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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF FRESNO, JUVENILE DIVISION

11 IN THE MATTER OF:

12 ODD DUCK

13 D.O.B. [deleted]

Fresno County Superior Court  
Case No.: [deleted]

RESPONSE TO PEOPLE'S  
DISPOSITION STATEMENT

14  
15 After not one, but *two* recommendations from the Probation Department that minor ODD  
16 DUCK would be more appropriately disciplined by something less than commitment to the  
17 Department of Juvenile Justice, the prosecution begs to differ. Quoting Welfare and Institutions  
18 Code section 202, the prosecutor's brief then goes on to ignore all but the first clause – and the  
19 argument virtually defines the phrase "*non sequitur*." Counsel for the defense submits that the  
20 Probation Department has appropriately considered *all* clauses of section 202, including "the  
21 best interests of the minor *in all* deliberations."

22 **I**

23 **THE PROSECUTION'S PROCEDURAL HISTORY IGNORES THE FACTS OF THE**  
24 **CASES, RESULTING IN A MISCHARACTERIZATION OF THE CRIMES**  
25 **COMMITTED, AS WELL AS OVERCHARGING**

26 The prosecution's disposition statement references the various charges committed by  
27 ODD DUCK, repeatedly characterizing them as acts of violence and even referring to them as  
28

1 “strong-arm robberies.” (Disposition Statement at 2.) The prosecution states that “[t]he minor  
2 may not be a violent person, but he continues to do violent acts.” (*Ibid.*)

3 Looking at these *acts* and various definitions of “violence” shows that the minor is not a  
4 violent person *and* he does not continue to do violent acts. It appears that the prosecution at  
5 times confuses the meaning of the word “violence” with the phrase “against the will of” and at  
6 other times mixes the meanings of the words “violence” and “provocative.”

7 The California Penal Code indicates that: “Words and phrases must be construed  
8 according to the context and the approved usage of the language.” (Pen. Code § 7(16); *People v.*  
9 *Kozlowski* (2002) 96 Cal.App.4th 853, 866 [117 Cal.Rptr.2d 504].) One method of determining  
10 the “approved use of the language” is through the use of dictionaries. (*See People v. Walton*  
11 (1945) 70 Cal.App.2d Supp. 862, 866 [161 P.2d 498]; *McAllister v. California Coastal*  
12 *Commission* (2008) 169 Cal.App.4th 912, 28 [--- Cal.Rptr.3d ---; 2009 Daily Journal D.A.R. 26];  
13 *Moghadam v. Regents of University of California* (2008) 169 Cal.App.4th 466, 479 [86  
14 Cal.Rptr.3d 739].) Turning to *Webster’s Third New International Dictionary, Unabridged*  
15 (2002), most definitions of the word “violence” reference the exertion of physical force, the  
16 intensity, turbulence, or furiousness of the activity, or vehemence. Ironically, a notable  
17 exception is most clearly demonstrated by the prosecution’s use of the word “violence”: one  
18 definition of the word is “undue alteration of wording or sense (as in editing or interpreting a  
19 text).” (*Webster’s Third New International Dictionary, Unabridged* (2002).)

20 Picking someone’s pocket and asking for money without any actual threat would not  
21 seem to come under the definition of “violence.” Such acts are not characterized by physical  
22 force, intensity of the act, turbulence, furiousness, or vehemence.

23 In the cases for which ODD DUCK was charged, some of which resulted in “no contest”  
24 pleas and others of which were neither admitted nor litigated, the behavior was non-violent.  
25 Alleged victims in all cases indicated that ODD DUCK’S behavior consisted primarily of  
26 requests. According to the report in one case, which resulted in a plea to a misdemeanor

1 violation of Penal Code section 496(a),<sup>1</sup> ODD DUCK repeatedly approached a girl, asked her for  
2 the time and then asked “Don’t I know you?”; “Don’t we go to school together?”; “Are you sure  
3 we don’t know each other?” The girl indicated that she did not know ODD DUCK. He then  
4 asked if he could “at least get a hug,” to which the girl replied “Okay.” Thereafter, ODD DUCK  
5 approached her again, saying he had “mistakenly put \$20 in her back pocket, which he stated  
6 was his.” Assuming the report is accurate and ODD DUCK did what was reported, he showed  
7 an ability that would make Carnac the Magnificent proud.<sup>2</sup> After making this statement, ODD  
8 DUCK then reached into her back pocket and removed a \$20 bill. ODD DUCK stated, “See this  
9 is my money. I put it in by mistake.” The girl nodded her head, ODD DUCK walked away, and  
10 the girl walked home. This behavior is without a doubt odd and also without a doubt could be  
11 frightening to an individual such as a young girl; it is not characterized by “violence.”

12 In two other incidents, the police reports similarly are devoid of any violent behavior. At  
13 most, *accepting every single word of the police reports as the truth, the whole truth and nothing*  
14 *but the truth*, ODD DUCK made, in one case, an ambiguous statement which might be  
15 interpreted as a threat. The statement was, “I’m going to sleep on him.” Whatever that might  
16 actually mean is beyond this writer. Given the odd nature of ODD DUCK’S interaction with the  
17 girl mentioned above and the fact that it allegedly came after a series of denials from another boy  
18 as to whether or not he had any money, one *could* interpret it as meaning ODD DUCK was bored  
19 with what he was hearing and was about to fall asleep – but this is strictly conjecture and the  
20 statement is admittedly open to other interpretations as well. In *any* event, the statement itself is  
21 not well-characterized as “violence”; unless perhaps, as with the prosecution’s own use of the  
22 word “violence,” it constitutes “undue alteration of wording or sense (as in editing or interpreting  
23 a text).”

24 As USLaw.com asked in a similar case, we might ask here “is this aggressive  
25 panhandling? Or robbery?” ODD DUCK’S behavior would have been more properly charged  
26

27 <sup>1</sup> This unfortunate plea was handled by another attorney prior to current counsel taking over the  
28 case.

<sup>2</sup> The reference is to the legendary “King of Late Night TV,” Johnny Carson, and his repetitive  
spoof of a clairvoyant character on “The Tonight Show starring Johnny Carson.”

1 under Penal Code section 647(c), which makes it a crime to “...accost[ ] other persons in any  
2 public place or in any place open to the public for the purpose of begging...”<sup>3</sup>

3 In any event, the actual behaviors are mischaracterized as “violence” considering the  
4 context and approved usage of the language.

5 **II**

6 **ODD DUCK’S BEHAVIOR IN CUSTODY IS DISRUPTIVE, CONSISTING**  
7 **PRIMARILY OF THE USE OF PROFANITY; WHILE ODD DUCK HAS BEEN**  
8 **VIOLENTLY ATTACKED, HE HAS NOT VIOLENTLY ATTACKED ANYONE**

9 The prosecution is not impressed with the Probation Report and argues that the court  
10 should ignore the Report’s recommendation, instead committing ODD DUCK to DJJ. On the  
11 other hand, the prosecution is impressed enough with the Probation Officer report to *utilize both*  
12 *italics and bold-faced type* when quoting from one part of that Report. In another demonstration  
13 of irony, the prosecution appears to be arguing that because ODD DUCK was assaulted, he must  
14 be deemed a violent person. The Report references ODD DUCK’S use of profanity and  
15 indicates that he is a “disruption to the pod.” The context and approved usage of the terms  
16 referenced in the Report provides no support for the belief that ODD DUCK is violent.

17 Furthermore, “troops on the ground” (i.e., officers in direct contact with ODD DUCK)  
18 indicate that ODD DUCK *is not what they would consider violent*. One officer actually stated  
19 that ODD DUCK was “kind of fun.” In response to counsel’s characterization of ODD DUCK  
20 as “perhaps being a bit of a smart-ass,” the officer smiled, appeared to agree and went on to state  
21 that ODD DUCK was endangering *himself*, not others.

22 And it is worth remembering that his potentially self-destructive behavior is *verbal* and  
23 non-violent (unless, again, we are doing violence to the terms “violent” or “violence” by “undue  
24 alteration of...sense” of those terms).

25  
26  
27  
28 <sup>3</sup> This section was once deemed unconstitutional by the Northern District Court of California, but  
a subsequent California case deemed otherwise. (*Blair v. Shanahan* (N.D.Cal.1991) 775 F.Supp.  
1315; *People v. Zimmerman* (1993) 15 Cal.App.4th Supp. 7 [19 Cal.Rptr.2d 486].)

**III****CALIFORNIA’S LEGISLATIVE ANALYST’S OFFICE EXPRESSES A DISAPPROVAL OF DJJ COMMITMENT FOR NON-VIOLENT INDIVIDUALS SUCH AS ODD DUCK AND THERE IS A PUSH TO ACCENTUATE COUNTY PROGRAMS OVER STATE PROGRAMS FOR JUVENILE OFFENDERS**

California’s Legislative Analyst’s Office (LAO) is “California’s Nonpartisan Fiscal and Policy Advisor.”<sup>4</sup> According to the LAO:

[T]he Governor’s 2007-08 budget plan proposes to shift part of the DJJ institutional population – primarily lower-level juvenile offenders – to counties along with block grant funding to offset the additional cost of this shift.

(*California’s Criminal Justice System: A Primer*, under the heading “Defining State and Local Responsibilities for Juvenile Offenders” [non-paginated] available at [http://www.lao.ca.gov/2007/cj\\_primer/cj\\_primer\\_013107.aspx#what%20happens%20jv%20off.](http://www.lao.ca.gov/2007/cj_primer/cj_primer_013107.aspx#what%20happens%20jv%20off.))

One reason given by the LAO for this shift is that:

[U]pon their release from state facilities, most juvenile offenders return to their home communities and that these local communities thus have a significant interest in their future behavior. Counties also already administer many of the programs these individuals need to reduce their likelihood of recidivism, such as drug and alcohol treatment programs and mental health treatment.

(*California’s Criminal Justice System: A Primer, supra.*)

The prosecutor argues that “the Division of Juvenile Justice has a plan to rehabilitate the minor.” (Disposition Statement at 3.) Perhaps not surprisingly, so does the Fresno County Probation Department. The plan of the Fresno County Probation Department, already in place, includes medication, counseling and education – the same things the prosecutor argues are available at the Preston Youth Facility.

DJJ commitment is for the most serious of youthful offenders. In 2005, only three-tenths of a percent of the arrested juveniles were sent to a state facility. (*California’s Criminal Justice System: A Primer, supra.*) ODD DUCK’S verbal behaviors, notwithstanding their disruptive

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<sup>4</sup> This information is taken from the header that appears on the top of pages at the website for the LAO available at <http://www.lao.ca.gov>. (Last visited January 23, 2009.)

1 effect, hardly place him in the top 0.3% of youthful offenders in California. Beyond this fact, the  
2 average age of youthful offenders in the DJJ is 19.3 years, with 70% of the population there  
3 being between 18 and 24 years of age. (“Juvenile Crime: Outlook for California” under the  
4 heading “Most Youth Authority Wards Are Older Than Age 17” available at  
5 [http://www.lao.ca.gov/1995/050195\\_juv\\_crime/kkpart5.aspx](http://www.lao.ca.gov/1995/050195_juv_crime/kkpart5.aspx) (last visited January 23, 2009).)  
6 ODD DUCK is only 15 years old.

7 Furthermore, Fresno County has a significant interest in ODD DUCK’S future behavior  
8 and ODD DUCK’S family currently resides in Fresno County. The Preston Youth Facility  
9 recommended by the prosecutor is more than an hour’s drive from Sacramento and several hours  
10 from Fresno. ODD DUCK’S mother currently visits him almost nightly and uses her time with  
11 him to talk to him about changing his behaviors. Transferring ODD DUCK to DJJ would limit  
12 his mother’s contact with him. This would have a detrimental impact upon ODD DUCK’S  
13 rehabilitation. For an incarcerated ward,

14 the normal developmental processes of adolescence, such as identity formation  
15 and societal integration, are much more difficult in an institutional setting,  
16 making family connections even more vital.

17 (Stephanie Watson, *The Family Connection and Young Offender Rehabilitation Act of*  
18 *2007: No Room for Retribution* (June 2008) McGeorge Law Review, vol. 39, pp. 682-3, citing  
19 David E. Arredondo, *Principles of Child Development and Juvenile Justice* (2004) 5 J. Ctr.  
20 Families, Child & Cts. 127.)

21 Partly because of this, a Safety and Welfare Remedial Plan arising out of a lawsuit  
22 against the DJJ requires, in alignment with California Penal Code section 6400, that minors be  
23 placed in a facility near their homes. (Watson, *supra*, at 683.)

24 The benefits the prosecution states are available in the DJJ are available in Fresno County  
25 as well, as demonstrated by the fact that ODD DUCK is currently receiving some of those  
26 benefits. Following the Fresno County Probation Department’s recommendation and keeping  
27 ODD DUCK in the local facility satisfies the desire of the legislature expressed in Penal Code  
28 section 6400, as well as the Safety and Welfare Remedial Plan of the Department of Juvenile

1 Justice, and contributes to the known biological and psychological requirements of adolescent  
2 developmental processes.

3 The prosecution complains that bed space at the JJC is “scarce.” No evidence of this  
4 scarcity in the brand-new County facility built to house a larger population of juveniles is cited.  
5 (And construction there appears to be ongoing with room already set aside for future growth.)  
6 Furthermore, resources at the State level are even scarcer as demonstrated by successful lawsuits  
7 concerning the lack of services. (“California’s Criminal Justice System: A Primer,” *supra*.) In  
8 2004, three DJJ facilities were closed and one facility was converted to a females-only facility.  
9 (“About the DJJ: History” available at [http://www.cdcr.ca.gov/Divisions\\_Boards/DJJ/](http://www.cdcr.ca.gov/Divisions_Boards/DJJ/About_DJJ/History.html)  
10 [About\\_DJJ/History.html](http://www.cdcr.ca.gov/Divisions_Boards/DJJ/About_DJJ/History.html) (last visited January 23, 2009).)

11 And, of course, California’s Governor’s budget plan calls for a shift to County-run  
12 facilities. (“California’s Criminal Justice System: A Primer,” *supra*.)

#### 14 IV

15 **THE FRESNO COUNTY PROBATION DEPARTMENT, TASKED WITH**  
16 **RECOMMENDING REHABILITATIVE PROGRAMS FOR DELINQUENT MINORS,**  
17 **HAS TWICE MADE RECOMMENDATIONS FOR LOCAL PLACEMENT, INCLUDING**  
18 **ONCE AFTER THE COURT STRONGLY INDICATED A DISAGREEMENT WITH**  
19 **THE INITIAL RECOMMENDATION; THE RECOMMENDATION RESULTING**  
20 **FROM THIS “SERIOUS CONSIDERATION” SHOULD BE FOLLOWED**

21 At the January 7, 2009, Disposition Hearing, the court vehemently and clearly stated its  
22 feeling that the Probation Department recommendation was not strong enough given the nature  
23 of the charges. Counsel for the minor orally provided further information to the court stating that  
24 the charges looked bad if one simply referred to the Penal Code sections which were violated,  
25 but that if one looked at the specific details of the incidents which resulted in the charges,  
26 counsel for the minor noted that the charges were lacking in actual violence. Counsel provided  
27 further oral argument as to why the Probation Recommendation was appropriate.

28 The court, *sua sponte*, decided to continue the matter. The court requested a written  
Statement in Mitigation from counsel for the minor be filed prior to the next hearing which was  
scheduled for January 23, 2009. The court then turned directly to the Probation Officer and

1 indicated that he wanted a re-evaluation and specifically stated that he had serious concerns  
2 about the recommendation already proffered.

3         The Probation Department clearly understood the court’s concerns. In the Addendum  
4 Report and Recommendation of the Probation Officer prepared January 15, 2009, the Probation  
5 Officer noted the court’s request to “screen the minor’s case with the California Department of  
6 Corrections and Rehabilitation, Division of Juvenile Justice.” (Addendum at 2.) The Report,  
7 incidentally, includes a discussion of the altercation of December 15, 2008, which is consistent  
8 with what counsel for the minor learned from officers at the facility and reported in the  
9 Statement in Mitigation filed with this court January 22, 2009. The Probation Officer’s  
10 Addendum Analysis and Plan states, “Your officer gave serious consideration for a commitment  
11 to DJJ.” (Addendum at 3.) However, the Addendum makes the same recommendation  
12 previously recommended.

13         The Fresno County Probation Department is taxed with the job of making  
14 recommendations to judges on placements and sentencing of juveniles. (“Juvenile Crime:  
15 Outlook for California,” *supra*.) The prosecution’s job is to prosecute crimes. While it is  
16 understandable that the prosecution would want minors punished for the crimes they admit or for  
17 which they are convicted (and apparently even for those for which they neither admit nor receive  
18 convictions), Probation Officers are specifically taxed with determining the best rehabilitative  
19 plan for convicted minors. Certainly a prosecutor *could* perform more intensive investigation –  
20 as counsel for the minor has done in this case – and armed with more in-depth information might  
21 justifiably argue for a different sentencing recommendation.

22         Here, however, the prosecution has done nothing more than to quote from reports  
23 provided by Probation – and then has gone on to argue that the quoted portions of these reports  
24 support a recommendation different than that given by the officer whose report is a summary of a  
25 more detailed investigation. In other words, in this case, the Probation Officer’s  
26 recommendation is based upon more detailed data and a more thorough investigation than that  
27 done by the prosecutor. Once again the prosecutor pours irony upon this case by taking the  
28 words of the Probation Officer’s report, extracting them from their context, mischaracterizing

1 them and using that to argue *against* the recommendation of the very officer whose report the  
2 prosecutor misconstrues.

3  
4 **CONCLUSION**

5 Counsel requests that the court follow the recommendation of the Probation Department  
6 with request to ODD DUCK Probation states and provides reasons to believe that it gave  
7 “serious consideration” to this court’s request for screening for DJJ placement and continues to  
8 make the same recommendation previously proffered.

9  
10  
11 January 23, 2009

\_\_\_\_\_  
Rick Horowitz  
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ODD DUCK