NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ROBERT LEE SIMMS,<br><br>Defendant and Appellant. | C084543<br><br>(Super. Ct. No. 16CF03069) |

Defendant Robert Lee Simms contends his conviction for first degree burglary must be reversed because the People failed to prove an adequate chain of custody for the DNA evidence presented. He adds that the trial court abused its discretion by denying his request to strike his prior strikes. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.) In supplemental briefing, he claims remand is required due to the changes in the law resulting from the passage of Senate Bill No. 1393.



Appendix A

We agree only with the final contention, and remand for exercise of discretion and possible resentencing. We otherwise affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

An information charged defendant with first degree residential burglary. (Pen. Code, § 459.)[1] It also alleged three prior serious felony convictions (§ 667, subd. (a)(1)), four prior prison terms (§ 667.5, subd. (b)), and three prior strikes (§§ 667, subd. (d), 1170.12, subd. (b)). After a trial at which defendant represented himself, the jury found him guilty of first degree burglary. In a bifurcated proceeding, the trial court found true that defendant had two prior strikes and four prior prison terms, but found one alleged prior serious felony and prior strike not true. After denying defendant's *Romero* motion, the court sentenced defendant to 25 years to life in prison plus 12 years.

*Trial Evidence*

On December 9, 2015, G.Y. left her home in Chico in the morning, locking the front door behind her; the home was in an orderly condition. Later that day, Chico police received a report of a burglary at the residence. Chico Police Officer Cedric Schwyzer responded to the call. He found the front door open and a window broken. The home appeared to have been ransacked and blood smears covered the light switches.

Chico Police Officer Keith Parsons was the crime scene investigator. He collected blood samples from three light switches. For each location, he took a control sample swab of distilled water, a swab of the background of the blood, and a swab of the blood itself. He put each swab in its own envelope and taped the envelope shut. He then transported the samples back to the Chico Police Department, filled out the requisite form, and booked the samples into the property system.

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[1] Further undesignated statutory references are to the Penal Code.

Officer Parsons filled out a "Physical Evidence Submission Form" (also called the BFS1 form), which is used to submit evidence to the California Department of Justice (DOJ) for evaluation. The form lists the items submitted and requests a DNA analysis for each item. At the bottom of the form is a space captioned "Chain of custody for items listed above," with a box labeled "Received from" and another box labeled "Delivered to." The first box was signed by "S. Bennett" (Sue Bennett), the Chico Police Department's evidence property technician; the second box was signed by "S. Kayser" (Susan Kayser) of the Chico DOJ laboratory and dated December 29, 2015.

On January 13, 2016, DOJ's Redding laboratory received a submission from the Chico laboratory via Federal Express. The submission contained the blood swabs taken from G.Y.'s home; one was tested.[2]

When the Redding laboratory receives items from a laboratory, they are stored in the laboratory's evidence vault until a criminalist is assigned to analyze them. Criminalist MaryJo Olegario took the swab from the evidence vault to test it for DNA.[3]

Olegario obtained a "DNA profile" on the swab by analyzing 15 locations, or "regions," using the polymerase chain reaction process, which is generally accepted by the scientific community. Once established, a DNA profile is compared to a reference sample to determine whether an individual can be included or excluded as a contributor to the sample; a mismatch at just one region will exclude a person as a contributor.

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[2] The record is unclear as to why only one sample of blood from the house was tested but defendant raises no issue on appeal concerning this fact. Nor does he head and argue any challenge to the trial court's admitting various reports and testimony regarding the writings on the envelopes and the meaning thereof.

[3] Defendant asserts in his briefing that Olegario processed "the swabs" from the light switches. As we explain, Olegario did process more than one swab, but the others were "reference oral swabs" taken later from defendant while he was in custody. Her testimony makes clear that she processed only one swab (identified as KP-3) that was sourced from the light switches.

DOJ maintains a DNA database called CODIS (Combined DNA Index System), containing evidence samples or "forensic profiles," including "profiles that were submitted from other unknown sources of DNA from crime scenes" and "DNA profiles from offenders." Once a DNA profile is obtained, the laboratory uploads it, then sends it to the state database for searching at the state and national levels.

Olegario furnished a report on her findings to the Chico Police Department on June 6, 2016. The report did not identify any suspect but stated that a CODIS search would follow.

On June 13, 2016, Chico Police Detective Dane Gregory was assigned to the case to "identify a subject that was identified as a suspect via a CODIS hit from a DNA sample, blood sample, obtained at [G.Y.'s residence] . . . on the day of the burglary." The laboratory report for the CODIS hit indicated that the blood sample obtained did not produce an initial match, but after it was submitted to CODIS, it was identified as likely belonging to Robert Lee Winston, identified by date of birth.

Using the "criminal index number" associated with Robert Lee Winston and checking the state database for records of prior arrests, Detective Gregory found "nine names associated with the same criminal identifying number, multiple aka's . . . for Robert Lee Winston as Mr. Robert Simms [i.e., defendant]." Five of the nine "aka's" were variations of Robert Lee Simms. By cross-referencing other numbers associated with the records of prior arrests (social security numbers, driver's license numbers, "FBI number") with DMV photographs and booking photographs from other agencies, Gregory determined that Robert Lee Winston and defendant were the same person.

Defendant was arrested on July 12, 2016 at the scene of another residential burglary.

On July 18, 2016, Gregory obtained a search warrant to take buccal swabs from defendant for comparison to the DNA identified by DOJ. Later that day, Gregory took two swabs from defendant at Butte County Jail. He booked them into Chico Police

Department evidence on July 20, 2016, using a BSF1 form. Sue Bennett signed the form on behalf of the department and submitted the swabs to DOJ, and a DOJ employee at the Chico laboratory signed the form on the same date to show receipt.

Olegario received the buccal swab samples in Redding by Federal Express from the Chico laboratory on July 28, 2016, and analyzed them. In a report dated August 22, 2016, she notified the Chico Police Department that the samples provided "strong evidence" that defendant was the source of the blood from the light switch in G.Y.'s home. She confirmed at trial that the DNA from the two sets of samples, the blood and the buccal swabs, "matched." Gregory received the report in September 2016.

## DISCUSSION

### I

### *Chain of Custody*

Defendant contends (1) the trial court abused its discretion when it admitted the DNA evidence without holding the prosecution to its burden of proof as to the chain of custody, instead shifting the burden to defendant; (2) the court applied the wrong standard in admitting the evidence; (3) the prosecution's chain of custody evidence was insufficient to meet its burden, thus the DNA evidence should have been excluded; and (4) the error requires reversal. We are not persuaded.

A. *Background*

Defendant moved orally in limine to exclude any DNA evidence gleaned from the blood samples on the basis that the People could not show an adequate chain of custody, stating correctly that the prosecution had the burden of proof. His oral motion did not mention the buccal swabs. The prosecutor incorrectly countered that all chain of custody questions "would go to [the samples'] weight and not their admissibility."

The trial court asked defendant if he had evidence to show a break in a "vital link" of the chain of custody. Defendant said he did.

The trial court stated: "[W]hat I would anticipate you would want to do is establish whatever question you would want as to the chain of custody and then argue that in closing argument that it goes to the weight." Defendant said he wanted to challenge the evidence's admissibility before it got to the jury, then added: "[T]here's 15 days unaccounted for." The court reiterated its (incorrect) view that "blood samples are considered admissible and questions as to the chain of custody go[] to the weight of that evidence."

Defendant replied: "I have the evidence now, and I would like to be heard on it." The court said: "Go ahead."

Defendant stated: "I have the original police report by Parsons who will be testifying today and the property receipt and I have [the] supplemental report. He's the one who collected the samples. I have a receipt of those samples into [the] property room. I have his admission submission form to the DOJ. And I have the DOJ first DNA report."

The trial court asked what defendant intended to do with those documents. Defendant replied: "My intention is to show that three days elapsed from the time they were taken off the switch until they got to evidence. [¶] Then they went into evidence and [Schwyzer] checked them out on 12-29-2015. And, obviously, for 15 days we have no idea where they went because the report from the DOJ lab -- I believe taken out of evidence from 12-29-15 and I quote from . . . physical evidence examination of . . . [Olegario:] [¶] ['']The following evidence was submitted to this laboratory by Susan Kaiser of the Bureau of Forensic Services Chico Laboratory and was received on January 13th.['] That's 15 days from the time they left the evidence room and they do not go directly to the Redding lab; they go to [the] Chico laboratory on the 29th. No slips, no nothing saying who received them there or anything, and they do not resurface again until January 13th, 2016. [¶] So three days from light switch to the evidence room is unaccounted for and then 15 days from time they were taken by [Schwyzer] on 12-29.

He altered his report on 12-30. So he took the DNA out on 12-29. They went to Chico laboratory. Stayed there for two weeks, 15 days[,] and then showed up at the Redding laborator[y]. So they didn't [go] directly to Redding laboratory as professed to be and then the document is altered, but it's still 15 days missing."

The prosecutor responded: "Well, the swabs were checked into the . . . Chico Police Department's evidence on 12-9, the very day they were collected, the very top of the receipt form has the date on it. [¶] This particular form wasn't printed out. It says printed on Saturday, December 12th, but they were in evidence on the 9th. On the 29th of December, the DOJ picked them up from the Chico Police Department. This is DOJ S. Kaiser, with a signature from the DOJ. And it's Evidence Technician Bennett Chico Police Department whose signatures are [on] the PES, the Physical Evidence Submission Form. [¶] They then go to the Chico laboratory, and the Chico laboratory sends them to the Redding laboratory via Federal Express and they are received in Redding on the 13th of January. [¶] *So [defendant] would have to show that they were not properly kept by those laboratories or by the Chico Police evidence section in order to show a significant break in the chain of custody. They were in the custody of the Chico Police Department or the Department of Justice the entire time.*" (Italics added)

Defendant asserted that the document the prosecutor was looking at was the "wrong sheet," because it concerned the buccal swab, not the blood swabs. The prosecutor countered that it was the "right sheet." Defendant said nothing else specifically about the buccal swabs. After reiterating that "the People will still need to establish chain of custody through their testimony," the trial court "at this point" denied defendant's motion to exclude the evidence. The court found that "the samples of blood from the light switches can be offered into evidence or testimony as to that in case [*sic*] and . . . the issue of chain of custody will go to weight of that evidence." The court did not mention the buccal swabs, and neither party raised them.

The prosecutor called Parsons, Gregory, and Olegario to establish chain of custody. They testified as indicated above.

Defendant did not raise any questions about chain of custody in cross-examining Parsons, other than to elicit that Parsons did not *himself* create the signatures of the Chico Police Department and DOJ employees that were affixed to the BFS1 form he turned in with the blood samples. Defendant also did not raise any questions about chain of custody as to the blood samples in cross-examining Gregory, other than to establish that Gregory was not in their chain of custody.

During Olegario's testimony, defendant objected (on the purported ground "Assumes irregularity") to her statement that she "believe[d]" the Chico laboratory received the samples to test from the Chico Police Department. The trial court overruled the objection. Defendant objected again, without specifying grounds, when the prosecutor offered Exhibit 15, the BSF1 form for the blood swab including annotations. The court overruled the objection.[4]

On cross-examination, Olegario testified that all of the evidence originally submitted to her (Redding) laboratory (the blood samples and other samples taken from the residence) was returned to the Chico laboratory after she completed her analysis. Defendant then questioned Olegario about the time sequence of the transmission of the blood swab from the Chico Police Department to the Chico laboratory to the Redding laboratory. She testified that the DOJ employee at the Chico laboratory wrote on the BSF1 form that the swab was delivered to that laboratory on December 29, 2015 and that it was received in Redding on January 13, 2016, by Federal Express from Chico. Defendant did not object to or otherwise challenge any of this testimony.

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[4] Defendant does not challenge any of these evidentiary rulings on appeal, only the general ruling finding the DNA evidence admissible.

Defendant asked if that meant there was a total of 15 days from the day the swab left the evidence room until it reached the Redding laboratory. Olegario answered: "Not necessarily. So I'm not exactly sure on the date that they sent it out. So when they received it, they probably put it into DNA evidence storage, and when they sent it out, they removed it from the evidence storage and then sent it via Federal Express." All she could be sure of is that it was sent sometime between December 29 and January 13. Olegario agreed that she did not know "how it was packaged at Chico Laboratory [or] who packaged it." When her laboratory received the swab, she followed the standard protocols for processing evidence.

After the parties rested and the trial court addressed the admissibility of the exhibits identified at trial, defendant objected to the admission of Exhibit 14, Olegario's August 22, 2016 report identifying the buccal swab as a DNA match to the blood sample. He couched his objection as "[c]hain of custody," but asserted only that it had not been shown the buccal swabs came from him ("It's not me. The buccal swabs are not me that she tested") and then added "inadequate foundation for the chain of custody for the DNA." The court overruled the objection without explanation, telling defendant that he could "argue that." Defendant also objected to the admission of Exhibit 16, the BSF1 form used to originally submit the buccal samples for comparison to the already tested blood samples, stating he had the "same objection" as to Exhibit 14, but without elaborating; the court summarily overruled that objection as well, again telling defendant he could "argue that." Defendant did not object to the admission of the exhibit (Exhibit 15) that concerned the blood samples.

In his closing argument, defendant asserted that it was unclear why the Chico laboratory did not test the blood samples instead of sending them on to the Redding

laboratory.[5] He added that "there's no trail" to show what was done with the blood samples at the Chico laboratory before they were sent two weeks later to the Redding laboratory: "We don't know what was done at the Chico Lab, how it was stored." He did not make any chain-of-custody argument as to the buccal swabs; indeed at one point he argued that the prosecutor wanted the jury "to believe the DNA taken from the light switch, DNA taken from me, are the same. And because they are the same I committed a burglary."

B. *Analysis*

"In a chain of custody claim, ' " [t]he burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." [Citations.]' [Citations.] The trial court's exercise of discretion in admitting the evidence is reviewed on appeal for abuse of discretion." (*People v. Catlin* (2001) 26 Cal.4th 81, 134 (*Catlin*).)

"While a perfect chain of custody is desirable, gaps will not result in the exclusion of the evidence, so long as the links offered connect the evidence with the case and raise no serious questions of tampering." (Méndez, Cal. Evidence (1993) § 13.05, p. 237, quoted in *Catlin, supra*, 26 Cal.4th at p. 134.)

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[5] There is no evidence in the record suggesting that the Chico laboratory has the capacity to DNA test.

1. *Buccal Swab Evidence*

Defendant challenges the *strength* of the chain of custody evidence as to both the blood sample swab and the buccal swabs. But he did not mention the buccal swab evidence in his motion in limine to exclude DNA evidence, did not object to the admissibility of the submission form and criminalist's report on the buccal swab evidence when it was offered and discussed during trial, and did not give any specific reasons to support his very general foundational objection to that evidence during the conference on admitting exhibits. Thus his argument as to the admissibility of that evidence is forfeited. (Evid. Code, § 353 [necessity of timely and specific objection]; *People v. Partida* (2005) 37 Cal.4th 428, 435 [party cannot argue court erred in failing to conduct analysis it was not asked to conduct].) We therefore consider only his challenge to the chain of custody of the blood sample.

2. *Blood Sample Evidence*

First, to the extent defendant contends the trial court used the wrong standard and misapplied the burden of proof in ruling on his motion in limine, the argument fails to show reversible error. While it is true that the court (and the prosecutor) articulated that a challenge in the chain of custody went *only* to the weight of the evidence, which is not the law, the court then corrected its error by allowing defendant to argue to the court regarding the allegedly inadequate chain and making a preliminary determination of adequacy. (See *Catlin, supra*, 26 Cal.4th at p. 134.) Although the court found that defendant's showing was insufficient to exclude the blood sample evidence in limine, it noted that the People still had the burden of establishing chain of custody at trial. In other words, the court found that the prosecutor had sufficiently proffered that the People could meet their burden at trial, but its ruling was tentative ("at this time") and subject to reconsideration when the evidence was actually offered. This ruling was well within the court's discretion.

Defendant bears the burden of showing that the trial court abused its discretion by admitting the blood sample evidence after hearing the evidence presented at trial. (*Catlin, supra*, 26 Cal.4th at p. 134.) He argues that the People failed to document precisely where the blood sample was at every point in the timeline and to explain in minute detail the exact means by which it was processed and handled at every step. But absent evidence that the sample was not where it was represented to be at some point, or that anyone *could have* tampered with it at *any* point, such arguments at most show gaps in the chain of custody, not a missing "vital link." (*Ibid.*) Defendant does not offer evidence that tampering was reasonably likely to have occurred, but only "the barest speculation" that it could have occurred. (*Ibid.*)

*People v. Jimenez* (2008) 165 Cal.App.4th 75, the only decision cited by defendant in which the appellate court reversed because of an inadequately established chain of custody, is distinguishable. There, three witnesses testified about the chain of custody of a comparison DNA sample, but none had firsthand knowledge of their respective testimony; as a consequence, the evidence was so lacking in foundation that it could not be determined whether the sample had anything to do with the defendant. (*Id.* at pp. 79-81.) In the present case, each witness called to establish chain of custody had firsthand and personal knowledge of his or her own part in the process, and Parson's testimony established that the blood sample from which the DNA evidence was derived was left *at the scene of the burglary*. Defendant has not shown reversible error as to the chain of custody of the blood sample evidence.

II

Romero *Motion*

Defendant contends the trial court abused its discretion by not granting his *Romero* request to strike his prior strikes. We disagree.

A. *Background*

Defendant filed a brief arguing for *Romero* relief on the grounds that his current offense was not violent or life-threatening, his prior offenses were also relatively minor, and both prior strikes were 20 years old. The People filed opposition, arguing that the prior strikes were also residential burglaries and that defendant had numerous and continuous contact with law enforcement both before and after the dates of the prior strikes.

The probation report, which the trial court read and considered, stated that defendant suffered first degree burglary convictions in 1992 and 1996. His criminal record also included felony convictions in 1991, 1993, and 2009, misdemeanor convictions in 1989 and 1995, and parole violations in 1994, 1995, 2005, and 2006.

At sentencing, the parties submitted on their briefs. The trial court first confirmed it had "broad but not unfettered discretion to dismiss prior strikes" and announced the relevant determinations, then found that "defendant appears to fit squarely within the Three Strikes law because the current offense is of the same type of crime committed in the past and the defendant has a long and continuous criminal career," adding the observation that "[o]ver the last 25 years [defendant] has rarely been out of prison."

B. *Analysis*

The three strikes law " 'establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court "conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme." ' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).

A trial court may properly exercise its discretion to strike a defendant's prior strike or strikes under section 1385 only if it finds that "in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the

particulars of his background, character, and prospects, the defendant may be deemed outside the [three strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

When a trial court declines to strike a prior strike, we review its decision for abuse of discretion. (*Carmony, supra*, 33 Cal.4th at pp. 374-375.) Where the court, aware of its discretion, " 'balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]." (*Id.* at p. 378)

Defendant asserts the trial court "did not consider the *Williams* factors. . . . Instead, the court focused exclusively on the classification of [defendant]'s strike offenses, and the length of [defendant]'s criminal record." He is mistaken. A defendant's offenses and the length of his criminal record fall squarely within the *Williams* factors, which include "the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background." (*People v. Williams, supra*, 17 Cal.4th at p. 161.)

Defendant relies on *People v. Bishop* (1997) 56 Cal.App.4th 1245, at page 1250 for the proposition that a person with two strikes may still deserve less than a 25-year-to-life sentence if there are factors in mitigation. We do not disagree with this premise in the abstract. But in both *Williams* and *Carmony* our Supreme Court has made it clear that the law requires an *individualized* finding as to whether a defendant fits within the three strikes scheme; the trial court made such a finding and we certainly cannot say it was irrational. Indeed, it seems well-supported by the record. Defendant asserts that his prior strikes were remote in time and apparently "quite mild" because he received the low term on each; his current offense was not violent because no one was home and there were no weapons involved; he adds that his crime was not sophisticated and he has a history of mental illness. But even assuming all these points are accurate, at best they show *some*

support for the exercise of discretion in *striking* one of defendant's strikes. They do not show that the court's decision was an abuse of that discretion. (See *Carmony, supra,* 33 Cal.4th at p. 377.)

The record supports the trial court's finding that defendant was a repeat offender who showed no prospects for reform and who had seldom been out of custody during his adult life. It was not an abuse of discretion to classify him as within the spirit of the three strikes law.

III

*Senate Bill No. 1393*

The parties agree that the law at that time of defendant's sentencing did not allow the trial court to strike a serious felony prior used to impose a five-year enhancement under section 667, subdivision (a)(1). Senate Bill No. 1393 removed this prohibition effective January 1, 2019. (Stats. 2018, ch. 1013, §§ 1, 2.)

Relying on *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), defendant argues and the Attorney General agrees that these amendments apply to him because his judgment is not yet final. We agree with the parties that under *Estrada*, absent evidence to the contrary, we presume the Legislature intended a statutory amendment reducing punishment to apply retroactively to cases not yet final on appeal. (*Id.* at pp. 747-748; *People v. Brown* (2012) 54 Cal.4th 314, 324.)

Although the Attorney General concedes the rule of *Estrada* requires retroactive application of Senate Bill No. 1393 to defendant's case, he argues remand is nevertheless unnecessary. He points to "the trial court's statements at sentencing when it denied the *Romero* motion and its findings about his unsuitability for probation." We are not persuaded. As our colleagues at the Second Appellate District recently observed, "what a trial court might do on remand is not 'clearly indicated' by considering only the original sentence." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111; see also *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425, 426 [remand is required unless the

record shows that the sentencing court clearly indicted that it would not have exercised its discretion].) We shall remand for the trial court's consideration of defendant's argument.[6]

**DISPOSITION**

The matter is remanded for exercise of discretion and possible resentencing as described by this opinion. The judgment is otherwise affirmed.

Duarte, J.

We concur:

Raye, P. J.

Renner, J.

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[6] On November 6, 2019, defendant filed a request to vacate submission in order to argue that Senate Bill No. 136, not yet effective, may apply retroactively to his section 667.5, subdivision (b) enhancements. We denied the request, but expand our limited remand to encompass consideration of that argument by the trial court, should defendant choose to raise it on remand.

Court of Appeal, Third Appellate District - No. C084543

**S259605**

# IN THE SUPREME COURT OF CALIFORNIA

**En Banc**

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THE PEOPLE, Plaintiff and Respondent,

v.

ROBERT LEE SIMMS, Defendant and Appellant.

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The petition for review is denied.

CANTIL-SAKAUYE

*Chief Justice*

Appendix B