

# OIR Use of Force Review

*UOF Review 1-30-22 JH Unit T*



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## Summary of Facts

On January 30, 2022, Deputy Juvenile Correctional Officer (DJCO) 1 was present in Unit T when two youths were heading to their rooms for the night.<sup>1</sup> DJCO 1 heard Y1 and Y2 talking and directed them to be quiet and close their room doors. Both youths failed to obey the directive and continued to talk. DJCO 1 repeated her directive to the youths, but they continued to talk. Then, DJCO 1 observed one of the youths punch the other youth in the face with a closed fist. In reaction, the battered youth punched the assailant in the shoulder area. According to DJCO 1, both youths “were aggressively punching each other.” At approximately 8:44 p.m., a Code 2 was called.<sup>2</sup>

DJCO 2 observed Y1 and Y2 exchanging blows and immediately ran towards the youths, yelling for them to “get down.” As DJCO 2 approached the two youths she again directed both youths to “get down on the ground and stop fighting.” Neither youth complied with the directives and DJCO 2 yelled “OC clear” and deployed a one second burst of spray across both youths’ eyes from a distance of approximately five feet.

The youths continued to fight with their eyes closed. DJCO 1 was able to separate the youths as DJCO 3 pulled Y2 away from Y1. DJCO 1 told Y1 to get down and he cooperated. Once Y1 was in the duck and cover position, DJCO 1 placed handcuffs on him. While on the ground, Y1 spit out blood.

DJCO 2 assisted Y2 to the ground. DJCO 3 knelt on Y2’s left side as DJCO 2 secured the youth in handcuffs.

After both youths were secured, DJCO 4 arrived and relieved DJCO 2 because her eyes came into contact with OC spray when she sprayed both youths.

A Supervising Juvenile Correctional Officer (SJCO) was also present and directed the DJCOs to escort the youths for decontamination.

DJCO 5 arrived and relieved DJCO 1. DJCO 5 and DJCO 6 then assisted Y1 to his feet and escorted him to the unit showers for decontamination. DJCO 7 arrived and relieved DJCO 3 by taking control of Y2’s right arm. SJCO 1 directed DJCO 4 and DJCO 7 to escort Y2 for decontamination. Both youths began the decontamination process within approximately four minutes of the Code 2. They were provided with new clothing, and their soiled clothing were placed in water-soluble bags and labeled.

## Lawful Requirements for Use of OC

In determining whether a particular use of force was appropriate, courts analyze the use of force “under the Fourth Amendment’s prohibition against unreasonable seizures using the framework articulated in *Graham v. Connor*.”<sup>3</sup> The reasonableness of a seizure turns on whether the use of force was “objectively reasonable in light of the facts and circumstances confronting [the user of force], without regard to their underlying intent or motivation.”<sup>4</sup>

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<sup>1</sup> All information regarding the incident is taken from DJCO reports and video of the incident that was provided.

<sup>2</sup> A Code 2 indicates that there is a fight in progress.

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

<sup>4</sup> *Graham v. Connor* (1989) 490 U.S. 386, 397; *Blankenhorn v. City of Orange* (9th Cir. 2007) 485 F.3d 463, 477.

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."<sup>5</sup>

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."<sup>6</sup> The second step is to measure "the governmental interests at stake by evaluating a range of factors."<sup>7</sup> 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."<sup>8</sup>

### 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.<sup>9</sup>

### 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."<sup>10</sup> "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.'"<sup>11</sup> 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."<sup>12</sup>

### 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 gel deployed by DJCO 2. The reports indicate that the single deployment of OC occurred while the youths were actively fighting each other. The burst lasted one second and was deployed from a distance of approximately five feet away and in the direction of the faces of Y1 and Y2. The youths continued to fight after coming into contact with the OC.

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.<sup>13</sup> Such is not the case here. Staff ensured that the length of time the youths felt the effects of the OC was limited. As soon as Y1 and Y2 were secured,

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<sup>5</sup> *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

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

<sup>7</sup> *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

<sup>8</sup> *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

<sup>9</sup> *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964.

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

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

<sup>12</sup> *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

<sup>13</sup> *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S.Dist.LEXIS 218539.

they were taken directly to the showers to begin the decontamination process. The reports reflect that no more than four minutes elapsed from the time unit staff were advised of the Code 2 and the time that the youths began the decontamination process.

### Governmental Interest

Intermediate force is a “significant level of force that must be justified by the governmental interest involved.”<sup>14</sup> 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.”<sup>15</sup>

### Severity of the Crime at Issue

The crimes at issue in this incident are violent crimes of assault and battery. Under California law, assault and battery are misdemeanor offenses.<sup>16</sup> 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.<sup>17</sup> The felony battery charge focuses on the actual injury inflicted, while the 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.”<sup>18</sup> “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”<sup>19</sup> Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”<sup>20</sup>

Here, the reports show that the youths were engaged in punching each other with closed fists. Y2 punched Y1 in the face, and as a result of the physical altercation Y1 was spitting up blood.

### 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.<sup>21</sup> Here, the reports make clear, and the video confirms, that one of the youths initiated the physical altercation when he punched the other youth in the face. The other youth then engaged in mutual combat and the reports establish that even after given commands to “get down on the ground and stop fighting,” the youths continued to punch each other. In fact, both youths continued to fight even after OC was deployed. It was not until DJCO 1 and DJCO 3 physically separated the youth that they were able to stop the fight and get them secured. These facts establish that but for the DJCOs intervention, the physical altercation would have continued. Therefore, at the time of the use of OC, the youths posed an immediate and ongoing threat to each other.

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

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

<sup>16</sup> Pen. Code, §§ 240, 242, 243(a).

<sup>17</sup> Pen. Code, §§ 242, 243(d), 245(a).

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

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

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

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

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

While the youths were not attempting to evade the DJCOs, they were clearly resisting their attempts to take control of them by refusing to comply with DJCO 2's commands to get down on the ground and stop fighting. The youths also ignored DJCO 2's commands to get down prior to her deployment of OC. Further, the fact that Y1 and Y2 continued to fight 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 and DJCO 2 had to do more than simply place a compliant youth into handcuffs. DJCO 1 and DJCO 3 had to physically separate the youths. DJCO 2 and DJCO 3 then had to physically assist Y2 to the ground and to kneel on either side of him in order to restrain and handcuff him.

### Balancing the Force Used Against the Need for Such Force

Finally, in order to determine if a particular use of force was excessive, courts "balance the gravity of the intrusion on the individual against the government's need for that intrusion."<sup>22</sup> 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."<sup>23</sup> That is not the situation that confronted the DJCOs 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 down and continued to fight after being sprayed. The most important distinction, however, is the fact that by continuing to fight, the youths clearly posed a threat to each other.

The youths involved in the fight were under the custody and care of the Probation Department. As such, the Probation Department has an obligation to protect them from harm. Prior to the deployment of OC, the youths posed an immediate threat to each other. Additionally, the harm that could have occurred to one or both involved youths from closed fist strikes justified the use of a one second burst of OC when they failed to follow commands to "get on the ground."

### Compliance with Department Procedure

#### State Law

The State of California has set forth the requirements that a facility that authorizes the use of chemical agents as a force option must have in their policies and procedures.<sup>24</sup> 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;<sup>25</sup> that the policy outline the facility's approved methods and timelines for

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

<sup>23</sup> *Silva v. Chung* (9th Cir. 2018) 740 F.App'x 883.

<sup>24</sup> Cal. Code Regs., tit. 15, § 1357 – Use of Force.

<sup>25</sup> Cal. Code Regs., tit. 15, § 1357(b)(2).

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;<sup>26</sup> 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;<sup>27</sup> 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.<sup>28</sup>

## 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.<sup>29</sup> 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.”<sup>30</sup> This verbiage is consistent with state law.

The video and reports regarding this incident make clear that one youth initiated the physical altercation when he struck the other in the face with closed fists. The other youth fought back and both youths began exchanging closed fist punches. As a result, at the time of the use of OC, there was an imminent threat to the safety of both youths that were involved in the physical fight.

DJCO 2 attempted to verbally de-escalate the situation by directing both youths to “get down” as she rushed towards the fight. DJCO 2 then attempted to again de-escalate the situation by providing another verbal command to Y1 and Y2 to “get down on the ground and stop fighting” prior to deploying the OC. Neither de-escalation effort was successful at ending the fight.

After directing the youths to get down and stop fighting, and providing a warning that OC would be deployed, DJCO 2 then deployed a one second burst of OC while the youths were actively fighting each other. The use of OC spray occurred during an imminent threat and only after attempts at de-escalation failed.

### 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.”<sup>31</sup> The OC Procedure further states that youth shall be placed, “fully

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<sup>26</sup> Cal. Code Regs., tit. 15, § 1357(b)(3).

<sup>27</sup> Cal. Code Regs., tit. 15, § 1357(b)(4).

<sup>28</sup> Cal. Code Regs., tit. 15, § 1357(b)(5).

<sup>29</sup> Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;

Procedure Manual Item 3-1-015 Use of Force – Facilities.

<sup>30</sup> Procedure Manual Item 3-1-056 I(C) General Information.

<sup>31</sup> 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.)

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.”<sup>32</sup>

According to DJCO 1, Y1 and Y2 were both affected by the OC spray. The DJCOs’ reports indicate that after each affected youth was secured, they were taken directly to begin the decontamination process. A review of the timeline included with DJCO 1’s report shows that both youths began the decontamination process within four minutes of the Code 2 being put out. Y1 was taken to the unit showers, and Y2 was taken to the unit restroom for the decontamination process.

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.<sup>33</sup> 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.”<sup>34</sup> None of the reports specifically state that a particular DJCO stayed with Y2 or Y3 during the entire decontamination process. A review of DJCO 5 and DJCO 6’s SIRs related to this incident indicated that Y1 “was escorted to the unit showers,” his handcuffs were removed, and he “walked into the shower to begin contamination.” Neither DJCO mentioned the removal or disposal of Y1’s clothing. However, the narrative from DJCO 1, who did not indicate that she was present during Y1’s decontamination, does indicate that “[b]oth youth were given new clothing, and the soiled clothing was placed in a water-soluble bag and labeled.”

Y2 was “escorted to the unit tango restroom.” Only DJCO 7 provided a written narrative regarding escorting Y2 for decontamination. In his narrative, DJCO 7 indicated that Y2 “was given clean clothing,” and his “soiled clothing was placed in a water-soluble bag and was labeled.” DJCO 7’s narrative does not mention the actual process used for Y2’s decontamination (i.e. sink or shower).

None of the reports specifically state that a particular DJCO stayed with Y1 or Y2 during the entire decontamination process. However, the SIR prepared by DJCO 7 indicates that after Y2 “ended his decontamination by choice” he “returned to his room.” Similarly, the SIR prepared by DJCO 5 states that decontamination for Y1 “ended at 9:13pm by choice,” and that the “youth went to his room with no issues.” These sentences imply that someone was present for each youth to alert to the fact that they were voluntarily ending their decontamination. However, it is unclear whether a DJCO was continuously present during each youth’s decontamination.

### *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.

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

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

<sup>34</sup> 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.<sup>35</sup> 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.”<sup>36</sup> The responsibility for contacting the youth’s parent or legal guardian is assigned to the SJCO/Duty Officer or designee.<sup>37</sup> Lastly, while the OC procedure does require 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.<sup>38</sup>

DJCO 1’s report indicates a SJCO was on scene and aware of the deployment of OC. DJCO 1’s report also indicates that “[m]edical was advised [of] the physical altercation.” The report documented the time medical staff was notified and the time medical staff saw the youths. The timeline also indicates that the guardians for the youths were notified. Finally, the timeline establishes that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident, and the youths involved, shortly after the Code 2 was called. CEGU came to talk to both youths within 14 hours, well under the 72 hours as required by procedure.

### 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.

### 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).<sup>39</sup> 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.<sup>40</sup>

DJCO 1 appears to have completed the main SIR for this incident. Five other DJCOs prepared supplemental incident reports. The main SIR identified the youths involved as well as the actions taken by DJCO 1 and DJCO 2 prior to the use of force. All DJCOs who used force submitted Use of Force reports, and DJCO 2 also prepared a Pepper Spray Checklist for each youth. Both DJCO 1 and DJCO 2’s reports identified the reason for the deployment of OC and the effect of the OC on the affected youth. The included timeline laid out the activities that occurred after the use of force, except for whether DJCOs were “with the youth throughout the entire decontamination process.”

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

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

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

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

<sup>39</sup> Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

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

## Conclusion

A review of the videos, SIR, and Use of Force reports establishes that the force used by DJCO 2 was within law and policy, and therefore appropriate. It is clear from the reporting that had DJCO 2 not deployed force, the youths would have continued to strike each other, possibly resulting in potentially more serious injuries.

## Recommendations

1. Update PMI 3-1-056 to specifically state that OC spray is classified as an intermediate level of force.
2. 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.
3. 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.