

# OIR Use of Force Review

*UOF Review 12-29-22 JH Unit H*



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## Summary of Facts

On December 29, 2022, at approximately 3:45 p.m., Deputy Juvenile Correctional Officer (DJCO) 1 was in the hallway of Unit H at Juvenile Hall, supervising youths coming out of their rooms to program.<sup>1</sup> Y1's door opened, and he exited his room into the hallway. As Y1's door closed, Y2's door opened and Y2 exited his room into the hallway. Y1 began to walk towards Y2, and Y2 took a couple of steps towards Y1. Y1 squared up in preparation to fight and then began punching Y2 in the face and head with closed fists. Y2 put his arms up around his face to block Y1's punches, and eventually began to fight back and swing at Y1.

DJCO 1 ran toward Y1 and Y2 and directed them to "get down." Y1 continued to assault Y2. DJCO 1 yelled "OC clear" and deployed a ½ second burst from approximately three to four feet, directed at Y2's forehead.<sup>2</sup> Both youths then went down to their knees on the floor while Y1 continued to punch Y2 in the head. DJCO 2 and Supervising Juvenile Correctional Officer (SJCO) 1 responded and assisted by dragging Y1 away from Y2 in order to separate them. DJCO 2 secured Y1 in handcuffs while DJCO 1 maintained Y2 on the ground in a prone position. DJCO 3 arrived and helped to control Y2 as DJCO 1 secured him in handcuffs.

Additional staff responded and directed uninvolved youth Y3, who was also in the hallway, to return to his room. SJCO 2 arrived on scene and directed staff to escort Y1 and Y2 to the showers for decontamination. Y1 was escorted to the Unit J showers for decontamination, and Y2 was escorted to the Unit H showers for decontamination. According to reports, Y1 began decontamination at 3:49 p.m., and Y2 began decontamination at 3:54 p.m. Although he was not involved in the altercation or the deployment of OC, Y3 complained of being exposed to overspray and began decontamination in the Unit G showers at 3:55 p.m.<sup>3</sup> All three youths began decontamination within 10 minutes following OC deployment. Y1, Y2, and Y3 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 *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>

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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> The OIR cannot definitively determine whether DJCO 1 sprayed Y1 or Y2 as the video shows that the youths were grappling with each other at the time of the deployment of OC spray. Additionally, DJCO 1 only provided a use of restraint/force form for Y2 despite both Y1 and Y2 being taken for decontamination.

<sup>3</sup> After reviewing reports and the video, Y3 was at least 10 feet away from deployment of OC and the direction of the spray was not in the direction of Y3.

<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.

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 was a single deployment of OC. DJOC 1's reports reflect that the deployment was ½ second in length and directed at Y2's forehead. However, DJCO 2's SIR indicates that she saw DJCO 1 "spray at youth [1] and youth [2] who were on the ground fighting." This seems to be more consistent with the video given that the two youths were grappling with each other.

Regardless of which youth DJCO 1 intended to spray, her single deployment of OC occurred while Y1 and Y2 were actively striking each other.

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<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.

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. Y1 was escorted to the Unit J showers and Y2 was escorted to the Unit H showers. Both youths began decontamination within nine minutes of the OC deployment. As it relates to Y3's alleged exposure to overspray, Y3 was escorted to the Unit G showers and began decontamination within 10 minutes of the 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 Y1 was punching Y2 with closed fists, and Y2 was attempting to strike back in defense, when DJCO 1 deployed the OC. Considering that Y1 and Y2 were throwing punches at each other's heads and upper torsos, 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 Y1 and Y2 posed an immediate threat to each other. At the time that DJCO 1 deployed OC spray, Y1 was striking Y2 in the head and upper torso area while Y2 was attempting to do the same to Y1. Despite DJCO 1's efforts to stop the fight by directing the youths to "get down," they continued to strike each

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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.

other. These facts establish that but-for DJCO 1's intervention, the mutual assault would have continued. Therefore, at the time the OC was deployed by DJCO 1, the youths clearly 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 youth were not attempting to evade DJCO 1, both youths were clearly refusing to comply with her commands and initial verbal attempt to get them to submit to her authority. DJCO 1 directed both youths to "get down." Neither youth complied with the directives and instead, continued their mutual assault. The fact that Y1 and Y2 continued to fight after the deployment of OC showed that they were willfully refusing to comply. Ultimately, DJCO 1, DJCO 2, and SJCO 1 had to intervene and pull the two youths apart.

#### 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, both 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, one of the youths clearly posed a threat to the other.

The youths involved in the fight 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, Y1 and Y2 posed immediate threats to each other. Additionally, the harm that could have occurred to either youth from strikes to the face, head, and upper torso justified the deployment of OC when the youths continued to fight even after being directed to get down. Thus, the single ½ second deployment of OC was 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

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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.

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

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 regarding this incident, as well as the video make clear that Y1 and Y2 posed an imminent threat to each other, as they were violently assaulting each other. DJCO 1 attempted to verbally de-escalate the situation directing the youths to “get down.” Despite this command, the youths continued their mutual assault. DJCO 1 also warned the youths that she would deploy OC spray by stating “OC clear!” However, both youths failed to stop fighting. As a result, DJCO 1’s attempt to gain compliance through verbal de-escalation prior to her deployment of OC spray was unsuccessful.

### 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>

DJCO 1’s main SIR report only indicates that she sprayed OC across one youth’s forehead. However, DJCO 2’s SIR indicates that she saw DJCO 1 “spray at youth [1] and youth [2] who were on the ground

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<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.

<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.

fighting.” As soon as both Y1 and Y2 were secured, they were escorted to the showers to decontaminate. A review of the reports indicated that both youths began the decontamination process within approximately nine minutes after the OC deployment. Y1 was escorted to the Unit J showers and Y2 was escorted to the Unit H showers to decontaminate. The video and reports show that both youths began decontamination nine minutes following the OC deployment. Y3 reported being exposed to overspray and was taken to the showers to decontaminate within 10 minutes of the OC deployment.

According to DJCO 1’s main SIR, DJCO 4 and DJCO 5 supervised Y1’s decontamination, which began at 3:49 p.m. and ended at 3:59 p.m. DJCO 6 and DJCO 7 supervised Y2’s decontamination, which began at 3:54 p.m. and ended at 4:04 p.m. Lastly, DJCO 8 and DJCO 9 supervised Y3’s decontamination, which began at 3:55 p.m. and ended at 4:06 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> The main SIR and DJCO 5’s narratives indicated that “[Y1] was given clean clothing and his soiled clothing was placed in a water-soluble bag labeled ‘pepper spray.’”

As it relates to Y2, the main SIR narrative indicated that “[Y2] was given clean clothing and his soiled clothing was placed in a water-soluble bag labeled ‘pepper spray.’” Additionally, both DJCO 6 and DJCO 7’s narratives indicated that “[Y2] was given fresh clothing and his soiled clothing was properly bagged and labeled.” DJCO 1’s Use of Force report for Y2 also indicate “yes” to the statements “contaminants placed in water-soluble bag,” “bag labeled,” and “new clothing/linen issued.”

In reference to Y3, the main SIR narrative indicated that “[Y3] was given clean clothing, and his soiled clothing was placed in a water-soluble bag labeled ‘pepper spray.’” DJCO 8’s narrative reported that “youth was given a clean set of clothes, and his contaminated clothes were placed in a water-soluble bag.” Additionally, DJCO 9’s narrative indicated that Y3 “dressed in to clean clothes” and his “contaminated clothes were placed in a water-soluble bag labeled ‘pepper spray.’”

Staff are also required to be with “the youth throughout the entire decontamination process.”<sup>35</sup> The main SIR and DJCO 3’s narratives states that staff supervised the three youths during decontamination. DJCO 5’s narrative indicates that he “supervised the decontamination process for [Y1] in Unit Juliet.” This verbiage implies, without specifically saying, that DJCO 5 was with Y1 throughout the entire decontamination process.

As it relates to Y2, the main SIR indicated that both DJCO 6 and DJCO 7 supervised the decontamination process for Y2. Additionally, both DJCO 6 and DJCO 7 indicated in their reports that they supervised Y2’s decontamination.

Lastly, as it pertains to Y3, the main SIR indicated that DJCO 8 and DJCO 9 supervised the decontamination process for Y3. DJCO 9 also reported that when Y3 started decontamination, he “stood by in assistance for Officer safety. Youth completed his decontamination shower at 1606...”

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<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.



### 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 indicated that SJCO 1 was present and assisted in dragging Y1 away from Y2. Additionally, DJCO 2’s SIR narrative indicates that SJCO 2 accompanied her and DJCO 4 as they escorted Y1 to decontamination.

The main SIR and Use of Force reports indicate that the medical unit was notified of the deployment of OC spray within six minutes of the incident as it relates to Y1 and Y2. The medical unit was also subsequently notified approximately five minutes later about Y3’s feeling the effects of OC pepper spray. All three youths were seen by medical staff within one hour of the start of the incident.

The reports indicate that SJCO 1 notified the mother of Y1 by phone call at approximately 6:18 p.m. Y2’s guardian or parents were notified, via voicemail, at approximately 4:28 p.m. Lastly, Y3’s mother was notified by phone call at approximately 4:39 p.m.

Finally, the main SIR indicates that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident and that all three youths were evaluated that same evening.

### 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 seven other DJCOs prepared supplemental incident reports. The main SIR identified the youths involved as well as the actions taken by DJCO 1 to attempt

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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.

<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.

to verbally de-escalate the incident prior to the use of force. The report also clearly lays out the activities that occurred after the uses of force.

In addition to her SIR, DJCO 1 also prepared a Use of Force report to document the intentional deployment of OC. However, DJCO 1 only completed a Use of Force report for Y2. DJCO 1 failed to complete a Use of Force report for Y1 and Y3.

Finally, DJCO 4 started a supplemental report for the incident but did not provide a narrative. It would be helpful to the reader to see what role DJCO 4 had in the escort, decontamination process, and if he remained with Y1 throughout the duration of his decontamination.

#### *Recommendation*

Provide additional training reminding DJCOs of the importance of making sure that they complete an SIR including a narrative in compliance with the Department's use of force procedure.

#### *Recommendation*

Provide additional training reminding supervisors of the importance of making sure that DJCOs' reports are accurate and complete. Supervisors should also be reminded of their role in making sure that inconsistencies in, or between, reports are addressed before reports are approved.

## Conclusion

A review of the SIRs and Use of Force reports establish that use of force (OC spray) by DJCO 1 was within law and procedure. The main SIR and video show that had DJCO 1 not deployed force, Y1 and Y2 would have continued their mutual assault, resulting in potentially serious injuries. When the youths started fighting, DJCO 1 used verbal commands to attempt to de-escalate the situation. DJCO 1 deployed OC spray only after her attempts to gain compliance failed.

## 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 of the importance of making sure that they complete an SIR including a narrative in compliance with the Department's use of force procedure.
4. Provide additional training reminding supervisors of the importance of making sure that DJCOs' reports are accurate and complete. Supervisors should also be reminded of their role in making sure that inconsistencies in, or between, reports are addressed before reports are approved.