APPENDIX A

Case No. 26-791

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN PAUL KOZOL,

Petitioner-Appellant,

v.

RON HAYNES,

Respondent-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 2:22-cv-00760-BJR
Hon. Barbara J. Rothstein

MOTION FOR CERTIFICATE OF APPEALABILITY

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Appellant Steven Kozol, through his counsel, Neil M. Fox, respectfully requests this Court for a Certificate of Appealability ("COA") pursuant to 28 U.S.C. § 2253(c), FRAP 22(b) and Ninth Circuit Rule 22-1(d).

1. *Introduction*

Steven Kozol has been incarcerated for over 25 years in a case where someone else attacked his friend and later sent a confession to a newspaper. Appellee Superintendent Ron Haynes has never disputed that the State withheld evidence that the main detective had a "disgraceful" career (per the judge who resentenced Mr. Kozol), ECF 26-2 at 77,[1] nor has Sup. Haynes disputed the State and its detective destroyed forensic evidence that could have corroborated the confession letter. Based simply on procedural barriers, no one ever ruled on Mr. Kozol's claims on their merits.

Mr. Kozol asks this Court to grant a COA on all issues he raised in the district court so that he can have access to justice.

2. *Statement of the Issues*

a. Could there be procedural default where the State failed to disclose exculpatory evidence before the state time limit expired and where the State and its

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[1] ECF citations are to the district court file.

law enforcement offices destroyed potentially exculpatory evidence after the time limit expired?

b. Can there be procedural default where the applicable Washington State rule did not exist at the time the time limit expired?

c. Is Washington's time-bar rule currently "clear, consistently applied, and well-established?"

d. Was there "cause" and "prejudice" for any procedural default?

e. Is Mr. Kozol actually innocent, and whether in this analysis the Court should apply an adverse inference against Sup. Haynes based upon spoliation of evidence?

f. Should Mr. Kozol's writ be granted on its merits?

3. *Factual and Procedural Background*

In November 2000 someone attacked Mr. Kozol's former roommate and friend, Thomas Wolter, in his home in Renton, Washington. Wolter did not know his assailant, and Mr. Kozol and his partner testified they were miles away, in central Seattle, that night. The State's evidence was circumstantial: the assailant used a taser that had been purchased by Kozol and a gun that was similar to one he also owned. Both items had been stored in Kozol's storage unit that appeared to have been ransacked when the police searched it. Blood with Wolter's DNA was found in

Kozol's Audi, although Kozol explained its presence based on either of two incidents where Wolter bled when the men lived together. There was also evidence the Audi mechanically could not have been driven far on the day in question. Kozol had in his possession a few of Wolter's old checks and bank statements, but no one alleged that there were any forgeries or attempts to access Wolter's accounts. ECF 27 at 6-9 (summary).

In King County Superior Court, the State of Washington charged Kozol with attempted murder and burglary. ECF 26-2 at 2-3. Kozol's lawyer (the late Anthony Savage) falsely told Kozol and his mother he had hired a private investigator. *Id.* at 516-519, 526-535. Absent investigation, Mr. Savage failed to locate a key alibi witness, Mr. Kozol's neighbor, Amal Osman, who could have corroborated Kozol's alibi that he was in Seattle at the time of the attack. *Id.* at 483-489.

In 2001, Mr. Kozol was convicted after trial and sentenced to 479 months in prison. He lost a state direct appeal, a state court collateral attack petition, a § 2254 petition and an appeal to this Court. ECF 27 at 4-5. The mandate from Kozol's first state appeal issued on February 24, 2004. ECF 26-2 at 209. Washington courts would later rule that the state time limit for Kozol to file a collateral attack petition under Revised Code of Washington ("RCW") 10.73.090 expired on February 25, 2005. ECF 26-5 at 7.

After that date Mr. Kozol learned the State suppressed evidence that the main detective, Denny Gulla, was dishonest and corrupt. ECF 26-2 at 294-413. One local prosecutor even moved to dismiss another case because she believed that Gulla "can't testify truthfully." *Id.* at 344. Mr. Kozol did not learn about Gulla's sordid record until family members told him of press accounts in December 2005. He did not receive the articles until January 2006, long after the time limit for collateral relief expired. *Id.* at 530-31.[2]

In 2009, a repenting "addict" mailed a letter to the *Seattle Post-Intelligencer* and took full responsibility for the attack on Wolter. *Id.* at 415. Unlike the State, Mr. Kozol sought forensic testing of the letter and envelope. *Id.* at 416-422. Although with the type of forensic analysis available in the late 2000s there were only inconclusive results from some limited testing, on *Det. Gulla's* instructions the letter and envelope were destroyed making later testing with better technology impossible. *Id.* at 423-427, 431-433, 439.

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[2] The district court judge stated that Kozol received a prosecutor's "report" about Gulla in "either December 2004, or February 2005." ECF 53 at 7. She confused issues about Gulla with Kozol's claims in his first habeas petition that were based on *another* report regarding another suspect, Wolter's conflicting descriptions and a house cleaner's statement about locks not working. *See Kozol v. Payne*, C06-1074-MJP, 2007.U.S. Dist. LEXIS 66989 at *7-*8 (W.D. Wash. Sept. 7, 2007), *aff'd* 329 Fed. Appx. 707 (9th Cir. 2009) (unpub.).

From prison, Mr. Kozol through Washington's Public Records Act, RCW 42.56 *et seq.* ("PRA") and learned the details of previously unknown (to him) evidence (such as a hair located at the scene and the existence of a Rolex-type watch abandoned by the "addict"). Kozol wanted all these items tested. However, Det. Gulla and others systematically destroyed the evidence despite rules requiring its preservation. ECF 27 at 16-18 (summary).

Contrary to many *pro se* litigants, Mr. Kozol did not file post-conviction writ after post-conviction writ, claiming a new violation of his rights with each new revelation. Rather, he waited to file one petition with all new claims until after he was resentenced in November 2020 – a proceeding granted because of the State's earlier misrepresentation of Kozol's offender score. ECF 26-2 at 12-27, 48.

On November 13, 2020, Judge Marshall Ferguson vacated the original 2001 judgment, ECF 26-2 at 48, and sentenced Kozol to serve 390 months, significantly lower than the original judgment. *Id.* at 50-58.

In June 2022, Kozol filed a state Personal Restraint Petition ("PRP") and a federal § 2254 petition contesting this new judgment. Kozol supported his claims with voluminous evidence (ECF 26-2). In both petitions, he alleged violations of the First, Sixth, and Fourteenth Amendments to the United States Constitution:

1. Prosecutorial misconduct in closing argument, including a "James Bond" narrative as a motive without any evidentiary basis, violated Mr. Kozol's right to due process and a fair jury trial.

2. The admission of a "manual" about silencers violated due process of law and freedom of speech.

3. The suppression of material impeachment evidence about Det. Denny Gulla violated due process. *Brady v. Maryland*, 373 U.S. 83 (1963).

4. The post-trial destruction of potentially exculpatory evidence violated due process. *Arizona v. Youngblood*, 488 U.S. 51 (1988).

5. Mr. Kozol was denied effective assistance of counsel at trial and on direct appeal in violation of the right to counsel and due process. *Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985).

6. The State of Washington unconstitutionally denied Kozol access to the courts.

Even though some of Kozol's claims did not arise until long after the now-vacated 2001 judgment became final, Washington courts never reached their substance and dismissed the PRP as time-barred. ECF 26-5 & 26-6.

The federal petition had been stayed and abeyed under *Rhines v. Weber*, 544 U.S. 269 (2005). ECF 9. After the state petition was finalized, the federal stay of was lifted. ECF 22.

Magistrate Judge David Christel then found that Kozol's current § 2254 petition was timely under § 2244(d) because of the intervening 2020. ECF 46 at 13-18 (citing, *inter alia*, *Gonzalez v. Sherman*, 873 F.3d 763, 769 (9th Cir. 2017); *Smith v. Williams*, 871 F.3d 684, 687-88 (9th Cir. 2017)). Judge Christel declined to address the merits based on procedural default – that Washington courts ruled the 2022 PRP was time-barred, *id.* at 19-25, and then rejected Kozol's claims of actual innocence or a denial of access to the courts. *Id.* at 26-35.

Kozol filed objections, and Sup. Haynes responded. ECF 49, 50. On January 15, 2026, District Court Judge Barbara Rothstein entered an order adopting the R&R and denying a COA. ECF 53. A judgment was entered the same date. ECF 54.

Mr. Kozol filed a timely notice of appeal on February 6, 2026. ECF 55. He now seeks a COA from this Court.

4. *Argument*

A. **The Legal Standard for Issuance of a Certificate of Appealability is Very Low**

To obtain a COA, a prisoner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A COA should issue if "jurists of reason could disagree with the district court's resolution of his constitutional claims

or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

"The standard for granting a certificate of appealability is low." *Frost v. Gilbert*, 835 F.3d 883, 888 (9th Cir. 2016) (*en banc*). The petitioner "need not show that he should prevail on the merits. He has already failed in that endeavor." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (cleaned up). A COA should issue unless the claims are "utterly without merit." *Wilson v. Belleque*, 554 F.3d 816, 826 (9th Cir. 2009) (cleaned up). When a district court denies a habeas petition on procedural grounds, without reaching the merits, a COA should issue if "jurists of reason" would also find it "debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

B. Mr. Kozol Meets the Standard for a COA

I. There Was No Procedural Default

Washington courts dismissed all of Kozol's claims on procedural grounds – that he filed them after the one-year time limit in RCW 10.73.090 expired on February 25, 2005. Contrary to federal law, *see supra* at 7, Washington courts followed a different rule that the 2020 judgment did not re-set the time-limit, ECF 26-6 at 23, a rule not announced in Washington definitively until 2013 in *In re Pers. Restraint of Adams*, 309 P.3d 451 (Wash. 2013). The district court followed this

analysis when determining that most of Kozol's claims were procedurally defaulted. ECF 53 at 4-5. Jurists of reason could disagree with this conclusion.

First, Kozol showed that the time-bar of RCW 10.73.090 is no longer "clear, consistently applied, and well-established." *Powell v. Lambert*, 357 F.3d 871, 872 (9th Cir. 2004). Currently, the Washington Supreme Court considers the one-year limit in RCW 10.73.090 to be non-mandatory and subject to the court's inherent authority to decide in any particular case to apply it or not without guidelines for the exercise of that discretion. *See In re Pers. Restraint of Fowler*, 479 P.3d 1164, 1167-68 (Wash. 2021); *In re Pers. Restraint of Davis*, 395 P.3d 998, 1002 n.2 (Wash. 2017).

The district court wrote off recent Washington Supreme Court cases as "the exercise of discretion under . . . extraordinary circumstances." ECF 53 at 5. However, some cases were not extraordinary at all and were simply (as in *In re Pers. Restraint of Davis*, *supra*) "garden variety" requests for more time. The mere existence of these Washington Supreme Court cases demonstrates that Mr. Kozol's arguments that the state time-bar is no longer "clear, consistently applied, and well-established" do not lack such merit as to deny him a COA.

Second, the plain language of RCW 10.73.090 is far from clear and is open to more than one reasonable interpretation. It states that the one-year period only

commences upon the entry of a judgment that is "valid on its face" without specifying *which* judgment is at issue – the first-in-time judgment that is set aside years later, or the latter judgment that is the one actually used to restrain a prisoner. Here, the first judgment from 2000 was invalid – using the wrong offender score and imposing a wrong sentence – as would be shown in 2020 when it was vacated. ECF 26-2 at 48. A conclusion that only the 2020 judgment was valid and thus the judgment that started the one-year discretionary time-limit running is certainly a reasonable construction, warranting judicial encouragement for further review. *See Collier v. Bayer*, 408 F.3d 1279, 1283 (9th Cir. 2005) (rule not well established where state court adopted construction of rule that differed from plain reading).

To be sure, *in 2013*, the Washington Supreme Court rejected this view in *In re Pers. Restraint of Adams*, *supra*. But a state procedural rule can only be used to deny access to federal courts if the State proves that it was consistently applied and well-established *at the time* of petitioner's purported default. *See Scott v. Schriro*, 567 F.3d 573, 580 (9th Cir. 2009). "If a state procedural rule is not well-established before a petitioner supposedly breaks the rule, then the rule cannot prevent federal review of the petitioner's federal claims." *Collier v. Bayer*, 408 F.3d at 1284.

Before *Adams*, the Washington Supreme Court issued a different decision in *In re Pers. Restraint of Skylstad*, 162 P.3d 413 (Wash. 2007), holding that for

purposes of RCW 10.73.090, "a judgment becomes final when all litigation on the merits ends." *Id.* at 415. This rule is similar to that applied by federal courts which made Kozol's petition in this case timely under 28 U.S.C. § 2244.

The very "need" for *Adams* in 2013, which departed from prior law, makes it axiomatic that RCW 10.73.090 was not "clear" beforehand. *Adams* cannot be applied to Mr. Kozol's case that was "final" *in 2004*, years before the Washington Supreme Court adopted *Adams*. Reasonable minds can differ about whether there was a consistently applied procedural barrier to review. *See Powell v. Lambert*, *supra* (no default where Washington's "mixed petition" rule was not in effect at time of purported default).

Third, where the State withholds evidence of the chief detective's corruption until after the time limit passes (Ground 3) and then destroys exculpatory evidence (such as the DNA on the "addict's" letter) (Ground 4), again after the time limit has come and gone, or when Kozol's lawyer lied to his family and says he hired an investigator but years later Kozol found out this was not true (Ground 5), it is really quite cruel then to blame a *pro se* prisoner for not including those claims in a petition to be filed before that evidence was disclosed, uncovered or even existed. Again, Kozol did not even hear of press accounts of Gulla's corruption until December 2005 and did not learn of the DNA evidence's destruction until 2011. This alone is "cause"

for the delay – a factor external to Kozol that prevented him from filing earlier. *See Banks v. Dretke*, 540 U.S. 668, 693-98 (2004).

The district court focused on the fact that even after Kozol learned of the withholding or destruction of evidence or his attorney's ineffectiveness, he waited until after he was re-sentenced in 2020 to file a new petition. Waiting until a new judgment is entered which arguably would re-set time limits and address successive petition concerns is a reasonable strategy that is designed to prevent a requirement that a prisoner file successive petitions each time they learned a new fact – filing one petition when learning of press accounts of Det. Gulla's corruption, another one after receiving the PRA materials documenting this corruption,[3] another petition when Kozol learned about the destroyed hairs, another upon learning of the destroyed Rolex-like watch, yet another when learning that Gulla ordered the destruction of the "addict's" letter and envelope, another when discovering Kozol's lawyer lied about the investigator, another petition when the police finally released Kozol's Audi and he discovered it had degraded over time to prevent forensic analysis.

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[3] It is not even clear whether Kozol could have filed a state PRP for newly discovered evidence when learning of Gulla's corruption. Washington's standard differs from that imposed under *Brady* and only allows for a new trial if the new evidence is not "merely cumulative or impeaching" and "will probably change the result of the trial." *In re Pers. Restraint of Kennedy*, 513 P.3d 769, 775 (Wash. 2022).

To determine "cause" for a default, Mr. Kozol was required simply to explain why some objective factor external to the defense prevented him from filing before the deadline expired on February 24, 2005. *Strickler v. Greene*, 527 U.S. 263, 283-290 (1999). Mr. Kozol has done that and the district court erred when imposing an additional requirement of "due diligence" on top of what is required.

Importantly, in state court, Kozol never invoked the elective exemption in RCW 10.73.100(1) for newly discovered evidence, and Washington courts accepted that disavowal. ECF 26-5 at 6-7 n.4. Thus, the state law's "diligence" requirement was never an issue. Similarly, the § 2254 petition was timely, without regard to whether the factual predicate of the claims were discovered with due diligence under § 2244(d)(1)(D). Given the federal cases that an intervening judgment made Kozol's petition neither successive nor untimely, waiting until Kozol was resentenced is in fact a more diligent procedural path than, again, filing petition after petition each time a new fact was discovered. The district court's contrary rule promotes chaos and wastes judicial resources; Kozol should not be penalized for *not* engaging in the abuse of the writ.

Judge Rothstein cited *Henry v. Ryan*, 720 F.3d 1073, 1082 (9th Cir. 2013). ECF 53 at 7-8. That case has little to do with Kozol's. The petitioner there did not even present a *Brady* claim in state court, raising it for the first time in federal court, and

this Court rejected his attempts to undermine the purposes of the procedural default rule which would "allow criminal defendants to circumvent the most appropriate forum for adjudicating such claims — state court." *Id.* at 1083. This is not the case here, where Mr. Kozol fully presented his claims to state court in one petition filed after the first judgment was vacated and a new one entered.

Reasonable jurists could disagree with the district court's conclusions. This Court should grant a COA on the procedural default issues.

ii. *Martinez* Excuses any Default Regarding Many of the Trial Level IAC Claims

A habeas petitioner may establish cause for a procedural default if they were unrepresented or represented by ineffective counsel at the state collateral review stage, the state collateral review stage was the first opportunity to present the claim, and the claim is substantial. *Martinez v. Ryan*, 566 U.S. 1, 17 (2012). *See also Trevino v. Thaler*, 569 U.S. 413, 429 (2013) (extending *Martinez* to cases in which the state procedural framework, while not requiring ineffective assistance claims to be brought in collateral proceedings, "makes it highly unlikely" that they can be raised on direct appeal); *Woods v. Sinclair*, 764 F.3d 1109, 1137 (9th Cir. 2014) (Washington's procedural framework makes it highly unlikely that ineffective

assistance claims may be brought on direct appeal, thus rendering *Martinez* applicable to claims brought by Washington prisoners).

Ground 5 of Kozol's petition was based in part on the fact that his trial lawyer was ineffective for not hiring an investigator and then not locating the evidence that Kozol subsequently obtained over the last 20 years – evidence of Gulla's corruption, new alibi evidence (the neighbor), corroboration that the Audi was not driveable, evidence about whether there was scar tissue on Mr. Wolter's foot, and evidence about the construction workers at Wolter's and Kozol's house. ECF 1 at 20-21.

The district court ruled that Kozol could not show "cause" under *Martinez* because he raised other ineffectiveness issues on direct appeal and in his first *pro se* PRP which attacked the 2001 judgment. The court ruled that "the *Martinez* exception does not extend beyond this 'first occasion' for raising an ineffective assistance of trial counsel claim." ECF 53 at 9. Because Kozol had raised ineffectiveness on direct appeal and in his first PRP, the district court concluded *Martinez* did not apply to Kozol. ECF 53 at 8-9. This is debatably wrong and a COA should issue.

Mr. Kozol's claims of ineffectiveness raised on direct appeal were based on challenges to the search and a lack of investigation. However, it appears that these claims were raised by Kozol himself in a *pro se* supplemental brief under Wash. R. App. P. 10.10, not by counsel. The Washington Court of Appeals rejected the claims

because the record did not support them and directed Kozol to raise the claims in a post-conviction petition. Dkt 1-1 at 94, 103-104, 109-110.[4] Kozol then filed a *pro se* post-conviction petition, again raising trial counsel's ineffectiveness. This time Kozol alleged counsel was ineffective for not cross-examining Det. Gulla adequately at the suppression hearing. This claim was rejected both because of "overwhelming evidence" and because of the lack of evidence to support his assertions. *Id.* at 86-87 & n.1.

This history does not mean that Mr. Kozol should be barred from relief under *Martinez*. A prisoner who raises the wrong claims in a *pro se* brief submitted on direct appeal or in a *pro se* post-conviction petition, and who lacks the resources to investigate the case fully and provide independent evidence to support their claims, is prototypically the person who should benefit from *Martinez*.

The district court's contrary conclusions were based on two citations: ECF 53 at 9 (citing *Martinez*, 566 U.S. at 16; *Senior v. Gilbert*, No. C15-0952, 2016 U.S.

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[4] The record is not completely clear whether all of Kozol's ineffectiveness arguments on direct appeal were raised by him, *pro se*, and not counsel, although the slip opinion seems to suggest this. Notably, Sup. Haynes did not argue that Kozol was barred from relief under *Martinez* because of the non-record based IAC claims raised in the direct appeal. ECF 36, 50. In any case, Sup. Haynes failed to file the briefing from the direct appeal below, contrary to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts. *See* Dkt. 46 n.1 (admonishing Respondent).

Dist. LEXIS 127439, 2016 WL 4992677 (W.D. Wash. Sept. 19, 2016), *certificate of appealability granted*, No. 16-35842, March 7, 2017, *aff'd* 720 Fed. Appx. 882 (9th Cir. 2018) (unpub.)). Neither of these citations support the conclusion that Mr. Kozol is not covered by *Martinez*.

The issue in *Senior* was whether there was cause for failing to exhaust an ineffectiveness claim when the petitioner had failed to ask the Washington State Supreme Court to review the claim after it was denied by an intermediate appellate court. 2016 U.S. Dist. LEXIS 127439 at *4-*6. This has little relevance to the issue at hand involving whether there is cause for Mr. Kozol not raising the proper issues at all in his *pro se* pleadings. Moreover, *Senior* is unpublished and is of limited precedential value.

As for the district court's citation to *Martinez*, the Supreme Court actually differentiated between attorney error and a *pro se* litigant's error. *Compare Martinez*, 566 U.S. at 14 ("[W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in *two circumstances*. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim

should have been raised, was ineffective . . . .") (emphasis added) *with Martinez*, 566 U.S. at 16 ("The holding in this case does not concern *attorney errors* in other kinds of proceedings . . . .") (emphasis added). Had the Supreme Court intended the limitation on its holding to apply equally to *pro se* litigants and litigants who had been ineffectively represented, it could have readily done so. Yet, it chose its language precisely and referenced only attorney errors in its exception.

When Mr. Kozol, *pro se*, tried to raise ineffectiveness on direct appeal, the Washington court told him to file a post-conviction petition. He did that, but without the resources of counsel or investigation, and ended up in the same place – a claim not well-developed factually, missing the key issues. He fits under the exception in *Martinez* since he could not raise non-record-based claims on direct appeal and then did not properly raise them in his first *pro se* collateral attack petition.

In *Senior v. Glebe*, *supra*, while rejecting Mr. Senior's arguments on their merits in a non-precedential unpublished opinion, this Court granted a COA to Senior, finding that there was "at least one federal constitutional claim debatable among jurists of reason." Order, Ninth Cir. No. 16-35842, Dkt. 2-1 (3/17/17). Mr. Kozol's case is even stronger. Reasonable jurists could disagree with the district court's conclusions, and COA should issue.

iii. Mr. Kozol is Actually Innocent

In *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995), the Supreme Court held that a defendant who otherwise would be procedurally barred from presenting a constitutional claim may obtain review of the claim by demonstrating actual innocence. Under *Schlup*, a defendant seeking review under the miscarriage of justice exception must establish their factual innocence of the crime and not mere legal insufficiency. *See Bousley v. United States*, 523 U.S. 614, 623 (1998). In *Gable v. Williams*, 49 F.4th 1315 (9th Cir. 2022), this Court affirmed granting habeas relief based on "actual innocence" in a 30-year old murder case where most of the evidence was circumstantial, most of the main witnesses had recanted and someone else had confessed. This Court stressed that the "new" evidence "does not actually have to be newly discovered. . . . Rather, we assess any evidence that is 'newly presented,' as in 'not presented at trial.'" *Id.* at 1322.

The State's case against Kozol was primarily circumstantial. The new evidence of Kozol's innocence include an alibi witness and the "addict's" confession letter to containing "hold back" evidence that only the true assailant would know (details about a Rolex-type watch found at the scene). Furthermore, there is evidence that law enforcement intentionally destroyed potentially exculpatory evidence that prevented

Kozol from reaping the benefits of the forensic testing he has always sought. This spoliation of evidence should lead to an adverse inference against Sup. Haynes.

iv. There Should be an Inference Against the State

The magistrate judge questioned whether the State's destruction of evidence could satisfy the *Schlup* standard. ECF 46 at 32. Mr. Kozol objected on this basis, setting out cases applying spoliation in habeas cases, ECF 49 at 12, but the district court judge failed to address the issue at all when adopting the R&R.

Yet federal courts have consistently recognized the availability of, as well as applied, an adverse inference in both the general habeas and *Schlup* contexts. *See Jimerson v. Payne*, 957 F.3d 916, 931 (8th Cir. 2020); *Earp v. Davis*, 881 F.3d 1135, 1142 (9th Cir. 2018); *Smith v. Baldwin*, 510 F.3d 1127, 1155-56 (9th Cir. 2007) (Reinhardt, J., dissenting); *Howard v. Holland*, 2014 U.S. Dist. LEXIS 94869 at *42-*43 (C.D. Cal. 2014). *See also Earp v. Chappell*, 2015 U.S. Dist. LEXIS 167089 at *37-*39 (C.D. Cal. 2015) (adverse inference proper in habeas case for government's destruction of fluid-stained napkin).

This makes sense because habeas proceedings are civil, and the federal civil rules apply. *Copeland v. Ryan*, 852 F.3d 900, 907 (9th Cir. 2017). Imposition of an adverse inference from spoliation is common in civil litigation. *See e.g., Glover v.*

BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993); *Cooley v. Meads*, 728 Fed. Appx. 773, 774 (9th Cir. 2018) (unpub.).

Bad faith is not required to find spoliation – just "some notice" the evidence was "potentially relevant to the litigation" before it was destroyed." *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006) (cleaned up). Thus, similar to this case, a district court in this Circuit recently imposed an adverse for spoliation of an anonymous letter and envelope that carried great probative value. *Bilbruck v. Valley Cnty.*, 2024 U.S. Dist. LEXIS 134620 at *16-*19 (D. Mont. July 30, 2024).

Mr. Kozol has shown that Det. Gulla and others working with him systematically destroyed key forensic evidence that Kozol could have used to show his innocence. The "addict's" letter and envelope, hairs found at the scene, light bulbs turned off before the crime, a Rolex-type watch and even the degradation of Mr. Kozol's car over years – all of this wanton destruction of evidence should lead to an inference in favor of Mr. Kozol's innocence under *Schlup*.

This certainly is an issue about which reasonable jurists could disagree and a COA should issue.

v. Jurists of Reason Would Find it Debatable That Kozol's Petition States a Valid Claim of the Denial of Constitutional Rights

No court – either state or federal – has ever ruled on the merits of Mr. Kozol's current constitutional claims. However, the State indisputably withheld years of records that the chief detective on the case was, in the words of Judge Ferguson, "disgraceful." ECF 40-10 at 17. Det. Gulla was untrustworthy, threatened to plant evidence and claimed to have judges in his "pocket." ECF 26-2 at 400-413. Consistent with his record, Det. Gulla then destroyed evidence that could have been used by Kozol to show his innocence. Mr. Kozol's trial lawyer lied to his mother about hiring an investigator and did not properly investigate the case and did not make proper objections at trial. The State's case against Kozol was based in part on the admission, in whole, of an incendiary silencer manual that contained pages and pages of prejudicial information, while the State adopted a theory of the case (that Kozol was acting out a "James Bond" fantasy) that lacked factual support. Kozol's appellate lawyer did not identify key issues that could have been raised on appeal. The State of Washington barred Mr. Kozol from challenging his conviction based on facts that only emerged after the time limit in RCW 10.73.090 passed. *See* ECF 27.

Jurists of reason would find it debatable that Mr. Kozol was denied his rights to freedom of speech, due process of law, to counsel, a fair jury trial and access to the

courts under the First, Sixth and Fourteenth Amendments. *See, e.g., Brady v. Maryland*, *supra*; *Strickland v. Washington*, *supra*; *Evitts v. Lucey*, *supra*; *Arizona v. Youngblood*, *supra*; *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Lewis v. Casey*, 518 U.S. 343, 346 (1996).

This Court should grant a COA so that Mr. Kozol's case can be resolved on its on its merits.

5. *Conclusion*

Accordingly, the Court should grant a COA on all issues raised by Mr. Kozol, procedural and substantive, and reverse the district court's denial of relief under 28 U.S.C. § 2254.

DATED this 11th day of March 2026.

Respectfully submitted,

s/ Neil M. Fox
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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 27(d)(2)(a), the attached motion is proportionately spaced, has a typeface of 14 points, and contains 5181 words (not counting heading and signature block), as calculated with the WordPerfect word count feature.

Dated this 11th day of March 2026.

s/ Neil M. Fox
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to attorney of record for all parties.

I certify or declare under penalty of perjury that the foregoing is true and correct, this 11th day of March 2026 at Seattle, WA.

s/ Alex Fast
Legal Assistant
Law Office of Neil Fox PLLC

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 25 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

STEVEN PAUL KOZOL,

Petitioner - Appellant,

v.

RON HAYNES, Superintendent, Stafford Creek Corrections Center,

Respondent - Appellee.

No. 26-791

D.C. No. 2:22-cv-00760-BJR
Western District of Washington, Seattle

ORDER

Before: SILVERMAN and BENNETT, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 5) is denied because the underlying 28 U.S.C. § 2254 petition fails to state a federal constitutional claim debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2)-(3); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) ("When ... the district court denies relief on procedural grounds, the petitioner seeking a COA must show both 'that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'") (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Any pending motions are denied as moot.

DENIED.

APPENDIX C

Case No. 26-791

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CURCUIT

STEVEN PAUL KOZOL,

Petitioner-Appellant,

v.

RON HAYNES,

Respondent-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 2:22-cv-00760-BJR
Hon. Barbara J. Rothstein

PETITION FOR PANEL REHEARING
and
PETITION FOR REHEARING EN BANC

STEVEN P. KOZOL
Petitioner-Appellant, pro se
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191 Constantine Way
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Appellant Steven P. Kozol, pro se,[1] respectfully submits this Petition for Panel Rehearing and Petition for Rehearing En Banc, pursuant to Ninth Circuit Rule 27-10. Mr. Kozol seeks rehearing on the Order denying a Certificate of Appealability, issued by the two-judge Panel on June 25, 2026. Attachment A

1. Introduction

Steven Kozol has been wrongfully incarcerated for over 25 years in a case where someone else confessed to the crime and the confession is corroborated by independent evidence, the State unlawfully destroyed multiple pieces of potentially exculpatory forensic evidence in bad faith, the lead detective in the case had multiple decades of serious misconduct history that was wrongfully withheld from the defense, and trial counsel charged Mr. Kozol for an investigator to obtain multiple pieces of exculpatory evidence for trial but never did so and lied about it. Respondent Sup. Haynes has never presented any meaningful arguments in opposition to these substantive claims and has therefore conceded the issues as a matter of law. The district court dismissed Mr. Kozol's habeas petition on procedural grounds, and no court has ever reached the merits of the significant constitutional claims.

Mr. Kozol respectfully asks this Court for a panel rehearing, and for a rehearing en banc for the following reasons:

---

[1] If the COA is issued, Mr. Kozol's former attorney of record in this case, Neil M. Fox, will be re-entering a notice of appearance for further proceedings.

a. A material point of fact and law was overlooked in the Panel's June 25, 2026 decision (see infra);

b. An apparent conflict with another decision of this Court was not addressed (see infra);

c. Consideration by the full court is necessary to secure or maintain uniformity of the Court's decision; the district court's opinion upheld by the Panel is in direct conflict with several Ninth Circuit cases cited by Mr. Kozol (see infra);

d. The district court opinion upheld in the Order by the Panel directly conflicts with an existing opinion of another court of appeals and implicates a significant question of federal law carrying national application in which there is an overriding need for material uniformity.[2]

2. Factual and Procedural Background

Mr. Kozol hereby incorporates by reference the facts presented in his Motion for COA (Case: 26-791, 3/11/2026, Dkt.Entry: 5.1, pgs. 2-7).

On June 25, 2026, Circuit Judges SILVERMAN and BENNETT issued a written order denying Kozol's request for a COA, stating that Kozol's §2254 petition "fails to state a federal constitutional claim debatable among jurists of reason." Attachment A. Mr. Kozol respectfully seeks rehearing on the bases set forth below.

---

[2] The district court stated no authority existed for applying an adverse inference for spoliation in the habeas context including analysis under Schlup v. Delo, 513 U.S. 298 (1995). ECF 46 at 32.

Kozol's Ground Four seeks application of Arizona v. Youngblood, 488 U.S. 51 (1988) for post-trial evidence destruction. While the Ninth Circuit has not yet addressed such an issue, such application has been approved by the Third, Fourth, and Tenth Circuit Courts of Appeals.

3. Statement of the Issues

a. Upon the district court's dismissal of Mr. Kozol's §2254 petition solely on procedural grounds, can he satisfy the relatively low burden to obtain a COA by (1) facially alleging the denial of a constitutional right, and (2) demonstrating that the district court's procedural ruling is debatable?

b. Is citation to at least one federal court opinion supporting each argument against procedural default sufficient to show it is "debatable"?

c. Are each of Mr. Kozol's constitutional claims facially sufficient under controlling Rule 12(b)(6) standards?

d. Is an asserted procedural issue per se "debatable" where the district court failed to rule on it?

e. Should the Court grant a rehearing, or rehearing en banc, and grant a COA to permit Mr. Kozol, with counsel, to submit further briefing and argument on the merits?

4. Argument

A. The Legal Standard for Issuance of a Certificate of Appealability Favors Kozol

A.E.D.P.A. permits a court to issue a COA when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). To meet this threshold inquiry, the petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could consider the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983).

The Barefoot standard promotes Congress' intent to prevent frivolous appeals while at the same time "protecting the right of prisoners to be heard." Lambright v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000). Importantly, the court must be careful to avoid conflating the standard for gaining permission to appeal with the standard for obtaining a writ of habeas corpus. Id. (citation omitted). Indeed, the issuance of a COA is not precluded merely because the petitionar cannot meet the standard to obtain a writ of habeas corpus, but rather, should only be denied if the claims are "utterly without merit." Id.

Where, as in this case, a district court dismisses claims on procedural grounds, a two-part Barefoot inquiry is conducted. First, it must be determined whether "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," and second, whether "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. at 1026 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

In this situation, the Court will simply take a "quick look" at the face of the habeas petition to determine if the petitioner has met the relatively low burden and has "facially allege[d] the denial of a constitutional right." Id. at 1026 (citation omitted). In this "quick look" stage, the Court takes the petitioner's "allegations as true." Id. All of the inferences that govern a Rule 12(b)(6) motion apply, the petitioner's factual allegations are taken as true and the non-moving party (petitioner) is entitled to the benefit of all reasonable inferences. Id. at 1026 n.5.

In the Ninth Circuit, assuming that the district court's procedural ruling was debatable, where the petitioner "has facially alleged the denial of a constitutional right...[the Court] will grant a COA." Nardi v. Stewart, 354 F3d 1134, 1139 (9th Cir. 2004)(quoting Lambright, 220 F.3d at 1026-27).

A district court's procedural ruling is "debatable" when a petitioner cites a contrary ruling from the Supreme Court, from another circuit, or this Circuit. Lambright, 220 F.3d at 1025-26.
When at least one court favorably rules on an issue that a petitioner seeks a COA on, that is sufficient to show that jurists of reason would find it debatable whether the district court properly dismissed the petition on procedural grounds. Nardi, 352 F.3d at 1139.

All the more, Slack makes it clear that a court "should not deny a petitioner an opportnity to persuade us through full briefing and argument to reconsider circuit law that apparently forecloses relief." Lambright, supra, at 1026.

Therefore, where a petitioner cites a published circuit case supporting his argument as to why his claim is not procedurally defaulted, and he has facially alleged the denial of a constitutional right under Rule 12(b)(6) standards, the Court should issue the COA. Moreover, "any doubts" as to whether a COA should issue "are to be resolved in favor of the petitioner." Lambright, supra, at 1025 (citation omitted). As explained below, Mr Kozol can make this showing and a COA should issue.

B. Mr. Kozol Has Facially Alleged the Denial of a Constitutional Right

The Panel ruled Mr. Kozol did not state a federal constitutional claim debatable among jurists of reason. Attachment A. Mr. Kozol respectfully asserts that the Panel misapprehended or overlooked the facial assertions in his habeas petition, or the applicable Rule 12(b)(6) standards.

Under the applicable Rule 12(b)(6) standards, it is certainly debatable whether the face of Kozol's habeas petition alleges a denial of a constitutional right for Grounds One, Two, Three, Four, and Five. See (Petition) ECF 1 at 5-10, 20-21. Kozol's petition clearly asserts the sufficiant facts and specific constitutional violation for each Ground.

Mr. Kozol does not have to show that he would prevail on these claims in order to obtain a COA. Lambright, supra, at 1025; Miller-El v. Cockrell, 537 U.S. 322, 338 (2003). Under Rule 12(b)(6) standards, Mr. Kozol only had to plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "Indeed, factual challenges to a plaintiff's complaint have no bearing on the legal sufficiency of the allegations under Rule 12(b)(6)." Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001).

Mr. Kozol has sufficiently plead constitutional right violations, and even if there are doubts, they must be resolved in his favor, and a COA should be issued.

C. The District Court's Procedural Rulings Are Debatable Among Jurists of Reason

1. No Default Occurred

Mr. Kozol argued in the district court, and in his Motion for COA, that no procedural default occurred because the procedural rules applied by the Washington courts were not "adequate."

First, the one-year time bar rule in RCW 10.73.090 was not "clear" because the plain language of that rule did not notify Mr. Kozol that a resentencing and entry of a new "valid on its face" judgment and sentence did not reset the one-year period.

A state procedural rule is "adequate" if it is "clear, consistently applied, and well established at the time of the petitioner's purported default." Fairbanks v. Ayers, 650 F.3d 1243, 1256 (9th Cir. 2011) A rule cannot be "adequate" if it was "well established" but not "clear" or "consistently applied." Townsend v. Knowles, 562 F.3d 1200, 1207 (9th Cir. 2009).

Despite making this argument at the district court level, (Traverse) ECF 42 at 16-17, (Objections to R&R) ECF 49 at 6, the Respondent did not address it. ECF 50. The issue has therefore been conceded. Yet the district court did not address this issue at all. ECF 46; ECF 53.

Because the district court never ruled on this issue, it should be per se "debatable among jurists of reason." 28 U.S.C. §2253(c)(2). Still, Mr. Kozol meets this burden, as his Motion for COA cited the Ninth Circuit case of Collier v. Bayer, 408 F.3d 1279, 1283 (9th Cir 2005), that dealt

with similar language in a state time-bar rule that was unclear as to whether an amended judgment reset the one-year period to file a collateral attack, and thus, the Court found no procedural default occurred. See Motion for COA (Case:26-791, 3/11/2026, Dkt.Entry:5.1, page 17). See also, Harmon v. Ryan, 959 F.2d 1457, 1462 (9th Cir. 1992)(no procedural default where the state rule was unclear as to how to seek discretionary review).

Mr. Kozol's citation to at least one case supporting his argument that no default occurred on any claims, has established that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Lambright, 220 F.3d at 1026.

Second, Mr. Kozol argued no default occurred on any claims because the other rule applied by the state courts, In re Pers. Restraint of Adams, 309 P.3d 451 (Wash.2013), was not in effect at the time of his purported default, and therefore was not an "adequate" rule for default purposes. See (Traverse) ECF 42 at 16-17; (Objections to R&R) ECF 49 at 6-7. Respondent never addressed and thus conceded this issue. ECF 50. Again, the district court never ruled on this issue. ECF 46; ECF 53.

With no district court ruling to scrutinize, the issue is either per se "debatable among jurists of reason," or is debatable because the Ninth Circuit has consistently held that no default occurs when the rule applied in state court was not "well established" at the time of the purported default. See Wells v. Maas, 28 F.3d 1005, 1010 (9th Cir. 1994); Fields v. Calderon, 125 F.3d 757, 761 (9th Cir. 1997); Petrocelli v. Angelone,

248 F.3d 877, 886 (9th Cir. 2001); English v. United States, 42 F.3d 473, 478 (9th Cir. 1994).

Because the Washington courts found that Kozol claims became time barred as of February 25, 2005, In re PRP of Kozol, 547 P.3d 260, 265 (Wa.App. 2024), and the applied rule in Adams did not become law until 2013, it is certainly debatable among jurists of reason as to whether there was a procedural default at all in Kozol's case.

2. "Cause" Was Shown for any Default

Mr. Kozol argued he could show "cause" for any default of Grounds Three, Four and Five because he only learned the factual basis for these claims after the one-year time bar had expired. See (Traverse) ECF 42 at 18-20; (Objections to R&R) ECF 49 at 7-8.

The district court made both a factual error, and declined to find "cause" based on a lack of diligence. ECF 53 at 7-8. As Kozol's Motion for COA to this Court made clear, not only did the district judge misapprehend a key material fact, see Motion for COA at 11 n.2, but also, Kozol did not discover the factual basis for Grounds Three, Four and Five until after the time bar had expired on February 24, 2005. Motion for COA at 18-21.

This established "cause" because it showed some objective factor impeded Kozol from learning the factual basis of these claims in time to comply with the state time bar. Guillory v. Allen, 38 F.4th 849, 859 (9th Cir. 2022). Specifically, the uncontested record shows Kozol did not learn of Det. Gulla's withheld misconduct history until after the time bar expired; he did not learn of the potentially exculpatory evidence,

or its destruction, until 2010; and Kozol did not learn of his attorney's misconduct until 2010.

Moreover, as a matter of law the district court's sua sponte application of a "diligence" requirement because Kozol "could have" used the new evidence exception in RCW 10.73.100(1), does not apply to Kozol for several reasons. ONE: 10.73.100(1) is an elective "exception" to a time bar, not a mandatory rule. In re Pers. Restraint of Ramsey, 576 P.3d 597, 599, 601, 602 (Wash. 2025). Not invoking RCW 10.73.100(1) does not violate a "rule." See English v. United States, 42 F.3d 473, 478 (9th Cir. 1994)(procedural default is violating a mandatory rule, "not merely the bypass of a procedural opportunity."). TWO: The state courts did not use RCW 10.73.100(1) to bar Kozol's claims. THREE: The state courts accepted Kozol's express disavowal of RCW 10.73.100(1). ECF 26-5 at 6-7 n.4. FOUR: Respondent did not assert RCW 10.73.100(1) as a procedural rule in its affirmative defense and thus waived the issue under Fed. R. Civ. P. 8(c) and 12(b), and failed its initial burden under Bennett v. Mueller, 322 F.3d 573, 585-86 (9th Cir. 2003). See also Shumway v. Payne, 223 F.3d 982, 988-89 (9th Cir. 2000)(when not invoked by petitioner .100(1) not part of "adequacy" analysis of RCW 10.73.090).

Based on this ample citation to case law, Kozol has demonstrated that the district court's ruling on the issue is "debatable among jurists of reason."

3. Martinez/Trevino Excuses any Default of Ground Five

The district court ruled that Martinez v. Ryan, 566 U.S 1 (2012) and Trevino v. Thaler, 569 U.S. 413 (2013) did not excuse any default of Ground

Five's failure-to-investigate claims because, it reasoned, Kozol's ability to raise other IAC claims on direct appeal counted as the "first instance" under Martinez, and therefore Kozol's pro se failure to raise Ground Five's claims in his 2005 state PRP did not establish "cause." ECF 53 at 8-9. This is debatable for at least two reasons.

First, the district court's exact reasoning has already been addressed and rejected by this Court in Woods v. Sinclair, 764 F.3d 1109, 1137 (9th Cir. 2014)(rejecting argument that because Washington does not "categorically" prohibit IAC claims on direct appeal Martinez does not apply when other IAC claims could be raised on direct appeal).

Second, all of Mr. Kozol's failure-to-investigate claims in Ground Five are based on extra-record evidence that could not have been brought on direct appeal. See Motion for COA at 22-25. Ergo, they could only be brought in a PRP, and Kozol's pro se failure to do so in his first PRP meets the criteria of Martinez/Trevino. See Michaels v. Davis, 51 F.4th 904, 929 (9th Cir. 2022)(Woods v. Sinclair "h[eld] that Washington state law meets the Martinez requirement that IAC claims are to be raised in initial-review collateral proceedings."). As the Ninth Circuit has acknowledged, many trial-level IAC claims could require future factual development of evidence outside the trial record, and therefore could not be brought on direct appeal. Detrich v. Ryan, 740 F.3d 1237, 1246 (2013)(citing Martinez, 132 S.Ct. at 1317).

Mr. Kozol's pro se failure to raise extra-record based IAC claims on state collateral review falls squarely under the holdings in Martinez and Trevino. See White v. Warden, Ross Corr. Inst., 940 F.3d 270, 276-78 (6th Cir. 2019).

4. Adverse Inference as Part of Schlup Analysis

The district magistrate found there was no case authority to consider spoliation in the context of Schlup v. Delo, 513 U.S. 298 (1995). ECF 46 at 32. Mr. Kozol objected and cited case authority, ECF 49 at 12, but the district court judge failed to address this issue. ECF 53.

On this issue, there is no material distinction between the general habeas and the Schlup contexts. A Schlup analysis inheres in federal habeas to excuse default of federal claims procedurally barred in state court. Gage v. Chappell, 793 F.3d 1159, 1166-67 (9th Cir. 2015). Kozol's citing of several cases makes this a "debatable" issue. See Motion for COA, at 27-28. Moreover, under Schlup a court must consider "all the evidence." House v. Bell, 547 U.S. 518, 539 (2006). This makes rejection of spoliation issues inherently "debatable" for COA purposes.

5. The District Court's Analysis Was Incorrect

The district court found the new Amal Osman declaration was not credible due to its timing, and it conflicted with Mr. Kozol's trial testimony. ECF 46 at 26-28; ECF 53 at 9-11. This rejection of evidence under Schlup is debatable for at least two reasons.

First, faulting credibility in this manner is contrary to Schlup. See Howell v Superintendent, 978 F.3d 54, 59, 60-62 (3rd Cir. 2020)(finding district court's Schlup analysis went astray, including rejecting new

affidavits because the delay in years in obtaining them rendered them unreliable). Ms. Osman declared the same facts she originally recounted years earlier -- which actually supports the declaration's credibility. ECF 26-2 at 483-489. See Kyles v. Whitley, 514 U.S. 419, 443 (1995) (reliability can depend on prior statement).

Second, the district court stated Kozol's trial testimony "would not place him outside walking his dog at 10:00 p.m. as stated in Ms. Osman's declaration." ECF 46 at 28. But this is a misquote of the record. Ms. Osman saw Mr. Kozol at "sometime around 10:00 p.m." ECF 26-2 at 485. Mr. Kozol testified that sometime before 10:00 p.m. he walked the dog for an unspecified period of time, and then returned inside the house and passed the time for a brief period until watching a television show at 10:00 p.m. ECF 46 at 27, lines 19-24. Ms. Osman seeing Kozol at "sometime around 10:00 p.m." certainly accounts for her seeing Kozol anytime from 9:45 p.m. to 10:00 p.m., and squarely coincides with Kozol walking his dog sometime prior to 10:00 p.m.

As a potentially "crucial alibi defense" in the court's view, ECF 46 at 27, an evidentiary hearing (which Kozol has been properly requesting) should have been held. In Schlup, a key piece of evidence was whether witness testimony could establish the petitioner could not have committed the crime within "65 seconds." Schlup, supra, at 331. To further determine credibility, an evidentiary hearing was ordered. Id. at 332.

Next, the district court did not conduct a "holistic judgment about all the evidence and its likely effect on reasonable jurors applying the reasonable doubt standard." House, 547 U.S. at 539. Contrary to Schlup,

the district court analysis turned on "discrete findings regarding disputed points of fact," id. at 539-40, attempting to find contradiction between Ms. Osman's declaration and Kozol's trial testimony, exacerbated by misstating the record.

The district court never analyzed the evidence of Kozol's neighbors who stated his Audi had not been driven for several "months," nor Kozol's receipt for the car battery two days after the crime to try to get the Audi driveable -- both of these go to corroborate defense testimony the Audi was not used in the crime. See ECF 42 at 25 n.17.

An evidentiary hearing should have been held to identify evidence of Wolter's foot injury as Kozol described. ECF 26-2 at 508-509. Showing the blood in the Audi could be from this injury would be crucial to "actual innocence" under Schlup. Nor did the court discuss police photos of Kozol's ransacked storage unit (where his weapons were stored) taken on the day of his arrest, ECF 26-2 at 542-554, despite prosecutors' closing argument assuring the jury that no evidence existed of Kozol's storage unit being burglarized. This evidence matches facts in the confession.

Finally, the district court ruled Det. Gulla's misconduct history would not inform the Schlup analysis because there was no connection to Kozol's case, and because the evidence was not compelling in Kozol's first habeas petition. ECF 46 at 30-31. In actuality, Kozol's first habeas petition did not contain the panoply of misconduct evidence now before this Court. More importantly, Gulla's misconduct history, including bragging to plant evidence, certainly relates to Kozol's case. Kozol earlier proved Det. Gulla fabricated evidence early in the investigation,

and testified falsely to get it admitted. ECF 26-2 at 257. This directly relates to Gulla's history, ECF 26-2 at 295-412, as such misconduct "early in the investigation" would impact a jury and "would have instantly upset the credibility of the rest of the police investigation." Atkins v. County of Riverside, 151 Fed. App'x 501, 504, 505 (9th Cir. 2005). See also Kyles, 514 U.S. at 445 (good faith of police investigation).

Reasonable jurors learning of a confession and possible DNA corroboration, considering the adverse inferences that DNA would match a third party and corroborate the confession, plus the evidence of Kozol's car not being driveable, Wolter's foot injury, as well as Ms. Osman's alibi, would have reasonable doubt as to guilt. See Larsen v. Soto, 742 F.3d 1083, 1096-97 (9th Cir. 2013)(where Respondent "fail[ed] to offer any contradictory evidence" petitioner's evidence demonstrated reasonable doubt under Schlup). None of Kozol's evidence is contradicted by evidence from Respondent Haynes. The adverse inferences and confession evidence alone can satisfy Schlup. "Evidence of third party guilt can satisfy Schlup." Gable, 49 F.4th 1315, 1323 (9th Cir. 2022).

5. Conclusion

Accordingly, the Court should grant rehearing, grant a COA on all procedural and substantive issues, and grant habeas relief.

DATED this 4th Day of July, 2026.

Respectfully submitted,

Steven P. Kozol
Petitioner/Appellant, Pro Se

UNITED STATES COURT OF APPEALS

FILED

JUN 25 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEN PAUL KOZOL,

Petitioner - Appellant,

v.

RON HAYNES, Superintendent, Stafford Creek Corrections Center,

Respondent - Appellee.

No. 26-791

D.C. No. 2:22-cv-00760-BJR
Western District of Washington, Seattle

ORDER

Before: SILVERMAN and BENNETT, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 5) is denied because the underlying 28 U.S.C. § 2254 petition fails to state a federal constitutional claim debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2)-(3); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) ("When ... the district court denies relief on procedural grounds, the petitioner seeking a COA must show both 'that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'") (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Any pending motions are denied as moot.

DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 16 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

STEVEN PAUL KOZOL,

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v.

RON HAYNES, Superintendent, Stafford Creek Corrections Center,

Respondent - Appellee.

No. 26-791

D.C. No. 2:22-cv-00760-BJR
Western District of Washington, Seattle

ORDER

Before: S.R. THOMAS and LEE, Circuit Judges.

The motion (Docket Entry No. 8) by Neil M. Fox to be relieved as appellant's counsel is granted. *See* 9th Cir. R. 4-1(e).

Appellant's motion (Docket Entry No. 7) for an extension to file a pro se motion for reconsideration is granted. Appellant's pro se motion (Docket Entry No. 10) for reconsideration and reconsideration en banc is deemed timely filed.

The motion for reconsideration and reconsideration en banc is denied. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

The clerk will serve this order on former counsel, the district court, and appellant individually.

This court will not entertain further filings in this closed case.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STEVEN PAUL KOZOL,

Petitioner,

v.

RON HAYNES,

Respondent.

CASE NO. 2:22-CV-760-MJP-DWC

REPORT AND RECOMMENDATION

Noting Date: August 27, 2025

The District Court has referred this action to United States Magistrate Judge David W. Christel. On June 2, 2022, Petitioner Steven Paul Kozol filed his federal habeas petition, pursuant to 28 U.S.C. § 2254, challenging a state court judgment and sentence. Dkt. 1. The Court concludes Petitioner has procedurally defaulted all cognizable grounds for federal habeas relief raised in the Petition and has not made a sufficient showing to overcome his default. Therefore, the undersigned recommends the Petition (Dkt. 1) be denied and a certificate of appealability not be issued.

I. BACKGROUND

A. Factual Background

In 2001, Petitioner was convicted in the King County Superior Court ("the Trial Court") of one count of attempted murder in the first degree, one count burglary in the first degree, and two firearm enhancements. Dkt. 1-1 at 112–119 (Judgment and Sentence in *State v. Kozol,* King County Sup. Ct. No. 00-1-09050-8 KNT (Aug. 3, 2001) (hereinafter "Trial Court")). The Court of Appeals of the State of Washington ("the State Court of Appeals") summarized the facts of Petitioner's case as follows:

> Steven Kozol and Thomas Wolter were housemates in Wolter's home from November 1999 to May 2000. Wolter was financially stable, whereas Kozol seldom worked. Kozol owed three months' rent when he moved out of Wolter's home.
>
> Six months later, on November 15, 2000, Wolter was violently attacked in his home by a man wearing a black ski mask over his head and face, leather gloves, and a thick gray sweat suit. Wolter fought his assailant in the upstairs office of his home where the initial attack occurred, then in the stairwell and at the bottom of the stairs, then back upstairs at the doorway to Wolter's bedroom after Wolter ran upstairs and tried to barricade himself in the bedroom and the assailant returned up the stairs and attempted to kick in the door, then back down the stairwell and into the lower part of the house where Wolter was finally able to break away and run to a neighbor's home. In the course of the attack and the ensuing struggle, Wolter was shot with a taser gun, shot three times with a handgun, and threatened with a knife.
>
> Wolter's neighbor called 911. Police arrived quickly but were unable to locate the assailant. Wolter was taken to Harborview Hospital where he was treated for the gunshot wounds and for numerous lacerations requiring stitches. Wolter was not able to identify his assailant, but he was able to describe the clothing worn by the man, and gave police a general description of the man's height, weight, and build. He also told police that when he was shot with the gun he heard a "popping" or "puff" noise, and that the gun seemed to have something long attached to it. This led police to believe that the gun had been equipped with a silencer.
>
> The officers obtained a search warrant to search Wolter's home for evidence. They found no sign of forced entry. They found bloodstains on the carpet and walls, bullets and bullet holes, a wire from a taser gun, a taser barb on the jacket Wolter had been wearing, and "AFIDS" on the floor of the office. The acronym AFIDS stands for "anti-felon identification tags." They are automatically deployed when a taser gun is fired, and they have a serial number on them that can be traced back to a specific taser gun. In this case, the AFIDS were traced to a taser gun that

had been purchased by Wolter's former housemate Steve Kozol, eight days before the attack, from a business called Spy Connection. The physical description Wolter gave police of his attacker was similar to that of Kozol.

The bullets retrieved from the crime scene were found to have been shot from a 9 mm. semi-automatic or fully automatic pistol manufactured by SWD Company. This company imprints the logo "Cobray" on the firearms that it manufactures. Police subsequently found evidence that Kozol had purchased a 9 mm. Cobray handgun and a rapid-fire attachment for the gun.

Because the AFIDS had been traced to a taser gun purchased by Kozol, police promptly began watching him. They saw him transfer a briefcase from his Audi vehicle into the trunk of a Mustang owned by his girlfriend. They obtained multiple search warrants to search Kozol's residence, a storage facility that he rented, his Audi, and his girlfriend's Mustang. In the Mustang, police found a briefcase containing Wolter's identification, several bank statements and blank checks belonging to Wolter, a newspaper article about the attack on Wolter, and a business card from the business called Spy Connection. Wolter subsequently identified the briefcase as one belonging to him.

Police found a book entitled *Quick and Dirty Home Made Silencers* in Kozol's Audi. They also found "smear transfer" bloodstains on the driver's seat of the car. Swabs were taken, tested, and found to exactly match a blood sample taken from Wolter.

In Kozol's garage, police found parts that could be used to make home made silencers for guns using some of the methods described in the book on how to make silencers that was found in Kozol's Audi. Detective Gulla, who helped execute the search warrant for Kozol's garage, subsequently testified that based on his training and experience with firearms and silencers, including actual experience in making a home made silencer, he immediately recognized the parts that he saw in the garage as those from which silencers can be made. He also testified that these parts were located in close proximity to one another.

Kozol was charged with attempted murder in the first degree, and in the alternative, with attempted murder in the second degree. He was also charged with burglary in the first degree. Each of the charges included an allegation that Kozol was armed with a deadly weapon at the time of the crimes.

Kozol brought a motion to suppress evidence obtained from only one of the several search warrants that were issued, the warrant which authorized the search of Kozol's house, garage, and car. The court denied the motion to suppress.

At trial, Kozol testified that although he had indeed purchased a taser gun, a 9 mm. Cobray handgun, and a rapid-fire attachment for the gun, these items had been stolen from his rented storage locker before the night of the crime against Wolter. He testified that he had intended to give the taser gun to his girlfriend for

> Christmas, and that he had intended to use the handgun for target practice. He testified that the blood on his car seat could have come from a rag that he had used to treat a foot injury Wolter received when he stepped on a nail, which rag he had tossed into his car. He testified that Wolter gave him the briefcase, and that because the two had shared the office on the second floor of Wolter's home while they were housemates, Wolter's identification, blank checks, and banks statements, which predated the crime by several months, could have been accidentally swept into the briefcase when Kozol moved out. He denied any involvement in the attack on Wolter. Both he and his girlfriend testified that on the night of the attack, Kozol had been with the girlfriend at her home the whole time. Kozol explained that the parts in his garage were for his hobby of building homemade rockets and for a business project of developing a new kind of air filter for diesel trucks. He also claimed to be writing a novel that included spies and taser guns.
>
> Wolter testified during rebuttal that he had no recollection of injuring his foot by stepping on a nail, or of giving Kozol his briefcase, but that the happening of either event was in the realm of possibility.
>
> The jury found Kozol guilty of attempted first degree murder and first degree burglary, and also found that he had been armed with a deadly weapon at the time of each offense. Kozol was sentenced within the standard range.

Dkt. 1-1 at 95–98 (Unpublished Opinion in *State v. Kozol*, Wash. Ct. App. No. 49154-7-I (June 30, 2003)).

B. Procedural Background

1. *Direct Appeal*

Following his 2001 jury conviction, Petitioner raised the following claims on direct appeal: (1) the Trial Court's failure to suppress evidence obtained pursuant to an allegedly defective warrant; (2) the prosecutor's failure to elect between alternative charges of attempted first- and second-degree murder, allegedly causing jury confusion; (3) ineffective assistance of trial counsel based on the failure to preserve and test blood evidence; (4) a defective jury instruction concerning the elements of attempted first-degree murder; and (5) additional *pro se* claims challenging the search warrant and trial counsel's performance. Dkt. 1-1 at 94–110

(Unpublished Opinion in *State v. Kozol*, Wash. Ct. App. No. 49154-7-I (June 30, 2003)). The State Court of Appeals found no reversible error and affirmed Petitioner's conviction. *Id.*

Petitioner then sought discretionary review before the Washington State Supreme Court ("the State Supreme Court"), raising six claims: (1) the definition of "attempt" provided in the jury instructions lessened the prosecution's burden of proof in violation of due process; (2) the State Court of Appeals incorrectly concluded that any erroneous instructions had been cured; (3) the affidavit supporting the search warrant failed to establish a nexus between the alleged criminal activity and the locations searched, violating the Fourth Amendment; (4) the search warrant lacked particularity also in violation of the Fourth Amendment; (5) the Trial Court improperly admitted evidence not covered by the warrant under the plain view doctrine in violation of the Fourth Amendment; and (6) that he was entitled to review of his Fourth Amendment claims because they raised significant questions of federal constitutional law. *See* Dkt. 26-2 at 244–45 (Report and Recommendation in *Kozol v. Payne*, No. 2:06-cv-01074-MJP (W.D. Wash. May 4, 2007) (hereinafter "2006 Petition") (summarizing procedural background for Petitioner's conviction and sentence and citing to locally filed state court record)).[1] On February 4, 2004, the State Supreme Court denied review without comment. Dkt. 1-1 at 92 (Denial of Review in *State v. Kozol*, Wash. Sup. Ct. No.74329-1 (Feb. 4, 2004)).

[1] Respondent did not submit a state court record as required under Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and was given multiple extensions of time to facilitate compliance. Dkt. 29, 31, 33, 35 (Orders granting Respondent's first, second, third, and fourth motions to extend deadline to file answer and state court record). Instead, for the state court record Respondent relies on documentation provided by Petitioner, which includes a copy of this Court's prior summary of Petitioner's state court proceedings in the 2006 Petition which does not include a copy of his petition for review on direct appeal. Because the parties do not dispute the issues raised by Petitioner in the state courts and because requiring Respondent to file a state court record would delay in these proceedings, the Court cites to the documentation provided by Petitioner and admonishes Respondent's Counsel for failure to fulfill this obligation.

2. *State Collateral Review (Initiated February 2005)*

On February 16, 2005, Kozol filed a motion for relief from judgment in the Trial Court, which was transferred to the State Court of Appeals for consideration as Petitioner's first personal restraint petition ("the 2005 PRP"). *See* Dkt. 26-2 at 245 (Report and Recommendation in 2006 Petition); *Id.* at 561–62 (Ruling Denying Review in *In re Personal Restraint of Steven Kozol,* Wash. Sup. Ct. No. 78226-1 (Apr. 5, 2006)). The 2005 PRP raised the following grounds: (1) the State presented false testimony through Detective Denny Gulla; (2) ineffective assistance of counsel; (3) prosecutorial misconduct; and (4) miscalculation of his offender score. *Id.* at 231–38 (Order Dismissing Personal Restraint Petition in *In re Personal Restraint of Steven Kozol,* Wash. Ct. App. No. 55747-5-I (Dec. 30, 2005)). The Court of Appeals dismissed the 2005 PRP on December 30, 2005, concluding that Petitioner failed to show that his proceedings in the Trial Court were affected by a constitutional error resulting in actual and substantial prejudice or a non-constitutional error amounting to a fundamental miscarriage of justice. *Id.*

Petitioner then petitioned the State Supreme Court for discretionary review, asserting the following grounds: (1) that the appellate court erred in deeming his arguments frivolous; (2) that the State violated due process by knowingly presenting false testimony; (3) that his counsel was ineffective for failing to challenge this evidence, cross-examine witnesses, or present defense evidence; (4) that his Sixth Amendment right to an impartial jury was violated by the inclusion of three biased jurors; (5) that trial counsel was ineffective for failing to challenge those jurors; and (6) that cumulative errors deprived him of a fair trial. *See id.* at 246 (Report and Recommendation in 2006 Petition); *id.* at 561–62 (Ruling Denying Review in *In re Personal Restraint of Steven Kozol,* Wash. Sup. Ct. No. 78226-1 (Apr. 5, 2006)). The State Supreme Court denied discretionary review on April 5, 2006, and later denied Petitioner's motion to modify that

decision on June 2, 2006. *See id.*; *id.* at 239 (Order in *In re Personal Restraint of Steven Kozol,* Wash. Sup. Ct. No. 78226-1 (Jun. 2, 2006)); *id.* at 229 (Certificate of Finality in *In re Personal Restraint of Steven Kozol*, Washington Court of Appeals No. 55747-5-I (Jul. 12, 2006)).

3. *Federal Habeas Proceedings (Initiated July 2006)*

In 2006, Petitioner filed a federal habeas petition ("the 2006 Petition") raising the following grounds for relief: (1) fabrication of physical evidence by law enforcement in violation of due process; (2) the State's use of false testimony from Det. Gulla violated due process; (3) ineffective assistance of trial counsel for failing to challenge that testimony; (4) failure by the State to disclose exculpatory evidence, such as evidence of Det. Gulla's professional misconduct; (5) cumulative error; (6) denial of the right to an impartial jury; and (7) ineffective assistance of trial counsel for not challenging biased jurors. Dkt. 26-2 at 246–47 (Report and Recommendation in 2006 Petition).

The Court dismissed the 2006 Petition with prejudice, concluding that grounds (1), (4), and (5) were unexhausted and procedurally defaulted and that the remaining grounds lacked merit. *Id.* at 247–65 (Report and Recommendation in 2006 Petition); *id.* at 266–75 (Order Adopting Report and Recommendation and Denying Habeas Petition in 2006 Petition); *see also id.* at 276–80 (Order Denying Petitioner's Motion to Alter or Amend Judgment in 2006 Petition). Petitioner then sought a certificate of appealability on all grounds raised in the 2006 Petition, which the Court granted. *Id.* at 281 (Order Granting Motion for Certificate of Appealability in 2006 Petition).

Petitioner proceeded with four claims on appeal, and, on May 5, 2009, the Ninth Circuit affirmed this Court's denial of habeas relief, concluding: (1) that any alleged false testimony by Detective Gulla did not affect the verdict in light of other "overwhelming" evidence supporting

Petitioner's conviction; (2) that Petitioner was not prejudiced by trial counsel's alleged deficiencies; (3) that the due process claim based on allegedly undisclosed evidence was procedurally defaulted; and (4) that the cumulative error claim failed because Petitioner had not demonstrated particular constitutional errors. *Id.* at 286–90 (Memorandum Decision in *Kozol v. Payne*, No. 08-35094 (9th Cir. May 5, 2009) (unpublished)).

4. *Resentencing Proceedings*

On September 25, 2018, Petitioner filed a motion for resentencing before the Trial Court, contending the offender score used at his original sentencing was incorrectly calculated. Dkt. 26-2 at 12–23 (Motion for Resentencing in Trial Court (Sep. 25, 2018). Specifically, Petitioner argued two 1991 convictions should have "washed out" under a Washington State sentencing provision that requires non-sexual prior convictions be excluded from the offender score where such convictions are followed by a five-year crime-free period. *Id.* at 17–18. Petitioner asserted he was erroneously denied the benefit of this "wash out" provision due to a long-vacated term of incarceration occurring in the five years following the 1991 convictions. *Id.* This error allegedly increased his offender score from 7 to 9, elevating his sentencing range and resulting in an excessive sentence. *Id.*

At the resentencing hearing, the State conceded there was an error in calculation of the offender scores for Petitioner's original judgment and sentence. Dkt. 40-10 at 9, 13, 69 (Verbatim Report of Proceedings in Trial Court (Nov. 13, 2020)). The Trial Court granted Petitioner's motion, resentencing him under the correct offender score and new standard sentencing ranges. *Id.* at 72–77. The Trial Court then vacated Petitioner's original judgment and sentence and issued a new judgment and sentence on resentencing on November 1, 2020. *Id.* at 23–24 (Ex. 4, Order Vacating Original Judgment in Trial Court (Nov. 13, 2020)); *Id.* at 10–21

(Ex. 3, Judgment and Sentence on Resentencing in Trial Court (Nov. 13, 2020)). The Trial Court subsequently entered an order correcting typographical errors in the offender score and sentencing ranges reflected on the new judgment and sentence and stating that all other terms and conditions remained in full force and effect. *Id.* at 7–8 (Ex. 2, Order Amending Judgment and Sentence on Resentencing in Trial Court (Jan. 25, 2021)). In sum, the Trial Court reduced Petitioner's total term of confinement from 479 months to 390 months. *Compare id.* at 112–119 (Judgment and Sentence in Trial Court (Aug. 3, 2001)) *with id.* at 7–8 (Ex. 2, Order Amending Judgment and Sentence on Resentencing in Trial Court (Jan. 25, 2021)).

Petitioner initially filed an appeal on other aspects of the Trial Court's decision but later voluntarily dismiss that appeal. Dkt. 39-1 at 3–5 (Notice of Appeal in Trial Court (Dec. 7, 2020)); Dkt. 26-2 at 292 (Ruling Dismissing Appeal in *State v. Kozol,* Wash. Ct. App. No. 82282-2-I (Jun. 8, 2021)). The State Court of Appeals issued its mandate on June 8, 2021. *Id.* at 293 (Mandate in *State v. Kozol,* Wash. Ct. App. No. 82282-2-I (Jun. 8, 2021)).

5. *State Collateral Review (Initiated June 2022)*

On June 1, 2022, Petitioner filed a PRP ("the 2022 PRP") in the State Court of Appeals asserting the following grounds: (1) prosecutorial misconduct, (2) erroneous evidentiary rulings regarding a "silencer manual," (3) newly discovered evidence and/or *Brady* violations concerning Detective Gulla's professional misconduct, (4) destruction of exculpatory evidence, (5) ineffective assistance of trial and appellate counsel, and (6) denial of access to the courts. Dkt. 3-1 (Personal Restraint Petition in *In re Personal Restraint of Steven Kozol*, Wash. Ct. App. No. 84098-3-I (Jun. 1, 2022)).

The State Court of Appeals dismissed all but one ground asserted in the 2022 PRP as untimely and barred under Wash. Rev. Code § 10.73.090, which requires that PRPs be filed

within one year after a facially valid judgment and sentence becomes final. Dkt. 26-5 (Unpublished Opinion in *In re Personal Restraint of Steven Kozol*, Wash. Ct. App. No. 84098-3-1 (Apr. 1, 2024)). The State Court of Appeals concluded that because grounds (1) through (5) concerned valid aspects of Petitioner's original judgment and sentence, the new judgment and sentence on resentencing did not reset the clock on his ability to obtain state collateral review of those claims. *Id.* at 7–12 ("Kozol's timeliness argument fails because none of his challenges to his convictions relate to the invalidity of the 2001 [judgment and sentence]."). It further concluded that Petitioner was not entitled to equitable tolling and was not exempt from the limitations period on actual innocence grounds. *Id.* at 12–17 ("[B]ecause Kozol's proffered new evidence does not show that it is more likely than not that no reasonable juror would have found him guilty, the actual innocence doctrine does not allow him to avoid the one-year time limit prescribed by RCW 10.73.090."). Finally, the State Court of Appeals concluded Petitioner's access to courts claim in ground (6) was without merit and did not preclude dismissal of the 2022 PRP as untimely and barred. *Id.* at 17–20.

Petitioner then sought discretionary review of the State Court of Appeals decision. Dkt. 39-3 at 35–110 (Motion for Discretionary Review in *In re the Personal Restraint of Steven Kozol*, Wash. Sup. Ct. No. 103015-1 (Apr. 30, 2024)). The State Supreme Court commissioner denied review, concluding the State Court of Appeals did not err in finding that the 2022 PRP was untimely and barred under Washington state law. Dkt. 26-6 (Ruling Denying Review in *In re the Personal Restraint of Steven Kozol*, Wash. Sup. Ct. No. 103015-1 (Jun. 17, 2024)). The commissioner noted that, though the 2022 PRP raised "at least one ground for relief that is potentially exempt from the time limit," it was "at best" a mixed petition and still properly dismissed as untimely under Washington law. *Id.* at 2 (citing *In re Pers. Restraint of Hankerson*,

149 Wn.2d 695, 702, 72 P.3d 703 (2003)). Petitioner then filed a motion to modify, and the State Supreme Court declined to modify the commissioner's ruling. Dkt. 39-3 at 1–33 (Motion to Modify Commissioner's Ruling in *In re the Personal Restraint of Steven Kozol*, Wash. Sup. Ct. No. 103015-1 (Jun. 24, 2024)); Dkt. 26-7 (Order in *In re the Personal Restraint of Steven Kozol*, Wash. Sup. Ct. No. 103015-1 (Sep. 4, 2024)).

That State Court of Appeals issued the certificate of finality on September 25, 2024, and Petitioner did not seek further review by the United States Supreme Court. Dkt. 26-8 (Certificate of Finality in *In re Personal Restraint of Steven Kozol*, Wash. Ct. App. No. 84098-3-I (Sep. 25, 2024)).

6. *Federal Habeas Proceedings (June 2022)*

In this federal habeas petition, filed on June 2, 2022, Petitioner asserts the following grounds:

1. Prosecutorial Misconduct During Closing Argument in Violation of the Sixth and Fourteenth Amendments to the United States Constitution ("Ground One")
2. Admission of Improper Evidence—"Silencer Manual"—in Violation of the First and Fourteenth Amendment ("Ground Two")
3. Suppression of Material Impeachment Evidence involving Detective Gulla's Professional Misconduct in Violation of the Fourteenth Amendment as Established in *Brady v. Maryland*, 373 U.S. 83 (1963) ("Ground Three")
4. Destruction of Potentially Exculpatory Evidence in Violation of the Fourteenth Amendment ("Ground Four")
5. Ineffective Assistance of Trial and Appellate Counsel in Violation of the Sixth and Fourteenth Amendments ("Ground Five")
6. Denial of Access to the Courts in Violation of the First, Fifth, and Fourteenth Amendments ("Ground Six")

Dkt. 1 at 5–11, 20–21. Petitioner also moved for a stay of these proceedings so he could attempt to exhaust his state court remedies. Dkt. 3.

On July 29, 2022, the Court directed Respondent (1) to address whether the Petition should be deemed second or successive to the 2006 Petition and (2) to respond to Petitioner's

request for a stay. Dkt. 5, at 1–2. Respondent responded that the Petition was not "second or successive" within the meaning of 28 U.S.C. § 2244(b) because the judgment and sentence on resentencing constituted a "new, intervening judgment" under *Magwood v. Patterson*, 561 U.S. 320 (2010). Dkt. 8 at 1–4. Respondent also agreed to a stay so that Petitioner may attempt to exhaust his remedies in the state court. *Id.* at 4. The Court entered a stay on September 9, 2022. Dkt. 9.

On October 23, 2024, the Court lifted the stay in this action and entered an agreed case schedule. Dkt. 22; *see* Dkt. 21 (Stipulated Motion to Lift Stay and Set Schedule). On December 24, 2024, Petitioner filed a memorandum in support of his Petition. Dkts. 25, 27. Petitioner also filed relevant state court records for his conviction and sentence. *See* Dkt. 1-1, Dkt. 3-1, Dkt. 3-2, Dkts. 26-1 through 26-8, Dkts. 39-1 through 39-3, and Dkts. 40-1 through 40-10. After receiving several extensions of time, Respondent filed his Answer to the Petition on May 2, 2025. Dkt. 36. Petitioner, who also received an extension, filed his Traverse on June 17, 2025. Dkt. 42. Respondent filed a timely Reply, Dkt. 43, and Petitioner subsequently filed a Notice of Supplemental Authority. Dkt. 44.

This matter is now fully briefed and ready for the Court's consideration.

II. DISCUSSION

Respondent argues the Petition should be denied and this action dismissed for two reasons. He first argues the Petition was filed more than one year after Petitioner's judgment of conviction became final making it untimely under 28 U.S.C. § 2244(d)(1)(A). Dkt. 36 at 13–21. Alternatively, Respondent argues that, except for Ground Six which cannot provide for federal habeas relief, all Grounds raised in the Petition were procedurally defaulted in the state courts. *Id.* at 21–41. In response, Petitioner argues the Petition is timely and, to the extent his claims are

defaulted, the procedural default is excused by his ability to (1) show cause and prejudice and (2) actual innocence. *See* Dkt. 42.

A. Statute of Limitations-Timeliness (All Grounds)

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which is codified at 28 U.S.C. § 2241 *et seq.*, a one-year statute of limitations applies to federal habeas petitions. Section 2244(d)(1)(A) requires a prisoner to file a habeas petition within one year of "the date on which the [state court] judgment [of conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review."

"[T]he judgment from which the AEDPA statute of limitations runs is the one pursuant to which the petitioner is incarcerated." *Smith v. Williams*, 871 F.3d 684, 687 (9th Cir. 2017). Where, as here, a petitioner's original judgment has been modified in the state courts, a federal court sitting in habeas review must determine whether such modification resulted in a new, intervening judgment subject to a renewed one-year limitations period. *Id.* at 688.

To make this determination, the Ninth Circuit applies the same principles set forth in *Magwood v. Patterson*, concerning second and successive habeas petitions. *Smith*, 871 F.3d at 686–88. In *Magwood*, the Supreme Court held that when a new, intervening judgment is entered—such as through modification of the underlying conviction or sentence—a federal habeas petition challenging that new judgment is not considered "second or successive." *Id.* at 341–42. The Supreme Court reasoned that the relevant judgment challenged on habeas review is always the one pursuant to which the prisoner is currently held, not an earlier invalidated judgment. *Id.* at 332–33. Thus, where the state court modifies and replaces a prior judgment, the date on which the new, intervening judgment becomes final marks the start of a new one-year limitations period. *See Smith*, 871 F.3d at 688.

This principle holds irrespective of whether any ground raised in the habeas petition arises from entry of the new judgment itself; that is, a habeas petition filed within one-year of the date a new, intervening judgment becomes final will be timely even if all grounds raised therein could have been raised on a prior judgment. *See Smith*, at 688 ("It is of no moment that [the new judgment] *reinstated* counts on which [the petitioner] had originally been convicted rather than adding *new* counts of conviction.") (emphasis in original); *see also Wentzell v. Neven*, 674 F.3d 1124, 1127 (9th Cir. 2012) ("'[W]here a first habeas petition results in an amended judgment, a subsequent petition is not successive,' even if its claims could have been raised in a prior petition or the petitioner 'effectively challenges an unamended component of the judgment.'") (quoting *Johnson v. United States*, 623 F.3d 41, 44 (2d Cir. 2010)).

Indeed, applying *Magwood*, the Ninth Circuit has held that a state court's substantive alteration of a sentence—but not the underlying conviction—creates a new, intervening judgment for purposes of federal habeas review. *Gonzalez v. Sherman*, 873 F.3d 763, 769 (9th Cir. 2017) ("The Supreme Court has directed that '[t]he sentence *is* the judgment' in a criminal case.... As such, a change to a defendant's sentence is a change to his judgment." (quoting *Burton v. Stewart*, 549 U.S. 147, 156 (2007) (emphasis in original))). Whether a sentencing action is substantive change resulting in a new judgment is a matter of state law. *See id.* at 769; *Colbert v. Haynes,* 954 F.3d 1232, 1236 (9th Cir. 2020).

In Washington, "only sentencing errors stemming from a trial court exceeding its statutory authority render a sentencing judgment invalid." *Id.* (citing *In re Coats*, 173 Wash.2d 123, 135 (2011)); *State v. Kilgore*, 167 Wash. 2d 28, 41 (2009) ("[W]hen a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence.") (internal citations and quotations omitted). With respect to offender

scores, resentencing is required—and a new judgment created—where an error in the offender score "affects the applicable sentencing range." *Id.* at 41 (holding an adjusted offender score that did not impact the applicable sentencing range or require the trial court to exercise discretion at resentencing did not result in a new, appealable judgment).

By contrast, "[m]ere typographical errors easily corrected would not render a judgment invalid. Similarly, errors in fact such as a date or place would not necessarily render a judgment invalid." *Coats,* 173 Wash. at 135 (citing *In re McKiearnan*, 165 Wash. 2d 777, 783 (2009)). Unlike a mathematical miscalculation impacting the duration and validity of a judgment and sentence, "a scrivener's error carries no legal consequences" as it rectifies only the written record of a judgment and sentence, not the judgment itself. *See Gonzalez*, 873 F.3d at 772 (addressing similar principles of California law).

Here, the record shows the total duration of Petitioner's sentence was reduced upon resentencing to correct an error in the calculation of his offender score in his original judgment and sentence. The Trial Court imposed a sentence which encompassed a 479-month term imposed for the attempted murder conviction and a concurrent 221-month term imposed for the burglary conviction, and each of these terms were inclusive of consecutive 60-month firearm enhancements. Dkt. 1-1 at 112–119 (Judgment and Sentence in Trial Court (Aug. 3, 2001)).[2]

At the resentencing hearing, the Trial Court concluded that a reduction in Petitioner's total term of confinement was necessitated by the erroneous calculation of his offender score, which affected the applicable sentencing range for his attempted murder conviction:

[2] A subsection of Petitioner's original judgment and sentence indicates that additional consecutive 60-month terms were imposed for each firearm enhancement, but the sentencing data and final sentence calculation show that the firearm enhancements were folded into the concurrent terms imposed for attempted murder and burglary. *Id.* at 113, 115. This result is further confirmed by discussions of the original sentence at Petitioner's resentencing hearing. *See, e.g.*, Dkt. 40-10 at 21 (Verbatim Report of Proceedings in Trial Court (Nov. 13, 2020)).

> Therefore, the court grants the defendant's motion to the extent that the offender scores are each reduced by two points which, according to the table on the defendant's resentencing memorandum, page 6, -- this is just for the attempted murder in the first degree count -- the resulting offender score would be 7, resulting in a standard range of 253.5 to 337.5 months. And then if you go toward the right on that table under the column for two firearm enhancements, the range there would be 373.5 to 457.5 months if you include the 120 months for the firearm enhancements, which I do here.
>
> For the crime of attempted murder in the first degree, the court amends the prior judgment and sentences Mr. Kozol to a total of 390 months. That would be 270 months under the standard range plus 120 months with the firearm enhancements. All other terms and conditions in the original judgment and sentence form shall remain the same.

Dkt. 40-10 at 72 (Verbatim Report of Proceedings in Trial Court (Nov. 13, 2020)). The State conceded the miscalculated offender score warranted resentencing as it affected the applicable sentencing range for Petitioner's attempted murder conviction. *See, e.g.*, *id.* at 9, 13, 69–73. Even so, because Petitioner's adjusted offender score did not affect the applicable sentencing range for his attempted burglary conviction, the Trial Court left the original 221-month term for that conviction intact. *Id.* at 72–73.

Under the new judgment and sentence on resentencing, Petitioner's total sentence was reduced to 390 months of incarceration, with a 390-month term imposed for attempted murder and a concurrent 221-month term imposed for burglary—both terms again inclusive of the consecutive firearm enhancements. *Id.* at 23–24 (Order Vacating Judgment in Trial Court (Nov. 13, 2020)); *Id.* at 10–21 (Judgment and Sentence on Resentencing in Trial Court (Nov. 13, 2020)); *Id.* at 7–8 (Order Amending Judgment and Sentence on Resentencing in Trial Court (Jan. 25, 2021)) (correcting scrivener's errors in the written record of the judgment and sentence on resentencing).

Here, Petitioner's judgment and sentence on resentencing constitutes a new, intervening judgment under *Magwood* and its progeny. To determine whether a change in a state criminal

sentence creates a "new judgment," the Ninth Circuit directs District Courts to look to the applicable state law. *Colbert*, 954 F.3d at 123. Critical to this inquiry is whether the state court action "replaces an invalid sentence with a valid one." *Id.* Because invalidity is a linchpin, the court in *Colbert*, after examining what constitutes an invalid sentence under Washington law, stated that "in Washington, only sentencing errors stemming from a trial court exceeding its statutory authority render a sentence judgment invalid." (citation omitted). *Id.* In Washington, "[a] sentencing court acts without statutory authority under the [Sentencing Reform Act] when it imposes a sentence based upon a miscalculated offender score." *In re Call*, 144 Wash. 2d 315, 332, 28 P.3d 709, 718 (2001).

At resentencing, the Trial Court agreed with Petitioner that his "washed out" offenses should not have been used to calculate his offender score and determined Petitioner needed to be resentenced. As the Trial Court acted outside its statutory authority when it entered Petitioner's original sentence, his original sentence was invalid and the 2020 judgment is a new, intervening judgment. *See In re Call*, 144 Wash. 3d at 332 (finding the sentence was invalid when the offender score included "washed out" offenses); *State v. Roche*, 75 Wash. App. 500, 513, 878 P.2d 497, 504 (1994) ("It is axiomatic that a sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score.").

Petitioner's resentencing thus falls squarely within the type of judicial action that gives rise to a new, intervening judgment for purposes of federal habeas review.[3] Accordingly, the one-year limitations period for Petitioner to file his federal habeas Petition began to run at the

[3] By contrast, the Trial Court's subsequent order correcting a scrivener's error in the judgment and sentence on resentencing did not produce new, intervening judgment. Dkt. 1-1 at 7–8 (Order Amending Judgment and Sentence on Resentencing in Trial Court (Jan. 25, 2021)).

conclusion of his direct review for his judgment and sentence on resentencing. 28 U.S.C. § 2244(d)(1)(A).

After Petitioner filed and subsequently dismissed his direct appeal on resentencing, the State Court of Appeals issued its mandate on June 8, 2021. Dkt. 39-1 at 3–5 (Notice of Appeal in Trial Court (Dec. 7, 2020)); Dkt. 26-2 at 292 (Ruling Dismissing Appeal in *State v. Kozol,* Wash. Ct. App. No. 82282-2-I (Jun. 8, 2021)); *Id.* at 293 (Mandate in *State v. Kozol,* Wash. Ct. App. No. 82282-2-I (Jun. 8, 2021)). As such, AEDPA's limitations period began to run the following day on June 9, 2021. *See Patterson v. Stewart*, 251 F.3d 1243, 1245–46 (9th Cir. 2001) (AEDPA's time limits are calculated in accordance with Fed. R. Civ. P. 6(a)). The limitations period then ran uninterrupted for 357 days and was tolled when Petitioner filed the 2022 PRP on June 1, 2022. Dkt. 3-1 (Personal Restraint Petition in *In re Personal Restraint of Steven Kozol,* Wash. Ct. App. No. 84098-3-I (Jun. 1, 2022)); 28 U.S.C. § 2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."). Petitioner filed his federal habeas Petition the following day on June 2, 2022. *See* Dkt. 1. Because it was filed approximately one week before the one-year limitations period expired, the Court finds the Petition complies Section 2244(d) and should not be dismissed as untimely.

Having concluded that the Petition is not time-barred, the Court next turns to Respondent's alternative argument that, except for Ground Six which offers no independent basis for federal habeas relief, Petitioner has procedurally defaulted all Grounds raised in the Petition.

B. Procedural Default (Grounds One through Five)

Exhaustion and procedural default are related but distinct doctrines governing federal habeas review. "[A] state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus." *Picard v. Connor*, 404 U.S. 270, 275 (1971). Exhaustion "refers only to remedies still available at the time of the federal petition" and asks whether the petitioner may still obtain the relief he seeks in the state system. *Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982); *O'Sullivan v. Boerckel*, 526 U.S. 838, 851 (1999) (Stevens, J., dissenting). A petitioner's federal claims will be considered exhausted only after "the state courts [have been afforded] a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary." *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986).

Procedural default, on the other hand, refers to federal claims that cannot, at the time the federal court reviews the habeas petition, receive such consideration in the state courts because of an adequate and independent state procedural rule barring review. *Franklin v. Johnson*, 290 F.3d 1223, 1230–31 (9th Cir. 2002) (citations omitted); *Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991); *O'Sullivan*, 526 U.S. at 845. Procedural default precludes the federal courts from reviewing a claim when the state court has, in fact, been presented with the claim but declined to reach the issue for procedural reasons or when it is clear the state court would, if presented with the federal claim, hold the claim procedurally barred. *Franklin*, 290 F.3d at 1230–31 (citations omitted). In other words, if a state procedural rule has or would now preclude the petitioner from raising his claim at the state level, the claim is considered "procedurally defaulted," and the federal courts are barred from reviewing the petition on the merits. *Coleman*, 501 U.S. at 731–32; *O'Sullivan*, 526 U.S. at 845.

All Grounds raised in the Petition are exhausted because each was presented to the state courts in the 2022 PRP and pursued through the final level of review. Dkt. 3-1 (Personal Restraint Petition in *In re Personal Restraint of Steven Kozol*, Wash. Ct. App. No. 84098-3-I (Jun. 1, 2022)). Nevertheless, Grounds One through Five are procedurally defaulted because the state courts declined to reach the issues for procedural reasons—namely, that the 2022 PRP was untimely and procedurally barred pursuant to Wash. Rev. Code § 10.73.090. Dkt. 26-5 (Unpublished Opinion in *In re Personal Restraint of Steven Kozol*, Wash. Ct. App. No. 84098-3-I (Apr. 1, 2024)); Dkt. 26-6 (Ruling Denying Review in *In re the Personal Restraint of Steven Kozol*, Wash. Sup. Ct. No. 103015-1 (Jun. 17, 2024)). The State Court of Appeals expressly declined to consider the federal claims in Grounds One through Five because each was barred by the one-year limitations period on PRPs filed in Washington state courts. Dkt. 26-5 (Unpublished Opinion in *In re Personal Restraint of Steven Kozol*, Wash. Ct. App. No. 84098-3-I (Apr. 1, 2024)). The State Supreme Court did not disturb the State Court of Appeals decision, concluding the lower court had not erred in finding the 2022 PRP was untimely and barred by Wash. Rev. Code § 10.73.090. Dkt. 26-6 (Ruling Denying Review in *In re the Personal Restraint of Steven Kozol*, Wash. Sup. Ct. No. 103015-1 (Jun. 17, 2024)); Dkt. 26-7 (Order in *In re the Personal Restraint of Steven Kozol*, Wash. Sup. Ct. No. 103015-1 (Sep. 4, 2024)).

"There is usually no doubt that the decision of a state supreme court rests on an adequate and independent state ground when the court's opinion clearly and expressly states that its decision is based on a state procedural rule." *Morales v. Calderon*, 85 F.3d 1387, 1390 (9th Cir. 1996). On more than one occasion, the Ninth Circuit has found Wash. Rev. Code § 10.73.090 to be an independent and adequate state procedural rule. *See Casey v. Moore*, 386 F.3d 896, 920 (9th Cir. 2004) ("We have already determined that this time-related procedural statute, Wash.

Rev. Code § 10.73.090, provides an independent and adequate state ground to bar federal review") (citing *Shumway v. Payne*, 223 F.3d 982, 989 (9th Cir. 2000)); *see also Powell v. Lambert*, 357 F.3d 871, 875 (9th Cir. 2004) (observing that "[m]any aspects of Washington's rule concerning time bars for personal restraint petitions are clear, consistently applied, and well-established," but concluding the procedural bar for untimely mixed petitions was not consistently applied before the rule was settled in *In re Stoudmire,* 141 Wash.2d 342, 5 P.3d 1240 (2000)).

Petitioner argues this is no longer the case, but he fails to demonstrate that any arguable variation in the application of Wash. Rev. Code § 10.73.090 by the Washington state courts amounts to more than the permissible exercise of discretion in the exceptional case. *See Ortiz v. Stewart*, 149 F.3d 923, 932 (9th Cir. 1998) (concluding a habeas petitioner did not place adequacy of state rule in question because the Ninth Circuit had already held the state procedural rule to be consistently applied and the petitioner failed to cite cases demonstrating subsequent inconsistent application), *overruled on other grounds as recognized by Apelt v. Ryan*, 878 F.3d 800, 827–28 (9th Cir. 2017); *see also Morales*, 85 F.3d at 1392–93 (explaining that "procedural rules need not be utterly mechanical," and procedural rules will bar federal habeas review so long as judicial discretion is applied "consistently," "within reasonable operating limits," and on a "principled" rather than "*ad hoc*" basis) (citations omitted).

Because the state courts expressly applied an adequate and independent state procedural bar to the federal claims in Grounds One through Five, each of these Grounds is procedurally defaulted. *See Williams v. Ryan*, 2019 WL 4750235, at *3 (D. Ariz. Sept. 30, 2019) ("If a state court expressly applied a procedural bar, and that state procedural bar is both independent and adequate, a federal habeas court cannot review the claim on the merits.") (citing *Ylst v. Nunnemaker,* 501 U.S. 797, 801 (1991)). Accordingly, Grounds One through Five are barred

from federal review unless Petitioner has made a sufficient showing to overcome his procedural default.

C. Overcoming Procedural Default (Grounds One through Five)

A procedural default will be excused and a petitioner will be entitled to federal habeas corpus review if he "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice[.]" *See Boyd v. Thompson*, 147 F.3d 1124, 1126 (9th Cir. 1998) (citing *Coleman*, 501 U.S. at 750). To establish "cause," a petitioner must show some objective factor external to the defense prevented him from complying with the state's procedural rule. *Coleman*, 501 U.S. at 753 (citing *Murray v. Carrier,* 477 U.S. 478, 488 (1986)). To show "prejudice," a petitioner "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original).

Only in an "extraordinary case" may the habeas court grant the writ without a showing of cause and prejudice to correct a "fundamental miscarriage of justice" where a constitutional violation has resulted in the conviction of a defendant who is actually innocent. *Murray*, 477 U.S. at 495–96. "[T]he miscarriage of justice exception is concerned with actual as compared to legal innocence." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (citation omitted).

To demonstrate he suffered a fundamental miscarriage of justice, the petitioner must first identify "new reliable evidence" that was not presented at trial, such as "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup v. Delo*, 513 U.S. 298, 324 (1995) (observing that "[b]ecause such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful"). Viewing all the

evidence in light of the new reliable evidence, the petitioner must then show "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518, 537 (2006) (citing *Schlup*, 513 U.S. at 327). The standard to establish actual innocence thus requires "a stronger showing than that needed to establish prejudice." *Id.* at 327 (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

Petitioner seeks to overcome his procedural default by demonstrating cause and prejudice as well as actual innocence. Dkt. 42 at 17–25.

1. *Cause and Prejudice*

Beginning with Petitioner's arguments regarding cause and prejudice, he contends the alleged destruction and concealment of certain evidence prevented him from presenting Grounds Three and Four in the 2005 PRP and his status as a *pro se* litigant at that time prevented him from presenting Grounds One, Two, and Five. Dkt. 42 at 17–20.

The concealment of material evidence by the government may constitute cause and prejudice for overcoming procedural default. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 264 (1999) ("In this case, cause and prejudice parallel two of the three components of the alleged *Brady* violation itself."). This does not mean, however, that cause exists in every instance where evidence has been suppressed or destroyed; "[r]ather, the state's suppression establishes cause only when it is the *reason* for [a petitioner's] failure to develop facts in state court proceedings." *Henry v. Ryan*, 720 F.3d 1073, 1082 (9th Cir. 2013) (citing *Banks v. Dretke,* 540 U.S. 668, 691 (2004)) (emphasis in original). For example, in *Henry*, the Ninth Circuit found a petitioner who was aware of an alleged *Brady* violation "long before federal habeas proceedings commenced" had not established cause because it was the petitioner's own lack of diligence in pursuing the claim in the state courts, not the alleged suppression of evidence, that caused his default. *Id.* at 1082–83 (observing that a "rule, under which suppression always establishes cause, would

permit a defendant who knows of wrongdoing by the state to wait to bring such a claim until he is in front of the judicial forum that he feels would be most sympathetic to his claim").

Here, Petitioner has not established cause for his default of Grounds Three and Four because, like the petitioner in *Henry*, he was aware of the alleged suppression and destruction of evidence long before he initiated these proceedings. Significantly, the Ninth Circuit concluded more than fifteen years ago that the alleged suppression of Detective Gulla's disciplinary record—asserted here in Ground Three—did not establish cause for overcoming the procedural default of a similar claim raised in the 2006 Petition, stating the following:

> Kozol argues the State's failure to disclose Detective Gulla's past professional misconduct and the prosecutor's report violated Kozol's due process rights. Kozol obtained the prosecutor's report in either December 2004, or February 2005, and read of Detective Gulla's past professional misconduct in a newspaper in December 2005. Although Kozol did not learn of this information until well after his direct appeal concluded, he still could have presented his claim of exculpatory evidence to the Washington Court of Appeals for collateral review under Washington's time-limit exception for "[n]ewly discovered evidence." RCW 10.73.100(1). He did not do so, and accordingly procedural default bars his argument. RCW 10.73.090; *see Coleman v. Thompson,* 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Baldwin v. Reese,* 541 U.S. 27, 29, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004) (a petitioner must exhaust state remedies before seeking a federal writ of habeas corpus).

Dkt. 26-2 at 289–90 (Memorandum Decision in *Kozol v. Payne*, No. 08-35094 (9th Cir. May 5, 2009) (unpublished)). The destruction of evidence alleged in Ground Four does not establish cause for the same reason—Petitioner represents that he was aware of the existence and/or destruction of such evidence on or before 2011. Dkt. 25 at 15–17, 39 (Memorandum in Support). Furthermore, records submitted by Petitioner show that, in 2011, he learned it was Detective Gulla who authorized the destruction of some of this evidence. Dkt. 26-2 at 431–36 (Letter from King County Sheriff's Office and Enclosures dated May 10, 2011). Even assuming the evidence in Grounds Three and Four was material to Petitioner's defense and suppressed/destroyed as he alleges, the procedural default of these Grounds resulted from Petitioner's own lack of diligence

in pursuing his claims in the state courts, not some "external objective factor that 'cannot fairly be attributed to him." *See Smith v. Baldwin*, 510 F.3d 1127, 1146 (9th Cir. 2007) (quoting *Manning v. Foster*, 224 F.3d 1129, 1133 (9th Cir. 2000)).

Next, the fact that Petitioner proceeded without the assistance of counsel in filing the 2005 PRP does not establish cause for his failure to present Grounds One, Two, and Five at that time. *See, e.g., Hughes v. Idaho State Board of Corrections,* 800 F.2d 905, 909 (9th Cir.1986) (finding that an illiterate *pro se* petitioner's lack of legal assistance did not amount to cause to excuse a procedural default); *Tacho v. Martinez,* 862 F.2d 1376, 1381 (9th Cir. 1988) (finding that petitioner's arguments concerning his mental health and reliance upon jailhouse lawyers did not constitute cause). Importantly, Petitioner raised a claim of ineffective assistance of trial counsel on direct appeal and, despite his *pro se* status, he also raised such a claim in the 2005 PRP; as such, none of the Grounds asserted here fall under the umbrella of the equitable rule established in *Martinez v. Ryan*, 566 U.S. 1 (2012) (failure to raise an ineffective assistance of trial counsel claim at the first opportunity for review in the state courts because of a petitioner's *pro se* status or deficient counsel may constitute cause for procedural default).

In sum, Petitioner fails to show some objective factor external to his defense prevented him from complying with Washington State's procedural bar on untimely PRPs. He has thus failed to show cause for overcoming the procedural default of Grounds One through Five. As the cause element is not satisfied, it is unnecessary for the Court to consider whether Petitioner established actual prejudice for overcoming the default. *See Turner v. Jabe*, 58 F.3d 924, 931 (4th Cir. 1995) (citing *Engle v. Isaac*, 456 U.S. 107, 134 n. 43 (1982)); *see also Henry*, 720 F.3d at 1083 (concluding claim subject to state procedural bar was procedurally defaulted where petitioner failed to establish cause for the default and without reaching the prejudice prong).

2. *Actual Innocence*

Petitioner also asserts he has overcome his procedural default by demonstrating actual innocence. Dkt. 42 at 20–25. To support this claim, Petitioner identifies the following evidence not presented at trial: (1) a declaration from Petitioner's former neighbor purporting to establish his alibi during the events in question, (2) an anonymous confession letter disclosing non-public facts about the crimes underlying Petitioner's convictions, (3) allegedly suppressed evidence of Det. Gulla's professional misconduct, and (4) evidence that was allegedly destroyed and/or not retained by the State. *Id.*

Petitioner presented this same evidence with the 2022 PRP to invoke the actual innocence exception to Wash. Rev. Code § 10.73.090. Dkt. 3-1 (Personal Restraint Petition in *In re Personal Restraint of Steven Kozol*, Wash. Ct. App. No. 84098-3-I (Jun. 1, 2022)). As with the miscarriage of justice exception for procedural default, Washington State's actual innocence exception requires that a petitioner present "new, reliable evidence" and show "in light of new evidence 'it is more likely than not that no reasonable juror would have found [the defendant] guilty beyond a reasonable doubt.'" *In re Pers. Restraint of Weber*, 175 Wn.2d 247, 258–59 (2012) (quoting *Schlup*, 513 U.S. at 324–29). The Court finds the State Court of Appeals' application of an identical legal standard to Petitioner's evidence persuasive and adopts that court's conclusions detailed below.

First, the State Court of Appeals concluded that the declaration from Petitioner's former neighbor was not reliable evidence of Petitioner's innocence:

> Kozol relies on a 2020 declaration from his former neighbor, Amal Osman, stating she saw and talked to Kozol while he was walking his dog at 10 p.m. on November 15, 2000—the same time the assailant was attacking Wolter. Osman's declaration does not satisfy the probability standard because it is directly contradicted by Kozol's and his girlfriend's trial testimony that they were watching television inside their apartment at 10 p.m. on the night of the attack. Moreover, Kozol never mentioned during his trial testimony that he interacted with Osman on the night of

> the attack, even though this fact would have provided him with a crucial alibi defense. The timing of Osman's declaration also undermines its reliability because she signed it almost two decades after purportedly witnessing the events in question. *See State v. Riofta*, 166 Wn.2d 358, 372-73, 209 P.3d 467 (2009) (courts should consider "how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence") (quoting *Schlup*, 513 U.S. at 332).

Dkt. 26-5 at 12–13 (Unpublished Opinion in *In re Personal Restraint of Steven Kozol*, Wash. Ct. App. No. 84098-3-I (Apr. 1, 2024)).

As the State Court of Appeals observed, Ms. Osman's declaration stating he saw Petitioner walking his dog at 10:00 p.m. on the night of the attempted murder and burglary is contradicted by Petitioner's own trial testimony. In particular, Petitioner provided the following account of his typical weeknight routine:

> I would usually arrive to her work, Barrier Volvo, around 6:30 to 6:40, park right in front of the door where her desk was, and wait for her to get off at seven. Then we'd go home. Once a week we would go out and get Mexican food before going home, but every other night we went straight home. We would arrive home, she would shower, I would walk the dog again, and then we would partake in our evening activities, reading playing cards a lot. Then we'd watch TV around ten or 10:30 every single night and we'd watch the same shows. At 10:00 it would be a show called Street Smarts, at 10:00. And then on the same channel, right after that, a show at 10:30 called Change of Heart, which is like a show about peoples' dates and they get on the TV show and argue. And then we put the timer on the television for fifteen minutes on channel 7 and watched the evening news and fell asleep to that with the timer shutting the TV off.

Dkt. 40-7 at 61–62 (Verbatim Report of Proceedings in Trial Court (Apr. 17, 2001)). And, with regard to his activities and whereabouts on the night in question, Petitioner testified:

> We arrived home about 7:30, and Vanessa went in, took her clothes off, changed, you know, showered, got ready to wind down for the evening. I don't recall what we ate, because I usually am not a big dinner eater, I will snack on some carrots or yogurt, something like that. But then I had to go walk the dog again and then we played -- we either played cards or read a book. I was reading two books at the time, I was reading a Tom Clancy book and a John Grisham book, and I know Vanessa did her nails, because she does that every night. She's always, every night, before we go to bed, that's a part of her routine, take her polish off and put the next day's polish. And then we watched TV, starting at 10:00, with those two shows that I already told you about, and then went to bed around eleven.

Id. at 91–92 (Verbatim Report of Proceedings in Trial Court (Apr. 17, 2001)). The sequence of events described in both portions of Petitioner's trial testimony would not place him outside walking his dog at 10:00 p.m. as stated in Ms. Osman's declaration. Dkt. 26-2 at 485–86 (Declaration of Amal Osman). Thus, this new witness account given nearly two decades following Petitioner's conviction is unreliable and does not satisfy the actual innocence standard. *See Herrera v. Collins*, 506 U.S. 390, 423 (1993) (O'Connor, J., concurring) (observing that accounts by witnesses purporting to exonerate criminal defendants in the years following their convictions are "an unfortunate although understandable occurrence" and such accounts—particularly those contradicted by the defendant's own statements—must be treated with "a fair degree of skepticism").

Second, with regard to the anonymous confession letter, the State Court of Appeals reached the following conclusions:

> Kozol relies on an anonymous letter signed by "A repenting addict" addressed to the Seattle Post Intelligencer in 2009 in which the author confesses to having committed the crimes for which Kozol was convicted. The author claims that to pay off a debt to a drug dealer, they obtained keys to Kozol's storage unit and Wolter's house from a construction worker, stole Kozol's taser and firearm from his storage unit, and then attacked Wolter with those weapons while burglarizing his house. The author did not reveal their identity because "I'd spend the rest of my life in prison." This letter does not satisfy the probability standard due, in part, to the author's anonymity. *See Riofta*, 166 Wn.2d at 372-73 (we review posttrial affidavits casting blame on third parties with "a fair degree of skepticism") (citing *Herrera v. Collins*, 506 U.S. 390, 423, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) (O'Connor, J., concurring)). Furthermore, it is highly improbable that a stranger would have been given keys to Wolter's house and Kozol's storage unit, stolen the exact weapons used in the attack in the four-day window between when Kozol put the taser in the storage and when the attack occurred, fitted the firearm with a silencer (which Kozol denied owning), and then used Kozol's weapons while burglarizing a house that happened to belong to Kozol's ex-roommate Wolter.

Dkt. 26-5 at 13–14 (Unpublished Opinion in *In re Personal Restraint of Steven Kozol*, Wash. Ct. App. No. 84098-3-I (Apr. 1, 2024)).

Petitioner disagrees with this assessment of his evidence, arguing the confession letter is reliable evidence of his innocence because it contained non-public facts about the burglary and attempted murder for which he was convicted. Dkt. 42 at 22. In this way, Petitioner contends the confession letter in his case is similar to the third-party confessions addressed by the Ninth Circuit in *Gable v. Williams*, 49 F.4th 1315, 1330 (9th Cir. 2022) ("Importantly, Crouse's confessions were corroborated by other evidence, including non-public facts about the murder that only a participant to the crime would know.").

However, unlike the confessions at issue in *Gable*, the anonymity of the confession letter presented by Petitioner cuts against its reliability. *See* Dkt. 26-2 at 415 (Letter from "Repenting Addict" to the Seattle Post Intelligencer). Explained further, because the letter's author is unknown, the anonymous confession lacks the inherent reliability of self-inculpatory statements made by known declarants. *See Chia v. Cambra*, 360 F.3d 997, 1004 (9th Cir. 2004) (citing Fed. R. Evid. 804(b)(3) and *Williamson v. United States*, 512 U.S. 594, 599 (1994) ("[R]easonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true.").

Moreover, there is no evidence excluding Petitioner—who is himself an individual with knowledge of the non-public facts disclosed—as the letter's author. The Trial Court reached a similar conclusion when addressing the anonymous confession letter at Petitioner's resentencing hearing:

> I don't put much stock in the confession letter. It is completely uncorroborated. It contained information that certainly Mr. Kozol would have had access to as well.... If there were any kind of corroboration from some other person or party indicating that there was someone else who ransacked the storage unit, if there was someone else who may have done this as described in the letter, then maybe I'll put some stock in that, but I don't.

Dkt. 40-10 at 71 (Verbatim Report of Proceedings in Trial Court (Nov. 13, 2020)).

Therefore, the Court finds the anonymous confession letter is not reliable evidence demonstrating Petitioner's actual innocence. *Compare Gable*, 49 F.4th at 1330 (affirming grant of habeas relief based on state court's exclusion of third-party confession with "strong indicia of reliability") *with Casillas v. Clark*, No. 23-2213, 2025 WL 900430, at *1 (9th Cir. Mar. 25, 2025) (finding no error in state court's exclusion of untrustworthy third-party confession) *and Christian v. Frank*, 595 F.3d 1076, 1085–86 (9th Cir. 2010) (finding no error in state court's exclusion of third-party confessions as incredible because confessions were made to unreliable witnesses and contradicted by the evidence).

Third, with regard to the allegedly suppressed evidence of Det. Gulla's professional misconduct, the State Court of Appeals addressed Detective Gulla's disciplinary record as follows:

> Kozol claims that the State withheld evidence of Det. Gulla's past professional misconduct in violation of its disclosure requirements under the *Brady* rule, which requires prosecutors to disclose any impeachment evidence known to the prosecution that is "material to guilt or punishment." *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 565, 397 P.3d 90 (2017) (citing *Strickler v. Greene*, 527 U.S. 263, 280-81, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)). Kozol provides no authority for the proposition that a petitioner may prove an actual innocence claim using evidence of a *Brady* violation. *See In re Pers. Restraint of Campbell*, 27 Wn. App. 2d 251, 264, 533 P.3d 144 (2023) ("If a party provides no citation in support of a proposition, we may assume that counsel, after diligently searching, has found none."). Regardless, none of Det. Gulla's misdeeds had any connection to Kozol's case and would not have changed the outcome of trial given the overwhelming evidence of Kozol's guilt as detailed above. *See Lui*, 188 Wn.2d at 565 (undisclosed evidence is not material if there is only a "mere *possibility*" that it "*might* have helped the defense or *might* have affected the outcome of the trial") (quoting *State v. Kwan Fai Mak*, 105 Wn.2d 692, 704–05, 718 P.2d 407 (1986)).

Dkt. 26-5 at 14 (Unpublished Opinion in *In re Personal Restraint of Steven Kozol*, Wash. Ct. App. No. 84098-3-I (Apr. 1, 2024)).

The lack of connection between Detective Gulla's misconduct and his investigative role in Petitioner's case was discussed in greater detail by the Trial Court at Petitioner's resentencing hearing:

> I understand the points made by Mr. Kozol and his attorney concerning the circumstances of the investigation by Detective Gulla. I did say earlier that the information and record before the court now shows that his conduct in other matters was disgraceful. There are newspaper accounts of his having propositioned underage girls and then trying to cover it up by lying to investigators, of his threatening a man whose wife he was having an affair with. I mean, just despicable conduct. What I did not see was evidence that Detective Gulla lied in court proceedings in which he didn't have a personal stake. I didn't see any evidence he lied in this proceeding, although there's an allegation that he destroyed evidence, the implication being that it was intentional to conceal information. But even that, while that was implied, I didn't see any evidence that that was the case beyond simply destroying evidence because after a certain amount of time, evidence is normally destroyed. Some of that information – there may be other information out there that Detective Gulla did in fact destroy evidence intentionally, but that information is not before the court here.

Dkt. 40-10 at 70–71 (Verbatim Report of Proceedings in Trial Court (Nov. 13, 2020)).

Furthermore, in determining Petitioner had failed to overcome his default by demonstrating prejudice, which requires a lesser showing, the Ninth Circuit concluded that evidence of Detective Gulla's misconduct presented with the 2006 Petition was "overwhelmed by the evidence connecting Kozol with the crimes for which he was convicted." Dkt. 26-2 at 290 (Memorandum Decision in *Kozol v. Payne*, No. 08-35094 (9th Cir. May 5, 2009) (unpublished)). In short, Petitioner fails to persuade why this Court should now find that Detective Gulla's disciplinary records are new, reliable evidence demonstrating his innocence.

Fourth, with regard to evidence was allegedly destroyed and/or not retained by the State, the State Court of Appeals concluded that such evidence did not demonstrate Petitioner's innocence in light of the evidence presented at trial:

> Kozol contends that the state destroyed evidence that he claims, upon further forensic testing, would have proven he did not commit these crimes. This evidence includes the anonymous confessor's letter and envelope, a Rolex watch the

> anonymous confessor claims to have left at the crime scene, a hair found in Wolter's office, light bulbs from Wolter's office, shells from the shotgun that Wolter kept behind his bed, and Kozol's Audi. Here too, Kozol cites no authority for the proposition that improper destruction of evidence can be used to establish actual innocence. Additionally, the destroyed evidence had little importance or relevance. The letter, envelope, and light bulbs had already been forensically tested. It is unclear how forensically testing the hair and shotgun shells would have established Kozol's innocence because Wolter's assailant was wearing a ski mask and gloves, which would have prevented him from transmitting hair or fingerprints to the crime scene. An eyewitness saw Kozol driving the Audi on the day of the attack, which directly contradicts his claim that further testing of the vehicle would have proven it was not drivable that day. And [with regard to the anonymous confession letter] it is highly unlikely that a person who was "committing robberies to support [their] drug habit" would wear a valuable watch while burglarizing a house and then point to the watch as "the only thing I can offer to prove I was the one who committed this crime."

Dkt. 26-5 at 14–15 (second alteration in original).

Seeking a different outcome, Petitioner argues that the destruction of potentially exculpatory evidence in his case requires an adverse inference be drawn against Respondent. Dkt. 42 at 23. According to Petitioner, these circumstances entitle him to an inference that forensic testing of the evidence—had it not been destroyed—would have demonstrated his actual innocence as required to overcome his default. *Id.*

In arguing that such an inference should be applied to excuse his procedural default, Petitioner relies on *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993), which concerned the "broad discretionary power" of the district court "to permit a jury to draw an adverse inference from the destruction or spoliation" of evidence in a products liability action, and *Jimerson v. Payne*, 957 F.3d 916, 930 (8th Cir. 2020), which found a habeas petitioner submitted sufficient evidence to establish the bad faith element of a *Youngblood* claim and concluded that, "under the[] particular circumstances" of the case, an adverse inference may be drawn. *Id.* at 23. Petitioner does not cite, nor has the Court found, any authority applying his proposed adverse inference in the context of the actual innocence exception to the procedural default rule.

In addition, the record shows Petitioner was not completely deprived of the opportunity to perform forensic testing of evidence allegedly destroyed in bad faith by Defendant Gulla. In particular, Petitioner contends that Detective Gulla authorized the destruction of the anonymous confession letter and a watch uncovered at the crime scene that Petitioner claims to be the Rolex-type watch mentioned in the confession letter. Dkt. 42 at 23; *see also* Dkt. 26-2 at 415 (Letter from "Repenting Addict" to the Seattle Post Intelligencer) (referencing a "blue colored Rolex wristwatch" that was lost and potentially left at the scene of the crime). Petitioner urges that further testing of these items may have demonstrated his innocence, but the anonymous confession letter was subject to forensic testing upon his request in 2009 and no DNA profile or latent prints were identified. Dkt. 26-2 at 423 (Crime Laboratory Reports dated October 2009); *see also* Dkt. 26-2 at 417–22 (email correspondence between Petitioner's former attorney and attorneys at King County Prosecutor's Office regarding forensic testing of confession letter in 2009).

Further, while a watch found at the crime scene was destroyed before forensic testing was requested or performed, much of the probative value assigned to this watch lies with its relation to the anonymous confession letter and the possibility it could substantiate the existence of the purported third-party confessor. *See* Dkt. 42 at 22–23; *see also* Dkt. 26-2 at 422 (email correspondence from Petitioner's former attorney requesting forensic testing of watch for comparison to confession letter sent in June 2009); *id.* at 430 (Letter from Office of Prosecuting Attorney for King County Re: DNA Test Request dated March 24, 2010); *id.* at 431–32, 434–36 (Letter from King County Sheriff's Office and Enclosures Re: Public Disclosure Request dated May 10, 2011). Because forensic testing of the letter revealed no DNA profiles or fingerprints for comparison to the watch, the ability to perform forensic testing of the watch would provide

little—if any—evidentiary support for Petitioner's actual innocence. Thus, these circumstances further support not adversely inferring that additional forensic testing of evidence allegedly destroyed by Detective Gulla would be probative of Petitioner's innocence.

In sum, Petitioner is procedurally barred from raising Grounds One through Five in the state courts and each of these Grounds is procedurally defaulted and barred from federal review. Further, Petitioner has failed to establish cause or actual innocence and has thus failed to overcome the default. For these reasons, the Court recommends Grounds One through Five be denied as procedurally defaulted.

D. Access to Courts (Ground Six)

Finally, in Ground Six, Petitioner asserts Washington State's bar on untimely PRPs violates his First Amendment right of access to the courts. Dkt. 1 at 21. While presented as an independent ground for federal habeas relief from his state court conviction and sentence, Ground Six is actually a challenge to the collateral review of that conviction and sentence in the state courts. A habeas corpus petition brought pursuant to 28 U.S.C. § 2254 is not the proper forum for such a claim. *Entler v. Washington State Supreme Ct.*, No. 3:09-cv-5451-BHS, 2009 WL 3380634, at *1, 3 (W.D. Wash. Oct. 19, 2009). The Ninth Circuit consistently holds that claims challenging post-conviction proceedings in the state courts are not cognizable in habeas corpus proceedings under 28 U.S.C. § 2254 because they do not challenge a petitioner's detention. *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989) (per curiam); *see also Ortiz v. Stewart*, 149 F.3d 923, 939 (9th Cir. 1998) (finding that the post-conviction court's failure to appoint petitioner counsel in his second post-conviction proceedings did not constitute a basis for a federal habeas claim); *Gerlaugh v. Stewart*, 129 F.3d 1027, 1045 (9th Cir. 1997) (stating that

errors in the post-conviction proceeding were not cognizable in federal habeas corpus proceedings).

Accordingly, the Court recommends that Ground Six be denied as it is not cognizable in these federal habeas proceedings.

III. EVIDENTIARY HEARING

The decision to hold an evidentiary hearing is committed to the Court's discretion. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "[A] federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Id.* at 474. In determining whether relief is available under 28 U.S.C. § 2254(d)(1), the Court's review is limited to the record before the state court. *Cullen*, 563 U.S. at 181–82. A hearing is not required if the allegations would not entitle Petitioner to relief under § 2254(d). *Landrigan*, 550 U.S. at 474. "It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id.* The Court finds it is not necessary to hold an evidentiary hearing in this case because, as discussed in this Report and Recommendation, Petitioner's Grounds may be resolved on the existing state court record.

IV. CERTIFICATE OF APPEALABILITY

A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district court's dismissal of the federal habeas petition only after obtaining a certificate of appealability (COA) from a district or circuit judge. See 28 U.S.C. § 2253(c). "A certificate of appealability may issue . . . only if the [petitioner] has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional

claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

No jurist of reason could disagree with this Court's evaluation of Petitioner's claims or would conclude the issues presented in the Petition should proceed further. Therefore, the Court concludes Petitioner is not entitled to a certificate of appealability with respect to this case.

V. CONCLUSION

For the reasons set forth above, the Court concludes Grounds One through Five are procedurally defaulted and Ground Six is not a proper ground for federal habeas relief. In addition, the Court finds an evidentiary hearing is not necessary. Therefore, the Court recommends the Petition (Dkt. 1) be denied, this action be dismissed with prejudice, and a certificate of appealability not be issued.

Objections to this Report and Recommendation, if any, should be filed with the Clerk and served upon all parties to this suit not later than **fourteen (14) days** from the date on which this Report and Recommendation is signed. Failure to file objections within the specified time may affect your right to appeal. Objections should be noted for consideration on the District Judge's motions calendar **fourteen (14) days** from the date they are filed. Responses to objections may be filed by **the day before the noting date**. If no timely objections are filed, the matter will be ready for consideration by the District Judge on **August 27, 2025**.

Dated this 12th day of August, 2025.

David W. Christel
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEVEN PAUL KOZOL,

Petitioner,

v.

RON HAYNES,

Respondent.

Case No. 22-760-BJR-DWC

ORDER ADOPTING REPORT AND RECOMMENDATION

I. INTRODUCTION

This matter comes before the Court on the Report and Recommendation ("R&R") of U.S. Magistrate Judge David W. Christel, which recommends denial of Petitioner Steven Paul Kozol's petition for a writ of habeas corpus, brought pursuant to 28 U.S.C. § 2254. Petitioner objects to the R&R.

Having reviewed this matter in light of Petitioner's objections, Respondent's response, the remaining record, and the relevant legal authorities, the Court hereby adopts the R&R, denies Petitioner's § 2254 petition, and dismisses this case with prejudice. The Court also denies a certificate of appealability ("COA"). The reasoning for the Court's decision follows.

II. BACKGROUND

The 36-page R&R contains a thorough review of the facts and procedural history of this case, which the Court will not repeat here. In sum, Petitioner seeks relief under § 2254 from his King County Superior Court convictions on charges of attempted murder in the first degree and burglary in the first degree. R&R at 2, Dkt. No. 46. Petitioner was originally sentenced to 479 months in prison. Exh. 11 at 115, Dkt. No. 1-1.

In 2001, following a jury conviction, Petitioner filed a direct appeal. R&R at 4. The Washington State Court of Appeals found no reversible error and affirmed Petitioner's conviction. *Id.* at 5. Petitioner sought discretionary review before the Washington Supreme Court. *Id.* On February 4, 2004, the Washington Supreme Court denied review without comment. *Id.*

On February 16, 2005, Petitioner filed a motion for relief from judgment, which was treated as his first personal restraint petition ("PRP"). *Id.* at 6. The State Court of Appeals dismissed the 2005 PRP on the merits. *Id.* Petitioner sought review before the Washington Supreme Court. *Id.* The State Supreme Court denied discretionary review. *Id.* at 6-7.

In 2006, Petitioner filed a federal habeas petition. *Id.* at 7. The Court dismissed the 2006 Petition with prejudice, concluding that each of the grounds raised were unexhausted, procedurally defaulted, or lacked merit. *Id.* Petitioner appealed. *Id.* at 7-8. The Ninth Circuit affirmed this Court's denial of habeas relief. *Id.*

In 2018, Petitioner filed a motion for resentencing before the Trial Court, contending the offender score used at his original sentencing was incorrectly calculated. *Id.* at 8. The Trial Court granted Petitioner's motion. *Id.* On November 1, 2020, the Trial Court vacated Petitioner's original judgment and sentence and issued a new judgment and sentence, which reduced Petitioner's term

of incarceration from 479 months to 390 months. *Id.* at 8-9. Petitioner initially appealed, in part, the Trial Court's decision on resentencing but later voluntarily dismissed that appeal. *Id.* at 9.

In 2022, Petitioner filed a PRP in the State Court of Appeals. *Id.* The 2022 PRP raised six grounds for relief. *Id.* The State Court of Appeals concluded, among other things, that Grounds One Through Five concerned aspects of Petitioner's original judgment and sentence, and the new judgment and sentence on resentencing did not reset the clock on his ability to obtain state collateral review of those claims. *Id.* at 10. Accordingly, the State Court of Appeals dismissed Grounds One through Five as untimely and barred under Revised Code of Washington ("RCW") § 10.73.090, which requires that PRPs be filed within one year after a facially valid judgment and sentence becomes final. *Id.* at 9-10. The State Court of Appeals also concluded that Petitioner's sixth claim was without merit. *Id.* at 10.

Petitioner sought discretionary review. *Id.* The State Supreme Court commissioner denied review, concluding, among other things, that the State Court of Appeals did not err in finding that the 2022 PRP was barred under RCW § 10.73.090. *Id.* at 10-11.

In 2022, Petitioner also filed a petition for writ of habeas corpus pursuant to § 2254 in this Court. *Id.* at 11. The Court entered a stay on September 9, 2022, so that Petitioner could attempt to exhaust his remedies in the state court. *Id.* at 12. On September 25, 2024, the State Court of Appeals issued a certificate of finality with respect to the 2022 PRP. *Id.* at 11. On October 23, 2024, this Court lifted its stay. *Id.* at 12.

Magistrate Judge Christel's R&R recommends denial of the § 2254 petition, dismissal of the action with prejudice, denial of Petitioner's request for an evidentiary hearing, and denial of a COA. *Id.* at 36. Petitioner filed objections, Dkt. No. 49, which the Court discusses below.

III. DISCUSSION

A. Standard of Review

In reviewing the R&R, this Court "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). However, a district court is free to adopt those portions of a magistrate judge's report to which no specific objection is made, provided they are not clearly erroneous. *Thomas v. Arn*, 474 U.S. 140, 149 (1985).

B. Petitioner's Grounds for Relief

As explained by the magistrate judge, Petitioner now raises six grounds for relief: (1) prosecutorial misconduct during closing argument in violation of the Sixth and Fourteenth Amendments to the United States Constitution; (2) admission of improper evidence in violation of the First and Fourteenth Amendments; (3) suppression of material impeachment evidence regarding Detective Denny Gulla's professional misconduct, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (4) destruction of potentially exculpatory evidence in violation of the Fourteenth Amendment; (5) ineffective assistance of trial and appellate counsel in violation of the Sixth and Fourteenth Amendments; and (6) denial of access to the courts in violation of the First, Fifth, and Fourteenth Amendments. R&R at 11. The magistrate judge rejected Petitioner's grounds for relief. *Id.* at 36. The Court addresses each objection in turn.

1. Petitioner Procedurally Defaulted on Grounds One through Five

The magistrate judge found that Petitioner procedurally defaulted on Grounds One through Five of his § 2254 petition based on Washington state courts' decision not to reach those grounds in light of Petitioner's failure to raise them within RCW § 10.73.090's one-year filing deadline for PRPs. *Id.* at 19-22. Petitioner asserts that there was no procedural default because RCW

§ 10.73.090's time bar was not "clear, consistently applied, and well-established" at the time of his purported default. Pet.'s Objs. at 5-7.

In habeas proceedings, the procedural default rule bars consideration of a federal claim when it is clear the state court has been presented with the federal claim but declined to reach the issue for procedural reasons, or it is clear that the state court would hold the claim procedurally barred. *Franklin v. Johnson*, 290 F.3d 1223, 1230-31 (9th Cir. 2002). "Procedural default is an affirmative defense, and the state has the burden of showing that the default constitutes an adequate and independent ground." *Insyxiengmay v. Morgan*, 403 F.3d 657, 665 (9th Cir. 2005) (emphasis omitted). "[T]o constitute an adequate state ground, the procedural rule must be 'clear, consistently applied, and well-established at the time of petitioner's purported default.'" *Powell v. Lambert*, 357 F.3d 871, 874 (9th Cir. 2004) (quoting *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994)).

Petitioner procedurally defaulted on Grounds One through Five of his § 2254 petition by failing to raise those claims within one year after his judgment and sentence became final, as required by RCW § 10.73.090. As the magistrate judge noted in the R&R, the Ninth Circuit has repeatedly concluded that RCW § 10.73.090 is an independent, adequate, and well-established state procedural rule. R&R at 20-21. In support of his argument that § 10.73.090's time bar was not "clear, consistently applied, and well-established," at the time of his default, Petitioner cites to various Washington Supreme Court cases in which that court either extended the deadline to file a PRP or excused noncompliance with the filing deadline based on intervening legal developments. Pet.'s Objs. at 5-6. However, the exercise of discretion under the extraordinary circumstances presented by those cases does not demonstrate that RCW § 10.73.090 was not a clearly, consistently applied, and well-established state procedural rule at the time of Petitioner's default. Indeed, procedural rules need not be applied in an "utterly mechanical" fashion to bar federal

habeas review. *Morales v. Calderon*, 85 F.3d 1387, 1392-93 (9th Cir. 1996); *see also Scott v. Schriro*, 567 F.3d 573, 580 (9th Cir. 2009) ("A state rule is considered consistently applied and well-established if the state courts follow it in the '*vast majority of cases*.'" (quoting *Dugger v. Adams*, 489 U.S. 401, 411 n.6 (1989))); *Powell*, 357 F.3d at 875 (observing that "[m]any aspects of Washington's rule concerning time bars for personal restraint petitions are clear, consistently applied, and well-established," and the procedural bar for untimely mixed petitions was consistently applied after the law was settled in 2000).

2. Petitioner Has Not Established a Basis for Excusing Procedural Default

Petitioner argues that any finding of procedural default should be excused based on "cause and prejudice," as well as actual innocence. Pet.'s Traverse at 17-25, Dkt. No. 42. The magistrate judge rejected both arguments. R&R at 23-34. For the following reasons, the Court agrees with the magistrate judge's conclusions.

a. Cause and Prejudice

Procedural default by a state prisoner may be excused where the prisoner can demonstrate cause for the default and actual prejudice. *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991). To satisfy the "cause" prong of the cause and prejudice standard, petitioner must show that some objective factor external to the defense prevented him from complying with the state's procedural rule. *Id.* at 753.

i. Grounds Three and Four

Petitioner asserts cause arising from that the alleged suppression of material impeachment evidence regarding Detective Gulla's professional misconduct and the destruction of potentially exculpatory evidence, which Petitioner claims prevented him from raising Grounds Three and Four of the instant § 2254 petition in his initial PRP. Pet.'s Traverse at 17-20. The magistrate judge

rejected this argument based on record evidence showing that Petitioner was aware of the factual predicate for Grounds Three and Four for years before he initiated these proceedings but failed diligently pursue those claims. R&R at 24-25. Petitioner asserts that the magistrate judge incorrectly concluded that Petitioner could have known about the State's withholding and destruction of evidence prior to February 24, 2005, the deadline to file his initial PRP. Pet.'s Objs. at 7-9.

Petitioner has not established cause to overcome procedural default of his third and fourth grounds for relief. The concealment of material evidence by the government may constitute cause and prejudice for overcoming procedural default. *See, e.g.*, *Strickler v. Greene*, 527 U.S. 263, 264 (1999). This does not mean, however, that cause exists in every instance where evidence has been suppressed or destroyed; "[r]ather, the state's suppression establishes cause only when it is the reason for [a petitioner's] failure to develop facts in state court proceedings." *Henry v. Ryan*, 720 F.3d 1073, 1082 (9th Cir. 2013).

As to Ground Three, record evidence shows that Petitioner obtained the prosecutor's report "in either December 2004, or February 2005, and read of Detective Gulla's past professional misconduct in a newspaper in December 2005." R&R at 24 (quoting Memorandum Decision in *Kozol v. Payne*, No. 08-35094 (9th Cir. May 5, 2009)). Accordingly, Petitioner could have presented his claim of evidence suppression to the Washington Court of Appeals for collateral review under Washington's time limit exception for "[n]ewly discovered evidence." RCW § 10.73.100(1). And as to Ground Four, Petitioner represents—and the evidence reflects—that he was aware of the existence or destruction of evidence on or before 2011. R&R at 24-25. Petitioner has not identified any evidence that contradicts this timeline. Given Petitioner's failure to diligently pursue Grounds Three and Four after learning of their factual predicate, he cannot now

establish that the State's alleged suppression or destruction of evidence was the reason for his failure to develop Grounds Three and Four in the state court proceedings. *Henry*, 720 F.3d at 1082.

ii. Grounds One, Two, and Five

As to cause for his default on Grounds One, Two, and Five—prosecutorial misconduct during closing argument, admission of improper evidence, and ineffective assistance of trial and appellate counsel—Petitioner argues that his status as a *pro se* litigant prevented him from presenting those claims in his initial PRP. Pet.'s Traverse at 19-20. The magistrate judge concluded that Petitioner's prior *pro se* status did not excuse his procedural default. R&R at 25. In reaching this conclusion, the magistrate judge found that none of the grounds asserted fell within the equitable exception to procedural default established by *Martinez v. Ryan*, 566 U.S. 1 (2012). *Id.* Petitioner asserts that the magistrate judge incorrectly concluded that *Martinez* does not apply to Petitioner's claims. Pet.'s Objs. at 9-10.

In *Martinez*, the U.S. Supreme Court established "a narrow exception" to procedural defaults, holding that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 566 U.S. at 9. The *Martinez* Court explained that this exception does not "extend to attorney errors in any proceeding beyond the *first occasion* the State allows the prisoner to raise a claim of ineffective assistance at trial." *Id.* at 16.

Martinez does not apply to the instant § 2254 petition. Notably, neither Grounds One nor Two concern claims of absence of trial counsel or ineffective assistance of trial counsel. R&R at 11. Nor does *Martinez* apply to Petitioner's claim of ineffective assistance of appellate counsel, raised in Ground Five, as the U.S. Supreme Court has expressly declined to extend *Martinez* to such claims. *Davila v. Davis*, 582 U.S. 521, 530 (2017).

As to Petitioner's claim of ineffective assistance of trial counsel, also raised in Ground Five, it is undisputed that Petitioner raised an ineffective assistance of trial counsel claim at the first available opportunity. R&R at 6, 25 (noting that Petitioner raised claims of ineffective assistance of trial counsel on direct appeal and on collateral review in his initial PRP). Because the *Martinez* exception does not extend beyond this "first occasion" for raising an ineffective assistance of trial counsel claim, that exception cannot be used here to excuse Petitioner's procedural default on Ground Five. *Martinez*, 566 U.S. at 16; *see also Senior v. Gilbert*, No. C15-0952, 2016 WL 4992677, at *2 (W.D. Wash. Sept. 19, 2016). Petitioner, providing no other basis for establishing cause, has not overcome the procedural default. *See Smith v. Murray*, 477 U.S. 527, 533 (1986) (providing that, if a petitioner fails to demonstrate cause for his noncompliance with a state's procedures, a reviewing court "need not determine whether petitioner has carried his burden of showing actual prejudice").

b. Actual Innocence

Where a petitioner cannot overcome procedural default by showing cause and prejudice, courts may nevertheless grant a habeas petition in an "extraordinary case." *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986). An extraordinary case is one in which habeas review is necessary to correct a "fundamental miscarriage of justice," that is, where a constitutional violation has resulted in the conviction of a defendant who is actually innocent. *Id.* at 496.

To support his claim of actual innocence, Petitioner identifies the following evidence not presented at trial: (1) a declaration from Petitioner's former neighbor purporting to establish his alibi during the events in question, (2) an anonymous confession letter disclosing non-public facts about the crimes underlying Petitioner's convictions, (3) allegedly suppressed evidence of

Detective Gulla's professional misconduct, and (4) evidence that was allegedly destroyed or not retained by the State. Pet.'s Traverse at 20-25.

In addressing the purportedly new evidence, the magistrate judge adopted the reasoning of the Washington Court of Appeals, which addressed the same evidence in response to Petitioner's 2022 PRP. R&R at 26. Like the Washington Court of Appeals, the magistrate judge concluded that neither the declaration from the former neighbor nor the anonymous confession letter were reliable evidence of Petitioner's innocence. *Id.* at 26-30. Furthermore, the magistrate judge concluded that Detective Gulla's misdeeds were not connected to Petitioner's case, and neither those misdeeds nor the evidence allegedly destroyed by the State demonstrated Petitioner's innocence, in light of the evidence presented at trial. *Id.* at 30-34.

Petitioner asserts that the magistrate judge failed to take a holistic view of the evidence, which, according to Petitioner, shows that, more likely than not, any reasonable juror would have reasonable doubt as to Petitioner's guilt. Pet.'s Objs. at 10-12. Petitioner has not made a colorable showing of actual innocence. A claim of actual innocence must be based on reliable evidence not presented at trial; "given the rarity of such evidence, 'in virtually every case, the allegation of actual innocence has been summarily rejected.'" *Calderon v. Thompson*, 523 U.S. 538, 560-61 (1998). To prevail, Petitioner must present evidence showing, more likely than not, that he is in fact innocent of the crime. *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *see also Carriger v. Stewart*, 132 F.3d 463, 478 (9th Cir. 1997) (actual innocence shown by sworn confession of third person accurately describing details of crime).

Contrary to Petitioner's contention, the R&R reflects that the magistrate judge examined the evidence thoroughly, providing detailed reasons for rejecting each piece of evidence and considering that evidence in light of the record as a whole. *See* R&R at 26-34. The Court finds no

error in the magistrate judge's reasoning. The Court is unpersuaded by Petitioner's version of the facts. Petitioner's claim of actual innocence fails.

3. Ground Six is Not Cognizable in Federal Habeas Proceedings

The magistrate judge concluded that Ground Six of the instant § 2254 petition, that Washington's bar on untimely PRPs violates Petitioner's First Amendment right of access to the courts, was not cognizable in federal habeas corpus proceedings. *Id.* at 34-35. Petitioner argues that the magistrate judge ignored the Supreme Court's decision in *Gutierrez v. Saenz*, 606 U.S. 305, 314 (2025), which acknowledged that "'a state-created right to postconviction procedures can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right.'" Pet.'s Objs. at 13.

The Court again finds no error in the magistrate judge's reasoning. As the magistrate judge noted, the Ninth Circuit has consistently held that claims challenging post-conviction proceedings in the state courts are not cognizable in habeas corpus proceedings under § 2254 because they do not challenge a petitioner's detention. R&R at 34-35. The Supreme Court's decision in *Gutierrez* does not alter Ninth Circuit precedent in this regard. Indeed, the *Gutierrez* Court concluded that an inmate had standing to bring a claim challenging Texas's postconviction DNA testing procedures pursuant to 42 U.S.C. § 1983. *Gutierrez*, 606 U.S. at 309. That Court did not address whether a challenge to the collateral review of a state court conviction and sentence, such as the access to courts claim Petitioner raises here, is cognizable in § 2254 proceedings. *See generally id.* Petitioner's sixth ground for relief fails.

IV. EVIDENTIARY HEARING

The magistrate judge concluded that it was unnecessary to hold an evidentiary hearing because the case could be resolved on the existing state court record. R&R at 35. Petitioner

contends that an evidentiary hearing is justified because he bears no fault in failing to develop the factual record in state court. Pet.'s Objs. at 5.

The Court agrees that an evidentiary hearing is unnecessary in this case. The state court record is adequately developed and refutes Petitioner's allegations such that he cannot show that he is entitled to relief under § 2254. *Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007) (providing that the decision to hold an evidentiary hearing is committed to the Court's discretion, and "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing"). The request for an evidentiary hearing is denied.

V. CERTIFICATE OF APPEALABILITY

The magistrate judge concluded that Petitioner was not entitled to a COA because "[n]o jurist of reason could disagree with this Court's evaluation of Petitioner's claims or would conclude the issues presented in the Petition should proceed further." R&R at 36. Petitioner asserts that the Court should grant a COA because the grounds presented are not "utterly without merit." Pet.'s Objs. at 14.

For the reasons discussed above, the Court agrees with the magistrate judge that Petitioner is not entitled to a COA.

VI. CONCLUSION

For the foregoing reasons:

A. Petitioner Steven Paul Kozol's objections are OVERRULED;

B. The Report and Recommendation is APPROVED and ADOPTED;

C. Petitioner's § 2254 petition for writ of habeas corpus, and this action, are DISMISSED with prejudice;

D. No certificate of appealability will issue; and

E. The Clerk is directed to close this case and send copies of this Order to Petitioner and to Magistrate Judge Christel.

DATED this 15th day of January 2026.

Barbara J. Rothstein

BARBARA J. ROTHSTEIN
United States District Judge