

OIR Use of Force Review

UOF Review 3-21-22 JH Unit H



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 March 21, 2022, at approximately 4:22 p.m., Y1 and Y2 were playing handball in the Secured Recreation Area (SRA) cage and began to yell at each other over a bad call.¹ Deputy Juvenile Correctional Officer (DJCO) 1 instructed the youths to settle down and to have a seat off to the side of the court. The youths began to call each other names, so DJCO 1 told Y2 to go back to his room to calm down. Y2 began to walk slowly towards his room. Y1 continued to argue with DJCO 1 about the bad call, and DJCO 1 instructed Y1 to go to his room to calm down. Y1 replied "I'll take it down alright," and began to walk quickly into the hallway. DJCO 2 followed Y1 to make sure that he made it into his room.

Y2 turned around in the hallway in the direction of Y1 and began nodding towards Y1. Y1 began running down the hallway towards Y2 yelling "[w]hat's up now Bitch!" Y2 lifted his shirt and both youths squared up to fight. Y1 and Y2 exchanged multiple closed-fist punches to their heads. DJCO 2 "gave multiple commands to 'Get down!'" The youths continued to ignore DJCO 2's directives by continuing to fight. DJCO 2 yelled out "OC clear," and according to his report, he "deployed three ½ second bursts of Oleoresin Capsicum (OC) spray towards" one youth, and two ½ second bursts of OC Spray towards" the other youth from approximately four feet.

Both youths went to the ground and continued to struggle. DJCO 2 re-holstered his OC spray and wedged himself in between Y1 and Y2 on the floor. DJCO 2 directed the youths to "[S]tay down, and don't move!" DJCO 3, DJCO 4, and DJCO 5 arrived on scene and assisted DJCO 2 in securing the youth. DJCO 3 assisted DJCO 2 in securing Y1, while DJCO 4 and DJCO 5 secured Y2. After Y2 was secured, DJCO 5 switched out with DJCO 6.

DJCO 2 and DJCO 3 escorted Y1 to the Unit K showers to decontaminate, and DJCO 4 and DJCO 6 took Y2 into the Unit H showers to decontaminate. Video shows Y1 being escorted from the hallway at 4:24 p.m.

Y2 began decontamination at 4:26 p.m., within four minutes of the first deployment of OC spray. Both youths were provided with clean clothing, and their soiled clothes were placed in water-soluble bags and labeled accordingly.

It is unclear when Y1 began decontamination. DJCO 2's report states in the Special Incident Report (SIR) narrative that the decontamination began at 4:25 p.m. However, DJCO 2's Use of Restraint/Force and Pepper Spray report indicates that decontamination started at 4:35 p.m., which would have been approximately 12 minutes after the first deployment of OC spray. DJCO 3's narrative also indicates that decontamination started at 4:35 p.m.

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 video provided to the OIR. All information regarding statements made or commands given were taken from reports because the video contains no audio.

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 moderate. According to DJCO 2's SIR narrative, he "deployed three half second bursts of Oleoresin Capsicum (OC) spray towards" one youth, and "2 half second bursts of Oleoresin Capsicum Spray towards" the other youth. The video shows that all deployments of OC occurred, and ended, within approximately eight seconds of the first burst. The reports indicate that all deployments of OC occurred while the youths were actively fighting each other.

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.

It is difficult to tell from the video how long each of the bursts lasted, however, DJCO 2's reports indicate that the bursts were "half second bursts."

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. As it relates to Y2, staff minimized the use of force by ensuring that the length of time that he was exposed to the effects of the OC was limited. As soon as he was secured, Y2 was taken directly to the unit showers to begin the decontamination process. The reports and video footage reflect that less than four minutes elapsed from the first deployment of OC and the time that Y2 was escorted for decontamination.

As it relates to Y1, it is unclear when Y1 began decontamination. DJCO 2's report states in the SIR narrative that decontamination began at 4:25 p.m. A review of the video shows Y1 being escorted from the hallway at 4:24. If DJCO 2's narrative is correct, then DJCO 2 would have minimized the force used on Y1, by escorting him directly from the hallway to the Unit K showers and beginning the decontamination process within two minutes of the first deployment of OC.

However, DJCO 2's Use of Restraint/Force and Pepper Spray report indicates that decontamination started at 4:35 p.m., which would have been approximately 12 minutes after the first deployment of OC spray. DJCO 3's narrative also indicates that decontamination started at 4:35 p.m. If the 4:35 p.m. time is correct, then there is a concern that Y1 may have continued to suffer the effects of the OC for almost 12 minutes.

Governmental Interest

Intermediate force is a "significant level of force that must be justified by the governmental interest involved."¹³ 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."¹⁴

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.¹⁵ Battery involving the infliction of serious bodily injury and assault by means of force likely to produce great bodily injury are both felony offenses.¹⁶ 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."¹⁷ "It is enough that the force used is likely to cause serious bodily injury. No injury is necessary."¹⁸ Courts have said that punching is "capable of inflicting significant pain and causing serious injury."¹⁹

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

¹³ *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805, 826.

¹⁴ *Graham v. Connor* (1989) 490 U.S. 386 [109 S.Ct. 1865, 104 L.Ed.2d 443].

¹⁵ Pen. Code, §§ 240, 242, 243(a).

¹⁶ Pen. Code, §§ 242, 243(d), 245(a).

¹⁷ *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

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

¹⁹ *Reaza v. County of Riverside* (C.D.Cal. Oct. 26, 2022, No. 5:20-cv-01188-MEMF (SPx)) 2022 U.S.Dist.LEXIS 198653.

Here, the reports and the surveillance videos show that the youths were wildly throwing punches in the head and body area with closed fists when DJCO 2 first deployed the OC at both youths. DJCO 2 continued to deploy OC as the two youths continued to alternate between punching and grappling with each other. The force used by Y1 and Y2 on each other was likely to cause serious bodily injury.

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.²⁰ Here, the reports make clear Y1 and Y2 were engaged in assaultive behaviors and posed immediate threats to each other at the time they were throwing closed-fist punches at each other. The reports also establish that even after being given multiple commands to “[g]et down,” the youths continued to punch each other. These facts establish that but for the DJCO 2’s intervention, the fight would have not only continued, but likely would have continued to escalate. There is no doubt that at the time of each deployment of OC, 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 the DJCO 2, they were clearly refusing to comply with his commands to “[g]et down” and were continuing to fight. DJCO 2 indicated in his report that he gave multiple commands to get down, and that the youths “continued to ignore” his directives and continued to fight.

Ultimately, in order to place the fighting non-compliant youths into custody, DJCO 2 had to do more than simply place passive youths into handcuffs. In fact, DJCO 2 eventually had to holster his OC spray and physically “wedge” himself between the youths to pull Y1 away from Y2 and end the fighting. DJCO 2 then had to lay on top of Y1 to hold him on the ground while he waited for assistance from additional staff to handcuff both youths.

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.”²¹ 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.”²² 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 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.

²⁰ *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

²¹ *Espinosa v. City & County of San Francisco* (9th Cir. 2010) 598 F.3d 528.

²² *Silva v. Chung* (9th Cir. 2018) 740 F.App'x 883.

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, during, and after the deployment of OC, the youths posed an immediate threat to each other. The youths were intent on fighting each other, and the harm that could have occurred to either of the two youths from closed fist strikes justified the use of OC when the youths failed to follow commands to “[g]et down.”

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.²³ 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;²⁴ 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;²⁵ 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;²⁶ 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.²⁷

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.²⁸ 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.”²⁹ This verbiage is consistent with state law.

DJCO 2 attempted to de-escalate the situation by providing verbal commands to Y1 and Y2 to “get down on the floor.” DJCO 2's de-escalation efforts were unsuccessful at ending the fight. At the time DJCO 2 deployed the OC, verbal de-escalation had failed, and the youths were actively fighting each other. Both youths were, at the times of the deployments, an imminent threat to each other's safety.

²³ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁴ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁵ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(5).

²⁸ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

²⁹ 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."³⁰ 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."³¹

According to DJCO 2's report, Y1 and Y2 were both affected by the OC spray. The DJCO reports indicate that as soon as the youths were secured, Y2 was escorted to the unit showers to decontaminate. Facility surveillance footage supports that Y2 began the decontamination process within four minutes of the first deployment of OC.

As it relates to Y1, there is a discrepancy between the narrative of DJCO 2's report, which states that the decontamination began at 4:25 p.m., and DJCO 2's Use of Restraint/Force and Pepper Spray report which indicates that decontamination started at 4:35 p.m. DJCO 3's narrative also indicates that decontamination started at 4:35 p.m.

Department procedure requires decontamination to begin "as soon as practical after a youth is subdued and restrained," and authorizes staff to use water from a shower, sink, or hose for decontamination purposes. If Y1's decontamination began at 4:35 p.m., then staff should have explained why Y1 was not decontaminated until approximately 10 minutes after he was subdued and restrained, including why an alternative water source such as a hose or sink could not have been used to avoid any delay. (This is obviously not an issue if 4:25 p.m. was, in fact, the correct time that the decontamination process began for Y1.)

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.³² According to the reports, both affected youths were provided with clean clothing and their contaminated clothing were placed in water-soluble bags and labeled accordingly.

Staff are also required to be with "the youth throughout the entire decontamination process."³³ DJCO 2's report indicated both DJCO 2 and DJCO 3 "supervised the decontamination process for" Y1. DJCO 6 wrote in his report that he and another DJCO supervised Y2 in the shower.

Notifications and Procedures 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.³⁴ 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."³⁵

³⁰ 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.)

³¹ Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

³² Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

³³ Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

³⁴ Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

³⁵ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

The responsibility for contacting the youth's parent or legal guardian is assigned to the Supervising Juvenile Correctional Officer (SJCO)/Duty Officer or designee.³⁶ 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.³⁷

DJCO 2's report does not expressly state that a SJCO was on scene or made aware of the deployment of OC. However, DJCO 2's report does indicate that an SJCO notified the guardians for both involved youths. In addition, the report indicates that "[t]he medical unit was called" for both youths involved in the altercation, and that both were seen by medical staff.

Finally, the report establishes that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident and youth involved two minutes after the Code 2 was called.³⁸

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 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 2 completed the main SIR for this incident and 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 uses of force. It is clear from the video footage that DJCO 2 was presented with a quickly evolving and rapidly escalating incident. It is also clear that none of the bursts of OC spray had the desired effect of causing the youths to end the fighting. Each of DJCO 2's bursts of OC spray were justified because of the imminent and continuing threat that the youths posed to each other and because each of the previous bursts failed to end the fight. However, this is not articulated in DJCO 2's report, which simply states the number of OC bursts that were deployed at each of the youths. DJCO 2's report should have made clear that each burst of OC was necessary because the fighting continued despite each deployment. This is readily apparent from reviewing the surveillance video. It is not clear from DJCO 2's report whether he made separate decisions to deploy each of the bursts of OC spray, with each deployment decision made because of the previous burst being ineffective, or whether he made a single decision to deploy multiple bursts in succession. In short, DJCO 2's report should have clearly articulated the factual justification for the use of multiple bursts of OC.

As identified throughout the report, there were several areas of concern regarding documentation. The OIR was unable to determine when Y1 began the decontamination process due to discrepancies in various reports. As a result, the OIR was not able to determine whether Y1 continued to suffer the effects of being sprayed with OC for up to 10 minutes after being sprayed.

³⁶ Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

³⁷ Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

³⁸ A Code 2 indicates that there is a fight in progress.

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

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

There were also discrepancies related to who supervised Y2's decontamination process. DJCO 2 wrote in his report that DJCO 4 "supervised the decontamination process for" Y2. However, DJCO 4 indicated in the SIR narrative that after he walked Y2 over the shower and Y2 entered the shower, he was relieved by DJCO 6. DJCO 6's report does not mention DJCO 4, but does indicate that after Y2 entered the shower that he and a different DJCO supervised Y2 in the shower.

Additionally, there was confusion regarding the "5 minute room checks" that occurred for both youths. According to DJCO 2's report, "5 minute room checks started at 1624 and ended at 1730." However, according to the various reports, Y2 was in the shower from 16:24 until 16:39, and Y1 was in the shower from somewhere between 16:25 (or 16:35) and 16:57.

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.

Use of Force Review Board

On April 20, 2022, the Department's Use of Force Review Board convened and reviewed this use of force incident. The Board did not recommend any corrective action but recommended that staff ensure that times and other specifics listed in the UOF form be accurately reflected in the narrative.

Conclusion

A review of the SIRs, Use of Force reports, and video footage established that the use of force by DJCO 2 was within law and policy, and therefore appropriate. It is clear from the video and reporting that had DJCO 2 not deployed force, the youths would have continued to strike each other, possibly resulting in potentially serious injuries. However, DJCO 2's reporting of the incident needed more detail and should have been written in a more clear and precise manner.

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 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.