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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

IN THE MATTER OF THE PERSONAL RESTRAINT OF
ALLEN FREDRICK REXUS

83327-3

No. 275191
Benton County Superior Court No. 05-1-00711-1

REPLY TO THE STATE'S RESPONSE
TO PETITIONER'S PERSONAL RESTRAINT PETITION

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STATEMENT OF FACTS

The statement of facts is attached to the Petitioner's Personal Restraint Petition and the State's Response brief.

CAVEAT

Petitioner has the right to file a Reply brief to the State's Response to the Petitioner's Personal Restraint Petition. Petitioner strongly disagrees with the State's claim the Grounds One, Two, and Three have no merit, and that Ground Four is misstated. The trial court's finding of fact that allowed the evidence used to convict Allen Rexus to stand was predicated on the ex parte testimony of police, with the witness' statement untested through cross-examination. A second witness statement is provided here. Petitioner again requests legal counsel be appointed and an evidentiary hearing be granted.

STANDARD OF REVIEW

1. A Personal Restraint Petition alleging a constitutional error must show "actual and substantial prejudice", while non-constitutional error/allegations must show "a fundamental defect which inherently results in a complete miscarriage of justice". In re Capello, 106 Wn. App. 576, 24 P. 3d 1074 (2001).

2. "For purposes of admitting a witness statement as hearsay, the Standard of Review is the so-called abuse of discretion standard". ST. V. BACHE, 146 Wn. App. 897 (2008), citing ST. V. WILLIAMSON, 100 Wn. App. 248, 255, 996 P.2d 1097 (2000).

3. "Unchallenged findings of fact entered following a suppression hearing are verities on appeal". ST. V. GAINES, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). "We review a trial court's conclusions of law in an order pertaining to suppression of evidence de novo". ST. V. CARNEH, 153 Wn.2d 274, 281, 103 P.3d 743 (2004).

RELIEF REQUESTED

Petitioner asks for suppression of evidence and vacation of conviction and sentence under RAP 16.4 (c) (3), material facts that exist

which have not been presented and heard; which in the interest of justice require vacation of the conviction and sentence, and under RAP 16.4 (c) (4), a significant change in the law ... which is material to the conviction.

The Petitioner, acting Pro Se, may have failed to clearly state this in his Personal Restraint Petition, apologizes for any oversight and asks the court to allow this to substitute here.

ANSWERS TO THE ISSUES ADDRESSED BY THE STATE IN ITS RESPONSE BRIEF

1. GROUNDS ONE, TWO AND THREE

The State claims that Grounds One, Two and Three do not constitute grounds for remedy under RAP 16.4 (c). This is wrong. RAP 16.4 (c) (3) allows material facts that have not been previously presented and heard to be brought.

Adrian Rexus, who brought the evidence in question to police, has now furnished two statements. One in the PRP, and one here, with this Reply brief. Both contain facts not previously heard, and contradict the testimony of the police at the suppression hearing. Had Adrian been at the suppression hearing, as he was subpoenaed to be, and available for cross-examination, the facts contained in his statements could have been brought to light then, and a different outcome would have resulted.

The State claims that Adrian's first statement (in the PRP) does not corroborate the Petitioner's Statement of the Case. The only corroboration that matters is where Adrian took the camera from. Adrian's father, Allen Rexus, by placing his camera in his private bedroom, a part of the home that Adrian did not have shared access to, sought to preserve his affairs and the camera's contents as private, and expected it would remain so.

As supported by Adrian's second statement (included here), the camera was not the "family's" , as the police have said and the State has relied so heavily on in convicting and justifying the conviction of the Petitioner. Adrian did not use the camera unless it was with the

express permission of his father. See *ST. V. THOMPSON*, 151 Wn.2d 793 (2004), at 806 (Thompson's use of the boathouse was clearly dependent upon the permission of the owners, i.e. his parents). Adrian knew the camera was his father's possession, and that he had no shared rights to it. Also of importance, the "family" in this context consisted only of Adrian and his father. They were the only two who lived in the home. Adrian clearly did not have the right to consent to the search of the camera.

These are material facts that until now had not been presented and heard. In the interest of justice and case law, this requires suppression of the evidence and vacation of the conviction and sentence.

2. ARGUMENT ON DIRECT APPEAL

The State claims the Petitioner was able to argue Grounds One, Two and Three on direct appeal.

Technically, this is true. Generally though, issues not preserved for appeal on the trial record cannot be brought on direct appeal. *ST. V. MCFARLAND*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995) states that: "It is not enough that the defendant allege prejudice- actual prejudice must appear on the record". *MCFARLAND*, 127 Wn.2d at 334. Furthermore, in *ST. V. LYNN*, 67 Wn. App. 339, 344, 835 P.2d 251 (1992), the court said: "...permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders, and courts". *LYNN*, 67 Wn. App. at 344. The "hearsay", as it may be, was not objected to, and therefore not preserved for direct appeal. That is why it is brought here, in collateral attack.

Deciding not to argue these issues under RAP 2.5 (a) was a tactical decision by Petitioner's direct appeal attorney, Janet Gemberling, of Spokane, Washington.

3. INEFFECTIVE ASSISTANCE OF COUNSEL, HEARSAY, AND CONFRONTATION

The State claims that the Petitioner's allegations about his trial attorney being ineffective and hearsay being admitted have nothing to

do with ... facts not previously heard ...", and "his conviction had nothing to do with statements made in a pre-trial hearing".

A. ADRIAN'S STATEMENTS TO POLICE

Adrian's statements to police were testimonial. There was no determination made that the statements were hearsay. These statements were taken in the course of a police interrogation, and introduced at the suppression hearing to prove the fact of the matter asserted, which was that Adrian had the right to consent to the search of the camera. Based on these statements, the evidence was allowed to stand, and was used to convict Allen Rexus. Therefore, his statements, given into evidence at the suppression hearing, had everything to do with the Petitioner's conviction. Adrian's two written statements herein are facts not previously heard.

The admission of hearsay may be a moot point now that there is written statements that contradict the testimony of police, but key procedural errors were made at the suppression hearing and deserve notation for the record.

For a statement to be admitted as hearsay, a determination must first be made. In *ST. V. BACHE*, the court cites *ST. V. WILLIAMSON*, 100 Wn.App., in clarifying what must be done. "The trial judge must have first made a preliminary finding of fact under ER 104 (a) that the (victim, witness) was still under the influence of an event at the time the statements were made before the judge could admit the evidence as an excited utterance" under ER 803 (a) (2). *WILLIAMSON*, 100 Wn. App. at 257.

Then, a determination whether a statement is testimonial for Sixth Amendment purposes should have been done, as discussed in *ST. V. MASON*, 127 Wn. App. 554, 126 P.3d 34 (2005), and laid out on page 13 of the Personal Restraint Petition.

The State also claims that the statements would be admissible under ER 803 (a) (3), effect upon the listener, and cites *ST. V. REDMOND*, 150 Wn.2d 489, 78 P.3d 1001 (2003). However, this case

discusses ER 803 (a) (4), which involves hearsay in medical records, and stems from a fight in a high school parking lot that involves 2nd degree assault. This is completely unrelated to this case. For the State to conclude, as it did in the Response, that any objection to hearsay would have been overruled and then admitted as an excited utterance is speculative at best.

In *ST. V. OHLSON*, 131 Wn. App. 71, 125 P.3d 990 (2005), the court said: Three requirements must be met for a statement to qualify as an excited utterance: 1) A startling event or condition must have occurred, 2) the statement must have been made while the declarant was under the stress of excitement caused by the startling event or condition, and 3) the statement must relate to the startling event or condition". *OHLSON*, 131 Wn. App. at 76-77 (citing *ST. V. CHAPIN*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992)).

Then, in *ST. V. OHLSON*, 162 Wn.2d 1 (2007), the court said: We can "conceive of a hybrid situation where a predominately excited utterance might contain testimonial evidence". *OHLSON*, 131 Wn. App. at 84. "We therefore reverse the court of appeals decision to the extent that it announced a per se rule that excited utterances cannot be testimonial". *OHLSON*, 162 Wn.2d at 17. In ruling this, our high court has determined that "hybrid" situations can exist where an excited utterance can contain testimonial evidence. This is just that situation.

Even if Adrian's statements had been ruled an "excited utterance", which to date it has not, agreeing with a suggestion by police that the camera was used freely by the "family" was unrelated to Adrian's "condition" at the time. It was (if it happened at all) simply an acknowledgement of the status of an object, and therefore does not meet the standard of the third condition of the qualification of hearsay.

The issue here has always been the assertion by the State that

at some point during the interrogation, the term "family camera" came up. Adrian says he never said this, and testimony by Officer Davis, the one who took Adrian's written statement, at the suppression hearing, corroborates this (See Clerk's Papers at 13).

In its Response, the State says "testimony at the suppression hearing was that Adrian Rexus could barely speak" (Response at 7). Apparently, something was clear enough for the police to surmise that the camera was the "family's" and testify to that in court.

Under direct questioning from Deputy Prosecutor Tamara Taylor at the suppression hearing, she asks Officer Davis: "Did Adrian Rexus ever indicate who the camera belonged to?". Officer Davis replies: "He never told me. He said it was the family camera. He never specifically told me that it was his, or he never told me it was his dad's or anybody's specific, no. He just said it was a camera at our house, or in my house" (CP at 13). So. "He never told me" but "he told me it was the family camera" followed by "he never told me it was ... anybody's specific, no". It cannot be both. With such a profound contradiction in open court, how can a court rightfully decide this issue without hearing both sides? How can a police officer's testimony be taken as the truth when he contradicts himself while trying to justify a warrantless search?

Keep in mind that 8 months had passed between the actual incident and the suppression hearing. It appears the State used this time to come up with a way to justify a warrantless search, but stumbled woefully in its delivery.

Adrian never told police the camera was the family's, and the State knew that. This was a deliberate violation of the Petitioner's rights and his conviction was the result of a fabricated justification of a warrantless search.

B. CONDUCT OF TRIAL ATTORNEY

The State claims that the failure of the trial attorney to object to the absence of subpoenaed witness Adrian Rexus, or to call him for cross-examination was trial tactics.

First of all, Adrian was available, he just chose not to show.

In fact, he talked to the Petitioner's mother outside the courthouse after the suppression hearing. Just because someone who is subpoenaed to testify does not show up does not render them "unavailable". Yet, no determination of this was done either. This is argued on page 14 of the PRP. Johnston was just not astute enough to recognize this.

Secondly, while it may have been a legitimate tactic for Johnston not to call Adrian for fear that it could have refuted his main defense issue of Adrian acting as a state agent, Johnston failed to develop a secondary line of defense. And that would be that Adrian did not have the right to consent to the search. Calling Adrian for cross-examination could have reinforced the state's position that he was not acting as a state agent, but it also could have established other grounds. A lay person could have concluded the "state actor" defense probably would not have worked, especially without calling the person involved to cross-examine him about his version of events.

Failure to establish additional lines of defense when they are available is enough to establish ineffective assistance of counsel. In *U.S. v. SPAN*, 75 F.3d 1383 (9th Cir. 1996), the court said: "... the fact that counsel did not request an excessive force instruction, or lay the foundation for one, does not necessarily mean this was a strategic decision", and, quoting *KELLOGG v. SCURR*, 741 F.2d 1099, 1102 (8th Cir. 1984), at 1099, "'The label of 'trial strategy' does not automatically immunize an attorney's performance from Sixth Amendment challenges'". Additionally, the court said: "We have a hard time seeing what kind of strategy, save an ineffective one, would lead a lawyer to deliberately omit his client's only defense, a defense that had a high likelihood of success". *SPAN*, 75 F.3d at 1389-1390.

The same court, in *SEIDEL v. MERKLE*, 146 F.3d 750 (9th Cir. 1998), said: "There is no evidence that trial counsel's failure

to present a potentially meritorious defense was strategy, rather than the neglect" and "Counsel's disregard for conspicuous pieces of evidence that pointed to a potentially fruitful trial strategy cannot be described as anything short of defective representation". MERKLE, 146 F.3d at 753-756.

In RIOS V. ROCHA, 299 F.Supp. 796 (9th Cir. 2002), the court said: "The failure to investigate is especially egregious when a defense attorney fails to consider exculpatory evidence". See LORD V. WOOD, 184 F.3d 1083, 1093 (9th Cir. 1999) (A lawyer who fails to adequately investigate, and introduce into evidence, information that demonstrates his client's factual innocence, or that raises doubts as to that question to undermine confidence in the verdict, renders deficient performance). RIOS, 299 F.Supp. at 805.

Our own courts have weighed in on this issue. In ST. V. BYRD, 30 Wn. App. 795 (1981), the court concluded: "... the presumption of counsel's competence can be overcome by showing, among other things, that counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial". BYRD, 30 Wn. App. at 799. In In re Brown, 143 Wn.2d 431, 21 P.3d 687 (2001), the court said: "A decision not to cross-examine a witness is often tactical ... because it may not provide evidence useful to the defense". BROWN, 143 Wn.2d at 451. Here, however, calling the witness would have yielded very valuable information for the defense.

To call Johnston's decisions not to object to Adrian's statements to police being admitted with no determination of their status, or not to call him for cross-examination "tactical decisions" or anything more than ineffectiveness would be a fundamental miscarriage of justice. Cross-examining Adrian would have yielded information that would have led to the evidence being suppressed, and a different outcome would have been the result.

Johnston simply was not astute enough to know what to do. Johnston at the time was a lawyer without much experience, and told Rexus "Your case is the first one like it I've ever done". Now faced with evidence he could find no way to refute, Johnston told Rexus, after the suppression hearing, which also doubled as pre-trial, that "You should just agree to a stipulated facts trial and get this into the appeals court, because you can't win here". On Johnston's advice, this is what the Petitioner did.

Most suppression hearings that have factual disputes allow testimony from both sides to be heard so a fair determination can be made, and to ensure further mistakes are not made at trial. See CALIFORNIA V. GREEN, 399 U.S., 90 S.Ct. 1930, 26 L.Ed. 489 (1970), and ST. V. BROWNING, 67 Wn. App. 93, 834 P.2d 84 (1992) as two prime examples.

It is important that both sides be heard in open court to clarify facts and ensure fairness. If not for the suppression court's disregard for established methods of procedure and defense attorney Richard Johnston's ineffectiveness, we would not be here today.

4. PRIVATE SEARCH DOCTRINE AND CONSENT TO SEARCH

The State claims that the Petitioner's reliance on ST. V. EISFELDT, 163 Wn.2d 628 (2008) is misplaced. The State is depending on a narrow interpretation of this case to prove its point. The ruling in EISFELDT has, among other things, spelled out two key provisions: "... Article 1 § 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not", at 634, and "The individual's privacy interest protected by Article 1 § 7 survives the exposure that occurs when it is intruded upon by a private actor", at 638.

In ST. V. THOMPSON, 151 Wn.2d 793 (2004), a case that discusses at length the validity of the consent to search, the Washington Supreme Court said: "I find this (failure by police to seek a

warrant beforehand) to be an abdication of our judicial duty to uphold privacy over law enforcement convenience, individual liberty over investigative expediency, and independence over government oppression ... The warrant requirement may be an inconvenience to the state, but it is a necessary and constitutionally required inconvenience that the judiciary must fervently protect, as affirmed by the U.S. Supreme Court over 30 years ago: '[I]t may be that it is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing that way, namely by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen against any encroachments thereon'". THOMPSON, 151 Wn.2d at 822, quoting COOLIDGE V. NEW HAMPSHIRE, 403 U.S. 443, 454 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). "Every inch this court yields to government encroachment is one more inch of privacy and liberty the Washington citizens must yield in consequence". THOMPSON, 151 Wn.2d at 823.

A. CONSENT TO SEARCH

The State claims Adrian had the authority to consent to the search of the camera, and cites ST. V. CANTRELL, 124 Wn.2d 183, 875 P.2d 1208 (1994). Cantrell is a vehicle search, which are inherently different than other searches. Both parties consented to the search, one in writing, but the conviction was overturned because of illegal detention following a legal traffic stop. This does not apply to this case, either.

This issue was decided on direct appeal, upheld by the private

search doctrine. Under RAP 16.4 (c) (4), "a significant change in the law", Petitioner brings this issue again because of the ruling in EISFELDT that renders the private search doctrine inapplicable under Article 1 § 7 of the Washington State Constitution, decided three months after the direct appeal ruling in this case.

The private party in EISFELDT was a repairman who looked inside a bag containing contraband in an attached garage of the house where he was working. He then called police and invited them into the garage to look in the bag, which police did, without a warrant. The repairman clearly did not have the right to allow police to search the house and bag of contraband, because neither was his to authorize.

Adrian did not have any possessory or ownership interest in the camera, just as the repairman did not have any possessory or ownership interest in the house or contraband. Adrian says in his second statement (included here) that he never actually said the camera was the "family's", and this is backed up by Officer Davis in his testimony, and is the truth. As stated earlier, the "family" in this context consisted only of Adrian and his father Allen.

On the two different occasions when Adrian used his father's camera, it was with his father's express permission. It was loaned for use in the same way that one would loan use of an object to a friend or relative. The loaned object is still the property of the person who owns it. The act of loaning an object does not define "joint control and mutual use for most purposes" that would allow the person borrowing the object the authorization or right to allow police to search it. ST. V. THOMPSON further illustrates this relationship: "... as testimony proved, he (Thompson) neither occupied the boathouse (the object searched) nor was it available to him for his exclusive use. Thompson's use of the boathouse was clearly dependent upon the permission of the owners, i.e. his parents". THOMPSON, 151 Wn.2d at 806. Adrian did not have the right to authorize the search of an object that was not his, regardless of where this search occurred.

B. ACTIVATING THE CAMERA

The State claims that turning on the camera did not constitute a search. This is wrong.

It has also been ruled that Adrian was not acting at the behest of the State. Yet the officer asked Adrian to operate the camera for him, in effect, to open a closed container for him because he did not know how to do so, so that he can view what's inside. The outward appearance of a digital camera or computer differs as to what is inside of it.

ST. V. EVANS, 159 Wn.2d 406 (2007), quotes ST. V. KEALY, 80 Wn. App. 162, 168, 907 P.2d 319 (1995), which holds: "Purses, briefcases, and luggage constitute traditional repositories of personal belongings protected under the Fourth Amendment", citing ARKANSAS V. SANDERS, 442 U.S. 753, 762, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), ST. V. EVANS, 159 Wn.2d at 409.

When you open a closed container and view what's inside, whether you are a private citizen or the police, you are conducting a search. When the government views what's inside, it is a search subject to the warrant requirement, regardless if someone is holding open the purse, briefcase, piece of luggage, or bag, for you. If this had been a closed briefcase brought in by someone who did not own it or have "joint control or mutual use for most purposes", and that person opened it at the request of police, the police then viewed its contents without a warrant while the person moved the contents around so the police could better see what's inside, and then the police obtained a warrant based on what they saw, to further search it, and subsequently a residence, this discussion would not be taking place. The search would have been ruled illegal, and it and everything that stemmed from it would be suppressed.

If the repairman in EISFELDT had held the bag of contraband open so the police could look inside it, would that case have had a different outcome? Very likely not. This claim by the State should be held without merit.

C. PRIVACY INTEREST

The State claims the "privacy interest herein was activating a digital camera" (Response at 9). It is much more than that.

As laid out in the Petitioner's PRP on pages 16 and 17, other jurisdictions have ruled that electronic media storage devices have the same protections as closed containers. See U.S. V. CHAN, 830 F.Supp.2d 531, 533 (D. CAL. 1993), and U.S. V. BARTH, 26 F.Supp. 2d 929, 936 (W.D. TEXAS 1998). A digital camera is the same as a closed container under these Federal rulings.

Article 1 § 7 recognizes purses, briefcases, luggage, and even eyeglass cases (See ST. V. RISON, 116 Wn. App. 955, 69 P.3d 362 (2003)), among other things, as closed containers afforded the full protection of the warrant requirement. It is not a stretch to adopt electronic media storage into this group as "traditional repositories of personal belongings" for Washington State. And in light of recent rulings by the Washington State Supreme Court that have given increased privacy protections to its citizens (See EISFELDT, ST. V. GRANDE, 164 Wn.2d 135 (2008)), the explosive proliferation and ownership of personal electronic devices and computers deserve this protection. It should be a significant factor that this has already been done elsewhere.

This was more than just "activating a camera", it was opening a closed container and viewing its contents without a warrant, and should be recognized as such.

D. CONTROL OF CAMERA

Lastly, the State claims "the police did not seize control of the camera, in EISFELDT they entered the residence" (Response at 9). This distinction is misplaced.

The police in EISFELDT did enter the residence, and seized control of a bag to look inside of it. After viewing the contents, the police left the bag where it was and obtained a telephonic warrant. Here, after viewing the pictures, the police seized the camera and used it to obtain a warrant. Any seizure that results from an unconstitutional search is illegal. This claim also has no merit.

CONCLUSION

Adrian Rexus' statements to police have not been ruled hearsay. Even if they were, agreeing with a suggestion by police (if that is even what happened) that the camera was the "family's" had nothing to do with his "condition" at the time, and thus the status of the camera would be a testimonial statement subject to the Sixth Amendment guarantee of cross-examination.

Adrian never told the police the camera was the "family's", and this is corroborated by Officer Davis' contradicting testimony at the suppression hearing.

In addition, the private search doctrine does not apply under Article 1 § 7 of the Washington State Constitution. The police should have obtained a warrant before looking at the pictures on the camera. Several different police officers looked through the contents of the camera before a warrant was ever issued.

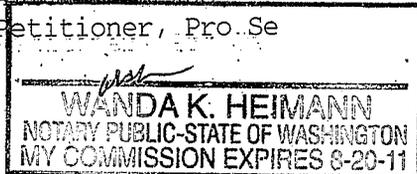
The Court ignored established modes of legal procedure and contradiction of police testimony at the suppression hearing.

The fabricated justification of a warrantless search by police, ineffective assistance of counsel, failure to follow established legal procedure, contradiction of police testimony, and denial of the right to confront adverse witnesses resulted in actual and substantial prejudice and a complete miscarriage of justice.

The State's claims in the Response should be held without merit, the Petition should be accepted, all evidence should be suppressed and the Petitioner's conviction overturned.

Allen F. Rexus

Allen F. Rexus
Petitioner, Pro. Se



Wanda K. Heimann

Notary Public in and for
the State of Washington,
residing in Walla Walla, Wa.
My Commission expires: 8/20/11

Subscribed and sworn before me
this 3rd day of February, 2009.

Second written statement
of Adrian Rexus

December 17, 2008

This is a second statement from me, Adrian Rexus, about the events of May 20-21, 2005, that led to the arrest of my father, Allen Rexus. It's true that I took the camera to the police, and helped them search it at their request. It was almost 4 years ago, so I don't remember exactly how everything went, but I was pretty emotional at times.

At some point when the police were questioning me, they suggested that the camera was the family's. I may have nodded yes, I don't quite remember. But, this is not the truth. The family at our house was only my dad and me, and I did not actually say to the police that the camera was the family's as they have said I said. It was my dad's, and that was understood in our house. He mainly kept it in his office or bedroom, and I was allowed to use it on occasion with his permission. I didn't use it otherwise. I also didn't realize it at the time that the police should probably have had a warrant before they looked through the pictures on the camera.

ADRIAN REXUS

Adrian Rexus

Notary for the
State of Washington



Danelle Campbell
notary for Sterling Savings
Kennewick, Wa.

Letter from Lila Silverstein
of the Washington Appellate Project

If counsel is appointed, Lila Silverstein has expressed an interest in representing the Petitioner. In the event of appointment of counsel, Petitioner requests Ms. Silverstein be appointed to represent Petitioner in this case.

WASHINGTON APPELLATE PROJECT

MELBOURNE TOWER • SUITE 701 • 1511 THIRD AVENUE • SEATTLE, WASHINGTON 98101

TOLL-FREE 1-877-587-2711 • ☎ (206) 587-2711 • ☎ (206) 587-2710

WWW.WASHAPP.ORG

January 13, 2009

Allen Rexus
DOC 890703
Adams, C-2121
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

Re: No. 275192 PRP of Allen Frederick Rexus

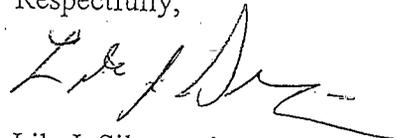
Dear Mr. Rexus:

I received your letter requesting assistance with your personal restraint petition. I would be happy to represent you if the court appoints counsel following its initial screening of your case. The issue is interesting, and you are correct that our supreme court rejected the private search doctrine in State v. Eisfeldt.

Based on my quick review of your case, it appears that it will come down to whether your son had the authority to consent to a search of the camera. It is impossible for me to evaluate that claim without the full transcript of the suppression hearing and the trial court's written findings. If we are appointed, I will receive the full record and will read it thoroughly.

Best of luck with your petition.

Respectfully,



Lila J. Silverstein
Attorney at Law
Washington Appellate Project

MOTION FOR DEFAULT JUDGEMENT
OF STATE'S RESPONSE

IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON
DIVISION III

| | | |
|---------------------|---|-------------------------|
| |) | No. 275191 |
| |) | |
| Allen F. Rexus |) | |
| |) | |
| Petitioner |) | PETITIONER'S MOTION AND |
| |) | |
| V. |) | AFFIDAVIT FOR DEFAULT |
| |) | |
| State of Washington |) | |
| |) | |
| Respondent |) | |

MOTION

Comes now the Petitioner in the above named, moves the Court for and Order:

1. RELIEF REQUESTED. The Court is requested to grant an order adjudging the above-named Petitioner. Petitioner asks that the Response brief of the Prosecuting Attorney in the above cited case be held in Default for failure to reply within the time limits set by RAP 16.9 and RAP 16.10 (b). Petitioner asks that the above mentioned brief of the Respondent be ordered to be in Default and sanctions be imposed of Order Prohibiting Late Filing of Respondent's brief.

2. Statement of Facts. The facts material to the Court's decision are succinctly stated as:

Said Respondent was duly and legally served with the process in this brief of Petitioner and more than the required period has elapsed since such service. Said Respondent has since filed and answered against the the brief on file herein. The basis for revenue in this court is: _____

3. Statement of issues. The Court is requested to rule on the following issue of law: Whether sufficient grounds exist to grant an Order of Default.

4. Evidence Relied upon. The documents and statements relied upon are particularly described as:

4.2 Affidavit of Service

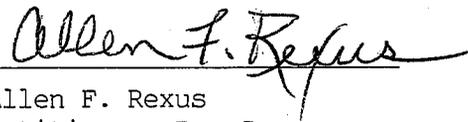
4.3 Files and Record Herein

4.4 Affidavit accompanying this Motion

5. Authority. Legal authorities relied upon are succinctly listed as:

RAP 16.9: "The Respondent must serve and file a Response within 60 days after the Petition is served, unless the time is extended by the Commissioner or Clerk for good cause shown...".

RAP 16.10 (b): "Respondent must file an answering brief within the time the response must be filed".



Allen F. Rexus
Petitioner, Pro Se

Allen Rexus
DOC # 890703
Adams, C-2121
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, Washington
99362

AFFIDAVIT

State of Washington
County of Walla Walla

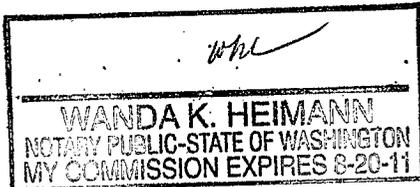
I, Allen F. Rexus, being duly sworn deposes and says:
I am the Petitioner Pro Se in the above-entitled action; that the
above-named Respondent was duly and legally served with the Personal
Restraint Petition on the 5th day of November, 2008, at Kennewick, Wa.,
as appears by due proof of such service on file herein; that more than
60 days have elapsed since the making and completion of said service.
Said Respondent has since answered the Personal Restraint Petition on
file herein, albeit 3 days late, and said Respondent is now in Default
in this action.

Allen F. Rexus

Petitioner Pro Se
Allen F. Rexus

Wanda K. Heimann
Notary Public in and for
the State of Washington,
residing in Walla Walla, Wa.
My Commission expires: *8/20/11*

Subscribed and sworn before
me this *3rd* day of *February*,
2009.



Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

*The Court of Appeals
of the
State of Washington
Division III*

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
<http://www.courts.wa.gov/courts>



November 5, 2008

Andrew Kelvin Miller
Benton County Prosecutors Office
7122 W Okanogan Pl Bldg A
Kennewick, WA 99336-2359

Allen Frederick Rexus
#890703
1313 N 13th Ave
Walla Walla, WA 99362

CASE # 275191
Personal Restraint Petition of Allen Frederick Rexus
BENTON COUNTY SUPERIOR COURT No. 051007111

Dear Counsel and Mr. Rexus:

A personal restraint petition was filed on October 27, 2008 and has been assigned case number 275191. Proof of service of a copy of the petition on respondent was filed. All correspondence and filings shall refer to this appellate court case number.

The following notation ruling was entered:

November 5, 2008
Filing fee waived. Response requested from the Benton County
Prosecutor.
Renee S. Townsley
Clerk

The response to the petition is due 60 days from the date hereof. See RAP 16.9. Authenticated documents relevant to the issue(s) raised in the petition must be attached to the response. Respondent must file the response in duplicate and serve a copy on petitioner. Proof of service should be filed with the response. Extensions will be granted only in extraordinary circumstances where the interest of justice so require.

Petitioner's reply is due within 30 days of service of the response. Upon filing of the reply, or after expiration of the 30 days, the matter will be referred to the Chief Judge for consideration without oral argument.

Petitioner shall keep the clerk of this Court advised of any address changes.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:slh

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In the Matter of the Personal
Restraint of:

NO. 275191

ALLEN FREDERICK REXUS,

Petitioner.

DECLARATION OF SERVICE

I, PAMELA BRADSHAW, declare as follows:

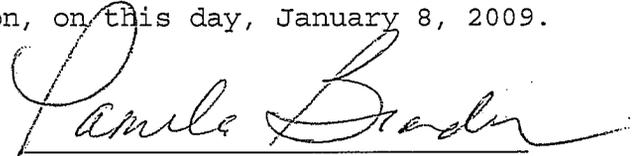
That I am over the age of 18 years, not a party to this action,
and competent to be a witness herein. That I, as a legal assistant in
the office of the Benton County Prosecuting Attorney, served in the
manner indicated below, a true and correct copy of the *Response to
Personal Restraint Petition* on this day, January 8, 2009.

Allen Frederick Rexus
#890703
1313 N 13th Ave
Walla Walla WA 99362

- U.S. Regular Mail, Postage
Prepaid
- Legal Messenger
- Overnight Express

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 this day, January 8, 2009.


PAMELA BRADSHAW

Excerpts from the Suppression Hearing
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, |) | |
| |) | VERBATIM REPORT |
| V. |) | 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 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

MAILING DECLARATION

I, Allen F. Rexus, declare that on February 3rd, 2009, I deposited the foregoing document:

A Reply brief to the State's Response
to Petitioner's Personal Restraint
Petition filed in Division III of the
State Court of Appeals of Washington
State.

or a copy thereof, in the internal mail system of Washington
State Penitentiary, 1313 North 13th Avenue, Walla Walla, Washing-
ton, 99362, and made arrangements for postage, addressed to:

The Court of Appeals
Division III
North 500 Cedar
P.O. Box 2159
Spokane, Washington
99210-2159

Attention: Renee Townsley
Clerk of the Court

Parties to be served:

Terry Bloor,
Deputy Prosecuting Attorney

Andrew Miller,
Prosecuting Attorney

Benton County Courthouse
7122 W. Okanogan Place, Bldg. A
Kennewick, Wa.
99336

Wanda K. Heimann

Notary Public in and
for the State of
Washington, residing
in Walla Walla, Wa

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

Allen F. Rexus
Allen F. Rexus, Petitioner Pro Se

