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

9
10
11 STATE OF OREGON,
12 Plaintiff,

13 -VS-

14 Mr. Defendant,
15 Defendant

CASE No. 15CRXXXX

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR DOWNWARD DEPARTURE

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

19
20 1. The Court's Authority To Depart.

21 Pursuant to negotiations, Mr. Defendant will plead guilty in Count 1 to the
22 lesser included offense of criminally negligent homicide; and guilty as charged in Count
23 2 to DUII. Because the negligent homicide is DUII-related, the crime seriousness is
24 increased from a category of 8 to 9. ORS 163.147 (requiring both second-degree
25 manslaughter and negligent homicide to be classified as category 9 if the driver was

1 driving under the influence of intoxicants). Based on that enhancement, Mr. Defendant
2 will face sentencing in gridblock 9-H. The presumptive guideline sentence is 37-38
3 months imprisonment. There is no plea agreement between the parties as to
4 sentence. ORS 137.671 and OAR 213-008-0001 both provide that the Court shall
5 impose the presumptive sentence unless it finds substantial and compelling reasons to
6 impose a departure. If the Court departs, it must state those reasons on the record
7 at the time of sentencing. Those reasons should support a finding that the
8 presumptive sentence would not accomplish the purposes of sentencing as to the
9 individual defendant. *See generally, State v. Wilson*, 111 Or App 147, 149-151
10 (1992).
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12 The Oregon Constitution as well as the Guidelines address the purposes of
13 sentencing. Article I, section 15 of the Oregon Constitution provides: “Laws for the
14 punishment of crime shall be founded on these principles: protection of society,
15 personal responsibility, and accountability for one’s actions and reformation.” The
16 Guidelines’ “Statement of Purposes and Principles” similarly provides: “The primary
17 objectives of sentencing are to punish each offender appropriately, and to insure the
18 security of the people in person and property, within the limits of correctional
19 resources,” OAR 213-002-0001(1). This rule also identifies “prevention of recidivism
20 and reformation of the offender” as “basic principles which underlie these guidelines,”
21 OAR 213-002-0001(3)(a). Thus, the purposes of sentencing under the Oregon
22 Constitution and the guidelines may be summarized as public safety, punishment
23 appropriate to the individual offender based on personal responsibility and
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1 accountability, and offender reformation, all with due consideration of limited
2 correctional resources.

3 Under the guidelines, the presumptive sentence is the *maximum* sentence the
4 Court may impose absent substantial and compelling reasons for upward departure.
5 *See, State v. Woodin*, 131 Or App 171, 175-76 (1994). In Mr. Defendant's case, the
6 State is not asserting the existence of aggravating factors to warrant a sentence in
7 excess of the presumptive maximum. The defense is relying on 10 mitigating factors.
8

9 The decision to depart, based on valid departure factors, is discretionary with
10 the court. *See, Gall v. United States*, 552 US 38 (2007)(where trial court based
11 mitigated departure on valid factor, appellate court should affirm the trial court's valid
12 exercise of discretion); *State v. Wilson, supra* at 149 (Appeals court reviews the
13 sentencing court's factual basis for departing, not its decision whether to depart).
14 However, valid departures are a two-step process: First, determining whether the facts
15 establish the mitigating factor(s); second, finding the factor(s) to be substantial and
16 compelling so as to justify a departure. *See, State v. Upton*, 339 Or 673, 681
17 (2005)(discussing upward departures). The Guidelines include a non-exclusive list of
18 mitigating factors sufficient to impose a departure sentence. ORS 213-008-
19 002(1)(a)(A)-(J). *See, State v. Orsi*, 108 OrApp 176, 180 (1991)(sentencing court
20 may depart on basis of non-enumerated factors). Non-enumerated mitigating factors
21 may be as compelling grounds for departure as listed factors. *Id.*
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1 2. Procedural Requirements For Imposing Downward Departures.

2 The evidence code does not apply in sentencing hearings. OEC 101(4)(d).
3 ORS 137.090 instructs the court, in determining aggravation or mitigation, to consider
4 “any evidence received during the proceeding; [t]he presentence report, where one is
5 available; and any other evidence relevant to aggravation or mitigation that the court
6 finds trustworthy and reliable.” Here, the defense has provided written documentation
7 in the Appendix to establish the factual basis for a downward departure, and requests
8 the Court receive those documents as evidence for purposes of sentencing. The Court
9 may also rely on the written or oral statements of counsel in making its sentencing
10 decision, if it finds the statements to be reliable. *State v. Waage*, 160 Or App 156,
11 165 (1999)(in that case, counsel’s statements regarding availability of treatment
12 program).

13 OAR 213-008-0002 sets out a “non-exclusive list of mitigating and aggravating
14 factors that may be considered in determining whether substantial and compelling
15 reasons for a departure exist.” In the case at bar, the Defense has given notice that
16 five of the enumerated mitigating factors apply, as well as five factors not contained
17 in the non-exclusive list of OAR 213-008-0002. A court needs only one valid factor to
18 depart. *State v. Wilson*, 111 Or App at 151 n.4 (1992)(discussing upward departure);
19 *State v. Hays*, 155 Or App 41, 49-51, *rev. denied*, 328 Or 40 (1998)(court relied on
20 two factors, finding either one of which would support the downward departure).
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1 Mitigating factors do not affect a defendant's due process and jury trial rights.
2 Therefore, the jury trial and pleading requirements required for aggravating factors are
3 inapplicable to mitigation.
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5 **3. Defendant's Mitigating Factors.**

6 Although listed in order of enumerated factors followed by non-enumerated
7 factors in the motion for downward departure, the factors are discussed here in the
8 order that most coherently presents the underlying facts.
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10 (1) The facts of this case are outside the heartland of drunk-driving
11 fatalities, and Mr. Defendant has demonstrated substantial pre-sentence
12 rehabilitation efforts.

13 **REDACTED**

14 (2) Mr. Defendant has evinced extreme remorse for his conduct in causing
15 the death of his best friend.

16 Approximately 20 minutes passed from the time of the collision until first-
17 responders arrived (Bates #4). During that time Mr. Defendant stayed with his best
18 friend who was mortally injured, and tried to comfort him. (Bates #10). First-
19 responders found him kneeling on the driver's seat and leaning over the passenger
20 seat where Mr. Victime remained unconscious and unresponsive with a massive head
21 injury. (Bates #97). . . . **REDACTED.**

22 Veterans Administration records (in Appendix, bookmarked as VJO Intake
23 Records) also document his continuing "guilt, depression, grief about losing my best
24 friend." *See State v. Hays, supra*, 155 Or App at 50 n.4 (noting that a defendant's
25 remorse may be a mitigating factor that would support downward departure in a

1 proper case); *see also, State v. Reid*, 140 Or App 293, 299 (1996)(“We agree that a
2 defendant’s empathy—or lack thereof—is appropriate to a court’s consideration of
3 what sentence should be imposed.”)

4 (3) Mr. Defendant suffered life-threatening injuries, weeks of excruciating
5 pain, and permanent physical injury, as well as increased severity of his
6 combat-related PTSD, and will also sustain lifetime revocation of driving
7 privileges, all as collateral consequences of his conduct.

8 Mr. Defendant lost half of the blood in his body through internal injuries,
9 underwent two major surgeries, REDACTED. If he had died there would be no
10 prosecution; that he almost died and sustained permanent injury to his right leg is a
11 punitive consequence of his conduct that should be considered in determining what
12 further punishment is warranted. *See also, United States v. Clough*, 360 F3d 967 (9th
13 Cir. 2004)(court has discretion to downward depart where defendant was shot by
14 police during arrest because his significant injuries constitute a continuing form of
15 punishment). Daniel Sheridan, a forensic nurse, has reviewed the hundreds of pages of
16 medical records from discovery and prepared a 3-page summary describing the nature
17 and extent of Mr. Defendant’ injuries from the accident. His report and c.v. are
18 included in the Appendix.

19 Mr. Defendant receives disability benefits for combat-related PTSD, formally
20 diagnosed in XXXX. During Operation XXXX he killed an Iraqi by shooting him in the
21 head, and was exposed to sights of other dead and injured Iraqis. Post-accident, after
22 witnessing his best friend die from a massive head wound caused by his impaired
23 driving, Mr. Defendant’ chronic PTSD has been exacerbated to severe levels. He
24 regularly experiences nightmares, flashbacks, irritability and impaired concentration,
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1 depression, and feelings of failure, guilt, and hopelessness, See VJO Intake Records, in
2 the Appendix.

3 That the accident, as well as the ongoing criminal prosecution, would cause
4 increased PTSD symptoms and distress is substantiated by the research. Mr.
5 Defendant' role in Mr. Victim's death is strikingly similar to circumstances that
6 commonly result in combat-related PTSD; e.g., witnessing the violent death of a buddy
7 or valued leader, and being responsible for or failing to save a buddy from death or
8 serious injury. See, William P. Nash, "Combat/Operational Stress Adaptations and
9 Injuries," in COMBAT STRESS INJURY: THEORY, RESEARCH, AND MANAGEMENT 33, 51
10 (Charles R. Figley & William P. Nash eds., 2007).

12 Given that the circumstances of the accident alone could cause PTSD, the
13 exacerbation of Mr. Defendant' combat-related PTSD is unsurprising. "The act of killing
14 another human being, even under circumstances that render the homicide a criminal
15 offense, carries a high risk that the perpetrator will experience a severe case of PTSD."
16 J. Vincent Aprile II, *PTSD: When the Crime Punishes the Perpetrator*, 23 Crim. Just. 39,
17 39 (2009). To engage in his defense, Mr. Defendant is required to repeatedly recall
18 and discuss this traumatic event, all of which trigger him to experience stress, anxiety,
19 and the other symptoms of PTSD. "[T]he accused is forced throughout the pretrial
20 and trial stages of a criminal prosecution to relive . . . the traumatic experience of the
21 crime," which has "the potential to stimulate and aggravate the accused's PTSD." *Id.*
22 at 40.

25 Mr. Defendant will continue to suffer daily from the debilitating symptoms of

1 PTSD, without intensive treatment that is unavailable in prison. The Oregon
2 Department of Corrections has opposed legislation to provide PTSD therapy to
3 inmates, claiming it would be cost prohibitive.

4 Apart from the sentence, the criminal conviction will trigger lifetime revocation
5 of driving privileges. ORS 809.235. REDACTED. This collateral consequence of
6 conviction is likewise severe: It will require that he find employment in a new field and
7 one that accepts convicted felons. It may require that he relocate his family to a city
8 served by mass transit, not only to be employed, but also to engage in rehabilitative
9 services.
10

11 (4) Mr. Defendant has lived conviction-free within the community for a
12 significant period of time; and has been a valued member of his
13 community.

14 The Guidelines recognize a downward departure may be warranted for a
15 defendant who has generally behaved as a law-abiding citizen. OAR 213-008-
16 0002(1)(a)(H)(defendant has lived conviction-free within the community for a
17 significant period of time preceding the current crime of conviction). A dispositional
18 departure on that ground is supported when incarceration is not necessary to protect
19 the public, particularly given the need to consider limited correctional resources.
20 “[T]he guidelines must conform corrections practices to available resources.”
21 *Guidelines Implementation Manual* at 6 (Official Commentary). In the current biennium,
22 the annual average per-inmate cost of imprisonment is \$43,678. Jesse Barton,
23 FELONY SENTENCING IN OREGON, p. 1-65 (May 2016 Supp.)(2012 ed.). Oregon faces
24 a \$1.7 billion shortfall in the state’s budget for the 2017-2019 biennium.

25 The State’s criminal history scoresheet shows Mr. Defendant has a single
conviction in XXXX, for a game violation. The enumerated factor focus on the absence

1 of aggravating facts; i.e., recent criminal convictions. Mr. Defendant' case is more
2 compelling because not only is his criminal history is minimal—not merely old—and he
3 has been a valued member of his community for many years. *See, Hays, supra*, 155 Or
4 App at 50-51(explaining a defendant with a criminal history rank “I” based on no prior
5 convictions, was entitled to a dispositional departure from prison to probation in a
6 negligent homicide case based on OAR 213-008-0002(1)(a)(H), because his “criminal
7 history is far superior to that of a petty shoplifter” who has racked up multiple Class B
8 and C misdemeanors).

9 Twelve individuals from all walks of life who know Mr. Defendant have written
10 letters that attest to his good character. **REDACTED**. Collectively, these letters
11 portray an honorable man who has contributed to the well-being of others in the
12 community after leaving military service, and who is the primary care giver for his son.
13 He has led a life that demonstrates imprisonment is not necessary for public safety.

14 (5) Mr. Defendant' status as a servicemember.

15 Mr. Defendant joined the Marine Corps at age 20, and engaged in combat
16 during Operation XXXX. He served four years in the XX Battalion with a primary
17 specialty of Electrical Equipment Repair Specialist, and received a General (Under
18 Honorable Conditions) Discharge. During service he received a Good Conduct Medal,
19 Letter of Appreciation, National Defense Service Medal, Combat Action Ribbon,
20 Meritorious Unit Commendations, Southwest Asia Service Medal (2), Kuwait Liberation
21 Medal, Sea Service Deployment Ribbon, and Rifle Expert (3rd Award). See DD-214, in
22 Appendix.

23 Oregon law recognizes that reduced punishment in felony cases may be
24 warranted due to military service, alone. The 2013 Legislature unanimously approved
25 Senate Bill 124 (enrolled as Oregon Law 2013, chapter 331), which explicitly

1 established military service as a mitigating factor in criminal sentencings. ORS
2 137.090(2) states: "In determining mitigation, the court may consider evidence
3 regarding the defendant's status as a servicemember as defined in ORS 135.881." Mr.
4 Defendant meets the definition of "Servicemember," ORS 135.881(4)(b)(A) & (B).
5 Subsequently, the Criminal Justice Commission added servicemember status to
6 enumerated list of mitigating factors. See OAR 213-008-0002(1)(a)(J).

7 Special treatment is appropriate for veteran defendants given their sacrifices
8 for our country. This is particularly true given the exceedingly small number of
9 American citizens who volunteer for active duty. According to a New York Times
10 article published in 2013, "Less than 0.5 percent of the [American] population serves
11 in the armed forces, compared with more than 12 percent during World War II."
12 [http://www.nytimes.com/2013/05/27/opinion/americans-and-their-military-drifting-](http://www.nytimes.com/2013/05/27/opinion/americans-and-their-military-drifting-apart.html?_r=0)
13 [apart.html?_r=0](http://www.nytimes.com/2013/05/27/opinion/americans-and-their-military-drifting-apart.html?_r=0) last accessed 11-18-2016.

14 Military service as a mitigating factor is particularly appropriate when the
15 defendant suffers from a service-connected mental condition:

16 "Our Nation has a long tradition of according leniency to veterans in
17 recognition of their service, especially for those who fought on the
18 front lines as [petitioner] did. Moreover, the relevance of
19 [petitioner's] extensive combat experience is not only that he served
20 honorably under extreme hardship and gruesome conditions, but also
that the jury might find mitigating the intense stress and mental and
emotional toll that combat took on [petitioner]." *Porter v. McCollum*,
558 US 30, 130 S Ct 447, 456 (internal citations omitted).

21 Legislative history to ORS 137.090(2) evinces sponsors' intent to provide
22 judges with a clear mechanism to help veterans suffering from PTSD or Traumatic
23 Brain Injury, who "find themselves in the criminal justice system, convicted of a crime
24 and facing incarceration, when a more appropriate sentence would be probation with a
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1 treatment regimen.” See Oregon State Bar, Legislative Proposal, in Appendix. The law
2 passed without opposition.

3 (6) Mr. Defendant’ mental capacity was diminished at all relevant times
4 related to the offense.

5 As noted above, Mr. Defendant suffers from service-related PTSD, and prior to
6 the vehicular homicide had a XX% disability rating based on this disorder. PTSD is a
7 stress and anxiety condition that results from exposure to an overwhelming traumatic
8 event combined with feelings of utter helplessness. With this disorder the traumatic
9 event “distressingly recurs” in various manifestations leading to impairment lasting
10 more than a month. Anxiety is most apparent in the “chronic feeling of dread,
11 apprehension, and hypervigilance” experienced by victims of PTSD. AM. PSYCHIATRIC
12 ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV). In
13 general, between 15% and 40% of combat veterans develop PTSD. True PTSD figures
14 are expected to be higher than the current estimates because many combat veterans
15 intentionally mask their symptoms, live in denial, or remain unaware of their symptoms
16 until long after experiencing the traumatic event. Evan R. Seamone (Judge Advocate,
17 U.S. Army), “Attorneys As First-Responders: Recognizing the Destructive Nature of
18 Post-Traumatic Stress Disorder on the Combat Veteran’s Legal Decision-Making
19 Process,” 202 Military Law Review 144, 153 (2009).
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22 This disorder and the symptoms Mr. Defendant experiences—sleep deprivation
23 from recurring nightmares, impaired concentration, depression and anxiety—
24 necessarily result in impaired judgment and diminished mental capacity. OAR 213-008-
25 002(1)(a)(C), authorizes a departure when a defendant’s mental capacity was

1 diminished *by other than* voluntary drug or alcohol abuse. In contrast, Mr. Defendant'
2 mental capacity was further diminished on the day of the accident by consuming
3 alcohol to excess. It is well-established that alcohol abuse is a symptom of PTSD, *See,*
4 *e.g.,* William B. Brown, *From War Zones to Jail: Veteran Reintegration Problems*, Justice
5 Policy Journal, Spring 2011, at 2 (Abstract), and that Mr. Defendant had a long
6 history of self-medicating with alcohol, see VJO Intake Records. Thus, alcohol abuse is
7 a component of his mental disorder and in that sense, involuntary versus voluntary.
8 That he drank to excess on the day of the crime should not serve to abrogate this
9 mitigating factor.
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11 The defense submits that these facts, which are integral to non-enumerated
12 mitigating factors in this case as well, provide a substantial and compelling reason for
13 a downward departure.
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15 (7) Mr. Defendant' military service and resulting PTSD aggravated his alcohol
16 dependency, which contributed to his criminal conduct.

17 This is not Mr. Defendant' first alcohol-related arrest; he successfully completed
18 a DUII diversion in XXXX, about 3 years prior to his PTSD diagnosis through the VA.
19 While the prior diversion may be viewed as an aggravating fact supporting the
20 presumptive prison sentence, it is important to note the established correlation
21 between military service, PTSD, and substance abuse—often a means of self-
22 medication. Mr. Defendant's VJO Intake Records regarding his PTSD attest that he.
23 **REDACTED.** As previously noted, it is not uncommon for veterans to suffer mental
24 health issues for years or even decades before being diagnosed, or be willing to
25 engage in meaningful treatment.

1 Researchers have documented the relationship between military service and
2 such conditions as PTSD, anxiety and depressive disorders, and substance abuse. INST.
3 OF MEDICINE OF THE NAT'L ACAD., GULF WAR AND HEALTH, VOL. 6: PHYSIOLOGIC,
4 PSYCHOLOGIC, AND PSYCHOSOCIAL EFFECTS OF DEPLOYMENT-RELATED STRESS 2
5 (2008). A study of nearly 3,000 Iraq War veterans found killing in combat “a
6 significant predictor of PTSD symptoms and alcohol abuse . . . suggesting that taking
7 a life in combat is a potent ingredient in the development of mental health
8 difficulties.” The authors note that killing “was also a significant predictor of . . . anger
9 and relationship difficulties.” Shira Maguen, Barbara A. Lucenko, Mark A. Reger,
10 Gregory A. Gahm, Brett T. Litz, Karen H. Seal, Sara J. Knight, and Charles R. Marmar,
11 “The Impact of Reported Direct and Indirect Killing on Mental Health Symptoms in Iraq
12 War Veterans,” 23:1 J. OF TRAUMATIC STRESS, 86 (February 2010). Another study
13 suggests that service personnel with “higher levels of exposure to violent combat,
14 who had killed another person” were more likely to engage in risky behaviors, which
15 may include excessive alcohol use, use of illicit drugs, and aggressive driving. William
16 D.S. Killgore, Dave I. Cotting, Jeffrey L. Thomas, Anthony L. Cox, Defendant McGurk,
17 Alexander H. Vo, Carl A. Castro & Charles W. Hoge, “Post-combat Invincibility: Violent
18 Combat Experiences Are Associated with Increased Risk-Taking Propensity Following
19 Deployment,” 42(13) J. OF PSYCHIATRIC RESEARCH 1112 (Oct. 2008).
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23 None of this is to say Mr. Defendant has a good excuse for having drunk to
24 excess on the day of the crime; rather, it serves to explain his conduct is related to
25 two enumerated mitigating factors: military service and diminished capacity. Those

1 factors tend to mitigate offender culpability and support a reasoned grant of leniency.
2 *See also, State of Minnesota v. Esparza*, 367 N.W. 2d 619 (1985)(non-enumerated
3 factors that tend to mitigate offender culpability provide a basis for downward
4 departure); *Wilson, supra*, 111 OrApp at 151 n.5 (noting that Washington and
5 Minnesota guidelines sentencing appellate decisions may function as guidance in
6 interpreting Oregon’s guidelines).

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8 (8) Mr. Defendant is amenable to treatment which is readily available and
9 likely to be more effective than the presumptive prison sentence in
10 reducing recidivism and protecting the public.

11 In recent months Mr. Defendant has engaged with Veterans Justice Outreach to
12 begin supportive therapy and obtain more necessary, intensive services available
13 through the VA now, but only if he is not imprisoned. Ms. VJO advises that he was
14 accepted into the SAR RTP (Substance Abuse Residential Rehabilitative Treatment
15 Program). See “Good News” email, attached. As explained by Ms. VJO, successful
16 completion of that 30-day program is a prerequisite for entering an in-patient VA
17 treatment program for PTSD that would last six to ten weeks. Mr. Defendant is also
18 approved for that program. Clients are expected to enter the PTSD program within a
19 few days of completing the substance abuse program. Although Mr. Defendant has
20 abstained from alcohol for more than a year, the VA evaluators concluded that he—
21 like other clients who have a history of self-medication for PTSD—needs to be
22 equipped with the tools for abstinence taught during the in-patient substance abuse
23 program. This is because the PTSD program is so emotionally difficult to complete,
24 that veterans are prone to relapse and dropping out of the program, according to Ms.
25

1 VJO.

2 Undersigned counsel has been in contact with the intake administrator at the
3 XXXX VA center, and has twice needed to postpone Mr. Defendant' admit date due to
4 this case being unresolved. Counsel will work with the administrator once a sentencing
5 date is set, to secure a bed for Mr. Defendant shortly after sentencing, should the
6 Court exercise its discretion to grant the downward dispositional departure. The
7 Oregon Court of Appeal has approved a downward dispositional departure to probation
8 for a child sex offender to receive rehabilitative treatment, with far less assurance of
9 the defendant receiving treatment. *State v. Waage, supra*.

11 When left untreated, PTSD can lead veterans to behave irresponsibly,
12 impulsively, violently, and self-destructively, which has created significant concern for
13 their own well-being and the well-being of others. Evan R. Seamone, *supra*, 202
14 Military Law Review 144, 153 (2009). Thus, affording Mr. Defendant this necessary
15 and available treatment now, when he is most receptive to treatment, is likely to be
16 more effective than the presumptive prison term in reducing recidivism and protecting
17 the public.

19 **REDACTED.** His PTSD is now severe. A probationary sentence that affords him
20 prompt access to treatment that he now desperately wants will make a world of
21 difference in his ability to successfully re-invent his life and continue to support his
22 family.

24 (9) Mr. Defendant cooperated with the State in resolving this case

25 Mr. Defendant has accepted criminal responsibility for his conduct,

1 demonstrated remorse, and will plead guilty. This suffices to establish an enumerated
2 mitigating factor, OAR 213-008-002(1)(a)(F)(defendant cooperated with the state
3 with respect to the current crime of conviction). Application of this factor does not
4 require remorse, nor cooperation in the form of testimony against a co-defendant.
5 *See, State v. Hays, supra* (affirming downward dispositional departure where
6 defendant cooperated with authorities investigating his own culpability, and later
7 stood trial). The defense also contends that the facts of the case, previously
8 discussed, establish negligent homicide rather than second-degree manslaughter.
9 Manslaughter would require proof beyond a reasonable doubt that Mr. Defendant was
10 both aware of and consciously disregarded a substantial risk that he was impaired to
11 such a degree that driving would result in the death of another person, whereas
12 negligent homicide is dependent on the failure to be aware of that risk. Simply put, Mr.
13 Defendant has fully accepted responsibility by agreeing to plead to the lesser offense,
14 as opposed to having already been granted leniency by the State through its offer.

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17 (10) Mr. Defendant' family will experience substantial hardships if the
18 presumptive sentence is imposed.

19 **REDACTED**

20 Courts have approved downward departures in cases where incarceration would
21 have a destructive impact on innocent family members. *See, e.g., United States v.*
22 *Aguirre*, 214 F3d 1122 (9th Cir. 2000); *United States v. Galante*, 111 F3d 1029 (2d
23 Cir. 1997)(affirming departure when defendant was a caring father of two sons who
24 would have faced severe financial hardships from his extended incarceration).
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1 4. Conclusion.

2 The above mitigating factors, alone or in combination, as supported by the
3 facts in Mr. Defendant' case, establish that a downward dispositional departure to
4 probation will best accomplish the purposes of guideline sentencing:

5 1) Public safety is best insured by a sentence that affords Mr. Defendant
6 access to intensive, in-patient treatment for his now severe PTSD, which he has
7 historically self-medicated with alcohol. That treatment is unavailable through the
8 Department of Corrections. Although substance abuse programs are available to DOC
9 inmates, treating the symptom of alcohol abuse without treating the underlying cause
10 of PTSD is destined to failure, as his history tragically demonstrates. Given his lack of
11 prior record, good character, family support, acceptance of personal responsibility, and
12 amenability to treatment, the presumptive prison sentence is clearly unnecessary to
13 protect the public. In his case the presumptive prison sentence will also fail the basic
14 principles of preventing recidivism and reforming the offender which underlie the
15 guidelines. OAR 213-002-0001(3)(a).

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18 2) Appropriate punishment for the individual offender is met in this case by the
19 five-year probationary sentence, which could include a period of jail with alternatives in
20 addition to successful completion of months of intensive, in-patient treatment, and
21 the mandatory lifetime driver's license revocation. Leniency is appropriate in light of
22 Mr. Defendant' extreme remorse, the substantial physical and emotional injuries he
23 sustained from the accident, his mitigated culpability based on military service and
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1 resulting diminished capacity, the destructive impact the presumptive sentence would
2 have on his dependents, and the other factors set forth above.

3 For these reasons, and any others as may be addressed at time of sentencing,
4 the defense has shown a downward departure is warranted.

5 RESPECTFULLY submitted this XXXXX, 2016.

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8 s/ Terri Wood

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10 TERRI WOOD, OSB #883325
11 ATTORNEY FOR DEFENDANT
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