

Investigation of OCSD Use of Force Policies and Practices



Office of Independent Review

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Introduction

The Office of Independent Review (OIR) assists the Orange County Board of Supervisors (Board) and the community through its oversight of five county agencies, including the Orange County Sheriff's Department (OCSD or Department). Its work is zealously focused on addressing and preventing harm to the public and County whenever possible. On a day-to-day basis, the OIR scrutinizes policies, practices, and specific incidents that may reveal systemic issues so that it can work to address them. It accomplishes this by working with the agencies within its jurisdiction, the Board, and the public to increase transparency, facilitate accountability, and ensure compliance with applicable law and best practices.

In May 2020, the murder of George Floyd by a Minneapolis police officer prompted protests across the country and the county, thrusting policing and the use of force to the forefront of the nation's attention. On June 9, 2020, the Board adopted a resolution acknowledging the "anguish and anger at the inexcusable treatment of Mr. George Floyd." The resolution affirmed the Board's continuing commitment to community policing, vigilance against racism, and securing necessary reforms. The same day, Sheriff Don Barnes and the Department issued a press release stating that the "death of George Floyd was wrong" and underscoring their commitment to work with the community and listen to its concerns. On August 27, 2020, in the wake of continuing intense local and national interest in policing and the use of force, the OIR announced that it would investigate the force policies and practices of the Department.

This report details the OIR's investigation of OCSD force policies, training, and practices. The authority to use force to address threatening situations, prevent harm, and effectuate a detention is one of the most impactful and high-risk practices entrusted to our peace officers. It is a focus of concern for members of the community and deputies. It is also a steady source of financial and reputational liability for the County. The OIR's review includes, where necessary and appropriate, recommendations to improve the policies, training, and practices of the Department to better prevent avoidable harms.

Throughout our investigation, OCSD deputies and command staff were transparent and cooperative, with few exceptions. OCSD's responses to OIR requests for information and access were generally timely and complete. At multiple critical junctures during the review, Sheriff Don Barnes and his executive staff often chose collaboration and engagement, rather than obfuscation and delay, enabling the OIR's work to continue. This report would not exist if the Department was not dedicated to securing and maintaining the benefits of external oversight. Department staff and members of the Association of Orange County Deputy Sheriffs were similarly helpful. Organized labor representatives were generous with their time, energy, and information, and this report is more thorough as a result.

The OIR also relied heavily on various individuals throughout the County when conducting its investigation. OIR staff reached out to and spoke with members and leaders of multiple faith-based, community-based, and advocacy organizations. Numerous individuals provided essential information to assist us in our assessment, many of whom were subjected to force used by deputies, both on patrol and in the jails. The trust engendered through these conversations is of paramount importance to the OIR as it works to carry out its oversight duties.

The OIR is also currently reviewing certain individual force incidents involving the Department, and that work is ongoing. This review of individual incidents may result in future public reports.

Summary of Findings

The OIR reviewed and assessed force-related policies, training, and practices of the Department. In each of these areas, OCSD has in place many critical components that effectively govern the use of force by its deputies. However, the Department is sometimes out of step with best practices that would better enable its deputies to carry out their work in the most safe and effective manner. For example:

- OCSD policies do not provide enough information on de-escalation and other critical areas, including the use of lethal force. Policies also allow avoidable high-risk force practices, like warning shots and what OCSD calls “alternative” force. Alternative force encompasses use of force techniques the Department does not address in its policies or cover in its training. These vulnerabilities increase risk for the public, the Department, and the County.
- OCSD training on force and crisis intervention revealed troubling cultural currents that may contribute to undesirable deputy conduct. Specifically, some instructors made statements and shared anecdotes that could encourage bias and run counter to certain policies and law. Certain courses, including those focused on improving interactions with individuals in mental health or other crises, lacked hands-on components or information relevant to deputies working within the jails.
- OCSD’s force-reporting and review practices make it difficult to fully understand how well the Department is managing the use of force by its deputies. Force reports, which are routinely the only comprehensive record of a force incident, often lacked necessary detail to completely understand the force at issue. The supervisory reviews that followed were, at times, deficient. The OIR also identified a frequent practice of late reports during the review period, which raises concerns about the Department’s efforts to ensure deputies comply with its policies.

Well-calibrated policies, training, and practices are interrelated and equally important in preventing and addressing unnecessary or unlawful uses of force. An incomplete or confusing force policy can deny deputies necessary information and needlessly frustrate accountability efforts. Poor training can mean good policies are unknown or misunderstood, neutering their benefits and leading to bad practices.

Recommendations aimed at improving these issues are detailed in the final section of this report. The Department has generally represented to the OIR that it is currently working to address some of the OIR’s findings, and the OIR expects OCSD to confirm the steps that it has taken soon. The OIR intends to work collaboratively with the Department to ensure its

recommendations are understood and, where OCSD is willing, that they are implemented in keeping with best practices.

As part of these efforts, the Department recently invited the OIR to assess proposed changes to existing OCSD policies on an ongoing basis, allowing it to routinely make recommendations before policies are finalized and implemented. The OIR looks forward to developing other constructive ways to better understand and help improve the Department's practices.

Methodology

The OIR's investigation of OCSD force policies and practices depended on a diverse set of information and sources. In reviewing that information, the OIR relied on its staff's professional expertise, applicable laws, and best practice materials published by law enforcement research and policy organizations. Collectively, OIR staff members have over twenty years of experience working for various organizations that assess law enforcement use-of-force practices in agencies across the state and country, including on behalf of the U.S. Department of Justice, the California Department of Justice, and various local government entities. In certain matters, as part of this work for other government agencies, OIR staff sought reforms through litigation and court-enforceable consent decrees.

The OIR reviewed OCSD force policies and practices that were in effect from January 1, 2020, through the first week of October 2020 (the review period). Where the Department updated its policies after this period, OIR staff reviewed those updates to ensure the conclusions and recommendations within this report are still pertinent. This report validates certain changes OCSD made and gives some additional guidance for further updates.

OIR staff also attended force-related training courses provided to new OCSD trainees in the Academy as well as in-service training for seasoned, sworn personnel. The courses included sessions intended to prepare deputies for interactions with individuals experiencing mental health crises. OIR staff observed these trainings, but did not participate in scenario-based or other class-related exercises.

In order to fully understand the real-world application of OCSD policies and training, OIR staff reviewed a randomized, statistically significant sample of force incidents that occurred during the review period. To ensure that the sample provided a representative distribution of force incidents, OIR staff requested and received a list of all such incidents, totaling 627 force incidents not involving a deputy-involved shooting (force incidents) that took place during this period. OIR staff then applied widely-accepted statistical tools to establish a reliable sample size, and then randomly selected that number of incidents from the supplied list. OIR staff reviewed OCSD use-of-force packets related to 147 force incidents, including contemporaneous reports created by deputies who used force, as well as any reports created by those who witnessed or reviewed the use of force, along with other information.

The OIR also visited every OCSD jail facility and interviewed a random sample of then-incarcerated persons. The conversations were focused on experiences within and outside of the jails. As mentioned previously, OIR staff also spoke with various stakeholders, including

representatives of organized labor, community groups, and other individuals who were witnesses or subjects of uses of force by OCS D deputies.

Policies Assessment

Effective policies are an essential component of a law enforcement agency's approach to using force. Policies inform training, give teeth to accountability systems, and serve as an ongoing resource for deputies. Sound policies clearly articulate the legal standard for using force and echo best practices that are generally accepted among similarly-situated law enforcement organizations as the most effective means of securing public safety, serving the community, and mitigating harm. Good policies also reflect an agency's values and principles, capitalizing on an opportunity to inspire confidence within the community that the department's members respect the lives of every person and only use force when needed.

Robust, precise policies that reflect best practices also help guard local governments against costly liability. Specifically, up-to-date policies may help deputies avoid high-risk uses of force—for example, by articulating and emphasizing thorough de-escalation tactics and techniques. Doing so helps avoid the kinds of force that result in serious bodily harm and can lead to expensive lawsuits. In addition, those policies serve to help respond to legal claims. In *Monell v. Department of Social Services*, the U.S. Supreme Court held that local government bodies are liable for civil rights violations in federal court when a constitutional violation results from a policy, regulation, custom, ordinance, or decision adopted or promulgated by the government body. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). Thus, policies in line with applicable laws and best practices help safeguard public funds when plaintiffs file lawsuits against the County.

OCS D has dozens of policies and procedures that, directly or indirectly, relate to how deputies use force and how the Department assesses each use of force. OCS D has two patrol-oriented policy compilations: the "Policy Manual," consisting of about 125 distinct policies; and the "Patrol Operations Manual," with another 80 or so policies, which OCS D commonly refers to as "procedures." The jails-oriented "Court & Custody Operation Manual" (CCOM) contains 35 additional policies or procedures. The Department's flagship force policy is Policy 300, "Use of Force." Though the Custody Manual includes a custody-specific force procedure, No. 1800, it refers the reader to Policy 300 (and Policy 309, "Electronic Control Device") for further details regarding the use of force and force reporting procedures. These policies, with redactions, are publicly available.

Effective law enforcement policies share two characteristics. Specifically, these policies are:

- Clear. Well-written policies plainly lay out specific requirements and articulate when and under what circumstances the policy applies, as well as why the policy is essential to effective law enforcement work. This latter point is especially crucial for assisting both deputies and community members in understanding the importance of the policy and why its implementation is vital. Furthermore, clear policies make it easier to hold deputies who violate them accountable and help create the Department's culture.

- Comprehensive. Sound policies fully reflect applicable law and best practices. As laws change and as best practices continuously develop, so too should policies. Comprehensive policies also accurately and exhaustively address a wide range of force-related matters, including the circumstances when force may be used, how it may be used, how it is to be assessed, and so on.

OIR staff considered both areas in analyzing OCSD’s force-related policies and flagged those policy provisions that fail to reflect these elements.

In many respects, the Department’s force-related policies are commendable. For example, the policies generally are well-organized and include many of the necessary core concepts, including some key factors to consider when analyzing the use of force. Regarding the use of less lethal force, for example, OCSD Policy 300 provides a sufficient overview of the U.S. Supreme Court case *Graham v. Connor*, which sets the minimum standard for how and when law enforcement officers may use force. In *Graham*, the Supreme Court held that the Fourth Amendment of the U.S. Constitution regulates an officer’s use of force, which must be “objectively reasonable” from the perspective of a “reasonable officer” on the scene, taking into account that officers “are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.” *Graham v. Connor*, 490 U.S. 386, 396-397 (1989). The Department also emphasizes the dignity and value of all human life within Policy 300, which states that “[t]he Department recognizes and respects the value of all human life and dignity without prejudice to anyone.” Policy 300, p. 3. The same policy also states that the Department “will not tolerate excessive and/or punitive force.” *Id.* at 2.

However, we also found that OCSD force policies frequently provide insufficient information and instruction regarding pivotal issues such as de-escalation; lack clarity and specific parameters regarding the use of force and the application of best practices; and mischaracterize weapons that are potentially lethal. We address these issues, and others, more fully below.

OCSD Policies Lack Necessary Clarity

As noted above, sound policies must relay the Department’s values and effectively enshrine standards for conduct that reflect legal requirements, Department rules, and best practices for using force. The complexity of situations confronted by deputies requires them to exercise discretion when it comes to force. Effective policies and training better enable a deputy to swiftly assess an ongoing incident and wisely choose from available, authorized options to resolve it. By setting forth clear constraints and commands, policies prepare deputies to act properly in use-of-force scenarios and their aftermath—and may better enable deputies to avoid using force at all. Conversely, unfocused policies that offer imprecise parameters and direction often leave deputies on their own, relying on unguided discretion to address quickly-evolving situations. Such indistinct policies may increase the possibility that these situations unnecessarily subject deputies and community members to harm and expose the county to liability.

As detailed above, Policy 300 includes a sufficient definition of the legal standard articulated in *Graham*: force must be objectively reasonable given the facts and circumstances encountered at the event preceding the force. In certain areas, Department policies go above and beyond the *Graham* standard. In these instances, the Department is in sync with best practices. For example, Policy 300 does state that deputies may only use weapons issued or approved by OCSD and that “[n]o other such instruments shall be carried or used.” Policy 300, p. 6. However, OCSD force policies lack necessary clarity in distinguishing force methods that are within policy from those that are not. Policy 300 utilizes at least three adjectives to describe classifications of force, including *authorized*, *alternative*, and *prohibited*—but it does not define them. A failure to adequately define such categories can increase high-risk and undesirable uses of force and make it harder for the Department to sufficiently address them.

The confusion created by Policy 300 is evident in its treatment of “authorized” force. The term is used throughout the policy but is not defined. It is also not immediately clear how a deputy is to determine whether a particular force technique is authorized if the technique is not specifically mentioned in the policy. Policy 300 somewhat addresses the concept of “authorized” in the policy’s definition of a Department “Member,” defined as a deputy and other individuals who are “authorized to utilize a use of force application, [and who have] successfully completed Department approved training in the use of force application being deployed....” Policy 300, p. 1. The definition implicitly identifies training as a necessary element to an authorized force technique, but it stops short of creating that requirement. Similarly, under the heading “Control Hold/Pain Compliance Techniques,” Policy 300 states that “Members may only apply those techniques for which the Member has received Departmentally approved training....” Policy 300, p. 5. Yet this restriction applies only to specific holds and techniques, not to the use of force generally.

Revisions to Policy 300, enacted in January 2021, introduced further confusion and places the Department at a disadvantage. New policy language allows deputies to “use alternative items or methods readily available to them, so long as the item or method was utilized in an objectively reasonable manner and only to the degree that reasonably appears necessary to accomplish a legitimate law enforcement purpose” when they “are unable to effectively use the tools, weapons, or methods provided by the Department.” Policy 300, p. 2. This recent addition to Policy 300, while hedged with *Graham*’s “objectively reasonable” language, starkly contradicts OCSD’s ban on using unapproved weapons and may result in deputies using prohibited force or using force in a manner divorced from policy constraints and training. The need for such a provision is unclear: the Department has operated for years without it, and it denies deputies necessary clarity that may result in avoidable violations of policy and law. Policy 300 also fails to clarify the relationship between unauthorized force techniques and “alternative” force methods. For example, it is unclear whether a carotid restraint, which is unauthorized as required by state law, can serve as an “alternative” method.

Furthermore, while Policy 300 states that using any force “to accomplish unlawful objectives is prohibited” and that OCSD “will not tolerate excessive and/or punitive force,” it does not include a comprehensive, representative list of types of force that are explicitly banned.

Force policies from other leading law enforcement agencies have done exactly this. For example, the New York Police Department’s force policy contains a list of more than a dozen force-related actions that the NYPD has banned, including using force as a coercive measure; using force against handcuffed individuals; and forcibly attempting to prevent a subject from swallowing a controlled substance.¹

Policy 300 also potentially creates confusion by vacillating between force types that are “prohibited” and “not authorized.” Specifically, Policy 300 states that deputies “are *prohibited* from using a choke hold,” but, as noted above, also states that deputies “are *not authorized* to use a carotid restraint hold.” Policy 300, p. 6 (emphasis added). While it is clear that the Department does not approve of the use of both chokeholds and carotid restraints, it is unclear why the former is “prohibited” and the latter is “not authorized.” This structure may imply a firm ban on chokeholds but a more pliant restriction on carotid restraints, thus possibly creating confusion and two different standards for each of the proscribed force techniques.

To OCSD’s credit, Policy 300 and other force-related policies do make use of the directive “shall,” making clear that some policy provisions are required. For instance, Policy 300 does state that deputies “... shall, when in a position to do so, intercede to prevent the unreasonable use of force.” Policy 300, p. 3. However, such requirements are potentially weakened when paired with the policy’s introduction—and Academy instruction—that pitches the policy provisions as “guidelines,” suggesting a pliable imprecision to the policy’s parameters.

This issue is evident in other policies, as well. OCSD’s introduction to its Patrol Operations Manual—which is a list of rules and regulations—states that the manual is “offered for reference, and is not intended to replace or modify departmental Rules and Regulations, nor is it intended to stifle discretion or initiative when appropriate.” Patrol Operations Manual (POM), Introduction, ¶ 4 (formerly called the Field Operations Manual). It is unclear why this policy manual pitches itself only as a “reference,” even though OCSD command staff informed us that deputies can be held accountable for violating it. It is also unusual that this policy manual includes the caveat that it is not intended to replace or modify other rules and regulations, which suggests that some aspects of the manual contradict OCSD’s separate Policy Manual. Finally, the Introduction’s qualification that the manual should not “stifle discretion or initiative when appropriate” is ill-advised and reminiscent of Policy 300’s provision that allows “alternative items or methods.” Such language gives deputies too much latitude to act contrary to Department policy.

The Department also uses similarly indefinite language in other policies, such as Policy 458, “Foot Pursuit Policy,” which cautions that it only applies to “most” foot pursuits. Policy 458, p. 1. Such language frames the policy as a collection of suggestions and may result in deputies improperly disregarding its provisions. And while the policy does include some

¹ New York Police Department, “Force Guidelines,” Procedure No. 221-01, effective July 17, 2020, at pp. 3-4 (*available at* https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide3.pdf) (last visited August 9, 2021).

requirements (e.g., a deputy “*should* broadcast identifying information” about a suspect if apprehension fails), other policy elements are, inexplicably, mere suggestions with little direction to inform the deputy’s discretion (e.g., if a deputy “can no longer see or hear the suspect, the deputy *should consider* setting up a containment perimeter...” Policy 458, p. 2 (emphasis added). As already noted, such unguided discretion may ultimately result in questionable decisions, which could contribute to avoidable injuries for deputies and community members. Language that gives deputies leeway to operate outside of policy also makes it difficult to hold deputies accountable for their actions.

Direction provided elsewhere in OCSD policy also gives deputies too much discretion, inviting situations that could result in avoidable force. For example, Policy 309, “Electronic Control Device (ECD),” regarding the use of electroshock weapons, states that “Members are highly discouraged from holding an ECD and a firearm at the same time due to the risk of unintentionally applying deadly force.” Policy 309, p. 1. The policy accurately identifies the risk in simultaneously holding both a lethal and less-lethal weapon, as the deputy could easily and accidentally discharge the firearm instead of the electroshock weapon. Conversely, the opposite could occur—at the very moment when deadly force is justified and necessary, the deputy may inadvertently discharge his or her ECD. However, the policy fails to prohibit the practice of holding both weapons at the same time, even though other agencies have done so. The ECD policy for neighboring Riverside County Sheriff’s Department, for example, states: “Deputies should not hold both a firearm and the TASER at the same time.”² But OCSD’s ECD policy merely “discourage[s]” such questionable tactics. The Department is thus ill-situated to hold deputies accountable who engage in such practices when they end disastrously.

At times, OCSD policies also neglect to provide sufficient information to enable deputies to determine when force is justified or what force options deputies should utilize. Policy 300, for example, notes that “[p]ain compliance techniques may be very effective in controlling a passive or actively resisting individual.” Policy 300, p. 5. Yet no OCSD policy defines “passive” or “actively” resisting, which may increase the likelihood that a deputy deploys pain compliance techniques in the wrong setting. Such undesirable deployments may lead to unnecessary harm to the persons subjected to force, increased liability to the County, and potential discipline to the deputy at issue. OCSD should clearly define such terms and use them throughout its force policies to provide greater clarity and direction to its deputies regarding what type of force can be used and when.

Policy 300 also fails to provide sufficient parameters regarding warning shots. The policy suggests the Department is hesitant in allowing them, stating that warning shots “generally” are “discouraged.” Policy 300, p. 8. But it allows their use if a deputy “believes that they appear necessary, effective and reasonably safe,” even though it provides no instruction on when warning shots are necessary, to what ends they may be effective, and how they can be safely

² Riverside County Sheriff’s Department Standards Manual (“Riverside Sheriff’s Department Manual”), Policy 310, “Conducted Energy Device,” p. 99, *available at* <https://www.riversidesheriff.org/DocumentCenter/View/5808/Department-Standards-Manual-6721> (last visited August 9, 2021).

discharged. *Id.* As an initial matter, OCSO should reconsider whether it will permit the use of warning shots at all, especially given its own justifiable hesitation in allowing them. Rounds discharged as a “warning” can ricochet off hard surfaces in unpredictable ways and strike a person, perhaps unseen at the time of discharge, located within or outside the immediate area. A wide range of law enforcement agencies oppose their use for this very reason. Riverside County Sheriff’s Department “strictly” prohibits warning shots,³ as does the New York Police Department⁴ and the Harris County (Texas) Sheriff’s Office. Harris County policy states that such discharges are “inherently dangerous” because they “may strike an unwanted target; they may cause a suspect to escalate his resistance to deadly force; or it may cause other peace officers to resort to deadly force due to their mistaken belief that the shot came from the suspect.”⁵

Other OCSO force-related policies also allow deputies to engage in questionable or high-risk actions that could needlessly cause serious injury or even death to a person with whom a deputy is interacting. Policy 309, regarding ECDs, states, “Simultaneous applications of ECDs should be limited to high risk or exigent circumstances,” giving a go-ahead for two or more deputies to tase someone at the very same time, with no guidance or direction as to what constitutes a “high risk” or “exigent” circumstance that warrants such a hazardous course of action. Other law enforcement agencies, such as the Dallas Police Department and the Oklahoma City Police Department, justifiably prohibit the simultaneous deployment of ECDs against a single subject altogether.⁶ According to the Police Executive Research Forum (PERF), simultaneously deploying more than one electroshock weapon against an individual is one of the “most common factors that appear to be associated with fatal and other serious outcomes.”⁷ If OCSO insists on allowing deputies to use such a dangerous tactic, then its policy should specifically define the “high risk” or “exigent” circumstances in which it is permissible.

Other aspects of OCSO force policies lack clarity regarding how a use of force incident should be assessed or addressed after it has occurred. As an example, Policy 318, “Canine

³ Riverside Sheriff’s Department Manual, Policy 300, “Use of Force,” p. 63.

⁴ New York Police Department, “Force Guidelines,” Procedure No. 221-01, at p. 3.

⁵ Harris County Department Manual, Policy No. 505, “Use and Discharge of Firearms,” *available at* <https://hcsopolicy.com/policy/505-use-and-discharge-of-firearms/> (last visited August 9, 2021).

⁶ Dallas Police Department General Order 907, “Electronic Control Weapon,” at § 907.04.D (“Two or more certified ECW users will not intentionally deploy their ECW simultaneously at the same subject at the same time”), *available at* <https://dallaspolice.net/resources/Shared%20Documents/General-Orders.pdf> (last visited August 9, 2021); Oklahoma City Police Operations Manual, 152.0, “Less Lethal Devices,” P. 126 (“Officers should not intentionally activate more than one ECD at a time against a subject”), *available at* <https://www.okc.gov/home/showdocument?id=5026> (last visited August 9, 2021).

⁷ PERF, Electronic Control Weapon Guidelines, 2011 (“PERF ECW Guidelines”), p 13, *available at* https://www.policeforum.org/assets/docs/Free_Online_Documents/Use_of_Force/electronic%20control%20weapon%20guidelines%202011.pdf (last visited August 9, 2021).

Program,” states: “Depending on the circumstances, unintentional bites may result in the temporary kenneling of the dog and/or additional training at the Sheriff’s contracted trainer.” Policy 318, p. 3. The policy does not, however, specify under what circumstances either outcome should occur. Neither does the policy contemplate permanently removing from service any dog who may present an unpredictable danger to the public. At a minimum, the policy should specify that all canines who bite a person not targeted by the handler will be removed from active service until OCSD has completed its review of the incident and has determined an appropriate outcome. This is a particularly concerning issue in light of the 2018 accident involving a Department canine who bit a County employee during a training exercise.

OCSD Policies Fail to Comprehensively Address De-Escalation

Force and force-related policies that are not sufficiently thorough may omit crucial information needed for the effective, lawful, and appropriate use of force, leaving deputies and community members at risk of unnecessary harm. With dozens of policies in place that shape how deputies use force and respond to force-related incidents, OCSD policies address many foundational use-of-force topics. However, we found that OCSD policies omit essential information or include imprecise or inaccurate information in critical areas, including in its treatment of de-escalation and the use of deadly force.

Comprehensive de-escalation policies and training are a hallmark of lawful and effective law enforcement strategies. In the wake of recent changes to California law and high-profile force incidents throughout the country, many law enforcement agencies have judiciously emphasized, expanded, and bolstered their policies, training, and requirements regarding de-escalation. Some agencies, including the Oklahoma City⁸ and San Diego⁹ police departments, have established separate de-escalation policies in an overt effort to emphasize their importance, placing them on equal grounds with other dedicated policies, such as those governing the use of force itself.

As the International Association of Chiefs of Police (IACP) has stated, de-escalation refers to actions taken “...to stabilize the situation and reduce the immediacy of the threat so that more time, options, and resources can be called upon to resolve the situation *without the use of force* or with a *reduction in the force necessary*”¹⁰ (emphasis added). The New York Police Department’s definition of de-escalation is similar, stating: “The goal is to gain the voluntary compliance of the subject, when appropriate and consistent with personal safety, to *reduce or*

⁸ Oklahoma City Police Department Operations Manual, Policy 153.0, “De-Escalation,” at pp. 138-139 (“Oklahoma City De-Escalation Policy”) *available at* <https://www.okc.gov/home/showpublisheddocument?id=19639> (last visited August 9, 2021).

⁹ San Diego Police Department Procedure, Policy 1.55, “De-Escalation” (“San Diego De-Escalation Policy”), *available at* https://s3-us-west-2.amazonaws.com/themis2.datasd.org/policies_procedures/Procedures/1.0%20Administration/155.pdf (last visited August 9, 2021).

¹⁰ IACP, “National Consensus Policy and Discussion Paper on Use of Force,” revised July 2020, at pp. 2, 9 (*available at* <https://www.theiacp.org/resources/document/national-consensus-discussion-paper-on-use-of-force-and-consensus-policy>) (last visited August 9, 2021).

eliminate the necessity to use force”¹¹ (emphasis added). Thus, de-escalation refers to efforts to *avoid* the use of force or to *reduce* the amount of force used. Simply using less-lethal instead of lethal force is *not* de-escalation—though the opportunity to use lesser force may be the result of a deputy’s de-escalation tactics. An agency’s de-escalation policy should include this distinction, along with specific de-escalation strategies.

In January 2021, as mentioned above, OCSD updated its flagship force policy, Policy 300, to expand its discussion of de-escalation. The changes were much needed, as the prior version of Policy 300 devoted a mere five lines to the subject. OCSD’s updated policy now includes language that lists de-escalation tactics, including “time, distance, cover, and concealment,” and several others. The changes bring OCSD into compliance with California Senate Bill (SB) 230, codified at Cal. Gov’t. Code § 7286, which provides the bare “minimum standard” for all law enforcement agencies’ policies regarding de-escalation and other force-related requirements. However, OCSD policies should do more to effectively and comprehensively address de-escalation strategies and tactics.

OCSD has no dedicated de-escalation policy, and existing policies that address de-escalation do not align with best practices. Instead, Department policies generally only provide passing references to de-escalation and, as noted below, some force-related policies even provide incorrect information about what de-escalation is and how it should be used. OCSD’s force policies should uniformly present a comprehensive framework that not only defines de-escalation but that also thoroughly explains how and when deputies should utilize such strategies. Rather than enumerating a few de-escalation tactics, as Policy 300 does, OCSD policy should include a more exhaustive list. For example, the policy currently lists 19 factors deputies should use to evaluate the reasonableness of force; the policy should include similar detail regarding de-escalation. Doing so will further empower deputies to effectively de-escalate and also enable the Department to more fairly and effectively assess and improve such efforts.

The policy should also explain what various de-escalation tactics entail and provide considerable detail regarding how, when, and under what circumstances such tactics can be utilized effectively. Policy 300 only lists about four, imprecise de-escalation options that provide few specifics (for example, one option merely states that deputies may employ “other tactics” as long as they “do not unreasonably increase Member jeopardy.”) A comprehensive policy will go further, including key details and context. The San Diego De-Escalation Policy, for instance, states that “officers shall create distance by seeking cover and selecting positions that place physical barriers between the officer and the subject, creating a buffer zone. The creation of the buffer zone helps to reduce situational intensity by decreasing perceived pressure while continuing to control the operational space.”¹²

¹¹ New York Police Department, “Use of Force,” Procedure No. 221-02, effective July 16, 2020, at p. 2 (*available at* https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide3.pdf) (last visited August 9, 2021).

¹² San Diego De-Escalation Policy, at p. 4.

An effective de-escalation policy should also dictate that, when feasible, deputies display empathy and establish rapport by asking questions, engaging in conversation and actively listening to what the person has to say; physically position themselves as necessary to reduce the likelihood of a physical confrontation and the resulting need for force; calmly verbalize the options available to the person that can help conclude the encounter; and avoid taking unnecessary action that may exacerbate the situation (e.g., aggressive body language).¹³ OCSD policy should also include considerations a deputy should bear in mind before using force, such as whether a subject may be disregarding a deputy's instructions due to a mental health crisis, a hearing impairment, limited English proficiency, and so on.¹⁴

OCSD generally excludes these concepts from its policies and procedural manuals, especially with regards to its jail operations. In all 1,000-plus pages of OCSD's Court & Custody Operation Manual, "de-escalate" is only mentioned once, and is used inaccurately. CCOM Policy 2100, "Medical and Health Services," requires a watch commander to document less restrictive physical restraints used to "de-escalate" a situation before placing an inmate in a padded safety cell. CCOM 2100, §2104.3(b)(2). However, the use of a restraining device, whether it be handcuffs, waist restraints, leg restraints, or a restraint chair, is *not* de-escalation. CCOM Policy 1800, the Department's custody-specific force policy, does include limited, rudimentary de-escalation approaches, noting, for example, that voluntary compliance is preferred to using force, that "force is not always necessary," and that when addressing "a problem with an inmate in a cell, usually the safest and most practical immediate solution is to back out, close and secure the door, and notify a sergeant..." CCOM 1800, §1800.1(g). The policy also encourages deputies to use their "command presence" and "verbal commands" to gain compliance. However, these tactics, employed without the support of other, curated de-escalation approaches, may aggravate already tense scenarios in a custodial setting and lead to *more* force rather than less.

Other OCSD policies mischaracterize or implicitly define de-escalation improperly or insufficiently. The Department's Patrol Operations Manual erroneously suggests that less-lethal *weapons* may be used against an individual to "de-escalate" a potentially "dangerous" or "deadly" incident. However, instructing deputies that they may shoot someone with a 12-gauge shotgun that discharges less-lethal munitions in order to "de-escalate" a situation muddles the primary goal of de-escalation, which is to avoid force altogether. *See* POM § 69, p. 69.5. And while an updated version of POM § 29, "Mental Illness," includes some effective de-escalation

¹³ See, e.g., Harris County (Texas) Sheriff's Office Department Manual ("Harris County Department Manual"), Policy No. 501, "De-escalation & Response to Resistance," § VI.A., available at <https://hcsopolicy.com/policy/501-de-escalation-response-to-resistance/> (last visited August 9, 2021); Oklahoma City De-Escalation Policy, at p. 139; California Peace Officer Standards and Training, "De-Escalation: Strategies & Techniques for California Law Enforcement," 2020, Chapter 7, "De-Escalation: Methods, Techniques, & Tactics," (available at https://post.ca.gov/Portals/0/post_docs/publications/DeEscalation.pdf) (last visited August 9, 2021).

¹⁴ See, e.g., Oklahoma City De-Escalation Policy, at p. 138.

tactics (e.g., addressing a person by name, talking to a person “as long as necessary” and keeping the deputy’s “voice low and actions calm”), the policy’s reach is limited to deputies’ interactions with individuals with apparent or perceived mental illness. POM § 29, p. 29.4. OCSD policies and procedures should make clear that such tactics and techniques can be effective and should be utilized when interacting with any member of the public—not just those with a mental illness.

OCSD Policies Regarding Lethal Force do not Adhere to Best Practices

By failing to effectively address de-escalation and its requirements, OCSD is unnecessarily increasing the exposure of both its deputies and the community to physical harm that is potentially avoidable. This deficiency extends to its treatment of lethal force. At times, deputies must use lethal force to protect the lives of community members and themselves. The authority to do so entails tremendous physical, emotional and legal risks for deputies and the people they are sworn to protect. Yet, though OCSD policy accurately reflects California law regarding the use of lethal force, it fails to adhere to best practices by omitting a list of prohibited types of force, and it includes misinformation regarding what constitutes lethal force.

OCSD Policy 300 accurately reflect California law regarding the use of lethal force. California Penal Code section 835a, amended in January 2020 by Assembly Bill (AB) 392, states that a law enforcement officer is justified in using lethal force only when the officer “reasonably believes” that the force is “necessary” to apprehend a violent fleeing felon or to defend against an imminent threat of death or serious bodily injury. By passing AB 392, California shifted the legal standard for using lethal force beyond *Graham’s* “objectively reasonable” standard. While lethal force is still analyzed through the same lens—that of the reasonable officer at the scene—the force must not just be objectively reasonable, but also *necessary*. OCSD issued a bulletin in December 2019 about the law change, but its core policy was not updated until January 2021—a full year later. While this was in keeping with the minimum requirements of the law, the delay in updating OCSD policy was unnecessary. OCSD should ensure that it updates its policies in a timelier manner to incorporate changes to state and federal law.

OCSD’s policy regarding lethal or deadly force complies with the minimum requirements of the law, but its treatment of the concept may lead to confusion for its deputies and their supervisors. To OCSD’s credit, Policy 300 accurately defines “deadly” force as that which “creates a substantial risk of causing death or serious bodily physical injury....” Policy 300, p. 1. However, the policy muddles the definition by including language that may unduly credit the intent of the deputy at issue and result in the application of a standard less stringent than the law. The policy states that a use of force not involving a firearm might be considered deadly if the deputy “*reasonably anticipates and intends* that the force applied will create a substantial risk of serious bodily injury or death.” Policy 300, p.7 (emphasis added). By introducing the additional element of “intent” for force not involving a firearm, the policy suggests that OCSD may consider a deputy’s subjective intention and anticipated result when determining whether any force other than a shooting is lethal force. However, a deputy’s *intention* in using a particular weapon or technique has no bearing on the risk of death or serious injury that results from the use of force. For example, striking a person on the head with a rigid, heavy object should always be considered a use of lethal force because of the substantial risk resulting from the act. That risk

is not eliminated or affected by a deputy's intent to only apply less lethal force. Indeed, in setting the "objectively reasonable" standard, *Graham* notes that an inquiry into the reasonableness of an officer's force is to be conducted "without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397.

OCSD Policy Does Not Require Deputies to Properly Justify and Document Force

In keeping with best practices, OCSD's policy regarding the use of electroshock weapons, Policy 309, requires deputies to assess the effectiveness of the weapon after a five-second cycle. In so doing, Policy 309 states that deputies should determine whether the person targeted has complied, whether the weapon is limiting the ability of the person to comply, whether any medical issues exist, and whether "other options or tactics may be more appropriate." Policy 309, p. 3. However, the policy does not require deputies to document their justification for each five-second cycle in a report, and it neglects to reflect other best practices, as well. For example, Policy 309 does not prohibit deputies from using drive stun mode (applying the weapon to a person without discharging the prongs) as a pain compliance technique, and it does not limit the total number of five-second shock cycles to which a deputy may subject a person. Both of these issues are addressed by PERF's guidelines on ECDs, which note that using such a weapon to achieve compliance through pain "may have limited effectiveness and, when used repeatedly, may even exacerbate the situation by inducing rage in the subject."¹⁵ The same report notes that "an [ECD] resulting in an exposure longer than 15 seconds (whether continuous or cumulative) may increase the risk of serious injury or death and should be avoided."¹⁶

Other law enforcement agencies, heeding such standards, have crafted their policies accordingly. The Oklahoma City Police Department policy on ECD use, for example, prohibits the use of drive stun mode as a pain compliance technique "unless necessary as a countermeasure to gain separation between the officer and the subject so that officer may consider another force option."¹⁷ The same policy states that officers are barred from "knowingly" exceeding a total of fifteen seconds of shock cycling on any one person.¹⁸

OCSD policy includes similar deficiencies regarding the use of other less lethal weapons, as well. Patrol Operations Manual § 64, which governs the use of oleoresin capsicum (OC) spray, does appropriately dictate that deputies' use of the weapon must be objectively reasonable, citing *Graham*. However, the policy does not specify how many seconds the spray should be discharged to constitute a use of force, does not specifically limit the number of times a deputy may discharge OC spray against a person, and does not require deputies to justify, in a report, each discrete OC discharge as a use of force.

¹⁵ PERF ECW Guidelines, p. 14.

¹⁶ PERF ECW Guidelines, p. 18.

¹⁷ Oklahoma City Police Department Operations Manual, Policy 152.0, "Less Lethal Devices," p. 133.

¹⁸ *Id.*

OCSD Mischaracterizes Weapons that are Potentially Lethal

OCSD's core force policy, No. 300, incorporates both the terms "less-lethal" and "non-deadly" to refer to weapons or actions that are not likely or intended to result in death or serious bodily injury. OCSD should resolve this discrepancy and jettison the term "non-deadly" entirely as it is misleading, inaccurate, and may instill in deputies the false sense that certain weapons, such as electroshock weapons, cannot kill someone. Any weapon or action, if used in certain manners or under certain circumstances, can result in death. Using the term "less-lethal" serves as a reminder of that fact.

OCSD should also avoid using confusing use-of-force terminology that is not defined or is not used elsewhere in OCSD policy. For example, Policy 300 includes a section titled "Non-Deadly Force Applications," which includes an incomplete list of less-lethal force options: "control holds/take downs, chemical agents, Electronic Control Device, less lethal weapons, batons, and personal body weapons." However, nowhere else in OCSD policy is the term "personal body weapon" used. OCSD should either define the term and use it consistently (to encapsulate various striking techniques using feet, knees, hands, and elbows), or it should discard the term entirely.

The aforementioned list of "non-deadly" force options also confusingly lists chemical agents, ECDs, and batons *in addition to* "less lethal weapons," thus indicating that the latter does not include the former. While we understand "less lethal" in this context may refer to the less-lethal projectiles described in the "Less Lethal" Policy 384, OCSD should clarify that ECDs, chemical agents, and batons *are* less-lethal weapons, with reference to those weapon-specific policies that govern their use. To its credit, OCSD has weapon-specific policies that provide additional directives for certain less-lethal weapons, including canines, ECDs, and OC spray. Where OCSD has no specific policies that govern how and under what circumstances a weapon is to be used (e.g., for baton), OCSD should establish them.

Training Assessment

Effective force training accomplishes multiple goals. It equips both prospective and experienced peace officers with an understanding of the relevant laws and policies that govern their work. In so doing, it prepares peace officers to use force in the most effective ways possible, so that they can achieve their objectives while mitigating the need to use force that may carry a greater risk of physical harm, minimizing unnecessary injury for all involved. It also serves to communicate the cultural values and ethics of the law enforcement agency providing the training. Carried out successfully, training serves as a necessary bulwark against misconduct that can ruin careers, lives, and increase liability for the County. Consistently achieving these goals is a difficult task that requires a sustained and concerted effort.

OCSD generally utilizes two facilities for training. The Orange County Sheriff's Regional Training Academy, operated in conjunction with Santa Ana College, serves to train not only incoming OCSD deputies but also new hires for other southland law enforcement agencies. The Sandra Hutchens Regional Law Enforcement Training Center includes classrooms, a mock

town designed for teaching tactics, emergency vehicle driving instruction, and other resources. OCSD selects the instructors teaching at both locations.

A significant component of OCSD's training requirements, materials, and concepts were developed by California's Commission on Peace Officer Standards and Training (POST), a public body of appointees that establishes minimum standards for the hiring and training of sworn peace officers. Adherence to POST standards by law enforcement agencies is incentive-based and voluntary. POST certification does not necessarily indicate that all of an agency's training, which typically extends beyond POST's basic standards, reflects current best practices. In the Academy, trainees receive the required 664 hours of training to be POST-certified, plus about 320 hours of additional law enforcement instruction. For sworn deputies, OCSD also provides on-going training in force and related topics, including instruction aimed at enabling OCSD deputies to effectively deal with individuals in crisis situations, like those who require trauma-informed care due to mental illness or a lack of housing.

The importance of the Department's training was clear in conversations OIR staff carried out with members of the community and deputies. Echoes of statements made in training, both positive and problematic, were present in several of those engagements. Foremost was the oft-repeated criticism by current OCSD deputies that training leaves much to be desired in the area of force. Several conversations with sworn staff focused on complaints arising from a perceived dearth of hands-on training in force techniques unrelated to firearms or other equipment. For example, some deputies emphasized to the need for more training on the use of effective grappling techniques, with the hope that deputies can be better prepared to rely less heavily on weapons or fist strikes. Following these conversations, we learned that the Department is working to provide more training in this area. Staff also repeatedly raised the lack of support, both in the form of resources and specialized education, for field training officers who serve to guide recent graduates from the Academy. Where relevant and illustrative, more examples are highlighted below.

To assess OCSD force training, OIR staff attended live force and related instruction provided to new trainees, annual force training for sworn deputies, and certain crisis intervention training (CIT) classes. CIT classes are designed to train deputies to effectively interact with individuals who are experiencing or have experienced trauma, including those with mental health needs. OIR staff also requested and reviewed materials—workbooks, presentation slides, and other information—instructors used in these sessions.

OCSD force-related training that the OIR observed was consistently engaging and succeeded in communicating certain necessary concepts and skills to attendees. Use of force instructors presented concepts and issues in an accessible fashion, routinely relying on their personal experiences, real-world examples in the form of news segments, and popular media excerpts (from movies, television, etc.) to illustrate abstract concepts. Instructors also repeatedly encouraged attendees to participate, posing questions to trainees and then challenging and probing their responses. The instructors, some of whom were either former or current sworn deputies with the Department, were passionate about their role in training.

Instructors also emphasized the importance and value of de-escalating situations with the aim of avoiding force. For example, at the Academy, one instructor began a classroom session by sharing the following maxim with trainees: “If you want a long career, avoid force.” The same instructor positively referenced former colleagues who relied on personal skills, including persuasion, personability, and other attributes, to mitigate the need for force. Another instructor, in the context of interacting with people with intellectual disabilities or mental illness, emphasized the need to de-escalate unstable situations and showed the class videos of officers who did so well (and others who failed to do so, with disastrous results). Emphasizing these values and techniques is commendable and a necessary component of encouraging deputies to use force alternatives.

The OIR also encountered many instructors who consistently and effectively conveyed best practices and recent legal updates to trainees. One instructor told us that the Department was beginning to train deputies to better utilize grappling techniques to reduce the number of incidents in which deputies punched individuals. Another instructor, addressing current sworn OCSO deputies, effectively delved into the ramifications of *Hayes v. County of San Diego*, the 2013 California Supreme Court case that held that an officer’s tactical decisions and conduct preceding the use of lethal force are relevant when determining whether the force was reasonable. *Hayes v. C’nty of San Diego*, 57 Cal. 4th 622, 639 (2013). The instructor skillfully handled several concerns that attendees raised regarding changing legal standards and limitations on deputy actions without criticizing the new standards or suggesting that things were better under previous, less restrictive criteria. The instructor clearly and consistently communicated the need for deputies to understand applicable legal standards like those enunciated in *Hayes*. But not all instructors the OIR observed were so adept. OCSO should ensure all instructors are reliably and dependably conveying best practices and relevant legal requirements to trainees.

The OIR’s review of OCSO use of force training also uncovered other issues that merit careful consideration by the Department. Academy classes for new trainees repeatedly failed to clearly explain foundational laws and standards that govern the use of force by peace officers. Instructors also routinely failed to emphasize the importance of strict adherence to Department policies. At times, Academy instructors also shared opinions or anecdotes that run counter to generally accepted law enforcement best practices. Finally, in certain instances, Academy instructors communicated opinions at odds with the nuanced treatment warranted by some difficult subjects. We address these concerns in more detail below.

Failure to Clearly Communicate Legal Standards

As mentioned above, at times, OCSO force instructors succeeded in communicating certain essential concepts and skills. However, Academy OCSO force training did not consistently relay all important concepts in a clear fashion. For example, OCSO’s Academy instructors failed to clearly communicate the legal and policy standards that govern the use of force by its deputies. As described above, the U.S. Constitution’s Fourth Amendment requires that force used by peace officers be “objectively reasonable,” generally held to mean that an officer’s actions must be reasonable in light of the facts and circumstances at issue, without regard to the involved officer’s subjective intent or motivation. In keeping with this standard,

Policy 300 defines “objectively reasonable force” as “force that is proportionate to the threat presented by, or the need to lawfully control, a subject in a particular moment.” Policy 300, p. 1.

In the Academy, however, we repeatedly heard “objectively reasonable” force described as that which was “reasonable given the objective” of the sworn peace officer at issue. This characterization substitutes one definition of “objective” (a purpose or goal) for that intended by the Supreme Court (a standard based on facts, uninfluenced by subjective considerations like opinions or personal feelings). Such a misstatement sheds the “objective” component of the Fourth Amendment and OCSD policy by unduly crediting the intent that motivated the officer at issue. In fact, the *Graham* standard requires that judges and juries do the opposite by tethering those scrutinizing force to the factual circumstances that confronted the officer at issue “without regard to their underlying intent or motivation.” *Graham*, 490 U.S. at 397. By repeatedly using the wrong definition of “objective,” OCSD created the risk of misleading or confusing trainees.

Instructors also misrepresented other constitutional amendments that govern the use of force. During one session, an instructor asked why it was unlawful for peace officers to use unnecessary or excessive force against individuals in a jail. The instructor then credited a student response citing the Fourteenth Amendment. This answer is only partially correct. The Fourteenth Amendment’s due process clause governs force used by officers against detainees awaiting trial, but the Eighth Amendment forbids cruel and unusual punishment for convicted prisoners. *Kingsley v. Hendrickson*, 576 U.S. 389, 400, 402 (2015). By providing incomplete information, instructors may negatively impact a trainee’s understanding of and adherence to the laws that control their work. Such incomplete information may also lead trainees to lose faith in the quality of instruction provided at the academy.

Diminishment of Department Policies

Policies establish when and in what manner deputies may use force and also help inform a community’s expectations regarding the use of force. Policies enshrine not only the state of the law and local requirements, but also serve as a necessary foundation for accountability and disciplinary efforts within the Department. Unfortunately, due to the regional nature of OCSD’s Academy training, instructors do not currently cover the specifics of OCSD policies. Instead, instructors encourage trainees to independently familiarize themselves with the policies of their agencies and any policy updates. OCSD should ensure that its Academy provides trainees with policy-specific force instruction.

When instructors did mention policies in Academy training, they did not always articulate their importance, and at times made statements that undermined them. In one session, an instructor referred to force policies as “guidelines” that were “put in place to suggest best practices.” In another session, the instructor assured trainees that policies were not absolute requirements, since they “leave you an out...not everything is a shall.” Later that session, the instructor summed it all up as follows: “Yes...we work in a box of rules and regulations. But you will one day step out of the box to make it work.” While instructors sometimes tempered these statements with admonishments that force must still be objectively reasonable, they nonetheless undercut the importance of adhering to policies, which outline acceptable uses of force. The last statement is especially problematic, as it explicitly condones uses of force that are out of policy.

The instructor went on to offer a specific example of when out-of-policy force may be warranted: In a use of force incident, he said, peace officers should be ready to rely on whatever is available to gain the upper-hand in a life-or-death situation, including ball-point pens and other objects. However, as referenced above, OCSD's core use of force policy prohibits, to some extent, the use of "weapons, force tools, or restraint equipment" not issued or approved by the Department, the Sheriff, or her/his designee. Policy 300, p. 6.

The diminishment of policies extended to other topics, as well. For example, a force instructor stressed that not all policies are created equal and identified the "uniform policy" as one that "doesn't need to be carefully read." This is untrue and does a disservice to OCSD deputies who are subject to discipline for policy violations, regardless of the genre. This statement is particularly concerning given the controversy that erupted following footage of an OCSD deputy donning insignia associated with extremist groups, while on-duty and in Department uniform. The 2020 incident led to intense public criticism of the Department. Training guidance that discredits particular policies may lead some deputies to disregard them, increasing the likelihood that violations will take place. OIR staff alerted the Department of this incident shortly after it occurred and received assurances that it would address the issue with the instructor.

After Department members graduate from the Academy, they enter a jail training program. If and when deputies leave the jails to work patrol, they are assigned a field training officer (FTO), who is essentially tasked with providing on-the-job training. OCSD deputies and labor representatives both expressed a lack of satisfaction with the program due to what they perceive to be inadequately trained or committed FTOs, though they acknowledged that OCSD has attempted to improve the program by creating a Master Field Training Officer program. The Master FTO program is designed to retain better-trained and more experienced FTOs. OCSD created 30 Master FTO positions to complement the 110 FTOs already in place. Though the Master FTO program launched in 2019, however, only 14 positions have been filled, leaving just more than half of them empty.

OCSD could also do more to ensure deputies are properly trained on new policies that are issued and old policies that are updated. Such updates may be triggered by evolving OCSD practices, changes to laws, and court decisions. Unfortunately, during interviews with OIR staff, OCSD deputies and labor representatives also expressed a lack of satisfaction with the communication and training that follows policy updates. Typically, after OCSD issues a new policy or update, deputies merely acknowledge, electronically, that they have received and read it. OCSD should ensure it proactively provides instruction to deputies regarding any significant changes to policies or the additions of new policies.

Problematic Guidance on Report Writing and the Duty to Intervene

Sworn peace officers are the most important safeguards against the unlawful use of force. They are not only trained and authorized to wield force in keeping with the law and Department policies, but they also serve as trusted witnesses in memorializing the force they use or incidents they observe. The reports created by OCSD deputies are critical to reviewing force incidents for compliance with applicable laws and policies—especially in situations where video footage or

witness accounts are non-existent or unclear. Furthermore, as required by California law, OCS D force policy mandates that a deputy must intercede in situations where another deputy uses force that is “clearly beyond that which is necessary....” Cal. Gov’t. Code § 7286; Policy 300, p. 3. For these reasons, training that addresses report writing and intervention must consistently communicate values and concrete guidance that are in line with accomplishing these important goals. OCS D training at the Academy that OIR observed did not meet this bar.

Effective use of force reports contain enough detail and information to allow those who may scrutinize such incidents, including OCS D supervisors, other law enforcement officials, the courts, and the OIR, to determine whether a particular use of force was lawful and within policy. Such determinations are fact intensive, and the Constitution and California state law establish strict requirements regarding the use of both lethal and less-lethal force—meaning each punch, kick, and ECD deployment must be objectively reasonable; and each use of lethal force must be necessary.

In discussing the importance of reports, instructors repeatedly emphasized their utility in helping deputies justify their uses of force—sometimes at the expense of encouraging them to write complete and detailed accounts. One instructor said trainees should write “simple” reports, instructing them to err on the side of generalities rather than specifics. The instructor illustrated this point by relaying the following: “You don’t have to write that you punched the subject seventeen times in the solar plexus, just that you punched numerous times.” While it may be impossible, at times, for a deputy to recall the exact number of fist strikes used during a violent encounter, deputies should be instructed to be as specific as possible and, where feasible, convey the exact type of force used, and the number of times it was used. The PowerPoint presentation for the course also included a slide entitled “C.Y.A.” (a commonly used acronym for the phrase “Cover Your Ass”) that highlighted the importance of reports in civil cases brought against the Department. According to the slide and the instructor, 98 percent of all use of force incidents are reasonable and justifiable—but civil cases are lost because the reports are “poor or improper.” No source for these statistics was provided, and the OIR did not find any study that supported this figure.

By encouraging trainees to omit details in their force reports, or to write them with an intent to persuade a reviewer rather than present all relevant facts, an instructor may be contributing to the use of vague or improperly persuasive language in force reports that makes it difficult to effectively assess the incidents they describe. This potential effect was present in the sample of force packets reviewed by the OIR, which included force reports that lacked necessary detail like specific subject actions that may have warranted force used by deputies. While it is difficult to know whether the guidance delivered in training contributes to such reporting practices, the risk that it may be an underlying cause should not be ignored.

Training discussions concerning the duty to intervene were similarly problematic. When introducing the topic, an instructor asked the class whether any of the trainees joined their respective law enforcement agencies to “rat on” or “refer for review” peer officers to superiors for misconduct they observed. No one raised their hand. The instructor then described a use of excessive force by a sworn officer, and invited suggestions on how a peer officer should handle reporting the event. The instructor ultimately settled on two distinct strategies: physical

intervention during the moment, if possible, and consulting with a supervisor. The instructor did not direct trainees to capture the excessive force in relevant reports. Furthermore, the instructor never communicated the need to intervene based on a sense of compassion or moral obligation, or an officer's duty to minimize harm to those they are sworn to protect.

Reliance on Troubling Examples

OCSD's basic training courses represent the Department's first meaningful opportunity to convey its expectations and organizational culture to trainees. To do so effectively, instructors should present material in a disciplined and organized manner that minimizes the possibility for misunderstandings. Unfortunately, as discussed below, OIR staff observed training sessions that included conflicting guidance for trainees and personal anecdotes that could be taken to endorse problematic behavior. The Department should work to understand how and what instructors are teaching, so that it can ensure that it agrees with the method and the message of instruction.

Like many professions, law enforcement has changed dramatically over the years. Formerly accepted methods and attitudes have been shed in favor of strategies that are considered to be both more effective and in keeping with the principles of democratic policing. Force instructors routinely referenced such change in order to convey that certain conduct and attitudes were no longer acceptable. However, guidance provided by instructors sometimes reflected outdated values and strategies.

In one instance, an instructor provided guidance on the use of deadly force that directly contradicted a previous warning. During the general introduction to the course, an instructor warned that policing philosophy was in flux and that trainees who think "you can draw a line in the sand and then say, 'Don't cross that line, or I will shoot!' [need to] change the way they think." However, during the final session, the same instructor stated that deputies were allowed to adopt such a strategy in deciding whether or not to use firearm, plainly determining that deputies should feel empowered to say "take one step closer and I'll shoot you." Following such a statement, the instructor stated: "Can you shoot? I think so." This oversimplified assessment ignored the different factors that sworn officers are called upon to consider in deciding whether to use force—especially lethal force—and is likely to confuse trainees.

Instructors also relied on troubling anecdotes to illustrate certain points, often without cautionary language to prevent trainees from misunderstanding the intended message. In one instance, the instructor sought to stress the importance of understanding the impact of video recordings on the review and scrutiny of force. In explaining a presentation slide entitled "MAKE A GOOD MOVIE," the instructor described working in an OCSD jail, and the importance and need of understanding where recording cameras were placed. "In my day," the instructor said, "you knew just where to go in order to tweak a problem inmate's fingers while you were handcuffing them." The implication is that such behavior would be cause for discipline or scrutiny if it was recorded. The instructor did not state that such behavior was inappropriate, or that such retaliatory conduct violates the law and OCSD policy.

Conversations with individuals who were previously or are currently incarcerated by OCSD included references to treatment like that described above. Those accounts were also

echoed by an individual formerly employed by the Department. In one instance, a formerly incarcerated person, without prompting by OIR staff, detailed being subjected to painful wrist and finger manipulation. According to this person, following the booking process, a deputy took her into a small room and applied a pain-compliance technique, manipulating her hands and fingers behind her back, even though she had been compliant throughout the process. According to the individual, the deputy provided only her conduct during the arrest as justification—conduct that had ceased some time ago. Individuals currently incarcerated mentioned similar stories, identifying by name areas within Orange County jails that are known to lack cameras as sites for such treatment. Another incarcerated individual told us of going through the jail booking process when he was weak with withdrawal symptoms and “not a threat to anyone.” Regardless, he said he was “tuned up” by deputies with joint locks and minor movements—that would not be captured on camera—and was told to “take it like a man.” One former correctional services assistant (CSA) also told us that deputies would “twist up” incarcerated individuals for no justifiable reason, putting them in wrist locks because they felt “disrespected.” The CSA said deputies could “really screw someone’s wrist up without having to write a report.” These allegations are troubling and merit changes to Department training.

Another Academy instructor described conducting a vehicle stop while on duty. When he described what initially drew him to focus on the motorist, he simply stated: “He was dripping parolee, if you know what I mean.” This statement raises concerns of bias. Recruits are unlikely to understand exactly what proper and lawful factors, if any, might differentiate someone who is on, has been, or has not been on parole. They might see such an example as implicit encouragement to trust general, undefined instinct above the kinds of observable facts that are necessary to support a vehicle stop. Such anecdotes can serve as an invitation to engage in biased behavior.

Crisis Intervention Training (CIT)

As detailed above, OIR staff attended training sessions aimed at equipping OCSD deputies with the ability to effectively help individuals experiencing a mental health or similar crisis. Currently, in addition to related Academy training, OCSD provides all sworn deputies with 16 hours of CIT training. OCSD also provides another 24 hours of CIT training to any deputies working in an assignment that has the potential for frequent exposure to people experiencing mental illness (about 25 percent of its deputies). OIR attended all 16 hours of the CIT course provided to all OCSD deputies, which included classes focused on encounters with individuals with mental health needs as well as classes geared toward addressing officer wellness concerns. Individual classes within the CIT course were mostly taught by current or former law enforcement officers, but mental health professional taught several sessions.

The training OIR staff observed merits praise for its focus on equipping deputies with necessary skills to mitigate the need for force when interacting with individuals in crisis. Courses also succeeded when they detailed federal and state laws that govern the treatment of individuals experiencing mental health crises. A significant portion of observed training was focused on increasing general knowledge of mental health issues and communicating practice tips on how to address individuals affected by those issues. The most effective delivery of general knowledge was provided by mental health experts from outside of law enforcement, who spoke clearly and

authoritatively about different kinds of mental health needs, how to identify them, and how to navigate them. Some lecturers helped to destigmatize people with mental illness by identifying and discussing the causes of mental health crises.

The Department's dedication to officer wellness issues is much needed. According to the most recent available data, suicide by peace officers in the United States significantly outnumbers deaths on duty. In 2019, approximately 238 peace officers committed suicide in the United States.¹⁹ That same year, 89 officers died while on duty as a result of accidents or felonious acts.²⁰ OCSD's dedication of training to issues that may contribute to suicides should be applauded.

For the most part, instructors also succeeded in providing practice tips on how to manage encounters with individuals in crisis while on patrol. One instructor provided a survey of state laws that govern the arrest of individuals with mental health needs, with an aim of ensuring that the deputies in attendance were able to exercise lawful duties conferred to them. The same instructor stressed empathy and highlighted the value of de-escalation with a simple statement: "It is better that the officer spend 15 or 20 minutes waiting and talking, [rather than] five minutes struggling to subdue the person."

However, OIR staff also observed some instruction that was not consistent with best practices or even other OCSD training. As background, OIR staff observed an Academy class regarding how officers should interact with people with mental illnesses and developmental disabilities. The instructor, to his credit, noted that officers should not lie to individuals in crisis—for example, an officer should not tell individuals that they are not going to jail or to a mental health facility when, in fact, the officer is planning to do just that. The instructor noted that dishonesty can negatively impact that person's view of law enforcement and can complicate future encounters that individual may have with officers. OCSD's policy on Mental Illness also notes that "lying to the disturbed person can delay his recovery in the mental hospital." POM § 29, p. 29.5. During a CIT class that OIR staff later observed, however, another instructor asked attendees for examples of how they had "de-escalated" situations. One deputy recalled a time that he had talked a distraught individual into peaceably coming with deputies by promising not to take the individual to jail—even though deputies then did so. Rather than addressing and correcting the deputy's decision, the instructor simply moved on to another example from another deputy.

¹⁹ First H.E.L.P., Inc., Officer Suicide Statistics, *available at* <https://bluehelp.org/the-numbers/> (last visited August 9, 2021).

²⁰ Federal Bureau of Investigation: Uniform Crime Report, 2019 Law Enforcement Officers Killed & Assaulted, Officers Accidentally Killed, *available at* <https://ucr.fbi.gov/leoka/2019/topic-pages/officers-accidentally-killed> (last visited August 9, 2021); Federal Bureau of Investigation: Uniform Crime Report, 2019 Law Enforcement Officers Killed & Assaulted, Officers Feloniously Killed, *available at* <https://ucr.fbi.gov/leoka/2019/topic-pages/officers-feloniously-killed> (last visited August 9, 2021).

The OIR found that crisis intervention training is lacking in other important areas, as well. Observed training lacked beneficial scenario-based exercises, failed to adequately discuss crisis intervention in incarcerated settings and, at times, communicated messages that could serve to stigmatize individuals with mental health needs. Each of these is discussed below.

The entirety of CIT training observed by OIR staff was classroom-based, in a lecture format. There were some interactive exercises, but they related to group-work and presentations. The OIR was unable to observe any scenario-based components. Scenario-based training involves activities that go beyond a traditional lecture and requires attendees to participate in interpersonal exercises that serve to better test concepts covered in the course. According to OCSD, such exercises are reserved for later modules of the CIT course. However, few members of the Department have received that level of training to date, and, as noted above, many deputies may never receive that additional training. The Department should reconsider amending the curriculum for its introductory crisis intervention training course to include scenario-based exercises.

In addition, none of the courses attended by OIR staff were specifically tailored to or focused on crisis incidents that are likely to occur within incarcerated settings. Department leadership assured the OIR that it does offer other, limited crisis-intervention coursework addressing scenarios within its jails, but not all deputies working within the jails have received it. This presents a serious deficit, since County jails include a significant population of individuals with mental health needs and all OCSD deputies are required to work within those jails before being eligible to work on patrol. Jails present different opportunities and challenges to dealing with individuals in crisis, and training should be tailored to ensure Department members are prepared to succeed in that environment.

Most troublingly, some instructors used language or relied on concepts that could potentially stigmatize individuals with long-term mental health needs. One instructor unfairly—and alarmingly—presented information that potentially typecasts all individuals with mental health needs as potential murderers. This instructor presented a slide with three photographs and the caption: “Danger to Others? Why do all mass shooters look like mass shooters?” The photographs were of three convicted killers who carried out mass shootings in 2011 and 2012. The instructor relied on the slide to illustrate the elements in California law that govern the detention of individuals who may have mental health needs. One of those elements is a determination of whether an individual is a danger to themselves or others. The slide, and the instructor’s comments in class, invite the inference that peace officers can determine whether an individual is a threat to the safety of others based on the individual’s appearance. This idea is not only wrong, but it may serve to encourage individuals to discriminate against and mistreat others who are perceived to be mentally ill.

Practices Assessment

The use of force by OCSD deputies, and the review of force by supervisors, are among the most important functions of the Department. As noted throughout this report, uses of force raise several inherent risks that endanger sworn officers, subjects, and witnesses. The misuse of force also creates the risk of reputational and financial harm to the County. To understand how

the Department uses force and to work to ensure it properly addresses such risks, as noted in this Report's "Methodology" section, OIR staff reviewed a statistically relevant, random sample of force incidents. OIR staff also spoke with staff and deputies within OCSD, as well as individuals who observed or were subjected to force by members of the Department, both outside and within County jails. Where relevant, this report highlights concerns shared during those conversations.

The sample of use of force incidents reviewed by the OIR generally evince the earnest and consistent dedication and bravery of the women and men who serve as peace officers for the County of Orange. The OIR reviewed several incidents in which OCSD members, through selfless acts, chose not to escalate encounters that could have resulted in serious or lethal uses of force. In one instance, two OCSD deputies were dispatched to deal with an unruly guest at a hotel. Once confronted, the individual threw his cell phone, which struck one of the deputies on the face and knocked off his glasses. Both deputies then went hands-on, pushing him into a wall and then onto the ground. During the scuffle, the subject grabbed a deputy's holstered weapon and pulled on it, causing the deputy to warn the other that the subject had grabbed his gun. Instead of relying on lethal force at that point, the deputies managed to subdue the individual using only hand strikes and control holds.

However, the OIR's review also uncovered indications of systemic issues that raise concerns about the Department's practices and policies. Specifically, the OIR identified a significant rate of late use-of-force reports within the sample it reviewed. It also identified deficiencies in those reports, including reports that lacked necessary detail. The OIR also found that, generally, deputies who use force only describe the force they personally used—not force they observed other deputies use. Finally, the OIR identified several recurring deficiencies in the supervisory reviews of the force incidents.

The OIR communicated some of these findings to OCSD before finalizing this report in an effort to ensure the Department was alerted to issues meriting immediate attention. Where concerns remain regarding these areas, we highlight them below. The OIR and the Department continue to work collaboratively to improve the policies and practices of the agency.

Overview of Department Force Practices

Written policies, unwritten protocols, and training all govern OCSD force practices. Following a use of force, deputies directly involved in or who witness the incident are required by policy to notify a supervisor "as soon as reasonably possible." Policy 300, pp. 3, 10. Any deputy who uses force must also document that force in a written report "promptly, completely, and accurately." *Id.* at 10. According to a member of OCSD's executive command staff, these reports are typically completed no later than the end of shift. In its jails facilities, OCSD Policy 1800.7 expressly requires its deputies to file a report within 24 hours when the force used results in, or constitutes a serious threat of, physical harm.

The dual-notice requirement to notify a supervisor *and* memorialize the use of force in a written report reflects best practices and serves multiple purposes. The notification to a supervisor helps ensure that the chain of command is made aware of a use of force incident in a timely manner, and that the consequences of that force are monitored. Written reports, in which

deputies describe the force used, conditions that led to the use of force, and any justification for the force, are crucial to determining whether force was lawful and in policy. When there is no video or audio recording of the incident, a written force report is the main record memorializing a use of force.

OCSD requires that written reports be reviewed by the immediate supervisors of the deputies involved in the use of force, consisting of a sergeant, a lieutenant, and a division commander. Each of these supervisors is tasked with ensuring the use of force is in accordance with applicable laws and policies, that necessary witness statements are collected and considered, and that the subject(s) of the force received timely medical care. Contrary to best practices, OCSD does not explicitly require that deputies who witness, but do not participate in, a use of force file written reports—only that they notify a supervisor.

For the force packets the OIR assessed from the review period, OCSD’s own review of those incidents was dictated, in critical part, by a set of unwritten protocols that likely contributed to lapses in their execution. Division commanders are empowered by OCSD to investigate certain deputy conduct and to levy a limited range of discipline, without a referral to Internal Affairs or approval from OCSD’s Executive Command. In 2020, more than 98 percent of use of force review dispositions were handled entirely within their originating divisions. When a use of force occurs, the division chain of command generally conducts investigations that do not always include interviews of all deputies involved or relevant witnesses. Under OCSD policy, sergeants, lieutenants, and division commanders may make one of three findings when assessing a use of force: (1) in policy, no further action required; (2) in policy, training or corrective action addressed; or (3) refer to command staff for an internal affairs investigation. A corrective action could entail verbal counseling or a written, negative performance note memorialized in the deputy’s next review. Neither training nor corrective action is considered discipline by the Department. Incidents must go to Internal Affairs for an investigation before any discipline is imposed.

According to a member of OCSD’s executive staff, supervisors who suspect that a deputy used out-of-policy force, unlawful force, and/or who failed to comply with substantive provisions of force-related policies are required to refer those incidents to Internal Affairs for review and potential investigation. Incidents where a deputy used deadly force that does not involve a shooting may, depending on the facts at issue, also be referred to Internal Affairs. These standards regarding non-shooting incidents are not articulated in writing.

Internal Affairs operates within OCSD’s Strategy Accountability Focus Evaluation (S.A.F.E.) Division, which is tasked with gathering information, tracking use of force trends, and putting such information to work for OCSD. Referrals to Internal Affairs are important to ensure that thorough and rigorous investigations are conducted of qualifying force incidents, and that the results of those reviews can be brought to bear to ensure that discipline is appropriately tailored to a force violation. The results of such investigations should also be used to assess not just the individual incident, but the policies, training, and practices that may have contributed to the incident. When reporting on use of force statistics and trends, OCSD categorizes all force incidents that were not referred to Internal Affairs as “within policy.”

Assessment of Force Incidents and Findings

For each force incident the OIR assessed from the review period, the OIR reviewed force reports created by OCSD deputies who used or reviewed the force at issue, along with related information. In reviewing the incidents, the OIR worked to understand the events that led to the force at issue, the force used, and the Department's assessment of the incidents. In certain instances, the OIR also reviewed audio and video recordings of the incident. The OIR relied on its expertise and its understanding of applicable laws, OCSD policies, and training when evaluating the force incidents. Where relevant, the OIR worked to understand how the incidents reflect systemic successes by the Department and areas that warrant improvement.

Late Force Reports

Timely and detailed force reporting is an essential part of the Department's efforts to assess the effectiveness of its policies and practices. Thorough force reports created by individual deputies are at times the only comprehensive record of a force incident, providing a window into the impressions and judgment of the deputy at issue. As such, with or without video of the incident, reports serve to protect the County in the face of public scrutiny and litigation. Just as importantly, the reports can—and should—be used to assess whether policies and training reflect the demands made on sworn personnel. Unfortunately, in its review, the OIR identified a significant number of late use-of-force reports.

The timely reporting of force is a hallmark of law enforcement best practices. The IACP, a recognized leader in American policing that develops and disseminates model policies and policy documents, has determined that force reports should be filed no later than the end of a peace officer's shift.²¹ The timely filing of the report is important since it ensures that the relevant peace officer memorializes "an accurate account of what the officer knew, observed, or believed at the time of the incident"—a necessary component of establishing a legal basis for the force at issue.²² Conversely, late reports invite scrutiny of the officer's justification for force by empowering doubts related to the veracity of the officer's memory and the potential for hindsight bias to take root.

OCSD use of force incidents result in the creation of a force packet, which includes force reports filed by deputies involved in the incident and a use of force summary document created by the sergeant, lieutenant, and division commander that review the incident. A force packet often includes more than one force report and may entail multiple uses of force by various deputies. The resulting use of force review process should not be carried out without all relevant force reports. As mentioned above, the OIR's review of 147 force packets revealed a significant

²¹ *Law Enforcement Policy Center: Reporting Use of Force*, International Association of Chiefs of Police, March 2017, pg. 4, available at <https://www.theiacp.org/sites/default/files/2020-06/Reporting%20UoF%20June%202020.pdf> (last visited August 9, 2021).

²² *Id.*

incidence of late written reports. Most troublingly, the supervisors who reviewed these incidents did not note or address, in any memorialized fashion, the late reports.

The OIR's review identified a total of 31 force packets that included individual written reports that were submitted three or more days late. Within these 31 packets, the OIR identified a total of 56 individual late force reports—one of which was filed 41 days after the force incident took place. Given the representational value of the sample reviewed by OIR, this supports an inference that approximately 21% of force packets between January and October of 2020 included one or more late force reports.

The failures to timely report force may be caused by a myriad of factors—but whatever the reasons may be, supervisors should flag overdue reports and directly address this deficiency with the relevant deputies. OCSD's almost universal failure to identify and deal with these late reports, which itself is a failure to cite a policy violation, increases legal risk for the County. As noted above, a late report may empower critical scrutiny of the stated justification for the force at issue, making the report less persuasive in the eyes of judges and jurors at litigation. It also impedes a timely review of the force incident—both because it delays it and because it may make it harder for the deputies at issue to accurately recall their observations and experiences, especially if video of the incident is unavailable for them to view.

Reports Lack Necessary Detail

Force reports OIR staff reviewed often lacked detail regarding uses of force, making it difficult to fully understand what took place during the event and why. As detailed above, the U.S. Constitution requires that each particular use of force be reasonable. *Graham*, 490 U.S. at 396. This means that if during an encounter, a peace officer sprays an individual with O.C. three times, then each spray must be assessed to determine its legality. While many deputies documented the number of times a particular force was used (e.g., the deputy wrote that he punched a subject in the face four times), many reports also made use of boilerplate or general language instead of providing particular, event-specific information. Multiple deputies submitted reports that described the events surrounding the use of force as “tense, uncertain, and rapidly evolving,” which is language lifted directly from *Graham*. But without any supporting information for reviewers and other readers to understand why, for example, a situation was “uncertain,” one cannot effectively assess the force used in response. One report simply stated that “force was used to control” the subject, without stating what force was used or what conduct justified its use. The use of such general language and lack of detail make it difficult for reviewers to determine whether the force was reasonable and within policy.

The failure to provide specific information may result from several issues, including policies that do not explicitly require such information; or supervisors who fail to flag such issues for correction; or because training is inadequate. Indeed, one instructor specifically recommended to trainees at the Academy that they include the phrase “tense, uncertain, and rapidly evolving” in their report writing, even though this language, as noted above, in and of itself provides no detail specific to any distinct force incident. As also described above, one instructor told Academy trainees: “You don't have to write that you punched the subject

seventeen times in the solar plexus, just that you punched numerous times.” This advice runs counter to best practices, suggests that deputies may be inexact in their report writing, and makes it difficult for supervisors—and others—to assess the reasonableness of the force.

A majority of the force packets we reviewed contained reports by deputies that failed to capture relevant events likely known to the writer. Many reports effectively detailed the conduct of the person against whom a deputy used force, but provided little or no narrative regarding the deputy’s own actions. This was especially true with regards to force reports arising from instances in which more than one deputy used force. Following such events, deputies routinely filed reports that described only the force they used—not force they likely observed other deputies using. For example, in one incident, the main reporting deputy wrote that he delivered two knee strikes to a subject’s torso during a struggle. At least four other deputies were at the scene and also wrote their own reports, but none of them mentioned the force used by the primary reporting deputy. While OCSD policy does not explicitly require such reporting, reviewers of force are placed at a disadvantage when details that enable cross-verification of accounts are omitted.

Furthermore, in instances where more than one deputy filed a force report about an individual incident, the reports often referred the reader to reports filed by another deputy. Often, these references were memorialized as: “For more detail, see Deputy [XXX]’s report.” Such a practice raises serious concerns that deputies are omitting key details from their reports if they know, or assume, that those details are contained within another deputy’s report. This practice may give rise to collaboration among OCSD members that results in sanitized force reports that lack relevant information. Reports that do not include all details a deputy remembers may obscure necessary information that enables supervisors to effectively review force. Several active OCSD deputies also shared these concerns with the OIR, noting that—on occasion—junior Department members working in the jails are tasked with writing a “main” force report even when they didn’t use force or were not the primary deputy involved, and the primary deputies write supplemental reports with cross-references.

Reports Often Do Not Memorialize Efforts to De-Escalate

Force reports are intended to capture the relevant conduct of everyone involved, both deputies and the subjects they encounter, so that reviewers can effectively assess the force given applicable law and policy. As such, reporting deputies should memorialize all relevant details—including the deputy’s efforts to avoid the use of force. Few reports that the OIR reviewed included descriptions of de-escalation efforts—possibly because deputies omitted such detail, or perhaps indicating that deputies are not routinely attempting to de-escalate situations at all, even when the subject against whom force is used is experiencing a mental health crisis or struggling with substance abuse. In one incident, for example, deputies tried to rouse an individual who smelled of alcohol and was passed out in a ditch. Rather than try to engage with the person verbally, deputies tried to handcuff the sleeping individual and one deputy punched him in the face when he resisted. The Department should modify its policies, training, and practices, as needed, to ensure that OCSD deputies describe any and all attempts to de-escalate situations or,

when no de-escalation is feasible, to explain why de-escalation was not attempted. Such information is necessary to understanding and improving efforts to de-escalate.

Information regarding de-escalation will also be particularly useful in assessing and improving the Department's effectiveness in dealing with individuals with mental health needs, as it can assist the Department in assessing the extent to which deputies are prepared to deal with individuals in crisis. In some incidents in which deputies encountered individuals struggling with mental health issues, deputies responded appropriately. During one incident, a deputy made a note of efforts to gain compliance with an unhoused individual who was wandering into busy vehicle traffic. Instead of confronting the individual immediately, the deputy contacted the Orange County Health Care Agency's Crisis Assessment Team, leading to the dispatch of a licensed clinical social worker. While the encounter still resulted in a non-lethal use of force, the use of mental health care professionals in such situations is encouraging. Unfortunately, the OIR did not encounter other examples of deputies using resources like this in the sample of force incidents it reviewed.

In other incidents involving individuals who were experiencing mental health crises, deputies did not respond with appropriate de-escalation attempts. Frequently, such encounters were initiated by a third-party observer (often friends and family) of the subject. The reports arising from these incidents often did not record any de-escalation efforts, or whether de-escalation was considered by the deputies involved and not attempted for specific reasons.

In one incident, four deputies were called to a domestic disturbance involving an adult son with schizophrenia, who had been verbally abusive with his mother. The mother told deputies that no weapons were in the house and that knives had been hidden. The son came outside, saw the deputies, then turned, went back into the house, and began ascending some stairs. A deputy ordered the son to come back, and when he kept walking, deputies grabbed him, pulled him down the stairs and into a table, breaking a vase in the process. Once on the floor, deputies wrestled the son into handcuffs and decided to detain him for a mental health evaluation. Deputies justified the force by citing his potential access to weapons, even though the mother had already told them such access was limited and deputies clearly outnumbered the individual in crisis. Deputies did not clearly indicate in their reports any substantial de-escalation efforts or any attempt to call a mental healthcare professional to the scene. Reports that lack these details are not likely to assist the Department in understanding and improving its crisis intervention efforts.

Supervisory Reviews of Force Are Often Insufficient

Thorough supervisory reviews ensure that force used by deputies is in keeping with applicable laws and policies. OIR staff analyzed multiple supervisory force reviews that were thorough, assessing not only written reports by the deputies involved, but also ensuring that the accounts were in keeping with any available video and audio. Several reports included minute-by-minute breakdowns of circumstances surrounding a use of force captured in these recordings, in keeping with best practices.

However, OIR staff also repeatedly encountered supervisory reviews that were cursory and incomplete. Reviews often failed to assess each force application—instead only assessing the most significant use of force at issue, or generally finding all force used to be reasonable without separately assessing each type of force utilized. Others generally assessed actions taken by the subject against whom force was used without closely analyzing the deputy’s conduct and determining whether each use of force by that deputy was reasonable. Thorough assessments are essential because they not only ensure that deputy actions are in keeping with the law and policy, but they also help the Department determine when it may need to change certain policies and protocols to address previously unanticipated situations. For example, in one instance, a deputy used OC spray for about six seconds against three incarcerated persons, striking one subject’s groin. The reviewing supervisors stated that the spray “gained compliance, protected [an inmate], and restored order.” But they failed to address whether the length of the OC spray burst was warranted; whether the deputy intentionally targeted all three individuals; and whether the deputy intentionally targeted a detainee’s groin. The supervisors also could have used the incident as an opportunity to recommend changes to OCSD force policies, which do not specify how long an OC deployment should last, do not state that deputies must give a subject time to comply after each burst, and do not specify that each spray must be justified.

OCSD policy also requires that a supervisor interview an individual subjected to force by a deputy. These interviews gather further information to better understand the force incident and help ensure any injuries were appropriately handled. However, the great majority of interviews appear to be incomplete. Most interviews within our sample only assessed whether injuries resulted from the use of force. Only a few reports highlighted information gleaned from the subject regarding the use of force itself. These are lost opportunities for supervisors to gather relevant information to help them better understand how the Department is using force—and whether such force is lawful and within policy.

In certain instances, the interviews were also likely ineffective. In one instance involving a Spanish-speaking individual, an interpreting deputy failed to accurately convey a complaint regarding an injury to the supervisor conducting the interview. The subject identified several areas on his body that hurt following the incident, but the deputy’s interpretation only identified one. On several other occasions, the deputies who used force attended the interview—potentially creating a chilling effect on the interview subject.

Most troublingly, OIR staff identified supervisory reviews that determined a use of force was unauthorized or out-of-policy, but the supervisors did not refer them to Internal Affairs for investigation—even though OCSD’s stated protocol requires supervisors to refer potential out-of-policy force violations to Internal Affairs for review. Instead, in these limited instances, supervisors elected to provide counseling to the deputies at issue.

A failure to refer out-of-policy or unauthorized uses of force to Internal Affairs minimizes the severity of such force, ensures that the complexity of the investigation will be limited, and removes the possibility of discipline. It also complicates OCSD’s efforts to accurately identify force trends, since the S.A.F.E. Division categorizes all force incidents as “in policy” if they are *not* referred to Internal Affairs.

OCSO's S.A.F.E. Division is charged with collecting and reviewing force-related information, which is routinely memorialized in quarterly and annual force reports aimed at providing an overview of force incidents and identifying trends. However, S.A.F.E. treats all force-related issues not referred to Internal Affairs as within policy, skewing its statistics and calling into question its conclusions.²³ For example, in its 2020 internal force report, S.A.F.E. stated that only 10 use of force incidents not involving a shooting were referred to Internal Affairs. As a result, S.A.F.E. wrongly concluded that 98.1% of all use of force incidents were within Department policy, because it failed to include incidents in which supervisors found an out-of-policy use of force but which were not referred to Internal Affairs.

In its 2020 report, S.A.F.E. concluded that OCSO "continues to operate with the highest level of professionalism" and "provide[s] the best service and training to our personnel." *Id.* at 20. In support, it cited the low rate of referral of use of force incidents to Internal Affairs. However, a law enforcement agency operating at its best has an active Internal Affairs division that serves as the foundational component of an early warning system geared towards saving careers and lives. Investigations conducted by Internal Affairs should not be treated as a presumptive sign that an out-of-policy force incident took place—only as a necessary step towards ensuring that the policies and practices of a department are meeting the needs of the agency and the community it serves.

Conclusion

The OIR thanks the members of the community and Department who helped inform this report. As noted above, the OIR has found much for which OCSO is to be commended regarding how deputies use force and engage with members of the community. Even so, the issues identified throughout the OIR's investigation suggest that there is work to be done to ensure that policy and training reflect best practices and that, in turn, such policies and training are soundly implemented in the County's jails and on its streets. The OIR stands ready to assist the Department and public as they turn their attention to these issues.

The OIR is also authorized by law to recommend reforms consistent with the law and evolving best practices, which we have included below. We have tailored the recommendations to address our findings and mitigate the risks identified throughout this document. The OIR will work with the Department and put its experience and knowledge at its service as it considers these recommendations.

Recommendations

Policy

- 1. OCSO should consider developing a stand-alone de-escalation policy that clearly defines de-escalation and thoroughly addresses related strategies and tactics.**

²³ See OCSO S.A.F.E. Division, *2020 Use of Force Annual Report*, pg. 3, on file with the OCSO.

Currently, OCSD includes its primary discussion of de-escalation in its flagship force policy, Policy 300. Given the significant role that de-escalation plays in the way a deputy should approach any interaction with a member of the community, including one that may involve the use of force, OCSD should consider devoting a separate policy to the subject. The policy should include a clear definition of de-escalation that stresses the primary goal of proactively using tactics and techniques to gain voluntary compliance of individuals *without* resorting to force or, in the alternative, using such tactics in order to resort to a lesser degree of force. The policy should also give significant detail regarding how and when deputies should use such tactics. For example, the policy should specify that, when feasible, deputies should display empathy and establish rapport with individuals by asking questions, engaging in conversation, and listening to what the person has to say; reposition to reduce the need for a physical confrontation; calmly verbalize the options available to the person that can help end the crisis; and avoid aggressive body language and other actions that could exacerbate the situation. OCSD's de-escalation policy should also require deputies to consider conditions that may affect an individual's ability to comply with instructions, such as physical disabilities, mental illnesses, and limited English proficiency. Finally, OCSD should ensure other force-related policies reflect and support the concepts in the de-escalation policy.

2. OCSD's force policy should better clarify what constitutes lethal force and include a representative list of specific types of force that are prohibited.

OCSD's Policy 300 accurately describes deadly force as that which "creates a substantial risk of causing death or serious bodily physical injury...." However, the same policy later seems to undermine this definition by stating that a deputy's actions may only constitute deadly force if the deputy "reasonably anticipates and intends" for the force to be deadly. OCSD policies should avoid apparent inconsistencies such as this and clarify that whether a specific action is potentially deadly does not hinge upon a deputy's intention. And though, to OCSD's credit, Policy 300 does ban the use of the choke and carotid restraint holds, OCSD's force policy should go further and provide a representative list of other types of force that are banned (for example, using force against handcuffed individuals).

3. OCSD should consider revising its force policy to limit the circumstances in which its deputies can use unauthorized force techniques.

Current OCSD policy allows deputies to use force in ways the Department has not provided guidance or training on, so long as such methods are "utilized in an objectively reasonable manner and only to the degree that reasonably appears necessary to accomplish a legitimate law enforcement purpose." As the OIR has suggested to the Department previously, OCSD should work with relevant stakeholders, including its labor partners, to consider eliminating this provision and expressly barring the use of unauthorized force. Short of that, it should consider revisiting the policy to better guide

such high-risk practices. For example, the Department could limit this discretion to extreme or exigent instances in which the subject's actions constitute an immediate danger and grave threat to deputies and others. Language like this has been included in other law enforcement agency policies as a result of U.S. Department of Justice efforts. Including sensible limitations like this will ensure that deputies practice such discretion in a manner that does not needlessly endanger their safety or that of the public, thus better protecting the County from avoidable risk.

- 4. OCSD should consider removing language identifying its policies as “guidelines,” a “reference,” and similar language; make clear that all policies and policy manuals include requirements and standards to which deputies must adhere; and provide more specific direction and parameters regarding deputy discretion.**

Referring to policies as “guidelines” or a “reference” can imply that such policies include elective or non-compulsory recommendations regarding deputy conduct rather than firm requirements, which deputies can be held accountable for violating. OCSD should thus consider referring to their policies as “requirements,” “standards” or with similar language to indicate that the policies—including those provisions that offer direction regarding deputy discretion—must be followed. OCSD force policies should also include additional parameters and checks on high-risk practices. For example, regarding the use of electronic control weapons, OCSD should consider barring deputies from holding both a firearm and electroshock weapon at the same time; prohibit deputies from using drive stun as pain compliance; prohibit the simultaneous deployment of multiple electroshock weapons at the same time; and limit the number of five-second shock cycles to 15 seconds.

- 5. OCSD should consider discontinuing the use of warning shots.**

The use of warning shots is an inherently dangerous practice that has been banned by other law enforcement agencies for that very reason. A round discharged as a warning may strike an individual, perhaps unseen at the time, or may prompt other officers to engage in sympathetic or reflexive fire, targeting the subject because they did not understand the first round discharged to be a warning. OCSD should consider eliminating the use of warning shots altogether or, at the very least, should provide strict parameters that control when, where, how, and under what circumstances a deputy may discharge a warning shot.

- 6. OCSD should clearly define terms and use them consistently across policies.**

The OIR noted multiple instances in which OCSD policy neglected to define terms that govern how and when deputies use force. Policy 300 states that pain compliance techniques may be an effective way to control both a “passive” and “actively resisting” individual, yet fails to define either term. OCSD policy should clearly define such terms

and use them consistently throughout force policies to dictate when and under what circumstances deputies may use various degrees of force. OCSO policies should also discontinue the use of ambiguous or misleading terms, such as referring to less-lethal force as “non-deadly,” or referring to electronic control weapons as “devices.”

- 7. OCSO policies should require deputies to separately describe, assess, and justify each use of force in their written reports, and reviewing supervisors should likewise analyze each discrete use of force in their written reviews.**

OCSO policies do not consistently require deputies to assess the effectiveness of a use of force before continuing to use force; neither do they require deputies to justify—nor supervisors to analyze—each use of force. To OCSO’s credit, Policy 309 does require deputies to assess the efficacy of each ECW cycle, but the same is not true for other force strategies. For example, there is no baton policy, and no other force policy requires deputies to separately assess each baton strike (or set of strikes) before continuing to use force. OCSO should consider clearly requiring deputies to separately assess each use of force and documenting their justification, under *Graham*, for all force used. Likewise, OCSO supervisors who are reviewing a deputy’s actions should analyze each distinct use of force under *Graham*.

- 8. OCSO should consider allowing a group of individuals that is representative of the greater Orange County community to participate in reviewing and, when necessary, improving its force policies.**

The force policies and practices of the Department will always be of tantamount importance to the community it serves. The Department should consider more routinely incorporating such perspectives when it revises its force policies. Inviting community voices into these discussions will benefit OCSO by increasing public understanding, trust, and support of the rules that govern its deputies.

Training

- 9. OCSO should consider creating a stand-alone de-escalation course for its Academy and in-service trainees, and should ensure that relevant concepts are woven into each of its force and related trainings.**

In trainings observed by OIR staff, discussions of de-escalation were often highly conceptual and generalized. At times, instructors provided specific tips—but often, these helpful guidelines were unmoored from a cohesive, universally useful set of concrete principles or standards of conduct. OCSO should consider creating a stand-alone de-escalation course that provides trainees with a clear roadmap to effectively de-escalate situations often confronted on patrol or in the jails. It should consider providing related material to each of its force instructors, so that necessary de-escalation precepts are echoed in every course touching on force. Doing so will ensure that trainees have an opportunity to fully understand and incorporate such tools into their work.

10. OCSD should assess its instructor recruitment, vetting, and hiring practices to ensure its Academy and in-service training is as effective as possible.

Instructors observed by OIR staff were passionate about their work and clearly eager to provide trainees with useful knowledge. However, as described more fully above, several presentations veered from best practices and Department policies, at times presenting conflicting visions of effective and safe policing. Such variations in teaching quality strongly suggest that OCSD recruit and vetting practices may need to be updated, especially in subjects like crisis intervention, which are relatively new in law enforcement. For that reason, the OIR recommends that when recruiting for instructors, OCSD make an express effort to reach potential candidates beyond the current or former peace officer community. Doing so will increase the diversity of viewpoints within OCSD training programs, make it easier to stay abreast of changing best practices, and improve the quality of instruction.

11. OCSD should effectively and routinely assess its current instructors, including periodic reviews of the non-POST materials that instructors rely on.

OCSD should periodically and effectively review the instructors who teach at its training facilities, with an eye towards ensuring that their approach and materials are in keeping with the cultural ethos of the Department and best practices. Such efforts must include the thorough review and vetting of non-POST materials that instructors rely on in their courses. These materials often include media and movie clips, anecdotes drawn from personal or shared experiences, and popular culture; and instructors often update them from year to year. Such updates, without robust monitoring, can introduce potentially undesirable messages that should be identified as soon as possible and corrected.

12. OCSD should consider incorporating more hands-on, scenario-based learning exercises in its introductory crisis intervention courses.

OCSD's introductory crisis intervention course currently involves only classroom-based instruction, with some group-based work and presentation components. Given the complexities of real-world scenarios on patrol and in the jails, the Department would benefit significantly from exploring ways to incorporate scenario-based exercises in its introductory courses. Though not required by POST, including such exercises in introductory courses will likely better prepare OCSD deputies to more effectively interact with individuals in crisis.

Practices

13. OCSD should consider creating and implementing a reoccurring audit scheme to routinely assess force packets for timeliness, completeness, accuracy, and compliance with applicable policies.

The OIR identified several failures to refer qualifying force incidents to Internal Affairs for review and instances in which force reports were late. OCSD should consider more widely auditing its force reporting and assessment practices to ensure that they align with its policies and stated practices. The Department should have the framework in place to identify such failures before the OIR, or another institution, does. A routine audit of information it has on hand, including the supervisory reviews of its force packets, should go a long way towards accomplishing this task. The audit should be carried out routinely, on a quarterly or bi-annual basis. Doing so will ensure the Department is aware of reporting and review practices throughout its operations and allow it to be vigilant in securing necessary compliance with applicable policies.

The Department should also ensure that its force reporting policies are in step with best practices. As detailed above, the accurate and timely reporting of force is an essential component of assessing force effectively, and of identifying small problems before they metastasize into life and career-ending mistakes. Reporting policies that fail to prioritize force reporting and reviews present significant risks for the public and County.

14. OCSD should ensure that supervisory reviews of force reports always include a thorough assessment of de-escalation efforts.

OCSD should treat de-escalation efforts, or their absence, with as much care and importance as it dedicates to uses of force. To that end, it should ensure that each and every supervisor reviewing force has sufficient information on hand to fully assess de-escalation strategies used, or not used, by the deputy at issue. The Department should then collect and analyze the assessments of its supervisors. Doing so will allow the Department to understand its de-escalation successes more effectively and build on them over time.

15. OCSD should ensure that supervisors who review force always separately analyze each distinct use of force.

As noted above, the OIR found that supervisory reviews of deputy force incidents were often cursory and incomplete, failing to assess each force application. Supervisors routinely used general terms to describe multiple force used by deputies in a single incident, then would simply state that all force used was in policy; for example, a supervisor may write that the “force used by all deputies involved was reasonable and necessary.” Instead, supervisors should separately assess each distinct use of force used in every force incident, separately analyzing each based on the *Graham* factors. Accordingly, supervisors should document, in their reports, whether the force used was reasonable and within policy based on factors such as the severity of the crime; whether the subject was attempting to resist or evade arrest; and the risk of injury to the officer or others.

16. OCSD should ensure its supervisors refer all qualifying force packets to Internal Affairs.

The OIR's review identified specific instances in which OCSD command staff reviewed force incidents that, in accordance with Department protocols, should have been referred to Internal Affairs for assessment. OCSD should work to understand this failure, consider enshrining its protocols in Department policy, and ensure that those policies clearly identify force incidents that must be referred to Internal Affairs. OCSD should consider including, at the least, the following kinds of force incidents for automatic Internal Affairs review: any use of force that is potentially (1) unauthorized; (2) out-of-policy; and/or (3) unlawful.

17. OCSD should work to improve the accuracy of its statistics and resulting analyses regarding force.

OCSD currently tasks its S.A.F.E. Division with gathering and assessing force-related data. The S.A.F.E. Division periodically details this work in reports. In internal documents, the S.A.F.E. Division concluded that the Department provides the best service and training to personnel, citing only the fact that a very small percentage of use of force incidents resulted in referrals to Internal Affairs. It used the same metric in 2019. As detailed above, citing such a figure unjustifiably stigmatizes the work of Internal Affairs, and fails to memorialize a review of other outcomes following the assessment of a use of force incident. OCSD should strongly consider reviewing the results of division commander investigations, which were the final word in the overwhelming majority of force incidents in 2020, with the express purpose of understanding what the outcomes of those reviews reveal about its systems. It should also work to identify other force-related factors that the S.A.F.E. Division can use to inform its assessments. In addition, the Department should proactively post the annual S.A.F.E. report on its website, so that it is readily available to members of the public who wish to better understand how often OCSD deputies use force and the outcomes of those incidents.