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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.  
May 20, 2013  
9:45 a.m.

10 Before:

11 HON. SHIRA A. SCHEINDLIN,

12 District Judge

13 APPEARANCES

14 BELDOCK LEVINE & HOFFMAN, LLP  
15 Attorneys for Plaintiffs  
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APPEARANCES (Cont'd)

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1 (Trial resumed)

2 THE COURT: I understand we have a couple of exhibits  
3 to offer in evidence and there is agreement on it, is that  
4 true?

5 MR. MARUTOLLO: Yes, your Honor. S15 needs to be  
6 admitted into evidence and there is agreement from both sides.

7 THE COURT: Did you say S15?

8 MR. MARUTOLLO: S15.

9 THE COURT: S15 is received.

10 (Defendants' Exhibit S15 received in evidence)

11 THE COURT: Is there another exhibit that needs to be  
12 done?

13 MS. PATEL: 166F.

14 THE COURT: 166F, no objection to that either?  
15 166F is received.

16 (Plaintiffs' Exhibit 166F received in evidence)

17 THE COURT: Are there any final exhibits to be  
18 received in evidence or are we ready to begin?

19 It looks like we are ready to begin. You all have a  
20 schedule. We are right on time. Who is going to begin?

21 MS. GROSSMAN: I am, your Honor.

22 THE COURT: OK. Ms. Grossman.

23 MS. GROSSMAN: May it please the Court, when we opened  
24 this case before your Honor ten weeks ago, we started out by  
25 saying that New York City is a big city. Ten weeks later that

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Summation - Ms. Grossman

1 productivity goals, and indeed officer performance and  
2 activity, are all measured in terms of addressing known and  
3 identified crime conditions, something that any trained police  
4 officer would expect, and not just in numbers for numbers sake.

5 Plaintiffs suggest that high crime area means areas  
6 where crime is generally the highest. They don't comprehend  
7 that the officer in the field is focused on areas of small or  
8 large sizes where there is a high incidence of particularized  
9 crime conditions, which can exist in areas of generally low  
10 crime.

11 Plaintiffs suggest that targeted instructions to stop  
12 the right people at the right time at the right place is code  
13 for stopping black and Hispanic youths in their neighborhoods,  
14 even if there is no basis for doing so. Plaintiffs just don't  
15 understand that to the NYPD, from the highest levels to the  
16 street cop, the right people are the right people about whom  
17 there is information directly connected to known crime  
18 conditions. This is true in areas populated mostly by  
19 minorities, particular people, and not all people of color or  
20 all people that live there.

21 In one of the more arrogant examples of plaintiffs'  
22 insistence that they know the meaning of words used by police  
23 better than the police do, plaintiffs define a pattern of  
24 criminal activity to suit their view that a burglary pattern  
25 known in relation to the Floyd stop is just not geographically

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Summation - Ms. Grossman

1 close enough to support reasonable suspicion. While that may  
2 be their opinion, it takes no credibility away from police  
3 officers' reliance on their understanding of a pattern.

4 Plaintiffs also advocate that a black person who  
5 complains about a stop but does not expressly base their  
6 complaint on a stated belief that they were stopped because of  
7 their race must be treated as if they meant to base their  
8 complaint on racial bias. This particularly forced  
9 interpretation of words by plaintiffs is itself inherently  
10 offensive.

11 The evidence has shown that there are many venues for  
12 complaints and that many black and Hispanic witnesses in this  
13 case had no problem using them and articulating their  
14 particular problem.

15 There is no evidence to support that the police  
16 department could not and cannot reasonably rely on the  
17 articulation of the complaint by the complainant himself or  
18 herself, regardless of his or her race.

19 And plaintiffs have been fast and loose using language  
20 to describe the number of stops as increasing over 700 percent  
21 in the last ten years or so, based on what is only evidence of  
22 an increase in documentation of stops, a goal they themselves  
23 sought to achieve in the Daniels litigation. Precision on all  
24 sides must be demanded.

25 With these ideas in mind, I will discuss the evidence

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Summation - Ms. Grossman

1 about the individual stops, followed by the evidence of the  
2 police department's systems. I will then discuss the specific  
3 issues arisen that have throughout the trial, and Ms. Cooke  
4 will finish with an explanation of how the expert statistical  
5 analysis does not support a widespread pattern or practice of  
6 Fourth or Fourteenth Amendment violations. I will then come  
7 back and address remedies.

8 So, your Honor, as you know, plaintiffs had every  
9 opportunity to present at least 25 to 50 class member  
10 witnesses. This happened back in the fall. They have had  
11 years of involvement in this litigation to attract witnesses  
12 and sent out thousands of mailings this fall to find witnesses.  
13 They have had license to cherry pick the best scenarios for  
14 this case but have only come up with 12 witnesses, including  
15 the class representatives, for a total of 19 stops.  
16 Presumably, these are the best examples of their allegations  
17 that they could present, and yet, they are woefully lacking.

18 First, plaintiffs set forth 19 stops and encounters  
19 involving the 12 plaintiffs and class member witnesses, but  
20 they have failed to show a single constitutional violation,  
21 much less a widespread pattern and practice of suspicionless  
22 stops.

23 Seven of the 19 encounters -- Mr. Floyd, Mr. Lino, Mr.  
24 Almonor, Mr. Peart, Mr. Sindayiganza and Mr. McDonald -- were  
25 based on a description from a radio run or a complainant or

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Summation - Ms. Grossman

1 Mr. Floyd testified about two police encounters in  
2 this case. One occurred on February 27, 2008. Officers Joyce  
3 and Hernandez, and their supervisor Sergeant Kelly, all  
4 testified that they were aware of a pattern of daytime  
5 residential burglaries occurring within the area around  
6 Mr. Floyd's house.

7 Indeed, in the two months preceding the February 27,  
8 2008 stop of David Floyd, there were 62 reported burglaries  
9 within a one mile radius of Mr. Floyd's house, and 28 within a  
10 half mile radius. Many of the burglaries occurred on  
11 residential blocks with two or three multiple family houses and  
12 very similar to Mr. Floyd's block.

13 We heard Professor Fagan explain that there was only  
14 one burglary in the two census tracts closest to Floyd's house.  
15 But as the NYPD officers and supervisors explained, a burglar  
16 does not care about census tracts, census lines, or walking a  
17 few blocks. A burglar cares about opportune locations, and  
18 Floyd's house fit that bill.

19 In addition, we heard testimony from Chief Shea and  
20 others about how burglary patterns sometimes cover whole  
21 precincts or even whole boroughs. The point is that you cannot  
22 just look at two census tracts covering a tiny portion of the  
23 precinct and conclude that crime is not a problem, as  
24 plaintiffs would have you do.

25 Now, the plaintiffs also assert that because the Bronx

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Summation - Ms. Grossman

1 River Parkway goes through the neighborhood, that somehow a  
2 burglar who struck on one side of the road would not cross to  
3 the other to commit more crimes. But the Bronx River Parkway  
4 is below street level, and on every block there are crossings  
5 over the parkway that makes crossing the parkway the same as  
6 walking down any street.

7 Plaintiffs also argue that because the burglary in the  
8 pattern occurred about three weeks before the Floyd stop, that  
9 the pattern was over. Again, this just demonstrates a  
10 fundamental misunderstanding of how criminals operate. Indeed,  
11 the pattern itself points this out as the first burglary in the  
12 pattern took place on January 4, 2008, and the last on January  
13 28, 2008.

14 The officers who stopped Mr. Floyd were all aware of  
15 the crime conditions in the area. Sergeant Kelly explained how  
16 he starts each tour. He reads crime complaints. He stays  
17 informed about crime conditions in the precinct. He speaks to  
18 detectives about patterns. He reviews maps posted in the  
19 precinct. He discusses conditions with his fellow officers and  
20 talks with community members.

21 Now, both Officer Joyce and Officer Hernandez  
22 testified that they were aware of the burglary patterns in the  
23 area, and that Sergeant Kelly briefs them on crime conditions  
24 before they go out on patrol.

25 So with this detailed information about the

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Summation - Ms. Grossman

1 conditions, including the burglary patterns, this team of  
2 anticrime officers went out on patrol. And when they arrived  
3 at Beach Avenue, they saw two men standing in front of the  
4 basement door to the building fiddling with the door, which  
5 looked suspicious to them.

6 The officers observed the men for a time, and it  
7 appeared to all three of them that Floyd was attempting to  
8 force his way into the building. There could be a perfectly  
9 reasonable explanation for what Mr. Floyd was doing, but to the  
10 officers at that time, that is what they were observing.

11 And on the ground next to Floyd was a black bag that  
12 Sergeant Kelly thought contained burglary tools. It could have  
13 been anything that was not problematic, not offensive, not  
14 criminal, but to the officers not knowing, that bag could have  
15 contained burglary tools.

16 Both men were glancing up and down the street in a way  
17 that appeared as if they were concerned about being watched.  
18 The officers observed a large key ring with many keys on it.  
19 They found this suspicious because a person who lives in the  
20 apartment is not likely to fiddle with a large key ring and  
21 some burglars use master keys in the hopes of opening a door.

22 The officers approached Floyd to investigate the  
23 possible burglary, as you would expect officers to do. They  
24 frisked him because burglary is a violent crime, and because  
25 the demeanor of the men made the officers concerned about a

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Summation - Ms. Grossman

1 the week on which it occurred changed significantly over time.  
2 Needless to say, Mr. Floyd's shifting statements about when the  
3 incident happened made it difficult to identify the officers  
4 involved. But you heard from Sergeant Justin Dengler. He  
5 testified about the great efforts made to do so, including the  
6 review of the 250s in the vicinity of the stop and trying to  
7 trace the whereabouts of and interviewing many of the 44  
8 officers that Mr. Floyd identified as possibly being involved  
9 after he reviewed photographs of over 200 officers.

10 Despite these efforts, the officers who were involved  
11 in this alleged incident were never identified, which means  
12 that this Court knows nothing about the circumstances that gave  
13 rise to the officers' view of reasonable suspicion for the stop  
14 in the first place. And that's a real impediment because not  
15 knowing what the officers' view of what was occurring is very  
16 difficult to analyze the basis for the stop if you're only  
17 limited to the plaintiffs' version of events, especially when  
18 the plaintiffs don't know what the officer is thinking or what  
19 the basis for his approach is.

20 No real conclusions can be drawn when only half the  
21 story is told because the officers have never been given a  
22 chance to explain why the incident occurred, assuming that it  
23 did. But from what we do know about the incident, it appears  
24 to have started as a request for information as Mr. Floyd  
25 admitted that the first thing the officers said to him was,

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Summation - Ms. Grossman

1 excuse me, may I speak to you, sir? This is hardly the sort of  
2 statement that would make a reasonable person think that they  
3 were not free to leave. This is especially true when you  
4 consider that Mr. Floyd was well aware he could walk away from  
5 the police, and Floyd's admission that he made the decision to  
6 stay and talk to the officers, and that he thought he was free  
7 not to hand over his identification. Indeed, the officers'  
8 actions did not suggest that Floyd wasn't free to leave.

9 When the officers spoke to Floyd he was in the middle  
10 of a sidewalk, no officers were behind him. Floyd admits that  
11 the ID he gave the officers was from out of state. And he also  
12 admits that during his conversation with the officers he  
13 reached into his pocket to take out his cell phone, and it was  
14 at that point that one of the officers became nervous. Floyd  
15 says that this officer stepped toward him and asked if he had  
16 any weapons. The officer then conducted a pat-down of Floyd's  
17 outermost clothing, and when he felt the pocket in which Floyd  
18 had a hard object -- which turned out to be a cell phone -- the  
19 officer asked Floyd what the object was, suggesting that the  
20 officer was concerned the object was a weapon of some kind.

21 THE COURT: Did you say what the basis was for the  
22 pat-down?

23 MS. GROSSMAN: This is a John Doe. This is unknown.  
24 We are just trying to make the -- we are limited with what the  
25 evidence is, your Honor.

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Summation - Ms. Grossman

1 THE COURT: OK.

2 MS. GROSSMAN: That is a suggestion. That is an  
3 inference that can be drawn, your Honor.

4 Floyd claims the officer then pushed the phone up so  
5 the top of it was visible, apparently attempting to verify that  
6 the object was not a weapon. Floyd admits that the officer  
7 didn't take anything out of the pocket, that the frisk last 15  
8 seconds and then the encounter came to an end.

9 Now moving on to Mr. Ian Provost.

10 Police Officer Jonathan Rothenberg stopped Ian Provost  
11 on the sidewalk of the Seth Low NYCHA Houses in Brooklyn at  
12 about 2:30 in the afternoon on November 24, 2009 when he-when  
13 he saw knife sticking out of Provost's pants pocket. The Court  
14 never heard from Mr. Provost in person because he refused to  
15 testify in court, despite the fact that he worked in New York  
16 City as recently as October 2012, and both his fiance and  
17 mother still live in New York City.

18 Perhaps he decided not to appear because after he  
19 testified in October 2012 to having been arrested only three  
20 times and describing those arrests in detail, defendants  
21 received a release from Mr. Provost's arrest records that show  
22 that Mr. Provost was actually arrested at least four times, and  
23 Mr. Provost failed to testify regarding an arrest of his for  
24 attempted murder.

25 THE COURT: When he was 17?

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Summation - Ms. Grossman

1 THE COURT: I was just trying to clarify that it  
2 wasn't this incident.

3 MS. GROSSMAN: So based on Mr. Provost's behavior and  
4 his knowledge of the knife in Mr. Provost's pocket, Officer  
5 Rothenberg was reasonably fearful for his safety. And as a  
6 result, he removed the knife from Mr. Provost's pocket and  
7 arrested him for possession of the knife in addition to  
8 disorderly conduct.

9 Now, after the impact sergeant, Sergeant Daniel  
10 Houlahan arrived at the scene to verify the arrest and  
11 Rothenberg took Provost to the precinct, Sergeant Houlahan  
12 fulfilled his duties as supervisor by instructing Officer  
13 Rothenberg that he did not have grounds to charge possession of  
14 a gravity knife and advising him to instead issue summonses for  
15 disorderly conduct and possession of a knife with a blade  
16 larger than four inches.

17 Now I am going to go move on to Nicholas Peart stops.  
18 Nicholas Peart testified about four stops that he alleged  
19 occurred between 2006 and 2011. I am just going to give you a  
20 preview, and then I am going to go into each stop.

21 He testified that in these stops, the officers never  
22 said or indicated that he was stopped because of his race.

23 Only one of those stops has identified police  
24 officers, while the other three are so-called John Doe stops.

25 In the stop with the identified officer, Mr. Peart was

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Summation - Ms. Grossman

1 forced to admit that he lied under oath about the facts alleged  
2 in that stop.

3 And with the three John Doe stops Mr. Peart's  
4 testimony has conveniently changed over time, especially his  
5 descriptions of the officers involved in these stops.

6 Strangely, Mr. Peart was the only witness to testify  
7 that the officers involved in the stop removed his  
8 identification actually from his pocket, a very unique way of  
9 trying to get at the person's identification -- not one other  
10 officer in this very long trial testified that they actually go  
11 into the pockets and go into the wallet and take out the  
12 identification.

13 On August 5, 2006, detective, then Police Officer  
14 Benjamin White responded to multiple radio runs about a crime  
15 in progress involving three individuals with a very specific  
16 clothing description.

17 Now, after observing three individuals, including  
18 Nicholas Peart, who fit the description exactly, Detective  
19 White noticed that the three men also had bulges in their  
20 waist/pocket areas that could to them have been a gun, and they  
21 were in the vicinity of the alleged criminal activity.

22 Based on this information, Detective White stopped  
23 Nicholas Peart and his two friends. Detective White testified  
24 that while he did frisk the individuals, based in part on the  
25 suspicious bulges he observed, he did not search them or remove

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Summation - Ms. Grossman

1 White wrote in narrative comments on the form, indicating  
2 specifically what objects had created the apparently suspicious  
3 bulge in each man's pants. Detective White also indicated on  
4 that form that the individuals were suspected of a violent  
5 crime, in addition to proximity to the crime location and the  
6 report from the victim or witness.

7 Finally, Detective White indicated that he frisked the  
8 individuals because they refused to comply with orders when  
9 they initially refused to show their hands and get on the  
10 ground when ordered.

11 The day after the incident, Mr. Peart made a complaint  
12 to the CCRB. He then went to the CCRB on August 26, 2006 and  
13 gave a formal statement, where he signed a verification form  
14 attesting to the truth of his statements that day.

15 When defendants asked Mr. Peart at trial if he had  
16 ever lied about this incident, he firmly stated no twice. Mr.  
17 Peart claimed that he told the truth when he spoke to the CCRB,  
18 but he also said that he told the truth with the exception of  
19 one small detail. And that small detail was that he told the  
20 CCRB that he had split his lip during the stop, even though he  
21 sustained no such injury. Mr. Peart admitted that he wanted  
22 the CCRB to believe that he had injured himself while following  
23 the officers' orders. He claimed to have corrected the  
24 mistruth, as Ms. Patel called it, at his deposition six years  
25 later.

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Summation - Ms. Grossman

1 If Mr. Peart was willing to lie under oath in 2006,  
2 what mistruths lie in the other stops Mr. Peart testified about  
3 here in this case?

4 Now I would like to turn to the stop of Mr. Peart in  
5 the spring of 2008.

6 In the first of Mr. Peart's John Doe stops, he claims  
7 to have been stopped in spring 2008, but he has no idea which  
8 month, what day of the week it happened. He gave vague  
9 descriptions of the area of the stop and inconsistent testimony  
10 on the direction he was walking, but testified that after the  
11 stop, the officers explained that he was stopped because there  
12 was a series of burglaries in the neighborhood.

13 Now, let's go to September 2010 stop of Mr. Peart.

14 Similarly, Mr. Peart could not identify the date he  
15 was stopped in his September 2010 stop. Remarkably, what he  
16 does testify to is seeing officers briskly approaching him,  
17 even though they were behind him, and hearing them order him to  
18 put his hands on the wall, even though he was wearing  
19 headphones and could not hear a thing.

20 For Mr. Peart's fourth stop, he testified he was  
21 stopped on April 13, 2011 outside of a NYCHA building where he  
22 lived. However, in written declarations and under oath, Mr.  
23 Peart previously testified that this stop occurred in May 2011  
24 and claims that he remembered the date all of a sudden when he  
25 looked at his Facebook posts the day before the trial started.

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Summation - Ms. Grossman

1 Those same Facebook posts reveal that the front door of his  
2 NYCHA apartment building was replaced in the month before his  
3 stop and tenants had to go through a laborious process to  
4 obtain a new front door key, and they are not normal keys that  
5 you can go to any store and copy. It's a very unique type of  
6 key.

7 Mr. Peart testified that during the stop the officers  
8 asked if he had just come out of his building, and as he  
9 testified on cross-examination, Mr. Peart admitted that the  
10 officers told him that he fit the description of someone who  
11 had been ringing a doorbell at the apartment, presumably,  
12 because an individual who previously had access to that  
13 building lost that access when the door was replaced.

14 Again, your Honor, since this is a John Doe type of  
15 incident, it is hard for the city to explain from the officer's  
16 point of view what might have happened, but we believe that  
17 these are inferences that could be drawn.

18 Besides having factual allegations that is were vague  
19 and ever-changing, Mr. Peart's descriptions of the officers for  
20 each of the John Doe stops has suspiciously evolved over time.  
21 Though at his deposition in 2012, Mr. Peart could not recall  
22 any details about most of the John Doe officers, including  
23 their race or gender, at trial Mr. Peart for the first time  
24 thoroughly described these officers in great detail. We think  
25 that's something you should consider in assessing his

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Summation - Ms. Grossman

1 on the very day he stopped Mr. Lino, he had seen video of  
2 robbers fleeing from the very corner where Lino was stopped.  
3 And Officer Arias and Kovall both described how they were  
4 briefed on the pattern at roll call that day and told that the  
5 pattern involved two black males working together and  
6 displaying a black handgun and that they had been given  
7 specific descriptions of the perpetrators, including their  
8 height, age, weight, and clothing, that all closely matched Mr.  
9 Lino and his friend. Moreover, both officers explained that  
10 the pattern involved robberies at that corner, and Arias  
11 explained how one of the robberies occurred as the victim  
12 exited a check cashing location, the entrance to which is  
13 visible from where Lino was stopped.

14 Both Officers Kovall and Arias explained that the  
15 descriptions of the perpetrators given to them at roll call  
16 were specific, but because of the five years that have passed  
17 since the incident, their memory has admittedly faded. And the  
18 officers testified that they were driving around on patrol when  
19 they noticed Mr. Lino and the man he was with. Both officers  
20 explained that it was the jackets the men were wearing that  
21 first caught their attention. They both thought the jackets  
22 closely matched the ones that they had been briefed on when  
23 they started their tour.

24 So Officer Kovall talked about how the men shown in  
25 the video closely matched Mr. Lino and his friend. Kovall's

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Summation - Ms. Grossman

1 memory here is extremely credible since he described the video  
2 in near perfect detail at his deposition despite the fact that  
3 he had not seen the video in nearly five years. Arias  
4 explained that the coat he saw Mr. Lino wearing, a tan or beige  
5 jacket was a spot on match to one of the coats he was briefed  
6 on as he started his tour that night. Indeed, Mr. Lino himself  
7 says he was wearing a tannish jacket that evening.

8 In addition to the close match of the jackets, the men  
9 the officers observed matched the height, the weight, age  
10 descriptions and they were standing on the exact corner where  
11 the robberies had been occurring -- in sight of the subway  
12 exits and the check cashing location, a prime location to find  
13 potential victims.

14 The officers' interaction with Mr. Lino was limited  
15 and focused on the suspected crime. Mr. Lino and his friend  
16 were aggressive with the officers from the beginning of the  
17 stop. Officer Kovall saw one of the men reaching towards his  
18 waist area, which is a common place where people keep weapons.  
19 And since the robbers had used a black gun in all the  
20 robberies, the officers frisked the men for their safety. Lino  
21 himself admits the frisk was limited to a pat-down of his  
22 outermost clothing and said that the frisk lasted a couple of  
23 seconds.

24 To complete their investigation, the officers called  
25 the lieutenant on duty to the location. The lieutenant had

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Summation - Ms. Grossman

1 Kovall and Arias explain the basis for the stop and then he  
2 briefly spoke to Lino and his friend. This sort of supervision  
3 is precisely the sort of activity that the remedies experts  
4 described was needed -- a high ranking supervisor coming to the  
5 scene of a stop, talking with the officers about the basis for  
6 their suspicion and talking with the person stopped. The stop  
7 came to a conclusion after about 10 to 15 minutes.

8 The decision of these officers to stop, question and  
9 frisk Mr. Lino was certainly supported by reasonable suspicion.

10 Now moving on to the February 24, 2011 stop.

11 Mr. Lino's second stop occurred almost three years  
12 later and in the same location. This time he was wearing a red  
13 leather Pelle Pelle brand jacket. And this time Mr. Lino was  
14 stopped by Officers Leek and Figueroa. The officers explained  
15 how they started their tour of the day that day of the stop,  
16 that they were shown a wanted poster in connection with a  
17 recent murder.

18 The poster showed a black male wearing a rare and  
19 distinctive jacket -- a red leather Pelle Pelle jacket with a  
20 white mark on one arm and a dark pattern on the back. The  
21 wanted poster described the suspect as five nine to six feet,  
22 male back, and because one of the photos on the poster showed  
23 the actual man, the officer knew the man was medium build and  
24 that the jacket was baggy on him.

25 Leek and Figueroa started their tour that night on

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Summation - Ms. Grossman

1 foot post, but part way through the night their sergeant picked  
2 them up to do some directed patrols. Again, this is the sort  
3 of direct supervision that allows three street-level  
4 supervisors to know that their officers understand and are  
5 following the Constitution.

6 One of the directed patrols the officers conducted was  
7 in the subway station at 103rd Street and Lexington Avenue. At  
8 about 9:45 p.m., the officers saw Clive Lino walk through the  
9 turnstiles. The officers both noticed that Lino was wearing a  
10 jacket that closely matched the jacket in the wanted poster.  
11 Lino's jacket, like the one in the wanted poster, was a red  
12 leather Pelle Pelle brand jacket. It also had a white mark on  
13 the arm and a dark pattern on the back. In addition, Lino  
14 himself closely matched the man in the wanted poster. He is  
15 five ten, medium build, and the jacket was baggy on him.

16 The officers stopped Mr. Lino on the subway platform.  
17 He was immediately aggressive with the officers and due to the  
18 crime suspected -- murder -- the fact that the baggy jacket  
19 could be used to conceal a weapon, Mr. Lino's refusal to comply  
20 with the officers' directions that he put his bag down, the  
21 officers were concerned for their safety and they frisked him.

22 The frisk was appropriately limited to a pat-down of  
23 the outside of his jacket and waist. Lino himself admitted at  
24 his deposition that the frisk was a limited pat-down, but he  
25 changed his story at trial and suggested that because he felt a

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Summation - Ms. Grossman

1 MS. GROSSMAN: (Continuing) Moving on to Mr. Leroy  
2 Downs.

3 You've heard testimony from Leroy Downs about a police  
4 encounter that he says occurred on August 20, 2008 in the Saint  
5 George section of Staten Island. Your Honor will recall that  
6 this is the stop in which officers Giacona and Mahoney were  
7 identified by CCRB and disciplined by NYPD for insufficient  
8 memo book entries regarding the details of their activity that  
9 day, even though they both testified that they do not recall  
10 making the stop and did not recognize Mr. Downs.

11 For his part, Mr. Downs testified at trial, some  
12 four-and-a-half years after the incident, that he would never  
13 forget the officers' faces and he confirmed their  
14 identification in court after your Honor called the officers  
15 back. However, at the CCRB, 17 months after the incident,  
16 Mr. Downs failed to select these two officers from a photo  
17 array.

18 No UF 250 was prepared for this incident, but both  
19 officers testified that their practice is to complete 250s when  
20 they conduct stops. Downs may be mistaken in identifying  
21 Giacona and Mahoney as the officers he encountered.

22 As for the stop itself, Mr. Downs says he was standing  
23 in front of his house talking on the phone.

24 As your Honor saw from the photograph, one of the  
25 photographs we included in evidence, the way Mr. Downs was

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Summation - Ms. Grossman

1 holding his microphone makes it appear that he was smoking  
2 something.

3           Indeed, Mr. Downs says the first thing the officers  
4 said to him was "Hey buddy, it looks like you are smoking  
5 weed."

6           Thus, regardless of who stopped Mr. Downs, if anyone,  
7 this stop too is not suspicionless as plaintiffs claim. It was  
8 based on the suspicion that Mr. Downs was smoking marijuana in  
9 public, a penal law misdemeanor.

10           Indeed, Mr. Downs himself admitted at his deposition  
11 that he thought it was legitimate for the police to question  
12 someone who appeared to be smoking marijuana in public, but  
13 that he took issue with the officers frisking and searching  
14 him.

15           As for the frisk, Mr. Downs says the officers patted  
16 down his outer clothing and then took out of his pocket his  
17 wallet, keys, and a bag of cookies. Because we do not have  
18 officers who recall the incident, we do not have the full  
19 perspective of why Mr. Downs was frisked or why the officers  
20 allegedly went into his pockets. If, for example, during the  
21 initial discussion the officers became concerned for their  
22 safety -- because of Mr. Downs' tone, actions, a bulge in his  
23 pants created by the contents of his pockets, or any number of  
24 other factors, the frisk would be justified. The problem is  
25 that we do not know whether or why the officers did what Downs

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Summation - Ms. Grossman

1 claims.

2 The point is that even in the limited version of this  
3 incident that we get from Mr. Downs' memory of the incident,  
4 which has changed over time, we see that there was cause to  
5 approach him and that there may have been good reasons to risk  
6 and search him; thus, the stop does not further plaintiffs'  
7 theory of widespread --

8 THE COURT: I'm sorry. Would you repeat that about  
9 may have been good grounds, what is that again, for frisking?

10 MS. GROSSMAN: There's a distinction between the  
11 approach and then a frisk.

12 THE COURT: What's the basis for the frisk?

13 MS. GROSSMAN: Well, again, because we don't have any  
14 officers who have a memory.

15 THE COURT: Well, right. Don't have a memory.

16 MS. GROSSMAN: So an inference might be drawn if -- we  
17 just don't know what the basis would have been for a frisk.  
18 There could have been a whole host of reasons that could have  
19 raised safety concerns to the officers.

20 THE COURT: That would really cause me to have to  
21 speculate, right?

22 MS. GROSSMAN: Right. Right.

23 Well this incident doesn't support theories of racial  
24 profiling, however, your Honor as Downs admitted neither  
25 officer made any comment about his race, nor any comment that

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Summation - Ms. Grossman

1 even suggested his race had anything to do with the stop.

2 Now I'm going to move on to Mr. Devin --

3 THE COURT: For the record, he was a black man in  
4 Staten Island, right?

5 MS. GROSSMAN: Yes, your Honor.

6 THE COURT: And the identified officers, do you  
7 recall? Were they both white? Do you recall?

8 MS. GROSSMAN: Well we, again, the two officers --

9 THE COURT: The ones that the CCRB identified.

10 MS. GROSSMAN: Yes. They are white.

11 Now with respect to Devin Almonor.

12 There is no objective evidence to suggest based on  
13 what he testified to that the basis for the approach was based  
14 on race.

15 THE COURT: Right. I'm just saying that this is not  
16 one that the city defends with a high crime area or a crime  
17 condition or any of those explanations, right?

18 MS. GROSSMAN: There may be conditions in this  
19 particular area.

20 THE COURT: No. No. Was there evidence of it? Was  
21 there any evidence in the record that that was the basis for  
22 this stop?

23 MS. GROSSMAN: No. I think that what appears to be  
24 the basis is based on plaintiffs' version of events which is  
25 that he was possibly smoking what appeared to be marijuana.

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Summation - Ms. Grossman

1 THE COURT: Something he denies entirely, says he is  
2 speaking on the phone?

3 MS. GROSSMAN: Yes.

4 THE COURT: And the identified officers have no memory  
5 of this stop and no memo book entry?

6 MS. GROSSMAN: But these officers were part of gang --  
7 they were part of a gang unit and they were in Staten Island as  
8 gang officers so if they were in the area --

9 THE COURT: And they were in plain clothes that day,  
10 right.

11 MS. GROSSMAN: Yes.

12 THE COURT: But the photo spread was uniformed  
13 officers, do you recall?

14 MS. GROSSMAN: Well the photo spreads were -- they  
15 were not in uniform. They were just wearing -- I think all the  
16 photos were of the same color shirt. So I don't believe  
17 that --

18 THE COURT: Not T shirts?

19 MS. GROSSMAN: Just like a colored shirt. That all  
20 the photos, everyone was wearing the same shirt. So that there  
21 was nothing that stands out in the photo array to draw your  
22 attention. So it's not as if the photos were of officers in  
23 police uniform.

24 Devin Almonor. He was stopped and frisked on  
25 March 20, 2010 because based on Officer Dennis and Lieutenant

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Summation - Ms. Grossman

1 Korabel's background and experience, they reasonably believed  
2 that Mr. Almonor was in possession of a weapon, based on his  
3 observed actions that day in an area where there had been  
4 complaints of disorderly youth.

5 THE COURT: Is this the young man?

6 MS. GROSSMAN: Yes.

7 THE COURT: The son of the police officer?

8 MS. GROSSMAN: Yes. That is correct, your Honor.

9 THE COURT: How old was he at the time?

10 MS. GROSSMAN: He was 13 at the time. It was a  
11 Saturday evening. 10:10 at night. About an hour and ten  
12 minutes out there on a Saturday night unaccounted for, not  
13 knowing -- where there's a lot of disorderly youth and garbage  
14 strewn all over.

15 THE COURT: What does "unaccounted for" mean?

16 MS. GROSSMAN: Well his time was unaccounted. I don't  
17 think he has memory and is unable to explain about an hour and  
18 ten minutes of his time that he's out there at around 10:10 at  
19 night when all of the 911 calls are coming in to the police.

20 So Mr. Almonor essentially claims that he happened to  
21 be in the wrong place at the wrong time. But we would submit  
22 there are parts of his story that just don't make sense.

23 First, like I said, he can't account for almost an  
24 hour-and-a-half of his time at night before he was stopped at  
25 10:10.

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Summation - Ms. Grossman

1 THE COURT: What year was this stop?

2 MS. GROSSMAN: This was in 2010. March 20, 2010.

3 Also he claims that he was going to the deli to meet  
4 up with his brother, but can't remember if he remained outside  
5 the deli five minutes or an hour. And when Mr. Almonor finally  
6 did leave the deli, he claims he did so to walk toward his  
7 home, but not with his brother.

8 So that night Officer Dennis and Lieutenant Korabel  
9 were in the vicinity of Hamilton Place in Harlem in response to  
10 numerous 911 calls. And these calls described a large fight,  
11 including dozens of youths throwing garbage cans into the  
12 street, setting off car alarms, with possible weapons involved.

13 The officers drove to the area and confirmed the  
14 damage, these disorderly groups caused, but somehow  
15 Mr. Almonor, whom I said was about 13-years-old at the time,  
16 was out and about at 10:10 on a Saturday evening.

17 He didn't see anything that the many 911 callers and  
18 two police officers observed. He saw nothing during that  
19 period of time in the area.

20 Well, when the officers were driving down Hamilton  
21 Place, they observed Mr. Almonor first looking behind him  
22 repeatedly and then jaywalking across the street from the east  
23 side of the street to the west.

24 Mr. Almonor gave conflicting testimony about whether  
25 he was jaywalking and which direction he was going.

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Summation - Ms. Grossman

1 And having observed Mr. Almonor jaywalking, the  
2 officers had a basis to approach him and arrest him regardless  
3 of whether it was their original --

4 THE COURT: I'm sorry. Did you say "and arrest him"?

5 MS. GROSSMAN: Not arrest him. But to approach him  
6 and issue him a summons for the jaywalking.

7 And though jaywalking on its own may not be indicative  
8 of engaging in a crime, a summonable offense, Lieutenant  
9 Korabel explained it can be indicative of flight when paired  
10 with other factors. Flight from --

11 THE COURT: I'm sorry. Jaywalking is indicative of a  
12 flight?

13 MS. GROSSMAN: Well the idea of jaywalking and  
14 crossing the street, trying to distance yourself from the  
15 police, trying to --

16 THE COURT: I'm sorry. Wait a minute. Trying to  
17 distance himself from the police. Are you saying that  
18 jaywalking was because he observed the police? Was that the  
19 theory?

20 MS. GROSSMAN: That's an inference we believe the  
21 court can draw from that.

22 The observation --

23 THE COURT: Did he say he saw the police?

24 MS. GROSSMAN: Well, I believe our officers believe  
25 that -- and it could have been trying to get away from whatever

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Summation - Ms. Grossman

1 disorderly conduct was going on in the area, whatever the basis  
2 for those 911 calls were.

3           So this observation was considered by the officers in  
4 addition to what else they observed. And including the fact  
5 that Mr. Almonor kept looking over his shoulder repeatedly in  
6 the direction of the previous 911 calls.

7           The officers also believed -- observed that he held  
8 his waistband in a manner that's commonly performed by  
9 individuals carrying unholstered weapons.

10           Now we know he didn't a weapon. We know that. But  
11 given the quick pace and what can often happen when someone  
12 makes these quick movements, that is something that the  
13 officers pay attention to and it is something that registered  
14 with those officers.

15           So, he also continued to hold the right side of his  
16 body away from the officers even after he was stopped, which  
17 the officers interpreted as Mr. Almonor trying to keep a weapon  
18 out of their line of sight.

19           The officers admitted at trial that on their own,  
20 these observations would not have amounted to reasonable  
21 suspicion, alone, but in the totality of all the circumstances,  
22 these observations together led the officers to believe that  
23 Mr. Almonor may have been carrying a weapon, and therefore, for  
24 safety reasons, the officers stopped and frisked Mr. Almonor,  
25 and he struggled throughout and refused to let the officers

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1 frisk the right side of his body, which made the officers more  
2 suspicious of Mr. Almonor's conduct.

3 Following his arrest, Almonor admitted that he gave  
4 the officers a fake name.

5 THE COURT: I'm sorry. And he was arrested for?  
6 If you recall.

7 MS. GROSSMAN: At that time they were unable to  
8 determine if he was a minor or if he was of majority age. So  
9 they could not give him a summons. And so they brought him  
10 back to the precinct because if he's a minor --

11 THE COURT: You say following his arrest. Was he  
12 arrested?

13 MS. GROSSMAN: Well he was detained. He was removed  
14 from the street, put in the police car, and brought back to the  
15 precinct. And his parents were called to come to the precinct  
16 and bring him home.

17 So following his arrest, Almonor admitted that he gave  
18 the officers a fake name. And Almonor claims that the officers  
19 never asked him for his phone number, but we know that the  
20 officers actually did call Almonor's parents to have them pick  
21 him up in the precinct.

22 Now I would like to move on to the matter with  
23 Cornelio McDonald.

24 Now with respect to Cornelio McDonald's stop on  
25 December 19, 2009. At the outset, Mr. McDonald's credibility

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Summation - Ms. Grossman

1 is seriously called into question by a number of issues, we  
2 would submit.

3 First, Mr. McDonald admits that he personally filed a  
4 number of frivolous lawsuits where he's claimed racial  
5 discrimination by the U.S. postal service. Mr. McDonald  
6 testified that this case is still pending -- even though, as  
7 noted in the record, this case has been closed and dismissed  
8 against Mr. McDonald. In fact, Mr. McDonald, who frequently  
9 appears pro se, has no recollection of how many lawsuits he's  
10 filed as a plaintiff. Simply put, Mr. McDonald's apparent  
11 belief he's being discriminated against -- along with his  
12 litigious nature -- sheds light on Mr. McDonald's biased  
13 mind-set against the police.

14 Secondly, Mr. McDonald has such a different view of  
15 what constitutes a stop. He believes he's being stopped every  
16 time an officer says "hello" to him. That's how he defines a  
17 stop. Any time an officer says "hello" he believes he's being  
18 forcibly stopped, stopped pursuant to Terry he would argue.

19 Perhaps most significantly, Mr. McDonald's many  
20 inconsistencies between his trial testimony and his deposition  
21 testimony call into question his entire version of events. The  
22 changes in his testimony -- particularly with respect to the  
23 contents of his pockets, the location of the stop, and what the  
24 officers told him after the stop -- lend doubt to  
25 Mr. McDonald's entire claim.

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Summation - Ms. Grossman

1           So, Detective Edward French, he testified that he had  
2 reasonable suspicion to believe Mr. McDonald was carrying a  
3 weapon because he observed a suspicious bulge in Mr. McDonald's  
4 left jacket pocket; it was also because of the way Mr. McDonald  
5 was walking and shifting his body which Detective French  
6 understood was consistent with the characteristics of someone  
7 carrying a weapon.

8           Detectives French's knowledge of robbery and burglary  
9 patterns on December 19, 2009 in the vicinity of the stop also  
10 contributed to the basis for why he approached Mr. McDonald.

11           With respect to the crime patterns, Detective French  
12 testified that he was familiar with the area where the stop  
13 occurred -- and had even made an arrest of an armed subject for  
14 robbery weeks before the incident. Detective French testified  
15 that he remembers being aware of two robbery patterns at the  
16 time of the incident -- one regarding an African-American male  
17 with a firearm holding up commercial establishments, and one  
18 regarding an African-American male burglarizing residences.  
19 Detective French was candid on the stand. He could not  
20 remember any further details of these patterns.

21           Plaintiffs will try to portray Detective French's  
22 truthfulness as evidence that the patterns were meaningless.  
23 In reality, as Detective French explained, any further detail  
24 about the patterns would have been provided at the meeting that  
25 he would have had with the officers at roll call at the start

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Summation - Ms. Grossman

1 of his tour. As such, Detective French would have known about  
2 these details at the time he stopped Mr. McDonald. After  
3 stopping Mr. McDonald, Detective French frisked the jacket  
4 pocket containing the suspicious bulge based on his reasonable  
5 fear for his safety.

6 THE COURT: Was that based on the crime pattern in the  
7 area?

8 MS. GROSSMAN: Well the crime pattern in the area, the  
9 basis for it's a violent crime that he is suspecting that has  
10 occurred in the area, and then the suspicious bulge, putting  
11 those factors all together --

12 THE COURT: The only conduct with Mr. McDonald is the  
13 suspicious bulge? Is that right or wrong?

14 MS. GROSSMAN: Well it's also proximity to where other  
15 patterns are happening right in the immediate area where there  
16 are commercial robberies.

17 THE COURT: So the basis for the frisk is?

18 MS. GROSSMAN: Safety concern.

19 THE COURT: And he's armed?

20 MS. GROSSMAN: Yes.

21 Now Detective French felt a hard object that he  
22 couldn't identify. He was still concerned for his safety. So  
23 he did a quick limited search of the jacket pocket and learned  
24 that the hard object was a cellphone.

25 It's true, there was no weapon in it -- there was no

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1 weapon in Mr. McDonald's pocket that night.

2 It's easy to look back on this stop in hindsight and  
3 say it was just a cellphone. Detective French, an experienced  
4 police officer, reasonably suspected that Mr. McDonald was  
5 carrying a weapon. And his success or failure in finding a  
6 weapon does not obviate the reasonable suspicion.

7 THE COURT: Let me just go over that for a minute.  
8 All the stops that you have and will talk about, no  
9 guns were found, right, on any of them?

10 MS. GROSSMAN: That's true, your Honor.

11 THE COURT: On any of them? Each time there was a  
12 suspicion of guns.

13 MS. GROSSMAN: That's true, your Honor. That's true.  
14 But the standard for reasonable suspicion is different than the  
15 standard for probable cause.

16 THE COURT: Well, of course.

17 But a lot of people are being frisked or searched on  
18 suspicion of having a gun and nobody has a gun.

19 So the point is: The suspicion turns out to be wrong  
20 in most of the cases with respect to guns. True?

21 MS. GROSSMAN: Well that's true. We haven't found any  
22 guns. Thankfully.

23 Detective French ultimately explained to Mr. McDonald  
24 the basis for the stop and obtained his pedigree information  
25 and completed a 250 in his -- as well as an activity log

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Summation - Ms. Grossman

1 regarding the stop. Defendants submit that reasonable  
2 suspicion did exist for the stop of Mr. McDonald. And we know  
3 that reasonable suspicion can exist even if you don't find a  
4 gun.

5 THE COURT: Of course. Nobody is questioning that.  
6 I'm just saying all these stops testified to here, many of them  
7 had frisks, some of them had searches, all because of fear that  
8 the person had a gun and nobody had a gun.

9 Some of the reasonable suspicion stops have to do with  
10 suspicious bulge, tugging at the waistline, hiding the right  
11 side, all this stuff, but there is no gun.

12 MS. GROSSMAN: It's not just a gun that could be a  
13 threat. It could be any kind of weapon.

14 THE COURT: It could.

15 MS. GROSSMAN: Now referring to Deon Dennis.

16 With respect to plaintiff Deon Dennis' stop, there are  
17 a number of facts that are not in dispute by the parties.

18 Mr. Dennis testified that on the evening of Saturday,  
19 January 12, 2008, he arrived at his girlfriend Kendra Edwards'  
20 apartment to help set up for Ms. Edwards' birthday party, which  
21 was scheduled to begin at 11 p.m. in her apartment.

22 While Mr. Dennis was preparing for the party, there is  
23 no dispute they had a beer and a cup of brandy. Mr. Dennis  
24 testified that the brandy was in a cup that looked foggy to an  
25 outside observer, similar to a water cup.

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Summation - Ms. Grossman

1           There is no dispute that a little before 11 p.m.,  
2 right before the party was about to begin, Ms. Edwards, his  
3 girlfriend, left the apartment briefly to go pick up more party  
4 supplies. And Mr. Dennis was downstairs to smoke a cigarette  
5 in front of the building.

6           There is no dispute that Mr. Dennis was alone standing  
7 in front of the building. Mr. Dennis testified that the street  
8 was well-lit, there were no other pedestrians around, and  
9 besides Mr. Dennis, the street was empty.

10           That same evening, Officers Angelica Salmeron.

11           THE COURT: I'm sorry. What?

12           MS. GROSSMAN: Salmeron. Officer Angelica Salmeron,  
13 the officers who approached Mr. Dennis, and Luis Pichardo, they  
14 were on patrol on 7th Avenue in Harlem. And they were  
15 responding to neighborhood complaints of drinking, excessive  
16 noise, and marijuana use in the area. And at around 11 p.m. --  
17 the same time the party was supposed to get started -- the  
18 officers observed Mr. Dennis standing alone in front of  
19 Ms. Edwards' apartment building on 7th Avenue.

20           Here is where the versions of the events diverge. The  
21 officers testified that they observed Mr. Dennis drinking from  
22 a transparent plastic cup containing brown liquid. They  
23 observed a bottle of Hennessy alcohol right next to him.

24           The officers approached Mr. Dennis and asked him what  
25 he was doing. Mr. Dennis, who continued drinking from his cup

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1 as the officers approached him, told the officers that he was  
2 drinking some Hennessy, it was a Saturday night, and it was his  
3 girlfriend's birthday. Officer Pichardo then smelled the  
4 contents of both the cup and the bottle and determined that  
5 both contained alcohol.

6 Mr. Dennis, meanwhile, claims he was not drinking from  
7 any cup outside his girlfriend's building. But Mr. Dennis  
8 testified that there was, in fact, a cup only a few feet away  
9 from where he was standing outside the building.

10 Mr. Dennis believes that this cup is the reason why  
11 the officers thought he was drinking -- he's apparently arguing  
12 that the cup just coincidentally happened to be there.

13 Yet, let's look at the evidence. Mr. Dennis testified  
14 he was drinking brandy out of a cup in his apartment about a  
15 half an hour before the stop; Mr. Dennis testified that he went  
16 outside to smoke a cigarette for only about five minutes;  
17 Mr. Dennis was waiting for the party to start any minute, as  
18 guests would be arriving around 11 p.m.; and Mr. Dennis  
19 testified that he told the officers he had indeed been drinking  
20 earlier in the evening. On top of all of that, the officers  
21 testified that Mr. Dennis was drinking hard liquor outside the  
22 building similar to the brandy he was drinking in the  
23 apartment.

24 The officers intended to give Mr. Dennis a summons for  
25 an open container of alcohol at that time, but Mr. Dennis was

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1 arrested due to an outstanding warrant after they checked his  
2 identification.

3 Defendant submits that the Deon Dennis stop was based  
4 not only on reasonable suspicion, but on probable cause for the  
5 summonable offense of drinking alcohol in public. No summons  
6 was issued, however, to Mr. Dennis that night. But that's  
7 because he was instead arrested on the outstanding warrant.

8 Moreover, although Mr. Dennis testified that he  
9 believed he was stopped because of his race, there was  
10 absolutely no evidence that the officers said anything about  
11 Mr. Dennis' race and Mr. Dennis concedes that the two Hispanic  
12 police officers who stopped him were always polite throughout  
13 the entire encounter.

14 Finally, plaintiffs have criticized Officer Salmeron  
15 for receiving a substantiated CCRB related to a stop conducted  
16 in 2006. Yet, since --

17 THE COURT: I just want to finish with the Dennis  
18 stop. The Dennis stop had no frisk?

19 MS. GROSSMAN: I don't -- I'm not a hundred percent  
20 sure.

21 THE COURT: Okay. No problem.

22 MS. GROSSMAN: Yet, so on the CCRB. Officer Salmeron  
23 received a substantiated CCRB related to a stop conducted in  
24 2006. Yet, since that single discipline in 2006, Officer  
25 Salmeron has not received any substantiated charges related to

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Summation - Ms. Grossman

1 any stop, question, or frisk allegations through the present  
2 day.

3 Now I'm going to move on to Kristianna Acevedo.

4 I understand that Mr. Dennis, he was frisked after the  
5 arrest.

6 Moving on to Kristianna Acevedo. On May 29, 2007  
7 narcotics detective Damian Vizcarrondo, Michele Hawkins, and  
8 Louis DeMarco were driving an unmarked vehicle en route to a  
9 buy-and-bust operation in Queens, New York. As they were  
10 driving on 43rd Street, a desolate area with abandoned  
11 buildings in the vicinity of known narcotics transactions, they  
12 observed Ms. Kristianna Acevedo walking alone on the street.

13 Now, make no mistake about it. These detectives did  
14 not intend to stop Ms. Acevedo. Detective DeMarco and  
15 Detective Vizcarrondo, both of whom were in the front seat and  
16 who had the best view of Ms. Acevedo as she was walking, saw  
17 Ms. Acevedo move her head over her shoulder a few times.  
18 Detective Vizcarrondo and -- thought Ms. Acevedo appeared  
19 angry. No officer, however, reasonably suspected Ms. Acevedo  
20 of any criminal behavior. Rather, the detectives were engaging  
21 in a request for information. And Ms. Acevedo was free to  
22 leave at any point.

23 The reason for the officers approach was to gain  
24 intelligence about narcotics in the area. Detective DeMarco  
25 had personally taken part in drug arrests in the vicinity

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Summation - Ms. Grossman

1 shortly before this incident in May 2007. Each of the  
2 detectives testified that they would frequently speak with  
3 individuals in the neighborhoods experiencing problems with  
4 narcotics because it was helpful to -- it was a helpful way to  
5 learn more about what was going on in the community.

6       Once the vehicle slowed down, there are some  
7 significant distinctions between plaintiffs' and defendant's  
8 version of events.

9       Defendant submits that Detective DeMarco rolled down  
10 the window of his vehicle and said to Ms. Acevedo, "Hi.  
11 Police. How are you doing? Can I talk to you," in a calm and  
12 respectful manner. Detective DeMarco had his shield  
13 prominently displayed.

14       Ms. Acevedo, in contrast, testified at her deposition  
15 that the first thing Detective DeMarco said was, "Hey, can I  
16 see your tattoos?" Ms. Acevedo backed away from this claim at  
17 trial, when she was confronted with the fact that she told CCRB  
18 that first thing Detective DeMarco said was, "Hey, come here."

19       Detective DeMarco subsequently stated that he wanted  
20 to ask her a question and see if she lived in the neighborhood.  
21 In response, Ms. Acevedo proceeded to curse at the officers and  
22 yell, "You're not a cop," and ran from the officers.

23       But the detectives each testified that they did not  
24 want to leave a pedestrian afraid and running from the police.  
25 Further, Detective Hawkins testified that there had been media

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Summation - Ms. Grossman

1 reports of individuals impersonating police officers at the  
2 time of the incident. And as a result, with all good  
3 intentions, the detectives put their vehicle in reverse to try  
4 to speak with Ms. Acevedo again, to explain that she was in no  
5 danger.

6 Again, even during the second encounter, the officers  
7 did not reasonably suspect Ms. Acevedo of any crime.

8 You've heard evidence that Ms. Acevedo stopped running  
9 when she reached a UPS van. The detectives approached her  
10 again at that point. But she continued walking throughout this  
11 second encounter, giving further credence to support the  
12 concept that she was always free to leave.

13 The detectives then attempted to explain to  
14 Ms. Acevedo that they were, in fact, NYPD officers. And you  
15 saw Detective Hawkins demonstrate on the witness stand how she  
16 identified herself to Ms. Acevedo.

17 Ms. Acevedo's trial version of events is seriously  
18 flawed in that she testified that Detective Hawkins searched  
19 her pockets and viciously slammed her head against the side of  
20 a van during the encounter, a charge Detective Hawkins  
21 vehemently denied. But Ms. Acevedo failed to mention these  
22 very allegations at her 2007 CCRB interview only months after  
23 the incident. Rather, she decided to raise these issues for  
24 the first time six years later.

25 Defendants submit that this request for information by

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Summation - Ms. Grossman

1 the street and when he was in the middle of the sidewalk, he  
2 says the men he saw in the bodega spoke to him. They said,  
3 "Hey, come over here, can I talk to you?"

4 Rather than saying "No, I am going to work,"  
5 Mr. Clarkson voluntarily decided to go over to the men and  
6 speak to them.

7 A reasonable person would not have thought the  
8 question, "Can I talk to you," was a command by a police  
9 officer to not leave the area. A reasonable person would have  
10 taken this to mean exactly what it says, "If you are willing,  
11 can I talk to you?" And Mr. Clarkson admits he made no attempt  
12 to leave the area. Never asked the officers if he was free to  
13 go, and never told the officers he didn't want to talk to them.

14 THE COURT: Did he testify here whether he felt free  
15 to go?

16 MS. GROSSMAN: I'm going to get to what eventually  
17 happens.

18 Mr. Clarkson admits he then spoke to the men for a  
19 minute or two, and that the officers pointed to a building down  
20 the block and asked if he knew anything about the drug activity  
21 that was going on in that building.

22 And the officers said, according to him, that they saw  
23 him walk past the building and that there was a problem with  
24 drugs there. And they just wondered if he knew anything about  
25 that.

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Summation - Ms. Grossman

1           Such a discussion though, we would submit, is not a  
2 Terry stop. It is simply asking a member of the community for  
3 information to address crime conditions.

4           And Mr. Clarkson, who was a teacher at the time, I'm  
5 sure would be concerned about drug dealing operating on the  
6 same block as the school. He would probably -- I would imagine  
7 he would want the officers from nearby precincts to do  
8 something about the drug activity.

9           Mr. Clarkson, though, admits that the officers did not  
10 display their guns. Never took out their handcuffs, never saw  
11 a nightstick.

12          Mr. Clarkson does claim that the officers asked him if  
13 he had contraband on him, and that when he responded no, they  
14 asked if they could check. Plaintiff told them no, as was his  
15 right. And the officer honored his denial and walked away.

16          And we have heard testimony, I believe, that he was a  
17 member of the Malcolm X Grassroots movement, an advisory group  
18 who offers training to the community on knowing your rights  
19 about stop, question and frisk.

20          THE COURT: So did he say he felt free to leave, or he  
21 didn't say one way or the other, from the beginning of the  
22 encounter?

23          MS. GROSSMAN: I don't see those words. I'm not  
24 looking at what -- I don't think the test is --

25          THE COURT: No. It's not subjective. It's objective.

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Summation - Ms. Grossman

1 But I just want to know if he gave any testimony. If you don't  
2 recall, that's fine. Or maybe he didn't. That's fine too.

3 MS. GROSSMAN: But objectively, the fact that he felt  
4 free to say I do not consent to a search.

5 THE COURT: I wasn't interested in the search. I was  
6 asking whether he felt free to leave.

7 MS. GROSSMAN: I understand.

8 THE COURT: If you remember some of the police  
9 officers later in the trial said it all depends on tone of  
10 voice. "Come here" can be said one way or another way. I  
11 remember there was police officer testimony: It all depends  
12 how it's said. So I'm wondering if he said he felt free to  
13 walk away from the request to talk.

14 MS. GROSSMAN: I believe he testified he did not feel  
15 free to leave.

16 THE COURT: Okay.

17 MS. GROSSMAN: Mr. Clarkson was not frisked and the  
18 officers never touched him in any way. The fact that  
19 Mr. Clarkson claims the officers took a step towards him while  
20 asking if they could check for any contraband does not change  
21 the fact that when he said no, the officers did not touch him.  
22 Indeed, Mr. Clarkson admitted that the officers were about  
23 three feet away from him while they spoke to him.

24 Now, plaintiffs will argue a reasonable person in  
25 Mr. Clarkson's shoes would not have felt free to leave because

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Summation - Ms. Grossman

1 Mr. Clarkson claims that when he went over to talk to the  
2 officers he was standing next to the wall of the bodega. He  
3 says the officers walked over to him -- again, at a distance of  
4 about three feet -- and then engaged in a conversation.  
5 Mr. Clarkson claims the men were blocking his path to leave,  
6 but such a claim makes little sense when you consider the fact  
7 that it was Mr. Clarkson who decided where to stand that  
8 afternoon. He was the one that walked over to the officers.  
9 He was the one that chose to stand against the wall of the  
10 bodega, and he was the one that chose to speak with the  
11 officers rather than leave the area.

12 As the facts here clearly show, Mr. Clarkson was asked  
13 if he was willing to talk. He was asked if he knew anything  
14 about a crime problem, and then the officers left after he  
15 indicated he no longer was willing to cooperate. So we would  
16 submit that that's not a Terry stop.

17 THE COURT: So again is there no 250 and no memo book  
18 entry? Both those questions.

19 MS. GROSSMAN: Okay.

20 Finally, a word needs to be said about why the  
21 officers were never identified for this incident.

22 THE COURT: I'm sorry. Which is it?

23 MS. GROSSMAN: This is unidentified. So there  
24 wouldn't be any paperwork.

25 THE COURT: So my question was, the previous one, was  
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Summation - Ms. Grossman

1 there a 250 and a memo book on the bodega questioning stop?

2 MS. GROSSMAN: Well this is the -- there was no  
3 identified officer.

4 THE COURT: Okay.

5 MS. GROSSMAN: This is Mr. Clarkson and he didn't  
6 identify any officers. So there wouldn't have been a 250 or a  
7 memo book.

8 THE COURT: Right.

9 MS. GROSSMAN: Finally, a word needs to be said  
10 about -- so I wanted to just talk a little bit about the  
11 efforts to identify the unknown officers.

12 Mr. Clarkson does not recall the day the incident  
13 happened. He never filed a complaint about the incident with  
14 the CCRB or anyone else. Thus, when the city first learned  
15 about his claims it was years after the incident occurred.  
16 Nevertheless, the city endeavored to determine who these  
17 officers were.

18 Detective Albano testified that during the course of  
19 discovery he searched the electronic 250 database but found  
20 nothing. Mr. Clarkson viewed two photo arrays of officers who  
21 fit the vague descriptions provided by him -- which is male,  
22 Latino, with dark hair; and male Caucasian -- one of which was  
23 conducted without defense counsel or NYPD present.

24 But Mr. Clarkson never identified anyone definitively  
25 and Detective Albano was not able to connect to the stop any of

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Summation - Ms. Grossman

1 MS. GROSSMAN: That's in this particular set of facts.  
2 Yes, your Honor.

3 As this frisk was being conducted Mr. Ourlicht was  
4 screaming at Officer Moran and threatened to fight him. In  
5 fact, Sergeant Moran was concerned -- so concerned for his  
6 safety --

7 THE COURT: So let me interrupt again.

8 So is a frisk warranted on every suspicious bulge?

9 In other words, any stop that's based on suspicious  
10 bulge or furtive movement of the hand to the waist would you  
11 argue that, therefore, a frisk is warranted?

12 MS. GROSSMAN: I think it always depends on the  
13 circumstances.

14 THE COURT: Right. But if that was all we knew, in  
15 other words, not high crime, not a burglary investigation, not  
16 a robbery or a homicide; but the suspicious bulge or the hand  
17 to the waist, which is the basis for the stop, would that also  
18 be suspicion for the frisk? Because I think that is this case.

19 That's what I'm saying. Do you argue that that is  
20 okay?

21 MS. GROSSMAN: I think in this case it is.

22 THE COURT: But I thought in this case at that point  
23 there was nothing but the same suspicion as for the stop.

24 MS. GROSSMAN: Well I think that those factors can be  
25 considered for both.

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Summation - Ms. Grossman

1 THE COURT: Right. That's my very question. If your  
2 only basis for the stop is suspicious bulge or furtive  
3 movement, hand to waist, and that's your basis for the stop,  
4 would that give you enough basis for a frisk without more?

5 MS. GROSSMAN: Well I think it depends on the  
6 circumstances.

7 THE COURT: Right. You've said that.

8 But I'm saying if there's nothing else. If it's not  
9 we're investigating a pattern of robberies, or a man with a gun  
10 was here yesterday, that kind of thing. If you don't have  
11 that, if you just have the bulge -- let me just finish -- if  
12 you just have the bulge or the hand-to-the-waist furtive  
13 movement as the basis for the stop and there is nothing more,  
14 does -- is that enough to warrant the frisk?

15 MS. GROSSMAN: I think that once -- let's suppose the  
16 officer approaches, and then he sees his cellphone, and is able  
17 to observe that it's a cellphone bulge.

18 THE COURT: He can't do that.

19 If he sees a suspicious bulge and/or hand-to-the-waist  
20 furtive movement -- that was the basis for a stop -- is it the  
21 city's argument that that would also support a frisk?

22 MS. GROSSMAN: I believe that it could. Yes.

23 THE COURT: Okay.

24 MS. GROSSMAN: So Officer Moran testified that through  
25 his training and experience individuals carrying weapons often

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Summation - Ms. Grossman

1 try to divert an officer's attention through verbal exchanges.

2 Again, your Honor, when you look at the -- it's very  
3 hard to take these artificial ways of looking at it and  
4 breakdown every single --

5 THE COURT: But it's also important to do that because  
6 it's the basis for stops, it's the basis for frisks. I'm  
7 trying to understand the city's position.

8 Go ahead. Let's go back to the Ourlicht stop.

9 MS. GROSSMAN: So Officer Moran testified that through  
10 his training and experience individuals carrying weapons often  
11 try to divert an officer's attention through verbal exchanges.  
12 And by this point, Moran had probable cause to issue Ourlicht  
13 the summons for disorderly conduct as his threatening behavior  
14 was causing a crowd to gather. So he was acting -- and he was  
15 acting in an unreasonably loud manner.

16 Mr. Ourlicht testified that he thought he was stopped  
17 because of his race for this incident even though no comments  
18 about Mr. Ourlicht's race were ever made. Interestingly,  
19 Sergeant Moran actually listed Mr. Ourlicht as a white male on  
20 the 250 for this incident.

21 Now moving on to David Ourlicht's June 6 or June 9,  
22 2008 stop and the February 2008 stop.

23 Mr. Ourlicht alleges two stops in June 2008 and  
24 February 2008 where he does not identify the officers involved.  
25 So these are again John Doe officers. And, again, the city is

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D5k9flo2 Summation - Ms. Grossman

1 limited in being able to address every single allegation that  
2 is made by Mr. Ourlicht.

3 In both cases, Detective Albino investigated officers  
4 selected by Mr. Ourlicht from photo arrays whom Mr. Ourlicht  
5 thought may possibly have been involved. And he searched 250  
6 databases. He reviewed activity logs. He personally met with  
7 officers. But was not able to identify any officer associated  
8 with these stops.

9 In the purported June 2008 stop, Mr. Ourlicht claims  
10 that a group of officers approached him and others sitting in a  
11 courtyard and informed them that there was an emergency report  
12 of a gun right around them.

13 Mr. Ourlicht admits that the officers apologized at  
14 the end of the stop. And there is no plausible inference that  
15 the officers' actions as described by Mr. Ourlicht resulted  
16 from a lack of reasonable suspicion or unlawful discrimination.

17 In the purported February 2008 stop --

18 THE COURT: I'm sorry. So, we only have one side of  
19 the story about the reasonable suspicion. Based on that, one  
20 side was --

21 MS. GROSSMAN: Was this gun run. That there was an  
22 emergency report of a gun in the area. And officers were  
23 responding to this housing development. And Mr. Ourlicht was  
24 in the area with others. And so.

25 THE COURT: So is the argument that anybody could have  
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Summation - Ms. Grossman

1 been stopped in the area because there was a report of a gun --  
2 sort of a loose gun in the area?

3 MS. GROSSMAN: Well it depends on what you call area.  
4 It's a very small area. It's the report of a gun. This  
5 happened -- this event is rapidly happening. And officers are  
6 descending upon the housing development and responding to some  
7 report of a gun not knowing exactly where it is. And being  
8 limited by the plaintiff's version of events.

9 THE COURT: I know it's the plaintiff's version.  
10 You've said that. I'm just wondering if it's the city's  
11 position is that anybody in this limited area, which I guess is  
12 right at or near the housing project, could have been stopped  
13 when looking for that gun.

14 MS. GROSSMAN: Yes. I think that at that time that  
15 would have been appropriate, your Honor. We believe that the  
16 stop, based on Mr. Ourlicht's version of events, was based on  
17 reasonable suspicion.

18 THE COURT: And that's the suspicion that there was a  
19 loose gun in the area and anybody proximate to that area could  
20 have been stopped?

21 MS. GROSSMAN: Yes.

22 In the 2008 stop, Mr. Ourlicht concluded that officers  
23 asked him -- so going on to the February 2008 stop.  
24 Mr. Ourlicht conceded that officers asked him to come near  
25 their vehicle. And Mr. Ourlicht also concedes that he freely

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Summation - Ms. Grossman

1 decided to walk to the vehicle. So we have officers in a car,  
2 according to the plaintiff, and they ask him a question and  
3 then Mr. Ourlicht freely comes over to the car to answer the  
4 question.

5 Now Mr. Ourlicht first can't establish that a stop  
6 requiring reasonable suspicion initially occurred since  
7 Mr. Ourlicht voluntarily responded to the voice from the car.  
8 Mr. Ourlicht also voluntarily chose to provide his  
9 identification which the individuals asked for while they were  
10 still sitting in the car. And no one had emerged from the car  
11 or acted otherwise to give Mr. Ourlicht the impression that he  
12 was not free to leave at that point in time.

13 THE COURT: Did he testify whether he felt he could  
14 ignore either the request to come over or the request for the  
15 ID? Do you know?

16 MS. GROSSMAN: I'll just verify.

17 THE COURT: No problem.

18 MS. GROSSMAN: Mr. Ourlicht claims that the only  
19 witness to this alleged stop was his white friend Anthony.  
20 Yet, he does not know.

21 THE COURT: He does not know?

22 MS. GROSSMAN: The only other witness to this incident  
23 was Anthony, his white friend. Yet, he doesn't know Anthony's  
24 last name or phone number. Even though he was roommates with  
25 Anthony at the time of his deposition. That could have been

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Summation - Ms. Grossman

1 helpful to put a little bit more flavor -- or provide further  
2 information to the stop.

3           Moreover, of the 19 alleged stops, David -- I'm sorry.

4           Again, he I believe testified he was not free to leave  
5 but, again, we don't have the officers' version of events.

6           So now of the 19 alleged stops, David Ourlicht's  
7 alleged February 2008 stop is the only stop that included a  
8 claim that a white individual near him was treated differently  
9 by the police. And Mr. Ourlicht asserts he was stopped based  
10 on his race because, he claims, he was treated differently than  
11 his white friend, Anthony. But Mr. Ourlicht himself testified  
12 that Anthony was also stopped, also searched, and therefore not  
13 free to leave.

14           THE COURT: There was some difference in their  
15 treatment, was there not, according to Mr. Ourlicht?

16           MS. GROSSMAN: There was some difference in terms of  
17 the timing and the sequence of events. But both were stopped  
18 and both were searched.

19           THE COURT: I thought there was something different;  
20 otherwise, what was the basis of his testimony they were  
21 treated differently? You don't recall that?

22           MS. GROSSMAN: No. I think that his testimony seemed  
23 to be that his friend was also searched and stopped.

24           THE COURT: It may be but he said there was something  
25 different and I don't remember what it was.

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D5k9flo2

Summation - Ms. Grossman

1 MS. GROSSMAN: I think what's material and relevant  
2 is, because this is a case about stops: Was his white friend  
3 treated any differently?

4 THE COURT: That may be.

5 But I'm asking if you recall what he said was  
6 different. He did say there was something different, but I  
7 don't recall. I guess the plaintiffs will --

8 MS. GROSSMAN: I believe his friend was found with  
9 marijuana on him.

10 THE COURT: That's not the difference in treatment.  
11 But the plaintiffs will have to answer that question. You  
12 don't have to.

13 MS. GROSSMAN: Okay.

14 Now moving on to the equal protection claims.

15 THE COURT: Okay.

16 MS. GROSSMAN: Plaintiffs, we submit, have failed to  
17 set forth an equal protection claim, as plaintiffs have failed  
18 to show that there's a widespread practice of stopping and  
19 frisking Blacks and Hispanics where the determinative factor in  
20 each stop and/or frisk is race rather than reasonable  
21 suspicion.

22 At least one named plaintiff in this case must show  
23 that his or her stop or frisk was motivated by race. This  
24 plaintiffs have failed to do. In this case, all named  
25 plaintiffs have either failed to testify that race played a

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1 part in their stops or they have merely stated that it was  
2 their subjective belief that race motivated their stops and/or  
3 frisks.

4 And, as the Second Circuit has recently affirmed, such  
5 subjective belief is, as a matter of law, insufficient to  
6 establish racial motivation.

7 None of the 12 plaintiffs --

8 THE COURT: I'm sorry. Which case was that?

9 MS. GROSSMAN: I will -- we'll provide you with the  
10 case.

11 THE COURT: Okay.

12 MS. GROSSMAN: None of the 12 plaintiffs and class  
13 member witnesses claimed that the NYPD used any racial slurs or  
14 race-based language at any point during the alleged stops.

15 In fact, the closest claim about an arguably  
16 race-based comment comes from one of the class member  
17 witnesses, Clive Lino, who alleged that a police officer of  
18 color received a call on his personal cellphone that we just  
19 discussed, which had a rap music ringtone. Even assuming this  
20 was the case -- which the officer vehemently denied, by the  
21 way -- it strains credulity to assume that anyone, including a  
22 police officer of color, is a racist because is he or she has a  
23 rap music ringtone.

24 But in any event, Mr. Lino is a class member, not a  
25 named plaintiff. So even assuming that his version of events

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Summation - Ms. Grossman

1 is accurate and the officer's cellphone ring somehow indicates  
2 racial bias, Mr. Lino's incident cannot form the basis of a  
3 claim against the city.

4 THE COURT: That's why I'm interested in that case  
5 you've cited, so I can look at it because -- are you saying  
6 that unless the officer uses racial slur or race-based language  
7 there can't be an inference that a stop was based on race? Or  
8 are you saying that I have to find at least one of these 19  
9 was, to even begin to make out an equal protection claim, since  
10 there is no evidence that any officer used a racial slur or a  
11 race-based word, the claim fails? That's your argument?

12 MS. GROSSMAN: It's not just the words. It's other  
13 facts --

14 THE COURT: That's what I'm asking. Could it be  
15 circumstantial? Could it be based on the circumstances of the  
16 stop?

17 I think what you were saying is based on the Second  
18 Circuit case that you'll tell me, the subject of the furtive  
19 stop is surely not enough. Could I look at all the  
20 circumstances surrounding the stop?

21 MS. GROSSMAN: Well, I think that the language that  
22 could be used could be one factor that could be considered.

23 But when you look at all the facts considered there is  
24 no -- there is no race-based reason that the plaintiffs can  
25 come forward with that would explain the stop.

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D5K8FLO3

Summation - Ms. Grossman

1 THE COURT: If there is no suspicion for the stop and  
2 the person stopped is black, can that be a race-based reason,  
3 if the Court were to conclude that there was no basis for the  
4 stop?

5 MS. GROSSMAN: I have not seen any case law that  
6 supports that theory.

7 THE COURT: So if it's suspicionless but it's stop of  
8 a black person, there is not a fair inference that it could be  
9 based on race?

10 MS. GROSSMAN: I would not submit not, because that  
11 means every Fourth Amendment stop of an individual by a white  
12 officer --

13 THE COURT: That turns out to be without any  
14 suspicion.

15 MS. GROSSMAN: To infer wholesale that there is a  
16 race-based reason that can support a Fourth Amendment claim, I  
17 would submit there is no authority for that.

18 THE COURT: If the Court were to conclude there was no  
19 suspicion, no fair basis for the stop, but the stop was made,  
20 there has to be a reason.

21 MS. GROSSMAN: You're speculating what the reason is.

22 THE COURT: There has to be a reason. If the Court  
23 were to conclude that there was no reasonable suspicion, it has  
24 to be then a reason why was this person was stopped.

25 MS. GROSSMAN: Why would it have to be an inference

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D5K8FLO3 Summation - Ms. Grossman

1 that it's a race-based reason?

2 THE COURT: What would happen if there is not  
3 reasonable suspicion?

4 MS. GROSSMAN: A mistake, an error, not understanding.  
5 There can be a whole host of reasons why an officer can  
6 mistakenly believe they have reasonable suspicion to make a  
7 stop.

8 THE COURT: Then I am probably getting into the next  
9 part of the argument which Ms. Cooke is going to handle. But  
10 if there were a statistical basis for the inference, and then  
11 you combine that with any one of these stops, you said this had  
12 no suspicion, it's a black person stopped, and there is a  
13 statistical basis to infer that blacks are overstopped, then  
14 can one conclude that it's race based?

15 MS. GROSSMAN: We would submit no because the  
16 anecdotal accounts have to have their support there as well.  
17 There has to be some race-based reason to --

18 THE COURT: If it's without reasonable suspicion.  
19 There is a stop that has no basis, and the person is black, and  
20 there is a statistical basis for over-stopping or proof that  
21 blacks are over-stopped, then would that be a fair inference?

22 MS. GROSSMAN: I don't believe so, your Honor. I  
23 think -- I am not sure if it's the Reynolds case out of the  
24 Second Circuit, it might be one case that lends support to our  
25 arguments. I will cite to that and lay that out in our

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Summation - Ms. Grossman

1 So even if you get to disparate impact and to the  
2 statistics, you then have to move to all the systems in place  
3 and what the police department is doing to address issues on  
4 training, monitoring, supervision, etc., which we have  
5 developed through this case in the last ten weeks.

6 But what we would say is that the evidence of the  
7 city's affirmative efforts regarding the endorsement of its  
8 policy against racial profiling shows that the city's policy is  
9 the opposite of what the plaintiffs contend. All of our  
10 systems, our policy against racial profiling, all the  
11 supervision, all the monitoring systems, all our training and  
12 efforts at ensuring that officers don't go out there and make  
13 stops solely based on race.

14 THE COURT: A question that's a little bit off point  
15 but not a whole lot. I just wondered if the record has the  
16 statistics of the decline that I have read about of the first  
17 quarter of 2013 being a big decline compared to the first  
18 quarter of 2012. Is that in the record of the number of stops  
19 that have declined for the first quarter '13 versus the first  
20 quarter of '12?

21 MS. GROSSMAN: We tried to get that into evidence, but  
22 the plaintiffs objected.

23 THE COURT: You don't think that number of the decline  
24 is in this trial record.

25 MS. GROSSMAN: I would have to check, but if you would

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1 like to make it part of the record --

2 THE COURT: I am just asking whether you know whether  
3 it is there.

4 MS. GROSSMAN: We tried at the very beginning of the  
5 trial.

6 So, as you know, the city's position is that the  
7 police department's policy is not racially motivated.

8 And that brings us to Senator Adams. The policy, as  
9 Senator Adams would have you believe, is not to instill fear in  
10 Black and Hispanic youth. We believe the plaintiffs wasted  
11 this Court's time when they called State Senator Adams to  
12 testify to an utterly implausible scenario that he says took  
13 place at a meeting with Governor Paterson, the police  
14 commissioner, Senator Martin Golden, and Hakeem Jeffries to  
15 discuss Adams' bill to eliminate personal identifying  
16 information in the UF-250 database.

17 Now, Senator Adams testified at trial that Police  
18 Commissioner Kelly stated at the meeting that Kelly targeted  
19 Black and Hispanic young people because -- or Kelly believes  
20 the police should target black and Hispanic young people  
21 because he wanted to instill fear in them so that every time  
22 they leave their home they can be stopped by the police.  
23 Senator Adams even claimed at trial that Police Commissioner  
24 Kelly repeated these comments while at a round-table discussion  
25 at Medgar Evers College in August 2010, which included 50

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Summation - Ms. Grossman

1 African-American officials and the Central Brooklyn Black  
2 Legislative Coalition.

3 No one in attendance at either of these meetings  
4 corroborates Adams' story and it is utterly absurd to believe  
5 that Police Commissioner Kelly, who has been a police  
6 commissioner for 12 years and in the public eye for decades,  
7 and has committed his life to public service, made the comments  
8 Senator Adams accuses him of making in front of numerous  
9 African-American public officials.

10 Former Chief of Department Joseph Esposito, Inspector  
11 Juanita Holmes, and then Community Affairs Bureau Chief Philip  
12 Banks, who is now Chief of Department, attended the Medgar  
13 Evers College meeting. And you heard from Chief Esposito and  
14 Inspector Holmes at this trial, and each official made clear  
15 that it is not the NYPD's policy to target unconstitutional  
16 stop and frisk activity at black and Hispanic youth in order to  
17 instill fear in them so that they are less likely to carry  
18 weapons when they leave home. Chief Esposito explicitly  
19 rejected Senator Adams' claim, and made it clear in his  
20 testimony that he has never communicated any such practice to  
21 police personnel down the chain of the NYPD command.

22 Now, as all of the experts have testified here,  
23 defendant agrees that a comprehensive approach to reinforcing  
24 constitutional enforcement activity involves training,  
25 documentation, supervision, evaluation, monitoring and

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Summation - Ms. Grossman

1 requirement that it be attached to the actual 250 form when  
2 it's submitted to the desk.

3 Yet, despite this, plaintiffs spent a large percentage  
4 of their time during discovery and at trial discussing activity  
5 logs. This is not a trial about activity logs; this is a trial  
6 about the constitutionality of stops.

7 The NYPD rightfully wants activity logs to be as  
8 detailed as possible, but there is no constitutional  
9 requirement that an entry be added to an activity log or that  
10 activity logs be kept.

11 THE COURT: I don't really understand that argument.  
12 One has to assess the constitutionality of the stop after the  
13 fact. I am sure you agree. I am not there for the stop. You  
14 weren't either. But the only way people like you and I can  
15 look at it is to look at the contemporaneous records. Those  
16 records consisted of the UF-250 and the memo book entry. If  
17 people aren't making memo book entries, we are left with just  
18 the check-off form, which might have a couple of lines for a  
19 little bit of an explanation, I gather the fuller explanation  
20 is going to be the memo book. That's the importance of the  
21 memo book, is to be able to assess and evaluate the  
22 constitutionality of the stop. So it is about the memo book to  
23 some extent because how else can the police department, or the  
24 city law department, or the Court, look at the stops and assess  
25 their constitutionality?

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Summation - Ms. Grossman

1 MS. GROSSMAN: We would submit that the 250 form is  
2 sufficient.

3 THE COURT: Then you may be different than the police  
4 department. The police department would like to see the memo  
5 book entries.

6 MS. GROSSMAN: That's an example of you try your best  
7 to do better than what might be required by the Constitution.

8 THE COURT: I am not sure that we know what is  
9 sufficient there to be able to establish after the fact the  
10 constitutionality. It seems to me the police department has  
11 taken a position that the UF-250 is not enough. And I think  
12 there was testimony that, just looking at the card, I can't  
13 tell whether this is constitutional, so I call for the memo  
14 book, I look at the memo book, I want to see that entry. Now  
15 Chief Hall has said, staple it to the 250, so when the sergeant  
16 reviews it he can look both at the 250 and the memo book.

17 So you seem to be on different page with the police  
18 department on that issue. The police department seems to want  
19 the memo book entry filled out, filled out correctly, and  
20 attached to the 250 so a fuller picture can be had.

21 But I didn't mean to talk. 11:30 is here in just one  
22 minute. You want the one minute? Is this a good time?

23 MS. GROSSMAN: Yes.

24 THE COURT: So we are reconvening at 11:45.

25 (Recess)

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Summation - Ms. Grossman

1 MS. GROSSMAN: What we also wanted to emphasize is how  
2 real police work is done on the streets interacting with the  
3 public, not filling out the paperwork.

4 THE COURT: Is your microphone on?

5 MS. GROSSMAN: So real police work is done on the  
6 streets interacting with the public, not filling out paperwork,  
7 which makes supervision of officers key to ensuring proper  
8 enforcement activity. And you have heard a great deal of  
9 testimony throughout the ten weeks of trial, your Honor, about  
10 all the different layers of supervision, what the supervisors  
11 do, how it is that they know the officers are out there  
12 engaging in reasonable suspicion stops, how they interact on a  
13 daily basis. I am not going to go into all of that in closing  
14 today, but I just wanted to remind you about the monitoring of  
15 the radio, speaking to officers at roll call, being out in the  
16 car, having an opportunity to have a personal interaction with  
17 the officers while they are in the car together. All of these  
18 layers of supervision, these are ways that the supervisors know  
19 what the officers are doing and that they understand what  
20 reasonable suspicion is and what they are doing out on the  
21 streets.

22 Now, Chief Esposito said it best. The NYPD strives  
23 for no crime and no enforcement activity. But plaintiffs claim  
24 that NYPD cares only about numbers and sets quotas to achieve  
25 those numbers, just for numbers sake.

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Summation - Ms. Grossman

1 This Court should see plaintiffs' allegations of  
2 quotas in the NYPD as what they truly are, which is a sideshow,  
3 a sideshow that I made reference to in my opening. In effect,  
4 plaintiffs have failed to meet their burden because they cannot  
5 prove that the causation prong -- that a single stop alleged  
6 was the result of a quota.

7 For example, in seven of the 19 stops described by the  
8 plaintiffs, stopping officers could not be identified. If  
9 these seven stops actually occurred, and even if the Court  
10 finds that they were unconstitutional, these stops logically  
11 could not have been motivated by a quota. Since the John Doe  
12 officer or officers involved in each of these stops did not  
13 complete a 250, under plaintiffs' theory of a quota that is  
14 enforced by a supervisor's review of the officer's activity,  
15 the officer wouldn't get credit for that stop. So this quota  
16 theory doesn't fit, especially with many of the John Doe  
17 incidents at issue in this case.

18 For the other 12 stops where officers were identified,  
19 plaintiffs have not shown any evidence of a quota that caused  
20 the stops of those individuals. If plaintiffs' theory is  
21 correct regarding quotas, the monthly activity numbers for  
22 officers in a command in a similar assignment should be nearly  
23 identical, and they are not.

24 You saw testimony throughout the trial of all the  
25 activity logs from various officers, and you saw variations of

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Summation - Ms. Grossman

1 all the different activity on days of patrol. There was not  
2 one uniform number that is seen by all the various officers who  
3 testified here and throughout the police department.

4 THE COURT: How many of those did we have?

5 MS. GROSSMAN: We had quite a handful.

6 THE COURT: A handful out of 34,000 --

7 MS. GROSSMAN: 15.

8 THE COURT: Out of 34,000 police in the city. I don't  
9 know that I can draw any inference based on 15 of the entire  
10 police force. I just didn't have a big enough sample. You  
11 have made that point yourself about the number of stops. The  
12 same is true with the number of those forms. I think I have  
13 seen 15, as you say.

14 MS. GROSSMAN: The plaintiffs have come forward with  
15 no proof to the contrary and it is their burden, we would  
16 submit, your Honor.

17 Now, you also heard from -- well, I would also remind  
18 the Court that you heard from a vast majority of the police  
19 officers who testified. They did not indicate that there were  
20 ever a set number of stops or 250s that needed to be completed  
21 during a given tour. Many officers testified to that.

22 Now, you also heard from numerous supervisors that  
23 they find quotas objectionable, because numbers for numbers  
24 sake does nothing to address the crime conditions. That's not  
25 to say that the NYPD doesn't care about numbers. It does. It

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Summation - Ms. Grossman

1 cares that officers are actively addressing crime conditions,  
2 but success is measured not in the number of summonses, 250s or  
3 arrests, but rather, by the decrease in crime rates, and the  
4 improvement in people's lives. And you have heard about that  
5 and how that happens at CompStat.

6 THE COURT: I think we have a bit of a semantic issue  
7 here. I have heard on tape numbers, despite denials that  
8 numbers should be used or are ever used. I heard the number  
9 words myself. I heard five, five, five, one or five, five,  
10 one. So you want to call them performance goals. Some people  
11 call them quotas. But the idea is sometimes, it seems, that  
12 the person speaking refers to actual numbers, whether it's a  
13 goal, whether it's a requirement, I understand the difference  
14 between a goal and requirement, but I have heard the use of  
15 numbers.

16 MS. GROSSMAN: Yes, your Honor. I will address that a  
17 little bit in a moment in my closing.

18 Before I get there, before I address that, I just  
19 wanted to take a moment to talk about Professor Silverman's  
20 report.

21 The plaintiffs presented evidence from two surveys by  
22 Professor Silverman. Plaintiffs looked to use this survey as  
23 evidence that in recent years, as compared to the past,  
24 officers have felt increased pressure to make arrests, issue  
25 summonses, and prepare stop and frisk reports. And they

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1 suggest that this increased pressure leads officers to conduct  
2 stops on less than reasonable suspicion. But we submit that  
3 the surveys are not reliable. They don't show what the  
4 plaintiffs purport that they show. And there are a number of  
5 problems with these surveys, including confusing wording,  
6 problematic pools of respondents, temporal biases, and  
7 nonresponsiveness to certain key questions.

8 Now, moving on to a little bit about quotas and  
9 performance goals, we submit that to achieve the police  
10 department's goal of no crime and no activity, officers have to  
11 work, and it is here that plaintiffs torture the mission of  
12 NYPD and try in vain to turn basic work obligations into a plot  
13 to achieve numbers through unconstitutional enforcement  
14 activity.

15 The plaintiffs and their experts have repeatedly  
16 muddied the water by conflating the terms "quota" and  
17 "performance goal." However, both legally and practically  
18 there is a significant difference between the two. As deputy  
19 Commissioner John Bierne testified, a performance goal, even  
20 when expressed in a numerical value, is an acceptable means of  
21 motivating staff and providing expectations for their work. A  
22 quota is a numerical goal that must be achieved in a specified  
23 period of time, which would lead to adverse employment action  
24 if not achieved.

25 Experts for both sides in this litigation have opined

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1 that productivity goals can be both an acceptable police  
2 practice and consistent with generally accepted practices in  
3 the field, particularly when they are assessed against the  
4 performance of similarly situated officer peers.

5 According to Mr. Stewart, performance goals --  
6 defendants' expert -- performance goals are an absolute  
7 necessity in monitoring supervision, because in policing, there  
8 are disincentives to engaging in some activities because they  
9 are dangerous. As the Court is well aware, officers are  
10 frequently assigned to locations that are, quite frankly,  
11 chaotic and rife with criminal activity. Some police officers  
12 may be risk adverse and reluctant to actually carry out their  
13 duties in response to these dangerous conditions.

14 THE COURT: Do you think the testimony about  
15 performance goals and numbers can be linked to the dramatic  
16 rise in stops over a period of time? There was an exhibit  
17 early on that showed X numbers of stops in 2004, then 5, 6, 7,  
18 8, 9, and dramatically upward, and finally I think it begins to  
19 level off or a decrease. But there is a period of a great rise  
20 in stops. Can that evidence be considered together with the  
21 alleged testimony of increasing pressure to make more stops?

22 MS. GROSSMAN: Well, your Honor, the goal of Daniels,  
23 as you remember, was to have officers actually be accountable  
24 for the stops, and actually document the stops. I remember  
25 being part of Daniels at the very early stage, and the big

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Summation - Ms. Grossman

1 concern was that there were stops going on and nobody was  
2 documenting that. So one accomplishment of Daniels was to  
3 actually encourage --

4 THE COURT: Even in the post-Daniel era, I think, the  
5 numbers go up. When is post Daniels?

6 MR. CHARNEY: 2004.

7 THE COURT: So that's the beginning of the evidence  
8 here, 2004 to 12. I don't know that that argument works,  
9 because once the documentation begins and is accepted as of  
10 2004, there is still a steady rise upward quite dramatically in  
11 some of the years, and then there is a leveling off, although,  
12 as you said, we don't have evidence of that first quarter of  
13 '13.

14 MS. GROSSMAN: There is a significant decrease, but  
15 that's not in the record.

16 THE COURT: I know. I asked that earlier.

17 MS. GROSSMAN: In 2012 there is.

18 THE COURT: Even though from 2004, there is a real  
19 dramatic increase.

20 MS. GROSSMAN: Remember, we had a lot of QAD audits,  
21 and it takes time for these QAD audits to have an impact.

22 THE COURT: I don't know what that means.

23 MS. GROSSMAN: We are monitoring through QAD. QAD  
24 goes in and does inspections and then the commands are doing  
25 their self-inspections. And through that process, it's a

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Summation - Ms. Grossman

1 constant encouragement and a constant oversight over making  
2 sure the forms are being prepared. So that could also hit home  
3 on the fact that the stops have to be documented.

4 THE COURT: You're saying maybe there was under  
5 documentation in the early years and the number of stops  
6 haven't really gone up?

7 MS. GROSSMAN: That could be, in part, an explanation  
8 for the rise.

9 THE COURT: Or it could be numbers for numbers.  
10 That's my question.

11 MS. GROSSMAN: When you actually look at the actual  
12 numbers that we are talking about, when you consider an officer  
13 on an eight-hour tour, and you multiply that by 20 days a  
14 month, and you actually look at the number of stops that  
15 officers on average are doing --

16 THE COURT: Do I know that?

17 MS. GROSSMAN: You can extrapolate from that.

18 THE COURT: From what, the 15 who filled out the  
19 activity logs?

20 MS. GROSSMAN: If you consider 18 to 20,000 officers  
21 on patrol, and you consider the total number of stops, and you  
22 do simple math, what you have per officer is just a few stops  
23 per month.

24 THE COURT: That's got to be over-inclusive because I  
25 don't know if there are 18 to 20,000 on patrol.

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Summation - Ms. Grossman

1 MS. GROSSMAN: There are 18 to 20,000 on patrol.

2 THE COURT: That is in the record?

3 MS. GROSSMAN: Yes. So when you actually do the math  
4 and look at the average number of stops per month, there are  
5 very few stops in any given month per officer.

6 THE COURT: I might try to do that math.

7 MS. GROSSMAN: Yes.

8 Now, according to Mr. Stewart, he says performance  
9 goals are, like I said, very important, and we just talked  
10 about the disincentives that are of concern. And we need to  
11 have these performance goals to make sure that the city streets  
12 are kept safe, and that officers are out there doing what they  
13 are paid to do, and that they are doing their jobs in a lawful  
14 manner.

15 I would like to now turn to Serrano and Polanco, the  
16 testimony that we have heard. Despite the attention given to  
17 these purported whistleblowers on quotas and the drama of taped  
18 roll calls being played in a public courtroom, at the end of  
19 the day, plaintiffs only produced one single officer, Pedro  
20 Serrano, out of a pool of approximately 35,000, who claimed  
21 that officers were punished if they did not reach a certain  
22 predetermined amount of activity. And plaintiffs only produced  
23 one single officer, Adhyl Polanco, who alleged that he  
24 succumbed to alleged pressure to conduct unlawful stops. There  
25 are serious flaws in each of these officer's testimony which

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1 undermines their credibility.

2 THE COURT: I have to say that even if I put their  
3 testimony aside, I am focusing somewhat on what I heard on the  
4 tape that the supervisors said. I almost rather you address  
5 that. But even if these guys have no credibility, the tape  
6 says what it says.

7 MS. GROSSMAN: I will address that. I plan on  
8 addressing that with Inspector McCormack for example.

9 THE COURT: Go ahead and tell me about Polanco and  
10 Serrano.

11 MS. GROSSMAN: Officer Serrano felt there was a quota.  
12 But at the end of the day, no matter what the supervisors say,  
13 at the end of the day, there is no evidence, other than what I  
14 have just set forth from Serrano and Polanco, that if there was  
15 a number requirement, that anyone committed unconstitutional  
16 stops. There is just nothing tethered to the individual stops  
17 that occurred here. There is no anecdotal evidence of that.  
18 And that we believe is a failing on the part of the plaintiffs'  
19 case and their evidence.

20 So turning to Officer Serrano's allegations against  
21 Inspector McCormack. As the Court is well aware, Serrano  
22 secretly taped Inspector McCormack during his evaluation  
23 meeting after Serrano was identified as a witness in this  
24 litigation. And while taping him, Serrano tried to bait  
25 Inspector McCormack into making racist comments, including that

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Summation - Ms. Grossman

1 he should stop all black and Hispanic people. Inspector  
2 McCormack did not take the bait, but he did make two comments  
3 that have been totally taken out of context by plaintiffs  
4 throughout the case.

5 First, Inspector McCormack, speaking in clear police  
6 shorthand, was taped stating that Officer Serrano should try to  
7 stop the right people in the right place at the right location.  
8 Plaintiffs attempted to turn this comment into some kind of  
9 smoking gun. This comment, however, proves nothing. Inspector  
10 McCormack explained at trial that he was referring to his  
11 limited resources. In other words, he wants his officers to  
12 stop the right people -- namely, criminals, and not elderly  
13 women walking through a park after hours to get to work -- at  
14 the right place and the right location, namely, in the sector  
15 where the condition needs to be addressed. In other words,  
16 when there is a crime condition in the neighborhood, in the  
17 precinct, officers shouldn't be wasting their time in a  
18 different neighborhood where the crime condition may not even  
19 be present.

20 Second, Inspector McCormack made a general comment on  
21 Officer Serrano's tape regarding stopping male blacks, 14 to  
22 20, 21, during roll call. Inspector McCormack explained  
23 precisely what he was referring to: A condition of hundreds of  
24 robberies and grand larcenies that were occurring in and around  
25 Mott Haven and Patterson housing developments at the 40

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Summation - Ms. Grossman

1 Precinct. What was the source of this crime condition?  
2 Victims. Victims, who made statements describing the  
3 perpetrators as male blacks, ages 14 to 21. Did that mean that  
4 Inspector McCormack wanted his officers to stop all male blacks  
5 ages 4 to 21? Of course not. But it did mean that his  
6 officers should be aware of crime conditions and complaints  
7 made by victims, while still acting within the boundaries of  
8 the law.

9 What you heard was Inspector McCormack doing what  
10 commanding officers should do -- telling his officer how to  
11 effectively focus his police work, long before a stop ever  
12 takes place, telling him where to go and who to look for for  
13 reasonable suspicion. Not because law-abiding black males aged  
14 14 to 21 are more suspicious generally than white males aged 14  
15 to 21, but because the robberies and grand larcenies in Mott  
16 Haven were reportedly being committed by black males aged 14 to  
17 21.

18 Instead of using limited resources to investigate  
19 known crime conditions and train their attention where it is  
20 most likely to yield information that may lead to legitimate  
21 enforcement activity, plaintiffs' wrong view of proper policing  
22 handcuffs the police and makes them passive -- the equivalent  
23 of closing their eyes -- until an extra piece of physical  
24 description is available. Or put another way, it requires them  
25 to be equally focused in attention on all people, despite

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Summation - Ms. Grossman

1 knowing some information about the age, race or gender of the  
2 suspects committing the crime.

3 So, perversely, when the police know that the gender  
4 of a suspect is male, and nothing more, plaintiffs view would  
5 require the police to focus their attention equally on men and  
6 women. In plaintiffs' world, until something more than age,  
7 gender or race is known about a suspect, the police can have no  
8 particular focus on any individual -- not just for stopping  
9 purposes, but for any purpose that could lead to enforcement.  
10 That is just not the reality of policing and not what the law  
11 holds.

12 Now, this concept about going out and addressing crime  
13 conditions is what all the supervisors are talking about at  
14 roll call and that is what the goal is. It's not to go out to  
15 go out and get numbers for numbers' sake because that is not  
16 helping policing. That is not addressing the conditions.

17 And in terms of the numbers, that's my reason for  
18 addressing the language issue and the precision of language at  
19 the beginning of my closing, your Honor, that you can't take  
20 certain language and interpret that to mean that officers are  
21 being told to go out there and just stop anybody for no reason.  
22 In the context of all the tapes, you hear that the officers are  
23 being told to go out and address the conditions.

24 THE COURT: I guess the only reason for concern on my  
25 part is, if you look at the large number of stops, if 90

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Summation - Ms. Grossman

1 percent of them result in no enforcement action, there is nine  
2 out of ten stops that turn out to have no enforcement effect.  
3 That's a lot of people being stopped.

4 So I wonder if, circumstantially, one could conclude  
5 that there is a pressure to increase the number of stops  
6 totally, let's get those numbers up as a good crime fighting  
7 tactic because so many of them were allegedly based on  
8 reasonable suspicion but it turns out they are dry because  
9 nothing happened.

10 That's a big error. You reasonably suspect something  
11 and you're wrong 90 percent of the time, what can I infer from  
12 that? That is a lot of misjudgment of suspicion.

13 MS. GROSSMAN: Your Honor, first of all, crime has  
14 come down tremendously.

15 THE COURT: There could be a lot of reasons for that.  
16 I can't speculate all the different reasons that crime may have  
17 decreased in those years.

18 MS. GROSSMAN: I would submit that, if officers were  
19 going out there and making stops for no reason, with no  
20 reasonable suspicion, stopping innocent people, you wouldn't  
21 see crime going down.

22 THE COURT: It was a question that I was asking. I  
23 wasn't arguing. I was asking you a question. That's a lot of  
24 stops that had no enforcement effect, so to speak, 90 percent.

25 MS. GROSSMAN: Well, I can address that.

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Summation - Ms. Grossman

1 THE COURT: What troubles me is the fact that the  
2 suspicion seems to be wrong 90 percent of the time. That is a  
3 high error rate.

4 MS. GROSSMAN: Professor Fagan --

5 THE COURT: I know he called them what is that word,  
6 apparently justified --

7 MS. GROSSMAN: I am not going there. He acknowledges  
8 in his AG's report that one arrest out of nine stops would not  
9 raise concerns for him because the basis of the stop is  
10 reasonable suspicion and that it's lower than the basis for an  
11 arrest which is probably --

12 THE COURT: I am not worried about arrests either. I  
13 am saying, 90 percent of these, there is no enforcement action  
14 at all, nothing. The person is thank you, goodbye, you may  
15 leave now. Nothing happens. No weapons. No summons. No  
16 arrests. No enforcement action. Thank you. You may go.

17 I am not limiting myself to arrests is my question. I  
18 am saying there is a high error rate on the suspicion,  
19 apparently. Just like I asked you the question earlier in your  
20 submission on the 19 stops, most of them were suspicious bulge  
21 or hand in the waist and there is no gun. And though we know  
22 the gun yield of all these 4 and 1/2 million is miniscule -- I  
23 think it is in the 1 percent range, if that -- whatever the  
24 number is. Anyway, that's why I asked about could this be a  
25 result of increased pressure for numbers. That was my only

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D5K8FLO3

Summation - Ms. Grossman

1 question.

2 MS. GROSSMAN: Professor Fagan actually addressed the  
3 very question that you just raised about whether there can be  
4 an inference -- a concern that eight out of the nine would mean  
5 that there is no reasonable suspicion.

6 THE COURT: You mentioned that's the arrest rate. OK.  
7 I get that.

8 MS. GROSSMAN: That's actually the same question here.

9 THE COURT: No. Is it correct that if one in nine  
10 ended up in arrests, arrests would be a smaller --

11 MS. GROSSMAN: No. He is saying one arrest out of  
12 nine stops.

13 THE COURT: Arrests. Arrests.

14 MS. GROSSMAN: That's what we are dealing with.

15 THE COURT: When I said 90 percent are dry, no  
16 summons, no arrest, no seizures.

17 I don't want you to spend your time arguing. I'm  
18 trying not to do that, being very careful to make sure that you  
19 have all of your time, which reminds me, when is Ms. Cooke  
20 getting up because your time ends at 12:30?

21 MS. GROSSMAN: Your Honor, I would just ask perhaps  
22 the Court might engage us with just another ten minutes just  
23 because of the questions. I did not anticipate that this  
24 would --

25 THE COURT: You didn't think you were going to get any  
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D5K8FLO3

Summation - Ms. Grossman

1 questions in a nonjury? I thought I tried to have very few --

2 MS. GROSSMAN: I appreciate it. I want to respond to  
3 your questions. They are most important in a closing.

4 THE COURT: Of course, it is a nonjury trial. Yes,  
5 you would want to answer the Court's questions.

6 MS. GROSSMAN: On the hit rate, let me just address  
7 that particular question.

8 We don't believe that you should be concerned about  
9 the hit rate because, like the effectiveness argument that your  
10 Honor excluded, the hit rate doesn't impact whether or not an  
11 officer had reasonable suspicion.

12 There are various witnesses who have testified about  
13 the reasons why there could be many stops that don't yield  
14 contraband, don't yield a basis for an arrest or don't yield a  
15 summons. These witnesses have talked about the fact that there  
16 could be an interdiction of crime. There could be a crime that  
17 was prevented from happening, it could have been interrupted.  
18 You never know that.

19 And it's hard to come up with empirical reasons, but  
20 there are many occasions where an officer may observe someone  
21 casing or stalking someone and that officer can make a  
22 reasonable suspicion stop and not have a basis to make an  
23 arrest.

24 THE COURT: I understand that. It is just that the  
25 question was, how do you account for the 90 percent. I'm not

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D5K8FLO3

Summation - Ms. Grossman

1 sure I can accept your argument that you can't assess  
2 reasonable suspicion by looking, to some extent, at what I  
3 might call the error rate. 100 percent of these are supposed  
4 to be based on reasonable suspicion of something, but 90  
5 percent turned out not to have it.

6 I am going to give you this ten minutes and stop at  
7 12:55. I am going to stay quiet, but we are stopping at 12:55  
8 instead of 12:45.

9 MS. GROSSMAN: To the point that I started with, the  
10 hit rate issue, there are witnesses who also testified about  
11 multiple -- there could be reasons why one stop -- or ten stops  
12 may result in one arrest. There are occasions where officers  
13 might stop multiple groups of people, so one event can actually  
14 trigger multiple stops per one event. So if you have a radio  
15 job, that could trigger multiple stops arising out of that one  
16 event. If you have individuals in a park at night --

17 THE COURT: I don't think you should spend any more  
18 time on my question. I appreciate that, but your time is so  
19 limited now.

20 How much time is Ms. Cooke going to get up for? I'm  
21 curious, because you're going to have to calculate it now.

22 MS. GROSSMAN: 20 minutes.

23 THE COURT: I am going to help you by really saying  
24 when those 20 minutes start. They start in seven minutes.

25 MS. GROSSMAN: Your Honor, I think what I will do

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D5K8FLO3 Summation - Ms. Grossman

1 right now is turn it over to Ms. Cooke for about 20 minutes.

2 THE COURT: OK.

3 MS. GROSSMAN: And then what I am going to do is  
4 return to talk briefly about remedies.

5 THE COURT: But you are only going to have seven  
6 minutes now, because I am calculating here, and that's with the  
7 extra ten minutes.

8 (Continued on next page)

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D5k9flo4

Summation - Ms. Cooke

1 MS. COOKE: Your Honor, at the start of this trial, I  
2 promised that the expert evidence would be insufficient for the  
3 plaintiffs to meet their burden of proving that the NYPD has a  
4 widespread practice of either Fourth Amendment or Fourteenth  
5 Amendment violations. We are sitting here ten weeks later and  
6 the evidence unquestionably has delivered on that promise.

7 Professor Fagan has not provided any credible analysis  
8 of the 4.43 million stops conducted by the NYPD between 2004  
9 and 2012 that can support the plaintiffs' claims.

10 The plaintiffs claims are unsupported as follows.

11 They have not established stops made by the NYPD are  
12 not supported by reasonable suspicion.

13 They have not established the NYPD makes those stops  
14 on the basis of someone's race.

15 And they have not established that stops have an  
16 impermissible disparate impact on Blacks or Hispanics.

17 What the expert evidence introduced at this trial does  
18 support, however, is that according to Professor Fagan's most  
19 recent analysis the NYPD makes stops that are apparently  
20 justified by reasonable suspicion 90 percent of the time.

21 THE COURT: We do agree, though, the apparently  
22 justified analysis is based solely on the 250s, right?

23 MS. COOKE: Correct.

24 THE COURT: Only the 250s which, of course, a number  
25 of officers have said you can't look only at the 250s.

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Summation - Ms. Cooke

1 MS. COOKE: Correct.

2 THE COURT: There's an issue there about what can be  
3 inferred from the 250s. That's why, I guess, it says  
4 apparently justified.

5 MS. COOKE: Correct.

6 THE COURT: I don't think he can assess reasonable  
7 suspicion in a constitutional sense.

8 MS. COOKE: As your Honor is aware, however, those  
9 check boxes and the determinations of the buckets -- apparently  
10 justified, ungeneralizable, or apparently unjustified -- were  
11 guided by review of case law and such that certain boxes are in  
12 and of themselves generally recognized to be representative.

13 THE COURT: We both understand how he conducted his  
14 analysis.

15 MS. COOKE: Correct.

16 THE COURT: I'm only saying he can't really assess  
17 constitutionality.

18 MS. COOKE: Correct. That's for your Honor.

19 After looking only at those forms, Professor Fagan can  
20 identify only that six percent of those 4.43 million stops,  
21 apparently on the form alone, lacks reasonable suspicion.

22 But as we've just discussed, there's additional  
23 information both on the form, as Professor Fagan was only  
24 considering the check boxes, and outside of the form that your  
25 Honor would consider if reviewing an individual stop for

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D5k9flo4

Summation - Ms. Cooke

1 rely on this disparate impact regression analysis as support  
2 for those Fourteenth Amendment claims. If you choose the wrong  
3 benchmark, the entire regression analysis is flawed and  
4 therefore the conclusions are meaningless. The statistical  
5 analysis performed by the experts in this case may be  
6 complicated, but this dispute about the benchmark is pretty  
7 straightforward.

8 Professor Fagan's benchmark in his regression analysis  
9 was the use of the percentage of race of people in the  
10 population in New York City by geographic census tract with the  
11 addition of crime complaint data, how many crimes occurred in  
12 geographic areas in certain time periods for the regression.

13 Professors Smith and Purtell argue that this racial  
14 disparity analysis being conducted in this case, the benchmark  
15 must include data on suspect description.

16 Professor Fagan is trying to determine if racial bias  
17 exists in stop patterns by the police. Race is an element that  
18 should be included in the benchmark in any regression analysis.

19 You heard Professor Fagan, however, did not include  
20 suspect race data in his analysis. In fact, you heard he  
21 absolutely refused to even test for that and the impact it  
22 might have had in his regression.

23 This was the case despite the fact that two times  
24 Professors Smith and Purtell provided alternate regression  
25 analysis which included the element of the variable of suspect

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Summation - Ms. Cooke

1 description and demonstrated that the impact of race virtually  
2 disappeared or the impact was reduced significantly.

3 THE COURT: Of course he did have an answer to you  
4 though. Didn't he say that if in one-third of the instances  
5 the race is unknown.

6 MS. COOKE: Missing data. Correct, your Honor. I'm  
7 getting to that.

8 THE COURT: That becomes too large an unknown factor  
9 and it would skew the results unfairly.

10 MS. COOKE: We'll address the missing data criticism.

11 However, first let me address the fact that several  
12 trial witnesses, in addition to Professors Smith and Purtell,  
13 specifically Assistant Commissioner Philip McGuire and Deputy  
14 Commissioner Michael Farrell, testified and provided evidence  
15 about information that should be included in an appropriate  
16 benchmark selection for racial disparity analysis.

17 Specifically, Professor Smith also testified that in  
18 measuring racial disparity the benchmark should include this  
19 crime suspect description because it's estimating the supply of  
20 the pool of persons exhibiting suspicious behavior before the  
21 police that are available to be observed.

22 Population as benchmark merely estimates the number of  
23 people in a particular area at a particular time.

24 As shown in those four graphic scatterplots that  
25 appear in Professor Smith and Purtell's second supplemental

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Summation - Ms. Cooke

1 expert report response, Exhibit H13, suspect description is  
2 more closely correlated to race and stops in the top two  
3 scatterplots.

4 Figures seven and eight on the top show the high  
5 correlation and, therefore, the narrow plot of the dots of  
6 stops to suspect race.

7 Figures and nine and ten on the bottom show a low  
8 correlation between the stops and population by race.

9 Those graphs show that reliance on residential  
10 population, as Professor Fagan did, is a poor estimate of who  
11 is committing crime in New York City. Professor Fagan's  
12 analysis misses this important demonstration of the correlation  
13 between race and stops.

14 As a minimum -- at a minimum, this observation, the  
15 test that should have been run before regression model was  
16 selected is the reason Professor Fagan should have included  
17 suspect race in his regression analysis to test for the impact  
18 on his results.

19 The evidence that the fact that the proper benchmark  
20 is crime suspect data is also evident in the 2011 and 2012  
21 reasonable suspicion stop books prepared by the New York City  
22 Police Department and shown at the trial.

23 Here are two pages, each a citywide page, from the  
24 2011 and 2012 reasonable suspicion stop books.

25 In 2011 and '12 you can see approximately 83 percent

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Summation - Ms. Cooke

1 of all known crime suspects and approximately 90 percent of all  
2 violent crime suspects were Black or Hispanic. And Blacks and  
3 Hispanics in those years represented approximately 80 percent  
4 of persons stopped.

5 This demonstrates again the correlation between the  
6 suspects of crime --

7 THE COURT: Isn't this kind of a circular argument  
8 that the police officer knowing the crime rates by race can use  
9 race to make the stop? In terms of reasonable suspicion? He  
10 can say, Well, since I know that 90 percent of crime in this  
11 area is committed by Blacks, I guess I can add that to my  
12 reasonable suspicion and say he's Black, it's more likely that  
13 he's going to be committing a crime, or has committed, or will  
14 commit than a white person so that gives me a further  
15 reasonable suspicion. Is that not a little circular?

16 MS. COOKE: As you have stated it, your Honor, it may  
17 be. But when we're talking about a regression analysis and the  
18 inclusion of variables in the analysis, you do want to include  
19 variables that will impact the phenomenon you are attempting to  
20 address.

21 THE COURT: But I'm saying the circularity itself is  
22 worrisome because it could be self-fulfilling on the stops.  
23 The fact that the stops reflect a similar percentage as the  
24 crime suspect data may show that the officers are influenced by  
25 the fact that they know in a certain area most crimes are

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Summation - Ms. Cooke

1 committed by Blacks. So you may worry that they're adding race  
2 in as a reasonable suspicion factor.

3 MS. COOKE: Well, your Honor, I guess the difference  
4 is the -- you're discussing it in terms of what the officer  
5 might have in their mind versus what a regression analysis is  
6 trying to include. It's a variable that --

7 THE COURT: I know. But what you're drawing from the  
8 regression analysis is if they match well that proves there's  
9 no race bias.

10 I'm saying it may be precisely the opposite. The  
11 closer the match may prove that the officer is saying that  
12 since Blacks commit crimes, I should stop Blacks to the same  
13 percentage as crime suspect.

14 It's a worrisome argument.

15 MS. COOKE: My response would be that the reason with  
16 the scatterplots and the fact that they closely correlated  
17 shows that they interact with one another in a close  
18 correlation such that they should be both included in the model  
19 because to omit one from the model is not reflecting the  
20 reality of the function that you're trying to test.

21 And so it's about statistical regression modeling  
22 versus talking about an officer's stop practice and knowledge  
23 on the street.

24 THE COURT: I can't divorce the statistical work here  
25 from the overall legal issues before me. All I'm worrying is

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Summation - Ms. Cooke

1 the more closely those percentages match, the more one is  
2 concerned that race becomes a factor in the stop itself.  
3 That's a fear.

4 MS. COOKE: That may be.

5 THE COURT: You can tell the officer: Look, let's  
6 match the crime data here. We know according to crime suspect  
7 data it's 90 percent. So make sure nine-tenths of your stops  
8 are Black. That would be bad.

9 You would agree.

10 MS. COOKE: I would agree.

11 THE COURT: Of course.

12 MS. COOKE: Nor can the statistical analysis establish  
13 officers' intent.

14 THE COURT: It can't.

15 But the reason the data is offered at the trial is to  
16 show or not show racial disparities in stopping. I don't want  
17 to argue. I really don't want to use your time. I just wanted  
18 to raise the point.

19 MS. COOKE: No problem.

20 Moving on to the issue of Professor Fagan's criticism  
21 of missing data.

22 THE COURT: Yes. Thank you.

23 MS. COOKE: The missing data criticism by Professor  
24 Fagan is misleading because it suggests that the missing data  
25 is equally problematic for all crimes. We know, looking at

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Summation - Ms. Cooke

1 table 2 from appendix B of Professor Fagan's second  
2 supplemental report, Exhibit 417 in this case, it's clear that  
3 Professor Fagan knew that suspect race was actually known for a  
4 very high percentage of seven of the nine crime categories  
5 listed in this table.

6 THE COURT: Right.

7 Again, we not going to spend much of your time on  
8 this. I think there was testimony that the property crimes --  
9 minor -- I may have the wrong one, but that they were a big  
10 percentage of the basis.

11 MS. COOKE: Only approximately 25 percent, your Honor,  
12 of the stops. They are a percentage but they -- if you look  
13 over at the -- I'm sorry -- 28. If you look over, it's 24.6  
14 and 4.8 on this chart. And this is for, this table, I believe,  
15 just 2010 and 2011.

16 THE COURT: So that's about -- those two together  
17 closing in on 30.

18 MS. COOKE: Correct. Correct, your Honor.

19 So if you look at the percentage of suspect race known  
20 in the other seven crime categories it's high; anywhere from --  
21 the lowest is disorder, quality of life at 73.2, and the  
22 highest is 98.7 for drug offenses.

23 So if we take a look at table 5, which is the  
24 regression analysis in any of Professor Fagan's reports -- this  
25 one comes from Exhibit 417 -- table 5 Professor Fagan ran a

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Summation - Ms. Cooke

1 THE COURT: I know. I just don't know what data is  
2 available in the interim. I don't know what you get every  
3 year.

4 MS. COOKE: It's not just the census data. It's also  
5 the other socioeconomic data factors such as unemployment,  
6 gender, the racial composition, the education levels, and those  
7 other socioeconomic factors also were selected from a single  
8 year, a single point in time and didn't account for change over  
9 time.

10 And when we're talking about an eight-year period of  
11 analysis, that there could be significant changes in the small  
12 geographic areas of census tracts that he's using as his unit  
13 of analysis.

14 Also Professor Fagan's attempt to include patrol  
15 strength as a control for probability of an officer  
16 encountering someone exhibiting suspicious behavior justifying  
17 a stop, his attempt to control for that failed as well, we  
18 would submit.

19 In the first report he simply used quarterly precinct  
20 staffing data as a patrol strength. And that staffing data to  
21 a precinct, it doesn't identify in any way whether or not those  
22 officers were on patrol, how long they were on patrol, whether  
23 or not they patrolled in pairs, and suffers from several  
24 infirmities.

25 The second report he used a calculation he created

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Summation - Ms. Cooke

1 himself where if an officer made a single stop in the census  
2 tract in a calendar month, that was one count for patrol  
3 strength. If an officer made ten stops in a census tract in a  
4 calendar month, that was one count for patrol strength. It  
5 didn't account similarly for pairs of partners. It didn't  
6 account for supervisors. It didn't account for the fact that  
7 the officer may travel through census tracts in a particular  
8 month but only make stops in certain census tracts. So we  
9 would submit that the measurement of the patrol strength there  
10 also was deficient.

11 And the fact that Professor Fagan claims he found a  
12 high correlation of .95 between his patrol strength measure and  
13 his first report of staffing data and his calculation of patrol  
14 strength, we submit Professor Purtell testified just because  
15 something is correlated doesn't mean it's measured accurately.  
16 The correlation just says these two data points moved in the  
17 same direction.

18 The evidence reflects -- excuse me. In an effort to  
19 avoid the impact of this criticism of his measurement of patrol  
20 strength when recognizing that it's critical to the reliability  
21 of the analysis, Professor Fagan, nine weeks into this trial,  
22 finally conducted a test to determine whether or not there was  
23 a need to model these zero counts. As Professor Purtell  
24 testified, zero counts, as you're aware, might have included  
25 zeros, ones, twos or gaps in the data. More than just the

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Summation - Ms. Cooke

1 zero.

2 Professor Fagan tested for this finally. And as  
3 Professor Purtell testified in the third round of rebuttal  
4 testimony, the hypotheses that defendants have been advocating  
5 about that these stops needed to be modeled differently and  
6 that included in the regression analysis with the control, that  
7 hypothesis that defendants have been asserting was proven by  
8 Professor Fagan's test.

9 THE COURT: I'm sorry. Would you summarize that  
10 again. What was proved by his final test?

11 MS. COOKE: That those zero counts, those observations  
12 where officers don't make the stop have an impact on the model  
13 and therefore they should be modeled and controlled for in the  
14 analysis separately.

15 THE COURT: I thought he stuck with that testimony.

16 MS. COOKE: Professor Purtell?

17 THE COURT: No. Fagan.

18 MS. COOKE: Yes. Correct.

19 Professor Purtell testified that the test proved the  
20 argument that defendants had been making that there was a  
21 different -- there was an impact for those zero counts versus  
22 the stop observation counts. So where there was a stop counted  
23 for patrol strength versus for when an officer was in the  
24 census tract but didn't make a stop.

25 The testimony remains that Professor Fagan ultimately

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D5k9flo4

Summation - Ms. Cooke

1 finally did conduct the test that Professor Purtell suggested  
2 would reveal the need to model and account for the zero counts  
3 in his regression analysis differently. When Professor Fagan  
4 did conduct it, professor Purtell received the results and it  
5 confirmed what Professor Purtell had been saying the whole  
6 time, which is they should be treated differently in the  
7 regression analysis.

8 THE COURT: That was Professor Purtell's position.  
9 But not Dr. Fagan?

10 MS. COOKE: Correct. Without justification. That's  
11 Professor Purtell's argument.

12 THE COURT: Now, we have a problem. Your 20 minutes  
13 just ended. But does Ms. Grossman want the seven minutes or  
14 does she want to cede them to you because it has to end at  
15 12:42 so that Mr. Zuckerman has 15. Who wants the seven, Cooke  
16 or Grossman?

17 MR. ZUCKERMAN: They want to take five from me.

18 THE COURT: So she gets five and you get seven?

19 I'll adjust my time.

20 MS. COOKE: Another problem we identified was  
21 Professor Fagan's failure to control in his regression analysis  
22 for his Fourth Amendment findings, which were that certain  
23 percentages of the stops where you're apparently justified,  
24 ungeneralizable, or apparently unjustified. He failed to  
25 control for that finding in his Fourteenth Amendment regression

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D5k9flo4

Summation - Ms. Cooke

1 With respect to the practical significance point.  
2 Professor Fagan claims that after controlling for the effects  
3 of crime and the volume of stops, he observes a statistically  
4 significant contribution of -- racial contribution to the stop  
5 rate. He reports those in table 5 of his reports.

6 However, as the defendant's expert, Professor Purtell,  
7 reported, even if you were to accept table 5 exactly as is with  
8 the variables as specified and the manner in which they were  
9 specified, notwithstanding the criticisms, there is no  
10 practical significance to those results.

11 Professor Purtell explained this with Exhibit N14  
12 which was in essence table 12 from the second supplemental  
13 report response with the addition of the fourth line at the  
14 bottom which is the percentage of the odds.

15 Looking at N14, the third row reflects an odd ratio.  
16 Professor Fagan agreed he recognized the data from the first  
17 three rows. The first row comes directly from table five and  
18 the second two rows are simply the mathematical statement of  
19 the first row in a different form. They're equivalent numbers.

20 A number greater than one in the third row means that  
21 the odds -- the person is more likely to receive the outcome.  
22 A number less than one is less likely.

23 The fourth row is simply a statement for the lay  
24 person to understand in a percentage.

25 Professor Purtell is representing in Exhibit N14 from

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Summation - Ms. Cooke

1 table 12 in the report that the odds are just better than a  
2 coin toss, 50.22 percent, that an increase in stops in New York  
3 City of one percent of the Black population versus the increase  
4 of one percent in the White population. That's the odds that  
5 an increase in stops would occur.

6 Professor Purtell testified that Professor Fagan's  
7 response to this, which were to for the first time predict the  
8 number of stops, doing something Professor Fagan has never done  
9 in the three years analyzing the data in this case or in either  
10 two related cases of Davis or Ligon. Professor Fagan came in  
11 on the third round of rebuttal and for the first time  
12 identified he predicted stops, the number of stops that would  
13 occur. Those are reflected in Exhibit 572.

14 When Professor Purtell saw this and he saw that at 80  
15 and 85 percent the predicted number of stops had reached a  
16 hundred or 120, Professor Purtell testified he knew those  
17 predictions were off. And they weren't slightly off. They  
18 were way off.

19 Professor Purtell testified that those were not  
20 consistent with what we know to be the actual numbers of stops  
21 for those census tracts with 80 to 85 percent of, in this case,  
22 percent Black or percent Hispanic.

23 Professor Fagan claimed on rebuttal in response to  
24 answers -- questions from your Honor that those actual  
25 numbers -- he was aware of the actual numbers and he claims his

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D5k9flo4

Summation - Ms. Cooke

1 actuals followed roughly the same shape and line of the  
2 predicted numbers. Except when he got to the extreme end, he  
3 called it, the 80 percent end. At that point he said he did  
4 begin to see a disconnect. But he said this number was small  
5 and there was a small number of cases. He referred to them as  
6 outliers.

7 I'd submit they are not outliers, your Honor. Looking  
8 at Exhibit 566, which was another exhibit in the second round  
9 of rebuttal testimony offered by Professor Fagan, this  
10 represents census tracts by percent Black population in New  
11 York City. As you can see, the 80 to 8 -- 80 to 100 percent  
12 census tracts are the darkest color on the map.

13 There are not a small number of those census tracts.  
14 Those are not outliers. And this map is only for percent  
15 Black. There would be another map for percent Hispanic. Both  
16 of them would have numbers of predictions significantly off  
17 from the actual.

18 THE COURT: Now it's 12:40.

19 MS. COOKE: I'm just finishing, your Honor.

20 We submit that hastily prepared last-minute analysis  
21 where he first attempts to do, with the population average  
22 model regression analysis in table 5, to predict the number of  
23 stops that would occur in census tracts in the city is  
24 absolutely unreliable and wholly meaningless to your Honor's  
25 evaluation of the evidence in this case.

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D5k9flo4

Summation - Ms. Cooke

1 Far from supporting the claims, Professor Fagan's  
2 analysis and opinions reflect that the NYPD officers have  
3 apparent legal suspicion to make stops and the stops are not  
4 made with a disparate impact on Blacks and Hispanics.

5 THE COURT: Thank you, Ms. Cooke.

6 All right. If you want those seven minutes, you have  
7 to stop at 12:47.

8 MS. GROSSMAN: Okay. Thank you.

9 So, your Honor, we submit the evidence shows that  
10 through the years NYPD has been anything but deliberately  
11 indifferent in its intention to proper stop, question and frisk  
12 activity. These self-initiated organic efforts that we've  
13 already discussed speak to that. In the words of Chief  
14 Esposito and Hall and -- Chief Hall, "NYPD is a big ship but  
15 it's slowly turning." There's no deliberate indifference here  
16 or lack of expertise in how to monitor its officers. Not all  
17 changes may have yielded the intended results in the preferred  
18 time. The activity log audits show that. But it is not for  
19 want of trying or for lack of accountability.

20 NYPD is not like the jurisdictions where consent  
21 decrees and monitors have been put in place to implement basic  
22 systems and methods of accountability. NYPD has on its own  
23 developed sophisticated systems, including early intervention  
24 systems and documentation systems, and has never required  
25 outside monitors to do that. We've done -- the police

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D5k9flo4

Summation - Ms. Grossman

1 Narratives inevitably have problems. They can be  
2 rote. There are only so many ways to describe a bulge. And  
3 saying it was in the back pocket as opposed to the front pocket  
4 will just sound rote after it's said thousands of times.

5 That is why the police department does not take its  
6 forms at face value. It has other ways of making sure its  
7 practices are legal. The system has plenty of other checks and  
8 balances in place.

9 THE COURT: So that's an argument as to why you  
10 believe the memo book should be filled out.

11 MS. GROSSMAN: That's -- I mean it's either one place  
12 or the other, yes.

13 Finally, this is not a case in which a court-appointed  
14 monitor is an appropriate remedy, especially not for the very  
15 limited purposes, solely implementation and reporting, which is  
16 what Professor Walker testified to.

17 As Director -- as Stewart, defendant's expert  
18 explained, monitors are only required in extreme situations as  
19 a last resort where a department is resistant to change. None  
20 of these factors weigh in favor of a monitor here.

21 THE COURT: Maybe we have a semantic issue with the  
22 word "monitor."

23 What if there was a retention of a consultant or  
24 expert who focused solely on the issues raised here. Not  
25 somebody who is looking at the whole police department, bigger

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Summation - Ms. Grossman

1 questions of the effectiveness of policing. The narrow issues  
2 raised in this case. Is that different from -- that's  
3 different from a monitor.

4 MS. GROSSMAN: I don't know. I didn't quite fully  
5 comprehend --

6 THE COURT: I think both experts talked about the need  
7 for outside expertise. In fact, Stewart, your expert, kept  
8 saying it was really good to have an outside consultant or an  
9 outside expert with knowledge in a particular area. And then  
10 he told how many times he's been that person. But he seemed to  
11 be able to say it's a good thing to have outside expertise when  
12 you need it.

13 So now I'm moving away from the word monitor and  
14 saying might there be a role for a targeted consultant or  
15 expert in a particular area.

16 MS. GROSSMAN: Well, your Honor, the police department  
17 has on its own hired outside -- we've had RAND come in and do a  
18 study. They did an analysis. And we provided that  
19 information. There were recommendations made and we followed  
20 many of the recommendations.

21 THE COURT: Many, not all.

22 MS. GROSSMAN: When the CCRB did a study of the  
23 trespass stops and identified a training issue, we immediately  
24 addressed that training issue and took steps to clarify  
25 trespass patrol procedures.

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Summation - Ms. Grossman

1 The police department complied -- the Daniels  
2 settlement agreement. It came and went. And the police  
3 department complied with every -- with those terms. And  
4 complied with the audits that were required and what the  
5 plaintiffs agreed to. And the department has demonstrated time  
6 and time again its responsiveness to community concerns.

7 A monitor will have significant detrimental effects.

8 THE COURT: Again, it's the type of monitor. It's  
9 what you envision as the word "monitor."

10 But go ahead.

11 MS. GROSSMAN: It's hugely burdensome, expensive, and  
12 will likely get in the way of policing. Officers may well be  
13 so overburdened with additional reporting and documentation  
14 requirements that they will not be able to carry out their jobs  
15 of protecting the safety and security of the community.

16 Even more troubling is the effect that having a  
17 monitor, particularly here where we believe it is utterly  
18 unnecessary, will have on NYPD moral, not to mention the  
19 monitor's potential to fatally undermine the chain of command.

20 As Stewart explained internal --

21 THE COURT: I do understand the argument. And the  
22 last minute has come. You have one minute to wrap up.

23 But I'm saying it may be that you're right, that  
24 depending how "monitor" is defined and how broad the duties  
25 are, some of the things you fear happening may be related to

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Summation - Mr. Zuckerman

1 The city does propose an amendment to interim order 22  
2 of 2012 to satisfy your Honor's directive in that regard.

3 THE COURT: Do I have that already? Have you  
4 submitted that?

5 MR. ZUCKERMAN: No. No. No.

6 All of the things I'm going to discuss are -- would be  
7 proposals made after issuance of a final order by your Honor.  
8 We haven't made specific --

9 THE COURT: Why don't you submit that language before,  
10 so that if I understand the amendment that you would be able to  
11 go along with, I might incorporate that right into the remedy I  
12 mean after all in this case I'm at the remedy phase. I'd like  
13 to hear the amendment to 22 that you would favor if there's  
14 going to be any.

15 MR. ZUCKERMAN: The plaintiffs in their brief  
16 suggested that we make proposals 30 days after final order.

17 THE COURT: Let's talk about that offline. Not with  
18 your time. Go ahead.

19 MR. ZUCKERMAN: So the plaintiffs request that the  
20 city circulate its proposal within 30 days of a final order by  
21 your Honor on the Ligon preliminary injunction matter. The  
22 city requests 60 days to do that as there is a strong desire to  
23 do the task correctly. Any written order would require the  
24 input of NYPD legal and office of management and planning in  
25 all probability. As such, 60 days is requested from the final

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Summation - Mr. Zuckerman

1 unit guide is similar and we request 60 days to make such a  
2 proposal.

3 The city's proposal on new video to replace video  
4 number five is similar, and we request 120 days to propose a  
5 new script.

6 We disagree with plaintiffs that officers should view  
7 that video three times. We would suggest that once is enough  
8 and more than once would be degrading to the officers.

9 Turning to supervision. There are two aspects to the  
10 Court's proposal on supervision.

11 First the, Court has ordered steps to be taken to  
12 ensure that UF 250 forms are prepared where necessary for the  
13 stops at issue in Ligon. We remind the Court that necessary  
14 UF 250 preparations are emphasized at the police academy,  
15 rodman's Neck and in everyday police work. However, following  
16 appellate review, the city proposes to reemphasize the same  
17 during the new train-the-trainer approach that would occur in  
18 connection with interim order, the amendment to interim order  
19 22 of 2012 and on the new video to replace video number 5.

20 Second, the Court proposed a system of review based  
21 upon Exhibit E at the Ligon hearing. Our proposal is set forth  
22 at pages six and seven of our remedies brief and we won't  
23 repeat it here. However, we wish to emphasize that what we  
24 will be proposing is not unduly burdensome and only because of  
25 the limited number of stops in the Bronx that were at issue in

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D5K8FLO5

Summation - Ms. Karteron  
AFTERNOON SESSION

2:05 p.m.

1

2

3

THE COURT: Mr. Dunn.

4

MR. DUNN: Ms. Karteron is going to make our  
presentation.

5

6

THE COURT: OK. Ms. Karteron.

7

MS. KARTERON: Good afternoon, your Honor. I will be  
very brief.

8

9

As Mr. Zuckerman has suggested, the parties do largely  
agree about the proposed remedies that were set forth in your  
Honor's amended opinion and order in February. There are two  
areas of disagreement, though, that I wanted to highlight.

10

11

12

13

The first is about timing. Mr. Zuckerman has  
suggested that none of the remedies that have been set forth in  
the amended opinion and order should take effect until after  
the appellate remedies are exhausted. And of course we don't  
agree with that. I think Mr. Zuckerman might have suggested,  
perhaps unintentionally, that we agree with that approach.

14

15

16

17

18

THE COURT: I think you would have to move for a stay.  
Do you agree?

19

20

21

MR. ZUCKERMAN: Absolutely. After a final order, it  
would be our intent to move for a stay.

22

23

MS. KARTERON: But, of course, we would like the Court  
to enter an order as soon as possible.

24

25

I just wanted to note that your Honor had previously

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Summation - Ms. Karteron

1 noted in your opinion on the stay from the initial opinion and  
2 order in February that it may make sense to wait until a  
3 liability decision is reached in Floyd and a decision, if any,  
4 on the injunctive relief in Floyd is reached and enter them  
5 both at the same time. Of course, you have made that decision  
6 before the parties in Floyd had put forth their positions on  
7 remedy. That came several weeks later.

8 Now we know that the Floyd plaintiffs, at least,  
9 foresee, as you can imagine, that it is a much more complex  
10 case, a fairly complex set of remedies that are very different  
11 than the ones that we are seeking in connection with the  
12 preliminary injunction. In light of that difference, we would  
13 like your Honor to consider moving forward with the remedies on  
14 our PI motion quickly and sooner rather than later.

15 The only other substantive difference between our  
16 positions that I wanted to set forth was that, with respect to  
17 supervision, your Honor had suggested that the city can make a  
18 proposal for a supervisory system to ensure that the 250s are  
19 completed in all circumstances when stops are taking place  
20 outside of TAP buildings in the Bronx and suggested, instead of  
21 setting forth your own ideas about those, that the city should  
22 have the opportunity to set forth a proposal.

23 Mr. Zuckerman said in his closing, and also in their  
24 brief, that they suggested emphasizing the need to complete  
25 250s in a new formal written policy, and also to emphasize the

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Summation - Ms. Karteron

1 need to complete 250s in a new training video to replace video  
2 number 5, which was the video your Honor had identified  
3 numerous problems with.

4 We would just like to note for the record at the  
5 moment that we are concerned that those two steps would not be  
6 sufficient to actually accomplish the goal of ensuring that  
7 officers are completing 250s.

8 THE COURT: What additional steps would you propose?

9 MS. KARTERON: We had a couple of things in mind,  
10 which we have not set out in detail in our brief because our  
11 initial thought was that the defendants should propose  
12 something. So, of course, we will be happy to address this  
13 more down the line.

14 We would suggest that there might be some kind of  
15 monitoring system at the precinct level that can be  
16 appropriate, some kind of spot-checking system perhaps, with  
17 maybe a different precinct every week, or something like that,  
18 with sergeants interacting with the officers under their  
19 command to find out what the interactions were that they had  
20 that might have required 250s, and then figuring out whether  
21 they were completed or not.

22 Again, we can address this all in more detail. I know  
23 your Honor said you don't want to hear about our differences or  
24 opinion about timing on the remedies. So, of course, we are  
25 happy to set that out in writing or however your Honor would

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Summation - Ms. Hoff Varner

1 MS. HOFF VARNER: Correct. Although blacks and  
2 Latinos make up only a little more than 50 percent of the  
3 city's population, 85 percent of the people stopped were black  
4 and Latino. And a vast majority of these individuals, as your  
5 Honor has said, 90 percent were neither arrested nor given a  
6 summons. And of these 4.3 million stops, fewer than 1 percent  
7 results in the recovery of a weapon, a seizure rate that is far  
8 lower than random chance. And only 1400ths of 1 percent  
9 results in the recovery of a gun.

10 THE COURT: Weapon versus gun?

11 MS. HOFF VARNER: Yes.

12 When .14 percent of stops results in the recovery of a  
13 gun, that means that clearly the NYPD isn't stopping the right  
14 people to actually get guns off the street.

15 And, in short, as the evidence presented at this trial  
16 shows, the NYPD has laid siege to black and Latino  
17 neighborhoods in the city over the past eight years, tossing  
18 the requirements of the Fourth and Fourteenth Amendments out  
19 the window, and making people of color afraid to leave their  
20 homes.

21 So what is animating these unconstitutional stops?  
22 You heard testimony from throughout the NYPD chain of command  
23 and their experts. They believe that race --

24 THE COURT: I am sorry to interrupt, but that's the  
25 nature of a nonjury. The city argues that if 85 percent of the

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Summation - Ms. Hoff Varner

1 crime, I don't know if that's right, but if 85 percent of the  
2 crime is committed by blacks and Hispanics, and 85 percent of  
3 the stops are blacks and Hispanics, is there anything disparate  
4 happening? Are you the right person to try to answer that?

5 MS. HOFF VARNER: I will provide an overview of why we  
6 think that's a problem now and Mr. Charney will also discuss it  
7 in detail.

8 In short, the problem is that the NYPD believes that  
9 race is a proxy for reasonable suspicion.

10 I want to point out that we are not challenging the  
11 deployment of officers to areas experiencing crime. What we  
12 are challenging is the deliberate indifference to the Fourth  
13 and Fourteenth Amendment rights of the people who live in those  
14 areas once those officers get there.

15 When deployed to these areas, the NYPD pressures  
16 officers to make stops, and then assumes that if a black person  
17 is stopped in a high crime area, then that's a legal stop.  
18 Time and time again you heard that the NYPD does not consider  
19 whether these stops are made with reasonable individualized  
20 suspicion. Rather, they stop people for being in the right  
21 place at the right time, and as Inspector McCormack instructed,  
22 being the right people. Yet the Constitution requires  
23 reasonable --

24 THE COURT: You said, time and time again you heard  
25 that the NYPD does not consider whether these stops are made

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Summation - Ms. Hoff Varner

1 with reasonable individualized suspicion. What is the proof  
2 that it does not consider?

3 MS. HOFF VARNER: The proof is that you heard, for  
4 example, from several commanding officers that you can't tell  
5 whether there is reasonable individualized suspicion from a  
6 UF-250, and yet in reviewing whether their officers are making  
7 quality stops, that's the beginning and the end of their  
8 inquiry.

9 To that point, stopping a person for being a member of  
10 a racial group, that at least according to the NYPD's  
11 incomplete and misleading crime suspect figures commit the most  
12 crimes, clearly violates that person's right under the Fourth  
13 and Fourteenth Amendments.

14 So this pressure to make stops, combined with a  
15 failure to adequately train, supervise, monitor or discipline  
16 officers, is just a surefire recipe for constitutional  
17 violations on a massive scale.

18 You heard the NYPD call this proactive policing. But  
19 as we have shown, proactive means stopping people who are  
20 members of the racial groups who engage in the most targeted  
21 behavior, rather than stopping only those individuals whose  
22 actual behavior is a basis for reasonable individualized  
23 suspicion.

24 THE COURT: What do you mean by targeted behavior?

25 MS. HOFF VARNER: As the statistics show, for example,  
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Summation - Ms. Hoff Varner

1 African-Americans commit that targeted behavior in the most and  
2 highest percentages, they use that as a proxy for reasonable  
3 suspicion instead of looking at the individual.

4 In short, what the NYPD calls proactive black and  
5 Latino residents of this city have far too often experienced as  
6 arbitrary and race-based harassment.

7 Now, in this case, we have heard the experience of the  
8 12 witnesses who have been stopped for a total of 19 times, and  
9 the city just argued that none of these stops violated the  
10 Constitution. Why? A few broad themes emerge.

11 They say the stops were based on consent. But in none  
12 of these stops did the individuals actually feel free to leave.

13 They say there was a suspect description. But that  
14 often means a suspect description like black male.

15 They say the stops took place in a high crime area.  
16 But we know that high crime area is checked off in more than  
17 half of all stops.

18 THE COURT: Where else could you expect the police to  
19 be deployed other than high crime areas?

20 MS. HOFF VARNER: The issue is partly that high crime  
21 area is also checked off in low crime area. In fact, as we  
22 showed in opening, high crime area is checked out in relatively  
23 equal numbers, regardless of what precinct you're in or how  
24 much crime is actually in the precinct.

25 As the testimony at trial has shown, these

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Summation - Ms. Hoff Varner

1 explanations are routinely invoked by officers to justify  
2 stops. And in the examples we have seen at trial, these  
3 explanations are nothing more than post hoc attempts to justify  
4 suspicionless race-based stops. Many of these explanations are  
5 nothing more than smoke and mirrors.

6 So before I discuss the individual stops, let me just  
7 clear some of this smoke.

8 First, it is well-settled law that whether a stop  
9 constitutes a Terry stop depends on whether a reasonable person  
10 would have felt free to terminate the encounter and walk away.

11 Under the circumstances described in these 19 stops,  
12 the city's assertion that reasonable individuals would have  
13 felt free to walk away is patently ridiculous. These were not  
14 consent stops.

15 THE COURT: I don't think they argue that all of them  
16 were consent stops by any means, just a few of them.

17 MS. HOFF VARNER: I think they said that six were  
18 based on consent, and we would argue that that's absolutely  
19 untrue.

20 They also said that the police were just asking  
21 questions as they are allowed to do under the common law right  
22 of inquiry. But here, the stop came first. The police stopped  
23 first and then frisked and then asked questions later.

24 THE COURT: A couple come to mind. Ms. Acevedo, was  
25 she stopped first? Or the man outside the deli, the teacher,

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Summation - Ms. Hoff Varner

1 THE COURT: That's a detailed description, or the red  
2 Pelle Pelle jacket. Not all the descriptions are just black  
3 male.

4 MS. HOFF VARNER: That's correct. Although when you  
5 actually look at the details of what the officers knew at the  
6 time they made the stop, we would argue that in many, though  
7 perhaps not all of these stops, the actual suspect description  
8 that the officers were looking for was basically black male.  
9 And I will talk about these in more detail.

10 I also just want to point out that, with respect to  
11 the black male suspect description, you heard that from  
12 Sergeant Telford, who supervised one of the highest stoppers in  
13 the NYPD in the third quarter of 2009, that his officers were  
14 stopping people based on a description of black men.

15 These types of suspect descriptions are not a  
16 constitutionally sufficient basis for a Terry stop. And in the  
17 hands of the NYPD, they can become so general as to give police  
18 officers license to stop just about any black male.

19 Third, we know that in more than half of all stops  
20 high crime area is checked off in the UF-250 even when the stop  
21 is in a low crime area. But the Constitution requires  
22 reasonable individualized suspicion, and stopping people for  
23 being in a high crime area is no different than stopping people  
24 for being black. It's not individualized.

25 And as we have seen, the city has argued that a crime

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Summation - Ms. Hoff Varner

1 pattern can justify a stop, even when the crimes are weeks  
2 apart or miles away from the stop. These can be so generalized  
3 and so broad as to render the constitutional requirement for  
4 reasonable suspicion meaningless.

5 And then, fourth, furtive movement is checked off in  
6 about 43 percent of the stops.

7 Another overused justification is suspicious bulge.  
8 This isn't surprising since the NYPD's training materials on  
9 the characteristics of armed suspects suggests that just about  
10 any behavior, clothing or bulge can be a weapon. And as we  
11 have seen, when put into practice on the streets, this results  
12 in stop after stop where the suspicious bulge is either  
13 nonexistent or is found to be something entirely innocent.  
14 It's a wallet, a cell phone, a set of keys.

15 And as for furtive movements, let me just take one  
16 example. Officer Pichardo told you that furtive movement is  
17 anything that catches his attention. It's no wonder that with  
18 these kind of factors at play, the NYPD hardly ever finds guns  
19 on the streets during stops.

20 So now that we have cleared away some of these  
21 overused stop factors, let me talk about these 19 stops of the  
22 12 individuals who came forward to testify.

23 The witnesses who testified in this courtroom are  
24 ordinary New Yorkers. They come from all five boroughs and  
25 range from 16 to 49 years old. They get up in the morning and

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Summation - Ms. Hoff Varner

1 go to work, class, and take care of their families. They are  
2 students, teachers, social workers, photographers, aspiring  
3 lawyers, future doctors. What ignites them is that while  
4 engaging in the normal activities of daily life, coming home  
5 from the gym, grabbing lunch, walking to the subway, their  
6 constitutional rights were violated by the NYPD stop and frisk  
7 policy. I will now take each one of them in turn.  
8 I begin with Leroy Downs, who is in the courtroom  
9 today. Leroy Downs, a black man living on Staten Island,  
10 walked home from his job as a substance abuse counselor. When  
11 he arrived home, he remained outside to finish a call. He then  
12 saw an unmarked police car drive past him and then reverse back  
13 to park in front of him. Officers James Mahoney and Scott  
14 Giacona jumped out of the car and said, Hey, buddy, you look  
15 like you're smoking weed. Mr. Downs held up his cell phone and  
16 said, Look, it's a cell phone. But the officers kept coming at  
17 him, eventually pinning him back against the fence. They  
18 patted him down and then searched his pockets. And this  
19 suggests that they intended to stop and frisk and search him  
20 from the very outset, even before they knew what he had in his  
21 hand, even after they knew what he had in his hand.  
22 Of course, they didn't find anything, but as they  
23 left, Mr. Downs asked for their badge numbers and the officers  
24 laughed at him and said, You're lucky we didn't lock you up.  
25 But Mr. Downs didn't think this was funny. He felt

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Summation - Ms. Hoff Varner

1 disrespected. And so he went to the 120th Precinct to file a  
2 complaint. He waited at the precinct for hours. But no one  
3 ever took his complaint, even after he identified the stopping  
4 officers. Finally, he left and filed a CCRB complaint.

5 And as for the officers, we all remember when they  
6 came into this courtroom and swore that they had no memory of  
7 the stop, even though the CCRB had identified them as the  
8 officers who stopped Mr. Downs. But when Leroy Downs saw them  
9 in the courtroom, he knew.

10 Your Honor asked, "Can you tell us, honestly, do you  
11 think you recognize one of or both of them?"

12 Mr. Downs replied, "Yes, both of them."

13 "You do? Can you say these are the two gentlemen who  
14 did stop you?"

15 And Mr. Downs, without hesitating, gave an unequivocal  
16 and definite yes.

17 Turning now to Devin Almonor. On March 20, 2010,  
18 13-year-old Devin Almonor was walking home after taking a  
19 friend to the bus stop, but he didn't make it home. Rather, he  
20 found himself handcuffed in the back of a police car in tears.  
21 What happened? Officer Dennis and his sergeant, Sergeant  
22 Korabel, came up to him in a police car, got out, demanded to  
23 know where he was going, patted him down, pushed him up against  
24 the car, cuffed him, and then threw him in the back seat of the  
25 car to take him down to the precinct, despite the fact that he

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Summation - Ms. Hoff Varner

1 lived only a few blocks away with his parents. When Devin,  
2 only 13, began to cry, Officer Dennis mocked him, saying, Why  
3 are you crying like a little girl?

4 You heard testimony from Devin and both of the  
5 stopping officers that makes it clear that there was no basis  
6 for reasonable individualized suspicion for this stop.

7 THE COURT: Today in summation we were told the basis  
8 according to the city for the stop. They said he was  
9 jaywalking. He was looking back repeatedly over his shoulder.  
10 There had been reports that evening of a lot of activity, a lot  
11 of criminal activity in the area. They did try to list a  
12 number of factors for the Almonor stop.

13 MS. HOFF VARNER: Let me take those in turn.

14 With respect to that furtive movement by looking over  
15 his shoulder, Officer Dennis did say that Devin had looked over  
16 his shoulder which I would note is entirely consistent with  
17 crossing the street. But, importantly, Sergeant Korabel  
18 testified he saw no such thing. I would submit that makes that  
19 explanation not credible.

20 THE COURT: And the jaywalking?

21 MS. HOFF VARNER: The jaywalking, first of all, Devin  
22 testified that he wasn't jaywalking, he was standing on the  
23 crosswalk. Second of all, you heard Sergeant Korabel testify  
24 that the jaywalking was consistent with evading police  
25 activity, but there was nothing in the record at the time about

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Summation - Ms. Hoff Varner

1 jaywalking.

2 I would also just note that, if jaywalking in New York  
3 City were consistent with committing a crime, then we would  
4 have all gotten stopped.

5 THE COURT: I think their theory today was, he was  
6 moving away from the police. That he must have seen the police  
7 and, therefore, was moving to get away from the police. Do you  
8 remember that?

9 MS. HOFF VARNER: Yes. I don't think there was  
10 anything in the record that suggested that Devin had seen the  
11 police until they got out of their car, but I will also check  
12 and put that into our findings of fact.

13 I also want to talk about the bulge because both  
14 officers --

15 THE COURT: The argument today was something about  
16 right side remained hidden from the police officers and  
17 justified the frisk.

18 MS. HOFF VARNER: Correct. Both officers admitted  
19 that they didn't see a suspicious bulge on Devin that night.  
20 And the 250 doesn't actually mention a suspicious bulge. But  
21 the more documents that Officer Dennis completed about the  
22 stop, the better it got, or the more suspicious Devin's  
23 behavior got.

24 In the 250 database, Officer Dennis added suspicious  
25 bulge, and in the written descriptions that came later in the

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Summation - Ms. Hoff Varner

1 grounds for the stop, other than the statistical and policy  
2 evidence which shows a policy of targeting, for example, young  
3 black and Hispanic men, that the stop was in fact based on race  
4 or motivated by race.

5 THE COURT: Your argument is a question that I asked  
6 of Ms. Grossman. If there is no reasonable suspicion basis for  
7 either the Downs or the Almonor stop, I asked her whether it  
8 was a fair inference then to say that it had to be based on  
9 race. She said that was not a fair inference. You said, if  
10 you look at all of the evidence, that inference can be drawn.

11 MS. HOFF VARNER: That's exactly right.

12 I would also, just one quick point on that, which is  
13 that, it's not whether the stop is based on race. It's whether  
14 race is a motivating factor. And I think based on the totality  
15 of the evidence and the dearth of reasonable suspicion of these  
16 stops, you can conclude that race is in fact a motivating  
17 factor.

18 THE COURT: At least in these first two.

19 MS. HOFF VARNER: David Ourlicht, also here today.

20 Mr. Ourlicht was a college student at St. John's, and  
21 was illegally stopped three times. The first time he was  
22 walking home when Officer Christopher Moran pulled up in a  
23 scooter and demanded his ID and to know where he was going.  
24 Officer Moran then got out of the scooter and immediately  
25 frisked David.

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1 As he reviewed David's ID, David said, "Now that you  
2 have my information, do you mind if I take yours?"

3 Well, Officer Moran clearly did mind because, as soon  
4 as backup officers arrived, he replied, "Now you're going to  
5 get the full treatment. Get against the wall."

6 David complied. Put his hands up against the wall,  
7 facing the wall, and an officer searched him, taking everything  
8 out of his pockets and throwing it on the ground.

9 THE COURT: Why was he allegedly stopped? Is this the  
10 one with the gun in the area?

11 MS. HOFF VARNER: This is the first of the three David  
12 Ourlicht stops, and Officer Moran testified that there was a  
13 suspicious bulge between one and a half to two feet running  
14 from David's right hip up to his armpit.

15 THE COURT: Nothing to do with that loose gun in the  
16 area. That's coming?

17 MS. HOFF VARNER: That's next.

18 THE COURT: This one, the officer sees somebody with a  
19 suspicious bulge?

20 MS. HOFF VARNER: Correct.

21 Officer Moran also gave David a summons for disorderly  
22 conduct, despite the fact that there was no basis, no crowd  
23 gathered and David didn't yell.

24 Officer Moran testified that David said he wanted to  
25 fight him, he wanted to fight the officer.

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1           What David said is that, when he was given the summons  
2 for disorderly conduct, he knew that it was baseless and he  
3 said, "I'm going to fight this." David never yelled. He  
4 wasn't angry. He was scared, and he certainly wasn't foolish  
5 enough to threaten to fight a police officer who had a visible  
6 gun.

7           THE COURT: Again, this is not the one where he is  
8 with his other friend Anthony. He is alone, right?

9           MS. HOFF VARNER: Yes, he is by himself.

10           To go back to that suspicious bulge, even if you could  
11 imagine an object that might cause this kind of enormous  
12 suspicious bulge, there was no such thing. David testified  
13 that he had a notebook in his left jacket pocket, not his  
14 right, but left jacket pocket that was plainly visible as a  
15 spiral notebook.

16           And he also testified that when Officer Moran  
17 initially frisked him, he frisked only the front center of his  
18 waistband, not the right side. And, of course, there was  
19 nothing that was one and a half to two feet creating a bulge on  
20 his right side.

21           The next month David was stopped again, this time with  
22 his friend Anthony. He and his friend Anthony, who is white,  
23 were walking to a subway when an unmarked car pulled up to  
24 them.

25           THE COURT: The next two for Ourlicht have no police  
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1 was searched first by three of the four officers. And when  
2 they discovered Anthony's drugs, David was the one who got  
3 searched for a second time and David was the one who got  
4 threatened with arrest. This stop clearly shows the disparate  
5 treatment that David, a black man, received when compared to  
6 his white friend.

7 By the way, the city tries to make much of David's  
8 inability to remember his friend's last name on the stand, but  
9 David did recall Anthony's last name when we disclosed it years  
10 ago in Rule 26 disclosures given to the city.

11 Let me address that third stop now.

12 David was stopped for the third time in June 2008. He  
13 and a friend were sitting on a bench in a housing complex when  
14 uniformed officers came into the courtyard, drew their weapons,  
15 pointed them at him and everyone in that courtyard and yelled,  
16 "We heard there was a gun. Everybody get on the floor."

17 David got face down on the ground and was frisked. No  
18 gun was recovered.

19 David was terrified, as anyone would be in that  
20 situation. And the only explanation he ever got was that there  
21 was a report there was a gun in the area.

22 THE COURT: I asked the city about that during  
23 summations, and I think I specifically asked Ms. Grossman, this  
24 is a small area, a very limited area, could the police really  
25 stop any, I guess, young male in that area because there was a

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1 very recent report of a gun gone missing right there. I think  
2 she said yes. Do you disagree with that?

3 MS. HOFF VARNER: We do. In support of that, we would  
4 cite two cases, Ybarra v. Illinois and, also, I think it's U.S.  
5 v. Jaramillo. It is a Second Circuit case from 1994, and we  
6 can provide those citations.

7 THE COURT: You cite them for the proposition that?

8 MS. HOFF VARNER: We would cite them for the  
9 proposition that a Terry pat-down or a Terry stop is not  
10 permissible with respect to a person in a public place where  
11 the officers have no specific and articulable facts on which to  
12 base a suspicion of that person in particular.

13 Let me talk about Cornelio McDonald.

14 He was stopped crossing the street between a public  
15 housing building where his mom lived which is 80 percent black  
16 and a private co-op where he lived which was 80 percent white.  
17 As he crossed the street, police officers in an unmarked van  
18 pulled up, identified themselves as police and searched him.

19 Officer French testified that he stopped and frisked  
20 and searched Mr. McDonald because he thought there might have  
21 been a weapon in his left jacket pocket. But what did this  
22 alleged weapon turn out to be? Cornelio's cell phone and his  
23 hand plunged into his pocket to keep warm on a cold winter  
24 night.

25 THE COURT: The city says, you don't look at what it  
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Summation - Ms. Hoff Varner

1 turned out to be, you look at what the officer observed. The  
2 officer observes a suspicious bulge in the right-hand pocket  
3 which you have to agree had to be there between a cell phone  
4 and hand. That's a bulge. I mean, the two together, a hand  
5 over a cell phone in a pocket would appear to an officer to be  
6 a bulge. She says, you don't look at the result, you look at  
7 what the officer perceived at the time of the stop.

8 MS. HOFF VARNER: Officer French also perceived that  
9 Cornelio's hands were close to his body which, of course, they  
10 would have had to have been because they were in his pockets.

11 Officer French also testified that he made this stop  
12 not just because of the bulge, but because of a high crime  
13 area.

14 THE COURT: So the question is, high crime area plus  
15 suspicious bulge, is that reasonable suspicion?

16 MS. HOFF VARNER: I would argue in this case it was  
17 not. If you can find reasonable suspicion based on a hand in a  
18 pocket or a cell phone which just about --

19 THE COURT: No, you don't know it's a cell phone at  
20 that point -- hand in a pocket over an object.

21 MS. HOFF VARNER: I think the first thing I just have  
22 to say, as a factual matter, I believe Mr. McDonald testified  
23 that there was no bulge in his pocket because his cell phone  
24 was so thin that it was just dropped into his pocket.

25 And while it's true that you don't know what the

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1 suspicious bulge is before you make the stop, it's also true  
2 that suspicious bulge can then be so overly broad as to justify  
3 a stop of just about anybody.

4 THE COURT: That's the question. If there is a  
5 suspicious bulge in a high crime area, is that enough to stop  
6 someone?

7 MS. HOFF VARNER: In this case, it was not.

8 THE COURT: What circumstance are you pointing to?

9 The argument is that a suspicious bulge in a high  
10 crime area is enough for a reasonable suspicion stop. Why do  
11 you say in this case, it's not because I can't figure out in  
12 what case you would say it would be?

13 MS. HOFF VARNER: Because there was nothing suspicious  
14 about this bulge, in short. The only thing that made the bulge  
15 suspicious --

16 THE COURT: You don't know that. You weren't on the  
17 street and you didn't see it. I am envisioning a hand in a  
18 pocket. That almost automatically creates a bulge.

19 MS. HOFF VARNER: The other issue, your Honor, is that  
20 the high crime area was so vague. Officer French testified  
21 that high crime area could encompass the entire borough of  
22 Queens, and he couldn't point to any of the predicate crimes  
23 that made this a crime pattern or a high crime area.

24 I also just want to point out on this stop that  
25 Cornelio McDonald believes and we think the evidence shows this

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1 deposition.

2           Officer Hernandez testified at the deposition that he  
3 saw him with 50 keys, and at trial that became 100 to 150.

4           And Sergeant Kelly said at trial for the first time  
5 that he thought the keys could have been a burglary tool. And  
6 he also said that he wasn't in fear for his safety.

7           But look at what happened. David was stopped first,  
8 frisked almost automatically. Even if we accept the officers'  
9 argument that trying a series of keys in the door is furtive  
10 movement, that cannot, as this Court and other courts have  
11 already ruled, be the basis for reasonable suspicion.

12           David Floyd was unconstitutionally stopped another  
13 time as well on April 20, 2007. And here there were uniformed  
14 officers who asked for ID, frisked him, demanded to know if he  
15 had weapons and then left.

16           The city's argument is that this stop was based on  
17 consent, which defies logic.

18           David testified that officers were uniformed and had  
19 weapons, they had guns, that they said something to make him  
20 stop walking, that they demanded his ID, that his back then was  
21 up against the wall and the officers were flanking him, so he  
22 wasn't free to leave.

23           THE COURT: This was a stop without any officers?

24           MS. HOFF VARNER: That's correct, your Honor.

25           Now, I want to talk about Lalit Clarkson who you asked

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Summation - Ms. Hoff Varner

1 about --

2 THE COURT: I'm sorry. What?

3 MS. HOFF VARNER: Lalit Clarkson.

4 Again, the city has argued that Mr. Clarkson's stop  
5 was not a Terry stop at all but was in fact based on consent.6 I think you asked whether he said he wasn't free to  
7 leave. Here is what he said.8 He said that he knew that the two men were officers.  
9 They were also unidentified, but he knew that they were  
10 officers based on his experience in the neighborhood. He was  
11 confident that they were police officers.12 As he left the bodega, they commanded him to come over  
13 here. They took out their badges and announced themselves as  
14 police. They didn't ask. They commanded. And so  
15 Mr. Clarkson, of course, obeyed. And as they began to ask him  
16 questions, the officers backed him up against the wall,  
17 physically preventing him from walking away.18 We submit that no reasonable person in these  
19 circumstances would have felt free to walk away.

20 THE COURT: Of course, that's his version.

21 Is this a good time for you to answer the argument  
22 that in several of the stops you have already described, there  
23 is not enough specificity for the city to have identified the  
24 officers?

25 MS. HOFF VARNER: I think there are three answers to

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1 that. The first is that, in many of these stops, the  
2 plaintiffs made a good faith effort to identify these officers.  
3 And there are deficiencies in the city's search, which we will  
4 point out in more detail in our post-trial briefing, that  
5 suggests that there could have been officers that were  
6 identified that may have been involved in these stops.

7 THE COURT: You're not going to do that in the  
8 summation today?

9 MS. HOFF VARNER: Not today. It's relatively detailed  
10 and we thought it was better written out than spoken.

11 THE COURT: This was the fellow who looked through  
12 photo spreads?

13 MS. HOFF VARNER: He was one of several individuals  
14 who looked through photo spreads. I can do a couple of quick  
15 details.

16 For example, David Ourlicht also looked at photo  
17 arrays and was unable to definitively identify any of the  
18 officers. But as he left that courtyard, the one where they  
19 said there was a report of a gun, he wrote down the number of a  
20 police van that was in the vicinity, one of the police vans  
21 that the officers got out of. And that police van was in the  
22 exact vicinity of that public housing courtyard on the day and  
23 the time that he thought the stop might have taken place.

24 That example and others, I think, suggests that the  
25 search for the John Doe officers was insufficient.

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1 I would also just say that, on this John Doe question,  
2 you do have the credibility of the witnesses themselves and can  
3 make determinations about whether you think they were right.

4 Finally, look what happened to Mr. Downs. He couldn't  
5 identify the officers either based on the photo array where  
6 they were all wearing the same shirt, but as soon as he saw  
7 them in the courtroom, he was in fact able to identify them.

8 And because I am short on time, I am going to try to  
9 go briefly through a couple other of these stops.

10 Clive Lino was stopped on February 5, 2008. Officers  
11 Colon and Arias claimed that they stopped Clive and his friends  
12 because they fit a description of robbery suspects, but that  
13 description is inconsistent between the two officers. Even if  
14 it were consistent, it's still too general, for example --

15 THE COURT: Is this the tan coat one?

16 MS. HOFF VARNER: Yes. This is the tan coat, where he  
17 was wearing a tan coat and the description was blue and black  
18 coat.

19 Also, as Officer Arias testified, the description that  
20 Mr. Lino fit was black male between five six and six feet tall,  
21 which would describe just about any black male.

22 Clive was stopped a second time in a subway station  
23 where the city tries to defend the stop by arguing that he fit  
24 the description from a wanted poster of a man in a red jacket.  
25 But this suspect description was two weeks old. And as the

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1 CCRB found, it was too remote in time to be the basis for  
2 reasonable individualized suspicion without more details.

3 On the stand, Officer Leek tried to embellish that  
4 suspect description by saying he determined the suspect's age  
5 based on a surveillance camera photo taken from the rear, which  
6 was clearly preposterous.

7 I also want to point out that the officers on this  
8 stop, the officers who stopped Clive must have been aware that  
9 he wasn't the right suspect. The city says that they detained  
10 him for 20 minutes because they wanted to investigate if he was  
11 the right guy. But here is their actual investigation. They  
12 just looked for the poster and they couldn't find it.

13 Here is what they didn't do. They didn't ask the  
14 sergeant who gave them the wanted poster to take a look and see  
15 if Clive was the right guy, even though the sergeant was 30  
16 feet away. They didn't like his ID. They didn't find the  
17 poster to compare it to Clive. If they really believed that he  
18 fit that suspect description, they sure did a lousy job of  
19 investigating.

20 Briefly, I want to talk about Dominique Sindayiganza,  
21 stopped in Union Square because a woman complained that someone  
22 fitting his description asked for money.

23 THE COURT: Didn't she do more than that? Didn't she  
24 point him out?

25 MS. HOFF VARNER: Yes.

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1 First of all, there is no evidence that this woman  
2 existed other than the testimony of Officer Luke White because  
3 he was unable to actually tell us anything about her or her  
4 name.

5 Second of all, this alleged eye witness identification  
6 took place from 30 feet away in the dark based on a side view  
7 while Mr. Sindayiganza was surrounded by officers.

8 THE COURT: But if she said so, if she said, that's  
9 the guy, didn't the officers then have reasonable suspicion?

10 MS. HOFF VARNER: The stop happened before the eye  
11 witness identification was made.

12 THE COURT: What did the police know at the time of  
13 the stop? The woman had said what before that?

14 MS. HOFF VARNER: I believe the woman said that it was  
15 a light skinned male with a backpack, but I am not quite sure  
16 about the details.

17 THE COURT: And he fit that description?

18 MS. HOFF VARNER: Well, you saw him. You know what  
19 color his skin was --

20 THE COURT: He is light skinned and he had a backpack  
21 and he was right there. He was in that vicinity. Do you think  
22 that is reasonable suspicion for a stop?

23 MS. HOFF VARNER: I think that's reasonable suspicion  
24 for the woman to come out and then make an identification at  
25 which point they can make a stop, but the stop came first

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1 before the --

2 THE COURT: I realize at the time of the stop,  
3 according to you, they had the description and the location.  
4 He was right there and he fit the description of light skinned  
5 male with a backpack. Isn't that enough for a reasonable  
6 suspicion?

7 MS. HOFF VARNER: We think not, your Honor. We think  
8 that's especially true in light of what happened after the  
9 stop -- in the middle of the stop, really -- which sheds light  
10 on whether these officers have any basis or not.

11 Here is what happened in the middle. The woman said  
12 that she -- we don't actually know what the woman said.

13 THE COURT: According to the testimony.

14 MS. HOFF VARNER: We know that Officer White told him  
15 that he couldn't walk to the subway. Even though the city said  
16 he was at this point free to go, he clearly wasn't free to go  
17 to the subway, though.

18 Officer Luke White has changed his story numerous  
19 times. For example, he testified that he frisked Mr.  
20 Sindayiganza as part of the search incident to arrest, but in  
21 sworn statements to the CCRB, he said he frisked Mr.  
22 Sindayiganza before he decided to arrest him, and then he told  
23 you that he never made the frisk at all. To top it off, he  
24 testified that his memory about the stop was better at trial  
25 three years later than it was at the CCRB eight months after.

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1 And, also, Officer White testified in his deposition  
2 that he didn't have reasonable suspicion when he first  
3 approached Mr. Sindayiganza. He then changed that answer after  
4 consulting with counsel in his deposition errata sheet. And  
5 then he testified at trial that he was just confused by this  
6 question.

7 We submit that this is not credible and that the best  
8 answer, his first answer, is that even Officer White didn't  
9 think he had reasonable suspicion.

10 Nicholas Peart, who is also here today, has been  
11 illegally stopped four times.

12 THE COURT: He was one of the three with the blue  
13 shorts?

14 MS. HOFF VARNER: Yes. But here is what is true about  
15 that story.

16 Officer Ben White testified at trial he made the stop  
17 because of the description and because he observed suspicious  
18 bulges in all three of their waistbands. But that call was  
19 anonymous, and as Officer White testified, an anonymous call is  
20 not enough.

21 THE COURT: If you have the description from an  
22 anonymous call plus the suspicious bulge, then is it enough?

23 MS. HOFF VARNER: It might be, but he didn't have the  
24 suspicious bulges either.

25 THE COURT: The officers said they did.

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1 MS. HOFF VARNER: At his deposition, he said the basis  
2 of the stop was the description alone. And at the CCRB, a  
3 month after the stop, he said that he found the bulges only  
4 during the frisk. And at trial, he then said that the bulges  
5 were actually the basis for the stop.

6 THE COURT: You're saying, if at the time of the stop  
7 they only had a description from an anonymous source, they  
8 can't have reasonable suspicion, as a matter of law? Is that  
9 what you're saying?

10 MS. HOFF VARNER: That's correct. And the suspicious  
11 bulges that he concocted were never the basis for the stop  
12 until the very moment that he stepped onto the stand.

13 THE COURT: Do you have a case on that one?

14 MS. HOFF VARNER: The case on the anonymous calls is  
15 Jayle v. Florida, and I can get you the cite.

16 In the other three stops, he was consistently --

17 THE COURT: Of course, it wasn't just the description,  
18 wouldn't it be the location too? There are three people, not  
19 one, and they are at the exact location, but it's all part of  
20 the anonymous call. Is that a problem, it is all a part of the  
21 same description?

22 MS. HOFF VARNER: It was. One other issue with the  
23 description, though, is that regardless of whether it was  
24 anonymous or not, Ben White could never tell us what the actual  
25 description was. All he said is just trust me, I know it

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1 matched, but he couldn't actually give us the description that  
2 he used to make the stop.

3 I just want to note that Nicholas was also stopped  
4 three additional times, and each stop he was not free to leave  
5 and he was frisked. And in the third stop, he was forced to  
6 watch as an officer took his keys and his ID that had his  
7 apartment number and disappeared into his apartment building  
8 where his two younger brothers and his sister were home alone.

9 (Continued on next page)

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Summation - Ms. Hoff Varner

1 MS. HOFF VARNER: (Continuing) and was forced to sit  
2 there terrified about what might happen inside the building.

3 THE COURT: Were there officers identified for any of  
4 the other three?

5 MS. HOFF VARNER: There were not.

6 But with respect to that last stop for Nicholas, I  
7 just want to say that if the NYPD's policy is, in fact, to  
8 instill fear, then it sure worked in this case. He was  
9 terrified.

10 I briefly will discuss Ian Provost, a 42-year-old  
11 Black man stopped and handcuffed by Officer Jonathan  
12 Rothenberg.

13 THE COURT: Is he the one with the knife sticking out  
14 of his pocket?

15 MS. HOFF VARNER: Right.

16 THE COURT: Is that reasonable suspicion right there?

17 MS. HOFF VARNER: No. Because the knife wasn't  
18 sticking out of his pocket.

19 THE COURT: That's a disputed fact issue.

20 MS. HOFF VARNER: It is.

21 But in his memo book he said he stopped him on  
22 suspicion of trespass. And then he testified -- he testified  
23 in this court that he couldn't tell whether it was a knife  
24 until after he took it out of Ian's pocket which is by  
25 definition not a knife in plain view.

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Summation - Ms. Hoff Varner

1 He also argued -- I'm sorry. The city also argued  
2 that he made the arrest for disorderly conduct because a crowd  
3 was forming. But Rothenberg admitted that Mr. Provost was  
4 yelling that the stop was unlawful.

5 And Sergeant Houlahan, who came to supervise, couldn't  
6 recall whether there was a crowd. And this was in the middle  
7 of a day on a weekday. We think that this is just implausible.

8 Deon Dennis was stopped outside of his apartment  
9 building in Harlem in 2008. On that same night Officers Luis  
10 Pichardo and Angelica Salmeron were on an impact overtime tour.  
11 And they were under instructions to meet a numerical goal that  
12 night, five summonses for the tour. So it's not surprising  
13 that when they saw Deon with a white styrofoam cup five feet  
14 away from him, they saw an opportunity to meet their quota.

15 Their story is entirely implausible. They say he was  
16 holding a cup of alcohol standing next to a bottle of Hennessy  
17 on the ground. But everyone agrees that Deon reached into his  
18 pocket to pull out his wallet and then pulled the ID out of his  
19 wallet and then handed the ID to the officers, all apparently  
20 as Officer Salmeron testified without ever putting down this  
21 alleged cup.

22 THE COURT: One hand goes in the pocket and one hand  
23 is holding the cup.

24 MS. HOFF VARNER: We think -- I think it's  
25 implausible. It probably is -- we can strike that but it's --

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1 Officer Salmeron testified that he was holding the same cup  
2 with his hands that he used to do all of these things.

3 THE COURT: He identified the right hand versus the  
4 left.

5 MS. HOFF VARNER: He did not -- no, he did. He said  
6 he pulled the wallet out with his right hand. And he denies  
7 that he ever had a cup. The only cup that he said --

8 THE COURT: But the officer said he had a cup in I  
9 guess the other hand? No?

10 MS. HOFF VARNER: She never specified. We know no  
11 details about this cup and this bottle other than the officers  
12 say they existed.

13 And as for whether they existed. As Officer Pichardo  
14 testified, for an arrest involving alcohol, they usually  
15 voucher the alcohol. Yet, neither officer documented or  
16 vouchered the alleged bottle or the alleged cup. And they  
17 never gave any explanation as to what happened to the cup. As  
18 for the bottle, they said they gave it back to his girlfriend.

19 THE COURT: And the ID was in the wallet?

20 MS. HOFF VARNER: Yes. In the wallet. In I believe  
21 it was his back right pocket.

22 THE COURT: In the wallet. So you would think you  
23 would need the second hand to take it out of the wallet.

24 MS. HOFF VARNER: That's my view.

25 I also just want to point out that Officer Salmeron

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Summation - Ms. Hoff Varner

1 told the court that Deon said he was drinking. You heard that  
2 testimony again from Ms. Grossman. But at her deposition when  
3 she testified to everything she remembered about the incident,  
4 she never included that fact. And neither did Officer  
5 Pichardo.

6 So the entire basis for this encounter was this  
7 alleged opened container, which the city argues gave the  
8 officers probable cause. Without that probable cause, there  
9 certainly was no basis to stop Mr. Dennis. And we believe that  
10 the officers stopped him in an attempt to meet a quota. This  
11 was a bad stop and a violation of his rights.

12 Kristianna Acevedo. Ms. Acevedo was chased down the  
13 street by an unmarked police van in reverse. While the city  
14 suggests that she may have told the CCRB different details  
15 about the story, here's what she consistently said. She said  
16 that she was chased down the street and that Detective Hawkins  
17 shook her against the UPS truck, and that the detectives  
18 roughed her up. We would argue that any inconsistencies are  
19 immaterial in light of this testimony to the CCRB that covers  
20 what's important about this stop.

21 THE COURT: But all the officers denied that that ever  
22 happened. Was it three of them?

23 MS. HOFF VARNER: That's true.

24 THE COURT: So all three you think are lying under  
25 oath?

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Summation - Ms. Hoff Varner

1 MS. HOFF VARNER: Well, first of all, the CCRB thought  
2 that they were. And we think --

3 THE COURT: And the evidence of that is?

4 MS. HOFF VARNER: Is that the complaint was  
5 substantiated.

6 THE COURT: The complaint that -- what was the  
7 complaint?

8 MS. HOFF VARNER: For abuse of authority with respect  
9 to a stop and I believe a frisk -- for a stop and a frisk.

10 The detectives' stories are also implausible and  
11 inconsistent. Two of the officers say that she thought she  
12 looked like she might have information about drug sales. And  
13 the other one says that she looked afraid, afraid of being  
14 followed. But despite this he still thought it was a good idea  
15 for two men in plain clothes in a van on a desolate street to  
16 engage her.

17 Everyone agrees that the detective began speaking to  
18 her from the van, that she took off running and yelling for  
19 help, that the van reversed to follow her, and that all three  
20 detectives got out of the van and approached her. So even  
21 under the officers' version of the story this kind of  
22 aggressive pursuit or approach would clearly leave a reasonable  
23 person feeling not free to leave.

24 Here's where the testimony diverges. The city says  
25 that Ms. Acevedo's description of the stop didn't happen. But

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Summation - Ms. Hoff Varner

1 what the detectives say is that they were chasing her to allay  
2 her concerns. Yet, they only spent 20 seconds with her to calm  
3 her down and then abandoned her and got in the street -- got  
4 back into the van, even though they all agreed that she was not  
5 anymore calm. It just doesn't make any sense. And the CCRB  
6 didn't think so either.

7 So once you discredit this story, what you're left  
8 with is what Ms. Acevedo said happened. Detective Hawkins  
9 yelled, "When you hear police, you stop." She pushed her  
10 against a UPS truck. He pockets and purse were searched. And  
11 the stop violated her constitutional rights.

12 Your Honor, over and over with Ms. Acevedo and many  
13 others the city has tried to attack the credibility of these  
14 plaintiffs by harping on tiny inconsistencies. But despite  
15 this laser-like focus on inconsistencies, the city has never  
16 managed to shake any of these witnesses on the material facts  
17 of their stops. More importantly, these witnesses have no  
18 reason to lie. They have nothing personally to gain by  
19 testifying in this trial. They have no financial incentive.  
20 None of them is going to recover a dime. But they have  
21 voluntarily subjected themselves to deposition and  
22 cross-examination because they believe they were illegally  
23 stopped and frisked. And they want to change this practice.

24 The city's also attempted to insinuate that these  
25 plaintiffs and witnesses are biased against the police. But

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Summation - Ms. Hoff Varner

1 you've heard them testify that they have no such bias and in  
2 many cases they have close family members or friends who are  
3 police officers. And Leroy Downs spent eleven months going to  
4 the citizens police academy in an effort to understand why he  
5 was stopped.

6 This isn't bias. This is motivation to change a  
7 policy and practice that is invasive and humiliating and  
8 destructive.

9 Deon Dennis testified that he became a plaintiff  
10 because he wanted to make sure his children didn't experience  
11 being stopped and frisked like he had been.

12 Nicholas Peart told us that he's testifying so that  
13 the relationship that the police have with the community will  
14 change.

15 These are the experiences of citizens who believe in  
16 the constitution and who believe that the police can do better  
17 than make innocent people afraid.

18 The city's argued that we haven't met our burden to  
19 show a widespread pattern and practice because we've only  
20 introduced evidence from 12 individuals about 19 stops. But  
21 the city is wrong. These 19 stops took place in all five  
22 boroughs over the course of many years. And we've heard  
23 testimony from 41 NYPD officers who were involved. And what  
24 the city leaves out is that these experiences are only one part  
25 of our case which also includes statistics and policy and

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Summation - Ms. Hoff Varner

1 Police Commissioner Kelly said the purpose of the stop --

2 THE COURT: Why do you call it un rebutted? I thought  
3 there was evidence from another officer who was at one or both  
4 of the meetings who said they never heard any such statement.  
5 I thought there was another officer who testified. Somebody  
6 was there.

7 MS. HOFF VARNER: Your Honor --

8 THE COURT: I thought somebody was there. One of the  
9 people who testified, high ranking.

10 MR. MOORE: Juanita Holmes was at Brooklyn College,  
11 not at the --

12 THE COURT: Right was at one of the places and said  
13 whatever it was that Adams said didn't happen.

14 That's all right. You'll get your turn. That's what  
15 I thought was the testimony.

16 MS. HOFF VARNER: Save it for Mr. Charney.

17 But the bottomline, he said the purpose was to instill  
18 fear into young Black and Hispanic men. That's exactly what  
19 these stops do.

20 So we've proven far beyond the applicable evidentiary  
21 standard that these people were stopped in violation of their  
22 constitutional rights. And my colleagues will show that these  
23 violations are the results of a widespread policy and practice.

24 THE COURT: All right. Thank you, Ms. Hoff Varner.  
25 Mr. Charney.

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Summation - Mr. Charney

1 THE COURT: Just for planning, how long do you expect  
2 to be on your portion?

3 MR. CHARNEY: Hopefully 50 minutes or less. So I'm  
4 going to go -- I know we have a break at 3:30. So I will go  
5 and then continue after the break.

6 THE COURT: Okay.

7 MR. CHARNEY: Ms. Hoff Varner summarized how the  
8 NYPD's stop-and-frisk practices have impacted the lives and  
9 dignity of twelve individual named plaintiffs and class  
10 members.

11 I now want to talk about how the statistical evidence  
12 in this case shows that what happened to these twelve  
13 individuals was part of a citywide pattern and practice of  
14 suspicionless and race-based stops and frisks which NYPD  
15 officers have continued to engage in over the last nine years.

16 Now, a lot of this -- these numbers have already been  
17 mentioned a few times, both this morning and this afternoon.  
18 Your Honor has heard about the incredibly low hit rates.  
19 You've heard about kind of the very basic yawning racial  
20 disparities so I'm going to focus on some of those numbers more  
21 specifically.

22 The first is with respect to the hit rates. As your  
23 Honor is aware, when you look at weapons and contraband the hit  
24 rates there under two percent for contraband, under one percent  
25 for weapons. And if you focus in on guns, it's actually

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Summation - Mr. Charney

1 .14 percent.

2 If you compare that to the case Indianapolis v.  
3 Edmond, which was a case involving random vehicle checkpoints  
4 for drugs, the drug seizure rate in that case where, again, you  
5 don't have any level of suspicion -- you just have random  
6 stops -- was almost five percent. And I think that comparison  
7 sheds a lot of light on the problem here.

8 One other thing I'll note is the decision in United  
9 States v. McCray which is an Eastern District case decided by  
10 Judge Gleeson which talks very specifically about how a low hit  
11 rate can be something that is evidence that maybe reasonable  
12 suspicion was not present. So I'll just note that.

13 Now, as your Honor is well aware Professor Fagan  
14 during a classification analysis --

15 THE COURT: Of course the city, when I asked that  
16 question of the city, isn't this a rather unsuccessful rate to  
17 have ninety percent of the stops with no enforcement action,  
18 the answer was well Professor Fagan himself said one arrest out  
19 of nine isn't so bad, or something like that.

20 MR. CHARNEY: As your Honor pointed out, that was one  
21 arrest out of nine, which I think the arrest rate in that study  
22 was about eleven percent for arrests only.

23 THE COURT: And here it's?

24 MR. CHARNEY: Here it's for arrests, about five  
25 percent. If you combine that with summonses, you get to eleven

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Summation - Mr. Charney

1 MR. CHARNEY: Apparently justified, yes.

2 Because, again, the other thing to point out here is  
3 that if an officer checks off furtive movements and, say,  
4 another factor, Professor Fagan was giving the officer the  
5 benefit of the doubt in classifying that as justified. That's  
6 assuming --

7 THE COURT: Well, apparently.

8 MR. CHARNEY: Yes, apparently justified.

9 That assumes the furtive movement was a legitimate  
10 checkoff.

11 So I think we need to consider whether or not, in a  
12 large number of these cases, is furtive movements, in fact, a  
13 legitimate checkoff.

14 Now I want to look at some graphs which were in  
15 Professor Fagan's reports and I also showed them in my opening  
16 about the use of high crime area.

17 Now, Ms. Hoff Varner mentioned that high crime area is  
18 checked off in roughly the same percentage of stops regardless  
19 of whether the stops are in a high crime census tract, an  
20 average/medium crime census tract, or a low crime census tract.  
21 And that's what this graph shows. This is a graph that divides  
22 the city into quintiles based on crime rates.

23 THE COURT: In other words, Q5 has the lower crime  
24 rate than Q1.

25 MR. CHARNEY: I believe, yeah.

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Summation - Mr. Charney

1 But as you can see, from the low crime census tracts  
2 to the high crime census tracts, high crime area is being used  
3 roughly the same percentage of time; which, again, calls into  
4 question is high crime area really being used as a legitimate  
5 stop factor?

6 We heard Ms. Hoff Varner describe both the case of  
7 Mr. Floyd and Mr. McDonald where there was a supposed crime  
8 pattern. And the crime pattern appeared to cover a wide swath  
9 of geographic area.

10 And the reason that I think this is important to point  
11 out is that both the city's experts and several NYPD officials  
12 who have testified in this case have emphasized how the NYPD  
13 analyzes crime, makes deployment decisions, and makes law  
14 enforcement strategy decisions using very small geographic  
15 units as its focus.

16 THE COURT: Ms. Hoff Varner said the high crime area  
17 was all in Queens. Is that what the evidence was?

18 MR. CHARNEY: I believe that Officer French talked  
19 about how the robbery pattern he was looking at encompassed the  
20 entire Police Service Area, which was virtually the entire  
21 Borough of Queens, because police service areas oftentimes  
22 encompass several precincts.

23 THE COURT: Because that's not true in Floyd where  
24 it's really much smaller.

25 MR. CHARNEY: It was much smaller than obviously the  
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Summation - Mr. Charney

1 whole borough or the whole precinct. However, the 36-block  
2 area that Professor Fagan looked at, in which there was only  
3 one burglary in the two months preceding the stop -- and that  
4 burglary actually happened more than a month preceding the  
5 stop -- the size of that area that he looked at, if you  
6 compared that to several of the sector maps which the city has  
7 put into evidence in the case, they are almost identical in  
8 size.

9 In other words, it's, again, focusing on a particular  
10 area that oftentimes, you know, shares -- it's very  
11 demographically similar. The characteristics of that kind of  
12 geographic area is exactly the kind of geographic area that the  
13 city uses when it analyzes crime patterns and makes these  
14 deployment decisions.

15 So the city is really trying to now have it both ways  
16 by saying, Look, you have to analyze crime at a very small unit  
17 of analysis. But when it comes to high crime area, we can  
18 defined that as broadly as we want.

19 On that point, I would just point the Court to a Ninth  
20 Circuit decision in United States v. Montero-Camargo, which I  
21 can spell for your Honor. But it's from 2000. And the Court  
22 said that you must be particularly careful to ensure that a  
23 high crime area factor is not used with respect to entire  
24 neighborhoods or communities in which members of minority  
25 groups regularly go about their daily business but is limited

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Summation - Mr. Charney

1 to specific circumscribed locations where particular crimes  
2 occur with unusual regularity.

3           So I guess what the plaintiffs are asking here is that  
4 the city be held to its own standards when it comes to defining  
5 what a high crime area is. If they want to focus on small  
6 geographic areas to analyze crime and to make deployment  
7 decisions, then that should also be the way that they measure  
8 whether a stop occurs in a high crime area.

9           Now, I want to move on to talk about what Professor  
10 Fagan called scripts. His analysis, he talked about how  
11 this -- over time there appears to be scripts of reasonable  
12 suspicion which officers are adopting; in other words, they  
13 appear to be checking off the same kinds of factors for stops  
14 increasingly over time so that it appears that they are really  
15 just using a script instead of actually trying to figure out in  
16 each individual stop whether there was reasonable suspicion.

17           And this is more than just a statistical analysis  
18 because we saw during the city's case in chief two real world  
19 examples of this playing out on the street. And these two  
20 examples were of the UF 250s of Officers Kha Dang and I believe  
21 it's Edward Gonzalez. Both from the 88 precinct. Both of whom  
22 happened to be among the highest stopping police officers in  
23 the entire department in 2009.

24           Up here we have Plaintiffs' Exhibit 557-D which was  
25 submitted into evidence during the testimony of Charlton

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Summation - Mr. Charney

1 Telford who was the supervisor of Officer Gonzalez. And this  
2 actually documents the 134 250s which he filled out in the  
3 third quarter of 2009.

4 As you can see, in 98.51 percent of these stops he  
5 checked off the exact same four stop factors, which was: "Fits  
6 description, actions indicative of casing, high crime area, and  
7 time of day, day of week, season." That means -- the same four  
8 in all -- in 98 percent of those stops.

9 And I want to talk about the "fits description." It  
10 was clear from the testimony that there didn't really seem to  
11 be a source for that description. None of these stops came  
12 from -- in response to a radio run, in other words, a call to  
13 the police. None of them involved the report of a victim or a  
14 witness. And none of them had the box "ongoing investigation  
15 e.g., robbery pattern" checked off on the 250.

16 So it begs the question what was this description that  
17 he was checking off in 98.51 percent.

18 THE COURT: That could have been the crime condition  
19 of the roll call. In other words, he was at the roll call.  
20 The officer in charge might have said here's what we're looking  
21 at today. We've had a burglary by a 50-year-old Hispanic male,  
22 five foot five, whatever.

23 MR. CHARNEY: On that point, Sergeant Telford was  
24 asked about that -- you know, was there a suspect description  
25 for this crime condition that you were addressing. And the

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Summation - Mr. Charney

1 examples he gave, and you've heard this already this morning,  
2 were things like male, Black, 14 to 19; and male, Black, in his  
3 20s. Those were the descriptions that were given by Sergeant  
4 Telford I guess it's now Lieutenant Telford during his  
5 testimony.

6 Similarly with Officer Dang, who was also an anticrime  
7 officer in the same precinct, he checked off "high crime area"  
8 and "time of day" in 77 percent of the 127 stops that he  
9 conducted during that third quarter.

10 But, it's important to point out that the locations of  
11 the stops in those 250s were widely dispersed throughout the 88  
12 precinct. And the 88 precinct covers Fort Greene and Clinton  
13 Hill Brooklyn. Many of these stops, according to those  
14 locations, were on streets, you know, with million-dollar  
15 brownstones, on streets with very trendy restaurants and shops.  
16 So to suggest again that the high crime area has specific  
17 meaning in all of these stops I think is highly questionable.

18 One thing that was similar in virtually all of Officer  
19 Dang's stops was the race of the people stopped. In Fort  
20 Greene, Brooklyn, in the 88 precinct, which Defendant's Exhibit  
21 Y8 shows was a very racially diverse precinct. I think it was  
22 about 40 percent African-American, 30 percent Caucasian, 15 or  
23 20 percent or so Latino. Of the 127 stops he did, 122 of them  
24 were of Black pedestrians and five were of Hispanic pedestrians  
25 in that quarter.

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Summation - Mr. Charney

1 As for Officer Gonzalez, in the same precinct,  
2 87 percent of his stops were of Black pedestrians.

3 Now what I think that statistic dovetails into my  
4 discussion --

5 THE COURT: But isn't the answer that the precinctwide  
6 demographics, it's not the same as the hot spots or the high  
7 crime areas within the precinct where you're going to deploy  
8 your officers. So deployment is going to the areas that need  
9 it.

10 MR. CHARNEY: That's true.

11 But I think as I've mentioned with respect to Officer  
12 Dang, the locations of his respective stops were not combined  
13 to certain parts of the precinct. Sure, there were some that  
14 were in high crime parts of the precinct. But there were  
15 others that were clearly on streets with million-dollar  
16 brownstones and that kind of thing.

17 So, again, I think it really raises questions about  
18 this use of high crime area as a stop factor.

19 But I wanted to turn then to --

20 THE COURT: Million-dollar brownstones aren't what  
21 they once were.

22 MR. CHARNEY: Right. Very good point. I'm sure your  
23 Honor can take judicial notice of that.

24 But I did want to mention -- I did want to turn to  
25 Professor Fagan's Fourteenth Amendment analysis, his analysis

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Summation - Mr. Charney

1 a little hard to find on his resume has a finance background  
2 and lacks any training in police, criminology, or studies of  
3 racial discrimination.

4 The five studies that he did prior to this case  
5 involving policing, all of which were done with Professor  
6 Smith, none of which addressed issues of racial disparity or  
7 the legality of any -- or any kind of NYPD practice.

8 Even Professor Smith, who the city has put forward as  
9 their expert on policing, has not, prior to his work in this  
10 case, ever conducted a statistical study addressing racial  
11 disparities in policing or any other context, nor the  
12 constitutionality of any particular policing practice.

13 And none of those five studies that Professors Smith  
14 and Purtell did conduct related to the NYPD used a negative  
15 binomial regression model, which is the one Professor Fagan  
16 used here, which they critique; nor did they use robust  
17 standard errors or explanatory variables, both of which were,  
18 again, very major parts of Professor Fagan's analysis.

19 Moreover Professor Smith is essentially the city's  
20 in-house consultant. Since 1981, he has been retained as a  
21 consultant in fifteen matters. All but three of those he was  
22 retained by the city of New York.

23 Now, Professor Fagan's main finding in table 5 of his  
24 report was that the racial composition of a census tract or a  
25 precinct, depends on which units of analysis you want to use --

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Summation - Mr. Charney

1 and what I mean by racial composition is the percent of the  
2 population that was Black or the percent of the population that  
3 was Hispanic in that precinct or census tract -- is a  
4 statistically significant predictor of the number of stops in  
5 that precinct or census tract, over and above crime. And after  
6 controlling for crime, patrol strength, socioeconomic factors  
7 and other factors which the criminological and social science  
8 research have shown to be associated with crime.

9 Professor Fagan also found -- and this is the analysis  
10 reflected in table 7 of his respective reports -- that within a  
11 given census tract or precinct, Black and Latino pedestrians  
12 are more likely to be stopped by the police and are stopped  
13 more frequently than Whites regardless of the racial  
14 composition of that precinct or census tract, the crime rates  
15 in those census tracts or precincts, or the other variables  
16 which -- associated with crime.

17 THE COURT: Okay. Two issues, obviously, that are the  
18 big ones that the city has raised repeatedly. One is the  
19 benchmark problem.

20 MR. CHARNEY: About to get to that.

21 THE COURT: You have to explain to me why, according  
22 to the city, he wouldn't even test the crime suspect data to  
23 see if it made a difference.

24 And the other argument is that it has no practical  
25 significance; even statistically significant, it has no

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D5k9flo6 Summation - Mr. Charney

1 practical significance.

2 MR. CHARNEY: I will dress both of those.

3 So let's talk about the benchmark critique. So  
4 defendant's critique of Professor Fagan's benchmark -- let's  
5 just be clear what that benchmark was.

6 Professor Fagan's benchmark was really a dual  
7 benchmark. It combined two things. It combined a measure of  
8 the local population of the unit of analysis he was focused on.  
9 So it was precinct in his first report, census tract in his  
10 later reports.

11 THE COURT: Let me interrupt again.

12 Ms. Cooke criticized it also for being static. She  
13 said he didn't use trending numbers.

14 MR. CHARNEY: A couple points on that.

15 The first would be that, again, we need to focus on  
16 the fact that in the first report he used 2007 population to  
17 analyze a six-year period. So that would be '04 to '09.

18 So the question really is how much did the city's  
19 population change -- really during -- from the '04 to '07  
20 period and then from if '07 to '09 period.

21 Professor Purtell testified at this trial, because he  
22 was asked about this, and he said that between 2000 and 2010 --  
23 so that's a ten-year period, the city's population citywide  
24 grew by between .6 and 1 percent.

25 So we would submit that that's not that big of a

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Summation - Mr. Charney

1 for crime or if you account for the fact that there are going  
2 to be more stops in areas with more crime, is race still  
3 playing a role in driving those stop numbers? And that we  
4 submit is exactly what his analysis in table 5 shows.

5 THE COURT: But the city argues why wouldn't he use  
6 the crime suspect data? Why wouldn't he even test it to see if  
7 it made a difference?

8 MR. CHARNEY: Obviously one answer is the  
9 incompleteness of the data. Almost 40 percent of the suspect  
10 races are missing.

11 THE COURT: Well but Ms. Cooke broke that down.  
12 Depends on the type of crimes. Certain violent crimes was 85  
13 or the guns was 87. There were a few 80s at the beginning of  
14 that chart.

15 MR. CHARNEY: As we saw, it was missing in high  
16 numbers of the property crimes, which make up 30 percent of the  
17 stops. That's not a small number.

18 THE COURT: No. But at least 70 percent.

19 MR. CHARNEY: Yes.

20 But there's two answers to that. One is, is I think  
21 when you talk about selection bias, which is what Professor  
22 Fagan -- that was the concern he had. And by selection bias he  
23 meant that if you leave out a certain portion of those suspects  
24 and those stops from the analysis, are you -- is there  
25 something different about those stops that you're then not

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Summation - Mr. Charney

1 accounting for which, if included, would change the results?

2 And so the question really becomes -- I mean one  
3 question is with respect to those stops where the -- I'm sorry,  
4 those crimes where the suspect races are unknown in such a high  
5 percentage, is there something different about those crimes and  
6 the people who commit those crimes than the people who are  
7 committing the crimes where you, I guess, know more of the  
8 suspect race? And then are you then able to make conclusions  
9 about this whole data set if you're leaving out --

10 THE COURT: There is something different with those  
11 crimes. There's no victim there to see -- you are not there if  
12 you are burgled but you are there if somebody attacks you.

13 MR. CHARNEY: That's true. But I guess also with  
14 respect to the characteristics of those suspects.

15 The city likes to say: Well, look 85 percent of the  
16 violent crime is committed by Blacks or Hispanics. With  
17 property it may be very different. It may be lower  
18 percentages. So then it becomes a situation where if you're  
19 going to throw all of that out -- and I think this also happens  
20 with the RAND stuff which I'm going to get to in a second -- it  
21 has the effect of in some ways inflating the percentages for  
22 the other racial groups because you've thrown out a group of  
23 stops and crimes where, in fact, the demographics of the  
24 suspect population may be very different and may be, you know,  
25 if you included it, it would change that number.

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Summation - Mr. Charney

1           But I think the more important criticism that we have  
2 of crime suspect generally is something that your Honor alluded  
3 to this morning which is the police department seems to think  
4 that the crime suspect population in the city is the best proxy  
5 for the population of people who are supposedly engaged in the  
6 suspicious behavior that are causing stops. And that belief is  
7 based on a very big assumption which we think as an empirical  
8 matter has not been supported; that is, they believe there is  
9 an overlap between the people who are committing the crimes and  
10 the people they're stopping.

11           The problem is that nine out of ten people they stop  
12 are not engaged in illegal activity. So then the question  
13 becomes first: Do you actually have a basis to assume there is  
14 that overlap; which we would argue they don't. And secondly,  
15 if you don't have that basis, what you're essentially telling  
16 us is that you still think that law-abiding Black and Hispanic  
17 pedestrians are in some way more suspicious to you than White  
18 pedestrians.

19           Now I asked that questions of several witnesses in  
20 this case, all of who immediately disavowed it and said of  
21 course we're not saying that.

22           That's fine. I believe that. I take them at their  
23 word. They're not saying they believe that.

24           But I guess in terms of how this is playing out on the  
25 streets of New York City, if what -- and this kind of gets --

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Summation - Mr. Charney

1 moves on from the statistics, but if what supervisors and  
2 managers are telling their officers, you know, that look at  
3 these crime patterns, look at the demographics of the crime  
4 suspects, stop the right people, you're sending the message  
5 that you're -- that, as Ms. Hoff Varner said, you're really  
6 using race as a proxy for reasonable suspicion.

7 THE COURT: I think Ms. Cooke put up the chart that  
8 showed that the stops percentagewise with race, almost  
9 identical to the crime suspect data, and was using that  
10 affirmatively saying, see, they are both 83 and 85.

11 I asked the question is that a circular argument.

12 MR. CHARNEY: I agree with you, your Honor. I think  
13 you asked the same question which I was going to argue which is  
14 that what that statistics shows you is -- it shows you two  
15 things. It shows you, according to the city, that you know  
16 well who we're stopping are the people who are committing the  
17 crimes. You know, I think there's a big problem with that  
18 because if everybody you're stopping is not committing a crime,  
19 then we don't think that's true.

20 But secondly, your Honor's point but doesn't this  
21 also, a circular argument, which alternatively can show that  
22 you are, in fact, profiling because you know who the crime  
23 suspects are by race so you're self-fulfilling that prophecy by  
24 going out and stopping people of that race.

25 Now Professors Smith and Purtell make a big thing of

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Summation - Mr. Charney

1 using --

2 THE COURT: Actually -- we could pick up, maybe make a  
3 physical note right on your -- quarter of. We're not taking  
4 fifteen minutes anymore. We're taking ten.

5 (Recess)

6 MR. CHARNEY: Before the break we were talking about  
7 this crime suspect benchmark. And the only other point I  
8 wanted to make on this is that in table 10 of Professor  
9 Purtell's and Professor Smith's report they actually run  
10 Professor Fagan's analysis using, including the crime suspect  
11 benchmark which they are adamant is the appropriate one to use.  
12 And the results of those that are reflected there show that --  
13 well, first of all, the percent Black and percent Hispanic  
14 continue to be highly statistically significant.

15 THE COURT: Highly what?

16 MR. CHARNEY: Statistically significant.

17 And, in fact, more highly correlated with the stop  
18 variable which is the determinative variable -- I'm sorry --  
19 the dependent variable than are the crime suspect variables.  
20 They have a higher correlation.

21 So, again, Professor Purtell's and Smith's own  
22 analysis I think confirms Professor Fagan's findings.

23 THE COURT: Are you saying Professors Smith and  
24 Purtell do the very thing that city said Fagan refused to do,  
25 ran his model using the crime suspect data.

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Summation - Mr. Charney

1 MR. CHARNEY: They do.

2 And the results are still the highest possible  
3 statistical significance and, again, a higher correlation for  
4 Professor Fagan's benchmark variable than the correlation is  
5 for Professor Smith's and Purtell's benchmark variable.

6 THE COURT: So you're saying there's really no gap in  
7 the data. He may have refused to do it but they did it.

8 MR. CHARNEY: Well, they did it using the incomplete  
9 data. In other words, they only used the 63 percent where it's  
10 known.

11 The point is it doesn't change the results. So for  
12 them to say they left out this really important variable which  
13 would have changed his findings is just not true.

14 THE COURT: They didn't say he left out --

15 MR. CHARNEY: They said he left out crime suspect;  
16 that he should have used that. I'm saying that even when run  
17 his model using that variable, it doesn't change his findings  
18 that the racial composition of the census tract is --

19 THE COURT: I didn't know if they called it a variable  
20 or a benchmark. But maybe it comes to the same thing.

21 MR. CHARNEY: I think that a benchmark is a form of  
22 variable. It's one of the independent variables that's in the  
23 analysis.

24 So, I guess that result, combined with the point I was  
25 making earlier, which your Honor also made about how a high

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Summation - Mr. Charney

1 correlation between crime suspect demographics and the stop  
2 demographics could be a self-fulfilling thing. And then in  
3 combination with the fact that you're missing data on almost  
4 40 percent of the crime suspects, all of these things, I think,  
5 for us and for Professor Fagan raise serious questions about  
6 whether crime suspect race is really the appropriate measure to  
7 be using to determine if stops are based on race.

8 THE COURT: I guess you mean or at least in part based  
9 on race.

10 MR. CHARNEY: I'm sorry. Motivated by race.  
11 That's a good point, your Honor.

12 I think we just want to put on the record that our  
13 understanding of the standard on the equal protection clause is  
14 that we just have to show that race is a motivating factor.

15 THE COURT: Ms. Hoff Varner said that.

16 MR. CHARNEY: Now with respect to the practical  
17 significance point I did want to talk about that because I know  
18 your Honor asked about that.

19 Now, the first thing I want to say is that Professors  
20 Purtell and Smith make a lot of noise in their critiques of  
21 Professor Fagan about how his model does not reflect reality.  
22 I think that's term they use.

23 We would submit right off the bat that Professor  
24 Purtell's practical significance analysis, which I think was  
25 reflected in Defendant's N14 which we were looking at earlier,

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Summation - Mr. Charney

1 we submit that that doesn't reflect the reality of what the --  
2 residential patterns are in New York City.

3 In other words, if what you're trying to measure is  
4 whether or not a one percent increase in the Black population  
5 has some kind of practical impact on the number of stops,  
6 that's assuming that, in fact, if you move from census tract to  
7 census tract your Black population is going to increase by one  
8 percent. And that's just, based on what we know about the  
9 residential patterns of New York City and the way the census  
10 tracts are divided in terms of race, that's just not the way  
11 that the census tracts are oriented in the city.

12 And the way that Professor Fagan addresses practical  
13 significance, which you'll remember he looked at the -- he  
14 compared census tracts that were in the 15 percent Black  
15 population group and then compared them to those in the 25 and  
16 35 and so on and looked to see whether the number of stops  
17 would go up in those various groups of census tracts.

18 That, we submit, is a much more realistic way to look  
19 at how the racial composition change would affect the stop  
20 patterns because that's, in fact, how residential composition,  
21 racial composition changes in New York City when you go from  
22 census tract to census tract.

23 But the other thing I want to point out is if you  
24 notice here in this exhibit, the last row here, the -- what  
25 Professor Purtell states there, he says "odds of an increase in

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Summation - Mr. Charney

1 stops given a one percent increase in the proportion of the  
2 Black population versus a one percent increase in the White  
3 population."

4 This was not the original wording that he had. In  
5 fact, prior to this he had completely different wording which  
6 was -- was -- the way he phrased it was he was trying to assess  
7 the likelihood of a Black person being stopped if the percent  
8 Black population had increased.

9 I guess what we would say about that is that this  
10 change and the confusion that appeared to exist in his  
11 different versions of this demonstrative, I think this goes  
12 back to one of my initial points about the lack of expertise  
13 here on the part of the defendant's experts which we think then  
14 has an impact on their ability to even understand what it is  
15 that Professor Fagan was measuring.

16 His table five. Let's be clear. What he was trying  
17 to measure was not the likelihood of a Black person versus a  
18 White person being stopped in a particular place. He was  
19 trying to assess the impact that the racial demographics of an  
20 area has on the stop activity in that area.

21 And I think the testimony that was elicited at this  
22 trial makes it clear that Professors Purtell and Smith don't  
23 seem to have a firm understanding of what it is Professor Fagan  
24 was trying to measure. And, therefore, their assessment that  
25 his analysis does not show practical significance I think is

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Summation - Mr. Charney

1 not entitled to as much weight as Professor Fagan's own  
2 analysis of practical significance, which by the way with  
3 respect to those graphs that we saw this morning and the --  
4 what happens when you get to the 85 percent Black population  
5 census tracts, two things to say about that.

6 The first is that as you go along that line from 15 to  
7 85, what Professor Fagan found the predicted stop numbers would  
8 be tracks very closely with what the actual stop numbers were  
9 in those census tracts. So right off the bat I think there is  
10 a very strong demonstration of practical significance.

11 But with respect to that 85 percent number which  
12 Ms. Cooke tried to show by showing that census tract map are  
13 not outliers. I think that mischaracterizes what Professor  
14 Fagan testified to.

15 What he testified to was not that 85 percent census  
16 tracts are outliers. What he testified to was that there are  
17 some outliers in that 85 percent census tract group which can  
18 then skew those numbers. Because, again, he looked at all the  
19 85 percent census tracts as a group. So if you have some  
20 outliers in there that have extremely low stop numbers, that  
21 will cause the overall -- the average of the number of stops to  
22 go down for that group.

23 So I think it's important that we read that testimony  
24 very carefully to really get an understanding of what Professor  
25 Fagan testified to, which I know is hard.

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Summation - Mr. Charney

1 THE COURT: He did predict this number of 120, which  
2 the person looking at it, I forgot if it was McGuire.

3 MS. COOKE: Purtell.

4 THE COURT: It was Purtell. Said that was a red flag.  
5 He knew it couldn't be that high.

6 MR. CHARNEY: Yes.

7 And Professor Fagan acknowledged that. He said yes,  
8 when you look at that 85 percent group, what the predicted  
9 number is a lot higher than what the actual number is. But  
10 then he talked about --

11 THE COURT: How did he get such a high number?

12 MR. CHARNEY: That's where the outlier testimony comes  
13 in. He said there were some outliers that when you actually  
14 look at the actual tracts, there were some outliers that have  
15 really low numbers. And that's what brings that 120 down for  
16 that 85 percent group.

17 THE COURT: Outliers are low numbers of --

18 MR. CHARNEY: Stops.

19 Again, that doesn't even say anything about the 15 to  
20 75 percent census tracts where the actual numbers and the  
21 predicted numbers in his analysis track very closely.

22 So, I think just to summarize with respect to the  
23 statistical part of the case, I think, you know, Professors  
24 Purtell and Smith made a lot of criticism of Professor Fagan's  
25 analysis, many of which they never actually tested to see if

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1 the criticism or the change that they were suggesting would  
2 have made a difference. And in the ones that they did test,  
3 particularly table 10, we saw that the results of Professor  
4 Fagan's analysis actually didn't change once you include their  
5 crime suspect variable.

6 Now I want to turn just really quickly to the RAND  
7 report which, as you know, the city is relying on in this case  
8 to show that they were not -- not deliberately indifferent to  
9 the problem of racial profiling.

10 THE COURT: That was admitted just for notice.

11 MR. CHARNEY: Just for notice. Yes.

12 And their argument is that the RAND study found that  
13 there were no racial disparities in the stop patterns and that  
14 therefore they didn't have any basis to think that there was a  
15 problem.

16 But as your Honor has heard in this case, the evidence  
17 I think shows very clearly that the NYPD's reliance on the  
18 findings of the RAND study to conclude that it did not have a  
19 racial profiling problem were entirely unreasonable. And they  
20 were entirely unreasonable for five reasons.

21 The first is that we now know that the crime --  
22 violent crime suspect data that was provided to RAND for 2006  
23 and which RAND used to conduct its external benchmarking  
24 analysis was erroneous. It was erroneous because it did not  
25 include any of the reported violent crimes where the suspect

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Summation - Mr. Charney

1 race was unknown, a number we now know was over ten thousand.

2 And the effect of that omission is to inflate the  
3 percentage of Black violent crime suspects very significantly.  
4 And that inflation in turn resulted in RAND's finding that  
5 Blacks were being stopped at a percentage lower than their  
6 representation in the crime suspect population.

7 And as Professor Fagan noted, because he analyzed the  
8 same 2006 violent crime suspect data that RAND got, in that  
9 2006 violent crime suspect data which he received in 2009, the  
10 crime suspect race was missing in 45 percent of those cases.

11 So that's the first reason why this reliance on this  
12 report was unreasonable.

13 Secondly, as --

14 THE COURT: But did they know that at the time?

15 MR. CHARNEY: Did who know that? Did the city know  
16 that at the time?

17 THE COURT: This error that Professor Fagan proves up  
18 or discovers years later when the city had the RAND report and  
19 states they reasonably relied on it, was their reliance  
20 unreasonable because they should have caught this error?

21 MR. CHARNEY: I think they should have caught this  
22 error.

23 The other thing I'll say is not that they only relied  
24 on it in 2006. They continue to rely on it up until today.

25 The other thing I'll say on this is that violent crime

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Summation - Mr. Charney

1 suspect as a benchmark regardless of whether the data is  
2 correct or not is just not the right benchmark to use. And  
3 it's not just me who is saying that.

4 Dr. Greg Ridgeway who is the author of the RAND study  
5 stated -- and the reason we know this is because Professor  
6 Smith testified to this when he was on cross-examination, that  
7 Professor Ridgeway himself has said that violent crime suspects  
8 is too narrow of a benchmark because, as we know, police  
9 officers make stops for a lot of nonviolent crimes. And, in  
10 fact, in New York the data shows, again the NYPD's own data,  
11 that violent crimes are the suspected crimes in less than a  
12 quarter of all stops by the police.

13 The third reason why this reliance on the RAND  
14 findings was unreasonable is that the internal benchmarking  
15 analysis, which was is, again, the analysis where they compare  
16 similarly situated officers to each other to determine if  
17 officers, certain officers are over-stopping pedestrians of  
18 color. That analysis only looked at 2,756 officers in the  
19 NYPD. That's 7 percent of the NYPD officer population. And it  
20 leaves out over 15,000 officers who made stops in 2006. And  
21 those 15,000 officers conducted 46 percent of the stops in  
22 2006, which means RAND was doing an analysis where almost half  
23 of the stop data was excluded from that analysis.

24 And even doing that, they found 15 officers who had  
25 stopped pedestrians of color at higher rates than their

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Summation - Mr. Charney

1 THE COURT: Isn't that a statistically significant  
2 portion?

3 MR. CHARNEY: You mean the 7 percent?

4 THE COURT: Well, you call it 7 percent. It's really  
5 10 percent of the patrol force.

6 MR. CHARNEY: That the 10 percent of the officers is a  
7 statistically significant --

8 THE COURT: Patrol force.

9 MR. CHARNEY: 10 percent of the patrol force is a  
10 statistically significant portion.

11 THE COURT: In other words, can you draw inferences  
12 from the 10 percent?

13 MR. CHARNEY: A 10 percent sample in other words?

14 THE COURT: Correct. I guess the answer is it really  
15 isn't a question for you. Is there evidence in the record?

16 MR. CHARNEY: I don't believe that any expert in this  
17 case testified to that one way or the other.

18 Again, to extrapolate and make conclusions about an  
19 officer force of over 30,000 officers based on looking at  
20 2700 --

21 THE COURT: I am telling you that's 10 percent of the  
22 patrol force, not everybody is on patrol.

23 MR. CHARNEY: That would still be 27,000 officers. So  
24 making assessments of about 27,000 officers, based on the stops  
25 of 2700, I'm not sure if that's really a reasonable thing to

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Summation - Mr. Charney

1 do. In fact, Professor Fagan I believe in his reports takes  
2 issue with trying to do just that.

3         The last thing I will say on the unreasonable reliance  
4 on the RAND report is that RAND did in fact find significant  
5 racial disparities in post-stop outcomes, as your Honor heard,  
6 in terms of the way pedestrians are treated once they are  
7 stopped, whether or not they are exposed to a frisk or a search  
8 or use of force. And, also, even the external benchmarking  
9 analysis found that Hispanic pedestrians were stopped at a  
10 percentage that was 5 to 10 percent higher than their  
11 representation in the violent crime suspect population. And  
12 that black pedestrians were stopped at a rate of 8 percent  
13 higher on suspicion of weapons than their representation within  
14 the weapons arrestee population, while whites were stopped at a  
15 rate of 11 percent lower on suspicion of weapons than their  
16 representation within the weapons arrest population.

17         So we think that all of those things together really  
18 show that a reasonable policy analyst, when analyzing this body  
19 of information, really wouldn't rely on it to then say  
20 conclusively we don't have a racial profiling problem, we don't  
21 have a problem with racial bias in our stop practices.

22         So now I want to move on to another big part of our  
23 case, which is what we submit is a deliberately indifferent  
24 failure on the part of the police department to adequately  
25 train, supervise, monitor and discipline officers to ensure

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Summation - Mr. Charney

1 that their stop and frisk practices complied with the  
2 Constitution.

3 Now, we heard a lot of testimony in this trial about a  
4 system of checks and balances. I believe Chief Esposito talked  
5 about it. I think Chief Hall also talked about it. And this  
6 was a slide we used in our opening which we believe really  
7 shows the same thing, which is that this system of checks and  
8 balances is really an interrelated system that includes  
9 training, that includes supervision and monitoring, and it  
10 includes discipline, and all these things need to work together  
11 to have an effective oversight system for NYPD's officer stop  
12 and frisk activity. And we would submit that in each of these  
13 areas, the evidence has shown that the police department's  
14 efforts are not adequate.

15 Now, in discussing these issues, I want to just keep  
16 three things in mind. One is, first, Chief Esposito, as well  
17 as former Chief of Patrol Giannelli and current Chief of Patrol  
18 Hall, have testified about the importance that the role that  
19 mid-level supervisors in this department play in ensuring that  
20 this system functions properly.

21 Secondly, we really want to emphasize the opinion of  
22 plaintiffs' police practices expert Lou Reiter that when it  
23 comes to oversight of this stop and frisk activity, there is a  
24 big difference between formal written policies and what he  
25 called the operational policy, in other words, how the policies

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Summation - Mr. Charney

1 are being implemented in the precincts and on the streets. And  
2 I think in each of these areas that separation is very evident.

3 So with respect to training, the police department has  
4 gone on and on, and we have heard about it in the closing this  
5 morning of the supposed excellence of the written training  
6 materials that the police department has.

7 Now, the first thing I want to say about that is, with  
8 respect to those written materials, your Honor has already  
9 ruled in the Ligon case that several of those materials  
10 misstate the constitutional standards and that you have at this  
11 point directed that the NYPD change some of those written  
12 materials. So as an initial matter, I think that's something  
13 to keep in mind.

14 Secondly, when it comes to the issue of racial  
15 profiling, as opposed to the standards under the Fourth  
16 Amendment, we believe that the written training materials that  
17 we have seen in this case are inadequate and problematic in  
18 several respects.

19 The first way that we think they are problematic is  
20 that what officers are -- first of all, we looked, I think,  
21 during the testimony of Chief Shea at a guide that was called  
22 policing in a multicultural society. And that guide does  
23 repeat the department's written policy against racial  
24 profiling; it states it correctly. But what it doesn't do is  
25 it doesn't train officers on what they should do if someone

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Summation - Mr. Charney

1 makes an accusation or complaint about racial profiling. It  
2 doesn't train officers on how to recognize when a civilian is  
3 complaining about racial profiling as opposed to something  
4 else. It doesn't train officers on how to recognize racial  
5 profiling in their own actions, or in the actions of their  
6 peers. And it does not train officers on what to do if they  
7 see others making stops that are based on race.

8 In fact, what this guide does instruct officers to do  
9 is that when they are accused of racial profiling, they  
10 shouldn't take it personally. And instead of training officers  
11 on how to recognize potential racial profiling, the department  
12 trains officers simply on the need to explain their own  
13 actions.

14 For example, in the lesson plan that goes with this  
15 guide on policing in a multicultural society, the point of the  
16 lesson plan is to illustrate the need to explain an officer's  
17 actions to a person that is stopped, but nothing trains them,  
18 in either this guide or the guide on multicultural immersion,  
19 on how to make stops that are not based on race.

20 Finally, in the section of the police student guide  
21 called policing impartially, the first guideline that is given  
22 to officers is that telling people why you stop them will help  
23 dispel the myth that stops are racially motivated and prevent  
24 altercations and misunderstandings from arising. This is  
25 Exhibit B11. This training reinforces the notion, which we

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Summation - Mr. Charney

1 have talked about at this trial at length, that racial  
2 profiling either doesn't exist, and if there is just enough  
3 explanation on the part of the officers, it's not really going  
4 to be a problem for the community.

5 These trainings do nothing to address the real impact  
6 that racial bias has on police work and it does nothing to  
7 address the legitimate complaints that a stop may have been  
8 based on race. We have heard about some of those, and we will  
9 hear a little bit more about that later. This training may  
10 explain why time and time again officers say that they have  
11 never heard complaints of racial profiling, just complaints  
12 about misunderstandings and failure to communicate.

13 Now, beyond the problems in the written materials with  
14 training on racial profiling, I did want to mention one thing  
15 about the recent trainings that have been done at Rodman's  
16 Neck, which I know we have heard a lot about, and I am not  
17 going to go into too much detail. But one point I did want to  
18 make is that we heard from Chief Shea, who testified during  
19 this trial, that one of the effects of this training -- and  
20 when I am talking this training, I am talking about the  
21 training on defining what is and what is not a level three  
22 encounter -- what one of the effects of that has been to train  
23 officers that encounters that they previously had thought were  
24 forcible stops in which would lead to reporting the stop on a  
25 UF-250 are now no longer considered as such, and therefore are

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Summation - Mr. Charney

1 Training also involves roll call and field training where  
2 sergeants and other supervisors have to reinforce the  
3 principles that are taught in the academy. And the evidence  
4 that has been shown at this trial has actually shown that that  
5 has not happened in many cases.

6 An example which I will give you is from the 28th  
7 Precinct, which is where plaintiff Deon Dennis was stopped.  
8 Officer Pichardo, who was one of the officers who stopped him,  
9 testified that he had been trained that a furtive movement can  
10 be any movement that catches his attention, which is a  
11 dangerously overbroad standard. And he testified that he did  
12 not remember if sergeants ever discussed stop and frisk during  
13 roll call.

14 The sergeant supervising Officer Pichardo that night,  
15 Sergeant Julio Agron, testified that at least prior to his  
16 deposition in 2009, he had never provided training to a  
17 subordinate officer on the manner in which the officer should  
18 conduct a stop and frisk. He testified that he couldn't recall  
19 receiving any training at the police academy about racial  
20 profiling. And he testified that, even when being promoted to  
21 sergeant, he received no training on racial profiling.

22 THE COURT: You're talking about four years ago.  
23 You're going back to '09 and we are here now.

24 MR. CHARNEY: I guess the reason I am doing that is,  
25 again, a lot of these witnesses have changed their testimony

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1 from their deposition to now.

2 THE COURT: And the training has changed.

3 MR. CHARNEY: The training did change in 2012.

4 THE COURT: Did.

5 MR. CHARNEY: We have heard a lot of testimony about  
6 the problems with it. Again, this class period here goes back  
7 to '05. So there is a long period of time where we believe  
8 officers were being mistrained, and we still think they are  
9 being mistrained.

10 THE COURT: That's the question. If the defendant has  
11 already corrected a problem, is there a problem? That's a  
12 question I have to ask myself.

13 MR. CHARNEY: One thing is they may have made the  
14 problem worse, because we believe they are now training  
15 officers that encounters, which are forcible stops, they are  
16 training them they are not forcible stops. We think that's a  
17 big problem. We think that the training on racial profiling is  
18 woefully inadequate. And we really believe that this training  
19 is not being reinforced at the precinct level, on the job and  
20 field training, and that is a big part of our case that not  
21 only applies to training but all of these areas. There is a  
22 disconnect between what is on paper and what is actually  
23 happening in the precincts.

24 I do want to move to supervision because I think that  
25 is really where this, I think, phenomenon really shows itself

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Summation - Mr. Charney

1 most clear.

2           Again, we heard from Chief Esposito, the chief of the  
3 department, that not only does he rely on supervisors heavily  
4 to make sure that the policies and procedures are implemented  
5 correctly by officers, but he believes that he has the best  
6 supervisors in the world. Those were his words.

7           So the question is: In reality, is what Chief  
8 Esposito saying actually the reality in the precincts?

9           Here is what the reality shows us. We have heard from  
10 numerous police officers, sergeants and lieutenants, and even  
11 precinct commanders, who have testified in this trial that the  
12 documentation of stops is woefully inadequate. We have heard  
13 that the supervisory review of these stops is woefully  
14 inadequate. We have heard that there have been little to no  
15 consequences for this woefully inadequate documentation. And  
16 we have heard that this poor documentation and lack of  
17 supervisory review has continued for years.

18           Here are a few examples. You have heard from several  
19 supervisors who have testified in this trial, and I will name  
20 you three -- Inspectors Donald McHugh and Kenneth Lehr and  
21 Sergeant Michael Loria -- who have testified that reasonable  
22 suspicion cannot be determined solely by looking at a UF-250  
23 form, a completed UF-250. Yet time and time again we have  
24 heard from officers who submit forms, and the sergeants that  
25 review them, that other than looking at the form itself, they

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Summation - Mr. Charney

1 don't do anything else to determine whether the stop is based  
2 on reasonable suspicion.

3 We have also heard from supervisors that they rarely,  
4 if ever, ask officers when reviewing a 250 what the underlying  
5 circumstances of that stop were.

6 We have also heard that supervisors rarely, if ever,  
7 review the memo book entry that's supposed to go along with the  
8 stop. And this is problematic for two reasons. One is because  
9 then if an officer is not documenting that stop, the sergeant  
10 is never going to know about it. And, secondly, in the rare  
11 occasion where the officer does put more details in the memo  
12 book, the officer is not going to see those.

13 So this is the kind of supervisory review which is  
14 going on on a daily basis.

15 THE COURT: What about the officer is not going to  
16 see?

17 MR. CHARNEY: The sergeant is not going to see.

18 THE COURT: Why wouldn't the sergeant see that?

19 MR. CHARNEY: Because many sergeants have testified  
20 that they don't review the memo book.

21 THE COURT: As of March 2013, Chief Hall says it has  
22 to be stapled to the UF-250. Has the police department fixed  
23 the problem?

24 MR. CHARNEY: We would say no for two reasons. One,  
25 because it appears that in a large number of cases they are

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Summation - Mr. Charney

1 still not doing it; secondly, we don't know the level of detail  
2 of these memo books because we haven't seen them yet; and,  
3 third, as I believe it was defendants' expert Mr. Stewart  
4 testified, the process that has been put in place, which again  
5 only applies to the patrol bureau, is somewhat clunky and  
6 burdensome and requires a lot of moving parts which may become  
7 something that officers are really going to have a problem  
8 with.

9           Again, this was simply a memo that Chief Hall issued.  
10 This was not an operations order. This was not an amendment to  
11 the patrol guide. It is basically something that can be  
12 changed tomorrow. So it really doesn't have any permanence.

13           The other point I want to make is that the city has  
14 said the patrol guide and NYPD policies require that officers  
15 respond to the scene of arrests, and that some of those arrests  
16 actually involve stops, and so officers are going to have  
17 firsthand knowledge -- sergeants are going to have firsthand  
18 knowledge of what their officers are doing.

19           There are a couple of responses to that. One is that  
20 in several of the stops that are at issue in this case, where  
21 an arrest was made, no supervisor showed up. And one example I  
22 want to give is Mr. Sindayiganza, where you had operation  
23 impact officers who were among the most inexperienced in the  
24 police department, I believe they had testified they had been  
25 out of the academy about a year at the time of the incident,

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Summation - Mr. Charney

1 and there was no supervisor with them. So, again, what happens  
2 on paper or what is supposed to happen on paper and what  
3 happens in reality is not always the same thing.

4 Secondly, several of the stops in this case, the  
5 supervisor was present and actually participated in the  
6 unconstitutional stop.

7 The examples I would give would be the David Floyd  
8 stop with the keys. You had the anticrime sergeant James  
9 Kelly, who was on the scene, who incidentally testified that  
10 even if there was no burglary pattern, he believed that the act  
11 of seeing Mr. Floyd jostle with the lock alone gave him  
12 reasonable suspicion to make the stop, which we think as a  
13 legal matter is just plain wrong.

14 Then Lieutenant Korabel, who was one of the officers  
15 who stopped Devin Almonor, who said that he believed that  
16 jaywalking suggests engagement in criminal activity or flight  
17 from a police officer, which again we think is just not the  
18 right standard.

19 So having the sergeant on the scene doesn't  
20 necessarily help the situation.

21 THE COURT: Mr. Charney, let me just ask you how much  
22 longer?

23 MR. CHARNEY: I am going to go for about ten more  
24 minutes.

25 THE COURT: So Mr. Moore is going to get 35. Is that  
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Summation - Mr. Charney

1 capacity and in fact does conduct audits which involve actually  
2 speaking to civilians and officers involved in the incidents  
3 that are being audited. So there really doesn't seem to be a  
4 legitimate reason, knowing what the police department knows  
5 about the shortcomings of paper audits, and knowing that they  
6 have the capability to do audits that are much more  
7 comprehensive, there doesn't seem to be a legitimate reason why  
8 they continue with these superficial paperwork audits.

9 The last thing I want to talk about is the area of  
10 discipline, the failure to discipline. I just want to make  
11 three pretty quick points about this.

12 Again, we believe that the current system for  
13 disciplining officers who commit improper stops and engage in  
14 racial profiling demonstrates a deliberate indifference on the  
15 part of the police department to this problem and to the need  
16 to correct it. And we think it shows this in three ways.

17 First, the department discounts the CCRB findings, it  
18 discredits civilians who made the substantiated CCRB  
19 complaints, and it averts punishment of officers who the CCRB  
20 found to have committed misconduct.

21 You heard from Deputy commissioner Schwartz, who is  
22 the chief internal prosecutor of the NYPD, who prosecutes cases  
23 of misconduct in the cases of substantiated CCRBs. And she  
24 said that, even though the CCRB uses a preponderance of the  
25 evidence standard when it substantiates, discipline will not be

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Summation - Mr. Charney

1 pursued when it is the word of the civilian against the word of  
2 an officer. And again, this is after the CCRB has already made  
3 a credibility determination after an investigation and has  
4 ruled by a preponderance of the evidence that the civilian had  
5 stated a legitimate complaint.

6 We submit that that is a very problematic position for  
7 the police department to take, and we submit that it is  
8 evidence of them not taking the problem with improper stops  
9 seriously.

10 Now, beyond that, since 2007 -- and, by the way, 2007  
11 is when the CCRB attorneys started reviewing substantiated  
12 cases, so lawyers were actually looking at these case files.  
13 The NYPD has declined to pursue any form of discipline in  
14 substantiated CCRB cases between 20 and 39 percent depending on  
15 the year. This is, again, even after accounting for those  
16 statute of limitations problems which Deputy Commissioner  
17 Schwartz mentioned. And year after year, even in those cases  
18 where they do pursue discipline, in cases where the CCRB  
19 recommends charges and specifications, which are the most  
20 serious form, the NYPD issues instructions, the least serious  
21 form of discipline, in the majority of those cases.

22 Now, the second way we think that the discipline  
23 system demonstrates a deliberate indifference is that the city  
24 has had notice since at least 2007 of a potential problem with  
25 racial profiling from the civilian complaints, but it has not

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Summation - Mr. Charney

1 we have shown examples of how this system has resulted in  
2 various superficial investigations. The two I will mention  
3 really quickly are the investigation of Mr. Dennis's OCD  
4 complaint, where the stopping officers were never even  
5 interviewed, and the investigation of Mr. Ourlicht's OCD  
6 complaint --

7 THE COURT: Did they both allege racial profiling? I  
8 thought the testimony by a number of the senior officers was  
9 that they had very, very few complaints of racial profiling.  
10 Most of the complaints had to do with either the person said I  
11 was stopped for no reason or the officers were rude. I thought  
12 the testimony from the higher-ups was that they rarely get a  
13 racial profiling.

14 MR. CHARNEY: Maybe I wasn't clear earlier. We think  
15 that, first of all, as an empirical matter, that's not true,  
16 because with respect to the higher-up Chief Esposito, his  
17 office had received 30 complaints specifically for racial  
18 profiling.

19 THE COURT: 30 is a miniscule number.

20 MR. CHARNEY: That was just in one year.

21 Respectfully, the volume of complaints that OCD gets  
22 versus CCRB is different.

23 THE COURT: It is. But do you know the number for any  
24 one year? Is it in the record?

25 MS. COOKE: Yes, it is. Inspector Helen McAleer.

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Summation - Mr. Charney

1 About 40,000.

2 MS. BORCHETTA: That's with the specific review that  
3 they have to do with documents because they don't code it so  
4 they can't really accurately say that.

5 MR. CHARNEY: Remember, Inspector Lehr came back with  
6 a sample, and he acknowledged that there were some in there  
7 that specifically had to do with race.

8 The more important point is that we believe the fact  
9 that the police department does not consider something racial  
10 profiling, unless somebody uses explicitly the words race or  
11 racial bias, we think is a head in the sand approach. Because  
12 if year after year the overwhelming majority of complaints for  
13 stops, improper stops, stops that were made without reasonable  
14 suspicion, stops that were made for no reason, if the  
15 complainants are of people of color year after year after year,  
16 for the police department to say we don't think that has  
17 anything to do with racial profiling, we say that is just a  
18 head in the sand approach. So that's our main point.

19 The last thing I will say is that, with respect to  
20 causation, we have heard again that the city does not believe  
21 we can tie any of these policy problems to the actual stops in  
22 this case. And we would submit that that's not true with  
23 respect to discipline. And there are two stops that we believe  
24 directly relate to a failure to discipline an officer for a  
25 prior improper stop.

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Summation - Mr. Charney

1           The first would be Mr. Dennis, who was stopped by  
2 Officer Salmeron, who two years before his stop had a  
3 substantiated CCRB complaint for an improper stop. She was  
4 never disciplined. She doesn't even know what happened with  
5 the case once it got to the police department. And Officer  
6 Rothenberg, who stopped Ian Provost in 2009, the prior year had  
7 a OCD complaint for racial profiling against him, and we don't  
8 have any evidence that shows whatever happened with that  
9 investigation.

10           So, again, this failure to take disciplinary action we  
11 think does demonstrate deliberate indifference, and we think it  
12 also, in at least those two cases, has a direct causal link to  
13 what ended up happening with those stops.

14           I think at this point I am going to turn it over to my  
15 colleague to finish this off.

16           THE COURT: Thank you, Mr. Charney.

17           MR. MOORE: Judge, I think I have both the good  
18 fortune and bad fortune to be the last one to speak.

19           I do want to let the Court know that Devin Almonor,  
20 Clive Lino and Cornelio McDonald are in court as well.

21           I guess I have about 40 minutes according to your  
22 clock.

23           THE COURT: That's true.

24           MR. MOORE: I know the city got a little more time.

25           THE COURT: You got it by Ms. Karteron.

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Summation - Mr. Moore

1 That said, if you need five more minutes, the city did  
2 ask for ten, I will give you five, but let's hope you wrap up.

3 MR. MOORE: I want to remind the Court that we are  
4 submitting findings of fact.

5 THE COURT: I will talk to you about that afterwards.

6 MR. MOORE: I think what I want to speak about, first  
7 of all, is to suggest to you that the city can't be heard to  
8 say that the concern about stop and frisk is something that has  
9 just come on the horizon recently. The city has been on notice  
10 since 1999 about the extent of the constitutional violations  
11 occurring on this issue in the city. And we go back to the  
12 beginning, February 4, 1999, with the death of Amadou Diallo at  
13 the hands of four officers in the street crime unit. That  
14 tragic issue shone a harsh light on street encounters that  
15 takes place daily in the city.

16 Shortly thereafter, the office of the attorney general  
17 issued a report that concluded that race was the determining  
18 factor in explaining the likelihood of stops being done by the  
19 NYPD. They looked at a number of statistics and concluded that  
20 that existed, and relying on the NYPD's own data. And more  
21 significantly, they suggested to the city, they invited the  
22 NYPD to engage them in an open dialogue, much as the plaintiffs  
23 had done in this case before the trial, to try to address some  
24 of these perceived and obvious problems and how officers engage  
25 in street encounters, particularly with respect to stop and

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Summation - Mr. Moore

1 frisk. As was the case before trial here, the city turned down  
2 this offer, just as it turned a blind eye to the rising tide of  
3 criticism over the past few years about the problems with  
4 respect to stop and frisk.

5 Now, as you know, the incident of Amadou Diallo also  
6 led to the filing of the Daniels case. And after several years  
7 of litigation, which we were both involved in, there was a  
8 stipulation of settlement. One of the key provisions of the  
9 Daniels decree was that the NYPD would conduct audits to ensure  
10 that documentation of stop and frisk activity would be  
11 completed in accordance with NYPD regulations. The other key  
12 provision was that the NYPD would audit to determine whether  
13 stop and frisk activity is based on reasonable suspicion.

14 In both accounts, the NYPD has failed, and we think  
15 that is powerful evidence of a deliberate indifference to the  
16 constitutional rights of the citizens of the city, the  
17 residents of the City of New York.

18 Since the decree, the NYPD has consistently failed the  
19 audit as to whether officers are documenting their stops.  
20 Moreover, the audits themselves are not designed to determine  
21 whether stop and frisk activity is based on reasonable  
22 suspicion. As Mr. Charney said, it's a paper audit to  
23 determine whether the information is simply being checked off,  
24 and they do not review the stop and frisk activity in any  
25 substantive way.

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Summation - Mr. Moore

1 Now, we were referring to how they have done over the  
2 years. I showed this document to Chief Esposito. I described  
3 it as the report card. And it shows that over the last ten  
4 years, at least with respect to the patrol service bureau, the  
5 NYPD has failed the QAD audit ten years in a row.

6 THE COURT: On activity logs, not the whole QAD audit.

7 MR. MOORE: That's right.

8 THE COURT: That category.

9 MR. MOORE: The only really relevant portion with  
10 respect to the issue of stop and frisk, for two reasons. One  
11 is, as many people have said, you can't determine whether  
12 reasonable suspicion exists by simply looking at the 250.

13 Now, some people have got on the stand and said they  
14 could, but I think any reasonable person would say, since it's  
15 a check off form, you really can't tell. So you need some  
16 written portion. And that written portion was in the memo  
17 books and it has not been done. It has just not been done over  
18 the last ten years, and I will have more to say about that.

19 THE COURT: The only real question for you is Chief  
20 Hall has now put out a memo in March 2013 stressing that point,  
21 giving an example of a memo book, and saying staple this to it.  
22 So has the city fixed the problem?

23 MR. MOORE: I don't think they have even come close to  
24 fixing the problem.

25 THE COURT: On memo books? Why not? Attached to his  
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Summation - Mr. Moore

1 memo is a sample on how to fill it out and a direction to  
2 attach it to the 250.

3 MR. MOORE: Let me tell you why I don't think it fixes  
4 that.

5 THE COURT: OK.

6 MR. MOORE: I am going to have to jump ahead a little  
7 bit.

8 THE COURT: That may not be the worst thing.

9 MR. MOORE: I am going to go back.

10 Let me just say, there are several things wrong with  
11 that. One is, as Mr. Charney said, it's not a patrol guide  
12 provision, it's not an interim order, it's not the kind of  
13 change, systematic change done in a systematic way that changes  
14 in police department practices are done typically in a police  
15 department, when they change something and issue a new patrol  
16 guide provision, they issue an interim order, they issue an  
17 order. This is a memo from the head of the patrol services  
18 bureau. It only applies to the patrol services bureau. I  
19 think Chief Hall said there are at least 6 to 7,000 officers  
20 who will not be covered by that, who have daily contact and  
21 have street encounters with people on a daily basis in the City  
22 of New York.

23 As I think we brought out with Chief Hall, there is an  
24 inconsistency between even what this memo says and what Chief  
25 Pizzuti's memo says in Queens North in terms what you can and

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Summation - Mr. Moore

1 can't do. The whole process I think is, as the defendants' own  
2 expert Mr. Stewart said, he used the term clunky, it's a clunky  
3 and cumbersome procedure. You're taking a small 250 and you  
4 are stapling it to a photocopy of the memo book entry. There  
5 is not even a provision to make sure that you put serial number  
6 of the 250 on the photocopy of the memo book entry.

7 We don't think it's a sufficient remedy. And to the  
8 extent that they have looked at it, in terms of whether they  
9 are doing it, they are not doing it. And I think it  
10 illustrates why we really believe -- and this is also jumping  
11 ahead, but maybe I am just going to keep jumping ahead -- it  
12 also illustrates why we think a monitor is very important here.  
13 Because if you look at that for ten years they haven't done  
14 been doing it, you can't say they haven't had notice of a  
15 deficiency. It's right there and every year they send memos up  
16 and down the chain of command saying, this is the problem, we  
17 have got to address it.

18 THE COURT: Certainly, it's trending toward better.

19 MR. MOORE: It's trending toward better, but it's  
20 still a failure. If you keep failing, even if you're getting a  
21 little better, you're still failing. Somebody once said the  
22 definition of insanity is if you do the same thing over and  
23 over and expect a different result. It's not changing. It  
24 hasn't changed in ten years.

25 THE COURT: It is changing. It is still technically a

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Summation - Mr. Moore

1 failure, it's below a 3, but it's certainly changing. From  
2 2007 to 2012, it has gone from 1 to 2.5. So a lot more people  
3 are putting an adequate description in the memo book.

4 MR. MOORE: I think it's not a sufficient change that  
5 you can say, we can trust the police department to make this  
6 change on their own, particularly given the way they have done  
7 it, the way they have attempted to do it.

8 THE COURT: Go back to your notes.

9 MR. MOORE: I do want to put one notion to rest, and  
10 it's sort of a personal notion because we have heard a lot of  
11 statements by counsel for the city that somehow it's the  
12 plaintiffs and the lawyers in Daniels that gave their seal of  
13 approval to what the department is now doing. I have to say  
14 that that's just simply not true. Most of the substance that  
15 is referred to in that stipulation of settlement was already  
16 put in place by the time that settlement was entered into, and  
17 we were not given the power to impose any additional  
18 documentation or auditing mechanisms on the department as a  
19 result of that decree. What we were guilty of was trusting  
20 that the New York City Police Department would actually address  
21 the problem on its own. We have seen that they cannot, and we  
22 believe that that's powerful evidence as to why an outside  
23 monitor must be appointed in this case.

24 Also, in terms of whether we are able to satisfy a  
25 burden of showing deliberate indifference, we have heard some

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Summation - Mr. Moore

1 discussion about the RAND report with respect to whether it put  
2 them on notice that there are deficiencies. The most  
3 significant recommendations by RAND were either watered down or  
4 ignored by the police department. I will speak about a couple.

5 The first one is RAND recommended that the boroughs  
6 with the largest racial disparity be reviewed. Now, that's a  
7 stark finding by RAND.

8 THE COURT: Say that again. The borough with the  
9 greatest?

10 MR. MOORE: With the largest racial disparity be  
11 reviewed.

12 THE COURT: Disparity meaning between stop and  
13 population?

14 MR. MOORE: Disparity in terms of racial disparity, in  
15 terms of whether the stops are based on race. And the NYPD  
16 ignored that recommendation.

17 The other recommendation that the NYPD ignored, which  
18 is I think important for the Court to understand, is that RAND  
19 recommended that the NYPD identify and flag officers with  
20 out-of-ordinary stop patterns.

21 It also recommended that the NYPD make identifying and  
22 flagging officers with these out-of-ordinary stop patterns part  
23 of the early intervention system in the NYPD, and they ignored  
24 this recommendation.

25 Indeed, we heard testimony in this court that when it  
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Summation - Mr. Moore

1 analyzed the data for over-stoppers in 2007, it miraculously  
2 identified no over-stoppers, and that's because it adopted a  
3 cutoff point that was different from the one RAND used.

4 I also want to speak a little bit about the testimony  
5 of Chief Esposito. At the end of the day, he was the highest  
6 ranking police officer who testified in this case and was  
7 designated by the city as a witness with respect to NYPD policy  
8 and practice. He testified that there were sufficient checks  
9 and balances, up and down the chain of command in the NYPD, to  
10 ensure that officers were making reasonable suspicion stops and  
11 not engaging in racial profiling.

12 The evidence we have presented in this case we think  
13 demonstrates just the opposite. He says he relies on the chain  
14 of command, but the evidence is clear that that chain is  
15 broken; it has been broken for some time. And he testified  
16 about four ways in which he does this. One was supervisory  
17 review, one was the self-inspection protocols, one was CompStat  
18 review of 250s, and the fourth way was investigation of  
19 officers' stop activity. And we have heard a lot of argument  
20 already about all of those areas, so I am not going to go into  
21 detail about all of them, but I think the evidence at this  
22 trial has demonstrated that in each of these areas, the NYPD  
23 has been deliberately indifferent.

24 Let's look at supervision as one. What the evidence  
25 has demonstrated is that first-line supervision has broken down

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Summation - Mr. Moore

1 when it comes to stop and frisks. You start with a check off  
2 form that is virtually meaningless as an analytical tool. It's  
3 only good for recording numbers. It's all part of this  
4 department's obsession with numbers, with quantity over  
5 quality.

6 Esposito admitted that you can't determine reasonable  
7 suspicion from looking at the 250, let alone racial profiling,  
8 but he said, if it's checked off within the checked boxes,  
9 that's good enough for him. That means all those stops have  
10 reasonable suspicion and there is no racial profiling.

11 As Mr. Charney just told you, we heard from many, many  
12 supervisors who testified that they never review their  
13 officers' conduct on the street, they never review the  
14 paperwork. It's again just a numbers game. They are looking  
15 to see if they are filling out the form properly.

16 We also heard, as you may recall, from a number of  
17 what are called integrity control officers. Those are the  
18 folks in precincts who are supposed to make sure that these  
19 audits are done and they are supposed to make sure that  
20 officers are complying with regulations and with the  
21 Constitution.

22 To a person, none of those testified that reasonable  
23 suspicion, stop and frisk, or racial profiling were ever  
24 discussed at precinct meetings, at borough meetings with ICOs.  
25 I know at trial they tried to say that they are starting to do

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Summation - Mr. Moore

1 it now, but their testimony, for the most part, was it's not  
2 done. And I think that's stark evidence because those are the  
3 people under this whole scheme that was developed under Daniels  
4 who are supposed to be the people to ensure that there was  
5 reasonable suspicion for these stops and that there wasn't  
6 racial profiling.

7 Now, Chief Esposito also talked about a CompStat  
8 review. That's another area he talked about as what he does to  
9 ensure the constitutionality of stops and frisks. And here  
10 again it just doesn't happen.

11 250s don't get into the meeting. Chief Hall tried to  
12 suggest that they did in his direct testimony. On cross he  
13 admitted that they don't get into it. As we saw from the  
14 transcript of the CompStat meetings that we looked at, that we  
15 were provided, the only real discussion of 250s has to do with  
16 numbers.

17 I won't talk about discipline and training because Mr.  
18 Charney just talked about that, but I want to talk to you a  
19 little bit about quotas.

20 We have heard much in this case about quotas. To be  
21 sure, there is some evidence of quotas being imposed on  
22 officers in the NYPD. You may recall, Deputy Chief Marino  
23 was -- essentially, the city was found guilty through him of  
24 imposing quotas in the 75th Precinct. You heard the tapes from  
25 Officer Serrano, from Officer Schoolcraft, from Officer

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Summation - Mr. Moore

1 Polanco, all of which have evidence of what they described as  
2 quotas.

3 THE COURT: What do you mean, the witnesses or the  
4 tapes?

5 MR. MOORE: The witnesses described them. The tapes  
6 speak for themselves. You have the transcripts. That's what  
7 they understood was being imposed on them.

8 You heard Lieutenant Barrett say on the tape that she  
9 wants five Cs or five 250s.

10 You heard Lieutenant Doute use numbers, we want five,  
11 five and five.

12 You also heard Lieutenant Barrett say, in one of the  
13 more outrageous comments on the tape, "Go crazy out there."  
14 And when I asked her what the limits of going crazy out there  
15 was she had no idea.

16 So you have heard a lot of evidence about quotas.  
17 It's important evidence, but I want to make it clear that this  
18 case is not about whether the NYPD is violating the New York  
19 State quota law. This case is fundamentally not about quotas.  
20 It's about pressure. Police feel an overriding pressure to get  
21 numbers, to show enforcement activity.

22 THE COURT: What is the proof of that, that the police  
23 feel pressure to get numbers?

24 (Continued on next page)

25

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Summation - Mr. Moore

1 MR. MOORE: I think the discussion about number. I  
2 think -- on the tapes you hear.

3 THE COURT: You said "police feel."

4 Is there anybody who testified to that other than  
5 Serrano and Polanco?

6 MR. MOORE: Well I think the officers saying that --  
7 supervisors, lieutenants saying these are the numbers, I think  
8 there was some discussion with Captain McHugh and the  
9 lieutenant who was involved with him who said McHugh is getting  
10 pressure from the borough. And I don't -- I don't exactly  
11 recall it but I do recall that that's what he was talking  
12 about. So I think that this case -- now when you talk about,  
13 it's not really about quotas. It's about pressure.

14 I want to remind the court of the testimony of  
15 Professor Silverman. His testimony was very important.  
16 Because he talked about pressure. He, along with a former  
17 captain in the NYPD, John Eterno did surveys of a broad range  
18 of officers. They conducted two different surveys. One in  
19 2008 and one in 2012. And they showed dramatically increasing  
20 pressure to do stops, especially in the Bloomberg/Kelly era.

21 For example, Silverman's 2012 survey shows that  
22 officers' feeling of high pressure to do stop, question and  
23 frisk increased in the Bloomberg/Kelly era as compared to the  
24 pre-Compstat era. The survey measured similar pressure with  
25 respect to summonses and arrests. Even more troubling, the

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1 2012 survey showed that with the increase in pressure to make  
2 stops there was a decrease in the pressure to obey the  
3 constitution. And I submit to you that that's a lethal  
4 combination for officers on the street in the City of New York.

5 More importantly this pressure does not exist we  
6 believe in a vacuum. The police feel pressure to get numbers  
7 in the context of an admitted strategy that targets young Black  
8 and Hispanic males.

9 THE COURT: Do you think the rise in the number of  
10 stops, which in some years was a dramatic rise.

11 MR. MOORE: Yes, Judge.

12 THE COURT: Do you argue that it's evidence of that  
13 pressure to get numbers?

14 MR. MOORE: Yes. I think the dramatic rise is a  
15 reflection of this pressure within the police department to get  
16 numbers and to address crime by showing enforcement activity.

17 And I think you can see from the -- what is  
18 essentially the un rebutted comments by Ray Kelly testified to  
19 to Eric Adams that -- where he admitted that the police target  
20 young Black and Hispanic males for stops to instill fear in  
21 them that when they go outside on the street they will be  
22 stopped. You invited the city several times in this case to  
23 bring Ray Kelly in. And they haven't done it.

24 THE COURT: So the only rebuttal is Juanita Holmes who  
25 says she was at one of these meetings and whatever Adams said

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Summation - Mr. Moore

1 what he said, she said was not said. That's the rebuttal.

2 MR. MOORE: She couldn't say -- she wasn't allowed to  
3 say obviously what Commissioner Kelly said.

4 THE COURT: No. She said what Adams said he said was  
5 not said.

6 MR. MOORE: Right. She wasn't at the meeting with  
7 Governor Paterson.

8 THE COURT: So that one is un rebutted in the evidence.

9 MR. MOORE: That is un rebutted.

10 There is some criticism of Ian Provost not coming up  
11 from North Carolina. Well, Ray Kelly is right across the  
12 street at One Police Plaza. There is no reason why he couldn't  
13 come in here in court and deny that. I'm not going to  
14 speculate as to why he didn't testify. Perhaps he didn't  
15 regard it as important enough. But for whatever reason that  
16 statement in the presence of the Governor of the State of New  
17 York and Senator Adams is un rebutted. But it's by no means  
18 alone.

19 THE COURT: Of course it wasn't, I think, accepted for  
20 the truth of it.

21 MR. CHARNEY: Yes, it was.

22 THE COURT: You're right. Thank you for the  
23 correction. Okay.

24 MR. MOORE: It absolutely was.

25 THE COURT: You're right.

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Summation - Mr. Moore

1 MR. MOORE: Thank you, Mr. Charney.

2 I think also if you look at -- and this comment about  
3 who the target is not -- an isolated comment by Ray Kelly.

4 If you look at the last exhibit in this case was the  
5 speech by Mayor Bloomberg back on April 30, 2013 to the police  
6 department. Just three weeks ago. He said, "We need stop and  
7 frisk to deter people from carrying guns." He said, "The days  
8 of being first responder is over. We are now -- we should  
9 consider ourselves first preventers."

10 That's a very dangerous concept, a very dangerous  
11 notion to instruct your police officers. What are the limits  
12 of being a first preventer? What are the constitutional limits  
13 of a first preventer?

14 As always, in these speeches, there's never a  
15 discussion about what is stop and frisk in terms of what is --  
16 it has to be done with reasonable suspicion.

17 It's an effective tool to stop crime.

18 THE COURT: Even more than reasonable suspicion.

19 Isn't it individualized reasonable suspicion?

20 MR. MOORE: Right. That's right, Judge.

21 And it's not just Kelly and Bloomberg who talked about  
22 targeting young Blacks and Hispanics. Chief of Patrol Hall  
23 said: You have to target the right people at the right place  
24 and the right time. And the other commanders used the same  
25 language.

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Summation - Mr. Moore

1 THE COURT: But, in fairness, that could have a  
2 completely different meaning. He could mean those who are most  
3 likely either to be committing crimes, did commit, or are about  
4 to commit a crime.

5 MR. MOORE: Right.

6 THE COURT: You should go where the crime is. That's  
7 another interpretation of that phrase, of course.

8 MR. MOORE: Right. But if you accept the police  
9 department's argument that they make over and over and over,  
10 this drum beat, that it is young Black and Hispanic males who  
11 are committing the majority of crimes, then when you say the  
12 right people --

13 THE COURT: But that half of the equation is not  
14 really disputed.

15 In other words, there are crime statistics by race.  
16 So you do have to accept the first half.

17 The question is, is that the basis for the -- can you  
18 conclude that is the basis for the stops?

19 MR. MOORE: We don't necessarily accept that as a  
20 given. I think it's based on an analysis of the data which is  
21 incomplete. There are many occasions where the city -- the  
22 police department doesn't know who commits crime.

23 But the point is, is that you have commanders, you  
24 have high ranking commanders telling their officers, and not  
25 hesitating to tell, like Inspector McCormack, "I'll tell you

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Summation - Mr. Moore

1 suspicion equation. But I think it has to be tempered with  
2 the -- with qualifiers that will not result in officers just  
3 willy-nilly stopping every young Black male on the street.

4 And as my cocounsel wants me to point out in the  
5 Department of Justice's guidelines regarding the use of race --

6 THE COURT: Which I assume are in evidence.

7 MR. MOORE: Yes.

8 MR. CHARNEY: They're not in evidence.

9 THE COURT: Then you can't read it.

10 MR. CHARNEY: I guess we think of it, it's a legal --

11 THE COURT: I can't -- this is just not in the record.  
12 Might be interesting. But it's not in the record.

13 MR. MOORE: Now, the other thing I want to talk about,  
14 Judge, is -- well I would say in terms of argument, Judge, that  
15 even if it's not in evidence the use of race as the determining  
16 factor in terms of how you target enforcement leads to the very  
17 kind of racial profiling, leads to racial stereotyping which I  
18 think we see in this case. And that's why it's a concern.

19 And you see it when you hear Deputy Inspector  
20 McCormack on the tape talking about who to target, who to focus  
21 on. He's not -- they never -- they never discuss it in terms  
22 of the guidelines with respect to reasonable suspicion, about  
23 how you need individualized reasonable suspicion. It's like  
24 this -- it's us against them. This is who we're going after.  
25 These are the people out on the street who we want you to stop.

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Summation - Mr. Moore

1 And I think that's where the police department has fallen down  
2 with respect to how it trains who supervise these officers.

3 Let me make another point which I think is important  
4 for the Court to understand. The police department has said  
5 over and over and over again there is no problem here. There  
6 is no problem. Chief Esposito said we don't have any issue  
7 here. There is no racial profiling. I've never seen a case  
8 where there's -- there wasn't reasonable suspicion.

9 THE COURT: He said what?

10 MR. MOORE: Where there wasn't reasonable suspicion.  
11 He's never seen a bad stop and frisk.

12 THE COURT: Who said it?

13 MR. MOORE: Chief Esposito.

14 THE COURT: He's never seen one?

15 MR. MOORE: The claim is all these claims are being  
16 made up by groups who are anti police who have some agenda to  
17 make the city less safe and secure.

18 THE COURT: I thought some of the other high ranking  
19 officials say there's always going to be some error but that  
20 doesn't mean we have a policy -- we have a bad stop here or  
21 there. Things happen in the field.

22 MR. MOORE: Fair enough.

23 THE COURT: I didn't remember that Chief Esposito  
24 said --

25 MS. GROSSMAN: He didn't.

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Summation - Mr. Moore

1 THE COURT: -- it never happened.

2 All right. I accept the city's --

3 MR. MOORE: The evidence --

4 THE COURT: The evidence is what it is. It's in the

5 record. We'll see. I'll read it.

6 Go ahead.

7 MR. MOORE: As I recall his testimony, he said if the  
8 UF 250 form was checked off, that was reasonable suspicion for  
9 him; and if there's reasonable suspicion, there can be no  
10 racial profiling. That was his testimony.

11 THE COURT: Yes. I understand.

12 MR. MOORE: And I think if you look -- and that he  
13 wasn't concerned about the fact that 90 percent -- that there  
14 was a 90 percent rate of where no further enforcement activity  
15 was taken.

16 In fact, officer, after officer, after officer said  
17 they weren't concerned about.

18 The only one who said they were concerned was  
19 Inspector Lehr. And in his precinct the hit rate was five  
20 percent, not ten percent; in other words 95 percent of the  
21 stops in his precinct led to no further enforcement activity.

22 And I think this suggestion that there is no problem  
23 is an insult to someone like Leroy Downs who made an immediate  
24 complaint about a stop, who was given the runaround at the  
25 precinct, who was so interested in the issue that he took this

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Summation - Mr. Moore

1 course at the citizens police academy, who got the vehicle  
2 number of the car. And yet to this day the officers claim that  
3 they -- that they weren't there, even after they came into  
4 court --

5 THE COURT: They were careful. I think they said they  
6 don't remember.

7 MR. MOORE: And that attitude is also an insult to  
8 someone like Devin Almonor who has a 13-year-old, chess-playing  
9 honor student and was the son of a retired NYPD police officer  
10 was stopped, arrested, cuffed, and humiliated by Officers  
11 Korabel and Dennis because he fit the description of a male  
12 Black.

13 And I suggest, as well, that this attitude is an  
14 insult to someone like Cornelio McDonald who is walking home  
15 one night in Queens and was stopped. You've heard the  
16 circumstances of that stop. I won't go over it.

17 I think what I would say is that this head-in-the-sand  
18 approach is damning to the police department.

19 To suggest that no one has complained about racial  
20 profiling or bad stops is disingenuous, in and of itself  
21 evidence of a deliberate indifference.

22 THE COURT: You mean in terms of the community?  
23 Because I don't know that you offered any proof that the  
24 community groups have complained.

25 MR. MOORE: Well I think there's been evidence by a  
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Summation - Mr. Moore

1 number of -- community meetings, inspectors, commanders have  
2 been asked about has stop and frisk come up. They've said yes.

3 THE COURT: Yes. But they all said --

4 MR. MOORE: Senator Adams testified that there's been  
5 many complaints that he's made to the police department about  
6 it at meetings.

7 THE COURT: Senator Adams did say the senior police  
8 personnel I think said stop and frisk comes up all the time but  
9 they have not had a complaint from the community about racial  
10 profiling. I think almost all the senior people said that.  
11 Except maybe one toward the end. I can't remember who.

12 MR. MOORE: I think if you recall Inspector Holmes  
13 testified that when she became the head of the 81 precinct  
14 after Inspector Mauriello left, that there was a series of  
15 community meetings. And one of the topics was a complaint  
16 about suspicionless stops and frisks and I believe also racial  
17 profiling, that it was occurring; that that's what Letitia  
18 James, a councilperson was saying to her; that's what other  
19 politicians were saying to her.

20 MS. GROSSMAN: Object. Objection. All of this is not  
21 in the record.

22 THE COURT: There was testimony.

23 MS. GROSSMAN: There is some parts.

24 THE COURT: There was testimony about Letitia James.  
25 I do recall.

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Summation - Mr. Moore

1 MS. GROSSMAN: Your Honor, there's a lot of  
2 mischaracterization of the testimony. I refer you to the  
3 record.

4 THE COURT: Of course.

5 MS. GROSSMAN: Obviously, that's what you have to rely  
6 on.

7 THE COURT: Of course.

8 MS. GROSSMAN: There's a lot here that is not accurate  
9 and not precise, your Honor.

10 MR. CHARNEY: As there was with your argument,  
11 Ms. Grossman.

12 MR. MOORE: Because I don't have much time left.

13 THE COURT: Maximum ten minutes.

14 MR. MOORE: I want to talk about remedies a little  
15 bit.

16 We have suggested a remedial approach in this case  
17 that is twofold.

18 First, it is clear that there are some specific  
19 remedies that should be adopted. There must be a change in how  
20 activity is documented, we believe.

21 The current scheme of two forms stapled together is,  
22 as their own expert said, both cumbersome and clunky and a  
23 recipe for disaster.

24 A new form should be developed with sufficient room  
25 for a narrative that provides pertinent details of the stop.

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Summation - Mr. Moore

1           It is important that the officer be required to  
2 document a stop to make sure the officer acted in accordance  
3 with the constitution.

4           And as the defendant's own expert says, it makes sense  
5 to do that with the initial form that documents the stop.

6           A newly created form would also include documentation  
7 of other police officers or civilian witnesses to the stop and  
8 include a tear-off carbon copy of the form to be provided to  
9 each and every individual stopped. That same tear-off copy  
10 would include the officer's name and shield number as well as  
11 contact information if the individual wishes to make a  
12 complaint.

13           Second, we believe that with regard to a specific  
14 remedial measure that the NYPD should rescind Operations Order  
15 52. The focus on achieving performance goals, numerical goals,  
16 productivity goals, call them what you want, when they're tied  
17 to this prospect of discipline is the very kind of pressure to  
18 get numbers which we all know leads to high level of stops and  
19 that leads to no further enforcement activity.

20           On a more general level, we think that -- there was  
21 some discussion in the -- by others who got up before me that  
22 supervisors must be held accountable for their bad stops and  
23 even for stops that are not well documented. This means that  
24 some meaningful review besides simply checking to see whether  
25 the boxes are checked right must be done to show that officers

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1 are doing their job.

2 And given the longstanding community discontent over  
3 the NYPD's stop-and-frisk practices, we believe the Court  
4 should order the joint remedy process that plaintiffs proposed  
5 before trial which would allow community members and other  
6 stakeholders in this process a voice in this process going  
7 forward.

8 And what would that process look like?

9 It's a process led by a facilitator with expertise in  
10 mediation and police reform that would allow the parties, all  
11 the stakeholders, police department, faith groups, community  
12 groups, police unions, the opportunity to talk about how to  
13 make this process better.

14 And finally, we believe that there should be a monitor  
15 with sufficient power to make sure that these changes are  
16 actually implemented by the police department.

17 THE COURT: As long as you created a list of five, the  
18 one intrigued me is not on your list.

19 Do you recall the testimony at the very end I think by  
20 Stewart about body worn cameras. What did you think of that?

21 MR. MOORE: I know it's a technology that's very easy  
22 to use.

23 THE COURT: Very easy to use. It struck me when he  
24 said it that if the officer knew it was being recorded on video  
25 it would solve a lot of problems. Everybody would know exactly

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Summation - Mr. Moore

1 what occurred. It would be easy to review it. The officer  
2 would be aware he's on tape. Everybody would know.

3 What did you think of a body worn camera?

4 MR. MOORE: Judge, I think it's something that should  
5 be considered. I think that's -- I don't want to give a  
6 definitive thing. It's something I would definitely think  
7 should be looked into. I think --

8 MS. GROSSMAN: Your Honor, I would just object to  
9 this. This was not in the report. This isn't what we asked.  
10 Your Honor asked a question.

11 THE COURT: No, he -- oh, no, I didn't. He mentioned  
12 it first as something that had happened at one of the various  
13 jobs he had. He used that word before I ever did. I didn't  
14 know the phrase.

15 MS. GROSSMAN: Not as a solution or a remedy to  
16 anything.

17 THE COURT: He did. He did. He talked about it was a  
18 remedy he had done elsewhere.

19 MS. GROSSMAN: But not as a recommended remedy here in  
20 New York.

21 THE COURT: No. That's absolutely true.

22 However, having raised it as a remedy that he thought  
23 was useful in other contexts, I'm intrigued by it.

24 But it seems to me it would solve a lot of problems.  
25 I wonder if you would now urge, at least on a experimental

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Summation - Mr. Moore

1 talking about effectiveness from the beginning.

2 THE COURT: Yes. I understand. I agree.

3 MR. MOORE: I believe it is at these moments --

4 THE COURT: You're not asking that stop and frisk be  
5 terminated.

6 MR. MOORE: No, Judge we're not.

7 We're not asking -- no reasonable person would come  
8 into this court and say don't stop and frisk. No reasonable  
9 person would come into this court and say don't deploy officers  
10 in high crime areas.

11 What we have urged, what the community has urged is  
12 that officers abide by the law. There's a rule of law. And  
13 that they have an obligation to uphold the law and not just go  
14 into communities and stop and frisk everybody they see. That's  
15 what the problem is.

16 And I think what the city has suggested by their  
17 position in this case is that we must forfeit our  
18 constitutional rights for the sake of fighting crime.

19 The question we must ask, however, is at what price?  
20 What price to the rule of law? What price to a generation of  
21 young Black and Hispanics who see themselves targeted for this  
22 practice when they are simply going about living their lives in  
23 a peaceful, law-abiding way? Are we as a nation, as a state,  
24 as a city willing to abandon these important fundamental rights  
25 by permitting the police the unchecked power to stop and frisk

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Summation - Mr. Moore

1 anyone they choose without regard to reasonable suspicion?

2 You will recall the words of Lieutenant Delafuente on  
3 one of the tapes. He said, "We own the streets." We submit  
4 that is the kind of attitude that has led to the widespread  
5 abuses of power that we have talked about for the past nine  
6 weeks and that actually I've been talking about for the past 14  
7 years.

8 The NYPD does not own the streets. It is the people  
9 of the City of New York who own the streets and they expect  
10 their police force to honor and respect that.

11 In the final analysis that is what this case is about.  
12 We need to restore justice and the rule of law. We need to  
13 restore the balance that protects all of our residents from  
14 arbitrary and capricious government conduct. That is the task  
15 before this court. To make a difference and to do something  
16 you believe is right. And we are confident that the Court will  
17 be up to the task. Thank you.

18 THE COURT: Thank you. Okay. We are done with  
19 summations. I need to talk to the lawyers a little bit about  
20 scheduling in both of the cases that we talked about today.

21 Let's obviously start with Floyd.

22 You both referred to posttrial submissions. I did not  
23 have in mind any lengthy period for this.

24 MR. MOORE: I understand.

25 THE COURT: I intend to immediately turn to this case

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Summation - Mr. Moore

1 MS. BORCHETTA: Right.

2 THE COURT: I can see what might --

3 MR. MOORE: I understand. But keeping in mind that  
4 it's a nine-week trial.

5 THE COURT: I am keeping that in mind. But I'm also  
6 keeping in mind my desire to give a prompt decision. I do not  
7 wish to be flooded with hundreds of pages. Already the trial  
8 record is eight thousand pages. The documents are how many  
9 hundred collectively, five hundred, maybe collectively or more.

10 MR. MOORE: Probably, some four or five hundred.

11 THE COURT: Probably five hundred collectively which  
12 is thousands of pages. So I've got thousands of pages of  
13 documents, eight-thousand-page trial record. Good summations  
14 on both sides. There's not a lot more to be said. So I want  
15 to make sure these are page limited.

16 Three weeks from today is the 10th or you say it's  
17 the 11th because today is over at 5:10 p.m. so you want  
18 Tuesday the 11th not Monday the 10th. That's a small  
19 difference.

20 Now page limits. I know you think this is something  
21 that is exceptional and it is, but I don't need a lot more  
22 paper. So the page limits on the brief will be the standard 25  
23 pages.

24 MR. MOORE: I think that the concern is really the  
25 findings or the proposed findings.

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Summation - Mr. Moore

1 THE COURT: Twenty-five pages on the so-called trial  
2 brief. We've had a lot of briefing on this case over the  
3 years. It's true, you've pointed out, there haven't been trial  
4 briefs. I'm very familiar with the law and you know my views  
5 on the law. It was pretty well spelled out in the Ligon  
6 decision. So a lot of that would be just rearguing points I've  
7 already visited. There are some issues of law that have come  
8 up today that would be of interest, but I think it can be  
9 covered in 25 pages. So that's that for the trial briefs.

10 It will be a simultaneous submission. No response.  
11 Simultaneous submission of these trial briefs. No response.

12 And then proposed findings. Now you have submitted  
13 proposed findings?

14 No. Again. Not at all.

15 MR. MOORE: You recall we had a lengthy summary  
16 judgment process.

17 THE COURT: Of course, but we didn't have proposed  
18 findings before the trial.

19 So what were you thinking of in terms of limits for  
20 that? I mean I know it's an 8,000 page record. I understand.

21 MR. CHARNEY: Can we --

22 MS. GROSSMAN: I was thinking 50 pages each,  
23 because -- for findings of fact.

24 THE COURT: I was sitting here thinking 35.

25 MS. GROSSMAN: I was just thinking it could only help

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1 your Honor in terms of the 8,000 pages. But if you want us --  
2 maybe we could do 40, I mean.

3 THE COURT: Well 40 pages per side. That's it.

4 MS. BORCHETTA: Your Honor, we would just make one  
5 attempt to plead, which is that, as the Court knows --

6 THE COURT: You don't need to repeat -- for example,  
7 the individuals, the twelve individuals stops. Leave it out.  
8 You've summarized it very carefully in summations. I have the  
9 testimony. I don't really think you can assist the Court in  
10 that, particularly -- maybe the rest of the record will be more  
11 useful. But the individual stops, I know how to do that.

12 MR. MOORE: Judge, the only thing --

13 THE COURT: The evidence is there. It's not that hard  
14 to find. The persons themselves testified. That's easy. And  
15 then where we have the police officers, we have them.

16 MR. MOORE: The only concern I have, Judge, is that  
17 obviously I think whatever happens here will be reviewed at  
18 some point.

19 THE COURT: I understand.

20 I'm saying don't use your pages to tell me what you  
21 know Mr. Leno said or somebody, I've got to get the names,  
22 Mr. Downs said, or Mr. Almonor said. I got it. I think that  
23 would be a misuse of your time and your pages.

24 MS. BORCHETTA: The one thing we would raise is  
25 because we have the obligation to show widespread practice,

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Summation - Mr. Moore

1 it's necessary for us to include a lot of the details from the  
2 different levels of supervision in order to prove various parts  
3 of the practice and that goes both to liability and to  
4 establishing a remedy.

5 THE COURT: That's all fine. I'm saying skip the 19  
6 stops and the twelve people.

7 MS. BORCHETTA: But even with taking that out, we  
8 think we would need longer than 40 pages. Because we need to  
9 include every instance or the city will argue that there isn't  
10 enough.

11 THE COURT: Every instance of what?

12 MS. BORCHETTA: For example, to be able to say every  
13 part of the supervisory review that we believe --

14 THE COURT: That's okay. But not the individuals.

15 MR. CHARNEY: That's fine.

16 MS. BORCHETTA: But we still believe -- for example, I  
17 think that the portions of our summary judgment findings of  
18 fact that were on, for example, the failures of the audits and  
19 the failures of supervision, that part was longer than 40  
20 pages. I mean all of these parts together without the --

21 THE COURT: If that's done, just refer me to it. Just  
22 say you have that. You can get started now.

23 MR. CHARNEY: That's not in evidence.

24 MS. GROSSMAN: That may not be in the record.

25 THE COURT: It's in the record of the case. Sure it's

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Summation - Mr. Moore

1 in the record. Of course, it's in the record. Everything in  
2 the docket is in the record. Absolutely. Of any case. It's  
3 docketed. It's in the record. The Court relies on it. Just  
4 refer me to a prior submission, if you've got that.

5 MR. CHARNEY: I guess two points on that is some of  
6 that may not be admissible in evidence, which is why I think  
7 Ms. Grossman is right that just because it was in the summary  
8 judgment --

9 THE COURT: Now that's not right. Everything in the  
10 summary judgment is supposed to be admissible as evidence. If  
11 nobody objected at that stage, the objection is waived. You  
12 know that. That would be admissible evidence that's cited in  
13 summary judgment motions or in opposition. It's in the rule.  
14 It's in Rule 56. What courts typically do if nobody objects,  
15 that's it. It's admissible.

16 MR. CHARNEY: I guess to Ms. Borchetta's point is we  
17 have 76 precincts, 40,000 officers and we just don't want to be  
18 in a position where if we are limited and we say here are three  
19 examples of bad supervision, the city is going to say but  
20 that's just three examples --

21 THE COURT: They're going to say it anyway.

22 Look, the other day in the -- the reason I make that  
23 point is in the motions at the close of the plaintiffs' case,  
24 which was on the record, Ms. Grossman argued that 12 to 19  
25 stops is just minuscule compared to four-and-a-half million.

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Summation - Mr. Moore

1 It proves nothing.

2 I asked her what number would be one that you would  
3 find acceptable and they said no number. There is no number  
4 that could be tried, even if I had five lifetimes, that would  
5 be satisfactory. I said would 25 be? Would 50 be? Would a  
6 hundred be? Imagine how long it would take to try. It took  
7 this long to try 19 stops, 12 people. Even if it was a hundred  
8 people, we'd be object trial six to eight months. They would  
9 still say a hundred stops out of four-and-a-half million proves  
10 nothing. So I understand the argument about numbers.

11 MR. CHARNEY: I guess we're just, with respect to a  
12 widespread practice --

13 THE COURT: I know but you would never tell me about  
14 40,000 individual officers or four-and-a-half million  
15 individual stops. I only have one life to give to my country.

16 MR. CHARNEY: So, again, we're in kind of a tough  
17 position because we agree with you, and we don't think we  
18 should have to show 40,000 examples of bad supervision.

19 THE COURT: The record is what it is now. Anyway, you  
20 can't add anything to the trial record.

21 MR. CHARNEY: We think in a trial there are dozens of  
22 examples of this and we think that --

23 THE COURT: So what page number do you think is  
24 adequate?

25 MS. BORCHETTA: Fifty.

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Summation - Mr. Moore

1 THE COURT: Which is where you started. I think the  
2 city said that too. We're back to 50 findings of fact. And 25  
3 on the brief. That's it.

4 And it is three weeks, folks. This is a very timely  
5 and pressing matter. It has to be done.

6 All right. I think that takes care of Floyd.

7 Now Ligon. I was confused a little bit by the  
8 argument. I thought we would have -- we had proposed language.  
9 I thought I would see it before I decided the remedy.

10 MR. ZUCKERMAN: There was some confusion, your Honor.  
11 The plaintiffs in their brief requested essentially that the  
12 city make proposals for the most part 30 days after --

13 THE COURT: You said after the final judgment, but  
14 these proposals might be part of the final judgment. If you  
15 said, Look, we don't think we're liable, but if we are and if  
16 we are to change Operations Order 52 or whatever, this is the  
17 language we think is the most we should do. I'd rather know  
18 that before I put the final into effect. I don't see -- I  
19 don't know how an additional final judgment without that  
20 input -- so I understand you're not waiving any claim, any  
21 appeal, any anything, no liability is your position. I  
22 understand.

23 But if there is, you should, I think, lay out what you  
24 think would be a reasonable remedy for a wrong you don't think  
25 happened, but reasonable as opposed to unreasonable. I'd

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D5k9flo8 Summation - Mr. Moore

1 rather have it before I issue the final order.

2 MR. ZUCKERMAN: I think we're prepared to do that.

3 THE COURT: Do it in 21 days too. So it's  
4 simultaneous with this.

5 MR. ZUCKERMAN: Your Honor, the problem is there are a  
6 bunch of things that the plaintiffs want us to do. You're  
7 talking about a video tape, change to the field --

8 THE COURT: What videotape -- the training?

9 MR. ZUCKERMAN: There are seven proposals. So it's a  
10 ton of work.

11 I think what we were hoping was that your Honor would  
12 order -- not that you would order it, but we realize that you  
13 were going to order us to do certain things. And if you order  
14 us to do certain things, we would then make proposals with  
15 respect to those certain things. And the plaintiffs wanted  
16 to --

17 THE COURT: I don't know what the final judgment is  
18 from which you're appealing. I'm a little mixed up here.

19 Mr. Dunn.

20 MR. DUNN: I think what it would look like is, for  
21 instance, the defendants shall within 30 days produce a policy  
22 to the Court, which the Court will review and approve.

23 The defendants will produce the training materials  
24 within 60 days that the parties would review and the Court  
25 would approve.

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Summation - Mr. Moore

1 The defendants will put in place --

2 THE COURT: What's the final order that's appealable?

3 MR. DUNN: It's that order saying they have to do  
4 those things.

5 THE COURT: Even before anybody could review what  
6 they're doing?

7 MR. DUNN: Your right. That is part of the conundrum  
8 because, for instance, what they would be appealing is a direct  
9 order from you that they do anything. As soon as you tell them  
10 to do something --

11 THE COURT: I think it's going to result in piecemeal  
12 appeal which the Circuit doesn't like. I think it should all  
13 be spelled out. It's not a final order.

14 I'd have to call it preliminary relief order and then  
15 call it final relief order after the 30-day period. I'll do  
16 that. But it will not be appealable on a preliminary relief order  
17 because I cannot assess the relief.

18 So I'll do what you say. But I'll call it preliminary  
19 order of relief. Give you 30 days to be specific. And then  
20 issue a final order of relief.

21 MS. GROSSMAN: Your Honor, if we could have -- could  
22 we get back to you tomorrow about that particular proposal in  
23 terms of process, a preliminary order as opposed to a regular  
24 order? Maybe we need to talk.

25 THE COURT: I won't be bound by what you want anyway.

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Summation - Mr. Moore

1 I'm going to do what I'm going to do. I'm not going to issue a  
2 final appealable order without the language. So I have to do  
3 it in these two steps if you want the 30 days after the  
4 preliminary order.

5 Frankly, you have the preliminary order. I gave the  
6 relief. And then I said I'll hold off. I'll basically retract  
7 that portion because you can't have rules for part of the  
8 police department and not all of the police department. It's  
9 confusing. Training is training.

10 So I said let me hold off until I deal with Floyd.  
11 Now we're there. I'm willing to go back and reinstate that  
12 order sort of as the preliminary order of relief.

13 Order that within 30 days from that date you make your  
14 various proposals. I pass on them. I issue a final order of  
15 relief. After all, it's still preliminary injunctive relief.  
16 And then it's appealable.

17 MR. ZUCKERMAN: Some of those things may take longer  
18 than 30 days.

19 THE COURT: All right. But you understand the process  
20 that I have in mind.

21 MR. ZUCKERMAN: Yes.

22 THE COURT: There is no final order until I actually  
23 impose the preliminary remedy.

24 Speaking of which, when do we get past preliminary  
25 relief? I guess not until that's appealed up and down. We

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1 don't go to a trial in that case, right?

2 MR. DUNN: That may be what you'd like to have happen,  
3 your Honor, but we're actually proceeding full pace with  
4 discovery with the city. We have a pretrial schedule. It has  
5 us going through the end of September. I think we're going to  
6 have to have a discussion about that schedule. But we are  
7 proceeding, we the parties on the discovery.

8 THE COURT: But then there would be motion practice.  
9 Is this another class action?

10 MR. DUNN: Yes, it is.

11 THE COURT: So there would be class motions,  
12 supposedly, and then summary judgment.

13 MR. DUNN: It would be the exact same sequence as  
14 we've had in the other cases.

15 MS. GROSSMAN: I just want to take a step back to  
16 Floyd.

17 THE COURT: Yes.

18 MS. GROSSMAN: The page limits. I thought I heard  
19 Ms. Borchetta say that, or confirm, 50 pages for the findings  
20 of fact.

21 THE COURT: Yes.

22 MS. GROSSMAN: But what about the proposed findings of  
23 law? I'm not sure. Is that the 50 pages --

24 THE COURT: Proposed findings of fact and conclusions  
25 of law. One document. 50 pages. That's it. And one trial

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1 brief.

2 And they may be repetitive. If it's in the trial  
3 brief, I don't know that you need to do proposed conclusions of  
4 law. I figured you're really going to cover that in the trial  
5 brief.

6 MS. GROSSMAN: I know I generally like to ask for an  
7 extra day. I was just wondering if we could have until June 12  
8 instead of June 11?

9 THE COURT: Why?

10 MS. GROSSMAN: Because of the -- I think a lot of us  
11 have worked very hard.

12 THE COURT: You've all worked very hard.

13 MS. GROSSMAN: And I think that if we could have that  
14 extra day, it would be helpful so that we could all rejuvenate.  
15 And so if we could have an afternoon extra day, I think that  
16 would be something that we'd appreciate. If you don't want to,  
17 that's fine, your Honor.

18 THE COURT: If you can rejuvenate because of one day,  
19 good for you. It's going to take me longer than that to  
20 recover.

21 June 12. You must submit June 12.

22 Do not write and ask for an extension because I'm  
23 telling you now the ruling in advance of the request. Denied.  
24 We have to do this promptly.

25 Now are we done?

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Summation - Mr. Moore

1 Thank you all for a very fine presentation on all  
2 sides today.

3 (Adjourned)  
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Summation - Mr. Moore

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PLAINTIFF EXHIBITS

Exhibit No.	Received
166F . . . . .	.7833

DEFENDANT EXHIBITS

Exhibit No.	Received
S15 . . . . .	.7833

