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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT CAVALIER, Defendant and Appellant.	B269617 (Los Angeles County Super. Ct. No. BA092651)

APPEAL from a judgment of the Superior Court of Los Angeles County. William C. Ryan, Judge. Affirmed.

Susan Wolk, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Robert Cavalier (defendant) appeals from the trial court's order denying his petition for resentencing on the ground that he was ineligible for relief under Proposition 36. He contends that the trial court erred in finding facts that were not encompassed by the verdict in his underlying conviction, that substantial evidence did not support the court's finding that he was armed with a deadly weapon during the commission of the offense, that the trial court erred in applying the preponderance of the evidence standard of proof rather than the reasonable doubt standard, that he was entitled to a jury on the issue of whether he was armed with a deadly weapon, that his life sentence is cruel and unusual, and that he was denied effective assistance of counsel. Although we conclude that the trial court should have applied a reasonable doubt standard of proof, we find the error harmless. As there is no merit to defendant's remaining contentions, we affirm the judgment.

BACKGROUND

In 1994, defendant was convicted of possession of a deadly weapon in jail, a shank, in violation of Penal Code section 4574, subdivision (a).[1] He also admitted two prior serious felony convictions within the meaning of the "Three Strikes" law (§ 667, subds. (b)-(i)), and two prior prison terms within the meaning of section 667.5, subdivision (b). He was sentenced to a total prison term of 27 years to life. In 2013, defendant petitioned in pro. per. for a recall of sentence under section 1170.126, the Three Strikes Reform Act (the Act, or Proposition 36). After the appointment of counsel, a second petition was filed. The trial court made an initial eligibility finding and issued an order to show cause. The People submitted opposition to the petition, asserting that

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

defendant was ineligible and unsuitable for relief. After reviewing the petition, supporting and opposition papers, the record of conviction, and hearing argument of counsel, the trial court took the matter under submission. On October 22, 2015, the court issued a memorandum of decision finding that because defendant had been armed with a deadly weapon during the commission of the commitment offense, he was statutorily ineligible for recall and resentencing. The court thus denied the petition, and defendant filed a timely notice of appeal from the court's order.

Findings

The trial court had before it the record on appeal from defendant's 1994 conviction, including the clerk's and reporter's transcripts, as well as this court's opinion affirming defendant's conviction. (See *People v. Cavalier* (Nov. 13, 1996, B091341) [nonpub. opn.].) In its memorandum of decision, the court summarized the relevant evidence adduced at the 1994 trial. The court then found in relevant part as follows:[2]

> "[Defendant] was properly found guilty of possessing a deadly weapon in jail in violation of section [4574], subdivision (a). The weapons were two six-inch toothbrush handles that [defendant] had modified by removing the bristles from the heads and sharpening the opposite ends into points. Although a toothbrush cannot normally be considered a deadly weapon, a toothbrush whose bristles are removed is no longer a toothbrush. By removing the bristles and sharpening the handles into points, [defendant] essentially redesigned them into weapons. [Defendant] has made a fanciful argument that he modified the toothbrushes for use as styluses, but there is no evidence to support that claim other than

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[2] The court's record citations have been omitted.

[defendant's] self-serving statements. None of the deputies had ever seen [defendant's] artwork in his cell or observed [him] using the toothbrushes in his artwork. There is also no evidence that [defendant] used the toothbrush handles as styluses in his artwork. Based on the record, the Court finds that [defendant's] modified toothbrush handles are deadly weapons per se."

"Even if [defendant's] modified toothbrush handles are not deadly weapons as a matter of law, the Court nevertheless finds that the toothbrush handles can still be considered deadly weapons. The record shows that the modified toothbrush handles are capable of being used in a deadly or dangerous manner. [Los Angeles County Sheriff's] Deputy [Steven] Turpen and Deputy [Steven] McKeller both testified that they had seen similarly modified toothbrush handles used as weapons in the jail. The deputies also testified that similarly modified toothbrush handles are capable of causing severe puncture wounds, including punctured lungs, eye stabbings, and heart stabbings."

"The record also shows that [defendant] intended to use the toothbrushes in a deadly or dangerous manner. [Defendant] was put on notice that inmates are only permitted to possess one toothbrush at a time. [Defendant], however, kept two toothbrushes in his cell and proceeded to sharpen the handles into points. [Defendant] conceded at trial that his toothbrush handles could be used to injure other people. [Defendant] then concealed his possession of the toothbrush handles by hiding them underneath his mattress. During his interview with Deputy [Charles] Brittain, [defendant] denied that the toothbrush handles were his. Shortly after [defendant] was transferred into a new cell, Deputy [Allen] Miller discovered a six-inch metal shank

> concealed in the vent of [the] cell. Deputy [Miguel] Cervantes searched the cell and its vents before [defendant] moved into it, and Deputy Miller believed the shank had recently been put in the vent based on the condition of the shank. Given that [defendant] knowingly broke the jail rules to possess the two toothbrushes, sharpened the toothbrush handles, concealed them underneath his mattress, denied possessing them to the investigating deputy, and was then later found concealing a metal shank in the vent of his new cell, the Court concludes that [defendant] intended to use the toothbrush handles in a dangerous or deadly manner."

The trial court concluded: "Based on the record of conviction, the Court finds that [defendant's] two toothbrush handles are 'deadly weapons' within the meaning of Penal Code sections 667(e)(2)(C)(iii) and 1170.12(c)(2)(C)(iii). Given that the toothbrushes were concealed underneath [defendant's] mattress, and were thus readily available to be used as weapons, the Court also finds that [defendant] was 'armed' within the meaning of Penal Code sections 667(e)(2)(C)(iii) and 1170.12(c)(2)(C)(iii)."

DISCUSSION

I. Arming exception to eligibility

Defendant contends that the trial court erred in finding him ineligible for resentencing. Under Proposition 36, an inmate serving an indeterminate third-strike term for a crime that is not a serious or violent felony may petition for resentencing to a second-strike term, unless his third-strike offense comes within one of the exceptions to eligibility. (§ 1170.126, subd. (e); *People v. White* (2014) 223 Cal.App.4th 512, 522.) As relevant here, one of those exceptions applies when "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm or

deadly weapon . . . ." (§§ 1170.12, subd. (c)(2)(C)(iii), 667, subd. (e)(2)(C)(iii), 1170.126, subd. (e)(2).)

Defendant was convicted under section 4574, subdivision (a), which provides in relevant part: "[A]ny person who, while lawfully confined in a jail . . . possesses therein any firearm, deadly weapon, explosive, tear gas or tear gas weapon, is guilty of a felony . . . ." "The elements of possession of a deadly weapon in county jail . . . are: (1) possession (2) of a deadly weapon, (3) without authorization, (4) by one lawfully committed to county jail." (*People v. Rodriquez* (1975) 50 Cal.App.3d 389, 395, fn. omitted.) "A defendant possesses a weapon when it is under his dominion and control. [Citation.] A defendant has actual possession when the weapon is in his immediate possession or control. He has constructive possession when the weapon, while not in his actual possession, is nonetheless under his dominion and control, either directly or through others. [Citations.]" (*People v. Pena* (1999) 74 Cal.App.4th 1078, 1083-1084.)

A conviction of possession of a firearm or deadly weapon does not automatically disqualify a defendant from resentencing. (See *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048 [firearm] (*Blakely*).) To render a defendant ineligible for resentencing, it must appear from the record that the defendant was not only in possession of the weapon, but was also "armed" with the weapon at the time. (*Id.* at pp. 1052.)

Defendant challenges both the court's finding that the weapon he possessed was a "deadly weapon," and the finding that he was "armed" when he possessed the weapon.

II. Permissible judicial fact finding

Defendant first argues that the trial court was precluded from finding any fact that was not encompassed by the verdict, and that the court thus erred in looking beyond the express or implied findings of the jury. He argues that in effect, the trial

court improperly relitigated the circumstances of the crime. Defendant relies on an extensive discussion of *People v. Guerrero* (1988) 44 Cal.3d 343 (*Guerrero*), where the California Supreme Court held that "in determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction," but may not relitigate the circumstances of the crime by looking beyond the record of conviction. (*Id.* at p. 355.)

In making Proposition 36 eligibility determinations, the trial court is required "to make a factual determination that is not limited by a review of the particular statutory offenses and enhancements of which petitioner was convicted." (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332.) And the *Guerrero* rule does not bar the trial court from making findings of fact drawn from the entire record of conviction. (*People v. Estrada* (2017) 3 Cal.5th 661, 672 (*Estrada*); see also *People v. Cruz* (2017) 15 Cal.App.5th 1105, 1110 (*Cruz*).)

In *Estrada*, as respondent has pointed out, the California Supreme Court rejected an argument similar to the one being made by defendant, holding that a trial court is not precluded from considering facts beyond those encompassed by the verdict or a guilty plea, and is not limited to drawing conclusions gleaned from findings implied by the elements of the offense. (*Estrada*, *supra*, 3 Cal.5th at pp. 669-671.) For example, when the court must determine whether the defendant was armed *during* the commission of the offense where, as here, there was no firearm enhancement, limiting the court to the jury's specific findings "would be inconsistent with the text, structure, and purpose of sections 1170.12, subdivision (c)(2)(c)(iii) and 1170.126, subdivision (e)(2) -- and would, by consequence, impose an unnecessary limitation." (*Estrada*, *supra*, at p. 672, see also pp. 670-671.) Since defendant was convicted on his plea of guilty in the underlying case, the trial court properly drew conclusions

from the testimony given at the preliminary hearing. (See *Estrada*, at pp. 667-669, 674-676.)

In sum, the trial court may determine eligibility for resentencing, and is allowed to review all relevant, reliable, admissible facts in the record of conviction (*Blakely*, *supra*, 225 Cal.App.4th at p. 1049), including the trial testimony and the appellate opinion affirming the defendant's conviction. (*Cruz*, *supra*, 15 Cal.App.5th at p. 1110.) The court may determine from the entire record of conviction whether the defendant was armed or used a deadly weapon during the commission of the offense in cases where such a finding was not required for conviction. (*Estrada*, *supra*, 3 Cal.5th at pp. 670-673.) Thus, the trial court in this case properly looked to the evidentiary record of defendant's 1994 trial to find that defendant was armed with a deadly weapon during the commission of his crime.

III. Defendant possessed a deadly weapon

Defendant contends that substantial evidence did not support the court's finding that the sharpened toothbrush handles were deadly weapons. Defendant observes that a toothbrush is not inherently deadly or a deadly weapon per se. He argues that other than objects that are deadly weapons as a matter of law, the definition of deadly weapon within the meaning of sections 667, subdivision (e)(2)(C)(iii) and 1170.12, subdivision (c)(2)(C)(iii) is more narrow than the definition for purposes of section 4574. In particular, defendant contends that when an object has both an innocent use and a dangerous use, the evidence must establish that the defendant had the specific intent to use the object as a weapon.

Findings of ineligibility are reviewed under the usual substantial evidence standard. (*People v. Guilford* (2014) 228 Cal.App.4th 651, 661 (*Guilford*).) Under that standard, we "view the evidence in the light most favorable to the People and must

presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

In determining whether an object not inherently deadly or dangerous is a deadly weapon, "the trier of fact may consider the nature of the object, [including] the manner in which it is used, and all other facts relevant to the issue. [Citations.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1029.) Thus, in cases alleging assault with a deadly weapon, the manner in which the object is used may demonstrate that it is a deadly weapon. (*Ibid.*; see also *People v. Brown* (2012) 210 Cal.App.4th 1, 6-7.) Exhibiting a dangerous object with the *intent* to use it to effect another crime may also be sufficient. (See *People v. Pruett* (1997) 57 Cal.App.4th 77, 85-88 (*Pruett*) [resisting arrest, robbery, assault].) Thus, proof of the specific intent to facilitate an assaultive crime with the object obviates the need to further define "deadly weapon." (Id. at p. 85-86; *People v. Martinez* (1998) 67 Cal.App.4th 905, 912-913 (*Martinez*).)

On the other hand, to prove that an object is a deadly weapon for purposes of section 4574, when that object has both an innocent use and a dangerous use, evidence of such facts as the manner in which the object is used or the intent with which it is used is unnecessary. (*Martinez*, *supra*, 67 Cal.App.4th at pp. 911-912; *People v. Savedra* (1993) 15 Cal.App.4th 738, 744-745.) "Within the meaning of this penal statute, an object is a deadly weapon if it has a reasonable potential of inflicting great bodily injury or death. [Citations.]" (*People v. Pollock* (2004) 32 Cal.4th

1153, 1178, citing *Martinez*, *supra*, at p. 912 and *People v. Savedra*, *supra*, at p. 745.)

Relying on *Martinez*, defendant makes the puzzling assertions that "the definition of armed with a deadly weapon within the meaning of Proposition 36 is a specific intent crime," and that to prove that an otherwise innocent instrument is a deadly weapon, the "evidence in the record of conviction has to demonstrate . . . that . . . the defendant *intended* to use it in such a manner." Although the basis of ineligibility for resentencing can be a specified crime, the exception applied here is not a *crime*, as defendant asserts. The exception merely describes the disqualifying *circumstance* that "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm or deadly weapon." (§§ 1170.12, subd. (c)(2)(C)(iii), 667, subd. (e)(2)(C)(iii), 1170.126, subd. (e)(2).) The statute does not define deadly weapon and does not require a specific intent to be armed with a deadly weapon, and there is nothing in the authority on which defendant relies to suggest otherwise.

We thus conclude that in determining whether the toothbrushes were deadly weapons for purposes of section 1170.126 ineligibility, the trial court correctly considered all relevant facts. Moreover, viewing the evidence in the light most favorable to the trial court's ruling, substantial evidence showed not only that the toothbrushes could be deadly, but also that defendant *intended* the modified toothbrushes to be used as weapons, not art styluses as he claimed.

First, substantial evidence established the deadly nature of the toothbrushes. Both Deputies Turpen and McKeller had seen similarly sharpened toothbrushes used by inmates to stab another inmate, causing deep puncture wounds. Based on his education and experience, it was Deputy McKeller's opinion that defendant's sharpened toothbrushes were capable of inflicting

death on another person. Second, the circumstances sufficiently suggested that defendant did not intend an innocent use for the toothbrushes. He admitted that he had removed the bristles and sharpened the toothbrushes, that one of them could be used to inflict injury, and that he kept them, concealed under his mattress in his cell, knowing they were not allowed. Further, after defendant was deprived of the ability to use his sharpened toothbrushes as weapons, a recently crafted metal shank was found hidden in a vent in defendant's new cell. Such facts give rise to the compelling inference that defendant sharpened and hid the metal shank for use as a weapon as a replacement for the seized weapons he had fashioned from toothbrushes. Substantial evidence thus supports the trial court's findings that the modified toothbrushes were deadly weapons within the meaning of section 1170.12, subdivisions (c)(2)(C)(iii), and 667, subdivisions (e)(2)(C)(iii), and for purposes of the eligibility exception of 1170.126, subdivision (e)(2).

IV. Defendant was "armed"

A. Ready access

Defendant contends that he was not "armed" because he had constructive, rather than actual physical possession of the weapon, and was handcuffed outside his cell during the search, insuring that the weapon was not readily accessible *at the time it was discovered*.

A conviction of the unlawful possession of a deadly weapon does not render a petitioner ineligible for resentencing under Proposition 36 unless the record also establishes that he was armed with the weapon at the time of the possession. (See *Blakely*, *supra*, 225 Cal.App.4th at pp. 1048, 1052 [firearm].) "A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively . . . . '[I]t is the availability -- the ready access -- of the weapon that constitutes

arming.' [Citation.]" (*People v. Bland* (1995) 10 Cal.4th 991, 997.) A defendant is ineligible for resentencing if he had such ready access "'*during* the commission of' the current offense . . . or 'at some point in the course of [the offense]' [Citation.]" (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1032 (*Osuna*), disapproved on another point in *People v. Frierson* (2017) 4 Cal.5th 225, 240, fn. 8 (*Frierson*); §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii); see also *Cruz, supra*, 15 Cal.App.5th at p. 1111; *People v. Hicks* (2014) 231 Cal.App.4th 275, 284-285 (*Hicks*); *People v. Brimmer* (2014) 230 Cal.App.4th 782, 798-799 (*Brimmer*).)

Defendant attempts to distinguish these cases on the ground that those defendants were observed to be in *physical* possession of the weapons at the time of the offense. We do not read a requirement that a defendant cannot be found to have been armed without the observation by a percipient witness who can attest that he possessed a weapon and had ready access to it. Nor do we discern such a rigid definition of ready access as meaning only located on the physical person of the possessor, regardless of its proximity to him or how easily he could access it, or a rule that accessibility cannot be proven with circumstantial evidence.

Rather, the point raised by the cited cases is that a defendant is armed for purposes of resentencing ineligibility if he had the weapon within ready access *sometime during the time* that he unlawfully exercised dominion and control over it. (See *People v. Valdez* (2017) 10 Cal.App.5th 1338, 1349-1353, review granted (S242240, Aug. 9, 2017), and briefing suspended pending publication of *Frierson*, *supra*, 4 Cal.5th 225.) We agree with the *Valdez* court that a "person is no less culpable for the offense just because he was not caught in the act and arrested at the time and place where the crime was committed. Similarly, where . . .

a defendant constructively possessed a weapon and simultaneously had it available for use offensively or defensively, he was armed at that point in time, and it does not matter that he was later detained in some place other than where the arming had previously taken place. He still had the weapon available for use at the earlier point in time. Thus, if he is charged with possession alleged to have taken place at that earlier time and convicted, he may also be deemed armed at that earlier time for purposes of the arming exception, rendering him ineligible for resentencing under the Act." (*Valdez*, *supra*, at pp. 1356-1357.)

Here, defendant occupied a single-person cell, and the toothbrush weapons were under his mattress. Deputy Turpen testified that jail mattresses were two feet wide, thin, and easily rolled up. The width of the cell from bars to back wall where the bed was located was 8 to 10 feet. It follows that while defendant was in his cell, he not only had dominion and control of the weapons, he had "ready access" to them, and was thus armed *during the commission of the offense* of possession of a deadly weapon, regardless of where he was when the discovery was made by the deputies. Substantial evidence thus supported a finding that defendant was armed during the commission of the offense of possession of a deadly weapon in jail.

B. Facilitative nexus

Defendant contends that one cannot be in possession of a weapon and armed with the same weapon, when unlawful possession was the sole crime. He argues that he was not armed because his constructive possession of the weapon was not "tethered" to a separate offense, and there was no "facilitative nexus" to the crime.

"[S]ection 1170.12, subdivision (c)(2)(C)(iii) provides only one express nexus requirement between these general descriptive terms and the inmate's prior offense: the excluding conduct must

occur '[*d]uring* the commission' of the offense. [Citation.] The term 'during' suggests temporal overlap: something that occurs throughout the duration of an event or at some point in its course. [Citation.] The term implies, at a minimum, a need for a temporal connection between the excluding conduct and the inmate's offense of conviction. Although the need to establish such a nexus imposes certain limits on the applicability of the firearm-related exception, the Act could certainly have imposed an even stricter requirement for triggering the exception . . . [such as] a 'facilitative nexus' requirement . . . [but] the Act does not do so." (*Estrada*, *supra*, 3 Cal.5th at p. 670.)

Thus, such factors as tethering and facilitative nexus are relevant to a sentence enhancement added to the punishment imposed for a separate crime when a principal was "armed with a firearm in the commission of" the separate crime. (See § 12022, subd. (a)(1); *People v. Bland*, *supra*, 10 Cal.4th at p. 999.) However, for purposes of resentencing eligibility under section 1170.126, such factors are not essential to the question whether a person convicted of unlawful possession of a weapon was armed during the offense for which a third-strike sentence was imposed, as appellate courts have consistently held. (See *Cruz, supra*, 15 Cal.App.5th at pp. 1111-1112; *People v. White* (2016) 243 Cal.App.4th 1354, 1359; *Hicks*, *supra*, 231 Cal.App.4th at pp. 284-285; *Brimmer, supra*, 230 Cal.App.4th at pp. 792-793; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1317; *Osuna*, *supra*, 225 Cal.App.4th at p. 1030.) We agree with the reasoning of the cited cases, and defendant has cited no published decision disagreeing with them. Therefore we conclude that "there must be a temporal nexus between the arming and the underlying felony, not a facilitative one." (*Hicks*, *supra*, at p. 284.)

Defendant also contends that a denial of resentencing for those convicted of possession of a deadly weapon in jail does not

further the objectives of Proposition 36 of making the punishment fit the crime, making room in prison for dangerous felons, and saving taxpayer money. He argues that the construction of "armed" in the above-cited cases would run counter to such objectives "by broadening the class of inmates determined to be ineligible for recall [and] serve only to exclude inmates who were otherwise not dangerous."

First, we reject any suggestion that an incarcerated felon who manufactures a deadly weapon and secretes it in a readily accessible area of his cell is not dangerous. Possession of a deadly weapon is dangerous both inside and outside jail, but particularly dangerous in jail. (See *Martinez*, *supra*, 67 Cal.App.4th at pp. 911-912.) Indeed, although defendant did not use the weapon, the "'mere possession of a potentially dangerous weapon in custody involves an implied threat of violence . . . .' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1082 [aggravating factor under section 190.3].)

Second, we reject defendant's contention that the prevailing definition of armed would be counter to the objectives of Proposition 36. Defendant argues that "in passing [Proposition 36], the electorate intended the disqualifying factors in [sections 667, subdivision (e)(2)(C)(iii) and 1170.12, subdivision (c)(2)(C)(iii)] to have a broader reach than the enhancements that they mirror." Defendant directly cites *Osuna*, *supra*, 225 Cal.App.4th at p. 1034, and *Blakely*, *supra*, 225 Cal.App.4th at p. 1055, to support his assertion; however, there is no such language in either case, and neither case construed those sections as mirroring sentence enhancements. Moreover, both cases extensively analyzed the history of Proposition 36 to reject arguments that the voters intended to require a tethering offense as required for enhancements. (*Osuna*, at pp. 1034-1040; *People*

v. Blakely, at pp. 1055.) We agree with their analyses and reject defendant's contention.

V. Burden of Proof

Defendant contends that the trial court erred in applying the preponderance of the evidence standard of proof to its factual findings, instead of requiring proof beyond a reasonable doubt.[3]

The California Supreme Court has recently resolved a conflict among courts of appeal regarding the proper standard of proof for ineligibility criteria under section 1170.126, by holding that the statute implies that the degree of proof required is beyond a reasonable doubt. (*Frierson*, *supra*, 4 Cal.5th 225.) The court's opinion was published after briefing was complete in this case, and in opposing defendant's contention, respondent relied primarily on *Osuna*, which was disapproved on that point in *Frierson*, at p. 240, fn. 8.)

Nevertheless, we agree with respondent that any error in applying an erroneous standard of proof was harmless. The court's reasoning in *Frierson* was based solely on its construction of the Three Strikes Reform Act, and thus on state law, and the court expressly declined to address the defendant's contention that federal due process required application of the reasonable doubt standard. (*Frierson*, *supra*, 4 Cal.5th at p. 239, fn. 7.) Absent a violation of due process, state law error is generally subject to the traditional test of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), under which it is the defendant's burden to demonstrate prejudice by establishing a reasonable probability

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[3] After setting forth its findings in the memorandum of decision, the trial court stated its disposition as follows: "For the foregoing reasons, the Court finds by a preponderance of the evidence that [defendant] is NOT ELIGIBLE for resentencing."

that the error affected the result. (*People v. Partida* (2005) 37 Cal.4th 428, 439.)[4]

Defendant contends that the error was prejudicial, because the evidence was not without conflicts, but he cites no authority for the proposition that under the *Watson* standard, the evidence must be without conflict. Regardless, the only conflicts cited by defendant relate to defendant's testimony in his 1994 trial, that he kept the modified toothbrushes in a box above his desk with his art supplies, not under his mattress as the deputies claimed, and that he used them as styluses to create art, not as weapons. As defendant admitted that one of the modified toothbrushes could be used to inflict injury and that he kept them in his single-inmate cell, he knowingly had dominion and control over items that could be used as weapons. His claim that he did not intend them to be weapons, was placed in doubt with the testimony of Deputies Cervantes and Miller. After the sharpened toothbrushes had been seized, defendant was moved to a new cell, which Deputy Cervantes first inspected, including the vent, but found no contraband; then, in a later search, Deputy Miller found a metal shank in the vent with a retrieval string. The metal shank appeared to have been recently crafted, as it was shiny, with no dust, rust or cobwebs.

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[4] Finding no published authority regarding the standard of review under the precise circumstances here, we found the reasoning in *People v. Williams* (2010) 49 Cal.4th 405, to be instructive. There, the California Supreme Court held as a matter of state law that consideration of prior felony convictions as circumstances in aggravation during sentencing required proof beyond a reasonable doubt. (*Id.* at p. 459.) However, as the error constituted a violation of state law, not federal constitutional law, such an error would be harmless unless "it was reasonably possible that the omission affected the verdict. [Citation.]" (*Ibid.*)

Both Deputies Turpen and McKeller were present during the search of defendant's single-inmate cell when the sharpened toothbrushes were observed and retrieved from under the mattress. Both deputies had seen a similarly sharpened toothbrush used by one inmate to stab another, causing deep puncture wounds. Deputy Turpen had been taught in the academy to recognize shanks such as sharpened toothbrushes, and had witnessed injuries from stabbings with similar instruments, including stabbings of the eyes, heart, and lung. Based on such education and experience, it was Deputy McKeller's opinion that defendant's sharpened toothbrushes were capable of inflicting death on another person.

In sum, the evidence overwhelmingly supported the trial court's findings that defendant's sharpened toothbrush was a deadly weapon, that defendant intended it to be a weapon, and that he was in knowing possession of it while in his cell. We conclude beyond a reasonable doubt that the trial court would have reached the same result under either the preponderance standard or reasonable doubt standard. The error was thus harmless whether tested under the *Watson* standard for state-law error or under the standard for federal constitutional error of *Chapman v. California* (1967) 386 U.S. 18, 24.

VI. Jury trial

Defendant contends that under the Sixth Amendment to the United States Constitution, he was entitled to a jury trial on the issue of whether he was armed during the commission of the current offense and whether the toothbrush handles were deadly weapons.

Section 1170.126, subdivision (f), expressly provides that it is the *court* that must determine whether a petitioner satisfies the criteria for resentencing. (*Blakely*, *supra*, 225 Cal.App.4th at p. 1059.) The contention that the Sixth Amendment mandates a

jury trial has been repeatedly rejected by appellate courts, which have held the rules of *Alleyne* and *Apprendi* does not apply to a determination of eligibility for resentencing under Proposition 36. (See, e.g., *Brimmer, supra*, 230 Cal.App.4th at pp. 802-805; *Guilford, supra,* 228 Cal.App.4th at p. 662; *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1304-1305 (*Kaulick*).) Defendant makes no effort to cite such cases or to distinguish them. Instead he relies on the line of cases following *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), including the more recent case, *Alleyne v. United States* (2013) 570 U.S. 99 (*Alleyne*.)

Apprendi held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at p. 490.) In *Alleyne*, the United States Supreme Court held that the Sixth Amendment also requires that facts that increase mandatory *minimum* sentences must also be submitted to the jury. (*Alleyne*, *supra*, 570 U.S. at p. 116.) Prior to the publication of *Alleyne*, "the United States Supreme Court ha[d] 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. [Citation.]" (*Kaulick*, *supra*, 215 Cal.App.4th at p. 1304, citing *Dillon v. United States* (2010) 560 U.S. 817, 827-829.) In *Dillon*, the Court held that downward sentence modifications under amendments to the federal Sentencing Guidelines did "not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt. Taking the original sentence as given, any facts found by a judge at [such a] proceeding do not serve to increase the prescribed range of punishment." (*Dillon*, *supra*, at p. 828.) Such legislative acts of

lenity, intended to give prisoners the benefit of later enacted adjustments to sentencing guidelines, are not constitutionally compelled. (*Ibid*.)

Similarly, a jury determination is not required under section 1170.126, subdivision (f), because a finding that an inmate is not eligible for resentencing, leaves in place the original sentence without increasing the penalty. (*Brimmer, supra*, 230 Cal.App.4th at pp. 802-805; *Guilford, supra*, 228 Cal.App.4th at pp. 662-663; *Kaulick, supra*, 215 Cal.App.4th at pp. 1304-1305.) We conclude that defendant was not entitled to a jury trial.

VII. Cruel or unusual punishment

Defendant contends that under factors considered in *People v. Dillon* (1983) 34 Cal.3d 441, and *In re Lynch* (1972) 8 Cal.3d 410, his life sentence is cruel and unusual. Petitions under Proposition 36 must be initially filed in the trial court, and it is that court which must first determine whether the petitioner satisfies the criteria for eligibility. (§ 1170.126, subds. (b) & (f).) As defendant did not present this issue in a petition filed in the trial court, it may not be presented for the first time here.

Moreover, the statute expressly provides that it is not "intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." (§ 1170.126, subd. (l).) This issue does not fall within the purview of the act, and further, it was resolved against defendant in his appeal from the original judgment. (See *People v. Cavalier*, *supra*, B091341) [nonpub. opn.].) The opinion in that appeal was filed in November 1996, and became final on January 16, 1997. Under ordinary principles of res judicata, the issue may not be relitigated now. (See generally, *People v. Barragan* (2004) 32 Cal.4th 236, 252-253.)

VIII. Assistance of counsel

Defendant contends that in the event that his reasonable doubt contention is deemed forfeited, and to the extent counsel argued below that the correct standard of proof was a preponderance of the evidence, he was denied effective assistance of counsel guaranteed under the Sixth Amendment. As we did not deem the issue forfeited, but instead found any error in the trial court's application of the wrong standard to have been harmless, defendant was not prejudiced by the error. Defendant's ineffective assistance claim must be rejected. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT