

OIR Use of Force Review

UOF Review 1-28-22 JH Unit G



Office of Independent Review
601 N. Ross St., 2nd Floor
Santa Ana, CA 92701

Robert P. Faigin, J.D., MPA
Executive Director

Contents

Summary of Facts.....	1
Lawful Requirements for Use of OC.....	1
Quantum of Force	2
Type of Force Used	2
Amount of Force Used	2
Governmental Interest.....	3
Severity of the Crime at Issue	3
Whether the Suspect Posed an Immediate Threat to the Safety of the Officers or Others.....	4
Whether the Suspect was Actively Resisting Arrest or Attempting to Evade Arrest by Flight	4
Balancing the Force Used Against the Need for Such Force.....	4
Compliance with Department Procedure	5
State Law.....	5
Department Procedure	5
Imminent Threat and De-escalation	5
Decontamination	6
Notifications and Procedures Required After Use of Force Incidents	7
Documentation	7
Conclusion.....	8
Recommendations	8

Summary of Facts

On January 28, 2022, at approximately 11:14 a.m., a Deputy Juvenile Correctional Officer (DJCO) 1 observed Y1 run from his assigned seat in the day area of Unit G toward Unit H.¹ DJCO 1 directed Y1 to “stop and get down,” but Y1 ignored his directives and went into Unit H. As DJCO 1 ran towards Unit H, Y2 took advantage of the commotion caused by Y1, got up from his assigned seat, and began exchanging closed-fist punches with Y3.

DJCO 1 directed both Y2 and Y3 to “get on the ground.” When the youths failed to comply, DJCO 1 shouted “OC Clear” and deployed a one second burst of Oleoresin Capsicum (OC) spray across the faces of Y2 and Y3 from about five feet away. Y2 continued to throw punches at Y3 after the deployment of the OC. As a result, DJCO 1 “assisted” Y2 to the ground to protect Y3 from receiving any further blows.

Once on the ground, DJCO 1 placed Y2’s hands behind his back and secured him in handcuffs. Y3 voluntarily went down to the ground and placed his hands behind his back. DJCO 2 arrived on scene and assisted DJCO 1 in securing Y3.

Two Supervising Juvenile Correctional Officers (SJCO) also arrived on scene. DJCO 3 and DJCO 4 responded to Unit H and located Y1. Y1 was then directed by staff to get down on the floor and place his hands behind his back. Handcuffs were applied and Y1 was escorted back to his room in Unit G. The handcuffs were then removed.

Once the unit was secured, DJCO 1 and DJCO 2 assisted Y2 to Unit J for decontamination. Once in the unit showers, Y2’s handcuffs were removed, and he began his decontamination process at 11:17 a.m. and ended his decontamination process at 11:22 a.m. Y2 was given a new set of clothes. Y2 was then escorted back to his room with no issues.

DJCO 5 assisted Y3 to his feet and escorted him to Unit G showers for decontamination. Y3 began his decontamination process at 11:16 a.m. and ended his decontamination process at 11:18 a.m. by choice. Y3 was also given a new set of clothes. After Y3 finished his decontamination, he was escorted back to his room with no issues.

Due to the youths being sprayed with OC, five-minute room checks were started at 11:22 a.m. The five-minute room checks were concluded at 12:45 p.m., when all youths were cleared of injuries by medical.

According to the reports provided, CEGU and Medical were notified, and the youths’ parents/guardians were also notified.

Lawful Requirements for Use of OC

In determining whether a particular use of force was appropriate, courts analyze the force “under the Fourth Amendment’s prohibition against unreasonable seizures using the framework articulated in *Graham v. Connor*.”² The reasonableness of a seizure turns on whether the use of force was “objectively

¹ All information regarding the incident is taken from DJCO reports and a review of the video provided.

² *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

reasonable in light of the facts and circumstances confronting [the user of force], without regard to their underlying intent or motivation."³

Reasonableness is determined by balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."⁴

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁵ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁶ Finally, the third step is to balance the quantum of force used on the individual against "the government's need for that intrusion to determine whether it was constitutionally reasonable."⁷

Quantum of Force

Assessing the quantum of force used requires analyzing the nature and quality of the intrusion on the individual's Fourth Amendment interests, which, in turn, requires the fact finder to evaluate both the type of force inflicted, and the amount of force used.⁸

Type of Force Used

In this incident, the force used was Oleoresin Capsicum (OC), commonly known as pepper spray. OC is an oily organic resin derived from the fruit of plants in the *Capsicum* genus, such as chili peppers.

The Ninth Circuit has clearly held that pepper spray is a form of "force capable of inflicting significant pain and causing serious injury."⁹ "Pepper spray 'is *designed* to cause intense pain,' and inflicts 'a burning sensation that causes mucus to come out of the nose, an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx,' as well as 'disorientation, anxiety, and panic.'"¹⁰ As such, pepper spray is regarded as "intermediate force" that, "while less severe than deadly force, nonetheless present[s] a significant intrusion upon an individual's liberty interests."¹¹

Recommendation

Update PMI 3-1-056 to specifically state that OC spray is classified as an intermediate level of force.

Amount of Force Used

The amount of "intermediate force" (OC) used in this case was minimal. There was one burst of OC sprayed by DJCO 1. The report indicates, and the video confirms, that the single deployment of OC occurred while the youths were actively fighting each other. The burst lasted one second and was deployed from approximately five feet away in the direction of the faces of Y2 and Y3. The youths continued to fight after coming into contact with the OC.

³ *Graham v. Connor* (1989) 490 U.S. 386, 397; *Blankenhorn v. City of Orange* (9th Cir. 2007) 485 F.3d 463, 477.

⁴ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

⁵ *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

⁶ *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

⁷ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

⁸ *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964.

⁹ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹⁰ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

¹¹ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

Some courts have also held that the failure to act by not properly decontaminating a person exposed to OC can rise to the level of a constitutional violation.¹² Such is not the case here. Staff also ensured that the length of time the youths felt the effects of the OC was limited. As soon as Y2 and Y3 were secured, they were taken directly to the showers to begin the decontamination process. The reports reflect that only three minutes elapsed from the time unit staff was advised of the Code 2¹³ and the time that the last youth began the decontamination process.

Governmental Interest

Intermediate force is a “significant level of force that must be justified by the governmental interest involved.”¹⁴ In evaluating the government's interest in the use of force, courts look to: “(1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight.”¹⁵

Severity of the Crime at Issue

The crimes at issue in this incident were violent crimes of assault and battery. Under California law, assault and battery are typically misdemeanor offenses.¹⁶ However, battery involving the infliction of serious bodily injury and assault by means of force likely to produce great bodily injury are both felony offenses.¹⁷ A felony battery charge focuses on the actual injury inflicted, while a felony assault charge focuses on the force used and not whether the force produced great bodily injury. “The crime of assault by means of force likely to produce great bodily injury is completed before any injury is inflicted.”¹⁸ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”¹⁹ Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”²⁰

Here, the report shows that the youths who were the target of the OC spray were engaged in punching each other with closed fists. Noticeably absent from the reports, however, is a description of the areas of the body targeted by the closed fist strikes. While strikes to the head can be likely to cause serious bodily injury, the same cannot always be said regarding strikes to other areas of the body. The lack of details in DJCO 1’s report concerning the areas attempted to be, or actually being, struck by Y2 and Y3 makes it impossible to tell if the crime at issue was a violent misdemeanor or a felony. That said, a violent misdemeanor is certainly more severe than minor criminal activity such as a theft or other misdemeanor crimes not involving force. As such, this *Graham* factor leans in favor of finding that the use of force was appropriate.

¹² *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S.Dist.LEXIS 218539.

¹³ A Code 2 indicates that there is a fight in progress.

¹⁴ *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805, 826.

¹⁵ *Graham v. Connor* (1989) 490 U.S. 386 [109 S.Ct. 1865, 104 L.Ed.2d 443].

¹⁶ Pen. Code, §§ 240, 242, 243(a).

¹⁷ Pen. Code, §§ 242, 243(d), 245(a).

¹⁸ *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

¹⁹ *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

²⁰ *Reaza v. County of Riverside* (C.D.Cal. Oct. 26, 2022, No. 5:20-cv-01188-MEMF (SPx)) 2022 U.S.Dist.LEXIS 198653.

Recommendation

Provide additional training reminding staff of the importance of providing clear details in reports, including areas of the body targeted by assaultive and/or violent physical behavior, to allow proper assessment of the likelihood of serious bodily injury when a supervisor is reviewing the incident.

Whether the Suspect Posed an Immediate Threat to the Safety of the Officers or Others

Courts have said that the most important element of the *Graham* factors is whether the suspect poses an immediate threat to the safety of the officers or others.²¹ Here, the report makes clear that not only did Y2 run towards Y3, but as soon as he got to him, he immediately began to strike him. The report also establishes that even after given commands to “get on the ground” by DJCO 1, the youths continued to punch each other. In fact, Y2 continued to throw punches even after the OC was deployed. It wasn’t until DJCO 1 “assisted Y2 to the ground,” that he was able to get the youth secured and stop the fight. These facts establish that but for DJCO 1’s intervention, the assault by Y2, and subsequent response by Y3, would have continued. Therefore, at the time of the use of OC, the youths posed an immediate and ongoing threat to each other. This *Graham* factor clearly weighs in favor of finding that the use of force was appropriate.

Whether the Suspect was Actively Resisting Arrest or Attempting to Evade Arrest by Flight

While the youths in this incident were not attempting to evade the DJCOs, they were clearly resisting arrest by failing to comply with DJCO 1’s commands to stop and get down while continuing to fight. DJCO 1 indicated in his report that he gave commands to stop prior to the deployment of OC. The fact that Y2 and Y3 continued to fight, both before and after the OC was deployed, showed that they were willfully refusing to comply with the force used to get them to submit to the DJCOs authority to take them into custody. Ultimately, to place the non-compliant combating youths into custody, DJCO 1 had to do more than simply place a compliant, or passively resisting, youth into handcuffs. In fact, DJCO 1 had to physically take Y2 to the ground to stop the battery and handcuff him. Based on the facts provided in DJCO 1’s report, this factor leans in favor of finding that the use of force was appropriate.

Balancing the Force Used Against the Need for Such Force

Finally, to determine if force was excessive, courts “balance the gravity of the intrusion on the individual against the government’s need for that intrusion.”²² Put another way, does the government’s need for the force used, based on the severity of the crime, the threat to safety, and the resistance of the subject, outweigh the type and amount of force used?

The Ninth Circuit has said that the law is clearly established “that police officers employ excessive force in violation of the Fourth Amendment when they use pepper spray upon an individual who is engaged in the commission of a non-violent misdemeanor and who is disobeying a police officer’s order but otherwise poses no threat to the officer or others.”²³ That is not the situation that confronted DJCO 1 in this incident.

As previously stated, the youths were engaged in, at a minimum, a violent misdemeanor, and potentially a violent felony, and they clearly disobeyed the DJCOs’ order to get on the ground and continued to

²¹ *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

²² *Espinosa v. City & County of San Francisco* (9th Cir. 2010) 598 F.3d 528.

²³ *Silva v. Chung* (9th Cir. 2018) 740 F.App’x 883.

fight after being sprayed. The most important distinction, however, is the fact that by continuing to fight, the youths clearly posed a threat to the DJCOs as well as to each other.

The youths involved in this incident were under the care and custody of the Probation Department. As such, DJCO 1 had an obligation to prevent the youths from harming each other.

Compliance with Department Procedure

State Law

The State of California has set forth the requirements that a facility, which authorizes the use of chemical agents as a force option, must have in their policies and procedures.²⁴ Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not reasonably possible;²⁵ that the policy outline the facility's approved methods and timelines for decontamination from chemical agents including that youth who have been exposed to chemical agents shall not be left unattended until that youth is fully decontaminated or is no longer suffering the effects of the chemical agent;²⁶ that the policy define the role, notification, and follow-up procedures required after a use of force incident involving chemical agents for medical, mental health staff and parents or legal guardians;²⁷ and that the policy provide for the documentation of each incident of use of chemical agents, including the reasons for which it was used, efforts to de-escalate prior to use, youth and staff involved, the date, time and location of use, decontamination procedures applied and identification of any injuries sustained as a result of such use.²⁸

Department Procedure

Imminent Threat and De-escalation

The Probation Department has two procedures that address the use of OC by DJCOs in the course and scope of their duties.²⁹ The OC Procedure provides that OC spray may “only be used when there is an imminent threat to the youth’s safety and/or the safety of the officer or others and only when de-escalation efforts have been unsuccessful or are not reasonably possible.”³⁰ This verbiage is consistent with state law.

The report regarding this incident makes clear that Y2 ran towards Y3 and immediately began to strike him with closed fists. Y3 fought back and both youths began throwing closed fist punches toward each other. As a result, at the time of the use of OC, there was an imminent threat to the safety of the youths that were involved in the physical fight.

DJCO 1 attempted to de-escalate the situation by providing verbal commands to Y2 and Y3 to “get on the ground.” DJCO 1’s de-escalation efforts were unsuccessful at ending the fight. As a result, when Y2

²⁴ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁵ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(5).

²⁹ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³⁰ Procedure Manual Item 3-1-056 I(C) General Information.

and Y3 “did not follow the given directives,” DJCO 1 deployed a one second burst of OC while the youths were still actively fighting each other.

Decontamination

The Probation Department’s OC Procedure requires that “[f]or youth exposed to OC spray, through a direct spray or over spray, decontamination measures must be undertaken as soon as practical after a youth is subdued and restrained.”³¹ The OC Procedure further states that youth shall be placed, “fully clothed, into a shower, at a sink, or on the patio with the garden hose, allowing cold water to freely fall onto the youth until the youth no longer feels the effects of the OC spray.”³²

According to DJCO 1, Y2 and Y3 were both exposed to the OC spray. Y1 was in Unit H where he was not exposed to the OC spray, so he was handcuffed without incident and escorted back to his room in Unit G. DJCO 1’s report indicates that after each affected youth was secured, they were taken directly to separate shower areas to begin the decontamination process. A review of the timeline included with DJCO 1’s report shows that Y2 began the decontamination process within three minutes of the Code 2 being put out. Y3 began the decontamination process within two minutes of the Code 2.

The OC Procedure also states that the youth will then remove contaminated clothing and be issued clean clothing. The contaminated clothing shall be disposed of in a marked plastic bag.³³ The reports indicate that both affected youths were provided with a “new set of clothes” and “contaminated clothes were bagged in a water-soluble bag and labeled.”

Staff are also required to be with “the youth throughout the entire decontamination process.”³⁴ None of the reports specifically state that a particular DJCO stayed with Y2 or Y3 during the entire decontamination process. However, the SIRs prepared by DJCO 1 indicate that after Y2 and Y3 “finished his decontamination by choice, he was escorted back to...his room with no issues.” Additionally, the SIR prepared by DJCO 2 indicates that after Y2 completed the decontamination process “[w]e then escorted the youth back to unit G...” These statements imply, but do not expressly state, that Y2 and Y3 were “directly supervised” during the entire decontamination process.

Although the written narratives by DJCO 1, and DJCO 2 imply that they were present for the entirety of the youths’ decontamination processes, it remains unclear whether each DJCO was continuously present throughout the entire decontamination process. A straightforward statement would be more helpful to the reader of their reports.

Recommendation

Update the portion of the Use of Force/Restraint SIR form relating to Pepper Spray and Decontamination to add an entry field that requires the report writer to specifically indicate which DJCO(s) stayed with each youth during the entire decontamination process.

³¹ Procedure Manual Item 3-1-056 II(F)(3) Decontamination/Aftercare Procedures. (The Department’s Use of Force Policy, Procedure Manual Item 3-1-015 VIII(E) Medical and Mental Health Considerations, has been renumbered and amended to include language that decontamination measures must be undertaken as soon as practical after a youth is subdued and restrained.)

³² Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

³³ Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

³⁴ Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

Notifications and Procedures Required After Use of Force Incidents

The OC Procedure requires that a DJCO who discharges an OC canister notify his or her supervisor as soon as possible.³⁵ The OC Procedure also makes clear that “[t]he staff member who sprayed the individual is responsible for advising medical personnel or others of the decontamination procedures.”³⁶ The responsibility for contacting the youth’s parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁷ Lastly, while the OC Procedure requires that the youth must be referred to Mental Health staff immediately following decontamination, it does not specifically identify whose responsibility it is to ensure that this section of the procedure is followed.³⁸

Recommendation

Update PMI 3-1-056 to clearly articulate who has the responsibility to refer youth to Mental Health Staff following decontamination. This change would put DJCOs on notice as to whose responsibility it is to ensure that Mental Health staff are contacted.

DJCO 1’s report indicates that two SJCOs were on scene and aware of the deployment of OC. DJCO 1’s report also indicates that “[m]edical [was] notified for all youths involved in the altercation.” The report documented the time medical staff saw the youths and that all involved youths were cleared of any injuries 36 minutes following the Code 2. The timeline also indicates that all the guardians for the youths were notified.

The timeline also establishes that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident, and the youths involved, within seven minutes of the Code 2.

Documentation

Department procedure related to use of force provides that any DJCO involved in, or a witness to, a use of force, which includes the use of Chemical - Oleoresin capsicum (OC) spray, shall write and submit a Special Incident Report (SIR).³⁹ Further, the procedure requires that a SIR and Use of Force Report must include a clear and factual justification for the use of OC, efforts to de-escalate prior to use and reasons why de-escalation was not reasonably possible, the youth and staff involved, the date, time and location of use, decontamination procedures applied, and identification of any injuries and medical treatment.⁴⁰

DJCO 1 completed the main SIR for this incident and three other DJCOs prepared supplemental incident reports. The main SIR identified the youth involved as well as the actions taken by DJCO 1 prior to the use of force. DJCO 1’s report identified the reason for the deployment of OC and the effect of the OC on the affected youths. The included timeline laid out the activities that occurred after the use of force.

Finally, the OIR observed that DJCO 1’s report lacked clear detail in describing the actions that were taken to get Y2 onto the ground. Specifically, DJCO 1 stated in the SIR that Y2 “had to be assisted to the ground...” The term “assisted” is vague and ambiguous and could represent anything from simple arm guidance to a foot-block shoulder-drag, or full on tackle. It is important that staff reports paint a full and

³⁵ Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

³⁶ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

³⁷ Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

³⁸ Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

³⁹ Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

⁴⁰ Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

accurate picture of the actions taken by all individuals involved. This is significantly more important in situations where no video is available to supplement a DJCOs written report.

Recommendation

Provide additional training to address report writing as it relates to using the non-descriptive phrase “assisted to the ground.” DJCOs should clearly articulate in their reports the means and type of force that they used to “assist” a juvenile to the ground.

Conclusion

A review of the SIRs established that the force used by DJCO 1 was within law and policy, and therefore appropriate. Based on the report, had DJCO 1 not deployed force, the youths would have continued to strike each other, potentially resulting in serious injuries. The harm that could have occurred to one or more of the involved youths from closed fist strikes justified the use of a one second burst of OC when the youths failed to follow commands to “get on the ground.”

Recommendations

1. Update PMI 3-1-056 to specifically state that OC spray is classified as an intermediate level of force.
2. Provide additional training reminding staff of the importance of providing clear details in reports, including areas of the body targeted by assaultive and/or violent physical behavior, to allow proper assessment of the likelihood of serious bodily injury when a supervisor is reviewing the incident.
3. Update the portion of the Use of Force/Restraint SIR form relating to Pepper Spray and Decontamination to add an entry field that requires the report writer to specifically indicate which DJCO(s) stayed with each youth during the entire decontamination process.
4. Update PMI 3-1-056 to clearly articulate who has the responsibility to refer youth to Mental Health Staff following decontamination. This change would put DJCOs on notice as to whose responsibility it is to ensure that Mental Health staff are contacted.
5. Provide additional training to address report writing as it relates to using the non-descriptive phrase “assisted to the ground.” DJCOs should clearly articulate in their reports the means and type of force that they used to “assist” a juvenile to the ground.