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Executive Director

**TO: Board of Supervisors**  
**FROM: Stephen J. Connolly**  
**DATE: Thursday, August 9, 2012**  
**RE: OIR Activity Report**

## **I. Discipline Process: Cases and Trends**

OIR's core function continues to be the monitoring of investigations into alleged misconduct by OCSA personnel. In the first half of 2012, the Department initiated 97 new cases: 86 related to on-duty misconduct, while 11 pertain to off-duty activity. Four of the cases involve criminal allegations that are being evaluated for possible prosecution. These totals, projected for the year, continue a trend in which the total number of new misconduct cases has decreased steadily since a high of 364 in 2009.<sup>1</sup>

One noteworthy development this year is the rise of the cases in which failure to follow the Department's audio and video recording policy is one of the charges. This reflects a determination by Patrol Operations leadership to emphasize compliance with this requirement, and to move beyond earlier interventions that took a more patient and less punitive approach. (The most frequent issue is the deputies' failure to turn on or leave on their microphone during citizen contacts.)

Though technical difficulties and unintentional oversights do occur with the equipment, the concern remains that some deputies have at times willfully ignored the policy in order to avoid scrutiny of their recorded remarks. So far, 19 new allegations have emerged in this calendar year, based on the collateral review of force incidents or citizen complaints that revealed gaps in relevant recordings. Five of these incidents have occurred in the last month. The hope and expectation is that vigilant enforcement will cause deputies to adapt their behaviors and make the recording system "second nature."

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<sup>1</sup> As previously described, however, some of this decrease is attributable to the "Commendation and Complaint" system that was instituted in 2010 and that allows for lower-level resolution of minor allegations. For the first half of 2012, 27 of the 97 new cases arose from citizen complaints that rose to the level of formal policy issues.

On a separate note, the Department recently experienced a rare but troubling “statute of limitations” failure in the context of a jail force case. Multiple deputies were found to have violated policy in their handling of an uncooperative inmate. Though the Department concurred with OIR’s recommendations regarding low-level discipline for involved personnel (primarily for their failure to notify a supervisor prior to initiating an encounter with a recalcitrant inmate), a clerical mistake caused the completed case to languish for several weeks – past the point where discipline could legally be imposed under the Peace Officer Bill of Rights. This meant that proper accountability could not occur.

This was OCSD’s first “missed statute” case in nearly two years. The result was disappointing. However, it also highlighted the need for a re-examination of protocols in tracking the cases as they work their way through the system. While OCSD’s new “decentralized discipline” model has had a number of positive effects on the discipline process, primarily by engaging managers more directly in performance issues relating to their own personnel, it has also created new efficiency challenges. This episode has reinforced the need for the Internal Affairs unit to maintain its vigilance as the facilitators of the process. OIR, which has generally tracked the cases only through the decision stage, will also now work with IA in monitoring the process through the actual imposition of discipline.

## **II. Deputy-Involved Shootings: 2012 Updates**

Since my last report to your Board, the Sheriff’s Department has been involved in one additional shooting incident. This brings to three the total number of shootings for 2012. (The first two were the fatal shooting in San Clemente in February, and the wounding of a suspect in Rancho Santa Margarita in March.) This most recent event was a non-hit shooting in the city of the San Juan Capistrano that occurred in the early morning hours of June 24. A deputy fired one round while attempting to apprehend a subject during a foot pursuit.

Deputies were responding to a 911 call that alleged a man had brandished a gun in a known gang area. Two suspects fled from the officers; both were eventually detained and charged with different criminal offenses. Because it was not a “hit” shooting, the District Attorney’s Office did not respond to take over the investigation. Nonetheless, the incident is being formally investigated regarding the actions of the suspects (a total of two were arrested) and the involved deputy. That deputy gave a voluntary statement to investigators later that morning, and the District Attorney is reviewing the completed case.

To this point, the District Attorney has not issued a formal decision on any of this year’s shooting incidents. Meanwhile, OIR is continuing to monitor the Department’s administrative reviews for each event.

### **III. Custody: Issues and Updates**

#### **A. Critical Incident Review: Inmate Disturbance**

On Sunday night, April 27, a large-scale disturbance took place within the Men's Central Jail. Late at night, deputies detected the odor of marijuana from a particular housing area and decided to initiate a full search of a block of cells, a process that affected some 70 inmates. The inmates were removed from their cells and brought to the roof while the search took place. When they were brought back, a small group of them incited the rest as a response to the search, which they asserted was inappropriately punitive and "disrespectful." Several of the inmates refused to return to their cells, and instead remained in the corridor area. They began to engage in acts of vandalism, including lighting a small fire and breaking the closing mechanism on a cell door. They also resorted to defensive measures in anticipation of a forceful reaction by the Department. Ultimately, more than 50 of them were involved.

Though the situation was obviously volatile, the involved inmates were at least contained within an enclosed module. Nor were they endangering each other. With these factors in mind, the jail supervisors were able to take a patient and deliberate approach to resolving the situation. Though an "Emergency Response Team" of trained and equipped deputies was summoned and staged on an as-needed basis, the watch commander took advantage of the lack of exigency to initiate discussion and attempt to defuse the situation without a physical conflict.

Over the course of approximately three hours, the spokesmen for the inmates and the Department's representatives worked out the logistics of a peaceful "surrender" by the inmates. Eventually all submitted to flex-cuffing and re-location in an orderly fashion. No force was necessary, and no injuries occurred. Three inmates were ultimately charged with crimes for their actions in the incident.

A few weeks later, OIR attended the Department's "Critical Incident Review," which provided a detailed recounting and analysis of the events from the disturbance. Jail staff had supplemented surveillance cameras with handheld video from an early point in the event; accordingly, extensive audio and video recordings provided a very useful frame of reference.

As usual, various aspects of the event were discussed, ranging from the effectiveness of the incident command structure to the mechanical issues exposed by the malfunctioning cell door. Certainly, the careful strategy and decision-making, and the "cooler heads" approach that allowed the situation to de-escalate so that a force deployment was not needed, were recognized and affirmed for their effectiveness.

One issue that OIR focused on was the "precipitating event," the search that led the inmates (by their own videotaped acknowledgement) to instigate the late night

disturbance. While the inmates' actions were obviously unacceptable (and in some instances illegal), their anger over the deputies' search tactics seemed to merit attention.

Inmates' possessions – particularly personal items (such as family photographs) or commissary items (which they have purchased) – take on great significance in an environment in which they have very little control and few amenities. On the other hand, regular searches by the deputies are necessary and often critical as a way of removing contraband of all kinds – including drugs and “homemade” weapons that pose a serious safety threat. Thus the stage is set for contention under the best of circumstances. When inmates perceive that deputies are intentionally damaging or mistreating their possessions, it increases the possibility that they will “act out” in problematic ways.

OIR discussed the importance of effective supervision and professionalism in the context of these searches, and the Custody Division Commanders agreed to make it a point of further emphasis in communication with sergeants and deputies. Interestingly, a search that occurred at another facility soon after the CIR reinforced both the importance of the searches and the benefits of a controlled and professional approach. The search yielded two cell phones, shanks, unauthorized prescription drugs, and other contraband. The search was also videotaped and later reviewed by facility supervisors, who noted the lack of damage to inmate property and the professionalism of involved personnel.

#### B. Use of Force: Reporting Issues

The Department recently held an executive-level force trend review to discuss a range of statistics culled from 2011. In the Custody Division, there was a 10% decrease in the total number of force events, compared to 2010. A total of 622 applications of force were recorded against 186 inmates.<sup>2</sup> The “control hold,” which is the most minor of force applications, comprised 32% of all deployments. Tasers were used on 25 occasions, while punches or kicks were involved on 46 occasions.

While the Department's scrutiny of force incidents in the jails (as well as in patrol) is significantly more thorough than in the past, there are nonetheless issues that merit ongoing attention and concern. The fact that only 20 (or 11%) of the incidents were identified as having *either* a possible policy violation *or* training issue (as opposed to being unambiguously within policy) suggests that reviewing supervisors are taking a narrow approach in their critiques. Conversely, while OIR understands the limited value of “nitpicking” or finding fault for its own sake, it believes that a properly rigorous review should be identifying potential issues in a larger number of cases. OIR is in the process of working with Department executives on clarifying the proper scope of the assessments for each individual event.

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<sup>2</sup> The Department tracks each use of force individually, even if it occurred in the context of the same incident. Accordingly, if two deputies each used a control hold followed by a punch as they grappled with the same resistant inmate, it would constitute 4 events for statistical purposes.

Additionally, OIR is concerned about the possibility that force is being “under-reported.” In five separate cases in recent months that have made their way to Internal Affairs (and two of which were also criminal referrals), significant physical contact with inmates went unreported initially and came to light only through inmate complaints and/or unrelated video review. During the resultant investigations, several of the involved deputies (and a sergeant in one instance) took the position that the contact did not rise to the level of reportable force. While accountability in those cases has occurred in the form of discipline, the incidents raise the question of whether similar “misunderstandings,” or more intentional avoidance of the reporting requirement, is occurring.

It is true that some minor contact (often characterized as “guiding” or “controlling” force) can properly occur without triggering the reporting obligations. It is also true that the temptation to take a “no harm/no foul” approach to minor encounters makes sense on some level: the necessary time and energy to write reports and conduct a full analysis might seem disproportionate to the significance of the event. For various reasons, though, the Department has rightly chosen to take a rigorous approach. It insulates the Department from liability and lessens the likelihood of unauthorized physical contact and bullying. OIR has encouraged the Department to re-emphasize these principles in response to the recent misconduct cases.

### C. Electronic Devices: Policy Review

In January of this year, an inmate escaped from the Theo Lacy Facility and was at large for a day before being recaptured as the result of an OCS D investigation. The Department conducted its usual Critical Incident Review process in an effort to assess the incident and draw lessons from it as needed. While some of the resultant changes had to do with the physical facility itself, including the reinforcement of security glass in a remote area that the inmate had exploited, a further detail concerned the attentiveness of deputies who were working at the time.

The inmate offered investigators a detailed recounting of his escape after being returned to custody, and alleged that, at one point as he walked along a high wall on his way to the edge of the facility, he passed a deputy at ground level whose attention appeared to be diverted by a cell phone. OIR followed up with Custody executives and requested further inquiry into the identity of the officer, and the possibility that discipline was appropriate.

The resulting investigation did not lead to formal discipline – a result with which OIR concurred.<sup>3</sup> Nonetheless, the incident was troubling, and not the first its kind. Last year, a deputy did receive discipline when his attention on a cell phone caused him to be slow in recognizing the need for an emergency response to a fight in the barracks. In

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<sup>3</sup> The deputy was eventually identified and interviewed, and he acknowledged the possibility that the inmate’s account was accurate. However, there were mitigating factors in his defense. The inmate’s security breach was both extraordinary and not immediately discovered; therefore the deputy had no reason to be on special alert. Moreover, and perhaps more importantly, the checking of the phone (which he did not specifically remember) was not in and of itself prohibited by policy.

another, earlier case, a deputy answered a cell phone while still participating in the subduing of a resistant inmate.

While these individual instances of distraction have received appropriate consideration, OIR has consulted with the Department about the need to address the broader reality of cellular phones and other electronic devices. In short, it is this: they constitute a significant liability to effective operations within the jail. The Department did indeed research the issue and appears to be moving toward adopting a new policy that is consistent with OIR's recommendation: the elimination of such devices from the secured areas of each facility.

The problems with the current situation are multi-faceted. They go beyond the aforementioned distraction issue (which unfortunately was a prominent feature of the Chamberlain inmate death case in 2006). Cell phones in the possession of inmates are a growing problem in jails nationwide, with some 11,000 confiscated in the California prison system alone in 2011. Their appeal, and the danger they potentially pose as a means of furthering criminal activity, is considerable. The smuggling of phones as contraband is extremely difficult to eradicate, and it is all too easy to picture scenarios in which even a phone borrowed temporarily (from a merely misguided or consciously manipulative deputy) could be used in harmful ways.

Notably, other local counties have already taken the step to forbid personnel from having their personal phones or other devices with them behind security.

With these considerations in mind, OIR recommended that OCSD adopt the current "best practice" regarding this issue, and change its policies accordingly. The Department did an assessment and the executive management has endorsed the taking of this simple but important step. While implementation will require outreach to the relevant employee unions, the goal is for OCSD to make this reform as soon as practicable.

#### **IV. OCSD Risk Management Initiatives**

One of OIR's continuing focal points is to work with OCSD on risk management from a variety of perspectives. Force incidents, while often necessary and part of the responsibilities of officers in the performance of their duties, are also a significant source of controversy and exposure in civil litigation. Accordingly, this is an important arena for training, supervision, and internal review.

OIR is working with the Department on pro-active measures relating to the documentation and assessment of force. OIR meets with SAFE representatives on a weekly basis to discuss new incidents that merit further attention based on the initial reporting. This review can lead to a variety of possible subsequent actions, ranging from a request for further evaluation regarding the necessity of force to suggestions regarding report-writing, training, or protocol review. Recent examples include the following:

- An individual was taken to the ground and arrested at a fast-food restaurant after ignoring a deputy's directions and ingesting a substance the deputy believed to be illegal narcotics. Though the force was minimal and the arrest potentially legitimate, the report lacked sufficient detail to establish the "probable cause" for the deputy's enforcement actions. The recommendation was for increased documentation and counseling.
- An inmate was left in a holding cell for an extended period, awaiting a mental health referral. He became increasingly agitated and belligerent toward staff. Eventually, with a sergeant supervising, deputies entered the holding cell to move him and a significant use of force ensued. While the force was justified, the recommendation was for further assessment of the long delay (while the inmate's condition worsened), and the possibility that use of an "Emergency Response Team," specially equipped and trained for cell extractions, might have minimized the harm to staff and inmate.
- Deputies responded to a family's request for intervention regarding an adult relative with a history of mental issues. The deputies ended up taking him into custody, and put his legs into a "hobble restraint." The man attempted to kick out the window of the patrol car and remained extremely uncooperative; nonetheless, the deputies asserted that no reportable force was used in the incident. The recommendation was for review of the video and audio documentation for this incident, and a new protocol that would require full reporting for every use of the hobble restraint.

This review combines careful, risk-oriented scrutiny of individual incidents with a proactive approach that is likely to affect future incidents in positive ways. OIR is involved in two other initiatives with SAFE that are intended to have a similar influence.

The first involves a training program that will "frontload" the Department's emphasis on risk management into the force review process. The Department is working with OIR in developing a matrix that will standardize as well as broaden the approach that supervisors take in the initial assessment and documentation of force incidents. This will ideally have a variety of implications. It will strengthen the reports by reflecting an awareness of potential risk issues, it will facilitate early identification of potential exposure, and it will promote a more holistic approach to evaluation of deputy performance.<sup>4</sup>

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<sup>4</sup> Search and seizure issues continue to be a source of potential controversy in patrol incidents. A pending Internal Affairs investigation concerns the legitimacy of a recent warrantless entry into a private backyard. The deputies' access required the cutting of a lock and was the precursor to a use of force and the arrest of the resident on a relatively minor charge. Of most concern was the active involvement of a sergeant, whose interpretation of the relevant legal principles was questionable.

The other program that SAFE will be emphasizing is the “Risk Liaison Officer” program. By designating a contact person at every individual unit of assignment, SAFE can ensure that it is getting useful feedback from the field (including timely information about possible claims or lawsuits), and that the policies or updates it wishes to disseminate are well-represented. OIR is participating in the design and implementation of a new training program for “RLO’s” that will be occurring in September.

Finally, the Department has created a new “Field Training Bureau” (staffed by a lieutenant and two sergeants) that is expressly dedicated to enhancing the OCSD patrol training program. It is also helping to coordinate the consistent reinforcement of “core functions of patrol” that include key concepts such as the 4<sup>th</sup> Amendment, effective communication with the public, and officer safety/defensive tactics. OIR will be meeting regularly with this unit as it establishes its goals and defines its specific responsibilities.

## **V. Probation Department: Incident Review**

The Office of Independent Review continues to monitor the progress of the Probations Department’s internal investigation into a February, 2012 incident involving a male and female minor having sex in a Juvenile Hall housing cell. Eight staff members were originally placed on administrative leave based on the circumstances of the incident itself. The encounter between the two minors, and the fact that their conduct was undetected for a period of hours in spite of requirements that staff conduct “safety checks” of each cell every fifteen minutes, was inherently reflective of a significant performance failure.

Interestingly, however, the investigation branched out from there. In pursuing investigative leads regarding a pattern of behavior within the relevant housing unit (some of which emerged from interviews with the juveniles themselves), the Department identified the need to expand the scope of its inquiry. It conducted an extensive review of video tape from the surveillance cameras within the unit. What emerged was not only corroboration for the earlier allegations, but the identification of eight additional employees whose consistency and dependability in conducting checks was belied by the evidence. Probation took action to relieve them of duty as well.

The internal investigations for all the subject employees are now complete, and the Department is coordinating with County Counsel and County Human Resources regarding the appropriate disciplinary measures. OIR has reviewed the case summaries and met with Probation executives on several occasions to discuss the progress of the case, and has been impressed with the focus and comprehensive nature of their response.

The investigations, as conducted by Probation’s Professional Standards Division, appear to be thorough and effective. The investigators reviewed hundreds of hours of tape and were able to use that evidence as a centerpiece for their framing of allegations. Accordingly, the interviews with the employees themselves (which are critical in serious cases) were methodical and complete, and the employees acknowledged shortcomings in a number of key instances.

While accountability for the involved employees seems to be proceeding on an appropriate path, OIR has also discussed systemic issues with Probation management. Again, the Department appears to be responding in a way that is thoughtful and proactive. It has already instituted minor reforms based in information gleaned from the investigations; that process is ongoing.

OIR will continue to monitor the review process and will provide your Board with further updates in the future.

## **VI. Conclusion**

Thank you for your attention to this memorandum. Please feel free to contact me at your convenience regarding these contents or other matters related to my responsibilities.

Best regards,

Stephen J. Connolly  
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