

# OIR Use of Force Review

*UOF Review 8-3-22 JH Unit Y*



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## 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 .....	4
State Law.....	4
Department Procedure .....	5
Imminent Threat and De-escalation .....	5
Decontamination .....	5
Notifications and Procedures after Use of Force Incidents .....	6
Documentation .....	7
Use of Force Review Board .....	8
Conclusion.....	8
Recommendations .....	8

## Summary of Facts

On August 3, 2022, at approximately 9:51 a.m., two staff members were supervising a group of youths during free time at Juvenile Hall. Y1 was seated at a round table located next to a bookshelf on a FaceTime call with his mother. Y2 and Y3 were seated together at a table near the corridor exit. Deputy Juvenile Correctional Officer (DJCO) 1 was positioned behind the staff desk, and DJCO 2 was sitting on a desk facing the bookshelf. Y2 asked DJCO 2 if he could get a book from the bookshelf.<sup>1</sup> As Y2 began to walk over towards the bookshelf, Y3 asked DJCO 2 for permission to sit on a chair in the carpet area and began walking towards a chair located in front of the round table where Y1 was seated. Y2 arrived at the bookshelf and looked at Y1 as he started to remove a book from the bookshelf. Y1 looked at Y2, Y2 put the book back into the bookshelf and began punching Y1 in the head with closed fists. Y1 retreated behind the table as Y3 ran over to the table, jumped on top of it and began punching Y1 in the upper body with closed fists. Y1 attempted to shield his head and face with his arms.

As the fight began, DJCO 2 got off the desk and started to run towards the fight. While DJCO 2 was running, he removed his canister of OC spray from his waist. As he approached the youths, DJCO 2 shook his canister of OC spray and then yelled “OC clear” and deployed a one second burst of OC targeted at Y2’s forehead. At this point all the participants moved to an area not visible to the camera.<sup>2</sup>

DJCO 1 and DJCO 2 both directed Y2 and Y3 to “stop” and “get down” but both youths continued to hit Y1 with closed fists. DJCO 3 was conducting a room check on the right side of the unit when she heard “get down” and ran towards the round table and saw Y3 punching Y1 in the head. DJCO 3 yelled “OC clear” and simultaneously deployed a one-second burst of OC spray directed at Y3’s forehead. Due to Y3 and Y1’s movements, Y1 was hit with overspray.

Y2 immediately got down into a duck-and-cover position. However, Y3 continued to hit Y1 with closed fists and kick at Y1. DJCO 2 attempted to separate Y3 from Y1 by grabbing Y3 by the arm, causing himself and Y3 to fall backwards. Once on the ground, DJCO 2 took control of Y3 utilizing an accordion squeeze until DJCO 8 responded to replace DJCO 2.

DJCO 7 and DJCO 8 escorted Y3 to the Unit Y showers to begin the decontamination process. Y3 began decontamination at 9:55 a.m. DJCO 4 arrived to assist DJCO 3 in securing Y1 and escorting Y1 to the unit patio to decontaminate using the hose. Y1 began decontamination at 9:56 a.m. DJCO 5 and DJCO 6 secured Y2 in handcuffs and escorted him to the Unit Z showers to decontaminate. Y2 began the decontamination process at 9:56 a.m.

## Lawful Requirements for Use of OC

In determining whether a particular use of force was appropriate, courts analyze the use of force “under the Fourth Amendment’s prohibition against unreasonable seizures using the framework articulated in *Graham v. Connor*.”<sup>3</sup> The reasonableness of a seizure turns on whether the use of force was “objectively

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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> Information from this point forward came from DJCO reports and could not be seen on the video provided.

<sup>3</sup> *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."<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 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 spray) used in this case was minimal. There was a total of two deployments of OC, and each youth was sprayed once. Both deployments were one second in duration and deployed from a distance of five feet. The reports indicate that both deployments of OC occurred while Y2 and Y3 were assaulting Y1.

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<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.

<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.

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 that the youths felt the effects of the OC was limited. As soon as the youths were secured, Y2 and Y3 were taken directly to the showers, and Y1 to the patio hose, to begin the decontamination process. According to the reports, all three youths began decontamination within three minutes of the first deployment of OC.

### 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 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> The felony battery charge focuses on the actual injury inflicted, while the felony assault charge focuses on the force used and not whether the force produced great bodily injury. “The crime of assault by means of force likely to produce great bodily injury is completed before any injury is inflicted.”<sup>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 show that Y2 and Y3 were punching Y1 with closed fists to his head and upper body when DJCO 2 and DJCO 3 deployed OC. Following the deployment, Y2 immediately got down, but Y3 continued to hit and kick at Y1. Staff separated Y3 from Y1 and secured all youths in handcuffs. Given that punches, especially to the head, can cause serious injury, the assaults by Y2 and Y3 must be considered severe.

### Whether the Suspect Posed an Immediate Threat to the Safety of the Officers or Others

Courts have said that the most important element of the *Graham* factors is whether the suspect poses an immediate threat to the safety of the officers or others.<sup>21</sup> Here, the reports make clear that Y2 and Y3 coordinated an attack on Y1 and simultaneously began to punch him. DJCO 1 and DJCO 2 directed both youths to “stop” and “get down” but both continued their attack on Y1. Even after DJCO 3 sprayed Y3, he continued to hit and kick at Y1. Y2 and Y3 clearly posed an immediate threat to Y1 as they struck

<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.

<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.

him with closed-fist punches. These facts establish that but-for DJCO 2 and DJCO 3's intervention, the violent assault on Y1 would have continued. Therefore, at the time of the deployments of OC, the youths posed a significant, immediate, and ongoing threat to the safety of Y1.

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

While the youths were not attempting to evade the DJCOs, both youths were actively resisting the DJCOs' attempts to take them into custody by refusing to comply with their commands and submit to their authority. The DJCOs directed all three youth to "stop" and "get down." Both Y2 and Y3 ignored the commands, and both continued to assault Y1. DJCO 2 had to physically separate Y3 from Y1 by grabbing Y3 by the arm, causing himself and Y3 to fall backwards. As for Y2, it was only after he was sprayed with OC that he submitted to the DJCOs' authority and laid down on the ground in the prone position.

#### Balancing the Force Used Against the Need for Such Force

Finally, in order to determine if force used was excessive, courts "balance the gravity of the intrusion on the individual against the government's need for that intrusion."<sup>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 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.

Y1 was under the custody and care of the Probation Department. As such, the Probation Department had an obligation to protect him from harm. At the time of each deployment of OC, Y2 and Y3 posed an ongoing threat to Y1. As a result, the harm that could have occurred to Y1 from repeated closed fist strikes to the head justified the deployment of OC by the DJCOs, particularly when the youths continued their violent assault on Y1 even after being directed to stop and get down. Each deployment of OC was justified when considering the above factors.

## Compliance with Department Procedure

### State Law

The State of California has set forth requirements that a facility, which authorizes the use of chemical agents as a force option, must have in their policies and procedures.<sup>24</sup> Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's

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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.

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 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 Y2 and Y3 posed an imminent threat to Y1. DJCO 1 and DJCO 2 both attempted to verbally de-escalate the situation by directing the youths to “stop” and to “get down.” Their attempts at de-escalation were unsuccessful, as Y2 and Y3 continued their attack on Y1 despite these commands.

### 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 reports, Y2 and Y3 came into direct contact with, and were affected by the OC spray. As soon as the youths were secured, Y2 was escorted to the Unit Z showers, while Y3 was escorted to the Unit Y showers to decontaminate. According to the reports, Y2 and Y3 both began decontamination

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<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).

<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.

within three minutes of the first OC deployment. Y2 later requested a second decontamination session and was escorted by DJCO 9 and DJCO 10.

Y1 was affected by overspray and was escorted to the Unit Y patio to decontaminate using the hose. Y1 also began decontamination within three minutes of the OC deployment.

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> 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.”<sup>34</sup> The main SIR narrative indicates that Y1 was “escorted and supervised by [DJCO 4 and 11] with Supervising Juvenile Correctional Officer (SJCO) [1] standing by.” DJCO 10’s SIR narrative indicates that “DJCO 5 and I supervised [Y2] in the shower. I continually asked [Y2] if he needed more time. At approximately 10:04 a.m. Y2 requested to stop the decontamination.” Similarly, as it relates to Y3, DJCO 7 and DJCO 8’s reports indicate that SJCO 4 “stood by as the youth decontaminated.” These statements imply that someone was present for the youths to alert staff to the fact that they were voluntarily ending their decontamination.

#### 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>

The SIR narratives indicate that a Supervising Juvenile Correctional Officer was at the decontamination for each youth. The main SIR indicates that the medical unit was notified within 15 minutes of the incident. Y1 was seen by medical staff within 30 minutes of medical staff being notified. Y2 was seen by medical within 33 minutes. Medical staff also responded to evaluate Y3 in 41 minutes but Y3 declined. Y3 later agreed to see medical staff and was cleared of any injuries. Y2 was also cleared, and Y1 was placed on head injury precaution. In addition, the main SIR indicates that staff notified the mother of Y1 and left voicemails for the parents or mother of Y2 and Y3.

Finally, the report establishes that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident and that CEGU staff responded and saw all three youths within five hours.

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

<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.



## 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 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.<sup>40</sup>

DJCO 1 completed the main SIR for this incident and eight other DJCOs prepared supplemental incident reports. The main SIR identified the youths involved as well as the actions taken by DJCO 2 and DJCO 3 prior to the uses of force. Both DJCO 2 and DJCO 3 prepared Use of Force reports to document the deployment of OC spray directed at Y2 and Y3. DJCO 3 also prepared a separate Use of Force report to document the overspray of Y1. The main SIR also clearly lays out the activities that occurred after the uses of force except for whether staff members remained with the youths throughout the decontamination process.

During a review of supplemental narratives, the OIR observed that DJCO 2's factual description of the events leading up to his deployment of OC is inconsistent with the video of the incident. In his report, DJCO 2 stated that prior to deploying OC, he attempted to grab a youth's arm but failed and the youth continued to hit Y1 in the head. DJCO 2 then subsequently deployed his OC. Conversely, a review of the video showed that as the fight began, DJCO 2 got off the desk and started to run towards the fight. While DJCO 2 was running, he removed his cannister of OC spray from his waist. As he approached the youths, he shook his cannister of OC spray and then deployed a one second burst of OC targeted at Y2's forehead. At no time prior to deploying the OC spray is DJCO 2 observed "attempting to grab" a youth's arm.

The OIR also observed some inconsistencies as it relates to the documentation of notifying the parents or guardians in this incident. Specifically, the main SIR indicates that the mother of Y1 was notified by a phone call from SJCO 4, while the mother and parents of Y2 and Y3 were notified via voice message. However, the use of force reports for Y2 and Y3 indicate that SJCO 4 notified both mothers of Y2 and Y3 regarding the altercation. As a result, it is not clear whether the SJCO 4 actually spoke to Y2 and Y3's parents or guardians or whether notification was made simply by leaving a voicemail.

## Recommendation

Provide additional training reminding DJCOs of the importance of making sure that their reports are accurate and complete.

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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.

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<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.

## Use of Force Review Board

On September 1, 2022, the Department's Use of Force Review Board convened and reviewed this use of force incident.

The Board made no recommendations for corrective action but recommended that all information that is covered in the main body of the report be reflected on the cover page. The Board further recommended that staff who witness the decontamination process write a narrative to document that the process was completed.

## Conclusion

A review of the SIRs, Use of Force reports, and video footage established that use of force by DJCO 2 and DJCO 3 was within law and policy. It is clear from the reporting that had the staff members not deployed force, Y2 and Y3 would have continued to assault Y1, resulting in potentially serious injuries. However, the documentation, as reflected in DJCO 2's report, does not conform to department policy. Specifically, the actions described by DJCO 2 as occurring prior to the deployment of OC were not consistent with what was observed in 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 DJCOs of the importance of making sure that their reports are accurate and complete.
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.