

1 MR. MAYR: Judge, at this time we call
2 Investigator Condon to the stand.

3 THE COURT: All right.

4 MR. MAYR: Judge, may I step out of the
5 courtroom for just one moment -- for a brief moment?

6 (Brief pause in the proceedings.)

7 THE BAILIFF: He was sworn earlier,
8 Judge.

9 THE COURT: All right. Good afternoon
10 Investigator Condon.

11 THE WITNESS: Hello.

12 THE COURT: Feel free to adjust the
13 chair and microphone.

14 THE WITNESS: Okay.

15 THE COURT: And just answer directly as
16 you can.

17 (Discussion off the record.)

18 THE COURT: All right. You may
19 proceed.

20 MR. MAYR: Thank you.

21 **INVESTIGATOR MARK CONDON,**
22 having been first duly sworn, testified as follows:

23 **DIRECT EXAMINATION**

24 BY MR. MAYR:

25 Q Would you please state your name for the

1 record?

2 A Mark Condon.

3 Q And how are you presently employed?

4 A The Houston Police Department.

5 Q And where are you presently assigned within
6 the Houston Police Department?

7 A Homicide.

8 Q How long have you been a homicide detective?

9 A Almost three years now.

10 Q Okay. How long had you been with the
11 homicide division when you were assigned to
12 investigate this case?

13 A Five or six months.

14 Q And where were you assigned to prior to
15 that?

16 A IFR.

17 Q What is that?

18 A It was a new division the Houston Police
19 Department created called Investigative First
20 Responder. It's detectives in uniform, basically.

21 Q How long in total have you been with the
22 Houston Police Department?

23 A Seventeen years.

24 Q Okay. In the course of your training with
25 the Houston Police Department, have you received any

1 training -- or I mean, you ever received any training
2 in conducting eyewitness identifications?

3 A Yes.

4 Q And what is that training?

5 A You take classes, in-service classes.

6 Q Okay.

7 A And then there's a lot of OJT, also.

8 Q Okay. Prior to this IFR.

9 A Yes.

10 Q Is that right?

11 A Prior to IFR?

12 Q Where were you at? Where were you assigned
13 to?

14 A Patrol.

15 Q Okay. You don't get to do a lot of photo
16 spreads in patrol, although you do some; is that
17 right?

18 A I don't think I ever did one.

19 Q Okay. When did you first -- when did you
20 receive your training, first of all, in regards to
21 administering photo spreads?

22 A When I went to IFR, they sent us to two
23 weeks of OJT at robbery. I was assigned to a robbery
24 investigator.

25 Q And through that work with that robbery

1 investigator, is that where you learned how to
2 administer photo arrays as part of the eyewitness
3 identification --

4 A Yes. Create and administer them, yes.

5 Q What other training did you receive while
6 you were there?

7 A Well, while I was in IFR, they sent us to
8 schools in order to learn how to do it properly.

9 Q What kind of schools?

10 A Well, they're in-service classes that -- at
11 the academy. I can't remember the names of them off
12 the top of my head, but they're in my training
13 records.

14 Q Okay. By the time you got to homicide
15 division, how many photo spread procedures had you
16 participated in?

17 A It's going to be a guess. Seventy, 80
18 somewhere -- a hundred. A lot.

19 Q But certainly not the same kind of numbers
20 some of the other investigators from homicide would
21 have; is that fair to say?

22 A Yes.

23 Q Okay. In that position, you did participate
24 in the investigation of a homicide that took place on
25 May 19, 2011, at 4206 Groton; is that correct?

1 A Yes.

2 Q And I'm just going to jump right into it.

3 We know that you were present at the
4 scene; is that correct?

5 A Yes.

6 Q Did you speak with any witnesses there?

7 A No, sir.

8 Q Okay. I want to talk about your first real
9 involvement in this case, and that was developing one
10 of the first suspects early on, an individual by the
11 name of Chad Jones.

12 Did you develop that individual as a
13 possible suspect in this case?

14 A My partner and I did, yes.

15 Q And why was it -- or -- well -- strike that
16 question.

17 This individual, Chad Jones, was part
18 of the reason that he was a possible suspect because
19 he matched the description given by eyewitness, Malik
20 Brown?

21 A Yes.

22 Q What was that description?

23 A Black male -- you want me to do it by
24 memory? Black male, bald, stocky, 5-foot 6 or 7. I
25 can't remember the height, but somewhere in that

1 area.

2 Q And this Chad Jones met that description; is
3 that right?

4 A Yes.

5 Q So, having that information, what steps did
6 you take at that point?

7 A I researched him on the computer in our
8 computer database, called Data Works. It's a mugshot
9 database, where you get mugshots of people that have
10 been arrested. I found him. We placed him in a
11 photo spread.

12 Q Okay. How do you put him in a photo spread?
13 Does the program just randomly put it together? I'd
14 like to know in detail the steps you go through?

15 A Sure. Okay. You log in, you select the
16 criminal database, and then you put in either their
17 name or you can put in their HPD number. And there's
18 maybe a few other numbers you can put in. But I
19 usually use name. I located him. I located the most
20 recent picture of him, is -- the one I'm almost
21 always use is the most recent picture of the suspect
22 or defendant or however you want to call him.

23 And once I've selected that picture,
24 I -- I hit the button for random insertion. Or you
25 right click the picture and hit random insertion. I

1 usually hit right click because the buttons aren't
2 labeled. But it randomly inserts it into six blanks
3 at the bottom of the screen.

4 And then you right click the picture
5 again, and you select similar pictures or similar
6 something, and it brings up six more pictures at the
7 top. And you scroll through those picture, until you
8 find the one that you want to use.

9 And then you right click again, random,
10 it goes down. You do that for all six. And then you
11 have to edit each picture. You have to right click
12 the picture, select edit. It goes to an editing
13 screen, because some pictures, the person's far away
14 and some that are close. You want them all about the
15 same distance, equal on the ears and the head and the
16 chin and all that.

17 Q Okay.

18 A So you have to edit each picture, which is
19 very time consuming. And once that's done and you're
20 happy with the photo array, then you name it. I
21 usually put the case number in and you save it.

22 Q Okay. And then you print it out. And when
23 you've got it together, since you're the one who
24 prepared it, you know -- you know, though, that the
25 photograph has randomly -- even though the program

1 has randomly placed the known photograph of Chad
2 Jones, you know where it's at, right?

3 A Yes.

4 Q State's Exhibit 5 is that photo spread; is
5 that correct?

6 A Yes.

7 Q And which photograph was Chad Jones?

8 A I don't know. I think it's 5, but I'm not
9 positive.

10 Q Do you want to refer to your offense report
11 to refresh your memory?

12 A Yes. You want to give me a second?

13 Q Uh-huh.

14 A Yeah, 5. Five.

15 Q Okay. Now, at this point -- at this point,
16 you got it together, you -- what's the next thing
17 that you do in terms of showing the photo spread?

18 A Well, back then -- it's different now. But
19 back then, I would just put it in a folder and label
20 it, my name, the case number and all that kind of
21 stuff.

22 Q Uh-huh.

23 A And the lineup number -- every lineup has a
24 number. And then just put it in the case file until
25 you're going to go show it.

1 Q And tell us how you go about showing it to
2 Malik in this case?

3 A In this case, I called -- I think I called
4 Toni and she brought -- she brought Malik to the
5 police station at 1200 Travis. I took him and Toni
6 into the conference room and showed him the array.

7 Q Okay. Prior to showing him the array, what
8 did you do?

9 A Took him into the conference room and
10 explained to him what I was going to do. And read
11 them the -- read him the admonishment. And then I
12 talked to him more because -- and I had never showed
13 a photo array before to a child. They've always been
14 adults.

15 So I kind of talked to him a little bit
16 more and gave him extra instructions, because I was
17 nervous about showing a child a photo array.

18 Q Okay.

19 A I wanted him to completely understand
20 everything.

21 Q Well, let's talk about that. So you've
22 never shown a photo spread to a child before,
23 correct?

24 A No.

25 Q You haven't received any -- had you received

1 any training on how to go about showing one to a
2 child?

3 A Not specific to a child, no.

4 Q In your training, have you learned anything
5 about the problems that may exist with children as
6 eyewitnesses as opposed to an adult?

7 A No.

8 Q You're nervous and so you just -- rather
9 than -- well, let me see if I can ask it this way:
10 These other things that you tell him, where are they
11 coming from?

12 A My experience with my own kids. Experience
13 with kids in general.

14 Q Okay. But no -- nothing that you would
15 have learned in your training or nothing has any sort
16 of scientific backing or anything else like that,
17 right?

18 A No.

19 Q You said that you read him the standard
20 admonishment form; is that right?

21 A Yes.

22 Q Do you have him sign that form or
23 acknowledge that form or is that included in your
24 case file, that standard admonishment form?

25 A Back then, no, you didn't have them sign it.

1 Today you do.

2 Q Your offense report doesn't make any
3 reference about reading him the standard admonishment
4 form. It talks about you giving your own
5 admonishments?

6 A Right.

7 Q Your testimony here today, though, is that
8 you recall actually reading him the standard
9 admonishments?

10 A Yes.

11 Q Even though that's not included in your
12 offense report?

13 A Yes.

14 Q You had a chance to review your offense
15 report?

16 A Yes.

17 Q And you see the words that you put in your
18 offense report to describe what you tell him?

19 A Yes.

20 Q And that is the only recorded recollection
21 of what's taking place?

22 A Yes.

23 Q There's no video of any of this taking
24 place?

25 A No, sir.

1 Q And even though there's nothing in here
2 about reading admonishment forms, you specifically
3 recall doing that in this case?

4 A Yes.

5 Q What about these other things that you tell
6 Malik at the time?

7 A I was doing it because he was so young, I --

8 Q Let me rephrase the question.

9 Not why you told him that. But what
10 specifically did you tell him?

11 A I told him that one of the pictures might be
12 a photo of the person he saw with a gun the night of
13 this incident. I told him he was not required to
14 pick anyone out, and to only pick some -- someone if
15 he was sure it was the same person.

16 Q And that's exactly how it's written in your
17 offense report?

18 A Yes.

19 Q But what's not written in your offense
20 report, is that you read the standard admonishment
21 form to him, right?

22 A Right.

23 Q So, was there anything else that you might
24 have possibly told him at that time?

25 A Not that I recall, no.

1 Q But you told -- there were some things that
2 you pulled off of your head and told him, right?

3 A Yes.

4 Q That may not be here in the offense report,
5 and you may not be able to be recall telling him at
6 the time?

7 A Oh, is it possible? Yes.

8 Q Okay. But you can't recall any of those
9 things that you told him at this point? Just other
10 than what's in the offense report?

11 A No. No, sir, I can't. I mean, I'm not
12 saying I did. I'm just -- it's possible that I said
13 something else, but I don't know what that would be.

14 Q That's what I want to be clear on. What you
15 put in your offense report that you told him, is not
16 -- there -- it's possible that you told him other
17 things besides what you put in your offense report?

18 A It's possible.

19 Q You just cannot recall what you told him?

20 A If I did say anything, yes, I can't recall
21 it.

22 Q And when you show him this photo spread,
23 this is down at the Houston Police Department,
24 correct?

25 A Yes, sir.

1 Q Who else is present at the time?

2 A Just me, Malik and Toni.

3 Q Okay. Now, you're aware of -- now, at that
4 point, when you're conducting the photo spread, were
5 you familiar with the Houston Police Department
6 policy on conducting these photo spreads?

7 A Yes, sir.

8 Q And were you aware that one of the things in
9 here that it says, that the witnesses shall be asked
10 about their observations individually and outside the
11 presence of other witnesses?

12 A Yes, sir.

13 Q Was your understanding at the time, that
14 because Toni Brown was not an eyewitness, she was
15 okay being there?

16 A That and the mother of such a small kid, I
17 did not want him doing it alone.

18 Q And in your training, any of the training
19 that you had received up from that point, no one had
20 ever talked to you about the problems with having
21 additional witnesses present, whether they actually
22 observed something or not?

23 A Yeah, that's covered in the classes I took.

24 Q Okay. And yet you still chose to have Toni
25 Brown there?

1 A Yes.

2 Q All right. Now, how -- once you show the
3 photographs and you give him some instructions, some
4 of which you remember, some of which -- if you gave
5 them, you can't remember, what takes place with this
6 first photo spread?

7 A He immediately said Position 2, 3 and 6 were
8 not the person he saw with a gun that night. He then
9 studied the remaining positions for about five
10 minutes, was unable to pick anybody.

11 Q So he sort of does a process of elimination,
12 and eliminates -- what numbers, again?

13 A Two, 3 and 6.

14 Q Two, 3 and 6. And studies these for about
15 five minutes?

16 A Yes, sir.

17 Q Okay. In your training up until that point,
18 have you ever heard of the difference between a
19 sequential administration versus a simultaneous
20 administration of showing photographs?

21 A I had not.

22 Q At that point you had not?

23 A No.

24 Q Have you learned about that subsequent to
25 that?

1 A Yes.

2 Q And what do you know the difference between
3 sub -- simultaneous versus --

4 A Sequential.

5 Q Sequential. Thank you.

6 A Yes, sir. Not -- I mean, I'm not a
7 professional in this ID stuff, as far as these
8 studies go. But I know there is some debate as to
9 whether -- which is better in the legal field.
10 Some say that simultaneous is better,
11 some say that sequential is better.

12 Q My question to you is: Do you know what the
13 difference is between the two?

14 A Oh, yes, sir.

15 Q Okay. And now, HPD has a policy to show
16 them sequentially; is that right? Or is it still
17 simultaneous?

18 A Both. We can choose which way we do it.

19 Q All right.

20 A In the new policy.

21 Q Now, at that time, back in June 2011, did
22 you know or had you learned about, either from your
23 training or your experience, about the difference
24 between showing a photo spread or using a blind or
25 blinded administration?

1 A No, I've never heard of that before.

2 Q Okay. Have you come to learn what that is
3 now?

4 A Yes, sir.

5 Q Okay. You did not use a blind or blinded
6 administration when showing this first group of
7 photographs to Malik; is that correct?

8 A That's correct.

9 Q You knew who the suspect was, right?

10 A Yes.

11 Q You prepared the photo -- photograph,
12 knowing where the suspect was?

13 A Yes.

14 Q And you showed this photo spread to Malik?

15 A Yes.

16 Q Now, after he's unable to pick out the
17 shooter, did you say anything else to Malik at that
18 point?

19 A It's okay, or something like that.

20 Q But the exact words you can't recall,
21 correct?

22 A No, sir.

23 Q It's not in your offense report?

24 A No, it's not. I mean, I'm sure I was polite
25 and I said, "It's okay and thanks for coming down."

1 And I walked him out and that kind of thing, but it
2 wasn't anything specific.

3 Q At that point in time, I know this is kind
4 of hard to do, but at that point in time, you felt
5 you had a pretty good suspect in Chad Jones, right?

6 A Pretty good?

7 Q He matched the description?

8 A He matched the description. It was the same
9 name said at the door. Other than that, that's
10 really all we had.

11 Q He had some prior beef with the complainant,
12 right?

13 A No, I don't -- that's -- that's debatable.

14 Q Well, let's -- let me ask it this way then.
15 After Malik doesn't pick out -- after Malik doesn't
16 pick out Chad Jones from this lineup, little part of
17 you is a little disappointed, correct?

18 A Disappointed?

19 Q I mean, it's human nature, right?

20 A I'm -- I'm disappointed every time I don't
21 get an ID, I guess.

22 Q Fair enough. Good. Okay.

23 So let's talk about the next photo
24 spread that Malik is shown. That is the photo spread
25 containing the photo of Christopher Field, who is

1 another suspect that you all developed, correct?

2 A Yes.

3 Q Did you have anything to do with the
4 preparation or administration of that photo spread?

5 A No, sir.

6 Q So, let's go to the one that's done in
7 November of 2011 involving my client.

8 Tell us the process in which you went
9 about -- first of all, fair to say that you developed
10 my client as a possible suspect in the shooting of
11 Keith Brown, correct?

12 A Yes, sir.

13 Q And based on that, you prepared another
14 photo spread?

15 A Yes, sir.

16 Q Take us through the steps that you went for
17 that. Not in as much detail with the right clicks
18 and everything, but just briefly take us through what
19 you did in there?

20 A It was the same method. I looked him up, I
21 added him to array by random insertion. I did
22 similar photos. I added those. I edited everything
23 and printed it out.

24 Q Okay. Now, obviously because of your work
25 in this investigation, you had had an opportunity to

1 review the statements that Malik Brown, the one
2 eyewitness had given in the case, correct?

3 A Yes, sir.

4 Q And you're aware that he had identified the
5 shooter as being bald?

6 A Yes.

7 Q However, the photo that you discovered or
8 that you pulled of my client, he had hair on the top
9 of his head, at least the top part of his head,
10 correct?

11 A Yes, sir.

12 Q Now, did that concern you at all that you
13 were showing him a photo that now had someone that
14 didn't match the description that he gave?

15 A A little, but it -- your photo is never
16 going to be exact as the description you're giving.

17 Q Sure.

18 A Because normally it's -- if you get lucky,
19 it's days before the -- when the picture was taken,
20 it was taken days before you made the array. But
21 normally it's months. Sometimes even years before.
22 So it's never going to look exactly like the
23 description you're given.

24 Q Okay. You put the photo spread together,
25 you notice that my client's photo was in the number

1 one position; is that right?

2 A Yes. I mean, I didn't -- it didn't alert me
3 or didn't make me nervous or anything like that.

4 Q Okay. I looking -- that was my next
5 question. I mean, at that point, had you, based on
6 your training, your experience, ever been taught not
7 to put your suspect in the number one position?

8 A No.

9 Q Have you learned subsequent to then, that
10 there's some thought out there that you should not
11 put the suspect in the number one position?

12 A No.

13 Q You're not aware of any of that?

14 A No.

15 THE COURT: Let me ask you a question.
16 You said earlier something -- a couple times about
17 random insertion.

18 THE WITNESS: Yes, sir.

19 THE COURT: What does that mean? When
20 you put the -- when you initiate --

21 THE WITNESS: On the screen, you'll
22 have a blank photo array down here. And up here,
23 you'll have six pictures. And when you find the
24 picture you want, you -- there's buttons on the side
25 that aren't labeled, which are confusing. So all I

1 do is right click the picture, and then a menu pops
2 up -- a context in Windows. And it will have
3 different options, and it will say random --
4 random -- you know, insert randomly.

5 THE COURT: So you push a button to
6 insert randomly.

7 THE WITNESS: Right.

8 THE COURT: And then that picture that
9 you selected --

10 THE WITNESS: It automatically flies
11 down into one of the six spots.

12 THE COURT: And it -- and it does that
13 by itself.

14 THE WITNESS: Yes, sir.

15 THE COURT: Okay. Thank you.

16 Q (BY MR. MAYR) Now, did you have the
17 capabilities, once it's randomly inserted, can you
18 take it and move it to a different position?

19 A Yes. Back then, I'm pretty sure you could.
20 I know you can now, because of the new changes. Back
21 then, I'm almost positive you could, yes.

22 Q But when you say "the new changes," the new
23 changes require you not to have the suspect in the
24 number one position, correct?

25 A No, that's not correct.

1 Q That's not correct? Okay.

2 A And I don't think that ever will be correct.

3 Q Well, you're obviously not familiar with the
4 Bill Blackwood Law Enforcement Management Institute's
5 policy on eyewitness identification, are you?

6 A No.

7 Q Okay. That answers that. Now --

8 A Well --

9 Q Let's talk about the procedure after you put
10 together the photo spread.

11 Do you call up -- I guess -- I assume
12 you call up Ms. Brown and come down or do you go
13 visit with her or what do you do?

14 A I made an appointment to meet with them. I
15 called Toni and said, "Is it okay if I come and show
16 Malik another array?"

17 Q Okay. So you tell her that you're coming to
18 show photos, correct?

19 A Yes, sir.

20 Q Which leads her to believe that you have a
21 possible -- another possible suspect; is that right?

22 A Yes, sir.

23 Q And you show -- where did you go to show
24 these to her? I'm sorry, to show them to Malik?

25 A At the residence. Do you want the address?

1 Q That's fine. You recall it being her
2 residence?

3 A Yes.

4 Q And when you got to her residence -- so it
5 wasn't a police department building by any means?

6 A No, it was in her living room.

7 Q Okay. What day was this that you go to show
8 him this?

9 A November -- no, I'm sorry, November 4th,
10 2011.

11 Q Where approximately -- we're actually
12 exactly 169 days after the shooting took place,
13 almost six months; is that correct?

14 A Yes, sir.

15 Q Did that cause you any concern that you're
16 asking this witness to look back and remember someone
17 from six months prior, much less a 9 year old?

18 A Sure, it did, yes.

19 Q Okay. And even though you had those
20 concerns, you still went through with the same
21 procedure as you had been taught and had done before
22 on previous photo administrations with any kind of
23 witness, right?

24 A Yes, sir.

25 Q Tell us when you came -- when you show up

1 there, tell us -- take us through the interactions
2 that take place?

3 A Well, it was a little chaotic. There were a
4 lot of kids running around, that kind of stuff. I
5 had to kind of had to ask somebody to clear the room,
6 get everyone else in the other rooms. And it was
7 myself, Malik, Officer Cheney and Toni in the room.

8 Q Okay. Who's Officer Cheney?

9 A He was an evening shift investigator. He --
10 he's still there, but he's about to promote to
11 sergeant Friday. We were on evening shift at the
12 time. He was another evening shift investigator,
13 because -- that went with me because Officer Burrow
14 was on vacation.

15 Q Okay. And so now, we know that there's four
16 people present. Where is everyone situated prior to
17 showing Malik or giving Malik the instructions and
18 then showing him the photo array?

19 A That is in the report, I'm sorry, that
20 Cheney was there.

21 Q Yeah, I saw that.

22 A I was sitting on the couch. Malik was next
23 to me. Cheney was in a chair and Toni was in a
24 chair.

25 Q Okay. So everyone's -- was sort of huddled

1 nearby, and what do you proceed to tell Malik at this
2 point?

3 A I explained to him that I was going to show
4 him a set of photographs, and that if he sees the
5 person he saw with a gun at his front door, then he
6 should point to him.

7 I also told him that he's not required
8 to pick anyone -- to pick anyone, and that this was
9 not like a test where he had to pick something. He
10 told me he understood.

11 Q Okay. And just so we're clear, you just
12 read what your recorded recollection is in your
13 offense report, right?

14 A Yes, sir.

15 Q But is it possible that other things were
16 said to Malik at that point that aren't reflected
17 here in this offense report?

18 A Sure, yes.

19 Q But you can't recall what those things were
20 you told him?

21 A If anything else was said, no, I can't.

22 Q Okay. Malik takes the photos -- array and
23 take us through what happens at that point?

24 A He looked at it for about three or four
25 minutes. I don't want to read verbatim, but he

1 read -- he looked at it for three or four minutes. I
2 told him to study each picture, ensure he's picking
3 the right person before he picks anyone.

4 Q Let me stop you right there.

5 Did you tell him that as he's in this
6 three- to four-minute window --

7 A Yes.

8 Q -- looking at it?

9 So he's looking at the photos, and
10 you're giving this -- these further instructions to
11 him; is that right?

12 A Yes.

13 Q And then the next thing it says is, "I could
14 tell that he was apprehensive and nervous while
15 looking at the pictures;" is that right?

16 A Yes.

17 Q What was it about him that made you believe
18 that he was apprehensive and nervous?

19 A It was just a feeling, I -- you know, that I
20 got from him. But being around my own kids, and
21 knowing how kids behave and somewhat of how he
22 behaved the last time, it was different. Something
23 was not right.

24 Q Okay. You obviously can't look into his
25 mind and know what's causing that apprehension and

1 fearful -- that seems almost rhetorical. But you
2 don't -- it's not like you asked him, why are you
3 scared? Why are you apprehensive, did you?

4 A No.

5 Q After about another minute, he used one
6 finger and pointed to Position No. 1; is that right?

7 A Yes, sir.

8 Q So, at this point he's looking at it about
9 for three to four minutes. And then after another
10 minute, that's when he points to position one. So,
11 according to your recollection of what's in your
12 offense report, it could have taken four to five
13 minutes, right?

14 A Yes, sir.

15 Q I asked him if he was sure that that was the
16 person he saw at the front door with the gun the
17 night his father was killed, he said -- and this is
18 quote, "I am pretty sure," unquote.

19 A Yes, sir.

20 Q The use of the quotes means he used those
21 exact words with you?

22 A Yes, sir.

23 Q Okay. And then you go on to say that I did
24 not make him pick between zero and a hundred percent,
25 due to age and level of understanding?

1 A Yes, sir.

2 Q That's because a second grader, they haven't
3 learned about percentages and all those other things,
4 right?

5 A Well, he's actually a pretty smart kid and
6 he may have been able to answer that. But, I mean,
7 he was just young, I didn't even ask him.

8 Q Okay. You then had him circle his choice,
9 initial and date the photo array. Did you have him
10 -- did you say anything else to him after that?

11 A I don't recall saying anything to him, no.

12 Q Could you tell that there was some sort of a
13 -- could you tell if there was a sense of relief once
14 that he was able to identify someone, first of all
15 with him?

16 A No, not relief.

17 Q How about with yourself?

18 A After he left the room, yes.

19 Q While he was in the room, though?

20 A No.

21 Q Just kept a stone face? Is that what you're
22 telling us?

23 A Yes, sir.

24 Q Okay. Fair enough.

25 A But after he left the room that's -- I was

1 happy.

2 Q Okay. Where was he after -- I mean, when
3 you -- he left the room, do you know where he went?

4 A He went towards the kitchen and made a right
5 and into some hallway.

6 Q Okay. Did you have any other discussions
7 with him after that?

8 A No, sir.

9 Q Okay. Have you had any contact with him
10 since that day back in 2011? In other words, have
11 you met with him within the past couple of weeks
12 preparing for trial or anything else like that?

13 A Yes.

14 Q Tell us about that?

15 A It was last week, I think, one day.

16 Q All right.

17 A And it was me, Burrow, Malik and the two
18 prosecutors in there.

19 Q Ms. Cooper and Ms. Antu?

20 A Yes.

21 Q Where was that meeting? Where did that take
22 place?

23 A Here. Here.

24 Q Okay. And take us through what took place
25 at that meeting?

1 A Well, we spoke to him about what he
2 remembered about the incident. It was mostly DA Antu
3 talking.

4 Q Okay.

5 A She has some experience with children.

6 Q Okay.

7 A It was almost all of her talking. Every
8 once in a while I would say something, going -- it
9 was just going through the process with him of -- of
10 when he heard the knock, when he heard -- what he did
11 next, what he saw, what he observed, that kind of
12 thing.

13 Q Okay. And he was shown the photographs
14 again; is that correct?

15 A Yes, sir.

16 Q Okay. And when I say "He was shown the
17 photographs," he was shown the same photo spread
18 where -- that he had drawn the circle around,
19 correct?

20 A Yes, sir.

21 Q Thank you, Detective Condon.

22 MR. MAYR: I'll pass the witness.

23 THE COURT: All right. You may
24 proceed.

25 MS. COOPER: Thank you, Your Honor.

1 THE COURT: Well, I'll tell you what,
2 we're going to take a break, 15 minutes.

3 (Recess taken.)

4 THE COURT: Both sides ready?

5 MR. MAYR: We're ready, Your Honor.

6 THE COURT: All right. You may
7 proceed.

8 MS. COOPER: Thank you.

9 **CROSS-EXAMINATION**

10 BY MS. COOPER:

11 Q Officer Condon, you -- whenever you
12 presented the photo spread to Malik, did you do the
13 full admonishments that were -- are required by HPD
14 policy?

15 A Yes.

16 Q And those were the admonishments here in
17 State's Exhibit No. 9, on page 2.

18 Did you go through each one of these
19 admonishments?

20 A Yes.

21 Q Do you do it the same way every time you
22 show a photo spread?

23 A Yes.

24 Q Well, back then before the new policy came
25 into affect?

1 A Yes. And now it's different, but back then,
2 yes.

3 Q All right. And this being your first photo
4 spread with a child, it sticks out in your mind?

5 A Yes.

6 Q Why did you not put that, that you read the
7 standard admonishment, in your report?

8 A At the time I wrote my supplement, I thought
9 it was more important to document the extra stuff
10 that I did. Because I was worried that it was a
11 child, that I wasn't going to document it enough by
12 putting standard HPD admonishment. Which is what
13 I've done in virtually every other report that I've
14 shown a photo array in. Or every other report.

15 Q Okay. So in your mind, the standard
16 admonishments are given, but you want to document the
17 things that you did in addition to that?

18 A Right.

19 Q And why was it that you did these additional
20 things?

21 A Because it was just such a small child and I
22 felt that I needed to tell him some extra stuff.

23 Q Okay. And so you're explaining to him
24 basically the admonishment, but more in a language
25 that he can understand?

1 A Both.

2 Q Okay. And what -- the additional
3 information you told him was along the lines of, if
4 you see the guy with the gun you need to pick him
5 out. He may or may not be there; is that right?

6 A Right. And that it's not like a test, where
7 he has to pick someone. That kind of thing.

8 Q Okay. And that's just to make sure he
9 really understands all the instructions; is that
10 right?

11 A Yes.

12 Q And he understood them?

13 A Yes.

14 Q Okay. When you showed him State's Exhibit
15 No. 7, did you tell him who to pick?

16 A No.

17 Q Did you do anything at all to suggest to him
18 which position the defendant was in?

19 A No.

20 Q After he picked out the defendant, did you
21 do anything at all, like take a deep breath, do
22 anything to suggest to him that he had picked the
23 right person?

24 A No.

25 Q Now, the defendant in State's Exhibit No. 7

1 is in the number one position. Anything at all in
2 the HPD policies that was in place at the time, that
3 says you're not supposed to put a -- the suspects in
4 position number one?

5 A No.

6 Q And there's nothing, even in the new
7 policies, there's nothing in the new one about not
8 putting a suspect in position number one, is there?

9 A No, ma'am.

10 Q And Malik did not take 30 minutes to make an
11 identification, did he?

12 A No.

13 Q Okay. You said it was about three to four
14 minutes?

15 A Yes, ma'am.

16 Q When you gave him or showed him State's
17 Exhibit No. 7, which includes the defendant in this
18 case, did you show him the -- or give him the same
19 admonishments that you did prior?

20 A Yes, ma'am.

21 Q All right. And you followed all -- all
22 policies with HPD when you conducted the photo spread
23 and presented them in this case?

24 A Yes.

25 Q Didn't do anything any different than you'd

1 do in any other case?

2 A Other than the extra talking I did, no.

3 MS. COOPER: I'll pass the witness.

4 THE COURT: All right.

5 **REDIRECT EXAMINATION**

6 BY MR. MAYR:

7 Q It was more important to document because it
8 was a child, correct? That's why you put in your
9 offenses report what you put, right?

10 A Yes, sir.

11 Q It was -- this is such a unique situation,
12 you knew that you had a situation you'd never dealt
13 before, and you wanted to document it to make sure
14 that you knew what you -- you could show what was
15 being done, right?

16 A Yes, sir.

17 Q You've got video rooms there at HPD in the
18 homicide division, right?

19 A Yes, sir.

20 Q You got audio recorders, right?

21 A Yes, sir.

22 Q You don't video record this procedure?

23 A We don't -- we don't video record or audio
24 record any kind of identification procedures in HPD.

25 Q The reason for that?

1 A I asked the same question when I became an
2 investigator. And the reason I was told is, victims
3 of crimes don't want to be recorded when they're
4 picking the suspect out, for fear of retaliation.
5 You're going to get less cooperation if you do that
6 to them when they're viewing the lineups.

7 Q Is also one of the other reasons because you
8 don't want to be able to show a Court or a jury
9 exactly what's taking place?

10 A No.

11 Q That's never been discussed amongst any of
12 you all there at Houston Police Department?

13 A No.

14 Q Are you aware of some policies out there
15 that -- whether -- either from the Department of
16 Justice or from the Bill Blackwood Law Enforcement
17 Management Institute that demand that you record the
18 procedures?

19 A Demand?

20 Q Uh-huh.

21 A There might be some studies that demand it,
22 but it's up to the individual department, their
23 policies. You follow that policy. If HPD were to
24 come out with one, then I would do it.

25 Q Houston Police Department officers

1 surreptitiously record individuals all the time; is
2 that correct -- well, let me rephrase the question.

3 Houston Police Department officers
4 surreptitiously record witnesses and suspects in the
5 course of numerous types of investigations, correct?

6 A Yes.

7 Q You could have easily recorded the -- what
8 was taking place and what was being said, without
9 Malik ever having to know that, correct?

10 A Sure.

11 Q But you didn't do that?

12 A No.

13 MR. MAYR: No further questions, Your
14 Honor.

15 THE COURT: All right.

16 MS. COOPER: I have nothing further for
17 this witness, Judge.

18 THE COURT: All right. Let me see
19 State's 7, please.

20 MS. COOPER: Judge, just for purposes
21 of the record, the date on here because of the way it
22 was photocopied, it looks like it says 1/4, but it
23 was actually 11/4. There's enough of one on the
24 original.

25 MR. MAYR: We figured that out, and we

1 would agree that that should read that the original
2 would have read 11/4/2011.

3 MS. COOPER: Right.

4 THE COURT: All right. And the record
5 will reflect that State's 7 in the Court's hand --

6 THE WITNESS: I have the original right
7 here.

8 THE COURT: In the Court's hands is a
9 -- seems to be -- presumably in ink, circle seems to
10 be a Xerox in appearance. Anyway...

11 All right. Thank you, Officer Condon.

12 THE WITNESS: Thank you.

13 THE COURT: All right. What says
14 defense?

15 MR. MAYR: Dr. Steven Smith.

16 THE COURT: All right. Dr. Smith.

17 MS. COOPER: Judge, may Officer Condon
18 be excused?

19 THE COURT: Sure.

20 MS. COOPER: Can he leave today?

21 MR. MAYR: He may.

22 THE COURT: Sure.

23 MR. MAYR: And I don't know if you want
24 to let Toni and Malik -- let them go. We do not
25 actually need them back.

1 (Attorneys confer.)

2 MS. COOPER: Okay.

3 THE COURT: Good afternoon, Doctor.

4 How are you doing today?

5 THE WITNESS: Fine, thank you.

6 THE COURT: Have you ever been sworn?

7 Have you ever been sworn yet?

8 THE WITNESS: I was when I first came
9 in with everyone else.

10 THE COURT: Okay. You may take the
11 witness stand and feel free to adjust the chair and
12 microphone. Make yourself comfortable. And just --
13 thank you.

14 All right. Just answer as directly as
15 you can.

16 You may proceed.

17 **STEVEN SMITH,**

18 having been first duly sworn, testified as follows:

19 **DIRECT EXAMINATION**

20 BY MR. MAYR:

21 Q Will you please state your name for the
22 record.

23 A Steven Smith.

24 Q And what do you do for a living?

25 A I'm a professor of psychology at Texas A&M