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IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR XXX COUNTY

STATE OF OREGON, Plaintiff, -VS- SMITH, Defendant	CASE No. 15CRXXXXX DEFENSE SENTENCING MEMORANDUM

The Defendant, by and through his undersigned counsel, timely submits this Memorandum for the Court's consideration in arriving at a fair and just sentence. The defense reserves the right to supplement this memorandum with additional points and authorities, including new claims, in response to any filings by the State, and on the record at the time of sentencing, currently set for October 12, 2015.

Respectfully submitted this 18th day of September, 2015.

s/ Terri Wood
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ATTORNEY FOR DEFENDANT

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I. Factors In Support Of Defense Sentencing Recommendation

A. Mr. SMITH Is Particularly Vulnerable To Abuse In Prison.

Mr. SMITH wants treatment, but there is no longer any sex offender treatment available in Oregon prisons.[1] Not only will his time behind bars delay access to treatment services necessary for rehabilitation, but the nature of these charges as well as his below average height and build, youthful appearance, and lack of prison culture experience, place him at imminent risk of violence, including sexual assault, at the hands of predatory inmates.

Sexual assault, and sexually-motivated physical assault, is an ever-present reality in our prisons nationwide. Data collections by the Bureau of Justice Statistics (BJS) have found up to 20 percent of prisoners report sexual victimization.[2] But reported incidences fall far short of actual numbers:

> Administrative records alone cannot provide reliable estimates of sexual violence. Due to fear of reprisal from perpetrators, a code of silence among inmates, personal embarrassment, and a lack of trust in staff, victims are often reluctant to report incidents to correctional authorities. At present there are no reliable estimates of the extent of unreported sexual victimization among prison and jail inmates[.][3]

According to the Oregon Department of Corrections, all of its facilities were audited once over the course of three years (2011-2013); during that period the audit found a total of 19 substantiated sexual assaults and 88 "unsubstantiated" cases, meaning insufficient proof to reach a conclusion, in addition to 41 that were ruled unfounded. Because it required 3 years to

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[1] See email exchange with DOC, copy attached.

[2] Bureau of Justice Statistics (BJS), *Data Collections for the Prison Rape Elimination Act of 2003*, 2 (2004). The most recent report, published in January 2014, for data from 2009-2011, reflected 8,763 allegations of sexual victimization in 2011, http://www.bjs.gov/content/pub/pdf/svraca0911.pdf .

[3] Allen J. Beck and Timothy A Hughes, Bureau of Justice Statistics (BJS), *Sexual Violence Reported by Correctional Authorities, 2004*, 1 (2005).

obtain data from each facility, but only for a single year at each facility, there is uncertainty in concluding that these numbers represent the extent of sexual assaults reported statewide for a single year; but the numbers clearly represent far less than the cumulative total of reported assaults statewide for a 3-year period.[4]

Studies have long shown that "brutal assault and homosexual rape are facts of daily life in mens' prisons."[5] It is likewise widely accepted that the severity of prisoner sexual assault increases with the security level of the institution.[6] For example, it is estimated that men in a minimum security facility experience a 9% victimization rate for sexual assault and a 2.8% victimization rate for assaults involving penetration.[7] In maximum security facilities, these figures jump to a 23% victimization rate for sexual assaults in general, and 15% rate of sexual assaults involving penetration.[8] According to Oregon Inmate Classification rules, an inmate serving a sentence with time remaining of more than 120 months would go to a Maximum security prison, with a "Close Custody Classification Level 4"; Medium security prisons house inmates with more than 48 months up to 120; and Minimum security prisons house inmates with less than 48 months remaining.[9]

Once victimized, prison rape survivors become the targets of repeated assaults. Rape is an institutionalized tradition, considered by prisoners a legitimate way to "prove your

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[4] See Prison Rape Elimination Act (PREA) Annual Report 2013, available at http://www.oregon.gov/doc/INSPEC/PREA/Documents/2013%20PREA%20Annual%20Report.pdf.

[5] Marjorie Rifkin, *Farmer v. Brennan: Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 Columbia Human Rights Law Review 273, 276 (Winter 1995).

[6] See, e.g., S. Donaldson, *Rape of Incarcerated Americans: A Preliminary Statistical Look* (7th Ed. July 1995).

[7] See C. Struckman-Johnson, *Sexual Coercion Reported by Men and Women in Prison*, 33 Journal of Sex Research 1 (1996); S. Donaldson, *Rape of Incarcerated Americans: A Preliminary Statistical Look* (7th Ed. July 1995).

[8] Id.

[9] See OAR 291-104-0106 through -0140.

manhood" and satisfy sexual and power needs.[10] Violence and struggles for dominance in prison culture often play out sexually.[11] Violent combat to establish placement in the hierarchy is a routine part of most men's introductions to prison, and these confrontations often play themselves out as rapes.[12] Once victimized, inmates become targets of frequent abuse because of their low rank in the prison hierarchy.[13] It was estimated that thousands of prisoners are subjected to involuntary sex every day. Very few of these rapes are ever reported to administrators, much less prosecuted.[14] Moreover, child sex offenders universally hold the lowest rank in prison culture by virtue of their crimes.

Mr. SMITH is fearful of what may happen in a prison setting. [Identifying information redacted]

Apart from the nature of the his crimes, Mr. SMITH possesses numerous characteristics that have been recognized as placing inmates at high risk for physical as well as sexual abuse by other inmates: Young, first-time prisoners are disproportionately the targets of rape and other forms of prison sexual assault.[15] Prison rape victims are also likely to be small, non-violent, from middle-class backgrounds, who are not "street wise," not gang-affiliated, and without

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[10] *Training Americans to Rape: The Role of Our Jails, Prisons and Reformatories* (USA Today Magazine, May 1995).
[11] Bowker, *Prison Victimization*, at 15-16 (Elsevier 1980).
[12] L. Tofani, *Rape in the County Jail: Prince George's Hidden Horror*, Washington Post, September 26-28, 1982; Bowker, *Prison Victimization*, at 15-16 (Elsevier 1980).
[13] See, e.g., Donaldson, *Hooking Up: Protective Pairing for Punks*, quoted in Mallory, *Sexual Assault in Prison: The Numbers are Far From Funny*, 10 The Touchstone No. 5 at 1 (Dec. 1999).
[14] *Training Americans to Rape: The Role of Our Jails, Prisons and Reformatories* (USA Today Magazine, May 1995).
[15] *Farmer v. Brennan*, 114 S.Ct. 1970-1987 (1994) (Blackmun, J., Concurring).

major fighting experience.[16] [Identifying information redacted] "Getting raped destroys you from the inside out, and it takes a part of you and puts it where you can't reach it."[17] Without adequate mental health treatment, sexual assault victims are at high risk for developing PTSD, depression, addiction, and suicidal ideation.[18] Mr. SMITH already has a documented history of [Identifying information redacted].

B. The Average Sentences Imposed In XXX County And Statewide For Defendants Convicted Of The Same Crimes As Mr. SMITH.

There are other considerations apart from Mr. SMITH' character and background and the probable consequences of a long prison sentence. The Court should consider the sentences imposed for other defendants sentenced on multiple counts of Encouraging Child Sex Abuse in the First Degree (hereafter referred to as "ECSA-1"), based on (1) the statewide average sentence; (2) the average sentence in XXX County; and (3) the highest sentence imposed in XXX County (117). Statistics obtained from the Criminal Justice Commission for defendants sentenced in 2010-2014 convicted of 5-10 counts of ECSA-1, reflect an average prison sentence of 61.2 months statewide, as well as 13% of those offenders receiving a probationary sentence. The average sentence increased to 109 months for defendants convicted of 10-20 counts of ECSA-1, although 9% received probationary sentences instead.

During the same time period, the average sentence for XXX County defendants convicted of 5-10 counts of ECSA-1 was 31 months, and 117 months for the single defendant convicted of 10-20 counts; no XXX County defendants received probation.[19] One XXX County

[16] See, e.g., *Butler v. Dowd*, 979 F.2d 661, 667 (8th Cir. 1992) (en banc), cert. denied 113 S.Ct. 2395 (1993); *Redman v. County of San Diego*, 942 F.2d 1435, 1437 (9th Cir. 1991) (en banc), cert. denied, 112 S.Ct. 972 (1992); *Stokes v. Delcambre*, 710 F.2d 1120 (5th Cir. 1983).

[17] Prisoner quote from Just Detention International, "SPR Fact Sheet: Mental Health Consequences of Sexual Violence in Detention" (October 2007), http://www.justdetention.org/en/factsheets/JD_Fact_Sheet_Mental_Health_vC.pdf .

[18] Id.

[19] See CJC Memorandum and CJC Research—XXX County chart, by paralegal Richard Price, two documents attached.

defendant convicted of Using a Child in a Display of Sexually Explicit Conduct, as well as ECSA-1, with a starting Criminal History F, was sentenced to 70 months.[20] As will be addressed later in this memorandum, the defense contends that under the constitutional principle of Double Jeopardy, and the statutory principle of merger, Mr. SMITH could not be convicted of more than 10 counts out of the 20 ECSA counts to which he plead guilty. Accordingly, the Court should consider the average sentences imposed on defendants with no more than 10 counts of conviction—61.2 months statewide, and 31 months for XXX County defendants—as a factor in determining a fair sentence in Mr. SMITH' case.

C. Mr. SMITH' Character And Background Support A Sentence Geared Towards Rehabilitation, Not Warehousing.

Every defendant is unique, often more so than the underlying facts of their respective cases, particularly when the conduct is P-2-P downloading of child pornography. Given the sadly rampant use of computers by thousands of people engaged in this conduct here and nationwide, a hefty prison sentence imposed on one user should not be justified on the ground of general deterrence. Mr. SMITH' character and background establish strong mitigating factors: [Identifying information redacted]

Those factors combined explain the grossly impaired judgment that led to Mr. SMITH committing the crimes charged in this case, and call for compassion versus condemnation in arriving at a fair sentence.

The following factors combined present a favorable prognosis for Mr. SMITH to reintegrate in the community post-prison, so long as his term of incarceration is not too long: [Identifying information redacted]

[20] *State v. Wilkins*, 10CR1816FE.

For all of the reasons set forth this memorandum, and further supported by the supplemental confidential document filed herewith, the defense submits that a sentence not in excess of 5 years imprisonment, with credit for time served and AIP eligibility,[21] is reasonable and reflects both the gravity of his criminal conduct, and unique mitigating factors. Given that Mr. SMITH has served about 10 months, and should be eligible for standard good time credit, a sentence of imprisonment in the range of 5 years or less should allow him to qualify for a minimum security classification at or near the start of his prison term. As discussed above, there would be substantially less risk of him being victimized by predatory inmates if he was housed at a low security institution.

II. Calculating The Presumptive Guideline Sentence

The law regarding merger, recalculating criminal history, factors related to consecutive versus concurrent sentence, and proportionality in child pornography cases is evolving. It is thus incumbent on defense counsel, in an "open sentencing" context, to make and preserve all legal arguments that could impact the Court's calculation of the presumptive guideline sentence, including those that are currently in the hands of our appellate courts. While a ruling in favor of the defense position on some or all of these legal issues would reduce Mr. SMITH' maximum exposure under the guidelines, the Court could reject all of the defense arguments on these legal issues and still arrive at a sentence consistent with the defense recommendation by imposing concurrent sentences. The State is likely to concede only one of the issues raised below, that the sentences imposed for paired counts of ECSA-1, and Encouraging Child Sex Abuse in the

[21] AIP eligibility standards prohibit AIP for persons convicted of most sex crimes, and the Department of Corrections has administrative discretion to deny AIP even to inmates who meet the standards. So while it is highly unlikely Mr. SMITH would be granted alternative incarceration programs by the DOC at this time, that could change in the future. Therefore the defense requests the Court authorize AIP eligibility. He could certainly benefit from the intensive drug treatment programs offered by the DOC under AIP.

Second Degree (hereafter referred to as "ECSA-2"), must run concurrent. Under that scenario, Mr. SMITH would face a maximum potential consecutive guideline sentence range of 403 to 456 months imprisonment, if the Court rejects all other defense arguments.

A. <u>Assigning ECSA-1 As A Crime Score 8 When "Duplication" Is Proven By Downloading Violates Vertical Proportionality Required By Article I, §16, Oregon Constitution</u>.

In *State v. Simonson*, 243 Or App 535 (2011), the "vertical proportionality" principle of Article 1, section 16 was held violated by the guideline Crime Score assigned by the Oregon Administrative Rules to Sexual Abuse in the Second Degree, ORS 163.425, when committed by one of the alternative means in that statute. The Court invalidated the Crime Score 7 assigned to that crime when the underlying conduct is sexual intercourse with a person under age 18 (but 16 or older) whose lack of consent is due solely to age, because it resulted in a greater punishment than what the guidelines provided for Rape in the Third Degree, ORS 163.355, a Crime Score 6, committed by having sexual intercourse with a person aged 14 or 15—a necessarily greater offense.[22] The defense in the case at bar makes the same type of objection as the defendant in *Simonson*: that the Crime Score 8 assigned by the Oregon Administrative Rules to ECSA-1, when the underlying conduct is "duplication" by downloading, is disproportionately severe when compared to the Crime Score and resulting sentence that may be imposed for other related crimes. See 243 Or App at 540-541.

Article 1, section 16 of the Oregon Constitution provides, in part, "[A]ll penalties shall be proportioned to the offense." A "penalty is the amount of time that an offender must spend in prison for his 'offense'." *State v. Rodriquez/Buck,* 347 Or 46, 60 (2009). An "offense" is a

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[22] Both statutes in *Simonson* were classified as Class C felonies. The Court focused on the nature of the conduct criminalized by these statutes, and the guidelines' classifications.

defendant's "particular conduct toward the victim that constitute[s] the crime." *Id.,* at 62. "A penalty is impermissible if it is disproportionately severe when compared to a sentence that may be imposed for other related crimes . . . . [a] concept colloquially referred to as 'vertical proportionality,' [and] an element of the protection provided by Article 1, section 16." *Simonson,* 243 Or App at 541 (citations omitted). *Simonson* invalidated the sentence grid block assigned for the offenses and remanded to the trial court for resentencing, calling "this case a textbook example for the application of vertical proportionality." The Court explained:

> Defendant's acts in committing sexual abuse in the second degree necessarily are less severe than the same acts would have been if defendant's victims had been younger, but the potential penalty for defendant's acts is greater than the potential penalty for the same acts against younger victims. 243 Or App at 541-42.

The offense of ECSA-1 in Mr. SMITH' case likewise presents a "textbook example" for vertical proportionality: His act in committing ECSA-1 by downloading child pornography is necessarily less severe than him downloading the same images for the purpose of sexual gratification—the underlying conduct for committing ECSA-2; but the penalties for all grid blocks with Crime Score 8 (ECSA-1) are far greater than the Crime Score 5 (ECSA-2) grid block penalties for the same acts when done with a sexual purpose. In addition, Crime Score 8 for this offense is disproportionate when compared to other related sex crimes involving more serious offenses with lower Crime Scores and resulting penalties, as will be discussed below.

The particular conduct that constitutes the crimes of ECSA-1 and ECSA-2, i.e., the "offense" for purposes of Article 1, section 16, is set forth in the Declaration filed without objection as the factual basis for Mr. SMITH' guilty pleas:

> That on or about August 30, 2014, and continuing until on or about January 21, 2015, in XXX County, Oregon, I did unlawfully and knowingly use Peer-to-Peer software I installed on my computer to search for and duplicate by downloading visual recordings of sexually explicit conduct involving a child, as particularly described in the Indictment and set forth below, and did knowingly possess these

> same visual recordings for the purpose of arousing and satisfying my sexual desires, all while knowing that the creation of these visual recordings involved child abuse.

The Court should take judicial notice of these operative facts.

Digital images of child pornography obtained via the Internet must be knowingly downloaded[23] to the defendant's computer to constitute "possession," in violation to ECSA-2. *See, State v. Barger*, 349 Or 553, 565-67 (2011)("possession" requires more than viewing images on a website that are automatically downloaded to the browser cache; "possession" cannot be inferred from the unexercised ability to manipulate an image); *State v. Ritchie*, 349 Or 572, 584 (2011)("control" of an image obtained via the Internet requires more than a defendant searching for and "taking affirmative steps to bring it to his screen."). The knowing download of the same digital recordings also proves "duplication," in violation of ECSA-1. *State v. Pugh, supra* at 362 (stating the offense is complete once a person knowingly downloads it, without disseminating or distributing it). Stated simply, when the criminal act is downloading, that act simultaneously proves duplication and possession of the digital images. *See, Pugh, supra,* 255 Or App at 362-64. The offense of ECSA-2 additionally requires the downloading be done for the purpose of arousing and satisfying the defendant's or another's sexual desires, which is necessarily more severe than simply downloading. Possession is also a continuing offense, *e.g., State v. Cantrell*, 223 Or App 9 (2008)(uninterrupted possession of the same firearm is a

[23] " 'Download' can be used as either a verb or a noun. As a verb, it refers to the process of receiving data over the Internet. . . . As a noun, download may refer to either a file that is retrieved from the Internet or the process of downloading a file." http://techterms.com/definition/download (last accessed 9/11/15). Downloading constituting "duplication" was not defined, but was described in *Pugh* as "when defendant double-clicked on the file names that resulted from his queries, he requested and received digital copies of videos that were present on other computers in the peer-to-peer file-sharing network. That is, after he downloaded the videos, he had his own copies," 255 Or App at 363.

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continuing act); i.e., a crime of potentially long duration; duplication is complete upon the instant of downloading, *Pugh, supra* at 362.[24]

In sum, the offense of ECSA-2 in all counts of Mr. SMITH' case is more severe than the offense of ECSA-1 in all counts because, in addition to the same act of downloading the same file, the offense of ECSA-2 involves a sexual purpose for the possession, and is a continuing offense (possibly for more than 3 months as to some counts). It is disproportionate to assign a Crime Score 8 to the ECSA-1 counts when the more serious offense of ECSA-2 is assigned a Crime Score 5.

The offense of ECSA-1 in Mr. SMITH' case is also less severe than the conduct proscribed by other related sex crimes with lower Crime Scores and resulting penalties:

- ORS 163.688, Possession of materials depicting sexually explicit conduct of a child in the first degree, a Class B felony, requires knowing possession of child pornography coupled with the use of that visual depiction to induce a child to engage in sexually explicit conduct. **Crime Score 6**.
- ORS 163.689, Possession of materials depicting sexually explicit conduct of a child in the second degree, a Class C felony, requires knowing possession of child pornography coupled with the intent to use that visual depiction to induce a child to engage in sexually explicit conduct. **Crime Score 4**.

[24] The Supreme Court's reasoning in *Barger* and *Ritchie*, and the corresponding evidence needed to establish possession for ECSA-2, call in to question whether *Pugh's* holding that downloading is duplication is correct. Technically speaking, downloading is simply receiving a digital copy that was created or "uploaded" from a computer network or website; i.e., the download (as a noun) is the copy, but *Ritchie* instructs a defendant does not control that copy by searching for and requesting it to be delivered to his computer—the same process *Pugh* describes as downloading. Mr. SMITH' case is not in a posture to raise this issue, and thus assumes for purposes of his sentencing arguments that *Pugh* was correctly decided.

In contrast, Mr. SMITH' ECSA-1 offense is solely acquiring his own copy of visual depiction, and involves neither an intent to use the child pornography to induce a live child to engage in sexual conduct, nor the actual use of the child pornography for that purpose.

The offense of ECSA-1 in Mr. SMITH' case is also less severe than the offenses of all other sex crimes with Crime Score 8, in that all of those crimes require the defendant to engage in sexual conduct, sexual solicitation or sex trafficking with a live (and often child) victim: ORS 163.207, Female Genital Mutilation, a B felony; ORS 163.365, Rape II, a B felony; ORS 163.395, Sodomy II, a B felony; ORS 163.425(1)(a), Sexual Abuse II, a C felony; ORS 163.427, Sexual Abuse 1, a B felony; ORS 163.433, Online Sexual Corruption of a Child I, a B felony; ORS 163.670, Using Child in Display of Sexual Conduct, an A felony; ORS 167.012, Promoting Prostitution, a C felony; and ORS 167.017, Compelling Prostitution, a B felony.

For these reasons, the Court should find that using a Crime Score 8 for Mr. SMITH' ECSA-1 offenses violates vertical proportionality mandated by Article 1, section 16 of the Oregon Constitution, and assign a Crime Score that is proportionate based on those assigned to related offenses. The defense submits that a Crime Score 4 is appropriate, as being one point less than the clearly more severe offense of ECSA-2 when duplication is by downloaded, and no greater than the Crime Score for possessing child pornography with an intent to use it to induce a child to engage in sexual conduct, ORS 163.689, an arguably more severe offense.

B. Double Jeopardy Prohibits Conviction On Both ECSA-1 and ECSA-2 Based On Downloading The Same Images On The Same Date.

The Double Jeopardy Clause of the 5th Amendment to the United States Constitution is applicable to the States through the Due Process Clause of the 14th Amendment. *See generally, e.g., State v. Mozorosky,* 277 Or 493, 497-98 (1977)(recognizing and applying federal interpretation of Double Jeopardy Clause in state theft prosecution). Claims of Double Jeopardy

can be raised in cases resolved by guilty pleas, and may even be raised for the first time on appeal. *See, United States v. Davenport*, 519 F3d 940 (9th Cir. 2007)(determining convictions and concurrent sentences for receipt and possession of child pornography imposed after guilty plea violated Double Jeopardy, although issue not raised in the trial court).

One protection afforded by the Double Jeopardy clause is conviction and punishment for more than one offense when two or more charges are based on the same underlying conduct or essentially the same evidence. *Id.* The Ninth Circuit has recognized that in cases where a defendant received child pornography by downloading it to his computer, and possessed it based on the same conduct, that conviction for both receipt and possession violated Double Jeopardy.[25] *E.g., Davenport, supra; United States v. Schales*, 546 F.3d 965 (9th Cir. 2008); *United States v. Lynn,* 636 F.3d 1127 (9th Cir. 2011). These holdings derive from *Ball v. United States*, 470 U.S. 856, 865 (1985)(as a general matter, possession of contraband is a lesser-included offense of receipt of the item). The remedy is for the Court to vacate one of the two or more convictions. *See, Schales, supra,* 546 F.3d at 980.

"When a defendant has violated two different criminal statutes, the double jeopardy prohibition is implicated when both statutes prohibit the same offense or when one offense is a lesser included offense of the other." *Davenport,* 519 F.3d at 943. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). In *Lynn, supra*, the defendant was charged with receipt on the date of

[25] Federal child pornography statutes make it illegal to "receive or distribute" and the courts have not construed distribution to include duplicating by downloading; instead, downloading proves receipt. Receipt and distribution carry the same statutory penalties. See 18 U.S.C. §2252, §2252A.

download, and possession on the date the images were found in his possession by law enforcement. The Ninth Circuit found:

> The allegation of different dates of commission for each offense, by itself, is insufficient to carve out separate conduct. One a person receives something, he also necessarily possesses it as of that moment, based upon a single action (like downloading a file). Thus, merely citing different dates or date ranges for the receipt and possession charges alone does not suffice to separate the conduct for double jeopardy purposes. 636 F.3d at 1137.

The factual basis for Mr. SMITH' guilty pleas is a matter of record and the Court may take judicial notice of the following:

> That on or about August 30, 2014, and continuing until on or about January 21, 2015, in XXX County, Oregon, [Mr. SMITH] did unlawfully and knowingly use Peer-to-Peer software [he] installed on [his] computer to search for and duplicate by downloading visual recordings of sexually explicit conduct involving a child, as particularly described in the Indictment and set forth below, and did knowingly possess these same visual recordings for the purpose of arousing and satisfying my sexual desires, all while knowing that the creation of these visual recordings involved child abuse.

Oregon appellate decisions make clear that duplication of child pornography necessarily requires possession. *See, State v. Dimock,* 174 Or App 500, 504 (2001)(duplication necessarily implied possession); *State v. Pugh*, 255 Or App 357, 365 (2013)(holding defendant "duplicated" child pornography when he downloaded the images from the Internet to his computer; relying on agent's testimony that downloading an image is acquiring one's own copy of the image). Furthermore, a defendant does not have possession of child pornography viewed on the Internet until he knowingly downloads the images to his computer. *State v. Barger*, 349 Or. 553 (2011); *State v. Ritchie*, 349 Or. 572 (2011)(possession of child pornography viewed on the Internet is not proven by images downloaded automatically and stored in the cache at time of viewing). Thus, the conduct of knowingly downloading child pornography is the same fact that establishes both "duplicates" and "possession" in the case at bar.

The defense acknowledges that the federal prohibition against multiple punishments may be defeated if the state legislature clearly intended separate punishments for the same conduct; i.e., the *Blockburger* test does not necessarily control the inquiry into the intent of a state legislature. *Ohio v. Johnson*, 467 US 493, 499 n.8. (1984). However, it is significant that Oregon has a test worded almost verbatim to the *Blockburger* test, in its statutory merger scheme. See ORS 161.067(1)("When the same conduct or criminal episode violates two or more statutory provisions and each provision requires proof of an element that the others do not, there are as many separately punishable offenses as there are separate statutory violations."), and compare, *Blockburger, supra* at 304 ("[W]here the same act or transactions constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

Although *Pugh* found the legislature intended to criminalize the act of downloading child pornography as a form of duplication to prove a violation of ECSA-1, rejecting the defendant's claim that his conduct could only be punished as possession under ECSA-2, the Court did not address whether the legislature intended to separately punish a defendant who simultaneously committed both crimes by the same act of downloading. 255 Or App at 360-364.[26] Furthermore, the purpose of the statutory scheme is to prevent "the underlying harm caused" by child sexual abuse—a unitary objective; and it imposes the harshest punishment on the most serious offense which involves the creation of child pornography or use of a child in a live display, and lesser punishments for correspondingly less serious offenses of distribution, and finally possession. *State v. Porter,* 241 Or App 26, 34, *rev. den.,* 350 Or 530 (2011). Thus,

[26] It is worth noting that the legislative history discussed in *Pugh* concerned a film developer making copies from negatives, not digital downloading. *Id.,* at 364.

the statutory scheme evinces a legislative intent to impose increasing penalties in gradation to the seriousness of the underlying conduct, similar to penalties for lesser included offenses; not to clearly require separate punishments for a violation of each statutory provision in this scheme.

The indictment contains paired ECSA-I and ECSA-2 counts involving the same file and same date. For the reasons explained above, conviction on both corresponding counts would violate Mr. SMITH' right against multiple punishments under the Double Jeopardy clause of the 5th and 14th Amendments to the United States Constitution. If the Court agrees with the defense, there will remain for sentencing either 10 counts of ECSA-1, or 10 counts of ECSA-2, and the felon in possession count. The defense submits that because ECSA-1 is based on the same underlying conduct that establishes ECSA-2 in this case, but lacks the additional element of sexual gratification, the Court should convict Mr. SMITH on the ECSA-2 counts. *See, Davenport, supra,* 519 F3d at 948 (Under Double Jeopardy law, the trial court has discretion to impose conviction and sentence for either possession, which has no minimum mandatory sentence, or receipt, which has a 5-year mandatory prison sentence; court should vacate defendant's conviction on one of the two counts, allow for it to be reinstated without prejudice if his other conviction should be overturned on direct or collateral review); *Lynn, supra*, 636 F3d at 1138 (same).

C. Oregon's Merger Doctrine Prohibits Separate Sentences On Multiple Counts Of This Indictment.

Merger occurs when two or more convictions are subsumed into a single conviction, and therefore, only one sentence may be imposed. Sentences for distinct convictions that do not merge may be run concurrently or consecutively based on other criteria. Much like the federal Double Jeopardy analysis discussed above, the merger doctrine restricts punishment for closely

related crimes arising out of the same criminal course of conduct. Oregon's primary statute regulating merger is ORS 161.067, and it describes three sets of circumstances where convictions do *not* merge, even though the crimes involve "the same conduct or criminal episode." *Id.* The statutory merger analysis is a two-step process: Crimes must first cross the threshold of being part of the same criminal episode. Then those crimes must evade the anti-merger provisions of ORS 161.067. Satisfaction of those two steps will reduce the number of convictions remaining for imposition of sentence. Merger can be raised after guilty pleas are entered, and may even be raised for the first time on appeal. *See, State v. Sauceda*, 236 Or App 358 (2010).

Subsection (1) bars merger when the same episode violates two or more statutes, and each requires proof of an element that the others do not. Subsection (2) bars merger when the same criminal episode violates only one statute, but involves two or more victims, except for certain enumerated crimes not pertinent here. Subsection (3) bars merger when the same episode violates only one statute and involves only one victim, but involves repeated violations of the same crime against the same victim where there is sufficient pause for an opportunity to renounce criminal intent. The Indictment herein charges violations of two or more statutes, so Subsection (1) is the controlling anti-merger provision.[27]

"Same criminal episode" means the same thing as the phrase "same act or transaction" used in the joinder statute, ORS 132.560(1)(b)(B). *State v. Boyd*, 271 Or 558, 565-67 (1975)("same criminal episode" in purview of statutory bar on double jeopardy and "same act or transaction" in purview of permissive joinder statutes are synonymous); *see, State v. Potter*,

[27] *State v. Reeves*, 250 Or App 294 (2012), involved 15 counts of ECSA-1, and thus turned on whether those counts involved separate victims to defeat merger, under subsection (2).

236 Or App 74 (2010)(charges arising from same criminal episode must be joined to avoid a double jeopardy claim).

ORS 161.067(1) provides: "When the same conduct or criminal episode violates two or more statutory provisions and each provision requires proof of an element that the others do not, there are as many separately punishable offenses as there are separate statutory violations." The defense expects the State to concede that the paired Counts of ECSA-1 and ECSA-2, both committed on the same date and involving the same named file containing child pornography, are part of the same criminal episode(s). If not, the points and authorities in section II.D(1) of this memorandum, *infra*, are incorporated by reference in this merger analysis.

The second step in the merger analysis involves comparing the elements of these two crimes. ORS 163.684 provides:

> (1) A person commits the crime of encouraging child sexual abuse in the first degree if the person:
>
> > (a)(A) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, displays, finances, attempts to finance or sells a visual recording of sexually explicit conduct involving a child or knowingly possesses, accesses or views such a visual recording with the intent to develop, duplicate, publish, print, disseminate, exchange, display or sell it; or
> >
> > (B) Knowingly brings into this state, or causes to be brought or sent into this state, for sale or distribution, a visual recording of sexually explicit conduct involving a child; and
>
> (b) Knows or is aware of and consciously disregards the fact that creation of the visual recording of sexually explicit conduct involved child abuse.

ORS 163.686 provides:

> (1) A person commits the crime of encouraging child sexual abuse in the second degree if the person:
>
> > (a)(A)(i) Knowingly possesses or controls, or knowingly accesses with the intent to view, a visual recording of sexually explicit conduct involving a

child for the purpose of arousing or satisfying the sexual desires of the person or another person; or

(ii) Knowingly pays, exchanges or gives anything of value to obtain or view a visual recording of sexually explicit conduct involving a child for the purpose of arousing or satisfying the sexual desires of the person or another person; and

(B) Knows or is aware of and consciously disregards the fact that creation of the visual recording of sexually explicit conduct involved child abuse; or

(b)(A) Knowingly pays, exchanges or gives anything of value to observe sexually explicit conduct by a child or knowingly observes, for the purpose of arousing or gratifying the sexual desire of the person, sexually explicit conduct by a child; and

(B) Knows or is aware of and consciously disregards the fact that the conduct constitutes child abuse.

(2) Encouraging child sexual abuse in the second degree is a Class C felony.

In *State v. Bray,* 342 Or 711, 718 (2007), the Court found that "[b]ecause the statute [ORS 163.684] use the word 'or' to connect the series of prohibited acts, a person will violate the statute if he or she commits only one of those acts." There is no reason to think the Court would reach a different conclusion about the alternative provisions of ORS 163.686. If a statute defining a crime contains alternate elements or ways for committing the crime, the court looks at the combination of elements that constitute the crimes for which the defendant was convicted, when determining merger. *State v. Reiland,* 153 Or App 601, 604 (1998). The court then looks at whether the same proof is required to prove the elements of the statutes being compared. *Id.,* at 604-05. See ORS 161.067(1)(turning of whether, when comparing two or more statutory provisions, "each provision *requires proof* of an element that the others do not")(emphasis added).

Although the Indictment alleges several of the various alternative acts provided by statute for committing both ECSA-1 and ECSA-2, the factual basis for Mr. SMITH' convictions

establishes solely the alternative act of "duplicates" for all ECSA-1 counts, and "possesses" for all ECSA-2 counts. ORS 135.395 requires a factual basis for the plea, "i.e., facts regarding whether the defendant committed the crime to which the defendant is pleading guilty," *State v. Heisser,* 232 Or App 320, 329 (2009). The factual basis for a plea given by a defendant is sufficient proof of facts for determining sentencing issues. *State v. Herrera-Lopez,* 204 Or App 188 (2006). "[A] guilty plea is an admission of the ultimate facts that are the material elements of the crime charged. A judgment of conviction based on a guilty plea is a valid judgment so long as it is . . . accompanied by a factual basis for the plea." *State v. Graves,* 150 Or App 437, 448 (1997)(EDMONDS, J., concurring). *See also, State Farm Fire and Cas. Co. v. Sallak,* 140 Or App 89, 93-94 (1996)(Oregon law requires the court be satisfied that there is a factual basis for the plea, which satisfies the "actually litigated" requirement of issue preclusion).

This is a side-by-side comparison of the elements for ECSA-1 and ECSA-2 that constitute the crimes upon which conviction may be entered, and which frame the merger analysis, per *Reiland*:

ECSA-1	ECSA-2
Knowingly duplicated a visual recording of sexually explicit conduct involving a child	Knowingly possessed a visual recording of sexually explicit conduct involving a child
	For the purpose of arousing or satisfying the sexual desires of the person
Knowing that creation of the visual recording of sexually explicit conduct involved child abuse	Knowing that creation of the visual recording of sexually explicit conduct involved child abuse

Once the elements are identified, *Reiland* instructs that the Court then considers whether the same proof is required by those elements; the wording of the elements being compared need not be the same. *Id.,* at 604-05; *Cf., Blockburger, supra,* 284 US at 304 ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to

determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."). ECSA-2 requires proof of the alternative element of possession, the same proof required for the alternative element of duplication in ECSA-1, as those elements have been interpreted by the Court of Appeals. *See, Pugh, supra,* 255 Or App at 362-64 (recognizing downloading constitutes both possession and duplication). Thus, proof of ECSA-1 does not require proof of an element that ECSA-2 does not, although ECSA-2 requires proof of the additional element of sexual purpose that ECSA-1 does not.

In sum, assuming there are 10 "same criminal episodes," the paired Counts of ECSA-1 and ECSA-2 should merge, reducing the respective counts of conviction from 20 to 10. [28] The defense submits that the ECSA-1 counts of conviction should be subsumed by the ECSA-2 counts, which require proof of the additional element of sexual purpose, and based on the vertical proportionality analysis that ECSA-1 committed by downloading must have a lower Crime Score than ECSA-2. *See, State v. Seaman*, 115 Or App 180, 182 (1992)(where Class B and C felonies merge, but under guidelines, C felony had greater Crime Score, court properly imposed conviction and sentence on C felony only).

The defense further submits that rather than 10 separate criminal episodes involving two interrelated statutes, Mr. SMITH' case involves only one criminal episode involving these two interrelated statutes (and the Felon in Possession count). If the Court agrees with either the Double Jeopardy or merger argument presented above, then whether the surviving 10 counts of either ECSA-2 or ECSA-1 would merge further requires another round of the two-step process: (1) Are the remaining ECSA counts—now all violations of the same statute—part of the same

[28] No claim is made that the elements of Felon in Possession of a Firearm would survive subsection (1) of the anti-merger statute. However, that crime is arguably part of the same criminal episode as the other counts in the Indictment, as discussed in the next section.

criminal episode; and (2) Do they survive the anti-merger provisions of ORS 161.067(2) or (3). Subsection (2) bars merger when the same criminal episode violates only one statute, but involves two or more victims, except for certain enumerated crimes not pertinent here. Subsection (3) bars merger when the same episode violates only one statute and involves only one victim, but involves repeated violations of the same crime against the same victim where there is sufficient pause for an opportunity to renounce criminal intent.

The issues of "same criminal episode," and number of victims are central to other sentencing issues discussed below; i.e., whether the guideline criminal history score should be reconstituted upon sentencing on various counts, and matters pertaining to consecutive sentences. Because there are so many variables involved, the defense will reserve arguments concerning whether the Court should even engage in a "second round" of merger under subsections (2) or (3) until time of the sentencing hearing.

D. Objections To Reconstituting Criminal History

Oregon's sentencing guidelines prohibit reliance on convictions to establish a defendant's Criminal History ranking until there has been a "pronouncement of sentence in open court." OAR 213-004-0006(2). Thus, the pronouncement of sentence in open court may significantly affect the Criminal History ranking of defendants who, in a single sentencing hearing, are sentenced for two or more crimes. The court may then use the first crime sentenced to determine the Criminal History ranking for the next crime sentenced, and so on. This system of scoring a defendant's Criminal History is known as "reconstituting" Criminal History. However, to the extent multiple convictions stem from the same criminal episode, they may not be used to reconstitute Criminal History. *E.g., State v. Miller,* 317 Or 297 (1993); *State v. Buchloz*, 317 Or 309 (1993).

1 The State bears the burden of proving a defendant's Criminal History. See ORS
2 137.079(5)(c); OAR 213-004-0013. The present statutory scheme allows bench trials using the
3 preponderance standard on the separate criminal episode finding needed to reconstitute
4 Criminal History. However, because a finding of separate episodes is used to aggravate a
5 defendant's sentence through reconstitution, regardless of whether a court imposes concurrent
6 or consecutive sentences, that finding is subject to the *Apprendi/Blakely* constitutional
7 prohibition on judicial fact-finding by a preponderance standard. *See, State v. Mallory*, 213 Or
8 App 392 (2007), *rev. den.,* 344 Or 110 (2008); *State v. Cuevas,* 263 Or App 94, 110-114 (2014),
9 *rev allowed*, 365 Or 163 (2014). In other words, despite the statutory scheme permitting the
10 court to consider evidence adduced at a sentencing hearing to determine the number of criminal
11 episodes, that process violates *Apprendi/Blakely* if used to decide reconstituting Criminal
12 History.

13 The Oregon Supreme Court has not yet issued its decision in *Cuevas.* Claims before the
14 Court—which may or may not be decided—include whether *Miller/Bucholz* were correctly
15 decided in allowing reconstitution when crimes stem from separate criminal episodes sentenced
16 in the same judicial proceeding. While that argument will be raised here for preservation
17 purposes, *Miller/Bucholz* remains binding on the lower courts. However, the language of
18 *Bucholz* itself suggests the Court is not required to reconstitute Criminal History, and retains
19 discretion much as it does to not impose an aggravated departure or consecutive sentences
20 although permitted to do so. *See, e.g.,* 317 Or at 314 ("the text of the adopted amendment
21 permits consideration of any previous conviction occurring before 'the time the current crime . .
22 . is sentenced' ").

23 These issues are discussed in greater detail, below.

24

25

(1) Mr. SMITH' Convictions All Arise From The Same Criminal Episode.

ORS 131.505(4) defines "criminal episode" for mandatory joinder purposes as "continuous and uninterrupted conduct that establishes at least one offense and is so joined in time, place and circumstances that such conduct is directed to the accomplishment of a single criminal objective." A criminal episode, as defined in ORS 131.505(4), "is synonymous with the phrase 'same act or transaction' " in the permissive joinder statute, ORS 132.560(2)[29]. *State v. Boyd, supra,* 271 Or at 565–66. The Indictment in Mr. SMITH' case alleges that all counts are "crimes that are of the same or similar character; or based on the same act or transaction; or based on two or more acts or transactions connected together or constituting parts of a common scheme or plan."[30] In addition, none of the counts are alleged to constitute a separate and distinct act or episode. The State should be estopped from taking the contrary position that these crimes constitute separate and distinct criminal episodes for purposes of sentencing. *See, State v. Nail,* 304 Or 359, 366 (1987)(where defendant pled guilty to assaulting two individuals "as part of the same act or transaction," as the indictment charged, the restrictions on consecutive sentences for crimes "arising out of a continuous and uninterrupted course of conduct" applied).

The courts rely on cases examining "same criminal episode" in the former jeopardy context to analyze the phrase in the context of Oregon's sentencing guidelines. *E.g., State v. Witherspoon,* 250 Or App 316 (2012)(a conviction cannot be included in a defendant's criminal history score for purposes of imposing sentence on another crime if double jeopardy principles required the two crimes to be prosecuted together). The test for whether crimes stem from the same criminal episode is whether the crimes are "cross-related," i.e., "whether a complete

[29] At that time, ORS 132.560(2) permitted joinder when there were several charges "for the same act or transaction." That provision has since been incorporated in ORS 132.560(1)(b)(B).
[30] Identical language is found in ORS 132.560(1)(b), the permissive joinder statute.

account of one [crime] necessarily includes details of the other." *Witherspoon*, *supra* at 322; *Boyd, supra*, 271 at 566. Courts have also found a single criminal episode when the defendant's conduct was directed at accomplishing a "single criminal objective." *State v. Burns,* 259 Or App 410, 422-26 (2013)(discussing "single criminal objective" in case involving two child victims as being the overarching requirement of finding a single criminal episode, for purposes of grid block calculation).

In Mr. SMITH' case, all of the digital child pornography images and the prohibited firearm were seized during the execution of a search warrant at his residence on January 21, 2015.[31] In *Boyd,* the Supreme Court held that all items of contraband found during a search are possessed as part of the same criminal episode; there, drugs and various items of stolen property. 271 Or at 571. *Boyd* continues to be applied in cases with multiple counts involving possession of contraband, regardless of when the items were first possessed. See, e.g., *State v. O'Dell,* 265 Or App 425 (2014). Under this long line of authority, all ECSA-2 counts (possession of child pornography) and Count 21, Felon in Possession of a Firearm, would be part of the same criminal episode, even though the distinct file name in each count represents a different item of contraband obtained on a different date than the contraband specified in the other counts. The ECSA-1 counts are necessarily part of the same criminal episode because, as previously discussed, the downloading simultaneously proved duplication and possession. That conclusion is supported by the rationale of *Boyd,* and the State's decision to join these crimes in the same Indictment:

> If a defendant is charged with the possession of drugs, some of which had been acquired at one time and the rest at another time, it would seem clear that he would be entitled to object to multiple prosecutions. There would be no reason

[31] The Court may take judicial notice of the search warrant and return filed with the XXX County Circuit Court Clerk.

> other than harassment of the defendant for the state to divide the condition of possession into parts and prosecute separately on each. The case should not be treated any differently simply because the items of contraband happen to be of different types. *Id*., at 571.

Alternatively, because each ECSA-2 count is paired to an ECSA-1 count as part of the same transaction (identical file name, date, download to same computer), the ECSA-1 counts must also be part of the same criminal episode as all of the ECSA-2 counts. *See also, O'Dell, supra,* 264 Or App at 310-311 (noting that the fact of possession is a criminal act of a continuing nature, and that there was no evidence that his possession of certain weapons "ceased and later resumed").

Additional support for finding all ECSA-1 and ECSA-2 counts to be part of the same criminal episode is found in case law applying the "cross-related" and "single criminal objective" tests in fact scenarios other than possession of contraband discovered through the same search, including cases involving multiple victims. *E.g., State v. Bryant,* 245 Or App 519 (2011) (Defendant convicted of assault of inmate and two prison guards; State conceded that the circumstances are so interrelated that a complete account of one offense could not be related without relating the details of the other); *State v. Burns,* 259 Or App 410 (2013)(discussing "single criminal objective" in case involving three child victims as being the overarching requirement of finding same criminal episode); *State v. Norman,* 216 Or App 475, 490 (2007)(attempted assaults on three different police officers done with the same goal of escape were same criminal episode), *vac'd in part on other grounds,* 345 Or 319 (2008). In *State v. Potter,* 236 Or App 74 (2010), the Court discussed the cross-related test used to determine same criminal episode for purposes of double jeopardy. The court first considers "whether 'a complete account of one [crime] *necessarily* includes details of the other' " or, framed another way, whether the crimes are "cross-related." Id. at 82-83 (quoting *Boyd, supra,* 271 Or at 566).

In Mr. SMITH' case, a complete account of each of the 20 child pornography counts would necessarily includes details of the other counts: He was arrested based on evidence discovered from execution of a single search warrant at his home, and indicted based on images all found in the same computer. Mr. SMITH both duplicated and possessed the images by downloading the images to the same computer; and his possession occurred simultaneously with the downloads (duplication). All downloaded files were stored in the same folder on his computer; all files were acquired using the same P-2-P software installed on his computer, based on the same or similar search terms. All of the child pornography images were acquired for purposes of sexual gratification.[32] The same holds true and satisfies the "cross-related" test if the Court determines, either on double jeopardy or merger grounds, that the ECSA-2 counts are subsumed and only 10 counts of ECSA-1 and the Felon in Possession count survive as convictions. *See Boyd, supra,* 271 Or at 566 n.5 ("the single episode definition in ORS 131.505(4) is [based on the accused engaging" in conduct which involves a sequence of events that flow in a continuous and uninterrupted way and that all of these events can be plotted on a plane of time . . . as where a bank cashier makes a series of false reports to the commissioner of banking to conceal a series of thefts of money from the bank").

Even if the crimes are not cross-related, they may still be part of the "same criminal episode" if they satisfy the "single criminal objective" test, ORS 131.505(4). *State v. Witherspoon, supra,* 250 Or App at 322-23. ORS 131.505(4) provides that "'[c]riminal episode'

[32] If the State had tried this case, it would have needed to show the large amount of child pornography downloaded to his computer through the time span alleged in the indictment, including the repetitive searches using the same or similar terms, as circumstantial evidence of Mr. SMITH knowledge that the files contained child pornography at the time he duplicated by downloading the files, and circumstantial evidence of sexual purpose. *See State v. Reeves, supra,* 250 Or App at 303-04 (explicit titles of the files as well as sheer volume were circumstantial evidence of knowledge).

means continuous and uninterrupted conduct that establishes at least one offense and is so joined in time, place and circumstances that such conduct is directed to the accomplishment of a single criminal objective."

In *State v. Tooley*, 265 Or App 30 (2014) the Court discussed and applied that definition in an aggravated murder case where the defendant killed a married couple—each spouse on a different day. The Court agreed the two murders were a single criminal episode. It noted that " 'single criminal objective' may encompass multiple related, though distinct, criminal objectives; in particular, that is so when, as in this case, the separate crimes are committed in service of an ultimate and discrete criminal goal." 265 or App at 40. See also *State v. Campbell,* 354 Or. 375, 379 (2013) (Walters, J., concurring), that "a 'single criminal objective' is not a narrow concept: Two or more offenses may be directed toward more than one criminal objective and still be part of the same criminal episode, as long as they reasonably can be seen to be directed toward a single overarching criminal objective." *Tooley* also found the defendant's conduct to be "continuous and uninterrupted," noting that "conduct" refers to "the act, manner or process of carrying out a task." 265 Or App at 43 (citation omitted).

In Mr. SMITH' case, the factual basis for his pleas establish that his single criminal objective was the acquisition of digital images of child pornography for the purpose of sexual gratification; and further, that his conduct in pursuing that objective commenced on or about August 30, 2014 and continued until on or about January 21, 2015, the date of the search warrant execution. There is no evidence that his criminal conduct in pursuit of that objective was interrupted until the seizure of his computer and arrest on the same day.

The defense acknowledges that it has found no case addressing whether crimes other than possession offenses that may occur over a several month time span are "continuous and

uninterrupted conduct." See, e.g., *O'Dell, supra* (same criminal episode where State alleged possession of four firearms "on or between December 1, 2010 to June 25, 2011"). Mr. SMITH' Indictment does not allege a date certain for any of the counts, but rather uses "on or about [a certain date]". If, as noted by *Tooley*, conduct is "the manner or process of carrying out" the crimes, Mr. SMITH followed the same process from the first download until police disconnected the computer at the time of the search; i.e., he used P-2-P software to search for and download child pornography to his computer, per the factual basis for his plea. In *State v. Norman*, 216 Or App 475, 489 (2007), *vacated on other grounds*, 345 Or 319 (2008), the Court noted that the totality of the circumstances control: temporal and spatial proximity, commonality of purposes, overlapping evidence needed by State to prove its case, may establish crimes are part of the same criminal episode, even when those factors considered in isolation would not suffice. The only suspect factor in Mr. SMITH' case is temporal proximity, which alone should not defeat a finding of same criminal episode for all 20 child pornography counts and the Felon in Possession count under the totality of the circumstances.

If all counts are part of the same criminal episode, then Mr. SMITH Criminal History ranking will remain at "F".

(2) Findings Of Separate Criminal Episodes To Reconstitute Criminal History Would ViolateThe *Apprendi/Blakely* Rule.

The defense submits that the existence of separate criminal episodes for various counts of the Indictment herein, when used to reconstitute Criminal History and thereby increase punishment, are "facts which go to the criminal acts for which a defendant is to be punished"—so-called offense-specific facts—"must be proved to a jury's satisfaction unless admitted or waived." *State v. Wedge*, 293 Or 598, 607 (1982). This rule prohibits basing an aggravated

sentence on such facts unless those facts were pled and found by the trier of fact beyond a reasonable doubt.

The rule from *Apprendi v. New Jersey,* 530 US 466 (2000), the so-called *Apprendi* rule based on the Sixth and Fourteenth Amendments to the United States Constitution, is similar but broader than the right established by *Wedge.* The *Apprendi* rule states: "Other than the fact of a prior conviction, 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." 530 US at 490. Thus, *Apprendi* applies to all types of factors, both offense-specific and offender-specific, except the fact of a prior conviction.

Blakely v. Washington, 542 US 296 (2004) reaffirmed *Apprendi*, and made clear the "prescribed statutory maximum" is the defendant's presumptive maximum guideline sentence based solely on the jury findings. The *Apprendi/Blakely* rule applies to cases where a defendant has pled guilty without waiving his right to a jury determination of facts needed to enhance his presumptive guideline range. In such cases, "the maximum penalty for a crime" is the maximum sentence that may be imposed based "solely on . . . the facts admitted in the . . . plea." *Blakely*, 542 US at 304. In other words, if the indictment alleged a sentencing factor that arguably was subject to the *Apprendi/Blakely* rule, the defendant's guilty plea would be an admission to the factor and could be used in sentencing. As previously noted, Mr. SMITH' Indictment contains no such allegations, and instead includes language from the permissive joinder statute that is supportive of the crimes constituting the same criminal episode per *Boyd.*

Because a finding of separate episodes is used to aggravate a defendant's sentence by reconstituting Criminal History and increasing the presumptive guideline range, regardless of whether a court imposes concurrent or consecutive sentences, that finding is subject to the

Apprendi/Blakely constitutional prohibition on judicial fact-finding by a preponderance standard. *State v. Cuevas,* 263 Or App 94, 110-114 (2014), *rev allowed*, 356 Or 163 (2014); *see, State v. Mallory*, 213 Or App 392 (2007), *rev. den.,* 344 Or 110 (2008).[33]

Cuevas held that, although a finding of separate criminal episodes can be made by the trial judge to determine whether consecutive sentences may be imposed,[34] that same factual finding cannot be used as a basis to reconstitute criminal history or to avoid the guideline's "Shift-to-I" limit on consecutive sentences. Instead, the *Apprendi/Blakely* rule must be followed. 263 Or App at 110-114. However, the finding of separate episodes does not run afoul of the *Apprendi/Blakely* rule "unless it requires factfinding beyond a determination of what is in the court records," *Id.*, at 112 (citing *State v. Mallory, supra*). *Cuevas* involved a jury trial on child sex offenses. The Court of Appeals approved the trial court's reliance on the jury's findings that certain counts were committed at different residences on different days to establish three separate episodes; the trial court had determined there were eight separate episodes. The appellate court determined harmless error applied to the other five episodes, because there was evidence from trial testimony—although no jury findings—to support a finding beyond a reasonable doubt that the conduct was not "joined in time, place and circumstances" and "was directed toward the accomplishment of different criminal objectives." *Id*., at 114-115.

Mallory involved guilty pleas to property crimes, and the issue of whether the trial court violated the *Apprendi/Blakely* rule by making findings that the crimes arose from separate criminal episodes and therefore were "prior convictions" upon pronouncement of sentence, to

[33] Although the tests used to determine "same criminal episode" are the same in the context of merger and the authority to impose consecutive sentences, the Court may engage in fact-finding by a preponderance standard when deciding the issue in those contexts.

[34] *Oregon v. Ice*, 555 US 160 (2009) held the *Apprendi/Blakely* rule applies to findings of fact that increase the punishment for *a particular offense*, not to the decision to impose sentences consecutively.

support enhanced repeat property offender sentences on some counts. *Mallory* held the trial court could rely on defendant's admissions that the offenses were committed on different dates to find separate episodes based on the "constitutionally adequate" court records. 213 Or App at 405. Those records are generally limited to "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Id.,* at 401 (quoting *Shepard v. United States*, 544 US 13 (2005)).

Mallory does not control the outcome in Mr. SMITH case for the following reasons:

First, *Mallory* did not examine whether the crimes were part of the same criminal episode under *Boyd,* or the "cross-related" test, or the "overarching criminal objective" test; *Mallory* relied solely on the ORS 131.505(4) definition. Mr. SMITH has asserted those tests for establishing "same criminal episode." See Section II.D(1) of this memorandum, *supra.*

Second, *Mallory's* conclusion that offenses occurring on separate dates are, without more, separate criminal episodes, is in conflict with a more recent decision of the Court of Appeals, and with dicta in *Boyd,* and in *State v. Hagberg,* 345 Or 161 (2008), *opinion withdrawn and superseded on reconsideration, on other grounds,* 347 Or 272 (2009)[35]. See *State v. Tooley*, 265 Or App 30 (2014)(murder of two different people on two different days at same residence is single criminal episode); *Boyd, supra,* 271 Or at 566 n.5 (explaining the ORS 131.505(4) definition is designed for "events [that] can be plotted on a plane of time . . . as where a bank cashier makes a series of false reports to the commissioner of banking to conceal a series of thefts of money from the bank"); *Hagberg, supra* at 174 n.8 (noting its holding was limited to the arguments of the parties and "should not be read as agreeing with the idea that, as

[35] *Hagberg* held the *Apprendi/Blakely* rule applied to determining "same criminal episode" in the context of consecutive sentencing; that opinion was withdrawn based on *Oregon v. Ice.*

a matter of law, criminal offenses committed on different dates cannot be part of a continuous and uninterrupted course of conduct. They can be, depending on the attendant circumstances.”).

Third, the Indictment in Mr. SMITH’ case does not allege time frames that establish beyond a reasonable doubt that the offenses occurred on different dates. The Indictment alleges “on or about” a certain date, meaning the crime could have occurred on any date within the applicable statute of limitations for the offense. See ORS 135.717; UCrJI No. 1026 (State not required to prove crime occurred on the date alleged, when prefacing the date with “on or about”). The charging document in *Mallory* used language that crimes occurred “on or between” specific dates, which did not overlap. 213 Or App at 405-406. *Cf., State v. Reeves,* 250 Or App 294 (2012)(defendant convicted of 15 counts of duplication by downloading child pornography, on or between the same certain dates, each count alleged as an act of same or similar character but being a separate criminal episode; remanded for determination of whether each count involved a separate victim for purposes of merger analysis, meaning all counts were necessarily part of the same criminal episode).

Fourth, the Indictment in Mr. SMITH’ case alleges that all crimes are part of the same act or transaction, which is synonymous with same criminal episode in ORS 131.505(4). *Boyd, supra,* 271 Or at 565–66.

Fifth, the factual basis for Mr. SMITH’ guilty pleas, to which the State had no objection and the Court received as part of the plea colloquy, states a continuing course of conduct, from “on or about August 30, 2014, and continuing until on or about January 21, 2015.”

In sum, there is no jury finding of separate criminal episodes, no admission by Mr. SMITH of separate criminal episodes, and no constitutionally adequate court records that establish beyond a reasonable doubt that the crimes to which he pled guilty constitute separate

criminal episodes. As a result, none of the counts of conviction may be used to reconstitute his Criminal History Score.

(3) *Miller/Bucholz* Were Wrongly Decided.

The defense makes this argument in summary form to preserve it for purposes of appeal, and acknowledges this Court must deny it.

In *Bucholz*, the Court erroneously construed *former* OAR-253-04-006(2)(now OAR 213-004-006(2)) to allow reconstitution of Criminal History Score when sentencing crimes stemming from separate criminal episodes and contained in two separate indictments. In *Miller*, the Court applied *Bucholz* to allow reconstitution when the charges were all contained in the same indictment but from separate criminal episodes; further, the Supreme Court erroneously construed *former* OAR 253-12-020 (now OAR 213-012-0020), which limits the length of consecutive sentences, as inapplicable when sentencing crimes stem from separate criminal episodes.

The text of OAR 213-012-0020 says nothing about a separate criminal episode exception to its application. The *Miller* decision is extra-constitutional, for it inserted into the rule an exception it omits. *See* ORS 174.010. The rule's context also supports a construction that there is no such exception. For example, the "single judicial proceeding" rule of *former* OAR 253-04-006(3), which exited when *Miller* was decided, supports a construction that the rule applies when counts are permissively joined under ORS 132.560(1)(b)(A) and (C), not just when they are mandatorily joined under subsection (1)(b)(B) as *Miller* held. Additional support includes the guidelines' economy principle and related laws. *See, Felony Sentencing in Oregon: Guidelines, Statutes, Cases* §1-1.4.1 (Jesse Barton ed. OCDLA 3d ed. 2012). This is because abandoning the exception would "comport[] with the policy underlying the guidelines to allocate punishment 'within the limits of correctional resources[.]" *State v. Davis*, 113 Or App 118, 121 (1992), *aff'd,* 315 Or 484 (1993). Moreover, legislative history in the form of

guidelines commentary further supports the construction that the rule applies whenever counts are permissibly joined, not just when they are mandatorily joined. *See, Sentencing Guidelines Implementation Manual* 126-28 (1989). *Miller* should be reconsidered and overruled.

As for *Bucholz*, the text of OAR 213-004-006(2) does not explicitly authorize Criminal History reconstitution. Moreover, the rule's context—the same *former* single judicial proceeding rule, the economy principle and related laws, as well as the criminal history rule's legislative history from the guidelines commentary—militate against allowing reconstitution. *See, Implementation Manual* at 50-51; *see also, Supplemental Sentencing Guidelines Implementation Manual* 8 (1992). *Bucholz* should be reconsidered and overruled.

E. Restrictions On The Court's Discretion To Impose Consecutive Sentences.

ORS 137.123 provides the sole authority for courts to impose consecutive sentences. If not authorized by this statute, consecutive sentences are unlawful. *State v. Trice I,* 146 Or App 15, 21, *rev. den.,* 325 Or 280 (1997). With one exception, discussed below, ORS 137.123 "makes concurrent sentences the norm and consecutive sentences the exception." *State v. Nail,* 304 Or 359, 366 (1987). Doubts about whether the applicable statutes authorize consecutive sentences should be resolved in favor of leniency. *See, State v. Linthwaite,* 295 Or 162, 178-179 (1983)(holding that statutory former jeopardy principles that create separate offenses for crimes against separate victims in the same criminal episode do not mandate consecutive sentences, finding that "[s]entencing not only must be appropriate for the crime, but it must be appropriate for the criminal, as well."). The burden is on the State to prove the Court's authority to impose any consecutive sentence(s) that it seeks.

ORS 137.123 permits but does not require consecutive sentences in three situations arguably pertinent here. First, under subsection (2), if a defendant is sentenced in the same

proceeding "for criminal offenses that do *not* arise from the same continuous and uninterrupted course of conduct." Second, under subsections (4) and (5), when the offenses are part of the same course of conduct, the court has discretion to impose consecutive sentences "only if the court finds" one of two criteria are met: that the crime "was not merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant's willingness to commit more than one criminal offense," subsection (5)(a); or that the crime "caused or created a risk of causing greater or qualitatively different loss, injury or harm" to the same victim, or caused or created a risk of harm to a different victim, subsection (5)(b). *Id.*

As previously noted, the phrase "same criminal episode" is synonymous with the phrase "same continuous and uninterrupted course of conduct," *see Boyd, supra*, 271 Or at 565-66. Thus, the discussion of the various tests for determining "same criminal episode" in Section II.D(1) of this memorandum is applicable to ORS 137.123, and incorporated by reference. For all the same reasons, the defense would object to the imposition of consecutive sentences under ORS 137.123(2), because all offenses in Mr. SMITH' case are part of the same—versus separate—criminal episode. In the context of permitting imposition of consecutive sentences, the Court serves as the fact-finder who makes the determination of same or separate criminal episodes post-plea, without violating the *Apprendi/Blakely* rule. *Oregon v. Ice,* 555 US 160 (2009).

With same criminal episode offenses, involving one victim or more, the State may rely on ORS 137.123(5)(a), upon showing the defendant's willingness to commit more than one criminal offense not incidental to commission of a more serious crime, see *State v. Anderson*, 208 Or App 409 (2006)(discussing legislative intent and case law interpreting this provision); or

subsection (5)(b), showing greater or qualitatively different harm to a single victim, see *State v. Rettman,* 218 Or App 179 (2008)(discussing application of this provision in a single victim case), or harm to more than one victim.

Mr. SMITH contends that consecutive sentences also are not permitted under subsection 5(a) for the paired counts of ECSA-1 and ECSA-2 (assuming both counts in each pair survive the defense objections under Double Jeopardy or merger) because his conduct in downloading the child pornography is part and parcel of possessing it for the purpose of sexual gratification. Stated differently, his conduct in committing ECSA-1 is incidental to his conduct in committing ECSA-2, and does not demonstrate a willingness to commit more than one criminal offense. That he downloaded multiple files as part of the same criminal episode does not change this analysis, unless there is more than one victim. The defense reserves further argument that subsection 5(a) does not permit consecutive sentences on any count except the Felon in Possession count, should the State seek to rely on this subsection for consecutive sentencing authority.

Consecutive sentences are permitted under subsection 5(b) for offenses causing harm to separate victims, and this is the most likely provision the State would rely on in Mr. SMITH' case. *See, Reeves, supra* (finding that children depicted in digital files of child pornography are victims for purposes of merger analysis).

The defense stipulates that each distinct file name in the various counts of the Indictment represent visual depictions of a different child being sexually exploited; i.e., that the 20 ECSA charges in Mr. SMITH' case involve 10 different visual recordings of child pornography, each depicting a different child. That undisputed fact does not necessarily determine the number of "victims" for purposes of consecutive sentences, or merger, which involve the application of

legal principles to these facts. The defense acknowledges that, under *Oregon v. Ice*, the Court is the proper fact-finder as to matters determining its authority to impose consecutive sentences, and whether counts of conviction should merge.

The number of victims is also at issue in determining whether the guideline's "Shift-to-I" rule and "200 percent" rule that limit the penalties imposed on consecutive counts apply. See OAR 213-012-0020(2) & -0020(5)(limits on sentences do *not* apply to crimes that have different victims). As previously noted, the *Apprendi/Blakely* rule applies to guideline determinations that serve to increase the presumptive sentence for any offense. *State v. Cuevas, supra.* The defense contends the constitutional requirements of *Apprendi/Blakely* apply not only to the determination of same criminal episode—grafted by *Miller* into the "Shift-to-I" and "200 percent" rules—but to the number of victims, as well, based on *Cuevas.* See discussion under Section II.F(3), *infra*, incorporated by reference herein.

The defense reserves further argument on the Court's authority to impose consecutive sentences until learning the statutory basis and underlying facts asserted by the State, which bears the burden of proof. However, for the reasons stated under Section I of this memorandum, the defense submits that, assuming the Court has authority to impose consecutive sentences, it should do so with great restraint, or choose to not exercise it at all. Due to the complexity of legal issues concerning the number of victims, those issues are addressed here.

F. Determining The Number Of Victims For Sentencing Purposes.

At the outset, Mr. SMITH and defense counsel want to be clear: there is no dispute that, as a matter of fact, children who are visually recorded while being sexually abused are victims. And the acts of producing, distributing, and possessing child pornography unquestionably inflict continuing harm on those children that persists throughout their lives. The issues raised here are

a different matter; i.e., whether those children are victims *as a matter of law*, under statutes that allow separate punishment or guidelines that result in increased penalties for crimes involving separate victims. Those legal issues do not turn on the very real, well documented, severe and ongoing emotional harm to the children depicted in the images—psychological trauma that manifests in physical as well as mental impairments—as they mature to adulthood and beyond. Those issues turn on questions of statutory interpretation and constitutional rules governing proof.

It is beyond dispute that the term "victim" has different meanings in different legal contexts:

> As the parties acknowledge, the word "victim" has been defined to mean different things in different legal contexts. For example, in the context of the victim's rights statutes, the term "victim" is defined broadly, as any person who has "suffered financial, social, psychological or physical harm as a result of a crime." ORS 131.007. Similarly, for purposes of the restitution statutes, "victim" is defined to include not only the person against whom the defendant committed the criminal offense, but also any person who "has suffered economic damages as a result of the defendant's criminal activities," including the Criminal Injuries Compensation Account and an insurance carrier, to the extent that either of those entities expended money on behalf of the person against whom the defendant committed the criminal offense. ORS 137.103(4). At the same time, although the legislature did not define the word "victim" for purposes of the statute governing merger of convictions, ORS 161.067(2), this court has held that, in that context, a narrower meaning applies: The word "victim" refers to "the category of persons who are victims within the meaning of the specific substantive statute defining the relevant offense." *State v. Glaspey,* 337 Or. at 563, 100 P.3d 730.

State v. Lykins, 357 Or. 145, 156-57 (2015). *Lykins* held that, for purposes of determining application of the "vulnerable victim" guidelines departure factor, "victim" means "the person who suffered harm that is an element of the offense for which the defendant is being sentenced," and not more "broadly to any person affected by a defendant's criminal conduct." *Id.,* at 160. *See also State v. Teixeira,* 259 Or App 184 (2013)(discussing different meanings of "victim" between ORS 161.067 (anti-merger statute), ORS 131.007 (Crime Victim's Bill of

Rights), and the guideline's departure factor based on "multiple victims"). *Teixeira* also rejected the definitions in ORS 161.067 and ORS 131.007, finding "[n]either statute defines 'victim' for purposes of anything related to the sentencing guidelines, or specifically for the purpose of calculating the appropriate punishment for a single crime." *Id.,* at 190. *Teixeira* held that "victim" for determining the appropriate sentence under the guidelines "means a person who is directly, immediately, and exclusively injured by the commission of the crime." *Id.,* at 199.

Lykins in dicta stated that its definition of "victim" would appropriately define that term as it was used throughout the sentencing guidelines. *Lykins* reversed the Court of Appeals application of the definition of "victim" from *Teixeria,* but did not discuss or overrule *Teixeria*, nor did it state that the definition of "victim" for purposes of guideline enhancements is the same as the definition for purposes of merger analysis.

(1) *State v. Reeves* Does Not Control This Court's Determination Of The Number Of Victims.

State v. Reeves involved conviction through a bench trial on 15 counts of ECSA-1, based on the downloading of digital child pornography images, including videos. Following the trial, defendant argued that all 15 counts should be merged into a single conviction. The court relied on ORS 161.067(3), the anti-merger provision that when, in the course of the same criminal episode, conduct violates only one statute and involves one victim, but involves repeated violations, each count that is separated by a "sufficient pause in the defendant's criminal conduct to afford the defendant an opportunity to renounce the criminal intent" may be separately punished. The Court of Appeals determined that the evidence did not establish a "sufficient pause" to prohibit merger under subsection (3), but went on to consider the State's second contention, that the "separate victims" provision of subsection (2) precluded merger. In

so doing, the Court answered a question of first impression in Oregon: whether the children depicted in child pornography are victims both of the underlying sexual abuse (captured on the visual recordings) and the possession and distribution of the resulting child pornography, for the applicability of ORS 161.067(2). The Court so found. 250 Or App 294, *rev. den.,* 352 Or 565 (2012)(hereafter referred to as *Reeves I*).

However, because the trial court had not made findings on there being more than one victim, the Court remanded with instructions for the trial judge to determine "the extent to which different children are depicted in the images that are the subject of each of the 15 counts—a determination that is necessarily within the trial court's factfinding competence," 250 Or App at 312. On remand the trial judge viewed the images for the 15 counts, found that each count involved a different child, and denied merger under subsection (2). In reaching that decision, the judge considered and rejected the defendant's contentions that the State could not legally establish separate victims without proof of the identity of each child, the child's birthdate, and that the child was living when defendant committed the ECSA-1 offense. On appeal of this second sentencing proceeding, the Court of Appeals noted it had held in *Reeves I* that the identity of the child did not have to be established,[36] and that defendant's other contentions would not be addressed under the law of the case doctrine. *State v. Reeves,* __ Or App __, 2015 WL 493738 (Aug. 19, 2015)(hereafter referred to as *Reeves II*).

> The trial court properly rejected those arguments because, under the "law of the case" doctrine, we had already determined that the victims in this case are the children "depicted in the downloaded images that are the basis of the 15 counts on which the court rendered guilty verdicts." *Id.* at 311 . . . . Under the law of the case doctrine, 'when a ruling or decision has been once made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and

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[36] Although not entirely clear, because the defendant in *Reeves* tried the case rather than pled guilty, there was no admission that the images were of actual minors, which may be why claims regarding birthdate and identity were raised; i.e., that the images could be "virtual children."

> conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal or other proceeding for review.' *Id.,* at *3.

Thus, *Reeves I & II* are controlling on this Court's determination of whether there are separate "victims" for purposes of merger under ORS 161.067, but only to the extent that "victims . . . are the children depicted in the downloaded images that are the basis of the" counts adjudicated guilty, whose identities do not have to be further established by the State. It did not reach the issue of whether the State must show the children depicted were persons still alive at the time of the defendant's criminal conduct, i.e., capable of being harmed by the defendant's conduct. *Reeves I & II* also may be persuasive, but not controlling, on this Court's determination of whether there are separate "victims" for purposes of imposing consecutive sentences under ORS 137.123. That determination affects the punishment that may be imposed, rather than the number of separate offenses for which a conviction may be entered, which are different concerns. *See, Lykins, supra; Teixeira, supra.*

Reeves I & II do not answer the question of whether the State must establish the "victim" was alive at the time of the defendant's acts of downloading or possessing the visual depiction of that person as a child—who otherwise could not even potentially suffer harm or injury from the defendant's conduct—for purposes of either merger or consecutive sentences. Accordingly, there is an alternative basis for merger or concurrent sentences that would not necessarily conflict with the holding in *Reeves I & II.*

The alternative ground for concurrent sentences, or merger not precluded by ORS 161.067(2), is premised on three principles. The first principle is that some crimes can contain the following alternative: that sometimes the victim in a particular crime is a specific, identifiable person and sometimes it is the State. That was recognized in *State v. Sumerlin*, 139

Or App 579, 584 (1996), which cited legislative history that says the recklessly endangering statute "covers potential risks as well as cases where a specific person is within the zone of danger." 139 Or App at 587. This principle is self-evidently true in crimes such as Identity Theft. The crime of Identity Theft can implicate a real, identifiable victim—the person whose identity is taken. *State v. Mullen*, 245 Or App 671 (2011), rev denied, 352 Or 25 (2012). But Identity Theft can also involve the theft of a person who is "imaginary" (ORS 166.800(4)(a)), and it is axiomatic that imaginary people cannot be victims because they can suffer no loss, injury or harm. Thus, there are times when the victim of Identity Theft is the public-at-large.

The second principle is that persons who are dead prior to the commission of a crime cannot be victims of that crime. *See, e.g., Lykins, supra* ("victim" is the person who suffered the harm that is an element of the offense)*; Teixeira, supra* ("victim" is the person directly harmed by the defendant's conduct). For example, if child pornography that depicted an adolescent Abraham Lincoln was duplicated in 2013, it is self-evident that Mr. Lincoln is not "revictimized" by the duplication of those images, having been murdered more than 100 years before. This is a silly but not a frivolous example; it can be safely assumed that the electronic images of children viewed today will still be viewed one hundred years from now. Inevitably, today's victims will be long dead when the images are seen on the 22nd century's version of a computer. If dead at the time the images are downloaded or possessed by the defendant—that is, if dead when the crime is committed—then those persons no longer exist to be harmed by that particular crime, and therefore the only victim is the State.

Based on those two principles, it can be safely asserted that—notwithstanding *Reeves I & II*—the possession or duplication of child pornography does not always involve a "revictimization" of the original victim, because there is not always a living victim to

revictimize, and therefore the crime of Encouraging Child Sexual Abuse does not always have a victim other than the State.

The third principle is that it is the State's burden to prove the existence of a victim, and if that showing is not made, there is no victim as a matter of law other than the State, and thus there is no obstacle to merger presented by ORS 161.067(2), or authority for consecutive sentences based on separate victims. *See, State v.* McConville, 243 Or App 275, 284 (2011)(if State asserts the anti-merger statute applies, it has the burden of adducing legally sufficient evidence; in that case, of the "sufficient pause" requirement); *see generally*, *State v. Westbrook*, 224 Or App 493, *vac'd on other grounds*, 226 Or App 462 (2009) ("The problem with the application of Article I, section 44(1)(b), under these circumstances is, as defendant noted in the trial court, that the indictment did not allege (and defendant did not admit) that the relevant crimes involved separate victims."). Again, Mr. SMITH stipulates that each distinct file name in his Indictment represents a different child, but under this argument it remains incumbent on the State to prove each of those children (even if adults now) were alive when he committed the crimes; otherwise, the "victim" for merger analysis is the State.

(2) *Reeves I* Was Incorrect In Holding That Each Child Depicted In A Visual Recording Of Sexually Explicit Conduct Is A "Victim" For Purposes Of Merger, And Should Be Overruled.

The defense makes the following argument to preserve it for purposes of appeal, acknowledging this Court must deny it.

Reeves I itself recognized that the answer to the question before it, who is the "victim" of ECSA-1 committed by downloading digital images of child pornography where the identities of the children were unknown to the State, was not obvious:

> The issue raised by the parties' arguments is how many victims were involved in defendant's crimes. That is, it is not clear whether—when multiple charges are based on images of different children—ORS 163.684 contemplates that there was one victim or more than one victim, or whether the statute is intended instead to promote the general welfare of children, rather than to address a criminal act committed against a particular person. Because ORS 163.684 is subject to all of the above interpretations, it is not clear which subsection of ORS 161.067, if any, governs the merger issue in this case. No Oregon case has addressed that issue, and the answer is not obvious. 250 Or App at 308-09.

Neither ORS 163.684 or 163.686 require proof of harm or risk of harm to any person as an element of the offense. *See, State v. Glaspey,* 337 Or 558, 565 (2004)(the victim of a crime is, ordinarily, "a person who suffers harm that is an element of the offense."). The only reference to any person in the elements of those crimes is that there be a "visual recording of sexually explicit conduct involving a child," and that the defendant knows "that the creation of the visual recording . . . involved child abuse."

> Our holding is consistent with the use of the term "victim" throughout the substantive part of the criminal code. Ordinarily, when the term "victim" is used in a statute that defines a criminal offense, it is used in the precise sense of a person who suffers harm that is an element of the offense. For example, when the statute defining aggravated murder refers to the "victim" of the murder, it is clear that it is referring only to a person who has suffered the particular harm—death—that is the gravamen of the crime of murder. *See* ORS 163.095(1)(e), (f), and (2)(a) (defining aggravated murder as murder committed under certain circumstances, including that murder occurred in course of "intentional maiming or torture of the victim," that "the victim of the intentional homicide was a person under the age of 14 years," and that "the victim" was correctional or police officer, witness, etc.). *See also* ORS 163.150(1)(a) (in sentencing proceeding for aggravated murder, "evidence may be presented as to any matter * * * including * * * victim impact evidence relating to the personal characteristics of the victim or the impact of the crime on the victim's family"). Similarly, ORS 163.235, the statute defining first-degree kidnapping, uses the term "victim" in a way that clearly refers to a person who has suffered the harm that the essence of the crime of kidnapping—unconsented and unauthorized confinement or transportation. *See* ORS 163.235(1)(b), (c), and (d) (person commits crime of first-degree kidnapping if person takes or secretly confines another without consent or authority, with purpose of "hold[ing] the victim as a shield or hostage," "caus[ing] physical injury to the victim," or "terroriz[ing] the victim or another person").

Glaspey, 337 Or. at 565-66. *Reeves I* erroneously found the test in *Glaspey* was satisfied because creation of the visual recording involves child abuse, and "[t]he person who suffers the harm in the creation of a visual recording of child abuse is the child who is abused," 250 Or App at 310. However, ECSA-1 by downloading does not have as an element the defendant's creation of child pornography.

Glaspey held that the child witness to a fourth-degree assault, although an element of the statute that makes the crime a felony Assault 3, was not a "victim" under that statute, because the child witness did not suffer the harm that is an element of the statute, i.e., physical injury. Surely there is no dispute that a child witness sustains emotional trauma by observing the infliction of injury on a parent, just as there is no dispute that the person whose sexual abuse was recorded as a child suffers emotional trauma upon knowledge that a defendant has downloaded and possessed those images. That, however, does not make that person a "victim" under the *Glaspey* test, because the statutes at issue here do not contain an element that the defendant inflict any harm to the person depicted in the images.

The digital image of a child involved in sexually explicit conduct—a person who need not be identified, be cognizant of the defendant's conduct, nor even any longer alive when that image is downloaded or possessed—does not suffice to make the child depicted a "victim" for purposes of the anti-merger statute. The use of the words "a child," and "child abuse" are definitional parts of the elements of these crimes: There must be a real, alive child at the time the visual recording was created—as opposed to a virtual or digitally created image of a child, or a real person who is not a minor but resembles a child—to qualify as child pornography. Furthermore, the creation of the recording must involve child abuse, in order to be valid under the First Amendment; e.g., a film depicting simulated sexual conduct is not child pornography.

Cf., Lykins (there must be a witness who is tampered with by the defendant to commit the crime of witness tampering, but the witness is not a "victim" of that crime.).

ECSA crimes committed by duplicating existing child pornography and possessing the same are designed to protect future victims of child sex abuse, by destroying the market for child pornography through punishing those who perpetuate or use that market. Those crimes therefore protect children generally and not the specific (and most often unidentifiable) child in the image. *Reeves* was incorrectly decided, and should be overruled.

(3) The "Shift-to-I" And "200 Percent" Rules Limits on Consecutive Sentences

OAR 213-012-0020(2)(a)(B) limits the penalties for consecutive sentences by requiring that the guideline range is established, not by using the defendant's true Criminal History Score, but instead by using Criminal History Score I. This is called the "shift-to-I:" rule. Under OAR 213-012-0020(2)(b), the total prison sentence for all counts run consecutively may not exceed twice the maximum presumptive incarcerative term for the primary offense, except by departure. *Miller* holds that these consecutive sentence limitations do not apply to crimes stemming from separate criminal episodes. OAR 213-012-0020(5) states these two limitations do not apply to consecutive sentences imposed "for crimes that have different victims."

As previously noted, the *Apprendi/Blakely* rule applies to guideline determinations that serve to increase the presumptive sentence for any offense. *Cuevas, supra.* The defense submits the constitutional requirements of *Apprendi/Blakely* apply not only to the determination of same criminal episode—grafted by *Miller* into the "Shift-to-I" rule—but to the number of victims, as well, based on *Cuevas.* See further discussion of the *Apprendi/Blakely* rule in Section II.D(2) of this memorandum, incorporated by reference herein. For the reasons stated in Section II.D(2),

there is no constitutionally adequate proof of separate criminal episodes, which clears the *Miller* hurdle.

Furthermore, the Oregon Supreme Court's decision in *Lykins*, *supra,* defining "victim" in the context of the sentencing guidelines—not *Reeves I* defining "victim" in the context of merger—controls in determining whether there are "different victims" under OAR 213-012-0020(5). The different children depicted in the digital recordings in the counts of conviction in Mr. SMITH case are not "victims" as that term is used in the guidelines, for the reasons discussed above in the preceding parts of Section II.F of the memorandum, incorporated by reference here. Thus, the application of Article I, section 44(1)(b) is not triggered.[37] *See, Westbrook*, *supra* ("the problem with the application of Article I, section 44(1)(b) under these circumstances is that the indictment did not allege (and defendant did not admit) that the relevant crimes involved separate victims.").

CONCLUSION

This Court should begin by determining the number of counts upon which convictions can be entered, first by applying statutory merger principles; only if it finds the 10, paired counts of ECSA-1 and ECSA-2 do not merge under ORS 161.067, does the Court need to reach the Fifth Amendment Double Jeopardy clause argument. If the Court agrees with the defense that the paired counts merge, the Court next must determine the appropriate Crime Score for ECSA-1 under the vertical proportionality claim raised by the defense, to ascertain whether ECSA-1 or ECSA-2 is the more serious crime and thus the one upon which to enter the conviction. The defense submits ECSA-2 is the more serious crime.

[37] The defense reserves the right to argue that Article I, section 44(1)(b) may be void, if the State seeks to rely on this provision to aggravate sentence.

The Court should then determine whether merger of the remaining counts—which at that point, all violate the same statutory provision, except the Felon in Possession count—is precluded by either a finding of "separate victims," or "sufficient pause," under ORS 161.067(2) or (3). In making a finding regarding "separate victims" for purposes of merger analysis, the Court may rely on Mr. SMITH' stipulation that each distinctive file name in the Indictment, of which there are 10, is a visual depiction of a different child being sexually exploited. The meaning of "victim" under ORS 161.067 is not the same as the meaning of "victim" in other contexts, including the guidelines or determining the validity of consecutive sentences.

The Court should next determine the guideline ranking for each conviction that is entered. The Court is bound by the *Apprendi/Blakely* rule in determining the issue of whether there are separate criminal episodes for the purpose of reconstituting the Criminal History score for successive counts of conviction. While the meaning of "same criminal episode" is the same in all contexts, i.e., all of the various tests for determining "same criminal episode" apply when that issue is raised in the context of merger, the guidelines or consecutive sentencing authority, the Court is limited to examining the indictment, plea documents, and plea colloquy for the facts that apply. The defense submits all counts, including the Felon in Possession count, are part of the same criminal episode for purposes of disallowing reconstitution of Criminal History. If the Court agrees, that does not foreclose the imposition of consecutive sentences.

If the Court intends to impose consecutive sentences, it must then determine whether consecutive sentences are authorized by ORS 137.123, This inquiry is likely to turn again on whether there are more than one criminal episode and more than one "victim". The *Apprendi/Blakely* rule does not apply to judicial fact-finding in support of consecutive

sentences. The defense submits that the meaning of "victim" in the context of consecutive sentencing is the same as the meaning of "victim" in the guidelines, and that the children depicted in digital images of child pornography are not "victims" as a matter of law. The defense submits that consecutive sentencing authority is not available as to certain counts, and awaits the basis of the State's request for consecutive sentences to make further argument.

If the Court finds it has the authority to impose consecutive sentences on some or all of the remaining counts, it must then determine whether the 'Shift-to-I" and the "200 percent" rules apply to restrict the total prison sentence that can be imposed without departure. The Court is bound by the *Apprendi/Blakely* rule in determining whether separate criminal episodes or separate victims are established to preclude the operation of those rules in determining the total consecutive sentence. The defense submits those guideline restrictions apply to the sentence calculations here.

In exercising its inherent discretion to impose concurrent sentences even though consecutive sentences may be authorized, the Court should consider all mitigating factors discussed in Part I of this Memorandum, and further supported by the confidential supplemental document filed herewith. For the reasons aforesaid, the defense requests the Court to impose a total prison sentence not exceeding five years, and a three-year term of post-prison supervision.

RESPECTFULLY SUBMITTED this 18th day of September, 2015.

s/ Terri Wood
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