

OIR Use of Force Review

UOF Review 4-18-22 JH Unit A



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Summary of Facts

On April 18, 2022, at approximately 8:28 p.m., Deputy Juvenile Correctional Officer (DJCO) 1 was supervising youths during free time from behind the staff desk when Y1 approached and asked for permission to go to his room for the night.¹ As Y1 began to walk towards the hallway he stopped near the pay phones where Y2 was seated. Y1 reached down and grabbed Y2's bowl of cookies. Y2 told Y1 to "put [his] shit down," but Y1 ignored him and began to walk away. Y2 then stood up and the two began to exchange words.

DJCO 1 directed both youths to "[s]top, knock it off." Y2 squared up to fight and then pushed Y1 in the upper chest area with both hands. Y1 threw his sweatshirt down and charged towards Y2. Y2 struck Y1 in the head with multiple closed-fist punches and Y1 fought back with the same. DJCO 1 continued to direct the youths to "stop and get down." DJCO 2 entered the day room from the hallway and directed both youths to "stop" and "get down," but they continued to fight. DJCO 2 then yelled "OC clear" and deployed a one-second burst of Oleoresin Capsicum (OC) spray directed at the youths' facial areas from approximately three feet away.

The OC spray had no effect on the youths, and they continued to fight and slam each other into a concrete wall. DJCO 2 deployed another one-second burst of OC aimed at both youths' facial areas from approximately three feet. Both youths fell to the floor, and Y1 landed on top of Y2. The youths continued to strike each other while on the floor. DJCO 3 arrived to assist and pulled Y1 off from Y2. DJCO 3 took control of Y1's right arm as DJCO 2 took control of Y1's left arm. Y1 was not placed in handcuffs. DJCO 4 arrived to replace DJCO 1, as she was having difficulty seeing due to residual OC spray. DJCO 3 and DJCO 4 escorted Y1 to the Unit A shower area to decontaminate. DJCO 5 arrived and instructed Y2 to roll over onto his stomach and place his hands behind his back. Senior Juvenile Correctional Officer (SRJCO) 1 took over and secured Y2 in handcuffs due to DJCO 5 being "indirectly oversprayed with the pepper spray." SRJCO 1 and DJCO 7 escorted Y2 to the Unit I shower area to decontaminate.

Y1 began decontamination at 8:32 p.m. and Y2 began decontamination at 8:34 p.m. An uninvolved youth, Y3, was exposed to overspray and had to be decontaminated as well. Y3 began decontamination at 8:48 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 reasonable in light of the facts and circumstances confronting [the user of force], without regard to their underlying intent or motivation."³

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.

³ *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."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 minimal. There were two one second deployments of OC sprayed from three feet away. The reports indicate that both deployments of OC occurred while Y1 and Y2 were fighting. Both bursts of OC were aimed at the facial areas of Y1 and Y2. After the second burst both youths went down to the ground; however, they continued to strike each other even after the second burst of OC was deployed.

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. Staff ensured that the length of time the youths felt the effects of the OC was limited. As soon as the youths were secured, Y1

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.

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

was taken directly to the unit showers to begin the decontamination process. The reports and video confirm that approximately five minutes elapsed from the first deployment of OC and the time that Y1 was escorted to the showers to begin the decontamination process. The reports and video also confirm that Y2 was escorted to begin decontamination within six minutes of the first deployment of OC spray.

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 misdemeanor offenses.¹⁵ 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.¹⁶ 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.”¹⁷ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”¹⁸ Some courts have said that punching is “capable of inflicting significant pain and causing serious injury.”¹⁹

Here, the reports show that Y1 and Y2 were exchanging numerous closed-fist punches to the face and torso area when DJCO 2 deployed the OC spray the first time. The youths did not stop fighting, and when DJCO 2 deployed the second burst of OC, they were slamming each other into a concrete wall. Both youths were placed on head injury precaution following a medical evaluation due to this incident. The force used by the two youths were clearly 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 that Y1 and Y2 had punched each other in the head numerous times. They clearly posed an immediate threat to each other as they threw closed-fist punches at each other. The reports also establish that even after being given commands to “stop” and “[g]et down,” they both continued to fight, at one point slamming each other into a concrete wall. These facts establish that at the time of the deployments of OC, the youths posed an immediate and ongoing threat to each other.

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.

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

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

While the youths were not attempting to evade DJCO 2, they were actively resisting her attempts to take control of them by refusing to comply with her commands to “stop” and “[g]et down” and submit to her authority. Both youths ignored these commands and continued their mutual assault. DJCO 2 also provided a warning prior to the deployment of OC, which did not deter the youths from continuing their assaultive behavior.

Ultimately, to place the combative youths into custody, the DJCOs had to do more than simply place passive youths into handcuffs. In fact, DJCO 3 had to physically pull Y1 off Y2.

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 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’ orders to “stop and get down” and continued to fight after being sprayed. The most important distinction, however, is the fact that by continuing to fight, the youths clearly posed a threat to each other.

The youths involved in the fight were under the custody and care of the Probation Department. As such, the Probation Department 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 closed fist strikes to the head justified the use of a single burst of OC when the youths failed to follow commands to “stop” and “[g]et down.” The second burst of OC was similarly justified, as the youths continued to punch each other and were slamming each other into a concrete wall. Thus, each 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.²³ 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

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.

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

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.

The reports regarding this incident make clear that Y1 and Y2 were arguing and becoming increasingly agitated with each other. DJCO 1 attempted to diffuse the situation by directing both youths to “stop, knock it off” well before they became physically assaultive. DJCO 1’s attempts to verbally de-escalate the situation were unsuccessful, as neither youth complied with her directives to stop. Instead, the youths both actively engaged in mutually assaultive behaviors. Both DJCO 1 and DJCO 2 then attempted to verbally de-escalate the situation when they directed the youths to “[s]top, get down.” Given that Y1 and Y2 were actively battering each other in the face area, it was clear that they posed an imminent threat to each other when DJCO 2 deployed OC spray on both occasions.

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

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.

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.

Y1 and Y2 came into direct contact with, and were affected by, the OC spray. As soon as the youths were secured, Y1 was escorted to the Unit A showers to decontaminate and Y2 was escorted to the Unit I showers to decontaminate. According to the reports, Y1 began the decontamination process within four minutes of the first deployment of OC, and Y2 began decontamination within six minutes of the first OC deployment. Both were well within the department's procedure requiring decontamination within ten minutes.

According to the main incident report prepared by DJCO 1, Y3 was exposed to overspray and was taken to the Unit A showers to decontaminate. Y3 began decontamination 20 minutes after the first deployment of OC. None of the reports provide an explanation as to why decontamination was delayed for Y3, and it is unclear when staff became aware that Y3 was exposed to overspray.

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.³² According to DJCO 1's report, all three youths were provided with clean clothing and their contaminated clothing was placed in water-soluble bags and labeled accordingly.

Staff are also required to be with "the youth throughout the entire decontamination process."³³ None of the reports specifically state that a particular DJCO stayed with the youth during the entire decontamination process. As it relates to Y1, DJCO 1's report indicates that DJCO 3 and DJCO 4 "supervised the decontamination process." However, DJCO 3's report indicates that DJCO 4 "took charge of the decontamination procedure at which time I left the unit and proceeded to attend to my blood stained clothing." Similarly, DJCO 1's report indicates that SRJCO 1 and DJCO 7 "supervised the decontamination process for youth" Y2 in Unit I. However, DJCO 7's report indicates that when Y2 stepped into the shower stall to decontaminate, "[he] was then relieved by" DJCO 8 and returned to Unit O.

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.

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 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

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.

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

not specifically identify whose responsibility it is to ensure that this section of the procedure is followed.³⁷

DJCO 1's report does not explicitly state that a SJCO was on scene and made aware of the deployment of OC. However, the supplemental report prepared by DJCO 7 mentions that SJCO 1 directed SRJCO 1 to assist Y2 to his feet. The main incident report does indicate that a DJCO notified the guardians for all three youths and indicates that "medical was called for all youth involved in the physical altercation." The report states that Y1 and Y2 were seen by medical staff within 20 minutes of being notified. According to the report, Y3 was seen by medical approximately one hour after medical was called. Finally, DJCO 1's report indicates that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident, and the youths involved, shortly 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 Special Incident Report (SIR).³⁹ Further, the procedure requires that 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 applied, and identification of any injuries and medical treatment.⁴⁰

DJCO 1 completed the main SIR for this incident and six other DJCOs prepared supplemental incident reports. The main SIR identified the youths involved as well as the actions taken by DJCO 2 prior to the use of force. The report also sets forth the activities that occurred after the use of force except for an explanation for the delay in commencing decontamination procedures for Y3.

No SIR narrative was prepared to document the decontamination process for Y3. The main SIR mentioned that Y3 was affected by overspray and was sent to the showers to decontaminate and DJCO 2 completed a Use of Force/Pepper spray form. However, there was no SIR narrative prepared by anyone who escorted, or supervised, Y3 during his decontamination. Due to the lack of reporting, it is unclear whether staff followed the proper decontamination procedures for Y3, or which staff members participated. Additionally, while the main SIR recorded the time medical staff evaluated Y3, noticeably absent is any explanation for the significant delay of Y3 being seen by medical. Over one hour elapsed from the time of OC exposure until Y3 was seen by medical.

The OIR also observed several inconsistencies within the reports submitted. DJCO 2's Use of Force/Pepper Spray form related to Y1 indicates that Decontamination was completed at 8:43 p.m., however it also indicates that Y1 was seen by medical at 8:42 p.m. More importantly, a review of the video provided appears to show medical heading to see Y2 at 8:42 p.m. and then coming back to see Y1 at 8:53 p.m. Several other reports also appear to contradict each other as to whether Y1 or Y2 was seen by medical at 8:42 p.m. or 8:54 p.m.

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.

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 May 12, 2022, the Department's Use of Force Review Board convened and reviewed this use of force incident.

The Board recommended that staff who supervise youth during the decontamination process complete an SIR documenting the steps of the decontamination process. The Board also recommended that staff who witness that the steps in the policy were followed should document compliance with the procedure in an SIR.

Finally, the Board "recommended that staff include all necessary and appropriate information in the check boxes on the UOF form."

Conclusion

A review of the SIRs and Use of Force reports established that the force used by DJCO 2 was within law and policy. It is clear from the reporting that had DJCO 2 not deployed force, Y1 and Y2 would have continued to fight, potentially resulting in serious injuries.

Recommendations

1. Update PMI 3-1-056 to specifically state that OC spray is classified as an intermediate level of force.
2. Update the portion of the Use of Force/Restraint SIR form relating to Pepper Spray and Decontamination to add an entry field that requires the report writer to specifically indicate which DJCO(s) stayed with each youth during the entire decontamination process.
3. 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.