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COA No. 31845-1-III

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STATE OF WASHINGTON,

Plaintiff/Respondent

v.

CLAY D. STARBUCK,

Defendant/Petitioner.

ANSWER TO PETITION FOR REVIEW

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INDEX

I. IDENTITY OF PARTY 1

II. STATEMENT OF RELIEF SOUGHT..... 1

III. ISSUE PRESENTED..... 1

IV. STATEMENT OF THE CASE 1

 A. Substantive facts. 1

 b. Crime scene..... 4

 c. Autopsy..... 7

 d. Relationship between the defendant and Ms. Starbuck. 9

 e. Other potential suspects. 13

 f. Text messages on december 1, 2011. 19

 g. Scientific testing of the recovered evidence. 20

 H. Procedural history. 25

V. ARGUMENT 29

 The “unknown” alternative suspects..... 33

VI. CONCLUSION..... 35

TABLE OF AUTHORITIES

WASHINGTON CASES

Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727,
164 L.Ed.2d 503 (2006) 33

Mak, 105 Wn.2d 692, 717, 718 P.2d 407 (1986)..... 35

State v. Downs, 168 Wash. 664, 13 P.2d 1 (1932)..... 33

State v. Franklin, 180 Wn.2d 371, 325 P.3d 159(2014) 32, 33

State v. Kwan, 174 Wash. 528, 533, 25 P.2d 104 (1933) 33

State v. Russell, 125 Wn. 2d 24, 882 P.2d 747 (1994)..... 33

State v. Starbuck, ---Wn. App.---, 355 P.3d 1167 (2015) 30, 31, 32

State v. Strizheus, 163 Wn. App. 820, 262 P.3d 100 (2011),
review denied, 173 Wn.2d 1030 (2012)..... 31

State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004) 33

I. IDENTITY OF PARTY

Respondent, State of Washington, was the plaintiff in the trial court and the respondent in the Court of Appeals.

II. STATEMENT OF RELIEF SOUGHT

Respondent seeks denial of the petition for review.

III. ISSUE PRESENTED

1. Did the court of appeals misapply this Court's decision in *State v. Franklin*, 180 Wn.2d 371, 325 P.3d 159 (2014), when it found the trial court did not err by excluding a sexually explicit series of texts between Ms. Starbuck and Mr. Walker – a proffered other suspect to the murder?

IV. STATEMENT OF THE CASE

The defendant was charged with and convicted of premediated murder in the first degree of his ex-wife, Chanin Starbuck, with aggravating circumstances. He was also convicted of sexually violating human remains. CP 14.

a. Substantive facts.¹

Defendant and Ms. Starbuck were divorced July 26, 2011. RP 1948.

¹ The State's responsive brief filed in the court of appeals did not contain a summary of facts.

On December 1, 2011 at 9:18 AM, a 911 call² was received from Ms. Starbuck's cell phone by the Spokane County 911 call center. RP 1456, 1737. The duration of the call was 34 seconds. RP 1456, 1738. The 911 operator did not hear the first several seconds of the call. RP 1737.³ The operator attempted to call back, but he only received voicemail. RP 1739. Immediately following the 911 call, Ms. Starbuck's phone⁴ was manually turned off at 9:18 AM. RP 2325, 2326, 2343-44.

Spokane County deputies conducted a welfare check⁵ at Ms. Starbuck's home on December 2, 2011, around 6:15 PM. RP 1757-58.

² Initially, the trial court found the content of the 911 telephone call was more prejudicial than probative and excluded it. RP 1603-07. It was only after the defense extensively cross-examined the medical examiner regarding her opinion of the day and time of death that the trial court found the relevance of the call outweighed its potential for prejudice and that both parties could benefit from its admission. RP 2040-2044. After its admittance, a copy of the original of the 911 call was played for the jury. RP 2082-83; Ex. 448.

³ If a person calling 911 speaks before the line is connected to the operator, the operator cannot hear the person speaking. RP 1737-38

⁴ Ms. Starbuck's cell phone was collected at her bedside and the contents were extracted for forensic analysis. RP 1780. After securing the appropriate search warrants, numerous other electronic and storage devices were taken from the crime scene and the defendant's home and were analyzed by forensic personnel. RP 2227-2243, RP 2275-2299.

⁵ Ms. Starbuck's mother requested the welfare check by law enforcement. RP 1757.

Ms. Starbuck did not respond. RP 1759. Shortly thereafter, Deputy Dutton made contact with the defendant regarding the welfare check. RP 1759. The defendant volunteered information about his divorce and Ms. Starbuck's "infidelity." RP 1760. "He went on to explain more or tell me more about how he had – had caught Chanin several times talking to men online, nude photos being found on the computer of her and ... other men." RP 1761. As the conversation proceeded, "[h]e went on telling me more incidents of infidelity, how she would leave at night ... leave the kids unattended." RP 1763. The defendant also remarked how the youngest child was not his biological son. RP 1763.

On December 3, 2013, Spokane County deputies again responded to Ms. Starbuck's home for a welfare check⁶ and made entry into the home. RP 942-949, 959-63. Ms. Starbuck was located in her bedroom deceased. RP 949, 961. After her death, she was placed in a sexually deprecating position on top of her bed. RP 978, 1676.⁷ There was no observable forced entry into the home. RP 984.

⁶ Deputies responded to the home the second time at the request of Ms. Starbuck's mother and friends because they had not heard from her in several days. RP 1571-72.

⁷ Ms. Starbuck was found naked, laying on her back with her hands positioned over her pubis. Her legs were spread open. RP 1671. A muscle massager was also on her pubis and a sexual toy (an erect penis with scrotum and testicles) had been inserted into her vagina. RP 1671-72. She

b. Crime scene.

Forensic specialists and detectives processed the scene for potential evidentiary items including latent fingerprints and potential DNA evidence. RP 1780-1788, 1860-1944, 1860-1944.⁸

Shortly after law enforcement began processing the scene, the defendant arrived at the home and inquired as to what was happening. Unsolicited, the defendant volunteered to a detective he had received several texts from Ms. Starbuck and he was concerned about her lifestyle. RP 996-97. He was directed to contact other detectives at a nearby

had significant bruising on most of her body. RP 949-50, 978-979, 1275, 1283-1286, 1669-70, 1672-73. Detectives focused evidence collection efforts in the bedroom where Ms. Starbuck was located. RP 1306. The home did not appear ransacked nor were items knocked over suggesting a struggle. RP 1307.

⁸ As explained by the evidence collection detective: “Whether I believe the value of it is going to be probative, meaning, you know, does it give us some lead to go on. What is the meaning of it? There are times there were probably some items in this case that I may have collected as a safeguard to make sure that we’ve gotten everything that may have any evidentiary value. Although, in that, you sometimes look at things and realize that there could be multiple, many meanings or reasons why evidence or what you think is evidence at the time is in a location and you collect it anyway.... Because this is the beginning of the story, and so when we walk in there, not having any idea necessarily what happened, you have to look everywhere for anything that might be evidentiary. And, as the story unfolds and you begin to learn things through interviews and such, you realize that some of those things you collected don’t have any meaning in regards to this particular situation.”RP 1322-21. Processing included collecting latent fingerprints in the home. RP 1325. The neighborhood was also canvassed for possible witnesses. RP 1025-1032.

substation. RP 998. After the defendant's arrival at the substation and, after brief biographical information was obtained, the defendant asked if Ms. Starbuck had been murdered and volunteered information about dating websites she frequented. RP 1068-69. He stated the last time he physically observed Ms. Starbuck was approximately five or six days prior at a parent-teacher conference. RP 1070. The defendant then offered to show detectives the last text messages he had exchanged with Ms. Starbuck. RP 1070-71. Detectives asked where the investigation should begin and defendant stated Ms. Starbuck had a history of phone sex and to look at her laptop. RP 1073. He remarked: "She does sex stuff, dildos and such." RP 1074. After a period of time, detectives insisted the defendant go home. RP 1077. As they were leaving the parking lot of the substation, the defendant continued to volunteer information about Ms. Starbuck's sex life, claiming she visited porn sites, and the children "hated" her. RP 1077, 1097-1098. The defendant appeared to be knowledgeable regarding the crime scene without being told any specifics of the crime. RP 1105.⁹

⁹ Several days later on December 4, 2011, the defendant left a voice mail with the lead detective Mike Ricketts inquiring, amongst other things, about the autopsy findings. RP 2086. Contact was made with the defendant and he agreed to speak with Detective Ricketts at the sheriff's department. RP 2086. The meeting took place on December 5, 2011. RP 2086. At that time, the defendant granted search consent to download

Several days after the murder, detectives asked the defendant to take a ride along and retrace his activities on the day of the murder. RP 1110-1120.¹⁰ The defendant claimed he drove his car to warm it up before picking the children up for school around 8:00 AM. RP 113. He asserted the car quit running and he walked back and forth using the same sidewalk and route to his home twice during the day. RP 1116-1119. He remarked he eventually returned to the car around 3:00 PM that day. RP 1120.¹¹ He also described his attire for that day. RP 2108. His story placed him within approximately 1½ blocks of Ms. Starbuck's home several times during the day of the murder. RP 2608.

Thereafter, and, unbeknownst to the defendant, detectives obtained home surveillance video footage (an ADT system) recorded the day of the murder, from sidewalk to sidewalk (including the street), of the specific spot the defendant claimed he walked back and forth several times the day

the data from his phone and for a DNA sample. RP 2090, 2094. DNA was also collected in the same manner from Austin and Blake Starbuck; John Kenlein; Tom Walker, and Michael Broadhurst. RP 2097, 2104, 2114.

¹⁰ The defendant's cell phone was turned off after 8:08 AM the day of the murder and turned back on at 3:37 PM. RP 2331-32. The last outgoing message on Ms. Starbuck's cell phone was sent at 3:17 PM. RP 2348.

¹¹ On cross-examination, the defendant asserted he did not recall telling the detectives where he walked back and forth the day of the murder. RP 2609-10, 2013, 2016. He claimed he only remembered telling the detectives where his car stalled the day of the murder. RP 2609.

of the murder.¹² RP 1135. After detectives reviewed the video footage several times, they were unable to locate the defendant on either sidewalk or the street the day of the murder as he had previously claimed. RP 1156-57, 2300-02.

c. Autopsy.

Dr. Sally Aiken, Spokane Medical Examiner, responded to Ms. Starbuck's residence on December 3, 2011. RP 1662. Dr. Aiken swabbed various points on Ms. Starbuck's body. Dr. Aiken explained:

So I took six swabs from the left side of the neck... When I talk about left and right today, it's always going to be the decedent's left side. So, this side of the neck on the decedent. I took six swabs from that area, the left side of the neck and the chin. Then I did the right arm and the left arm. I did four -- or, pardon me, six swabs from the left arm and four swabs from the right arm. And that was all at the investigative scene. I also did some swabs at autopsy.

RP 1663.

During the autopsy, Ms. Starbuck's left lower eyelid and left nostril were also swabbed by Dr. Aiken. RP 1666. The doctor also clipped the fingernails on both hands and swabbed between the fingers. RP 1667-68. Specific swabs collected at the time of autopsy included the right arm,

¹² As described by a detective: "The camera is on the south side of [the] house, and it faces south. And it is right up in the corner of the garage so that it has a view of the driveway, the initial view, and then it pans out where you can see south across the street into the field and then the houses beyond." RP 1141.

left arm, neck, eye and nose area, and the left ankle. RP 1789-1802. Also taken were swabs of the vaginal opening and vaginal vault; and the pubic area was combed. RP 1789-1802. Fingernail clippings were also taken of both the right and left hand. RP 1789-1802. The swabs and samples were provided to the Washington State Patrol Crime Laboratory for testing. RP 2015.

Dr. Aiken documented numerous, significant bruises,¹³ pattern injuries¹⁴ and scrapes over the entirety of Ms. Starbuck's body (front body, back body, head, arms, and legs). RP 1671-1684, 1686-88, 1693-94, 1695-96.¹⁵ She also documented dislocation of the larynx – thyroid cartilage. RP 1687-88. Most of the ribs on the left side and four ribs on the right were fractured by blunt force. RP 1688, 1694. Ms. Starbuck also had bleeding in the deep area of the scalp. RP 1689.

At one point, Ms. Starbuck was face down on the bed before death. RP 1676. After death, she was moved to her staged position. RP 1676.

¹³ None of the bruises showed any sign of healing. RP 1693.

¹⁴ A pattern injury bruise maintains the shape of the object that caused the bruise. RP 1677.

¹⁵ Ms. Starbuck had pattern injuries to her left and right breasts and left hand potentially from a taser burn. RP 1691, 1695. In addition, at one point she may have been stomped on by a shoe and some injuries suggest she was dragged. RP 1692.

During the confrontation and after death, Ms. Starbuck had a device removed from her anus. RP 1730.

The cause of death was attributed to asphyxia due to compression of the neck. RP 1696.

d. Relationship between the defendant and Ms. Starbuck.

The defendant and Ms. Starbuck remarried for the second time on December 29, 2006. RP 2584. The couple separated in June 2010 and the defendant moved out of the family residence. RP 2584. They subsequently divorced, and the decree was entered in July 2011. RP 2585. After the divorce, the two older sons, Blake and Austin Starbuck, lived with the defendant. RP 2585. The three younger children resided with Ms. Starbuck. RP 1339.

On October 28 of 2011, the defendant was ordered to pay and he was in arrears of over \$9,100 in child support and spousal maintenance, plus \$500 in attorney's fees to Ms. Starbuck. RP 1947-48; Ex. 445. The defendant stated this judgment did not make him angry. RP 2585. At the time of the dissolution, the court ordered Ms. Starbuck to receive 50 percent of the defendant's pension. Ex. 445. The defendant maintained this did not make him bitter. RP 2587. At the time the decree was entered, the court authorized a restraining order preventing the defendant from having contact with Ms. Starbuck, and it remained in effect until

August 2012. RP 2587-88. Ex. 445. The defendant stated during cross-examination that he is not a jealous person and he does not get angry. RP 2599. However, he stated he installed spyware on Ms. Starbuck's home computer because he had "suspicions." RP 2599.

Recovered text messages sent by the defendant to Ms. Starbuck preceding the crime included:

[w]ell, thank you, you stupid bitch. You gave me a three-day notice on 15 K. We will need to talk on how to recover.

(August 26, 2011). RP 2283; Ex. 586.

Well, there's an E. You just keep jerking guys off, Chanin, and you alienated four of your five kids. You're lucky [L.S.] has the issues she does or it would be five. Let's talk.

(August 26, 2011). RP 2283-84; Ex. 587.

Instead of doing what's right and what the kids would like, you are more concerned with trying to screw me. But you hurt them. They don't like you for it, and

(September 7, 2011). RP 2285; Ex. 589

By you keeping kids from me, they dislike you more and more. They love being with and seeing me. Can't you see that.

(September 13, 2011). RP 2285; Ex 590.

After all your school and good grades, you're gonna teach. \$4,000 a year for your schooling, how's that right. Have you even had a dental job interview.

(September 15, 2011). RP 2285; Ex 591.

You're a deadbeat mom. You have no concern of how money is made. You just take, take, take, and I give, give, give. I am trying.

(September 15, 2011). RP 2285; Ex 592.

In April 2011, the defendant spontaneously complained to his dentist, Dr. Steven Bates, about Ms. Starbuck dating "lots" of other men and her internet activities. RP 1548. "He was portraying her as being very loose sexually and rendezvousing with a lot of different men." RP 1549. During the conversation, the defendant told Dr. Bates he had placed a keystroke device on Ms. Starbuck's computer so he could monitor all of her activity including emails. RP 1549.¹⁶

On November 21, 2011, a parent-teacher conference was held with the defendant and Ms. Starbuck. RP 1440. During this time and while out of ear shot of Ms. Starbuck, the defendant voluntarily expressed concern to the teacher regarding Ms. Starbuck's dating activities and that the children hated Ms. Starbuck. RP 1440. The defendant remarked he would not be surprised if Ms. Starbuck was found dead, with her throat slit open because of her lifestyle. RP 1440-41.

¹⁶ Forensic analysis of Ms. Starbuck's computer confirmed this assertion. RP 2279. There were two spyware installs on Ms. Starbuck's computer. RP 2295. The computer was last accessed on May 23, 2011. RP 2279.

In December 2011 after the murder, the defendant texted Renee Attridge about Ms. Starbuck's "sexual" lifestyle. RP 1552, 1554. She felt uncomfortable with the nature of these texts. RP 1553. "He was trying to make her look bad." RP 1553. Ms. Attridge was close to L.S. (Starbuck child), as she was a special needs child. RP 1552.

The evening of December 3, 2011, Doug Carter and his wife went to the defendant's home to check on the children. RP 1573. The defendant requested Mr. Carter accompany him into a bedroom. RP 1574. The ensuing "... conversation was surreal ... he said that [Ms. Starbuck] was promiscuous and that he's been trying to help her for some time...." RP 1574. The defendant further revealed M.S. was not his biological son. RP 1575. The defendant "... tried to portray her as a sexual deviant." RP 1575. Mr. Carter found the conversation odd as it was the day Ms. Starbuck's body was found. RP 1584.

On December 4, 2011, Christie Levy visited and took dinner to the Starbuck children at the defendant's home. RP 1740. After visiting with several children, the defendant requested Ms. Levy follow him into a bedroom. RP 1741. She previously had very little contact with the defendant. RP 1741-42. The defendant stated that Ms. Starbuck's death was not a surprise. RP 1742. "And he said, well, you didn't know Chanin and it was expected because she was dating lots of people and she was

engaged in promiscuity. She was online dating, she was having multiple relations.” RP 1742. Ms. Levy felt uncomfortable with the conversation. RP 1742. On December 9, 2011, Ms. Levy dropped the children off at the defendant’s home. The defendant asked her to step out onto the porch. The defendant again remarked about Ms. Starbuck’s “promiscuity” – that “she was engaged in relationships that were dangerous...” RP 1746.

Lana Beck saw the defendant at a school event on December 12, 2011. During the conversation, the defendant voluntarily commented about Ms. Starbuck’s infidelity, how the children caught her having an online affair while he was in Alaska. RP 1589. “It was at least five minutes of that kind of discussion.” RP 1589-90.

e. Other potential suspects.¹⁷

Drew Starbuck was in Rexburg, Idaho, on the day of the murder. RP 1221. He had never been to Spokane. RP 1221.

Blake Starbuck was at the high school on the day of the murder. RP 1358-59. His attendance was confirmed by the principal of the school. RP 1436-37. Prior to the murder, the last time he had contact with his mother, Ms. Starbuck, was mid-September 2011. RP 1368, 1372-73.

¹⁷ Family members were included as “other suspects” because they could not be excluded by the DNA analysis.

Austin Starbuck was working December 1, 2011 from 8:30 AM to 5 PM. RP 1403-04. His presence at work that day was confirmed by his supervisor. RP 1444-1447. Although a rare occurrence, he had to leave work around 3 PM the day of the murder to pick up his siblings. RP 1411-12, 1419.

Tom Walker testified he had lunch once with Ms. Starbuck. RP 1474. Arrangements were made between the pair for a date on December 4, 2011. RP 1475. Mr. Walker had known Ms. Starbuck for three to four weeks. RP 1475. He had communicated with Ms. Starbuck by text message and by telephone. RP 1475.

On December 1, 2011, Mr. Walker was physically present and worked at his job in Airway Heights, Washington.¹⁸ RP 1476. He left around 9:40 AM to attend a funeral in the Spokane Valley.¹⁹ After the funeral, he drove back to work where he remained for the day. RP 1476-77.

¹⁸ The city of Airway Heights is 31.07 miles from Deer Park. http://www.distancebetweencities.net/deer-park_wa_and_spokane-valley_wa/

¹⁹ The city of Spokane Valley is 28 miles from Deer Park. www.distancebetweencities.net/deer-park_wa_and_spokane-valley_wa/

Mr. Walker's boss testified that Mr. Walker was at work on December 1, 2011, starting at 8 AM, and he left for a funeral around 9:30 AM. RP 1855. Mr. Walker returned around 11 AM that same day where he remained at work in Airway Heights for the remainder of the day. RP 1855. Tom Walker's attendance at the funeral in the Spokane Valley on December 1, 2011 was verified by a relative of the deceased. RP 1851-1853. Additionally, Mr. Walker's signature appeared in the guest book. RP 1851-1853; Ex. 443. Mr. Walker was present for the entire funeral which lasted approximately 1½ hours. RP 1851-52.

On December 1, 2011, Mr. Walker received several text messages from Ms. Starbuck's cell phone. RP 1479. As the detective explained:

At 12:10 [PM], Chanin Starbuck's cell phone sends a return message to Tom Walker's cell phone: I had to leave to stop by the bank. Can you meet at The Onion at 1:00. At 12:12 [PM] Tom Walker's cell phone to Chanin: No, I wish I could. I had to leave work to go to a funeral so that was my lunch. This is found on Tom's download.

RP 2344; Ex. 271C. Several other text messages were exchanged between Mr. Walker and Ms. Starbuck's cell phone the afternoon of December 1, 2011. RP 1481-1486.

Mr. Walker sent and received cellular calls and texted with his cell phone throughout the day December 1, 2011. RP 2339. Phone records established his cell phone never activated any of the cell phone towers in

Deer Park during the day or night. RP 2339. He was not in Deer Park at any time he used his phone on December 1, 2011. RP 2334, 2339-40. Mr. Walker received a text from Ms. Starbuck's phone at 12:10 PM on the day of the murder and he responded by text at 12:12 PM to Ms. Starbuck's phone. Accordingly, he was not in Deer Park nor did he send texts from Ms. Starbuck's phone. It was physically impossible to do so. RP 2334.

Mr. Walker was extensively cross-examined by defense counsel regarding his activities on December 1, 2011. RP 1486-1490.²⁰

John Kenlein testified he met Ms. Starbuck on a dating website in mid-September 2011. RP 1492. They had sex approximately five to six times before her murder. RP 1493. He communicated with Ms. Starbuck through text messages or email. A date was planned for 10:30 AM on December 1, 2011. RP 1493. He left his residence around 9:00 AM on that day. RP 1494. He took his children to school, bought a certain latte drink in north Spokane, and drove to Deer Park. RP 1494. Starbucks coffee (in north Spokane) had a receipt similar to the latte purchased by Mr. Kenlein on December 1, 2011 at 9:50 AM. RP 1328-1333.

Mr. Kenlein arrived in Deer Park around 10:30 AM, drove to Ms. Starbuck's home, and knocked on her door. RP 1496. With no

²⁰ No questions were permitted per the trial court's regarding sexually explicit text messages exchanged between Mr. Walker and Ms. Starbuck during the early morning of December 1, 2011.

answer, he left. RP 1496. He drove to a pay phone and again tried to contact Ms. Starbuck. RP 1497. He returned to her home a second time. RP 1497. He walked around the house and he had no contact with her. RP 1497. "The house was completely closed up, shuttered, blinds closed, blinds drawn." RP 1497. He left and drove to the Deer Park library. He then returned to Spokane. RP 1498. He drove to Whitworth University in Spokane and found a public computer terminal. RP 1499. He sent an instant message and an email to her asking if she was ok. RP 1499, 1502. The message was sent at 12:17 PM. RP 1502. Mr. Kenlein explained he used a false name for dating because he was married. RP 1505. Ms. Starbuck had no knowledge he was married. RP 1505. Ms. Starbuck's phone sent a text to Mr. Kenlein at 12:37 PM. Mr. Kenlein then attempted by text to reschedule their date for later in the evening. Ms. Starbuck's phone replied by text: "No. Tonight I have a headache and I will have Clay take the kids." RP 1514. Mr. Kenlein had a receipt for food he purchased in Spokane around 2 PM. RP 1517-18. Mr. Kenlein stated he returned home and then he went to several businesses with family members in the afternoon and early evening. RP 1519. He had several other receipts from the businesses. RP 1519. During the evening, he dropped his daughter off to basketball practice around 8:00 PM. RP 1521. He returned home and left again for Deer Park arriving around 10:30 PM.

RP 1523. Ms. Starbuck's home was dark. RP 1524. He returned to Spokane after attempting to call Ms. Starbuck several times from a pay phone. RP 1525.

Mr. Kenlein was cross examined by defense counsel regarding his whereabouts on December 1, 2011, his use of fictitious names, his marriage, and his relationship with Ms. Starbuck. RP 1526-1546.

Detectives corroborated Mr. Kenlein's statement regarding his activities and whereabouts on December 1, 2011. RP 2336-38. For instance, it would have been physically impossible for Mr. Kenlein to transmit the electronic message from Whitworth University to Ms. Starbuck at 1:00 PM on December 1, 2011, and simultaneously transmit a message back to himself from Ms. Starbuck's cell phone during the same time period. As the detective explained:

I was able to extract the IP address from the emails [Mr. Kenlein] had sent and determine his location around 1 o'clock [December 1, 2011] in the afternoon to be that of Whitworth College²¹, consistent with the phone call he had made to Chanin Starbuck. At that same time, there were some instant messages returned to John Kenlein from Chanin's phone. And, like I had said earlier, Chanin's phone had not left the Deer Park area. I looked at the drive distance and time and there would have been no way for [Mr. Kenlein] to have been at Whitworth, sending those

²¹ Whitworth University is located in Spokane. Deer Park is located about 20 miles north of Spokane. www.cityofdeerpark.com.

emails and instant messages and to manipulate her phone in Deer Park at the same time.

RP 2337.²²

Mr. Kenlein attempted to contact Ms. Starbuck fourteen times on December 1, 2011 (thirteen times by instant message and one time by telephone). RP 2334-35.

John Kenlein's wife testified he took the children to school in Spokane shortly before 9:00 AM the day of the murder. He arrived back home approximately 3:30 PM. RP 1752.

f. Text messages on December 1, 2011.

Ms. Starbuck's cell phone was turned back on at 12:05 PM on December 1, 2011. RP 2328, 2344. There were 11 SMS (text) messages sent from her phone and there were approximately 99 that were received by her phone between 12:05 PM and 4:00 PM on December 1, 2011. RP 2328. There was an attempt made to delete the record of the 911 call on Ms. Starbuck's cell phone. RP 2329-30.

At 8:08 AM on December 1, 2011, the defendant's phone was turned off or placed into airplane mode. RP 2330-31.²³ His cell phone

²² Detectives corroborated other facets of Mr. Kenlein's whereabouts on December 1, 2011. RP 2337.

²³ The defendant claimed his battery on his phone went dead at this time. RP 2604.

came back online at 3:37 PM on the same day (7 hours and 24 minutes). RP 2330. There was no activity with his cell phone during that time period. RP 2332.

In the mid-afternoon hours on December 1, 2011, there were several texts exchanged between the younger children and Ms. Starbuck's cell phone. RP 2347-48. The texts sent from Ms. Starbuck's cell phone used the family nickname for one of the children. RP 2350.

g. Scientific testing of the recovered evidence.

The defendant lived in Ms. Starbuck's home (where the murder occurred) from May 2008 to June of 2010. RP 2602. He admitted he had a working knowledge of the interior of the home. RP 2602.

Trace evidence including hairs and debris collected at the crime scene was analyzed by the Washington State Patrol. RP 2370-2383.²⁴

Lorraine Heath, supervising forensic scientist at the WSP crime lab in Spokane, testified regarding the DNA analysis of the swabs of Ms. Starbuck's neck; swabs from Ms. Starbuck's eye and nose area; right and left hand fingernail clippings; vaginal swab; defendant's reference DNA sample; Austin Starbuck reference DNA sample; Blake Starbuck

²⁴ The defendant's complaints in his opening brief regarding the investigation and subsequent forensic testing and analysis were the same criticisms addressed by the defense at the time of trial through cross-examination. RP 1287-1336, 1803-1816, 2162-2213, 2352-2362, 2384-2391, 2467-2484.

reference DNA sample; Marshal Starbuck's DNA reference sample; John Kenlein reference DNA sample; Tom Walker's DNA reference sample; Michael Broadhurst's DNA sample; and various law enforcement and medical examiner personnel who were near Ms. Starbuck's body prior to collection of the DNA samples. RP 2403-2407; Ex. 467, 468, 469, 479, 480, 481, 482, 483, 485, 508, 509, 510, 511, 512.

With respect to the DNA methodology and analysis conducted on the samples, Ms. Heath explained:

Starting with the vaginal swabs from Chanin Starbuck, semen²⁵ was identified on the vaginal swabs. And all of the

²⁵ Sperm can survive “[w]ith individuals who, for whatever reason, are laying down and not mobile, sperm has been known to survive in the vaginal vault for at least seven days. That is [a]ffected by if the person is deceased, if the body is decomposing, the weather. If it's extremely warm, that will increase the decomposition and therefore reduce the likelihood of finding semen. In a mobile individual, who's up and about, showering, changing clothes, you know, living a normal life, it typically is a little bit shorter lifespan but still up to about a hundred and 20 hours or five days even in a mobile victim.” RP 2408. During cross-examination, Ms. Heath remarked: “[DNA scientist Kristi Barr] found a single spermatozoon, which is a single little sperm, when she did her examination. That's an extremely low level. When she quantified the amount of DNA present, we can quantify the amount of female DNA versus the amount of male DNA present. And when she performed that, there was actually no male DNA detected. Obviously, it doesn't mean there wasn't any there. There was a single spermatozoon, but it means it was below our limit for our detection. So at that point in her testing, she did not proceed further. I subsequently tested at a much later date that item for the DNA analysis. So she did perform analyses on it, and I also did.” RP 2427. The DNA profile obtained from the single sperm did not meet the criteria for inclusion. RP 2427-28. All reference samples were excluded as the donor. RP 2428.

DNA typing profiles I'm going to be mentioning in terms of these results are Y-STR profiles, so they're the male specific DNA profiles that look only at DNA on the male chromosome. Because of that, the Y chromosome is inherited directly from father to son. So, all a man's biological male children will have the same profile, and going backwards up the genetic lineage, the paternal grandfather will also have the same and paternal uncles. You can draw a family tree. But it's inherited directly from father to son. So, on the vaginal swabs, a trace Y-STR DNA typing profile was obtained. It was suitable for exclusions only, and all of the reference samples that have been mentioned here, the donor of them were all excluded as being the possible donor of the profile from the vaginal swabs.

RP 2407.

Ms. Heath stated the Y-STR DNA typing profile obtained from the right hand fingernails and the neck swabs of Chanin Starbuck were consistent with having originated from two different male individuals. A major and a minor contributor. RP 2409.²⁶ The major contributor²⁷ *matched* the known samples for Clay Starbuck and his lineage. RP 2409. Therefore, neither the defendant nor his paternal male relatives could be excluded as the donor of the major male DNA profile from these two samples. This profile was observed zero times in the US Y-STR database and therefore is not expected to occur more frequently than one in 2800

²⁶ No male DNA was detected on the left hand fingernails. RP 2409.

²⁷ A major contributor is a person who deposited a greater amount of DNA.

male individuals in the United States population. RP 2409. This Y-STR profile was an *exact match* to the defendant and the male bloodline of his family. RP 2409. As Ms. Heath explained:

It matches [the defendant]. It also matches all the males in the paternal line, so including in this case Austin and Blake Starbuck.²⁸ But Y-STRs, because of the way they're inherited, are less discriminating. They are not unique, obviously, to the individual, because they're inherited in the paternal line.

So, when I give the statistic I quoted, what I'm saying is I cannot say with a hundred percent scientific certainty it is his DNA. What I can say is that no more than one in 2800 individuals in the US population would be expected to have that same profile by coincidence.

It matches [the defendant]. So, at all the different places we look at that I mentioned earlier, the numbers match between Clay, Austin and Blake's profile and the profile from the right fingernail clippings and the neck swabs.

And just to round out the commentary on those samples, *all of the other individuals that were tested that were mentioned when I went through all this evidence, they were excluded as being donors to that sample.*

RP 2410-11. (Emphasis added).

Mr. Walker, Mr. Kenlein, and Mr. Broadhurst were excluded as donors of the DNA in the fingernail and neck swabs. Exclusion means the

²⁸ It was determined through DNA analysis that the youngest son, Marshall Starbuck, was not the defendant's biological son. RP 2485-86. Accordingly, he was excluded from any DNA comparisons by the crime lab.

particular individual could not have been the contributor of the DNA on Ms. Starbuck. RP 2411.²⁹

With regard to the face swabs of Ms. Starbuck, a partial profile matched the defendant and his paternal bloodline of relatives. RP 2411. This partial profile was observed 212 times in the US Y-STR database and therefore is not expected to occur more frequently than one in 46 male individuals in the United States population. RP 2411. All other donor DNA reference samples (including Walker, Kenlein, and Broadhurst) were excluded as contributors to the DNA found on the face swabs. RP 2411.

In addition, all reference sample DNA contributors were compared and excluded as the partial Y-STR profile obtained from the keypad of Ms. Starbuck's cell. RP 2412.³⁰

Ms. Heath also remarked that if a different male's DNA was or could be located on the evidence, it would not exclude the defendant or his paternal line of relatives as contributors of the DNA collected on Ms. Starbuck's neck, fingernails and face. RP 2487-88.

²⁹ An exclusion is an absolute that the DNA detected is not from that person. An inclusion has a weight assigned to it in terms of whether other people could also have contributed to that profile. RP 2485.

³⁰ With respect to touch DNA, Ms. Heath remarked: "So touch DNA is extremely variable, and there's all sorts of reasons why your DNA may not be detected even if you have handled or touched something." RP 2413.

Ms. Heath also explained why some of the collected potential evidentiary items were not tested:

Typically when a case comes in, a large number of items are submitted, and as I discussed yesterday, a discussion occurs between the lab and the submitting agency about what questions in a case need to be answered and then where the items were collected. And then together that information is used to determine which items are most likely to answer the questions at hand. As mentioned already, that's occurred in this case. The items that weren't tested, one was the vaginal wash. As I said earlier, it's a poor sample. It frequently does not produce usable results, because there's just such an overwhelming amount of female DNA. And, in fact, vaginal washes are very rarely collected and are not included in our standard sexual assault evidence collection kit used in this state for standard sexual assaults. The other two items that have been mentioned were the arm swabs from the left and right arm. The information I had regarding the incident did not suggest any specific reason why those would answer the question as to who had killed Ms. Starbuck. So, we did not examine those items. In the initial conversation, we talked about those most likely to -- to provide an answer to who actually committed the crime, rather than just other people that might have had contact with her in her daily life.

RP 2490-91.

h. Procedural history.

Pretrial, the State brought several motions in limine. The State moved to exclude alternative suspects and a sexually explicit text message sent by Mr. Walker to Ms. Starbuck the early morning on the day of the murder.

After argument, the Honorable Gregory Sypolt ruled:

In reference to the instant issue of whether or not alternative suspect evidence should be admitted or excluded, the Court is prepared to address that today. So I do have in mind the cases that you've both cited and they're appropriate and there's one additional one that I think one of you has cited, State vs. Strizheus, and that's spelled S-T-R-I-Z-H-E-U-S, and that's one that's a recent case, 2011, and in that case, in fact, the defendant's son had declared to the police that it was all his fault, he should be arrested and he should be in jail. Yet there wasn't any connection, any nexus established by the defense between that son and the location of the crime. There was no eyewitness who could put the son at the crime scene and there was other evidence that really isn't all that pertinent to that discussion. So I did take, I believe, and hopefully a careful look at the cases, and I think again you've each cited State vs. Clark, and it seems to me that the rule here, the central rule is, as expressed in Clark citing back to Downs and citing State vs. Mak, M-A-K, that mere evidence of another party's motive or motive coupled with threats by such other person is inadmissible unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged. And also the rule is expressed that it's incumbent on the defense to introduce such evidence establishing that nexus and connection between the alternative suspect and the charged crime to establish the proper foundation. And this language as I'm about to paraphrase is expressed in a number of the cases. And the foundation requires that there be proof of connection with the crime such as a train of facts or circumstances as tending clearly to point out someone besides the accused as the guilty party and in this matter we have three named possible alternative suspects as counsel have listed them out in some elaborate detail. Mr. Kenlein, Mr. Broadhurst and Mr. Walker, and indeed it's not disputed that each of them had some sort of relationship physical and/or sexting through electronic means or actual sex, as the case may be, with the decedent here, the alleged victim. So, the theory is that because of the salacious nature

of these relationships and the desire on the part of each of them to maintain confidentiality and not be identified and particularly in the case of Mr. Kenlein who went to admittedly elaborate lengths to do that, that that would then equate and translate into a motivation to kill the alleged victim here, Ms. Starbuck.

And it's also offered by the defense that there are other individuals who haven't been named here today who might well be in a similar position as the three named alternative suspects who have the same motivation. And again admittedly there's a high probability of embarrassment and a whole slew of problems for each of these gentlemen in explaining things to their significant others about having this paramour of Ms. Starbuck, the alleged victim. Nonetheless, that appears to be as far as it goes. And in fact, I think [defense attorney] Mr. Reid made a comment that more or less, I don't know why these things could be embarrassing to each of these gentlemen. It is true also that the alibis are not completely airtight to one degree or another. Nonetheless, the state and law enforcement specifically went to effort to seek out evidence to establish whether or not there were alibis in the case of each of these gentlemen and not only them but also others including Austin and Drew, Austin Starbuck and Drew Starbuck. And I am aware the line of cases that says in situations where the evidence is primarily circumstantial then the defense may seek to counter that with similar type evidence in order to establish the foundation. In this particular matter, based on the counsel's pleadings and argument and offers of proof, it appears to me that there is no direct evidence nor even circumstantial evidence that provide the clear connection and the clear train of facts or circumstances between any of the alternative named suspects and the homicide of Ms. Starbuck. So counsel I would grant the motion to exclude the evidence of alternative suspects.

RP 117-120.

In regards to the trial court's ruling on excluding the explicit text sent by Mr. Walker to Ms. Starbuck in the early morning on the date of the murder, the court orally ruled as follows:

It's suggested here and urged that the fact of consequence sought to be proven here by introduction of these explicit texts, as I understand it from the defense' point of view, is to rebut an assertion. That's anticipated to come from the state's case. Specifically the assertion is that law enforcement and the state's theory, part of it is that the defendant wanted to create and establish a track record of sexual proclivities on the part of the victim and thereby throw off suspicion that might otherwise be focused on the defendant.

And then there's a reference to the other count here, since it alleges sexual conduct with a deceased person, that there's a connection from a relevance perspective there as well. The Court has addressed the alternative suspect issue earlier this afternoon and with regard to these texts, they are explicit. They are of such a nature that some persons, i.e. jurors, might be offended by the content of it. They might well think that the alleged victim here was a bad person because she had these texts ongoing with Mr. Walker. The fact that the text occurred on the date of the homicide, which I believe the state urges that Dr. Aiken will testify about really doesn't heighten, in the Court's view, the relevance of the content of a text or texts between Mr. Walker and Ms. Starbuck. At this point, Counsel, I will grant the motion to exclude evidence of those texts. I find that there's a high likelihood of prejudice to be engendered should that evidence be admitted, and really whether or not the victim engaged in these type internet relations, again, doesn't have a direct connection with the fact or facts of consequence that were outlined by the defense. I don't see it. If there is a connection, it's so minimal that it pa[les] in

comparison to the prejudicial impact that might well be engendered from introduction of that type evidence.

RP 127-29.

V. ARGUMENT

The decision of the court of appeals does not present any issue justifying the grant of review. Petitioner argues that the relevant criteria supporting his request for review are RAP 13.4(b)(1), claiming the court of appeals decision is in conflict with this Court's opinion in *State v. Franklin*, 180 Wn.2d 371, 325 P.3d 159(2014), and, RAP 13.4(b)(3), arguing a significant question of law under the state or federal constitutions is presented. Neither criterion is satisfied.

The court of appeals cites extensively from the *Franklin* opinion and the cases discussed therein.

The overarching claim of the defendant is that the trial court excluded other suspect evidence relating to Mr. Walker, Mr. Kenlein, and Mr. Broadhurst. However, even though the trial court ruled that this evidence should be kept out, the evidence was ultimately presented at trial. The State called Mr. Walker and Mr. Kenlein and the defendant cross-examined these witnesses without objection. The only evidence actually excluded, pertinent to this petition, was the salacious text messages exchanged between Mr. Walker and Ms. Starbuck the morning of the

murder. Mr. Walker was examined regarding his whereabouts the day of the murder and his relationship with Ms. Starbuck, including the texts exchanged with Ms. Starbuck's cell phone later in the day.³¹

Therefore, the only issue is whether the court of appeals misapplied *Franklin* when it found the salacious text messages themselves were properly excluded by the trial court.

As court of appeals correctly found:

The Walker text similarly does not assist in identifying him as the killer. The primary probative value of the text, given that the victim was posed partially in conformance with the photo requested therein, was that the killer had access to the victim's phone and used the information therein, clumsily, to cast suspicion toward Walker. It did not put him at the scene—indeed, the phone records put him well away from Deer Park the entire day; he had no opportunity to commit the crime. Walker's photograph request is not suggestive of a motive for murder or of any violent intention at the least. It also does not constitute a step toward committing murder. In short, the text does nothing to suggest Walker committed the crime.

State v. Starbuck, ---Wn. App.---, 355 P.3d 1167, 1175 (2015).

In addition, the defendant advances the same argument here that was discussed and rejected by the court of appeals. He claims the court of appeals improperly considered the strength of the State's case against the

³¹ The appellate court noted the other suspect exclusion order was not strictly followed. *Starbuck*, 355 P.3d at 1172.

defendant when it found no error in the exclusion of the text messages. However, the court of appeals specifically avoided that consideration as follows:

Mr. Starbuck argues that consideration of the strength of Walker's alibi is forbidden by *Holmes*. His argument misconstrues that case. There, South Carolina had a rule in derogation of the common law rule followed in this state—and approved by the United States Supreme Court in *Holmes*—which prohibited other suspect evidence when the government's case was strong. 547 U.S. at 323–324, 126 S.Ct. 1727. In other words, the common law rule could be ignored, despite the defendant's showing, if the State's case against the defendant was strong enough. The *Holmes* prohibition, however, was not directed at governmental evidence that weighed on the strength of the defendant's other suspects evidence. It simply prohibited consideration of unrelated evidence when making that determination. The trial court was free to consider evidence introduced by the State on the topic—Mr. Walker testified where he was during the day and the phone and employment records backed him up. The trial court properly used that information while determining whether Mr. Starbuck made a nonspeculative showing that Mr. Walker could have committed the crime.

Starbuck, 355 P.3d at 1175 (footnotes omitted).

That analysis is in accord with *Franklin* and the cases cited by this court in *Franklin*.

Likewise, in establishing a foundation for other suspect evidence, the court of appeals in the present case stated: “The defendant must show a clear nexus between the other person and the crime.” *Starbuck*, 355 P.3d at 1173; *see, also, State v. Strizheus*, 163 Wn. App. 820, 830, 262 P.3d

100 (2011), *review denied*, 173 Wn.2d 1030 (2012) (absent a clear nexus between the other person and the crime, a defendant cannot establish an “other suspect” defense). Ultimately, the court of appeals stated the focus is on whether the defendant sufficiently connected either Mr. Walker or Mr. Kenlein to the murder. *Starbuck*, 355 P.3d at 1173.

This Court held in *Franklin* that while the “train of facts and circumstances” standard remains good law, it stands for the proposition that “[s]ome combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime.” *Franklin*, 180 Wn.2d at 381.

The defense did not and could not provide the trial court with any evidence of the alternative suspects’ ability to commit the murder, or reasons the suspects may have committed the crime (such as prior quarrels or disputes, hostility, acrimony between the suspects and Ms. Starbuck). Nor did the defense provide any evidence of the alternative suspects’ opportunity to commit the murder. The defendant’s offer of proof to the trial court was nothing more than raw speculation.

In actuality and as noted above, the only facts kept from the jury were the salacious texts exchanged between Mr. Walker and Ms. Starbuck during the early morning hours the day of the murder and the alleged “unidentified online suitors” of Ms. Starbuck. As noted above, the “other

suspects” – Walker and Kenlein – were questioned and cross examined by the defense. Moreover, they were physically excluded from commission of the crime by their whereabouts the day of the murder *and by the DNA evidence*. The jury was able to evaluate this testimony in reaching its decision.

The court of appeals properly applied this court’s governing decisions in affirming the trial court’s exclusion of the defendant’s speculative “other suspect” evidence. The decision relies on the principles established in *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); *Franklin, supra*; *State v. Downs*, 168 Wash. 664, 13 P.2d 1 (1932); *State v. Kwan*, 174 Wash. 528, 533, 25 P.2d 104 (1933); *State v. Russell*, 125 Wn. 2d 24, 882 P.2d 747 (1994); and *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004)

The “unknown” alternative suspects.

With no evidentiary support, the defendant argues that Ms. Starbuck’s dating lifestyle³² was such that many people wanted to harm her and might have been responsible for the murder. More specifically, the defendant complains the court of appeals

³² Several of the claims made by the defendant are not located in the record. For instance, he claims: “Chanin sent several men a video of her with the sexual device that was discovered in her body.” *See*, Def.’s Br. at 35.

“misunderstood” the relevance of the defendant’s other suspect evidence claiming: “There was no avoiding the fact that the victim’s texts, the crime scene, and the forensic evidence demonstrated that Chanin was engaged with multiple sex partners. Thus, evidence establishing that this fact gave others the opportunity to commit the crime was integral to the defense.”³³ Def.’s Br. at 34. The claim makes an evidentiary leap from online dating to murder without any proof or logical connection. In *State v. Mak*, this Court cautioned specifically against admission of this type of generalized motive evidence:

“[I]f evidence of motive alone upon the part of other persons were admissible ... in a case involving the killing of a man who had led an active and aggressive life it might easily be possible for the defendant to produce evidence

³³ It is uncertain as to what the defendant relies in asserting that Ms. Starbuck’s dating online and “sexting” made her susceptible to being murdered. According to www.statisticbrain.com/online-dating-statistics/, a total of 49,250,000 people in the United States have tried online dating and 47.6 percent of those individuals were female. It is a common practice and not aberrant as argued by the defendant. In addition, 49 percent of smartphone users have engaged in sexting (the practice of sharing sexually explicit messages or images). <http://www.medicaldaily.com/sexting-now-mainstream-half-us-adults-send-and-receive-268703>. Moreover, in a 2009 survey, over 50 percent of women 18 to 60 years of age had used a sexual vibrator. <http://www.livescience.com/7781-americans-vibrators-study-claims.html>. In addition, 56 percent of American men and 30 percent of American women have had five or more sexual partners in their lifetime. www.kinseyinstitute.org/resources/FAQ.html#number.

tending to show that hundreds of other persons had some motive or *animus* against the deceased; [and] a great many trial days might be consumed in the pursuit of inquiries which could not be expected to lead to any satisfactory conclusion.”

Mak, 105 Wn.2d 692, 717, 718 P.2d 407 (1986), *overruled on other grounds by State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

Ultimately, the fact that Ms. Starbuck was dating online and had a sexual relationship with several men does not make these known or unknown men suspects in her murder.

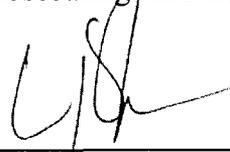
Accordingly, there is no conflict with existing authority or with the state or federal constitutions. This Court should deny the petition for review.

VI. CONCLUSION

For the reasons stated above, respondent requests the Court deny the petitioner’s request for review.

Respectfully submitted this 4th day of November, 2015.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CLAY D. STARBUCK,

Appellant,

Supreme Court No. 93263-9
(COA No. 31845-1-III)

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on November 4, 2015, I e-mailed a copy of the Answer to Petition for Review in this matter, pursuant to the parties' agreement, to:

Suzanne Elliott
Suzanne-elliott@msn.com

11/4/2015

(Date)

Spokane, WA

(Place)

Kim Cornelius

(Signature)

OFFICE RECEPTIONIST, CLERK

To: Cornelius, Kimberly A.
Subject: RE: Clay Starbuck, No. 923639

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Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Subject: Clay Starbuck, No. 923639

Attached please find the Respondent's Answer to Petition for Review in the above case.

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