Supreme Court No. 92792-8

IN THE SUPREME COURT OF WASHINGTON STATE

STEVEN P. KOZOL,

Plaintiff/Petitioner,

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Defendant/Respondent.

PETITIONER'S RAP 13.4(d) REPLY TO ISSUES RAISED IN RESPONDENT'S ANSWER

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I. ISSUES ADDRESSED ON REPLY

In its Answer, the Department asserts that the Court should not accept review of the issues raised in Mr. Kozol's Petition, but should instead accept review on the following issues:

(1) Whether the boilerplate back page of the grievance form was an identifiable record responsive to Kozol's requst for inmate grievance records; and

(2) Whether the Department conducted an adequate search for the grievance record it was initially unable to locate.

Pursuant to RAP 13.4(d), Mr. Kozol replies to these issues that were raised in Respondent's Answer.

II. FACTS RELEVANT TO REPLY

Petitioner Kozol is bringing a motion before this Court to strike from Respondent's Answer all reference to e-mail evidence appearing at Clerk's Papers 477-528. Because Respondent relies heavily on this inadmissible evidence in its counterstatement of facts, Petitioner Kozol reasserts the uncontroverted facts set forth in the Petition for Review.

III. REASONS WHY REVIEW SHOULD BE ACCEPTED OF RESPONDENT'S PRESENTED ISSUES

A. The Second/Back Page of Each Requested Record Was an Identifiable Record Responsive to Kozol's Requests for the Original Grievance Forms, and Did not Contain Only "Boilerplate Instructions."

In its Answer to Mr. Kozol's Petition, the Department asks the Court to accept review and to determine that the withheld

second pages of each of the 31 specifically requested original grievance forms was not responsive due to the second pages allegedly containing only "boilerplate instructions." Answer, at 2. The Court should accept review of this case, and should hold that the Department's position and the published opinion below is both legally and factually incorrect.

A request under the PRA must be for an "identifiable public record." Hangartner v. City of Seattle, 151 Wn.2d 439, 447-48, 90 P.3d 26 (2004). "[A] party seeking documents must, at a minimum [(1)] provide notice that the request is made pursuant to the PRA, and [(2)] identify the documents with reasonable clarity to allow the agency to locate them. Id., at 447. Each of Mr. Kozol's requests sought, by separate sentence, "the original complaint form." CP 42-71. The Department repeatedly confirmed that Mr. Kozol's requests each sought the original complaint/grievance form. CP 72-150. The Department did not seek clarification. "[If] the agency was unclear about what was requested, it was required to seek clarification." Neighborhood Alliance of Spokane v. Spokane County, 172 Wn.2d 702, 727, 261 P.3d 119 (2011).

The Department admitted that it knew each original complaint/grievance form is comprised of two pages. CP 228. Viewing the facts de novo, in the light most favorable to Mr. Kozol, there is no question that the requests for each original complaint/grievance form "g[ave] a reasonable description enabling

the government employee to locate the requested record." Beal v. City of Seattle, 150 Wn.App. 865, 872, 209 P.3d 872 (2009).

The Department stated that when scanning the original grievance documents into its secondary computer files, it only scanned the first page of each original grievance, and elected to not scan the second pages.[1] The Department also stated that it knew the original (two page) paper grievance forms were retained in the primary paper filing system. CP 152-153. These facts, combined with its repeated confirmation that each request sought the "original" grievance/complaint form, makes clear that each request for the complete "original complaint form" was a request for an identifiable record.

To excuse its failure to produce each requested original document in its entirety, the Department argues that because it did not consider the second pages responsive, it was not required to search for them. In turn, its argument that the second pages were not responsive is based exclusively upon its assertion that the second pages are never used in the grievance process and only contain "boilerplate instructions." But as a threshold issue, these arguments are based exclusively upon a lone declaration that establishes nothing whatsoever probative to this issue.

On summary judgment in a PRA action regarding the adequacy of the agency's search for records, the agency bears the burden,

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[1] This is refuted by the Department's production of over 1,000 separate second pages of original grievances from its computer database. CP 259-271.

beyond material doubt, of showing its search was adequate. To do so, the agency should present "reasonably detailed, nonconclusory affidavits submitted in good faith. These should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive records were searched." Neighborhood Alliance, 172 Wn.2d at 721.

The Department presented no evidence on summary judgment to establish how any of the searches were conducted for the 31 different "original complaint forms" Mr. Kozol specifically requested. In fact, the Department presented no evidence on summary judgment to establish how any of the searches were conducted for 30 of the 31 requests in general.[2] The Declaration of Lee Young is not probative to any material fact pertaining to these 30 requests. First, Ms. Young, at best, could only testify to facts regarding the two (2) requested records maintained at the Washington State Penitentiary (WSP), as she did not declare that she worked elsewhere at either Airway Heights Corrections Center (AHCC) or Stafford Creek Corrections Center (SCCC), nor that she handled/processed/searched for any of those twenty-nine (29) original inmate grievances. CP 152-153. With twenty-nine records being at these other different prisons (CP 253-256) Ms. Young did not establish knowledge of activities pertaining to these original records, nor the searches for them.

[2] The inadequacy of the search in request no. PDU-19880 is addressed elsewhere in this brief.

Second, even in regard to the one prison where she did work, Ms. Young does not even establish that she personally processed/scanned or searched for either of the two (2) original grievance forms located at the Washington State Penitentiary. Ms. Young generally asserts that the second pages of original grievances were not used in agency business because the Department does not scan the entire original paper document into its secondary computer database. However, she merely offered purely speculative and conclusory evidence, stating in the abstract: "It would not be scanned," "Normally, this should occur," and "the hard paper copies may be retained longer." CP 152-153. Ms. Young's declaration is completely conclusory in that she only attests in the abstract to what she may have done in the past with other grievances, or what might occur in the future with other original grievance forms.

This deficiency is fatal, as it meets none of the requirements stated in Neighborhood Alliance. The declaration does not identify the "search terms and the type of search performed," nor does it "establish that all places likely to contain responsive records were searched." Id., at 721. Because the declaration merely opines about what may generally be done in past or future circumstances, it does not meet "the burden, beyond material doubt, of showing [the] search was adequate." Id. It is not competent, admissible evidence for summary judgment purposes.

However, there exists a far more glaring deficiency in the Department's argument, which is also fatal to its position. It is impossible for the Department's assertion to be proven beyond material doubt, that the second/back pages of the 31 requested original grievance forms were not responsive because they only contain "boilerplate instructions." The Department destroyed all of these requested (two page) original paper grievance forms, eight of which were destroyed after Mr. Kozol requested them, so there is no way for the Department to prove what was contained on the second pages. CP 253-256, 397.

Further, there is no question that inmates and staff do substantively use the second pages of original grievance forms in the grievance process. CP 403-456. The published opinion sharply conflicts with these facts. And there is no question that the second/back pages of original paper grievances often do not contain any "boilerplate instructions." CP 411-419. Because the Department destroyed these records, forever concealing the agency misconduct of racially derogatory comments and other actions that Mr. Kozol sought, the Department cannot also benefit from the same unlawful destructions. Under spoliation, these records would be presumed to establish the evidence Mr. Kozol contends.

These facts are dispositive of the Department's entire strained, post-hoc argument that silent withholding and failing to adequately search for responsive records was excusable because,

according to the Department, when it scanned record pages as a secondary usage of creating a computer backup of its original paper records, it elected to not scan the second pages of original paper documents into the computer system because of the content of the second pages. But again, no actual searches for these records were identified in the Young declaration, and the contents of the withheld pages are unknown because the Department destroyed them, with eight destructions unlawfully occurring after Mr. Kozol requested the records. CP 397.

An equally important issue is that, even if the Department could prove that the second pages only contained "boilerplate instructions," this does not mean they are not public records that were requested. A public record is any document "prepared, owned, used, or retained" by an agency, which includes an agency employee acting within the scope of employment. Nissen v. Pierce County, 183 Wn.2d 863, 881, 357 P.3d 45 (2015). Based upon the laundry list of "NONGRIEVABLE ITEMS" on the second pages (CP 156), DOC staff are permitted to not resolve and can reject a filed grievance for any one of these enumerated bases. With the burden being on the Department on summary judgment, it failed to prove that these stated reasons were never used or cited to by staff to deny a grievance. Even the act of a DOC staff denying a grievance for an enumerated "nongrievable" basis is still agency usage under RCW 42.56.010(3); see, e.g. Nissen, supra.

Moreover, in so far as the Department is arguing that a complete original grievance form is not a public record unless substantively used by inmates or staff, such a position is also incorrect. The Department is the creator of the "boilerplate language." As such, even under its strained explanation, the instructions are "prepared, owned, used, or maintained." RCW 42.56.010(3). The elements of a public record in RCW 42.56.010(3) are disjunctive, so even if a record is not "used," its preparation, ownership or retention still renders it to be a public record. As this Court stated, "[t]here is little difference between a document needed by the [agency] for its operations and a document needed by the [agency] to fulfill a public records request." Neighborhood Alliance, 172 Wn.2d at 723 n.13.

As now exposed, the Department's "boilerplate instructions" argument is really just a half-baked, post-hoc attempt to justify its failure to adequately search based upon its unlawful modification of Mr. Kozol's requests. The argument that the Department did not consider the second pages of original grievances to be responsive to Mr. Kozol's requests, while certainly creative, still falls short in light of this Court's holdings in Neighborhood Alliance.

The Department claims that it would not consider the second pages of original paper grievances responsive in its search for what it calls the electronic "grievance record," because it

generally chooses to not scan the second pages into the secondary computer file because they only contain "boilerplate instruction."[3] CP 153. But while this argument may have superficial appeal, it misses the central issue here: the Department only searched a secondary computer file and never searched for the requested "original" paper records.

Each of Mr. Kozol's requests sought "any and all records for [specific grievance number]. This includes the original complaint form." CP 41-71. The Department's declaration evidence establishes that its staff knows the original paper grievance documents are located and maintained in the primary local files at each prison facility. Staff know to look for, and have looked in other records requests, for original documents in these local files because this is the known location where the original paper grievance documents are maintained. CP 153.

What the Department made clear in taking its position is that it completey disregarded Mr. Kozol's specific request for the original paper grievance documents. Instead, it elected to only search for what it termed to be the "grievance record" in the secondary computer files. The Department then attempted to justify its action by stating that the second page,

> "would not be scanned and maintained as part of the [electronic] grievance record. Therefore, when the Plaintiff's request for documents related to grievances was processed, the [second pages] would not have been considered responsive to his request."

CP 29-30.

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[3] Again, speculating what "would" be considered responsive does not establish what actually occurred regarding these specific records requests.

In order for the Department's argument to be plausible, it would have had to completely disregard Mr. Kozol's distinct request for the "original grievance form." Such modification or disregard of a specific request violates the PRA. "The PRA requires each relevant agency to facilitate the full disclosure of public records to interested parties." Resident Action Council v. Seattle Housing Authority, 177 Wn.2d 417, 431, 300 P.3d 376 (2013) (emphasis added). An agency must "provide for the fullest assistance" to inquirers. RCW 42.56.520 (emphasis added). And the "Public Records Act does not allow...silent editing of documents or records." Progressive Animal Welfare Society v. Univ. of Wash. (PAWS II), 125 Wn.2d 243, 270, 884 P.2d 592 (1994). There is no legal authority for an agency to alter, amend, or disregard a portion of a Public Records Act request without consent from the requestor. Nothing excuses the Department's actions in this case, because it repeatedly confirmed that the requests included the "original" complaint/grievance form.

Here, even though no facts of any record searches were established by the Young declaration, the Department argued that its search of the secondary scanned computer files was sufficient. CP 29-30. This is squarely contradicted by this Court's holdings in Neighborhood Alliance. In that case, the agency's search consisted of the only place a computer record could not be found: a county employee's new computer, even though the employee had some idea that searching only the new computer would prove unfruitful. Neighborhood Alliance, 172 Wn.2d at 722.

The case at bar is essentially the inverse of what occurred in Neighborhood Alliance but with the same outcome, as the DOC represented that its choice was to limit its searches to only the secondary computer storage files, when it knew the original (two page) grievance forms would only be located in the agency's primary paper file system. CP 153. In Neighborhood Alliance the county limited its record searches to only the primary location, and avoided searching secondary locations. Id., at 722-723.

Identical to what occurred in Neighborhood Alliance, the Department's searches here "consisted of the only place a complete [original grievance] record could not be found." Id., at 721-722. In fact, the Department knew its response would be incomplete since Mr. Kozol asked for each complete (two page) original paper grievance form, which the Department claims are never located in its secondary computer files. See Neighborhood Alliance, at 722 ("But she did not search further, despite the indication that the response would be incomplete, since the request asked for the complete electronic record").

The Department asked the Court of Appeals to publish its opinion below because,

> "[t]he opinion captures two important public records principles in a single, concise opinion, and because there have been relatively few published cases describing facts that amount to an adequate search, publication would permit trial courts to use it as a touchstone in evaluating sufficiency of an agency's search."

Motion to Publish, at 1.

But as the undisputed facts in the record show, this published case is a far cry from representing a situation that can be relied upon as authority for defining an adequate records search. To the opposite, the Department's modification or disregard of the requests and the inadequate record searches are troubling violations of the PRA. If agencies are permitted to shield certain public records from disclosure, such as these requested original documents, by selectively moving certain document pages to secondary file systems and then only searching those file systems when specific records are requested, agencies will then have more silent control of what is being disclosed to the public. Such activity is equal to what was disapproved by this Court in O'Neill v. City of Shoreline, 170 Wn.2d 138, 240 P.3d 1149 (2010), where the Court recognized that "[i]f government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined." Id., at 150.

Statistically speaking, the actions taken by the Department in this case to conceal public records containing evidence of staff misconduct are certainly not the norm among agencies in Washington. As the evidence in the record shows, however, the Department has no qualms about unlawfully destroying responsive records that have been requested to expose agency misconduct. Petition for Review, Appendix C. Based upon what has occurred multiple times in the present case, should review of this case

not be accepted, then the public's right to stay informed will be exposed to significant harm, as the Department will undoubtedly continue with further such improper conduct, and will be able to reinforce such positions by citing to the published opinion below, as its express intentions reveal.

An agency modifying a request, intentionally disregarding a clear request for specific records, or limiting its records searches to a location that it knows complete records do not exist, violates the PRA and allows the agency to selectively edit what records it produces as responsive by claiming its search was reasonable. Such actions are nothing more than a sophisticated form of silent withholding, as the agency's unauthorized modification of a request permits the agency to limit its records search to only the locations the agency ultimately desires to reasonably be expected to contain responsive records. Not every requestor will have the wherewithal to ferret out that records are being overlooked or excluded by such agency practices.

Here, the Department is attempting to artfully disguise its PRA noncompliance through the compound layers of request modification, selective document file creation, and selective searches. Unmasked, these actions violate the PRA's strong public policy favoring full disclosure, as the people "do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." RCW 42.56.030. The PRA is a strongly worded mandate for broad disclosure of

public records, that stands for full access to information concerning the conduct of government on every level. Neighborhood Alliance, 172 Wn.2d at 714.

The Department's presented issue pertaining to "boilerplate instructions" page content is, at its core, merely a post-hoc attempt to justify the unlawful alteration or modification of Mr. Kozol's records requests, and the inadequacy of the resultant searches. Accordingly, this Court should accept review to determine whether an agency can sua sponte modify a record request to disregard specific documents sought, because this appears to be an issue of first impression. Because the Department limited its record searches to the location that it knew would not contain the complete original grievance forms, the decision below conflicts with this Court's holdings in Neighborhood Alliance, which warrants that review be accepted under RAP 13.4(b).

B. It is Unknown Whether the Department Conducted an Adequate Records Search for the Grievance Records It was Initially Unable to Locate

In its Answer, the Department asks the Court to accept review to determine that its record searches were adequate in respect to one request, PDU-18880, even though the responsive records were subsequently located as a result of Mr. Kozol's lawsuit. Answer, at 2. Because this issue is material to the issue upon which the Court of Appeals erred in finding Mr. Kozol to not be the prevailing party, the Court should accept review and should

grant Mr. Kozol's CR 56(f) motion and remand the case to the trial court for appropriate discovery.

The Department initially "assured" Mr. Kozol that no responsive records existed in request no. PDU-18880. CP 77. After Mr. Kozol filed and served this lawsuit upon the Department, it eventually produced some responsive records once Mr. Kozol began conducting discovery. CP 78. In its summary judgment motion the Department argued that no PRA violation occurred, and that Mr. Kozol was not the prevailing party, because the Department's record search was adequate even though the responsive records were later located. CP 30. The Declaration of Denise Vaughan is the sole evidence the Department relied upon to argue its search in respect to PDU-18880 was adequate. CP 35-37.

But like the Lee Young declaration, the Vaughan declaration also fails to comport with summary judgment requirements under CR 56(e), Evidence Rule 602, and this Court's requirements for agency declarations set forth in Neighborhood Alliance. Ms. Vaughan's declaration, at paragraphs 7-9, scantilly attempts to identify how the agency searched for records. However, this is nothing more than inadmissible hearsay evidence, because the "Public Disclosure Coordinator assigned to the request" is never identified by Ms. Vaughan, and Ms. Vaughan does not attest that either she or the unidentified employee personally searched for any of the records at issue in PDU-18880. CP 14-15.

With no first-hand knowledge presented as to how any search for records in PDU-18880 was conducted, Mr. Vaughan's testimony is probative of nothing material to the adequacy of the search. CR 56(e); ER 602. In fact, the only information provided as to any search for records in PDU-18880 was in Defendant's Answer to Interrogatory No. 9, where the Department speculatively offered that former employee Theresa Pernula "would likely have" checked one database for the records in each of the 31 separate requests.[4] CP 239.

As a result, the Department's adequacy of its search in PDU-18880 was never established for summary judgment purposes. Ultimate facts, speculations, or conclusions of fact are insufficient for summary judgment purposes; likewise, conclusory statements of fact will not suffice. Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). This lack of foundation in the Vaughan declaration is insufficient as a matter of law under not only CR 56(e) and ER 602, but also under the standard set forth by this Court. The Department has not met its burden "beyond material doubt, of showing its search was adequate....[through] reasonably detailed, nonconclusory affidavits....includ[ing] the search terms and the type of searches performed...establish[ing] that all places likely to

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[4] Notably, the DOC objected to Interrogatory No. 9 on the grounds that it "calls for speculation" to describe the record searches. CP 239. Thus, the Department ostensibly has no idea how it searched for any of these 31 separate records.

contain responsive records were searched." Neighborhood Alliance, 172 Wn.2d at 721.

Second, Mr. Kozol's motion for a CR 56(f) continuance should have been granted, where he stated, "because Defendant is raising this adequacy-of-search argument and evidence in support for the first time here, it is necessary for Plaintiff to conduct discovery as to specific facts of these matters." CP 211-212. Mr. Kozol presented by sworn declaration that he could only obtain this material evidence by way of additional discovery. CP 220.

As this Court explained in Neighborhood Alliance, discovery in an action under the Public Records Act is governed by the Superior Court Civil Rules. Under the rules, discovery is broad and extends to all relevant, nonprivileged information that is likely to lead to admissible evidence. Relevancy in an action under the PRA includes why documents were withheld, destroyed, or even lost. The trial court has discretion to narrow discovery, but the court must not do so in a way that prevents discovery of information relevant to the issues that may arise in an action. Neighborhood Alliance, 172 Wn.2d at 716-719. See also Worthington v. WestNET, 182 Wn.2d 500, 508-509, 341 P.3d 995 (2015) (to determine whether entity is subject to the PRA, the trial court could have considered numerous relevant factors. "Without discovery, none of these questions can be answered").

If the Department's search is found to be inadequate, then Mr. Kozol - whose lawsuit caused disclosure and production of withheld records - would be the prevailing party as a result

of the wrongful disclosure. "[A]n adequate search is required in order to properly disclose responsive documents. The failure to perform an adequate search precludes an adequate response and production." Neighborhood Alliance, 172 Wn.2d at 721. It is necessary for Mr. Kozol to conduct discovery, as the Vaughan declaration establishes nothing, and the facts are not known with only the agency's untested version of events being presented.

At any rate, even if discovery proves true DOC's claim that it searched the Liberty computer system and grievance log ID 1109284 could not be found there,[5] this does not absolve the Department from its obligation to search the paper files where, as established above, it knows the original paper grievance documents exist. CP 152-153.

Even without Mr. Kozol conducting discovery into these matters, the Department's search for records in PDU-18880 was inadequate as a matter of law. All paper grievance records are scanned into the secondary "Liberty" computer database, and DOC identified that the no scanned copies of the documents in grievance log ID 1109284 existed in the Liberty system. CP 36-37 (¶ 7). The Department maintained all original paper grievance documents in its local facility files. CP 153. Here, the Department failed to conduct any search whatsoever beyond its searching "Liberty" computer files. This is despite having previously searched for paper grievance documents in the local

[5] DOC purports that a February 14, 2012 e-mail proves or indicates that no records of grievance # 1109284 existed in the computer system, but this e-mail establishes nothing about any particular grievance. CP 39-40.

paper files, and knowing that all the original grievance documents existed in this location. CP 153. All original paper documents in grievance # 1109284 existed in the local paper files at the time of the records search in PDU-18980, as these original paper documents were not destroyed until several months later. CP 256.

This constitutes an inadequate search under the standard set forth in Neighborhood Alliance, because the documents existed in other locations in the agency that staff knew about, yet the agency failed its duty to search the locations where the records could reasonably be located. Id., at 722-723. When the Department thought that grievance # 1109284 did not come up in the computer, the Department simply stopped looking, despite expressly recognizing the anomaly of this one grievance not coming up when the 30 other grievances were located in the computer. CP 36-37 (¶ 7). This is all the more reason why the Department should have searched its paper file system. It was only after Mr. Kozol brought the power of judicial review that some of the responsive records were finally located and produced. This is a textbook example of how an agency's rote reliance on general, perfunctory search methods, when not conducting any further investigation, leads to an inadequate search for and wrongful denial of requested records.

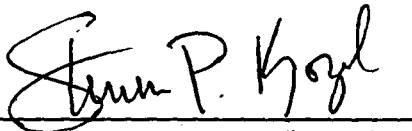
Based upon these uncontroverted facts in the record, the opinion below is in conflict with this Court's holdings in Neighborhood Alliance and review is warranted under RAP 13.4(b).

"If the undisputed facts in the record do not support the Court of Appeals' holdings as a matter of law, these holdings are subject to reversal by this court." L.K. Operating, LLC v. Collection Group, LLC, 181 Wn.2d 48, 72, 331 P.3d 1147,1157 (2014)(citing DGHI Enters. v. Pac-Cities, Inc., 137 Wn.2d 933, 942-43, 977 P.2d 1231 (1999)). Because the Department intends for state agencies to begin relying upon the Court of Appeals' published opinion as an example of an adequate search for records, this Court should accept review because the published opinion conflicts with the facts of this case and with this Court's prior decisions.

IV. CONCLUSION

For the foregoing reasons Petitioner respectfully requests that review be granted.

RESPECTFULLY submitted this 8th day of April, 2016.



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DECLARATION OF SERVICE BY MAIL
GR 3.1

I, STEVEN P. KOZOL, declare and say:

That on the 8th day of April, 2016, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 92792-8:

Petitioner's RAP 13.4(d) Reply;

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;

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addressed to the following:

Clerk of the Supreme Court	Candie M. Dibble, AAG
Temple of Justice	Attorney General's Office
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 8th day of April, 2016, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Signature

STEVEN P. KOZOL

Print Name

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