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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.

SERGIO PENA ACEVEDO,

Defendant and Appellant.

E062712

(Super.Ct.No. INF067289)

OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge.†

Affirmed.

Marianne Harguindeguy, under appointment by the Court of Appeal, for
Defendant and Appellant.

† Becky Dugan was the judge for the hearings on February 19 and March 25, 2013, and December 9, 2014. Arjuna T. Saraydarian (Retired Judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) was the original sentencing judge on January 13, 2011.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

This is an appeal by defendant and appellant Sergio Pena Acevedo 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.)¹ 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 BACKGROUND²

On November 24, 2009, California Highway Patrol Officer William Strom was on routine patrol on Interstate Highway 10 when he observed a vehicle drifting or weaving between lanes and driving at varying speeds. Officer Strom activated his patrol car's emergency lights when he was about 50 feet behind the vehicle and followed the vehicle for about a mile before the vehicle pulled over to the shoulder. During that time, Officer

¹ All future statutory references are to the Penal Code unless otherwise stated.

² The relevant factual background is taken from the trial transcript on the substantive charges in case No. E052818 (*People v. Acevedo* (Nov. 10, 2011, E052818) [nonpub. opn.] (Acevedo I)). On April 22, 2015, this Court took judicial notice of the record in that case. The trial transcript was used by the trial court in determining whether defendant was eligible or ineligible to be resentenced under the Act.

Strom saw the driver's "right arm coming up off the shoulder, moving up and down," "fidgeting around," "as if something was trying to be concealed." The windows of the vehicle, a blue pickup truck, were not tinted, it was light outside, and the officer was able to see inside the vehicle. Officer Strom believed the driver was trying to conceal something "[b]ecause of the way his arm was moving when [the officer] was attempting to make the stop on him, just the fidgeting, it was like he was trying to conceal something within that area on his right-hand side."

Once the vehicle stopped, Officer Strom made contact with the driver. Defendant was the driver and sole occupant of the vehicle. After Officer Strom administered field sobriety tests on defendant, defendant was arrested for driving while under the influence of alcohol or drugs. When Officer Strom informed defendant that he would be impounding the truck, defendant yelled, " 'Leave the truck there' " and " 'Take me to fucking jail. Take me now.' " Officer Strom nonetheless conducted an inventory search of the truck prior to towing defendant's vehicle, and found a loaded .38-caliber revolver stuffed between the driver's seat and the truck's center console. In finding the loaded revolver, Officer Strom explained, "I went to the area where I had assumed [defendant] was trying to conceal something, which is the right-hand side, and there was a towel sticking up between the center console and the driver's seat, and when I removed the towel the gun was locate[d] inside that towel."

Defendant's former fiancé testified that she had found the revolver in a box of donations left at the gate of a thrift store owned by her parents. Because she did not want

any problems for her parents, she wrapped the gun in a towel and placed it under the right passenger seat of defendant's truck. She explained that she was supposed to drop defendant off at a rehab facility in her car and then take the truck to defendant's father.

On April 7, 2010, an information was filed charging defendant with possession of a firearm by a felon (Pen. Code, former § 12021, subd. (a)(1)); possession of ammunition by a felon (Pen. Code, former § 12316, subd. (b)(1)); misdemeanor resisting arrest (Pen. Code, § 148, subd. (a)(1)); misdemeanor driving under the influence (Veh. Code, § 23152, subd. (a)); misdemeanor driving with a blood alcohol content over 0.08 percent (Veh. Code, § 23152, subd. (b)); and misdemeanor driving on a suspended license (Veh. Code, § 14601.1, subd. (a)). The information further alleged that defendant had suffered two prior serious and violent felony convictions (Pen. Code, §§ 667, subs. (b)-(i), 1170.12, subs. (a)-(d)) and four prior prison terms (Pen. Code, § 667.5, subd. (b)). (See *Acevedo I*, E052818 and *People v. Acevedo* (Aug. 4, 2014, E058557) [nonpub. opn.] (*Acevedo II*).

On December 13, 2010, a jury found defendant guilty of the felon in possession of a firearm and possession of ammunition charges. Defendant had pled guilty to all of the misdemeanor charges. In a bifurcated proceeding, the trial court found the prior allegations to be true. On January 13, 2011, defendant was sentenced to a total determinate term of four years plus an indeterminate term of 25 years to life in state prison as follows: a term of 25 years to life for the felon in possession of a firearm, plus

one year for each of the four prior prison term allegations; defendant's sentence on the felon in possession of ammunition was stayed pursuant to section 654.

On November 10, 2011, this court affirmed the judgment.

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 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).)

On December 4, 2012, defendant filed a petition for resentencing under section 1170.126. The People opposed the petition on the grounds that defendant was statutorily ineligible under the Act. The People argued that defendant was ineligible because he was armed with a firearm during the commission of the crime and that defendant posed a risk to public safety.

The trial court heard the petition on February 19 and March 25, 2013. Initially, the trial court found that a conviction for felon in possession of a firearm under former section 12021 did not render defendant ineligible under the Act. The court thereafter informed the People that “[i]f you’re arguing to me, though, that although he pled to a 12021 that the particular facts are that he was armed with it during another crime, I would address those, because I think that may be going to the specific language of the statute, ‘armed with a firearm.’ ” The prosecutor replied that defendant was pulled over for driving under the influence and had a gun in the car that was within his control and possession. The court responded, “Yeah, so I’ll accept those facts. I’ll rule against you today . . . the statute is pretty clear and it specifically itemizes a language of ‘armed with while.’ So that’s why I’m comfortable that if he has it in the car while he’s drunk, he may be stupid, but not ‘armed with while.’ ”

On March 25, 2013, following argument from the parties, the trial court granted the petition, finding defendant eligible for resentencing under section 1170.126. The court thereafter resentenced defendant to the upper term of six years for felon in possession of a firearm, plus four one-year terms for the four prior prison term enhancements, for a total aggregate term of 10 years; defendant’s sentence for felon in possession of ammunition was stayed pursuant to section 654.

On April 15, 2013, the People appealed, and on August 4, 2014, this court reversed the trial court’s ruling and remanded the case with directions to the trial court “to examine the evidence adduced at trial to determine whether the prosecution’s case

was based on the theory that defendant was guilty of possession of a firearm by a felon because he had actual physical possession of the firearm or had ready access to that firearm.”³ (*Acevedo II, supra*, E058557, p. 17.)

Following remand, on December 9, 2014, defendant filed points and authorities in the trial court, arguing the court should uphold its previous eligibility determination. The People filed an opposition on January 9, 2015, arguing that the law of the case did not apply and that defendant was “armed with a firearm” within the Act because he had a firearm available for ready use. Defendant subsequently filed his reply on January 9, 2015.

On January 9, 2015, the trial court held a hearing on the petition. Following argument, the trial court found that defendant was ineligible for resentencing because he was “armed within the meaning of the statute.” The court acknowledged that it had previously erred in ruling defendant was eligible. The court explained: “My problem is an obvious problem. All of the appellate cases across the entire state said I got it wrong. They said that possession is basically, unless there is some weird factual oddity of constructive possession, like it’s in a foot locker in the gym, while he’s at home, the Court has to find, basically, that armed and used excludes him. [¶] They—some of the

³ We note that when *Acevedo II* was decided, the record on appeal did not contain the trial transcript on the substantive charges, and the factual basis of the underlying offenses was taken from *Acevedo I, supra*, E052818. (See *Acevedo II, supra*, E058557 p. 2, fn. 2.) We further point out that since *Acevedo II* was decided, appellate courts, including this court, have further clarified the armed with a firearm exclusion under the Act.

scenarios the appellate courts have reversed. You know, Defendant is standing outside his house, a gun is in the entertainment center, the court found that was armed and used. They said that was for—how do they put it, defensive or offensive purposes. [¶] If you're going to reach that far out, I'm sorry, that person wasn't even able to reach the gun, he was outside his house when the police came. They excluded him from his house and yet the court found that was armed and used.”

In finding defendant was ineligible, the court further clarified: “The kind of situation we have here, if I use the definition the appellate courts have consistently given, which is possessed for offensive or defensive purposes, there was a gun found in the console. It was covered with a towel. He was the sole occupant. He was stopped for drunk driving. When he was removed from the car, he made very—and it's off, odd set of facts. ‘Leave my car alone. Don't touch my car. You don't have to tow it. Don't take it. Leave it.’ That is strong circumstantial evidence [defendant] knew the gun was there. [¶] It had to be possessed for offensive or defensive purposes where it's literally loaded within arm's reach as he sits there. Luckily he didn't pull it or he wouldn't be here today. [¶] It was right there in the console . . . all the cases pointed out, you don't need to have had it in your hand. You don't need to have reached for it. So if you take into consideration all of the trial court information about it, that the officer saw him fumbling, and the officer testified, ‘I looked where I saw him fumbling to hide something.’ That is what he testified to. He said, ‘I looked there because that is where I saw him fumbling.’ [¶] And what he tells him when he gets out, and the fact they find a

loaded gun concealed by the towel right where he was fumbling, I don't know how I could possibly get around the definition of armed and used that our appellate courts has gotten us. It's possessed for defensive or offensive purposes.”

II

DISCUSSION

Defendant makes a number of arguments relating to the trial court's denial of his petition to recall his sentence following a remand by this court. While acknowledging many of the issues raised in his current appeal have been rejected by appellate courts, defendant, nonetheless, specifically argues: (1) the courts have distinguished between possession and arming and arming requires a “facilitative nexus” to an underlying offense; (2) the armed with a firearm exclusion in the Act, like the arming statute, “requires a tethering felony, and does not apply to a stand-alone conviction for illegal firearm possession”; (3) the rule of lenity must prevail if this court determines the statute is ambiguous on whether the armed with a firearm exclusion encompasses constructive possession; (4) the trial court abused its discretion when it acted in contravention of the law of the case doctrine; (5) the trial court abused its discretion when it relied on the record of conviction to resolve disputed issues of fact; (6) the evidence contained in the record of conviction was insufficient to show he was armed with a firearm beyond a reasonable doubt; (7) the trial court's finding that he was ineligible for resentencing violated the Sixth and Fourteenth Amendments because a jury trial and a finding beyond a reasonable doubt is constitutionally required for previously unadjudicated facts;

(8) defendant is entitled to resentencing because the prosecution did not plead and prove the armed exclusion; and (9) the Court of Appeal decisions addressing these issues were wrongly decided.

The People respond the law of the case doctrine precludes relitigation of the meaning of the phrase “armed-with-a-firearm” for purposes of the Act as that issue was decided by this court in *Acevedo II*. The People further assert: (1) the trial court did not violate the law of the case doctrine or abuse its discretion in denying the petition on remand; (2) the trial court properly considered the trial transcript in determining the applicability of the armed with a firearm exclusion; (3) the Constitution does not require a jury finding beyond a reasonable doubt to determine an inmate’s eligibility under the Act; and (4) neither the Constitution nor the Act require the armed with a firearm exclusion be pled and proven by the prosecution.

For the reasons explained below, we reject defendant’s contentions.

A. *Standard of Review*

When interpreting a voter initiative, “we apply the same principles that govern statutory construction.” (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) We first look “ ‘to the language of the statute, giving the words their ordinary meaning.’ ” (*Ibid.*) We construe the statutory language “in the context of the statute as a whole and the overall statutory scheme.” (*Ibid.*) If the language is ambiguous, we look to “ ‘other indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet.’ ” (*Ibid.*)

B. *Overview of 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 (*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 note that defendant’s 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). 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, subds. (3), (4) & (5), p. 105 (Voter Information Guide);⁴ 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.)

C. *Burden of Proof*

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 the argument that the People had the burden to prove ineligibility beyond a reasonable doubt. 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.

⁴ 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.)

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. (*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*, 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.)

D. *Armed With a Firearm Exclusion*

Defendant 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 tethering offense. Assuming, without deciding, the law of the case doctrine does not apply as claimed by the People, we disagree.⁵

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.”

⁵ We address the issues raised by defendant in this appeal to further clarify the conclusions reached in *Acevedo II, supra*, E058557.

(*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; see *People v. Hicks* (2014) 231 Cal.App.4th 275, 284 (*Hicks*).)

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 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; *White, supra*, 223 Cal.App.4th at p. 524; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1054 (*Blakely*)).

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, as 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). However, the court 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, and again in November 2014 in *Hicks, supra*, 231 Cal.App.4th at pp. 283-284.

In *Hicks, supra*, 231 Cal.App.4th 275, the defendant argued he was not armed during the commission of the offense because there was no “underlying felony to which the arming is ‘tethered.’ ” (*Id.* at p. 283.) The appellate court rejected his argument, and

noted that although sentencing enhancements under section 12022 require a “ ‘facilitative nexus’ ” between the arming and the possession, the Act does not. (*Ibid.*) Relying on the conclusion reached by the Courts of Appeal in *Brimmer* and *Osuna*, the court explained that under the Act, a defendant is deemed to have been “armed with a firearm” if the firearm was available “ ‘[d]uring 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. (1993) p. 703.) Thus, there must be a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the same. [Citation.]” (*Hicks, supra*, 231 Cal.App.4th at pp. 283-284.)

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.⁶ (*Blakely, supra*, 225 Cal.App.4th at pp. 1056-1063.) In *Cervantes* and *Martinez*, the court held a defendant, as 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 firearm’ ” within the meaning of Penal Code 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.)

⁶ 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.)

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 reasoned that “ ‘during the commission of’ ” the current offense requires a temporal nexus between the arming and the underlying felony, not a facilitative one. (*Id.* at p. 1032; accord, *Brimmer, supra*, 230 Cal.App.4th at pp. 798-799; *Hicks, supra*, 231 Cal.App.4th at p. 284.)

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 *Hicks* was wrongly decided. We reject defendant’s contention and adhere to the analysis articulated in the above-noted cases. Defendant has not provided any controlling authority to persuade us otherwise.

Defendant’s reliance on the doctrine that “ ‘the expression of certain things in a statute necessarily involves exclusion of other things not expressed’ ” is misplaced. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1391,

fn. 13, quoting *Henderson v. Mann Theatres Corp.* (1976) 65 Cal.App.3d 397, 403.)

Based on this doctrine, he argues if the drafters of the Act had “intended [the interpretation of armed with] to be construed differently than the same phrase used elsewhere in the Penal Code, they could have done so.” However, the applicable rule of statutory construction is that the court must “give effect to all provisions of a statute whenever possible. [Citations.]” (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 49.)

Applying the armed with a firearm exclusion to defendant’s current offenses is consistent with both the record of conviction and the voters’ intent. “[W]e believe the electorate intended the disqualifying factors to have a broader reach than defendant’s interpretation of the statute would give them.” (*Osuna, supra*, 225 Cal.App.4th at p. 1034.) The Act was not intended to reduce the sentences of felons who were armed with a firearm during the commission of the current offenses. (See *Elder, supra*, 227 Cal.App.4th at p. 1314.) Although “possession of a gun of itself is not criminal, a *felon’s* possession of a gun is not a crime that is merely *malum prohibitum*. As we stated nearly 20 years ago, ‘public policy generally abhors even momentary possession of guns by convicted felons who, the Legislature has found, are more likely to misuse them.’ [Citation.] Therefore, even if the great majority of commitments for unlawful gun possession come within our interpretation of this eligibility criterion, it would not run afoul of the voters’ intent.” (*Id.* at p. 1314, fn. omitted.)

E. *Trial Court’s Reliance on Trial Transcript*

Defendant argues the trial court abused its discretion in relying on two contested facts from the reporter’s transcript that were not examined in *Acevedo II*: (1) the officer saw defendant “ ‘fumbling to hide something’ ” and found the gun in the area where defendant was fumbling; and (2) the officer’s testimony that defendant asked him to leave his car alone, which the trial court believed constituted circumstantial evidence of knowledge of the gun. We disagree.

“The factual determination of whether the felon-in-possession offense was committed under circumstances that disqualify defendant from resentencing under the Act is analogous to the factual determination of whether a prior conviction was for a serious or violent felony under the three strikes law. Such factual determinations about prior convictions are made by the court based on the record of conviction.” (*Hicks, supra*, 231 Cal.App.4th at p. 286, citing *People v. Guerrero* (1988) 44 Cal.3d 343, 355 (*Guerrero*) [in determining facts underlying prior convictions, court may look to entire record of conviction].) As such, in order to determine whether a defendant is ineligible for resentencing, “a trial court may rely on the record of conviction, including this court’s prior opinion in defendant’s appeal from his original judgment and trial transcripts, as evidence to determine eligibility under the Act.”⁷ (*Brimmer, supra*, 230 Cal.App.4th at

⁷ The term “ ‘record of conviction’ ” has been used “technically, as equivalent to the record on appeal [citation], or more narrowly, as referring only to those record documents reliably reflecting the facts of the offense for which the defendant was convicted.” (*People v. Reed* (1996) 13 Cal.4th 217, 223.) The record of conviction includes the transcript of the jury trial (*People v. Bartow* (1996) 46 Cal.App.4th 1573, [footnote continued on next page]

pp. 800-801.) Indeed, numerous decisions interpreting the Act have concluded that when certain eligibility facts have not been resolved by the verdicts or special findings rendered at trial, the trial court may independently examine the record of conviction in order to make determinations regarding those facts. (*Hicks, supra*, 231 Cal.App.4th at p. 286; *Brimmer, supra*, at pp. 799-801; *White, supra*, 223 Cal.App.4th at p. 525 [reliance on record of conviction including information, pretrial motion, and closing argument]; *Blakely, supra*, 225 Cal.App.4th at pp. 1058-1063 [a trial court may examine relevant, reliable, admissible portions of the record of conviction to determine disqualifying factors]; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1336-1338 [determination of whether the defendant was disqualified from resentencing is based solely on evidence found in record of conviction].) The trial court therefore properly considered the trial transcript in determining the applicability of the armed with a firearm exclusion.

Relying on *People v. McGee* (2006) 38 Cal.4th 682 (*McGee*), defendant, nonetheless, argues that it was improper for the trial court to consider the officer's testimony because the issue of defendant "fidgiting" was a point of contention at trial. He therefore believes "the jury never had to decide whether [defendant's] 'fidgiting' was to hide or move a firearm because it was not necessary for a conviction."

[footnote continued from previous page]

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1579-1580) and the appellate record (if any), including the appellate opinion (*People v. Woodell* (1998) 17 Cal.4th 448, 451.)

In *McGee*, *supra*, 38 Cal.4th 682, the California Supreme Court determined the court should decide whether a prior conviction constitutes a strike. There, the defendant had prior robbery convictions in Nevada. A prior conviction in a foreign jurisdiction is a strike in California only if the convictions involved conduct that would also constitute a strike under California law. (*Id.* at p. 691.) The court noted there are distinctions between the elements of robbery in Nevada and California such that “it was at least theoretically possible that defendant’s Nevada convictions involved conduct that would not constitute robbery under California law.” (*Id.* at p. 688.) The trial court examined various documents from the Nevada convictions, including transcripts from preliminary hearings. The court concluded that the defendant’s conduct in the Nevada robberies constituted strikes. (*Id.* at p. 690.) The Court of Appeal reversed, concluding that under *Apprendi*⁸ the question should have been submitted to the jury.

Our Supreme Court reversed the Court of Appeal. The court held that the defendant was not entitled to have a jury decide whether his Nevada robbery convictions qualified as strikes under California law. In reversing, our Supreme Court stated: “[W]e observe that the matter presented is not, as the Court of Appeal appears to have assumed, a determination or finding ‘about the [defendant’s earlier] conduct itself, such as the intent with which a defendant acted.’ Instead, it is a determination regarding the nature or basis of the defendant’s *prior conviction*—specifically, whether *that conviction* qualified as a conviction of a serious felony. California law specifies that in making this

⁸ *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).

determination, the inquiry is a limited one and must be based upon the record of the prior criminal proceeding, with a focus on the elements of the offense of which the defendant was convicted. If the enumeration of the elements of the offense does not resolve the issue, an examination of the record of the earlier criminal proceeding is required in order to ascertain whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law.” (*McGee, supra*, 38 Cal.4th at p. 706.)

Defendant’s reliance on *McGee* is misplaced. Here, the trial court considered the trial transcript in determining whether the armed with a firearm exclusion under the Act applied. The use of such trial transcripts is appropriate under the circumstances as trial transcripts are part of the record of conviction and reliable in making eligibility determinations. The officer’s testimony concerning defendant fidgeting, that he found the gun in the area where he saw defendant fidgeting, and defendant’s post-arrest statements were uncontradicted.

We find guidance here from *Bradford*, which examined an exclusion for eligibility “that applies if ‘[d]uring . . . the current offense, [that is, the offense which the resentencing petition targets] the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.’ ” (*Bradford, supra*, 227 Cal.App.4th at p. 1327, quoting §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) In *Bradford*, evidence was presented at the defendant’s trial that he robbed several stores, and had a pair of wire cutters in his pocket when arrested.

(*Bradford, supra*, at pp. 1329-1330.) He was convicted of three counts of burglary, and was sentenced as a “three strikes” offender. (*Id.* at p. 1327.) In denying the defendant’s petition for recall and for resentencing, the trial court ruled that he was ineligible for relief, concluding that because he had a pair of wire cutters when arrested, he had been armed with a deadly weapon during the commission of the burglaries. (*Id.* at p. 1330.)

The appellate court concluded that in the absence of verdicts or special findings resolving the defendant’s eligibility for resentencing, trial courts are authorized to make independent factual determinations regarding the eligibility criteria stated above.

(*Bradford, supra*, 227 Cal.App.4th at pp. 1331-1334, 1336-1337.) In so concluding, the court noted that the eligibility criteria did not describe or “clearly equate to” any offenses or enhancements. (*Id.* at p. 1332.) The court further determined that the trial court’s independent determination of eligibility facts does not enhance a defendant’s existing sentence, and thus does not implicate his or her right under the Sixth Amendment of the United States Constitution to have essential facts found by a jury beyond a reasonable doubt, as set forth in *Apprendi*. (*Bradford, supra*, at pp. 1334-1336.)

In discussing the independent factual determinations, the *Bradford* court concluded that the trial court’s inquiry is “necessarily retrospective,” and akin to the task facing a sentencing court assessing whether a prior conviction may be proved as an enhancement. (*Bradford, supra*, 227 Cal.App.4th at p. 1339.) The court thus looked for guidance to a line of cases addressing that task stemming from *Guerrero, supra*, 44 Cal.3d at p. 355, in which our Supreme Court held that sentencing courts may examine

the record of conviction to determine the “ ‘substance’ ” of a prior conviction, for purposes of establishing an enhancement. (*Bradford*, at pp. 1338-1340.) In view of the *Guerrero* line of cases, the court concluded that the trial court may examine the record of conviction in order to determine eligibility facts. (*Ibid.*)

We therefore conclude that when the eligibility facts set forth under the Act have not been resolved by the verdicts or special findings rendered at trial, the court may independently examine the record of conviction in order to determine whether the defendant is eligible for relief.

Moreover, a conflict in the evidence would not require a reversal of the trial court’s finding that defendant was armed with a firearm as long as that finding is supported by substantial evidence. (*Hicks, supra*, 231 Cal.App.4th at p. 286.) 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 *Bradford, supra*, 227 Cal.App.4th at p. 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. 996-997, 1003, italics omitted.) Defendant contends that he was not in *actual* possession of the firearm found in the car and that “he was not convicted of anything more than constructive possession.” However, as previously explained, 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 bundle 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 a loaded firearm in the location where the officer saw defendant fidgeting. In sum, defendant’s close proximity to a loaded

firearm, along with evidence that defendant was the sole driver and occupant of the pickup truck, the location of the gun, i.e., under a towel in between the center console and driver's seat of the truck, defendant's fidgeting with his right arm in the area where the gun was located, and defendant's post-arrest statements to the officer, 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.)

F. *Defendant's Law of the Case Assertion*

Defendant argues the trial court violated the law of the case doctrine, and thereby abused its discretion, when the trial court relied on other Court of Appeal opinions rather than *Acevedo II* in determining whether defendant's possession of a firearm had a " 'facilitative nexus' " to the offense of felon in possession of a firearm. He maintains that the "trial court's discussion of the distinction between constructive possession and arming had nothing to do with the law as stated by *Acevedo II*" and that "the *Acevedo II* opinion does not at all support the trial court's statement 'unless there is some weird factual oddity of constructive possession, like it's in a foot locker in the gym, while he's at home, the Court has to find, basically, that armed and used excludes him.' " We reject defendant's contention as his argument is based on his selective reading of this court's unpublished opinion in *Acevedo II, supra*, E058557.

The doctrine of law of the case deals with the effect of the first appellate decision on the subsequent retrial or appeal. The decision of an appellate court stating a rule of

law necessary to the decision of the case conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case. (*Ryan v. Mike-Ron Corp.* (1968) 259 Cal.App.2d 91, 96; *Quackenbush v. Superior Court* (2000) 79 Cal.App.4th 867, 874.) The law of the case doctrine generally precludes multiple appellate review of the same issue in a single case. The doctrine, as the name implies, is exclusively concerned with issues of law and not fact. (*Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 434.) The doctrine is applicable, generally speaking, only to principles of law laid down by the court as related to a retrial of the facts but the doctrine does not embrace the facts themselves. (*Muktarian v. Barmby* (1968) 264 Cal.App.2d 966, 968.) The doctrine is applicable to criminal as well as civil matters and to decisions of intermediate appellate courts as well as courts of last resort. (*Clemente v. State of California* (1985) 40 Cal.3d 202, 211.) The doctrine promotes finality of litigation by preventing a party from relitigating questions previously decided by a reviewing court. (*George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1989) 49 Cal.3d 1279, 1291.)

Defendant's reliance of the law of the case doctrine is misplaced. In support of his law of the case claim, he quotes the portions of this court's unpublished opinion in *Acevedo II*, in which we discussed the case law construing the "armed with a firearm" language in section 12022, the possession element of felon in possession of a firearm. However, notably absent from defendant's brief is any discussion of the two subsequent paragraphs in *Acevedo II* where we noted and rejected defendant's argument that an

additional tethering offense is required for the armed with a firearm exclusion. Indeed, in *Acevedo II* we concluded: “Where the record establishes that a defendant convicted of possession of a firearm by a felon was armed with the firearm, i.e., he had a firearm capable for ready use, during the commission of that offense, the armed-with-a-firearm exclusion applies and the defendant is not entitled to resentencing relief under the [] Act. We therefore rejected defendant’s argument that the plain language of the armed-with-a-firearm exclusion requires that the arming be anchored or tethered to an offense which does not include possession.” (*Acevedo II, supra*, E058557, pp. 14-15.) Therefore, contrary to defendant’s argument, the trial court’s focus on the accessibility of the firearm, i.e., whether it was available for use for an offensive or defensive purpose, and its references to cases addressing the available-for-use requirement was entirely consistent with our unpublished decision in *Acevedo II* and published opinion in *Brimmer*.

Likewise, the trial court properly considered on remand of what defendant characterizes as “additional informative facts beyond what [was] already contained in *Acevedo II*.” In fact, because the trial court did not analyze the record of conviction in *Acevedo II*, we remanded the matter in *Acevedo II*, “to allow the trial court to examine the evidence adduced at trial to determine whether the prosecution’s case was based on the theory that defendant was guilty of possession of a firearm by a felon because he had

actual physical possession of the firearm or had ready access to that firearm.”⁹ (*Acevedo II*, *supra*, E058557, p. 17.)

G. *Violation of Sixth Amendment Right*

Defendant contends the Sixth and Fourteenth Amendments to the United States Constitution mandate that a jury find beyond a reasonable doubt that he was “ ‘armed with a firearm’ ” during the commission of the offense before he could be deemed ineligible for resentencing because his conviction for possession of a firearm does not necessarily entail a finding that he was armed. We disagree.

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*, at

⁹ We also remanded the matter because the record on appeal in *Acevedo II* did not contain the trial transcripts and the factual background of the underlying offense from this court’s opinion in *Acevedo I* and was unclear as to whether defendant had knowledge of the gun’s existence in the truck.

p. 527 [same]; *Osuna, supra*, 225 Cal.App.4th at p. 1039 [same]; *Blakely, supra*, 225 Cal.App.4th at p. 1060 [same].)

As the court in *People v. Guilford* (2014) 228 Cal.App.4th 651 (*Guilford*), concluded: “This contention already has been resolved against defendant. ‘[T]he 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.’ [Citations.] [¶] Contrary to defendant’s view, nothing in *Alleyne v. United States* (2013) 570 U.S. ___ [186 L.Ed.2d 314 . . .] assists him. As described by our Supreme Court, in *Alleyne*, ‘the United States Supreme Court held that the federal Constitution’s Sixth Amendment entitles a defendant to a jury trial, with a beyond-a-reasonable-doubt standard of proof, as to “any fact that increases the mandatory minimum” sentence for a crime.’ [Citation.] The denial of a recall petition does not increase the mandatory minimum sentence for a defendant’s crime.” (*Guilford, supra*, at pp. 662-663; see *Hicks, supra*, 231 Cal.App.4th at p. 286 [the court properly makes factual determinations for purposes of deciding eligibility for resentencing under section 1170.126].) Nothing defendant argues persuades us otherwise.

H. *Pleading and Proof Requirement*

Defendant further claims that he is eligible for resentencing because an arming allegation was not pleaded and proved by the prosecution in the underlying case. We again disagree.

“Several published cases have held that the [] Act does not contain a pleading and proof requirement with respect to factors that disqualify defendants from resentencing” (*People v. Chubbuck* (2014) 231 Cal.App.4th 737, 745.) Indeed, we so held in *Brimmer, supra*, 230 Cal.App.4th at pages 802-803. There is an express pleading and proof requirement for both the existence of prior strike convictions and disqualifying factors in the initial sentencing of a new offense under the Act. (*Brimmer*, at pp. 802-803, citing §§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C); accord, *Guilford, supra*, 228 Cal.App. 4th at pp. 656-657.) There is no such express provision in section 1170.126 for recall and resentencing of a strike conviction. (*Brimmer*, at p. 803.)

Nor does the absence of a pleading and proof requirement violate defendant’s constitutional rights to due process or a jury trial. (*Brimmer, supra*, 230 Cal.App.4th at pp. 803-804.) Determining whether an inmate is eligible for resentencing under section 1170.126 is not analogous to provisions that enhance a defendant’s sentence beyond the statutory maximum but provides for downward modification of the original sentence, so factfinding in that proceeding does not implicate Sixth Amendment issues. (*Kaulick, supra*, 215 Cal.App.4th at pp. 1302-1304; *Brimmer, supra*, at pp. 804-805.)

Defendant argues that because the theory presented by the prosecutor at trial was “the broad concept of possession,” i.e., that defendant had constructive possession or control of the gun based on the gun being in the car, the jury did not decide defendant was armed and there was no reason for defendant to argue he was not armed. This argument has previously been rejected. In *Elder*, the court rejected the argument that it

would be improper for the trial court to find a defendant ineligible based on facts for which there was no incentive to litigate in the underlying proceeding in the absence of a pleading and proof requirement. (*Elder, supra*, 227 Cal.App.4th at p. 1316.) In determining whether defendant is eligible for resentencing pursuant to section 1170.126, the theory of possession of a firearm does not matter; what matters is whether there is substantial evidence in the record from which the trial court could reasonably find that defendant was “armed with a firearm” during the commission of that offense.

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:

McKINSTER
J.

MILLER
J.