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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. CURTIS EUGENE MILLER, Defendant and Appellant.	B266611 (Los Angeles County Super. Ct. No. YA031024)

APPEAL from an order of the Superior Court of Los Angeles County, William Ryan, Judge. Affirmed.

Jonathan B. Steiner and Nancy Gaynor, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior

Assistant Attorney General, Noah P. Hill and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

In 1997, appellant Curtis Eugene Miller was convicted of possession of a firearm by a felon and sentenced to a term of 25 years to life as a "three strike" offender. In the underlying action, the trial court denied appellant's motion under Penal Code section 1170.126 to be resentenced pursuant to the Three Strikes Reform Act of 2012 (Reform Act).[1] We reject his challenges to that ruling and affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. *1997 Conviction*

In 1996, appellant was charged with being a felon in possession of a firearm (former § 12021, subd. (a)(1)).[2] Accompanying the charge were allegations that appellant had suffered two prior convictions constituting strikes under the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

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1 All further statutory citations are to the Penal Code.

2 The offense of being a felon in possession of a firearm is now codified in section 29800, subdivision (a)(1).

At trial, the prosecution presented evidence that on November 30, 1996, Los Angeles County Sheriff's Department Deputy Sheriffs Ralph Hernandez and Jeffrey Cale were on routine patrol when they saw a car turn at an intersection without stopping for a red light or signaling. The car held three occupants, including appellant, who was in the right front passenger seat. The deputy sheriffs directed the car to stop and then walked toward it from their patrol car.

As the deputy sheriffs approached the car, they ordered its occupants to show their hands. Although the driver and a passenger in the rear seat immediately complied, appellant looked in the deputy sheriffs' direction, turned back, and leaned forward in his seat. Deputy Sheriff Cale saw that appellant's hands were between his thighs. Moments later, appellant showed his hands. After the deputy sheriffs ordered the car's occupants to leave it, they found a loaded and operational handgun wedged between the back cushion and seat cushions of the right front passenger seat.

Appellant presented testimony from Walter McMillan, who was the passenger in the car's rear seat. McMillan stated that when the deputy sheriffs directed the car to stop, its driver said that he had a gun, moved his hand toward appellant, and asked appellant "to get rid of it . . . ." According to McMillan, he did not see a gun, but heard a "thump" on appellant's seat.

In rebuttal, the prosecution called Deputy Sheriff Cale, who testified that when the deputy sheriffs found the gun, McMillan said that he had no knowledge of it.

On April 3, 1997, a jury found appellant guilty of being a felon in possession of a firearm. After finding true the allegations that appellant had suffered convictions for kidnapping and robbery in 1980, the trial court sentenced him to a term of 25 years to life under the Three Strikes law. In an unpublished opinion, this court affirmed the judgment. (*People v. Miller* (Jan. 22, 1999, B118475).)

B. *Petition for Recall of Sentence*

In 2012, the electorate enacted the Reform Act by approving Proposition 36. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 169-170.) The Reform Act amended the Three Strikes law to provide that absent specified exceptions, an offender with two or more prior strikes is to be sentenced as a two strike offender unless the new offense also is a strike, that is, a serious or violent felony.[3] (See *ibid.*) The Reform Act also added section 1170.126, which creates a post-conviction resentencing proceeding for specified inmates sentenced under the prior version of the Three Strikes law. (*Yearwood, supra,* at pp. 169-170.)

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[3] Generally, an offense is a "strike" if it is either a "violent felony" under section 667.5, subdivision (c), or a "serious felony" under section 1192.7, subdivision (c). (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1525.)

Under that statute, a defendant sentenced as a three strike offender may petition for recall of the sentence and for resentencing, but is subject to certain eligibility criteria. (§ 1170.126, subd. (e).)

In March 2013, appellant filed a petition for resentencing pursuant to section 1170.126. On August 17, 2015, the trial court denied the petition with prejudice, concluding that appellant was ineligible for resentencing because he was armed with a firearm during his commission of the offense of being a felon in possession of a firearm (§§ 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2)). This appeal followed.

DISCUSSION

Appellant contends the trial court erred in finding him ineligible for resentencing under an exclusion that applies if "[d]uring the current offense, [that is, the offense which the resentencing petition targets] the defendant . . . was armed with a firearm or deadly weapon . . . ." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2); see *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1327 (*Bradford*).) Appellant maintains (1) that the court improperly made an independent finding regarding the eligibility fact relating to being armed with a firearm, (2) that the standard of proof for the eligibility fact is proof beyond a reasonable doubt, and (3) that the exclusion should not be construed so as "to render a person convicted of unlawful weapon possession ineligible for a recall of sentence

based solely upon his access to [a] weapon . . . ." For the reasons discussed below, we reject his contentions.

A. *Independent Determination of Eligibility Fact*

We begin with appellant's challenge to the court's independent determination of the crucial eligibility fact, namely, that appellant was armed with a firearm during his commission of the offense of being a felon in possession of a firearm.[4] As the resentencing statute does not require that

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[4] To the extent appellant presents an issue of statutory interpretation, our inquiry applies established principles. "'In interpreting a voter initiative like [the Reform Act], we apply the same principles that govern statutory construction. [Citation.]' [Citation.] '"The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]"' [Citation.] 'In determining intent, we look first to the words themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citations.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]' [Citation.] We also "'refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." [Citation.]' [Citation.]" (*People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1014 (*Cervantes*).)

eligibility facts have been resolved by the verdicts or special findings rendered at trial, many decisions have concluded that the trial court may independently examine the record of conviction in order to make determinations regarding those facts.[5] (E.g., *People v. White* (2014) 223 Cal.App.4th 512, 526-527 (*White*); *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1028-1040 (*Osuna*); *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048; *People v. Manning* (2014) 226 Cal.App.4th 1133, 1139-1144; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1314-1336 (*Elder*); *Bradford*, *supra*, 227 Cal.App.4th at pp. 1338-1340; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 799-801 (*Brimmer*); *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-286 (*Hicks*).) This court reached the same conclusion in a recent decision (*People v. Frierson* (2016) 1 Cal.App.5th 788, 791-793, review granted Oct. 19, 2016, S236728 (*Frierson*).)

Instructive discussions are found in *Bradford, Osuna,* and *Hicks.* 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*,

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[5] 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, 1579-1580.)

supra, 227 Cal.App.4th at pp. 1329-1330.) He was convicted of three counts of robbery, 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 robberies. (*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.) As the court noted, the eligibility criteria did not describe or "clearly equate to" any offenses or enhancements. (*Id*. at p. 1332.) In discussing the independent factual determinations, the 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. (*Id*. at p. 1337.) The court thus looked for guidance to a line of cases addressing that task stemming from *People v. Guerrero* (1988) 44 Cal.3d 343, 355 (*Guerrero*), 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, supra,* 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*.) The court otherwise found it unnecessary to decide whether *Guerrero* and its progeny governed other issues applicable to the eligibility determination.[6] (*Id*. at pp. 1339-1340, 1336-1337.)

In *Osuna*, the defendant drove his car at an excessive speed and refused to yield to a police officer who tried to pull him over. (*Osuna*, *supra*, 225 Cal.App.4th at p. 1027.) The defendant eventually stopped, left his car while holding a gun, and fled into a house. (*Ibid*.) When arrested, he denied having a gun, and said that he had been carrying a cell phone. (*Ibid*.) After arresting the defendant, officers found an unloaded nine-millimeter gun hidden in the house and nine-millimeter ammunition in the car. (*Ibid*.) The defendant was convicted of possession of a firearm as a felon and obstructing a police officer, and was sentenced as a three strike offender. (*Id*. at pp. 1026-1027.)

When the defendant sought resentencing, the trial court determined that he was ineligible for relief because he

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[6] Because the evidence at trial disclosed only that the defendant had a pair of wire cutters in his pocket when arrested, but not that the wire cutters were intended for use as a weapon, the court determined, as a matter of law, that the evidence was insufficient to establish that the defendant was armed with a deadly weapon during the commission of the robberies. (*Bradford*, *supra*, 227 Cal.App.4th at pp. 1341-1343.)

was armed with a firearm during the commission of his "current" offense. (*Osuna*, *supra*, 225 Cal.App.4th at p. 1028.) In affirming that ruling, the appellate court concluded that the trial court was authorized to make an independent determination regarding that factual issue. (*Id.* at pp. 1038-1040.)

In *Hicks*, police officers frisked the defendant after he appeared to throw away a bag containing drugs, and found he had several .380 caliber bullets. (*Hicks*, *supra*, 231 Cal.App.4th at pp. 280-281.) When the officers searched a nearby apartment where the appellant had left a backpack, they found a loaded .380 caliber gun in the backpack. (*Ibid.*) The defendant and his half-brother testified that the bullets and the gun belonged to the half-brother. (*Ibid.*) After the defendant was convicted of possession of a firearm as a felon and possession of ammunition as a felon, he was sentenced as a three-strike offender on the basis of the former offense. (*Ibid.*) In thereafter rejecting the defendant's petition for resentencing the trial court determined that he was ineligible, concluding that he was armed with a firearm when he committed the offense of possessing a firearm as a felon. (*Id.* at pp. 279-280, 284.) The appellate court affirmed, reasoning that the defendant's eligibility hinged on whether he was "armed with a firearm" while he possessed it as a felon, and that the trial court was authorized to make an independent determination regarding that factual issue on the basis of the record of conviction. (*Id.* at pp. 283-286.) The court further rejected a contention predicated on the

existence of conflicting evidence relating to the determination, stating "[c]onflicting evidence . . . does not cast doubt on the trial court's factual findings because we review factual findings for substantial evidence." (*Id.* at p. 286.)

Appellant maintains that trial courts may not make independent determinations of eligibility facts under the resentencing statute, relying on restrictions applicable to sentencing courts assessing whether a prior conviction may be proved as an enhancement, as set forth in *Guerrero* and subsequent decisions. Appellant argues that under those restrictions, the trial court's inquiry regarding eligibility facts is limited to "the facts of the actual conviction," as reflected in the record of conviction.[7]

In *Frierson*, we rejected an essentially identical contention. (*Frierson, supra*, 1 Cal.App.5th at pp. 791-793,

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[7] Appellant places special emphasis on *People v. Wilson* (2013) 219 Cal.App.4th 500, 510, which held that under *Guerrero*, the trial court may not impose an enhancement on the basis of an independent determination of a disputed factual issue. Although *Wilson* also concluded that *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 establishes a similar restriction regarding the imposition of enhancements, appellant has expressly declined to assert a contention predicated on *Apprendi*, which several courts have determined to be inapplicable to the resentencing statute (*Blakely*, *supra*, 225 Cal.App.4th at pp. 1058-1062; *Osuna*, *supra*, 225 Cal.App.4th at pp. 1038-1040; *Bradford*, *supra*, 227 Cal.App.4th at pp. 1334-1335).

rev. granted.) There, the defendant was convicted of stalking and sentenced as a "three strike" offender. (*Id*. at p. 791.) In ruling that the defendant was ineligible for resentencing, the trial court found that he engaged in the offense with the intent to inflict great bodily injury, relying on trial evidence that he sent the victim letters stating he would injure and kill her. (*Ibid*.) We determined that the court's fact finding was proper notwithstanding the restrictions traceable to *Guerrero*, concluding that they reflect concerns applicable to the enhancement of punishment, whereas the resentencing statute provides only for a reduction in punishment. (*Id*. at pp. 791-793.) We abide by *Frierson*.

Appellant contends the resentencing statute, viewed in the context of the Reform Act, must be interpreted to incorporate the restrictions traceable to *Guerrero*. In addition to enacting the resentencing statute, which provides for retrospective reduction in punishment, the Reform Act amended the Three Strikes law to impose "prospective" restrictions on punishment. As amended, section 667 provides in pertinent part that "[i]f a defendant has two or more prior serious and/or violent felony convictions . . . that have been pled and proved, and the current offense is not [a serious or violent felony as defined in the three strikes law, the defendant shall be sentenced as a second strike offender] *unless the prosecution pleads and proves* any of the following: [¶] . . . [¶] (iii) During the commission of the current offense, the defendant used a

firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii), italics added, 1170.12, subd. (c)(2)(C)(iii), italics added.)

Relying on *People v. Johnson* (2015) 61 Cal.4th 674 (*Johnson*), appellant maintains that the resentencing statute and the prospective provisions of the Reform Act reflect a parallel structure. As the prospective provisions require that eligibility facts be "pleaded and proved," he argues that the parallel structure mandates the application of "the full *Guerrero* test" to the resentencing statute. We disagree.

Johnson involved consolidated appeals by two defendants sentenced as three strike offenders who were denied resentencing under the retrospective provision. (*Johnson*, *supra*, 61 Cal.4th at pp. 679-680.) In one appeal, the defendant's "current convictions" -- that is, the targets of his resentencing petition-- were for offenses that were classified as strikes after he suffered those convictions, but before the adoption of the Reform Act. (*Johnson*, *supra*, at pp. 679-680.) In the other appeal, the defendant was convicted of a strike and a nonstrike. (*Ibid.*) Because he had two prior strikes, he was sentenced to two terms of 25 years to life under the Three Strikes law, one relating to the strike, and the other relating to the nonstrike. (*Ibid.*) When he sought resentencing with respect to the term relating to the nonstrike, the trial court concluded that his conviction for the strike barred relief. (*Ibid.*)

The Supreme Court thus addressed two issues, namely, whether the status of an offense as a strike is determined as of the effective date of the Reform Act, and whether an inmate who was convicted of both a strike and a nonstrike is eligible for resentencing with respect to the nonstrike. (*Johnson*, *supra*, 61 Cal.4th at p. 679.) The court held that the classification of a strike is determined as of the effective date of the Reform Act, and that an offender convicted of a strike and a nonstrike is eligible for resentencing with respect to the nonstrike. (J*ohnson, supra,* at pp. 687, 694.) In resolving the first issue, the court concluded that although "the parallel structure" of the Reform Act's prospective and resentencing provisions "reflects an intent that sentences imposed on individuals with the same criminal history be the same, regardless of whether they are being sentenced or resentenced," certain differences in the provisions' terms established that the Reform Act "is more cautious with respect to resentencing." (*Johnson, supra,* at p. 686-687.) As the court noted, the resentencing statute -- unlike the prospective provisions -- expressly permits a trial court to deny relief to defendants when such relief "'would pose an unreasonable risk of danger to public safety.'" (*Id*. at p. 686, quoting § 1170.126, subd. (f).)

Johnson thus did not hold that the Reform Act's prospective and resentencing provisions manifest an unqualified parallel structure. On the contrary, in construing those provisions, the Supreme Court applied established principles of statutory interpretation, which

dictate that a statute's language is the primary source of evidence of legislative intent. (*Johnson*, *supra*, 61 Cal.4th at p. 682.) The court's discussion of the first issue recognized differences between the statutory language of the prospective and resentencing provisions that marked a material difference in the structure of those provisions. (*Id.* at p. 686-687.)

In our view, the absence of a "pleading and proof" requirement in the resentencing statute reflects a legislative intent *not* to mandate the restrictions traceable to *Guerrero.* Numerous appellate courts have determined that the absence of that requirement in the resentencing statute marks a legislative intent to permit trial courts to make independent determinations regarding those facts. (*People v. Thurston* (2016) 244 Cal.App.4th 644, 647 [discussing cases].) The absence of the requirement also necessarily shows an intent not to graft "the full *Guerrero* test" onto the resentencing provision, as imposing such a test would materially curtail the independent determination of eligibility facts. That intent comports with the cautious approach of the Reform Act to resentencing.

Appellant's reliance on *People v. Berry* (2015) 235 Cal.App.4th 1417 (*Berry*) and *People v. Arevalo* (2016) 244 Cal.App.4th 836 (*Arevalo*) is misplaced, as each decision applied *Guerrero* and its progeny only in requiring that eligibility facts be determined on the basis of the record of conviction. In *Berry*, the appellate court held that the trial court, in making an eligibility finding under the

resentencing statute, may not examine facts underlying certain dismissed charges. (*Berry*, *supra*, 235 Cal.App.4th at p. 1428.) After the defendant pleaded guilty to fraud and forgery charges pursuant to a plea agreement, other charges alleging his possession of a firearm were dismissed, and he was sentenced as a "[t]hree [s]trike[]" offender. (*Id.* at pp. 1421-1423.) Upon a review of the facts that the defendant admitted in entering his pleas, the trial court denied the defendant's petition for resentencing, concluding that he was armed while committing the offenses to which he pleaded guilty. (*Ibid.*) Reversing, the appellate court held that the trial court erred in relying on the admitted facts underlying the dismissed counts, concluding that they fell outside the record of conviction relating to the offenses to which he pleaded guilty. (*Id.* at pp. 1425-1428.) In contrast, here the trial court based its finding regarding appellant's arming on the evidence underlying the count of which he was convicted, as reflected in the record of conviction.

In *Arevalo*, after stating that eligibility findings under the resentencing statute must be based on the record of conviction, the appellate court concluded that the correct standard of proof for that determination is proof beyond a reasonable doubt. (*Arevalo*, *supra*, 244 Cal.App.4th at pp. 844, 848-852.) In so concluding, the court made no reference to *Guerrero* and its progeny. (*Id.* at pp. 848-852.) As discussed further below (see pt. B. of the Discussion, *post*), this court has not found *Arevalo* persuasive regarding the applicable standard of proof. In sum, the trial court did

not err in making an independent determination regarding the eligibility fact.[8]

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[8] Appellant also directs our attention to *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 3-4 (*Oehmigen*), which examined whether defendants seeking relief under the three strikes resentencing statute are entitled to an evidentiary hearing on their eligibility. There, the defendant was sentenced as a three strike offender after pleading guilty to assault with force likely to cause great bodily injury. In entering the plea, the defendant stated that he had directed his speeding car at a pursuing police vehicle, thus requiring its occupants to make an evasive maneuver, and that after he crashed his car, officers found in it a gun and pipe bombs. (*Id.* at pp. 5-6.) When the defendant sought resentencing, the trial court concluded that the limited record of judgment established his ineligibility, as it showed that his conviction involved both being armed with deadly weapons and an intent to inflict great bodily injury. (*Id.* at p. 6.) On appeal, the defendant contended that he was entitled to an evidentiary hearing on his eligibility, pointing to the requirement for an evidentiary hearing on a petition for habeas corpus upon a prima facie showing of relief based on a contested issue of fact. (*Ibid.*) The appellate court concluded that the three strikes resentencing statute imposes no requirement for an evidentiary hearing on eligibility. (*Id.* at pp. 6-7.) In rejecting the defendant's analogy to habeas corpus proceedings, the court stated that eligibility is a question of law, "not a question of fact that requires resolution of disputed issues" and that the facts "are limited to the record of conviction . . . ." (*Id.* at p. 7, italics omitted.)

(Fn. continued on next page.)

B. *Standard of Proof*

Relying primarily on *Arevalo*, appellant contends that eligibility facts must be determined on the basis of the beyond-a-reasonable-doubt standard, rather than on the preponderance-of-the-evidence standard.[9] There is a division of opinion among the appellate courts regarding that issue.[10] In *Osuna*, the court concluded that the trial

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Oehmigen is not persuasive on whether the trial court may make independent eligibility findings. *Oehmigen* did not confront that issue, as the facts in the limited record of conviction -- that is, the defendant's admissions in entering the plea -- were undisputed. (*Oehmigen*, *supra*, 232 Cal.App.4th at p. 8.) Furthermore, *Oehmigen* buttresses its assertion that eligibility is a question of law solely by a citation to *Bradford*, which characterizes the eligibility determination as factual (*Bradford*, *supra*, 227 Cal.App.4th at pp. 1334, 1343).

[9] Generally, "[t]he burden of proof thus serves to allocate the risk of error between the parties, and varies in proportion to the gravity of the consequences of an erroneous resolution. [Citation.] Preponderance of the evidence results in the roughly equal sharing of the risk of error. [Citation.] To impose any higher burden of proof demonstrates a preference for one side's interests. [Citation.] Generally, facts are subject to a higher burden of proof only where particularly important individual interests or rights are at stake[.]" (*In re Marriage of Peters* (1997) 52 Cal.App.4th 1487, 1490.)

[10] The issue regarding the correct standard of proof is before our Supreme Court in the review of *Frierson*.

court is authorized to make eligibility findings on the preponderance of the evidence, relying on Evidence Code section 115, which provides that "[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (*Osuna*, *supra*, 225 Cal.App.4th at pp. 1038-1040.) In contrast, in *Arevalo,* the court concluded that the appropriate standard is proof beyond a reasonable doubt. (*Arevalo*, *supra*, 244 Cal.App.4th at p. 852.) In *Frierson*, we rejected *Arevalo* in favor of the "generally accepted rule" set forth in *Osuna*, stating: "Preponderance is the general standard under California law, and there is no showing that trial courts will be unable to apply it fairly and with due consideration. Nor is there a showing that they have failed to do so." (*Frierson, supra*, 1 Cal.App.5th at pp. 793-794, rev. granted.) We see no error in that rationale.

C. *Interpretation of Exclusion*

We turn to appellant's contention regarding the exclusion under which the trial court found him ineligible for resentencing, namely, that "[d]uring the commission of the current offense, . . . [appellant] . . . was armed with a firearm or deadly weapon . . . ." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).) The key issue concerns the circumstances under which the offense of being a felon in possession of a firearm is subject to that eligibility exclusion.

Generally, courts interpreting the term "armed" in the

exclusion have sought guidance from *People v. Bland* (1995) 10 Cal.4th 991 (*Bland*), which examined a sentencing enhancement set forth in section 12022, subdivision (a), applicable to defendants "'armed with a firearm in the commission or attempted commission of a felony.'" (*Id.* at p. 998.) Our Supreme Court concluded that under the enhancement, the term "armed" means that the defendant had the firearm "available for offensive or defensive use." So understood, the term "armed" encompasses unloaded and inoperable firearms, as such weapons that "create[] a risk of harm because [their] passive display 'may stimulate resistance.'" (*Bland, supra,* at pp. 1004-1006, quoting *People v. Nelums* (1982) 31 Cal.3d 355, 360.) The court further concluded that the enhancement also demands the satisfaction of certain requirements beyond the mere existence of arming, stating: "[B]y specifying that the added penalty applies only if the defendant is armed with a firearm 'in the commission' of the felony offense, [the enhancement] implicitly requires that the 'arming' take place *during* the underlying crime and that it have some '*facilitative nexus*' to that offense." (*Bland*, *supra*, at p. 1002.)

In construing the eligibility exclusion relating to "armed" offenders, our focus is on the crime of being a felon in possession of a firearm. "The elements of this offense are conviction of a felony and ownership or knowing possession, custody, or control of a firearm. [Citations]. '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.]' [Citation.] 'Implicitly, the crime is committed the instant the felon in any way has a firearm within his control.' [Citation.]" (*Osuna*, *supra*, 225 Cal.App.4th at pp. 1029-1030.) As explained in *Osuna*, because one may possess a gun without its being available for one's use, a defendant may commit the offense of being a felon in possession of a firearm without having satisfied the definition of "'armed'" set forth in *Bland*. (*Id.* at p. 1030.)

Numerous courts have determined that under the Reform Act, the offense of being a felon in possession of a firearm falls under the pertinent eligibility exclusion when the possession in question amounted to arming, as specified in *Bland*. (E.g., *White*, *supra*, 223 Cal.App.4th at pp. 524-525; *Cervantes*, *supra*, 225 Cal.App.4th at pp. 1012-1018; *Osuna*, *supra*, 225 Cal.App.4th at pp. 1028-1038; *Blakely*, *supra*, 225 Cal.App.4th at pp. 1051-1057; *Elder, supra,* 227 Cal.App.4th at 1312-1314 & fn. 6; *Brimmer*, *supra*, 230 Cal.App.4th at pp. 793-799.) Notable discussions are found in *Osuna*, *Hicks*, and *Elder*.

In *Osuna*, the defendant's conviction of being a felon in possession of a handgun was supported by evidence that police officers saw him holding a gun as he entered a house, where an unloaded gun was later discovered (see pt. A. of the Discussion, *ante*). (*Osuna*, *supra*, 225 Cal.App.4th at

p. 1027.) The trial court ruled that the defendant was ineligible for resentencing because he was armed with a firearm during the commission of his "current offense," that is, being a felon in possession of a firearm. (*Id*. at p. 1028.) In affirming that ruling, the appellate court concluded that the offense did not, by itself, render the defendant ineligible absent a showing that he was armed, as defined in *Bland*, viz., that the firearm was available to him for offensive or defensive use. The court recognized that "[h]aving a gun available does not further or aid in the commission of the crime of possession of a firearm by a felon," but concluded that the exclusion mandates no showing that the arming promoted the "current offense." (*Id*. at p. 1032.) The court further determined that the exclusion demands only a temporal nexus -- but no facilitative nexus -- between the arming and the offense of being a felon in possession of a firearm, as the exclusion merely requires that the arming occur "during" the commission of the offense, unlike the enhancement construed in *Bland*, which required that the arming occur "in" the commission of the offense. (*Id*. at pp. 1032-1033.)

In *Hicks*, the defendant was convicted of being a felon in possession of a handgun upon evidence that police officers found bullets on his person and a loaded gun in a backpack that he had been seen carrying (see pt. A. of the Discussion, *ante*). (*Hicks*, *supra*, 231 Cal.App.4th at pp. 280-281.) After the trial court found that he was ineligible for resentencing, the appellate court affirmed, applying *Osuna*. (*Id*. at

pp. 283-284.) In construing the eligibility exclusion, the court rejected the defendant's contention that it required the existence of an "underlying felony to which the arming is 'tethered.'" (*Id.* at p. 283.) The court explained that although that contention would be correct if directed at the arming enhancement discussed in *Bland*, it failed in light of the plain language of the exclusion, which concerns eligibility for reduced punishment. (*Ibid.*) As the court noted, the exclusion requires no facilitative nexus between the arming and any offense. (*Ibid.*)

In *Elder*, police officers executing a search warrant for an apartment found the defendant standing outside the apartment. (*Elder*, *supra*, 227 Cal.App.4th at p. 1317.) The defendant admitted that he lived there. (*Ibid.*) Inside the apartment, the officers discovered two guns and a photo of the defendant holding one of them. (*Ibid.*) He was convicted of being a felon in possession of a firearm and sentenced as a three strike offender. (*Id.* at p. 1311.) Following the denial of his petition for resentencing, he contended on appeal that under the exclusion, "ineligibility for resentencing for being 'armed' . . . require[s] something beyond the substantive offense of possession itself," relying on decisions interpreting the enhancement discussed in *Bland*. (*Id.* at p. 1312.) In affirming the denial of the petition, the appellate court rejected that contention, stating: "The illogic of this line of reasoning rests on its conflating the *criterial definition* of an ineligible *offense* (being armed during the commission of such offense) with the derivative nature of the armed

enhancement (which requires being armed *in* the commission of an offense)." (*Id.* at pp. 1312-1313.)

Here, the record establishes that appellant was armed with a firearm -- that is, had a gun available to him for offensive or defensive use -- during his possession of the firearm as a felon. The trial evidence showed that when the deputy sheriffs stopped the car containing appellant, he moved his hands under his seat, where a loaded handgun was later discovered.[11] Appellant was thus armed with a firearm, as specified in *Bland*. (See *Osuna*, *supra*, 225 Cal.App.4th at pp. 1028-1030; *Hicks*, *supra*, 231 Cal.App.4th at pp. 279-280, 283-284.)

Appellant contends the word "during" in the eligibility exclusion must be construed as having the same meaning as the word "in," as used in the enhancement construed in *Bland*. To support that contention, appellant notes that courts have sometimes interpreted the word "in" to express a purely temporal relationship. He directs our attention to *People v. Poroj* (2010) 190 Cal.App.4th 165, 176 and *People v. Valdez* (2010) 189 Cal.App.4th 82, 90, which examined an enhancement in section 12022.7, subdivision (a), applicable

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[11] In evaluating the evidence, the trial court was not required to credit McMillan's account of how appellant acquired the gun, as McMillan did not provide that account to the deputy sheriffs who stopped the car containing appellant. (*People v. Williams* (1957) 152 Cal.App.2d 641, 643-644 [trial court may reject even uncontradicted testimony provided that it does not do so arbitrarily].)

to defendants who personally inflict great bodily injury "in the commission of a felony or attempted felony." In each case, appellant argues, the court interpreted the word "in" to convey a temporal relationship between the criminal conduct and the injury. (*Poroj*, *supra*, at pp. 172-176; *Valdez*, *supra*, at p. 90.)

Appellant's contention fails, as nothing within the eligibility exclusion suggests that the word "during" there has the complex meaning attributed to the word "in" in *Bland*, which viewed "in" as conveying both a temporal and a facilitative relationship. The word "during" ordinarily has a purely temporal meaning. (Merriam-Webster's Collegiate Dict. (1995) p. 360 [defining "during" to mean "throughout the duration of"].) The fact that the word "in" sometimes has a purely temporal meaning does not show that the word "during," as found in the eligibility exclusion, expresses a facilitative relationship in addition to a temporal one.

Appellant contends the pertinent exclusion, viewed in the context of the Reform Act, must be interpreted to require a facilitative nexus between arming and an offense independent of the crime of being a felon in possession of a firearm. Under the Reform Act, subdivision (e)(2) of section 1170.126 provides that a defendant is not eligible for resentencing if his or her current sentence was imposed for an offense appearing in three provisions stated in materially identical terms in both sections 667 and 1170.12 (§§ 667, subd. (e)(2)(C)(i) - (iii), 1170.12, subd. (c)(2)(C)(i)-(iii).) Of those three provisions, two enumerate particular offenses

rendering a defendant ineligible for resentencing. (§§ 667, subd. (e)(2)(C)(i) - (ii), 1170.12, subd. (c)(2)(C)(i)-(ii).) The remaining provision, which incorporates the exclusion at issue here, states that the defendant is ineligible if: "During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

Appellant maintains that the structure of the three provisions establishes that the exclusion applies only when the arming is related to, or promotes, an offense other than being a felon in possession of a firearm. He argues: "Where the statute is meant to exclude specific offenses themselves, it so states, but where it is meant to exclude an offense only if something beyond its mere commission occurs, it states 'during the commission of' the offense something else happens." He further asserts that the phrase "'during the commission of the current offense'" constitutes surplusage unless "something beyond [the] commission [of being a felon in possession of a firearm] occurs," that is, the "arming was meant to facilitate some crime." We disagree.

Although the third provision specifies circumstances rendering the current offense ineligible for resentencing, nothing in it suggests that those circumstances must attach to a crime other than the current offense. As noted in *Bradford*, the provision, on its face, refers to "facts attendant to commission of the actual offense," that is, the offense for which the defendant seeks resentencing. (*Bradford*, *supra*,

227 Cal.App.4th at p. 1332.) The provision thus encompasses the offense of being a felon in possession of a firearm when the manner in which *that* crime was committed involved arming.

Appellant also contends that so construing the eligibility exclusion would frustrate the goals of Proposition 36. He argues that in approving Proposition 36, the electorate did not intend to deny relief to offenders convicted of possessing a firearm as a felon, which he characterizes as a "low-level felony." He argues: "Having a weapon readily available for use generally does not render a person truly dangerous; it is a right protected by the federal constitution. It only becomes dangerous when it might facilitate a crime, when it might be used for violence. . . . Proposition 36 was meant to give lesser sentences to the less dangerous felons while making sure that the truly dangerous felons were kept behind bars."

Appellant's contention fails in light of the election materials relating to Proposition 36, which state that it was not intended to afford relief to offenders who committed "'gun-related felonies'" or whose third strike "'involved firearm possession.'" (*Cervantes*, *supra*, 225 Cal.App.4th at p. 1016, italics omitted.) As explained in *Elder*, 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*. . . . '[P]ublic 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." (*Elder*, *supra*, 227 Cal.App.4th at p. 1314, quoting *People v. Pepper* (1996) 41 Cal.App.4th 1029, 1037-1038.) In sum, the trial court did not err in denying appellant's petition for recall of his sentence and resentencing. [12]

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[12] In a related contention, appellant suggests that the occurrence of the word "'during'" in the exclusion undercuts the interpretation placed on the exclusion by *Osuna* and the other pertinent decisions. He argues that those decisions "fail to explain why the electorate," in approving Proposition 36, "would have used the word 'during' as the means of excluding anyone who had access to a weapon instead of making such an exclusion clear by including the weapon possession crimes in the list of crimes for which resentencing is prohibited . . . ." He also argues that the choice of the word "'during'" is inapt for the purpose of "excluding anyone who had access to a weapon" because it has been construed judicially to convey a facilitative nexus.

For the reasons discussed above, we reject both arguments. Because Proposition 36 reflects an intent to deny relief for offenders convicted of "gun-related felonies," the exclusion is reasonably construed as a "catch all" provision that characterizes "gun-related felonies" in temporal terms, that is, by means of the word "during." Furthermore, the term "in," not the term "during," has been construed judicially to convey a facilitative nexus.

DISPOSITION

The order of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.