

ORIGINAL

Supreme Court No. 833273

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,  
Respondent,

v.

ALLEN FREDERICK REXUS  
Petitioner.

STATE OF WASHINGTON  
SUPREME COURT  
2009 DEC 10 AM 7:51  
CLERK  
ANDY MILLER  
PROSECUTING ATTORNEY

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PETITION FOR REVIEW OF THE COURT OF APPEALS,  
DIVISION III  
NO. 275191

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RESPONSE TO MR. REXUS'S MOTION FOR  
DISCRETIONARY REVIEW

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## FACTS

Attached are the Findings of Fact/Conclusions of Law entered by the trial court, as well as the transcript of hearing on January 5, 2006. Essentially, on May 21, 2005, Adrian Rexus, the defendant's son, came to the police station in tears with a camera. (Appendix B-Report of Proceedings 01/05/06<sup>1</sup>, 10-11). Adrian was so upset he could not tell the police what was on the camera, but stated the the officers could view the photos. (App. B, 11). The police were technologically challenged and had Adrian activate the camera. (App. B, 11, 18). He did so, and the police looked over his shoulder as Adrian scrolled through the photos. (App. B, 19). The police saw a man, later identified as the defendant, in sexually explicit photos with a girl about five years old. (App. B, 19).

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<sup>1</sup> Appendix B-Report of Proceedings 01/05/06, hereinafter referred to as "App. B."

Adrian told the police that it was a family camera which the defendant had used. (App. B, 13).

### ISSUES

1. Where a third person brings a digital camera to a police station, turns it on, holds it and shows the police officer photos on it, has there been a "search"?
2. If this constitutes a "search," is State v. Eisfeldt, 163 Wn.2d 628, 185 P.3d 580 (2008) implicated?
  - A. Did the defendant's son have the authority to show the police pictures on the camera?
  - B. Does State v. Eisfeldt prohibit the acts of defendant's son, or the responsive actions of the police?

### ARGUMENT

1. The actions of the police do not constitute a "search."

A "search" occurs when the State has unreasonably intruded into a person's "private affairs." State v. Dearman, 92 Wn. App. 630, 962 P.2d 850 (1998); State v. Seagull, 95 Wn.2d 898, 632 P.2d 44 (1981). As in Seagull, this issue

often arises in cases involving an "open field" or "plain view" issues. As in Dearman, it may involve the use of some technique, like a drug-sniffing canine, which enhances a police officer's powers of detection.

Here, there are only two possible "private affairs" that the defendant could claim the police violated. One, asking the defendant's son, Adrian, to turn on the camera, and two, looking at the photos as Adrian held the camera and scrolled through them. Neither of these could be deemed to be a "private affair" of the defendant. Activating the camera could be done by reference to a user's manual, which could be obtained by the public. Further, the police did not go anywhere or do anything to view the photos on the digital camera. Police officers merely looked at a camera which a third person displayed to them. So, there was no "search."

2. Even if this constituted a "search" there is no violation of Article 1, Section 7 of the Washington State Constitution; State v. Eisfeldt, 163 Wn.2d 628, 185 P.3d 580 (2008) is not implicated.

a) Adrian Rexus had the authority to consent to the camera's search.

The testimony before the trial court was that the camera in question was the family's camera. (App. B, 13). The trial court found that the defendant's son stated it was the family's camera and had been used by the defendant. (Appendix A-Findings of Fact and Conclusions of Law On 3.6 Hearing<sup>2</sup>, No. 3).<sup>3</sup>

Many families, including apparently the defendant's, do not provide digital cameras to each member of the household. Therefore, a camera may be owned, used, or possessed by various family members. That is what occurred

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<sup>2</sup> Appendix A-Findings of Fact and Conclusions of Law on 3.6 Hearing hereinafter referred to as "App. A."

<sup>3</sup> The State respectfully disagrees with the Ruling of Commissioner Goff in asking for briefing on "whether Mr. Rexus had a reasonable expectation of privacy in the contents of his camera." (Emphasis added). There was no evidence before the trial court contradicting Adrians's statement that it was a family camera.

here. Adrian Rexus had the right, privilege, or ability to use the camera. He had the right to consent to a search of the camera. Consent to search from someone with authority to do so is an exception to the requirement for a warrant. State v. Cantrell, 124 Wn.2d 183, 875 P.2d 1208 (1994).

- b) Even if the police conducted a "search," and even if Adrian Rexus did not have the authority to consent to the search, State v. Eisfeldt is not implicated.

State v. Eisfeldt, 163 Wn.2d 628, 185 P.3d 580 (2008) specifically allows the actions of the defendant's son.

The Eisfeldt Court noted that the citizen therein, a repairman who had entered the defendant's garage, "had no relationship with any police officer and was not encouraged by the State to search the house. Since Piper (the repairman) was a private actor when he searched the house, Eisfeldt's constitutional protections are not implicated." Eisfeldt, at 635. Likewise,

the Court further stated, "the concurrence suggests citizens do not 'retain a privacy interest in evidence of a crime obtained by a private actor and delivered to the police.' This is correct where the evidence obtained during a private search is given to the State; constitutional protections do not apply to private actors." Eisfeldt at 638.

This is exactly what the defendant's son did. He saw pictures on a family camera of his father (the defendant) engaged in oral sex with an approximately five-year-old girl (App. B, 12). He brought that camera to the police, and showed the police the pictures. (App. B, 11-12). That is specifically allowed by Eisfeldt.

If the defendant's son had been snooping in his father's bedroom and come across a camera locked in a safe, and then brought the police into the bedroom to retrieve the camera, Eisfeldt would be implicated. That was the situation in Eisfeldt. The Court focused on whether the

evidence is obtained by a private actor or by the State. Eisfeldt at 638. Here, the evidence was obtained by a private actor, the defendant's son, not the police.

### CONCLUSION

The police did not search the camera by having Adrian Rexus activate it and then look over his shoulder as he scrolled through the photos. Even if it was a search, Adrian had the authority to give the camera to the police; it was the family's camera. In any event, State v. Eisfeldt specifically authorizes a private citizen (the defendant's son) to bring incriminating evidence to a police station.

The trial court and Court of Appeals have made the right decision. Accordingly, the petition should be denied.

**RESPECTFULLY SUBMITTED** this 8th day of December,

2009.

**ANDY K. MILLER**

Prosecutor

A handwritten signature in black ink, appearing to read "Terry J. Bloor", is written over the printed name and title of the Deputy Prosecuting Attorney.

**TERRY J. BLOOR**, Deputy

Prosecuting Attorney

BAR NO. 9044

OFC ID NO. 91004

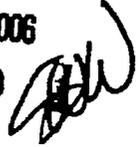
**APPENDIX A**  
FINDINGS OF FACT  
AND CONCLUSIONS OF LAW  
ON 3.6 HEARING

**CERTIFIED**

**JOSIE DELVIN**  
BENTON COUNTY CLERK

JAN 24 2006

FILED



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

Plaintiff,

vs.

ALLEN REXUS,

Defendant.

NO. 05-1-00711-1

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON  
3.6 HEARING

THIS MATTER, having come duly and regularly before the Court for a 3.6 hearing on the 5th day of January, 2006, the defendant being personally present and represented by Richard Johnston, Attorney for Defendant, and the State of Washington being represented by Tamara Taylor, Deputy Prosecuting Attorney for Benton County, the Court having reviewed the case record to date, and having been fully advised in the premises, now, therefore, makes the following:

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW ON 3.6 HEARING - 1

**CERTIFIED**



FINDINGS OF FACT

1. On or about May 20, 2005, Kennewick Police Officers Davis and Canada made contact with three individuals who arrived at the police station. Those individuals included Adrian Davis, who is the defendant's son, and Billie Watkins.
2. Both officers got some information from Billie Watkins. Mr. Watkins and the other two individuals then went into the police station.
3. One of the individuals brought a digital camera, Exhibit A, and voluntarily gave it to Officer Davis. Adrian Rexus stated that this was the family's digital camera and had been used by his father. Officer Davis asked Adrian Rexus what was on the digital camera.
4. Adrian Rexus was emotional and crying. He tried to explain what was on the digital camera but gave limited information because he was very emotional. The officer did not know how to turn on the camera and gave it to Adrian Rexus who subsequently scrolled through the photos on the camera.
5. While Adrian Rexus scrolled through the images, both of the officers saw pictures of a young female. One photograph showed the young female holding a penis. Another photograph showed a penis going into a young girl's mouth. Another photograph showed an adult male close to the genitals of a young girl.
6. Based on Adrian Rexus showing these photographs, an officer advised Adrian Rexus that they would hold onto the camera.
7. None of the officers asked Adrian Rexus or anyone else to bring the camera into the station. None of the officers printed out the images from the camera until a search warrant was secured.
8. After the camera was retained by the officers, it was then turned over to Sgt. Mill who called in Detective McCalmant. Sgt. Mill scrolled through the photographs and showed them to Detective McCalmant in preparing for a search warrant in this case.
9. A search warrant was later issued. During the execution of the search warrant, an officer found, among other things, Exhibit B, a digital tape from a video camera.

10. The search warrant ordered the officers to seize removable storage media associated with video cameras.

CONCLUSIONS OF LAW

1. The police officers' actions were reasonable and did not constitute an illegal search.
2. The digital camera was brought into the police station without any police interaction.
3. The officer, in asking Adrian Rexus how to turn on the camera, did not conduct a search requiring a warrant.
4. As such, the court denies the defendant's motion to suppress.
5. Exhibit B, the digital tape from the video camera, falls into the category of "removable storage media" associated with a video camera.
6. Therefore, the police were allowed to seize the digital tape during the execution of the search warrant.

DONE IN ~~OPEN COURT~~ this 27<sup>th</sup> day of January, 2006.

Carrie Runge  
JUDGE CARRIE RUNGE

Presented by:

TAMARA A. TAYLOR  
Deputy Prosecuting Attorney  
OFC ID 91004/WSB 28345

Approved as to form:

R. J. Johnston 34014  
RICHARD JOHNSTON  
ATTORNEY FOR DEFENDANT  
WSB

**APPENDIX B**  
VERBATIM REPORT OF PROCEEDINGS  
JANUARY 5, 2006

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF BENTON

COPY

STATE OF WASHINGTON,	)	COA# 249999
	)	NO. 05-1-00711-1
Plaintiff,	)	
V.	)	VERBATIM REPORT
	)	OF PROCEEDINGS
	)	JANUARY 5, 2006
ALLEN F. REXUS,	)	
	)	
Defendant.	)	

Proceedings before the HONORABLE CARRIE L. RUNGE,  
Benton County Superior Court, Kennewick, Washington

APPEARANCES:

FOR PLAINTIFF: Tamara Taylor, Deputy  
Benton County Prosecutor  
7320 West Quinault  
Kennewick, Washington 99336

FOR DEFENDANT: Richard Johnston  
Attorney at Law  
2020 West Sylvester  
Pasco, Washington 99301

REPORTED BY: Patricia L. Adams, Official Court Reporter

1 January 5, 2005

2 Kennewick, Washington

3  
4 P-R-O-C-E-E-D-I-N-G-S

5  
6 (WHEREUPON, court convened in this matter at 1:45 PM, proceedings  
7 were had as follows:)

8  
9 MS. TAYLOR: Good afternoon, Your Honor.

10 MR. JOHNSTON: Good afternoon, Your Honor. We're here  
11 on the defense's suppression motion.

12 THE COURT: Yes.

13 MR. JOHNSTON: I don't intend to call any witnesses,  
14 except perhaps Mr. Rexus. I don't know if Miss Taylor may have  
15 some plans for witnesses. If not, we could just begin the  
16 discussion.

17 THE COURT: However counsel prefers.

18 MS. TAYLOR: Your Honor, I'll let counsel go ahead and  
19 proceed, since this is his motion.

20 MR. JOHNSTON: Okay. Well, thank you.

21 Your Honor, we're here. As we had outlined in the brief,  
22 there are three issues. There is a digital camera involved.  
23 The digital camera belonged not to Mr. Allen Rexus. I'm relying  
24 on the officer's statement in the affidavit for the search  
25 warrant. I think the Court should focus on the affidavit of the

1 search warrant because these are the facts that were given to  
2 the Judge, of course, who issued the search warrant.

3 In the affidavit of the search warrant, it's explained that  
4 a young man named Adrian Rexus took his father's digital camera  
5 to the police. And I think when he got there, he met with  
6 officers and either showed the officers the contents of the  
7 camera or helped them review the contents of the camera.

8 Whatever the case, I wouldn't argue, Your Honor, about  
9 whether or not the police did anything illegal by obtaining the  
10 camera from the young man. That was a private action. He  
11 wasn't acting as an agent of the police. I would concede that  
12 when he took the camera to the police, he wasn't acting at their  
13 behest.

14 However, once the police had the camera and they had the  
15 statement from the young man that the camera might contain  
16 images of a child, a naked child, it's our position that at this  
17 point the police needed a search warrant to go forward and view  
18 the contents of the camera.

19 We're relying on the Washington Constitution that they're  
20 not to intrude into the private affairs of an individual without  
21 authority of law. I can't find any authority of law here that  
22 would permit the police to effectively thumb threw the contents  
23 of the camera. I think this is analogous to a computer where if  
24 you're gonna look for computer files on a computer that are  
25 digital, you have to have a search warrant to look at the

1 computer files.

2 This is also somewhat similar to the purse. In our case, in  
3 Washington State v. Parker, where the purse was found in the car  
4 belonged to a different person. The police looked in that  
5 particular purse and the court ruled, no, you have to have a  
6 warrant to look in the purse. The purse is an object. It's  
7 closed. You can't just look in it.

8 Here, it's just like a purse or any kind of container. The  
9 police may have acquired the container legally, but for them to  
10 effectively open the container and peruse its contents without  
11 obtaining a search warrant is an illegal invasion of the private  
12 affairs of the owner of the camera. And that owner was Mr.  
13 Rexus.

14 On that basis, the material found in the camera should be  
15 suppressed.

16 Then we go from there to the fact that Mr. Rexus was  
17 confronted with the contents of the camera. And when he was  
18 confronted with the contents of the camera, he made a statement  
19 to the police. It's not a defense contention, Your Honor, that  
20 he didn't make it voluntarily after Miranda warning. Our  
21 contention is that he wouldn't have made the statement at all  
22 except for the police exploitation of the illegal acquisition of  
23 the contents of the camera. And because the statement flowed  
24 from the illegal acquisition of the contents of the camera, then  
25 the statement should be suppressed even though it was made

1 voluntarily.

2 The next element of this is whether, then -- You know, then  
3 one has to go back to the affidavit of the search warrant and to  
4 say, well, if the camera is not available and the contents of  
5 the camera are not available and the confession of Mr. Rexus is  
6 not available, then is the remaining information in the affida-  
7 vit for warrant sufficient to issue a search warrant as it  
8 stands? If that information is insufficient, then whatever was  
9 taken under the search warrant has been improperly obtained.

10 As I read the affidavit for search warrant, one removes the  
11 camera and the confession, there is not much left but the  
12 statement made in bold in the affidavit, which is the statement  
13 of Adrian Rexus. And in that statement I don't think Mr. Rexus  
14 indicates enough information that would allow a search warrant  
15 to be issued to go to the home and seize all of the materials  
16 requested under the warrant.

17 Mr. Rexus, Adrian Rexus's statement in bold in the statement  
18 only makes references that he saw child pornographic images  
19 eighteen months before. He says he thinks he saw his father  
20 operate a flash camera. But what he does is he doesn't say he  
21 saw his father taking pictures of the child nude. He just says  
22 he saw through a crack in the door the flash of a camera and the  
23 bare arm of the child. Just that alone doesn't seem to be  
24 sufficient to cause one to go and look into computers and seize  
25 computers and everything else that was requested under the

1 warrant.

2 Finally, the warrant seems to be oriented, if the warrant is  
3 valid, Judge, the warrant appears be oriented toward computer-  
4 based materials -- digital images of media that may be read by  
5 a computer. And some of what was taken from the house were  
6 video tapes. It is the defense contention that video tapes are  
7 not covered by the warrant. Just to give you, there was A  
8 through H talks about computer hardware, computer software,  
9 records stored in electronic or magnetic coding or on media  
10 capable of being read by a computer. Computer instructions,  
11 computer printouts. All order information, invoices and  
12 purchase agreements. Address books, diaries and notebooks. Any  
13 digital cameras, web cams and peripheral devices, removable  
14 storage media such as flash cards suitable for storing digital  
15 images.

16 So given those things, even if this warrant was valid, I  
17 would contend that there was, I think, an eight millimeter  
18 videotape and some other film that was seized and those items  
19 are clearly not within the scope of the warrant.

20 I think that's the end of our discussion, Judge. It  
21 fundamentally is to say that this was not a private search. The  
22 search of the police acquired an object. The object itself was  
23 not the evidence. The contents of the object is the evidence.  
24 And to review the contents of the object, they needed a search  
25 warrant. And that's the first domino in the list. Thank you,

1 Judge.

2 THE COURT: Thank you Mr. Johnston. Miss Taylor.

3 MS. TAYLOR: Thank you, Your Honor. Just briefly to  
4 the first point counsel made. The officers didn't have to shut  
5 their eyes to evidence brought to the station and submitted to  
6 them. In this case, the individuals that brought it brought it  
7 voluntarily, upon no request by the police officers. And they  
8 actually handled the camera. In flipping through the photos,  
9 the officers looked at the photographs. There is no authority  
10 of law to say that that in and of itself was a search and that  
11 it was an unlawful search.

12 It's similar to somebody bringing a cell phone and scrolling  
13 through numbers on the cell phone. Or bringing in a log book  
14 and thumbing threw the log book to show the illegal transaction.  
15 But to say the police have to close their eyes when evidence is  
16 dropped off, there is absolutely no authority for that and  
17 counsel doesn't cite any authority for that.

18 The State is gonna be calling the officers to testify as to  
19 exactly what occurred when the camera was dropped off and what  
20 information they had from the individuals who dropped it off. I  
21 expect Officer Davis and Officer Canada and Detective McCalmant  
22 to testify about that camera. I also have the camera here that  
23 is evidence, Your Honor.

24 As to the other issues that counsel has raised, I'm gonna  
25 kind of reserve on those until the Court makes a ruling as to

1 whether the camera, in and of itself, if there was an illegal  
2 search. I'm hoping that we can kind of bifurcate this so we  
3 don't have to put on a whole bunch of testimony that may not be  
4 relevant. So I'm hoping that Your Honor can rule as to the  
5 first issue before we get into the second and third issues.

6 As to the fourth issue, the State does have a copy of.  
7 Actually, we have the tape in question and we are going admit it  
8 as evidence. And it says right on it digital HD video. It's  
9 been reconstructed, but you can see the old case where it has  
10 digital on it.

11 Counsel is arguing that that isn't digital evidence. And  
12 we're gonna have testimony by Detective Greg Castro that indi-  
13 cates this did fall within the parameters of the search warrant,  
14 mentioned in the affidavit of search warrant, as well. So we'll  
15 have a little bit of testimony as to exactly what that contains.  
16 Does it contain digital coding? Is it something that has  
17 depictions of minors on it? That sort of thing, to show it does  
18 fall within the parameters of that search warrant.

19 I have nothing further at this time, Your Honor.

20 MR. JOHNSTON: Well, Your Honor, I would like -- If  
21 we're gonna call any witnesses, it will only be Mr. Rexus, and I  
22 may not need to call him. I would just prefer if the State is  
23 gonna go ahead and produce evidence, that they do so, if that's  
24 okay with you, and we can go from there.

25 MS. TAYLOR: Thank you, Your Honor. Your Honor, the

1 State would call Officer Trevor Davis.

2 TREVOR DAVIS

3 (sworn or affirmed, was examined as follows:)

4 DIRECT EXAMINATION

5 BY MS. TAYLOR:

6 Q. Good afternoon, Officer Davis.

7 A. Good afternoon, Ma'am.

8 Q. Officer Davis, would you state your name for the court?

9 A. Trevor Davis.

10 Q. What is your occupation?

11 A. I am a police officer for the City of Kennewick.

12 Q. How long have you been a police officer?

13 A. Approximately three and a half years.

14 Q. Back on May 21st of this year, were you acting as a police  
15 officer?

16 A. Yes, Ma'am. I was assigned to the Kennewick patrol division  
17 on the east end of town.

18 Q. And at about 4:00, did some individuals contact you at the  
19 station?

20 A. Yes. I was actually inside the station working on a report.

21 A fellow officer, who was Officer Brian Banner was actually  
22 leaving. He was going off shift. He'd come inside and said  
23 there was some individuals outside who wanted to make a child  
24 molestation report.

25 Q. Did you actually go out and contact those individuals?

1 A. I did. I went outside. There was three individuals  
2 standing by the vehicle and I went outside and asked one of 'em  
3 what they wanted to report.

4 Q. I guess, did they indicate what they wanted to report?

5 A. Yes. One of the individuals stepped forward, I believe. If  
6 I can refer to my report really quick.

7 MS. TAYLOR: Any objection, counsel?

8 MR. JOHNSTON: No, if I could just see it to make sure  
9 I've got the same one.

10 THE WITNESS: Yes, sir. I just want to make sure I  
11 have the correct individual.

12 MR. JOHNSTON: Sure. Thank you, Judge.

13 A. It was Billy Watkins was one of the three individuals  
14 standing by the vehicle. He stepped forward and said that he  
15 wanted to make the child molestation report.

16 Q. (By Ms. Taylor, continuing) Did you get some details as to  
17 what he had seen or observed?

18 A. Well, he actually pointed -- There was an individual --  
19 There was three individuals, one was standing behind him. He  
20 was actually, this specific person was actually crying, was  
21 upset.

22 He stepped forward and identified himself as Adrian Rexus.  
23 He said he had in his possession a camera that contained some  
24 photographs of a young girl about five years old being sexually  
25 molested.

1 Q. At this point, did you, I guess, bring them into the station  
2 to talk to them about what had happened?

3 A. Yeah. About that time Officer Canada had joined me outside  
4 and he obviously felt it was better to go inside the station to  
5 continue our conversation. So we came inside and I asked 'em  
6 what more information about the camera? What was on the camera?

7 MS. TAYLOR: Your Honor, if I could approach to have  
8 this marked?

9 THE COURT: Yes.

10 THE CLERK: State's Identification Number A is marked.

11 MS. TAYLOR: If I may approach the witness, Your Honor?

12 THE COURT: Yes.

13 Q. (By Ms. Taylor, continuing) Officer Davis, I'm gonna have  
14 you open that and see if you recognize that exhibit.

15 A. Yes. This appears to be the same photo -- or, the same  
16 camera that I was given by Mr. Rexus -- by Adrian Rexus.

17 Q. You go into the station. What happens after you get into  
18 the station?

19 A. Well, like I said, I asked 'em what they saw or what was on  
20 the camera. Adrian was so upset, he was crying. He couldn't  
21 talk about what he had seen. He said we could view the photos  
22 on the camera.

23 He handed it to me. I'm not a technological expert. I  
24 actually had no idea how to turn on the camera, so he took it  
25 back and turned on the camera itself. And right away, the first

1 photograph that popped up on the view screen, which was right  
2 behind the camera, was what appeared to be a young girl about  
3 four or five, six years old holding what appeared to be an  
4 adult-sized penis in her hands.

5 Q. Did he proceed to go through other photos at that time?

6 A. Yeah. There is apparently a way to scroll through some  
7 photos. He scrolled through, I think, four, five or six roughly  
8 and continued showing several other photos of the same girl  
9 holding an adult-sized penis.

10 One photo was of what appeared to be the same penis being  
11 inserted into the girl's mouth. And then I think the last photo  
12 I viewed was that of the defendant or an adult male with his  
13 mouth up against the genital area of the young girl.

14 Q. And this was Adrian Rexus that was showing you the  
15 photographs?

16 A. I believe it was. All three -- All five of us, the three  
17 young men who had come to the station, myself and Officer Canada  
18 were right close, viewing the camera. I believe, if I remember  
19 correctly, it was Adrian who was actually thumbing through the  
20 photos.

21 Q. To your knowledge, had you or any other officers asked them  
22 to bring in the camera?

23 A. No. To my knowledge, I had never met any of these  
24 individuals prior to that moment.

25 Q. Okay. And at that point, what did you do after viewing the

1 photographs?

2 A. I took the camera. I informed my supervisors, specifically  
3 Sergeant Miller, of the situation. Advised him that, of the  
4 camera, the photos on the camera. And then informed him that  
5 that same little girl was still at the residence where these  
6 incidents had occurred, with the suspect that was on the video.

7 Q. Did you do anything with the camera after you had it back at  
8 the station?

9 A. I gave it to Sergeant Miller at that time and then  
10 afterwards -- then I proceeded to take a statement, a typed  
11 statement from Adrian.

12 Q. Did Adrian Rexus ever indicate who the camera belonged to?

13 A. He never told me. He said that it was the family's camera.  
14 He never specifically told me that it was his, or he never told  
15 me that it was his dad's or anybody specific, no. He just said  
16 this was a camera that was at our house or in my house.

17 Q. Okay. At any time, did you ask him to do anything specific-  
18 ally with the camera to modify anything or change anything?

19 A. No, Ma'am. Not after the original time where he actually  
20 turned the camera on. After that, neither one of us had  
21 possession of the camera.

22 Q. And you didn't print out any photographs at that time?

23 A. No, Ma'am, we didn't attempt to. I don't think we even have  
24 the software at the station, or at least the capability from our  
25 work stations to print out the photograph or the software that's

1 on the camera. So, no.

2 Q. Do you have a detective that kind of deals in that area or  
3 specializes in that area?

4 A. Yes. Detective Gerry Shigeno is what we call the ICAC --  
5 Internet Crimes Against Children -- the detective who special-  
6 izes in internet computer digital software, who we rely on to  
7 retrieve that information.

8 Q. After the search warrant was obtained, he actually went  
9 through and did print out some photographs from the camera?

10 A. I believe so, yes.

11 Q. Okay. At any point did you ever tell Adrian Rexus or the  
12 other individuals that they had to turn over the camera or they  
13 couldn't go home with the camera?

14 A. We informed them that the camera -- that we were gonna take  
15 the camera and that it would be used as evidence. And that they  
16 probably would not get it back anytime in the near future. And  
17 they actually replied that that was fine. They didn't want the  
18 camera, anyway.

19 Q. None of them asked for it back or wanted it back?

20 A. Not to my recollection, no.

21 MS. TAYLOR: I don't have anything further. Mr.  
22 Johnston may have some questions for you.

23 THE WITNESS: Okay.

24 ///

25 ///

CROSS-EXAMINATION

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BY MR. JOHNSON:

Q. Good afternoon.

A. Hi.

Q. When you received the camera and saw the camera the first time, it was dark like it is now, I'll say? There was no pictures showing in the back window?

A. That's correct, sir.

Q. And you did not know how to turn the camera on and cause a picture to appear in that back window?

A. No, I did not.

Q. You had to ask for the help of Mr. Rexus?

A. Yes, sir.

Q. Okay. I'm looking at the affidavit for search warrant. Tell me if I'm correct. It says here that Mr. Rexus, Adrian, had told you that he had been out of his house and then gone back to the house to retrieve the camera his father used?

A. That's what he informed me of, yes, sir.

Q. So he did let you know that his father had used the camera?

A. Yes, sir.

Q. And you had asked Mr. Rexus what was the contents of the camera? I think you said you asked him what was on the camera or something like that?

A. Yes, because they had told that the photos of the girl being molested were on the camera and included of more detail as to

1 what he because referring to.

2 Q. Right. And then was it Mr. Rexus, after your inquiry, who  
3 showed you how to turn on the camera and then who manipulated  
4 the camera in such a way that one could review the photographs  
5 contained in the camera?

6 A. Yes, sir.

7 MR. JOHNSTON: Nothing more, Judge.

8 MS. TAYLOR: Nothing further from this witness, Your  
9 Honor.

10 THE COURT: You may step down.

11 THE WITNESS: Okay.

12 MS. TAYLOR: Your Honor, the State would move to admit  
13 the camera.

14 MR. JOHNSTON: No objection to that, judge.

15 THE COURT: Exhibit A is admitted.

16 MS. TAYLOR: Your Honor, the State would call Officer  
17 Canada.

18

19 JAMES CHRISTOPHER CANADA

20 (Sworn to testify, was examined as follows:)

21 DIRECT EXAMINATION

22 BY MS. TAYLOR:

23 Q. Good afternoon, Officer Canada.

24 A. Good afternoon.

25 Q. Would you state your full name for the Court?

1 A. James Christopher Canada.

2 Q. What is your occupation?

3 A. I am a patrol officer for the City of Kennewick.

4 Q. Back on May 21st of this year, were you on duty as a patrol  
5 officer?

6 A. Yes.

7 Q. How long have you been an officer?

8 A. Just about three years.

9 Q. Have you been an officer solely with the Kennewick Police  
10 Department? Or were you somewhere else?

11 A. No, I spent twenty-three months in the city of West  
12 Richland.

13 Q. On May 21st, were you dispatched to the front of the  
14 Kennewick Police Department?

15 A. Well, we weren't necessarily dispatched. Like Officer Davis  
16 said, a traffic officer was getting off and we were inside doing  
17 reports and he said there was some individuals out front who  
18 wanted to report a child sex report.

19 Q. And Officer Davis had already been out with the individuals  
20 when you arrived out there, is that correct?

21 A. Yes.

22 Q. When you arrived outside, I guess what did you observe or  
23 what happened at that point?

24 A. Well, when I arrived outside, it was Billy Watkins who was  
25 kind of going through the story of the camera and Adrian Rexus

1 going over to his house, telling him that he had something to  
2 tell him. And he proceeded to tell him about his father, Mr.  
3 Rexus, and the five-year-old little girl. And he told him what  
4 he had saw and that this camera that his father used was at the  
5 house. He said he knew where it was and that they made a plan  
6 to go get it.

7 They went over and the two other individuals, Billy Watkins  
8 and the other young man, went to the front door. Mr. Rexus went  
9 in through another avenue in the home and retrieved the camera.  
10 The other two young men knocked on the door. Mr. Rexus came  
11 out. They were talking to him.

12 Adrian came down, acted as if he had been sleeping and Mr.  
13 Rexus went inside to get a drink of water, they said, and  
14 that's when they took off and got into Mr. Watkins' car. And  
15 they drove and actually called him on the cell phone and said we  
16 have the camera. We know what you've done. And that they were  
17 going to let the police know.

18 Mr. Rexus said if you go to the police, it's gonna ruin my  
19 lif. I've worked hard to get where I am. They actually looked  
20 at the pictures in the car, themselves, before even coming to  
21 the police station. And that they said that they had the camera  
22 in their possession. And we brought them inside and we all sat  
23 in the room.

24 Adrian was crying and said here is the camera. I, like  
25 Officer Davis, am challenged technology-wise. He turned on the

1 camera. He was crying the whole time. Actually had his head  
2 down. Was crying, thumbing through the pictures. And we looked  
3 over his shoulder at the pictures.

4 Q. What photographs did you see as you looked over his  
5 shoulder?

6 A. Well, I only saw the first about three pictures. One was  
7 the -- The first one was what appeared to be a six-year old --  
8 five- or six-year-old little girl holding an erect male penis.

9 And the next one was where the penis was in the child's  
10 mouth or going into the child's mouth.

11 And the last one that I saw was what appeared to be a white  
12 male with his lips on the child's private area.

13 Q. At any point prior to this, had you asked Adrian Davis to  
14 bring in the camera?

15 A. No. They showed up -- All three of them showed up with the  
16 camera already in their possession.

17 Q. And this was the first that you heard about these photo-  
18 graphs, is that correct?

19 A. Yes.

20 Q. Did you ever ask him to manipulate or change anything on the  
21 camera?

22 A. No.

23 Q. After viewing the photos, the camera was taken as evidence,  
24 is that correct?

25 A. Yes.

1 MS. TAYLOR: I don't have any further questions for  
2 you, but Mr. Johnston may have some questions for you.

3 MR. JOHNSTON: I have no questions for Mr. Canada, Your  
4 Honor.

5 THE COURT: You may step down.

6 MS. TAYLOR: Your Honor, the State would call Detective  
7 McCalmant.

8

9

RANDY MCCALMANT

10 (Sworn or affirmed, was examined as follows:)

11

DIRECT EXAMINATION

12

BY MS. TAYLOR:

13

Q. Detective McCalmant, if you would state your full name for  
14 the court.

15

A. Randy McCalmant -- M-C-C-A-L-M-A-N-T.

16

Q. What is your occupation?

17

A. I'm a detective currently assigned as a Metro Drug Task  
18 Force detective and my home agency is Kennewick Police  
19 Department.

20

Q. How long have you been a detective?

21

A. I was assigned to the regular investigation unit with  
22 Kennewick Police Department for three and a half years. And  
23 I've been with Metro Drug Task Force for just over two months.

24

Q. And your total years as an officer?

25

A. Just over ten years.

1 Q. Back on May 21st, were you working in your official capacity  
2 as a detective?

3 A. Yes. I was home sleeping at the time I received the phone  
4 call. But, yes, I was called in.

5 Q. So you were called in?

6 A. To assist the patrol with the investigation.

7 Q. And you actually prepared the affidavit for the search  
8 warrant, is that correct?

9 A. That's correct.

10 Q. When was your first -- I guess, how did you come in contact  
11 with the evidence in the case, the digital camera?

12 A. When I arrived at the station, Sergeant Miller had  
13 possession of the camera. At some point before I began the  
14 affidavit, he had scrolled through several of the photos. I was  
15 able to view the photos at that time.

16 Q. While he was scrolling through the photos?

17 A. Correct.

18 Q. Can you describe the photographs that you saw in the camera?

19 A. There were several photographs of a four- to six-year-old  
20 child, female. Several of them were of the child holding a  
21 penis. A penis approaching or about in the child's mouth.

22 There were photos of the child nude on a bed, in the shower.

23 And there was at least one photo of the defendant in close  
24 proximity to the child's vaginal region with his mouth.

25 Q. Prior to you arriving at the station, did you have any

1 knowledge of this case?

2 A. No, I did not.

3 Q. Okay. Did you ever instruct anybody to bring the camera  
4 into the station?

5 A. No, I did not.

6 MS. TAYLOR: I don't have any further questions for  
7 you. Mr. Johnston may have some questions for you.

8

9

10 CROSS-EXAMINATION

11 BY MR. JOHNSTON:

12 Q. Just one. You said he scrolled through the camera when you  
13 were looking at the pictures?

14 A. Correct.

15 Q. Who was he?

16 A. Sergeant Mill.

17 Q. Sergeant Mill?

18 A. Correct.

19 MR. JOHNSTON: Thank you. No more questions.

20 MS. TAYLOR: Nothing more from the State, Your Honor.

21 THE COURT: You may step down.

22 MS. TAYLOR: Your Honor, I don't have any further  
23 witnesses as to this point, which is just point number one.

24 I don't know if counsel has any witnesses as to that point.

25 MR. JOHNSTON: No, Your Honor. I would be ready to

1 address it.

2 THE COURT: Any argument with regards to this issue?

3 MR. JOHNSTON: I would just point out some things here  
4 I think that I heard in testimony. Number one, Officer Canada  
5 and Officer Davis both described, certainly Officer Canada  
6 described how he was told that the young boys had gone back to  
7 the house and obtained the camera -- I'll say by subterfuge --  
8 and that it was a camera that had been used by the father of  
9 Adrian Rexus.

10 Knowing the camera was obtained by subterfuge should have  
11 indicated to the police that the young man didn't have access to  
12 the camera. It was not his camera. So it's clear the police  
13 knew this camera belonged to somebody other than Adrian Rexus,  
14 because the police knew the young man had obtained it by having  
15 two friends stand at the front room to distract Mr. Allen Rexus,  
16 while Adrian Rexus entered the house by some means other than  
17 the front door to retrieve the camera. So, the police were on  
18 notice that this camera did not belong to Adrian Rexus.

19 Then we're told that when the camera was received by the  
20 police, they couldn't see anything on it. And they didn't know  
21 how to operate it. But in fact, they got the camera and they  
22 couldn't see anything. And then Officer Davis said he asked the  
23 young man, what's on it? And the young man showed him.

24 Well, at that point, if the young man is sitting there and  
25 Officer Davis asks him what's on the camera and the young man

1 turns it on and shows him how to view it, then that young man  
2 has become a agent of the police.

3 I would have no argument to the fact that the young man  
4 might have turned over the camera, but when the police start  
5 looking at the contents of the camera and getting somebody to  
6 help them view the contents of the camera, that was clearly a  
7 search. The camera was there as an object with the black screen  
8 on the back. You had to push a button, you had to do something  
9 to activate that camera to see, to get it to where you could see  
10 its contents. And the police clearly did that.

11 Also, they did it individually. The other detective, I  
12 can't remember his name -- the last gentleman who testified is  
13 the person who showed him the contents of the camera was  
14 Sergeant Mill.

15 So it's clear that the police, every time they searched this  
16 camera -- and I say that they did search it -- they searched  
17 it without any authority of law. They had an object that was  
18 brought to them. We're not arguing that. It was brought to  
19 them. They didn't co-opt Mr. Adrian Rexus and cause him to  
20 bring the camera. But they certainly co-opted Adrian Rexus and  
21 got help in looking at the contents of the camera and certainly  
22 looked at the contents of the camera without a search warrant  
23 and without any authority of law.

24 There wasn't access here. The camera was in a locked file  
25 cabinet. They didn't know the contents. They couldn't, just by

1 looking at the camera, know its contents. They had to unlock  
2 the camera, open it up, look inside. That's a search.

3 THE COURT: Thank you, Mr. Johnson. Miss Taylor.

4 MS. TAYLOR: Your Honor, did we already admit Exhibit  
5 A, the camera itself?

6 THE COURT: Yes.

7 MS. TAYLOR: Your Honor, you won't find any lock on  
8 that camera or anything prohibiting somebody to scroll through  
9 the pictures on it. It is in no way like a locked file cabinet.

10 Say somebody goes to the police station and has a bag full  
11 of marijuana and says this was my roommate's. Shows the  
12 officers the bag full of marijuana. They don't have to turn  
13 their eyes and say we can't do anything until we get a warrant  
14 on it.

15 So if you have two individuals looking over somebody's  
16 shoulder getting this information as the person is going through  
17 it -- Not instructing them as to what to do. Not saying go to  
18 that picture, pull up that file, do this, do that, do that. The  
19 person is there, they just pulled up the files and are going  
20 through them. There is no search in that context. And when the  
21 police see those pictures, they're entitled to seize the evi-  
22 dence because they now have seen evidence of a crime. So  
23 counsel's argument that this is like a locked file cabinet, it  
24 is no way like a locked file cabinet.

25 Counsel says they become agents of the police. Simply

1 because they're going through the film does not make them an  
2 agent of the police. They were not instructed what to do to  
3 that camera. If the officers had instructed them as to do this  
4 and do that, that sort of thing, that might make it difficult.  
5 This was not the case. The officers are not telling them what  
6 to do with the camera.

7 The individuals came to the police station with the camera.  
8 Adrian Rexus wanted them to see the pictures, wants to show  
9 them. He goes through them himself on the film with his own  
10 hands, so I don't think I see how that gets to point where he is  
11 an agent because he is showing the evidence to the officers.  
12 Similar to somebody who dropped off the bag of marijuana at the  
13 Police Department or the mother who dropped it off saying this  
14 is my son's marijuana. They have a right to look and see what  
15 that evidence is. They do not have to turn their eyes away from  
16 evidence of a crime dropped off at the Police Department.

17 Nothing further on that point.

18 MR. JOHNSTON: Just short rebuttal, Judge. The officer  
19 said when he got the camera, it was turned off. He could not  
20 see anything. This is not the same as having a bag of mari-  
21 juana. I mean, I think there might be a different argument if  
22 the bag of marijuana was in a bag that was closed or if I took  
23 Your Honor's suitcase and took it to the police. I don't know  
24 that I can just open it up. You know, if the police say what's  
25 in that suitcase, Mr. Johnston? And I said, well, even I don't

1 know. Let's open her up and I'll take a look with you. Then  
2 I'm acting as their agent. They're just getting me to do that  
3 which they would not be permitted to do.

4 But in the case, the officer testified the camera was turned  
5 over to him. He had it. He could not operate it. He gave it  
6 back to Adrian Rexus. So the officer had it and then he gave it  
7 back. When he gave it back, and with his questions of what are  
8 the contents of the camera, he is asking for help. When he does  
9 that, he is making Mr. Rexus his agent. And then Mr. Rexus  
10 operates the camera and shows the contents of the camera.

11 It's clearly a search. It's not like someone coming in and  
12 saying, Your Honor, I found this object. You look at the object  
13 and on its face you can see that it is evidence. I think this  
14 would be different if the young man had printed off the pictures  
15 of the camera and then brought them in and handed them over.  
16 Then on their face, there is nothing the police can do.

17 She's right, they don't have to avert their eyes. They look  
18 at the photograph, they see it. In this case, it's not a matter  
19 of just averting your eyes; when you look at the camera, you  
20 can't see anything. That's the status of the camera when the  
21 police first had it. Not asking them to avert their eyes. They  
22 looked at it. They can't see anything. It's turned off. Hey,  
23 kid, help me. I can't see anything.

24 So the kid helps. Now, we've got a search.

25 THE COURT: The evidence before the Court is that

1 apparently on a given date -- and I apologize I didn't catch the  
2 particular date that the three individuals appeared outside of  
3 the Kennewick Police Department -- three young men who  
4 apparently indicated to Officer Banner, who was apparently going  
5 off duty, that they wanted to report a crime. Officer Trevor  
6 Davis and Officer Canada were advised by Officer Banner to make  
7 contact with these individuals and did so.

8 Officer Davis's testimony establishes that apparently an  
9 individual by the name of Billy Watkins stepped forward.

10 Apparently, Adrian Rexus, the defendant's son, was somewhat  
11 behind Mr. Watkins and crying. Both Officer Davis and Officer  
12 Canada got some preliminary information from Mr. Billy Watkins  
13 as to why they were at the police station and what was contained  
14 on the camera. The officers, Davis and Canada, asked the indi-  
15 viduals to come into the Police Department, and that's apparent-  
16 ly when Officer Canada then joined in.

17 Once inside the station, Officer Davis asked additional  
18 questions, to include what was on this particular camera.  
19 Apparently, the camera, which is Exhibit A, was turned over to  
20 Officer Davis by Adrian Rexus. Officer Davis asked Adrian Rexus  
21 what was on the camera. According to Officer Davis, Adrian  
22 Rexus was emotional, crying, couldn't really talk. He explained  
23 what was on the camera. At that point in time, then, apparently  
24 the camera was given back to Adrian Rexus, who turned on the  
25 camera and scrolled through the pictures or scrolled through the

1 photos.

2 Officer Davis and Officer Canada with were both able to see  
3 pictures of a young female that included the young child holding  
4 what appeared to be an adult male penis. They also saw another  
5 picture that showed the adult penis going into this young girl's  
6 mouth. And also saw an adult male on another photo, mouth very  
7 close to the young girl's genitals.

8 So that is the testimony that is before the court and which  
9 is established by Officer Davis and Officer Canada.

10 Based on Adrian Rexus showing, scrolling through the photos,  
11 the officers advised Adrian Rexus that the camera would not be  
12 turned back over. That they would be holding onto the camera.  
13 None of the officers involved, including Detective McCalmant,  
14 had asked Adrian Rexus to bring this camera to the station. And  
15 at that point in time, no one took the camera and printed out  
16 the pictures that were viewed on the digital camera screen.

17 It was only after the camera, then, was retained by Officers  
18 Davis and Canada that it was apparently turned over to Sergeant  
19 Jessie Mill, who was essentially advised of the circumstances  
20 and Detective Randy McCalmant was called out and apparently  
21 arrived at the station and subsequently constructed the search  
22 warrant in this case.

23 In preparing for the search warrant, Sergeant Jessie Mill,  
24 who had possession of the camera, in fact scrolled through the  
25 photos on the digital camera and showed Detective McCalmant

1 those photos.

2 So the question in this case is whether there is an illegal  
3 search. From the Court's perspective, one of the things that  
4 the Court has to look to is what is reasonable under the circum-  
5 stances. It's clear from the testimony that's been established  
6 that, first of all, the officers in no way asked Mr. Adrian  
7 Rexus to bring this camera to the station. Adrian Rexus did  
8 this of his own accord. Apparently, came to the station with  
9 two other individuals. This camera, apparently given the story,  
10 did not belong to Adrian, but was apparently the family's  
11 camera. More specifically, in fact, had been used by his  
12 father. But Adrian Rexus clearly brought in the camera volun-  
13 tarily with no police interaction at this point in time what-  
14 soever.

15 The issue then becomes what about the fact that the officers  
16 in this case did not know how to turn on the camera? And do we  
17 have a search at that point in time?

18 Again, the Court has to look to what is reasonable under the  
19 circumstances. Apparently, Adrian Rexus is quite emotional.  
20 And although the police have some preliminary information from  
21 Billy Watkins as to why the three individuals are there, the  
22 police certainly don't have much information before them. Is it  
23 reasonable to expect that the police would get a search warrant  
24 at that point in time for the digital camera, to turn on the  
25 digital camera, review the digital camera and/or to hook up the

1 digital camera to software and then download the pictures?

2 From the Court's perspective, that would not be reason- able  
3 under these circumstances. First of all, the officers  
4 apparently had very limited information. Adrian Rexus, who is  
5 is the one with the primary information, was not able to  
6 emotionally explain to the officers specifically what was on the  
7 camera. Quite frankly, it is questionable whether the officers  
8 would have had enough, without scrolling through the photos on  
9 the camera, to get a search warrant at that point in time.

10 The officers, by simply asking Adrian to turn on the camera,  
11 from the Court's perspective, that does not equal a search which  
12 requires a search warrant or exception to the search warrant.  
13 So the Court will deny the defendant's motion to suppress on  
14 that point, that it is somehow an illegal search, when the  
15 officers simply asked the question of how do you turn the camera  
16 on? And when, in fact, it was Adrian Rexus who brought the  
17 camera in, who turned the camera in and turned it on and  
18 scrolled through the photos for the officers.

19 MR. JOHNSTON: Given that, really, I don't know if we  
20 need to discuss the second point. I would just like to be able  
21 to say that we have it on the order and we'll save that for  
22 appeal if an appellate division were to disagree with Your Honor  
23 on the first point.

24 If that's acceptable, then I think we could go on to our  
25 third contention here.

1 MS. TAYLOR: Your Honor, it's my understanding the  
2 third point was also based on the Court's ruling as to the first  
3 point, whether this was an illegal search. If I could have just  
4 a second?

5 What I was saying is our second point was if this was  
6 an illegal search, then one had to consider the balance of the  
7 affidavit. Being as how you said the search was not illegal, I  
8 would just like to be able to preserve that issue for appeal  
9 that otherwise one could still raise that later. And we would  
10 be on to our third point as to whether or not a couple of the  
11 items that were seized were properly seized under the warrant,  
12 given its validity at this point.

13 MS. TAYLOR: I'm sorry, I was confused, Your Honor.

14 As to the third point, that regards the microcassette. Your  
15 Honor, I would ask to take testimony from Detective Greg Castro  
16 as to microcassette.

17

18 GREG CASTRO

19 (Sworn or affirmed, was examined as follows:)

20 DIRECT EXAMINATION

21 BY MS. TAYLOR:

22 Q. Good afternoon.

23 A. Good afternoon.

24 Q. Would you please state your name?

25 A. My name is Greg Castro -- C-A-S-T-R-O.

1 Q. What is your occupation?

2 A. Police detective with the City of Kennewick.

3 Q. How long have you been a detective?

4 A. I've been a detective there for a year and a half.

5 Q. How long have you been with the Kennewick Police Department?

6 A. I've been with Kennewick for six years. And a California  
7 Deputy Sheriff for eleven years prior to that.

8 Q. Were you the detective assigned to this case involving Allen  
9 Rexus?

10 A. Yes.

11 Q. Were you involved in the execution of a search warrant at  
12 his residence?

13 A. Yes.

14 MS. TAYLOR: Your Honor, if I could approach to have an  
15 exhibit marked?

16 THE COURT: Yes.

17 THE CLERK: State's Identification B is marked.

18 MS. TAYLOR: If I could approach the witness?

19 THE COURT: Yes.

20 Q. (By Ms. Taylor, continuing) I'm handing up State's  
21 Identification B, do you recognize what's in that evidence bag?

22 A. Yes, I do.

23 Q. How do you recognize that?

24 A. This is -- There is actually two objects in the bag. One  
25 is the original object we found at Mr. Rexus's home on the day

1 of the search warrant. It is a broken mini-digital HD video  
2 cassette that we found in the back yard of the house.

3 The other object is a reconstructed video cassette of the  
4 exact same type and make that contains the tape that was found  
5 in the broken cassette. And this was reconstructed by Lockheed  
6 Martin in Richland.

7 MS. TAYLOR: Your Honor, the State would move for  
8 admission.

9 MR. JOHNSTON: No objection to that, Judge.

10 THE COURT: Exhibit B is admitted.

11 Q. (By Ms. Taylor, continuing) Just to clarify, there is kind  
12 of some broken pieces there of the cassette. The tape was  
13 actually in that broken cassette?

14 A. Yes, right. The mini-cassette had been broken in half and  
15 the tape had been severed about midpoint. We took the broken  
16 tape and broken cassette to Lockheed Martin. They spliced the  
17 tape together and reassembled it on a new cassette frame.

18 Q. And the broken one was found at the defendant's residence,  
19 is that correct?

20 A. Yes.

21 Q. I guess, would you describe that item? Or what is that  
22 item?

23 A. Well, this is -- It's a videotape cassette that goes to a  
24 digital movie camera.

25 Q. For those that are technology advanced -- or technology

1 challenged I should say, like me, you have a camera and tape is  
2 in the camera essentially --

3 A. Yes.

4 Q. -- and you can take the tape out of the camera?

5 A. Right. Yes.

6 Q. And in your job as a detective, have you dealt with those  
7 type of cassettes before or microcassettes before?

8 A. I don't think I had ever come across a digital cassette  
9 before.

10 Q. And after the cassette was fixed or put back together, was  
11 it able to be played in some sort of device?

12 A. Yes. Lockheed Martin put the image of the tape on both a  
13 DVD and also a large format VHS tape, as well as -- excuse me,  
14 and also some still photographs from individual frames onto DVD  
15 form.

16 Q. In order to view the actual cassette, itself, you would need  
17 one of the devices to put it in, is that correct?

18 A. Yes. I've been referring to it as a micro-cassette.

19 Q. Eight millimeter microcassette, is that essentially what  
20 that is?

21 A. Well, I don't know the millimeter size. I can just read  
22 what it says on the cassette. It says digital HD video, Sony,  
23 mini DVD, etcetera.

24 Q. From that tape, I guess, can you briefly describe what it  
25 shows?

1 A. The tape showed Alazay Godwin at about age five, would be my  
2 estimation, sitting on a bed. Initially clothed with a bath  
3 robe of some type. There is an adult male filming her, talking  
4 to her. Encourages her to -- Well, I won't say specifically  
5 because I can't recall the specific things that the man was  
6 encouraging her to do. But she ends up removing her bath robe  
7 and applying to her vagina a small vibrator or something similar  
8 to a vibrator.

9 Q. Were you able to recognize the male voice on that?

10 A. I believe the voice was Allen Rexus's voice.

11 Q. Was that microcassette capable of storing magnetic coding?

12 A. My understanding is, I'm certainly no expert, but the tape  
13 -- this type of tape, all audio videotape is magnetic in basis.

14 Q. Okay. And we have this other term, removable storage media.  
15 That's removable from the video camera, is that correct?

16 A. Exactly. As it appears here.

17 MS. TAYLOR: I don't have any more questions. Counsel  
18 may have some questions.

19

20

CROSS-EXAMINATION

21 BY MR. JOHNSTON:

22 Q. I don't know if you have your, Officer, if you have your  
23 evidence log handy with you there?

24 A. No, sir.

25 Q. If I can approach, I'll just show you the one I've got.

1 A. Sure.

2 Q. I want to ask you to tell me what item on the evidence log  
3 that is. I'm guessing it's number SW 15, but perhaps you could  
4 let me know?

5 A. Just give me a second to make sure.

6 Q. Sure.

7 A. It appears to be, but just let me make sure.  
8 Yes, I believe that where I've indicated broken eight  
9 millimeter in garbage can is this object here.

10 Q. Okay. So this would be SW 15, as best as we can determine  
11 at this moment?

12 A. Yes, sir.

13 Q. All right. Have you ever tried playing that on a computer?  
14 Do you know if that would be playable on the computer taken from  
15 Mr. Rexus's home?

16 A. This object?

17 Q. (Indicating). Yes, sir.

18 A. I don't think it can be played on a computer. It would need  
19 a camera or something similar to drive it. That would be my  
20 guess.

21 Q. So in your experience, it's not something, as far as you  
22 know, that would be played by a device that's a peripheral to a  
23 computer?

24 A. Right. My understanding is this can only be played with a  
25 camera and then onto some type of a screen.

1 Q. All right.

2 MR. JOHNSTON: That's all . Thank you.

3 MS. TAYLOR: Nothing further, Your Honor.

4 THE COURT: You may step down.

5 MS. TAYLOR: Your Honor, if I could approach?

6 THE COURT: Yes.

7 MS. TAYLOR: There are no further witnesses from the  
8 State as to this issue, Your Honor.

9 MR. JOHNSTON: And no witnesses here, Judge.

10 THE COURT: I'll hear argument.

11 MR. JOHNSTON: Just to get going here, if that's SW 15,  
12 I don't know if it can be played on a computer peripheral, but I  
13 listed several items that appeared to be at least identified on  
14 this evidence log and that's the only information I have as  
15 video tape film. I think I listed the particular objects in the  
16 brief here.

17 The State hasn't presented any evidence to the contrary  
18 regarding anything other than SW 15. We listed SW 1, 2, 8, 10,  
19 11, 15 and 23 as being items that did not appear to be within  
20 the scope of the warrant.

21 MS. TAYLOR: Your Honor, I can clarify. The film was  
22 developed. It didn't have anything of evidentiary value on any  
23 of those other items that didn't have anything of evidentiary  
24 value on it.

25 MR. JOHNSTON: So are we saying they are suppressed?

1 MS. TAYLOR: There is no basis to suppress them. The  
2 State won't be admitting them at trial.

3 MR. JOHNSTON: Well, I think we'll still ask for Your  
4 Honor's ruling on these matters. Even if the State says today  
5 they won't admit them, I don't know --

6 THE COURT: It's kind of hard for the Court to make a  
7 ruling on evidence that has not been presented to me. Appar-  
8 ently the Court's understanding is the State will not be offer-  
9 ing those particular pieces of evidence in at the trial. So now  
10 we do have a record that those items that have been specifically  
11 enumerated by you, Mr. Johnston, and agreed to by Miss Taylor  
12 that there is no items of evidentiary value on these particular  
13 pieces, so these items will not be used by the State, nor  
14 admitted into trial.

15 MR. JOHNSTON: That's fine. Thank you, Judge.

16 The other thing we have to do here today, Judge, is this is  
17 our pretrial date. So we need to deal with that, I presume, as  
18 well, before we conclude here.

19 THE COURT: Where are we going here with regards, then,  
20 to any other argument on SW 15?

21 MR. JOHNSTON: I want to say on SW 15, I'll rely on the  
22 officer. He says he doesn't think it can be played on the  
23 computer. And the search warrant talks about specifically --  
24 and I've got to get to the doggoned thing -- but it talks about  
25 items that were can played on computers.

1           That's not computer hardware. That's not computer software.  
2           It may be item C, records stored in a form of electronic or  
3           magnetic coding on computer media or on media capable of being  
4           read by a computer or computer related equipment.

5           I don't know that the State's given you evidence of what  
6           this can be read by and whether or not it can be read by  
7           computer related equipment. Given that, even though it's  
8           something, I don't know what it is -- it's something that says  
9           it's some form of digital object. It appears to me it may not  
10          be within the scope of the warrant -- just talking about SW 15.

11           THE COURT: Thank you, Mr. Johnston. Miss Taylor.

12           MS. TAYLOR: Your Honor, I've quoted a lot of language  
13          from the search warrant and the search warrant affidavit, but I  
14          think we really need to focus on what's in the search warrant  
15          itself. It does list in the search warrant a couple different  
16          things. Visual depictions of minors engaged in sexually  
17          explicit conduct. Any other recorders or recordings concerning  
18          secual activity with minors. Any video cameras as well as  
19          removal and storage media.

20           I think that is the one it falls into best is that it's  
21          removable storage media associated with the video camera. So  
22          while the search warrant does talk about evidence and computer  
23          evidence, it does not exclude video cameras and associated  
24          videotapes. Stated right there on the warrant at section 3-I,  
25          as well as it falling into those other categories that the State

1 listed.

2 THE COURT: Anything additional, Mr. Johnston?

3 MS. TAYLOR: Your Honor, as to item eleven it listed  
4 DVD and eight millimeter cassette. I said I wouldn't admit item  
5 11. That would refer to the 8 millimeter cassette and not the  
6 DVD.

7 You don't have any objection to the DVD?

8 MR. JOHNSTON: Well, if we're clarifying, I guess. I  
9 mean, the DVD, no, I think I would admit that if it's a DVD that  
10 is playable on a computer and would be within the scope of the  
11 warrant, Your Honor.

12 MS. TAYLOR: Nothing further from the State, Your  
13 Honor.

14 MR. JOHNSTON: Nothing to add here.

15 THE COURT: Miss Taylor, your specific reference to the  
16 removable storage media, where was that located?

17 MS. TAYLOR: Just a second, Your Honor.

18 THE COURT: Or are you referring specifically to the  
19 search warrant itself, as opposed to the affidavit? Those two  
20 items in the search warrant affidavit, as well as the search  
21 warrant were attached to Mr. Johnston's memorandum.

22 MS. TAYLOR: The last section on the very last page of  
23 the search warrant, Your Honor, it says any digital cameras,  
24 slash, video cameras, camcorders, web cameras presenting video  
25 over the internet and associated peripheral devices and,

1 software as well as associated and removable storage media. And  
2 then it gives some examples, such as flashcard, suitable for  
3 storing digital images, including to forensically recover such  
4 images as evidence.

5 So it is specifically listing any digital cameras, slash,  
6 video cameras, associated peripheral device, and software as well  
7 as associated removable storage media.

8 So that's where I think it really falls into is that  
9 category.

10 THE COURT: The Court has before it, then as Exhibit  
11 B, which has been identified by Detective Castro as the digital  
12 HD video. Again, one is broken. It's been reconstructed and  
13 apparently Exhibit B is an item that, according to Detective  
14 Castro's testimony, stores information on a magnetic basis. It  
15 is certainly something that is removable from the storage media  
16 such as a video camera or other camera.

17 This Exhibit, B as established by the testimony, can't  
18 necessarily be played via the computer as Mr. Johnston points  
19 out. However, the search warrant, specifically page three,  
20 subsection I, as signed by Judge Matheson, indicates that the  
21 officers are allowed to recover and obtain any digital cameras,  
22 video cameras, camcorders, web cameras presenting video over the  
23 internet and associated peripheral devices and software, as well  
24 as the associated removable storage media. And then giving  
25 examples.

1 From the Court's perspective, then, the Court finds that  
2 Exhibit B is removable storage media and, as such, the Court  
3 would deny the motion to suppress.

4 MR. JOHNSTON: At this point then, Judge, I guess we're  
5 on to the pretrial situation. Okay?

6 A couple of things. One is the defense has asked for a copy  
7 of this item B, the copy that was made on a DVD. I've never  
8 received it. If that's gonna be entered as evidence, I would  
9 like to receive it tomorrow so as to have sufficient time to  
10 look at it before our trial date on the 17th. So I would like  
11 the Court to order the prosecution, the State, to provide that  
12 to me by tomorrow.

13 THE COURT: Miss Taylor?

14 MS. TAYLOR: Your Honor, I have no objection with  
15 counsel viewing that disk at the police station. Detective  
16 Castro can arrange that tomorrow.

17 DETECTIVE CASTRO: Yes.

18 MR. JOHNSTON: I would like to have a copy of it. I've  
19 signed the protective order. I've received copies of other  
20 things. As I understand it, they have an additional copy of  
21 this. If they do, I would simply like to just have the copy so  
22 I can review it in my office and look at it as carefully as I  
23 may wish, more than once.

24 MS. TAYLOR: Your Honor, if he does sign a protection  
25 order, if there is one, we have no problem making a copy.

1 MR. JOHNSTON: I've already signed a protection order.

2 MS. TAYLOR: To that item?

3 MR. JOHNSTON: As to all the items in this case. A  
4 protection order where I signed up where all the materials  
5 related to this case would be held by me and returned for use  
6 after this. I think I could use that. I've received other  
7 things without signing individual protection orders so far, Your  
8 Honor.

9 MS. TAYLOR: I have no objection with that, Your Honor.

10 MR. JOHNSTON: The only other thing is I don't know if  
11 anything else has been recovered. I'm relying on the fact that  
12 the State's evidence is only going to consist of those things  
13 which have been supplied to me at this time, with the exception  
14 of the item that will be supplied to me tomorrow. And I just  
15 want to put that on the record.

16 I know what I've received. I have it. There may be other  
17 images that were on this computer. These other things haven't  
18 been provided to me, so I'm relying strictly on what I have as  
19 being that is what the evidence will be presented by the State,  
20 Judge. I just want to get that on the record.

21 If there is anything else brought in, I'm going to be  
22 objecting to it at that late date or certainly wanting a contin-  
23 uance later if something new pops up. So given that and given  
24 that I receive that other thing tomorrow, I would say we're  
25 ready to go. I'm sure if the State says I'll have it tomorrow,

1 I will. So we'll say ready for trial.

2 I think our trial date is on the 17th because the 16th is, I  
3 think we corrected that once before.

4 THE COURT: It's a holiday.

5 MS. TAYLOR: Your Honor, I note that Detective Shigeno  
6 has been working on going with seizing evidence from the  
7 computer. What I would like to do, I guess, is get in touch  
8 with counsel tomorrow and make sure he does have everything that  
9 Detective Shigeno has up to this point. I know he has found  
10 stuff continuously throughout this investigation.

11 The State did reserve to file additional charges, so we  
12 would ask to put this on next Thursday's docket for that Amended  
13 Information. I will actually FAX a copy of that to counsel,  
14 hopefully by tomorrow. If we could just enter the plea next  
15 Thursday.

16 MR. JOHNSTON: What time can we speak? I would like to  
17 schedule it now. If we're gonna review if I have everything,  
18 when would we do that?

19 MS. TAYLOR: I'll have to check my calendar. I don't  
20 even know what victim interviews I have. But I do have time  
21 tomorrow. I don't have a full schedule tomorrow.

22 MR. JOHNSTON: I'll depend on than that, then. Okay.

23 THE COURT: I will indicate, then, that the parties are  
24 essentially ready for trial on January 17th.

25 MR. JOHNSTON: Yes.

1 THE COURT: Mr. Rexus, sir, you do need to be back  
2 before the Court next Thursday, which is January 17th, at 8:30  
3 AM for the Amended Information, sir.

4 MR. JOHNSTON: Just reserve at this time, Judge. If  
5 anything comes up, if there is a bunch more stuff, we'll deal  
6 with it then.

7 THE COURT: Very good.

8 MR. JOHNSTON: Okay thank you, Your Honor.

9 THE COURT: Thank you.

10 (WHEREUPON, proceedings in this matter concluded,  
11 Court adjourned at 2:55 PM, end of transcript).

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STATE OF WASHINGTON )

: SS.

COUNTY OF BENTON )

I, Patricia L. Adams, Official Court Reporter, do hereby certify that I was present and reported in Stenotypy the proceedings had in the above-entitled cause; and

That said Stenotype notes have been reduced to typewritten form by me, with the attached pages representing a true and correct transcription; and

That I am certified to report Superior Court Proceedings in the State of Washington;

WHEREUPON, I have affixed my official signature this 26<sup>th</sup> day of May, 2006.

  
PATRICIA L. ADAMS  
Official Court Reporter  
Benton-Franklin Counties  
Superior Court

///

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

NO. 833273

Respondent,

vs.

DECLARATION OF SERVICE

ALLEN FREDERICK REXUS,

Petitioner.

I, **PAMELA BRADSHAW**, declare as follows:

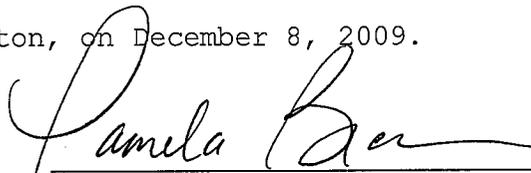
That I am over the age of 18 years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Respondent's Response to Mr. Rexus's Motion for Discretionary Review* and this *Declaration of Service* on December 8, 2009.

Allen Frederick Rexus  
#890703  
1313 N. 13<sup>th</sup> Avenue  
Walla Walla, WA 99362

- U.S. Regular Mail, Postage Prepaid
- Legal Messenger
- Facsimile

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

**EXECUTED** at Kennewick, Washington, on December 8, 2009.

  
 \_\_\_\_\_  
 PAMELA BRADSHAW