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8 IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

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11 STATE OF OREGON,
12 Plaintiff,

13 -VS-

14 MR. X,

15 Defendant

CASE No. 20-14-

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR DOWNWARD DEPARTURE

16 COMES NOW the Defendant, by and through counsel Terri Wood, and submits
17 the following points and authorities in support of his Motion For Downward Departure:

18 1. Court's Authority To Depart: Mr. X's presumptive sentence under Oregon's
19 sentencing guidelines is 15-18 months imprisonment. There is no plea agreement
20 between the parties as to sentence. ORS ORS 137.671 and OAR 213-008-0001 both
21 provide that the Court shall impose the presumptive sentence unless it finds
22 substantial and compelling reasons to impose a departure; if the Court departs, it must
23 state those reasons on the record at the time of sentencing.
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1 The decision to depart, based on valid departure factors, is discretionary with
2 the court. *See, Gall v. United States*, 552 US 38 (2007)(where trial court based
3 mitigated departure on valid factor, appellate court should affirm the trial court’s valid
4 exercise of discretion); *State v. Wilson*, 111 Or App 147, 149 (1992)(Appeals court
5 reviews the sentencing court’s factual basis for departing, not its decision whether to
6 depart). However, valid departures are a two-step process: First, determining whether
7 the facts establish the mitigating factor(s); second, finding the factor(s) to be
8 substantial and compelling so as to justify a departure. *See, State v. Upton*, 339 Or
9 673, 681 (2005)(discussing upward departures).
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11 2. Procedural Requirements In Imposing Downward Departures: The evidence
12 code does not apply in sentencing hearings. OEC 101(4)(d). ORS 137.090 instructs
13 the court, in determining aggravation or mitigation, to consider “any evidence received
14 during the proceeding; [t]he presentence report, where one is available; and any other
15 evidence relevant to aggravation or mitigation that the court finds trustworthy and
16 reliable.” Aggravated departure factors generally must be submitted to the jury using
17 the reasonable doubt standard. Mr. X has agreed to waive jury and consent to trial by
18 court on the aggravating factor alleged by the State, should the State elect to
19 proceed.
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21 OAR 213-008-0002 sets out a “non-exclusive list of mitigating and aggravating
22 factors that may be considered in determining whether substantial and compelling
23 reasons for a departure exist.” In the case at bar, the Defense has given notice that
24 four of the enumerated mitigating factors apply, as well as three factors not contained
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1 in the non-exclusive list of OAR 213-008-0002. A court needs only one valid factor to
2 depart. *State v. Wilson*, 111 Or App at 151 n.4 (1992)(discussing upward departure).

3 The State has given notice of one aggravating factor—one that is not listed in
4 the rule. The Court has discretion to decide to depart on the basis of mitigating or
5 aggravating factors other than those set out in OAR 213-008-0002. *See, e.g., State*
6 *v. Orsi*, 108 Or App 176, 180 (1991). The validity of nonenumerated aggravated
7 factors remain subject to certain constitutional attacks, outside the scope of this
8 Memorandum.

9
10 Mitigating factors do not affect a defendant’s due process and jury trial rights.
11 Therefore, the jury trial and pleading requirements required for aggravating factors are
12 inapplicable to mitigation.

13 3. Defendant’s Mitigating Factors:

14 1) OAR 213-008-002(1)(a)(C), Defendant’s mental capacity was diminished.
15 Based upon Dr. _____ psychological report, and Mr. X’s eligibility for _____ programs,
16 there should be no dispute that this factor applies. Mr. X’s IQ scores place him in the
17 one percentile, meaning 99 percent of the adult population scores higher than him.
18 Although traditionally tied to IQ scores, intellectual disability is a thinking or reasoning
19 disorder, characterized by the inability to recognize and avoid risk. The intellectually
20 disabled adult has severe adaptive behavior problems in social judgment, social
21 understanding, and other areas of adaptive functioning. S. Greenspan & G.W. Woods,
22 “Intellectual disability as a disorder of reasoning and judgment: the gradual move away
23 from intelligence quotient-ceilings,” Curr Opin Psychiatry 2014, 27:110-116 (copy
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1 attached). The defense submits that these facts, which are integral to the
2 nonenumerated mitigating factors in this case as well, provide a substantial and
3 compelling reason for a downward departure.

4 2) OAR 213-008-002(1)(a)(F), Defendant cooperated with the state with
5 respect to the current crime of conviction, by consenting to the search, voluntarily
6 disclosing the location of firearms, showing remorse, and timely entering a guilty plea.
7 Application of this factor does not require cooperation in the form of testimony
8 against a co-defendant. *See, State v. Hays*, 155 Or App 41 (1998)(affirming
9 downward dispositional departure where defendant cooperated with authorities
10 investigating his own culpability, and later stood trial; remorse is not required). The
11 defense submits that Mr. X's cooperation, remorse, and timely acceptance of
12 responsibility for his conduct make recidivism less likely.

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14 3) OAR 213-008-002(1)(a)(G), Degree of harm is significantly less than typical
15 for such an offense, given that the guns were stored unloaded, in an outbuilding at
16 Defendant's personal residence, and not possessed in connection with any other
17 felonious activity (e.g., drug trafficking, theft). The typical felon in possession of a
18 firearm case involves possession of the gun to facilitate commission of another
19 offense, such as a drug deal, burglary, robbery, or assault. Significantly, Mr. X has no
20 arrests or convictions for any such crimes. The typical case involves the firearm being
21 transported outside the felon's residence, as well as being loaded and ready to fire.
22 *See generally, State v. Rhoades*, 210 Or App 280 (2006)(court departed downward
23 from life sentence to 60 months prison where defendant's prior sex crimes convictions
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1 arose from single course of conduct; defendant was on post-prison supervision at the
2 time of last conviction).

3 4) OAR 213-008-002(1)(a)(I) Defendant is amenable to treatment through
4 [agency name deleted] supervision and programs, which have already commenced,
5 and which are likely to be more effective than the presumptive prison term in reducing
6 recidivism; and probation will serve community safety interests by promoting
7 reformation of Defendant's social skills and interpersonal relationships, and ensuring he
8 lives in a safe environment.

9
10 5) Defendant is particularly vulnerable to abuse in a prison environment due to
11 mental retardation/intellectual disabilities. Federal courts have long recognized that
12 individual characteristics that make a defendant particularly vulnerable to abuse in
13 prison are valid grounds for downward departures. See, e.g., *United States v. Parish*,
14 308 F.3d 1025, 1031 (9th Cir. 2002; *United States v. Lara*, 905 F.2d 599, 603 (2d
15 Cir. 1990); *United States v. Long*, 977 F.2d 1264, 1277-78 (8th Cir. 1992) (a
16 physical impairment may make a defendant unusually vulnerable to abuse in prison and
17 warrant a downward departure); *United States v. Gonzalez*, 945 F.2d 525 (2d Cir.
18 1991) (downward departure affirmed where the defendant had "soft" and "feminine"
19 features that would make him prey to other prisoners).

20
21 6) Defendant's intellectual disabilities will preclude him from participating in
22 prison programs designed for rehabilitation, as well as programs with early release
23 incentives, causing him to serve a greater portion of his sentence than the non-
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1 impaired inmate. Mr. _____ Declaration, as well as Dr. _____'s report, support this
2 factor.

3 7) Defendant's intellectual disabilities will likely cause him to run afoul of
4 prisoner conduct codes, resulting in extended periods of solitary confinement, either
5 for protection or as punishment, which is known to cause severe mental health
6 problems even in prisoners without pre-existing mental health issues. Mr. _____'s
7 Declaration, as well as the consensus of mental health experts who have studied the
8 effects of solitary confinement, support this factor. See, e.g., Grassian, S. & N.
9 Friedman, "Effects of sensory deprivation in psychiatric seclusion and solitary
10 confinement," International Journal of Law and Psychiatry, 18, 1, 15-26
11 (1995)(finding such conditions often induce psychosis and other serious psychiatric
12 symptoms, including massive free-floating anxiety, hyper-vigilance, acute confusional
13 states, emergence of primitive and aggressive fantasies, paranoia, and violent
14 destructive outbursts or self-mutilation); *In re Medley*, 134 US 169, 168 (1890)("[a]
15 considerable number of prisoners fell, after even a short confinement, into a semi-
16 fatuous condition, from which it was next to impossible to arouse them, and others
17 became violently insane; others still, committed suicide; while those who stood the
18 ordeal better were not generally reformed, and in most cases did not recover
19 sufficient mental activity to be of any subsequent service to the community.").

22 4. Sentencing Options: The presumptive term of probation for grid block 6
23 offenses is 3 years. The Court may impose up to 5 years probation for grid block 6
24 offenses by way of departure. OAR 213-005-0008(2)(b)(judge may by departure
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1 impose a greater term of supervised probation when necessary to ensure that the
2 conditions and purposes of probation are met). If the Court imposes probation as a
3 dispositional departure, the defense has no objection to a 5-year term of probation, as
4 that option is part of the defense argument that a dispositional departure presents a
5 better guarantee of community safety than a far shorter presumptive prison sentence.

6 As to the pending probation violation, revocation would result in a maximum of
7 60 days incarceration and two years of post-prison supervision. The incarcerative term
8 would be served in the county jail. The defense urges the Court to impose a short
9 period of incarceration as a sanction, due to the seriousness of his conduct, but
10 continue Mr. X on probation and extend the term. Mr.X's jail sentence is likely to be
11 served in conditions similar to solitary confinement, i.e., maximum custody, given the
12 challenges his several mental disorders pose to placing him in general population.
13 Therefore, incarceration should be brief for the same reasons argued in support of
14 downward departure. OAR 213-005-0008(2)(a) allows extending the term up to a
15 total of 5 years based upon a violation of probation.

16 Keeping Mr. X on probation on both the new case and the existing probation
17 case will afford the Court the greatest flexibility and control in dealing with any future
18 violations of supervision. There may be some bumps along the way, but the current
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