

1 me that your lunch has arrived, so we're going to excuse
2 you for lunch. We will have you back in about 45
3 minutes to continue the trial. Counsel, make sure your
4 witnesses are ready.

5 (Noon recess.)

6 (Jury present.)

7 THE COURT: Thank you. Please be seated.

8 MR. BERNARD: Your Honor, the State calls
9 Kenneth Jones.

10 THE BAILIFF: The witness has been sworn.

11 KENNETH JONES

12 Having first been duly sworn, testified as follows:

13 DIRECT EXAMINATION

14 BY MR. BERNARD:

15 Q. Deputy Jones, will you introduce yourself to
16 the jury?

17 A. My name is Deputy Jones, Sr. Harris County
18 Deputy.

19 Q. What do you do for a living, Deputy Jones?

20 A. I work for the Harris County Sheriff's Office.
21 Currently assigned to the detention.

22 Q. And where do you work?

23 A. 1200 Baker Street.

24 Q. And is that in Harris County, Texas?

25 A. Yes.

1 Q. And what is at 1200 Baker Street?

2 A. A jail facility where we house inmates.

3 Q. And were you working there on May 4, 2012?

4 A. Yes.

5 Q. And I want to call your attention to the
6 morning of May 4, 2012. Did anything unusual happen
7 that morning?

8 A. Yes.

9 Q. What happened?

10 A. We were called over the intercom system,
11 myself, being a rover on the floor.

12 Q. And where were you called to?

13 A. H Pod, I believe. Detention Officer McClain
14 called for rovers. And I went to the pod to find out
15 what was going on.

16 Q. Up here is a map of the layout of the pod?
17 Could you show us how you approached the pod?

18 A. I arrived to this hall and we went to the
19 hallway adjacent to the sitting area where Detention
20 Officer McClain was sitting and that's where she told us
21 what was going on.

22 MR. JOSH HILL: Objection. Calls for
23 hearsay.

24 THE COURT: Sustained. You can't talk
25 about what someone else told you.

1 THE WITNESS: Yes, sir.

2 Q. (By Mr. Bernard) Where did you go after that?

3 A. I then proceeded to the outside entrance.

4 Q. Was anyone else with you?

5 A. Yes.

6 Q. Who?

7 A. Detention Officer Harden.

8 Q. And what happened after you reached that door?

9 A. The door was opened. We then stepped inside.

10 And the door closed behind us.

11 Q. And what happened next?

12 A. The inner door opened.

13 Q. And where did you go after that?

14 A. We then proceeded to go in the day room area,
15 which is this area right here. (Indicating.)

16 Q. And without telling us what she indicated or
17 what you were informed of --

18 A. Uh-huh.

19 Q. -- did you communicate with Deputy McClain at
20 that time or with Officer McClain?

21 A. Yeah, visual.

22 Q. And what did you do after you communicated with
23 Officer McClain visually?

24 A. Then went to -- I then proceeded to C Cell.

25 Q. And what was in C Cell?

1 A. Inmates.

2 Q. How many inmates?

3 A. Three.

4 Q. And were any of the inmates who were in
5 there -- are any of the inmates who were in Cell C in
6 the courtroom today?

7 A. Yes.

8 Q. Could you describe how many -- how many of the
9 inmates who were in Cell C are in the courtroom today?

10 A. One.

11 Q. And could you describe that inmate by
12 describing an article -- by describing the clothing that
13 the inmate is wearing today. In the courtroom today,
14 could you describe the clothing that the person who was
15 in Cell C is wearing right now.

16 A. Yes.

17 Q. Would you please do so?

18 A. Black suit, white shirt. I think it's pin
19 striped, I'm not sure, but it's a black suit with a
20 white shirt.

21 Q. Would you describe that person's facial hair?

22 A. Semi-goatee, large sideburns.

23 MR. BERNARD: Your Honor, the State would
24 ask that the record reflect that the witness has
25 identified the defendant?

1 THE COURT: Yes.

2 Q. (By Mr. Bernard) Deputy, where was -- where was
3 Graves in Cell C when you arrived?

4 A. When I arrived, Inmate Graves was standing to
5 the rear. (Indicating.)

6 Q. And what was he wearing?

7 A. At that time, he had on county-issued pants
8 with no shirt.

9 Q. And what happened next?

10 A. I then -- or we then asked Inmate Graves to put
11 on his shirt and exit the cell block.

12 Q. And where were the other inmates who were in
13 Cell C?

14 A. (Indicating.) They were laying in the bunks,
15 bunk area. They were laying in the bunks.

16 Q. And where did you and Deputy Harden go with
17 Inmate Graves?

18 A. We escorted Inmate Graves back out through the
19 day room to the vestibule area. That's when the doors
20 closed behind.

21 Q. Where did you go then?

22 A. Then the outer door opened and then went to the
23 hallway, to walk back to the hallway, the main hallway
24 on the floor.

25 Q. And what happens in the hallway?

1 A. We later -- we just confirmed by looking at his
2 armband who he was.

3 Q. And did you speak to -- did you speak to Graves
4 out there?

5 A. I mentioned to Inmate Graves, you are wrong,
6 you know you are wrong for doing that.

7 Q. Did he respond?

8 MR. JOSH HILL: Objection. Calls for
9 hearsay.

10 MR. BERNARD: Your Honor, statement of
11 party opponent. It's not hearsay.

12 THE COURT: Overruled.

13 Q. (By Mr. Bernard) Did he respond?

14 MR. JOSH HILL: Judge, I'm going to
15 object. May we approach?

16 THE COURT: Yes.

17 (Discussion at the bench.)

18 MR. JOSH HILL: Judge, a couple of
19 things. One, at this point, he is in custody. Any
20 statements made are going to be subject in that he
21 hadn't been read his rights. Second, I haven't been
22 given a single statement of the defendant prior to
23 trial.

24 THE COURT: Let's excuse the jury please
25 briefly.

1 THE BAILIFF: All rise for the jury.

2 (Jury out.)

3 THE COURT: All right. Let's just have a
4 hearing to determine if the defendant, I mean, we know
5 the defendant is in custody. I don't think anyone would
6 disagree with that. We need to have a hearing to
7 determine if the defendant's alleged comments or
8 statements are in response to custodial interrogation.

9 MR. JOSH HILL: And furthermore, I haven't
10 been provided with any statements of the defendant prior
11 to trial. And the offense report doesn't list any
12 statements of the defendant.

13 THE COURT: Mr. Bernard.

14 MR. BERNARD: Your Honor, the statement
15 that I anticipate Deputy Jones will testify to is not a
16 recorded statement that I would be able to produce.
17 It's not written. It's not even a verbal statement.

18 THE COURT: It's not a verbal statement.
19 Then what is he about to say.

20 MR. BERNARD: I anticipate that he's about
21 to say that he nodded.

22 THE COURT: Well, under the cases that
23 I've read, a defendant's physical acknowledgement to a
24 comment is considered a statement, Mr. Bernard.

25 MR. BERNARD: Very well, Your Honor.

1 THE COURT: Under 39.14, under the
2 discovery statute, it goes to this Court's standing
3 discovery order, and all statements have to be disclosed
4 to the Defense.

5 MR. BERNARD: Your Honor, if that
6 statement were recorded on video or something like that,
7 I certainly would have produced that to Mr. Hill.

8 MR. JOSH HILL: I was not made aware of
9 its existence in any form, through open file or
10 otherwise.

11 THE COURT: I have the Court's file here,
12 excuse me, for a moment. I don't see a standard order
13 of discovery on file.

14 MR. JOSH HILL: My understanding, when
15 it's set for pretrial motion, that gets signed and gets
16 signed when it gets set for trial.

17 THE COURT: I don't have it in the Court's
18 file and I'm concerned about that. It might have gotten
19 imaged, but I don't have it in here. Could you tell me
20 where the Court's standard discovery order is in this
21 case?

22 (Discussion off the record.)

23 (Back on the record.)

24 THE COURT: No order of discovery in this
25 case, either on the Court's own standard order nor in a

1 reply to a motion by defendant for discovery. And so,
2 you now have known this, Mr. Hill, that a statement was
3 made and it's going to be offered. I'm not going to bar
4 the -- I'll give you a few moments to visit with your
5 client privately if you want. Can you take the
6 defendant back in the holdover cell to allow him to have
7 a conference with his attorney.

8 MR. BERNARD: Are we going to take up the
9 issue of the Miranda warning after that?

10 THE COURT: Yes.

11 (Discussion off the record.)

12 (Short recess.)

13 THE COURT: Mr. Bernard, are you ready to
14 argue this?

15 MR. BERNARD: Yes, we'll proceed.

16 THE COURT: The Defense is objecting to
17 the introduction of the officer's nod or the officer's
18 statement that the defendant nodded. Okay. Proceed.
19 The question is, is the defendant's nod in response to
20 the officer saying you know you did wrong, is that a
21 custodial interrogation, triggering the usual
22 requirement of the Miranda warnings being issued.

23 MR. JOSH HILL: For the record, my
24 objection is 38.22, 38.23, my Brady Motion, my list of
25 State's witnesses motion, and my Miranda objection. So

1 it's clear for the record.

2 THE COURT. Yes, sir. Mr. Bernard.

3 MR. BERNARD: Your Honor, Miranda and
4 38.22 come down to the same thing in this case. 38.22
5 only applies to oral statements and in response to
6 custodial interrogation. And the Court of Criminal
7 Appeals gives construction to the term custodial
8 interrogation under Texas law that is parallel to the
9 United States Supreme Court in Miranda.

10 Your Honor, in 132 SCT 1181, in House v
11 Fields, the Supreme Court held that even when being
12 questioned on events outside of a jail, a prisoner is
13 not necessarily in custody simply because that person
14 is in jail for some earlier offense. And the question
15 is in House v Fields and in an earlier case, Maryland v
16 Shafzer, the Supreme Court has held that there's no
17 bright line rule. In fact the Supreme Court has said
18 repeatedly that it has never held, never established any
19 bright line rule.

20 What the Supreme Court looks to are
21 questions like whether or not the person who is
22 interrogating the individual, first of all, has removed
23 them from their usual environment in a manner that is
24 analogistic to a person, from a free person going from
25 their usual environment to arrest. And so the question

1 is essentially whether or not considering life in the F
2 pod as his usual environment, whether Graves has been
3 removed from his usual environment in a manner that is
4 analogistic to an arrest.

5 I would say the analogy here, Your Honor,
6 is detention and not an arrest. He had not been -- no
7 additional restraints had been put on him. He hadn't
8 been isolated in any other room or separated. And also
9 ultimately, voluntariness and the relevance and the
10 circumstances to voluntariness is the touchstone of this
11 inquiry.

12 And the Supreme Court explains in Maryland
13 v Shafzer, that the ability of the person making the
14 interrogation to increase or decrease or control the
15 term of the duration of the incarceration of the person
16 being interrogated is key to whether or not the person
17 being incarcerated would reasonably perceive himself
18 being under arrest or in a situation which they're
19 making involuntary statements.

20 And so, Your Honor, given that the issue
21 here is whether it's a custodial interrogation under
22 Miranda and the Supreme Court has not set a bright line
23 rule and the various factors that the Supreme Court does
24 consider, do not indicate that this was anything more
25 than an investigative detention. The State argues that

1 it is not a Miranda violation.

2 MR. JOSH HILL: Judge, my argument is
3 quite simple. The officer is called in to investigate
4 an indecent exposure. They extract him from his cell
5 and move him into a hallway where no other inmates are
6 present. It's quite clear he wasn't free to go back
7 into his cell if he wanted to. He was clearly in
8 custody for the purpose of the investigation of this
9 offense for which we're trying today. No investigation
10 occurred subsequent to that questioning. This is a full
11 on custodial interrogation from the defendant and a head
12 nod or verbal statement is inherently unreliable.
13 That's why we require it to be recorded.

14 And what we have here is an inmate who is
15 effectively taken into custody on this case. He's taken
16 from the cell because of this case, through the
17 vestibule and into a different secured area where he's
18 being questioned by the officer on the ultimate issue of
19 this case.

20 THE COURT: I'll give you a brief reply.

21 MR. BERNARD: Your Honor, that complaint
22 is an investigative detention in which a person is
23 indeed clearly not able to leave, but custodial
24 investigation in which a person has to be under arrest
25 or subject to the equivalent in a prison environment and

1 a brief removal from one's usual circumstances for
2 questioning without additional restraints, that's a
3 classic investigative detention. And Mr. Hill doesn't
4 know whether or not there was subsequent investigation.

5 Now if I were to go into the matter, which
6 I didn't plan to, it does turn out that the defendant
7 was taken and was, in fact, isolated to a room and left
8 there for a little while and later was asked whether he
9 would submit to make a written statement and he said he
10 wouldn't. I didn't before and don't now plan on going
11 into those matters before the jury. Indeed there is a
12 procedure for further investigation which would be the
13 equivalent of an arrest. But that point had not been
14 reached when the question that Deputy Jones asked was
15 ask.

16 MR. JOSH HILL: Judge, that additional
17 part would be a violation against his right to remain
18 silent. But in terms of this case, the deputy had
19 already decided on his own that he was guilty of this
20 offense when he said you know what you did was wrong.
21 This is not a temporary detention.

22 THE COURT: Your Motion to Suppress is
23 granted on that one point.

24 MR. JOSH HILL: Thank you, Judge.

25 THE COURT: Let's have the jury.

1 THE BAILIFF: All rise for the jury.

2 (Jury present.)

3 THE COURT: Thank you. You may proceed.

4 And just for the record, the last objection was
5 sustained.

6 DIRECT EXAMINATION CONTINUED

7 BY MR. BERNARD:

8 Q. Deputy Jones, how long have you worked at the
9 jail?

10 A. 24 years and 7 months.

11 Q. Deputy Jones, I want to call your attention to
12 the process for bringing a person into the jail. What
13 are the inmates given when they are brought into the
14 jail?

15 MR. JOSH HILL: Judge, I'm going to object
16 to relevance.

17 THE COURT: Overruled.

18 Q. (By Mr. Bernard) What are the inmates given
19 when they come into the jail?

20 A. When they're brought into my section, when they
21 leave classification, they're issued a bed roll, jump
22 suit, tooth paste, tooth brush, and an inmate's
23 handbook.

24 Q. Deputy Jones, I'm showing you what is marked as
25 State's Exhibit 4.

1 MR. JOSH HILL: Judge, I'm going to object
2 to the relevance, if he can't testify he handed any of
3 these to the defendant. I don't believe it's relevant
4 in this case.

5 THE COURT: Overruled.

6 Q. (By Mr. Bernard) I'm showing you what is marked
7 as State's Exhibit 4. What is this?

8 A. Harris County Inmate Handbook.

9 Q. Is this an exact copy of that handbook?

10 A. Yes.

11 MR. JOSH HILL: Judge, I'm going to object
12 to hearsay. All the elements contained within this
13 document. I'm going to object to relevance. I'm going
14 to object that it's not a properly admitted business
15 record.

16 THE COURT: Relevance.

17 MR. BERNARD: Your Honor, if I may
18 approach. I can't describe it.

19 (Discussion at the bench.)

20 MR. BERNARD: Under 1109 on page 33, are
21 the statements I'm interesting in getting in.

22 MR. JOSH HILL: And without testimony that
23 this specific inmate received and read their book, it's
24 irrelevant in this case. And what is subject to an
25 administrative punishment is not necessarily relevant to

1 what is possible grounds for a criminal information
2 against him. It's apples and oranges.

3 MR. BERNARD: Your Honor, the relevance --

4 THE COURT: I'm going to admit only the
5 portions that are indicated with the blue arrows. Find
6 a way to copy maybe the front and these portions only,
7 the part that the jury will be allowed to see.

8 MR. BERNARD: Okay. May I read the page
9 numbers as well.

10 That's fine.

11 THE COURT: Your objection is overruled.

12 (Jury present.)

13 THE COURT: The objection is overruled.
14 The exhibit will be admitted. Just the pertinent part.
15 You may proceed.

16 Q. (By Mr. Bernard) Deputy Jones, are there female
17 jail staff?

18 A. Yes.

19 Q. And are the rules for what they can do
20 different than what the male staff can do?

21 MR. JOSH HILL: Judge, I'm going to object
22 to the relevance of this type of questioning.

23 THE COURT: Overruled.

24 Q. (By Mr. Bernard) Are the rules for what female
25 staff can do with respect to male inmates different that

1 what male staff can do with male inmates?

2 A. Yes.

3 Q. Are female staff allowed to strip search
4 inmates?

5 A. No.

6 Q. And are female staff allowed to observe male
7 inmates shower?

8 A. No.

9 Q. And is it part of your duties to watch inmates
10 masturbate?

11 A. No.

12 Q. Is it part of your duties to watch inmates
13 shower?

14 A. No.

15 Q. Could you tell on Exhibit 1 where inmates
16 shower.

17 A. (Witness complies.)

18 Q. Are female staff permitted to enter that area
19 and observe the male inmates shower?

20 A. They're permitted to enter, but not the
21 enclosure where they shower at.

22 Q. And from outside of the enclosed part, how much
23 of the showering inmate is visible?

24 A. It varies on the height of the inmate. No more
25 than like the shoulders, head and shoulders and the

1 feet. That's it.

2 Q. Deputy Jones, I'm showing you what is marked as
3 State's Exhibit 3. What is this?

4 A. A picture of the inside of the cell block.

5 Q. And could you show us --

6 MR. JOSH HILL: Object to the relevance in
7 regards to this case.

8 THE COURT: Your response.

9 (Discussion at the bench.)

10 MR. BERNARD: Your Honor, it's just a
11 blown up portion of the cell.

12 MR. JOSH HILL: I'm not sure what portion
13 of the cell block this is or what the relevance is.

14 (Jury present.)

15 THE COURT: Okay. It's admitted over
16 objection. 3 may be published to the jury.

17 Q. (By Mr. Bernard) Deputy Jones, could you clear
18 the screen for me.

19 A. (Witness complies.)

20 Q. Deputy Jones, what is that there?

21 A. That's the top bunk.

22 Q. And what room is that there?

23 A. That's C Cell.

24 Q. Deputy Jones, after you pulled the defendant
25 out of C Cell, did anyone tell you that he wasn't the

1 person who was masturbating?

2 MR. JOSH HILL: Objection, calls for
3 hearsay.

4 THE COURT: Sustained.

5 MR. BERNARD: Your Honor, the State needs
6 a little more time to prepare that next exhibit.

7 THE COURT: Is that the last thing you're
8 going to address with this witness?

9 MR. BERNARD: Yes, Your Honor.

10 THE COURT. Go ahead and get that
11 completed. We'll wait for you here.

12 (Brief pause.)

13 Q. (By Mr. Bernard) Deputy Jones, what was the
14 defendant's demeanor when you pulled him out of the
15 cell?

16 A. I described it as --

17 MR. JOSH HILL: Judge, I'm going to object
18 to relevance.

19 THE COURT: Overruled.

20 THE WITNESS: Kind of like maybe a
21 dejected mood. You know, down, not as far as just kind
22 of -- maybe like a little sad. You could tell there was
23 something wrong.

24 Q. (By Mr. Bernard) Deputy Jones, did the
25 defendant exhibit any surprise when you pulled him out

1 of the cell?

2 MR. JOSH HILL: Judge, I'm going to object
3 to the relevance of that and also to the speculation of
4 that and also to whether he was surprised.

5 THE COURT: Sustained.

6 Q. (By Mr. Bernard) Deputy Jones, I'm showing you
7 what's been marked as State's Exhibit 4. What is this?

8 A. Inmate Handbook.

9 Q. And this a true and correct copy of portions of
10 the Inmate Handbook?

11 A. Yes.

12 MR. JOSH HILL: Judge, I would re-urge my
13 objection to hearsay and relevance.

14 THE COURT: Overruled. And I'll give you
15 a running objection. It's admitted.

16 MR. JOSH HILL: Thank you, Judge.

17 Q. (By Mr. Bernard) Deputy Jones, I'm showing you
18 the second page of State's Exhibit 4. Could you read
19 what it says there please.

20 A. It says "Engaging in sexual acts".

21 Q. What else does it say?

22 A. No inmate shall propose or take part in any
23 sexual act such as sexual intercourse, masturbation,
24 anal sex, oral sex, or manipulation of any person's
25 private parts.

1 Q. Deputy Jones, I'm showing you the third page of
2 State's Exhibit 4. Can you read the portion after the
3 numeral 1?

4 A. Yes. A: You must be fully clothed between
5 lights-on time and lights-out time. The only exceptions
6 to this rule are when you are showering or sleeping
7 after lights-out time.

8 Q. Deputy Jones, is masturbation considered -- on
9 the basis of your training as a deputy working in the
10 prison, is it a violation of the rules that you just
11 read for a person to masturbate?

12 A. Yes.

13 MR. JOSH HILL: Judge, I'm going to object
14 to relevance.

15 THE COURT: Overruled.

16 MR. BERNARD: The State passes the
17 witness, Your Honor.

18 THE COURT: You may examine.

19 CROSS EXAMINATION

20 BY MR. JOSH HILL:

21 Q. Deputy Jones, did you give a copy of that
22 handbook to the defendant, Mr. Graves?

23 A. No.

24 Q. Did you observe anybody give him a copy of the
25 handbook?

1 A. No.

2 Q. So you don't know if he has a copy of that
3 handbook?

4 A. No.

5 Q. Okay. I want to go over State's Exhibit 1 that
6 was up a little while ago, that was the diagram, the
7 schematic of the jail cell, and you described where the
8 shower was. Okay. Just so we are on the same page.

9 A. Yes.

10 Q. And in that shower there's very clearly a gap
11 in the front of it; is that correct?

12 A. Yes.

13 Q. Such an opening, where if you're standing
14 directly in front of the shower, you can see what's
15 going on inside of the shower; correct?

16 A. No.

17 Q. So if you're standing in front of the opening
18 you can't see inside the shower?

19 A. The shower heads are not -- if you put it back
20 up.

21 Q. Sure. I want to show you, this is State's
22 Exhibit 1, and this area that looks like a backward
23 C-shape?

24 A. Uh-huh.

25 Q. Toward the middle, bottom middle of the

1 diagram. This was the shower; correct?

2 A. Right.

3 Q. And we see there is a gap right here where
4 there is no walls; right?

5 A. Yes.

6 Q. Somebody standing there facing the direction
7 where my finger is facing into that gap, you would be
8 able to see into the shower stall; correct?

9 A. You would be able to see into the middle part
10 of the shower stall.

11 Q. Okay. And if you turned your head, could you
12 see to the right or the left?

13 A. If I turned my head right, no, I couldn't see
14 to the right of the stalls because there's a pillar
15 right there.

16 Q. So what you're telling me, if I'm standing
17 right here in the entrance way, and the shower -- I
18 haven't stepped inside. I'm standing right outside.

19 A. Okay.

20 Q. You're saying I would not be able to see into
21 the shower?

22 A. You would be able to see into the shower then.

23 Q. Okay. Now, did you go into Mr. Graves' cell
24 when he was taken out, did you actually go into the cell
25 or were you waiting in the common area?

1 A. No, I entered the cell.

2 Q. And when you entered the cell, did he have an
3 erection?

4 A. No, not to my knowledge.

5 Q. Did you see semen on his clothing, on the
6 bunks, on the floor, anywhere else?

7 A. No.

8 MR. JOSH HILL: Pass the witness.

9 THE COURT: Redirect.

10 MR. BERNARD: No further questions, Your
11 Honor.

12 THE COURT: You may stand down, sir. Call
13 your next witness.

14 MR. BERNARD: Your Honor, the State rest.

15 THE COURT: What says the Defendant?

16 MR. JOSH HILL: Judge, we have a motion.

17 THE COURT: Please approach the bench.

18 (Discussion at the bench.)

19 MR. JOSH HILL: I would move for a motion
20 of acquittal based on a couple of things. One, they
21 haven't proved the element of the intent to gratify
22 sexually. They also haven't proven the element of
23 reckless behavior. They also haven't offered any
24 testimony that he was facing the station in which jail
25 personnel monitor jail inmates.