

# OIR Use of Force Review

*UOF Review 3-22-22 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

## Contents

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

## Summary of Facts

On March 22, 2022, at approximately 8:33 p.m., Deputy Juvenile Correctional Officer (DJCO) 1 was positioned in front of the staff desk, DJCO 2 was seated behind the staff desk, and DJCO 3 was standing in the hallway.<sup>1</sup> Y1 was seated at a table, positioned in between two collect phones, with two other youths. Y2 was seated in a chair and using the collect phone closest to DJCO 3 and the staff desk. DJCO 3 instructed Y1 to go to his room. Y1 got up from the table, began to walk towards DJCO 3 and the hallway, and then turned around and walked back to the table. He remained standing there as he shuffled around some papers he had with him. Y1 then left the table and began to walk towards DJCO 3 and the hallway again, when he abruptly ran towards Y2, and punched Y2 in the face. DJCO 1 called a Code 2 over the radio as DJCO 2 pressed the hard duress button from behind the staff desk.<sup>2</sup>

Y1 continued to swing at Y2 as Y2 put his left hand up in an attempt to keep Y1 back. Y2 covered his head with his right arm to block any more of Y1's punches from making contact. Y2 then began to push Y1 backwards with both hands as Y1 continued to throw punches at him. Y2 then swung at Y1 with his right hand.

DJCO 3 gave a verbal warning to stop, or she would deploy Oleoresin Capsicum (OC) spray. Y2 went to the ground. DJCO 3 yelled "OC clear" and deployed a burst of OC spray (the duration of the burst is unclear) towards Y1. DJCO 3 reported that the spray was deployed from approximately five feet away.<sup>3</sup> After DJCO 3 deployed the OC spray, Y1 immediately turned away from Y2, and went to the ground, ending the assault.

After the youths were secured, Y2 was escorted to medical and Y1 was escorted to the unit showers to begin decontamination. Y1 began decontamination at 8:37 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*."<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>

---

<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 2 indicates that there is a fight in progress.

<sup>3</sup> As discussed more fully in the body of this report, it is unclear that the actual distance was five feet. It is possible that DJCO 3 began deploying the burst from a distance of five feet, but the duration of the burst is unknown, and the video shows that a DJCO was moving towards Y2 during the encounter, which would imply that the distance was fluid.

<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.

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 deployed at Y1 while he was charging at Y2. The duration of the burst is unclear. In DJCO 3's Special Incident Report (SIR) narrative, she states that the burst was of a duration of one second. However, in her Use of Force Form, DJCO 3 describes the burst as two seconds. A review of the video does not resolve the discrepancy, and leaves open the possibility that the burst was even longer.

According to DJCO 3's report, the burst was deployed from approximately five feet away and was aimed at Y1's face. The video is inconclusive as to the distance because it is not known at what point in the video DJCO 3 began deploying the OC spray. It is possible that DJCO 3 began deploying the burst from around five feet away, but the duration of the burst is unknown, and the video footage shows that DJCO 3 was moving closer towards Y2 during the encounter, which would imply that the deployment distance was fluid, and from a shorter distance at the end of the burst than at the beginning.

---

<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.

The burst appears to have caused Y1 to cease his assaultive behavior, turn away and distance himself from Y2, and go down to the floor into a prone position.

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 Y1 felt the effects of the OC was limited. As soon as the youths were secured, Y1 was taken directly to the unit showers to begin the decontamination process. The reports and video footage reflect that only four minutes elapsed from the deployment of OC and the time that Y1 was escorted to begin the decontamination process.

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

Here, the reports and video show that Y1 charged and swung at Y2, ultimately punching him in the face and head with closed fists. It is at this point when DJCO 3 deployed OC spray at Y1. The force used by Y1 on Y2 was clearly likely to cause serious bodily injury. In fact, the reports indicated that Y2 was bleeding from his nose when responding staff arrived.

### 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 Y1 had just punched Y2 and continued to engage in assaultive behavior after he landed the first punch. Y2 tried to defend himself and push Y1 back. Y1 clearly posed an immediate threat to Y2 as he continued to charge and swing at Y2. The reports also establish that even after being given a command to “get down on the

---

<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.

floor,” Y1 continued to strike Y2. These facts establish that at the time DJCO 3 began to deploy OC, Y1 posed an immediate threat to Y2 and but for DJCO 3’s intervention, the assault on Y2 would have continued.

While it is clear that at the time the OC was deployed, Y1 posed an immediate threat to the safety of Y2, it is unclear how long the burst of spray lasted. DJCO 3’s SIR narrative and Use of Force form varied as to how long the burst was, and the video footage revealed the possibility that the burst may have continued after the youth had disengaged and placed himself on the ground.

#### [Whether the Suspect was Actively Resisting Arrest or Attempting to Evade Arrest by Flight](#)

While the youths were not attempting to evade DJCO 3, Y1 was clearly refusing to comply with her commands to “[g]et down on the floor” and instead continued to strike Y2. DJCO 3 also provided a warning prior to the deployment of OC, which did not deter Y1 from continuing his assaultive behavior. However, after Y1 was exposed to OC spray, he ceased his assaultive behavior and got down into a prone position on the floor. It is unclear whether the spraying continued after Y1 disengaged, and if so for how long.

Ultimately, to place Y1 into custody, DJCO 3 had to do more than simply place a passive youth into handcuffs.

#### [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.”<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 DJCO 3 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 DJCO 3’s order to stop. 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 had an obligation to protect them from harm. Prior to the deployment of OC, Y1 posed an immediate threat to Y2. Additionally, the harm that could have occurred to Y2 from closed fist strikes clearly justified the use of a single half to one second burst of OC when Y1 failed to follow commands to “[g]et down on the floor.”

However, it is unclear how long the burst of OC continued, and from what distance or distances the OC was deployed. If DJCO 3 discontinued the use of force when Y1 ceased actively resisting, then the force used was appropriate. If, however, DJCO 3 continued to deploy OC spray past the point of when Y1

---

<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.

disengaged from Y2 and began complying with her commands, then the balance would weigh against the need for such force since Y1 no longer posed an immediate threat.

## 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.<sup>25</sup> Those requirements include, in part, 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 regarding this incident make clear that Y1 punched Y2 in the face without provocation. DJCO 3 immediately attempted to verbally de-escalate the situation by directing both youths to “get down on the floor.” DJCO 3’s attempts to de-escalate the situation were unsuccessful, and Y1 continued to charge at, and strike, Y2. DJCO 3 also warned the youths that if they did not stop fighting that she would deploy OC. Neither youth complied with her directives to stop. It was clear that Y1 posed an imminent threat to Y2 at the time DJCO 3 began to deploy the OC.

However, it appears that after approximately one second of exposure to OC, Y1 ceased all assaultive behavior and no longer posed a threat to Y2. The spray duration in this instance is uncertain because DJCO 3’s narrative and Use of Force form are inconsistent when it comes to the duration of the burst of

---

<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.

OC spray. As a result, the OIR is unable to determine whether DJCO 3 violated the above-mentioned procedure by continuing to deploy OC spray when the imminent threat had ceased.

### 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, Y1 came into direct contact with, and was affected by, the OC spray. As soon as the youths were secured, Y1 was escorted to the unit showers to decontaminate. Facility surveillance footage shows that Y1 was escorted to begin the decontamination process within four minutes of the deployment of OC.

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>34</sup> The reports indicate that Y1 was provided with clean clothing and his contaminated clothing was placed in a water-soluble bag and labeled accordingly.

Staff are also required to be with "the youth throughout the entire decontamination process."<sup>35</sup> DJCO 4 wrote in his report that he and another DJCO supervised Y1 in the shower.

### 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>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>

DJCO 1's report indicates that a Supervising Juvenile Correctional Officer (SJCO) was made aware of the deployment of OC by indicating that SJCO 1 instructed a DJCO to escort Y2 to medical. DJCO 1's report further indicates that SJCO 1 was present for the decontamination of Y1 and notified the guardians of both youths. Additionally, DJCO 1's report indicates that "[t]he medical unit was called" for both youths involved in the altercation, and that both were seen by medical staff shortly after being called. Finally,

---

<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.

<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.



DJCO 1's report indicates that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident, and the youth involved, shortly after the Code 2 was called.

### 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 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>41</sup>

DJCO 1 completed the main SIR for this incident and four other DJCOs prepared supplemental incident reports. The main SIR identified the youth involved as well as the actions taken by DJCO 3 prior to the use of force. The report also clearly laid out the activities that occurred after the use of force.

However, there are internal inconsistencies concerning spray duration in DJCO 3's reporting. DJCO 1's SIR narrative states that DJCO 3 "deployed a one second burst [of OC spray] targeted at [Y1's] face from about a five-foot distance away..." DJCO 3's SIR narrative also states that she "deployed a one second burst across [Y1's] face from about a 5-foot distance away..." However, DJCO 3's Use of Force form states that she deployed a two second burst of OC. Accurate reporting of spray duration is extremely important since spray duration is limited by Department procedure to three ½ second to one second bursts for a cumulative total of three seconds.

Additionally, DJCO 1's report identifies that Y1's decontamination was supervised by DJCO 5 and DJCO 6. However, neither DJCO 5 nor DJCO 6 completed a report. Instead, DJCO 4 wrote a report indicating that he and DJCO 5 supervised the decontamination.

### 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 noted the inconsistencies between the reported spray durations as well as the fact that the parental notification time was listed in the narrative but not on the UOF form.

The Board recommended that staff ensure consistency in reporting. The Board also recommended that staff who supervise the youths through the decontamination process document the decontamination steps in an SIR.

---

<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.

## Conclusion

A review of the SIRs, Use of Force reports, and video footage established that the use of force by DJCO 3 began as lawful and appropriate. It is clear from the reporting that had DJCO 3 not deployed force, Y1 would have continued to strike Y2, possibly resulting in serious injuries.

However, whether the use of OC spray continued past the point that Y1 stopped being a threat (which would make the force used unlawful and against policy) is inconclusive given the fact that DJCO 3's reporting of the incident contains internal inconsistencies related to spray duration which cannot be resolved by viewing the video of the incident.

## 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.