No. S103358 - CAPITAL CASE

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

MARCOS ESQUIVEL BARRERA,
Defendant and Appellant.

Los Angeles County Superior Court, Case No. PA029724
The Honorable Ronald S. Coen, Judge

THIRD SUPPLEMENTAL RESPONDENT'S BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

On January 21, 2022, appellant filed an "Application for Permission to File Third Supplemental Opening Brief." On January 24, 2022, this Court granted appellant's application and directed respondent to file a third supplemental respondent's brief. Pursuant to this Court's Order of January 24, 2022, respondent files the instant Third Supplemental Respondent's Brief.

I. APPELLANT'S HEARSAY CLAIM SHOULD BE REJECTED

Appellant argues in the Third Supplemental Opening Brief ("TSOB") that the admission of Dr. Boger's forensic radiology report, which he contends was inadmissible hearsay, violated state evidentiary law because there were no applicable hearsay exceptions, such as the official record (Evid. Code, § 1280) or business record (Evid. Code, § 1271) exceptions. (TSOB 11-20.)[1] Appellant's hearsay claim should be rejected because People's Exhibit No. 26,[2] which was Dr. Ribe's autopsy report concerning Lupita (see Peo. Exh. No. 26 at pp. 1-36), and which also included two pages of Dr. Boger's report (see Peo. Exh. No. 26 at pp. 21-22), was admissible under the official record and/or business record hearsay exceptions.

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[1] Regarding appellant's arguments concerning *People v. Sanchez* (2016) 63 Cal.4th 665 (TSOB 12-15), respondent addressed appellant's *Sanchez* claims in the Second Supplemental Respondent's Brief ("SSRB"). (See SSRB 8-56.)

[2] For ease of reference, the 36 pages of People's Exhibit No. 26 will be referred to in sequential order.

A. Applicable law

"Hearsay is 'evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.' [Citation.]" (*People v. Turner* (2020) 10 Cal.5th 786, 821, quoting Evid. Code, § 1200, subd. (a).) "Hearsay evidence is generally inadmissible unless it satisfies a statutory exception. [Citation.]" (*Ibid.*, citing Evid. Code, § 1200, subd. (b).)

As discussed in the Second Supplemental Respondent's Brief (see SSRB 26-27), "experts can take hearsay into account when forming their own opinions," but an expert cannot "'relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception.' [Citation.]" (*Turner*, *supra*, 10 Cal.5th at p. 821, quoting *Sanchez*, *supra*, 63 Cal.4th at p. 686.)

In *Turner*, this Court noted that "when an appropriate foundation has been laid, autopsy reports have sometimes been admitted as business records [citing Evid. Code, § 1271; *People v. Beeler* (1995) 9 Cal.4th 953, 979] or official records [citing Evid. Code, § 1280; *People v. Clark* (1992) 3 Cal.4th 41, 158-159]." (*Turner*, *supra*, 10 Cal.5th at p. 822.) "Both the business record and official record exceptions require a showing that the writing 'was made at or near the time of the act, condition, or event' [citing Evid. Code, §§ 1271, subd. (b), 1280, subd. (b)]; either 'in the regular course of a business' [citing Evid. Code, § 1271, subd. (a)] or 'by and within the scope of duty of a public employee' [citing Evid. Code, § 1280, subd. (a)]; and that 'sources of

information and method and time of preparation were such as to indicate [the writing's] trustworthiness' [citing Evid. Code, §§ 1271, subd. (d), 1280, subd. (c)]." (*Turner*, *supra*, 10 Cal.5th at p. 822.)[3]

In *Turner*, this Court recognized that "the prosecution might reasonably have perceived no need to offer the autopsy report under a hearsay exception" because when the defendant's case was tried in 2007, "courts frequently allowed experts to

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[3] Evidence Code section 1271 states:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

(See *People v. Hovarter* (2008) 44 Cal.4th 983, 1010-1011; *Beeler*, *supra*, 9 Cal.4th at p. 979.)

Evidence Code section 1280 states:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

(See *People v. Martinez* (2000) 22 Cal.4th 106, 119-120; *Clark*, *supra*, 3 Cal.4th at pp. 158-159.)

relate case-specific hearsay under the rationale that such evidence merely explained the basis for the expert's opinion and was not offered for its truth." (*Turner, supra*, 10 Cal.5th at p. 823, citations omitted.) Noting that *Sanchez* changed this aspect of the law, this Court stated, "But, while our treatment of hearsay has changed in light of evolving Supreme Court jurisprudence, this change does not make it appropriate in this case to uphold the admission of hearsay against a criminal defendant based on an exception that was never presented to the trial court, for which no effort was made to lay the necessary foundation, and on which the court never ruled." (*Ibid.*, citation omitted.) However, this Court also stated, "Had the report been offered and admitted under an exception, the words of the document itself would have constituted admissible hearsay." (*Ibid.*)

B. People's Exhibit No. 26 would have been admissible under the official record and/or business record hearsay exceptions

At appellant's trial, People's Exhibit No. 26, which was Dr. Ribe's autopsy report concerning Lupita (see Peo. Exh. No. 26 at pp. 1-36), and which also included two pages of Dr. Boger's report (see Peo. Exh. No. at pp. 21-22), was admitted into evidence without any objection by appellant (see 11RT 1763-1767, 1780).[4]

[4] In the Second Supplemental Respondent's Brief, respondent argued that insofar as appellant challenges the admission of the coroner's report (concerning Lupita) itself (Peo. Exh. No. 26) into evidence, he has forfeited any hearsay or confrontation clause objections because his trial counsel failed to object to People's Exhibit

Appellant now complains that People's Exhibit No. 26 was "not offered or admitted under any exception." (See TSOB 15.) However, had appellant's trial counsel objected on hearsay grounds to the admission of People's Exhibit No. 26, it would have been admissible under the official record and/or business record hearsay exceptions.

People's Exhibit No. 26, the coroner's report regarding Lupita, was admissible under the official record hearsay exception under Evidence Code section 1280. (See *Clark*, *supra*, 3 Cal.4th at pp. 158-159 [physician who prepared autopsy report for Jane Doe 99 died before penalty phase; another physician testified about that autopsy report because that report qualified as an official record under Evid. Code, § 1280]; *People v. Wardlow* (1981) 118 Cal.App.3d 375, 387-388 [autopsy report admissible under the official record exception to the hearsay rule contained in Evid. Code, § 1280].)

First, People's Exhibit No. 26 "was made by and within the scope of duty of a public employee." (See Evid. Code, § 1280, subd. (a).) The coroner's report was prepared by Dr. Ribe, who was a forensic pathologist and senior deputy medical examiner for the Los Angeles County coroner's office. (See 9RT 1510-1511, 1514.) Thus, Dr. Ribe was a "public employee" (see Evid. Code, § 1280, subd. (a)), and Lupita's autopsy was performed within the scope of a coroner's statutory duty (see Gov. Code, § 27491).

No. 26 at trial (see 11RT 1762-1767; see also 9RT 1514-1515). (See SSRB 21-24.) Respondent reasserts the forfeiture argument (see SSRB 21-24) in the instant Third Supplemental Respondent's Brief.

Second, People's Exhibit No. 26 "was made at or near the time of the act, condition, or event." (See Evid. Code, § 1280, subd. (b); see also *Martinez*, *supra*, 22 Cal.4th at p. 128 [observing that the "timeliness requirement [regarding Evid. Code, § 1280, subd. (b)] 'is not to be judged . . . by arbitrary or artificial time limits, measured by hours or days or even weeks'"; rather, "'account must be taken of practical considerations,' including 'the nature of the information recorded' and 'the immutable reliability of the sources from which [the information was] drawn'"].) Dr. Ribe performed Lupita's autopsy on May 23, 1998. (See Peo. Exh. No. 26 at pp. 1-2; see also 9RT 1514-1515.) In the report, Dr. Ribe summarized that a total of 29 X-rays were taken of Lupita's body, including: 19 pre-autopsy X-rays, consisting of 7 taken on May 22 (before unwrapping) and 12 taken on May 23 (after unwrapping); 2 autopsy specimen X-rays taken on May 23; and 8 post-autopsy X-rays consisting of 4 chest wall and 8 upper extremities taken on May 31, and 4 humeri and 8 femora taken on June 6. (See Peo. Exh. No. 26 at p. 13.) Dr. Ribe testified that he referred the X-rays to the radiology expert consultant. (9RT 1536.)

The radiology report was signed by Dr. Boger (radiology consultant) and dated July 14, 1998. (See Peo. Exh. No. 26 at p. 22.) Dr. Ribe's autopsy report regarding Lupita was signed by Dr. Ribe and dated July 24, 1998. (See Peo. Exh. No. 26 at pp.

14, 27-29.)[5] Thus, People's Exhibit No. 26, which was initially dated by Dr. Ribe on July 24, 1998 (see Peo. Exh. No. 26 at pp. 14, 27-29), "was made at or near the time of" Lupita's autopsy examination on May 23, 1998 (see Peo. Exh. No. 26 at pp. 1-2; see also 9RT 1514-1515), within the meaning of Evidence Code section 1280, subdivision (b), given the additional time needed to take the X-rays of Lupita's body and to provide the X-rays to Dr. Boger for his evaluation.[6]

Third, the "sources of information and method and time of preparation were such as to indicate its trustworthiness." (See Evid. Code, § 1280, subd. (c); see also *People v. George* (1994) 30 Cal.App.4th 262, 273-274; *People v. Parker* (1992) 8 Cal.App.4th 110, 116 [the trustworthiness requirement for hearsay exception under Evid. Code, § 1280 is established by a showing that the

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[5] Dr. Ribe's autopsy report regarding Lupita was also later signed by Dr. Ribe and dated April 6, 2000. (See Peo. Exh. No. 26 at p. 30.) People's Exhibit No. 26 indicated that a "supplemental report to autopsy report" was issued on April 27, 2000, "to add the following in the autopsy report," including from the coroner's file: "Autopsy report, microscopic reports, pre-autopsy x-rays, at-scene and autopsy photographs, investigator's memoranda, Radiology consult, Forensic dentistry consult, Forensic Anthropology consults, criminalists reports, Sheriff's Crime Lab report, stored tissue specimens, [and] histologic slides," as well as testimony and hospital records. (See Peo. Exh. No. 26 at p. 1.)

[6] Unlike Evidence Code section 1271, Evidence Code section 1280 allows "'the court to admit an official record or report without necessarily requiring a witness to testify as to its identity and mode of preparation if the court takes judicial notice or if sufficient independent evidence shows that the record or report was prepared in such a manner as to assure its trustworthiness.' [Citation.]" (*Martinez*, *supra*, 22 Cal.4th at p. 129.)

written report is based upon the observations of public employees who have a duty to observe the facts and report and record them correctly].) In addition to Dr. Ribe's trial testimony about his preparation of the autopsy report concerning Lupita (see 9RT 1510-1556), numerous pages of People's Exhibit No. 26 bore the seal[7] of the Los Angeles County Coroner's Department in purple ink (see Peo. Exh. No. 26 at pp. 14-20, 22, 24-25, 27-34, 36), including Dr. Boger's report (see Peo. Exh. No. 26 at p. 22).[8]

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[7] On these pages of People's Exhibit No. 26, there was the seal in purple ink accompanied by the following statement that "This is a true certified copy of the record [i]f it bears the seal of the Department of Coroner imprinted in purple ink," and with the signature of Anthony T. Hernandez, the Director of the Department of Coroner of Los Angeles County in California. (See Peo. Exh. No. 26 at pp. 14-20, 22, 24-25, 27-34, 36.)

[8] Appellant also argues that "[t]o the extent the trial court did rule that [Lupita's] autopsy report was not hearsay and did meet the official and business records exceptions" (see TSOB 16), Dr. Boger's two-page report (see Peo. Exh. No. 26 at pp. 21-22), which was included in Dr. Ribe's autopsy report concerning Lupita (see Peo. Exh. No. 26 at pp. 1-36), "was an additional layer of hearsay" (see TSOB 16). However, as addressed above, regarding People's Exhibit No. 26, Dr. Ribe was a "public employee" (see Evid. Code, § 1280, subd. (a)), and Lupita's autopsy was performed within the scope of a coroner's statutory duty. Moreover, as will be addressed below, Dr. Ribe was a "qualified witness" who testified to the identity of People's Exhibit No. 26 and the mode of its preparation. (See Evid. Code, § 1271, subd. (c); see also *Beeler*, *supra*, 9 Cal.4th at p. 979 [no requirement in Evid. Code, § 1271 that the person who prepared the business record testify regarding its contents].) In any event, in *People v. Ayers* (2005) 125 Cal.App.4th 988, 994-996, the Court of Appeal discussed a situation involving two levels of hearsay: (1) domestic violence victim's statements to an employee of the Alliance Against Family Violence (AAFV); and (2) AAFV employee's recordation of her statements in AAFV forms. The Court of Appeal held that the AAFV forms were not properly admitted as business records (Evid. Code, § 1271) because the

Therefore, had appellant's trial counsel objected to People's Exhibit No. 26 based on hearsay, it would have been admissible under the official record exception under Evidence Code section 1280.

Moreover, People's Exhibit No. 26 would have been admissible under the business record hearsay exception under Evidence Code section 1271. (See *Beeler*, *supra*, 9 Cal.4th at p. 979 [pathologist who performed victim's autopsy did not testify; another pathologist, who did not participate in the autopsy, testified and qualified autopsy report as a business record under Evid. Code, § 1271].) First, People's Exhibit No. 26 "was made in the regular course of a business." (See Evid. Code, § 1271, subd. (a).) As discussed above, the report was prepared by Dr. Ribe, who was a forensic pathologist, licensed physician, and medical examiner who worked for the coroner's office. (See 9RT 1510-1511, 1514.)

Second, People's Exhibit No. 26 "was made at or near the time of the act, condition, or event." (See Evid. Code, § 1271, subd. (b).) Based on the same facts summarized above (concerning Evid. Code, §1280, subd. (b)), People's Exhibit No. 26, which was initially dated by Dr. Ribe on July 24, 1998 (see Peo. Exh. No. 26 at pp. 14, 27-29), "was made at or near the time of"

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victim "was not under an official duty to accurately report information." (*Id.* at p. 995.) The case of *Ayers* concerning multiple levels of hearsay is distinguishable from the instant case concerning People's Exhibit No. 26 because both Dr. Ribe (who performed Lupita's autopsy and prepared the autopsy report) and Dr. Boger (who conducted a radiology examination) had a duty to accurately report information. (See *ibid.*)

Lupita's autopsy examination on May 23, 1998 (see Peo. Exh. No. 26 at pp. 1-2; see also 9RT 1514-1515), within the meaning of Evidence Code section 1271, subdivision (b).

Third, the "custodian or other qualified witness testifie[d] to its identity and the mode of its preparation." (See Evid. Code, § 1271, subd. (c); see also *Beeler*, *supra*, 9 Cal.4th at p. 979 ["Evidence Code section 1271 itself states no requirement that the person who prepared the business record testify regarding its contents"]; *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 322 ["witness need not have been present at every transaction to establish the business records exception; he or she need only be familiar with the procedures followed"], 324 ["any 'qualified witness' who is knowledgeable about the documents may lay the foundation for introduction of business records – the witness need not be the custodian or the person who created the record"].) As noted above, People's Exhibit No. 26 was prepared by Dr. Ribe, who testified at trial about the coroner's report and the mode of its preparation. (See 9RT 1510-1556.) Dr. Ribe also testified about his training, education, and work experience, including his frequent appearances in California courts as an expert witness in the fields of pathology. (See 9RT 1512-1513.)

Fourth, the "sources of information and method and time of preparation were such as to indicate its trustworthiness." (See Evid. Code, § 1271, subd. (d).) As noted earlier, Dr. Ribe testified at trial about his preparation of the autopsy report concerning Lupita (see 9RT 1510-1556), and numerous pages of People's Exhibit No. 26 bore the seal of the Los Angeles County Coroner's

Department in purple ink (see Peo. Exh. No. 26 at pp. 14-20, 22, 24-25, 27-34, 36), including Dr. Boger's report (see Peo. Exh. No. 26 at p. 22). Thus, had appellant's trial counsel objected to People's Exhibit No. 26 based on hearsay, it would have been admissible under the business record exception under Evidence Code section 1271. Therefore, appellant's hearsay claim should be rejected.

C. Appellant's confrontation clause claim should be rejected

Referring to the Second Supplemental Opening Brief (SSOB 16-28), appellant argues that Dr. Boger's report is testimonial, and its admission violated the confrontation clause (TSOB 20-22).

In the Second Supplemental Respondent's Brief, respondent argued that Dr. Ribe's trial testimony concerning Lupita's healing fractures did not violate the confrontation clause because Dr. Boger's findings were not testimonial. (SSRB 30-31.) For the same reasons (see SSRB 30-31), the admission of Dr. Boger's report did not violate the confrontation clause because this report was not testimonial.

In *People v. Edwards* (2013) 57 Cal.4th 658, this Court stated:

> Autopsy statements that simply record anatomical and physiological observations . . . are "less formal" than statements of the autopsy physician's expert forensic conclusion as to the cause of death. [Citation.] Statements in the former category . . . are "comparable to observation of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment. Such observations are not testimonial in nature. [Citation.]" [Citation.]

(*Id.* at p. 706 ["We also found the anatomical observations in the *Dungo* autopsy report to be nontestimonial under the 'primary purpose' test"]; see also *id.* at p. 708 ["This testimony by Dr. Fukumoto did not, however, recount Dr. Richards's *forensic opinions* as to the cause of Deeble's injury or death, but rather his medical observations of objective fact. That a break appears 'incisional,' a nose appears to be broken, or residue appears to be from adhesive tape, are expert medical observations of the body's condition – assessments like those a doctor would make to determine the proper treatment of a live patient"], original emphasis.) Therefore, appellant's current confrontation clause claim should be rejected.[9]

D. Appellant's claim regarding prejudice should be rejected

Again, referring to the Second Supplemental Opening Brief (SSOB 28-33), appellant argues that the admission of Dr. Boger's report was prejudicial under any test because this report was critical to proving premeditation, torture-murder, and the torture-murder special circumstance (TSOB 22-23).

In the Second Supplemental Respondent's Brief, respondent argued that, even assuming arguendo that Dr. Ribe's trial testimony about Dr. Boger's findings constituted testimonial hearsay, any alleged error was harmless under *Chapman v.*

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[9] As he did in the Second Supplemental Opening Brief (SSOB 28), appellant again makes various cursory contentions alleging violations of his state and federal constitutional rights (TSOB 22). Such cursory and perfunctory allegations should be rejected. (See *People v. Mayfield* (1993) 5 Cal.4th 142, 196; *People v. Marshall* (1990) 50 Cal.3d 907, 945, fn. 9.)

California (1967) 386 U.S. 18, 24, and/or *People v. Watson* (1956) 46 Cal.2d 818, 836. (See SSRB 31-56.) Specifically, respondent argued that, even without the complained-of trial testimony of Dr. Ribe concerning Dr. Boger's findings, (1) any alleged error was harmless under *Chapman* and/or *Watson* because substantial evidence supported appellant's conviction for first degree murder by torture regarding Lupita (SSRB 36-48); (2) substantial evidence supported appellant's conviction for first degree premeditated and deliberate murder regarding Lupita (SSRB 48-51); and (3) substantial evidence supported the torture-murder special circumstance finding, and the jury also found the multiple murder special circumstance to be true (SSRB 51-56).

For the same reasons (see SSRB 31-56), the admission of Dr. Boger's report was harmless under *Chapman* and/or *Watson* – in light of the substantial evidence that supported appellant's convictions for first degree murder by torture and first degree premeditated and deliberate murder regarding Lupita.

As previously conceded by appellant (see AOB 33), regarding the first element of torture murder, there was substantial evidence showing that appellant committed acts causing death that involved a high probability of Lupita's death. (See *People v. Streeter* (2012) 54 Cal.4th 205, 244-245; *People v. Jennings* (2010) 50 Cal.4th 616, 642.) Among other things, the evidence showed that on the day leading to Lupita's death, appellant repeatedly hit Lupita and threw Lupita against the wall, resulting in a cracking sound when the back of her neck hit the wall. Lupita fell to the floor, her neck was downward, and she did not make

any noise. She never recovered from this beating and died within hours. (See 9RT 1588-1591, 1593-1600; 10RT 1647-1649.)

Regarding the second element, there was substantial evidence of appellant's willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose. (See *Streeter*, *supra*, 54 Cal.4th at pp. 244-245.) First, appellant's intent to cause extreme pain or suffering on Lupita can be inferred from the condition of two-year-old Lupita's body, which was smaller than the average size of a child that age (9RT 1540-1542, 1554-1556), lacked endocrine organs (9RT 1542-1543), suffered from numerous external and internal bruises (9RT 1518, 1524-1525,1539-1540, 1543-1544), had hemorrhaging in the skull bone and bleeding inside the skull (9RT 1525-1527, 1529-1532, 1535), and had a fractured skull (9RT 1533-1536). Second, appellant's intent can be inferred from the nature of the killing. The prolonged way that appellant allowed Lupita to die after he inflicted the fatal injury against the wall showed his intent to cause her extreme pain or suffering out of anger and sadism. Appellant was angry that Lupita had urinated in her underwear, and his anger led to his initial beating of her and his cruel order to have her showered in cold water. After beating Lupita some more, he threw her against the wall so hard that her neck made a cracking sound when it hit the wall. As Lupita lay unconscious on the ground, appellant angrily called her a "bitch." During the many subsequent hours while Lupita remained unconscious but alive, appellant spoke to co-defendant Ricardo about how to

conceal her, tried to convince Petra that Jose Esquivel had harmed Lupita, and twice refused to take her to the hospital before Lupita finally died in Petra's arms. (See 9RT 1587-1597, 1599-1604, 1647-1656, 1674, 1728-1732.) Third, appellant's intent can be inferred from the circumstances of the crime, showing that his abuse of Lupita was motivated by revenge and hatred. Co-defendant Ricardo testified that after Lupita came to live with her and appellant began to beat Lupita, appellant told co-defendant Ricardo that he treated Lupita in that way because Lupita "would not follow" him and "did not love [him]." (11RT 1822.)

Substantial evidence also supported appellant's conviction for first degree premeditated and deliberate murder regarding Lupita. The three factors, which are relevant to resolving the issue of premeditation and deliberation, are planning activity, motive, and manner of killing. (*Streeter*, *supra*, 54 Cal.4th at p. 242; see *Jennings*, *supra*, 50 Cal.4th at p. 645; *People v. Combs* (2004) 34 Cal.4th 821, 850; *People v. Anderson* (1968) 70 Cal.2d 15, 33-34.) First, the manner of Lupita's killing demonstrated appellant's intent to cause extreme pain or suffering on Lupita. Among other things, appellant beat and hit Lupita every day. (9RT 1585-1587; 10RT 1647.) As discussed above, on the day leading to Lupita's death, appellant hit Lupita repeatedly out of anger (9RT 1588-1591, 1593-1594), cruelly ordered the others to use cold water to shower Lupita and changed the warm shower water to cold water for Lupita (9RT 1590-1592), and brutally threw Lupita into the wall (9RT 1590, 1595-1597). Second, as

discussed above, appellant told co-defendant Ricardo that he mistreated Lupita because Lupita "would not follow" him and did not love him (11RT 1822). (See *Jennings, supra*, 50 Cal.4th at p. 646 [discussing the *Anderson* factor of the defendant's preexisting motive against victim including the defendant's inability to control victim's behavior].) In other words, appellant felt unloved by Lupita and wanted to hurt her out of anger.

Third, there was evidence of appellant's planning activity regarding Lupita's killing. (See *People v. Whisenhunt* (2008) 44 Cal.4th 174, 201 [evidence of the defendant's actions after he inflicted the fatal wounds, such as dissuading others from seeking medical help and preventing them from calling 911 before the victim's death, showed he deliberately intended to kill her].) After appellant hit Lupita and threw her against the wall, and while she was lying unconscious on the floor but still breathing, appellant spoke with co-defendant Ricardo about what they should do with Lupita. Appellant told co-defendant Ricardo that he wanted to take Lupita to the park to hide her from their landlord. (10RT 1647-1650.) Co-defendant Ricardo told appellant to take Lupita to the hospital, but he refused. (10RT 1674.) While Lupita remained on the floor in the same location, appellant threatened Jose Esquivel, told him to take the blame, and told him to tell Petra that he (Jose Esquivel) had done this to Lupita. (10RT 1650-1651.) Later, while Lupita was still alive at Petra's residence, appellant refused Petra's request to take Lupita to the hospital. (See 10RT 1652-1653, 1730.) During the many hours after he had inflicted the fatal injuries on Lupita,

appellant had the time to deliberate the consequences of his conduct and twice refused to take Lupita to the hospital.

Moreover, for the same reasons (see SSRB 31-56), the admission of Dr. Boger's report was harmless given the substantial evidence that supported the torture-murder special circumstance finding, as well as the jury's true finding regarding the multiple murder special circumstance. The torture-murder special circumstance (Pen. Code, § 190.2, subd. (a)(18)) requires: (1) proof of first degree murder, (2) proof that the defendant intended to kill and torture the victim, and (3) proof of the infliction of an extremely painful act upon a living victim. (See *Jennings*, *supra*, 50 Cal.4th at p. 647.)

First, as discussed above, there was proof of first degree murder regarding Lupita based on the theory of murder by torture and the theory of premeditated and deliberate murder. As discussed in respondent's brief ("RB"), there was substantial evidence of the first degree murder of Ernesto based on the theory of murder by torture (see RB, Argument I.E.1) and premeditated and deliberate murder (see RB, Argument I.F.2).

Second, there was proof that appellant intended to kill and torture both Lupita and Ernesto. Concerning Lupita, as discussed above, appellant's intent to kill her was evidenced by appellant's beating and hitting of Lupita every day (9RT 1585-1587; 10RT 1647); appellant's hitting her in anger and throwing her into the wall on the day leading to her death (9RT 1588-1591, 1593-1597); and appellant's repeated refusals to allow Petra to take the unconscious Lupita to the hospital (10RT 1652-1653,

1674, 1730). Appellant's willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose was evidenced by the condition of Lupita's body, which was too small for her age (9RT 1540-1542), suffered from bruising and hemorrhaging (9RT 1518, 1524-1526, 1532-1533, 1539-1540, 1543-1544), had a fractured and bleeding skull (9RT 1529-1536), and was missing endocrine organs (9RT 1542-1543). Moreover, Lupita's siblings witnessed appellant's constant abuse of Lupita, which included hitting her every day and throwing her into a wall more than once. (9RT 1585-1587, 10RT 1647, 1703-1704, 1706.)

As discussed in respondent's brief (see RB, Argument I.F.2), in the context of showing substantial evidence of appellant's premeditated and deliberate murder of Ernesto, there was substantial evidence that appellant had intent to kill Ernesto. Appellant beat Ernesto daily (9RT 1583, 1585-1586, 1604-1607; 10RT 1660-1662, 1665, 1669); appellant did not allow others to feed Ernesto (9RT 1611-1613; 10RT 1636-1637, 1664-1666, 1685, 1704); Ernesto was emaciated and weighed only 36 pounds at the time of his death (8RT 1448, 1453-1455, 1457; 9RT 1489, 1499-1500, 1507); and Ernesto lost consciousness about two months before his death (10RT 1665). On the night of Ernesto's death, appellant hit him, yanked his head backward, hit his chest three times, and kicked his head which hit the wall. (10RT 1666-1669.) Appellant did not take him to the hospital and instead, went to

bed and left Ernesto on the floor the entire night. (10RT 1669-1671.)

As discussed in respondent's brief (see RB, Argument I.E.1), in the context of showing substantial evidence of appellant's willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion persuasion, or another sadistic purpose, there was substantial evidence that appellant intended to torture Ernesto as evidenced by the condition of his body, which was emaciated and showed signs of deliberate starvation (8RT 1448; 9RT 1489, 1499-1500), weighed only 36 pounds and was 45 inches in height (8RT 1457), was missing a thymus (9RT 1499), had 20 broken bones (9RT 1477-1487, 1489-1491), had brain injuries (9RT 1491-1498), and had numerous bruises, lesions, ulcers, abrasions, and scars (8RT 1451-1456, 1459-1466, 1468-1470, 1473-1474). Ernesto's siblings witnessed appellant's constant physical abuse of Ernesto, including appellant's beating of Ernesto on a daily basis with his hands and objects (9RT 1583, 1585-1586, 1604-1605; 10RT 1660-1661, 1665), appellant's punching and kicking of Ernesto (10RT 1669), and appellant's breaking of Ernesto's leg (10RT 1605-1607, 1661-1662). On the night of Ernesto's death, appellant hit Ernesto, yanked his head backwards, hit his chest three times with a closed fist, and kicked his head which hit the wall. (10RT 1666-1669.)

Third, there was proof of the infliction of an extremely painful act by appellant upon both Lupita and Ernesto while they were alive. As discussed above, the evidence showed that in

addition to appellant's repeated physical beating of Lupita prior to her murder (see 9RT 1585-1587; 10RT 1647), on the day leading to Lupita's death, appellant repeatedly hit Lupita and threw her against the wall, resulting in a cracking sound and causing her neck to fall downward (see 9RT 1588-1591, 1593-1600; 10RT 1647-1649). As discussed in respondent's brief (see RB, Argument I.E.1), the evidence showed that in addition to appellant's repeated and regular physical beating of Ernesto prior to his murder (see 9RT 1583-1586, 1604-1607; 10RT 1660-1662, 1665), on the day leading to Ernesto's death, appellant hit Ernesto repeatedly, yanked Ernesto's head backward, hit Ernesto's chest three times with a closed fist, and kicked Ernesto's head with his foot, causing Ernesto's head to hit the wall (see 10RT 1667-1668). Thus, substantial evidence supported the torture-murder special circumstance finding as to counts 1 and 6.

Here, as to counts 1 and 6, the jury also found the multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)) to be true. (22CT 6070; see 15RT 2040-2041.) Even assuming arguendo that the jury's true finding on the torture-murder special circumstance should be reversed, appellant's judgment of death should remain because the jury properly found the multiple murder special circumstance to be true. (See *People v. Mungia* (2008) 44 Cal.4th 1101, 1139.) Appellant was convicted of the first degree murders of both Ernesto and Lupita, and, as discussed above, there was substantial evidence supporting these convictions.

For all of these reasons, the admission of Dr. Boger's report was harmless under *Chapman* and/or *Watson* in light of the substantial evidence that supported appellant's convictions for first degree murder by torture and first degree premeditated and deliberate murder regarding Lupita. Moreover, the admission of Dr. Boger's report was harmless given the substantial evidence that supported the torture-murder special circumstance finding, as well as the jury's true finding regarding the multiple murder special circumstance. Therefore, appellant's current claim regarding prejudice should be rejected.

II. APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AND HIS RELATED FUTILITY CLAIM SHOULD BE REJECTED

Apparently recognizing that counsel's failure to object to the admission of Dr. Boger's report forfeited his challenge on appeal, appellant argues that his trial counsel was ineffective for failing to object to the admission of Dr. Boger's report on hearsay or confrontation grounds. (TSOB 25-27.) Appellant further argues that any objection to the admission of Dr. Boger's report would have been futile. (TSOB 23-24.)

Appellant's claim of ineffective assistance of trial counsel should be rejected. Initially, this claim should be rejected because the appellate record does not shed any light on why counsel failed to object to Dr. Boger's report. In any event, the claim should be rejected because appellant fails to show that his counsel performed deficiently under *Strickland v. Washington* (1984) 466 U.S. 668. Appellant's trial counsel could have made the reasonable tactical decision not to object to Dr. Boger's report

concerning Lupita, while objecting to pages from Dr. Whiteman's autopsy report concerning Ernesto, because counsel believed that Dr. Whiteman's autopsy report pages did not meet foundational requirements for the official and/or business hearsay exceptions while Dr. Boger's report did. Moreover, appellant fails to show prejudice under *Strickland* because substantial evidence supported his murder convictions and special-circumstance findings. In addition, appellant's related futility claim should be rejected because the record shows that his trial counsel was aware of his ability to raise arguable hearsay and other objections to any of the prosecution exhibits, given that counsel objected to pages from the coroner's report concerning Ernesto on hearsay grounds.

A. Applicable law

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's conduct fell below an objective standard of reasonableness – and that the defendant was prejudiced by counsel's acts or omissions. (*Strickland*, *supra*, 466 U.S. at p. 687; *accord* *Harrington v. Richter* (2011) 562 U.S. 86 104; see *People v. Mai* (2013) 57 Cal.4th 986, 1009; *People v. Samayoa* (1997) 15 Cal.4th 795, 845; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

The first prong of the *Strickland* test – deficient performance – requires a showing that counsel's performance was "outside the wide range of professionally competent assistance." (*Strickland*, *supra*, 466 U.S. at p. 690; see *Mai*, *supra*, 57 Cal.4th at p. 1009 ["defendant must first show counsel's performance was deficient,

in that it fell below an objective standard of reasonableness under prevailing professional norms"].) "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." (*Richter*, *supra*, 562 U.S. at p. 104, citing *Strickland*, 466 U.S. at p. 689; see *Mai*, *supra*, 57 Cal.4th at p. 1009 ["[w]hen examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance"]; *People v. Lucas* (1995) 12 Cal.4th 415, 443 ["we presume counsel's decision not to raise the claim was a reasonable, tactical one unless the record affirmatively demonstrates otherwise"]; see also *People v. Boyette* (2002) 29 Cal.4th 381, 424 ["[f]ailure to object rarely constitutes constitutionally ineffective legal representation"]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 502 ["deciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance"].)

The second prong of the *Strickland* test – prejudice – requires a showing of a "reasonable probability that, but for counsel's unprofessional errors, the result of the [trial] would have been different." (*Strickland*, *supra*, 466 U.S. at p. 694; see *Mai*, *supra*, 57 Cal.4th at p. 1009 ["defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different"].) A reasonable probability is a probability "sufficient to undermine confidence in the outcome."

(*Strickland*, *supra*, 466 U.S. at p. 694; *see also* *Woodford v. Visciotti* (2002) 537 U.S. 19, 22; *Boyette*, *supra*, 29 Cal.4th at p. 430.) "The likelihood of a different outcome must be substantial, not just conceivable." (*Richter*, *supra*, 562 U.S. at p. 112, citing *Strickland*, *supra*, 466 U.S. at p. 693.)

"'Surmounting *Strickland*'s high bar is never an easy task.'" (*Richter*, *supra*, 562 U.S. at p. 105, quoting *Padilla v. Kentucky* (2010) 559 U.S. 356, 371.)

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. [Citation.]
>
> (*Richter*, *supra*, 562 U.S. at p. 105, citing *Strickland*, *supra*, 466 U.S. at pp. 689-690.) "It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.' [Citations.]" (*Richter*, *supra*, 562 U.S. at p. 105.)
>
> [If] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim on appeal must be rejected. [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. [Citations.]

(*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267, internal quotation marks omitted.)

B. Appellant's claim of ineffective assistance of counsel should be rejected

Regarding the performance prong of *Strickland*, appellant argues that there was no tactical reason for his trial counsel's failure to object to Dr. Boger's report, especially since his trial counsel interposed a hearsay objection to pages from Dr. Whiteman's autopsy report concerning Ernesto (Peo. Exh. Nos. 21-23). (TSOB 25-27; see also 11RT 1764-1765.) Initially, there is nothing in the appellate record regarding trial counsel's tactical decision that sheds any light on why counsel failed to object to Dr. Boger's report and thus, appellant's claim of ineffective assistance should be rejected. (See *Mendoza Tello*, *supra*, 15 Cal.4th at pp. 266-267.) In any event, contrary to appellant's argument, his trial counsel could have made the reasonable tactical decision not to object to Dr. Boger's report regarding Lupita (which was included in People's Exhibit No. 26) while objecting to pages from Dr. Whiteman's autopsy report regarding Ernesto (in People's Exhibit Nos. 21 through 23). Indeed, appellant's trial counsel could have reasonably believed that the pages from Dr. Whiteman's autopsy report regarding Ernesto in People's Exhibit Nos. 21 through 23 did not meet the foundational requirements for the official and/or business records hearsay exceptions while Dr. Ribe's autopsy report regarding Lupita (which included Dr. Boger's report) did. As discussed above, People's Exhibit No. 26 would have nonetheless been admissible under the official and/or business records hearsay exceptions.

Unlike People's Exhibit No. 26, which included the official seal of the Los Angeles County Coroner's Office on several pages (see Peo. Exh. No. 26 at pp. 14-20, 22, 24-25, 27-34, 36) including Dr. Boger's report (see Peo. Exh. No. 26 at p. 22), none of the narrative pages of Dr. Whiteman's autopsy report concerning Ernesto (see Peo. Exh. Nos. 21, 22, 23) had any such official seal of the coroner's department. Thus, appellant's trial counsel could have reasonably believed that People's Exhibit Nos. 21 through 23 lacked the foundation for the official and/or business records hearsay exceptions. In addition, People's Exhibit No. 12 was a certified copy of the coroner's report regarding Ernesto. (See 8RT 1450.) Appellant's trial counsel did not object to the admission of People's Exhibit No. 12. (See 11RT 1763-1767, 1780.)

Moreover, appellant's trial counsel could have made the reasonable tactical decision to more aggressively object to the narrative pages from Ernesto's autopsy report in People's Exhibit Nos. 21 through 23 (as opposed to the autopsy report concerning Lupita in People's Exhibit No. 26) because these autopsy report pages concerning Ernesto detailed facts about numerous physical injuries to Ernesto's body, which were more prejudicial to appellant's defense. At trial, Dr. Whiteman, the deputy medical examiner who performed Ernesto's autopsy (see 8RT 1445-1450), testified in detail about the numerous injuries on Ernesto's body (see 8RT 1450-1466; 9RT 1468-1507). Pages two through four of Ernesto's autopsy report detailed numerous gruesome injuries to Ernesto, including abrasions, bruises, scars, lesions, ulcers,

fractures, and hemorrhaging. (See Peo. Exh. Nos. 21-23; see also 9RT 1474-1475.)

In addition, unlike Ernesto's body, which was discovered by the police shortly after the burial of his body (see 8RT 1421-1427), Lupita's body was not discovered by the police until over six months after her burial (see 9RT 1530, 1553). By the time Lupita's body was recovered, her body was decomposed and also affected by the acid which had been poured on her body when buried. (See 9RT 1517-1522, 1531, 1533.) Dr. Ribe testified that the condition of Lupita's body, with the decomposition and acid, made it difficult for him to perform an autopsy and evaluate her injuries. (See 9RT 1522, 1543-1545.) Thus, Dr. Ribe's autopsy report concerning Lupita did not include as many details about the external injuries to Lupita's body, such as injuries to her skin, given the decomposition of her body due to the passage of time and the effects of the acid. Therefore, appellant's trial counsel could have made the reasonable tactical decision not to object to Dr. Boger's report regarding Lupita (which was included in People's Exhibit No. 26) while objecting to narrative pages from Dr. Whiteman's autopsy report regarding Ernesto (in People's Exhibit Nos. 21 through 23). For this reason, appellant fails to show deficient performance by trial counsel.

Regarding the prejudice prong of *Strickland*, appellant refers to the Second Supplemental Opening Brief (SSOB 28-33), as well as his current prejudice argument (TSOB 22-23), and argues that had his trial counsel objected to the admission of Dr.

Boger's report, there is a reasonable probability that the outcome of his trial would have been different (TSOB 27). Not so.

For the same reasons discussed in the Second Supplemental Respondent's Brief (see SSRB 31-56), the admission of Dr. Boger's report was harmless under *Chapman* and/or *Watson*. As discussed above in detail (see Argument I.D), substantial evidence supported appellant's convictions for first degree murder by torture and first degree premeditated and deliberate murder regarding Lupita. The admission of Dr. Boger's report was also harmless given the substantial evidence that supported the torture-murder special circumstance finding, as well as the jury's true finding regarding the multiple murder special circumstance. For these same reasons, Petitioner fails to show prejudice under *Strickland*.

Therefore, appellant's claim of ineffective assistance of counsel should be rejected.

C. Appellant's related futility claim should be rejected

Finally, appellant's related futility argument (TSOB 23-24) should be rejected. In the Second Supplemental Respondent's Brief, respondent argued that appellant forfeited any challenge to the admission of Dr. Boger's report based on hearsay or the confrontation clause because appellant failed to object to the admission of Dr. Boger's report on such grounds. (See SSRB 21-24.) Appellant now argues that such an objection to Dr. Boger's report, based on hearsay or confrontation clause grounds, would have been futile. (TSOB 23-24; see also *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4 ["[a]n objection in the trial court

is not required if it would have been futile"]; *Boyette*, *supra*, 29 Cal.4th at p. 432 [discussing futility exception to general rule of forfeiture].)

Appellant's futility argument (TSOB 23-24) should be rejected because the record shows that his trial counsel was aware of his ability to raise hearsay and other objections to any of the prosecution exhibits, especially given that trial counsel objected to the narrative pages of the coroner's report regarding Ernesto (Peo. Exh. Nos. 21-23; see 9RT 1474-1475, 11RT 1764-1765) on hearsay grounds. Moreover, as discussed above, trial counsel could have made the reasonable tactical decisions to object to some of the People's exhibits on hearsay grounds while refraining from objecting to other exhibits on such grounds. (See Argument II.B.) Although appellant's trial counsel did not object to People's Exhibit No. 26, it would not have been necessarily futile for his trial counsel to object to People's Exhibit No. 26 (including Dr. Boger's report) based on appellant's current arguments that Dr. Boger's report was inadmissible hearsay, and its admission violated state evidentiary law (see TSOB 11- 20); as well as his claim that the report is testimonial, and its admission violated the confrontation clause (see TSOB 20-22). In addition, as discussed in the Second Supplemental Respondent's Brief (see SSRB 21-24), the fundamental change announced in *Sanchez*, *supra*, 63 Cal.4th at pp. 682-684, pertained only to the admissibility of expert testimony conveying case-specific hearsay, and an objection to the admission of Dr. Boger's report itself on hearsay or confrontation clause grounds would not have required

appellant to anticipate any new rule announced in *Sanchez*. Therefore, appellant's related futility argument should be rejected.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of conviction and sentence of death be affirmed.

Respectfully submitted,

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July 25, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached **THIRD SUPPLEMENTAL RESPONDENT'S BRIEF** Uses a 13-point Century Schoolbook font and contains **7,568** words.

ROB BONTA
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SUSAN S. KIM
Deputy Attorney General
Attorneys for the People

July 25, 2022

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Marco Esquivel Barrera**
No.: **S103358**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On July 25, 2022, I electronically served the attached **THIRD SUPPLEMENTAL RESPONDENT'S BRIEF** by transmitting a true copy via this Court's TrueFiling system.

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on July 25, 2022, at Los Angeles, California.

S. Hubbard	/s/ S. Hubbard
Declarant for eFiling	Signature

Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on July 25, 2022, a true copy thereof enclosed in a sealed envelope has been placed in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013-1230, addressed as follows:

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FOR DELIVERY TO:
Hon. Ronald S. Coen, Judge

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on July 25, 2022, at Los Angeles, California.

M. Siacunco	/s/ *M. Siacunco*
Declarant for U.S. Mail	Signature

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STATE OF CALIFORNIA
Supreme Court of California

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/s/Shoshana Hubbard
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