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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES SANDERS,

Defendant and Appellant.

E061488

(Super.Ct.No. RIF151656)

OPINION

APPEAL from the Superior Court of Riverside County. Michele D. Levine,  
Judge. Affirmed.

Jared G. Coleman, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Stephanie H.  
Chow, Deputy Attorneys General, for Plaintiff and Respondent.

This is an appeal by defendant and appellant Charles Sanders from the trial court's order denying defendant's petition to recall his sentence under the Three Strikes Reform Act of 2012, added by Proposition 36 (the Act). (Pen. Code, § 1170.126.)<sup>1</sup> On appeal, defendant raises a number of arguments to support his claim that the trial court erred in finding him ineligible for resentencing under the Act. For the reasons explained *post*, we reject defendant's contentions and affirm the trial court's order denying defendant relief under the Act.

## I

### FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

On July 14, 2009, Officers Joseph Sabolchic and Robert Grmusha went to defendant's home while investigating the illegal use of a counterfeit credit card at a nearby gas station. The officers entered the residence, and Officer Sabolchic called out for defendant as they walked through the home. Officer Sabolchic saw defendant standing in the doorway of an upstairs bedroom, crouched with his hands to his right side, behind the door frame. Officer Sabolchic could not see defendant's hands. Officer Sabolchic later found two firearms located behind the door frame, to the right, next to a closet. Officer Sabolchic believed the firearms were within defendant's reach.

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<sup>1</sup> All future statutory references are to the Penal Code unless otherwise stated.

<sup>2</sup> The relevant factual background is taken from a portion of the trial transcript and part of defendant's statements to the police. These two sources were used by the trial court in determining whether defendant was eligible or ineligible to be resentenced under the Act.

Officer Grmusha testified that he found the two firearms on the floor, less than two feet from a bed that sat against the wall farthest from the doorway. Officer Grmusha also stated that there was a juvenile lying on the bed and that the semiautomatic handgun was loaded with eight rounds, plus one round in the chamber in a ready-to-fire position.<sup>3</sup> Defendant admitted that the firearms were his and that he had “bought them off the streets.”

On June 8, 2011, a jury convicted defendant of second degree burglary (§ 459), making a counterfeit credit card (§ 484f, subd. (a)), possession of a counterfeit driver’s license (§ 470b), possession of a firearm by a felon (former section 12021.1, subd. (a)), unlawful possession of ammunition (former § 12316, subd. (b)(1)), and misdemeanor child endangerment (§ 273a, subd. (b)). In a bifurcated proceeding, the trial court found true that defendant had suffered two prior violent or serious strike convictions (§§ 667, subd. (c) & (e)(2)(A), 1170.12, subd. (c)(2)(A)) and two prior prison terms (§ 667.5, subd. (b)). The trial court struck one of defendant’s two prior strike convictions and sentenced defendant to a total term of six years plus 25 years to life in state prison.

On November 6, 2012, the electorate passed Proposition 36, also known as the Act. Among other things, this ballot measure enacted section 1170.126, which permits

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<sup>3</sup> In an unpublished opinion from defendant’s prior appeal, in relevant part, this court noted, “Police tracked defendant’s car to a residence located near the gas station. There, police found defendant crouched down in the doorway of an upstairs bedroom. Near the doorway, and near a bed where a child was lying, police found a loaded semiautomatic firearm in a ready-to-fire position, and an unloaded revolver.” (*People v. Sanders* (Sept. 13, 2012, E054155) [nonpubl. opn.]) This nonpublished opinion is part of the record of appeal in defendant’s current appeal.

persons currently serving an indeterminate life term under the “Three Strikes” law to file a petition in the sentencing court seeking to be resentenced to a determinate term as a second striker. (§ 1170.126, subd. (f).) If the trial court determines, in its discretion, that the defendant meets the criteria of section 1170.126, subdivision (e), the court may resentence the defendant. (§ 1170.126, subds. (f), (g).)

Section 1170.126, subdivision (e), provides, as pertinent here, that a defendant is eligible for resentencing if he or she is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of section 667 or subdivision (c) of section 1170.12 “for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.” (§ 1170.126, subd. (e)(1).) The Act makes ineligible for resentencing those persons who “[d]uring the commission of the current offense, the defendant used a firearm, [or] was armed with a firearm . . . .” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii); see § 1170.126, subd. (e).)

On January 29, 2013, defendant filed a petition for resentencing under section 1170.126. On April 24, 2013, the People filed an opposition to defendant’s petition for resentencing. The People opposed the petition on the ground that defendant was statutorily ineligible for resentencing under the Act because during the commission of his commitment offenses, defendant was armed with a firearm. On May 1, 2013, defendant filed a resentencing brief. On May 2, 2013, the trial court found defendant

eligible for resentencing under section 1170.126, despite defendant's conviction for being a felon in possession of a firearm.

On February 11 and April 29, 2014, the People filed a motion and a supplemental motion, respectively, to reconsider the trial court's ruling finding defendant eligible to be resentenced under the Act. Defendant subsequently filed opposition motions.

The trial court heard the People's motion to reconsider its ruling on June 24, 2014. Following argument, the trial court recalled its previous ruling and found defendant ineligible for resentencing under section 1170.126, because during his commitment offenses, defendant had a loaded firearm capable of ready access and was therefore armed with a firearm.

Defendant timely filed an appeal on July 8, 2014. We note that in *Teal v. Superior Court* (2014) 60 Cal.4th 595, 597, our Supreme Court recently concluded decisions under the Three Strikes Reform Act are appealable orders.

## II

### DISCUSSION

Defendant makes a number of arguments relating to the trial court's denial of his petition to recall his sentence. Specifically, he argues that (1) the People had to prove beyond a reasonable doubt that he was ineligible to be resentenced; (2) the arming exclusion under section 1170.126 requires that an inmate be armed with a firearm in addition to, and contemporaneous with a current commitment offense; (3) the evidence contained in the record of conviction was insufficient to show he was armed with a

firearm beyond a reasonable doubt; (4) the trial court’s finding that he was ineligible for resentencing violated the Sixth Amendment because it was based on factual findings not pled and proven to a jury; and (5) the Court of Appeal decisions that did not apply *Apprendi*<sup>4</sup> principles to resentencing proceedings were wrongly decided. We reject these contentions, for the reasons explained below.

A. *The Act Generally*

“The Act amended sections 667 and 1170.12 and added section 1170.126; it changed the requirements for sentencing some third strike offenders. ‘Under the original version of the three strikes law a recidivist with two or more prior strikes who is convicted of any new felony is subject to an indeterminate life sentence. The Act diluted the three strikes law by reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender. [Citations.] The Act also created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)’ ” (*People v. Brimmer* (2014) 230 Cal.App.4th 782, 791

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<sup>4</sup> *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).

[Fourth Dist., Div Two] (*Brimmer*), review denied Jan. 14, 2015, quoting *People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168 (*Yearwood*).

“Thus, there are two parts to the Act: the first part is prospective only, reducing the sentence to be imposed in future three strike cases where the third strike is not a serious or violent felony [citations]; the second part is retrospective, providing similar, but not identical, relief for prisoners already serving third strike sentences in cases where the third strike was not a serious or violent felony (Pen. Code, § 1170.126).” (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1292, italics omitted (*Kaulick*)).

“The main difference between the prospective and the retrospective parts of the Act is that the retrospective part of the Act contains an ‘escape valve’ from resentencing prisoners whose release poses a risk of danger.” (*Id.* at p. 1293.)

We agree with defendant that his current commitment felony offense of felon in possession of a firearm is not a serious or violent felony under section 667.5, subdivision (c), or section 1192.7, subdivision (c). However, the inquiry does not end with whether or not the current conviction is a serious or violent felony. As previously noted, an inmate is eligible for such resentencing if none of his or her commitment offenses constitute serious or violent felonies and none of the enumerated factors disqualifying a defendant for resentencing under the Act apply. (§ 1170.126, subd. (e).)

Being armed with a firearm during the commission of a current offense is a disqualifying factor listed in section 667, subdivision (e)(2)(C)(iii), and section 1170.12,

subdivision (c)(2)(C)(iii).<sup>5</sup> Thus, under the plain language of the armed with a firearm exclusion, defendant is ineligible for resentencing relief as a second strike offender if his life sentence was “imposed” because “[d]uring the commission of the current offense, [he] . . . was armed with a firearm.” (§§ 667, subd. (e)(2)(C)(iii) & 1170.12, subd. (c)(2)(C)(iii), both cross-referenced in § 1170.126, subd. (e)(2).)

“In approving the Act, the voters found and declared that its purpose was to prevent the early release of dangerous criminals and relieve prison overcrowding by allowing low-risk, nonviolent inmates serving life sentences for petty crimes, such as shoplifting and simple drug possession, to receive twice the normal sentence instead of a life sentence. (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 1,

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<sup>5</sup> Section 667, subdivision (e)(2)(C)(iii), provides: “[e)(2)](C) If a defendant has two or more prior serious and/or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, and the current offense is not a serious or violent felony as defined in subdivision (d), the defendant shall be sentenced [as a second strike offender] pursuant to paragraph (1) of subdivision (e) unless the prosecution pleads and proves any of the following: [¶] . . . [¶] (iii) During the commission of the current offense, the defendant used a firearm, [or] was *armed with a firearm . . .*” (Italics added.)

Section 1170.12, subdivision (c)(2)(C)(iii), provides: “[c)(2)](C) If a defendant has two or more prior serious and/or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, and the current offense is not a felony described in paragraph (1) of subdivision (b) of this section, the defendant shall be sentenced [as a second strike offender] pursuant to paragraph (1) of subdivision (c) of this section, unless the prosecution pleads and proves any of the following: [¶] . . . [¶] (iii) During the commission of the current offense, the defendant used a firearm, [or] *was armed with a firearm . . .*” (Italics added.)

subds. (3), (4) & (5), p. 105 (Voter Information Guide)<sup>6</sup>; see *People v. White* (2014) 223 Cal.App.4th 512, 522 . . . (*White*), review den. Apr. 30, 2014, S217030 [Fourth Dist., Div. One].) The electorate also mandated that the Act be liberally construed to effectuate the protection of the health, safety, and welfare of the people of California. (Voter Information Guide, *supra*, text of Prop. 36, § 7, p. 110; see *White, supra*, at p. 522.) Accordingly, we liberally construe the provisions of the Act in order to effectuate its foregoing purposes and note that findings in voter information guides may be used to illuminate ambiguous or uncertain provisions of an enactment. [Citations.]” (*Brimmer, supra*, 230 Cal.App.4th at p. 793, citing *White, supra*, at p. 522 and *Yearwood, supra*, 213 Cal.App.4th at pp. 170-171.)

B. *Burden of Proof*

Defendant argues that the People had the burden to prove ineligibility beyond a reasonable doubt. Our colleagues in *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040 (*Osuna*) and *White, supra*, 223 Cal.App.4th at pp. 526-527 rejected a similar argument. In *White*, the court noted the Act deals separately with future prosecutions in which the Act requires the prosecution to plead and prove the factors which would authorize an indeterminate third strike sentence. The Act requires such factors to be proved beyond a reasonable doubt. The Act, however, does not set a burden of proof for the determination of criminal history factors that would render an inmate ineligible for resentencing.

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<sup>6</sup> We take judicial notice of the Voter Information Guide for the California General Election of November 6, 2012, relating to the Act. (See Evid. Code, §§ 452 & 459.)

(*Kaulick, supra*, 215 Cal.App.4th at p. 1293.) Where a statute does not set a burden of proof, then such burden is by a preponderance of the evidence. (Evid. Code, § 115; *Osuna, supra*, 225 Cal.App.4th at p. 1040.) In *Osuna*, the court held “a determination of eligibility under section 1170.126 does not implicate the Sixth Amendment, a trial court need only find the existence of a disqualifying factor by a preponderance of the evidence.” (*Osuna*, at p. 1040.)

C. “*Armed With a Firearm*”

Defendant also contends that the armed with a firearm exclusion under section 1170.126 requires that an inmate be armed with a firearm in addition to, and contemporaneous with a current third strike offense. We disagree.

In *People v. Bland* (1995) 10 Cal.4th 991 (*Bland*), on which defendant relies, the California Supreme Court held that the arming enhancement under section 12022 “requires both that the ‘arming’ take place during the underlying crime and that it have some ‘facilitative nexus’ to that offense.” (*Bland*, at p. 1002, italics omitted.) The court concluded that “a defendant convicted of a possessory drug offense [is] subject to this ‘arming’ enhancement when the defendant possesses both drugs and a gun, and keeps them together, but is not present when the police seize them from the defendant’s house.” (*Id.* at p. 995.) Under the reasoning in *Bland*, for a defendant to be “armed” for purposes of section 12022’s additional penalties, he or she must have a firearm “available for use to further the commission of the underlying felony.” (*Bland*, at p. 999.)

The pertinent language contained in the Act and section 12022 is not parallel. “[U]nlike section 12022, which requires that a defendant be armed ‘*in the commission of*’ a felony for additional punishment to be imposed (italics added), the Act disqualifies an inmate from eligibility for lesser punishment if he or she was armed with a firearm ‘*during the commission of*’ the current offense (italics added). ‘During’ is variously defined as ‘throughout the continuance or course of’ or ‘at some point in the course of.’ (Webster’s 3d New Internat. Dict. (1986) p. 703.) In other words, it requires a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the same. (*Bland, supra*, 10 Cal.4th at p. 1002 [“‘in the commission’ of” requires both that “‘arming” occur during underlying crime *and* that it have facilitative nexus to offense].)” (*Osuna, supra*, 225 Cal.App.4th at p. 1032.)

Since the Act uses the phrase “[d]uring the commission of the current offense,” and not in the commission of the current offense (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)), and since at issue is not the imposition of additional punishment but rather eligibility for reduced punishment, we conclude the plain language of the Act disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm for being a felon in possession of a firearm.

Our conclusion that the Act merely requires a temporal nexus between the commitment offense and the firearm use or arming is supported by a recently published opinion from this court and several published opinions from other appellate courts. In fact, defendant’s tethering or contemporaneous claim has been rejected by all the

appellate courts that have considered it (*Brimmer, supra*, 230 Cal.App.4th at pp. 795-799; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314 (*Elder*); *Osuna, supra*, 225 Cal.App.4th at p. 1032), while two other Courts of Appeal have held that felon in possession is subject to exclusion from section 1170.126 resentencing when the defendant was armed during the offense (*Brimmer, supra*, at pp. 795-799; *White, supra*, 223 Cal.App.4th at p. 524; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1054.)

In *Brimmer, supra*, 230 Cal.App.4th 782, following an analysis of the firearm enhancement statutes, we held: “a defendant is armed if the gun has a facilitative nexus with the underlying offense (i.e., it *serves* some purpose in connection with it); however, this requires only that the defendant is aware during the commission of the offense of the nearby presence of a gun available for use offensively or defensively, the presence of which is not a matter of happenstance. This does not require any intent to use the gun for this purpose.” (*Id.* at pp. 794-795, citing *People v. Pitto* (2008) 43 Cal.4th 228, 239-240.) We further explained: “Although the crime of possession of a firearm by a felon may involve the act of personally carrying or being in actual *physical* possession of a firearm, as occurred here, such an act is not an essential element of a violation of former section 12021, subdivision (a), because a conviction of this offense may also be based on a defendant’s constructive possession of a firearm. [Citations.] . . . Hence, while the act of being armed with a firearm—that is, having ready access to a firearm (*Bland, supra*, 10 Cal.4th at p. 997)—necessarily requires possession of the firearm, possession of a firearm does not necessarily require that the possessor be armed with it.” (*Brimmer*, at

p. 795, citing *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417 [a conviction for possession of a gun can also be based on constructive possession of the gun] and *People v. Mejia* (1999) 72 Cal.App.4th 1269, 1272 [defendant need not physically have the weapon on his person; constructive possession of a firearm “is established by showing a knowing exercise of dominion and control” over it].)

In *Brimmer, supra*, 230 Cal.App.4th 782, the defendant was convicted of being a felon in possession of a firearm (former § 12021, subd. (a)(1)) and possession of a short-barreled shotgun (former § 12020, subd. (a)) and was sentenced to 25 years to life. Following the passage of the Act, the defendant filed a petition for resentencing under section 1170.126. The trial court granted defendant’s petition, and the People appealed. (*Brimmer*, at pp. 788-789.) On appeal, like in this case, the defendant argued that possessory offenses can never fall under the armed with a firearm exclusion, because one cannot use, or be armed with a firearm “ ‘during the commission’ ” of such offenses without another separate or tethering offense. (*Id.* at p. 797.) We rejected the defendant’s claim, noting the record of conviction in that case showed the defendant not only possessed the shotgun, but also that he was armed with the shotgun during his commission of his current possessory offenses. The record showed that the defendant was armed with an unloaded shotgun while arguing with or threatening his girlfriend during his possession of that shotgun. (*Id.* at pp. 795-798.)

*White* deemed it appropriate for the court to look beyond the crime for which the defendant had been sentenced to determine whether the “armed-with-a-firearm”

exception to resentencing applied. (*White, supra*, 223 Cal.App.4th at p. 523.) There, the defendant had been convicted and sentenced as a felon in possession of a firearm. The court recognized that “possession of a firearm does not necessarily require that the possessor be armed with it” (*id.* at p. 524), but affirmed the denial of resentencing because the record of conviction showed that the prosecution’s case was not based on the theory that the defendant was guilty of possession of a firearm by a felon because he had constructive possession of the firearm; it was based on the theory that he was guilty of that offense because he had actual physical possession of the firearm. (*Id.* at p. 525.)

In April 2014, the Fifth District published four cases germane to the issues raised by defendant: *People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1011 (*Cervantes*); *People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 984-985 (*Martinez*); *Osuna, supra*, 225 Cal.App.4th at p. 1026; and *Blakely, supra*, 225 Cal.App.4th at p. 1048. And, in July 2014, the Third District agreed with the Fifth District in *Elder, supra*, 227 Cal.App.4th at pp. 1312-1314.

In *Elder*, the defendant was convicted of possession of a firearm by a convicted felon after a loaded gun was found on a shelf of an entertainment center in the defendant’s apartment; another gun was found in an unlocked safe in a bedroom; and a photograph of defendant holding the gun on the entertainment center was also found. (*Elder, supra*, 227 Cal.App.4th at p. 1317.) At trial, the defendant claimed the guns belonged to his girlfriend and that he only visited on weekends. (*Ibid.*) The defendant appealed, claiming as a matter of statutory interpretation he cannot be armed while

committing the crime of unlawful possession of a gun and that the prosecution had to plead and prove the circumstance in the proceedings underlying his commitment offense. (*Id.* at p. 1311.) Following an analysis of the Act and section 12022, the appellate court held that for purposes of section 1170.126, unlawful possession of a gun can constitute being armed with the gun during the possession if the defendant is aware during the commission of the offense of the nearby presence of a gun available for use offensively or defensively, the presence of which is not a matter of happenstance, and no intent to use the gun is required. (*Id.* at pp. 1312-1314.)

In *Blakely*, the court held that a defendant convicted of being a felon in possession of a firearm is not automatically disqualified from resentencing because of that conviction. Such a defendant is disqualified for resentencing only if he or she had the firearm available for offensive or defensive use.<sup>7</sup> (*Blakely, supra*, 225 Cal.App.4th at pp. 1048, 1056-1063.) In *Cervantes* and *Martinez*, the court held a defendant, like in this case, may be barred from resentencing and is armed with a firearm even if he or she was not carrying a firearm on his or her person. (*Cervantes, supra*, 225 Cal.App.4th at pp. 1011-1018; *Martinez, supra*, 225 Cal.App.4th at pp. 984-985, 989-995.) In *Martinez*, the question before the court was whether during the commission of violating Health and Safety Code section 11370.1, subdivision (a), the defendant “ ‘was armed with a

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<sup>7</sup> In addition to applying standard principles of statutory construction in the court’s analysis of section 1170.126 in *Blakely*, the court also considered the rule of lenity which defendant argues is operative here. (*Blakely, supra*, 225 Cal.App.4th at pp. 1053-1054.)

firearm’ ” within the meaning of sections 667, subdivision (e)(2)(C)(iii) and 1170.12, subdivision (c)(2)(C)(iii), even if the defendant did not have actual possession of the firearm. (*Martinez, supra*, 225 Cal.App.4th at p. 990.)

In *Osuna, supra*, 225 Cal.App.4th 1020, the court held that where there are facts in the record of conviction showing the defendant was armed with a firearm—meaning it was available for immediate offensive or defensive use—during the commission of the defendant’s current offense, the defendant is disqualified from resentencing under the Act even though he or she was convicted of possessing the firearm and not of being armed with it. The court further concluded that being armed with a firearm during the commission of the current offense for the purposes of the Act does not require that the possession be “ ‘tethered’ ” to or have some “ ‘facilitative nexus’ ” to an underlying felony. (*Osuna*, at pp. 1026-1040.) The court explained: “unlike section 12022, which requires that a defendant be armed ‘*in the commission of*’ a felony for additional punishment to be imposed (italics added), the Act disqualifies an inmate from eligibility for lesser punishment if he or she was armed with a firearm ‘*during the commission of*’ the current offense (italics added). ‘During’ is variously defined as ‘throughout the continuance or course of’ or ‘at some point in the course of.’ [Citation.] In other words, it requires a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the same. [Citation.]” (*Id.* at p. 1032; accord, *Brimmer, supra*, 230 Cal.App.4th at pp. 798-799.)

Based on the foregoing, we reject defendant's contention that the armed with a firearm exclusion requires that an inmate be armed during the commission of another current commitment offense other than being a felon in possession of a firearm.

Defendant argues that *White*, *Osuna*, *Blakely*, and *Elder* were incorrectly decided and should not be followed. We reject defendant's contention and adhere to the analysis articulated in those cases as we did in *Brimmer*.

D. *Substantial Evidence Supports Conclusion Defendant Was "Armed"*

Defendant further maintains that the evidence in the record of conviction was insufficient to determine that defendant had a firearm available for use. We generally review a "trial court's legal conclusions de novo and its findings of fact for substantial evidence." (*People v. Trinh* (2014) 59 Cal.4th 216, 236.) A determination of what the Act requires is a legal question subject to de novo review. Whether evidence supports the conclusion defendant was armed, as that term is to be construed, is a question of fact we review for substantial evidence. (See *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331 ["we hold the court's determination that the wire cutters were a deadly weapon is not supported by sufficient evidence"]; *Osuna, supra*, 225 Cal.App.4th at p. 1040 ["The record in this case amply established defendant was disqualified from resentencing as a second strike offender because he was armed with a firearm during the commission of his current offense."].)

We accordingly turn to the record in this case and to the question of whether defendant was armed, as that term is used in the Act, during the commission of his possession offense.

As noted above, in contrast to “using” a firearm, “arming under the sentence enhancement statutes does not require that a defendant utilize a firearm or even carry one on the body. A defendant is armed if the defendant has the specified weapon available for use, either offensively or defensively.” (*Bland, supra*, 10 Cal.4th at pp. 997, 1003, italics omitted.) Defendant contends that he was not in actual possession of the firearms found in the bedroom and that there was no evidence to show he was seen within an arm’s reach of the firearms. However, a defendant need not be in actual physical possession in order for the armed with a firearm exclusion to apply. For example, in *Martinez, supra*, 225 Cal.App.4th 979, law enforcement officers found the defendant in his kitchen, drug paraphernalia on his person, a bindle of heroin on the table before him, a shotgun in one of the bedrooms, and another gun in one of the closets. (*Id.* at p. 985 & fn. 2.) The defendant argued he was not armed during his heroin possession offense, for purposes of resentencing, because the gun was in a “separate room” from the heroin. (*Id.* at p. 986.) While the trial court agreed with the defendant, the Court of Appeal, reviewing these undisputed facts de novo, reversed. (*Id.* at pp. 990, 995.) The appellate court concluded the defendant, as a matter of law, “had the firearm available for immediate offensive or defensive use.” (*Id.* at pp. 993, 995.)

Here, defendant was found within reach of two firearms, one loaded in a ready-to-fire position. Officer Sabolchic found defendant crouched down in the doorway of a bedroom, with his hands hidden behind the doorframe. Officers later found the two firearms near the bed frame. Defendant admitted that the firearms belonged to him and that he had “bought them off the streets.” In sum, defendant’s close proximity to a loaded ready-to-use firearm and an unloaded firearm, along with evidence that defendant’s hands were hidden behind the bedroom doorframe near where the guns were found, allowed for a reasonable inference that defendant was armed with a firearm. Therefore, the trial court correctly found sufficient evidence to show defendant “had the firearm available for immediate offensive or defensive use.” (*Martinez, supra*, 225 Cal.App.4th at p. 993.)

E. *Violation of Sixth Amendment Right*

Defendant further claims that using a disqualifying factor not pled and proved to the jury violated his constitutional rights to due process and a jury trial under *Apprendi, supra*, 530 U.S. 466 and its progeny. Defendant’s exact contentions have been rejected by this court and other appellate courts addressing the issue. (*Brimmer, supra*, 230 Cal.App.4th at pp. 804-805; *White, supra*, 223 Cal.App.4th at p. 527; *Osuna, supra*, 225 Cal.App.4th at pp. 1039-1040; *Blakely, supra*, 225 Cal.App.4th at p. 1060; *Elder, supra*, 227 Cal.App.4th at p. 1315.)

Appellate courts have consistently found that the resentencing provisions under section 1170.126 are akin to a hearing regarding “downward sentence modifications due

to intervening laws” (*Kaulick, supra*, 215 Cal.App.4th at p. 1304), and therefore *Apprendi* and the limitations of the Sixth Amendment do not apply to resentencing determinations. (Accord, *Brimmer, supra*, 230 Cal.App.4th at pp. 804-805 [*Apprendi* and its progeny do not apply to a determination of eligibility under the Act]; *White, supra*, 223 Cal.App.4th at p. 527 [same]; *Osuna, supra*, 225 Cal.App.4th at p. 1039 [same]; *Blakely, supra*, 225 Cal.App.4th at p. 1060 [same].) We reject defendant’s assertion that these cases were incorrectly decided, and adhere to the rationale explained in those cases.

Defendant misapplies *Apprendi* and its progeny to resentencing petitions under section 1170.126. Determinations required under section 1170.126 are not factors justifying enhancing a defendant’s sentence beyond the statutory maximum. (See *Kaulick, supra*, 215 Cal.App.4th at pp. 1302-1304.) As such, “the United States Supreme Court has already concluded that its opinions regarding a defendant’s Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt do not apply to limits on downward sentence modifications due to intervening laws.” (*Id.* at p. 1304, citing *Dillon v. United States* (2010) 560 U.S. 817, 829.) “The retrospective part of the Act is not constitutionally required, but an act of lenity on the part of the electorate. It does not provide for wholesale resentencing of eligible petitioners. Instead, it provides for a proceeding where the original sentence may be modified downward. Any facts found at such a proceeding, such as dangerousness, do not implicate Sixth Amendment issues. Thus, there is no constitutional requirement that the facts be established beyond a reasonable doubt.” (*Kaulick*, at pp. 1304-1305; accord, *Brimmer, supra*, 230 Cal.App.4th

at p. 805, quoting *Osuna, supra*, 225 Cal.App.4th at p. 1040 [“A finding an inmate is not eligible for resentencing under section 1170.126 does not increase or aggravate that individual’s sentence; rather, it leaves him or her subject to the sentence originally imposed.” *Osuna*, at p. 1040; see *Blakely, supra*, 225 Cal.App.4th at p. 1061].) “A trial court’s determination that a defendant is ineligible for resentencing pursuant to section 1170.126 does ‘not increase the penalty to which [a] defendant [is] already subject, but instead disqualifie[s] [a] defendant from an act of lenity on the part of the electorate to which [a] defendant was not constitutionally entitled.’ ” (*Brimmer*, at p. 805, quoting *Osuna*, at p. 1040.)

III

DISPOSITION

The order denying defendant’s petition for a recall of his life sentence is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ  
P. J.

We concur:

KING  
J.

MILLER  
J.