

# OIR Use of Force Review

*UOF Review 4-3-22 JH Unit T*



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## Summary of Facts

On April 3, 2022, at approximately 10:53 a.m., Y2 and an uninvolved youth were standing up against a wall talking when Y1 approached and said something to Y2.<sup>1</sup> Y1 then began to punch Y2 in the head and face numerous times. Y2 attempted to return punches and push Y1 away.

Deputy Juvenile Correctional Officer (DJCO) 1 and DJCO 3 responded. DJCO 1 directed both youths to get on the ground and stop fighting. Neither youth complied with DJCO 1's directives and the fight continued. DJCO 2 called a Code 2 over the radio.<sup>2</sup> DJCO 3 attempted to do a foot block shoulder drag but disengaged as DJCO 1 yelled out "OC Clear" and then deployed a one-second burst of Oleoresin Capsicum (OC) spray across both youths' faces from about three and a half feet away. Y2 went to the ground and into a prone position. Y1 then jumped onto Y2's back, while Y2 was prone on the ground, and continued to punch him in the head. DJCO 3 then pulled Y1 off Y2.

DJCO 1 knelt on the right side of Y2 and secured his right hand in an accordion squeeze with no pressure due to his compliance. DJCO 3 secured Y1 in handcuffs. DJCO 4 arrived and secured Y2's left hand in an accordion squeeze with no pressure. Supervising Juvenile Correctional Officer (SJCO) 1 arrived and directed staff to escort Y1 to the unit showers for decontamination, and to arrange for Y2's decontamination to occur on the patio in the Secured Recreation Area (SRA).

Y1 was escorted to the unit showers at 10:55 a.m. to decontaminate. DJCO 5 and DJCO 6 supervised Y1's decontamination. DJCO 3 walked Y2 over to a chair on the patio where he began decontamination using the hose at 10:56 a.m. DJCO 4 and DJCO 7 supervised Y2's decontamination.

## 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>3</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>4</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>5</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>6</sup> The second step is to measure "the governmental interests at stake by evaluating a range of factors."<sup>7</sup> Finally, the third step is to balance the quantum of force used on the

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

<sup>2</sup> A Code 2 indicates that there was a fight in progress.

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

<sup>4</sup> *Graham v. Connor* (1989) 490 U.S. 386, 397; *Blankenhorn v. City of Orange* (9th Cir. 2007) 485 F.3d 463, 477.

<sup>5</sup> *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

<sup>6</sup> *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

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

individual against “the government's need for that intrusion to determine whether it was constitutionally reasonable.”<sup>8</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>9</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>10</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>11</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>12</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 one- second deployment of OC sprayed from three and a half feet. The reports indicate, and the video confirms, that the single deployment of OC occurred while Y1 and Y2 were fighting. The burst of OC was aimed at the faces of Y1 and Y2. Y2 went down to the ground immediately after encountering the OC spray. The OC spray did not deter Y1. Y1 jumped onto Y2’s back and continued to punch Y2 multiple times in the head. DJCO 3 then grabbed Y1 by the shoulders and pulled him away from Y2.

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>13</sup> 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 was taken directly to the unit showers to begin the decontamination process. The reports reflect, and the video confirms, that less than two minutes elapsed from the deployment of OC and the time that Y1 was escorted to the showers to begin the decontamination process. The reports and video footage also indicate that Y2 began decontamination within three minutes.

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<sup>8</sup> *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

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

<sup>10</sup> *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

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

## Governmental Interest

Intermediate force is a “significant level of force that must be justified by the governmental interest involved.”<sup>14</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>15</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>16</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>17</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>18</sup> “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”<sup>19</sup> Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”<sup>20</sup>

Here, the reports and the video footage show that Y1 punched Y2 in the face and head with closed fists multiple times and was continuing to do so when DJCO 1 deployed the OC spray. The force used by Y1 on Y2 was clearly likely to cause serious bodily injury if DJCO 1 did not intervene.

## 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>21</sup> Here, the reports make clear that Y1 had punched Y2 in the face and head numerous times. Although Y2 tried to defend himself and fought back, Y1 clearly posed an immediate threat to Y2 as he continued to batter Y2. The reports also establish that even after being given commands to “[g]et down on the ground” and “stop fighting,” Y1 continued to strike Y2. These facts establish that at the time of the deployment of OC, Y1 posed an immediate and ongoing threat to Y2.

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

While the youths were not attempting to evade DJCO 1, they were clearly actively resisting DJCO 1 and DJCO 3’s attempts to take them into custody. When Y1 continued to strike Y2, and Y2 continued to fight back, both youths were clearly refusing to comply with DJCO 1’s commands to get down on the ground and stop fighting. DJCO 1 also provided a warning (“OC clear”) prior to the deployment of OC, which did not deter the youths from continuing their assaultive behavior.

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<sup>14</sup> *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805, 826.

<sup>15</sup> *Graham v. Connor* (1989) 490 U.S. 386 [109 S.Ct. 1865, 104 L.Ed.2d 443].

<sup>16</sup> Pen. Code, §§ 240, 242, 243(a).

<sup>17</sup> Pen. Code, §§ 242, 243(d), 245(a).

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

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

<sup>20</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>21</sup> *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

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>22</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>23</sup> That is not the situation that confronted the DJCOs in this incident.

As previously stated, the youths were engaged in, at a minimum, a violent misdemeanor, and potentially a violent felony, and they clearly disobeyed the DJCOs’ order to “get on the ground and stop fighting.” Additionally, Y1 continued to assault Y2 even 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 posed an immediate threat to Y2. Additionally, the significant bodily harm that could have occurred to Y2 from closed-fist strikes justified the use of a single burst of OC when the youths failed to follow commands to “[g]et down on the ground.” Thus, the deployment of OC was justified when balancing each of the above factors.

## 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>24</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>25</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>26</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>27</sup> and that the policy provide for the documentation of each

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<sup>22</sup> *Espinosa v. City & County of San Francisco* (9th Cir. 2010) 598 F.3d 528.

<sup>23</sup> *Silva v. Chung* (9th Cir. 2018) 740 F.App'x 883.

<sup>24</sup> Cal. Code Regs., tit. 15, § 1357 – Use of Force.

<sup>25</sup> Cal. Code Regs., tit. 15, § 1357(b)(2).

<sup>26</sup> Cal. Code Regs., tit. 15, § 1357(b)(3).

<sup>27</sup> Cal. Code Regs., tit. 15, § 1357(b)(4).

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>28</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>29</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>30</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 1 immediately attempted to verbally de-escalate the situation by directing both youths to “[g]et down on the ground and stop fighting.” DJCO 1’s attempts to de-escalate the situation were unsuccessful, as neither youth complied with her directives to stop. It was clear that Y1 posed an imminent threat to Y2 at the time DJCO 1 deployed the OC.

### 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>31</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>32</sup>

According to the SIRs, both youths 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 showers to decontaminate and Y2 began decontamination using the patio hose. Facility surveillance footage shows that Y2 began the decontamination process within three minutes of the deployment of OC, and that within two minutes of the OC deployment Y1 was escorted to the unit showers to begin decontamination.

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>33</sup> According to the reports, both youths were provided with clean clothing and their contaminated clothing was placed in water-soluble bags and labeled accordingly.

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<sup>28</sup> Cal. Code Regs., tit. 15, § 1357(b)(5).

<sup>29</sup> Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;

Procedure Manual Item 3-1-015 Use of Force – Facilities.

<sup>30</sup> Procedure Manual Item 3-1-056 I(C) General Information.

<sup>31</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>32</sup> Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

<sup>33</sup> Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

Staff are also required to be with “the youth throughout the entire decontamination process.”<sup>34</sup> DJCO 1’s report indicated that DJCO 5 and DJCO 6 supervised the decontamination for Y1. DJCO 4 indicated in his report that DJCO 7 and “I supervised [Y2] in the SRA cage.”

### 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.<sup>35</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>36</sup> The responsibility for contacting the youth’s parent or legal guardian is assigned to the SJCO/Duty Officer or designee.<sup>37</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>38</sup>

DJCO 1’s report states that SJCO 1 was on scene and was made aware of the deployment of OC. SJCO 1 directed staff on how to proceed with decontamination procedures for each youth. In addition, DJCO 1’s report indicates that a DJCO notified the guardians for both involved youths, that “medical was called” for both youths within 3 minutes of the incident, and that both were seen by medical staff shortly after completion of the decontamination process. Finally, DJCO 1’s report indicates that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident and of the youths 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>39</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>40</sup>

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

### Use of Force Review Board

On May 3, 2022, the Department’s Use of Force Review Board convened and reviewed this use of force incident.

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<sup>34</sup> Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

<sup>35</sup> Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

<sup>36</sup> Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

<sup>37</sup> Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

<sup>38</sup> Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

<sup>39</sup> Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

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

The Board did not recommend any corrective action but recommended that staff who supervise youths during the decontamination complete an SIR documenting compliance with the steps of the decontamination process.

## Conclusion

A review of the SIRs, Use of Force reports, and video footage established that use of force by DJCO 1 was within law and policy. It is clear from the reporting that had DJCO 1 not deployed force, Y1 would have continued to strike Y2, possibly resulting in potentially serious injuries.

## Recommendations

1. Update PMI 3-1-056 to specifically state that OC spray is classified as an intermediate level of force.