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8 SUPERIOR COURT OF CALIFORNIA  
9 COUNTY OF WESTEROS

10 PEOPLE OF THE STATE OF ) CASE NO. XXX  
11 CALIFORNIA, )  
12 )  
13 Plaintiff, ) **PRELIMINARY HEARING**  
14 vs ) **MEMORANDUM**  
15 )  
16 CLIENT ) DATE: 2020  
17 ) TIME:  
18 Defendant ) DEPT:  
19 \_\_\_\_\_ )

20 **STATEMENT OF THE CASE**

21 Client is the defendant in the above-entitled action. He is currently charged with felony  
22 violations of California Penal Code (“PC”) § 245(b), Assault with a Semiautomatic Firearm, PC §  
23 246.3(a), Willful Discharge of a Firearm with Gross Negligence, and PC § 25850(a), Carrying a  
24 Loaded Firearm. All charges stem from the same incident, which occurred on January 1, 2019. The  
25 prosecution has provided the defense with an amended complaint and will be seeking to add a felony  
26 violation of section<sup>1</sup> 192(b), Involuntary Manslaughter, with an allegation pursuant to section  
27 12022.5(a)/ 1203.06 (personal use of a firearm).

28 **STATEMENT OF PROBABLE RELEVANT FACTS**

This case involves a tragic accidental shooting. Based on the discovery provided by the  
prosecution, the defense believes that the following facts will likely be established at the preliminary

<sup>1</sup> Unless otherwise stated, all references are to the California Penal Code.

1 hearing. Sometime after midnight on January 1, 2019, Mr. Client, who was just 18 years old, along  
2 with Friend 1 and two other friends, were driving around, hanging out, and drinking. Mr. Client  
3 allegedly brought his cousin’s gun to show the others. Although they all believed the gun was  
4 unloaded, in reality, it had one round in the chamber. At some point in the evening, while the four  
5 teenagers were sitting in the parked van and passing the gun around, it abruptly went off. A bullet  
6 struck Decedent, who was sitting in the front passenger seat. Mr. Client immediately instructed  
7 someone to call 911 and applied pressure to the wound with his T-shirt. The young men drove Mr.  
8 Decedent directly to the hospital. Mr. Decedent succumbed to his injuries approximately one week  
9 later.  
10

11 The young men gave several different statements to law enforcement, some of them  
12 conflicting; however, they steadfastly maintained that the shooting was accidental and not  
13 intentional. Mr. Client had no motive or desire to shoot Mr. Decedent—the men were friends—and  
14 they had not quarreled before the shooting. The shooting was, by all accounts, a tragic accident.  
15

16 **ISSUES OF LAW FOR THE PRELIMINARY HEARING**

17 **I. The Prosecution Must Prove Each Element of the Charges, Including the Conduct**  
18 **Enhancements, at the Preliminary Hearing.**

19 It is well understood that the prosecution need only present evidence sufficient for the  
20 Magistrate to “entertain a strong suspicion of guilt” of the charges alleged, not “proof beyond a  
21 reasonable doubt.” (*Williams v. Superior Court* (1969) 71 Cal.2d 1144, 1147.) Nonetheless, the  
22 prosecution must present proof of each element of the charges, including the conduct enhancements.  
23 (*People v. Superior Court (Mendella)* (1983) 33 Cal. 3d 754, 761.) The preliminary hearing and the  
24 section 995 motion are important not just for screening out groundless prosecutions, but also to  
25 ensure that the defendant is not charged excessively. (*Id.*) As the California Supreme Court explained  
26 in *Mandella, supra*:  
27  
28

1 It is of at least equal, and often far greater, importance that the defendant not be  
2 charged excessively. ... [¶] To deny that the defendant is prejudiced by such  
3 exercises of prosecutorial discretion is to overlook the serious increase in a  
4 defendant's burden of standing trial on the greater charge, the tactical advantage  
5 conferred upon the prosecutor in respect to plea bargaining ... and the various  
6 collateral effects of the more serious accusation itself. An adequate screening  
7 procedure must be concerned with these problems of the overcharge as well as of  
8 the wholly unfounded charge. (*Id.* at 759–60, citations omitted.)

9 In the instant case, as the following memorandum will demonstrate, because the shooting was  
10 accidental and not intentional, the prosecution will be unable to meet its burden concerning the  
11 alleged violations of sections 245(b), 246.3(a), and the section 12022.5(a)/ 1203.06 enhancement.

## 12 **II. The Arming Enhancement is Inapplicable to an Accidental Shooting.**

13 The enhancement under section 12022.5(a) reaches only intentional, not accidental, conduct.  
14 Although section 12022.5(a) itself does not explicitly include the word “intentional,” section  
15 1203.06(a)(2) does. The latter states, in pertinent part, “As used in subdivision (a), ‘used a firearm’  
16 means to display a firearm in a menacing manner, to *intentionally* fire it, to *intentionally* strike or hit  
17 a human being with it, or to use it in any manner that qualifies under Section 12022.5.” (*Id.*,  
18 emphasis added.) Furthermore, “the definition of personal use given in section 1203.06 has been  
19 accepted as applicable to section 12022.5(a) and has been incorporated into [the former jury  
20 instruction].” (*People v. Johnson* (1995) 38 Cal. App. 4th 1315, 1319.) Thus, Judicial Council of  
21 California Criminal Jury Instruction (“CALCRIM”) 3146 provides in pertinent part: “Someone  
22 personally uses a firearm if he or she *intentionally* does any of the following: ... 3. Fires the  
23 weapon.” (CALCRIM 3146, emphasis added; *See also People v. Mehserle* (2012) 206 Cal. App. 4th  
24 1125, 1139 [“A firearm-use enhancement under section 12022.5, subdivision (a) requires an element  
25 of intent.”]; *In re Tameka C.* (2000) 22 Cal. 4th 190, 197 [“Defendant does not contest that she fired  
26 her weapon intentionally, and under the quoted definition nothing more is required.”].)

1 It is thus clear from the relevant statutes, case law, and jury instructions, that section  
2 12022.5(a)/ 1203.06 is inapplicable to accidental shootings. Consequently, if this Court finds that the  
3 shooting was unintentional, then the prosecution has not met its burden concerning the enhancement.  
4

### 5 **III. A Violation of Section § 245(b) Requires Intentional Conduct.**

6 Section 245(b) provides that “Any person who commits an assault upon the person of another  
7 with a semiautomatic firearm shall be punished by imprisonment in the state prison for three, six, or  
8 nine years.” The relevant jury instruction, CALCRIM 875, illustrates that for the jury to convict, they  
9 must find, among other elements, that: “The defendant did [the] act willfully”; and that “When the  
10 defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by  
11 its nature would directly and probably result in the application of force to someone.” The defendant  
12 must actually intend to commit a “willful and unlawful use of force or violence upon the person of  
13 another.” (*People v. Lara* (1996) 44 Cal.App.4th 102, 107; *See also People v. Williams* (2001) 26  
14 Cal. 4th 779, 788.) Criminal negligence does not satisfy the general intent required for section § 245.  
15 (*People v. Lara, supra*, 44 Cal.App.4th at 107.)  
16

17 In *U.S. v. Vasquez-Gomez* (9th Cir. 2018) 901 F.3d 1060, the Ninth Circuit considered the  
18 precise question of whether section 245 encompasses unintentional conduct. In holding that the  
19 underlying conduct required for section 245 must be intentional and that a section 245 conviction,  
20 therefore, meets the federal definition of a “crime of violence,” the Court explained as follows:  
21

22 The essential question is whether assault in California can be committed  
23 accidentally or whether it requires an intentional use of force. As defined in  
24 California, assault “requires an intentional act and actual knowledge of those facts  
25 sufficient to establish that the act by its nature will probably and directly result in  
26 the application of physical force against another.” [*People v. Williams, supra*, at  
27 790]. ***We conclude that this definition requires an intentional use of force.***  
28 Thus, because assault in California requires an intentional use of force, assault in  
California satisfies the mens rea requirement for § 16(a). Accordingly, we hold,  
consistent with our decisions in the earlier cases cited above, that from its

1 enactment in 1993 to its amendment in 2011, California Penal Code § 245(a)(1)  
2 was categorically a crime of violence as defined in 18 U.S.C. § 16(a)  
3 (*Id.* at 1068, internal citation modified to include case name, emphasis added,  
4 footnotes omitted.)

5 Hence, should this Court determine that Mr. Client’s firing of the weapon was not intentional,  
6 then the prosecution has not met its burden in proving a violation of section 245(b).

7 **IV. Section 246.3(a) Requires Intent to Fire the Weapon.**

8 Section 246.3(a) provides, in pertinent part: “Except as otherwise authorized by law, any  
9 person who *willfully* discharges a firearm in a grossly negligent manner which could result in injury  
10 or death to a person is guilty of a public offense...” (Cal. Penal § 246.3(a), emphasis added.) The  
11 Legislature’s use of the term “willfully” means that the prohibited conduct must be performed  
12 purposefully or intentionally. (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438-1439; *See also*  
13 *People v. Robertson* (2004) 34 Cal.4th 156, 167, overruled on other grounds in *People v. Chun*  
14 (2009) 45 Cal.4th 1172.) Because the statute prohibits “willfully” discharging a firearm, proof of  
15 intent to fire the weapon is required. (*In re Jerry R., supra*, 29 Cal.App.4th at 1437.) The first  
16 element of the relevant jury instruction states: “The defendant *intentionally* shot a firearm.”  
17 (CALCRIM 970, emphasis added.) An honest belief that a gun is empty also negatives the mental  
18 state of an intent to fire the gun. (*In re Jerry R., supra*, 29 Cal.App.4th at 1440.) It is therefore  
19 indisputable that section 246.3(a) requires an intent to fire the weapon. Should this Court find that  
20 Mr. Client did not intend to fire the weapon, then the prosecution has not met its burden regarding  
21 this offense.  
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**CONCLUSION**

Mr. Decedent’s untimely death was a terrible tragedy. Yet, the anticipated facts at the preliminary hearing will demonstrate that the shooting was an accident. Consequently, the prosecution will be unable to prove a violation of section 245(b), section 246.3(a), or the section 12022.5(a)/ 1203.06 enhancements. Thus, the defense will respectfully request that Mr. Client be discharged on those counts and/or allegations at the close of the preliminary hearing.

Dated: \_\_\_\_, 2020

Respectfully Submitted,

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Attorney for Client