

# OIR Use of Force Review

*UOF Review 12-20-22 YLA*



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

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

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## Summary of Facts

On December 20, 2022, at approximately 8:27 p.m., Deputy Juvenile Correctional Officer (DJCO) 1 and DJCO 2 were supervising a group of youths on the patio during large muscle exercise.<sup>1</sup> Y2 was playing basketball with a group of five other youths. Y1 was across the patio and began making a kissing gesture towards Y2. Y1 then ran over to where Y2 was playing basketball and began to punch Y2 in the face and upper torso with closed fists. DJCO 1 told the youth to “stop” and to “get down,” and DJCO 2 notified staff of a Code 3 over the radio.<sup>2</sup> Y2 fought back and punched Y1 in the face with closed fists.

As Y1 and Y2 continued to fight, Y3 ran from the pull up bar towards Y4, who was playing basketball, and yelled “Fuck Lopers!...Paleta!” and began punching Y4 in the face and upper torso with closed fists.<sup>3</sup> DJCO 1 directed Y3 and Y4 to “stop, get down.” Neither youth complied, and DJCO 1 yelled “OC clear” and deployed a one-second burst of Oleoresin Capsicum (OC) spray towards Y3 and Y4 from approximately five to eight feet. Y3 and Y4 continued to fight and exchange closed-fist punches following the OC deployment.

Meanwhile, DJCO 2 pulled Y1 away from Y2 and secured Y1 in handcuffs. Y2 voluntarily got into a prone position on the ground.

Y3 and Y4 continued to fight while moving towards the area where Y2 was laying on the ground. Y3 continued to disregard directives to “stop and get down” and Y4 began throwing closed fist punches toward Y3. “In order to maintain necessary control of the youth fighting and prevent further injury,” DJCO 1 yelled “OC clear” and deployed another one second burst of OC towards Y3 and Y4. DJCO 3 arrived to assist, and pulled Y4 off Y3, and secured Y4 in handcuffs. DJCO 1 secured Y3 in handcuffs.

Additional staff responded and directed all uninvolved youths to return to their rooms. Supervising Juvenile Correctional Officer (SJCO) 1 arrived on scene and directed DJCO 3 and DJCO 9 to escort Y4 to the Youth Leadership Academy (YLA) 2 shower for decontamination. SJCO 1 also directed DJCO 4 and DJCO 5 to escort Y2, who was exposed to overspray, to the right side of the unit showers for decontamination. DJCO 1 and DJCO 6 escorted Y3 to the left side of the unit showers for decontamination.

Y3 and Y4 began decontamination within five minutes of the OC deployment. Y2 began decontamination within three minutes of the OC deployment. All three youths were provided with clean clothing, and their contaminated clothing was bagged and labeled accordingly.

## 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

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<sup>1</sup> All information regarding the incident is taken from DJCO reports and video provided to the OIR. All information regarding statements made or commands given were taken from reports because the video contains no audio.

<sup>2</sup> A Code 3 indicates that staff needs assistance.

<sup>3</sup> Y3 claims to be a member of the criminal gang called Townsend Street. Y4 claims to be a member of the criminal gang called Lopers. These are known gang rivals.

*Graham v. Connor*.”<sup>4</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>5</sup>

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>6</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>7</sup> The second step is to measure "the governmental interests at stake by evaluating a range of factors."<sup>8</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>9</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>10</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>11</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>12</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>13</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 were two one-second deployments of OC. The reports and video reflect that the deployments of OC occurred while Y3 and Y4

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

<sup>5</sup> *Graham v. Connor* (1989) 490 U.S. 386, 397; *Blankenhorn v. City of Orange* (9th Cir. 2007) 485 F.3d 463, 477.

<sup>6</sup> *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

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

<sup>8</sup> *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

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

<sup>10</sup> *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964.

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

were mutually assaulting each other with closed fist strikes to the head and torso. According to DJCO 1, each burst of OC was sprayed towards both Y3 and Y4. Y2 was hit by overspray during the incident.

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>14</sup> Such is not the case here. Staff ensured that the length of time that the youths felt the effects of the OC was limited. As soon as the youths were secured, they were escorted to the showers to decontaminate. All three youths began decontamination within five minutes of the first OC deployment.

### Governmental Interest

Intermediate force is a “significant level of force that must be justified by the governmental interest involved.”<sup>15</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>16</sup>

### 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 misdemeanor offenses.<sup>17</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>18</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>19</sup> “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”<sup>20</sup> Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”<sup>21</sup>

Here, the video and reports show that Y3 and Y4 were punching each other with closed fists when DJCO 1 deployed OC the first time. Following the deployment, the youths continued to fight and DJCO 1 deployed a second burst of OC to stop the fight and separate the youths. Considering that Y3 and Y4 were throwing continuous punches at each other's heads which could result in serious injury, the assaults by Y1 and Y2 should be considered severe.

### 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>22</sup> Here, the reports make clear that Y3 and Y4 posed an immediate threat to each other. At the time that DJCO 1 deployed OC spray, Y3 and Y4

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<sup>14</sup> *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S.Dist.LEXIS 218539.

<sup>15</sup> *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805, 826.

<sup>16</sup> *Graham v. Connor* (1989) 490 U.S. 386 [109 S.Ct. 1865, 104 L.Ed.2d 443].

<sup>17</sup> Pen. Code, §§ 240, 242, 243(a).

<sup>18</sup> Pen. Code, §§ 242, 243(d), 245(a).

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

<sup>20</sup> *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

<sup>21</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>22</sup> *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

were continuously punching and striking each other in the upper torso and head. Despite DJCO 1's efforts to stop the fight by directing them to "stop" and to "get down," they continued to strike each other. Therefore, at the time OC was deployed by DJCO 1, the youths clearly posed an immediate threat to each other.

Even after OC was deployed the first time by DJCO 1, both Y3 and Y4 continued to swing at each other. DJCO 1 deployed a second burst of OC, which was also directed at both Y3 and Y4. After the second burst of OC was deployed, DJCO 3 was able to intervene and pull Y4 down to the ground. Y3 then assumed the prone position on the ground. These facts establish that but-for DJCO 1's intervention, the mutual assault would have continued. Therefore, at the time of both OC deployments, the youths posed an immediate and ongoing threat to each other.

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

While the youths were not attempting to evade DJCO 1, both youths were clearly refusing to comply with her commands and initial attempts to get them to submit to her authority. When the youths began to fight, DJCO 1 immediately directed both of them to "stop" and "get down." They ignored her directives and continued to fight. Even after DJCO 1 yelled "OC clear" and deployed her first burst of OC spray, the youths continued their mutual assault. DJCO 1 yelled "OC clear" once more before deploying her second burst of OC. It was only after the second burst of OC that Y3 and Y4 submitted to the DJCO's authority and were able to be taken down to the ground.

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

Finally, in order to determine if force used was excessive, courts "balance the gravity of the intrusion on the individual against the government's need for that intrusion."<sup>23</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>24</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 fights were under the custody and care of the Probation Department. As such, the Probation Department had an obligation to protect them from harm. Prior to the deployment of OC, Y3 and Y4 posed an immediate threat to each other. Additionally, the harm that could have occurred to either youth from closed fist strikes to the head justified the deployment of OC when the

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<sup>23</sup> *Espinosa v. City & County of San Francisco* (9th Cir. 2010) 598 F.3d 528.

<sup>24</sup> *Silva v. Chung* (9th Cir. 2018) 740 F.App'x 883.

youths continued to fight even after being directed to stop and get down. Thus, the two one-second deployments of OC were justified when considering each of the above factors.

## Compliance with Department Procedure

### State Law

The State of California has set forth requirements that a facility, which authorizes the use of chemical agents as a force option, must have in their policies and procedures.<sup>25</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>26</sup> 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;<sup>27</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>28</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>29</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>30</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>31</sup> This verbiage is consistent with state law.

The reports and video regarding this incident make clear that Y3 and Y4 posed an imminent threat to each other, as they were violently assaulting each other. DJCO 1 attempted to verbally de-escalate the situation by directing the youths to “stop” and to “get down.” DJCO 1 also warned the youths that she would deploy OC spray by stating “OC clear!” before her first and second deployments of OC. Despite these commands, the youths continued their mutual assault. DJCO 1’s attempts to de-escalate the situation prior to the deployments of OC spray were unsuccessful.

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<sup>25</sup> Cal. Code Regs., tit. 15, § 1357 – Use of Force.

<sup>26</sup> Cal. Code Regs., tit. 15, § 1357(b)(2).

<sup>27</sup> Cal. Code Regs., tit. 15, § 1357(b)(3).

<sup>28</sup> Cal. Code Regs., tit. 15, § 1357(b)(4).

<sup>29</sup> Cal. Code Regs., tit. 15, § 1357(b)(5).

<sup>30</sup> Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;  
Procedure Manual Item 3-1-015 Use of Force – Facilities.

<sup>31</sup> Procedure Manual Item 3-1-056 I(C) General Information.

## 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>32</sup> 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."<sup>33</sup>

According to the reports, Y3 and Y4 came into direct contact with, and were directly affected by, the OC spray. Y2 was affected by overspray. As soon as the youths were secured, Y2 was escorted to the right side of the YLA-1 showers, Y3 was escorted to the left side of the YLA-1 showers, and Y4 was escorted to the YLA-2 showers to decontaminate. According to the reports, all three youths began decontamination with five minutes of the first OC deployment. DJCO 4 and DJCO 5 escorted Y2 for decontamination, which began at 8:28 p.m. and ended at 8:43 p.m. While DJCO 4 and DJCO 5's reports indicate that they escorted Y2, they do not indicate that they supervised his decontamination. DJCO 8's report indicates that he and DJCO 7 supervised Y3's decontamination, which began at 8:30 p.m. and ended at 8:50 p.m. Similarly, DJCO 9's report indicated that he and DJCO 3 supervised Y4's decontamination, which began at 8:32 p.m. and ended at 9:00 p.m.

The OC Procedure also states that the youth will then remove contaminated clothing and be issued clean clothing. The contaminated clothing shall be placed in a marked plastic bag.<sup>34</sup> DJCO 5's narrative for Y2 indicated that "new clothes were given to him; old clothes were properly bagged." DJCO 4 also indicated that "youth showered and all dirty linen exchanged for clean linen."

As it relates to Y3, DJCO 7 indicated that "youth's clothing was placed in a water-soluble bag and new clothing was issued." DJCO 8 also reported in his narrative that Y3 was "instructed to place all contaminated clothing and towels in water-soluble bags labelled OC Clothes. [Y3] was then issued clean clothes."

DJCO 3 and DJCO 9 also wrote narratives describing the decontamination process for Y4. DJCO 3 indicated that "[Y4] was given fresh clothing and his soiled lined was placed in a water-soluble bag and properly labeled." According to DJCO 9, Y4 "took off all his contaminated clothes, put them in water soluble bag. [Y4] got dressed in clean clothes."

The main SIR written by DJCO 1 also indicated that "all youth involved in this incident received new clothing and soiled clothing was properly bagged and labeled." DJCO 1 also filled out a Use of Force report for Y3 and Y4. The Use of Force reports indicate "yes" to the statements "contaminants placed in a water-soluble bag," "bag labeled," and "new clothing/linen issued."

Staff are also required to be with "the youth throughout the entire decontamination process."<sup>35</sup> None of the reports specifically state that staff remained with the youths during the entire decontamination

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<sup>32</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.)

<sup>33</sup> Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

<sup>34</sup> Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

<sup>35</sup> Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.



process. However, DJCO 5's narrative does indicate that Y2 ended the decontamination "by choice." This verbiage implies, without specifically saying, that DJCO 5 was with Y2 throughout the entire decontamination process.

Similarly, DJCO 7's narrative indicates that, "[Y3] was repeatedly asked if needed more time in the shower." DJCO 8 also reported that "[Y3] was continually asked if he needed more time in the showers for decontamination." The verbiage again implies, without specifically saying, that DJCO 7 and DJCO 8 were with Y3 throughout the entire decontamination process.

Lastly, DJCO 3 reported that Y4 ended the decontamination "by choice" and DJCO 9 wrote that "DJCO [3] and I supervised [Y4] in the shower" and that he "continually asked [Y4] if he needed more time." The verbiage in both reports also implies, without specifically saying, that DJCO 3 and DJCO 9 were with Y4 throughout the entire decontamination process. While it is possible that all the verbiage above is meant to imply that the DJCOs were present throughout the entire decontamination process for Y2, Y3, and Y4, 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.

### *Notification 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>36</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>37</sup> The responsibility for contacting the youth's parent or legal guardian is assigned to the SJCO/Duty Officer or designee.<sup>38</sup> 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.<sup>39</sup>

The main SIR, written by DJCO 1, as well as supplemental reports indicate that SJCO 1 and SJCO 2 were on scene and supervised the securing of the youths and directed the escorts for decontamination.

DJCO 1's SIR and Use of Force forms indicate that staff notified the guardians of Y2, Y3 and Y4 by voice message.

The main SIR and Use of Force reports indicate that the medical unit was notified of the incident within eight minutes of the first OC deployment and that all three youths were seen by medical staff approximately 28 minutes after the start of the incident. Y2 was cleared of any injuries. Y3 and Y4 were placed on Restrictive Activities and Head Injury Precaution.

Finally, the main SIR indicates that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident.

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<sup>36</sup> Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

<sup>37</sup> Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

<sup>38</sup> Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

<sup>39</sup> Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

## 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>40</sup> Further, the procedure requires a SIR and Restraint Report must include a clear and factual justification for the use of OC, efforts to de-escalate prior to use or reasons why de-escalation was not reasonably possible, youths and staff involved, the date, time and location of use, a complete description of decontamination procedures, and identification of any injuries and medical treatment.<sup>41</sup>

DJCO 1 completed the main SIR for this incident and eight other DJCOs prepared supplemental incident reports. The main SIR identified the youths involved as well as the actions taken by DJCO 1 to attempt to de-escalate prior to the uses of force. The report also lays out the activities that occurred after the uses of force except for whether staff members remained with the youths throughout the decontamination process.

DJCO 1 also prepared a Use of Force report to document the intentional deployments of OC directed at Y3 and Y4. Noticeably absent is a Use of Force report prepared by DJCO 1 to document Y2's exposure to overspray. A staff member who assisted in escorting Y2 for decontamination prepared a Use of Force report to document his securing of Y2's elbow. He also noted that a chemical restraint was used. However, the page used to document the details of an accidental exposure to OC was not prepared to record the specifics related to Y2's exposure to overspray.

## Recommendation

Provide additional training reminding DJCOs who deploy OC to complete a Use of Force form for each affected youth, whether intentional or the result of overspray.

## Conclusion

A review of the SIRs and Use of Force reports establish that both deployments of OC spray by DJCO 1 were within law and policy. The main SIR and video show that had DJCO 1 not deployed force, Y3 and Y4 would have continued their mutual assault, likely resulting in potentially serious injuries. When Y3 and Y4 started their mutual assault, DJCO 1 used verbal commands to attempt to de-escalate the situation. DJCO 1 deployed her OC spray only after her attempts to gain compliance failed.

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<sup>40</sup> Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

<sup>41</sup> Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

## 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. Provide additional training reminding DJCOs who deploy OC to complete a Use of Force form for each affected youth, whether intentional or the result of overspray.