavily credits its complainants?

12 A. No. It's steps the two agencies have taken together; some
13 they've done independent on their own, and some that we've done
14 with them.

15 Q. So in part because of what the NYPD has done you believe
16 that the CCRB no longer too heavily credits complainants as
17 often as they used to?

18 A. I believe because we worked together on various projects
19 that the quality of investigations has improved, yes.

20 Q. Now you mentioned before he-said/she-said issue in some of
21 these cases, right?

22 A. Yes.

23 Q. And you would agree with me that some -- at least some
24 cases alleging an improper stop and frisk might end up as the
25 complainant's word versus a police officer's word, right?

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1 A. Unfortunately, yes.

2 Q. And you believe that in any stop-and-frisk case in which
3 you only have the complainant's version and the officer's
4 version, the department cannot pursue discipline, right?

5 A. No.

6 I believe that the appropriate rules to substantiate a
7 case need to be met. And if it's not met with the standards
8 that are used both by internal affairs, CCRB, DOI, if it was
9 improperly substantiated, then I have a problem.

10 I mean there's many times when I think the complainant
11 may be telling the truth but there's nothing to put it to the
12 preponderance of the evidence statute.

13 THE COURT: That's what Ms. Borchetta is trying to
14 find out. That's what I'm trying to find out.

15 Where are these standards defined? Because in my
16 court it would be enough to believe the complainant over the
17 officer.

18 THE WITNESS: Correct.

19 But there was probable cause to make that arrest and
20 so you get there based on probable cause.

21 THE COURT: Are you talking about me?

22 THE WITNESS: No. In a case in your court, say it's a
23 criminal case --

24 THE COURT: Say it's not. Say it's an employment
25 discrimination. We have those all the time. He-said/she-said.

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1 Do you believe the employer, the employer witness? Do you
2 believe the employee, the employee witness? That's it.

3 So where is it written out that it's not enough to
4 believe the complainant over the officer or the officer over
5 the complainant? Where does it say you need more than that?

6 THE WITNESS: In every annual report by the CCRB they
7 give the various levels of how they do a case. They can
8 exonerate --

9 THE COURT: I know that.

10 Where does it say that in order to find that -- I
11 forget what you called -- preponderance of the evidence,
12 51 percent, it has to be more than believing the complainant
13 over the officer.

14 I just want to see the standard written out. Well, if
15 you have it somewhere.

16 THE WITNESS: Here if you look at the dispositions
17 where it says substantiated.

18 THE COURT: Not at all.

19 She's showing me Exhibit P12, referring me to page 13,
20 the definition of substantiated which says, "There is
21 sufficient credible evidence to believe that the subject
22 officer committed the act charged in the allegation and thereby
23 engaged in misconduct."

24 That tells me nothing. That would simply mean I
25 believe the complainant over the officer. That would be

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1 sufficient credible evidence. But unless you say no, not in
2 that court. There there's a standard somewhere that says it's
3 not enough to believe the complainant. There must be
4 corroboration. Where is that rule?

5 THE WITNESS: There doesn't have to be corroboration
6 but there has to be something that -- if the complainant
7 testimony clearly has the ring of the truth and the officer has
8 clearly no idea what's going on, then that would be a situation
9 where I could see that it should be probably substantiated.

10 THE COURT: Oh, so it can be enough to find -- let me
11 finish -- so it can be enough to find the complainant credible
12 and the officer not credible? That could be a substantiated
13 complaint?

14 THE WITNESS: Yes.

15 THE COURT: I think she's been asking that for about
16 an hour or an hour-and-a-half.

17 THE WITNESS: Each case is fact specific.

18 THE COURT: Of course. That's obvious.

19 THE WITNESS: But if they're equal.

20 THE COURT: Of course.

21 THE WITNESS: Then you don't get to 51 percent.

22 THE COURT: Of course. I've been doing this forever.

23 THE WITNESS: Me too.

24 THE COURT: Yeah, I know. I heard you say that.

25 Q. You believe, though, that if all you have is the

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1 complainant's version and the police officer's version, then
2 you should recommend unable to prosecute, right?

3 A. Each case is fact specific. There's many times when you
4 can tell from what the complainant says that obviously it has a
5 ring of truth. They'll say something that the officer made a
6 comment or something that they wouldn't know unless they were
7 there when it happened.

8 THE COURT: I think, Ms. Borchetta, as a trier of fact
9 I've gotten it. The answer now is in some instances the
10 plaintiff's testimony is enough. In some instances.

11 MS. BORCHETTA: Respectfully, I do think I need to ask
12 one more question on this.

13 Q. The question is: Isn't it true that you do believe that
14 you must recommend unable to prosecute because you cannot
15 prevail on a he-said/she-said case.

16 A. Not in every case.

17 Q. Let's look at your Davis deposition which is the deposition
18 from 2011.

19 A. I have a bunch of them here.

20 Q. 2011. The first name is Kelton Davis.

21 A. Thank you. What page am I looking at?

22 Q. 255.

23 Starting at line 17 and going to page 256, line 11.
24 Do you recall giving the following testimony to the following
25 question.

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1 "Q. What do you mean by the cases were not legally sufficient?

2 "A. Well, as I mentioned earlier, we need to have
3 preponderance of the evidence, which is roughly 51 percent. So
4 sometimes the CCRB would substantiate cases, for lack of a
5 better term, he-said/she-said, and there is nothing that sends
6 it over that 51 percent. So we could never prevail on that
7 case because we had nothing that could either corroborate one
8 side or the other and it really should have been
9 unsubstantiated. So some of those cases were originally
10 written up as charges and specs. But when the advocates were
11 bringing in the witness to do preparation or if they didn't
12 have the witness make it even harder because you may have a
13 taped interview for an investigator which is not going to carry
14 the same weight as a live officer on the stand. So in that
15 case we wouldn't be able to succeed."

16 You gave that testimony, right?

17 A. Yes.

18 MS. COOKE: I would note for the record simply that
19 the answer to that question didn't end there. It actually
20 continues to page 57, line 9. But it doesn't appear it has to
21 do with the issue of the 51 percent issue. But there is more
22 to the answer there.

23 Q. You heard the criticism that the department advocate's
24 office is biased in favor of police officers, right?

25 A. I've heard it from people asking me that question?

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1 THE COURT: You never heard it?

2 THE WITNESS: I mean I've heard it -- yes, I've heard
3 it.

4 Q. Does that criticism at all concern you?

5 A. No. Because I've also heard that we're too hard on the
6 police officers.

7 Q. At the time of your deposition in this case in 2009 you
8 believed that the law of search and seizure is not clear,
9 right?

10 A. I believe that there are -- it's different. It's difficult
11 to interpret. That courts have a plethora of, you know, every
12 case is case specific and it's not the -- you know, it's not
13 steadfast. It's not that you read your Miranda rights or did
14 you read them or did you not read them.

15 I think you even said that in your last decision that
16 sometimes it's difficult.

17 Q. So you believe that the law of search and seizure has gray
18 areas, right?

19 A. I think the question was regarding DeBour.

20 THE COURT: That's what I said.

21 THE WITNESS: That's why I think it was asked in my
22 deposition.

23 I think there's certain things in search and seizure
24 are very concrete but I think in certain parts of DeBour it can
25 be difficult.

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1 Q. DeBour is a case that's about the law of search and
2 seizure, right?

3 A. Yes. To some extent.

4 Q. So you believe that under the DeBour decision the law of
5 search and seizure has gray areas, right?

6 A. I think that sometimes it's difficult to interpret
7 especially for officers out there on the street and you get
8 variances in decisions sometimes.

9 Q. But you recall that you have disagreed with the CCRB's
10 assertion that the law of search and seizure is clear?

11 A. Again I believe it's DeBour that I disagreed with, that
12 it's clear.

13 Q. So you disagreed with the CCRB when the CCRB was saying
14 that the standard of search and seizure was clear, right?

15 A. Yes.

16 Q. You disagree with that, right?

17 A. Yes.

18 Q. If you turn to your deposition in this case. Again, it's
19 the case of David Floyd is the first name.

20 A. What page?

21 Q. Page 213.

22 THE COURT: Is this going to be impeachment? Is it
23 going to say something different there than she said here? If
24 it's the same, don't do that.

25 MS. COOKE: It doesn't appear to be different, your
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1 Honor.

2 MS. BORCHETTA: Okay.

3 THE COURT: It sounds like you got what you wanted
4 anyhow.

5 Q. In 2008, in response to the CCRB's 2007 report, you gave
6 input into talking points that were used internally in the
7 NYPD, right?

8 A. Can you -- I'm not exactly sure what you're asking me.

9 Q. I will show you what's been marked as Defendants' W13. Am
10 I correct these are internal NYPD talking points into which you
11 had some input related to the CCRB's 2007 report?

12 A. Well the heading says 2007 status report.

13 I'm not sure if this was prepared for that or if it
14 was prepared for the city council testimony.

15 Q. And the city council testimony that you're referring to is
16 a city council hearing at which you gave testimony regarding in
17 part the CCRB's 2007 report, right?

18 A. It was a while ago. I definitely gave testimony. I don't
19 know if it was -- it was issues concerning that they probably
20 brought up in their report.

21 Q. Well, you do though recognize these as talking points into
22 which you had some input that were circulated within the NYPD,
23 right?

24 A. I believe there's some points later on that I had some
25 input on, yes.

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1 MS. BORCHETTA: Your Honor, I would move the admission
2 of Defendants' Exhibit W13.

3 MS. COOKE: No objection, your Honor.

4 THE COURT: All right. W13 is received.

5 (Defendants' Exhibit W13 received in evidence)

6 Q. And on the second page of this exhibit there's a section on
7 police department dispositions, right?

8 A. The bottom of the page?

9 Q. Yes.

10 A. Yes.

11 Q. And you had input into this section, right?

12 A. I believe that one line on that page came from CCRB.

13 Q. But you had -- you can look through the document. You have
14 it in your hand.

15 But in that section you gave input into the points in
16 this section, right?

17 A. Page three. Going on, further down, yes.

18 Q. In these talking points there is one bullet that says, "The
19 department advocate's office disagrees with the CCRB conclusion
20 that the law of search and seizure is clearly established, well
21 articulated, and understandable under the DeBour decision. The
22 fact that there is a plethora of appellate division cases that
23 modify and/or further explain the case support this belief."

24 Do you see that?

25 A. Yes.

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1 Q. You still agree with that point, right?

2 A. Yes.

3 Q. And there's also a point here that says, "The department
4 advocate's office agrees with the CCRB that the good faith
5 defense does not preclude disciplinary action against a police
6 officer. However, when it is clear that the officer acted in
7 good faith, fairness dictates that it be considered as
8 mitigation by the CCRB investigator and the panel, and should
9 favorably impact evaluation of the officer's credibility."

10 Right?

11 A. Yes.

12 Q. And this is responding to a point made by the CCRB that
13 although they would not recommend discipline if an officer
14 misunderstood the law, if the law is clear, they would still
15 consider discipline, right?

16 A. I don't know what it's responding to.

17 Q. Well if you look at the 2007 report that you have in front
18 of you which is Plaintiffs' Exhibit 111.

19 A. What page?

20 Q. I'm sorry. Just give me one second.

21 If you turn to page -- stamped at the bottom NYC 7697.

22 Are you on that page?

23 A. Yes. Sorry.

24 Q. And on the second column in the last paragraph do you see
25 where it says, "When the CCRB finds that an officer has

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1 misinterpreted unclear law rather than committed misconduct, it
2 does not substantiate allegations against the officer --

3 A. Could you slow down. I don't see where you're reading
4 from.

5 Q. It's the last paragraph on the page.

6 A. "In fact both assertions are incorrect."

7 Q. Yes. Do you see the sentence after that?

8 A. So just give me one second, please.

9 THE COURT: Could you start reading it again so I
10 could hear it.

11 Q. The sentence is, "When the CCRB finds that an officer has
12 misinterpreted unclear law rather than committed misconduct, it
13 does not substantiate allegations against the officer at all."

14 MS. COOKE: The sentence actually finishes, "as
15 described on page 24."

16 MS. BORCHETTA: "As described on page 24."

17 Right? Do you see that?

18 THE WITNESS: I see that, yes.

19 Q. So at least according to the CCRB, the CCRB would not
20 substantiate an allegation against an officer who misunderstood
21 unclear law, right?

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

23 Q. And then if you look at page 24, which is stamped at the
24 bottom NYC 7698, would you agree with me that on this page the
25 CCRB says that it believes that DeBour is clear?

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1 A. I would have to read this and I don't know where it is on
2 this page if you want to point me to it. Or do you want me to
3 just read everything here? It's a big page.

4 MS. BORCHETTA: It's really the whole page. But at
5 the bottom of the page in the last paragraph. You can read
6 that.

7 And I'll read --

8 THE WITNESS: Reading.

9 I'm a quick reader but just give me a second, please.
10 Okay.

11 Q. So you would agree that there the CCRB is saying that they
12 think that officers should understand DeBour, right?

13 A. Yes.

14 Q. And so you understand the CCRB's point here to be that they
15 will substantiate allegations even where an officer has
16 misunderstood DeBour because they believe DeBour is clear,
17 right?

18 A. Yes.

19 Q. And your response to that is the talking points?

20 A. It's not my response. It's OMAP's response.

21 Q. You had input into this point, right? Into these points?

22 A. Some of them yes.

23 Q. And you just said you agreed with them, right?

24 A. Which one are we talking about now?

25 Q. We're talking about the point on the department advocate's

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1 office agrees with the CCRB that the good faith defense does
2 not preclude disciplinary action against a police officer.
3 However when it is clear that the officer acted in good faith,
4 fairness dictates that it be considered as mitigation by the
5 CCRB investigator and the panel and should favorably impact
6 evaluation of the officer's credibility.

7 Right.

8 A. Yeah. Those two things aren't inconsistent.

9 Q. You also agree with the bullet point after that, that
10 DeBour is not clear, right?

11 A. Yes. I agree with both of those.

12 Q. So the point that you were making here, you and the NYPD,
13 is that the CCRB should not substantiate allegations against an
14 officer when he doesn't understand DeBour, right?

15 A. That's incorrect.

16 What the point is, is that they should take that into
17 account as mitigation and that would be something they should
18 consider in a penalty recommendation.

19 Q. So if we have an example --

20 A. I'm sorry. In a level -- I'm correcting my own self -- in
21 a level of what they recommend for discipline.

22 Q. But you would agree with me that those two bullet points
23 that I've just focused on, on the NYPD talking points are a
24 response to the point that the CCRB is making that they will
25 substantiate allegations against officers who misunderstand

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1 DeBour, right?

2 A. Most likely, yes.

3 Q. And you just said that what you believe is that an officer,
4 if he misunderstands DeBour, that would affect the penalty --
5 the discipline issue, right?

6 A. That can, under the right circumstances and if there's a
7 good faith basis for that mistake, should be considered in
8 making a recommendation for penalty as opposed to willful
9 misconduct.

10 Q. In that example that hypothetical that you just gave, the
11 officer -- you would recommend a penalty of instructions,
12 right?

13 A. I can't say that without knowing the facts, the officer's
14 history, the commanding officer -- you know, there's a lot of
15 things that go into making a recommendation of the level of
16 discipline.

17 Q. But you're saying a misunderstanding of search and seizure
18 law should be a mitigating factor that would decrease the level
19 of penalty imposed, right?

20 A. I'm saying that a reasonable misunderstanding of search and
21 seizure law may be a mitigating factor in making the
22 recommendation for the level of discipline.

23 Q. Well it's fair to say that your office declined or
24 recommends no discipline in some substantiated CCRB
25 stop-and-frisk cases because the department disagreed with the

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1 CCRB's understanding of search and seizure law, right?

2 A. If we felt that they applied the wrong legal analysis we
3 may then say that no disciplinary action, we would recommend no
4 disciplinary action.

5 Q. And it's your position that if an officer violates Fourth
6 Amendment law because he didn't understand search and seizure
7 law that was unclear he should not be subject to discipline,
8 right?

9 A. That's not what I'm saying.

10 Q. But you believe it should be taken into consideration and
11 potentially mitigate the discipline that's issued, right?

12 A. It's something that if it's a reasonable misunderstanding
13 it should be considered as mitigation. If it's a woeful not
14 caring then no. I mean every case is fact specific and fact
15 specific to the level of the service.

16 Q. Well is it fair to say that at least in some cases you
17 recommend no discipline in substantiated CCRB stop-and-frisk
18 cases because you believe that CCRB misapplied search and
19 seizure law?

20 A. They did -- yes.

21 Q. And when do you believe that an officer may lawfully stop a
22 pedestrian?

23 A. Do you want me to go through the levels --

24 THE COURT: Wait. Do you want her to simply repeat
25 the DeBour standard? Because DeBour you believe controls in

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1 New York, right?

2 THE WITNESS: Yes.

3 THE COURT: Well then that's that.

4 Q. I want to turn though to page -- a page of the 2007 report
5 which you should have open in front of you and it's the page
6 stamped NYC --

7 A. Is that 111?

8 MS. BORCHETTA: 111.

9 THE WITNESS: What page?

10 Q. And the page NYC 7701.

11 Okay. I just -- on this page there's a case profile,
12 right?

13 A. There's two case profiles.

14 Q. Those are examples of CCRB substantiated cases, right?

15 A. Correct.

16 Q. And I just want to look at the first example. Do you see
17 that example one?

18 A. Yes.

19 Q. And in this example it says, "At approximately 10:45 p.m.
20 on November 2, 2005, two black male friends in their early 20s
21 drove to Whitestone, a wealthy and primarily white neighborhood
22 in Queens. The friends parked their cars and walked about a
23 block through the mostly empty streets, passing a private
24 security van which ignored them. Then a marked police car
25 containing two uniformed officers drove towards the friends.

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1 "The sergeant in the passenger's seat asked the men
2 what they were doing in the neighborhood, and they replied that
3 they were taking a walk and looking at real estate in the
4 neighborhood. The sergeant exited the car and repeated his
5 question, and the men repeated their answer.

6 "The sergeant continued questioning the men, asking
7 for their IDs, verifying which car in the neighborhood was
8 theirs, and asking them if they knew anyone who lived in the
9 area. The sergeant then frisked the men. The sergeant
10 explained that there had been burglaries in the neighborhood,
11 and told the men that they were not suspects, but that he just
12 had to make sure that they were not involved."

13 Looking at that portion of the example, you -- this
14 example from the CCRB report was specifically referenced in the
15 talking points that we were looking at earlier, right?

16 A. I believe so, yes.

17 Q. You see the section where it says profile number one
18 Whitestone stop-and-frisk.

19 Do you see that?

20 A. Yes.

21 Q. And that's bullet points responding to the sample case
22 profile I just read from, right?

23 A. Yes.

24 Q. And the first bullet here says, "The officers did not
25 conduct a forcible stop. Rather, in an action that was

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1 completely justified the officers conducted a stop under the
2 common law right of inquiry."

3 Do you see that?

4 A. Yes.

5 Q. Do you agree with that?

6 A. Now you have -- this was 2008. I haven't read the actual
7 case folder since then.

8 My recollection of what's written in the CCRB report
9 was not what was exactly -- it's condensed so it was not
10 exactly what was sent to us.

11 I believe that our interpretation at the time was that
12 it was not a forcible stop. I don't remember anything that
13 indicated that it was. But I haven't read the case file in
14 four years.

15 Q. So are you saying you need to know more than the sample
16 that I just read in order to determine whether that was a stop
17 or a common law right of inquiry?

18 A. I don't believe that this is a total accurate
19 representation of what was sent to us so I don't want to
20 really -- and then if you're asking me these talking points,
21 they're in relation to what was sent to us, not exactly what
22 they put in the case study.

23 Q. But I'm asking you now looking at this example whether you
24 believe this was a stop or a common law right of inquiry?

25 A. I don't believe the sergeant got out of the car, if I

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1 remember correctly.

2 THE COURT: She's not asking that. She's saying
3 assume that you're sitting there for the first time reading
4 this example and these are the available facts.

5 Do you think this was a proper stop under the common
6 law right of inquiry?

7 She's just trying to get your opinion so to speak.

8 THE WITNESS: There's more to it. They definitely can
9 ask them what they were doing. They were walking in the middle
10 of the street at night. They can ask them. I don't believe he
11 held them. He can ask them for ID. At that point it starts to
12 rise to the next level. But there were other circumstances, if
13 I remember correctly.

14 THE COURT: You don't remember anything correctly.
15 She's saying just take these facts as the only facts, the ones
16 on the screen in front of you. There's nothing else to
17 remember. Just based on that.

18 THE WITNESS: I believe the sergeant acted properly.

19 THE COURT: All the way through or up to a point?

20 THE WITNESS: Well the frisk part, clearly from the
21 fact pattern is incorrect. But I believe it was different in
22 the --

23 THE COURT: No. No. No.

24 THE WITNESS: So the way that it's written, the frisk
25 is improper.

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1 THE COURT: The frisk is improper.

2 But up until then everything is fine, based solely on
3 what you see on the screen?

4 THE WITNESS: It doesn't make sense to me because
5 there's -- about the car, I have an issue with that. Because
6 he's saying verify which car is theirs and asking them these
7 questions that have nothing to do with the fact pattern. So I
8 don't want to speak out of context.

9 THE COURT: You also said looking at this that they're
10 walking in the middle of the street. Is that in the fact
11 pattern?

12 THE WITNESS: It might not be. I might remember that
13 from my own independent recollection.

14 THE COURT: So right here it says taking a walk and
15 looking at real estate in the neighborhood.

16 THE WITNESS: Yeah.

17 THE COURT: So the only thing we know is the time of
18 day, the neighborhood, and the race of these two. That's what
19 we know. And based on that, the officer has the right to roll
20 down the window and ask them questions.

21 THE WITNESS: Correct.

22 THE COURT: But the next step is: Does he have a
23 right to come out of the car and ask for the ID and ask them to
24 verify which car, who they know in the area?

25 THE WITNESS: I don't know about the car. It had a
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1 lot of context to me.

2 THE COURT: The rest of it.

3 THE WITNESS: I think he's okay.

4 THE COURT: He can ask for the ID?

5 THE WITNESS: Yes.

6 THE COURT: But what you don't like is the frisk?

7 THE WITNESS: The frisk based on that fact pattern is
8 improper.

9 THE COURT: Okay.

10 Q. Also putting aside whether your opinion of based on these
11 facts that are represented by the CCRB in the case profile,
12 putting aside whether you think it was -- they were okay in
13 asking those questions, did you think -- do you think, looking
14 at this, that it was a stop or that it was a common law right
15 of inquiry?

16 THE COURT: Depends at which point. She obviously
17 said initially it's a common law right of inquiry. It wasn't a
18 stop at all, right?

19 THE WITNESS: Correct.

20 THE COURT: When they just rolled down the window and
21 talked to the folks, that was a common law right of inquiry,
22 right?

23 THE WITNESS: Yes.

24 THE COURT: Now the question is: Did it escalate into
25 a stop when they got out of the car and asked for the ID and

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1 asked the additional questions about do you know anybody in the
2 neighborhood, and which car is yours, and all that?

3 THE WITNESS: I have issues about asking about the car
4 because it doesn't seem appropriate.

5 THE COURT: How about asking for the ID?

6 THE WITNESS: They can ask for the ID.

7 THE COURT: Okay. So you don't think it became a stop
8 yet?

9 THE WITNESS: It's on the cusp.

10 THE COURT: All right.

11 Q. And looking at the talking points again.

12 THE COURT: It's 4:30. Do you want to get that last
13 question? Go ahead.

14 MS. BORCHETTA: I will try it.

15 THE COURT: Okay.

16 Q. There's a bullet that says "While the CCRB intimates
17 otherwise, CCRB was never indicated by the CCRB
18 investigator..."

19 THE COURT: "Race was never."

20 MS. BORCHETTA: I'm sorry. I will try again. That's
21 what happens when I try to go quickly.

22 "While the CCRB intimates otherwise, race was never
23 indicated by the CCRB investigator as a basis for determining
24 that the stop was unlawful."

25 Q. Do you see that?

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1 A. Yes.

2 Q. Okay. Just looking at the facts that we have in this fact
3 pattern from the CCRB and understanding that at the time your
4 office might have had additional information, just looking at
5 the facts presented by the CCRB, do you agree that there is no
6 indication that race might have been a factor?

7 A. What -- I'm not sure what you're asking me.

8 Q. I'm asking whether, looking at this fact pattern presented
9 by the CCRB, you agree that race was not a factor?

10 A. Right.

11 The reason I think that bullet point if I -- it's a
12 long time ago, but there was another -- CCRB had put something
13 else out where they said that they were stopped solely based on
14 race, which was not in any of the -- it was not in the report
15 in any of the materials, it was in some kind of --

16 THE COURT: I guess what she's saying and it's really
17 kind of a -- not a totally fair question but if all you knew is
18 what was on the screen, she's really asking your opinion, would
19 you think that one of the reasons they talked to these folks is
20 that they were black?

21 THE WITNESS: No.

22 THE COURT: Okay. It's 4:30. Actually it's 4:32 so
23 it's time to stop. You have to come back, unfortunately for
24 you, 10:00 tomorrow.

25 I need the lawyers to stay for a minute so we can go

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1 over the letters.

2 THE WITNESS: I'll leave everything here.

3 THE COURT: That's fine. So while you're stepping

4 down let's just continue.

5 (Witness excused)

6 (Continued on next page)

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D4M8FLO6

1 THE COURT: There were letters last night about, was
2 it Dr. Reiter or Mr. Reiter?

3 MS. PUBLICKER: Mr. Reiter.

4 THE COURT: There were letters about Mr. Reiter. I
5 thought one of the points might have been resolved, Ms.
6 Publicker, in the response letter.

7 MS. PUBLICKER: The quest for excellence issue. The
8 plaintiffs did say that they would not question regarding that.

9 THE COURT: So that's not a problem.

10 So the only part left was your view that the report
11 needs to redact out the portions that give legal opinions or
12 legal conclusions or try to tell me what the case law says, all
13 of which is my province and not the province of the expert.
14 The only response to that seemed to be, you had the report for
15 ages, why didn't you raise that earlier? There was no real
16 response on the merits.

17 On the merits of the thing, Ms. Publicker has the
18 better of it. I don't let any expert tell me how to read a
19 case. That's what I am trained to do, is read cases. I am
20 probably better trained than Mr. Reiter to read a case. So I
21 don't need Mr. Reiter to tell me how to read a case or what the
22 holding of a case is or anything that is a legal conclusion.
23 So I don't let experts tell me what the law is because that's
24 my province to figure out the law. It's not always easy, as
25 the witness just said, but so be it. That's my job. So I

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1 don't let experts do that. So while the objection is untimely,
2 it seems to be right.

3 MR. CHARNEY: I guess our response is that that is not
4 what Mr. Reiter is doing with the cases.

5 THE COURT: Are there other parts of the report that
6 aren't cases? I saw in your letter he is only using cases as
7 examples of fact patterns?

8 MR. CHARNEY: Yes. He is not trying to interpret the
9 holding of a federal or state court decision.

10 THE COURT: What is he using the cases for?

11 MR. CHARNEY: It's hard without the report itself.

12 THE COURT: Anyway, if he is not trying to tell me
13 what the holding is, then that's fine. If he is just saying,
14 here is an example of a fact pattern that I drew from a case,
15 that's the same as the hypothetical you had on the screen,
16 that's OK.

17 Were you planning to introduce the report itself into
18 evidence?

19 If so, Ms. Publicker, then what I think we should do
20 is propose redactions and let the plaintiff respond. In other
21 words, take a red pen and say, these are the portions we would
22 suggest need to be redacted, and they may agree on some and
23 disagree on some and reduce the number of disagreements so that
24 I can look at it and making a ruling. I really don't want to
25 look at it. It's the same problem in a nonjury trial, but if I

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1 have to, I have to. So could you take a red pen and bracket
2 out the ones you think should be redacted?

3 MS. PUBLICKER: I can. I also was wondering if your
4 Honor would be open to another suggestion.

5 THE COURT: Sure. Any suggestion that might result in
6 less work for me, I am more than open to it.

7 MS. PUBLICKER: My idea was that Mr. Reiter, he is
8 going to testify about his opinions. To the extent that your
9 Honor excludes a certain opinion or certain topics from his
10 live testimony, that before we submit the expert report to your
11 Honor, that we strike those portions.

12 THE COURT: That might work too. Whichever is more
13 efficient. But if you did it the other way, then they might
14 know what to leave out of the questioning and what to leave in.
15 You probably know which portions you think are objectionable.
16 You could take the red pen and put brackets. It still will be
17 helpful to the plaintiffs.

18 MS. PUBLICKER: Yes, your Honor.

19 There is one slightly new issue. I got an e-mail this
20 morning stating that plaintiffs intend to question Mr. Reiter
21 about QAD audits from 2010 to 2012, which were not part of his
22 opinion.

23 THE COURT: What kind of audits?

24 MS. PUBLICKER: The QAD, the quality assurance
25 division audits. So to the extent that Mr. Reiter is trying to

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1 update his opinion with new evidence that was not in his expert
2 report or in his deposition testimony, the defendants object.

3 MR. CHARNEY: Our response to that would be of course
4 his report came out in 2010. There have been three or four
5 audits since then. The audits themselves haven't changed.
6 They are still done the same way. But to the extent he is
7 opining about those audits and how they are done, I don't see
8 how the fact he hasn't put in a supplement report would in any
9 way prejudice the defendants.

10 THE COURT: But for the fact that he is an expert, it
11 smells awfully like what happened with McGuire today. He
12 updated statistics that have never been seen till a week ago,
13 and I let him do some of that because they just came out in
14 December or last week, and there is still a conversation going
15 on whether they can come in. New audits come out. If it's the
16 same methodology and the same critiques, applied the same
17 methodology to these audits.

18 MS. PUBLICKER: To the extent it is regarding the
19 methodology, we don't have an objection. But to the extent
20 that he has formed new opinions --

21 THE COURT: I think that's right. New opinions you
22 were entitled to hear. People are limited to the opinions of
23 their report. Hopefully, it's the same attacks that he has
24 made on prior audits.

25 MR. CHARNEY: Understood.

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1 THE COURT: The other set of letters had to do with
2 still complaining that the plaintiffs are not identifying the
3 exhibits they intend to use with witnesses.

4 Who wrote that letter?

5 MR. MARUTOLLO: I did, your Honor. Just in connection
6 with this Reiter issue, just in general, the parties have been
7 following the rules indicated by your Honor.

8 THE COURT: They haven't done a perfect job, but maybe
9 they are attempting to follow the rules.
10 Go ahead.

11 MR. MARUTOLLO: The issue that remains is recently, in
12 addition to naming certain exhibits, there will also be a
13 discussion of the exhibits that have already been admitted into
14 evidence and may also be raised. Since there are so many
15 exhibits already admitted into evidence, I think it wastes
16 valuable court time to have objections on the record when it
17 can be discussed and resolved prior to coming into court and
18 talking about it.

19 THE COURT: So instead of saying we reserve the right
20 to refer to any one of the 200 exhibits in evidence, can't you
21 tell them which exhibits you're going to use when you question
22 Mr. Reiter?

23 MS. BORCHETTA: I think the city didn't speak to us
24 about that particular letter before going to the Court, and I
25 think our response is that we have been identifying by exhibit

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1 number the exhibits that we want to use and that the language
2 that the city took exception to was just an inartfully stated
3 reservation of rights, to the extent we can't predict
4 everything that's going to happen.

5 THE COURT: You will try to identify all exhibits you
6 intend to use?

7 MS. BORCHETTA: As we have been, yes.

8 THE COURT: Have we taken care of the letter writing
9 tonight? Then I will see you tomorrow.

10 MR. MARUTOLLO: One note. The witness at issue was
11 Sergeant Steven Monroe. If the plaintiffs could then, I
12 suppose, amend their designations for that witness.

13 THE COURT: I don't even see that person on the list.

14 MR. MARUTOLLO: That person is on the list for Friday.
15 So we were provided the exhibits for that person already.

16 MS. BORCHETTA: To the extent there are any additional
17 exhibits other than what have been identified, we will. Again,
18 I think that was just an inartfully reservation of rights.

19 MS. GROSSMAN: Your Honor, you mentioned on Friday?

20 THE COURT: I don't have any further information.

21 MS. GROSSMAN: We should just proceed the way --

22 THE COURT: Until I speak to you.

23 MS. GROSSMAN: Very good.

24 (Adjourned to April 23, 2013, at 10:00 a.m.)
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DEFENDANT EXHIBITS

Exhibit No.	Received
D144396
Y84409
Q64413
N64419
W134516

