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Hearing

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAVID FLOYD,

Plaintiff,

v.

08 CV 1034 (SAS)

CITY OF NEW YORK, ET AL.,

Defendants.

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New York, N.Y.
March 8, 2012
2:20 p.m.

Before:

HON. SHIRA A. SCHEINDLIN,

District Judge

APPEARANCES

CENTER FOR CONSTITUTIONAL RIGHTS
Attorneys for Plaintiff Floyd
BY: DARIUS CHARNEY

NEW YORK CITY LAW DEPARTMENT
Attorneys for Defendants City
BY: HEIDI GROSSMAN

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1 (Case called)

2 THE COURT: So this is Professor Fagen. Good
3 afternoon.

4 MR. FAGEN: Good afternoon.

5 THE COURT: We have had a lot of submissions on the
6 issue of the experts' reports, how the reports were prepared
7 and methodology the opinions. In short there's a Daubert
8 challenge by the City to the opinions that Professor Fagen
9 would like to give in this case.

10 The opinions in the simplest form address two issues.
11 In the simplest form one is the Fourth Amendment issues but
12 then there was reason for suspicion for the stops and to do
13 that he worked with the universe of 2.8 million UF-250s which
14 is the form that police officers use to record the basis for
15 making a stop. And then he also gave opinions with respect to
16 disparate treatment and those use the UF-250s but in a
17 different way. So that's the first big divide and I want to
18 talk about that for a moment.

19 With respect to the Fourth Amendment issue, the UF-250
20 has what's called a side one and a side two. We're going to be
21 talking about that a lot. And side one has the question -- and
22 I quote, "What were circumstances which led to stop?" And the
23 police officer can check at least one box but could check more.
24 And on side two of that form there are other questions and one
25 of them is called Additional Circumstances/Factors and the

1 directs the officers to check all that apply. So it was
 2 Professor Fagen's study of the 2.8 million UF-250s that led to
 3 his opinion.

4 With respect to the opinion on the Fourteenth
 5 Amendment issue, the alleged disparate treatment, I am not sure
 6 I am right about this but the only part of the UF-250 that's,
 7 particularly, important is the box that says "race". And in
 8 that box the choices are "White", "Black", "White Hispanic",
 9 "Black Hispanic", "Asian Pacific Islander", "American
 10 Indian/Alaskan Native". That opinion doesn't turn at all on
 11 the boxes about the circumstances leading to the stop or the
 12 additional circumstances. It only has to do with the race and
 13 maybe the crime. It's a box that says, specify which
 14 felony/penal law misdemeanor is suspected. Leading to some
 15 extent is broken down with that in mind but it does not depend
 16 on the so-called coding issues.

17 So we have two different sets of opinions in a way and
 18 the city attacks both for different reasons. I think it's
 19 always helpful to know the Court's initial thoughts. It helps
 20 you focus your arguments. And I will say that with respect to
 21 the Fourteenth Amendment opinion on this alleged disparate
 22 treatment, it's the easier of the two. The city essentially
 23 has one big attack and the one big attack is that Professor
 24 Fagen did not use as a benchmark the race suspects in crimes.
 25 The City thinks he should have. The City thinks there's data

1 on the race of suspects at least in a high percentage of
2 crimes, not 100 percent but a lot of crimes. The plaintiffs,
3 actually, think that there's no good data with respect to the
4 race of suspects. It's not good enough that there is a
5 percentage where the race is actually known. There's a
6 percentage where the race is suspected and there's a percentage
7 where we have no idea of the race.

8 And there is some selection bias maybe when the race
9 is identified. And for a host of reasons the professor made
10 the decision not to use that as a benchmark but he had many
11 other ideas of benchmarks to extract his opinion from the data
12 he had. And I said I would share with you my initial
13 impression. My initial impression is he is using credible
14 methodology. He is qualified in the field and he should be
15 allowed to give the opinion everything else is
16 cross-examination. Nothing really much more to be said. I am
17 certainly willing to have the City have some oral argument here
18 if only for the record but maybe in the hope of convincing me
19 but as of now I am inclined to let that part go forward.
20 That's the easy part.

21 With respect to the Fourth Amendment claim, I have
22 very little criticism with Professor Fagen but I have some big
23 questions. And that is, and I don't speak lightly when I know
24 every word I speak is on the record, but what choice is there?
25 We have 2.8 million stops. The only data we have on those 2.8

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1 million stops is what the police officer decides to check off.
2 Its accuracy is, obviously, questionable but there's no other
3 data. We, obviously, cannot have 2.8 mini trials. We,
4 obviously, don't have the time for that, don't have the staff
5 for that, don't have the ability for it. It would shut down
6 the police department. Every officer who made a stop over the
7 last nine years would have to come to court and describe all
8 the things that were in his mind. So the only way one could do
9 a study of the reasons for those stops is on the form that the
10 City created. That's the only data we have is the form the
11 City created and the form that the City uses itself to analyze
12 the appropriateness of its actions with respect to stops and
13 frisks. So I don't think we have any choice but to accept the
14 UF-250s as the starting point.

15 Then the only tact was with the coding. How did the
16 professor, who I am not sure of this but I don't think is a
17 lawyer but, certainly, not a judge and certainly not a jury,
18 doesn't look like 12 people to me. He looks like one, so he
19 not a jury, not a judge. Is he a lawyer? No, not a lawyer.
20 How does he decide the notion of what is justified, what is
21 unjustified and what is indeterminate? How does he do that?
22 Well, his methodology was to look at the case law. And,
23 clearly, one couldn't look at all cases that all judges all
24 over the State of New York are writing on stops and frisks that
25 too is impossible. So he used some. Some were New York Court

1 of Appeals, some were the Second Circuit, some were the federal
2 district court and some were the New York lower courts. And he
3 reads those cases and puts their holding in a parenthetical and
4 draws out from that holding the guidelines of what courts have
5 accepted as a basis for reasonable suspicion. The City then
6 looks at some cases and questions his interpretation of those
7 cases.

8 And I've looked at the long, long chart that's part of
9 Ms. Grossman's declaration. It's really four different charts.
10 And I think we're going to be spending some time this afternoon
11 on the four different charts to see if there's really all that
12 much disagreement. And to the extent there is, how material is
13 it? Because in one or two cases my view is that even if the
14 City is right, for example, that the Fernandez case comes out
15 different than the Francis case maybe it's, certainly, a higher
16 court, certainly, four years later but it's a trivial
17 difference in the outcome of the statistics. So even if one
18 corrected one or two of the standards to be drawn from the
19 cases it wouldn't change very much.

20 And when I look at the last of the City's four charts
21 which was only eight cases, I didn't think the City would
22 necessarily write out its interpretation of the case over his
23 interpretation of the case. And, of course, the plaintiffs
24 came back and said the same thing and wrote a brief saying the
25 City is relying on a dissent. The City is relying on the fact

1 that the Second Circuit hasn't decided a cert issue. The City
 2 this, the City that, but it's not so clear that the holding as
 3 described by the professor at least was wrong.

4 And the question is, is there or was there a better
 5 way to do that? Instead of Professor Fagen, who is not a
 6 lawyer, judge or jury, deciding what the factors are that would
 7 justify a stop should he have asked the Court to do that before
 8 the coding? I don't know that that would have been acceptable
 9 to the City either. Should the City have appointed a neutral
 10 master to read the cases and decide the coding? Maybe. Should
 11 we have asked the jury whose 12 nonlawyers are far less
 12 qualified than Professor Fagen's reading those cases to decide
 13 what the factors are? Surely not. So, again, I'm not sure
 14 there was any other way to get at that. The case law method
 15 was a good method. He tries to say, let's extract from the
 16 case law what factors justify a reasonable suspicion stop and
 17 which don't. And, of course, the cases aren't consistent.
 18 That's another problem. Certainly, lower courts are never
 19 consistent until the higher courts get ahold of it. And
 20 circuits differ around the country than the Supreme Court
 21 because they're final, not because they're right, correct,
 22 everybody. So that's the way it is.

23 So, again, I am not entirely sure I understand what
 24 the City would have wanted. Once we have to agree that the
 25 UF-250 database is the only way to go, I am not entirely sure

1 what the real quarrel with this methodology is.

2 Now, another tact the City has is that he made a
3 coding error, fairly big coding error and that effected the
4 outcome by many percentage points, maybe eight and he corrected
5 it. He realized the error. He corrected it. The City said,
6 we're prejudiced. This is too late. It's not fair to us.
7 Well, I would understand that argument if our trial was
8 scheduled for April of 2011. It is not, sadly. We have these
9 Daubert motions. We have class certificate motions. We have
10 motions that keep us busy. Some day we may have motion in
11 limine. I don't have a trial date and I don't know when it is.
12 I wish I did know when the trial date is but I know it's not
13 next month. I know it may not be in 2012. So I am not
14 entirely sure what the prejudice is. The City has months and
15 months to adjust to the correction which, frankly, was
16 graciously made. He realized it was in error, corrected his
17 statistics or figures, totals and percentages. It is what it
18 is. It's corrected.

19 So those are some of my initial thoughts. I haven't
20 reached a thought yet as to whether to allow this but I am
21 somewhat mystified as to what the choices are given what I've a
22 just said is the background of the matter, how you look at 2.8
23 million stops other than with the very system the City has
24 created. It's not a perfect system, clearly, but from the data
25 that the professor put in front of me, I can see that the

1 police officers in my opinion are just checking more boxes and
2 they're checking the ones that I think will defend any stopping
3 that doesn't apply. So we're seeing a rise in furtive moments
4 and we're seeing a rise in high crime areas and, frankly, it
5 doesn't matter that it's a high crime area. It's just a good
6 thing to check. So I don't think that anybody is saying the
7 forms are, particularly, accurate but there is nothing else we
8 have. So those are some preliminary thoughts.

9 Given that it's the City's motion I guess we should
10 begin to some extent -- this is going to sound vague -- with an
11 oral argument that may address some of the points I made or it
12 may address some of the points the City wants to make to
13 highlight in their briefs. A lot of paper here. I have read a
14 lot of it but it doesn't hurt to distill it down to your key
15 point and then allow the plaintiff's lawyers a chance to
16 respond to you and then I may have some questions for Professor
17 Fagen and you may too and that's why he is here as a witness.
18 So that's I guess the order in which we're going to proceed.

19 MS. GROSSMAN: Thank you, your Honor.

20 Well, I think the first issue about the UF-250 is the
21 only way to go. There is no other better choice. I think that
22 just because there's no other choice doesn't mean that you have
23 to accept the methodology that is flawed in many respects.

24 THE COURT: Let's pause here. How could you study 2.8
25 million stops other than through the UF-250s?

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1 MS. GROSSMAN: Study for what purpose? To make a
2 decision about the unconstitutionality of the stops?

3 THE COURT: To analyze whether the stops are justified
4 under reasonable suspicion standard. How would you do that
5 other than by studying the 2.8 million UF-250s?

6 MS. GROSSMAN: But the purpose of the UF-250 form is
7 not to establish --

8 THE COURT: I'm not asking you that. That's not my
9 question. You really have to focus in on the question. How
10 else could you propose analyzing 2.8 million stops to see
11 whether there's a problem in terms of reasonable suspicion
12 being the basis for a stop? Is there any way to study 2.8
13 million stops?

14 MS. GROSSMAN: I don't see a way. And the reason why
15 I don't see a way is when you think about hearings that have
16 been held before you, your Honor, on the issue of reasonable
17 suspicion look at how fact intensive --

18 THE COURT: Absolutely right. That's why I am asking
19 the question. Can you think of any other way --

20 MS. GROSSMAN: No.

21 THE COURT: -- seem to me that's quite a concession on
22 your part. I am not saying that negatively but I am saying you
23 therefore agree with me that if it's to be done, if one is
24 supposed to look at all 2.8 million we have nothing but the
25 UF-250s. We can't have a suppression type hearing which is

1 what I do, you are right. You said look at the hearings held
2 before you. It usually comes up in a criminal case and
3 somebody moves to suppress saying the stop and essentially the
4 arrests are bad and I spend hours, three hours or five hours
5 taking testimony from the police officers, briefing, argument
6 and I either find there was a basis or not. And if it was no
7 basis I suppress the evidence received. If there is no trial
8 the indictment is dismissed. That happens once in a while, not
9 very often but it happens and it takes three to six hours for
10 one and that is your point. So that's why I said respectfully
11 that was quite a concession. You are saying there is no way to
12 look at 2.8 million, period. That's your answer.

13 MS. GROSSMAN: That's my answer.

14 THE COURT: But it's not an answer I can accept. I
15 can't do that. Therefore, we are a back to the UF-250, so we
16 have to start with the proposition that there's no alternative.
17 The database we have is the universe of 2.8 million UF-250s.
18 Now we can go from there.

19 MS. GROSSMAN: This is the first time this particular
20 question has been represented on that issue and that from my
21 perspective and from what I am looking at as a lawyer I am not
22 an expert. I am using argument. I am trying to use what I
23 know. But for my own understanding is it does not appear that
24 there's another way. But I would like to have an opportunity
25 to give thought to that, to get back to your Honor about that

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1 because it's a very serious question.

2 THE COURT: It's a very serious question. It's the
3 one that's been keeping me up nights losing, a lot of sleep,
4 saying to myself if it's not the 2.8 million UF-250s, what is
5 it? I, obviously, cannot have 2.8 million three hour hearings
6 and everybody know that. I understand it. So we can't go the
7 one by one hearing. If your answer would be a sampling which I
8 know in another context, how many could we reasonable have that
9 would be a viable sample? There are two experts here who know
10 a lot about sampling, I assume. Doctors Fagen and, was it
11 Smith?

12 MS. GROSSMAN: Yes.

13 THE COURT: And they know much more than I do but I
14 suspect it's also more than could be done with live hearings.
15 It is just not possible, I think, to do enough. You have them
16 with enough different circumstances, enough different scenarios
17 that you could then extrapolate from some reasonably small
18 sample the rate of either unjustified or indeterminate stops.
19 I don't think you could do it. That's my strong guess if you
20 were to do the sampling, also impossible.

21 So then you'd be back to statistical samples. You
22 would be using less than 2.8 samples but you would still be
23 using UF-250s. So I suggest to you we are all stuck with the
24 UF-250 but, yes, you could consult afterwards and if you want
25 to suggest an alternative of interest, go ahead, but I suspect

1 we'd be past that. There is no alternative.

2 MS. GROSSMAN: Let me just raise an issue that is of
3 very, it's a very significant issue because if you are going to
4 allow the use of the UF-250 database to be used to establish
5 reasonable suspicion --

6 THE COURT: Well, you put it a different way than I
7 would. I am starting a different proposition. I am saying,
8 how do we examine whether there's a problem? Whether there are
9 stops, too many stops that are not based on reasonable
10 suspicion as defined in the law? How do we go about the
11 inquiry? And the only way I can think of is to use the UF-250s
12 data because there's 2.8 million of them. We could sample
13 database but it's still the database. That's all we've gotten
14 to so far. I think it has to be recognized that we start with
15 the UF-250 database.

16 MS. GROSSMAN: So, the problem that I raise that I
17 think is something that the Court really has to give serious
18 thought to is the burden of proof here. And if you're in a way
19 allowing the UF-250 database and opinions by Professor Fagen
20 that says "X" number of stops --

21 THE COURT: You are going way past me. I didn't want
22 to get to the second problem yet which is how we analyze the
23 data. I want to see how we get to agreement that this is the
24 only data we can work with, then we get to the question of once
25 we agree on that did he do it right or did he make bad coding

1 decisions leaps that he shouldn't have made. He is not a
2 lawyer. All the rest of the argument, but you want to first
3 start with the overriding proposition that with 2.8 million
4 stops to deal with we don't have a choice except for the UF-250
5 database, then you could tell me all the things you did wrong
6 in using that data but I want to see if we can agree that there
7 was no choice to use that data.

8 MS. GROSSMAN: Well, I still -- and I don't mean to
9 belabor the point -- but I do still think that whatever if --
10 you are right. Professor Fagen opines on UF-250s and says X
11 numbers are unjustified and you look at the case law and you
12 say, okay, that's reasonable. Let's accept that as true, at
13 the end of day that never means anything about the actual
14 Constitutionality about all of the stops.

15 THE COURT: If I agree with that but if you were to
16 have an individual suppression hearing on everyone of the 2.8
17 million stops you would learn much more than is on the UF-250
18 form. The officer would testify. He would say, I don't have
19 time to write everything down. I checked off the boxes. But
20 now let me tell you everything I remember or everything that's
21 in my memo book or whatever, but we can't do it. There's no
22 way to have 2.8 million hearings. We have gone over this and I
23 don't think you could do it by sampling if you had to have live
24 hearings. We have gone over the same grounds. I understand
25 your point. But if I had one hearing, ten hearings, each one

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1 would take hours. Each officer, if he had notes in his memo
2 book or something, might be able to add information to the form
3 but none of that's possible. It's not practical. It's not
4 possible. The City itself uses the UF-250 for its quality
5 control and to make sure there is integrity in the process of
6 these stops.

7 MS. GROSSMAN: The question is what does this data in
8 that opinion go to? What is it there to prove?

9 THE COURT: We'll talk about the Fourth Amendment
10 claim. I've already put the other thing aside.

11 MS. GROSSMAN: The question about the
12 constitutionality of the stops on a wide scale basis, what
13 question does that go to? Goes to the Monell question whether
14 the City has pattern and practice of suspicionless stop,
15 whether they're on notice.

16 THE COURT: Correct.

17 MS. GROSSMAN: And so even if we accept that Professor
18 Fagen believes that "X" number are insufficient,
19 unconstitutional and that the Court analyzes the case laws and
20 agrees that his interpretation is correct, that doesn't
21 translate into the police department being on constructive
22 notice about the wide scale problem of unconstitutional stops.

23 THE COURT: That's fine. But it's an argument way
24 down the road that I don't need to have a hearing on. The
25 hearing today is a Daubert hearing. Let's put the credentials

1 aside because I am satisfied. We're not here for that but you
2 are attacking the methodology. That's fine. I want to take
3 that in small steps. The first step is the universe of data.
4 And I am fairly convinced there was no choice. You didn't pick
5 the wrong universe of data that's doable. You said, may I
6 consult after the hearing with my expert and if we have
7 anything else to offer we'll let you know. Putting aside that,
8 I said sure. Now, I don't think we have any alternative. This
9 is the data the City keeps. It's the way it records the basis
10 for stopping people. There has to be a basis. We don't have a
11 country where you can just stop anybody, hopefully. So you
12 have to have a reasonable suspicion and the law defines the
13 parameters of reasonable suspicion.

14 MR. CHARNEY: Your Honor, I would submit that in fact
15 while the City has this.

16 THE COURT: Has this?

17 MS. GROSSMAN: Has the UF-250 forms. It requires the
18 officer to prepare the UF-250 forms. There are orders and
19 audit procedures to review. I would submit that the City
20 really doesn't under Monell have a requirement, an obligation
21 to do that.

22 THE COURT: I agree but it does. It doesn't have an
23 obligation. It chose to track. It chose to document for good
24 reason. I think there's a lot of reasons people document a lot
25 of things. One is to be able to defend itself. One is for

1 transparency, a lot of good reasons to document what you do but
2 it chose to do it. We have this data. It's available. It's
3 not perfect data because I don't trust that the person who
4 entered the data necessarily was writing down what happened, so
5 to speak, but that's a different issue. This is the only data
6 we have. We're back to the beginning. So I want to get past
7 that now. Let's assume that the only data we have, now we are
8 ready for your attacks on how he manipulated the data, how he
9 dealt with the data. What was wrong with it?

10 MS. GROSSMAN: Yes. We set out all our concerns in
11 our papers.

12 THE COURT: I said you could distill it in oral
13 argument.

14 MS. GROSSMAN: What Professor Fagen did was he took,
15 he looked at ten boxes on a certain part of the form.

16 THE COURT: Side one and side two.

17 MS. GROSSMAN: Okay. Side one. We'll use that
18 annotative form that we attached. That might be very helpful.

19 THE COURT: Yes, I have it.

20 MS. GROSSMAN: So what Professor Fagen and his team
21 did was looking at side one of the form, they looked at the
22 check-off boxes, the ten boxes under what were circumstances
23 which led to the stop and he looked at on side two --

24 THE COURT: On side two?

25 MS. GROSSMAN: And then he looked on side two of the

1 form at some of the boxes checked off there. And what he did
2 was he came up with a method to put any combination into
3 certain buckets.

4 THE COURT: Right. Three buckets, "justified",
5 "conditionally justified", "indeterminate".

6 MS. GROSSMAN: That's right.

7 THE COURT: Well, no. I was wrong. "Justified",
8 "unjustified" and "indeterminate".

9 MS. GROSSMAN: Sorry, your Honor. Now you can look --
10 there's many, much more information on the form from which to
11 determine reasonable articulable suspicion. And Professor
12 Fagen's scheme doesn't at all consider that and address that it
13 omits that because he can't address the form. So accepting --

14 THE COURT: Because he can't what?

15 MS. GROSSMAN: Because the information on the form was
16 too unwieldy and too complicated to do as thorough a search on
17 whether the forms really showed reasonable articulable
18 suspicion. So he simplified the classification.

19 THE COURT: What are you referring to in particular?
20 I thought one of your criticisms is he didn't consider the
21 handwritten notes.

22 MS. GROSSMAN: But there's much more information.

23 THE COURT: I thought that was one big one.

24 MS. GROSSMAN: It was.

25 THE COURT: Let's talk about that one for a minute.

1 cause I know he didn't. What percent of the 2.8 million have
2 handwritten notes? I either didn't find that in your brief or
3 missed it. Do you know?

4 MS. GROSSMAN: I don't think the plaintiffs, Professor
5 Fagen ever set that out.

6 THE COURT: So you don't know either.

7 MS. GROSSMAN: We don't know because look at every
8 field on that form that's handwritten, entries everywhere.

9 THE COURT: Where are there handwritten entries?

10 MS. GROSSMAN: There are fields throughout the form
11 that require handwritten entries. You can start at the top,
12 the address or intersection of a cross street or stop. Someone
13 has to put in information about the location of the stop.
14 There's information in that location of that stop. We said in
15 our brief high crime area.

16 THE COURT: But high crime is on the chart, page two.

17 MS. GROSSMAN: That's right. But, your Honor,
18 consider this. Professor Fagen's scheme when he puts -- when
19 he considers a form, a CJ, conditional justified stops on side
20 one of the form, his scheme says CJ on the side one, plus a
21 field in the ACAF field like high crime area, he says that
22 should be a justified stop. However, there are many stops that
23 take place in high crime areas where the high crime area box is
24 not checked off. There are thousands of those that could
25 potentially exist. But Professor Fagen's scheme did not

1 consider that and it's a huge omission and it really renders
2 this in combination with many other concerns we have had. It
3 renders the whole classic model flawed, fatally flawed.

4 THE COURT: But there is a problem with that too and
5 that's the definition of high crime area. We've gone over this
6 before. Is the whole precinct a high crime area?

7 MS. GROSSMAN: That's right, your Honor. You are
8 absolutely right. And Professor Fagen imposes his own
9 definition of high crime area which is not necessarily
10 consistent with the definition of high crime area.

11 THE COURT: I thought his is with the officer checked
12 the box on side two.

13 MS. GROSSMAN: He doesn't give consideration to what
14 the other information in the form tells you about whether the
15 stop took place in a high crime area. So that omits, that
16 deflates the number of justified stops.

17 THE COURT: Well, if the officer doesn't see fit to
18 check it, obviously, that wasn't his reasonable suspicion.
19 That's the problem. The officer is supposed to check off boxes
20 that form the basis of his suspicion. If he didn't check that
21 off this is high crime area then I guess that wasn't the reason
22 he checked the box.

23 MS. GROSSMAN: That doesn't mean the stop under the
24 circumstances because of the totality of circumstance test and
25 you know that if an officer came into a hearing and didn't

1 check off high crime area but he gave testimony about and I am
2 sure you have had tons of hearings where the paperwork doesn't
3 reveal everything done by the testimony.

4 THE COURT: You are right. I couldn't possibly have
5 2.8 million hearings.

6 MS. GROSSMAN: Consider your own experience. How
7 often is it that every detail of a stop or an encounter is
8 actually in the paperwork? If you find that's reliable in that
9 way then there's really no basis to think that these forms with
10 a check-off box gives you everything that happens. You know
11 that's not there.

12 THE COURT: You are right. I know that it's not
13 everything that's happened but I know it's sufficient to the
14 police department when they have to analyze the quality
15 control, they have to work with this too. There's a lot of
16 stops being made. We can't do them one by one. I cannot
17 question every officer and every stop for hours on details. We
18 have to live with the data we have.

19 MS. GROSSMAN: The purpose of the audit is not to
20 establish reasonable suspicion.

21 THE COURT: It's to see whether on audit basis there a
22 high incidence of suspicion stuff. They're worried too.
23 Police department wants to get this right and so they're
24 checking, reviewing to make sure that there's not a high
25 percentage of stops but don't have the basis and suspicion, the

1 reason it was suspicious. Otherwise what's the audit for?

2 MS. GROSSMAN: OK. Then if the auditors are looking
3 at the form and let's start with what happens. It goes through
4 process and supervisor is looking at the form. It goes through
5 channels. It's entered into a database. Eventually, audits
6 are done there are samples and if the question is while you
7 look at -- if I were a precinct commander and I know that high
8 crime area and I see that there's a furtive movement and I know
9 that even the high crime area box is not checked off, I know
10 this is a high crime area. That's what this is we've sent him
11 out there. I know that if those two equal reasonable
12 suspicion, there was reasonable suspicion. The fact that the
13 motivation of the officer and what he checked off may be
14 reflected in the form or not doesn't mean it wasn't there. And
15 so I think that that presents a challenge here in coming up
16 and -- in accepting Professor Fagen's methodology.

17 THE COURT: Figure 13 of the Fagen report somewhat
18 troubling chart which seems to show that high crime area is the
19 basis for the stop in all areas regarding how high the crime
20 really is in that area. So it's being used or checked at the
21 same rate across all the various areas.

22 MS. GROSSMAN: It's a very good point and let me
23 address that. What Professor Fagen assumes is the way that
24 crime is addressed to the department and how high crime area is
25 used. There can be a low precinct crime, a low crime rate but

1 there can be hot spots and high crime areas within. But
2 Professor Fagen's analysis is are not looking at those hot
3 spots. He is looking at data that's precinct wide.

4 THE COURT: That's right.

5 MS. GROSSMAN: So his analysis and his odd methods
6 don't take into account the spikes in crime and what we're
7 talking about here. It hides it and masks it and that's a real
8 problem when the reality of policing you can look at it --

9 THE COURT: I think you use precincts when you want to
10 and don't use precincts when you don't want to. The fact is
11 that there is an overall crime rate in these various areas and
12 it just definitely is lower in some areas an higher in others.
13 Essentially it's the same rate in all five of these divisions.
14 It tells me something about the officers' use of the phrase
15 "high crim rate" is a safe bet to put on the court. I don't
16 think this form is perfect but it's the only data we have.

17 MS. GROSSMAN: There actually is no box on the side
18 two.

19 THE COURT: I realize that. It has areas. It has
20 high incidents of reported offense of type under circumstances
21 but I suspect the officer in the field translates that to high
22 crime rate because I don't think he could probably know.

23 MS. GROSSMAN: That is an assumption.

24 THE COURT: On my part? We've just proved it with
25 David Floyd. I am saying that you can't expect the person on

1 the beat to know what's the burglary rate or the pickpocket
2 rate or one the gun rate or whatever of which I now stopped
3 this person. They know in their precinct where there may be a
4 high crime area but they can't know all crimes on all corners.

5 MS. GROSSMAN: You've just proven my point, your
6 Honor. Using David Floyd as an example, just because there
7 might be three block radius and maybe not does not mean that
8 ten blocks away --

9 THE COURT: Then you are up to precinct-wide data.

10 MS. GROSSMAN: No.

11 THE COURT: It's much larger than the exact area of
12 the crime under investigation. So I am sorry but the side two
13 box that says area has high incident of reported type under
14 investigation is translates to high crime rate.

15 MS. GROSSMAN: Well, that's something that's implicit
16 assumption built into is, that's very weighty and it's very
17 complicated and to put that to the jury that's going to be very
18 confusing. I don't know how you could ever put that in a jury
19 charge and the concerns of --

20 THE COURT: I don't know what you mean by putting it
21 in a jury charge. And the exact words are what they are. It
22 will be either be checked off or not. I am missing the point.

23 MS. GROSSMAN: You are even suggesting that --

24 THE COURT: Your real point is that even if the
25 officer didn't check it out. If it's a known high crime area

1 it should count.

2 MS. GROSSMAN: That's one of my points.

3 THE COURT: That's problematic because you get into
4 defining what you think is the high crime area, the whole
5 precinct, the hot spot, is it the corner type of crime? We
6 want to be as objective as possible but what the boxes allow
7 you to do is to stay objective. Once you start with the areas
8 where you can write in something it becomes less objective.
9 Now you have to interpret what somebody wrote. So somebody
10 puts, maybe they'll put the Soundview section of the Bronx.
11 Maybe they'll put a street corner. I don't know what they'll
12 put exactly. Maybe they'll just put the borough. That's why I
13 leave it to the objective boxes that the officer actually
14 picked. Oh, well.

15 MS. GROSSMAN: Your Honor, just to make clear
16 Professor Fagen doesn't even use -- he uses last month's data.

17 THE COURT: What does that mean?

18 MS. GROSSMAN: It means he's making a comparison, he
19 is not using -- when the stop happens he is -- his analysis
20 looks to and relies upon old data from the previous month that
21 isn't necessarily correlated --

22 THE COURT: I don't know what you are talking about.
23 I thought I'm talking about his coding of the UF-250.

24 MS. GROSSMAN: We are, but it's related because you
25 are accepting the notion that a high crime area is, that there

1 is no high crime area in the -- I am sorry. Let me think that
2 through a little bit more and I'll get back to that.

3 THE COURT: Okay. One of the tacks is, certainly, he
4 doesn't consider the fill in the bank parts of the form such as
5 the location. That's one of the criticisms.

6 MS. GROSSMAN: Yes.

7 THE COURT: What else does he not consider besides the
8 location, the address/intersection or cross streets?

9 MS. GROSSMAN: Well, in addition as we've also set out
10 in our papers given Professor Fagen's scheme, if a box that's
11 checked "other" on side one with no other box checked on side
12 one but it has a box checked on side two he has categorized
13 that as an indeterminate, I believe.

14 THE COURT: That's correct. That's my notes too. Any
15 time side one is checked only with the box "other" doesn't
16 matter what's on the second side. He considers it
17 indeterminate.

18 MS. GROSSMAN: So I know that I don't know that
19 anyone's done any study of narratives but Professor Fagen did
20 not consider the narratives that would have populated the field
21 "other" to really get a sense of --

22 THE COURT: What field are you talking about?

23 MS. GROSSMAN: Look on side one and then look down six
24 boxes. It says other reasonable suspicion of criminal activity
25 specified, the last box on the left side.

1 THE COURT: Yes.

2 MS. GROSSMAN: Are there reasonable conditions,
3 criminal activity specified. Professor Fagen did not --

4 THE COURT: Oh, well, that was the one I was really
5 asking you when I say do we know how many have the narrative,
6 you really meant there when it says "specified". I have no
7 idea. Maybe somebody knows how many of these did have a
8 handwritten explanation of the other. My guess is very few but
9 I don't know that.

10 MS. GROSSMAN: It could be. I don't know but I do
11 know that there are other areas in the form, there are other
12 locations in the form that Professor Fagen did not include in
13 his classification scheme.

14 THE COURT: Like?

15 MS. GROSSMAN: Look at "other". Let's go down to
16 "other", "scars", "tattoos", etc.,.

17 THE COURT: I got it.

18 MS. GROSSMAN: And other scars. I guess my point is
19 that you can look through this entire form. There are many
20 fields.

21 THE COURT: I know but age, height, weight is after
22 the stop. That could not be the basis of reasonable condition.
23 That's what you fill in after you stop the person.

24 MS. GROSSMAN: I guess my point is that all the
25 information tell you something.

1 THE COURT: No, they don't. That's precisely what I
2 am disagreeing with. I am saying filling in a person's age,
3 height and weight is after the fact.

4 MS. GROSSMAN: I am not talking --

5 THE COURT: I know but there are on the forms. There
6 are other areas on the form that have nothing to do with
7 reasonable suspicion. Was suspect arrested? Even that
8 although you will talk about that later in a different context
9 one of these is a suspicion for the stops, so many of the
10 people, many of the lines on this form don't relate to
11 reasonable suspicion.

12 MS. GROSSMAN: Your Honor, with all due respect, I
13 think that's taking a very limited view of the form.

14 THE COURT: Really? Now, you are usually a very good
15 advocate. I am sure you don't mean that. Tell me how in the
16 name of person stopped has to do with reasonable suspicion.

17 MS. GROSSMAN: Not the name.

18 THE COURT: So do I have to put you through on every
19 one of those? You know that many of those boxes don't relate
20 to reasonable suspicion.

21 MS. GROSSMAN: Let's look to side two.

22 THE COURT: Let's stay with side one. That's there
23 after the fact. You've got to concede that you don't care
24 about hair, eyes and build. That's afterwards.

25 MS. GROSSMAN: Physical force used.

1 THE COURT: Okay. I am happy to talk about the ones
2 that you want to talk about but let's just be real about the
3 ones that don't count. If physical force was used indicate
4 type. I don't think you mean that one either. Handcuffing
5 suspect? That's after the stop.

6 MS. GROSSMAN: Well, I think we have a fundamental
7 difference of opinion about what the form means. And if you
8 are going to take -- if your understanding of form is that the
9 only --

10 THE COURT: I didn't say that. I just said point to
11 me what you think goes to reasonable suspicion. I haven't
12 picked anything. I am asking you the questions. You help me.
13 What do you think on this form goes to reasonable suspicion
14 other than the question, What were the circumstances which led
15 to the stop?

16 MS. GROSSMAN: Your Honor, how about a trial that we
17 had just last week with you, when we had an individual who was
18 very upset and started kicking the car and the officer exited
19 the car and he goes to try to remove her off the corner and in
20 the middle of that attempt there's physical force used to
21 remove her and she kicks him and that is part of the basis also
22 for arresting for assault. And so --

23 THE COURT: But we're not having an arrest case here.
24 We're having a stop, question, frisk case. Let's stay with
25 that.

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1 MS. GROSSMAN: There's so many fluid situations in an
2 encounter that it is very hard to be so precise.

3 THE COURT: I know but I have a stop, question and
4 frisk case. That was a false arrest case. Well, tried, I
5 might add. So, but here we are on stop, question and frisk
6 case, so let's stay with that.

7 MS. GROSSMAN: Well, time of day. Time of day could
8 also relate to the patterns. And it all matches with the
9 information. You have to look at a lot of the information.
10 It's time of day, the offense charged that could give insight
11 into the suspicion of suspicious bulge.

12 THE COURT: Say that one again slowly.

13 MS. GROSSMAN: Criminal possession of a weapon. If
14 you have a particular offense charged which is information
15 that's handwritten onto the form, misdemeanor suspected.

16 THE COURT: Right. And if the person were to write
17 down possession of a weapon, what do you think that would go
18 to?

19 MS. GROSSMAN: Well, it's clearly going into what he
20 thinks he is seeing.

21 THE COURT: True. But that's covered by the ten
22 boxes, there is know doubt about it. Carrying objects in plain
23 view used in commission of crime.

24 MS. GROSSMAN: We're backing into a purpose of if the
25 form that was not there. That's not what the purpose of the

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1 form was for. It's to true try to put information into the
2 form. It's not -- the purpose of the form isn't to make, to
3 look at just one part of the form and say, I can't look at the
4 whole.

5 THE COURT: I agree with you. I just want to know
6 what other portions you think should have been studied in this
7 analysis and that go to the topic of reasonable suspicion and
8 you've pointed out one at the moment, the time of day. Okay,
9 that is one. Then you said which felony but exactly the
10 example you gave is covered by the boxes clear. You said if
11 the person's arrested for possession of a weapon or for
12 suspicion of possession of weapon then the officer couldn't
13 help but check carrying objects in plain view, or suspicious
14 bulge so I am still trying to look for the other parts that you
15 think he should have considered and didn't now the biggest one
16 you have is location. I guess you still feel very strongly
17 that when a person writes an address/intersection or cross
18 street of stop that is really important to analyze because it
19 would have been able to be correlated with data.

20 MS. GROSSMAN: Let me make another point. On side two
21 and, again, this wasn't part of Professor Fagen's report. We
22 didn't respond to it in that way. And we can certainly look
23 back and give more thought about what the other boxes are to
24 respond to your questions sufficiently but just looking quickly
25 at the form's side two. Was person frisked?

1 THE COURT: Okay.

2 MS. GROSSMAN: I am going to take you all the way over
3 the right column at very top and you see the first box on the
4 right column says "refusal to comply". Let's go down to two,
5 to suspicious bulge object/(describe). Do you see that
6 suspicious bulge object it's the last box on the right?

7 THE COURT: Yes.

8 MS. GROSSMAN: And it says "describe". So let's talk
9 about the reality of filling out this form. Let's not only
10 think, did you only check off the box on the front? So let's
11 suppose there is a suspicion of criminal possession of a weapon
12 or there's some consideration that there is a bulge and that
13 was the basis for the stop. But, perhaps, the officer instead
14 of putting the description on the front of the form put it on
15 the back of the form. It's very hard to be so rigid about
16 where you put information and I think from the officer's
17 perspective, the key about this form is transparency. Just
18 give the information and if it's not perfect, that's okay. As
19 long as the information is there as long as you document the
20 stop someone can come back to you.

21 THE COURT: I agree with the example you just gave is
22 there is a box called "was the person frisked".

23 MS. GROSSMAN: But you are limiting that to was person
24 frisked. What could very well have happened in the real world
25 that the officer didn't put the bulge that he thought he saw in

1 the front of the form but instead put it in that portion. It's
2 just an imperfect system.

3 THE COURT: It's an imperfect world but it's not
4 unlikely that the officer would put it in the question, Was the
5 person frisked.

6 MS. GROSSMAN: Your Honor, what causes an office tower
7 want to frisk someone when he sees a suspicious bulge?

8 THE COURT: I'm only saying he's got that choice on
9 page one in a question that's not limited to frisk. It says
10 very clearly what were the circumstances which led to the stop?
11 On the side two it says, Was the person frisked, yes or no? If
12 "yes", must check at least one box. That's when the person
13 would check "suspicion bulge" there.

14 MS. GROSSMAN: Well, "must check at least one box".

15 THE COURT: Yes. If "yes" there may not have been a
16 frisk. We got "stop and frisk". The front talks about what
17 are the basis for the stop. This question is already the next
18 step. Was the person frisked? Yes. If "yes", check a box
19 please. Don't check a box if the person wasn't frisked.

20 MS. GROSSMAN: I don't think that that reflects the
21 reality of what happens on the street.

22 THE COURT: These people trained in using UF-250s.
23 They are not that hard. I hope our police officers can read
24 this. They're trained to read a UF-250. They're trained to
25 fill it out.

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1 MS. GROSSMAN: I think the form cannot possibly
2 capture every single scenario. It's too small a form. If your
3 Honor is suggesting that in the future we have to maintain
4 documents like this and then we are going to be subjected to
5 these kinds of cases where we can't even defend then maybe we
6 should just put ten page forms together.

7 THE COURT: Don't create a strawman and then knock it
8 down. I'm not saying what you should do at all, what the
9 police department should do. This is not a case where I'm
10 setting a rule. I'm only talking about the data that has been
11 collected. Police department designed this form, I didn't.
12 The police department trains people in using this form. I am
13 sure that they get a lesson on how to fill out UF-250 and then
14 they fill out many of them over the course of their career. I
15 am just trying to read it in a logical way.

16 To say that it's not logical that they can read the
17 was person frisked, I'm not being in reality and in touch with
18 the streets, the person is trained. The front says, why did
19 you stop them? And the first page says, Was the person
20 frisked? No. Then they don't check any more boxes.

21 MS. GROSSMAN: I still have a problem with that one
22 and I don't like to belabor it. We have very limited time.

23 THE COURT: Way too limited. Well, we had some
24 scheduling problems but --

25 MS. GROSSMAN: But when you think about the -- what

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1 were the circumstances which led to the stop? And then going
2 on to side two, Was person frisked? Those two are not mutually
3 exclusive. "Exclusive" meaning that they -- you can check off
4 "suspect". You can let me just look at these "suspicious bulge
5 object" described.

6 THE COURT: But you wouldn't if there was no frisk is
7 all I am saying. I take your point if there was a frisk the
8 person could check that off. And if Professor Fagen didn't
9 bother to look at that box he may have lost some data. I
10 understand but still that's only supposed to apply as a frisk.

11 MS. GROSSMAN: Well, I think we just -- I mean the
12 same -- I take the same position with a lot of other
13 information. I mean, frankly, the check off boxes exist
14 throughout the form and Professor Fagen didn't even consider
15 those in the context of reasonable articulable suspicion. He
16 didn't include the handwritten entries and we understand why.
17 It's just that the form is just unwieldy and it doesn't
18 sound --

19 THE COURT: If the form is unwieldy that, certainly,
20 isn't the professor's problem. The form is the City's form.
21 The City designed the form. The City uses the form and we've
22 already said this is the only data we have for 2.8 million
23 stops. I think the plaintiffs would argue we're not thrilled
24 with the data but this is all that there is. We didn't design
25 this thing.

1 MS. GROSSMAN: But you can't really force a
2 methodology that doesn't work with data that just doesn't get
3 you to the place that you want to go. Even if it's the best
4 available for Professor Fagen --

5 THE COURT: No. No. that's the best for anybody
6 studying this. He didn't choose it over another. Look, I
7 started this whole conversation saying what alternative did we
8 have for data? The answer is no alternative. This is the
9 data. Then he works with the data and we have to respect and
10 listen to all your attacks on the way he's worked with the
11 data. But not his choice of data, not the design of the form,
12 those aren't his problems.

13 One problem you've point out is he chose not to pay
14 attention to certain parts of the form which you think go to
15 reasonable articulable suspicion. You've identified a couple,
16 not all the ones you've tried to but the address is one you've
17 mentioned and I think that's about it.

18 MS. GROSSMAN: "Other" on the front of the form.

19 THE COURT: Where it says "specified" but my problem
20 with that one is I have no idea how many people specify
21 anything. I suspect it's long but I do know that.

22 MS. GROSSMAN: Is that the basis for an expert report
23 to come in?

24 THE COURT: No. No. But if we were to learn that
25 only two percent of these forms specified anything under

1 "other" then it's not a material error. I'd like to know how
2 many wrote something under the word "other"? That I would like
3 to know. I don't know what it would take to go back and figure
4 out.

5 MS. GROSSMAN: I am not saying that looking at one,
6 it's not just about one piece. It's collective and so it adds
7 up but I understand your point, your Honor.

8 Then again what other contraband was found? Describe
9 the contraband and location. Demeanor of person after being
10 stopped. Remarks --

11 THE COURT: That doesn't go to the reasonable
12 articulable suspicion. That's after the stop. Why do you
13 bring that up? That's after the stop.

14 MS. GROSSMAN: Again, I agree with you. It is after
15 the stop.

16 THE COURT: So who cares? It can't relate to
17 reasonable articulable suspicion. The officer if he was
18 sitting here has to tell me what he noticed before the stop so
19 it doesn't matter.

20 MS. GROSSMAN: Let me go then to --

21 THE COURT: It doesn't matter what contraband was
22 found after that. If you think it doesn't, that's very
23 interesting because the arrest rate is very low. The finding
24 of actual contraband is very low. Apparently, randomized stops
25 do better than all of this which is quite interesting in terms

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1 of stopping millions of people for a very low heel but you
2 didn't want to go there. You should say we shouldn't be
3 looking at hit rate. Yet, you want me to look at was
4 contraband found.

5 MS. GROSSMAN: That isn't, actually, what I meant.

6 THE COURT: That's how it came out. You want to know
7 was contraband found. In other words, did we have a hit. And
8 yet another context you argued, judge, don't look at the hit
9 rate which is very low. It's five percent or six percent
10 better on randomized stop.

11 MS. GROSSMAN: Let's go to the additional
12 circumstances factor, check all that apply. Clearly, you would
13 agree that that all goes to additional circumstances really to
14 the stop. And Professor Fagen, actually, didn't even do the
15 legal analysis regarding these boxes to see would those in
16 combination with one another add up to reasonable articulable
17 suspicion.

18 THE COURT: If nothings on side one.

19 MS. GROSSMAN: Right. And if "other" which is
20 represents hundreds of thousands of stops indeterminate
21 category, if there is an "other" checked off in the front --

22 THE COURT: I know.

23 MS. GROSSMAN: And then on the back he did not -- the
24 boxes could in combination add up to reasonable articulable
25 suspicion.

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1 THE COURT: I agree. That's one of the stronger facts
2 which --

3 MS. GROSSMAN: That's pretty much what is left in the
4 indeterminate.

5 THE COURT: I need to talk to plaintiff's lawyers
6 about that. That's an attack I understand.

7 MS. GROSSMAN: Well, then I am sorry for wasting your
8 time. I should have gone right there. I apologize.

9 THE COURT: Is there any our points that you do want
10 to make about the methodology and working with the UF-250 data?

11 MS. GROSSMAN: Just give me a second.

12 THE COURT: Sure.

13 MS. GROSSMAN: As to classification I think that in
14 addition to what's in our papers those are pretty much the
15 arguments that we raise --

16 THE COURT: You had said on side one at the time of
17 the stop would be important but it's actually one of the
18 additional circumstances on page two. It does say "time of
19 day", "day of week", "season", "corresponding to reports",
20 "criminal activities", one of the box one could check in
21 additional circumstances. So, actually, he did consider time
22 of stop. Not by the narrative entry under page one, "time of
23 stop" but on the box that says "time of day". It is there.
24 It's the third box.

25 MS. GROSSMAN: And that's only if it was checked.

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1 THE COURT: Correct. I understand. Okay. Did you
2 say there's more right now?

3 MS. GROSSMAN: On the classification other than what's
4 in our paper and if you have any other questions that you would
5 like me to address I would be happy to do that. On the
6 regression I know you understand the issue with the regression
7 but I would just like to point out that when you look at some
8 of the case law in employment discrimination cases and you look
9 I think it's a New Jersey case regarding Driving While Black
10 case involving the state troopers, it was very important in
11 look at the regression and the reliability of the regression to
12 look at the benchmark and offending behavior identifying those
13 who are engaged in offending behavior is really critical. So I
14 would just -- I didn't a chance given the space constraints to
15 fully develop those arguments but I know that you could look at
16 the cases and when you've considered the employment
17 discrimination cases, for hiring case, for example, you don't
18 look to you -- look to the qualified applicants to determine
19 whether there's a discrimination in the hiring practices. You
20 don't look to the population because not everyone in the
21 population is eligible.

22 THE COURT: But what I don't understand about that
23 argument is the ability to identify the race of those who one
24 suspects of having committed the crime. Sometimes we have race
25 identification and sometimes we don't.

1 MS. GROSSMAN: Yes.

2 THE COURT: How do we extrapolate from maybe the 50 or
3 60 percent maybe we have accurate race data and the 40 percent
4 that we don't?

5 MS. GROSSMAN: Well, your Honor, I think that there is
6 some extrapolation that's done in many statistical analyses.

7 THE COURT: Given the source of the information on the
8 cases where we do have race data and the kinds of crimes where
9 we don't have race data, I don't know that that extrapolation
10 would be fair.

11 MS. GROSSMAN: Well, when you -- let's look at there's
12 some high crime precincts in some of our submissions that we
13 provided to you where for total crimes the suspect descriptions
14 are known at a higher rate than in others. And for all crimes
15 the rate we know 62 percent of the suspects. And remember for
16 all crime remember also there are categories of crime.

17 THE COURT: That's exactly my point.

18 MS. GROSSMAN: The property crime is I believe and I
19 could be wrong. I might not be accurate but I believe that the
20 property crime has lower -- there are lower suspect
21 descriptions. You know less of the suspects and they're more
22 unknown. But it doesn't mean that there's no reason to believe
23 that the proportion of stops based on the information we know
24 about the crime that's being committed and the demographics of
25 whose committing the crime, there is no reason to think there

1 is no evidence to suggest that the data wouldn't match. It
2 wouldn't be the same proposition.

3 THE COURT: I wonder if we have the burden of proof on
4 that if you think you can extrapolate from the 62 percent where
5 you have race information to the 38 percent where you don't, I
6 don't know what your scientific basis is for believing you can
7 just assume it would be the same ratio in the 38 percent
8 unknown.

9 MS. GROSSMAN: Your Honor, to that point I would say
10 Professor Fagen himself has relied on that kind of data. So
11 why is it okay in one context but not okay in other context?
12 Maybe the question wasn't asked. Maybe it wasn't what the
13 plaintiff's attorneys wanted him to look it at.

14 THE COURT: It was a question I was going to ask at
15 this hearing. I noticed that he didn't in one of his articles,
16 maybe it was the Journal American -- Association he did at that
17 time.

18 MS. GROSSMAN: And in the Attorney General's report
19 for Attorney General Spitzer at the time in 1999.

20 THE COURT: That's a long time ago. Maybe he learned
21 from his errors. Maybe he doesn't think it's valid any longer.
22 That's a lot of years ago. So I think if I am going to have
23 any time left for the plaintiffs --

24 MS. GROSSMAN: Thank you for your attention.

25 THE COURT: Mr. Charney.

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1 MR. CHARNEY: Yes, your Honor.

2 THE COURT: From the long conversation I've just had I
3 am trying to focus more on the methodology used to analyze the
4 2.8 million UF-250s and, of course, there are some problems.
5 First of all, as you know there was one error that got
6 corrected. Secondly, there's a whole question of coding
7 extrapolating factors in cases whether he is the one who should
8 have made a determination. And then very importantly is, I
9 guess, his decision not to consider any other spaces or boxes
10 on these forms and why didn't he. Fourth, I've already asked
11 three questions. Another one would be why if nothing was
12 checked on side one did he decide that that had to be an
13 indeterminate or, actually, I think an unjustified if there is
14 nothing on side one no matter what's on side two an in
15 determinate if the only check on side one is an "other". So
16 these are big decisions that were made that affect the
17 statistics a lot. And then to add to all the other questions,
18 how you can remember all those, I noticed you weren't taking
19 notes.

20 MR. CHARNEY: That was earlier.

21 THE COURT: We could have is read back slowly but on
22 top of that now -- I may have lost my train of thought. Oh,
23 dear, there was one more. Well, I think I've forgotten the,
24 one more was about choice.

25 MR. CHARNEY: Well, I can try to take them in reverse

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Hearing

1 order.

2 THE COURT: Yeah, I just wish I remembered one more I
3 was going to ask you but it's gone.

4 MR. CHARNEY: I think I can address very quickly the
5 question you had about --

6 THE COURT: Oh, I know. Does he have any idea of the
7 percentage of these forms that actually specified the other
8 reason on page one, side one. Nobody seems to know whether
9 that's two percent of these forms or 20 percent of these forms.
10 I don't know.

11 MR. CHARNEY: Okay. On the point about the, how I
12 classified, the stops where the, only the circumstances on page
13 two were checked off in additional circumstances --

14 THE COURT: He said that was unjustified. Nothing on
15 side one. It's always unjustified.

16 MR. CHARNEY: Just to let you know that the universe
17 of stops that had that characteristic, in other words, were
18 only things on side two were checked off, I believe it was
19 something like 17,000.

20 THE COURT: Oh, I remember that.

21 MR. CHARNEY: 20 and 30. It's basically around one
22 percent of the 2.8 million stops that he looked at. So I think
23 with respect to whether or not this would affect his analysis
24 either way --

25 THE COURT: Hold on. I know about 17,924 stops but I

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Hearing

1 think he mischaracterized those 17,924.

2 MR. CHARNEY: I thought those are the ones where only
3 additional circumstances were checked off.

4 THE COURT: I think that's where there is at least one
5 side, one conditionally. I'll tell you what I think. The
6 17,000, at least one side one conditionally justified
7 circumstances as well as the side two additional circumstances
8 I thought there were only 17,000.

9 MR. CHARNEY: If you had our Daubert opposition brief
10 page 7, the paragraph in the middle.

11 THE COURT: Oh, well, it doesn't matter. I see what
12 you mean. I take it if there's nothing on side one and there's
13 only additional circumstances on side two you are saying
14 there's only 0.6 percent of that 17,924, so it wouldn't affect
15 the analysis. That's one answer on that question.

16 MR. CHARNEY: Now, you had the question about where
17 they check "other" on side one and then check an "additional
18 circumstance" on side two and that was labeled as, classified
19 as "indeterminate".

20 THE COURT: Right.

21 MR. CHARNEY: Professor Fagen can talk more about
22 this, about the other category, obviously, "other" on its face
23 without looking at anything else doesn't tell you anything you
24 actually have to look at other things.

25 THE COURT: That's exactly the City's argument that it

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Hearing

1 says specified how many of them wrote out.

2 MR. CHARNEY: He can tell you about that. I am not
3 going to try to --

4 THE COURT: Okay.

5 MR. CHARNEY: -- tell you how that works so we can
6 have him answer that question.

7 With respect to the question had you about some of
8 these other sections of the form where other information is
9 located, I think you already answered or you made one of my
10 points with respect to the time of day. It's actually in the
11 form. I mean with respect to the location I would say much of
12 the same thing. And the reason being that, and I think we put
13 some of this in our Daubert submissions exhibit, police
14 officers are trained very extensively on how to fill out these
15 forms and the training manuals say very explicitly for that
16 section "check all boxes that apply". So to argue that there
17 are hundreds of thousands or tens of thousands of officers who
18 don't check off "high crime area" when it is a high crime area
19 doesn't seem like a very reasonable assumption for the City to
20 make especially since they haven't provided any data suggesting
21 that's the case.

22 The argument about the impact zone --

23 THE COURT: Let's not leave the location point yet.
24 If he had looked at that box and it correlated it had to
25 precinct data because it says addressed/intersection, if one

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Hearing

1 had looked at every single address/intersection for 2.8 million
2 forms one would know according to Ms. Grossman whether it's a
3 high crime area because of the precinct it's in or the hot spot
4 it's in or whatever.

5 MR. CHARNEY: I guess I would also refer back to the
6 analysis that you also pointed out and showed us the chart that
7 they used that stop factor in our view inaccurately often. But
8 the other thing I wanted to say on this point of they may not
9 check off "high crime area" when they should, an argument is
10 actually inconsistent with how the police department itself
11 reviews the UF-250s because the head of their quality assurance
12 division when asked, how do you determine whether the stop was
13 based on reasonable suspicion, she said, well, I look at those
14 stop circumstance boxes the same ones that Professor Fagen
15 looked at. So to now come back and say, well, he should have
16 looked at more. That would have told you whether it was really
17 based on reasonable suspicion. They are essentially
18 criticizing their own review process because their review
19 process focuses on looking at the stop circumstance boxes and
20 so he is doing what they do. And that actually --

21 THE COURT: Yeah, but that's not fair. They are not
22 reporting to be an expert in the lawsuit trying to prove the
23 constitutionality of stops. They are doing a rough audit of
24 their officers to be sure that there isn't a high incidence or
25 suspicionless stops. They're satisfied. They are allowed to

1 put, design whatever tests they want. They've designed a test
2 based solely on the boxes and if they're satisfied, enough
3 books are checked that stops aren't suspicionless they move on.
4 They have a different purpose in reviewing these forms than you
5 do.

6 MR. CHARNEY: That's right. But I guess two things I
7 would say in response to that would be the first being, I have
8 no idea how many stops where "high crime area" was not checked
9 off, in fact in the city occurred a high crime area. I don't
10 know the answer to that question. I don't think anyone's told
11 us the answer to that question.

12 The other thing I will say is that I think it's
13 important to keep in mind the purpose of Professor Fagen's
14 analysis and what he used that analysis, what opinion he formed
15 from that analysis. And I think you pointed it out in your
16 summary judgment decision. I think it's stated very clearly on
17 page 55 of his report which is the fact that there's this high
18 number of stops that it's really hard to -- you can't --
19 looking at the face of the form you can't establish reasonable
20 suspicion but this is really not a good way, it's not an
21 affective way to monitor and regulate the constitutionality of
22 officers --

23 THE COURT: Are you saying you are not using his
24 opinion to prove to a jury that "X" percent of the stops were
25 unconstitutional? I need to know that because that's what

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Hearing

1 you've just articulated is a different argument. When say what
2 you just articulated was this was not a good method to monitor
3 or give notice or track, that's a different argument. Are you
4 also saying that it proves "X" percentage of unconstitutional
5 stops?

6 MR. CHARNEY: We are using it to show a pattern and
7 practice of unconstitutional stops and we are using it to show
8 because we remember we have several theories of Monell
9 liability in this case, failure to monitor and supervise.

10 THE COURT: I understand the second one. If you are
11 saying this is not a good method, fails to talk about
12 monitoring and training, fine, but for the first purpose --

13 MR. CHARNEY: We are using it to show a widespread
14 practice.

15 THE COURT: So, for example, if he says there's
16 nothing on side one but four boxes are checked on side two or
17 three he calls that always unjustified. Why? Should I ask him
18 or you but why is that unjustified?

19 MR. CHARNEY: You could probably ask both of us. It
20 is our position and I know there's definitely some case law to
21 back this up that -- I'll address it two ways. First of all,
22 again, I refer back to the fact that we're talking about a
23 small universe of stops. We say it's 17,000.

24 THE COURT: That's right. That is the nothing on side
25 one. Then I won't ask that again. Then what's the size of the

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Hearing

1 universe with side one as "other"?

2 MR. CHARNEY: Well, a couple things that we need to
3 keep in mind about that one. Remember they're allow to check
4 as many boxes as they want on side one. So there are a
5 significant number of stops where "other" plus another side one
6 factor are checked off. A lot of times other plus two other
7 side one factors checked off and there may be some checked off
8 on the second page. So a lot of the stops where "others" were
9 checked --

10 THE COURT: I was interested in only --

11 MR. CHARNEY: "Other" by itself. That I would have to
12 ask Professor Fagen.

13 THE COURT: Okay. You mean the numbers of those?

14 MR. CHARNEY: Yes, the numbers were --

15 THE COURT: Okay.

16 MR. CHARNEY: And the, obviously, he has a lot to say
17 about the handwritten notes in his decision, not to look at
18 those which we submit are based on very sound methodological
19 principles.

20 THE COURT: All right. So maybe it's time to talk to
21 him but you had wanted to say one more thing about hot spots
22 or --

23 MR. CHARNEY: Oh, sure.

24 THE COURT: -- or impact zone.

25 MR. CHARNEY: The only other thing maybe just for the

1 record because I think your Honor already hit the nail on the
2 head and we, obviously, agree with what you said, but
3 Ms. Grossman claimed that with respect to that analysis about
4 their use of high crime area doesn't necessarily correlate with
5 the crime in the area. In other words, they're using it in low
6 crime precincts. They're using it in high crime. Ms. Grossman
7 made the point, well, you have to look at smaller geographical
8 areas. You have to look at little sections within a precinct.
9 He didn't do that. That's actually false. He did do that. If
10 you look at his Daubert, the declaration he put in in
11 opposition to the Daubert motion in Paragraph 19, as well as
12 Exhibit C of that declaration, he does the same analysis at the
13 census track level as you recall from the day before the motion
14 is very, very small geographic area, usually a matter of city
15 blocks. And he looked traffic and the crime rate and the use
16 of high crime area as justification for stops in that census
17 track and you can see the same pattern.

18 THE COURT: But that's in the disparate treatment.

19 MR. CHARNEY: No, that's actually another Fourth
20 Amendment opinion which I think, the last point I would like to
21 make it's also important to keep in mind that Professor Fagen
22 has offered several separate opinions as the Fourth Amendment.

23 THE COURT: I notice a couple of thing them do not
24 depend on this coding.

25 MR. CHARNEY: Your Honor is making my job easier.

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Hearing

1 THE COURT: Well, I noticed one. Certainly, one that
2 stood out was the percent of all stops that resulted in arrest,
3 nothing to do with coding and the summons and however often
4 force is used more likely to be used against Blacks and
5 Hispanics and Whites nothing to do with the code.

6 MR. CHARNEY: Also this high crime area analysis
7 because he is just tracking how often are they using it? Are
8 they using it when the crime rate is higher or when it's low?
9 It's on a separate analysis and he uses that to opine that it's
10 a very questionable indicator of reasonable suspicion.

11 THE COURT: I know and I was focusing on the coding
12 issues.

13 MR. CHARNEY: Okay.

14 THE COURT: The other only other one you should defend
15 maybe before I get a chance to start taking testimony is the
16 benchmark argument that Ms. Grossman ended with.

17 MR. CHARNEY: Okay. Well, I have a couple things we
18 can say about that. I mean most of this is in our papers. The
19 first, I think, obvious one that we made upfront was that
20 because you have so much missing race data in the crime suspect
21 data it really would be statistically unsound --

22 THE COURT: Well, is the 62 percent accurate? Is the
23 data that's allegedly -- race in 62 percent?

24 MR. CHARNEY: But you have to extrapolate that to the
25 entire universe would create various --

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Hearing

1 THE COURT: I'm not asking you to extrapolate to the
2 60 to 38 unknown --

3 MR. CHARNEY: That's the data we were given. We can't
4 dispute it.

5 THE COURT: So for this purpose you accept that for 62
6 percent of the crimes we do have race data?

7 MR. CHARNEY: Yes.

8 THE COURT: But what you say is we don't have race
9 data and the other 38 percent would be inappropriate to
10 extrapolate from the 62 to 38 and why is that?

11 MR. CHARNEY: One being that we don't know what parts
12 of the City the 38 percent are in. We don't know what types of
13 crimes the 38 percent apply to. And the reason that's
14 important is because depending on the crime category the racial
15 demographics of a suspect differs greatly so there could be
16 serious selection by if you were going to extrapolate from the
17 62 to the hundred and the other piece of it is --

18 THE COURT: But he did that. He used that benchmark
19 in the past himself, right?

20 MR. CHARNEY: Well, he used -- so what he did in his
21 other studies is he actually used arrest data. He didn't have
22 access to the crime data. And he will tell you that crime data
23 is superior when what you are trying to measure is the crime
24 rate in a particular locality. And that was, actually, what he
25 was trying to do here because what he is analyzing is are the

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Hearing

1 stop patterns the NYPD driven by, as they say, crime? In other
2 words, because crime is higher here, we are going to go here?
3 Or is it the racial composition of these particular localities?
4 And that is the analysis he was doing.

5 So he looked at racial composition and crime rate in
6 different localities and tried to assess what influences crime
7 versus racial composition were having on the stop patterns.
8 That's the analysis he was doing. And so he -- that's the
9 reason he chose that benchmark. There is -- he has used it
10 many times before. It's been Peer Reviewed. It's been
11 published. And to now suggest that it's so out of whack that a
12 jury can't even hear about it is taking it way too far

13 THE COURT: All right. What I would like to do now is
14 have a five minute recess and then have Professor Fagen take
15 the stand and answer some of the Court's questions and if
16 anybody else wants to ask a few questions, we're not going to
17 have hours and hours of another deposition but if the lawyers
18 want follow-up, that's fine.

19 MS. GROSSMAN: Your Honor, I just want -- I don't
20 think the plaintiff addressed your question about the hundreds
21 of thousands indeterminate where there is an "other" checked
22 off on front with the AFs on the back and I just thought that
23 would be beneficial. That's one of our arguments.

24 THE COURT: Okay. I think he said he was always
25 indeterminate if the only one checked on front side was

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Hearing

1 "other".

2 MS. GROSSMAN: Right. Now --

3 THE COURT: Doesn't matter how many were checked off
4 on side two if the only thing on side one was "other" he always
5 said was indeterminate.

6 MS. GROSSMAN: But I just didn't think plaintiffs
7 addressed the fact that the box is checked that supports
8 reasonable suspicion.

9 THE COURT: That question is why did he code it that
10 way if the only one on side one is "other" he didn't care how
11 many were on side two it's all indeterminate?

12 MR. CHARNEY: Cause we don't have any reason to
13 believe and, again, this is why he classified those based only
14 on the second page as "unjustified". We don't have any reason
15 to believe that if you only checked off the ones on side two
16 that wouldn't constitute reasonable suspicion, so by adding
17 "other" to the mix, we don't know, maybe "other" gets you
18 there.

19 THE COURT: So your argument really is that no matter
20 how many of these side twos you check off they can't alone
21 create reasonable suspicion.

22 MS. GROSSMAN: Because the case law which the City, of
23 course, goes into in detail in its chart, none of those cases
24 where they claim that additional circumstances alone establish
25 reasonable suspicion, there was always something else. There

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Hearing

1 was also one of the page one factors, there was a suspicious
2 bulge, someone acting as a lookout. It was never just this is
3 a high crime area by itself or this is a time of day where --

4 THE COURT: But we are talking about multiple on side
5 two. So if on side two you had a report from a victim and it's
6 a high crime area and it's at night and this were evasive
7 action, did you have all four of those which are all on side
8 two, why isn't that reasonable suspicion to stop somebody?

9 MR. CHARNEY: I guess, again, I haven't seen any cases
10 where that particular fact pattern when you have a combination
11 of only side two factors.

12 THE COURT: I disagree. I think there are many such
13 cases.

14 MR. CHARNEY: The other point again to go back to is
15 we're talking about 17,000.

16 THE COURT: No. 17,000 was where --

17 MR. CHARNEY: You are talking about "other" plus.

18 THE COURT: Yes. Plus a whole talking about other on
19 the side one and a whole combination on side two theoretically.

20 MR. CHARNEY: I am not going to accept the defendant's
21 estimate that there are hundreds of thousands of stops where
22 you have "other" and "multi".

23 THE COURT: Do we know or can we find out?

24 MS. GROSSMAN: Your Honor, we can supply you with
25 those numbers. We can't now but I can tell you from my

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Hearing

1 preliminary look, they are hundreds, maybe 433,000.

2 THE COURT: That sounds pretty specific.

3 MR. CHARNEY: I guess to be clear, are we talking
4 about "other" plus one or more ACs or are we talking about
5 "other" and "multiple"?

6 THE COURT: I don't know. I'll find out.

7 MR. CHARNEY: No. So I take exception or I disagree
8 with the estimate that it's "other" and "multiple". It may be
9 "other" and "one or more".

10 THE COURT: Okay. All right. Let's take a break now
11 till five of four, about six minutes.

12 (Recess)

13 THE COURT: So my additional question, Mr. Charney, is
14 this, when there is nothing on the front in a combination of
15 circumstances on side two, you said oh, it is so small it
16 wouldn't change the analysis. It's 17,000. It's 0.6 percent.
17 So I took that to mean so if you want to eliminate that or
18 whatever, we can live with it. But once you do that you've got
19 a problem because then can't be worse off if you check "other".
20 So now the front has "other" and the back, the second side has
21 "multiple". There's no point in telling me how small the
22 universe is that has "none" on the front and "multiple" on side
23 two because it's a slippery slope argument for you if you are
24 willing to say oh, we can live with that. We'll recode.

25 MR. CHARNEY: You need to be able to figure out how

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Hearing

1 many have "other" on the front and "multiples" on the back.

2 THE COURT: Because you can't treat it differently
3 than you would treat none on the front. So the fact that such
4 a small universe of 17,000 which is only 0.6 percent, I think
5 you probably are willing to say, fine, recode it. Do what you
6 want. But you really can't because it has to be treated the
7 same as or worse than "other" on the front and "multiple" on
8 the back.

9 MR. CHARNEY: So if I understand correctly you just
10 want to make sure you are now talking about stops where "other"
11 is checked on the front and then more than one additional --

12 THE COURT: We will get to the "one" or "more than
13 one" but for the sake of argument let's say more than one.

14 MR. CHARNEY: And I guess my response to that is that
15 I don't know if the answer to the question is how many stops
16 fall into that group and, again, if it is a very small number I
17 guess I would say --

18 THE COURT: Same problem. But if it's a very big
19 number and Ms. Grossman was talking about close to half a
20 million, now she may have been thinking when she said a half a
21 million, it was "other" on side one and only one other factor
22 on side two but it's more than one on side two, then it's a
23 combination of factors.

24 MS. GROSSMAN: It was the one or more.

25 THE COURT: That's what he was afraid of. He would

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Hearing

1 like you to separate the "one" and "more than one" because what
2 he is saying, his argument is no one factor on side two
3 standing alone has supported reasonable articulable suspicion
4 in the case law. You are correct, when you have multiple
5 factors you showed them your case chart. I don't think he
6 disagrees. If you have multiple factors, some case law would
7 support reasonable suspicion.

8 With that, Mr. Fagen, can we ask you some questions?

9 MR. CHARNEY: If you are going to be referring to the
10 binder --

11 THE COURT: Sure.

12 JEFFREY FAGEN,

13 called as a witness by the Plaintiff,

14 having been duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY THE COURT:

17 Q. Professor Fagen, you've been present today throughout this
18 time we have had oral argument. You have heard my comments and
19 questions. You've heard the lawyers' arguments. I do have
20 some questions for you.

21 Why did you decide that you would only look at the two
22 sections where the officer checks boxes, namely, the one that
23 says what circumstances were the circumstances which led to
24 stop on side one and additional circumstances/factors on side
25 two, why did you decide to only look at those two parts of the

1 form?

2 THE WITNESS: And which specific parts so, for
3 example, the question about the address or location of --

4 THE COURT: I'm doing that yet. I am saying why did
5 you decide to look only at those portions I described on side
6 one and two. Why did you decide not to look at those things?

7 THE WITNESS: We looked, the data that were most
8 consistently and completely available to us referred to those
9 two sections of the report. Some of the information in, for
10 example, there was box for the location of the stop. That
11 information was actually by the police department for some
12 years and by our staff for other years. Geo-coded so that we
13 could locate the exact spot on the map where it took place.

14 So we did know the locations of the stops. We used
15 the locations of the stops because in each of our analysis we
16 counted up the number of stops that took place in a particular
17 area, then we took into account characteristics of those areas.
18 In one analysis we did it by the precincts and then in we did
19 it by the census track. So we did use the location information
20 because it was incorporated into that.

21 The other --

22 THE COURT: But not on our analysis justified,
23 unjustified and indeterminate to make that determination you
24 used only the boxes in two areas, side one. What were the
25 circumstances which led to the stop and side two, additional

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Fagen - Direct

1 circumstances/factors. You decided to consider any other
2 evidence on the UF-250 forms and I am asking you why.

3 THE WITNESS: Okay. There are detail codes available
4 for several of the categories that are checked off on side one.
5 For example, description of what -- I think there is a
6 description of what the bulge is and some other details about,
7 that relate to the box itself. And set aside the question of
8 the other box for a second. Those are very inconsistently and
9 often rarely completed. So we decided it wasn't enough usable
10 information in those boxes to make a systematic analysis.
11 Again, our goal was to come up with something systematic and
12 reliable. With respect to the "other" we actually did look at
13 those.

14 THE COURT: You looked at what?

15 THE WITNESS: The text stream that was associated with
16 CS "other", with the circumstances "other". And it was filled
17 out quite often. When the officer did check off "CS other" it
18 was on filled out. However, the information that's available,
19 the notations that were written, weren't recorded in a way
20 where the information was useful to us. So, for example, we
21 would note things, I guess, I'd use the word "gibberish".
22 There'd be a letter "X", a very high percentage or a number of
23 them where it said "NA", "not applicable" others that had
24 notations that we couldn't interpret like "XNE". We had no
25 idea what that meant. Others that said "hanging out in the

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Fagen - Direct

1 hallway". Others that said "trespass" which was a crime but
2 that didn't help us ascertain what the basis of suspicion was
3 for that stop, the conclusion about a crime. Others said
4 "loitering" which was again a conclusion about a crime. So we
5 were unable to identify information in a sufficient number of
6 cases using those boxes where we could come up with a
7 statistically reliable estimate that would add more information
8 than what we'd already had.

9 THE COURT: But you said high percentage of officers
10 who checked "other" actually did specify something in writing?

11 THE WITNESS: They did. But what was specified was
12 not something that was usable to us in making a systematic
13 analysis ever that particular box to make some additional
14 conclusion about the nature of that information.

15 THE COURT: Well, that answers the questions about the
16 "other" box and specifying in writing, what the other was. But
17 let's go back to my initial question. Why did you decide not
18 to consider any of the other boxes on the form other than the
19 two that we've talked about?

20 THE WITNESS: Example, your Honor?

21 THE COURT: All of them. Do you have the form in
22 front of you?

23 MR. CHARNEY: Your Honor, is asking a question that I
24 understand but he may --

25 THE COURT: Don't rephrase this for me, Mr. Charney.

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Fagen - Direct

1 I've been doing this a long time. I am sure he gets it too but
2 I'm happy to rephrase it. Do you have the form in front of you
3 now?

4 THE WITNESS: Yes, I do. Okay.

5 THE COURT: All I am saying is, you made the decision
6 that your analysis of what is justified, unjustified,
7 indeterminate and is based solely on two portions of the form.
8 On side one what were the circumstances which led to stop? On
9 side two additional circumstances/factors? I am just asking
10 you a general matter why did you not consider any of the other
11 information on the form? You can do it one by one or you can
12 do it collectively but you chose not to consider any of
13 remaining information on the form in your reasonable suspicion
14 analysis. I am just asking you why.

15 THE WITNESS: We can go section by section. So
16 starting on side two, the information under "was person
17 frisked" that was not relevant to determining the basis for the
18 stop. We have that information but we decided that it wasn't
19 helpful in deciding was there a reasonable and articulate
20 suspicion for the stop. The same goes for "was person
21 searched".

22 We did use the box for "was weapon found". Because I
23 think as your Honor noted, we looked at the number of cases
24 where a weapon was recovered and it was a very tiny fraction of
25 the stops, roughly, one weapon for every thousand stops. So we

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Fagen - Direct

1 did use that as one of the bases on which to conclude the form
2 was doing work that it was designed to do.

3 THE COURT: The form?

4 THE WITNESS: That the stops themselves were based on
5 accurately reasonable suspicion. In other words, if reasonable
6 suspicion was being concluded in an accurate way, then we would
7 have guessed that there would have been a much higher number of
8 weapons recovery.

9 THE COURT: Right. Go ahead.

10 THE WITNESS: "Was other contraband found"? We did
11 the same with that. We recorded the types of contraband found,
12 drugs. And we were given information in the database about
13 whether drugs were recovered. There was specific mentions of
14 contraband. So we did use that again as another estimate about
15 whether reasonable suspicion was being applied in an accurate
16 way.

17 I think that takes care of the back of the form.

18 THE COURT: So you did not consider, of course,
19 "demeanor of person after being stop" or "remarks made by
20 person after the stop".

21 THE WITNESS: No. The information there was very
22 spotty in the database.

23 THE COURT: I don't know what precinct, serial number
24 and all that.

25 THE WITNESS: We took into account precinct, the spec

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Fagen - Direct

1 location of the stop in terms of -- We thought we did not
2 include height, weight, gender.

3 THE COURT: Now you are going to side one? Why don't
4 you start at the top.

5 THE WITNESS: We didn't include the time of stop. I
6 think there is some information where we looked at time of
7 stop. It didn't seem to be, particularly, helpful to us.
8 "Period of observation", I think that's simply the length of
9 time that the officer was in the encounter.

10 THE COURT: Did you consider it or not in assessing
11 reasonable suspicion?

12 THE WITNESS: We did not consider that.

13 THE COURT: Why?

14 THE WITNESS: We didn't think that it mapped well on
15 to the case law.

16 We looked at the intersection. We did not consider
17 whether the stop was done on the inside.

18 THE COURT: When you said we looked at the
19 intersection, let me understand that. When you concluded
20 justified, unjustified or indeterminate, I thought you did that
21 solely on the --

22 THE WITNESS: I'm sorry. You are right.

23 THE COURT: You didn't consider the address for that
24 purpose?

25 THE WITNESS: Correct. We didn't use it, right.

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1 THE COURT: You didn't use inside/outside?

2 THE WITNESS: No, that didn't --

3 THE COURT: Right. Or transit or housing?

4 THE WITNESS: No.

5 THE COURT: Or type location?

6 THE WITNESS: No.

7 THE COURT: How about the next box?

8 THE WITNESS: We didn't use the crime suspected for
9 reasonable suspicion, nor did we use duration of the stop. The
10 next set of boxes we did use.

11 THE COURT: You did?

12 THE WITNESS: What circumstances led to the stop.

13 THE COURT: Oh, that of course. Go ahead.

14 THE WITNESS: We did not have the information on the
15 name of the person, their nickname, street address date of
16 birth, address. We didn't know any identifying information
17 about the individual, so all of that was set aside. We didn't
18 know the nature -- well, I think we, actually, did know the
19 nature of the identification that was provided.

20 THE COURT: Where is that?

21 THE WITNESS: Below "address" it says
22 "identification", "verbal", "photo ID", we did not use that.

23 THE COURT: Oh, okay. I see that. Go ahead.

24 THE WITNESS: We did not use that for the reasonable
25 suspicion analysis, nor did we use the person's gender, race,

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1 age, height, weight, hair color, eye color or build. We did
2 not use information on scars and tattoos as basis for
3 reasonable suspicion. I don't recall but I don't believe that
4 that's, actually, in the database other than one of the
5 notation boxes and that was, again, very rarely filled out.

6 Whether the officer explained the reason for the stop
7 was not relevant to us for that particular analysis.

8 Were other persons stopped, questioned or frisked, we
9 did not include that as a basis or reasonable suspicion.

10 THE COURT: Why not?

11 THE WITNESS: It didn't seem to be as we, again, as we
12 articulated in our memo about the cases that we read we didn't
13 see a group stop as being something that was relevant to case
14 law -- in case law.

15 We did not use physical force. Our interpretation of
16 the physical force box was physical force that was used by the
17 officer.

18 THE COURT: During the stop?

19 THE WITNESS: Yes. So that was after the stop.

20 THE COURT: That would be true of the arrest and
21 summons and all that.

22 THE WITNESS: Correct.

23 THE COURT: So you've anticipated that question. Now,
24 why did in coding this, why did you conclude that the only box
25 checked on side one was "other" and there were multiple boxes

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1 on side two that had to be coded as "indeterminate"?

2 THE WITNESS: I have to go back and check that
3 particular number of cases. I don't recall why we made that
4 determination.

5 THE COURT: Who made that determination?

6 THE WITNESS: We did.

7 THE COURT: Who is "we"?

8 THE WITNESS: Myself and my research assistant.

9 THE COURT: Okay.

10 THE WITNESS: We read the case law. We did not
11 consider multiple additional circumstances. Our reading was
12 that -- and this is sort of the general framework for the
13 analysis -- was what was on the front of the box was were the
14 basis for suspicion that led to the stop. And the additional
15 circumstances were things that would qualify or condition that
16 initial factor. We felt that the presence of -- well, I
17 actually don't know how many boxes. And, again, as I said, I
18 have to go back and check how many boxes were checked off in
19 multiple ACs, we just don't know. But I'll have to go back and
20 see. It could be it was such a small number that we did not
21 consider it to be something that would move the dial measurably
22 in this analysis.

23 THE COURT: You keep saying "we decided" or "we
24 determined". Who are these research assistants?

25 THE WITNESS: These were my second and third year law

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1 students. I consulted on occasion members of the faculty, law
2 faculty.

3 THE COURT: Right. So, let's turn back to side one.
4 So in deciding whether to code a certain box as "justified" or
5 "conditionally justified", who made that decision and how was
6 it made?

7 THE WITNESS: We read the case law.

8 THE COURT: Well, when you are saying "we" did you
9 read --

10 THE DEFENDANT: I read the case law together with my
11 research assistants and they made a recommendation and I
12 questioned them and we went back and we discussed each one of
13 the factors. We updated the memo most recently in the fall of
14 2000 and I believe, 08. Case law as of that time when we began
15 to work on this.

16 THE COURT: What is your background or training that
17 allows you to read a legal decision and decide what the holding
18 is?

19 THE WITNESS: Well, I have been teaching law for at
20 least the past, since 1998 and reading cases and looking at the
21 interpretation and applications of those cases and in a variety
22 of different areas of law.

23 THE COURT: Have you taken courses in law?

24 THE WITNESS: No, I have not. But I am doing research
25 and reading extensively and deeply in law review articles, as

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1 well as case law and opinions, very active conversations with
2 my colleagues at law school who are --

3 THE COURT: What is your educational background?

4 THE WITNESS: I have a PhD in civil engineering.

5 THE COURT: Are you a criminologist?

6 THE WITNESS: Yes. My research practice is in
7 criminology.

8 THE COURT: Any training in criminology.

9 THE WITNESS: My doctorate was in a special program in
10 urban systems SUNY Buffalo and I concentrated in that doctoral
11 program in criminal justice.

12 THE COURT: Did you take courses in that?

13 THE WITNESS: One or two, yes.

14 THE COURT: At SUNY?

15 THE WITNESS: During my training.

16 THE COURT: Okay.

17 THE WITNESS: I was on the faculty at Rutgers for
18 seven years and before that the faculty of John Jay College.

19 THE COURT: Teaching what?

20 THE WITNESS: Various courses in criminology and
21 research --

22 THE COURT: All right. Let's turn to question of the
23 benchmark. You heard the discussion here about benchmarking.
24 And why is it first of all, that you don't think you can
25 extrapolate from the 62 percent of suspects where race is known

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1 to the 38 percent where race is not known and just project on
2 the 62 percent where race is known happened to be 60 percent of
3 minority and 40 percent white, why can't you extrapolate that
4 to the other 38 percent?

5 THE WITNESS: First of all, your Honor, the data that
6 we were given to do the analysis for this report, the figure
7 was not 62 percent. It was actually closer to 50 percent.

8 THE COURT: Where did I get the 62 and 38? Asking the
9 lawyers.

10 MR. CHARNEY: They subsequently this past fall
11 produced new investigations of the 2009 and 2010 crime data but
12 that was more than a year after he did his expert.

13 THE COURT: So the current number is 62 and 38 but it
14 wasn't then?

15 MR. CHARNEY: Only for those two years. And he
16 actually looked at, I believe, five or six years of data going
17 back from '04 to '09.

18 THE COURT: So at that time what was the breakdown
19 between known and who remembers?

20 THE WITNESS: It was in the low 50s.

21 THE COURT: Why can't you extrapolate from one to the
22 other?

23 THE WITNESS: The method -- that would require an
24 analysis that called in is statistics and imputation analysis.
25 One would have to impute to missing observations, information

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1 that's known from observations where it's not missing. There's
2 a great deal of disagreement and fighting among statisticians
3 about the best way to do such imputations, even the context in
4 which such imputations are actually done.

5 There's an area of social science which is very
6 commonly used database about homicides across the United
7 States. And the best minds in that field when they work with
8 that data set conclude that one can make imputations at very
9 large units of analysis, generally, at the state level. But to
10 make imputations of units of analysis that are smaller than
11 that would be a big mistake, meaning counties or city or
12 smaller areas than that. I offer that just as an example of
13 disagreements about imputations, so that's one reason.

14 Second, and I think your Honor articulated the
15 question of selection bias really well. I think that we would
16 be taking a risk by making assumptions about cases when we only
17 have information in half or slightly more than half about what
18 was going on in the other half of the cases where we had no
19 information. The risk of error there would bias what we
20 concluded if we were to make that kind of large scale
21 application to missing data.

22 It's kind of like a keys and lamppost problem. If we
23 were to make, we're looking for keys and we only look under the
24 lamppost, there's a vast area beyond the lamppost where they
25 are other things going on out there that we simply don't know

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1 about.

2 THE COURT: All right. That answers the question of
3 why you didn't extrapolate from the known data to the unknown.
4 But why didn't you want to choose to consider race as a factor
5 in terms of the known crime rate suspects when you tried to
6 analyze the disparate impact allegedly of the stops in one
7 community over another? Why didn't you think you had to
8 compare the suspect, in other words, those who were committing
9 the crime?

10 THE WITNESS: Couple of reasons. One was, again, we
11 did not want to make assumptions based on -- we didn't want to
12 do a test of the disparate impact or disparate treatment of
13 suspects or individuals based on information which was
14 incomplete about the universe of people in that the racial
15 distribution of people in that neighborhood.

16 THE COURT: So you're saying the answer to the second
17 question is pretty much the same as the first because the data
18 is incomplete and you can't extrapolate to the whole it's not
19 safe to use that benchmark.

20 THE WITNESS: We believe that the bias that would be
21 produced would make the analysis -- where I to submit such an
22 analysis to Peer Review Journal -- I have two peer reviews --
23 it would be rejected out of hand.

24 THE COURT: What was the benchmark you used?

25 THE WITNESS: We used benchmark, two simultaneously

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1 one was total amount of crime in the area. The first analysis
2 was done by the precinct. The second by the census track. And
3 we also used the population that was in that area at that time.

4 THE COURT: By race?

5 THE WITNESS: Yes. The total population and the
6 racial distribution within that area. We thought that those
7 two benchmarks in tandem gave complete information about the
8 crime.

9 THE COURT: I believe you questioned the accuracy of
10 the information that police officers report on the record on
11 the UF-250. To some extent they now are checking more boxes to
12 play it safe. They are checking furtive movements, high crime,
13 they're easy to check and hard to investigate, so to speak. So
14 if you have your own doubts about the accuracy of the data that
15 how can it support any opinion if the data itself is bad?

16 THE WITNESS: Well, we take the information as it's
17 given to us. We take the conditions as it's given and make
18 assumptions about it and --

19 THE COURT: But do you think the data is inaccurate to
20 begin with, how can we draw any conclusions from bad data?

21 THE WITNESS: I think you can make conclusions about
22 the data generating process based on what the data itself
23 looked like. So, for example, as you noted, your Honor, if we
24 see a very high rate of a particular box being checked off that
25 says high crime area regardless of the crime rate in the area

1 or furtive movements which is a very broad subjective category
2 of perception or a sharp increase in a particular box being
3 checked off, violent crime action is indicative of violent
4 crime, we see this as something that comments about the data
5 generating process itself and that was a bases for my criticism
6 of the reliability of the data for using it as an accurate way
7 to regulate --

8 THE COURT: Right. And I understand that. But, my
9 last question was, Mr. Charney, what are you using this expert
10 for? And he said two things. One is that the City is not
11 sufficiently monitoring and training and all that. That's one.
12 But for the other purpose for trying to analyze the
13 constitutionality or unconstitutionality of the stops as a
14 pattern, if the data is bad, if you believe on the one hand
15 that police officers are just willy-nilly are checking boxes or
16 checking boxes that they know don't relate or will get them by
17 on an audit, if the data is bad, how can it support an opinion
18 as to whether a stop is justified or not justified if you
19 yourself believe the data is inaccurate?

20 THE WITNESS: It's a slightly convocated answer.

21 THE COURT: Well, I am here to hear.

22 THE WITNESS: We take the data. We assume that the
23 data are giving us information that the police are putting
24 forward as their justification for the stops. Our comment has
25 to -- we caveat and we say if this is right, if the police are

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1 articulating the date that is actually the basis for the stop,
2 then we analyze the data based on what they say to us. Our
3 conclusion afterwards says, well, we have some reasons to
4 believe that some of the indicia that they marked off for a
5 reasonable suspicion seem to be used in a rather undisciplined
6 way.

7 So I mean, perhaps, I am not answering the question
8 correctly. I understand that. But we can only analyze what'
9 put before us in terms of data and draw some conclusions based
10 on patterns that we observed.

11 THE COURT: I understand but your background is an
12 engineer. If you knew that the data that you were studying was
13 inaccurate would you be willing to make any scientific
14 conclusion based on data you knew or believed to be inaccurate?
15 Would you want to say, gee, that bridge is safe, when you
16 thought you had false data from the inspectors? I don't think
17 so. Because then the bridge would collapse and hundreds of
18 people would die. So the question is, what can you do with
19 data you don't believe has integrity?

20 THE WITNESS: One of the things that we do with it is
21 we poke and prod the data to see if it is reliable and
22 consistent. There's different measures for looking at the
23 quality of data. One is reliability, meaning does the same
24 person report the same thing consistently over time when
25 confronted with the same circumstances? We see reliability of

1 data but reliability doesn't necessarily mean validity. In
2 other words, is what's written down a correct observation of
3 what's actually happening out in the world? It's a little bit
4 harder to test because we can test that for internal validity.
5 One of the analysis that we did that we did not report in here
6 was something called a factor analysis of those, the reasonable
7 suspicion markers.

8 A factor analysis is, basically, a way to look at
9 correlations between particular items. Are there underlying
10 patterns? And one of the things we found in that analysis, the
11 factor analysis, was that in fact things did kind of hang
12 together that should have hung together. So, for example,
13 there is two or three of both the stop factors in the
14 additional circumstances that address the question of violent
15 crime in one way or another. We found that those, actually,
16 did hang together in the correlation. I'd be happy to supply
17 those if the Court's interested.

18 So we did find, actually, that there was some validity
19 internally to those analysis, I mean, to the use of those
20 markers. Somebody who was interpreted actions indicative of a
21 violent crime who was actually likely to mark off another
22 factor that seemed to speak to the same underlying construct.
23 So we thought there was some validity based on the way that
24 these things grouped to go.

25 THE COURT: Another question is, you remember the

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1 error about Category Five and Category Five is the one where it
2 should be justified if there's two or more conditionally
3 justified stopped circumstances on side one but originally you
4 coded Category Five as indeterminate, when later you said it
5 was justified if there are two or more. How did that error get
6 there and how did it get out?

7 THE WITNESS: There are many, many, it's a very
8 detailed analysis, many pages of documentation. I could sit
9 here and explain how an error happened.

10 THE COURT: That particular error where you had two or
11 more conditionally justified circumstance on side one but coded
12 as indeterminate, how did that creep in?

13 THE WITNESS: It was an error. We wrote many lines of
14 code --

15 THE COURT: Computer code. Okay.

16 MS. GROSSMAN: -- to do this. And there was a mistake
17 in the computer code and we went back and we read it and
18 mistakes still got through.

19 THE COURT: OK. So it was a computer error, so to
20 speak. I realize you created the error in creating the code
21 but that's how it got there.

22 THE WITNESS: Yes.

23 THE COURT: How did you realize the error was there?

24 THE WITNESS: We realized it when the City's papers --
25 and we were quick to correct it, as you know.

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1 THE COURT: The indeterminate percentage of stops
2 increased from 15 to 24.

3 THE WITNESS: Decrease.

4 THE COURT: The error increased it and the
5 correction --

6 THE WITNESS: The percentage of stops remained, the
7 stops remain the same. The number shifted downward.

8 THE COURT: To 15.4.

9 THE WITNESS: Percentage of stops that you were
10 justified shifted upwards.

11 THE COURT: So you ended up with 15.4 of indeterminate
12 and 16.7 unjustified for a total of roughly 22.

13 THE WITNESS: Right, yes.

14 THE COURT: How much weight did you put on so-called
15 hit rate?

16 THE WITNESS: Well, as your Honor noted, we thought
17 that when we -- and we continue to think that a hit rate in
18 terms of right seizure of contraband or weapons on the one hand
19 or making a viable arrest on the other hand was very, very low.
20 And we didn't have a sense about what that should be.

21 THE COURT: Right. How do you know six percent is
22 low? Maybe it's high.

23 THE WITNESS: Statisticians always ask the question,
24 how well does this thing happen better than chance? If you
25 can't do much better than chance then your system is not very

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1 helpful.

2 THE COURT: Right.

3 THE WITNESS: So we went, set about in looking for
4 different cases where there were roadblocks. We thought
5 roadblocks were actually the most relevant.

6 THE COURT: Because everybody is stopped at the
7 roadblock.

8 THE WITNESS: Right. There was one other research
9 study that we looked at which was where they did the kind of
10 analysis of, actually, of narratives but they were narratives
11 that were recorded by an independent observer. And I think I
12 cited to that study was published in the Journal called
13 Criminology in the Public Policy.

14 In that one they said 45 percent, they had a hit rate
15 of that was somewhat lower and a little bit higher. We looked
16 at the study in Michigan which is Sisk and we looked at Edmund
17 in Indianapolis and the hit rates there were higher in terms of
18 seizure of drugs and contraband from the hit rate here.

19 THE COURT: Were those random?

20 THE WITNESS: Roadblocks. To the best of our
21 knowledge they were checkpoints.

22 THE COURT: Everybody stopped.

23 THE WITNESS: Yes. On some random schedule and I
24 think that was part of the hold in those cases. And they were
25 finding 13 percent I think was the case in Sisk. So we said,

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1 okay, this is a reasonable benchmark maybe plus or minus two or
2 three percent in either direction would be good but we're
3 finding hit rates very, very far below that.

4 THE COURT: From that you conclude that there was
5 never reasonable suspicion in the first place. The stops were
6 essentially random, not random but baseless. In other words,
7 they were just stops.

8 THE WITNESS: They were inaccurate. I think the term
9 that we use is "inaccurate". And therefore whatever the
10 training, whatever the methodology was that the police officers
11 were using to determine a reasonable suspicion and make a stop
12 based on that was simply not accurate and not yielded. It was
13 wrong. Suspicion that was inaccurate.

14 THE COURT: You judged that as I say by hindsight by
15 comparing it to randomize stops, like roadblocks or
16 checkpoints?

17 THE WITNESS: Correct.

18 THE COURT: I've asked a number of questions that were
19 of concern to me. The next question is who goes next? I don't
20 know if there is anything else you want to bring out. I may
21 have missed something that I questioned you about that I said I
22 would take up later with him or maybe not. So I'll give you
23 the first chance to see if there's something you want to fill
24 in before Ms. Grossman.

25 MR. CHARNEY: Can I have one moment?

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1 THE COURT: Sure.

2 (Pause)

3 MR. CHARNEY: I just have maybe one or two questions.

4 CROSS-EXAMINATION

5 BY MR. CHARNEY:

6 Q. Professor, I think Judge Scheindlin asked you this
7 question. When you went through the various sections of the
8 UF-250 form, the ones you considered and didn't consider and
9 maybe I may have missed it, but could you tell us why you
10 didn't use the stop location section of the form as part of
11 your analysis of classifying stops as justified, unjustified or
12 indeterminate?

13 A. The reason for using stop locations would have been to
14 qualify or provide some additional information relative to the
15 crime rate in the area. I believe it would have been most
16 germane than to an assessment whether the stop took place in a
17 high crime area. And there were a couple issues with that.
18 One, we assumed and based our decision on the fact that
19 officers were trained to check all that applied. And we
20 assumed that if, in fact, the stop took place in a high crime
21 area they would have checked the box accordingly. So we really
22 didn't want to second guess the decision of the officer.

23 Second, we didn't want to impose our decision or
24 criteria about what's a high crime area versus a low crime
25 area. I think as you can see from some of our charts crime

1 distributes very widely across the city from very low claim
2 rates in some places to high crime rates in other places. We
3 didn't know what the cut-off was. We couldn't say how officers
4 are trained to think about high crime area. Was it very high
5 in the last month or week? What constitutes high? Three stops
6 or robberies, is ten total felony crimes? Does it include
7 felonies plus misdemeanor? We have no basis for imposing --

8 THE COURT: So the sole objective was the checkmark on
9 the box.

10 THE WITNESS: Correct. And the most consistently
11 applied.

12 BY MR. CHARNEY:

13 Q. And then just referring back to the benchmark question. In
14 your 2007 study that you did with Professor Gelman what
15 benchmark did you use in that case? Sorry. In that analysis?

16 A. We used a combination of the population in the police
17 precincts and the race and crime specific arrest rate in that
18 precinct.

19 Q. Okay. Now, did you use arrest data in this study that you
20 did for this case?

21 A. No, we did not.

22 Q. Why didn't you use arrest data?

23 A. After we -- we have always said and I think we said in 2007
24 article that it would have been better, we would have preferred
25 to use actual data on the crime. We were not provided with

1 those data at that time. We use the best date that were
2 available to us at the time we did that study.

3 In addition, there were some researchers who had been
4 writing in some of the professional journals, including people
5 who did the random analysis for the city, Mr. Ridgeway, who
6 were very critical in fact of our use of arrest data as
7 benchmark. They said that it was inadequate. We needed a much
8 broader and richer measure of crime itself to understand the
9 acts of the police officers in an area and we thought, yes, we
10 agree.

11 THE COURT: Why was the arrest data not accurate
12 enough?

13 THE WITNESS: Because arrest, when you study arrests
14 it's only really a partial view of crime. There are many, many
15 crimes that are not cleared.

16 THE COURT: Not what?

17 THE WITNESS: "Cleared" meaning when you can't
18 identify who actually committed the crime by an arrest
19 clearance rate is basically the percentage of crimes as result
20 in an arrest. Clearance rates vary quite a bit, very low to
21 very high. As we say in criminology, if you rely only on
22 arrest data to estimate criminal activity you are really
23 relying more on the actions. You are measuring the actions of
24 the police as much as you are the criminals. So we chose
25 instead to use a measure of total amount of crime and that's

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1 what we used.

2 BY MR. CHARNEY:

3 Q. In that 2007 study were you comparing stop rates between
4 precincts in that study? In other words, were you comparing
5 the level of stops done in Precinct A with the level of stops
6 that you had done in Precinct B in that 2007 study?

7 A. No. That 2007 study analyzed the likelihood of an
8 individual of a specific race to be stopped by the police in a
9 particular area. And in that case precincts relative to the
10 race specific and crime specific rates of activity in that
11 area.

12 Q. What about in the analysis you did for this case?

13 A. The analog in case would be in Table Seven of my report.
14 Table seven of the report looks at the likelihood of a Black
15 person or Hispanic or an other race person relative to a White
16 person being stopped in a neighborhood for a particular type of
17 crime.

18 Q. Okay. What about the first question I asked. In the
19 analysis you did in this case, did you do any comparison of
20 stop activity in one precinct or one source of census track and
21 compare it to stop activity in another census track for
22 another --

23 A. Yes, we did. That would be results reported in Table Five.
24 That was the comparison of stop rates across precincts looking
25 at the combination of the racial composition of the precincts

1 and the crime rate in that precinct.

2 Q. And that analysis where you were looking across precincts
3 what, if anything, did you discover about the correlation
4 between racial composition of a precinct, the census track or
5 neighborhood and stop rate controlling for the crime rate?

6 THE COURT: Say that again.

7 Q. The correlation between the stop rate in the precinct or
8 census track between that and the racial composition of that
9 precinct, the correlation between those two things controlling
10 for the crime rate, what did you discover?

11 A. We discovered that after one controls for the crime rate in
12 the precinct, in one analysis in the precinct, the second in
13 the census track that the racial composition of the
14 neighborhood predicted the stop rate in the neighborhood and we
15 did that both total stops and when we just aggregated it for
16 stops for a particular type of crimes that were alleged on the
17 form.

18 Q. And the last question: When you looked at census tracks,
19 in your analysis of that were census tracks bigger than
20 precincts, smaller or around the same size?

21 A. Much smaller than precincts. Precincts have roughly
22 100,000 people on average. Census tracks have roughly five
23 thousand people on average. The footprint of a precinct is
24 very large. The footprint in a census track in some cases is
25 large when have you sparsely populated areas of the Bronx, for

1 example. But for the most part the foot print is, actually,
2 quite small, a few square blocks.

3 Q. What, if anything, can you say about the racial
4 demographics of census tracks that you looked at?

5 A. They're internally consistent. New York City for better or
6 worse, more for worse I think in the minds of many people is a
7 pretty segregated city. So there is a great deal of --
8 population distribution within the census track.

9 THE COURT: Okay. Ms. Grossman.

10 BY MS. GROSSMAN:

11 Q. Professor Fagen, you said that you had some second year law
12 students assist you in your research analysis.

13 A. Second and third year law students, several of whom were
14 on, a few of whom were on law review, yes.

15 Q. But they were law students. They had not taken the bar
16 yet; is that right?

17 A. Correct.

18 Q. How many of the cases did you read?

19 A. The ones that they cited.

20 Q. How many were cited in your memo?

21 A. I didn't count.

22 THE COURT: I did today. It was maybe 40.

23 BY THE COURT:

24 Q. How many?

25 A. I probably read 25.

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1 Q. How many times did you read them?

2 A. Probably in some cases more than once but that was a few
3 mostly one time.

4 Q. And how many time did you spend reading those cases?

5 A. I can't recall. Reading a case from start to finish, 20
6 minutes.

7 Q. Okay. And --

8 THE COURT: Did you say that on occasion you also
9 consulted faculty members?

10 THE WITNESS: On occasion.

11 THE COURT: About cases or holdings in cases?

12 THE WITNESS: Well, about the summary of, about my
13 view of about the applicability of the factor and see if they
14 had a sense of their view of the case law at large if it
15 differed.

16 THE COURT: Not to second guess your understanding of
17 a particular case?

18 THE WITNESS: No, not on the case. On the general
19 conclusion.

20 THE COURT: I understand. Did you also consult with
21 counsel in this case?

22 THE WITNESS: No. I gave them our memo and that's it.

23 THE COURT: Okay.

24 BY MS. GROSSMAN:

25 Q. Now, you also discussed or mentioned something about

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Fagen - Cross

1 imputations at the state level and you mentioned that you don't
2 want to make too many risks to make assumptions but something
3 about what you said about this imputation at the state level,
4 it was important and significant to you about the size of the
5 area; is that right?

6 A. Yes.

7 Q. But then NYPD is a very large area relative to that; isn't
8 that true?

9 A. Yes.

10 THE COURT: NYPD is not --

11 MS. GROSSMAN: I'm sorry.

12 Q. The City of New York is a large city so that imputation
13 issue that you may be concerned about with smaller areas
14 doesn't really -- it's not really relevant here what the city
15 the size of New York City?

16 THE COURT: Is that accurate are or is that backwards?
17 I thought size worked the other way. Imputing to a large size
18 is a dangerous thing.

19 THE WITNESS: No. Imputing to a smaller size --

20 THE COURT: Okay.

21 A. No, that's not right. If we were to do imputations, we
22 would do them in very small areas because we're trying to
23 understand and compare areas. So we wouldn't want to impute
24 for the whole city. That would unfairly weight what happens in
25 the Rockaways to what happens in the Bronx. And so instead we

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1 were much more interested in trying to make imputations within
2 either precincts -- in either case would have been probably not
3 a healthy thing to do statistically.

4 BY MS. GROSSMAN:

5 Q. Thank you, Professor Fagen. Now you mentioned that the use
6 of arrest data is no longer preferable in the way that you had
7 used it in past articles; is that right?

8 A. That seems to be the weight of opinion among researchers
9 who were doing this kind of work.

10 Q. Well, you just told the judge and all of us that that's one
11 of the reasons why you don't use it.

12 A. Why we didn't use in this analysis.

13 Q. But that was the data that was used in the ABs report?

14 A. Yes.

15 Q. So based on the fact that you don't, that arrest data is
16 really not to be used, is not really recommended to be used for
17 these kinds studies, the AG's report is really not a valid
18 report any longer in terms of reliability; isn't that right?

19 A. I don't think that was a fair conclusion. We used data
20 that was available in the AG's report and we did have measures
21 at the citywide crime rate. We were able to take that in
22 consideration, but not the specific local precincts.

23 Q. But the fact is you just told us that that very same arrest
24 data that you did use in your previous study is the same data
25 that you used in the AG report and that is the reason why you

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Fagen - Cross

1 did not use it in this report. So the methods --

2 A. The same data?

3 Q. The same arrest data?

4 A. From 1999?

5 Q. Arrest -- the quality of data, the arrest data?

6 A. We did not use 1999 arrest data.

7 THE COURT: She is not saying the same -- she's saying
8 the same type of data. Did you use the same type of data in
9 the Attorney General's study?

10 A. Yes.

11 THE COURT: She is asking do you still consider the A
12 government's report to be an accurate report or accurate
13 opinion since it did rely to some extent on arrest data that
14 you wouldn't use now.

15 A. I think the conclusions are accurate to the extent that the
16 analysis that we did consider multiple factors including
17 arrests, we did look at the correlations which we knew totally
18 about crime and arrest data and we were satisfied that the
19 arrest data at that time was the best alternative.

20 THE COURT: Sure. But looking back today you still
21 would stand by the reliability of the outcome?

22 THE WITNESS: I think I would, yes.

23 BY MS. GROSSMAN:

24 Q. And so you could use the same arrest data in this case?

25 MR. CHARNEY: Objection, your Honor.

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Fagen - Cross

1 THE COURT: I think -- No. He is saying it's not the
2 best way to do is although he was asked --

3 A. We took the best route. And truth is we, actually, have
4 looked at but didn't report what would happen if we actually
5 used arrest data, the results are unchanged.

6 Q. Well, in fact, the best available data, wouldn't you agree,
7 is really suspect described by race if you could have that
8 data, right?

9 A. It's incomplete.

10 Q. But in a perfect world that be the preferable --

11 A. It is not a perfect world.

12 THE COURT: But she's saying if every --

13 A. If we knew for every felony instead of 50 percent, if we
14 knew a hundred percent, possibly. I'd have to look and see. I
15 can't make a blanket conclusion.

16 THE COURT: This is only a hypothetical question. If
17 you happen to know the race of every single perpetrator of a
18 crime you would use it if you knew it for a fact.

19 THE WITNESS: In a perfect world, sure.

20 BY MS. GROSSMAN:

21 Q. You also mentioned when the judge asked you about the
22 "other" boxes and the type of information that was contained in
23 the narrative portion of other than side one of the form; do
24 you remember that?

25 A. (Nodding)

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Fagen - Cross

1 Q. You said there was a high percentage that was populated but
2 there was a lot of information that you just couldn't define,
3 you couldn't interpret, correct?

4 A. Yes.

5 Q. You ever produce those results of your analysis to the
6 City?

7 A. No.

8 Q. Do you have them?

9 THE COURT: Did you do an analysis?

10 A. We looked at them. We inspected them. We took a sample of
11 those cases, the fairly large sample, printed out all of them
12 and inspected it and it just wasn't useful.

13 Q. That was never produced to the City?

14 A. No.

15 THE COURT: When you say "produced" what?

16 MS. GROSSMAN: In discovery.

17 THE COURT: I understand what "produced" means. But
18 what was there to produce? What could you, if they said show
19 us now what data you checked with respect to the narrative part
20 of "other", do you have computer printouts with these notations
21 like XNE?

22 THE WITNESS: The data that was provided to us had the
23 text field in text form. So we put up in the computer and we
24 said, give us, take a sample of a thousand. So we took a
25 random sample of the thousand and start to look at the text

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Fagen - Cross

1 streams.

2 THE COURT: Did you have a report of what was on those
3 one thousand samples?

4 THE WITNESS: We didn't prepare a report.

5 THE COURT: I don't know the order report but did the
6 computer spit out in some way what was on these one thousand
7 sample UF-250s?

8 THE WITNESS: We could ask the computer to do it. We
9 inspected it and look --

10 THE COURT: It was a thousand?

11 THE WITNESS: Well, we took a sample of how --

12 THE COURT: It was, in fact, a thousand?

13 THE WITNESS: Yes.

14 THE COURT: You looked at the explanation on "other"
15 where it says "specified" and the computer could now spit out
16 what was on those one thousand to you?

17 THE WITNESS: Yeah, if we asked it to.

18 THE COURT: But you hadn't asked it to, but you could?

19 THE WITNESS: We could.

20 THE COURT: I am not sure there was any failure to
21 produce anything.

22 THE WITNESS: At the time of the report we simply
23 looked at what was on the screen.

24 THE COURT: Never produced.

25 BY MS. GROSSMAN:

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Fagen - Cross

1 Q. You never generated copies of what you found on the
2 computer?

3 A. For that particular analysis, no.

4 Q. When you did do the analysis of the fields that were
5 populated, the entries that were made, it was based on your
6 interpretation of what's there. I mean that's your own
7 interpretation of the information?

8 A. Sorry. I don't understand.

9 THE COURT: Nobody else second guessed it for you.
10 You didn't have an expert in police lingo or something to tell
11 you that EXN meant something. You just looked at it yourself?

12 THE WITNESS: Correct.

13 THE COURT: Okay.

14 BY MS. GROSSMAN:

15 Q. Now, Professor Fagen, you in your classification analysis
16 you conclude that about, close to about 80 percent of the stops
17 fall into the "justified" category, right?

18 A. Right.

19 Q. Now, did you consider the impact that the 80 percent of
20 justify stops had on your regression and anallys contained in
21 your report?

22 A. I am sorry. I don't understand.

23 THE COURT: Neither do I.

24 Q. Meaning that if we have 80 percent justified stops your
25 regression analysis is not limited to the 20 percent that are

1 problematic; isn't that right?

2 THE COURT: I don't understand question. I think he
3 is focused on the fact that 20 percent of 2.8 million people
4 is -- somebody help me.

5 A. Five hundred thousand.

6 THE COURT: Five hundred thousand people were
7 unjustifiably stopped. That's a lot of people to have suffered
8 an unjustifiable stop. That's already clear. I don't think he
9 was thinking anything about the 80 percent. I think he was
10 saying five hundred thousand people is a lot of people.

11 Q. But your conclusion in your regression, Professor Fagen, is
12 that race predicts the stop rate; isn't that light?

13 A. Over and above the crime rate.

14 Q. And that was -- that analysis was done for all 2.8 million
15 stops, correct?

16 A. Yes.

17 Q. Now, how do you reconcile that finding against the fact
18 that 80 percent of the stops were justified?

19 A. Well, again, I have to confess I don't understand what you
20 are asking. You are asking whether or not our analysis of
21 reasonable suspicion somehow bears on our analysis equal
22 protection?

23 Q. Exactly. Because if there's reasonable suspicion for a
24 stop, it's a race neutral reason for a stop. Race can't be the
25 reason. It's a race neutral reason. A reasonable suspicion

1 under the case law is a race neutral reason for a stop. Did
2 you consider that?

3 THE COURT: In determining what?

4 A. I am sorry.

5 THE COURT: One person at a time, professor.

6 Did you consider in determining what?

7 MS. GROSSMAN: In determining whether race was the
8 factor, the reason the -- what that race predicted the stop
9 rate, that race was the influence of the stop rate, that race
10 caused the stop, it was the reason for the stop. So we're
11 getting back to what is the reason for the stop?

12 THE COURT: I think by definition, if 80 percent of
13 the stops were justified as to those stops, you can say that
14 race was the factor that drove the stop, right? You can't say
15 that or can you?

16 THE WITNESS: Well, I can say this, one of the
17 analysis that we did was in Table Thirteen and we looked at
18 whether or not the indicia of suspicion actually assisted
19 understanding the patterns of stops. In that model we found
20 that, in fact, if we looked at all of the measures that we used
21 to predict the pattern of stops without using reasonable
22 suspicion we found a certain distribution. Did we then get any
23 additional understanding or explanation of the stops by adding
24 in the factors having to do with reasonable suspicion? And the
25 answer was on balance, no, we didn't learn anything new.

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Fagen - Cross

1 Q. But you didn't do that analysis?

2 A. I'm sorry.

3 Q. You didn't actually consider it. We just learned from your
4 corrected, by correcting your coding errors the numbers went up
5 from 70 percent to 80 percent of the justified category. So
6 you didn't consider that 80 percent and how that impacts your
7 regression analysis?

8 MR. CHARNEY: Objection, your Honor.

9 THE COURT: I think sustained because I don't
10 understand the question. Whether it's 70 or 80, all he is
11 saying is he compared rates where putting whole reasonable
12 suspicion analysis aside and just predicting what the stops
13 would be based on population and the crime rate it would have
14 been the same, in any event.

15 MS. GROSSMAN: That's what table?

16 THE COURT: He said "thirteen".

17 A. Thirteen.

18 Q. But in your regression analysis you control from particular
19 factors; isn't that right?

20 A. Which regression?

21 Q. There are various regressions in your report. Isn't one of
22 the regressions among them one of the controls that conducted
23 was for patrol strength?

24 A. Yes. In the regressions --

25 Q. But in that regression analysis you didn't control for

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Fagen - Cross

1 reasonable suspicion the fact that 80 percent of the stops here
2 were explained by reasonable suspicion?

3 A. No, we didn't.

4 Q. Thank you. Professor Fagen, did you quality control your
5 coding that you made mention of earlier?

6 A. Coding of what?

7 Q. Coding of the classification methods.

8 A. What do you mean "quality coal"?

9 Q. Well, when you had researchers go through and code to you
10 under the term "quality control"?

11 A. Of course.

12 Q. What do you understand it to be, professor?

13 A. To accuracy.

14 Q. Okay.

15 A. Uniform application of criteria. We could go on.

16 Q. Sure. So, did you do any of that in your coding process?

17 A. Sorry. Coding of -- we used a lot of codes. Which one?

18 Q. There were some that were quite problematic here; isn't
19 that right?

20 A. I am sorry. I really don't understand what you are
21 referring to.

22 Q. The coding errors that were made that you corrected,
23 correct?

24 A. Okay.

25 MR. CHARNEY: Objection, your Honor,

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Fagen - Cross

1 mischaracterization of his testimony. That was only one.

2 THE COURT: She used the word "errors". He said it
3 was one. He said in the computer code the computer code that
4 was written said that if there were two conditional justified
5 boxes that was coded in the end as unjustified instead.

6 THE WITNESS: We moved them from "indeterminate"
7 innocent to "justified".

8 THE COURT: Should have been coded as "justified".

9 BY MS. GROSSMAN:

10 Q. So my question to you is, what kind of quality control did
11 you do during your, during the running in and the analysis of
12 coding your classification method?

13 A. For that particular analysis?

14 Q. Yes.

15 A. We read the code and looked at the result and read the code
16 again and looked again and the mistake leaked through, the one
17 mistake.

18 THE COURT: But is there no real judgment calls in
19 this kind of coding here. No researcher has to make a judgment
20 call because it was decided in advance what would be called,
21 which of these boxes would be conditionally justified,
22 unjustified or indeterminate. Each one is assigned word "J" or
23 "CJ" or "I" so nobody makes a judgment.

24 THE WITNESS: Right. It was simply a question of
25 translating our memorandum into a set of computer instructions.

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Fagen - Cross

1 THE COURT: Right. So that after those boxes are
2 added up, so to speak, you then have to see how many had one
3 box, how many had no box, whether the box was justified or
4 conditionally justified and how many boxes on the other side
5 and that's where the code error crept in.

6 THE WITNESS: Yes, right.

7 THE COURT: But there's no coding objective decisions
8 to be made in this particular study.

9 THE WITNESS: That is correct. So it wasn't -- so
10 less of a coding error than it was a writing.

11 THE COURT: Computer instructions.

12 BY MS. GROSSMAN:

13 Q. Professor Fagen, you appear to be -- you find that you are
14 very critical of the UF-250 form, right?

15 A. Well, I make some conclusions that it's not a very helpful
16 way of gauging suspicion.

17 THE COURT: Why is that?

18 THE WITNESS: Because it leads to very low hit rates
19 because it seems to include some things, patterns that are
20 nonrandom.

21 THE COURT: Like?

22 THE WITNESS: The excess use of movement in high crime
23 area and unresponsive use of high crime area.

24 Q. Well, it's not necessarily an intention behind the officer.
25 Could just be a function of the form and the way it's prepared,

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1 correct?

2 A. I can't offer an opinion.

3 THE COURT: It's almost the opposite. Nothing wrong
4 with the form but if the officer decides everybody is going to
5 check high crime area, play it safe. It's not the form's fault
6 at all. That would be a training area. They are just
7 protecting themselves.

8 THE WITNESS: That's fair enough. It's a bump. It
9 helps to move something from being in a gray area.

10 THE COURT: If a police officer knows that and wants
11 to protect himself or herself, everybody checks high crime.

12 THE WITNESS: More or less.

13 BY MS. GROSSMAN:

14 Q. So you are critical of the form and you find fault with the
15 form. You are aware that the UF-250 form was result of a
16 negotiated settlement between the City of New York and class
17 counsel in the Daniels case?

18 MR. CHARNEY: Objection.

19 THE COURT: Do you know that?

20 A. I do know that but had no bearing even how we use the form.

21 THE COURT: That's not the question. So let's answer
22 what's asked.

23 Q. You know that was adopted as the agreement of class counsel
24 who were the same class counsel in this case, right?

25 THE COURT: Do you know that?

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Fagen - Cross

1 A. To the best of my knowledge, it's true.

2 Q. Well, that's because you know that because you were the
3 consulting expert for the plaintiffs then, weren't you?

4 A. No.

5 Q. Did you consult with the plaintiffs in the Daniels case?

6 A. No.

7 Q. Didn't you have consultations with them?

8 A. No.

9 THE COURT: He just said he wasn't involved.

10 A. I had one meeting with one of the attorneys from
11 plaintiff's counsel to answer some questions that he asked.
12 That was it.

13 THE COURT: Was it one meeting?

14 THE WITNESS: One meeting.

15 THE COURT: You don't know what stage of that case?
16 Was it the end, the beginning, in the middle, you don't know?

17 THE WITNESS: No idea. Can't recall.

18 MS. GROSSMAN: Just one second please.

19 (Pause)

20 BY MS. GROSSMAN:

21 Q. Professor Fagen, do you remember being deposed in this case
22 by Mr. Larkin?

23 A. Yes.

24 Q. And do you remember being asked some questions and giving
25 some answers at that deposition; do you remember that?

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Fagen - Cross

1 A. Yes.

2 Q. Do you remember these questions and these answers?

3 I had conversations with people from the Center for
4 Constitutional Rights, correct?

5 A. Yes.

6 Q. Do you remember that question?

7 A. Yes.

8 Q. Sometime prior to early 2009 you met with Mr. Charney,
9 correct?

10 A. Prior to 2009?

11 Q. Yes.

12 A. When did I begin?

13 MR. CHARNEY: Your Honor, can I ask defense counsel
14 what page of the transcript?

15 MS. GROSSMAN: Sorry. That's page 37. Page 38,
16 actually, line five.

17 Q. Prior to your phone call with Mr. Charney did you have any
18 conversation with any other attorney who you understood to be
19 representing the plaintiffs in this case?

20 THE COURT: She asked you to read slowly.

21 MS. GROSSMAN: Sorry.

22 Q. Prior to the phone call with Mr. Charney did you have any
23 questions with any other attorney who you understood to be
24 representing the plaintiffs in this case?

25 A. I have had conversions in the past with Mr. Moore and

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1 Mr. Goodman but this was a number of years ago in the wake of
2 the Daniels case.

3 THE COURT: So do you remember that answer?

4 A. Yes. I have met on occasion with Goodman & Moore. This
5 was to have lunch or to have a drink. We had a shared mutual
6 interest and the question of this particular policy by city.
7 It wasn't about a specific case.

8 MR. CHARNEY: Can I just point out that the testimony
9 that was read says "in the wake of".

10 THE COURT: Yes, I saw that. I heard that "in the
11 wake up".

12 MR. CHARNEY: Just to clarify the record.

13 THE COURT: Thank you. I heard it.

14 MS. GROSSMAN: Thank you. I have no further
15 questions.

16 MR. CHARNEY: Can I ask one redirect?

17 THE COURT: Sure.

18 BY MS. GROSSMAN:

19 Q. Going back to the use of the arrest data, Professor Fagen,
20 is it your testimony that you using arrest data to do an
21 analysis like the one that was done in the Attorney General's
22 report, is it your opinion today that that is unreliable data
23 used and therefore an unreliable methodology?

24 A. No, it's not unreliable. It's less reliable than using
25 full compliment of crime data.

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1 MR. CHARNEY: No other questions.

2 THE COURT: Okay. I think that closes the hearing.

3 We managed to get it accomplished by roughly five o'clock. I'm
4 appreciate of that. Thank you.

5 (Adjourned)

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